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UNCONSCIONABILITY AND THE UNIFORM COMMERCIAL CODE

WILLIAM B. DAVENPORT*

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I. INTRODUCTION

Section 2-302 of the Uniform Commercial Code represents the first statutory embodiment of the concept of unconscionability.¹ Captioned "Unconscionable Contract or Clause," the section reads as follows:

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

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

The following comments of the draftsmen to this section highlight its purpose:

This section is intended to make it possible for the courts to

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1. All further reference to § 2-302 or any other section of the Code will be made merely by section citation without more.

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. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. 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. . . . The principle is one of the prevention of oppression and unfair surprise (Cf. *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 3d Cir. 1948) and not of disturbance of allocation of risks because of superior bargaining power.²

The section, as interpreted by the comments of the draftsmen, has been the subject of much discussion.³ It has been described as "un-

2. UNIFORM COMMERCIAL CODE, § 2-302, Comment 1. It further continued:

The underlying basis of this section is illustrated by the results in cases such as the following:

Kansas City Wholesale Grocery Co. v. Weber Packing Corporation, 93 Utah 414, 73 P.2d 1272 (1937), where a clause limiting time for complaints was held inapplicable to latent defects in a shipment of catsup which could be discovered only by microscopic analysis; *Hardy v. General Motors Acceptance Corporation*, 38 Ga. App. 463, 144 S.E. 327 (1928), holding that a disclaimer of warranty clause applied only to express warranties, thus letting in a fair implied warranty; *Andrews Bros. v. Singer & Co.* (1934 CA) 1 K.B. 17, holding that where a car with substantial mileage was delivered instead of a "new" car, a disclaimer of warranties, including those "implied," left unaffected an "express obligation" on the description, even though the Sale of Goods Act, called such an implied warranty; *New Prague Flouring Mill Co. v. G. A. Spears*, 194 Iowa 417, 189 N.W. 815 (1922), holding clause permitting the seller, upon the buyer's failure to supply shipping instructions, to cancel, ship, or allow delivery date to be indefinitely postponed 30 days at a time by the inaction, does not indefinitely postpone the date of measuring damages for the buyer's breach, to the seller's advantage; and *Kansas Flour Mills Co. v. Dirks*, 100 Kan. 376, 164 P. 273 (1917), where under a similar clause in a rising market the court permitted the buyer to measure his damages for non-delivery at the end of only one 30 day postponement; *Green v. Arcos, Ltd.* (1931 CA) 47 T.L.R. 336, where a blanket clause prohibiting rejection of shipments by the buyer was restricted to apply to shipments where discrepancies represented merely mercantile variations; *Meyer v. Packard Cleveland Motor Co.*, 106 Ohio St. 328, 140 N.E. 118 (1922), in which the court held that a "waiver" of all agreements not specified did not preclude implied warranty of fitness of a rebuilt dump truck for ordinary use as a dump truck; *Austin Co. v. J. H. Tillman Co.*, 104 Or. 541, 209 P. 131 (1922), where a clause limiting the buyer's remedy to return was held to be applicable only if the seller had delivered a machine needed for a construction job which reasonably met the contract description; *Bekkevold v. Potts*, 173 Minn. 87, 216 N.W. 790, 59 A.L.R. 1164 (1927), refusing to allow warranty of fitness for purpose imposed by law to be negated by clause excluding all warranties "made" by the seller; *Robert A. Munroe & Co. v. Meyer* (1930) 2 K.B. 312, holding that the warranty of description overrides a clause reading "with all faults and defects" where adulterated meat not up to the contract description was delivered.

3. In his article, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 486 n.3 (1967), Professor Arthur Allen Leff notes that there are in excess of 130 discussions of § 2-302 in various legal periodicals and studies.

doubtedly the most controversial provision in the entire Code."⁴ It has recently been the subject of severe and extended criticism.⁵

Notwithstanding the discussion and the controversy, forty-nine of the fifty-one jurisdictions (including every state except Louisiana) which have enacted the Code have accepted the section in its official text form. Only California and North Carolina have omitted the section from their Codes.

The significance of the omission of the section in the two states is questionable. The concept of unconscionability, of course, originated in equity. The court of chancery was a court of conscience whose purpose and function were to relieve against the unfair or unjust rigors of the common law. However, the concept of unconscionability was applied in cases at common law as well as in equity, and even in sales cases, long before the uniform commercial code was first proposed in 1940.⁶ The concept has roots in the English common law which can be traced at least as early as 1663.

Primarily this article seeks to demonstrate that section 2-302 introduces nothing really new and is substantially a restatement of common law. Secondly, it seeks to establish by a review of decisions under section 2-302 that the dire consequences predicted upon its enactment have not followed. Thirdly, by a review of case applications both before and since the Code, it endeavors to determine what unconscionability involves. Fourthly, it summarizes the practical consequences of a holding of unconscionability and suggests how the commercial lawyer drafting contracts may avoid or minimize this problem. Finally, it assesses the practical impact of the section.

II. SECTION 2-302: SUBSTANTIALLY A RESTATEMENT OF COMMON LAW

The decision of the Court of Appeals for the District of Columbia in *Williams v. Walker-Thomas Furniture Co.*⁷ is perhaps the most recent illustration of the common law application of the concept of unconscionability. In April, 1962, Mrs. Williams bought a stereo at a stated value of \$515 on the practical equivalent of a consumer conditional sales contract.

4. W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 44 (1964).

5. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

6. Mr. William A. Schnader, a member of the Philadelphia Bar and President of the National Conference of Commissioners on Uniform State Laws in 1940, proposed the concept of a uniform commercial code to replace the seven prior uniform commercial acts in the Conference's annual meeting that year. See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 58 (1940).

7. 350 F.2d 445 (D.C. Cir. 1965).

At the time of the purchase her account showed a balance of \$164 still owing on prior purchases. From late 1957 until 1962 she had purchased several items from Walker-Thomas. Her purchases over these years aggregated \$1,800, and her total payments amounted to \$1,400. The reverse side of the contract listed the name of Mrs. Williams' social worker and stated that she received a \$200 monthly stipend from the government and that she had seven children. Shortly after her purchase of the stereo, Mrs. Williams defaulted. Walker-Thomas thereupon sought to replevy all of the items she had purchased since 1957. It claimed the right to do this on the ground that the conditional sales contract granted it a security interest in all of the items previously purchased by Mrs. Williams on which her payments had not been completed; and since all payments were applied pro rata on all previous items and there was always a balance due, they were complete on none. Mrs. Williams, represented by the Legal Assistance Office of the Bar Association,⁸ conceded the right of Walker-Thomas to repossess the stereo but disputed its right to repossess all of the items she had purchased since 1957. Her contention that the contract was unconscionable and unenforceable was rejected by both the trial court and the District Court of Appeals.⁹ The Court of Appeals for the District of Columbia reversed. The court did not agree with the lower courts that they lacked the power to refuse enforcement to contracts found to be unconscionable. Noting that Congress had enacted the Uniform Commercial Code for the District subsequently to the contract involved, the court held that this did not mean (1) that the common law of the District of Columbia was otherwise at the time of the enactment of the Code or (2) that it precluded the court from adopting a similar rule in the exercise of its powers to develop the common law for the District. The court cited several cases in support of this position, and there are many more which it could have cited.¹⁰ The court remanded the case to the lower courts for findings on the issue of unconscionability since they had made none. In characterizing the security interest provision of the contract as "rather obscure," the court questioned the existence of "important terms hidden in a maze of fine print and minimized by deceptive sales practices." The aspect of unconscionability here was primarily unfair surprise.

As previously mentioned, the notion of unconscionability, although that word was not then used to describe it, may be traced in the English

8. See Skilton and Helstad, *Protection of the Installment Buyer of Goods Under the Uniform Commercial Code*, 65 MICH. L. REV. 1465, 1477-82 (1967).

9. *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. App. 1964).

10. Among the decisions cited by the court were *Hume v. United States*, 132 U.S. 406 (1889); *Scott v. United States*, 79 U.S. (12 Wall.) 443 (1870); *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), and *Greer v. Tweed*, 13 Abb. Pr., N.S. 427 (N.Y.C.P. 1872). The Court of Appeals also made reference to the discussion in *Hume* of the English authorities, discussed herein in notes 11-16 and accompanying text. Other decisions not cited by the court, but which do support its conclusion, are discussed in subsequent text or noted in subsequent notes.

common law at least as early as 1663. *James v. Morgan*,¹¹ presided over by Sir Robert Hyde, then at the head of the King's Bench, involved an action of assumpsit on an agreement by the defendant to purchase a horse from the plaintiff at a price calculated at a barley corn a nail in the horse's shoes, doubling it with each nail. There were 32 nails in the horse's shoes, and this established the price at 500 quarters (4,000 bushels) of barley, a patently exorbitant price of £100. Chief Justice Hyde directed the jury to give the value of the horse, £8, in damages. The case has often been described or referred to as the Horseshoe Case.¹²

Another case commonly paired with *James v. Morgan* is *Thornborough v. Whiteacre*.¹³ The case is a remarkable precedent. A word from Chief Justice Holt concerning his views of the merits of the defendant's case prompted its settlement. The plaintiff's declaration asserted that in consideration of 2s.6d. paid down and the balance (£4 17s.6d.) to be paid on fulfillment of the contract, the defendant promised to deliver to him two grains of rye on a certain Monday and to double it successively every Monday thereafter for a year. The quantity required was an astronomical amount—524,288,000 quarters; it exceeded the amount of rye in the entire world. Counsel for the defendant argued that damages could not be awarded for an agreement impossible of performance. In opposition it was said that although the contract was a foolish one, the defendant ought to pay something for his folly. The earlier case, *James v. Morgan*, was then remembered and conceded to be good law. The defendant then offered the plaintiff his half crown and his costs, which the plaintiff accepted; and no judgment was given.

