

Boston College Law Review

Volume 9

Issue 2 *Number 2*

Article 3

1-1-1968

Unconscionability—The Code, the Court and the Consumer

Martin B. Shulkin

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/bclr>

 Part of the [Consumer Protection Law Commons](#), and the [Contracts Commons](#)

Recommended Citation

Martin B. Shulkin, *Unconscionability—The Code, the Court and the Consumer*, 9 B.C.L. Rev. 367 (1968), <http://lawdigitalcommons.bc.edu/bclr/vol9/iss2/3>

This Uniform Commercial Code Commentary is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

UNCONSCIONABILITY—THE CODE, THE COURT AND THE CONSUMER

I. INTRODUCTION

The doctrine of unconscionability has long been applied by equity courts to deny specific enforcement of contracts whose provisions are unreasonably harsh and burdensome to one of the parties.¹ This equitable doctrine was adopted in statutory form by Section 2-302 of the Uniform Commercial Code to allow courts to "police explicitly" against unconscionable contracts,² yet nowhere in the Code is the term "unconscionable" defined.³ This fact has led several commentators to question the meaning and usefulness of section 2-302.⁴ Unfortunately, these discussions have largely been speculative, for although Pennsylvania became the first state to adopt the Uniform Commercial Code in 1954, it was not until 1964 that section 2-302 was even cited as an alternative holding in the case of *American Home Improvement Co. v. MacIver*.⁵

Within the past year, however, a number of decisions have been handed down citing section 2-302 either directly or as an alternative basis for the court's holding. Even though these decisions mark only the beginning of the development of section 2-302, they do provide a basis to evaluate the early criticism of section 2-302 and some indication as to the direction application of this section will take. It is the purpose of this comment to examine these cases in light of the prior criticism of section 2-302 in order to determine whether any pattern emerges to provide guidance for the future use of the section.

II. THE NATURE OF THE PROBLEM

In its entirety section 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

¹ E.g., *Banaghan v. Malaney*, 200 Mass. 46, 85 N.E. 839 (1908); *Kleinberg v. Ratett*, 252 N.Y. 236, 169 N.E. 289 (1929). See J. Pomeroy, *Specific Performance of Contracts* § 40 (3d ed. 1926).

² U.C.C. § 2-302, Comment 1. That many of the states who adopted § 2-302 felt that they were incorporating equity principles into sales law is evident from the official comments to the various state statutes. See, e.g., Del. Code Ann. tit. 5A, § 2-302 (1967); Fla. Stat. Ann. § 672.2-302 (1966); Ill. Ann. Stat. ch. 26, § 2-302 (Smith-Hurd 1963); Minn. Stat. Ann. § 336.2-302 (1966); N.J. Stat. Ann. tit. 12A:2-302 (1962); Wash. Rev. Code Ann. § 62A.2-302 (1966). In all, 49 states have adopted the Uniform Commercial Code. Of these, California and North Carolina have omitted § 2-302. All Uniform Commercial Code citations are to the 1962 Official Text.

³ The few definitions that do exist at common law, being phrased in terms of an emotional response to a given factual situation, provide little help in understanding its meaning. For example, an unconscionable contract has been defined as one in which "no sensible man not under delusion, duress, or in distress would make, and such as no honest and fair man would accept." *Stiefler v. McCullough*, 174 N.E. 823, 826 (Ind. 1931).

⁴ See *Leff, Unconscionability and the Code—The Emperor's New Clause*, 115 U. Pa. L. Rev. 485 (1967); 1 W. Hawklund, *A Transactional Guide to the Uniform Commercial Code*, § 1.1601, at 44-45 (1964) (hereinafter cited as *Hawklund*).

⁵ 105 N.H. 435, 201 A.2d 886 (1964).

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.

