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## ANALYZING UNCONSCIONABILITY PROBLEMS

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Section 2-302 of the Uniform Commercial Code allows courts to refuse to enforce unconscionable clauses and contracts. Although an analogous doctrine was known at common law, it was not extensively used. Since the UCC provision was proposed, however, the doctrine of unconscionability has become fashionable as an all-purpose weapon against contract problems, both within and without the Code. The primary problem with this all-purpose weapon is that the concept of unconscionability is vague, so that neither courts, practicing attorneys, nor contract draftsmen can be certain of its applicability in any particular situation.

Before examining the concept of unconscionability, it is necessary to discuss its desirability, in order to illustrate the major problems that the doctrine attempts to solve and the primary conceptual pitfalls that the doctrine must avoid if it is to be useful. Only then can the content of the doctrine be examined. This article develops an analytical structure from the evolution of section 2-302 and from the cases decided after its promulgation. First, a conceptual framework is derived from the drafting history, draftsman's comments, Official Comments, and traditional equity and common law cases on the subject.

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Second, the holdings of recent cases are used to test, illustrate and expand this conceptual framework.

The structure focuses on two types of abuses, one relating to the contract formation process and the other to the substantive terms of the contract; usually both types of abuses must be present to produce a finding of unconscionability. Contract formation abuses may consist either in deception or in refusals to bargain over contract terms.

The abuses concerning substantive contract terms are more important and more difficult to categorize. The primary type of abuse focuses on the public interests involved in protecting the integrity of the bargaining process, and weighs the contravention of any such interest against the legitimate interests of the drafting party in the rights asserted. Analysis of this type of abuse under section 2-302 is analogous to the courts' traditional approach in voiding contracts or clauses as contrary to "public policy," but a balancing of interests is now possible. A second type of abuse concerns boilerplate clauses that conflict with the fundamental duties imposed on the drafting party by the transaction. As with express warranties, these fundamental duties may not be disclaimed, even upon notice to the non-drafting party. A third abuse concerns fine-print clauses that undermine the reasonable expectations of the non-drafting party. Major rights of the non-drafting party are not waived merely because he has signed a form, and the courts view supposed manifestations of assent more realistically in the modern form contract transaction. A fourth category of abuse is price disparity, which may be regarded either as merely another inequitable factor to be considered with all the other circumstances of the case, or as sufficient in itself to require equitable relief.

This article does not attempt to evaluate the effectiveness of the unconscionability doctrine as a tool for policing the consumer marketplace or reforming standard contracts. Such an evaluation is needed, especially in comparison to the effectiveness of the proposed Uniform Consumer Credit Code in accomplishing the same task. However, any such evaluation must be based on an explicit analytical structure, and it is hoped that the structure developed here will serve as a starting point for evaluation of the unconscionability device.

As a starting point, this article emphasizes the derivation of its own analysis, rather than its differences with others. Although the arguments presented may in part rebut theories hostile to the unconscionability doctrine, the article seeks to say more than "they are wrong." Thus direct attacks on such theories are usually relegated to footnotes.<sup>1</sup>

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<sup>1</sup> See notes 50, 54, 81 & 151 *infra*. See also text accompanying notes 114-15 & 133-36 *infra*.

## I. IS THE DOCTRINE DESIRABLE?

The unconscionability doctrine is expressly incorporated into the UCC, except in California and North Carolina, and is therefore part of the statutory law of forty-seven states.<sup>2</sup> Nevertheless, some people still have serious doubts about its propriety,<sup>3</sup> and any advocate of the doctrine must be able to argue not only that it is part of the law, but also that it is a desirable part and its use should be promoted. The attitude of the judiciary and the bar will determine whether the doctrine is used or ignored. Moreover, an examination of the underlying reasons for the doctrine will shed light on its meaning and range of application.