It has been said that these two cases "were plainly cases in which one party took advantage of the other's ignorance of arithmetic to impose upon him"¹⁴ and "involved improvident bargains struck between amateur confidence men and country bumpkins."¹⁵ In his renowned opinion in *Earl of Chesterfield v. Janssen*,¹⁶ Lord Chancellor Hardwicke, in listing

11. 1 Lev. 111, 83 Eng. Rep. 323 (1663). The background of this case and the one following is discussed in the opinions in *Hume v. United States*, 132 U.S. 406, 411-13 (1889), and *Leland v. Stone*, 10 Mass. 459, 462 (1813).

12. Reference to the case was so made in *Greer v. Tweed*, 13 Abb. Pr., N.S. 427, 429-30 (N.Y.C.P. 1872). Reference was also made to the case by description, but not by name, by Lord Chief Justice Hale in *Lord Eure and Turton*, 1 Vent. 266, 86 Eng. Rep. 178 (1675).

13. 6 Mod. 305 (1705); *sub nom.* *Thornborow v. Whitacre*, 2 Ld. Raym. 1164, 92 Eng. Rep. 270. See note 11 *supra*. The total consideration to be paid by the plaintiff was £5. It will be remembered that there were 20 shillings to the pound and 12 pence to the shilling. A crown was the equivalent of 5 shillings; a half crown, the amount paid down by the plaintiff, was 2s6d.

14. *Hume v. United States*, 132 U.S. 406, 413 (1889) (Fuller, C.J.).

15. Note, *Unconscionable Contracts: The Uniform Commercial Code*, 45 IOWA L. REV. 843, 847 (1960).

16. 2 Ves. Sen. 125, 28 Eng. Rep. 82 (1750). Although the case is frequently cited, the facts are seldom discussed. The case involved a prayer for relief by the executors of the maker of a post-obit note. One John Spencer, aged 30 but not of the best in health or habits, borrowed £5,000 on bond in the amount of £20,000 conditioned to pay £10,000 at or soon after the death of his grandmother, the Duchess of Marlborough, then aged 78 but

four species of fraud recognized by courts of equity, noted, contrary to the occasionally expressed view that the common law was without mercy,¹⁷ that it did relieve against unconscionable bargains:

It may be apparent from the intrinsic nature and subject of the bargain itself; 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; which are unequitable and unconscientious bargains; and of such even the common law has taken notice; for which, if it would not look a little ludicrous, might be cited 1 Lev. 111, *James v. Morgan*.¹⁸

The foregoing language is frequently quoted, whether the source is cited or not, as the classic definition of unconscionability.¹⁹ Coincidentally, both *James v. Morgan* and *Thornborough v. Whiteacre* involved contracts for the sale of goods. Both aspects of unconscionability—oppression and unfair surprise—were present in them.²⁰

These then are probably the earliest and the most recent decisions applying the concept of unconscionability at common law. Between the times of their rendition numerous cases have applied the concept at common law, both in England and this country.²¹ Some of them are herein-after discussed.

of sound constitution and good habit, but to be totally lost if she survived him. She lived six years and three months. He survived her by one year and eight months. Upon her death he came into great personal fortune and executed a confirmation bond (with power to confess judgment) in the penalty amount of £20,000, conditioned upon the absolute payment of £10,000 at or before the following April. Before his death Spencer paid £2,000 on the debt and expressed himself satisfied with the conduct of the defendant lender. After the defendant confessed judgment and sought execution against the executors, they sought relief from the court upon the payment of the amount borrowed with interest from the date of its advancement. The court enforced the confirmation bond to the extent of £10,000 but voided the penalty amount. The opinions of Lord Hardwicke and Justice Burnett on the nature of unconscionable bargains are especially interesting.

17. In *Lear v. Chouteau*, 23 Ill. 39, 42 (1859), the Supreme Court of Illinois made this observation:

In such a contract as this there is neither reciprocity, fairness nor good conscience, and if the defendant was simple enough to consent to such an agreement, a court of equity will not compel him to execute it specifically, but leave the parties to their remedies at law, which has no conscience and knows no mercy. In order to induce a court of equity to enforce specifically a contract, it must be founded on a good consideration, it must be reasonable, fair and just. If its terms are such as our sense of justice revolts at, this court will not enforce it, though admitted to be binding at law. Such is the character of this agreement—there is not one reciprocal feature in it

18. 2 Ves. Sen. at 155, 28 Eng. Rep. at 100.

19. See discussions on the point in several of the cases cited in note 21 *infra*.

20. These two aspects frequently overlap. In these two cases it may be said that the oppression consisted of the plaintiff's taking advantage of the defendant's ignorance of arithmetic, of which ignorance the plaintiffs were surely aware. By reason of this ignorance the defendants agreed to terms, in one case to a price and in the other to a quantity, to which they presumably would not have agreed had the terms been directly expressed in the amount of the resultant price and quantity. This ignorance thus led to the surprise of the defendants at having made an extremely one-sided bargain. The surprise may be characterized as unfair.

21. England: *Jestons v. Brooke*, Cowp. 793 (K.B. 1778); *Floyer v. Edwards*, Cowp. 112 (K.B. 1774).

III. DECISIONS UNDER THE CODE

Applications of section 2-302 or dicta based upon it are increasingly more frequent. The results reached in decisions to date seem in accord with the intention of the draftsmen of the Code and with pre-Code applications of the concept of unconscionability. One decision, however, has been the subject of expressed concern.²² Only two of the reported decisions to date have been those of reviewing courts.

In *American Home Improvement, Inc. v. MacIver*,²³ the Supreme Court of New Hampshire relied on section 2-302 as an alternative ground of decision. The plaintiff sought enforcement of an agreement for home improvements (consisting of the installation of windows and siding) for a price of \$1,759. At the same time defendants signed the agreement, they also signed an application for financing, which made a total amount due of \$2,568 payable over 5 years. Of this amount, \$959 was the value of the goods and services to be furnished; \$800 represented a sales commission; and \$809 represented finance charges. Defendant requested plaintiff to stop working a few days after the agreement was signed, and plaintiff complied. Plaintiff sought damages for the breach. Defendants moved to dismiss the action by reason of non-compliance with a New Hampshire truth-in-lending statute. The court granted this motion on the ground that there was not even a "token compliance" with the statute. The court held, however, that an independent reason also barred recovery—*i.e.*, the transaction was unconscionable. The court's reasoning concerning unconscionability is contained in a cryptic paragraph.²⁴ In the absence of the truth-in-lending statute, it does not seem that the same result should follow from a conclusion of unconscionability;

United States: *Hume v. United States*, 132 U.S. 406 (1889); *Scott v. United States*, 79 U.S. (12 Wall.) 443 (1870).

Illinois: *Marshall Milling Co. v. Rosenbluth*, 231 Ill. App. 325 (1924).

Indiana: *Schnell v. Nell*, 17 Ind. 29 (1861) (consideration of one cent would not support promise to pay \$600); *Stiefler v. McCullough*, 97 Ind. App. 123, 174 N.E. 823 (1931).

Kansas: *Caplice v. Kelley*, 27 Kan. 359 (1882); *Kelley v. Caplice*, 23 Kan. 474 (1880).

Massachusetts: *Baxter v. Wales*, 12 Mass. 365 (1815); *Leland v. Stone*, 10 Mass. 459 (1813); *Cutler v. How*, 8 Mass. 257 (1811).

New York: *Greer v. Tweed*, 13 Abb. Pr., N.S. 427 (N.Y.C.P. 1872).

This list is by no means exhaustive. The concept is recognized in dicta in numerous other decisions from the foregoing and other jurisdictions.

22. See note 23 *infra*. See Lefl, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 547-51 (1967); Braucher, *Sale of Goods in the Uniform Commercial Code*, 26 LA. L. REV. 192, 205-06 (1966).

23. 105 N.H. 435, 201 A.2d 886 (1964). The only ground of defense asserted was non-compliance with the truth-in-lending statute. The plaintiff filed no brief in the Supreme Court.

24. The paragraph reads:

Inasmuch as the defendants have received little or nothing of value and under the transaction they entered into they were paying \$1,609 for goods and services valued at far less, the contract should not be enforced because of its unconscionable features. This is not a new thought or a new rule in this jurisdiction. See *Morrill v. Bank*, 90 N.H. 358, 365, 9 A.2d 519, 525: "It has long been the law in this state that contracts may be declared void because unconscionable and oppressive * * *." *Id.* at 439, 201 A.2d at 889.

i.e., the court should have awarded plaintiff some relief by way of money damages based upon a reasonable contract price. The decision, while clearly correct on its primary ground, is unsatisfactory on the ground of unconscionability.

