Catholic University Law Review

Volume 22
Issue 1 *Fall 1972*

Article 13

1972

Kugler v. Romain: Price Unconscionability and the Consumer Class Action – Are They Compatible?

William J. Britt

of the media,[70] and physically unattractive candidates would still be at a disadvantage. Political parties would still need to choose ". . . able and personable candidates who [can] sell themselves, because TV has changed the course of campaigns."[71] But, the unfair advantage now held by wealthy candidates would be significantly lessened, and the evasion of political issues would become costly.

John Clifford

Kugler v Romain: Price Unconscionability and the Consumer Class Action—Are They Compatible?

The substantive doctrine of price unconscionability, embodied by implication in Section 2-302[1] of the Uniform Commercial Code, and the procedural class action device,[2] are juridical pronouncements, capable of mitigating, to some extent the present shortcomings of consumer protectionism. The New Jersey Supreme Court, in *Kugler v. Romain*,[3] has recognized the expedience of joining of the two concepts by granting class-type relief based on a finding of price unconscionability. This article will analyze that decision and discuss the relationship among the principles it embraces.

70. McLuhan is quoted as saying that in 1960, when Nixon's use of the media was less than expert, "without TV, Nixon had it made." But in 1968 Frank Shakespeare said "without television, Richard Nixon would not have a chance." MCGINNISS 35, 58.

71. *See* Leonard Hall's March 1, 1955 statement to the National Federation of Republican Women in C. THOMPSON 137, *supra* note 69.

1. N.J. STAT. ANN. § 12A: 2-302 (1962) provides:

(1) If the court as a matter of law finds the contract or any other 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.

All states except California and North Carolina have enacted this provision.

2. FED. R. CIV. P. 23.

3. 58 N.J. 522, 279 A.2d 640 (1971).

Lower Court Decision

The initial action was brought against the nonresident defendant, Romain, individually and trading as Educational Services Co., by the Attorney General[4] of New Jersey, pursuant to the New Jersey Consumer Fraud Act,[5] which in pertinent part provided:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, supression or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale or advertisement of any merchandise or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice . . .[6]

The defendant was engaged in the sale of a "Complete Ten Year Educational Program" by means of home solicitations consciously directed at low-income urban areas. The wholesale cost of the "educational package" was found to be approximately $35-$40. The cash price for the same was fixed at $249.50, while the time price, (since virtually every consumer bought on time), was fixed at $279.95, payable in 24 equal installments of $11.50[7]. Evidence was adduced at trial[8] that the maximum retail price that should have been charged was $108-$110.[9] Similar evidence was presented as to the quality of the "educational" materials. In the plain and simple words of the plaintiff's expert witness, the books were "useless."[10]

The Attorney General sought injunctive and restorative relief for the 24

---

4. The action was specifically brought by the Office of Consumer Protection: N.J. STAT. ANN. § 52:17B-5.6 (1970).

5. N.J. STAT. ANN. § 56:8-1, N.J. STAT. ANN. § 52:17B-5.6. For a good discussion of the New Jersey Consumer Fraud Act see Comment, *Consumer Remedies—Statutes—A New Approach*, 1 SETON HALL L. REV. 208 (1970).

6. N.J. STAT. ANN. § 56:8-2 (Supp. 1970). *See* note 18 *infra.*

7. Curiously, the time price of $279.95 less a $9.00 deposit was payable in 24 equal monthly installments of $11.50 or $276.00.

The inflated cash price enabled the seller to come within the legal limits on interest proscribed by N.J. STAT. ANN. § 17:16C-41 (Supp. 1970), which provides that the interest charge shall not exceed $10 per $100 per year. The maximum interest allowable on a principal balance of $249.50 for two years is $49.90 (10% of $249.50 times two) while the amount in fact charged was $29.50. Thus by setting a cash price in excess of $229.10, the seller assured himself of procuring time sales within the legal limits without sacrificing a gross profit margin of $239 ($279 less $40).

8. 110 N.J. Super. 470, 266 A.2d 144 (Chancery Div. 1970).

9. Brief of the Attorney General at 8. Expert testimony of Dr. Soloman Flink, M.A., Ph.D., Chairman of Dept. of Economics, Graduate School of Business Administration, Rutgers University, established that the price charged by the defendant was "exhorbitant".

