



Spring 2001

Unconscionable Quandry: UCC Article 2 and the Unconscionability Doctrine

Carol B. Swanson

Recommended Citation

Carol B. Swanson, *Unconscionable Quandry: UCC Article 2 and the Unconscionability Doctrine*, 31 N.M. L. Rev. 359 (2001).

Available at: <https://digitalrepository.unm.edu/nmlr/vol31/iss2/5>

This Article is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the *New Mexico Law Review* website: www.lawschool.unm.edu/nmlr

UNCONSCIONABLE QUANDARY: UCC ARTICLE 2 AND THE UNCONSCIONABILITY DOCTRINE

CAROL B. SWANSON*

INTRODUCTION

When the Uniform Commercial Code (UCC) § 2-302 introduced the innovative¹ unconscionability doctrine in the 1960s,² the undefined concept³ created a wild card in contract law.⁴ A blurred doctrine⁵ designed to address extreme unfairness,⁶ unconscionability has been the focus of endless commentary⁷ but has not been a frequent basis for relief.⁸

Still, in a commercial world of standardized contracts⁹ largely unread by the parties,¹⁰ the unconscionability doctrine is an important variable. Courts and commentators have construed and criticized the concept for almost forty years, and the arguments and uncertainty continue unabated. Detractors decry unconscionability's formless presence; supporters applaud the amorphous doctrine's ability to supply relief when other policing defenses fail. By the end of the 1980s, it was unclear whether—or how—Section 2-302 might be improved.

* Professor of Law, Hamline University School of Law. A.B., Bowdoin College; J.D., Vanderbilt Law School. The author is grateful to Allen Blair for his fine research and commends Professors Linda Rusch and Steve Swanson for their invaluable support.

1. See E. ALLAN FARNSWORTH, *CONTRACTS* § 4.28, at 307 (3d ed. 1999) (describing unconscionability as one of the UCC's "most innovative sections").

2. W. DAVID SLAWSON, *BINDING PROMISES: THE LATE 20TH-CENTURY REFORMATION OF CONTRACT LAW* 57 (1996) (describing the doctrine's introduction and subsequent adoption).

3. "Nowhere among the Code's many definitions is there one for *unconscionability*. That the term is incapable of precise definition is a source of both strength and weakness." FARNSWORTH, *supra* note 1, § 4.28, at 310. See *infra* notes 31-33 and accompanying text.

4. See THOMAS D. CRANDALL & DOUGLAS J. WHALEY, *CASES, PROBLEMS, AND MATERIALS ON CONTRACTS* 679 (3d ed. 1999) (describing unconscionability as a "wild card doctrine"). *But see* Michael M. Greenfield & Linda J. Rusch, *Limits on Standard-Form Contracting in Revised Article 2*, 32 U.C.C. L.J. 115, 121 (1999) (saying that unconscionability is vague, but not a "wild card" because "courts can work with it, and merchants can live with it").

5. See Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law*, 33 NEW ENG. L. REV. 265, 294 (1999) ("Unconscionability lies in the borderland where lines between contract theory, doctrine, and practice are blurred.").

6. As a general matter, the doctrine is defined as "[e]xtreme unfairness" and as "[t]he principle that a court may refuse to enforce a contract that is unfair or oppressive because of procedural abuses during contract formation or because of overreaching contractual terms." BLACK'S LAW DICTIONARY 1526 (7th ed. 1999).

7. See FARNSWORTH, *supra* note 1, § 4.28, at 307-08 (noting that scholars have "lavished more ink on [Section 2-302] than on any comparable passage in the Code").

8. See *infra* notes 143-44 and accompanying text. Even when successful, the doctrine has not altered business conduct. Contract provisions deemed unconscionable do not disappear from the scene since their inclusion poses no risk. See SLAWSON, *supra* note 2, at 143 (unconscionability "has had no discernible effect on business conduct").

9. Unconscionability cases invariably involve standard contract terms. See SLAWSON, *supra* note 2, at 142 ("In the thousands of decisions concerning unconscionability the courts have handed down since the Code was enacted, there is not one in which the terms held to be unconscionable were not standard."). A standard-form contract is a "preprinted contract containing set clauses, used repeatedly by a business or within a particular industry with only slight additions or modifications to meet the specific situation." BLACK'S LAW DICTIONARY 325 (7th ed. 1999). This article will use the terms "standard," "standardized," and "standard-form" contract interchangeably. See *infra* notes 218-27 and accompanying text.

10. See *infra* notes 222-24 and accompanying text.

During the past decade, the UCC Article 2 drafting committee has been contemplating significant revisions, including the redrafting of Section 2-302.¹¹ Just as unconscionability itself is classically regarded as requiring substantive and procedural components,¹² the revisions have been problematic on both levels. Procedurally, the drafters have endured lengthy infighting among various interest groups, hoping ultimately to craft a product that the states will adopt uniformly. Throughout years of drafting, the committee has lurched forward through fits and stops, adopting and then dropping various approaches to the unconscionability doctrine's substantive content.¹³ The options under consideration have included expanding remedies, broadening the time frame for misconduct, and providing more specificity regarding the relevant tests, but no substantive suggestion has satisfied both industry and consumer factions.

In 1999, a revised approach to unconscionability stood poised for final adoption by the National Conference of Commissioners on Uniform State Laws (NCCUSL), but the politics of competing concerns brought Article 2's reading to a halt before the final vote, deferring action for at least another year.¹⁴ When the reconstituted drafting committee began its task once again,¹⁵ the unconscionability section essentially reverted to its pre-revisions stance, taking Section 2-302 back to where it started.¹⁶

Thus, despite great dissatisfaction regarding the formless nature of a difficult doctrine and years of diligent examination, no consensus has been achieved regarding how to improve Section 2-302's substance. Ironically, unconscionability's lack of definition is at once its best and worst feature. The concept is unloved, yet apparently just too cherished to risk reforming. This unconscionable quandary is the apparent future of the current Article 2 revisions process,¹⁷ as well as the doctrine itself.

This article explores unconscionability in terms of where it has been, where it is going, and how the Article 2 revisions process has affected the concept's outlook. It begins with a brief overview of the doctrine's controversial birth as part of Article 2 nearly forty years ago. Part I next examines unconscionability's development

11. Although Section 2-302 has been the traditional home for the unconscionability doctrine in UCC Article 2, several revised drafts have moved the concept to a new location in part 1—§ 2-105. See *infra* notes 155-84 and accompanying text (describing the drafts incorporating Section 2-105).

12. See discussion *infra* Part I(B)(1)(a).

13. Recent revised drafts of Article 2 can be found at <http://www.law.upenn.edu/library/ulc/ulc.htm> (last modified June 7, 2001). This site is maintained by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in association with the University of Pennsylvania.

14. See discussion *infra* Part II(A)(2) (describing the events surrounding NCCUSL's 1999 annual meeting).

15. When NCCUSL chose to defer, rather than approve, the revisions, Professor Richard E. Speidel, the drafting committee's reporter since its inception, resigned, and a newly reconstituted committee was appointed. See Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683, 1683 n.2 (1999) (noting that Speidel resigned on July 26, 1999); see also Press Release, The American Law Institute (ALI) and NCCUSL, ALI and NCCUSL Announce New Drafting Committee for UCC Articles 2 and 2A (Aug. 18, 1999) [hereinafter ALI & NCCUSL Aug. 18, 1999 Press Release] (describing the reconstituted committee), available at <http://www.ali.org/ali/pr081999.htm>.

16. This article reflects research through the summer of 2000. Subsequent changes have yielded a revised unconscionability provision that even more closely resembles the original. See U.C.C. § 2-302 (Draft for Approval at Annual Meeting of NCCUSL Aug. 10-17, 2001), available at <http://www.law.upenn.edu/bll/ulc/ucc2/ucc0612.htm>.

17. The Article 2 revisions are currently stymied for a host of reasons. See *infra* Part II.

under case law and commentary. Part II explores how the Article 2 revisions process has addressed unconscionability, including the drafting committee's various substantive approaches. Giving special attention to the version almost approved in 1999, the article weighs that aborted effort against the more conservative "status quo" content of the current draft. Part III addresses the larger picture, concluding that the failed revisions process may not be a failure for contract law and that the very subtle changes in the current Section 2-302 may actually assist the natural development of a doctrine renowned for its mysterious qualities. In short, this unconscionable quandry may ultimately yield quite comfortable results.

I. THE UNCONSCIONABILITY DOCTRINE

A. *In the Beginning*

Two centuries before the Uniform Commercial Code made the unconscionability doctrine available at law, the courts had woven public policy and ideas from equity and tort into innovative principles that would save consumers from unfair bargains.¹⁸ There was something instinctive about refusing to enforce oppressive contractual provisions; after all, equity should not permit disproportionate hardship in a free enterprise society.¹⁹ In oft-quoted words from the eighteenth century, an unconscionable agreement is one "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."²⁰ Pre-Code cases confirm the equitable origins of unconscionability, but are not helpful in construing the doctrine's meaning in modern times.²¹

Controversial from its inception,²² Section 2-302 presents Article 2's unconscionability doctrine, the most significant change in contract law²³ and

18. For a discussion of the unconscionability doctrine's historical underpinnings, see KEVIN M. TEEVEN, *A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT* 314-18 (1990); 8 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* §§ 18:1-18:2 (4th ed. 1998). The concept dates back to Roman law and the Middle Ages. See Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law*, 33 NEW ENG. L. REV. 265, 288 (1999) ("The doctrine of unconscionability has a kinship with the Roman law of *laesio enormis* and the Middle Ages' just price theory.").

19. In essence, the free enterprise society contemplates fully volitional agreements between parties possessing equivalent economic power. "The indispensable tool in the operation of a free enterprise society is contract. The essence of contract is volition, that free exercise of will by parties who are on a relatively equal economic footing and who are brought together in the dynamic market place by their needs and desires." JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* § 96, at 481-83 (3d ed. 1990) (describing the historical background of unconscionability in equity).

20. *Hume v. United States*, 132 U.S. 406, 411 (1889) (quoting *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 125, 155, 28 Eng. Rep. 82, 100 (Ch. 1750)); see also MURRAY, *supra* note 19, § 96, at 486 (saying that it is "almost mandatory" for unconscionability discussions to begin with this eighteenth century quote).

21. Equity cases typically involved suits for specific performance against land vendors who resisted, arguing that the bargain was too harsh. In contrast, most Section 2-302 cases are damages actions against buyers who object to an arguably unfair clause in a form contract. See FARNSWORTH, *supra* note 1, § 4.28, at 310 (contending that early equity cases are not helpful when construing the meaning of Section 2-302).

22. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 9-37, at 398-403 (3d ed. 1987) (describing the controversy surrounding Section 2-302's enactment); Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 461-62 (1995) ("The incorporation of the unconscionability doctrine into the [UCC] in Section 2-302 generated as much controversy and discussion as any other section of the first Official Text...") (footnote omitted).

23. See SLAWSON, *supra* note 2, at 57 (stating that unconscionability was "[t]he most important change in contract law" introduced by Article 2); see also Prince, *supra* note 22, at 468 ("Before the promulgation of Section

“perhaps the most valuable section in the entire Code.”²⁴ The section reads,

(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.²⁵

Section 2-302 recognizes an unconscionability concept that goes beyond equity, inviting courts to police contracts openly for unfairness instead of using what drafter Karl Llewellyn²⁶ called “covert tools.”²⁷ State courts generally accepted the doctrine almost as soon as the Code was enacted,²⁸ codifying unconscionability to make it applicable to many other transactions and incorporating it as a matter of common law.²⁹

2-302 and the beginning of its influence, courts in law were largely deemed incapable of denying enforcement based on an absence of fairness in the exchange.”)

24. See FARNSWORTH, *supra* note 1, § 4.28, at 307 (quoting Karl Llewellyn, 1 N.Y.L. Revision Comm., Hearings on the Uniform Commercial Code 121 (1954)).

25. U.C.C. § 2-302 (1999).

26. Karl Llewellyn is known as the father of the UCC. MURRAY, *supra* note 19, § 11, at 23 (stating that in order to know Article 2, it is important to understand “the pre-Code work of Karl Llewellyn, the principal draftsman of Article 2 and the father of the UCC”). It is interesting that the NCCUSL and the ALI chose colorful Llewellyn as the principal draftsman:

There is a comforting irony in the fact that the Conference and Institute not only chose Karl Llewellyn as principal draftsman (or Chief Reporter) for the Code but succeeded in living with him for fifteen years on terms of mutual respect and amity. Llewellyn in the 1930s had become the symbol of the academic revolt against Langdellianism and orthodoxy. He was flamboyant both in his personality and his prose style. He must have seemed, to most members of both Conference and Institute, unsound. On the other hand, Llewellyn had been a devoted member of the Conference for many years and had become the Conference’s principal draftsman in commercial law matters. He was also, beyond question, the preeminent academic authority on sales law (which was the starting point for the Code project): a revised Sales Act without Llewellyn’s participation would have been unthinkable....

GRANT GILMORE, *THE AGES OF AMERICAN LAW* 84 (1977) (footnotes omitted).

27. Karl N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939) (noting that “[c]overt tools are never reliable tools”). The comments to Section 2-302 describe the section’s purpose:

This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract.

U.C.C. § 2-302 cmt. 1 (1999).

28. See SLAWSON, *supra* note 2, at 57 (noting this important transformation in the 1960s and 1970s). Pennsylvania was the first state to adopt the UCC in 1953; by 1995, every state and the District of Columbia had enacted it. See *id.* at 5-6 (describing the history of UCC adoptions).

29. See MURRAY, *supra* note 19, § 96, at 489 (describing the doctrine’s application in numerous contexts); WILLISTON & LORD, *supra* note 18, § 18:5-:6, at 22-43 (describing common law extension of Article 2 and the unconscionability concept in state statutes, respectively); Prince, *supra* note 22, at 462 (noting that courts regularly apply Section 2-302 “to resolve issues in other types of contracts”). One commentator recently described the doctrine’s broad impact as follows:

Although UCC 2-302 is not one of the general articles of the Code and so strictly speaking governs only “transactions in goods,” it has wisely been applied, either by analogy or as an

Although the Code provides many definitions, nowhere does it define "unconscionability."³⁰ Section 2-302's comments provide only general guidance,³¹ stating that the "basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."³²

From the very beginning, the transactional context was a controversial part of the equation. Principal draftsman Llewellyn believed that Article 2 should treat commercial and consumer transactions differently.³³ This occurred in Section 2-207, which directly addresses the difficulties arising when businesses exchange non-matching forms.³⁴ Despite its many shortcomings, Section 2-207 attempts a realistic assessment of agreement in commercial settings.³⁵ In contrast, the UCC's drafters

expression of a general doctrine, to many other kinds of contracts, including contracts that fall under other articles of the Code. The Restatement Second contains a section on unconscionability patterned after the Code's and applicable to contracts generally, and several uniform laws contain similar provisions applicable to contracts within their purview.

FARNSWORTH, *supra* note 1, § 4.28, at 308 (footnotes omitted); see also *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (declaring the unconscionability doctrine to be part of contract common law).

30. Many believed that such vagueness would render unconscionability completely ineffectual. See Arthur Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 558-59 (1967); see also MURRAY, *supra* note 20, § 96, at 487 (noting that Section 2-302 is not "even a limited improvement").

31. Section 2-302 is, after all, a general clause:

All will agree that by any test § 2-302 is a general clause. Instead of "good morals" or "good faith,"...the standard proposed—again the only standard—is "conscience"; courts are authorized to refuse enforcement to any contract or clause that offends it. If the draftsmen of the U.C.C. had any particular limitations or targets in mind, no clues can be found in the Official Comment....It is idle to parse this [language] or seek guidance from the illustrations [given]....So it is only a slight exaggeration to say that § 2-302, as it appeared in the Code at the outset had no meaning, and most of the meanings it is to have will be discovered in the course of its application. This is a characteristic feature of general clauses....

JOHN P. DAWSON ET AL., *CONTRACTS: CASES AND COMMENT* 693 (7th ed. 1998) (quoting John P. Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041, 1042-44 (1976)).

32. U.C.C. § 2-302 cmt. 1 (1999). Although the UCC comments are styled as "official," the state legislatures do not enact them. The Code's drafters provided comments "to promote uniformity" and "to safeguard against misconstruction." FARNSWORTH, *supra* note 1, § 1.9, at 34-35 (quoting General Comment at p. ix of 1972 edition).

33. By the late 1940s, the UCC drafters were keenly aware that the courts had been fashioning special relief for consumers on a case-by-case basis:

[These observations] were of considerable concern to the persons working on the new statute. We are told that Karl Llewellyn not only perceived the need for a release valve to allow courts to reach reasonable decisions in "hard" cases without doing violence to the certainty needed for commercial law rules, but that he also was of the opinion that the statute should differentiate between consumers and professionals. This differentiation was to be accomplished through the so-called "merchant rules," which created a different standard in appropriate circumstances "between merchants."