The procedure followed by the trial court and the result reached by the reviewing court in *Frostifresh Corp. v. Reynoso*²⁵ represent an application of section 2-302 consonant with the intention of the draftsmen of the Code. The seller of a combination refrigerator-freezer sued the buyers for \$1,145 on an installment contract for its purchase, plus \$245 in finance charges. The cost of the appliance to the seller was \$348. The contract was in English. It had been negotiated orally in Spanish by defendant and a Spanish-speaking salesman representing the seller. Misrepresentations were made in the negotiations; but since fraud was not pleaded, the court held that it was not available as a defense. During the course of the trial it appeared to the court that the contract might be unconscionable. The court adjourned the trial to a later date to afford the parties an opportunity to present evidence concerning the commercial setting, purpose and effect of the contract. At the conclusion of the hearing the court found that the terms of the contract were "shocking to the conscience." Since the buyers had not returned the refrigerator-freezer to the seller, the court entered judgment for the amount of its cost to plaintiff less a down payment. Upon appeal the reviewing court upheld the finding of unconscionability, but reversed the judgment for a new trial limited to the amount of the seller's damages. The reviewing court held that the seller should recover its net cost for the refrigerator-freezer, plus a reasonable profit, trucking and service charges necessarily incurred, and reasonable financing charges.

These two cases involved consumer situations. However, section 2-302 has also found application in commercial situations.

*Denkin v. Sterner*²⁶ involved an agreement by a seller to sell a buyer certain refrigeration equipment for \$35,500. The agreement contained a provision that if the buyer cancelled the contract before any of the items contracted for were delivered, the seller could confess judgment for the full amount of the contract price. Before delivery of any part of the equipment the buyer cancelled the agreement because he learned that he could buy the equipment cheaper elsewhere. The seller confessed judgment pursuant to authority contained in the agreement. The buyer moved to open the judgment on the ground, among others, that the contract provision authorizing confession of judgment for the full amount of the purchase price was contrary to section 2-709 of the Uniform Commercial Code and, therefore, void. Section 2-709, captioned

25. 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd in part*, 281 N.Y.S.2d 964 (App. Term 2d Dep't 1967).

26. 10 Pa. D. & C.2d 203 (C.P. 1956).

"Action for the Price," provides, *inter alia*, that a seller may recover the price of the goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or circumstances reasonably indicate that such an effort will be unavailing; further that after a buyer has wrongfully failed to make a payment when due or has repudiated, a seller who is not entitled to recover the price shall be awarded damages for non-acceptance under section 2-708. The seller countered with the argument that not only was he entitled to recover the price under section 2-709 but that contractual modification or limitation of remedies was contemplated by section 2-719. In rejecting this argument, the court cited the comment to section 2-719 that a clause purporting to modify or limit the remedial provisions of article 2 in an unconscionable manner is subject to deletion and in that event the remedies made available by article 2 are applicable as if the stricken clause had never existed. In granting the buyer's motion, the court held that to permit the seller to recover the full amount of the purchase price without a showing of (1) what goods, if any, had been identified to the contract, (2) what goods were standard items and readily salable, (3) what goods had been actually specially manufactured prior to cancellation by the buyer, and (4) what goods had been or could be readily resold, would result in "unreasonably large liquidated damages." The contractual provision was "unconscionable and void."²⁷

In *Sinkoff Beverage Co. v. Jos. Schlitz Brewing Co.*²⁸ a brewer had endeavored for several months to induce a local distributor in a New York county to change its marketing methods. In June, 1966, the brewer served a ten-day notice of termination of the distributorship agreement. The agreement had been signed in 1960. The agreement provided that either party could terminate it without cause or notice. The local distributor asserted an exclusive distributorship and claimed that the resultant diminution of its gross sales and net profits raised a question as to its ability to continue in business. It contended that the ten-day notice of termination was unconscionable under section 2-309 of the Code. Subsection (3) thereof provides:

Termination of a contract by one party, except upon the happening of an agreed event, requires that reasonable notification be received by the other party and that an agreement dispensing with notification is invalid if its operation would be unconscionable.

The motion of the distributor for a preliminary injunction enjoining the termination presented the court with a threshold question of unconscionability. After concluding that only a simple (not an exclusive)

27. The reference to § 2-302 is indirect—*i.e.*, by cross-reference from the Comment to § 2-719.

28. 51 Misc. 2d 446, 273 N.Y.S.2d 364 (Sup. Ct. 1966).

distributorship existed, the court noted that the issue of unconscionability related to the time of making of the contract. The court observed that the creation of the relationship between the brewer and the distributor was, at that first point in time, of great benefit to both parties but perhaps particularly favorable, and therefore especially inoppressive, to the distributor. The motion for the injunction was denied.

These have been the principal decisions to date applying section 2-302.²⁹ Neither the results in any of them nor the reasoning employed in three of them furnish any basis for concern on the part of the commercial lawyer.³⁰ The scarcity of reported decisions interpreting section 2-302 seems remarkable indeed when one considers that the Code has been in effect in Pennsylvania for over thirteen years, in Massachusetts for over nine years, in Illinois and Ohio for over five years and in New Jersey and New York for over three years. This is even more remarkable when it is noted that the decisions of trial courts are reported in New York, Ohio and Pennsylvania. To date the controversy over section 2-302 has permeated the legal periodicals far more than it has the courts.

IV. WHAT DOES UNCONSCIONABILITY INVOLVE?

Perhaps the most frequently expressed concern with section 2-302 is that the concept which it embodies is a vague one and creates uncertainty.³¹ The question may be asked: What constitutes unconscionability?³² The comments of the draftsmen state that the principle of section 2-302 is one of prevention of oppression and unfair surprise. All, or nearly all, of the cases decided at common law, in equity or under the Code can be grouped under one of these two headings. To some ex-

29. References to § 2-302 have also been made in *Application of the State of New York v. ITM, Inc.*, 52 Misc. 2d 39, 53, 275 N.Y.S.2d 303, 321 (Sup. Ct. 1966); *Central Budget Corp. v. Sanchez*, 53 Misc. 2d 620, 279 N.Y.S.2d 391 (N.Y. City Civ. Ct. 1967), and the twin cases of *Paragon Homes of New England, Inc. v. Langlois*, 4 UCC Rep. 16 (Sup. Ct. 1967) and *Paragon Homes of Midwest, Inc. v. Grace*, 4 UCC Rep. 19 (Sup. Ct. 1967). The first case involved an action by the Attorney General to enjoin the promoters of a referral type sales program involving an endless chain transaction from engaging in alleged fraudulent and illegal practices under the New York Executive Law, and § 2-302 was cited as one of numerous grounds of decision. The second case involved an action by a finance company on a balance for a used car. The decision is one at a preliminary stage in the proceeding, in which a motion for summary judgment was denied. In the final two cases reference was made to § 2-302 by way of dictum. The court dismissed the actions on the ground of *forum non conveniens*. All of these cases involved consumer situations. In this connection it may be noted that Working Draft No. 6 of the Uniform Consumer Credit Code (Dec. 4, 1967) contains provisions authorizing injunctions against unconscionable and fraudulent conduct. See §§ 5.106, 6.111 thereof.

30. See notes 22 and 23 *supra* and accompanying text.

31. See, e.g., Ireton, *The Commercial Code*, 22 MISS. L.J. 273, 280 (1951); Broeker, *Articles 2 and 6: Sales and Bulk Transfers*, 15 U. PITT. L. REV. 541, 555, 557 (1954).

32. The term "unconscionable" is defined in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabr. ed. 1961) as "not guided or controlled by conscience," "excessive," "exorbitant," "lying outside the limits of what is reasonable or acceptable," "shockingly unfair, harsh or unjust."

tent oppression and unfair surprise may overlap in some situations.³³ While many situations of unfair surprise also involve oppression, many situations of oppression involve no surprise whatever.

An examination of illustrative cases under the two headings will make the point.

A. *Oppression*

Oppression may take the form of plain economic duress, damage clauses which are really penalties and may serve to create an *in terrorem* effect and thereby attempt to bring a potentially breaching party into line, or total one-sidedness or want of reciprocity.

1. ECONOMIC DURESS

Two cases, one of earlier date and one of very recent date, involve asserted economic duress.

In *Kelley v. Caplice*,³⁴ the Supreme Court of Kansas declined enforcement of a promissory note for \$477.73 on this ground. The sole consideration for the note was the payee's signature on a receipt for payment in full, demanded by an insurance company, on a ten-year endowment insurance policy on the life of her husband of which she was beneficiary. The maker had purchased the insurance policy from the payee and her husband by the release of a claim against the husband for \$600 and the payment of \$275 in addition; and the payee and her husband had executed an assignment of the policy to the maker. The latter had paid the premiums on the policy after the assignment until its maturity. At maturity the insurance company required the payee's signature on a receipt for payment of the amount due under the policy, \$1,477.73, as a condition of payment to the maker. The payee declined to give her signature except on the payment or the promise of payment of \$477.73 of the amount forthcoming. Unable to procure payment other than by costly litigation and great delay, the maker executed the note in the amount of her demand. In reversing a judgment for the amount of the note, the court ruled:

The agreement is an unreasonable and unconscionable one. Mrs. C. is only entitled to reasonable compensation for the inconvenience of service in making her signature. She suffered no loss, injury or disadvantage, nor parted with anything of value in signing her name. The demand for the signature of Mrs. C. on the part of the insurance company before payment was arbitrary, and yet out of abundant caution in transacting

33. See *In re Elkins-Dell Mfg. Co.* 253 F. Supp. 864, 871 (E.D. Pa. 1966), and note 20 *supra*.

34. 23 Kan 474 (1880). The note was a non-negotiable instrument.

its business, not very unreasonable. . . . Morally, Mrs. C. ought to have given it, without making the extortionate demand she did. Instead of acting justly, she attempted to take advantage, and an unfair one, of the plaintiffs in error, who had bought and paid for all her right and interest in the policy. She thought herself in a condition to exact an unconscionable bargain, and for service worth only a few cents she demanded and received a written promise for the payment of nearly five hundred dollars. The mind revolts at enforcement of such a promise and as the courts, as a rule, under such circumstances seize upon the slightest act of oppression or advantage to set at naught a promise thus obtained, we are of the opinion that Mrs. C. is only entitled to what may be fairly due her for writing her signature, and that she cannot recover on the agreement.³⁵