10. *Id.* at 9.

consumers who testified and for all those consumers similarly situated. Specifically, he prayed for (1) injunctive relief pursuant to N.J. Stat. Ann. § 56:8-8[11] enjoining the defendant from engaging in those practices prohibited by Section 2 of the Act; (2) a declaration that the contract price was fraudulent *per se* and unconscionable under N.J. Stat. Ann. § 56:8-2 or N.J. Stat. Ann. § 12A:2-302 respectively; (3) rescission of all contracts between purchasers listed and those consumers "similarly situated;" (4) restorative and remedial orders pursuant to N.J. Stat. Ann. § 56:8-8,[12] for the benefit of the 24 consumers who testified and those "similarly situated," and an order enjoining the defendant from enforcing any of the contracts entered into with consumers listed in the complaint and all those consumers "similarly situated;" (5) assessment of civil penalties pursuant to N.J. Stat. Ann. § 56:8-13,14.

The trial court found that the defendant had violated Section 2 of the New Jersey Consumer Fraud Act only with respect to having fraudulently induced the 24 testifying consumers into executing installment sales contracts.[13] The judgment required the defendant to restore all monies paid by eight consumers who testified; enjoined the defendant from engaging in deceptive and fraudlent practices; assessed civil penalities in the amount of $2400 ($100 per each offense); and enjoined the defendant from instituting any action arising from the contracts against any of the 24 consumers who testified at the trial.[14]

Although the trial court's judgment was generally favorable to the Attorney General, the court specifically limited relief to those consumers who testified and thereby denied a class action-type judgment to all those "similarly situated", on the grounds that (1) while the sales price appeared "excessive," such "exorbitance" did not *per se* constitute a fraud within the purview of N.J. Stat. Ann. § 56:8-1;[15] and, (2) the Attorney General lacked standing to assert the unconscionability of a contract or clause thereof pursuant to N.J. Stat. Ann. § 12A:2-302,[16] stating unconscionability ". . . is strictly a matter of private concern. . ."[17]

---

11. N.J. STAT. ANN. § 56:8-8 (1964) provides:
[T]he court may make such orders or judgments as may be necessary to prevent the use or employment by any person of any prohibited practices, or which may be necessary to restore to any person in interest any monies or property, real or personal which may have been acquired by means of any practice herein declared to be unlawful.
12. *Id.*
13. 266 A.2d at 148.
14. *Id.* at 153.
15. *Id.* at 149.
16. *See* note 1 *supra* for the text of N.J. STAT. ANN. § 12A:2-302 (1962).
17. 266 A.2d at 150.

New Jersey Supreme Court Decision

Judge Francis, writing for a unanimous court, held that unconscionability, undefined by the code, is an "amorphous concept" to be liberally construed and "must be equated with the concepts of deception, fraud, false pretense, misrepresentation, concealment and the like, which are stamped unlawful under N.J. Stat. Ann. § 56:8-2."[18]

Specifically, he held that a sales price of two and one-half times the reasonable market price of goods which were "practically worthless" was "exorbitant" and as such constitutes unconscionability within the purview of the Consumer Fraud Act. The court could now rest its decision on Section 2 of the New Jersey Consumer Fraud Act reasoning:

> If therefore, in this case the price charged for the educational package is so exorbitant as to be unconscionable, Section 2 makes it unnecessary to decide whether the Attorney General could maintain a class action for all similarly affected consumers based solely upon violation of Section 2-302, the unconscionability clause of the Uniform Commercial Code.[19]

While the decision was expressly based on Section 2, a realistic interpretation of the opinion led one to the conclusion that in the absence of Section 2, the same result could be reached solely under N.J. Stat. Ann. § 12A:2-302. The court cites with approval, *State of New York by Lefkowitz, Attorney General v. ITM, Inc.*[20] in which the Attorney General of New York, pursuant to the New York Consumer Protection Act,[21] attacked certain consumer retail sales contracts, procured through high pressured sales tactics and a referral scheme, on the alternative grounds of price unconscionability. The New York Supreme Court declared:

> It is clear that these excessively high prices constituted 'unconscionable contractual provisions' within the meaning of Section 63, subdivision 12, of the Executive Law. . . . But even if the prices charged were not unconscionable per se they were unconscionable within the context of this case.[22]
>
> . . .