Fred H. Miller, *Consumers and the Code: The Search for the Proper Formula*, 75 WASH. U. L.Q. 187, 189-90 (1997); see also Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 503-12 (1987) (discussing Llewellyn's beliefs).

34. This much-disparaged "Battle of the Forms" section has been the subject of more commentary than any other Article 2 provision. See John E. Murray, Jr., *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307, 1309 n.5 (1986) (providing an extensive listing of articles).

35. One business law commentator recently described Section 2-207's beneficial innovations as follows: Section 2-207 shifts the paradigm of contract formation. Although party autonomy remains a fundamental assumption of the law of contract formation, Section 2-207 raises the level of sophistication by recognizing some of the realities of behavior constituting the assent process.

did not craft a comparable provision directly dealing with the realities of assent in consumer transactions.³⁶ For the most part, the current Code simply does not provide much consumer-specific protection, despite Llewellyn's original intentions.³⁷

B. Applications and Interpretations

1. The Courts Dissect Section 2-302

a. The Classic Two-Pronged Test

Relatively speaking, the cases applying unconscionability under Article 2 have not been numerous; judges only cautiously apply the doctrine.³⁸ Although Section 2-302 does not define unconscionability, the section's comments provide some guidance by faulting the one-sidedness of contract clauses.³⁹ In practice, courts give important weight to UCC comments, although the text sections themselves are certainly more authoritative.⁴⁰

Left to their own devices, various courts have created their own formulations for unconscionability.⁴¹ Courts tend to emphasize the doctrine's fact-dependent flexibility⁴² and may allude to the historical notion that an unconscionable

It facilitates the formation of contracts by an exchange of documents, notwithstanding the common law mirror image rule, while simultaneously retreating from the objective theory of mutual assent when it is not realistic for one party to view the other's apparent manifestation of assent as assent. That is, performance by one party does not amount to assent to the terms on the form of the other when the drafting party reasonably knows that the party has not read or assented to those terms.

Greenfield & Rusch, *supra* note 4, at 120.

36. *See id.* at 121 (saying that "the fiction of objective assent retains its full force" with respect to consumer transactions).

37. Much of what Llewellyn wanted ultimately did not find its way into Section 2-302, and what little consumer differentiation did result was very controversial. *See* Fred H. Miller, *Realism Not Idealism—Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707, 726-27 (1998) (explaining why omitting consumer differentiation was done "for good reason").

38. *See* FARNSWORTH, *supra* note 1, § 4.28, at 312 (describing judicial caution in applying the unconscionability doctrine); *see also* Goodwin v. Ford Motor Credit Co., 970 F. Supp. 1007, 1013 (M.D. Ala. 1997) (noting that unconscionability is an extraordinary remedy).

39. *See supra* note 32 and accompanying text.

40. Professor Farnsworth has described the comments' status in the following fashion:

In practice, courts have given considerable weight to the comments—more than that ordinarily accorded an authoritative treatise or article but less than that accorded the text itself. If the statutory provisions adopted by the legislature contradict the comments, the comments must clearly be rejected. The more difficult problem arises where the comments make assertions as to matters on which the text is silent, and here also courts have often rejected the comments.

FARNSWORTH, *supra* note 1, § 1.10, at 35 (footnotes omitted); *see, e.g.*, Walker v. Am. Cynamid Co., 948 P.2d 1123, 1128 (Idaho 1997) (noting that the courts often give UCC comments "substantial weight").

41. Judicial approaches have certainly not been consistent. *See* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 103 (1981) ("The decided cases do not invoke the doctrine of unconscionability in any systematic or even coherent way."). Nonetheless, unconscionability under Code precedent and common law precedent generally yields the same results. *See, e.g.*, Perdue v. Crocker Nat'l Bank, 702 P.2d 503 (Cal. 1985) (noting that "[b]oth [Code and common law] pathways should lead to the same result").

42. *See, e.g.*, A&M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 120 (Cal. Ct. App. 1982) (describing unconscionability as "a flexible doctrine designed to allow courts to directly consider numerous factors which may adulterate the contractual process").

understanding is one that no sane person would make.⁴³ The description probably used most often appears in the classic case of *Williams v. Walker-Thomas Furniture Co.*:⁴⁴ "Unconscionability has generally been recognized to include 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."⁴⁵ This language features both substantive and procedural components—the terms must unreasonably favor one party, and the process must eliminate meaningful choice.⁴⁶

Procedural unconscionability broadly encompasses a whole host of circumstances surrounding contract execution. Unfair process can result from the use of unreasonably hard-to-read print,⁴⁷ incomprehensible language,⁴⁸ or sharp bargaining practices⁴⁹ and relates to unequal bargaining power, including negotiation skill.⁵⁰ Some disparity in bargaining position occurs in most standardized contracts; thus, unequal bargaining power alone cannot constitute unconscionability.⁵¹ As a practical matter, the courts more readily overlook procedural unfairness if the contract involves goods or services that are nonessential or could have been acquired elsewhere.⁵²

43. See *supra* note 20 and accompanying text.

44. 350 F.2d 445 (D.C. Cir. 1965). This case was the typical Section 2-302 decision; it involved a damages action against the buyer, who objected to the unfairness of a particular contract clause. See generally FARNSWORTH, *supra* note 2, § 4.28, at 310-11 (describing what most Section 2-302 cases involve). Although in the *Walker-Thomas* case the contract was executed before the Code's effective date, the court regarded Section 2-302 as "persuasive authority for following the rationale of the cases from which the section is explicitly derived." *Walker-Thomas*, 350 F.2d at 449. Since its publication, *Walker-Thomas* "has generally been treated as a Code case." FARNSWORTH, *supra* note 1, § 4.28, at 311 n.26.

45. *Walker-Thomas*, 350 F.2d at 449. This quote is one of the "more popular" expressions of unconscionability. MURRAY, *supra* note 20, § 96, at 490.

46. Professor Arthur Leff first made the distinction between the two components. See Leff, *supra* note 30, at 487 (describing the procedural/substantive dichotomy); see also Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445, 489 (1994) ("As every first year law student knows, a consideration of unconscionability begins with Arthur Leff's analysis."). The line between procedural and substantive unconscionability is often blurred. See MURRAY, *supra* note 19, § 96, at 490-91 (describing the confusing distinctions).

47. See, e.g., *John Deere Leasing Co. v. Blubaugh*, 636 F. Supp. 1569, 1571 (D. Kan. 1986) (indicating that the lease terms were "in very light-colored, fine print" that was difficult to see).

48. See MURRAY, *supra* note 19, § 96, at 496-97.

49. *Id.*

50. Bargaining power often implicates bargaining skill. See, e.g., *Kerr-McGee Corp. v. N. Utilities*, 673 F.2d 323, 330 (10th Cir. 1982) (finding that the circumstances were not unconscionable since "experienced negotiators for both parties entered into an agreement"). In essence, procedural unconscionability may take two forms—oppression and unfair surprise. Courts have also described these categories as involving "lack of voluntariness" and "lack of knowledge," respectively. See Prince, *supra* note 22, at 474 (discussing how courts and commentators have construed procedural unconscionability). Relief for unfair surprise is not terribly controversial and has antecedents in other policing doctrines such as duress, misrepresentation, and mistake. Addressing oppression, on the other hand, is more problematic and conceptually more difficult to apply. See John A. Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 944 (1969) (noting that unfair surprise is easier to visualize than oppression).

51. The comments to Section 2-302 provide that the underlying principle is not to disturb the "allocation of risks because of superior bargaining power." U.C.C. § 2-302 cmt. 1 (1999); see also *Hydraform Prod. Corp. v. Am. Steel & Aluminum Corp.*, 498 A.2d 339 (N.H. 1985) (quoting Comment 1 and noting that unconscionability turns on whether the bargaining power is so disparate that the weaker party lacks genuine choice). When the weaker party lacks meaningful choice, the agreement may be called an "adhesion contract."

52. See FARNSWORTH, *supra* note 1, § 4.28, at 313 (stating that a "court will often buttress its [unconscionability] conclusion...by stressing that the goods or services were not essential or could have been procured elsewhere").

Substantive unconscionability, on the other hand, is somewhat harder to define. Unlike procedural unconscionability, the substantive component has no elements or factors; instead, the focus is simply on contract terms that unreasonably favor one party.⁵³ In some respects, it is like Justice Stewart's view of pornography—you know it when you see it.⁵⁴

On occasion, courts have made creative attempts to give the two-pronged unconscionability doctrine more meaningful content. One approach has been to discuss the weaker party's reasonable expectations as an adjunct to the unconscionability analysis.⁵⁵ Another view has been the adoption of multi-factored analyses. In *Wille v. Southwestern Bell Telephone Co.*,⁵⁶ for example, the Kansas court's 1976 decision enumerated ten factors to consider when applying the concept.⁵⁷ Ten years later, two cases went beyond the two-pronged substantive and procedural approach to list seven considerations.⁵⁸ By simply reiterating factors commonly found throughout unconscionability case authority, these "blunderbuss efforts" were not successful.⁵⁹

Although UCC § 2-302 has remained relatively stagnant, having never been significantly amended, the courts have made some important inroads in the subsequent years.⁶⁰ Since the *Walker-Thomas* decision in 1965, judicial definitions of unconscionability have remained largely the same, but the courts have strengthened the doctrine in at least two respects. First, the courts have expanded

53. See, e.g., *Garrett v. Janiewski*, 480 So. 2d 1324, 1326 (Fla. Dist. Ct. App. 1985) ("Substantive unconscionability requires proving that the terms of the contract are unreasonable and unfair.")

54. With respect to pornography, Justice Stewart said that he could not intelligibly define what materials were illegal, "[b]ut I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). Contract law commentators have drawn the comparison between that statement and the nebulous unconscionability doctrine. See, e.g., Darren Bush, *Caught Between Scylla and Charybdis: Law & Economics as a Useful Tool for Feminist Legal Theorists*, 7 AM. U.J. GENDER SOC. POL'Y & L. 395, 405 (1998/99) (quoting *Jacobellis* and noting the comparison); Anthony Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 38 (1995) (comparing unconscionability and obscenity in terms of definitional difficulties).

55. See, e.g., *San Francisco Newspaper Printing Co. v. Superior Court*, 216 Cal. Rptr. 462, 464 (Cal. Ct. App. 1985) (stating that adhesion contracts are enforceable unless unconscionable or outside the weaker party's reasonable expectations).

56. 549 P.2d 903 (Kan. 1976).

57. The ten factors were (1) the use of printed forms involving adhesive provisions; (2) excessive price or cost-price disparity; (3) consumer denied basic rights and remedies; (4) penalty clause(s) included; (5) circumstances surrounding contract formation; (6) inconspicuous clauses; (7) clauses not understandable; (8) overall balance of rights and obligations; (9) exploitation of the underprivileged, unsophisticated, uneducated and illiterate; and (10) unequal bargaining power. *Id.* at 906-07.

58. *Mullan v. Quickie Aircraft Corp.*, 797 F.2d 845, 850 (10th Cir. 1986) (delineating the following seven elements: (1) a standardized contract executed by parties of unequal bargaining power; (2) no opportunity to read before signing; (3) use of fine print for the disputed provision; (4) no evidence that the disputed provision was commercially reasonable or reasonably anticipated; (5) whether terms are substantively unfair; (6) the parties' relationship, including factors of assent, unfair surprise, and notice; and (7) all circumstances surrounding contract formation); *Davis v. M.L.G. Corp.*, 712 P.2d 985, 991 (Colo. 1986) (listing the same seven considerations).

59. See MURRAY, *supra* note 19, § 96, at 492 (criticizing the *Mullan* and *Wille* decisions as "blunderbuss efforts" that did not enhance the available unconscionability definitions).

60. Professor Slawson described these "monumental achievements" as follows:

[The courts] have broadly interpreted Article 2 in an effort to make it good law; but for these efforts, the article would need amending even more urgently. Although the pace of some of the reforms has been slower since the middle 1980s, we can attribute most of the slowing to the reforms having been largely accomplished. Moreover, the slowing has only been relative to the extraordinarily fast pace of reform that prevailed in the 1960s and 1970s.

SLAWSON, *supra* note 2, at 159.

the classic two-pronged test to permit relief based on one prong alone; second, they have allowed merchants to more frequently enjoy the doctrine's protections.

b. One Prong Alone

It has been unclear to what extent courts will grant relief based on procedural or substantive unconscionability alone.⁶¹ Although many courts say that both types of unconscionability must be shown to invalidate a contract clause,⁶² decisions increasingly reflect a sliding scale that more readily takes into account the two elements without necessarily requiring both.⁶³ If the process or substance alone is sufficiently unfair, theoretically, relief will follow.⁶⁴

Despite this theory, courts generally resist finding procedural unconscionability unless substantive unfairness is also present.⁶⁵ Even if there is no possibility of negotiation—as when the weaker party must accept or reject an adhesion contract⁶⁶—that circumstance alone does not compel a finding of unconscionability. Indeed, standard-form contracts promote undeniable efficiencies, and public policy accordingly supports their enforcement.⁶⁷ If the procedural element is seriously

61. See MURRAY, *supra* note 19, § 96(2)(b), at 491 (“There is also a lack of clarity as to whether one form of unconscionability (procedural or substantive) is sufficient without the other.”).

62. See, e.g., *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999) (stating that Pennsylvania law requires a two-fold determination for unconscionability); *The Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 322-23 (6th Cir. 1998) (saying that Michigan law requires both components); *Iwen v. U.S. West Direct*, 977 P.2d 989, 995 (Mont. 1999) (“Unconscionability requires a two-fold determination: that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions.”). See generally Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 17 (1993) (“Most statements of the law of unconscionability now hold that both procedural and substantive unconscionability are required before courts will grant relief from a challenged term.”); Richard J. Hunter, Jr., *Unconscionability Revisited: A Comparative Approach*, 68 N.D. L. REV. 145, 169 (1992) (stating that there are “few instances” when one element exists without the other).

63. See, e.g., *Kinney v. United Healthcare Services, Inc.*, 83 Cal. Rptr. 2d 348, 352 (Cal. Ct. App. 1999) (saying that unconscionability's procedural and substantive elements are “reviewed in tandem” such that the greater the degree of one, the less that is required of the other); *Carboni v. Arrospide*, 2 Cal. Rptr. 2d 845, 849 (Cal. Ct. App. 1991) (describing a “sliding scale” that lets a strong showing of substantive unconscionability compensate for a lesser showing of procedural unconscionability).

64. One commentator described this shift in the following way:

Whereas *Walker-Thomas* required that a contractual provision be both procedurally and substantively unconscionable in order to be stricken, courts now use a so-called sliding scale. A term is now stricken if the two kinds of unconscionability, considered together, “weigh enough.” In principle, therefore, either procedural or substantive unconscionability is now sufficient, if it alone “weighs” enough.

SLAWSON, *supra* note 2, at 142 (footnote omitted); see also Craswell, *supra* note 62, at 17-18 (“[S]ome courts have suggested a vaguely mathematical metaphor in which a large amount of one type of unconscionability can make up for only a small amount of the other.”).

65. See, e.g., *Communications Maint., Inc. v. Motorola, Inc.*, 761 F.2d 1202 (7th Cir. 1985) (finding no need to reach issue of procedural unconscionability since there was no substantive unconscionability); *Res. Mgmt. Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1043 (Utah 1985) (noting that procedural unconscionability alone could support relief, but such a case “would be rare”).

66. An adhesion contract is a standard-form contract that provides a take-it-or-leave-it proposition. See FARNSWORTH, *supra* note 1, § 4.26, at 297 (describing contracts of adhesion). Despite the pejorative term, adhesion contracts are “part of the fabric of our society” and “should neither be praised nor denounced....” *Goodwin v. Ford Motor Credit Co.*, 970 F. Supp. 1007, 1015 (M.D. Ala. 1995). Such arrangements are economically efficient and accordingly beneficial. See *infra* note 218 and accompanying text (describing the advantages of standardized agreements).

67. See *infra* notes 220, 227 and accompanying text.

flawed, courts generally conclude that other policing doctrines—such as fraud, misrepresentation, duress, and mistake—more efficiently redress such contract formation problems.⁶⁸

In contrast, it is more difficult for a court to ignore substantive unfairness, even though substantive unconscionability alone is not supposed to support relief.⁶⁹ In an exceptional case, the substantive term is so outrageous that it is unenforceable regardless of procedural issues.⁷⁰ More often, when substantive unconscionability is found, some form of its procedural counterpart lurks nearby.⁷¹

In recent times, courts have shown an increasing willingness to find unconscionability exclusively on substantive grounds.⁷² One example is *Brower v. Gateway 2000, Inc.*,⁷³ a class action suit in which the plaintiffs contended that an arbitration clause was invalid under UCC § 2-302, among other reasons.⁷⁴ As an initial matter, the court considered, then rejected, plaintiffs' procedural argument that the arbitration clause was unenforceable as an adhesion contract.⁷⁵ Although the parties did not possess equal bargaining power, the consumers were not forced to "take it or leave it;" indeed, they could return the goods to Gateway within thirty days and buy the products from a competitor.⁷⁶

Even though procedural unfairness was not present,⁷⁷ the court concluded that substantive unconscionability alone did justify relief.⁷⁸ Here, the arbitration clause unreasonably favored Gateway because of the excessive cost.⁷⁹ Acknowledging that

68. See *Res. Mgmt. Co.*, 706 P.2d at 1043 (noting that fraud, misrepresentation, duress, and mistake are superior "tools" in such situations); see also Richard Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 302 (1975) (stating that procedural unconscionability allows the courts to reach fraud or duress even if their specific elements are not present).