Upon remand the trial court found that plaintiff's services were worth one cent and entered judgment therefor. In affirming, the Supreme Court of Kansas rejected the argument that its prior decision was based upon a concept of inadequacy of consideration and reiterated that unconscionability was the basis of its decision:

The refusal of Mrs. Caplice to write her signature blocked the payment of the policy. She did not pretend to have any title or interest in the policy or its proceeds; but when she ascertained the inability of her assignees to collect the money on the policy she had transferred to them, without her release, except by long delay and costly litigation, she conceived the idea of exacting a hard and unconscionable bargain from the very persons whom she ought, in common honesty, to have aided to collect the policy she had transferred. For the mere inconvenience of writing her name, for service worth only one cent, she demanded an agreement in writing for the payment of nearly \$500.³⁶

The more recent assertion of a claim of economic duress involved a different kind, different types of persons and a different setting. The assertion was made in a bankruptcy proceeding by a trustee on behalf of creditors. The court employed the equity rather than the common law approach to unconscionability.³⁷ Although the facts arose in a state where the Code was in effect, the court expressly refused to apply section 2-302 to the agreement involved—a security agreement with accounts as collateral.³⁸ *In re Elkins-Dell Mfg. Co.*³⁹ presented the questions whether a referee in bankruptcy may, and, if so, whether he should, under the circumstances, refuse to enforce security agreements between

35. *Id.* at 476-77.

36. *Caplice v. Kelley*, 27 Kan. 359, 373 (1882).

37. See notes 51 through 53 *infra* and accompanying text; also notes 92 and 93 *infra* and accompanying text.

38. *In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864, 873 n.4 (E.D. Pa. 1966).

39. 253 F. Supp. 864 (E.D. Pa. 1966).

a creditor (Fidelity America Financial Corporation) and two bankrupts which he found unconscionable. The referee had held the agreement unconscionable on its face and denied enforcement. The reviewing district court concluded that a referee may deny enforcement if he finds an agreement unconscionable but held that in the particular case the referee had "acted precipitously in refusing to enforce" the agreements and remanded the cases to the referee for "thorough factual hearings on unconscionability." Under the security agreement the lender was to advance 75% of the value of accounts assigned to it but was obligated to take only those accounts of the bankrupt which, "in the sole and unlimited discretion of [the lender], may be acceptable to [the lender] and to pay therefor." The agreement also reserved to the lender the power to direct the postoffice to deliver the bankrupt's mail to it, to receive, open and dispose of all mail addressed to the bankrupt. On its part the bankrupt promised that it would not negotiate for or borrow money elsewhere and that it would not sell any of its assets, in either case without the written consent of the lender.⁴⁰ The bankrupt also promised not to request an extension from or a composition with creditors, to make an assignment for the benefit of creditors or to seek relief under the Bankruptcy Act without the written consent of the lender. The interest rate on the loan was $\frac{1}{23}$ of 1% per day (in excess of 15.8% per year) on the total unpaid balance, with a minimum of \$500 per month, plus $\frac{5}{23}$ of 1% on check collections. In holding the agreements unconscionable, the referee denied the amounts collected by the lender or asserted as a secured claim any status as secured claims but allowed them as unsecured claims, denied the lender all interest in excess of 6% (the legal rate in Pennsylvania), and ordered the lender to pay the costs of the two proceedings. In the words of the referee the agreement "spelled ruin to the bankrupt." After characterizing the agreement as "somewhat one-sided" and then concluding that a bankruptcy court may refuse to enforce an agreement which it finds unconscionable, the district court turned to a consideration of standards of unconscionability. Noting the two broad categories of unconscionable contracts, those involving unfair surprise and those involving oppression, the court placed the security agreement in question in the latter category with the observation, "We are not dealing with a fictional assent but with a genuine assent by businessmen to terms which, the trustees assert, ought not to be countenanced." The court then continued:

We entertain grave doubts about the wisdom of declining to enforce contracts entered into under these circumstances. It would be unsound to encourage bankruptcy trustees or general

40. The court compared this provision with the provision of the contract in *Campbell Soup Co. v. Wentz*, 172 F. 2d 80 (3d Cir. 1948), discussed *infra* in text accompanying notes 50 through 53, which excused Campbell from accepting carrots under certain circumstances but did not permit the grower to sell the carrots elsewhere.

creditors to attempt to escape lawful factoring debts by impassioned appeals to equity—unsound because it would be inconsistent with the scheme of the Bankruptcy Act and because it would tend to dry up the credit of businesses which need it most. There are important considerations of policy in favor of promoting the availability of funds for businesses in distress, even at unusually high rates of interest. The risks of lending are sometimes great, and the inducements may have to be commensurate. These are considerations particularly impelling upon the bankruptcy court, which, charged with responsibility for the liquidation of business misfortunes, has a corresponding interest in keeping businesses afloat. . . .

To hold these contracts unenforceable on their face would probably be to impose a judicially invented but economically dysfunctional morality upon knowledgeable contracting parties.⁴¹

In remanding the cases to the referee for a hearing on the commercial setting of the agreements and the need of lenders for provisions of the kind challenged by the trustee, the court observed that if the agreements were then found unconscionable, the effect of the "taint of unconscionability" would be "the substitution of Fidelity [the secured creditor] as an unsecured creditor."

2. DAMAGE CLAUSES IN REALITY PENALTIES

A second situation of oppression is the liquidated damage clause which is in reality a penalty and which may or may not be designed to create an *in terrorem* effect for the purpose of bringing a breaching party into line.

An early illustration of this situation is *Greer v. Tweed*,⁴² decided by a lower New York court in 1872. An agreement required the defendant to pay for nine copies (at \$55 per copy) of a literary work called "Universal Biography" to be published by the plaintiff. One half of the price was to be paid when the proof sheets of a sketch of defendant's life should be issued. The contract provided that if the material for the sketch was not furnished by the defendant within ten days from its date, the subscription money was to be paid at that time to apply on the work referred to or to a future similar work. The contract also obligated defendant "to pay the publisher the price of three copies [\$165] for every day's time that elapses between the receipt and return of proof of said sketch, and also for every day's time that elapses between the end of said ten days and the furnishing" of the sketch and a photograph referred to in an accompanying memorandum. The complaint charged defen-

41. 253 F. Supp. at 871.

42. 13 Abb. Pr., N.S. 427 (N.Y.C.P. 1872).

dant's neglect to furnish the sketch and photograph for 161 days since December 21, 1871, the date limited by the agreement, and the date of filing suit. The work had been published, of course without defendant's biography. Copies had been tendered, and payment demanded and refused. The complaint sought judgment for the price of the books tendered, \$495, and liquidated damages in the amount of \$26,464.⁴³ A motion to vacate a default judgment recovered by the publisher was granted upon two grounds, the first of which was that the agreement was unconscionable:

First, the contract, if it be construed as claimed, according to its literal terms, is well described, in the language of Judge Story (1 Story Eq., Jur., § 188), as "such as no man in his senses and not under delusion would make on the one hand, and as no honest or fair man would accept on the other." It is so extortionate and unjust that it raises the presumption [sic] of deceit and fraud in its inception. The distinction between legal and equitable remedies is abolished in our system of jurisprudence, and such relief is to be afforded, whether formerly peculiar to a court at law or to one in equity, as is appropriate to the case presented; but even courts of law take notice of the inequitable and unconscientious character of such agreements, declare them void and remit the claimant as to such damages as afford him a reasonable and just compensation for any injury he has sustained.⁴⁴

What is perhaps the most recent pre-Code case applying the concept of unconscionability at common law in a sales case also concerned a liquidated damage clause of this kind. In *Marshall Milling Co. v. Rosenbluth*,⁴⁵ a buyer unquestionably breached a contract for the sale of flour by refusing to take delivery of two-thirds of the contract amount. The principal question that disturbed the court was the liquidated damage provision. A portion of it permitted the seller to recover for flour remaining unshipped by reason of the buyer's breach:

(a) four cents a bushel for the number of bushels required to manufacture "such unshipped flour," calculating $4\frac{3}{4}$ bushels of wheat to each barrel of flour; *plus* (b) two cents a bushel for each thirty days between the date of the contract and the date of the breach; *plus* (c) the amount of decline in the price of No. 1 Northern Spring Wheat in Minneapolis "from date hereof to date of breach."

43. The court noted that under the construction of the contract advanced, if the institution of the suit were delayed until six years (apparently the period of the applicable statute of limitations) from the first day of default, plaintiff might recover in excess of \$350,000. 13 Abb. Pr., N.S. at 430-31. In this respect the clause is like those in the two cases next cited; *i.e.*, the damages would increase by reason of plaintiff's delay.

44. 13 Abb. Pr., N.S. at 429.

45. 231 Ill. App. 325 (1924) (the Uniform Sales Act was in effect at the time).