18. 279 A.2d at 651-52; N.J. STAT. ANN. § 56:8-2 (Supp. 1970) has been amended to include "unconscionable commercial practice" as an unlawful act.

19. 279 A.2d at 652.

20. 52 Misc. 2d 39, 275 N.Y.S.2d 303 (1966).

21. Sec. 63, Subdiv. 12 provides:

> Whenever any person shall engage in repeated fraudulent or illegal acts . . . in the carrying on, conducting or transaction of business, the Attorney General may apply . . . for an order enjoining the continuance of such business activity . . . and the court may award relief applied for or so much thereof as it may deem proper. The word 'fraud' or 'fraudulent' as used herein shall include . . . unconscionable contractual provisions.

22. 275 N.Y.S.2d at 320-21.

> This court consequently finds these contracts are unconscionable within the meaning of both the Uniform Commercial Code, Sec. 2-302 subdivision 1 and Executive Law, Sec. 63 subdivision 12. . . .[23]

The trial court, in the instant case, read *ITM* in its narrowest possible context, distinguishing it from *Kugler* on the grounds that Section 63 subdivision 12 of the New York Executive Law "specifically prohibits 'unconscionable contractual provisions'."[24] On the contrary, the court in *ITM* upheld the standing of the Attorney General to invoke Section 2-302 of the Uniform Commercial Code by alleging price unconscionability on behalf of the consuming public.

By imputing unconscionability into the scope of Section 2, the court was able to utilize the price unconscionability rationale as a means of establishing the illegal aspect common to all of the sales contracts, *i.e.*, the exorbitant price. Having identified the common unlawful element, the court was not barred from providing broad class-type relief by invalidating all sales contracts executed by consumers "similarly situated" and granting the necessary restorative relief required by N.J. Stat. Ann. § 56:8-8.[25]

Price Unconscionability

The court in *Kugler* has demonstrated the willingness of the New Jersey judiciary[26] to implement needed consumer reform through the oft scoffed-at[27] doctrine of price unconscionability embodied in UCC 2-302.[28] Excessive price considered either as one element of unconscionability or as an un-

23. *Id.* at 322.
24. 266 A.2d at 150.
25. *See* note 11 *supra* for text of N.J. STAT. ANN. § 56:8-8 (1964).
26. With the exception of New York and New Jersey, the case law development under U.C.C. § 2-302 has been relatively sparse. For an excellent synopsis and discussion of the case law see West, *Unconscionability: A State by State Survey*, 5 CLEARINGHOUSE REV. No. 2 (1971).
27. A chilling judicial reception was given the doctrine in the District of Columbia. *See* Patterson v. Walker-Thomas Furniture Co., 277 A.2d 111 (D.C. Ct. App. 1971), and Morris v. Capital Furniture and Appliance Co., 280 A.2d 775 (D.C. Ct. App. 1971). *See also*, Zuckman, *Walker-Thomas Strikes Back: Comment on the Pleading and Proof of Price Unconscionability*, 30 FED. B.J. 308 (1971) [hereinafter cited as Zuckman].
28. For the leading cases prior to *Kugler* acknowledging that an exorbitant price can be equivalent to an unconscionable contractual term, *see* American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964); State *ex rel.* Lefkowitz v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303 (1966); Frostifresh Corp. v. Reynosco, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (1966); *rev'd on damages only* 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967); Central Budget Corp. v. Sanchez, 53 Misc. 2d 620, 279 N.Y.S.2d 391 (1967); Toker v. Perl, 103 N.J. Super. 500, 247 A.2d 701 (1968); Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (1969).

conscionable contractual term in and of itself has been the subject of much debate.[29] The excessive price in *Kugler* was seemingly utilized in a dual capacity. On one hand, it was considered as an element of unconscionability in that it "raises a strong inference of imposition,"[30] with respect to the testifying consumer "representatives." On the other hand, it was considered unconscionable in and of itself in order to rescind contracts entered into by non-testifying consumer class members. The consumer "representatives" were able to prove fraud by testifying to the misrepresentations, and thus invoke the sanctions of the Consumer Fraud Act. The non-testifying consumer class members, as such, could not. Notwithstanding, the court granted class relief by considering the exorbitant price term as an unconscionable provision, presumptive of fraud, and common to all sales contracts entered into by consumers "similarly situated."

