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Contracts--Developing Concepts of Unconscionability

Kevin D. Dolan
West Virginia University College of Law

CONTRACTS—DEVELOPING CONCEPTS OF UNCONSCIONABILITY

Section 2-302 of the Uniform Commercial Code[1] is a widely discussed and controversial statement of the law of unconscionability. It was a part of the original UCC as adopted by Pennsylvania in 1953, but some states elected to omit that section when they accepted the UCC.[2] There are three fundamental reasons for their not adopting the section. The first objection is that the section goes against the security of the transaction by allowing the courts to remake parts of the contract. The second stems from the fact that the section limits the parties' freedom to contract because it is often interpreted to allow an inquiry into the fairness of the exchange.[3] The third involves the vagueness of the section due to its lack of definitions or any precise explanation of the concept.[4] All of these objections are legitimate to some extent, but there are other factors which outweigh the negative aspects and make the adoption of section 2-302 advantageous.

The law of unconscionability under section 2-302 has expanded greatly in the last ten years and is still developing. The courts today are using the section more readily in settling disputes. This could be due either to a better understanding by the courts of what the section encompasses or to a feeling on the part of the courts that this is the best way to an equitable result in most cases. Whatever the reasons, the law has developed quickly, and it is important to see where the law stands at the present time.

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[1] U.C.C. § 2-302 provides:

(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.

[2] California and North Carolina did not include the section when they adopted the UCC, but North Carolina incorporated the section six years later in 1971. California has still not adopted it.

[3] Comment, *Unconscionable Sales Contracts and UCC Section 2-302,* 45 VA. L. REV. 583 (1959).

[4] Bush & Hurd, *Unconscionability: A Matter of Conscience for California Consumers,* 25 HASTINGS L.J. 1 (1973).

MEANING OF THE WORD UNCONSCIONABILITY

To begin a discussion of any concept it is first necessary to define that concept. Unconscionability is a doctrine that has been known in our courtrooms since the nineteenth century. One of the first cases to discuss the issue was decided in 1889, when an unconscionable bargain was described as one "which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other. . . ."[5] This definition is a popular one and has been mentioned often in more recent cases.[6] Another definition commonly offered involves unconscionability as affronting one's sense of decency. A promisor can be relieved of his duty only "when the transaction affronts the sense of decency without which business is mere predation and the administration of justice an exercise in bookkeeping."[7] The first definition seems to be based only on what transpires between the two contracting parties and what results are received by them, while the second is just as concerned about the transaction's effect on society and the business world. A final definition describes unconscionability as "improvidence, total one-sidedness, oppression or unfairness in other respects, as distinguished from illegality or fraud."[8] This definition seems to closely follow the intent of the UCC as alluded to in Comment 1 of section 2-302 which says, in essence, that a clause must be one sided to be unconscionable, and that the principle overriding the entire section is the prevention of oppression and unfair surprise.[9]

Unconscionability or an unconscionable term is not defined in the UCC nor is there any place where the specific elements involved are set out. It has been suggested that this omission was an oversight by the draftsmen, but the better view seems to be that it was intended. A strict definition of the word unconscionability would have a substantial effect on our commercial law. If there were a strict definition of the word, instead of general guidelines for the court to apply in determining what is unconscionable, it would be possible for a party to draft a contract which barely avoided coming within the definition but violated the spirit of

[5] Hume v. United States, 132 U.S. 406, 410 (1889).

[6] *See, e.g.,* Neal v. Lacob, 334 N.E.2d 435, 439 (Ill. 1975); Martin v. Approved Bancredit Corp., 224 Ga. 550, 553, 163 S.E.2d 885, 887 (1969).

[7] Gimble Bros. Inc. v. Swift, 62 Misc. 2d 156, 158, 307 N.Y.S.2d 952, 954 (1969).

[8] Annot., 18 A.L.R.3d 1305, 1306 (1968).

[9] U.C.C. § 2-302, Comment 1.

unconscionability, thereby defeating the purpose of the doctrine.[10] Unconscionability is a doctrine that should be decided on a case-by-case basis because what is unconscionable in one factual setting may not be in another. It is basically a subjective theory. It seems this was known to the draftsmen because they included section 2-302(2) which directs the court to look at the transaction in the commercial setting[11] and leads to different results in different settings. This argues for the proposition that the omission of the definition was not a result of oversight but rather was due to the careful reasoning and considerations of the authors. What is unconscionable is a matter left up to the judge's determination since, according to section 2-302(1), unconscionability is a matter of law to be decided in the court's discretion.

The section not only does not define unconscionability, but it does not even suggest to the courts what tools they can apply to label a contract unconscionable. Karl Llewellyn, the principal draftsman of section 2-302, said the unconscionable provision of the UCC will lead appellate courts into a "machinery for striking down where striking down is needed. . . ."[12] But the section does not provide the machinery; it merely leads the courts toward the machinery that the courts themselves must create.[13] The thought here is that requiring the courts to create their own standards of unconscionability will result in more predictability and allow them to develop the law in accordance with the needs of society.[14] The courts will then be able to set their own standards for unconscionability and can decide subsequent cases on precedent instead of interpretation of statutes. If the draftsmen of the section had supplied a detailed definition of the word, the development of the case law would most likely have been choked off. The draftsmen probably came to the conclusion that with the continuing development of our economic system and the changing ideas, concepts, and values that accompany it, the law must be free to evolve at the same time. The easiest way to allow this is not to restrict the courts with rigid definitions and tests which may envelop only certain

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[10] Spanogle, *Analyzing Unconscionability Problems,* 117 U. PA. L. REV. 931, 941 (1969) [hereinafter cited as Spanogle].

[11] See note 1 *supra.*

[12] K. LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 369 (1960).

[13] Murray, *Unconscionability: Unconscionability,* 31 U. PITT. L. REV. 1, 36 (1969).

[14] Kugler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971).

contingencies, but to give the courts a broad and flexible standard with which to work.