The pressure for the use of the unconscionability concept springs primarily from the inflexibility of our inherited contract doctrines. The results of this inflexibility can most easily be seen in the modern consumer sale transaction.<sup>4</sup> The consumer signs a contract (usually a form prepared by the merchant or lender), thereby supposedly manifesting an intent to be bound by all its terms. Of course, in practice the buyer has not read the terms and usually could neither understand nor change them even if he had.<sup>5</sup> His only actual intent is a very general one to buy or borrow rather than abstain from buying or borrowing. There is no actual intent relating to the specific clauses in the form's fine print, but problems relating to specific clauses do arise, and they must be resolved by courts. The traditional incantation by the court is that the consumer is bound by what he signed, and the printed clauses control. This doctrine violates the consumer's expectations to the extent that it does not represent his understanding of the contract terms. Historically, it seems that when contract law did not protect the expectations of a significant segment of the public, there was agitation for change. The record of such agitation extends

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<sup>2</sup> CCH INST. CREDIT GUIDE ¶650, at 4451; UNIFORM COMMERCIAL CODE §2-302 [hereinafter cited as UCC]; CAL. COMM. CODE §2302 (West 1964); N.C. GEN. STAT. §25-2-302 (1965). Note, however, that California does have a statutory provision for the denial of specific performance where factors analogous to unconscionability exist in the contract. CAL. CIV. CODE §3391 (West 1954).

<sup>3</sup> See Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); Note, *Unconscionable Business Contracts: A Doctrine Gone Awry*, 70 YALE L.J. 453 (1961); Comment, *Policing Contracts Under the Proposed Commercial Code*, 18 U. CHI. L. REV. 146 (1950-51).

<sup>4</sup> See Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931).

<sup>5</sup> See Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Wilson, *Freedom of Contract and Adhesion Contracts*, 14 INT'L & COMP. L. Q. 172 (1965).

at least from the introduction of quasi-contractual concepts to the present truth-in-lending legislation.<sup>6</sup>

Courts have not been insensitive to agitation for change of traditional contract doctrine in situations involving violations of consumers' expectations. Unconscionable contracts and clauses have been surreptitiously invalidated for decades.<sup>7</sup> But surreptitious invalidation created problems. The courts did not usually invalidate on the express ground that a particular clause or contract was unconscionable. Their regard for "freedom of contract" prevented such a straightforward approach or any explicit recognition of judicial control over the terms of a bargain. Instead, the courts resorted to various formal, technical devices to achieve their ends. Although the results in the particular case may have been desirable, the technical devices used to achieve them were stretched, misconstrued, and otherwise abused. Courts used lack of mutuality,<sup>8</sup> failure of consideration,<sup>9</sup> and construction of contract terms<sup>10</sup> to achieve desired results in situations where they would not traditionally have been used.

If the application of misused technical devices and unusual construction methods could have been limited to the unconscionable contract situation, no particular problems would have been created. However, the language of the decisions did not mention unconscionability, thereby purporting to be of general application, and the doctrines enunciated were supposedly applicable to all contracts. Of course, indiscriminate application of the doctrines was extremely unsettling and caused great difficulty in predicting the courts' handling of normal, fairly drafted contracts.<sup>11</sup>

The limited attack on unconscionable clauses through these devices also encouraged contract draftsman to try again with "clearer" language. The clearer language was always longer, more technical, and harder for the non-drafting party to understand. A vicious cycle was

<sup>6</sup> For treatment of quasi-contractual concepts see 1 A. CORBIN, *CONTRACTS* § 19 (1963); Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 63-69 (1888).

Examples of present legislation are: Pub. L. No. 90-321 (May 29, 1968); MASS. GEN. LAWS ANN., ch. 255D, §§ 9, 23 (Supp. 1967); UNIFORM CONSUMER CREDIT CODE, art. 2 pt. 3, art. 3 pt. 3 [hereinafter cited as U3C].