"Procedural unconscionability,"[31] *i.e.*, abuse in the contract formation process such as fraud, violations of truth-in-lending statutes and referral schemes, has been present in most cases before a finding of price unconscionability could be made. In *Kugler*, the procedural abuse took the form of fraudulent representations made as to the quality of the "educational" materials. Fraud was therefore easily established as to the consumers who testified. However, it is unlikely that the court would reach the same result based only on proof of gross price disparity.

All decisions involving price unconscionability, save one,[32] have contained elements of procedural abuse. *American Home Improvement v. MacIver*,[33] the first case to cite Section 2-302, and thus spawn the doctrine of price unconscionability,[34] involved a violation of New Hampshire's truth-

29. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) [hereinafter cited as Leff]; Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969) [hereinafter cited as Spanogle]; Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969); Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1969); Speidel, *Unconscionability Assent and Consumer Protection*, 31 U. PITT. L. REV. 359 (1969) [hereinafter cited as Speidel]; M. Shanker & M. Abel, *Consumer Protection Under Article 2 of the Uniform Commercial Code*, 29 OHIO ST. L.J. 689 (1968); Comment, *Unconscionable Sales Prices*, 20 ME. L. REV. 159 (1968); Zuckman, *supra* note 27.

30. 279 A.2d at 653.

31. Leff 489-508.

32. Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (1969).

33. 105 N.H. 435, 201 A.2d 886 (1964).

34. For pre-code case law recognizing gross price disparity as grounds for equitable relief, *see* Miami Tribe of Oklahoma v. United States, 281 F.2d 202 (Ct. Cl. 1960); Hume v. United States, 132 U.S. 406 (1889); Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1949). *See also* 3 J. POMEROY, EQUITY JURISPRUDENCE §§ 926-28 (5th ed. 1941), discussing cases where equitable relief was granted based on gross price disparity absent other inequitable factors.

in-lending statute[35] and the presence of a gross disparity between price and "value." In *MacIver*, the seller had agreed to furnish and install 14 combination windows and one door and "flincoat" the side walls of the defendant's house at a cost of $1759. The defendant executed an installment contract which boosted the total time sales price to $2568.60 payable over five years. After minimal performance by the seller, he instituted an action to enforce the contract. Although truth-in-lending violations did exist, the Court took pains to void the contract on "independent" grounds of unconscionable price disparity stating:

> Inasmuch as the defendants have received little or nothing of value and under the transactions they entered into they were paying $1609 for goods and services valued at far less, the contract should not be enforced because of its unconscionable features. . . . 'It has long been the law in this state that contracts may be declared void because unconscionable and oppressive. . .'[36]

This (dictum?) has led one court to cite *MacIver* for the proposition that gross price disparity alone may constitute unconscionability.[37]

The New York court in *ITM*[38] was also faced with various forms of procedural abuses such as fraud and illegality (lottery), each sufficient to justify the injunctive relief granted. Notwithstanding the fraudulent practices perpetrated on consumers, the court implied that retail prices varying from two to six times a seller's cost are unconscionable and therefore render the contracts unenforceable.

In *Central Budget Corp. v. Sanchez*[39] the statutory requirement[40] that notice of assignments must be in at least eight point bold type was violated. However, the court denied the plaintiff-assignee's motion for summary judgment on an automobile sales contract, holding that the defendant buyers were entitled to present evidence on the question of unconscionability,[41] and that "excessively high prices may constitute unconscionable contractual provisions. . .,"[42] citing *ITM, Williams*, and *MacIver*. The assignor-seller had