While the UCC does not give us a working definition of unconscionability, it does provide a few hints we can use. The section itself states that unconscionability is a matter of law to be decided by the court and not the jury.[15] This question of law is to be decided in consideration of the underlying questions of fact that existed at the time the contract was made.[16] The facts are looked to for the purpose of finding contracts that are so one-sided as to make the contract or clause unconscionable. The principle involved here, according to the Comment, is the prevention of oppression and unfair surprise. But the prevention of these procedural abuses[17] is not all that was contemplated by Llewellyn. He also indicated that it was necessary to find some unreasonable or unfair term in the contract, since the main purpose of section 2-302 is to relieve one of a grossly unfair bargain. The draftsmen's Comment continues with the notion that the principle of prevention of oppression and unfair surprise should in no way amount to a disturbance of the allocation of risks due to superior bargaining power. The section is not an attempt to alter one's freedom to contract, but is, rather, to be used to help those people, who, because of some handicap, either self-imposed or imposed on them by another, are unable to help themselves. Freedom to contract protects the contract when both parties have the ability to negotiate and make a meaningful choice as a result of the negotiations. When these abilities are abrogated or extinguished by the stronger party, freedom to contract is no longer present and the unconscionability doctrine should be invoked.

In considering section 2-302, it is important to remember the good faith requirement prevailing throughout the UCC.[18] This concept is especially pertinent when the seller is an experienced professional man and the buyer is so inexperienced or uneducated that he is open for exploitation. In this type of situation the good faith

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[15] U.C.C. § 2-302(1).

[16] W. L. May Co. v. Philco-Ford Corp., 273 Ore. 701, 543 P.2d 283 (1975).

[17] The term "abuses" is adopted here to refer to practices or circumstances which are factors in the determination that a contract is unconscionable. The term "unconscionability" is sometimes used in the same way, but the author finds that usage somewhat confusing.

[18] U.C.C. § 2-103(1)(b). "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

in which the bargaining was carried out is more closely scrutinized, and it is easy to equate unconscionability with deception, fraud, false pretense, and misrepresentation, even to the point that in extreme situations these concepts seemingly become interchangeable.[19] The better view seems to separate these concepts, and we should look to unconscionability only in the absence of fraud.

COURTS' INTERPRETATIONS OF UNCONSCIONABILITY

Most cases involving unconscionability have mentioned both procedural and substantive abuses. Procedural abuses are the oppression and unfair surprise referred to in Comment 1 of section 2-302. Professor Arthur A. Leff defines a procedural abuse as "bargaining naughtiness."[20] It involves any abuse that comes into play during the preliminary negotiations of the contract and usually results in a lack of meaningful choice for one party. Substantive abuses, on the other hand, are the evils in the final contract usually resulting in some harm being done to one party or some unnecessary burden being placed upon him.[21] The presence of these two abuses has been the deciding factor in most unconscionability cases.[22]

In searching for these abuses, it is important that we look at the circumstances existing at the time of the contract's execution. Evidence of the commercial background and setting and also the custom and usage in the trade involved can possibly alleviate the unconscionability of the transaction. Therefore, to label a contract unconscionable, three things are usually looked to: 1) the presence of a procedural abuse; 2) the presence of a substantive abuse; and 3) the commercial background or setting of the transaction. The two abuses will be discussed separately herein, in the context of the commercial background and setting.

Procedural Abuses

Unfair surprise is the deception found in the drafting of an instrument which involves concealing important facts in fine print or inserting clauses that a lay person may not be able to under-

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[19] Kugler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971).

[20] Leff, *Unconscionability and the Code: The Emperor's New Clause,* 115 U. PA. L. REV. 485, 487 (1967) [hereinafter cited as Leff].

[21] *Id.* at 487.

[22] J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 4-7 (1970).

stand.[23] There are overtones of fraud involved in this concept due to the concealment of facts, but unfair surprise does not involve the misrepresentation of a fact which is necessary for fraud.[24] Oppression, connoting duress, is basically the lack of opportunity to codetermine terms due to one party taking unfair advantage of his position.[25] The most common example is the contract of adhesion, where one party has no choice at all in the terms of the contract.

Unconscionability is not to be used merely for the sake of relieving one from a bad bargain brought on by an unequal allocation of risks resulting from superior bargaining power. It takes more than the bad bargain resulting from unequal bargaining power to constitute unconscionability. To be unconscionable, the procedural abuse of oppression or unfair surprise must be present along with the bad bargain. The procedural abuse is found when there is a lack of meaningful choice in the process of making the contract and is based on either consumer ignorance or the seller's deceptive practices. The presence of a procedural abuse is a subjective matter depending upon factors such as the education, relative knowledge of the subject, and economic situation of each contracting party. What is a procedural abuse with respect to one individual may not be such with another.

One type of consumer ignorance is brought out in the case of *Frostifresh v. Reynoso.*[26] The contract here involved the sale of a refrigerator-freezer to the Spanish-speaking defendants. The negotiations were conducted by a Spanish-speaking salesman who told the defendants they would have no trouble paying for the freezer because they would be paid commissions on the sales made to their friends and neighbors. During the negotiations, plaintiff's salesman was aware that Reynoso's job was to terminate in one week and should have realized this sale would be a financial hardship to him. The retail installment contract signed by defendants was written in English and was never translated or explained to them and provided for a contract sales price of $900 plus a credit charge of $245.88 making a total purchase price of $1145.88. The cost of the appliance to the plaintiff corporation was $348. The court found the contract unconscionable and said it was "too hard a

[23] Wille v. Southwestern Bell Tel. Co., 219 Kan. 755, 758, 549 P.2d 903, 906 (1976).

[24] Spanogle, *supra* note 10, at 943.

[25] *Id.* at 950.

[26] 52 Misc. 2d 26, 274 N.Y.S.2d 757 (1966).

bargain," but defendants were required to pay $348, the cost of the appliance.[27] The court did not label anything a procedural abuse in the opinion, but it did mention the "handicap" the defendants were under due to their lack of knowledge because of the language barrier.[28]

A more recent case involved a contract for the sale and installation of a gas conversion burner.[29] Jimeniz, a Spanish-speaking landlord in New York, was sued by Brooklyn Union Gas Company after having defaulted in his payments on the burner. The contract was written in English and was never explained to the defendant. Plaintiff never negotiated directly with Jimeniz but induced his tenants to put pressure on him to sign the contract. The court, in finding the contract unconscionable, stated that the bargaining positions were unequal due to the defendant's limited knowledge of English, and as a result of this language barrier, he could not protect himself. The court then took that responsibility on itself saying, "since he cannot protect himself, the court must protect him. . . ."[30]

Both cases seem to say that since the defendant had only a limited knowledge of English, the bargaining positions were unequal. It is easy to see that one's inability to read the contract can result in oppression and unfair surprise. It is oppressive in that it takes advantage of a person's language handicap, and unfair surprise comes about when one does not realize the effect of the clauses contained in the contract because he cannot read them.