69. See FARNSWORTH, *supra* note 1, § 4.28, at 313 (stating the general rule, then noting "some reluctance to concede that a plainly oppressive term can be legitimized by fairness in bargaining").

70. See, e.g., *Vance v. Nat'l Benefit Ass'n*, 1999 WL 731764 (N.D. Ill. Aug. 30, 1999) (selling a credit card for \$1400 when the available credit was \$36 was so oppressive as to be unconscionable); *Gillman v. Chase Manhattan Bank*, 534 N.E.2d 824, 829 (N.Y. 1988) (alluding to the exception in dictum). Various examinations have differed regarding the degree to which courts have been willing to grant relief on the basis of substantive unconscionability alone. See Harrison, *supra* note 46, at 450 n.14 (listing several sources reaching different conclusions); see, e.g., Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 745 (1982) (identifying ten cases in which unconscionability was based on substantive terms alone).

71. See Harrison, *supra* note 46, at 490 (noting the great likelihood that "when there is substantive unfairness, procedural unfairness of some form is also nearby").

72. See, e.g., Eisenberg, *supra* note 70, at 752-54 (noting a trend towards redressing substantive unfairness regardless of procedural defects).

73. 676 N.Y.S.2d 569 (N.Y. App. Div. 1998).

74. Plaintiffs also contended that the clause was invalid under section 2-207, but the court concluded that that section was inapplicable because the contract essentially involved only one "form"—the paperwork inside the delivered Gateway box. Thus, an enforceable agreement did not exist until the computer merchandise was retained beyond the thirty days specified in Gateway's "Agreement." *Id.*; see also *Hill v. Gateway, Inc.* 2000, 105 F.3d 1147 (7th Cir. 1997) (concluding that section 2-207 was inapplicable for the same reason in an action involving the same arbitration clause subject to federal claims).

75. *Brower*, 676 N.Y.S.2d at 572.

76. *Id.* Although returning the merchandise would entail work and expense, the court viewed this as a fair "trade-off for the convenience and savings for which the consumer presumably opted" when she decided to buy merchandise by phone or mail. *Id.* at 573.

77. The court looked to the contract formation process, taking into account the transaction's setting, the aggrieved party's experience and education, the use of "fine print" or high-pressure tactics, and any disparity in the parties' bargaining power. *Id.* No factor favored plaintiffs' claim. *Id.*

78. *Id.* at 574-75.

79. The arbitration procedures required a \$4000 advance fee (more than the cost of most Gateway products),

New York law typically required the presence of both procedural and substantive elements, the court noted that sometimes substantive unconscionability alone is adequate.⁸⁰

c. Consumers and Merchants

When the UCC first introduced the unconscionability concept, legal commentators assumed that the courts would use it exclusively to protect individual consumers, not businesses.⁸¹ The classic unconscionability action involves an aggrieved individual consumer, and the courts remain somewhat leery about applying the doctrine to protect sophisticated companies.⁸² After all, the concept's equitable roots demonstrate a traditional concern for the weaker contracting party.⁸³ On the other hand, Section 2-302 certainly does not exclude merchants from its benefits.⁸⁴ The law surrounding the use of unconscionability in contracts between merchants certainly exists, although it is less developed than in the consumer context.⁸⁵

Over time, the courts have increasingly extended the unconscionability doctrine beyond the context of individual consumers to businesses; in fact, today approximately forty percent of all reported cases involve businesses asserting the doctrine,⁸⁶ with no apparent differences in case results.⁸⁷ The courts will treat some merchants as "quasi-consumers" based on relative disadvantages such as the

of which \$2000 was nonrefundable. *Id.* at 571.

80. The court cited other cases standing for this proposition. *See, e.g.*, *Gillman v. Chase Manhattan Bank*, 534 N.E.2d 824, 829 (N.Y. 1988); *see also Res. Mgmt. Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1043 (Utah 1985) (saying that "gross disparity in terms, absent evidence of procedural unconscionability, can support a finding of unconscionability").

81. *See* SLAWSON, *supra* note 2, at 25 (describing the legal scholars' speculation); *see also* JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 4-9, at 155-57 (3d ed. 1988) (noting speculation that unconscionability would be inapplicable to businesses as a matter of law).

82. *See, e.g.*, *Cont'l Airlines v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1527 (9th Cir. 1987) (saying that it "makes little sense" to invoke unconscionability "in the context of two large, legally sophisticated companies"); *Const. Assoc. v. Fargo Water Equip. Co.*, 446 N.W.2d 237, 242 (N.D. 1989) (expressing skepticism of unconscionability claim in purely commercial contracts); *Hydraform Prod. Corp. v. Am. Steel & Aluminum Corp.*, 498 A.2d 339, 344 (N.H. 1985) (declining to apply doctrine, noting that the buyer "was not an innocent in the industry"); *see also* Jane P. Mallor, *Unconscionability in Contracts Between Merchants*, 40 SW. L.J. 1065, 1066 (1986) (noting that unconscionability has most frequently benefited consumers).

83. *See* Prince, *supra* note 22, at 479-80 (describing the consensus among courts and commentators).

84. Some early drafts of Section 2-302 did exclude merchants from using the doctrine if they had an opportunity to read the agreement. *See id.* at 480 n.105 (citing Leff, *supra* note 30, at 492-93).

85. *See* John Edward Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735, 779 (1982) ("If unconscionability is still in its formative stages, the doctrine is pre-embryonic with respect to merchant-to-merchant transactions."); *see also* Jane P. Mallor, *Unconscionability in Contracts Between Merchants*, 40 SW. L.J. 1065, 1067 (1986) (saying that "surprisingly little scholarly attention has focused on the task of articulating standards for unconscionability determinations in contracts between merchants").

86. *See* SLAWSON, *supra* note 3, at 143 ("At least 40 percent of the parties seeking the protections of unconscionability in the reported cases have been business consumers since 1990.").

87. *See id.* (describing the courts' extension of the unconscionability doctrine to business consumers); Richard J. Hunter, Jr., *Unconscionability Revisited: A Comparative Approach*, 68 N.D. L. REV. 145, 150 (1992) (saying that "it has now become clear that the small business entrepreneur" can also take advantage of the unconscionability doctrine).

absence of business experience or less education⁸⁸ and, even in the absence of such conditions, will occasionally offer relief.⁸⁹

2. The Commentators (Mostly) Complain

Commentators have not been generous to the unconscionability doctrine since its inception.⁹⁰ Indeed, the overall perception is that Article 2 has generated much more controversy and disagreement than has the common law of contract.⁹¹ In general, Section 2-302's commentators fall into two categories: supporters who admire the section's ability to protect against overreaching and unfair contracts⁹² and detractors who fear that the doctrine's broad and ill-defined reach will unpredictably undercut the contracting parties' original intentions.⁹³

Section 2-302's lack of precision has been subject to ridicule; the section has been called "an emotionally satisfying incantation" that illustrates that "it is easy to say nothing with words."⁹⁴ This same attribute, on the other hand, makes the doctrine utterly malleable. Some accordingly assert that unconscionability should intentionally defy description to be effective—that courts need discretionary space within which to address unfairness.⁹⁵

From a doctrinal perspective, critics have contended that unconscionability is both too narrow to address unfairness in contracts and too indirect to handle contract issues that need broad, clear treatment.⁹⁶ Some complain that the concept is self-contradictory. It recognizes the legitimacy of contracts to which one party arguably did not give meaningful consent, then denies the agreements' legitimacy to the extent that they operate unfairly.⁹⁷

88. See Prince, *supra* note 22, at 480 (describing how businesses can be quasi-consumers).

89. Among business entities, certainly some can be more sophisticated—and possess more leverage—than others. Still, the courts assume that all merchants possess the strength and savvy to avoid procedural unconscionability:

While courts on rare occasions grant relief to merchants who are not quasi-consumers, such decisions are inherently suspect with regard to the presence of procedural unconscionability. The courts have stated that there is a presumption against finding unconscionability in contracts between merchants. The sophisticated business entity is deemed more likely to guard against hidden terms in a contract and is held responsible for understanding the terms of the contract. The sophisticated business entity is more likely not only to have the benefit of counsel, but also to have alternatives and to be able to bargain effectively for balanced terms. For these reasons, courts have been reluctant to find that a merchant has been taken advantage of through unconscionability.

Prince, *supra* note 22, at 481-82.

90. See, e.g., DiMatteo, *supra* note 5, at 293 (stating that the doctrine "has not been without its critics").

91. See SLAWSON, *supra* note 2, at 160 (noting that a review of contract treatises suggests "the clear impression that there is much more disagreement about Article 2 than about the common law of contract").

92. Early admirers included: William B. Davenport, *Unconscionability and the Uniform Commercial Code*, 22 U. MIAMI L. REV. 121 (1967) (contending that Section 2-302 is a useful device consistent with prior common law); M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969) (defending Section 2-302 and rebutting Professor Leff's analysis).

93. See Prince, *supra* note 22, at 462 (noting the "two camps" for Section 2-302's commentators).

94. Leff, *supra* note 30, at 558-59.

95. See, e.g., Epstein, *supra* note 68, at 304 (stating that the doctrine's strength is its flexibility); Prince, *supra* note 22, at 470-71 (describing how lack of precision assists flexibility).

96. See DiMatteo, *supra* note 5, at 293 (describing these criticisms and presenting possible alternatives).

97. See SLAWSON, *supra* note 2, at 144 (describing the doctrine's self-contradictory underpinnings).

The classic procedural/substantive dichotomy, first proposed by Arthur Leff,⁹⁸ has also frequently been criticized. Although the distinction can be analytically interesting, some view it as not terribly meaningful.⁹⁹ Commentators have stretched the limits of their creativity in the search for alternatives.¹⁰⁰ Professor Murray, for example, favors two different unconscionability categories.¹⁰¹ The first group would be the “unexpected” contract that subjects one party to unfair surprise,¹⁰² and the second involves “no choice” agreements—ones in which a party possessing superior bargaining power dictates terms to a party having no reasonable option.¹⁰³ Alternatively, it has been suggested that the traditional unconscionability analysis be abandoned in favor of the reasonable expectations approach, which would grant the consumer’s reasonable expectations even if unconscionability is not established.¹⁰⁴

Despite long-standing fears, business law experts today generally agree that Section 2-302 has not been the disaster that many had predicted.¹⁰⁵ The past thirty years of judicial application have demonstrated that the unconscionability concept,

98. See *supra* note 46 and accompanying text.

99. See Craswell, *supra* note 62, at 18 (“Some scholars have questioned the utility of the entire distinction.”); Harrison, *supra* note 46, at 489-90 (saying that the two-prong approach is interesting, but “it is not terribly useful”).

100. Many original approaches have been suggested for handling the inequalities inherent in adhesion contracts. See, e.g., Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1176 (1983) (suggesting that adhesion contracts be presumptively unenforceable).

101. See MURRAY, *supra* note 19, § 96, at 492-95 (presenting Professor Murray’s suggested unconscionability analysis). Murray prefers this approach because it emphasizes the two dominant themes found in unconscionability case law, requiring courts “to apply these two pervasive concepts to the huge tapestry of fact situations which continue to unfold.” *Id.* at 495. This, Murray argues, is preferable to the “illusion of certainty” created by the traditional procedural/substantive dichotomy and has greater utility than a laundry list of elements typically present in, but not essential to, unconscionability cases. *Id.* For example, a standard-form contract is often present in unconscionability cases, but is certainly not crucial to the holding. See *id.* § 96, at 495 n.36 (discussing how courts employing unconscionability “laundry lists” often include standardized agreements on the list). A Pennsylvania court incorporated Murray’s approach in 1985. *Germantown Mfg. Co. v. Rawlinson*, 491 A.2d 138, 146-48 (Pa. Super Ct. 1985) (adopting the “unexpected” and “no choice” unconscionability analyses).

102. “Unexpected” unconscionability often appears in the context of boilerplate forms, where a seller can inject material, risk-shifting terms that the buyer would not expect to find. MURRAY, *supra* note 19, § 96, at 494-95 (describing the elements of “unexpected unconscionability”).

103. The “no choice” contract involves oppression because the weaker party requires certain goods or services that are essential to his physical or economic well being and has no reasonable alternative. This is the classic adhesion contract. *Id.* § 96, at 495 (explaining the “no choice” prong of his analysis).

104. Professor Slawson compares the two doctrines as follows:

[Unconscionability] is much less effective against abuses of bargaining power. Whereas reasonable expectations gives the consumer his reasonable expectations in every case, unconscionability requires the court to conclude that the contract or contract term will operate very unfairly against the consumer in the particular case, and the consumer has the burden of persuading the court to reach this conclusion. The result is that unconscionability decisions are too particularized to the facts of the case to constitute precedents, and the doctrine fails to generate any sizable body of law to protect consumers.

SLAWSON, *supra* note 2, at 57. Given the similarities between the doctrines, the two doctrines often support each other in the same cases. See *id.* at 57 (noting that early reasonable expectations cases also rested on unconscionability); see, e.g., *C&J Fertilizer, Inc. v. Allied Mutual Ins. Co.*, 227 N.W.2d 169 (Iowa 1975) (applying both doctrines and using a tentative draft of UCC § 2-302).

105. Even Professor Leff, who was Section 2-302’s first principal critic, predicted that the courts would “most likely adjust, entrusting the irritating aspects of the Section with a smoothing nacre of more or less reasonable applications, or the legislatures may act if things get out of hand.” Leff, *supra* note 30, at 558-59.

though amorphous, is workable.¹⁰⁶ Thus, although courts and commentators continue to complain about unconscionability, the doctrine has ultimately achieved a grumbling acceptance, largely because the courts have been reasonably restrained.¹⁰⁷

II. ARTICLE 2 REVISIONS

Given the intense criticism surrounding the unconscionability doctrine, as well as the need to overhaul and update Article 2, it is not surprising that revision efforts were forthcoming. What has been of great interest, however, is the protracted and excruciating nature of the revision process itself as contract law experts have wrestled with the various substantive alternatives proposed to replace the current Section 2-302 formulation.

A. *Endless Process*

1. The Big Picture

The Article 2 revision saga began twelve years ago and is still ongoing.¹⁰⁸ Although the rather messy UCC revision process¹⁰⁹ has been extensively critiqued,¹¹⁰ private law-making often provokes criticism, given the difficult balance of competing interests such work necessarily involves.¹¹¹ Even if the end result presents an improvement, the revision process undeniably entails a significant drain on both human and fiscal resources.¹¹²

106. See Greenfield & Rusch, *supra* note 4, at 121 ("Though the concept is vague, courts can work with it, and merchants can live with it.").

107. See Prince, *supra* note 22, at 463 (describing the "general comfort of courts and commentators").

108. In 1988, the Permanent Editorial Board (PEB) appointed a study group to consider whether revisions were necessary. Based on the group's recommendation, the PEB authorized the appointment of an Article 2 drafting committee and a reporter in 1991. For an in-depth discussion of the process surrounding the Article 2 revisions 1991-99, see Rusch, *supra* note 15. Professor Rusch served both as an observer and an associate reporter in the uniform law revision process.

109. See Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707, 707 (1998) ("It is said that if you like sausage you should not watch it being made. The same observation has been made about legislation."). Professor Miller is Executive Director of the NCCUSL and a member of the ALI. His article provides a very informative overview of how the process works generally and how consumer issues were served in this particular set of revisions. See *id.*

110. See, e.g., Peter A. Alces & David Frisch, *Commercial Codification as Negotiation*, 32 U.C. DAVIS L. REV. 17, 20 (1998) (concluding "that the article 2 revision project may not, as currently realized, be worth the commercial law candle").

111. See, e.g., Carol B. Swanson, *Juggling Shareholder Rights and Strike Suits in Derivative Litigation: The ALI Drops the Ball*, 77 MINN. L. REV. 1339 (1993) (arguing that the ALI's massive Corporate Governance Project yielded unworkable results due, at least in part, to the pressures of competing business law factions).

112. The ad hoc nature of the revision process only underscores that expense:

[T]he rulemaking process has a tendency to expand and lose focus during consideration of proposals. The proposals may not even be related to the specific problems that caused the revision process to be undertaken; they may also fail to connect to any of the recommendations of the study committee.