35. N.H. REV. STAT. ANN. ch. 399-B:2 (1961).
36. 201 A.2d at 889.
37. 275 N.Y.S.2d at 321. One commentator forewarned: "*MacIver* may mark the beginning of a possible trend towards voiding contracts under Sec. 2-302 where a great disparity exists between price and value." Comment, *Unconscionability—The Code, the Court, and the Consumer*, 9 B.C. IND. & COM. L. REV. 367, 371 (1968).
38. 52 Misc. 2d 39, 275 N.Y.S.2d 303 (1966).
39. 53 Misc. 2d 620, 279 N.Y.S.2d 391 (1967).
40. N.Y. PERS. PROP. LAW §§ 302(9), 403(3)(a) (McKinney Supp. 1970).
41. *See also* Milford Finance Corp. v. Lucas, U.C.C. Rep. Serv. 801 (Mass. App. Dist. 1970).
42. 279 N.Y.S.2d at 392. Prof. Murray in his article, *Unconscionability: Unconscionability*, appearing in 31 U. PITT. L. REV. 1 (1969), criticizes the judicial reasoning

sold the defendants a 1959 Buick automobile for $939.75 plus finance charges of $242.47. The buyer was compelled to spend $570 in repairs less than one week later, which was clearly indicative of a breach of warranty.

The courts in *Kugler*, *MacIver*, *ITM*, and *Sanchez*, all presented alternative statutory grounds authorizing the relief granted. *Frostifresh v. Reynosco*[43] and *Toker v. Perl*,[44] although fraught with procedural abuse, did not contain alternative statutory grounds upon which relief could be conditioned. *Frostifresh* became the first case to rest its decision exclusively on Section 2-302, utilizing for the first time the third remedy provided therein.[45] Suit was instituted by the seller to recover an amount allegedly due on an installment contract for the purchase of a refrigerator-freezer. The husband and wife defendants were Spanish-speaking people, hoodwinked by the seller's Spanish-speaking salesman into executing an installment contract, written in English and completely unintelligible to them. A referral scheme, similar to the one used in *ITM*, convinced the buyers that their purchase would not cost them anything, since commissions on similar sales made to their neighbors were to be purportedly credited to their account. The sale price for the refrigerator-freezer was $1145.88 which included a $245.88 credit charge. The wholesale cost to the defendant was $348.00. The lower court found the contract "shocking to the conscience" and limited recovery to cost stating: "The service charge . . . almost equals the price (cost $348) of the appliance.[46] Finding the trial court's remedy a bit harsh, the appellate court upheld the finding of unconscionability but allowed the seller to recover reasonable profit, necessary trucking and service charges, and reasonable finance charges.[47]

---

in *Sanchez* and its predecessors, admonishing:

> This kind of approach is virtually indistinguishable from common law form of action thinking . . . . No thought is given to why such cases may give rise to the activation of the unconscionability concept. This kind of judicial reasoning, all too prominent, precludes the development of a rational structure. *Id.* at 66.

43. 52 Misc. 2d 26, 274 N.Y.S.2d 757 (1966), *rev'd on damages only*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (1967).

44. 103 N.J. Super. 500 (Law Div. 1968), *aff'd in part* 108 N.J. Super. 129 (App. Div. 1970).

45. *Supra* note 1. *See also* Toker v. Westerman, 8 U.C.C. REP. SERV. 798, 799 (1970), where the court found the sale of a refrigerator-freezer at two and one-half times its reasonable retail value, "shocking and therefore unconscionable" under Section 2-302. The court limited recovery to the reasonable value of the item.

46. 274 N.Y.S.2d at 759.

47. Both courts, in finding unconscionability, aided the seller by allowing him to recover the value of his product. The courts could have refused enforcement simply on the grounds of illegality (lottery). *See* Spanogle, *supra* note 29, at 965 n.169.

In *Toker*, the husband and wife buyers were deluded into believing the food plan they agreed to included the price of a freezer ($799.95). Finding the maximum retail value to be $300, the court refused to enforce the contract on the grounds that a price-value differential of greater than two and one-half times is unconscionable, citing *Sanchez*.

To date, the strongest holding that gross price disparity absent procedural abuse, constitutes unconscionability is found in *Jones v. Star Credit Corp.*,[48] where the plaintiff-buyers sought to reform a sales contract for the purchase of a freezer unit. The court found the maximum retail value to be $300. The defendant had charged $900 ($1439 with credit charges and sales tax). After holding that the contract was a contract for sale and not a refinancing agreement, despite the words, "refinance of freezer" typed on the letterhead, the court held that the contract was unconscionable, giving the price value disparity ($900-$300) the "greatest weight," citing *MacIver, ITM,* and *Frostifresh*.[49]