<sup>7</sup> *E.g.*, Hardy v. GMAC, 38 Ga. App. 463, 144 S.E. 327 (1928); Wood, Stubbs & Co. v. Kaufmann, 233 Ill. App. 138 (1924); New Prague Flouring Mill Co. v. Spears, 194 Iowa 417, 189 N.W. 815 (1922); Austin Co. v. Tillman Co., 104 Ore. 541, 209 P. 131 (1922); Kansas City Wholesale Grocery Co. v. Weber Packing Corp., 93 Utah 414, 73 P.2d 1272 (1937).

<sup>8</sup> *E.g.*, American Agric. Chem. Co. v. Kennedy & Crawford, 103 Va. 171, 48 S.E. 868 (1904); Nicholls v. Wetmore, 174 Iowa 132, 156 N.W. 319 (1916); see 1-A A. CORBIN, *CONTRACTS* § 128, at 551 n.94, §§ 152-170 (1963).

<sup>9</sup> *E.g.*, Austin Co. v. Tillman Co., 104 Ore. 541, 209 P. 131 (1922).

<sup>10</sup> *E.g.*, Andrews Bros. v. Singer & Co., [1934] 1 K.B. 17 (C.A. 1933); Wholesale Grocery Co. v. Weber Packing Corp., 93 Utah 414, 73 P.2d 1272 (1937); see Llewellyn, *supra* note 4; Llewellyn, Book Review, 52 HARV. L. REV. 700 (1939).

<sup>11</sup> See Llewellyn, *supra* note 4.

begun. The draftsman's first try was capable of some form of misconstruction, and the court with perfectly good intention would so misconstrue it. The draftsman would then try again, and, if necessary, again, each new form being more incomprehensible to the layman, but more technically impervious to misconstruction. If the form eventually succeeded in becoming technically impervious to misconstruction, it would probably be totally incomprehensible as well, especially to any layman. In effect, with the best of intentions, the court had completely thwarted the non-drafting party's expectations.

The Code at least eliminates pressure on a court to resort to misconstruction or other misuse of technical devices to reach a desired result. The court may now attack the unconscionable features of a contract directly.<sup>12</sup> The overreaching, technically impervious, but practically incomprehensible clause should no longer be the ultimate quest of the draftsman. Even an incomprehensible clause that is not necessarily overreaching may now be a liability under the Code, since the non-drafting party cannot understand it. It would seem wise for the draftsman to concentrate on presenting clauses in clear, understandable language.

What can the unconscionability doctrine accomplish? First, it can help transform traditional notions of "freedom of contract." The common law has always limited the meaning of "freedom of contract" that allows only the choice between entering into a particular contract or abstaining, so that when one party has chosen to contract the other is absolutely "free" to impose any terms. Legislatures have limited possible contract terms, such as through usury statutes;<sup>13</sup> and courts have also imposed limitations, on their own authority and without legislation: for example, through decisions voiding liquidated damage clauses as penalties.<sup>14</sup> But the unconscionability doctrine can strengthen the concept of "freedom of contract" that implies the ability to co-

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<sup>12</sup> This does not, however, necessarily eliminate the problems caused by past decisions involving misconstruction.

<sup>13</sup> R. POUND, *THE SPIRIT OF THE COMMON LAW*, 186-87, 198-99 (1921). The doctrine of usury can be traced prior to biblical times. The Roman Law of the Twelve Tables, the first codification of existing Roman laws and customs, permitted the taking of interest within the maximum legal rate of one-twelfth part of the capital. T. DIVINE, *INTEREST, AN HISTORICAL AND ANALYTICAL STUDY IN ECONOMICS AND MODERN ETHICS* 5-11, 19-20 (1959); Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 *TUL. L. REV.* 345 (1937), 12 *TUL. L. REV.* 42 n.114 (1937). A prohibition of interest in any form was incorporated into an early English statute. 11 Hen. VIII, c. 8 (1494). In 1545 interest was legalized by statute in England and the maximum rate was set at 10%. Usury Act, 37 Hen. VIII, c. 9, § III (1545). Later, the maximum legal rate was lowered to 5%. 12 Anne, Stat. 2, c. 16 (1713). This latter statute was the forerunner of modern American statutes. *E.g.*, N.J. STAT. ANN. § 31:1-1 (1963). See Berger, *Usury in Installment Sales*, 2 *LAW & CONTEMP. PROB.* 148, 157-58 (1935).