As has previously been noted the statute does not attempt to define "unconscionable." However, to aid courts in applying this statute, the official comments to the section set out a basic test: "[W]hether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."⁶ In explanation of this test of "one-sidedness" the comments advance two principles. These principles are (1) the prevention of oppression and (2) the prevention of unfair surprise.⁷

Unfair surprise occurs as a result of the nondrafting party having been unaware at the time the contract was entered into that certain harsh and burdensome conditions exist in the contract. Such unfair surprise may be created in two ways. First, the terms of the contract are drafted in language so complex that it is unreasonable to expect the nondrafting party to understand their meaning.⁸ Second, a clause of the contract is so inconspicuous that it is unreasonable to expect that the nondrafting party will read or comprehend it.⁹

The principle of oppression involves two considerations: (1) the circumstances under which the contract was made, and (2) the resulting contractual impositions. In the first instance, "oppression" refers to a situation whereby one party because of a lack of any real bargaining power¹⁰ is unable to alter the terms of the contract. This can result from two economic situations. First, the supply of goods may be so limited that the seller has virtually a monopolistic control over their distribution. Second, although there is a large supply of goods available, an entire industry may regulate their sale in such a way as to prevent the consumer from having any meaningful choice as to the terms of the bargain.¹¹ In both economic situations, the consumer must take

⁶ U.C.C. § 2-302, Comment 1.

⁷ *Id.*

⁸ *Sec. e.g., Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

⁹ *See, e.g., New Prague Flouring Mill Co. v. Spears*, 194 Iowa 417, 189 N.W. 815 (1922), where the court refused to enforce a contract whose provisions were embodied in fine print and the defendant, due to poor eyesight, was unable to read them. This case is noted in U.C.C. § 2-302, Comment 1, as an example of an appropriate case for the application of § 2-302.

¹⁰ *See Comment, Unconscionable Sales Contracts and the Uniform Commercial Code*, Section 2-302, 45 Va. L. Rev. 583, 586 (1959).

¹¹ An example of this situation is the employment in all the contracts of a particular industry of a standard clause limiting the rights of redress of the consumer. *See, e.g.,*

UNCONSCIONABILITY

the terms as dictated or not at all. The resulting contractual impositions must be, by definition, unreasonably burdensome to be "oppressive."¹² If the terms of the contract are not unreasonably harsh to one of the parties, lack of bargaining power or surprise should not be sufficient to render the contract unconscionable.

The critics of section 2-302 feel that the tests set out in the comments provide little guidance for the application of the statute. This has led to three general criticisms: (1) that section 2-302 leaves the applicability of the section solely to the discretion of the individual court, a factor, it is feared, which will lead to abuse, inconsistency and carelessness in decision making;¹³ (2) that businessmen will have great difficulty in determining proper business conduct¹⁴ and draftsmen will have no guidelines to assist them in making contracts;¹⁵ and (3) that the remedies by which the courts may enforce the remainder of a contract without the unconscionable clauses or "may so limit the application of any unconscionable clause as to avoid any unconscionable result" allows the courts to make contracts to which neither of the parties has agreed.¹⁶ Whether or not these criticisms of section 2-302 have proven valid can best be determined by analyzing the cases decided under section 2-302.

III. THE CASES DECIDED UNDER SECTION 2-302

The first case to cite section 2-302 was *American Home Improvement Co. v. MacIver*,¹⁷ in which the plaintiff company agreed to install windows and a door and to flintcoat the sidewalls of the defendant's house for \$1,759.00. In consideration, MacIver signed a financing agreement providing a rate of payment of \$42.81 per month for sixty months—a total cost to the defendant of \$2,568.60—but the agreement did not state the rate of interest the homeowner would have to pay. After the plaintiff had completed only a negligible amount of work, MacIver ordered the work stopped, and the company sued for damages.

On the basis of the New Hampshire "truth-in-lending" statute,¹⁸ MacIver's contention that the contract was void for failing to disclose the interest

Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960), where the court refused to uphold the disclaimer of warranty used by all major automobile manufacturers which limited consumers' remedies to replacement of defective parts.

¹² Webster's Third New International Dictionary 1584 (1963).