A second type of consumer ignorance closely related to the first is the lack of education. In a 1971 Indiana case,[31] the printed, form contract involved was a gas station lease which contained a hold harmless clause providing for the indemnification of the oil company for any negligence by the oil company on the leased premises. Weaver had left high school after one and a half years and had no help in deciding on the agreement, nor did defendant explain the hold harmless clause to him. Weaver signed the contract with no knowledge of the clause which was in fine print and contained no title heading. This action arose after one of the oil

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[27] *Id.* at 28, 274 N.Y.S.2d at 759-60.

[28] *Id.* at 27, 274 N.Y.S.2d at 759.

[29] Brooklyn Union Gas Co. v. Jimeniz, 82 Misc. 2d 948, 371 N.Y.S.2d 289 (1975).

[30] 371 N.Y.S.2d at 292.

[31] Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971).

company's employees sprayed gasoline on Weaver and his assistant causing them to be burned. Section 2-302 was discussed by the court but was not controlling since no sale of goods was involved. However, the abuses found in unconscionability were laid out and the contract was found unenforceable. In discussing the abuse due to lack of education, the opinion stated: "It seems a deplorable use of justice to hold a man of poor education, to a contract prepared by American Oil, for the benefit of American Oil which was presented to Weaver on a take it or leave it basis.' "[32]

Another case shows that a person's education can wipe out a procedural abuse.[33] Plaintiff Neal owned an automobile dealership and had been in that business for thirteen years. He held a college degree and had been a teacher in the Chicago School Systems for the six years preceding his association with the dealership. The contract he entered into was drawn up by Lacob, a lawyer, and provided for Lacob to lend Neal $5000 and guarantee him a $15,000 line of credit. In return, Neal was to furnish Lacob a car every year and pay him $25 for each new car sold in addition to the repayment of the loan. In discussing the unconscionability issue the court said such factors as the age and education of the contracting parties should be considered in addition to their experience and bargaining positions.[34] Plaintiff was a 40-year-old college graduate and had been in the automobile business for several years. The negotiations were conducted at arm's length, the contract was signed, and the defendant paid substantial consideration. Therefore, the contract was not found to be unconscionable.[35] It was unimportant that the allocation of risks was heavily in favor of the defendant. Thus, procedural abuses are subjective and the education of the parties is relevant.

A procedural abuse can also be found in many cases where the consumer is poor. Many poor people have a misconception of the value of money that will put them in an undesirable bargaining position and make them ripe for exploitation by sellers. *Jones v. Star Credit Corp.*[36] is the leading example of this situation. Plaintiffs were welfare recipients and contracted with a salesman from

[32] *Id.* at 462, 276 N.E.2d at 147.
[33] Neal v. Lacob, 31 Ill. App. 3d 137, 334 N.E.2d 435 (1975).
[34] *Id.* at 144, 334 N.E.2d at 440.
[35] *Id.*
[36] 59 Misc. 2d 189, 298 N.Y.S.2d 264 (1969).

Your Shop At Home Service, Inc. for the purchase of a home freezer. The price of the unit was set at $900 and the total purchase price was $1234.80 which included credit charges, insurance and tax. The Joneses had paid $619.88 toward the purchase before defaulting. The trial record showed a maximum retail value of $300 for the freezer. The court, in finding the contract unconscionable, discussed at length the price excessiveness, yet it did not base its decision on that factor alone. "The very limited financial resources of the purchaser, known to the sellers at the time of sale, is entitled to weight in the balance."[37] The court felt that this gross inequality of bargaining power negated the meaningfulness of choice which is vital in contracting.

Procedural abuses based on the deceptive practices of the seller are of three major types. The first involves a contract containing incomprehensible language. This abuse is clearly found in a leading case decided in New Jersey prior to its acceptance of the UCC.[38] Henningsen purchased a new car from defendant's dealership in 1955 and gave it to his wife for Mother's Day. The purchase order was a preprinted form containing small print clauses at the bottom of the page. One clause stated that the buyer had read both front and back of the agreement. Henningsen signed the agreement without reading both sides. The back side was written in fine print and explained Bloomfield's warranty disclaimers. The only warranty available to plaintiff according to the agreement was for the replacement of mechanical parts. Plaintiff did not realize this until after his wife had an accident due to a defect in the car. Plaintiff brought the action to recover for her personal injuries. The court disallowed the warranty exclusion, and plaintiff recovered because, in the words of the court:

> *In the context* of this warranty, only the abandonment of all sense of justice would permit us to hold that, as a matter of law, the phrase "its obligation under this warranty being limited to making good at its factory any part or parts thereof" signifies to an ordinary reasonable person that he is relinquishing any personal injury claim that might flow from the use of a defective automobile.[39]

Another case involving incomprehensible language found the buyer, Williams, signing a contract with a complicated cross-

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[37] *Id.* at 192, 298 N.Y.S.2d at 267.
[38] Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).
[39] *Id.* at 400, 161 A.2d at 93.

collateral clause.[40] Williams purchased a number of household items from appellant for which payment was to be made in installments. The printed form contract purported to lease the goods to Williams with the title remaining in Walker-Thomas until all monthly installments equalled the stated value of the items. The cross-collateral clause, hidden in fine print, provided that all payments made on furniture sold to Williams "shall be credited pro rata on all outstanding leases, bills and accounts due the Company by [purchaser] at the time each such payment is made."[41] This incomprehensible language, hidden in fine print, did not signal to Williams that she would not own any furniture until every installment of every purchase had been paid and therefore negated her consent to the contract. "When a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms."[42]

The second deceptive practice of the seller is much more common. This procedural abuse is found in a clause written in fine print. Karl Llewellyn, the chief draftsmen of UCC Section 2-302, stated "fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement. . . ."[43] The cross-collateral clause in *Williams v. Walker-Thomas Furniture Co.*, discussed above, was written in fine print and the salesman did not specifically point it out. The court reasoned that Williams could not have consented to all the terms of the contract if she did not even know they existed. It is in this type of case that the courts should look to see if the terms of the contract are so unfair that it should not be enforced.