<sup>14</sup> *E.g.*, *Priebe & Sons v. United States*, 332 U.S. 407 (1947); *Seeman v. Biemann*, 108 Wisc. 365, 84 N.W. 490 (1900). See 5 A. CORBIN, *CONTRACTS* § 1058 (1964).

determine the terms of a contract.<sup>15</sup> Courts may now examine unbargained terms without disturbing those terms that have been co-determined, and unilaterally determined terms can be subjected to special scrutiny.

Second, the unconscionability doctrine can improve the stability of contracts. It seems that courts have always regulated contracts for unfairness. But prior cases created problems because of the surreptitious manner of decision, the misused technical devices, and the uncertainty produced by their use. Under the Code, courts will not have to use surreptitious devices in such cases. Because the courts can use overt, instead of covert, methods,<sup>16</sup> some of the uncertainties should be eliminated. Opinions may now state the reasons that actually influenced decision, and the attorney's ability to predict how a court will decide future similar cases should increase. Increased predictability should also increase the stability of contracts.

However, uncertainty will result if the reasons used by the bench are not susceptible to analysis by the bar. If a rationale can be stated only in subjective terms, its usefulness in increasing predictability is greatly diminished.<sup>17</sup> The extent to which the unconscionability doctrine will enhance the stability of contracts depends heavily on the ability of the bench and bar to formulate solid definitions of the basic concepts involved. On the other hand, it must be recognized that it is irrelevant to compare predictability under the unconscionability doctrine to predictability under a mythical jurisprudential system in which courts never consider the fairness of contract terms they are asked to enforce.

## II. WHAT IS THE DOCTRINE?—A CONCEPTUAL APPROACH

A conceptual analysis of the unconscionability doctrine presents two basic questions: what concepts are involved, and how is uncon-

<sup>15</sup> The ambivalent nature of "freedom of contract" is somewhat alleviated in German legal theory by a conceptual analysis that recognizes 2 distinct elements. The "bargaining" element—the power to co-determine the terms of the contract—is called the *Gestaltungsfreiheit*. The "Agreement" element—the freedom to decide whether to enter the transaction—is called the *Abschlussfreiheit*. Disregarding fully monopolistic enterprises, the *Abschlussfreiheit* includes the freedom left to the consumer to decide with whom he will contract. But the *Gestaltungsfreiheit* is lacking in consumer transactions based on standard form contracts. Lenhoff, *Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law*, 36 TUL. L. REV. 481, 482 (1962). The development of fair exchange concepts has been traced quite thoroughly in Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 TUL. L. REV. 345 (1937), 12 TUL. L. REV. 42 (1937).

<sup>16</sup> "Covert tools are never reliable tools." Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939).

<sup>17</sup> It must be recognized that even subjective overt tools are better than covert tools, because the former give insight into the actual manner of decision even if they are not always subject to analysis.

scionability defined? The two questions are different and involve different problems. An answer to the first question need only illuminate a structure for analyzing problems presented; but an answer to the second is impossible in any rigorous sense, and even if possible, would be undesirable. However, it is possible to shed light on the concepts involved without attempting rigorous definition, for the doctrine is the product of an examinable background that includes prior case law, statements by the draftsmen, the drafting history of the statutory section, and the Official Comments. In addition, there is now a case-law gloss on the statute which will be examined in the next section of the article.

Section 2-302 itself provides neither a definition of the term "unconscionable" nor an elaboration of the conceptual framework of the doctrine. Instead, the section describes the remedies available to a court once it has found an unconscionable contract or clause. The section requires a hearing to be held before the court determines whether unconscionability is present.<sup>18</sup> In making a decision on unconscionability, the court is required to examine the commercial setting of the individual transaction, thereby prohibiting use of standardized rules. Each case *must* be judged on its own particular facts; there is no exception to the hearing requirement once unconscionability is claimed.<sup>19</sup> The statutory language both does not define the concept and provides procedures which hinder the development of a rigid definition.