Jones, unlike *Kugler* and its ancestors, did not involve procedural abuse in the contract formation process, such as deception, referral schemes, or nondisclosure which alone could have been sufficient grounds upon which to grant relief. Fraud was not present, nor did the court deem it necessary to a finding of price unconscionability.[50] The court, however, warned of reducing Section 2-302 to a "mathematical ratio formula."[51]

By considering price disparity as the most important element of unconscionability, and presumptive of all other elements, *Jones* presents the strongest holding to date that gross price-value disparity, absent procedural abuses, may constitute unconscionability.[52] In *Kugler*, "procedural unconscionability" in the form of fraudulent representations was established with respect to the testifying consumer representatives. The exorbitant price presumed it with respect to the non-testifying class members. In this capacity, the unreasonable price term took on the character of "substantive unconscionability."[53]

48. 59 Misc. 2d 189, 298 N.Y.S.2d 264 (1969).
49. *Id.* at 266.
50. *Id.*
51. *Id.* at 267.
52. *See* Speidel, *supra* note 29, at 369-74. *See also* Spanogle, *supra* note 29, at 964-69. The Federal Trade Commission in administering 15 U.S.C. § 45, which prohibits "unfair and deceptive" trade practices has declared that unconscionably high pricing, by itself, violates the Act. On this point, *see* Leon A. Tashof, individually and Trading as New York Jewelry Company, [1967-1970 Transfer Binder] TRADE REG. REP. (11th ed.) 18,606, at 20,955 (FTC 1968). The holding in *Jones* is also consistent with Section 6.111(3)(c) of the Uniform Consumer Credit Code which provides that "gross disparity between the price" and value shall be considered by the Administrator as a factor in applying for injunctive relief.
53. Leff, *supra* note 29, at 509.

The next level of inquiry is a determination of what makes an exorbitant price "exorbitant," and how is this to be established. Is it disparity with cost? Fair market value? Credit charges? The court in *Kugler* was faced with a number of considerations in determining price disparity: (1) the wholesale unit cost to the seller ($35-$40); (2) the maximum retail price established by expert testimony ($108-$110); (3) the value of the item in terms of its usefulness—likewise determined by expert testimony (worthless); (4) the credit charges ($29.50). The Court expressly found price unconscionability in terms of a retail price, two and one-half times greater than the maximum retail market price.

It will become apparent that the test employed in *Kugler* is the only proper measure of price disparity. In *MacIver* the disparity was found to exist between retail price and what the court termed "value".[54] Value was found to be $959, retail price ($2568.60), less credit charges ($809), less commission ($800). *ITM* announced a price disparity test based upon a wholesale unit cost relationship, in that retail prices varied from two to six times wholesale unit cost. *Frostifresh* determined price unconscionability in terms of credit charges approximating wholesale cost. *Jones* and *Toker* based price disparity on a comparison of cash price with "maximum retail value".

Kugler was in fact based on a *Jones-Toker* fair market value standard ($108-$110). However, the finding of price unconscionability satisfies the wholesale unit cost test (ITM) since the cash price ($249) was over six times the unit cost ($35-$40). Likewise, the *Frostifresh* credit test can be met since "the service charge ($29.50) . . . almost equaled the price (cost-$35-$40)." *MacIver's* "value" test (time price less interest and commission) is of no moment since the consumers in *Kugler* were paying $45.50 ($29.50 interest plus $16 commission) for goods valued at $108-$110, clearly not unconscionable under *MacIver*.

A test based exclusively on fair market value, credit charges, wholesale cost, or interest plus commission presents a distorted picture. Interest charges, if within statutory limits, are irrelevant in determining price disparity. They represent the cost to the buyer of postponing the payment of the cash price. Interest charges are deemed *per se* reasonable by statute and are in no way related to the reasonableness of a retail cash price. A comparison of retail cash price to wholesale unit cost penalizes inefficient retailers who are faced with high operating costs and commission fees.

54. For a discussion of "value" in *MacIver*, *see* Comment, *Unconscionable Sales Prices*, 20 ME. L. REV. 159, 160 (1969).