More recently, the operator of a fertilizer plant brought suit to recover for his burglary loss under his insurance policy, but was denied recovery when the incident did not fit within the policy's definition of a burglary.[44] The definition of burglary set out in the policy included a phrase requiring visible marks of entry made on the exterior of the building. The definition was written in 6 point

[40] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).
[41] *Id.* at 447.
[42] *Id.* at 449.
[43] K. LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 370 (1960).
[44] C. & J. Fertilizer, Inc. v. Allied Mutual Ins. Co., 227 N.W.2d 169 (Iowa 1975).

type as compared to 24 point type appearing on the face of the policy. Plaintiff's plant was burglarized and there was damage done to the interior, but there were no marks on the exterior of the buildings. The insurance company refused to pay. The court decided that this liability-avoiding provision in the policy's definition was unconscionable. The court, in holding the contract unconscionable, said that this was a classic example of the proverbial fine print clause which "becomes visible only after the event."[45] It was additionally suspect here where, instead of appearing logically in the exclusions of the policy, it posed as a part of the esoteric definition of burglary.

When looking at the "fine print" abuse cases, it is important to remember that not all uses of fine print are unconscionable. This print must also be unfair or unreasonable, in that it will work an undue hardship on the buyer.

To see the importance and predominance of the third type of procedural abuse, which is based on seller's guile, one need only look at the drafting history of the UCC. All early drafts of that document limited the application of the unconscionability section to form contracts.[46] Not until the 1948 draft was this reference to "form contracts" deleted.[47] The form contract referred to here is but one part of an adhesive contract; there must be something else present. This something else is the fact that the seller is either a monopolist or oligopolist in his selling area. The buyer is denied the possibility of making a bargained-for exchange because there is no place else to make the purchase.

Adhesion contracts are found where the contract is a preprinted form and is actually a take-it or leave-it proposition. There is no opportunity to dicker over the terms; therefore there is no meaningful choice on the part of the buyer. A lack of meaningful choice may lead to the negation of a party's manifestation of assent, and in these cases he may not be liable for what he has signed.

The classic example of a contract of adhesion is found in *Henningsen v. Bloomfield Motors, Inc.*,[48] involving the sale of a car. The standardized form contract imposed on the buyer in-

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[45] *Id.* at 179.
[46] Leff, *supra* note 20, at 492.
[47] *Id.* at 495.
[48] 32 N.J. 358, 161 A.2d 69 (1960).

cluded warranties releasing the manufacturer from tort liability. This contract was standard not only with Chrysler, but with General Motors and Ford, which three companies represented 93.5% of the passenger-car production for the year in question. After reviewing these facts, the court said that "[t]he gross inequality of bargaining position occupied by the consumer in the automobile industry is thus apparent,"[49] and found this transaction void as being against public policy because of the unfairness of the disclaimers and the lack of meaningful choice by the buyer.

The two elements of an adhesion contract appear in this situation. First, it is a standardized printed contract which discourages bargaining for terms, and, second, the same or similar terms appear in all contracts for the purchase of automobiles used by major automakers in the U.S. The buyer is forced to agree to these terms in order to buy a new car. The consumer is given no real choice of terms, for he has no other market to go to in order to shop around for more advantageous contractual terms. Wherever he goes he will run into the same type of limiting clause.

A more recent case refused to term a stock repurchase option a contract of adhesion because the purchaser willfully entered into the contract, it was highly beneficial to him, and his reasonable expectations at contracting time were not frustrated.[50] Despite its refusal to label the contract as such, the court comprehensively defined a contract of adhesion as a "standardized contract which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."[51] The court went on to say that a good test of whether a contract is one of adhesion is whether the stronger party has disappointed the reasonable expectations of the other party.[52] This fits in with the foregoing analysis because in order to be termed unconscionable, not only must the contract be adhesive, but it must also be unfair or do harm to the party which is forced to accept its terms.

All of the procedural abuses that have been discussed relate to one element of the contract—the manifestation of assent. When interpreting what will be unconscionable, it is necessary to deter-

[49] *Id.* at 391, 161 A.2d at 87.

[50] Yeng Sue Chow v. Levi Strauss & Co., 49 Cal. App. 3d 315, 122 Cal. Rptr. 816 (1975).

[51] *Id.* at 325, 122 Cal. Rptr. at 821.

[52] *Id.*

mine whether there was the meeting of the minds that is necessary to create a valid contract.[53] Those clauses that show a manifestation of assent by the parties will be approved by the court, and those that were not agreed to because they were hidden or unreadable will alert the court to the presence of a procedural abuse and to the possibility of an unconscionable deal. The terms which represent procedural abuses are most likely not even known to the party where they are written in fine print or are hidden clauses, and if they are known, they are probably not understood because of the incomprehensibility of the language or one's lack of education. To say that a person signing such a contract was agreeing to all the terms seems to be a gross misstatement for one cannot assent to that which he does not fully understand. The presence of the procedural abuse will open the court's eyes to the possibility of the unconscionability of the entire contract. The next task is to scrutinize the terms of the contract to decide whether they are so unfair as to make the contract unenforceable. This unfairness is found in the substantive abuse of the transaction.

Substantive Abuses

Courts have often said they will not inquire into the adequacy of consideration given in a contract.[54] This is not always true, as courts will sometimes look to the difference between the price of an item and its value to find a harsh, unfair or unreasonable term called a substantive abuse. There are many cases which view the excessiveness in price as a substantive abuse, although many opinions do not use the term "substantive abuse." The courts use at least three different methods for determining price excessiveness: 1) disparity between credit charges and the selling price; 2) disparity between cost to the seller and the selling price; and 3) disparity between market value and the selling price.

In a case involving the sale of a refrigerator-freezer, the cost of the refrigerator to the plaintiff was $348, yet the selling price to the defendant was $900 plus a $245.88 credit charge.[55] The total

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[53] "Assent" is evidenced by a proposition emanating from one side, and acceptance of it on the other; the proposition and acceptance together constituting what is sometimes called a "meeting of the minds." Wm. J. Lemp Brewing Co. v. Secor, 21 Okla. 537, 547, 96 P. 636, 639-40 (1908).

[54] *See, e.g.*, Blumenthal v. Heron, 261 Md. 234, 274 A.2d 636 (1971); Ervin v. Garner, 25 Ohio St. 2d 231, 267 N.E.2d 769 (1971).