The origin of the concept of unconscionability is somewhat obscure.<sup>20</sup> Although both equity and law courts employed the term frequently, no explicit rule was formulated. The doctrine was used commonly to deny specific performance in sales of realty involving in-

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<sup>18</sup> UCC §2-302(2).

<sup>19</sup> *But see* Sinkhoff Beverage Co. v. Jos. Schlitz Brewing Co., 51 Misc. 2d 446, 273 N.Y.S.2d 364 (Sup. Ct. 1966), denying a hearing on a motion for a preliminary injunction.

<sup>20</sup> One of the earliest references to the concept of unconscionability, if not the earliest, was made by Lord Hardwicke in the famous case of Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82 (Ch. 1751). Lord Hardwicke viewed the unconscionable bargain as giving rise to the presumption of fraud.

[Fraud] may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains . . . .

*Id.* at 100. *See also* 3 J. POMEROY, EQUITY JURISPRUDENCE §§ 923-24 (5th ed. 1941); 1 J. STORY, EQUITY JURISPRUDENCE § 351 (14th ed. 1918). Lord Hardwicke noted that even the common law had taken notice of this type of bargain. *See, e.g.,* James V. Morgan, 83 Eng. Rep. 323 (K.B. 1664); Thornborow v. Whitacre, 92 Eng. Rep. 270 (K.B. 1706). Although the term "unconscionable" was not used by these courts, they both permitted the defendants to pay less than they had contracted to pay because of the extreme harshness of the contracts.

adequate consideration;<sup>21</sup> however, its use was not limited to such cases. The doctrine was also applied to require specific performance of contracts for the sale of goods<sup>22</sup> and other types of contracts.<sup>23</sup> Law courts used the doctrine to reduce the amount recoverable below that of technical contract damages.<sup>24</sup>

Some doubt has been raised whether the theory of these cases validly bears on the concept in the statute.<sup>25</sup> Since the arguments concerning the relationship of prior cases to section 2-302 are derived primarily from the Official Comments to the Code, further discussion of the substantive teachings of the prior case law will be postponed until after this relationship, and the Comments, have been examined in more detail.<sup>26</sup>

One obvious source of information about the meaning of statutory language is the writings of the draftsman,<sup>27</sup> in this case Karl N.

<sup>21</sup> *E.g.*, *Ballentyne v. Smith*, 205 U.S. 285 (1907); *Mangold v. Bacon*, 237 Mo. 496, 141 S.W. 650 (1911); *RESTATEMENT OF CONTRACTS* § 367 (1932); 3 J. POMEROY, *EQUITY JURISPRUDENCE* §§ 924-28 (5th ed. 1941) and cases cited therein. For contracts inherently one-sided or unconscionable, see 5 J. POMEROY, *EQUITY JURISPRUDENCE* §§ 2209 n.98 (4th ed. 1919) and cases cited therein.

<sup>22</sup> *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948); *Dessert Seed Co. v. Garbus*, 66 Cal. App. 2d 838, 153 P.2d 184 (1944).

<sup>23</sup> *Pope Mfg. Co. v. Gormully*, 144 U.S. 224 (1892) (patent contract); *Weeks v. Pratt*, 43 F.2d 53 (5th Cir. 1930) (patent contract); *In re Chicago Reed & Furniture Co.*, 7 F.2d 885 (7th Cir. 1925) (loan); *Jacklich v. Baer*, 57 Cal. App. 2d 684, 135 P.2d 179 (1943) (contract to repay debt from boxing receipts); *Miller v. Laneda*, 75 Ore. 349, 146 P. 1090 (1915) (exclusive sales contract).

<sup>24</sup> *Hume v. United States*, 132 U.S. 406 (1889); *Baxter v. Wales*, 12 Mass. 365 (1815); *Leland v. Stone*, 10 Mass. 459 (1813); *Thornborow v. Whitacre*, 92 Eng. Rep. 270 (K.B. 1705); *James v. Morgan*, 83 Eng. Rep. 323 (K.B. 1663).