Another clause of the contract provided that as to any of the flour remaining "unshipped" because of the failure of the buyer to "furnish shipping directions" within the required time, the seller should have the right to "extend the shipping date thirty days, and thereafter (as long as buyer's said failure or refusal continues) *continue the life hereof by as many such successive extensions as seller may desire.*" The buyer told the seller on a November 20 that he would take no more flour. The following March the seller advised the buyer that since he had never furnished the seller with shipping directions, "*the contract has been allowed to automatically extend itself for thirty days at a time.*" The result was that the seller endeavored to keep the contract alive for four months in a declining wheat market and assert a constantly expanding claim for damages against the buyer. In refusing to enforce the damage provision and allowing the seller the normal measure of damages for such a breach, the Appellate Court of Illinois held:

To permit the plaintiff under such circumstances to recover, in addition to the amount ordinarily allowed as compensatory damages, a penalty of *two cents per bushel per month for four months*, on account of such delay on the part of plaintiff, would, in our view, be unreasonable and unconscionable.⁴⁶

This decision involved contractual provisions similar to those in *New Prague Flouring Mill Co. v. Spears*,⁴⁷ one of the case illustrations in the comments to section 2-302. In that case the Supreme Court of Iowa reached its decision through a process of "adverse construction of language,"⁴⁸ a process admittedly used by some courts in rare moments of judicial candor,⁴⁹ but the Illinois court reached a similar result with a straightforward holding of unconscionability. *Spears* also involved the elements of very fine print and poor eyesight on the part of the buyer. It is an illustration of both aspects of unconscionability and will be noted in subsequent discussion under the heading of unfair surprise.

Section 2-718(1) provides in part, "A term fixing unreasonably large liquidated damages is void as a penalty." This provision would thus expressly void liquidated damage clauses of the type involved in *Rosenbluth*. Comment 1 to section 2-718 states that "an unreasonably small amount" of liquidated damages "would be subject to similar criticism and might be stricken under the section on unconscionable contracts or clauses."

46. *Id.* at 337. The emphasis in all instances is that of the court.

47. 194 Iowa 417, 189 N.W. 815 (1922).

48. See comment to § 2-302, quoted *supra* in text accompanying note 2.

49. An illustration in point is *Railway Passenger & Freight Conductors' Mut. Aid & Benefit Ass'n v. Robinson*, 147 Ill. 138, 35 N.E. 168 (1893) (suit for death benefits). The Supreme Court of Illinois there observed:

The judicial mind is so strongly against the propriety of allowing one of the parties, or its especial representative, to be judge or arbitrator in its own case, that even a strained interpretation will be resorted to if necessary to avoid that result. 147 Ill. at 159-60, 35 N.E. at 176.

3. ONE-SIDEDNESS OR WANT OF RECIPROCITY

A third situation of oppression is an agreement which is totally one-sided or is said to lack reciprocity. The agreement generally provides for the rights of one party in specified situations but fails to define the rights of the other party in these situations or to accord the other party similar rights.

The classic case in point is *Campbell Soup Co. v. Wentz*,⁵⁰ cited in the comment to section 2-302. Campbell sought specific performance of a written contract made in June, 1947, with farmer growers for the sale of all Chantenay red-cored carrots to be grown on the farm of the sellers during the 1947 season. The farmer sellers harvested approximately 100 tons of carrots from their farm but declined delivery in January, 1948, at a time when the market price was triple the contract price and Chantenay red-cored carrots were virtually unobtainable. The district court denied relief on the ground that the buyer had failed to establish that the goods were "unique" goods. The court of appeals disagreed with this ground and said that if this were all that was involved, specific performance was indeed appropriate.⁵¹ The reason for affirmance rather than reversal was the court's view that the agreement was "too hard a bargain and too one-sided an agreement to entitle plaintiff to relief in a court of conscience." The contract contained a provision for liquidated damages of \$50 per acre for any breach by the farmer growers but none for any breach by Campbell. The provision which the court found the "hardest" was one excusing Campbell from accepting carrots under certain circumstances, but not permitting the growers to sell them elsewhere without the consent of Campbell. However, the criterion of unconscionability in equity was overall imbalance, not objection to any single provision:

The plaintiff argues that the provisions of the contract are separable. We agree that they are, but do not think that decisions separating out certain provisions from illegal contracts are in point here. As already said, we do not suggest that

50. 172 F.2d 80 (3d Cir. 1948).

51. On this point the Court observed:

We think that on the question of adequacy of the legal remedy the case is one appropriate for specific performance. It was expressly found that at the time of the trial it was "virtually impossible to obtain Chantenay carrots in the open market." This Chantenay carrot is one which the plaintiff uses in large quantities, furnishing the seed to the growers with whom it makes contracts. . . . Its blunt shape makes it easier to handle in processing. And its color and texture differ from other varieties. The color is brighter than other carrots. . . . It did appear that the plaintiff uses carrots in fifteen of its twenty-one soups. It also appeared that it uses these Chantenay carrots diced in some of them and that the appearance is uniform. The preservation of uniformity in appearance in a food article marketed throughout the country and sold under the manufacturer's name is a matter of considerable commercial significance and one which is properly considered in determining whether a substitute ingredient is just as good as the original. . . .

Judged by the general standards applicable to determining the adequacy of the legal remedy we think that on this point, the case is a proper one for equitable relief. *Id.* at 82.

this contract is illegal. All we say is that the sum total of its provisions drives too hard a bargain for a court of conscience to assist.⁵²

The case demonstrates the traditional equity approach to unconscionability. Numerous other decisions are in accord.⁵³ Moreover, it is not uncommon even in cases at law for a court, in ruling against the drafting party, to note that the contract is "one-sided."⁵⁴

B. *Unfair Surprise*

Unfair surprise is found in several situations. One is where the ignorance of a party or carelessness on his part, known to the other party, results in a contract with a term or terms not understood or intended by him and extremely favorable to the other party. A second situation involves forms read or understood only with great difficulty by reason of their appearance in very fine print, their being printed on both sides of translucent paper, or their being misleadingly arranged. These two situations approach, if they do not pass, the borderline of sharp practice, fraud and mistake. A third situation of unfair surprise is the attempted contracting out of the dominant purpose of the contract. A fourth type is a limitation of remedies asserted as a bar to personal injury claims in the case of new consumer goods.

1. ASSENT OBTAINED BY REASON OF IGNORANCE OR CARELESSNESS OF ONE PARTY KNOWN TO OTHER

Several of the cases already discussed fall into this classification: *James v. Morgan*,⁵⁵ *Thornborough v. Whiteacre*,⁵⁶ and *Frostifresh Corp. v. Reynoso*.⁵⁷

However, one of the more famous cases of unfair surprise involved the United States itself. In *Hume v. United States*⁵⁸ the claimant bid on sixteen items, including shucks, required for a government hospital. The printed bid forms were furnished by the government and the ac-

52. *Id.* at 84.

53. *Lear v. Chouteau*, 23 Ill. 39 (1859), quoted at note 17 *supra*, reached the same result on the same reasoning. *Nevada Nickel Syndicate v. National Nickel Co.*, 96 F. 133, 153-55 (D. Nev. 1899), contains an excellent discussion of the subject and cites numerous authorities.

54. For example, in *Denkin v. Sterner*, 10 Pa. D. & C.2d 203, 205 (C.P. 1956), discussed in text accompanying notes 26 and 27 *supra*, the court remarked:

Perusal of the agreement disclosed some peculiar features which would indicate that it was undoubtedly prepared by the sellers. . . .

Why anyone would sign such a biased and one-sided agreement is difficult to understand.

55. 1 Lev. 111, 83 Eng. Rep. 323 (1663), discussed in text accompanying notes 11 and 12 *supra*.

56. 6 Mod. 305 (1705), discussed in text accompanying note 13 *supra*.

57. 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd in part*, 281 N.Y.S.2d 964 (App. 2d Dep't 1967), discussed in text accompanying note 25 *supra*.

58. 21 Ct. Cl. 328 (1886), *aff'd*, 132 U. S. 406 (1889).

companying schedule referred to estimated quantities—pound, bushel, ton, barrel, gallon, gross, and the like, as the case might be. In the case of shucks, on which only the claimant bid, the estimated quantity column on the government form read "pound." In fact, the government's custom was to buy shucks by the hundredweight, and the reference to "pounds" on the schedule was attributable to a clerical error in the printing of the bid forms. The claimant's bid was sixty cents per pound. At the time the market value of shucks ranged from \$12 to \$35 a ton, or from 6 mills to 1¾ cents a pound, depending on quality and other factors. The government appropriated the 6,720 pounds of shucks tendered by the claimant before discovery of the error on its part and of the claimant's assertion that there was no error. The government's refusal to pay the contract price asserted by the claimant (\$4,032) on the ground that it was grossly excessive forced the claimant to sue for it in the Court of Claims. The government pleaded clerical error on its part and charged the claimant with attempting to practice a fraud in taking advantage of the mistake. The government asserted that the contract price was \$40.32 on the basis that its intended quantity in hundredweights should govern. The claimant filed a replication denying any mistake on his part and asserting that "the whole transaction was in absolute good faith in the ordinary course of business." The Court of Claims awarded the claimant \$117.60, the highest market value. In awarding only this amount, the court held that the price term was unconscionable, since it was nearly forty times the highest value of shucks.⁵⁹ In affirming, on the appeals of both the claimant and the government, the Supreme Court commented on the replication of the claimant as follows:

The claimant by his replication insists that the price of sixty cents per pound for shucks "was the price at which he intended to bid, and that there was no mistake on his part in making out the bid." This is an admission, when taken with the findings of fact, that he designed to commit the agents of the government to a contract "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," and is fatal to his recovery according to the letter of the contract.⁶⁰

2. ASSENT OBTAINED BY SIGNATURE TO FORMS DIFFICULT TO READ OR DECEPTIVELY ARRANGED

Case illustrations involving this factual situation are indeed legion. *Williams v. Walker-Thomas Furniture Co.*,⁶¹ discussed previously, is an excellent example. The Court of Appeals for the District of Columbia

59. 21 Ct. Cl. at 330-32. The court cited *James v. Morgan*, 1 Lev. 111, 83 Eng. Rep. 323 (1663), and the first two Massachusetts cases cited in note 21 *supra*, in support of its holding.