[55] Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (1966).

charge for the appliance was $1145.88, or more than three times the actual cost! The court held that this was too hard a bargain and that the conscience of the court would not allow the contract to be enforced, but required the defendant to pay the actual cost of $348.[56] In reaching its decision, the court pointed out the fact that the service charge was almost equal to the cost of the appliance and found that fact, in and of itself, indicative of oppression and found the contract unconscionable.[57]

In another New York case, the excessive price complaint was based on the fact that there was a large disparity between the retail value of a freezer and the plaintiff's selling price.[58] The freezer purchased here had a maximum retail value of $300. It was sold to plaintiff for $900 with insurance, credit charges, and tax added on to make the total charge $1234.80. The court based its finding of unconscionability on the substantive abuse represented by the difference in the retail value and the price charged, and found the sale of a freezer unit having a retail value of $300 for $900 unconscionable as a matter of law.[59]

Another measure of excessive price which will constitute a substantive abuse occurs when there is an unjustifiably large disparity between the cost of an item to the seller and the contract sales price—an inflated markup. *American Home Improvement, Inc. v. MacIver*[60] provides an example. The agreement was for home improvements to be made on defendant's property at a cost of $1759. The actual charge, however, was found to be $2568.60 when the installment payments were totalled. This increase of actual charges of $809.60 over the agreed contract price evidently represented the credit and carrying costs. Prior to trial, plaintiff had also paid $800 as a sales commission in reliance on the contract. Therefore, $1609.60 of the purchase price was attributable to credit and commission charges, leaving a figure of $959 as the actual charge for services and materials used in the improvements. At the time of trial the defendant had paid $1609 and the work done by plaintiff was negligible at most. It would seem that the excessive contract price, when compared to the actual charge for services and materials, would be enough to constitute the excessive

[56] *Id.* at 28, 274 N.Y.S.2d 759-60.
[57] *Id.* at 27, 274 N.Y.S.2d 759.
[58] Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (1969).
[59] *Id.* at 191-92, 298 N.Y.S.2d at 266.
[60] 105 N.H. 435, 201 A.2d 886 (1964).

price needed for the substantive abuse, but the court made an even stronger case and said the contract was unconscionable because the defendants had received "little or nothing of value for which they had already paid $1609."[61]

Regardless of the price-excessiveness test employed, the UCC does not give any indications as to what degree of disparity must be found to constitute an abuse; that determination is left to the court. This is the better method in that courts should be free to decide each case independently and not forced to apply a rigid test to the facts of the case. An example of the unreasonable results which might come from a strict test can be seen if we hypothecate a test which declares all charges which exceed the reasonable retail value by 50% to be unlawfully excessive. The sale of an item, which regularly retails for $6, for $10 would be excessive, but the sale of an item, the actual value of which is $7000, for $10,000 would be approved. The unlawfully excessive deal will have the buyer lose $4 but the legal deal will cost him $3,000. The grossness of the disparity in the latter case seems to indicate excessiveness, and in the former case the loss of only $4 does not seem so grossly unfair as to be unconscionable, yet the results are just the opposite. On a $10 deal one cannot be hurt much, but when talking about $10,000 the cost may involve the entire life savings of a middle income family. A stronger case is made when the buying party in a $10,000 contract is a poor person.

Setting a rigid test would not allow the courts to decide these cases according to the circumstances of each case. When a court decides the issue of unconscionability, it must take into account everything contemplated by section 2-302(2) involving the commercial setting and circumstances. The test of what is excessive pricing must vary with the social setting of which the contract is a part. A good example involves the ghetto merchant who, because of his credit risks and costs, should be able to charge a higher price than the suburban merchant, without his price being considered excessive. It is logical to compare prices of merchants in similar locations and circumstances, since the problems and costs to them should be approximately the same, but the courts must be on the alert for monopolies, oligopolies, and price fixing, any of which may make the comparison of prices among merchants in a neighborhood of no avail in determining excessiveness.

[61] *Id.* at 439, 201 A.2d at 889.

One possible criterion for finding price excessiveness that has been suggested, but not yet used by the courts, would be to find an excessive profit on each sale.[62] This test involves the same problems as the others in defining what is excessive, but there are added problems with this test in finding what is the actual profit per unit. It is easy to reduce one's reported profit margin by raising the reported costs of making the sale. The merchant can do this by paying large salaries to himself or other officers or by paying large salesmen's commissions to relatives who may work for him.

Possibly the best test of excessiveness is the one suggested in *Frostifresh Corp. v. Reynoso.*[63] The court did not enforce that sale at the price and terms of the contract because it was shocking to the conscience.[64] This test leaves the ultimate responsibility where it belongs—in the lap of the court. It is for the court to decide excessiveness, and it is the court's conscience and the court's valuation processes which produce a determination of excessiveness.

Substantive abuses are also found where a party has added some unfair or restrictive clause. The type of clauses that have been the subject of such an abuse are varied and the ones dealt with here are in no way meant to be exhaustive.[65] The first example of this type of abuse is found in a warranty disclaimer case.[66] The contract for the sale of automobiles was written in English, but the defendant understood only Spanish. In the contract, he waived both the warranty of merchantibility and the warranty of fitness for purpose without knowing it. The court said the unknowing waiver coupled with the inequality of bargaining power rendered the contract unenforceable under section 2-302.[67] The unfairness resulted from the waiver of the warranties, and that waiver was considered the substantive abuse in the case.

Consequential damage clauses have also been used as a basis for a substantive abuse. In a Washington case,[68] the contract included a clause stating: "In no event shall the seller be liable for special or consequential damages."[69] The court did not find this

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[62] J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 4-5 (1972).

[63] 52 Misc. 2d 26, 274 N.Y.S.2d 757 (1966).

[64] *Id.* at 28, 274 N.Y.S.2d at 759.

[65] Other such cases include exculpatory, indemnity, and hold harmless clauses. *E.g.*, Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971).

[66] Jefferson Credit Corp. v. Marcano, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (1969).

[67] *Id.* at 142, 302 N.Y.S.2d at 394-95.

[68] Schroeder v. Fageol Motors, Inc., 86 Wash. 2d 256, 544 P.2d 20 (1975).

[69] *Id.* at 258, 544 P.2d at 22.

contract to be unconscionable, but did remand the case due to the lack of facts on the record as to the prior dealing of the two parties. The court said it did not have sufficient facts to decide whether this exclusion was standard from prior dealing of the parties or whether the custom of the trade or practice was to exclude these damages. "The presence of either of these elements, unless the trade practice as related to plaintiff was clearly unreasonable, would support a finding of conscionability in spite of the lack of 'negotiations' or the 'inconspicuous' appearance of the clause."[70] The court was actually saying that the clause was unfair and would make the contract unconscionable in the absence of other factors, but that other conditions, such as the parties' prior dealing, could take this clause out of the unconscionability realm.