An initial comparison of the cash price with the average retail market price charged by similarly situated sellers[55] offers a proper measure of disparity. Some commentators have suggested that if a cash price varies from 1.7 to 2 times the average retail market price charged by similarly situated sellers, it is prima facie unconscionable.[56] The burden would then shift to the seller to justify his price by showing wholesale unit costs, operating costs, fixed costs, and chattel paper discounts giving rise to a net profit presumably in accord with that of sellers similarly situated. In *Kugler* the prima facie showing of a retail price, two and one-half times greater than the average market price, was uncontroverted by any evidence of cost justification. Indeed, it established that a gross profit margin of approximately $209, or greater than 80 percent of the cash price, was clearly unconscionable.

The power of the courts to void contracts containing price terms found to be unconscionable presents serious questions of public policy. The idea of permitting courts to fix prices on an *ad hoc* basis seems utterly repugnant to the common law sacred cow, "freedom of contract" (*but* see U.C.C. 2-305(1). This notion accounts for the reluctance of courts to vitiate contracts on a showing of price disparity and nothing more. Indeed, all the decisions applying the doctrine of price unconscionability, excluding *Jones*, have contained alternative grounds (fraud, illegality etc.) to justify their holdings. The purpose of Section 2-302, to prevent "oppression and unfair surprise. . .,"[57] is best served by considering gross price disparity as an unbargained-for, economically oppressive term presumptive of procedural abuse which Section 2-302 is designed to prevent. One may be troubled by the holding in *Jones* that an exorbitant price may be unconscionable *per se*. However, the court's treatment of the exorbitant price term in

55. The uncommon nature of the product sold in *Kugler* (educational materials) made it necessary to establish an average retail market price by expert testimony. This method of proof can be effectively utilized to prove the market value of unique goods which do not exist in a relevant market.

56. *See*, Speidel, *supra* note 29, at 372-75 and Zuckman, *supra* note 27, at 318-19.

57. *See* Comment 1 to Section 2-302. *See also* the oft-cited Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). The case involved the sale of household items secured by a cross-collateral clause of the sales contract. This provision had the effect of vesting title with the seller by keeping a balance due on all outstanding purchases. In *Williams* the United States Court of Appeals for the District of Columbia set out certain elements as conditions precedent in determining the presence of unconscionability: (1) an absence of meaningful choice, precipitated by a gross inequality of bargaining power; (2) contractual provisions which are unreasonably favorable to the other party; (3) lack of an opportunity to understand the terms of the contract. *Williams*, although the leading case on unconscionability, is not directly applicable since it was confined to enunciating a totality of circumstances test, and did not deal specifically with price unconscionability per se. It is interesting to note that Judge Francis cites *Williams* only once, as supporting MacIver. For satirical commentary on *Williams* and *MacIver*, see LEFF 544-45.

Kugler may lessen the anxiety, for in *Kugler*, proof of the procedural abuse (fraud) by the testifying class representatives was required before the exorbitant price term could be applied substantively. It is in this context, *i.e.*, the consumer class action, that an exorbitant price term can be applied substantively in order to grant relief to those consumers "similarly situated" without sacrificing the *sine qua non* of procedural abuse in the contract formation process.

Consumer Class Action

The extensive injunctive and restorative relief granted by the court in *Kugler*, although receiving impetus from specific statutory authority,[58] is derived, in essence from the class action rationale. The court saw fit to devote a substantial portion of its opinion to class action considerations in support of its holding. It recognized the inherent value of the consumer class action as a deterrent to widespread price gouging and deceptive practices[59] perpetrated on low-income consumers.

The inadequacies of the present system in combating consumer frauds are self-evident. The effectiveness of governmental agencies such as the Federal Trade Commission, limited to seeking injunctive relief, and relying heavily on voluntary compliance, is questionable.[60] Individual private remedies are likewise inept. Private attorneys are dissuaded from taking consumer fraud cases since the amount of the individual claim is relatively insignificant.[61] The superiority of the consumer class action over other means of redress is founded not only on its potential to provide restorative relief to defrauded consumers not parties to the action,[62] but also on its deterrent effect,[63] enhanced by increased publicity and a greater damage award.