Such an ad hoc approach is costly. Dozens, sometimes hundreds, of lawyers and academics periodically meet, usually for days at a time, to debate the myriad of rulemaking proposals that are advanced. This effort goes on for years: It takes anywhere from three to five years for a statutory change to have been studied, drafted, and first proposed for legislative enactment. This requires an enormous devotion of human and professional capital. Other costs result from the inevitable transition and re-education of the commercial law community. Furthermore, indirect

In general, the uniform law revision process provokes two fundamental public policy concerns.¹¹³ First, by definition, uniform laws should be adopted uniformly, although absolute uniformity today is likely less important than it was when the UCC was first developed a half-century ago.¹¹⁴ Some contend that the fact of revision can itself be a mistake because of the difficulties associated with achieving uniform enactment of any revised approach.¹¹⁵ Karl Llewellyn himself anticipated that amending the UCC would be difficult, saying it was “the problem of the semi-permanent code.”¹¹⁶ In fact, the original Article 2 has seen no important amendments to date.¹¹⁷

The second overriding concern is how to accommodate diverse voices in the revision process. Business law commentators worry that interest groups will unduly influence the process in the absence of equally powerful, countervailing interests.¹¹⁸ Ultimately, the end result necessitates some compromise among the various interests, which may mean that the final balance satisfies no one.

In the face of such universal concerns, the Article 2 revision process started¹¹⁹ and moved forward, operating in a remarkably open fashion. The NCCUSL and the American Law Institute (ALI) act together as partners in the Article 2 revision process. The drafting committee consists of NCCUSL and ALI members. The

costs may result from inadvertent ambiguities and problems of the revised statutory language:

New rules can raise new problems of interpretation.

Steven L. Schwarcz, *A Fundamental Inquiry into the Statutory Rulemaking Process of Private Legislatures*, 29 GA. L. REV. 909, 917-18 (1995) (footnotes omitted). Of course, the instant process has lasted much longer than the “three to five years” Schwarcz suggests.

113. In addition to these fundamental concerns, there are numerous other criticisms of the uniform law revision process. One recurring issue is the lack of meaningful empirical data supporting the need for revisions. See Alces & Frisch, *supra* note 110, at 68 (saying “it is essential that rule makers have a reasonably accurate understanding of how the system (broadly conceived) works,” but that the committee often must make decisions armed only with conclusory assertions, anecdotal evidence, and reported case opinions); see also Rusch, *supra* note 15, at 1692 (citing numerous process problems, including the observation that “the wrong people are at the table”—that business people and consumers, rather than lawyers, should discuss the “reasonable standards” and that lobbyists lacking knowledge of current commercial law standards hinder progress).

114. Now that a “core” uniformity under the UCC exists, a more liberal view of uniformity is reasonable. See Miller, *supra* note 37, at 721-26 (discussing how the uniformity concept has eased over time).

115. Professor Slawson articulated this concern as follows:

We do not want to amend [Article 2] if the amendment would destroy its uniformity among the states, because this would defeat one of the purposes for which it was enacted. Therefore, no state should amend it unless all states will enact the same amendment, but it is nearly impossible to obtain such universal agreement if the amendment is controversial, and almost any important amendment will be controversial.

SLAWSON, *supra* note 2, at 159.

116. ALI & NCCUSL, *Report and Second Draft of the Revised Uniform Sales Act (1941)*, in 1 ELIZABETH SLUSSER KELLEY, UNIFORM COMMERCIAL CODE DRAFTS 269, 302 (1984).

117. See SLAWSON, *supra* note 2, at 159 (describing the absence of significant revisions and the need for comprehensive reforms).

118. See Rusch, *supra* note 15, at 1689 (noting the “often repeated” concern that interest groups “may capture the process”).

119. The revision process can be instigated in several ways—because of influential law review articles, or through study by the PEB or the American Bar Association (ABA). Regardless of origin, the PEB initially considers any suggestion for UCC revision. See Miller, *supra* note 37, at 712-13 (describing the early stages in detail). The Article 2 revision process began because of a PEB study. See *id.* at 712 n.13.

committee has met regularly¹²⁰ since 1991. These well-attended¹²¹ public meetings have included American Bar Association (ABA) advisors¹²² and representatives of various consumer and business interest groups.¹²³ The drafting committee routinely entertains the suggestions provided by observers and advisors.¹²⁴ Periodically, Article 2 drafts are also presented to the ALI and the NCCUSL membership.

During the past eight years, the drafting committee moved forward in fits and starts, and emotions sometimes ran high.¹²⁵ By 1997, certain Article 2 revisions provoked heated controversy, especially those sections aimed at consumer protection.¹²⁶ Business interests regarded the changes as unwarranted, and the resulting tensions forced a cooling-off period that postponed drafting committee meetings until the following March.¹²⁷ In 1998 and 1999, industry and consumer representatives continued to debate the consumer protection provisions, and the committee did its best to craft a workable compromise that would achieve final approval.¹²⁸

2. 1999: The Collapse of Consensus

Just when the lengthy drafting odyssey appeared to be drawing to an end, the process derailed. In 1999, after receiving the ALI's final approval, the revisions went before NCCUSL at its annual July meeting. Although business interests

120. The drafting committee typically meets for long weekends three times a year. See Rusch, *supra* note 15, at 1684 n.5 (saying that meetings "ran from Friday morning through Sunday noon"); see also Miller, *supra* note 37, at 714 (noting that "[t]he period for these meetings begins in September and concludes in April, about two and one half months before [NCCUSL's] annual meeting...at the end of July").

121. Attendance has ranged from 40 persons to more than 100. See Rusch, *supra* note 15, at 1684 n.5 (discussing attendance at drafting meetings).

122. The ABA eventually named three advisors to the project. See *id.* at 1683 n.3 (noting the ABA appointments).

123. In fact, the drafting committee has the task of identifying those interests "that will operate under or be otherwise impacted by the statute, and that thus presumably can, and have an incentive to, contribute insight into its formulation." Miller, *supra* note 37, at 716.

124. See Rusch, *supra* note 15, at 1684 (noting that "[t]he receptiveness of the drafting committee to suggestions by people not on the drafting committee was remarkable"). This open process, in many respects, was a significant benefit. As one five-year participant in the revisions process has noted:

NCCUSL has worked hard to open up the process so that those who have the time and the money to attend meetings may participate in the process. The drafts are widely circulated and available electronically. This wider net facilitates bringing more people to the table with a variety of experiences that informs the drafting committee regarding the merits and demerits of particular proposals for the drafts. The Article 2 drafting committee meetings were open. The chair allowed everyone present to voice views, sometimes resulting in meetings that bogged down, but all viewpoints had an opportunity to speak.

Id. at 1691.

125. For example, industry representatives began to complain that the drafting committee was too "pro-buyer" and "anti-seller", and that "[m]any of the law professors on the panel have a pro-consumer bias, or are liberals." See Jonathan Groner, *Cracking the Commercial Code: An ambitious attempt to bring the UCC into the computer age has some software providers bugged*, THE RECORDER, Nov. 4, 1993, at 1 (noting that "[a]s the process of revision heats up, so does the clamor on both sides").

126. See Rusch, *supra* note 15, at 1684-85 (describing the "tremendous fire" drawn by the consumer provisions).

127. See *id.* at 1685 (discussing the drafting committee's cooling-off period).

128. See *id.* at 1685 (saying that in the final year, the committee "began to crystallize its approaches to various difficult issues" and that the consumer protection sections occupied the bulk of the committee's time).

continued to object to the revisions,¹²⁹ the drafting committee fully expected that NCCUSL would endorse the long-debated changes. Rather than taking action on the project, NCCUSL surprised the committee by opting to defer the revisions' final reading "in large part, because of fear of continued industry opposition to the draft and the perceived threat of nonuniform enactment of the revised article."¹³⁰

The unexpected break in the NCCUSL proceedings frustrated many in attendance. After the seemingly interminable hard work and consensus building, it was difficult to believe that the revisions were being thrown back for further examination and redrafting. NCCUSL's executive director said that the revisions had already achieved "the best balance we can" and that "it isn't going to get better."¹³¹ NCCUSL's president was similarly frustrated by the group's inability to finalize the revisions, noting that NCCUSL should "bite the bullet" and approve the suggested changes.¹³²

129. These concerns can be summarized as follows:

The first and most obvious problem with proposed Article 2 is that many politically powerful commercial interests strenuously object to it in its present form and will oppose it in state legislatures. It is reasonable to expect that they will succeed in blocking adoption of Article 2 in some states and fail in others. Unless consensus is reached before the July meeting of the National Conference, which is unlikely, its approval at that meeting would put the uniformity of state commercial law in jeopardy.

There are many radical changes proposed, according to the objectors, without evidence that buyers and sellers are inadequately served by current law....

The overarching objection, however, is to what has been aptly termed "costly tinkering." Almost every section of Article 2 has been rewritten. Sections have been broken apart, recombined and reshuffled. The relevance of decades of decisional law would immediately be put in question by adoption of this new Article. It would take years of litigation to determine which changes are substantive and which are not. The appropriate standard, say the objectors, which would avert this disaster, is to make changes only where they are demonstrably necessary to alleviate serious problems of buyers or sellers.

Martin F. Connor, *A Look at the Current Uniform Law Agenda of the NCCUSL*, METROPOLITAN CORP. COUNS. (New York Metro Edition), July 1999, at 42.

130. See Rusch, *supra* note 15, at 1684 (saying that these reasons for deferment were revealed in discussions between NCCUSL leadership and the drafting committee following the meeting announcement). The joint ALI and NCCUSL news release, which is available through the ALI's website, explained NCCUSL's inability to finalize the Article 2 revisions in the following way:

In May of this year the ALI approved revised versions of both Articles 2 and 2A that were the result of many years of collaborative effort by the two organizations. At the annual meeting of NCCUSL in July, opposition to certain sections of Article 2, which regulates the sale of goods to consumers and to merchants, led the leadership of NCCUSL, which has the sole responsibility for seeking enactment of UCC revisions in the state legislatures, to conclude that the prospects for uniform adoption throughout the country required additional review of some provisions.

Accordingly, the NCCUSL annual meeting took no action with respect to either Article 2 or 2A.

ALI & NCCUSL Aug. 18, 1999 Press Release, *supra* note 15.

131. The full quote of Fred Miller, NCCUSL's executive director, at the ALI's annual meeting in 1999 was as follows:

I would make two observations. One, I have been a commissioner for over 25 years. I have taught commercial law for that same period of time. If you take an objective look at the Revised Article 2 you will find there are many benefits in there that will reduce litigation costs, prevent litigation, answer questions. It is a quality product from the standpoint of substance. It is also true that I think we have reached the best balance we can. If you are going to delay this for a year, yes, you can upset the balance one way or the other and that's going to have an impact on enactment. I think it's time to let it go. If you want to kill it, kill it, I agree with Mr. Langrock, but do not delay it, it isn't going to get better.

Rusch, *supra* note 15, at 1685 (quoting the unedited transcript from the ALI's annual meeting of 1999, at 904-05).

132. Gene LeBrun, NCCUSL's president, nicely summarized the frustrations following the conference determination to defer the Article 2 vote:

After the controversial 1999 meeting, the ALI and NCCUSL jointly announced the formation of a new drafting committee to continue the revisions effort.¹³³ In doing so, the ALI deferred to NCCUSL's judgment, hoping ultimately for a result that would satisfy all interests.¹³⁴ The ALI acknowledged that the new draft must "be fair, balanced, and useful, and recognized as such by those whom it will affect" so that it will be a worthy successor to the current Article 2, which "has served the nation's commerce for half a century."¹³⁵

Today, the revisions have apparently stalled. The current drafting committee was unable to procure approval from either the ALI or NCCUSL at their annual meetings in 2000, and it is unclear whether the revisions will ever become reality.¹³⁶ In any event, it is important to keep in mind that any approval of the Article 2 revisions will not end the process. Should amendments ultimately be promulgated, each commissioner then has a duty to cause her state legislature to consider the proposal.¹³⁷ If all goes as hoped, the NCCUSL jurisdictions would uniformly enact the revised Code.¹³⁸

[T]his project has been around between NCCUSL and the ALI for 12 years...and eight years in the drafting process. It's had innumerable Drafting Committee sessions, it's been before the ALI Council, it's been before this membership before, it has been before the body of NCCUSL, we have had four Drafting Committee meetings in the last year. All of the issues which have been discussed here have been discussed many, many times on the floor of the conference and particularly with the Drafting Committee. I don't think that further delay is going to change the matter. We have to bite the bullet at some point in time.

Id. at 1685-86 (quoting the unedited transcript from the ALI's annual meeting of 1999, at 892-93).

133. The news release making the joint announcement is available through ALI's web site. See ALI & NCCUSL Aug. 18, 1999 Press Release, *supra* note 15.

134. ALI Director, Lance Liebman, diplomatically described the reconstituted revisions efforts as follows: The American Law Institute believes that the revised versions of Article 2 and Article 2A that it approved in May reflected a fair and balanced treatment of the many difficult issues presented and offered the promise of genuine improvement in the law. Nevertheless, the Institute is deferring to the judgment of the National Conference, its long-time partner in the drafting of the Uniform Commercial Code, that more work is needed to achieve a statute capable of uniform enactment. A distinguished committee will now seek to reconcile the differences of view about some of the most contentious provisions.

ALI & NCCUSL Aug. 18, 1999 Press Release, *supra* note 15.

135. *Id.*

136. The revisions ultimately stalled because of difficulty defining the article's scope with respect to "smart goods." Shortly after NCCUSL's annual meeting ended in early August, the managing editor of the UCC Bulletin/UCC Reporting Service sent out the following email message entitled "NCCUSL defers Rev. 2 again": Rev. 2 Drafting Chair Bill Henning announced that they were not ready to present a final draft that would then be subject to approval by ALI next May...as had been planned. The reason is the coverage-of-"smart goods" problem. A new "if an integral part of the goods" test for coverage of embedded chips was discussed in a very tentative manner inasmuch as not even the drafting committee had signed off on it yet. Not even "sense of the house" votes were considered due to the extremely preliminary nature of these discussions. More details in the next UCC Bulletin.

E-mail from Chris Hoving, Managing Editor of the UCC Bulletin/UCC Reporting Service, to ucclaw-1@assocdir.wuacc.edu (Aug. 4, 2000) (on file with the author); see also Press Release, NCCUSL, Uniform Law Group Wraps Up Meeting (Aug. 3, 2000) (describing the six uniform acts approved, but saying nothing about progress on the Article 2 revisions), available at <http://www.nccusl.org/pressreleases/pr8-3-00-2.htm>.

137. The state bar association often facilitates this process by creating a revision committee to review and make appropriate recommendations. See Miller, *supra* note 37, at 716 (describing the process of taking revisions to the states).

138. These jurisdictions include all fifty states, the District of Columbia, Puerto Rico, and the United States Virgin Islands. See *id.* at 716 n.23 (noting the National Conference jurisdictions and the adoption success rate for various UCC articles).

B. Substantive Options

The Article 2 revision process has seen more than its fair share of surprises and setbacks, but the process of change is not the drafters' sole concern, nor even their greatest. A parade of substantive choices complicates their task.

1. Early Considerations

By the end of the 1980s, many agreed that UCC revisions were necessary.¹³⁹ The initial study group appointed to consider revising Article 2 did not believe that Section 2-302's text required changes; instead, the group recommended only that the section be moved to Article 1 to make it applicable to all UCC articles.¹⁴⁰ As for the Official Comments, the study group urged several clarifications. In essence, the group wanted the comments to elucidate the doctrine's application in terms of the procedural/substantive dichotomy, contract inducement, contract enforcement, and the consumer context.¹⁴¹

As for the Article 2 drafting committee, it viewed Section 2-302 as too open-ended and difficult to particularize.¹⁴² Noting that the unconscionability doctrine had not often been used to invalidate sales contracts, the committee wrote,

A survey reveals relatively few cases under Article 2 where former 2-302 is involved and even fewer cases finding a contract or clause unconscionable. This could mean that there is less unconscionability in the world than one might imagine—that strong sellers and buyers have cleaned up their acts. It could also mean that it is difficult for consumers to litigate these issues and that the courts are not getting a steady flow of cases to decide. Given the relatively small size of consumer claims and the absence of provisions in Article 2 for punitive damages, attorney fees and class actions and the growing use of arbitration and mediation, the latter explanation is more probable than the former. Thus, one

139. With changing technology, there was a sense that the Code at least needed updating: [N]early everyone in the business community agrees that the Uniform Commercial Code—the bane of law students but the centerpiece of a century-old effort to standardize the common law—is an outdated document that was fine when contracts were typed in triplicate, but is in many ways out of touch with the computer age.

Jonathan Groner, *The Uniform Commercial Code Does Not Compute*, N.J. L.J., Nov. 8, 1993, at 6.

140. The study group issued a Preliminary Report in 1990 before the drafting committee formed. See generally Richard E. Speidel, *Contract Formation and Modification Under Revised Article 2*, 35 WM. & MARY L. REV. 1305, 1305-06 (1994) (describing the early stages of the revision process). The Preliminary Report, which indicates the group's recommendation to relocate section 2-303, appears in a published appraisal conducted under the ABA's Committee on the UCC. See Task Force of the A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the Uniform Commercial Code, *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1073-74 (1991) [hereinafter *Article 2 Appraisal*].