The clause leading to an unconscionability finding in the West Virginia case of *Ashland Oil, Inc. v. Donahue*[71] was a restrictive cancellation clause. The plaintiff-supplier was permitted to terminate the contract by giving ten days written notice, while the defendant had to provide the plaintiff with sixty days written notice for the same purpose. The court found the cancellation clause to be unconscionable on its face, and agreed with the defendants that the contract was grossly unfair and, as such, was against public policy and thus void. The plaintiff could not cancel without showing that the defendant had not substantially performed his obligations to the plaintiff, and the plaintiff had not done so here.

The substantive abuses must be looked at in conjunction with section 2-302(2). The substantive abuse term may be abrogated by the commercial setting in which the contract was negotiated or by the prior course of dealing between the two parties.[72] For example, a contract in which the price term seems excessive is not necessarily unconscionable. There are circumstances which could make the contract enforceable despite the seemingly excessive price, and the irony of the situation is that circumstances that would constitute a procedural abuse may be the very factors that negate the unconscionability issue. The excessive price may have been charged due to the buyer's precarious financial condition or his bad credit rating. The party's status as a poor person, which might normally constitute an important factor in a procedural abuse, might be the factor which justifies the merchant's charging a seemingly exces-

[70] *Id.* at 261, 544 P.2d at 23-24.
[71] 223 S.E.2d 433 (W. Va. 1976).
[72] See text accompanying note 70 *supra.*

sive price. The merchant must be allowed a greater price to cover the higher risks inherent in dealing with the economically unsound. When considering the circumstances involved, the relevant elements are the general commercial background and the special commercial needs of the particular trade involved.[73] This can involve custom and usage in the trade, prior dealings of the two parties, or any special circumstances involving one or both parties.

Relationship Between Substantive and Procedural Abuses

The hardest question to be decided by the courts is what factors must be present, and in what degree, in order to find a contract or a clause unconscionable. A majority of the cases have found that both a procedural and a substantive abuse are necessary and some courts have found that the presence of a gross procedural abuse with a slight substantive abuse will suffice to justify a finding of unconscionability. By the same token, a gross substantive abuse coupled with a slight procedural abuse may also be found to constitute unconscionability. Other cases, especially in the price-value disparity category, have said that a substantive abuse is all that is needed.

The principal case showing the need for both a procedural and substantive abuse is *Williams v. Walker Thomas Furniture Co.*,[74] which was discussed earlier. Appellee sold furniture by a contract that contained a cross-collateral clause in extremely fine print. The effect of this clause was to keep title to all the goods bought by Williams in the hands of Walker-Thomas until Williams paid all the debts she owed on all merchandise bought from the seller. When Williams defaulted in her payments, Walker-Thomas replevied every item purchased from them. The lower court held for Walker-Thomas. The appellate court said that unconscionable contracts are not enforceable and defined unconscionability as including an absence of meaningful choice on the part of one of the parties (procedural abuse) together with contract terms that are unreasonably favorable to the other party (substantive abuse). The procedural abuse here was the incomprehensibility of the clause's language together with the fine print, and the substantive abuse was the unfairness of the clause itself. Even though the contract had been executed before the UCC was adopted, the UCC was adopted between the contract date and the date of trial. The court

[73] W. L. May Co. v. Philco-Ford Corp., 273 Ore. 701, 543 P.2d 283 (1975).
[74] 350 F.2d 445 (D.C. Cir. 1965).

mentioned that its decision agreed with section 2-302 but was not based on that section.[75]

In another case,[76] the owner of a fertilizer plant sued his insurance company for a burglary loss he sustained. The insurance company's definition of burglary was included in the contract fine print, and the company's agent did not bring the buyer's attention to it at any time during negotiations. The burglary here did not fall within the insurance company's definition and they refused to reimburse the fertilizer company for their $9,982.30 loss. The court held this definitional clause of the contract unconscionable and noted that commentators suggest the following factors be examined in determining unconscionability: assent, unfair surprise, notice, disparity of bargaining power, and substantive unfairness.[77] In this case the procedural abuse was found in the fine print clause containing the definition. The substantive unfairness is easily seen to be the same as a substantive abuse and, in this case, is the unfairness of the burglary definition clause as applied to the party contracting for insurance. His reasonable expectation of the terms of the contract was not fulfilled. He did not get adequate coverage, as one would expect from this type of insurance contract. He would not expect there to be exclusions written into the burglary definitions. Had he known this to be the case, he undoubtedly would have gone elsewhere for his insurance or at least gotten another policy to handle this contingency.

The most recent case which has come out explicitly stating the need for both abuses in unconscionability is the case of *Wade v. Austin.*[78] According to the contract, Austin, who was a real restate broker, agreed to try to sell Wade's house for a commission. Austin was to have the sole right to sell the property during the listing period and would be given compensation if the house was sold during that period no matter who made the sale. The house was sold by Wade, who refused to give Austin any compensation. The court, using section 2-302 of the UCC, did not find the contract unconscionable. The court noted that two types of abuses must generally be found for unconscionability. The first is procedural, which may arise in the contract formation but was absent in this contract because Wade had listed with Austin previously under the

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[75] *Id.* at 449.

[76] C. & J. Fertilizer, Inc. v. Allied Mutual Ins. Co., 227 N.W.2d 169 (Iowa 1975).

[77] *Id.* at 181.

[78] 524 S.W.2d 79 (Tex. Civ. App. 1975).

same terms without complaint. The commercial setting of the deal negated the procedural abuse.[79] No substantive abuse was found because there was no unfair action taken by Austin, who used reasonable efforts to find a purchaser.[80]

These three cases show the majority view that both a substantive and a procedural abuse are required for a finding of unconscionability. Other cases involving price-value disparity have reaffirmed the need for both types of abuses before a contract will be found unconscionable. There are at least two cases that have specifically stated that price-value disparity itself is not enough to prove unconscionability.

In *Patterson v. Walker-Thomas,*[81] Patterson bought goods from Walker-Thomas totalling $597.25 and defaulted after making payments of $248.40. In a suit by Walker-Thomas to recover the unpaid balance, Patterson based her unconscionability defense on the fact that the goods were grossly overpriced. There was no evidence introduced to that effect, and the buyer was precluded from the defense. The appellate court affirmed, saying that excessive price may be raised in defense as an element of unconscionability. The court noted that the price term may be examined when determining a contract's reasonableness, but that it is only one element of unconscionability and excessive price alone is not unconscionable.[82] Beyond a showing of excessive price, the court wanted a showing of a lack of meaningful choice available to the parties at the time they decided to enter into the contract.