---

58. N.J. STAT. ANN. § 56:8-8 (1964).

59. Blalock, *Unconscionable Consumer Installment Contracts*, 54 A.B.A.J. 279 (1968).

60. On this point *see* Travers & Landers, *The Consumer Class Action*, 18 U. KAN. L. REV. 811, 812 [hereinafter cited as Travers] (1970); Eckhardt, *Consumer Class Actions*, 45 NOTRE DAME LAWYER 663, 666 (1970) [hereinafter cited as Eckhardt]. For a blatant illustration of the inadequacy of the F.T.C. in handling consumer frauds *see* Holland Furnace Co., 24 F.T.C. 1413-14 (1936); Holland Furnace Co., 341 F.2d 548 (7th Cir.), *cert. denied*, 381 U.S. 924 (1965), in which the defendant, found to have defrauded consumers in 1936, continued to defraud consumers for 29 years, retaining profits in the face of an F.T.C. "cease and desist" order and numerous individual complaints. *See* Eckhardt 667 for a discussion of this case. This trend may be turning. *See* F.T.C. v. Sperry & Hutchison Co., 92 S. Ct. 898 (1972).

61. *See* Eckhardt 663 and Travers 813.

62. *See* Travers, *supra* note 60. The authors stress "It is not enough to pass a law prohibiting or requiring certain conduct; some mechanism must be provided to secure compliance" at 811.

63. Prof. Starr in an exhaustive, two-part analysis of consumer class actions contained in 49 B.U. L. REV. 407, 508-09 (1969) suggests "a class action by similarly defrauded consumers against their wrongdoers for damages and recission of contracts for

Most courts are reluctant to sustain consumer class actions,[64] since they involve, arguably, separate and distinct transactions. Nevertheless, the California Supreme Court in *Darr v. Yellow Cab Co.*,[65] and *Vasquez v. San Joaquin*,[66] has adopted a much more liberal view by sanctioning the "community of interest test," *i.e.* whether the issues common to the class are so important that their adjudication on a class basis will benefit both the litigants and the court. In *Vasquez* the court reversed a lower court decision which held that a class action was not properly maintainable, opting for an approach strikingly similar to that of *Kugler*. The similarity is contained in the following, where the Court is of the opinion that proof of the falsity of the representations is not a hinderance to the establishment of the common issues. In the words of the Court:

> It is also alleged that the representations regarding the freezers were false, and that the prices charged for them were exorbitant, excessive and *unconscionable, amounting to not less than twice the reasonable retail price. The falsity of these representations could be shown on a common basis since proof of the allegations regarding the quality and price of the freezer purchased by the named plaintiff would provide proof as to all.*[67]

It is in this context, *i.e.* the consumer class action, that an exorbitant price term can be applied substantively as presumptive of procedural abuse. The reasoning employed by *Vasquez* is on an equal footing with *Kugler*. *Kugler* and *Vasquez* recognize that the class action device resolves the fundamental question of whether gross price disparity is an element of unconscionability or can be unconscionable in and of itself. The class action employs the excessive price term in each of its dual capacities; as an element of uncon-

---

the named parties, as well as broad injunctive relief for a carefully limited class of consumers . . ." can be brought within the present confines of procedure. *See also*, Dole, *Consumer Class Actions under Recent Consumer Credit Legislation*, 44 N.Y.U. L. REV. 80 (1969). Congressional response to the problems facing the consumer class action has been limited. *But see* H.R. 262, 92d Cong. 1st Sess. (unreported Jan. 1971), The Consumer Class Action Act, now pending. The Act confers original jurisdiction of Federal Courts, to entertain consumer class actions based on violations of Section 5(a)(1) of the Federal Trade Commission Act which prohibits unfair and deceptive acts. The Act would legislatively overrule Snyder v. Harris, 394 U.S. 332 (1969) which held that claims of class members could not be aggregated to satisfy jurisdictional amounts.

64. The New York Court of Appeals in Hall v. Colburn, 26 N.Y.2d 396, 311 N.Y.S.2d 881 (1970), affirmed a lower court decision dismissing a consumer class action involving violations of the New York Retail Installment Act. For a discussion of *Hall, see Eckhardt, supra* note 60, at 664. For the cases in which consumer class actions were dismissed *see* Eckhardt, *supra* note 60, at 666 n.15.

65. 63 Cal. Rptr. 724, 433 P.2d 732 (1967).

66. 94 Cal. Rptr. 796, 484 P.2d 964 (1971). In *Vasquez* the Court sustained a class action alleging fraud, in which the representatives sought rescission of contracts for the purchase of freezers.

67. *Id.* at 971 (emphasis supplied).