¹³ See Ireton, *The Commercial Code*, 22 *Miss. L.J.* 273, 280 (1951); Comment, *Policing Contracts Under the Proposed Commercial Code*, 18 *U. Chi. L. Rev.* 146, 152 (1950).

¹⁴ See Hawklund at 45; Note, *Section 2-302 of the Uniform Commercial Code; The Consequences of Unconscionability in Sales Contracts*, 63 *Yale L.J.* 560, 568 (1954).

¹⁵ But see 1 *New York Law Revision Commission Report, Study of the Uniform Commercial Code 177-78* (1954) (hereinafter cited as *NYLRRCR*).

¹⁶ 1 *NYLRRCR* at 98; King, *Suggested Changes in the Uniform Commercial Code—Sales*, 33 *Ore. L. Rev.* 113, 115 (1954).

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

¹⁸ *N.H. Rev. Stat. Ann. ch. 399-B:2* (Supp. 1967) provides that at the time credit is extended the borrower must be furnished with "a clear statement in writing setting forth the finance charges, expressed in dollars, rate of interest, or monthly rate of charge, or a combination thereof, to be borne by such person in connection with such extension of credit as originally scheduled."

rates was upheld by the court. In discussing the disclosure issue the court examined the price of \$2,568.60 that MacIver had to pay, breaking it down into three items: (1) a sales commission of \$800.00; (2) interest and carrying charges of \$809.60; and (3) goods and services valued at \$959.00. Thus, concluded the court, the defendant was paying an additional \$1,609.60 for goods and services valued at \$959.00. Under these circumstances, the court declared that for the purpose of implementing the disclosure statute the company could not recover under the contract.¹⁹

The court then went on to state that for "another and independent reason" recovery should be denied the company because the transaction was unconscionable under Section 2-302 of the U.C.C.²⁰ Unfortunately the court did not pursue in depth its reasoning behind the applicability of this section. The only statement that vaguely suggests the court's reasoning declares that "In as much as the defendants have received little or nothing of value and under the transaction they entered into they were paying \$1,609.00 for goods and services valued at far less, the contract should not be enforced because of its unconscionable features."²¹ Yet this has led several commentators to view the court's decision as equating unconscionability with "too expensive."²² Inequality of value and price is one indication that unconscionable provisions may exist but it is hardly justifiable to conclude from the court's discussion of unconscionability that this was the sole basis for the court's decision. The more reasonable interpretation would seem to be that various facts in the case contributed to the court's determination. All the facts involved in this case, including that of price, were discussed in conjunction with the disclosure issue. The court in declaring that for "another and independent reason" recovery could not be granted because the transaction was unconscionable, isolates this declaration from all factual discussion. This would more logically suggest that the court considered all the elements of the case in deciding that the contract was unconscionable, not just the price issue.

This conclusion is borne out by the court's statement that "the contract should not be enforced because of its unconscionable features." "Features" reinforces the idea that more than one factor led to the court's holding. The court's discussion of the failure to disclose the interest rate strongly suggests the presence of unfair surprise. Disclosure statutes, declared the court, are "designed to inform the uninformed and this includes many average individuals who have neither the capability nor the strength to calculate the cost of

¹⁹ The interest rate that MacIver was to pay may be calculated from the formula:

$$\frac{24C}{L(N+1)} = R$$

where C equals the cost of the loan; L, the amount of the loan; N the number of payments to be made; and R the annual simple interest rate. See Leff, *supra* note 4, at 550 & n.264 for a discussion of this formula. In the *MacIver* case, the calculation is:

$$\frac{24 \times 810}{1759 \times 61} = 18.1\%$$

If one discounts the salesman's commission, the calculation yields slightly over 33%.

²⁰ 105 N.H. at 439, 201 A.2d at 888-89.

²¹ *Id.* at 439, 201 A.2d at 889.

²² See Leff, *supra* note 4, at 548 & n.259.

UNCONSCIONABILITY

the credit that has been extended to them."²³ Failure to state the rate of credit therefore can result in unfair surprise to the consumer. Thus it would appear that several elements in this case led to the court's decision.