141. The Preliminary Report raised three key questions to be addressed in Section 2-302 comment revisions: (1) whether meaningful choice could outweigh complete disclosure; (2) whether the unconscionability test should be expanded to include the inducement and enforcement phases; and (3) whether Section 2-302 should be more clearly aimed at consumer rather than commercial contracts. See Prince, *supra* note 22, at 464 n.20 (citing the Preliminary Report at 2-3).

142. See Greenfield & Rusch, *supra* note 4 at 137 (quoting U.C.C. § 2-105 note 3 (Revision Draft Mar. 1, 1998)).

should not rely upon litigation in court under vague standards as the primary method against unconscionable behavior.¹⁴³

Regarding the existing doctrine as relatively ineffective, the drafters began reviewing possible formulations for making unconscionability more efficient and meaningful.

From the start, there was no consensus concerning how the revised Article 2 should specifically address consumer issues, given the fact that consumers could be both buyers and sellers.¹⁴⁴ The ABA task force had nonetheless pressed for the consideration of a statute dealing with consumer transactions, saying, "Isn't it time to try to deal in a statutory way with the adhesion contract?"¹⁴⁵ Although the states had aggressively enacted consumer protection legislation, the UCC drafting committee concluded that the states' laws were not an effective substitute for a workable unconscionability doctrine under Article 2.¹⁴⁶ Thus, from the revision project's earliest stages, it was apparent that consumer protection would be even more controversial than it was fifty years ago and would need to be directly confronted.¹⁴⁷

2. The Initial Drafts

The drafting committee initially addressed Section 2-302 under two possible approaches. The earliest view was to follow Article 2A for consumer contracts.¹⁴⁸ It extended Section 2-302's reach by expanding the time frame for determining unconscionability and by increasing the available remedies. Under this version, Section 2-302 would police consumer contracts "induced by unconscionable conduct" or whenever such conduct "occurred in the collection of a claim arising

143. *Id.* at 137-38 (quoting U.C.C. § 2-105 note 3 (Revision Draft Mar. 1, 1998)).

144. *See id.* at 122 (stating that "[f]rom the beginning, in the PEB preliminary study report, the ABA Task Force report that responded to the preliminary report and the PEB final study report, there has been [such] disagreement"); *see also Article 2 Appraisal, supra* note 141, at 994-96, 1000-09 (discussing the problem of consumer protection); *PEB Study Group: Uniform Commercial Code, Article 2 Executive Summary*, 46 BUS. LAW. 1869, 1876, 1878 (1991) (same).

145. *See Article 2 Appraisal, supra* note 140, at 1005 (responding to the PEB's Study Committee Report).

146. The drafters said,

Although we have done no systematic study, it is clear that consumer protection laws among the states vary in scope and coverage. There is no uniformity here. Some states have little or no consumer protection legislation while others have comprehensive legislation. Moreover, there frequently are gaps between federal law and state law in particular areas, such as consumer warranties. The risk is that litigation will arise in states with weak consumer protection laws or that stronger parties will select that law through choice of law clauses. Article 2, then, is justified in providing some consumer protection rules to fill the gaps.

U.C.C. § 2-105 note 3 (Revision Draft Mar. 1, 1998), *quoted in* Greenfield & Rusch, *supra* note 4, at 138.

147. *See Miller, supra* note 37, at 727 (stating that "today the question of consumer protection in the Code is even more controversial because the consumer movement has come of age" and that "code amendments had to better accommodate consumer interests for both fairness and enactability reasons).

148. As the current Reporter for Articles 2 and 2A recently explained,

I did not try to conform [Revised Article 2A's unconscionability section] to Revised Article 2, as the question between the two articles has not been whether Article 2A should conform to Article 2, but whether Article 2 should conform to Article 2A. Although we have chosen not to conform Article 2 to Article 2A, there has never been any real problem with Article 2A as it is, so there does not seem to be any pressing reason for conformity except for the sake of conformity.

U.C.C. § 2A-108 reporter's note (Revision Draft Mar. 2000).

from the consumer contract."¹⁴⁹ This first view was quickly eliminated.

The second, more reduced model largely reverted to the original Section 2-302 language, except that it still denied the enforcement of contract terms "induced by unconscionable conduct."¹⁵⁰ In short, this "inducement" focus suggested that unconscionability would result if the agreement "would never have been entered into if unconscionable means had not been employed to induce the agreement to the contract."¹⁵¹ As the drafting committee struggled to achieve the appropriate balance, consumer protection concerns dominated the discussion.¹⁵² Subject to heavy

149. This short-lived approach also awarded attorney's fees under appropriate circumstances. The revised text under this approach read,

(a) 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.

(b) If the court as a matter of law finds that a consumer contract or any clause of such contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from the consumer contract, the court may grant appropriate relief.

(c) Before making a finding of unconscionability under subsection (a) or (b), the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the contract or clause thereof, or of the conduct.

(d) In an action in which a party claims unconscionability with respect to a consumer contract:

(1) If the court finds unconscionability under subsection (a) or (b), the court shall award reasonable attorney's fees to the consumer.

(2) If the court does not find unconscionability and the consumer claiming unconscionability has brought or maintained an action known to be groundless, the court shall award reasonable attorney's fees to the party against whom the claim is made.

(3) In determining attorney's fees, the amount of the recovery on behalf of the claimant under subsections (a) and (b) is not controlling.

U.C.C. § 2-302 (Revision Draft Feb. 17, 1993), *quoted in Greenfield & Rusch, supra* note 4, at 136 n.61.

150. This slimmed-down approach read as follows:

(a) 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 or induced by unconscionable conduct, 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.

(b) Before making a finding of unconscionability under subsection (a) or (b), the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the contract or clause thereof, or of the contract.

U.C.C. § 2-302 (Revision Draft Dec. 21, 1993), *quoted in Greenfield & Rusch, supra* note 4, at 136 n.62.

151. U.C.C. § 2-105 note 1 (Revision Draft July 1997). This note also gave examples of unfair practices that induce the contract,

such as taking advantage of a consumer's inability to protect his or her interest, or contracting with knowledge that the consumer is unable to receive a substantial benefit from the transaction, unreasonable delay and pressure in concluding the contract, or making misleading statements of opinion on which the consumer was likely to rely.

Id., *quoted in Greenfield & Rusch, supra* note 4 at 136-37 n.64.

152. A subcommittee appointed specifically to address the extent to which Article 2 should include consumer protection provisions reported to the drafting committee in advance of NCCUSL's 1996 annual meeting. The drafting committee praised the report as seeking to achieve a workable middle ground:

The Report takes a balanced but cautious approach. Thus, the Report rejects the extremes of excluding consumer protection provisions altogether or turning Article 2 into a consumer protection statute. Rather, the emphasis is on rules that clarify and expand the information flow between seller and buyer, particularly where there is a consensus on those rules in the cases or legislative developments, or there is clear evidence that the current text creates serious potential for unfair surprise or prejudice or the rule is needed because of other changes.

criticism, the inducement language disappeared from the draft by December 1997.¹⁵³

Still searching for more precision in the unconscionability approach,¹⁵⁴ the drafters' March 1998 version renumbered Section 2-302 to make it Section 2-105, thus placing unconscionability as a section of general application in Article 2. The draft adhered to the original language, but did include a comment concluding that "Article 2, then, is justified in providing some consumer protection rules to fill the gaps [left by state consumer protection laws]."¹⁵⁵

There remained considerable disagreement about how to enhance the doctrine's effectiveness. Within two months, a new draft Section 2-105 appeared for discussion purposes.¹⁵⁶ Although subsections (a) and (c) presented no deviation from the original Section 2-302, the proposed subsection (b) provided special relief in consumer contracts.¹⁵⁷ In essence, the suggested revision provided that in a contract between an individual and a merchant,¹⁵⁸ non-negotiable terms authenticated by the individual would be deemed unconscionable if the individual knew nothing about the term and the term varied unreasonably from industry standards or presented substantial conflict—either with a negotiated term or with

Richard E. Speidel, *May 1996 Draft, Progress Report to NCCUSL* (accompanying July 1996 Draft of Revised Article 2, Sales for the 1996 Annual Meeting of NCCUSL), available at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (last visited July 2, 2001).

153. The inducement language was removed in the December 1, 1997 partial draft. Greenfield & Rusch, *supra* note 4, at 136 (citing the respective drafts in which the inducement language appeared and noting the objections raised).

154. The drafters felt that more precision was necessary because the original Section 2-302's unconscionability standards were too vague for an effective remedy. See U.C.C. § 2-105 note 3 (Revision Draft Mar. 1, 1998) (describing in detail the reasons for concluding that Section 2-302's application had been relatively ineffectual), quoted in Greenfield & Rusch, *supra* note 4, at 137.

155. *Id.*

156. The notes following the new draft Section 2-105 clearly stated that this section had not been approved by the drafting committee and was presented only to focus discussion on the relevant issues. See U.C.C. § 2-105 note 2 (Revision Draft May 1, 1998), quoted in Greenfield & Rusch, *supra* note 5, at 138-39.

157. The May 1998 draft provided:

(a) If a court as a matter of law finds the contract or any term 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 term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.

(b) In a consumer contract [contract between an individual and a merchant], non-negotiable [non-negotiated] terms in a record which the [consumer] [individual] has authenticated or to which it has agreed by conduct are unconscionable if:

(1) the consumer [individual] had no knowledge of them; and

(2) the term:

(A) varies unreasonably from applicable industry standards or commercial practices;

(B) substantially conflicts with one or more negotiated terms in the agreement; or

(C) substantially conflicts with an essential purpose of the contract.

This subsection does not apply to a term disclaiming or modifying an implied warranty in accordance with another section of this article.

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

U.C.C. § 2-105 (Revision Draft May 1, 1998), quoted in Greenfield & Rusch, *supra* note 4, at 138 n.67.

158. The draft left open the possibility that Section 2-105(b) might apply to contracts between merchants and individuals, rather than limiting its application just to consumer contracts. U.C.C. § 2-105 note 2 (Revision Draft May 1, 1998) (stating that the "bracketed language" leaves open that interpretation for discussion), quoted in Greenfield & Rusch, *supra* note 4, at 138-39.

the agreement's purpose. The drafters intended that the new language would state "more clearly what terms are unconscionable without stating a rule that applies in every case"¹⁵⁹ and would "provide more protection than some courts have given under the standards of subsection (a) when interpreted to require oppression or extreme one-sidedness."¹⁶⁰

The proposed subsection was to apply only to non-negotiable terms¹⁶¹ because such circumstances reflect the "core element of the so-called contract of adhesion and signals the potential absence of meaningful choice."¹⁶² Most often, buyers lack choice when the non-negotiable term appears as undisclosed boilerplate or is disclosed on a take-it-or-leave-it basis. Subsection (b) would apply to the former, but not the latter, since it required that the buyer lack knowledge.

As for the knowledge requirement, the thrust of subsection (b) was to protect against unfair surprise.¹⁶³ Thus, unconscionability would be available under subsection (b) only if the consumer lacked awareness of the offending clause, even if the consumer knew the term was there, but did not comprehend its import.¹⁶⁴ If the consumer possessed knowledge, recovery would still be possible pursuant to 2-105(a). The May 1998 approach to unconscionability dissolved in the face of stiff opposition, and the language once again reverted to its original configuration.¹⁶⁵

3. The Last-Ditch Attempt for Real Reform in 1999

In May 1999, there was a final effort to "provide a little meat on the bare bones of unconscionability."¹⁶⁶ The May draft left the March 1998 section placement undisturbed but changed the wording to read,

159. U.C.C. § 2-105 (Revision Draft May 1, 1998), *quoted in* Greenfield & Rusch, *supra* note 4, at 139.

160. *Id.*

161. The bracketed language in subsection (b) suggested the possible substitution of "non-negotiated" for "non-negotiable." U.C.C. § 2-105(b) (Revision Draft May 1, 1998) (providing "non-negotiated" in brackets). The drafters favored "non-negotiable" because "'non-negotiable'...is easier to understand than the phrase "non-negotiated." What does it mean to negotiate a term? Even if the concept includes a simple discussion of the term by the parties, that surely would give the other party "knowledge" of the term and foreclose the application of subsection (b)." U.C.C. § 2-105 note 2 (Revision Draft May 1, 1998), *quoted in* Greenfield & Rusch, *supra* note 5, at 139. Another distinction, according to the drafters, would be that non-negotiable terms should likely appear in fine print. *See id.* ("A negotiable term is not likely to be contained in the fine print.").

162. U.C.C. § 2-105, note 2 (Revision Draft May 1, 1998), *quoted in* Greenfield & Rusch, *supra* note 4, at 139.

163. *See id.* (describing the policies underlying the knowledge requirement).

164. *See id.* (saying that a consumer would be bound by an arbitration clause that she knew about, even if she did not understand what arbitration meant). Of course, unfair surprise can also result when the buyer is vulnerable because of age, education, intelligence, experience, relative bargaining power, or incoherence of the contract terms in question. *See* NEC Technologies, Inc. v. Wilson, 478 S.E.2d 769, 771 (Ga. 1996) (describing the relevant factors). Subsection (b) does not address these other elements of unfair surprise once the knowledge requirement is met.

165. *See* U.C.C. § 2-105 (Revision Draft Feb. 1, 1999) (using original Section 2-302 language); U.C.C. § 2-105 (Revision Draft Feb. 15, 1999) (same); U.C.C. § 2-105 (Revision Draft May 1, 1999) (same).

166. Greenfield & Rusch, *supra* note 4, at 141 (describing in detail the attempts to strengthen the unconscionability doctrine during the first part of 1999); *see also id.* at 140-44. The new approach to section 2-105 was pieced together by a special task force. *Id.* at 141 ("the final draft of revised Article 2 settled due to the efforts of the consumer task force"). After the March drafting committee meeting, NCCUSL leadership had appointed the "Consumer/Industry Task Force," which met with industry and consumer representatives to resolve areas of disagreement. Memorandum from Larry Bugge (Drafting Committee Chair), Dick Speidel (Reporter) and Linda Rusch (Associate Reporter) to Members of the American Law Institute (May 10, 1999) (describing revisions to the May 1999 draft), *available at* <http://207.103.196.3/ali/1999%5Fbudge.htm>.

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

(b) In a consumer contract a nonnegotiated term in a standard form record is unconscionable and is not enforceable if it:

(1) eliminates the essential purpose of the contract;

(2) subject to Section 2-202, conflicts with other material terms to which the parties have expressly agreed; or

(3) imposes manifestly unreasonable risk or cost on the consumer in the circumstances.

(c) If a court as a matter of law finds that a consumer contract or any term thereof has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a consumer contract, the court may grant appropriate relief.¹⁶⁷

(d) If it is claimed or appears to the court that a contract or any term thereof may be unconscionable, the parties must be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.¹⁶⁸

In this formulation, subsections (a) and (d) came directly from the former Section 2-302. Subsections (b) and (c), however, provided additional protection for consumer contracts. Both managed to survive motions to dismiss at the ALI's annual meeting that spring.¹⁶⁹

Subsection (a) again provided the basic test for unconscionability without defining it. Instead, the drafters quoted the oft-used language from Comment 1 to former Section 2-302, which provided in relevant part,

The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the terms involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract....The principle is one of the prevention of oppression and unfair surprise...and not of disturbance of allocation of risks because of superior bargaining power.¹⁷⁰

Stating that the doctrine was intended to have a relatively broad reach,¹⁷¹ the drafters noted that most courts require a "certain quantum" of both procedural and substantive unconscionability.¹⁷² Procedural unconscionability was the presence of

167. Subsection (c) is the same as current § 2A-108(2). U.C.C. § 2A-108(2) (1999).

168. U.C.C. § 2-105 (Revision Draft June 28, 1999), available at <http://www.law.upenn.edu/bll/ulc/ucc2/ucc299am.htm>.

169. See U.C.C. § 2-105 cmt. 3 (Revision Draft June 28, 1999) (mentioning both motions).

170. U.C.C. § 2-105 cmt. 2 (Revision Draft June 28, 1999), available at <http://www.law.upenn.edu/bll/ulc/ucc2/ucc299am.htm>.

171. See *id.* ("The concept integrates elements beyond the traditional defenses of fraud, mistake and duress into a broader test for enforceability.")