60. 132 U.S. 406, 415 (1889).

61. 350 F.2d 445 (D.C. Cir. 1965), discussed in text accompanying notes 7 through 9 *supra*.

there mentioned "important terms hidden in a maze of fine print." Burying key terms of an agreement in fine print among a mass of unimportant material has been the subject of discussion elsewhere.⁶² Indeed some forms seem almost designed to discourage reading, such as a form printed on both sides of translucent paper or in ink of a color approaching that of the paper used, so as to require that the paper be held at an angle to the light in order to be read.⁶³ Courts are understandably reluctant to hold that a signature to such a form means assent to all contained therein.

One of the illustrative cases in the comment to section 2-302, *New Prague Flouring Mill Co. v. Spears*,⁶⁴ involved a form contract containing some 4,000 words reproduced on both sides of a single sheet of paper of the size of a leaf of the Iowa Reports, five inches in width by eight inches in length. The Supreme Court of Iowa contrasted its appearance in this small type with its reproduction, when set in type required for abstracts of printed records filed with the court, of nine full pages with single spacing.⁶⁵

By the very reason of their engagement in an occupation which requires them to do a great deal of reading, judges are understandably sympathetic with arguments that contracts or clauses were not read because they appeared in very fine print. The Code concept of conspicuous-

62. Note, *Contract Clauses in Fine Print*, 63 HARV. L. REV. 494 (1950). A practical discussion of the subject, calling attention to the Code requirement of conspicuousness (§ 1-201(10)) in certain situations, may be found in Vogel and Bernstein, *Fine Print*, 21 BUS. LAW. 544 (1966).

An entertaining discussion of the subject matter may be found in Mellinkoff, *How to Make Contracts Illegible*, 5 STAN. L. REV. 418 (1953). One of the methods is described as follows:

Get it out of Sight

On the sound premise that "if they can't see it, they can't read it," numerous contractual provisions are entirely removed from the printed page or the line of sight. Devices to hide the body are varied. There is, for example, the customary practice of innkeepers to post their finely printed notice of limitation of liability on the inside of a closet door, preferably underneath a coathook. *Id.* at 424.

63. Reference to a printed form of the second type is made in Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966), on the first page.

64. 194 Iowa 417, 189 N.W. 815 (1922). See note 2 *supra*.

65. The factor of fine print was aggravated by the factor of the condition of defendant's eyesight; without his glasses, he was unable to read the contract himself. Of the contract itself the Supreme Court of Iowa observed:

In view of our conclusion that the judgment appealed from may be affirmed upon grounds already discussed, we do not attempt to decide the question raised by counsel whether the order in suit discloses upon its face a legally enforceable contract. It is enough at this time to say that, if it be a contract it is like the Apostle's conception of the human frame, "fearfully and wonderfully made," and one upon the construction and effect of which a competent and experienced lawyer may spend days of careful study without exhausting its possibilities. *Id.* at 438-39, 189 N.W. at 824.

The type of damage clause involved was rejected by an Illinois court as "unconscionable." See notes 45-47 *supra* and accompanying text.

ness⁶⁶ probably has its roots in the judicial dislike of fine print. The same observation may be made with respect to judicial disapproval of deceptively arranged forms. Such forms may also constitute the basis of unfair surprise, even though the print may sometimes be easily read. Even busy executives have been fooled by such forms. Two illustrations make the point.

In *International Transp. Ass'n v. Atlantic Canning Co.*⁶⁷ the president of a canning company carelessly signed deceptively arranged documents received through the mail, unaware that they represented a contract. No oral communication was involved. Enforcement of the contract was denied on a finding of fraud, although the Supreme Court of Iowa observed, "The fraud, if any, existing in this case consisted of the strata-gem, trick or device by which the defendant was induced to sign the contract without reading it."⁶⁸ The fraud was found in the letter and sheet containing plaintiff's offer, in the arrangement of their contents, the type of printing used, and in the manner in which they were folded and enclosed in the envelope.

In *Otto Baedeker & Associates, Inc. v. Hamtramck State Bank*⁶⁹ the cashier of a bank signed a form received through the mail under circumstances similar to the previous case. Again, the court denied enforcement on the ground of fraud with the observation:

The instrument undoubtedly expresses the obligation to pay in such manner that it would be recognized by an ordinarily intelligent person who will take the time to read the instrument. *In fact, it is evident that one would need to be careless to fail to appreciate the obligation.* On the other hand, the general aspect of the instrument, the stating of the offer in small type, the separation of the acceptance from the offer, the blocking of advertising matter in the form, the circuitry of the language, the inclusion in the contract of a questionnaire associated by the trade with free representation and which covers more than one-half of the sheet, make up an instrument in which the obligation to pay does not stand out and it cannot be said, as a matter of law, that a busy person, accustomed to receiving inquiries of the same general form, would not be deceived by it into signing without reading.⁷⁰

66. § 1-201 (10). It provides as follows:

"Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any standard term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.

67. 216 Iowa 339, 249 N.W. 240 (1933).

68. *Id.* at 344, 249 N.W. at 242.

69. 257 Mich. 435, 241 N.W. 249 (1932).

70. *Id.* at 440-41, 241 N.W. at 250 (emphasis added).

The form was designed to "capitalize [on] carelessness."

Additional cases may be cited in which the courts have commented upon the misleading character of printed forms in declining to enforce provisions contained in them.⁷¹

Implicit in the holdings of cases like these is recognition by the courts that it is unfair to hold persons to the terms of documents which they have signed but which they in reasonable probability did not read or understand because the terms appeared in print difficult to read or were contained in deceptively arranged forms.

3. CONTRACTING OUT OF DOMINANT PURPOSE OF CONTRACT

Another situation of unfair surprise is the attempted elimination of the dominant purpose of the sales contract.⁷² This situation has been dealt with in recent English decisional law applying what has become known as the doctrine of fundamental breach, *i.e.*, the core of the contract cannot be extracted by any language therein.⁷³

*Andrew Bros. Ltd. v. Singer & Co.*⁷⁴ is one of the case illustrations in point in the comment to section 2-302. By a written agreement the defendant sellers appointed the plaintiffs sole dealers within a designated area for the sale of "new Singer cars," and plaintiffs agreed to purchase from the defendants a specified number of these cars. Clause 5 in the agreement stated: "All cars sold by the company [the defendants] are subject to the terms of the warranty set out in Schedule No. 3 of this agreement, and all conditions, warranties and liabilities implied by statute, common law or otherwise are excluded." The warranty contained in Schedule No. 3, limited to new vehicles manufactured by defendants, was "in lieu of any warranty (or condition) implied by common law, statute or otherwise as to the quality or fitness for their purpose" and made the sole obligation of the defendants to replace or repair within twelve months of the date of delivery of any vehicle any fault disclosed and due to defective materials or workmanship. Plaintiffs gave an order to defendants for a new Singer car and accepted delivery thereof at defendants' works at Birmingham. The speedometer then read 550 odd miles, and a parking ticket issued at Leicester was found in the pocket. Plaintiffs asserted a claim for breach of warranty against defendants in failing to supply a new car. Defendants relied upon the exclusion clause as exempting them

71. *Hufford v. National Retailer-Owned Grocers, Inc.*, 16 Ill. App. 2d 1, 6, 147 N.E.2d 437, 439 (1957), and *Cox v. Greenlease-Lied Motors*, 134 Neb. 1, 7, 277 N.W. 819, 822 (1938), are examples.

72. See comment to § 2-302 quoted *supra* in text accompanying note 2.

73. For an excellent discussion of the subject, see Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178 (1964).

74. [1934] 1 K.B. 17 (C.A.)

from liability. Both the trial and the reviewing courts held that the term "new Singer car" was an express, not an implied, term of the contract and that since a "new" Singer car had not been delivered, defendants were liable for breach of contract.⁷⁵

*Karsales, Ltd. v. Wallis*⁷⁶ is a more recent, and a better, illustration. Defendant, a garage owner in Bagshot, was shown a second-hand Buick in excellent condition and arranged to buy it. Defendant signed hire-purchase contract papers for it in blank in December, 1954. The details were completed and the contract was dated February 10, 1955. Defendant accepted his copy without objection. About a week later the car was left outside his garage late at night. Defendant examined it the next morning and found it was the same Buick car he had inspected previously—in the sense that it had the same body and engine and registration number. In other respects, it was not the same car. It had evidently been towed to defendant's garage. A rope was attached to the front bumper. The tires had been changed, old ones having been substituted for new ones. The chrome had been removed. The valves were burned. The cylinder head was off. Two pistons were broken. "The car would not go." Defendant refused to accept it. Plaintiff relied upon a clause in the hire-purchase contract which read, "No condition or warranty that the vehicle is road-worthy, or as to its age, condition or fitness for any purpose is given by the owner or implied herein." The Court of Appeal applied the doctrine of fundamental breach in rejecting plaintiff's argument based on the exempting clause. Lord Denning's opinion states the doctrine clearly and forcefully:

Notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference

75. Lord Scrutton observed:

In my view there has been in this case a breach of an express term of the contract. If a vendor desires to protect himself from liability in such a case he must do so by much clearer language than this, which, in my opinion, does not exempt the defendants from liability where they have failed to comply with the express term of the contract. *Id.* at 23.