Significantly, however, the equating of high price with unconscionability is the interpretation that later courts have given to *MacIver*. For this reason, however unjustified, *MacIver* may mark the beginning of a possible trend toward voiding contracts under section 2-302 where a great disparity exists between price and value.

The next case in the judicial development of section 2-302 is *Williams v. Walker-Thomas Furniture Co.*²⁴ The defendant, Mrs. Williams, in order to purchase various household items from the Walker-Thomas Furniture Co. during the period 1957-1962, signed a number of form contracts providing for payments to be made in installments. Under the terms of these contracts, which were widely used by the company,²⁵ the items were purportedly leased to her for a stipulated monthly rental. Title to each item remained with the company until the total of the payments equalled the purchase price of the item, at which time title was to pass to Mrs. Williams. However the contracts further contained a clause which provided that,

"the amount of each periodical installment payment to be made by [purchaser] to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by [purchaser] under such prior leases, bills or accounts; and all payments now and hereafter made by [purchaser] 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." Emphasis added.)²⁶

The effect of this clause was to keep a balance due on all items purchased. As a result, a default in payment for any one item allowed the company to repossess all the items previously purchased. Furthermore, as these contracts were drafted as lease arrangements, money paid under them would be treated as rental charges and, hence, nonreturnable.

In Mrs. Williams' situation, she had paid the furniture company \$1,400.00 for merchandise purchased since 1957, and at the time of her latest purchase—a \$514.95 stereo—she only owed \$164.00. When Mrs. Williams failed to meet her payments on the stereo, the company brought suit, under the terms of the contract, to recover all items purchased since 1957. At the trial, it was established that at the time Mrs. Williams entered into the last contract the company knew that she had seven children to support on her welfare allowance of \$218.00 per month from the Government.²⁷

Section 2-302 was not in effect in Washington, D.C. at the time the parties entered into the contract in question, but as this case was one of first impression, the court used the section as persuasive authority in declaring

²³ 105 N.H. at 438, 201 A.2d at 887.

²⁴ 350 F.2d 445 (D.C. Cir. 1965).

²⁵ *Id.* at 447.

²⁶ *Id.*

²⁷ *Id.* at 448.

the contract void. In reaching the result, the court laid down several guidelines for determining unconscionability under section 2-302; (1) an absence of meaningful choice caused by an inequality of bargaining power, (2) terms unreasonably favorable to one party, and (3) a lack of reasonable opportunity to understand the contract because the terms were hidden in fine print or clouded over by deceptive sales practices.²⁸ These tests reflect the principles of oppression and unfair surprise set out in the official comments to section 2-302.

Several facts in the *Walker* case point to the existence of oppression and unfair surprise. The form contract used by the furniture company is a device which often gives the merchant an advantage of surprise over the consumer.²⁹ By placing the complexly worded provision in the body of a form contract, the company discouraged Mrs. Williams from reading or understanding it. The resulting harshness of the provision indicates the oppressive nature of the transaction. Mrs. Williams by defaulting on payments for one item in 1962 was to lose through repossession all the items purchased since 1957.³⁰ This result becomes even more oppressive when viewed with the already precarious financial condition of Mrs. Williams.

The principles proclaimed in the *Walker* case were adopted by the next court to apply section 2-302, in *Application of State of New York v. ITM, Inc.*³¹ This action was brought on behalf of the State of New York by the Attorney General, pursuant to a statute empowering him to bring an action against any person who fraudulently or illegally conducts a business.³²

ITM was engaged in the business of selling household goods to consumers at their homes under retail installment contracts providing for payments to be made over an extended period of time. To induce the consumer to sign this contract, ITM developed what was known as a "referral sales program." Under this scheme, the consumer was to submit twenty names of other prospective customers. For each sale made to one of these suggested customers, the consumer would receive a commission. By this arrangement, the consumer was assured that his own purchases would ultimately cost him nothing. Because of this assurance ITM was able to sell to the consumer broilers which cost the company \$80.00 for \$658.08, vacuum cleaners which cost it \$140.00 for \$920.52, and color television sets which cost ITM \$450.00 for \$1,292.40.³³ Testimony at the trial demonstrated that if just twelve out of every twenty names submitted by each consumer were to enroll in this system, by the seventh stage millions of people would be involved in purchasing these items. If projected further, this number would soon exceed the world's population. Depending on the size of the sales force, a juncture

²⁸ *Id.* at 449.