Similarly, the court in *Kugler v. Romain* stated that "an exorbitant price ostensibly agreed to by a purchaser of the type involved in this case—but in reality unilaterally fixed by the seller and not open to negotiation—constitutes an unconscionable bargain. . ."[83] Since the price was fixed by the seller and not open to negotiations, it indicated an absence of meaningful choice (procedural abuse) and this, together with the excessive price (substantive abuse) led to a finding of unconscionability by the court. These cases are further examples of courts requiring the presence of both a procedural and substantive abuse, but other cases seem to suggest that only a substantive abuse is needed.

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[79] *Id.* at 87.
[80] *Id.*
[81] 277 A.2d 111 (D.C. App. 1971).
[82] *Id.* at 114.
[83] 58 N.J. 522, 279 A.2d 640, 652 (1971).

Some cases seem to allow price-value disparity, the substantive abuse, to be unconscionable in and of itself. This analysis was first used in *American Home Improvement, Inc. v. MacIver.*[84] In this case the value of the goods was equal to $959. The contracted purchase price, however, was $1,759. The court held that since MacIver received little or nothing of value and had paid $1,609 for goods valued at far less, the contract should not be enforced. The disparity between the value and price of the goods is the only abuse discussed by the court, and commentators have interpreted this case as saying that a price grossly in excess of the normal retail value is, in itself, unconscionable.[85] If this case is closely examined, however, it is easy to find a procedural abuse also. In the making of the contract, MacIver signed an instrument that contained a blank note and a blank power of attorney. Furthermore, the contract did not state the rate of interest or the amount of interest and other fees to be charged as required by state statute.[86] This is what put MacIver on an unequal footing in bargaining with American Home and could easily be designated a procedural abuse.

Frostifresh Corp. v. Reynoso[87] was similarly decided when the court used price excessiveness as its only criterion for unconscionability. The Spanish-speaking defendant signed a sales agreement for $1,145.88 for a refrigerator that cost the plaintiff $348. The court found that the harsh bargain resulting from the sale of the freezer at the amount specified was shocking to the conscience and therefore unenforceable.[88] This substantive abuse is all that is mentioned. There is no mention of the glaring procedural abuse inherent in the language barrier which prevented the defendants from understanding the terms of the contract. This case has been used as an example of a situation where price-value disparity alone is enough for unconscionability, but the procedural abuse is definitely present. It is possible that the court felt either that the abuse was so obvious that it need not be mentioned or that there was no need to discuss the procedural abuse. Whatever the court's reason for ignoring it, the presence of the procedural abuse cannot be denied, and price-value disparity was not all that was involved in that case.

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[84] 105 N.H. 435, 201 A.2d 886 (1964).

[85] Ellinghaus, *In Defense of Unconscionability,* 78 YALE L.J. 757, 790 (1969); Note, *Unconscionability Under the UCC—Two Trends in Cases,* 1 LOY. CHI. L.J. 313 (1970).

[86] 105 N.H. at 437, 201 A.2d at 887.

[87] 52 Misc. 2d 26, 274 N.Y.S.2d 757 (1966).

[88] *Id.* at 27, 274 N.Y.S.2d at 759.

Two New Jersey cases have also been cited as agreeing with the proposition that a substantive abuse alone may be enough to establish unconscionability.[89] The plaintiff involved in both cases, Robert Toker, was doing business as Budget Associates of New Jersey and had purchased the accounts of the defendants from People's Foods. An agent of People's Foods visited Perl's home and talked to the defendants about various food plans. When defendants mentioned that they couldn't store the amount of food discussed, the agent stated that a freezer was included in the plan. Mr. Perl signed three forms pertaining to the food plan; then Mrs. Perl did the same. The next day the defendants discovered they had signed an installment contract for the purchase of a freezer in addition to the food plan and attempted to cancel the contract. The freezer and food were delivered. The maximum value of the freezer was $300, but the entire charge for it was $1,092.96, including a purchase price of $799.95 and tax, insurance, and credit charges of $293.01. The installment contract was then assigned to Toker. In its opinion the court says: "The exorbitant price of the freezer makes this contract unconscionable and therefore unenforceable."[90] There is another part of this case that is sometimes overlooked. The contract was not found unenforceable due only to the unconscionability. Fraud was also involved here, and that came about by the knowing misrepresentations by People's Foods as to the contents of the contract.[91] The defendants were led to believe that the freezer was included in the price of the food plan and never knew they were signing an installment contract for the purchase of a freezer; so this case is decided on two points, fraud and unconscionability. The court found it easy to say that the contract was unconscionable because of the excessive price, but it discussed unconscionability only after the fraud had been found. Fraud was the determining factor here, and unconscionability was merely a side issue. Had the court not found sufficient evidence of fraud and had to decide the case purely on unconscionability grounds, it could have used the abuses which occurred when the contract was executed. Unconscionability is only quasi-fraud or, at most, has connotations of fraud. It is not truly fraud for there is an element of fraud missing in unconscionability that was present in this case, that is, a misrepresentation of a material fact.[92]

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[89] Toker v. Westerman, 113 N.J. Super. 452, 274 A.2d 78 (1970); Toker v. Perl, 103 N.J. Super. 500, 247 A.2d 701 (1968).

[90] 103 N.J. Super. at 503, 247 A.2d at 703.

[91] *Id.* at 502, 247 A.2d at 702.

[92] The elements necessary to establish fraud are representation of existing fact,

Toker v. Westerman[93] also involved the sale of a refrigerator freezer by People's Foods. The cash price for the appliance was $899.98 and the total charge was $1,229.76. Westerman refused to pay the balance of $573.89 and claimed unconscionability due to overpricing. The reasonable retail value of the freezer had been estimated at $350 to $400. This court used *Toker v. Perl*[94] as precedent to decide that the contract was unconscionable due to the excessiveness in price. The court erred in following *Toker v. Perl* because it is possible to see the language in that case concerning unconscionability as mere dictum. Regardless of the error of citing *Toker v. Perl*, the decision was probably correct since it is possible to find a procedural abuse in the facts of this case. The seller was a door-to-door salesman who took advantage of the economic position of this defendant who was a welfare recipient. The resulting inequality of bargaining power would constitute a procedural abuse.

What these cases seem to say is that a large price-value disparity in itself will be enough to label a transaction unconscionable. But in looking closer, it can be seen that there are procedural abuses in all of the cases.