A like holding was made in *Fairbanks Morse & Co. v. Consolidated Fisheries Co.*, 190 F.2d 817 (3d Cir. 1951). Defendant purchased a generator from plaintiff. The description of it in the contract documents included the designation "1136 KW." The generator would not supply electric power of the quantity of 1136 kilowatts. Defendant asserted breach of express warranty in an action by the seller for the balance of the price. The seller relied upon two disclaimer clauses. The court held that the clauses did not negate the express warranties inherent in the detailed description of the equipment.

76. [1956] 1 W.L.R. 936 (C.A.). The facts are simplified for purposes of discussion. Plaintiff was an intermediary who presented the hire-purchase contract for the car to a finance company after acquiring it from the seller, one Stinton. Stinton retained possession of the car until the paper work had been completed and he had been paid by the hire-purchase finance company. The finance company made no inspection of the car. The finance company subsequently assigned its rights under the hire-purchase contract to the plaintiff.

or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract. The thing to do is to look at the contract apart from the exempting clauses and see what are the terms, express or implied, which impose an obligation on the party. If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses.⁷⁷

In the case at hand the defendant bargained for something that "would go," not the practical equivalent of a pile of junk that "would not go." Under any reasonable standard there was unfair surprise.

4. CONTRACTUAL LIMITATIONS OF REMEDIES WITH RESPECT TO NEW CONSUMER GOODS

An additional area in which unfair surprise may be found is the purchase by a consumer of new goods. The consumer understandably expects that these goods carry some warranties of merchantability and fitness for purpose, whether express or implied. In any event, he does not normally expect any exclusion of warranties or limitation of remedies to bar any claim for personal injury against the dealer or manufacturer if these warranties are breached. Normally, manufacturers of new goods do not, for practical reasons, exclude all warranties, express or implied, with respect to their product.⁷⁸ Rather, they usually make certain express

77. *Id.* at 940.

78. The practical reasons are self-interest, pride in their product, and customer relationships. They believe, and they want the customer to believe, that he is getting something for his money.

However, a seller of second-hand goods stands in a different position. He generally does not have knowledge of the use of the goods in the hands of the first user or the treatment to which they were subjected. Quite understandably he may want to disclaim warranties of quality and fitness for purpose. Under § 2-316(2)(a) he can accomplish this by the use of the words "as is" or "with all faults." The same observation may be made of the seller of defective goods rejected by the manufacturer and known as "seconds" or "rejects" and of goods subjected to storage for an unusually long period of time (e.g., war surplus goods). The courts have enforced disclaimers in these situations without any hesitation: *Garofalo Co. v. St. Mary's Packing Co.*, 339 Ill. App. 412, 90 N.E.2d 292 (1950) (sale of 900 to 1000 cases of "rusty" cans of tomato juice "as is no recourse"); *Rogers v. Hale*, 205 Iowa 557, 218 N.W. 264 (1928) (sale of two rebuilt taxicabs "as is"); *Roby Motors Co. v. Cade*, 158 So. 840 (La. App. 1935) (sale of second-hand truck "as is"); *Johnson v. Waisman Bros.*, 93 N.H. 133, 36 A.2d 634 (1944) (sale of steam shovel 25 or 30 years old which had not been in use for many years "as is and where is"); *Industrial Rayon Corp. v. Clifton Yarn Mills, Inc.*, 310 Pa. 322, 165 A. 385 (1933) (sale of "inferior" rayon yarn "as is"); *Pokrajac v. Wade Motors, Inc.*, 266 Wis. 398, 63 N.W.2d 720 (1954) (buyer of a used car on an "as is" and "with no guarantee" basis had no cause of action against seller by reason of defective brakes causing personal injury to buyer); *American Elastics, Inc. v. United States*, 187 F.2d 109 (2d Cir. 1951), *cert. denied*, 342 U.S. 829 (1951) (sale of elastic webbing material as war surplus material on "as is" and "where is" basis); *United States v. Atlanta Wrecking Co.*, 8 F.2d 542 (N.D. Ga. 1925) (auction sale of tent poles as government surplus property on "as is" basis).

However, absent a disclaimer complying with the requirements of § 2-316, the customary implied warranties of merchantability (§ 2-314) and fitness for purpose (§ 2-315) may be incorporated into a sale of second-hand goods. A warranty in the case of second-hand goods may also exist by reason of a statute other than the Code. See note 84 *infra*. More-

warranties, exclude all other warranties, including implied warranties, and limit, or attempt to limit, their obligation under the express warranty to repair or replacement of parts found to be of defective material or workmanship. From a practical standpoint the problem of unfair surprise in this situation exists primarily with respect to contractual limitation of remedies.

Section 2-719(3) of the Code provides that a limitation of consequential damages for personal injury in the case of consumer goods is *prima facie* unconscionable. In *Haley v. Merit Chevrolet, Inc.*,⁷⁹ an Illinois case arising before the effective date of the Code, the court held that an attempt by an automobile dealer to eliminate all obligations other than replacement of defective parts was "violative of public policy" and void and could not bar a claim for personal injury on the part of the buyer and a companion who were injured in an accident attributable to a defect in the car. This is the same result contemplated by section 2-719(3), in which unconscionability is equated to violation of public policy.⁸⁰

Both aspects of unconscionability—oppression and unfair surprise—exist in this situation, although the latter may predominate. The element of unfair surprise was noted in *Henningsen v. Bloomfield Motors, Inc.*⁸¹ The Supreme Court of New Jersey there held that an automobile manufacturer's disclaimer of implied warranty of merchantability and the obligations arising therefrom was contrary to public policy.⁸² The court made reference to fine print and lack of clarity of the language to advise the purchaser that he was relinquishing any claim for personal injury. For practical business reasons few manufacturers of new goods would phrase any limitation of their express warranty obligation in language so clear.⁸³ In fact, despite the trend of decisional and statutory

over, the express warranty of some motor car manufacturers may cover the second and even third owner. See note 85 *infra*.

79. 67 Ill. App. 2d 19, 214 N.E.2d 347 (1966).

80. See comment to § 2-302 quoted in text accompanying note 2 *supra*.

81. 32 N.J. 358, 161 A.2d 69 (1960).

82. This decision antedates the effective date of the Code in New Jersey. What the result would be under the Code remains to be seen. Subsection (2) of § 2-316 provides in part:

Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

In Skilton and Helstad, *Protection of the Installment Buyer of Goods Under the Uniform Commercial Code*, 65 MICH. L. REV. 1465, 1476 (1967), the authors observe:

There is nothing in the comments to section 2-316 which suggests that a disclaimer complying with section 2-316 (2) must still run the gantlet [sic] of section 2-302. Curiously, section 2-719, which applies when a contract clause limits the remedies for breach of warranty, expressly provides that "limitation of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable." It would be illogical in our view if the same were not true when the terms of the contract take the form of an exclusion of warranty, rather than a limitation of remedy.

83. Among other reasons, some of which are set forth in the first paragraph of note 78 *supra*, its presence, after due publicity, would create a problem for the sales force.

law⁸⁴ automobile manufacturers have in recent years employed an expanded express warranty effectively as a sales device and have only recently shown signs of restricting the scope of these warranties.⁸⁵

The foregoing discussion adequately demonstrates that there is no absence of guidelines for determining unconscionability. The commercial lawyer concerned with the problem has an ample basis for predictability of results on the basis of the decisions herein discussed and others like them.

V. CONSEQUENCES OF HOLDING OF UNCONSCIONABILITY

The next question that may be posed is—what happens when a contract or a clause thereof is held unconscionable? Section 2-302 states that when a contract or a clause thereof has been found unconscionable, the court may refuse to enforce the contract, may enforce the remainder of the contract without the unconscionable clause or may so limit the application of any unconscionable clause so as to avoid any unconscionable result. While the consequences vary in accordance with the forum in which the defense is asserted, the results reached in pre-Code decisions indicate the result that would probably be reached under the Code.

84. The decisional law is the developing case law following *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). See, e.g., *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965). Recent developments in statutory law have occurred at both the federal and the state level.

At the federal level is the enactment of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1424 (Supp. II, 1967). Subchapter 1 thereof deals with motor vehicle safety standards to be established by a federal authority, originally the Secretary of Commerce but now the Secretary of Transportation. See 49 U.S.C. § 1652 (Supp. II, 1967). Federal legislation in the area of warranty regulation may also be forthcoming. Senators Magnuson and Hayden have introduced bills in the Ninetieth Congress which would provide federal regulation of warranties offered by manufacturers of new motor cars and new household appliances. *Miami Herald*, Dec. 8, 1967, p. 13-D, col. 1. For further particulars, see S. 2726, 2727, and 2728, 90th Cong., 1st Sess.

At the state level has been the enactment of § 2-719 as part of the Code on a nearly nationwide basis. A more recent development is a provision added to the Illinois Consumer Fraud Act and applying to any retail sale to a consumer of a new or used motor vehicle made on or after January 1, 1968. The provision specifies the obligation of the dealer to the consumer for a percentage of the cost of repairs of the power train components for a period of thirty days from the date of delivery. The percentage varies with the age of the vehicle. Repairs necessitated by abuse, negligence or collision are excluded. The dealer may negotiate a sale not subject to the provision by inserting as part of the sales agreement a legend, in at least 10-point bold type immediately above the signature line, reading:

"THIS VEHICLE IS SOLD AS IS WITH NO WARRANTY
AS TO MECHANICAL CONDITION"

The provision does not preclude issuance of a warranty of a motor vehicle dealer or motor car manufacturer that meets or exceeds its requirements. For further particulars, see ILL. REV. STAT. ch. 121½, § 262L (1967).