²⁹ It has been stated that § 2-302 is primarily aimed at this type of merchant-consumer form contract. See Marsh and Warren, Report on Proposed Amendments to the Uniform Commercial Code, at 2-18 (1961).

³⁰ 350 F.2d at 447.

³¹ 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966).

³² N.Y. Executive Law § 63, subd. 12 (McKinney 1967). The term "fraud" is defined in this provision to include "any device, scheme or artifice to defraud and any deception, or . . . unconscionable contractual provisions."

³³ 52 Misc. 2d at 53, 275 N.Y.S.2d at 320.

UNCONSCIONABILITY

would soon be reached where the plan had to "fail as a matter of economic feasibility and mathematical certainty."³⁴

The court voided all the transactions entered into between the company and its customers on the grounds of fraud.³⁵ It further found the contracts to be unconscionable under Section 2-302 of the U.C.C.³⁶ In this area, the court's discussion centered largely around the disparity between value and price found in these installment contracts. The court cited *MacIver* for the proposition that high price alone is grounds for finding unconscionability.³⁷ The court, however, was not completely willing to adopt this view. Instead it held that the high prices, when viewed in conjunction with the deceptive sales practices employed by the company, were unconscionable.³⁸

Several facts in the *ITM* case indicate that the consumers did not have a reasonable opportunity to understand the contract. The defendant employed a retail installment contract. This type of contract may disguise discrepancies in price by stressing only the small weekly sum the consumer need pay, thus clouding over the much higher total cost actually being charged. When used with the other sales practices involved in these transactions, the discrepancy between the actual value of the goods and its eventual cost to the consumer becomes even more obscure. By emphasizing the rich rewards from the commissions, the seller deluded the consumer into thinking that he would actually profit by this system. The court also found that it was not reasonable to expect the consumer to see the fallacies in the arrangement.³⁹ The consumer's chance to profit by this method largely depended on how far the "chain" had already progressed because of the diminishing field of purchasers in a given locale. Without this information, the consumer had no way of measuring his chance of success.

Up to this time, however, no court had used section 2-302 as the sole basis for its decision. The first case decided wholly under the section, and the first to apply the third remedy that section 2-302(2) makes available to the court, was the case of *Frostifresh Corp. v. Reynoso*.⁴⁰ The defendants, husband and wife, were Spanish-speaking people who negotiated orally with a Spanish-speaking salesman for the purchase of a refrigerator-freezer unit. During the conversation, the husband told the salesman he would be unemployed in a week and could not afford the unit. The salesman assured them that, under a referral sales arrangement similar to the one in *ITM*, the unit would cost them nothing because of the commissions they would receive on the sales that would purportedly be made to their friends. The couple was then given an installment contract to sign, written entirely in English, which in no way was explained to them. The cash sale price of the unit was \$900.00 plus a \$245.88 credit charge, making the total cost \$1,145.88. At the trial, the plaintiff admitted that the cost to the corporation for the appliance

³⁴ *Id.* at 47, 275 N.Y.S.2d at 315.

³⁵ *Id.* at 47-53, 275 N.Y.S.2d at 315-19.

³⁶ *Id.* at 54, 275 N.Y.S.2d at 321.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 48, 275 N.Y.S.2d at 315-16.

⁴⁰ 281 N.Y.S.2d 964 (App. T. 1966).

was \$348.00. When the defendants failed to meet the payments, the merchant sued for the amount due under the contract terms.