172. *Id.* (citing *NEC Technologies v. Nelson*, 478 S.E.2d 769 (Ga. 1996) and *American Software, Inc. v. ALI*, 54 Cal. Rptr. 477 (Cal. App. 1996)).

unfair surprise or oppression.¹⁷³ Substantive unconscionability was signaled by a contract term that was not commercially reasonable. Subsection (a) would apply only to “commercial contracts and to consumer contracts not covered by (b) and (c)...”¹⁷⁴

As for consumer contracts under subsection (b), the drafters specifically permitted—and somewhat defined—relief in the absence of procedural unconscionability. It would not be necessary to show unfair surprise if the contract term met one of subsection (b)’s three tests: elimination of essential purpose; conflict with other expressly agreed-upon material terms; or the imposition of manifestly unreasonable risk or cost. The drafters provided three illustrations demonstrating the tests: a ladder purchase for failure of essential purpose,¹⁷⁵ a restrictive return policy that conflicts with the salesperson’s direct statement for the second test,¹⁷⁶ and a restrictive choice-of-forum clause to demonstrate a manifestly unreasonable cost.¹⁷⁷

Subsection (c) presented relief for unconscionable inducement or collection.¹⁷⁸ The drafters intended to give the courts “limited power to police against ‘hide the terms’ tactics, whether pursued before or after the sale” and to induce “sellers to disclose rather than to hide terms that, while not substantively unconscionable, impair the buyer’s reasonable expectations.”¹⁷⁹ This controversial provision

173. The drafters cited a number of relevant factors for assessing procedural unconscionability, assuming that the buyer has objectively assented to the contract. These included “(1) Age, education, and intelligence; (2) Business acumen and experience; (3) Relative bargaining power; (4) Who drafted the contract; (5) Whether the terms were explained to the weaker party; (6) Whether alternations of a term were permitted; and (7) Whether there were alternative sources of supply.” *Id.* (citing *Maxwell v. Fid. Fin. Services, Inc.*, 907 P.2d 51 (Ariz. 1995)).

174. *Id.*

175. The elimination of essential purpose illustration was as follows:

Consumer buys a ladder described as a “10’ ladder” with 12 rungs. Consumer later discovers a term in the standard form that states: “Warning, do not stand on any of the top six rungs.” This is far more restrictive than the usual warning not to stand on the top rung. If the restrictive label, a non-negotiated term, eliminates the essential purpose of the contract to sell and buy a 10 foot ladder, it is not enforceable. As such, the ladder probably does not conform to the representation that it was a “10 foot ladder.”

U.C.C. § 2-105 cmt. 3, illus. 1 (Revision Draft June 28, 1999).

176. This second illustration was:

Consumer buys a coat for his son, who is not along. He is assured by the sales person that the coat can be exchanged within 10 days if it does not fit. The standard form sales slip, however, provides that “all sales are final.” The coat does not fit. Assuming that the parol evidence rule is inapplicable, the non-negotiated term is not enforceable because it conflicts [with] the sales person’s representation, a material term to which the parties have expressly agreed.

U.C.C. § 2-105 cmt. 3, illus. 2 (Revision Draft June 28, 1999).

177. The final illustration, which demonstrates “manifestly unreasonable cost,” was,

Consumer in California buys a new stove and in the standard form covering the purchase there is a non-negotiated term requiring that any litigation regarding defects in the stove must be litigated in Georgia, the location of the seller’s home office. If this imposes a manifestly unreasonable cost in the circumstances, the term is not enforceable.

U.C.C. § 2-105 cmt. 3, illus. 3 (Revision Draft June 28, 1999).

178. Subsection (c) was taken from Section 2A-108(2). See U.C.C. § 2-105 cmt. 3 (Revision Draft June 28, 1999) (describing the subsection’s origin and purposes).

179. U.C.C. § 2-105 cmt. 3 (Revision Draft June 28, 1999). Examples of such clauses included advertising a watch as “moisture resistant,” then disclosing in the box that the product is resistant only “to 50 mm.” *Id.* (providing illustrations involving a fire extinguisher that cannot be used on kitchen fires and computer software that required annual upgrading).

addressed a “particularized application of procedural unconscionability.”¹⁸⁰

This suggested format for unconscionability, which was considered by NCCUSL at its 1999 annual meeting, drew considerable fire.¹⁸¹ Critics regarded Sections 2-105(b) and (c) as too ambiguous, utterly unnecessary, and at odds with current law.¹⁸² The drafters, on the other hand, viewed Section 2-105’s changes as arguably quite modest.¹⁸³ Although the ALI had approved this formulation, NCCUSL did not.

4. The Current Revisions

After NCCUSL declined to vote on the June 1999 draft, opting instead to defer consideration, the revision process changed gears entirely. The newly reconstituted committee moved forward, reverting to Article 2’s original language and repositioning the unconscionability section from Section 2-105 to Section 2-302.

Once again using Section 2-302 for the unconscionability doctrine, the current drafting committee has made only one minor language adjustment, changing the word “clause” to “term”:

(a) If the court as a matter of law finds the contract or any term 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 term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.

(b) When it is claimed or appears to the court that the contract or any term 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.¹⁸⁴

180. U.C.C. § 2-105 cmt. 3 (Revision Draft June 28, 1999).

181. See Greenfield & Rusch, *supra* note 4, at 144 n.74 (quoting Letter from Clark R. Silcox, National Electrical Manufacturers Association, to the ALI (May 14, 1998) (complaining that “[n]o justification has ever been demonstrated for an expansion of the law in this manner”).

182. See Motion, Joel Rothstein Wolfson to the ALI (May 13, 1999), available at <http://207.103.196.3/ali/1999%5Fwolfson.htm>; Motion, James J. White to the ALI (May 13, 1999), available at http://ali.org/ali/1999_White1.htm; Motion, William A. Worthington to the ALI (May 14, 1999), available at <http://207.103.196.3/ali/1999%5Fworthington.htm>.

183. Two commentators, frustrated by the commercial community’s continued resistance, described the changes that would have resulted under Section 2-105:

As approved by the ALI, Section 2-105 is a quite modest change in the law governing standard-form contracts. It elaborates ever so slightly on the concepts of oppression and surprise that underlie unconscionability. Though it is possible that a consumer may be aware of a fine-print provision in a standard form, it is highly unlikely. Therefore, the category of surprise may encompass any provision that is adverse to the consumer’s understanding of the deal, as well as any provision that is inconsistent with the consumer’s assumptions concerning remedies and enforcement of the parties’ obligations. This surprise alone may be enough to render the provision unenforceable under Section 2-105(b) if the fine print conflicts with the express agreement. In that situation subsection (b)(2) declares that the fine print is not enforceable....

If the standard form does not conflict with the parties’ express agreement, surprise is not enough under Section 2-105 to render the terms in the form unenforceable. In the absence of conflict between the form and the express agreement, a requirement of oppression, i.e., substantive unconscionability, remains. Subsection (b) elaborates on this requirement....

The innovation of subsection (b) is to foreclose the argument that the court must also find procedural unconscionability.

Greenfield & Rusch, *supra* note 4, at 146-47.

184. U.C.C. § 2-302 (Revision Draft Mar. 2000).

The basic technical change from “clauses” to “terms” resulted from the drafters’ desire to incorporate the word “term,” which Article 2 defines, instead of the word “clause,” which is more vague and less meaningful.¹⁸⁵

Although Section 2-302’s text remains substantively unchanged, the drafting committee has presented new comments to supplement the section. In essence, the proposed comments shuffle around some of the old language, but do make some additional points. The changed material centers essentially on the question of whether the unconscionability doctrine demands a finding of both procedural and substantive components. On the one hand, the new comments are cautionary, warning that

a court ought not, on the basis of substantive unconscionability alone, refuse to enforce a term disclaiming an implied warranty that complies with the requirements of Section 2-316 or a term that provides for a remedy that is expressly agreed to be exclusive under Section 2-719 (as long as that term provides a minimum adequate remedy).¹⁸⁶

The drafters similarly urge that unconscionability “generally” requires that a court find both “procedural” and “substantive” unconscionability.¹⁸⁷

On the other hand, the comments do acknowledge that, in an appropriate case, a court might invoke procedural unconscionability alone to negate a term or contract, although doing so in the absence of substantive unconscionability should be only a seldom occurrence.¹⁸⁸ Still, seldom is not never, and the proposed comments leave the door open to recovery for oppression in the absence of substantive unconscionability.¹⁸⁹

As for substantive unconscionability providing an independent basis for relief, the current revisions certainly do not preclude that possibility. First, the drafters indicate that both procedural and substantive elements are “generally” required but not demanded. In addition, the drafters inserted the recent case of *Brower v. Gateway 2000, Inc.*,¹⁹⁰ which illustrates the section’s application in the context of substantive unconscionability alone.¹⁹¹ The *Brower* case involved an arbitration term that the court deemed substantively unconscionable regardless of the

185. This was not intended in any respect as a substantive change. Instead, the drafters merely intended to make Section 2-302 conform with NCCUSL’s style rules.

186. U.C.C. § 2-302 cmt. 1 (Revision Draft Mar. 2000).

187. *Id.*

188. The drafters explained,

Accordingly, courts also should seldom invalidate a contract, or a term of a contract, that is not substantively unconscionable and that merely allocates risk, even disproportionately [sic], or that otherwise significantly cuts against the complaining party, on the basis of the other party’s conduct standing alone. *Unconscionability is not intended to allow disturbance of allocation of risks because of superior bargaining power, and in those cases that call out for relief often the conduct will constitute an invalidating cause, such as fraud or duress.*;

U.C.C. § 2-302 cmt. 1 (Revision Draft Mar. 2000) (italicized language appears in current Section 2-302).

189. The drafters stated that such an approach would be consistent with the provisions of Section 2A-108(2) and the Uniform Consumer Credit Code § 5.108, providing the example of a court invalidating a contract because of high-pressure sales tactics used in selling a home to a consumer buyer. *See* U.C.C. § 2-302 cmt. 1 (Revision Draft Mar. 2000) (describing the application of Section 2-302(a)).

190. 676 N.Y.S.2d 569 (N.Y. App. Div. 1998).

191. U.C.C. § 2-302 cmt. 1 (Revision Draft Mar. 2000) (presenting “but a small number of the cases decided prior to the Code and after its enactment”).

consumer's awareness.¹⁹² The offending clause, which the court determined to be substantively unconscionable, required arbitration in Chicago pursuant to rules mandating a \$4,000 advance fee, of which \$2,000 was nonrefundable even if the claimant prevailed.¹⁹³

Revisions continue to be made. At this point it is unclear when the Article 2 revisions will be finalized, but they will likely present only technical changes to the commercial world.¹⁹⁴

III. SOLVING THE UNCONSCIONABILITY PUZZLE

A. Defining the Problem

The threshold determination is whether a problem exists. If Section 2-302's original language works, then changes are not necessary. After all, "if it ain't broke, don't fix it."¹⁹⁵ Unless the unconscionability section is inadequate to address existing policy issues and public needs, then the revisers should wisely leave well enough alone. Conversely, if the doctrine is substantively ineffectual, putting a face to that problem is the logical first step.

In order to determine Section 2-302's effectiveness, it is essential to assess the doctrine's underlying purpose. Unconscionability became part of the UCC largely because of a need to police unfair bargains. This mechanism would enable courts to invalidate grossly one-sided contracts without resorting to "covert tools."¹⁹⁶ In essence, the unconscionability doctrine provides a safety net, one that voids contracts not quite meeting the more rigid requirements of other policing devices such as duress and misrepresentation.

To what extent has Section 2-302 successfully accomplished this purpose by effectively policing unfair bargains? Although the commentary is mixed, most is negative, and the volume of discontent alone signals a desire for change—for improvement.¹⁹⁷ The most common criticisms stem from the amorphous nature of the doctrine and the drafters' unwillingness to provide a UCC definition. On the other hand, this lack of precision was apparently by design, and some regard it as

192. *Brower*, 676 N.Y.S.2d at 573-74.

193. *See supra* notes 73-80 and accompanying text.

194. Later revisions to Section 2-302 have eliminated the proposed comments discussed above, suggesting instead a new "Preliminary Comment" for NCCUSL's consideration in Aug. 2001. This version is quite similar to Section 2-302's current comment section except that it omits all specific references to case authority and includes the statement that "[c]ourts have been particularly vigilant when the contract at issue is set forth in a standard form." *See* U.C.C. § 2-302 preliminary cmt. (Draft for Approval at Annual Meeting of NCCUSL Aug. 10-17, 2001), available at <http://www.law.upenn.edu/bll/ulc/ucc2/ucc0612.htm>.

195. As the drafting committee headed through the Article 2 revision process, one commentator complained that "Article 2 is not broke," saying,

As a whole, Article 2 is not broke—I know no one who thinks it is. After a little use, all codes reveal a few unfortunate turns of phrase, structural inconsistencies, overly idealistic assumptions, and gaps that cannot reasonably be closed by the statutory language. Blemishes of that sort never justify revision—because similar problems inevitably show up in the revisions themselves not long after enactment.

Richard Hyland, *Draft*, 97 COLUM. L. REV. 1343, 1350 (1997) (also saying that revisions are especially not justified "in the law of obligations, which is not as susceptible to obsolescence").

196. *See supra* note 26-27 and accompanying text.

197. *See supra* Part I(B)(2).

a great source of strength, allowing for judicial discretion. In addition, many amorphous legal concepts flourish despite their inherently uncertain application. Thus, although any doctrine can benefit from enhanced directives regarding its function and use, the unconscionability section's formlessness is not fatal, and the courts have provided helpful structure where the UCC text has not.

Another argument supporting the need to revise Section 2-302—and apparently one reason driving the drafting committee—was the dearth of authority applying the section as a basis for relief.¹⁹⁸ It was assumed that an effective unconscionability section would necessarily be more pervasive. The relative inactivity, the committee contended, resulted from the doctrine's impractical nature, given the minor dollar amounts usually advanced in consumer claims. After all, what would motivate such small suits when the section failed to include any allowance for punitive damages or attorney's fees and was difficult to litigate?

Although this concern is understandable, the lack of Section 2-302 case authority may be explainable on other grounds. For one thing, unconscionability is not crafted to be the primary tool for avoiding contract enforcement; rather, it is the safety net to catch those cases falling outside other mechanisms. As a result, it should naturally appear as a back-up choice, not the principal claim, in contract actions. Courts also construe the doctrine as one that should apply with caution only in extraordinary circumstances.¹⁹⁹ In addition, businesses would likely be reluctant to generate case authority finding oft-used standard contract terms unconscionable, preferring instead to settle or otherwise dispose of the matter. Given the absence of hard statistical data to establish in any meaningful fashion whether the authority of the existing Section 2-302 is inappropriately low, it is difficult to premise a compelling argument for revision on this ground.

Despite the unconscionability doctrine's flawed nature, it has already done much to correct the most egregious systemic inequalities of bargaining power.²⁰⁰ Judicial trends since Section 2-302's enactment have also strengthened the doctrine, broadening its application.²⁰¹ On balance, the law is better with the UCC's unconscionability doctrine than without it, and the benefits would certainly not be eliminated by a thoughtful reexamination.

In the end, Article 2 was going to undergo revisions because of necessary technical adjustments, if not for major substantive changes. Assuming that Section 2-302 shows room for improvement, defining the problems requiring change is extremely difficult. There are almost as many views as there are business law commentators. Some suggest that there is no meaningful basis for revision because of an absence of reliable, objective empirical data.²⁰² From the drafting committee's

198. See *supra* notes 142-43 and accompanying text.

199. See, e.g., *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1365 (Fed. Cir. 1999) (“[R]escission of a contract for unconscionability is an extraordinary remedy.”).

200. See, e.g., SLAWSON, *supra* note 2, at 32-34 (“Although many one-sided consumer contracts are still in use, and virtually all consumer contracts are still one-sided in certain respects, the truly egregious cases are by now over two decades old.”).

201. See *supra* Part I(B)(1)(b)-(c).

202. As two business law commentators recently stated,

[T]he disagreement about whether the unconscionability concept provides enough protection for consumers would benefit from empirical research. Consumer advocates argue that cases are

perspective, however, there were at least three areas worthy of further examination: consumer protection, the classic procedural/substantive dichotomy, and the time frame for evaluating unconscionability—whether contract inducement and enforcement should be relevant inquiries.²⁰³ Section 2-302 leaves open many additional questions concerning the doctrine's meaning and application,²⁰⁴ and the drafting committee has had the unenviable task of wrestling with the appropriate balance.

B. Consumers: Handle with Care?

From the beginning, consumer protection was a focus of Article 2.²⁰⁵ When Karl Llewellyn first pieced together the UCC half a century ago, he believed that consumers should receive heightened protections over other contracting parties.²⁰⁶ Although his efforts were largely unsuccessful, Article 2 has always imposed certain special standards on merchants.²⁰⁷ In doing so, the UCC has deviated from the common law tradition, which formulated generalized contract rules that applied equally to all parties.²⁰⁸ Thus, any Article 2 revisions that enhance different treatment for consumers and businesses would widen the gulf between UCC and common law contract approaches.²⁰⁹

not an adequate representation of the overreaching that goes on in forms given the cost of litigation, the relatively small dollar amounts involved, and the uncertainty of what constitutes unconscionable terms. Industry advocates argue that the absence of cases and the occasional successful challenge to a term is evidence that the standard is working just fine. The absence of reliable and objective empirical research on the issue stymies attempts to reach a workable solution as neither side acknowledges the validity of the other side's world view.

Greenfield & Rusch, *supra* note 4, at 144.