85. *Wall St. J.*, Sept. 8, 1967, p. 3, col. 1-2. The warranty of one manufacturer on 1968 cars will be limited to first and second registered owners. Currently the warranty covers all cars for five years or 50,000 miles, whichever occurs first, regardless of the

For example, in *Hume v. United States*, previously discussed,⁸⁶ the Court of Claims found a price term unconscionable. On the claimant's theory the court would have rendered a judgment for \$4,032. On the government's theory the court would have rendered a judgment for \$40.32. The court rendered a judgment for an amount of \$117.00, a reasonable price and one most favorable to the claimant, since it represented the highest market value of the goods at the governing time. Both the claimant and the government appealed. The Supreme Court affirmed. The Code contemplates the same result. The result is a contract in which, after deletion of the unconscionable price term, nothing is said as to price; and under section 2-305 the parties have agreed to pay a reasonable price.⁸⁷

Another example is *Marshall Milling Co. v. Rosenbluth*.⁸⁸ The court there voided a liquidated damages clause as "unconscionable" and applied the normal damage rule, namely, the difference between the contract price and the market price of the goods at the time of breach. The Code contemplates the same result, since with the deletion of the damage clause, section 2-708 would apply.⁸⁹

We have already noted how the reviewing court handled the problem of a contract with an unconscionable price term under the Code in *Frostifresh Corp. v. Reynoso*.⁹⁰ The result is similar to that reached in *James v. Morgan*,⁹¹ decided 304 years earlier.

In equity the consequence of unconscionability consisting of an extremely one-sided contract, one lacking in any reciprocity, has traditionally been the denial of specific performance, as *Campbell Soup Co.*

number of owners. It is said that 85% of all cars are in the hands of second or third owners after five years.

86. 21 Ct. Cl. 328 (1886), *aff'd*, 132 U.S. 406 (1889). See text accompanying notes 58-60 *supra*.

87. Section 2-305 provides in part:

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if

(a) nothing is said as to price;

88. 231 Ill. App. 325 (1924).

89. Section 2-708 provides:

(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

90. See text accompanying note 25 *supra*.

91. 1 Lev. 111, 83 Eng. Rep. 323 (1663). See text accompanying note 11 *supra*.

*v. Wentz*⁹² illustrates. In suits for specific performance under section 2-716,⁹³ application of these equity decisions should follow.

VI. AVOIDANCE AND MINIMIZING OF PROBLEM OF UNCONSCIONABILITY

Unconscionability should be no problem for the majority of commercial lawyers. One obvious way not to become involved with the problem, is to avoid the use of clearly objectionable terms in drafting a contract. For example, a waiver of claims for personal injury in the case of consumer goods would be *prima facie* unconscionable under section 2-719. Nothing is gained, and something may be lost, by putting such a clause into a sales agreement. If an occasion arises for judicial enforcement of the agreement in a situation not involving the clause, even the presence of such a clause may well create an adverse reaction on the part of the court.⁹⁴ Most commercial lawyers are cognizant of this consideration and avoid use of any questionable provisions in the drafting of contracts.

Claims of unconscionability arise more frequently from the use of forms difficult to read by reason of fine print or the type of paper or type of ink and from the use of agreements lacking reciprocity of obligation.

Exposure to the claim of unconscionability may be lessened considerably, if not altogether removed, by the printing of forms in clear, readable type⁹⁵ on opaque paper. The "split-ticket" purchase order and acceptance forms⁹⁶ with subject-matter captions in larger size type, used

92. 172 F.2d 80 (3d Cir. 1948). See text accompanying notes 50-52 *supra*. The value of legal rights after rejection of efforts to enforce a contract in equity is questionable. See Frank and Endicott, *Defenses in Equity and "Legal Rights,"* 14 LA. L. REV. 380 (1954).

93. Section 2-716 provides in part: "(1) Specific performance may be decreed where the goods are unique or in other proper circumstances."

94. *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948), demonstrates the point. Enforcement was not sought of any of the provisions which the court found, in the aggregate, "hard."

95. Readable type does not necessarily mean large-size type. If smaller-size type is clear and widely spaced, it may sometimes be read as well as larger-size, closely spaced type. Some provisions must be in type that is "conspicuous," defined in § 1-201(10), if they are to be effective—*e.g.*, disclaimers of implied warranties of merchantability and fitness for purpose. See § 2-316(2).

96. Both sides of an 8½ x 11 sheet are used. This space is ample for necessary provisions in most cases and permits clear arrangement and affords ease of readability of content. See Vogal and Bernstein, *Fine Print*, 21 BUS. LAW. 544 (1966). The legend at the bottom of the face side should conspicuously refer to continuance of terms on the reverse side. Compare Application of Central States Paper & Bag Co., 132 N.Y.S.2d 69 (Sup. Ct.), *aff'd*, 284 App. Div. 841, 134 N.Y.S.2d 271 (1st Dep't) (1954), *motion for leave to appeal denied*, 307 N.Y. 939, 122 N.E.2d 336 (1954), and Application of Liberty Country Wear, Inc.; 197 Misc. 581, 96 N.Y.S.2d 134 (Sup. Ct. 1950), *with* *Hunt v. Perkins Mach. Co.*, 226 N.E.2d 228 (Mass. 1967), and *Arthur Philip Export Corp. v. Leathertone, Inc.*, 275 App. Div. 102, 87 N.Y.S.2d 665 (1st Dep't 1949). In the first two cases arbitration clauses appearing on the reverse side of printed form agreements were held effective as part of the agreement by reason of a clear and conspicuous reference on the face side to terms on the reverse side. In the fourth case an arbitration clause on the reverse side of a printed form agreement was

by many large companies, are illustrative. Anyone taking the time can read them easily. Courts are much more likely to reject a claim that the terms of a printed form were not read where the party against whom enforcement is sought could easily have read them had he taken the time to do so.

Finally, there is the problem of balancing extremely one-sided agreements—those wanting in reciprocity. The two *Campbell Soup Co.* decisions provide an object lesson. In *Campbell Soup Co. v. Wentz*⁹⁷ we observed that the Court of Appeals for the Third Circuit declined enforcement of a contract between Campbell and carrot growers because of the one-sided character of the agreement and Campbell's "having driven too hard a bargain." By the time *Campbell Soup Co. v. Diehm*⁹⁸ presented the district court with a complaint for specific performance of a contract with tomato growers, Campbell had revised its contract and balanced its terms. In comparing the contract clause for clause with the one in *Wentz*, the court noted that the objectionable provisions had been deleted and the contract balanced. Specific performance was granted with the observation:

All of the provisions of the contracts herein are mutual and benefit the farmers and the Company equally. For example, the provision relating to contingencies exonerates both the growers and Campbell of default or delay in certain circumstances.⁹⁹

VII. IMPACT OF SECTION 2-302

It is extremely doubtful that section 2-302 will produce any results different from those produced before the Code. Any court that does not want to enforce a contract or any clause of a contract which it thinks is unfair for any reason is always ingenious enough to find some way in

denied effect by reason of an ambiguous reference ("See also back") in small print in an inconspicuous place on the face side. In the third case effect was denied to a warranty disclaimer clause on the reverse side of a printed form agreement, which clause complied with the requirements of § 2-316 concerning conspicuousness, by reason of an ambiguous reference on the face side of the form and the fact that the forms were bound into a multiple copy pad so that a buyer would ordinarily see the reverse side only after he had signed the agreement.

97. 172 F.2d 80 (3d Cir. 1948), discussed in text accompanying notes 50-52 *supra*.

98. 111 F. Supp. 211 (E.D. Pa. 1952).

99. *Id.* at 214. The court further noted:

The Court of Appeals in the *Wentz* case, *supra*, made mention of the provision in the contract before it specifying that Campbell's determination of conformance with specifications would be conclusive. This provision has been eliminated in the present contracts. Conformance now depends on standards established by the United States Department of Agriculture, and grading is performed by graders licensed by the United States Department of Agriculture and assigned to the loading platforms by the State Department of Agriculture.

The present contracts remove entirely from the discretion of the plaintiffs the determination of the acceptability of the quality of the tomatoes.

Finally, the Court of Appeals in the *Wentz* case, *supra*, made mention of the damages for breach of contract by Campbell. The contracts here involved contain no provision with respect to liquidated damages.

which to deny it enforcement. Many courts have forthrightly characterized contracts or clauses as "unconscionable" and denied them enforcement long before the origin of the Uniform Commercial Code. In this respect, the controversy over section 2-302 has been a tempest in a teapot.

It was the hope of the draftsmen of the Code that courts would take advantage of section 2-302 and further develop the law concerning unconscionability and that the precedents which they would create would be of value to commercial lawyers in drafting contracts.¹⁰⁰ Whether this hope of the draftsmen will be realized remains to be seen.

Perhaps the greatest impact of section 2-302 has been to focus attention upon the concept of unconscionability. While section 2-302 is limited in scope to article 2, section 1-103 clarifies that the concept, as developed at common law and in equity, is not so limited.¹⁰¹

100. Indeed, the first Campbell Soup Co. case was demonstrably valuable to Campbell. See notes 97-99 *supra* and accompanying text.

101. Section 1-103 clarifies the role of the Code as a displacing statute. It provides: Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating cause shall supplement its provisions.