The circumstances surrounding the signing of this contract are of primary importance in rendering the contract unconscionable. The salesman knew that the couple could not afford the unit. To induce them to purchase this freezer, the salesman "distracted and deluded"⁴¹ the couple into believing that it would cost them nothing because of the commissions they would receive from sales made to their friends. Laboring under this misconception, the couple signed a retail installment contract written entirely in English, a language largely foreign to them. As the contract was in no way explained to them, they remained largely ignorant of its provisions. It is not unreasonable to assume that because of the deceptive sales practices employed, the couple in signing the contract never considered that they were incurring any contractual liability. Furthermore, enforcement of the contract would result in unduly burdensome impositions on the couple. When unfair surprise is presented and the resulting contractual impositions are unreasonably burdensome, courts will not enforce the contract as it is unconscionable. Since the couple did not return the merchandise, however, the court allowed the merchant to recover \$348.00, the cost to the merchant of the appliance.

The appellate court upheld the finding of unconscionability, but reversed the lower court's decision on damages and allowed the seller to recover a "reasonable profit" over his net cost.⁴² In so doing, the appellate court applied the third remedy of section 2-302 allowing courts to "so limit the application of any unconscionable clause as to avoid any unconscionable result." As the defendants had already used the product, a refusal to enforce the contract would not put the parties back in their original position. Similarly, as the unconscionable provision was, in effect, the price term, it would be impossible to enforce the contract without it. By limiting the applicability of the unconscionable clause, the court could allow the purchaser to keep his appliance and the merchant to make a reasonable profit.⁴³ Thus, the court was able to secure performance of the contract at terms fair to both parties.

The fact that section 2-302 provides the courts with adequate remedies to deal with the diverse factual situations that arise is an important factor in insuring proper application of this section. The court in *ITM* used the first remedy and voided the entire contract. In *Reynoso*, the court used the third remedy to limit the applicability of the unconscionable provision. The second remedy, permitting the court to strike any unconscionable clause and enforce the remainder of the contract without it, has also been recently used in two cases. *Paragon Homes of New England, Inc. v. Langlois*⁴⁴ and *Paragon Homes of Midwest, Inc. v. Crace*⁴⁵ presented similar situations and may be treated together. In both cases, form contracts for the purchase of household goods

⁴¹ *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 27, 274 N.Y.S.2d 757, 758 (Dist. Ct. 1966).

⁴² 281 N.Y.S.2d at 965.

⁴³ This would coincide with U.C.C. § 2-305 (1) allowing courts to substitute a reasonable price where such term is absent in the contract.

⁴⁴ 4 U.C.C. Rep. Serv. 16 (N.Y. Sup. Ct. 1967).

⁴⁵ 4 U.C.C. Rep. Serv. 19 (N.Y. Sup. Ct. 1967).

UNCONSCIONABILITY

were executed by residents of Massachusetts and Wisconsin respectively with corporations licensed to do business in the particular state but not in New York. The clauses in question named the Nassau County Supreme Court of New York as the sole forum for adjudicating any suits that might arise under the contract. When the defendant homeowners breached the contract, the plaintiff corporation brought suit in New York under the terms of these contracts. Although acknowledging that such a clause is usually valid,⁴⁶ the New York court refused in both cases to take jurisdiction.

The ostensible rationale behind this holding was the doctrine of forum non conveniens.⁴⁷ However, the court went on to say that if jurisdiction had not been refused on these grounds, the clause would have been stricken under section 2-302. The court placed strong emphasis on the fact that this was a transaction between a merchant and consumer in which a form contract was employed. Without elaborating on this, the court declared that the parties were not on an equal basis.⁴⁸

From this discussion several inferences can be drawn. It would appear in these two cases that the consumers signed form agreements of the company, unaware either of the existence of the clause limiting redress only to the courts of New York or of the legal implications of the clause. In either event, the added expense of traveling to New York to defend an action would largely discourage the defense of the suit. By striking the unconscionable clause, suit can still be maintained in the jurisdictions where the transactions took place.