203. See *supra* note 141.

204. The significant inquiries include the following:

Presumably, extensive comments to the draft version of unconscionability will address numerous questions such as: is there merit in the "substantive"/"procedural" dichotomy suggested by some courts and writers? What about "apparent" versus "genuine" assent, or "unexpected" versus "no choice" forms of unconscionability? What about a "contract of adhesion?" Should the principles of famous cases such as *Henningsen v. Bloomfield Motors, Inc.* or *Williams v. Walker-Thomas Furniture Co.* be codified as reliable guides? What about the application of unconscionability in cases involving merchants, which courts have studiously rejected except for those "merchants" who demonstrate the contractual understanding of consumers? What about the use of unconscionability in cases where the buyer claims a gross disproportion between price and value with an allegation of over-reaching? Extensive comments explicating myriad applications of the unconscionability standard are not only desirable but necessary. Yet, a general statement of the basic elements of unconscionability in the section, aided by such comments, may be even more desirable, notwithstanding the formidable challenge such an effort would entail.

John E. Murray, Jr., *The Emerging Article 2: The Latest Iteration*, 35 DUQ. L. REV. 533, 542 (1997).

205. See, e.g., Greenfield & Rusch, *supra* note 4, at 116-21 (describing the historical tension between the treatment of consumer and commercial transactions in the UCC).

206. Zipporah Batschaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 481 (1987).

207. One is a "merchant" if one is 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." U.C.C. § 2-104(1) (1999). For more specific information on the development of the UCC's merchant rules, see Wiseman, *supra* note 206.

208. See FARNSWORTH, *supra* note 1, § 1.10, at 37 (noting that "special rules for merchants remained foreign to the American lawyer until the advent of the Uniform Commercial Code").

209. See SLAWSON, *supra* note 2, at 6 (saying that the differences [between the UCC and common law] are

In order to assess what special contract protections might be necessary in the modern contract context, one should first consider the precise definition of "consumer." The general definition is simply one who consumes, whether person or thing.²¹⁰ Under the UCC, however, the meaning has quite different overtones, implicating both the nature of the party and the end use of the good.²¹¹ The present Article 2 draft states that a consumer contract necessarily involves an individual buying an item from a merchant, primarily for personal use.²¹² Ultimately, one must consider what impact a business's presumed sophistication and a good's end use should have on the unconscionability doctrine's application.

In the context of leases, Article 2A's unconscionability provision contains all of Section 2-302's protections and more for consumers.²¹³ In fact, Section 2A-108 was

sure to widen, because different institutions make the laws).

210. THE RANDOM HOUSE DICTIONARY (UNABRIDGED) OF THE ENGLISH LANGUAGE 437 (2d ed. 1987). One business law commentator recently similarly described "consumer," using the concept broadly so that it might encompass both individuals and businesses:

"Consumer" shall mean a person who buys a product in order to consume it. This is not the sense in which the term is commonly used, which includes just individuals who consume for personal purposes. In the sense in which I will use the term, even large business organizations can be consumers.... To take a specific example, an automobile-manufacturing company would normally purchase steel for use in manufacturing processes. It might buy automobile tires from a tire manufacturer for installation on its vehicles. It would buy electricity, telephone service, and water for a variety of uses. It would buy word processors and paper for office use and coffeemaking equipment, paper cups, and napkins for the comfort and convenience of its employees. Thus, it would be a "consumer" of these products.

SLAWSON, *supra* note 2, at 24.

211. The current Article 2 does not define "consumer," but does describe "consumer goods" by cross-reference to Section 9-109, which states that consumer goods "are used or bought for use primarily for personal, family or household purposes." See U.C.C. § 2-103(3) (1999) (providing the cross-reference). The March 2000 draft includes definitions for both "consumer" and "consumer contract," stating that the former is "an individual that buys or contracts to buy goods that, at the time of contracting, are intended by the individual to be used primarily for personal, family, or household purposes." U.C.C. § 2-103(a)(8) (Revision Draft Mar. 2000). A "consumer contract" is a contract between a merchant seller and a consumer. U.C.C. § 2-103(a)(9) (Revision Draft Mar. 2000).

212. See U.C.C. § 2-103(a)(8)-(9) (Revision Draft Mar. 2000) (defining "consumer" and "consumer contract"). The Article 2A revisions similarly describe "consumer" and "consumer lease." See U.C.C. § 2A-103(a)(6)-(7) (Revision Draft Mar. 2000) (defining the terms).

213. Section 2A-108 provides,

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

(2) With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.

(3) Before making a finding of unconscionability under subsection (1) or (2), the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the lease contract or clause thereof, or of the conduct.

(4) In an action in which the lessee claims unconscionability with respect to a consumer lease:

(a) If the court finds unconscionability under subsection (1) or (2), the court shall award reasonable attorney's fees to the lessee.

(b) If the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action he [or she] knew to be groundless, the court shall award

the drafting committee's initial choice when revising Section 2-302, but that model was quickly discarded as too controversial.²¹⁴ In addition to the classic Section 2-302 language, Section 2A-108 also extends protection to consumer lease inducement and enforcement,²¹⁵ as well as providing for attorney's fees or other relief in the appropriate consumer lease action. Although this more expansive unconscionability treatment has apparently worked well under Article 2A,²¹⁶ business interests vigorously opposed this approach for Article 2. The practical arguments for distinguishing between the two frameworks are unclear.

Almost without exception,²¹⁷ later Article 2 drafts augmented Section 2-302's original language with special consumer protection provisions. These approaches included attempting to define relief for consumers when adhesion contracts impose unreasonable terms or when substantive unconscionability makes procedural unfairness entirely unnecessary, as well as awarding appropriate relief for the unconscionable inducement and enforcement of consumer contracts and attorney's fees in appropriate consumer contract actions.

Assuming that the unconscionability doctrine should reach farther or at least achieve better definition, the revision drafters have decidedly opted to favor consumers over other contracting parties. That treatment certainly comports with Article 2A's approach to unconscionability in lease transactions, but may not make sense in the larger context, depending upon how the unfairness problem is presented and analyzed.

Although unfair agreements present themselves in many ways and in many frameworks, the use of standard-form contracts provides the classic dilemma. Contracts today are overwhelmingly standardized,²¹⁸ regardless of whether they

reasonable attorney's fees to the party against whom the claim is made.

(c) In determining attorney's fees, the amount of the recovery on behalf of the claimant under subsections (1) and (2) is not controlling.

U.C.C. § 2A-108 (1999). This language came from § 2-302 and the Uniform Consumer Credit Code § 5.108, 7A U.L.A. 167-69 (1974). U.C.C. § 2A-108 cmt. (describing the uniform statutory sources). The revised Article 2A has retained the same substantive content. *See* U.C.C. § 2A-108 (Revision Draft Mar. 2000) (reflecting only minor technical adjustments).

214. *See supra* notes 145-46 and accompanying text.

215. The purpose for this language was

[t]hus subsection (2) recognizes that a consumer lease or a clause in a consumer lease may not itself be unconscionable but that the agreement would never have been entered into if unconscionable means had not been employed to induce the consumer to agree. To make a statement to induce the consumer to lease the goods, in the expectation of invoking an integration clause in the lease to exclude the statement's admissibility in a subsequent dispute, may be unconscionable. Subsection (2) also provides a consumer remedy for unconscionable conduct, such as using or threatening to use force or violence, in the collection of a claim arising from a lease contract. These provisions are not exclusive. The remedies of this section are in addition to remedies otherwise available for the same conduct under other law, for example, an action in tort for abusive debt collection or under another statute of this State for such conduct.

U.C.C. § 2A-108 cmt. (1999).

216. *See* U.C.C. § 2A-108 reporter's note (Revision Draft Mar. 2000) (commenting that there is no need to conform Section 2A-108 to Section 2-302 since Section 2A-108's operation had not been problematic).

217. The two approaches not confined to consumer protection were the drafts prohibiting unconscionability during the inducement phase for any contract and suggesting that the section be repositioned in part 1. *See supra* note 150 and accompanying text.

218. *See* SLAWSON, *supra* note 2, at 30 (describing the prevalence of standardized contracts); 1 ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.4, at 13 (rev. ed. 1993) ("much of modern

appear to be,²¹⁹ making the term “adhesion contract” a routine concept in contract law. Although the efficiency benefits flowing from standardization are great,²²⁰ the disadvantages are undeniable.²²¹ Consumers see no reason to review them,²²² and the sellers themselves often neglect to read standard forms.²²³ Certain industries have even dispensed with the formality of presenting the full contract to the consumer before executing the deal.²²⁴ Under the circumstances, the quality of assent is understandably at issue.²²⁵ The standardized contracts problem has been the endless source of scholarly inquiry.²²⁶ The discussion, however, is truly

business is done on terms dictated by one contracting party to another who has no voice in its formulation”); Greenfield & Rusch, *supra* note 4, at 115 (“the use of standard-form documents pervades commercial transactions and is almost universal in consumer transactions”); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943) (“The development of large scale enterprise with its mass production and mass distribution made [the standardized mass contract] inevitable.”).

219. Even contracts that appear to be specially tailored are usually cut-and-paste forms. See SLAWSON, *supra* note 2, at 30 (concluding that forms appearing to be “individually crafted” almost never are).

220. One commentator characterized these savings as follows:

When businesses become large enough to engage in numerous transactions of a kind, they can reduce their transaction costs by making their contracts in standard form. Businesses incur the costs of drafting a standard contract only once and spread them over as many transactions as they use the contracts. Standard contracts also make a business’s legal risks more manageable by making them more uniform, also effecting a cost saving.... In fact, the savings effected by standardizing contracts are so great that when for some reason a business cannot realize them, the business is likely not to use contracts at all.

SLAWSON, *supra* note 2, at 30; see also CORBIN & PERILLO, *supra* note 218, § 1.4, at 15 (noting that adhesion contracts “are essential to the functioning of the economy”). Other benefits flowing from standard forms include the drafter’s ability to control remedies, enforcement mechanisms, and its sales personnel. See Greenfield & Rusch, *supra* note 4, at 115-16 (listing four long-recognized benefits); see also Goodwin v. Ford Motor Credit Co., 970 F. Supp. 1007, 1015 (M.D. Ala. 1997) (describing adhesion contracts as “part of the fabric of our society” despite the potential for abuse).

221. The disadvantages essentially flow from the perceived imbalance between buyer and seller. This imbalance can be the result of unfair surprise (as when the buyer is unaware of, or does not understand, a particular provision) or the absence of options (as when the buyer sees and understands the arguably unfair contract clause, but has no reasonable alternative). See, e.g., MURRAY, *supra* note 19, § 97, at 502-03 (describing the “plethora of problems associated with the use of standard forms”).

222. See SLAWSON, *supra* note 2, at 30 (“There is no reason to read [standard contracts] if [the consumers] cannot change them, if they probably would not understand them, or if they are unlikely to discover anything in them that would persuade them to buy the product from another producer.”); CORBIN & PERILLO, *supra* note 218, § 1.4, at 14 (noting that reading the provisions would be “rather pointless”). Even if the documents are read, they may be impossible to understand. See MURRAY, *supra* note 19, § 96, at 484 (“[E]ven for the rare buyer who does read [the fine print provisions], there is more than considerable doubt that he understands what he read.”).

223. See SLAWSON, *supra* note 2, at 31 (“For example, I have never met an insurance or mortgage salesperson who read the insurance policies or the mortgages.”).

224. One commentator described this practice in the following fashion:

Consumers so regularly fail to read standard contracts that in industries with especially long and complicated contracts, producers often dispense even with the formality of showing the contract to the consumer and having him or her sign it. They ask the consumer instead to sign a short and simple “order” or “agreement” that incorporates the contract by reference. The practice in the insurance industry for years has been to send a person the insurance policy some weeks after he has purchased the insurance. Before purchasing their insurance, buyers typically see only a one-page form on which they check the blanks to indicate the coverage amounts, exemptions, and additional coverages they want.

Id. (noting that the mortgage, real estate, and healthcare industries typically operate similarly as well).

225. The issue of assent in standard-form contracts dates back to at least 1917. See Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34, 39-40 (1917) (describing the assent problem).

226. See ROBERT E. SCOTT & DOUGLAS L. LESLIE, *CONTRACT LAW & THEORY* 509 (2d ed. 1993) (noting that legal scholars have widely debated this issue).

academic. Since such contracts are a commercial fact of life, commentators cannot realistically argue for the elimination of standardized agreements.²²⁷

Given the difficulties presented by the pervasive standard-form agreement, one must consider whether individual consumers deserve special treatment to the exclusion of nonconsumers. The principal underlying tension appears universal; it is between freedom of contract and the plain fact that the modern contracting process often lacks meaningful choice:

[T]he paradigm of the consumer buyer who is aware of material, risk-shifting provisions over which he has no bargaining power is extremely rare. The sad reality is that the typical consumer does not have the foggiest notion of such provisions but signs what the salesperson refers to as the "standard form" though the salesperson is equally ignorant of the import of the boilerplate provisions. This reality raises the confrontation between the requirement that one must be bound by what he signs, whether or not he reads or understands it, to insure the stability of contracts, and the reality that innumerable consumer buyers (and, if the truth be known, merchant buyers, as well) are apparently assenting to the deprivation of fundamental protection by unwittingly signing documents containing clauses disclaiming basic warranties and excluding fundamental remedies.²²⁸

Certainly, merchant buyers and individual consumers are both providing "assent" without appreciating the full agreement; both are victims under this regime.

Even if the relevant terms are reviewed, the drafter enjoys a superior position that may unfairly exploit the weaker party.²²⁹ To the extent freedom of contract presupposes equal bargaining power, the contracting parties' relative fortunes become significant. Of course, most contracting did not occur on a truly level playing field even in the 1800s.²³⁰ Today, however, the unevenness has arguably become exacerbated. Modern contracting occurs almost entirely between vertically-related parties, and vertical contracts inherently give the higher party the superior bargaining power.²³¹

As a matter of principle, special consumer protection should not supplant unified treatment for consumer and commercial transactions absent a compelling reason for

227. See CORBIN & PERILLO, *supra* note 218, § 1.4, at 14 (noting that challenging standardized contracts have become part of our society's fabric, the author concludes that legal scholars should analyze and study such contracts rather than praising or denouncing them).

228. MURRAY, *supra* note 19, § 96, at 484-85 (footnote omitted).

229. See, e.g., CORBIN & PERILLO, *supra* note 218, § 1.4, at 14 (noting that such contracts minimize the realization of the adhering party's reasonable expectations); SLAWSON, *supra* note 2, at 30 ("The standard contract enables the producer to take maximum advantage of his superior understanding of the product and the law.").

230. See SLAWSON, *supra* note 2, at 31 (noting that the "level playing field" did not really exist even in the nineteenth century).

231. Professor Slawson describes this trend towards vertical contracting relationships, stating that horizontal arrangements are relatively unimportant:

Horizontally related persons rarely contract. Two corporations in the same industry will contract if one acquires the other's assets. Two lawyers will contract to settle a dispute. Two individuals or two couples will contract if one is buying the other's house. As these examples illustrate, however, these occasions are exceptional. None is a routine occurrence for the persons concerned.

Id. The superior bargaining power corresponds to the higher level's technology and can occur regardless of relative wealth. *Id.* at 31-32.

doing so.²³² Under the current regime, no compelling reason is apparent. Although the UCC as originally crafted did not address consumer problems,²³³ the traditional two-pronged analysis for ascertaining unconscionability takes into account the inherent differences between consumers and merchants by weighing the contracting parties' relative bargaining positions and sophistication.²³⁴ Moreover, the trend has been to permit businesses to take advantage of the unconscionability policing mechanism, even if such relief is more frequently granted in the consumer context. Thus, the existing unitary approach operates in a multi-factored environment that is flexible enough to meet the needs of consumers without excluding the practical issues faced by merchants. The problems associated with vertical contracts exist throughout contracting. Although individual consumers²³⁵ may, as a general rule, be more vulnerable in transactions with merchants, even sophisticated parties want and need protection.²³⁶

C. *Dickering over the Procedural/Substantive Dichotomy*

Another basis for reexamining Article 2 is concern over the two-pronged analysis that has embraced Section 2-302. Commentators have long criticized the breakdown of unconscionability into procedural and substantive components²³⁷ even though the courts have generally found the approach workable.

Although many concerns surround the dichotomy's precise application, the main problem is the extent to which either procedural or substantive unconscionability alone can support relief. Over time, different courts have appeared to supply their own, different answers to this question. While many jurisdictions adhere to the language requiring the presence of both components, the growing trend has been to employ either a sliding scale analysis or to allow one element to suffice, if the unfairness was sufficiently strong.²³⁸ Given the split in authority, it might be helpful to have Article 2 provide more directed guidance.

When the revision drafters faced this dilemma,²³⁹ they examined several different approaches, each defining the unconscionability analysis only in terms of consumer contracts. As discussed above, limiting application only to consumers is not sensible in the larger context. Thus, this evaluation will review the proposed models in terms of general application.