Courts have said that they will not relieve a person from a bad bargain.[95] That seems to be what is done when they decide cases only on the basis of a substantive abuse, but the presence of procedural abuses, though overlooked or unremarked in the opinion, brings these cases in line with those which require both procedural and substantive abuses. Without that procedural abuse, the courts would be doing just what they have said they would not, that is, relieving a person from a bad bargain.

In a recent West Virginia case, the court seemingly decided the unconscionability issue on the presence of a substantive abuse alone.[96] Ashland Oil Company and Donahue entered into a lease agreement and a dealer contract for one year beginning November 1, 1968, subject to certain termination provisions. The lease agreement allowed either party to cancel in writing not less than ten

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its materiality and falsity, speaker's knowledge of its falsity, his intent that it shall be acted upon by person to whom made, such person's ignorance of its falsity, reliance on truth of representation and right to rely thereon, and consequent damage to him. Graff v. Geisel, 39 Wash. 2d 131, 234 P.2d 884, 889 (1951).

[93] 113 N.J. Super. 452, 274 A.2d 78 (1970).

[94] 103 N.J. Super. 500, 247 A.2d 701 (1968).

[95] *See, e.g.*, Wade v. Austin, 524 S.W.2d 79 (Tex. Civ. App. 1975).

[96] Ashland Oil, Inc. v. Donahue, 223 S.E.2d 433 (W. Va. 1976).

days before the end of the lease period, but a provision in the dealer contract allowed Ashland to terminate upon ten days written notice to Donahue if, in the opinion of Ashland, Donahue had done anything to impair the quality, good name, or reputation of the goods or products of the seller, Ashland. This provision in the dealer contract was in addition to a clause allowing either party to terminate the agreement within sixty days without cause. On February 7, 1975, Ashland terminated both the lease agreement and the dealer contract by separate letters. Donahue refused to leave the premises, and Ashland brought this suit to recover possession of that property. In the opinion, written by Justice Wilson, the Supreme Court of Appeals found that the documents were so interrelated that each would be meaningless without the other and neither party would have entered into either of them separately. Therefore, reasoned the court, the two instruments should be construed together and considered as one.[97] The court found the ten day cancellation clause in the dealer contract, available only to Ashland, unconscionable on its face and went on to say that it was unnecessary to base the holding upon any disparity of bargaining power between the two parties.[98] The court seemed to say that a procedural abuse is not needed, especially in view of the absence of evidence of such an abuse in the case itself. It cannot be determined whether the clause was hidden in fine print or whether this was a contract of adhesion due to Ashland's possible contrived monopoly in the area, but there are hints in the case that there may have been a procedural abuse. First of all, Justice Wilson did not say there was no disparity of bargaining power; he merely said "we do not find it necessary to base our holding upon a disparity of bargaining power."[99] Also, Donahue, in answer to Ashland's complaint, alleged that the agreement was void as against public policy because it was unfair and the plaintiff was in a grossly superior bargaining position.[100] There is nothing in the opinion indicating why Donahue thought Ashland had the grossly superior position. Since these issues were not discussed, a procedural abuse cannot affirmatively be ascribed to these circumstances, although it is quite possible one might be found in the form contract. The case seems to suggest that the substantive abuse itself will lead to unconscionability, and the treatment of this case in future opin-

[97] *Id.* at 437.
[98] *Id.* at 440.
[99] *Id.* at 440.
[100] *Id.* at 437.

ions will be especially noteworthy with respect to whether that suggestion proves to be true. If that suggestion is accepted and courts begin to hold the substantive abuse to be enough for unconscionability, this will leave many unanswered questions. Will any type of substantive abuse be enough for unconscionability? If so, how unfair must it be? Must it be grossly unfair only? Can the presence of a procedural abuse help make a contract unconscionable if the substantive abuse is not enough?

The approach most often used to decide unconscionability is that of applying the procedural and substantive abuses on a sort of sliding scale. When the terms of the contract seem exceedingly harsh only a very small procedural abuse will be needed. Likewise, when the contract formation process is grossly unfair the courts will accept a slight substantive abuse. The price-value disparity cases discussed above are good examples of courts ignoring the procedural abuse after finding the harsh substantive one. On the hypothetical sliding scale, the substantive abuses were so harsh that the courts did not feel constrained even to mention the procedural abuse.

At the other end of the scale, there is one case illustrating extensive procedural abuses which reduced the need for a substantive abuse. The case of *Henningsen v. Bloomfield Motors, Inc.*[101] involved a number of different procedural abuses. The contract had a fine print clause, a clause hidden on the back of the contract, and a clause containing incomprehensible language. To top it all off, these clauses were part of an adhesion contract. The substantive abuse here was the presence of a disclaimer of warranties. This was not very unfair since this type of disclaimer can possibly be acceptable under section 2-316 of the UCC.[102]

CONCLUSION

The Sales article of the UCC was written to apply to transactions of goods[103] and Section 2-302 thereof has been applied most often to dealings between merchants and consumers. Unconscionability is a developing doctrine, however, and courts have already

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[101] 32 N.J. 358, 161 A.2d 69 (1960).

[102] U.C.C. § 2-316(1):

> Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other. . . .

[103] U.C.C. § 2-102.

extended the statute by analogy into other areas of the law or have used the doctrine as an alternative basis for their holdings.[104] The earliest unconscionability cases in this country were decided in the late nineteenth century.[105] Since unconscionability is a common-law defense, the courts should feel free to continue to develop the law and their interpretations of it and to extend its application into other areas of the law without worrying about being accused of judicial lawmaking.

When the courts do extend this law, they must be certain not to change it so much as to obliterate completely the intent of the draftsmen. They will be faced with the question of whether they should require the presence of a procedural and a substantive abuse or whether only one of them will suffice. The draftsmen did not set out to alter one's freedom to contract when they wrote this section; they merely wanted to protect those people who are virtually defenseless in contract formations. To keep within both of these strictures, both a substantive and a procedural abuse should be found. This seems to be the better view since the courts will then allow the parties to live with a bad bargain that was made with no unequal bargaining power. Therefore, unfairness and inequality of bargaining power should be required for a finding of unconscionability. But because this law was only recently codified, it will be some time before we will see the true impact that this section will have on our commercial law.

Kevin D. Dolan

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[104] Wille v. Southwestern Bell Tel. Co., 219 Kan. 755, 549 P.2d 903 (1976).
[105] *E.g.*, Hume v. United States, 104 U.S. 406 (1889).