The most recent case to be decided under section 2-302 is that of *Unico v. Owen*.⁴⁹ In this case, defendant Owen signed a retail installment contract with the Universal Stereo Corporation for the purchase of one hundred forty stereophonic records for \$698.00. These were to be delivered at the rate of twenty-four per year until all one hundred forty had been delivered. In addition, Owen was to receive a Motorola stereo record player completely free of charge. With the extra credit charge, the total cash price Owen was to pay amounted to \$849.72. This was to be paid in thirty-six monthly installments at the rate of \$22.77 a month. To comply with this financing arrangement, Owen signed a note which accompanied the contract. The name, Universal Stereo Corporation, was printed on the front of the note, but on the back was an "elaborate printed form"⁵⁰ assigning payment to Unico. Unico was a partnership formed expressly for the purpose of financing the Universal Stereo Corporation. In return for Unico's loan to Universal of 35 percent

⁴⁶ 4 U.C.C. Rep. Serv. 16, 18 (N.Y. Sup. Ct. 1967); 4 U.C.C. Rep. Serv. 19, 20 (N.Y. Sup. Ct. 1967).

⁴⁷ 4 U.C.C. Rep. Serv. 16, 18 (N.Y. Sup. Ct. 1967); 4 U.C.C. Rep. Serv. 19, 20 (N.Y. Sup. Ct. 1967). This doctrine is: "the right of the court in the exercise of its equitable powers to refuse the imposition upon its jurisdiction of the trial of cases even though the venue is properly laid if it appears that for the convenience of litigants and witnesses and in the interest of justice the action should be instituted in another forum where the action might have been brought." Black's Law Dictionary 783 (4th ed. 1951).

⁴⁸ 4 U.C.C. Rep. Serv. 16, 19 (N.Y. Sup. Ct. 1967); 4 U.C.C. Rep. Serv. 19, 21 (N.Y. Sup. Ct. 1967).

⁴⁹ — N.J. —, 232 A.2d, 405 (1967).

⁵⁰ Id. at —, 232 A.2d at 407.

of the balances of customer contracts assigned to Unico, Universal submitted substantial control of its business operations to Unico. Therefore, Unico not only had a thorough knowledge of Universal's method of operations but to a large extent fashioned the form of contract and note employed by Universal.⁵¹

On the reverse side of this contract were various terms set out "into three separate parts, the body of each part being in very fine print."⁵² For the purpose of this analysis, the only term that need concern us is that declaring "that the liability of the buyer to any assignee shall be immediate and absolute and not affected by any default whatsoever of the seller signing this contract."⁵³ The effect of this provision was to make the consumers' liability to the assignee absolute even if the seller failed to deliver anything under the contract.

Owen received the record player and the original twelve albums called for by the contract. Nothing further was ever delivered by Universal. After continuing to pay the next twelve installments due on the note, Owen ceased payment. At the time he stopped payment he had already paid \$303.04. Unico then brought suit for the balance due on the note, relying on the aforementioned clause to prevent Owen from using the seller's breach as a defense.

The court held that Unico was not a "holder in due course" and could not collect on the note.⁵⁴ It further held that the clause limiting the buyer's right to redress was unconscionable under section 2-302.⁵⁵ In making its determination, the court emphasized factors common to most of the cases previously discussed. A standardized retail installment contract between a merchant and consumer was used. The unconscionable provision was embodied, in the words of the court, "in very fine print." Furthermore the oppression is shown by the conditions imposed by the contract. Under the terms of this transaction, the defendant was required to pay the full amount of the note to Unico even if Universal delivered nothing. Under the unique circumstances of this particular case, the seller and financier were virtually one and the same party. It is this close relationship which renders the provision allowing Unico to collect after Universal defaults unconscionable.

In deciding this issue of unconscionability, the court stressed the problems involved in the usual merchant-consumer transaction: (1) the substantial difference in bargaining power between the merchant and consumer based on the inequality of economic resources between them, permitting the merchant to shape the exchange in his favor;⁵⁶ (2) the fact that mass marketing of consumer goods has required the use of standardized contracts with the result that there is "no real arms length bargaining;"⁵⁷ (3) the fact that the ordinary consumer does not read the fine print nor would he be likely to understand the "legal jargon" if he did.⁵⁸ For these reasons, the court con-

⁵¹ *Id.* at —, 232 A.2d at 413.