232. See Fred H. Miller, *Consumers and the Code: The Search for the Proper Formula*, 75 WASH. U. L.Q. 187, 210-11 (1997) (stating that "a special consumer provision should not be fashioned unless there is good reason to believe that a unitary rule for consumer and commercial transactions alike will not be satisfactory").

233. See FARNSWORTH, *supra* note 1, § 4.29, at 316 (describing the UCC drafter's original intent).

234. See *supra* notes 50, 56-59, and accompanying text.

235. The unconscionability doctrine obviously does not alone protect consumer rights; many states have crafted consumer protection laws to provide additional remedies. For a helpful overview of state consumer protection laws, see Shirley F. Sarna, *State Consumer Protection*, SD62 ALI-ABA 457 (1999) (reviewing the types of "Consumer Protection Acts" for each state).

236. See SLAWSON, *supra* note 2, at 32-33 (stating that individual consumers and businesses can both be victimized by unfair bargaining power and that the long-held assumption that sophisticated businesspeople need no protection is no longer true).

237. See *supra* notes 99-104 and accompanying text.

238. See *supra* notes 63-66 and accompanying text.

239. See *supra* note 141 and accompanying text.

The most interesting proposals affecting the procedural/substantive dichotomy were the May 1998 and June 1999 drafts, which inserted new subsections designed to relieve the weaker contracting party facing an adhesion contract. Subsection (b) under the earlier model provided a remedy when the contract presented an unfair, non-negotiable term only if the weaker party lacked knowledge of the term. Unfairness was specifically defined as varying unreasonably from the industry standard or conflicting with the contract's purpose or a negotiated term. No matter how unfair the term, subsection (b) would provide no relief if there was knowledge.²⁴⁰ Under the NCCUSL annual meeting draft, subsection (b) dispensed with the knowledge restriction entirely, providing relief when the standard-form contract's non-negotiated terms eliminated the agreement's essential purpose, conflicted with other material, expressly agreed-upon terms, or imposed manifestly unreasonable risk or cost upon the weaker party.²⁴¹ Thus, no matter what the weaker party knew or appreciated, it could be saved from its bargain because this latter proposal omitted the procedural unconscionability component.

Between the two proposals, the May 1998 approach was the more restrictive and would have undercut the modern judicial trend. By suggesting that substantive unfairness could not support relief in an adhesion contract when the weaker party had knowledge, but lacked meaningful choice, the drafters seemingly stepped back from recent case authority suggesting that substantive unconscionability alone is sufficient. Even though recovery under the old unconscionability analysis²⁴² may still have been possible, the creation of an explicit, but more restrictive, recovery mechanism under the new subsection (b) would give courts reason to pause.

The NCCUSL's 1999 annual meeting draft provided more generous relief under circumstances that seemed to fairly state current case law as it has been developing. Regardless of knowledge, certain non-negotiated terms would be too unfair to survive. Procedural unconscionability would drop out of the equation when warranted. This language, but for its consumer-specific application, could have assisted the judicial trend toward recovery under one prong. On the other hand, since the draft did not clarify the possibility of recovery under procedural unconscionability alone, the proposal might have unnecessarily restricted recovery in that regard.

Under either proposal, the definition of non-negotiable and non-negotiated would have given rise to considerable debate and case construction. Just what is non-negotiable presumably lies in the stronger party's hands and cannot be ascertained with certainty unless the weaker party attempted a negotiation. The parameters of non-negotiated would be larger than for non-negotiable; after all, the parties by definition could not negotiate non-negotiable terms, but other terms open to negotiation may not actually be either known or discussed.

The current draft, which essentially reverts to the original Section 2-302 language, may assist the courts with respect to the procedural/substantive dichotomy. This is because the new suggested comments clarify whether one

240. Of course, recourse could still be had pursuant to subsection (a)—from the original Section 2-302. *See supra* notes 163-65 and accompanying text.

241. *See supra* Part II(B)(3).

242. Recovery would still be theoretically possible pursuant to U.C.C. § 2-105(a) (Revision Draft May 1998).

component alone can provide relief, stating that circumstances sometimes require such a result despite the general rule requiring both elements.²⁴³ The choice of illustrative cases similarly demonstrates this bent, including the recent *Brower v. Gateway 2000, Inc.*, which provided for relief in the absence of procedural unconscionability.²⁴⁴ Thus, the current draft with supporting comments tracks the modern judicial trend.²⁴⁵

D. Remedies and the Rest

The original Section 2-302, which is essentially the same as the revised Section 2-302, provides that unconscionability's sole remedy is the court's ability to refuse or limit enforcement so as to negate any unconscionable impact. In earlier draft revision stages, the section expanded the consumers' remedial options to include the court's ability to order any appropriate relief²⁴⁶ or the award of reasonable attorney's fees.²⁴⁷

The proposal suggesting the allowance of attorney's fees disappeared early in the revision process.²⁴⁸ Consumer advocates pressed for this change, arguing that the allowance of attorney's fees would somewhat offset the litigation advantage a commercial entity may enjoy over an individual.²⁴⁹ Awarding attorney's fees could also make business less likely to employ standard form contracts containing unconscionable terms.²⁵⁰ Although comparable language has not been problematic as part of Article 2A,²⁵¹ the opposition from business interests was simply too fierce.

The suggested award of appropriate relief was to be in connection with policing the inducement or enforcement of consumer contracts. This, too, is already permitted under Article 2A's unconscionability provision and has not proved controversial. Since Section 2-302 specifically limits the doctrine's application to the time of contract execution, the proposal would have expanded the relevant time frame. As a practical matter, this extension made good sense and provided helpful definition to the procedural unconscionability component. After all, why should

243. *Supra* notes 187-89 and accompanying text.

244. *Supra* notes 191-93 and accompanying text.

245. These suggested comments have disappeared since this article's completion in the summer of 2000. *See supra* notes 16, 194.

246. *Supra* notes 149, 167 and accompanying text.

247. *Supra* note 149 and accompanying text. Article 2A—both the original and the current draft—provides these remedies.

248. The original draft was patterned after Section 2A-108. *Supra* notes 148-49 and accompanying text.

249. One commentator has described this effect in the following fashion:

This type of attorneys fees provision addresses, in small measure, some of the inherent litigation advantage a commercial entity may have over an individual. A business may have an interest in prevailing in the particular case which far exceeds the amount of money at stake in that case, because it has engaged or wishes to engage in the challenged practice with other customers. Because a large business may have counsel on staff, it may more readily engage in litigation. An attorneys fees provision for prevailing consumers...acts to partially level this tilt in the playing field.

Gail Hillebrand, *The Redrafting of UCC Articles 2 and 9: Model Codes or Model Dinosaurs?*, 28 *LOY. L.A. L. REV.* 191, 197 (1994).

250. At least one study has suggested that businesses have not altered their contracting conduct despite the existence of Section 2-302. *See supra* note 8.

251. *Supra* note 148 and accompanying text.

unfair process be more defensible simply because it occurs before or after contract execution? To the extent appropriate relief goes beyond the traditional remedy of not enforcing the unconscionable clause or contract, this suggested change was too liberal for commercial representatives to support.

While both remedial proposals have beneficial aspects, it might again make sense not to limit their application to the consumer context, although the availability of attorney's fees would likely make the most difference in consumer actions. Still, the presumption should be against differentiating between contracting parties absent the most compelling circumstances.

Finally, simple structural changes can sometimes reap surprisingly meaningful benefits. For example, moving the unconscionability doctrine from Section 2-302 to part 1²⁵² would require only minor organizational tinkering, yet would be beneficial without touching the substantive content. Placing the doctrine in part 1 would present unconscionability as "an underlying and pervasive standard"²⁵³ much like the good faith requirement. This one revision would be consistent with the doctrine's goals and would enhance its application in a more subtle, but basic, fashion.

E. Process, Consensus, and Common Ground

It is far from clear that the 1999 collapse of the NCCUSL annual meeting draft illustrates a process failure. Given the frustrations surrounding the decision to defer consideration of Article 2's revisions, as well as the current drafting committee's determination to revert to the traditional unconscionability doctrine as configured in the original Section 2-302, one might understandably conclude that business interests had captured the revision process, forcing the elimination of enhanced protections for consumers. Even if industry representatives did not ultimately unduly sway the drafting committee, they may have had a controlling impact on the NCCUSL leadership at the 1999 annual meeting.²⁵⁴

252. During the drafting process, the unconscionability provision resided in Section 2-105 for quite some time. See *supra* Part II(B)(2)-(3).

253. Murray, *supra* note 204, at 540 (commending the move to part 1 as "sensible").

254. One drafting committee participant described the influence of industry representatives in the following way:

While interest groups have been very active in the Article 2 revision process, they did not capture the drafting committee. This failure of capture is perhaps best reflected in the letters that continued to pour in protesting various items in the revision as the draft proceeded to final approval at the ALI and NCCUSL in 1999. Whether the industry has captured the leadership of NCCUSL remains to be seen in light of the leadership's decision at the 1999 NCCUSL annual meeting to defer the project for yet another year and to reconstitute the drafting committee, which will presumably be more receptive to industry complaints. Concerns about enactability had already influenced the July 1999 draft and resulted in compromises in positions the drafting committee originally maintained.... The drafting committee's ability to deal with the controversial issues, such as standard-form contracting in consumer contracts, was minimal due to interest group pressure, in spite of effective representation of consumer interests. The standard-form contracting issue generated the most comments from participants in the process. The observers opposing the consumer provisions have repeatedly threatened to stop enactment in the states if the draft contained the proposed provisions for consumer contracts in standard-form situations.

Rusch, *supra* note 15, at 1689-90.

Major recurring concerns involve the informational framework and the participants. It is intuitively difficult to argue for revision lacking the data necessary to support the need for change and the substantive proposals to replace existing law.²⁵⁵ Similarly, the process stumbles when those most eager to participate are those having a strong self-interest that may preclude viewing the larger picture. Even worse, the participants are largely the interest groups' legal representatives.²⁵⁶

If an inclusive approach to uniform law revisions is problematic, the better alternative is not apparent.²⁵⁷ The available information is imperfect, but that will almost always be true. When rules are formulated as part of a democratic process, the results reflect the compromise positions among diverse participants.²⁵⁸ In some respects, there is a certain inevitability regarding the entire process—the tensions are predictable, and an outcome that errs on the side of conservative change is not surprising.²⁵⁹

As for process, criticisms are easy to make, but birthing will always be difficult. So long as lawmakers value the inclusion of diverse perspectives, hard compromises will have to be made. When the various representatives aggressively pursue their causes, locating a common ground for change may not be possible, and that is not necessarily a problem. After all, if no consensus can be reached, then perhaps no changes were needed in the first place.

Whether NCCUSL's failure to approve the Article 2 revisions in 1999 was a mistake is not clear, although the manner in which the events unfolded was unfortunate.²⁶⁰ Presumably, the competing interests there shared at least one common goal regarding the unconscionability doctrine—enactability.²⁶¹ That is,

255. See *supra* notes 113, 202.

256. See *supra* note 202 (expressing concerns about having exclusively lawyers at the revision table). Although this criticism is understandable, it is difficult to imagine that the principals themselves would achieve better-reasoned results.

257. Rusch, *supra* note 15, at 1692 (noting that “devising a different process for drafting commercial law in a democratic society would be extremely difficult”).

258. *Id.* at 1693 (saying that rules flowing from a democratic process “will not be theoretically pure and will reflect tradeoffs between various positions”).

259. One jaded commentator, believing the Article 2 revisions to be a mistake, described his vision of the drafting process as follows:

For some reason, it gives me pleasure to imagine the colloquy at the annual meeting of the American Law Institute when the revisions to the Sales Article come up for discussion. It will all take place in a swank hotel ballroom that comfortably seats three thousand. A couple of senior members will be recognized at the microphones and will point out, correctly, that a word has been misused or is ambiguous. They will propose alternative language, and their suggestions will be gratefully accepted and duly noted by the Reporter. A few younger members will rise to point out, again correctly, that the Draft would permit the gougers to take egregious advantage of consumers in several situations. There will be support for an amendment, but the Reporter will mention that the idea was considered and rejected in committee, and the amendment will fail on a voice vote. The revisions will be approved, and The ALI Newsletter will congratulate all concerned on the progress that has been made in the commercial law.

Richard Hyland, *Draft*, 97 COLUM. L. REV. 1343, 1345 (1997) (noting also that nothing “can alter in any way the inevitability of this result”). Interestingly, in 1999 the ALI did vote for fairly substantial substantive revisions, but NCCUSL was the body that turned the revisions back.

260. Even assuming that deferring the vote was a reasonable outcome, waiting to make a surprise announcement midway through the reading of the revisions was an odd and unseemly twist in a lengthy process that had always strived for fair accommodation.

261. Regardless of other disagreements the process participants do agree that uniform enactment is a critical goal:

after all, the point of uniform laws. The participants, however, differed as to how they interpreted the consensus necessary for uniform enactment. Although the word "consensus" can mean "unanimity," it also conveys the sense of "general agreement" and "the judgment arrived at by most of those concerned."²⁶² In other words, the presence of strong opposition does not necessarily negate consensus if there is general agreement as to the entire package. The NCCUSL leaders themselves said as much when the approval process fell apart in 1999.²⁶³

If the natural result of such a process is that uniform law amendments are few and far between, then that outcome was anticipated fifty years ago by Karl Llewellyn, the UCC's father.²⁶⁴ Just because a revision process was initiated does not mean that revisions—especially substantial, substantive ones—are the likely result. Despite its shortcomings, the UCC has been a surprisingly durable law that has served the commercial world very well for generations.

Finally, even assuming that the uniform law revision process is inept—or at least unnecessarily inefficient—commercial law will not likely suffer. After all, to the extent that the uniform laws are not precise, are confusing, or otherwise yield unfair or nonsensical results, specific problems can be redressed when the revised laws work their way through the various states, and the courts can, to some extent, remedy any shortfalls by interpretation and supplementation. Somehow, in the great balance between lawmakers and courts, the competing factions representing business and consumer interests will ultimately achieve an equilibrium; if not, and the uniform law's deficiencies are too great, meaningful revisions will eventually occur. Such is the give-and-take of commercial law and business law in general.²⁶⁵

CONCLUSION

For all the shouting and commentary overkill, Section 2-302 has come full circle. Although the unconscionability doctrine has many detractors, it appears that Section 2-302 will escape the revisions process unscathed. Controversial at every stage—from inception to the current drafting marathon—the doctrine and its revision process both have procedural and substantive components creating an unconscionable quandary. Nonetheless, the future should ultimately be unsurprising and beneficial.

The fact that the lengthy revision process has been controversial and appears to be producing rather conservative changes is neither surprising nor troublesome. As Karl Llewellyn predicted nearly forty years ago, achieving substantive amendments

[T]here is consensus among the participants in the revision process that the standard [for completing the UCC revisions] should be the ultimate enactability of the statute in fundamentally uniform form. The Uniform Commercial Code is simply too important to the economy of the country and to the perpetuation of the federal system to permit significant nonuniformity through amendments, or through the failure to enact the revisions....

Miller, *supra* note 232, at 214-15.

262. WEBSTER'S NEW COLLEGIATE DICTIONARY 238-39 (1979) (providing "group solidarity" as the first definition, then listing "unanimity" as a synonym and giving the other stated definitions).

263. See *supra* notes 131-32 and accompanying text (quoting NCCUSL's executive director and its president following last summer's annual meeting).

264. See *supra* note 116 and accompanying text.

265. See, e.g., Carol B. Swanson, *Corporate Governance: Sliding Seamlessly into the Twentieth Century*, 30 GA. L. REV. (1997) (describing the equilibrium achieved by competing interests in corporate governance).

would be extraordinarily difficult. Although this inertia gives the UCC a certain static quality, it does enable the courts to develop the relevant doctrines over time, especially with respect to an undefined legal concept such as unconscionability.

As for substantive content, the current Section 2-302 adequately serves its underlying purposes. The revisers initially were concerned that Section 2-302 required retooling because so few reported cases provide relief under it. This lack of authority is understandable; after all, the doctrine essentially operates as a safety net catching palpably unfair fact patterns not meeting the standards of other policing mechanisms. Through the years, the courts have strengthened unconscionability to expand its reach to individuals and businesses under a flexible application of the traditional two-pronged analysis.

Under the controversial proposals rejected during the revision process, special protections for consumers would have distanced UCC treatment from its common law counterpart and would have unnecessarily disadvantaged non-consumer parties to the contracting process. In modern vertical transactions, the weaker parties—whether individuals or commercial entities—may need the safety net provided under Section 2-302. Ironically, although business interests successfully opposed these changes, in some respects the revisions would have cut back on the courts' current expansion of unconscionability.

Thus, it appears that the revisions process will yield an unconscionability section with essentially unchanged text, but with comments clarifying the application of the procedural/substantive dichotomy. The language does not demand that both prongs be established for relief, which makes the comments flexible enough to comport with the current judicial trend. Despite all the fuss, the more things change, the more they remain the same—and that is not a bad result here.