⁵² *Id.* at —, 232 A.2d at 407.

⁵³ *Id.* at —, 232 A.2d at 408.

⁵⁴ *Id.* at —, 232 A.2d at 416.

⁵⁵ *Id.* at —, 232 A.2d at 418.

⁵⁶ *Id.* at —, 232 A.2d at 410.

⁵⁷ *Id.* at —, 232 A.2d at 410.

⁵⁸ *Id.* at —, 232 A.2d at 410-11.

UNCONSCIONABILITY

cluded that in construing such contracts, the courts must be "responsive to equitable considerations."⁵⁹

IV. CONCLUSION

Official comment 1 to section 2-302 declares the broad principle of unconscionability to be the "prevention of oppression and unfair surprise." The cases discussed provide examples of a basic similarity of factors considered by the courts in making their determination of whether a contract is unconscionable.

Courts have most readily applied section 2-302 in the area of form contracts used in merchant-consumer transactions. This reflects the courts' very practical realization that in today's commercialized setting many contracts are entered into by consumers without any real knowledge of the provisions.

In determining if unfair surprise is present, the courts have considered two general factors; (1) the contract itself and (2) the sales technique employed by the merchant. In the first instance, unfair surprise may be present either because the unconscionable provision is embodied in the fine print of the contract or is couched in language so complex that it is not likely to be understood. In the second instance, unfair surprise may be present because the sales technique employed by the merchant deceived the consumer. The prime example of this type of activity is the "referral sales program" noted in the *ITM* case, in which the consumer is deluded into thinking that his purchase will be paid for by the commissions he is to receive from sales to customers whom he has recommended to the merchant.

Oppression is demonstrated by the burdens imposed on the consumer by the provisions of the contract. A great disparity between value and price has served in the cases decided under section 2-302 as the primary indicator that oppression exists. One way this disparity has been caused is through the use of retail installment contracts. By emphasizing the low time payments, sight is often lost of the high total cost.

Several courts have indicated that high price alone could be enough to void a contract as unconscionable.⁶⁰ This result stems largely from the holding in the *MacIver* case. However, the *MacIver* court in citing section 2-302 as an alternative holding did not delineate its reasons for so doing. Furthermore, in all the cases examined, disproportionately high price was merely *one* element which aided the court in making its decision. High price is an indicator that unconscionability might exist, but should not in itself be sufficient to void a contract under section 2-302. If this were not so, a person who purchases an item in an expensive store and later finds the same item selling for a much lower price in some discount house might bring an action under section 2-302 to have the sale set aside on the grounds that the price paid was much higher than necessary. Thus merchants might continuously be threatened with suits for selling items at a higher price than some competitor.

⁵⁹ *Id.* at —, 232 A.2d at 411.

⁶⁰ In addition to the cases discussed in the text, see *Central Budget Corp. v. Sanchez*, 53 Misc. 2d 620, 621, 279 N.Y.S.2d 391, 392 (N.Y.C. Cir. Ct. 1967) where the court suggests that high price alone might be sufficient to render the contract unconscionable.

This could place an undue burden on the merchant's right to engage in free trade. On the other hand, it would be far less burdensome to require the party seeking to overturn the contract to prove that his assent to the high price was caused by oppression or unfair surprise. This would discourage frivolous law suits and still provide adequate protection against unfair tactics of the merchant.

With the possible exception of the trend toward equating high price with unconscionability, the fears of the critics have largely proven erroneous. The similarity of factors considered by the courts have shown a basic uniformity of pattern. While section 2-302 has for the most part been applied in situations where the courts already have another basis for their decision, this should in no way detract from the section's potentiality. The few cases that have been decided under section 2-302 cannot indicate the full future impact of the section. However, they do provide some guidelines as to the direction this section will take. If carefully developed, this section should provide an effective means of protecting the legitimate interests of both parties to a contract.

MARTIN B. SHULKIN