<sup>25</sup> *Leff*, *supra* note 3, at 534, 537, 538, 541.

<sup>26</sup> See text accompanying note 81 *infra*.

<sup>27</sup> Statements of draftsmen have often been accepted in federal courts as indicative of legislative intent. See, e.g., *Schwegmann Bros. v. Calvert Distilleries Corp.*, 341 U.S. 384, 394-95 (1951); *Kaline v. United States*, 235 F.2d 54, 63, 64 (9th Cir. 1956); *United States v. Rehwald*, 44 F.2d 663 (S.D. Cal. 1930).

State courts, however, have been reluctant to consider the testimony of draftsmen. See, e.g., *People ex rel. Dwight v. Chicago R. Co.*, 270 Ill. 87, 105-06, 110 N.E. 386, 393 (1915); *Third District Land Co. v. Toka*, 170 So. 793, 795 (La. App. 1936); *Baltimore Retail Liquor Package Stores Ass'n v. Kerngood*, 171 Md. 426, 430, 189 A. 209, 210 (1937). But see *Deaney v. Linen Thread Co.*, 19 N.J. 578, 584-85, 118 A.2d 28, 31-32 (1955); *Tappan Washington Memorial Corp. v. Margetts*, 9 N.J. Super. 212, 217-218, 75 A.2d 823, 826 (1950).

Although draftsmen's comments have been accepted as a useful source of legislative history, their testimony has usually been before an official body, *i.e.*, a committee or commission. Reference to draftsmen's comments in this article will not be so limited, but will also include extrinsic writings—some of which appeared subsequent to promulgation of the Code. Although a court may take a dim view of the use of such material, *cf.* *United States v. United Mine Workers*, 330 U.S. 258, 281-82 (1947); *Glen Cove Theatres, Inc. v. City of Glen Cove*, 36 Misc. 2d 772, 774-75, 233 N.Y.S.2d 972, 974-75 (Sup. Ct. 1962), it is doubtful whether its use is inappropriate in an article of this nature. Llewellyn's statements cannot realistically be disregarded as an unreliable source in ascertaining the meaning of the concept of unconscionability. See 2 A. SUTHERLAND, *STATUTORY CONSTRUCTION* § 5010 (1943); Mooney, *Old Kontract Principles and Karl's New Code: An Essay on the Jurisprudence of our New Commercial Law*, 11 VILL. L. REV. 213, 222-24 (1966); Comment, *Statutory Construction—Legislative Intent—Use of Extrinsic Aids in Wisconsin*, 1964 WIS. L. REV. 660, 664-67 nn. 26-30. See also Thomas, *Statutory Construction When Legislation is Viewed as a Legal Institution*, 3 HARV. J. LEGIS. 191, 219, 220 (1966).



Llewellyn.<sup>28</sup> At first, the unconscionability doctrine was limited to a defense against form contract abuses.<sup>29</sup> Llewellyn believed that the form contract transaction represents two contracts.<sup>30</sup> One contract comprises the "dickered" terms, those actually bargained for, to which the non-drafting party has manifested a specific assent. The other comprises the "supplementary boilerplate" contract, based on the un-discussed (and almost certainly unread)<sup>31</sup> terms printed on the form. The non-drafting party does not manifest any specific assent to the supplementary boilerplate contract. He assents only to the general pattern of the transaction, and to any reasonable and decent terms which might be expected in such a transaction, in addition to those bargained for.<sup>32</sup>

It is obvious that this analysis does not fit into the detailed doctrines of the *First Restatement of Contracts*,<sup>33</sup> and probably does not fit within the *Second Restatement*.<sup>34</sup> It does, however, fit within the more basic Restatement concepts of manifested assent.<sup>35</sup> Although the cases have traditionally held that a party who signs a writing

<sup>28</sup> There is little doubt that Llewellyn, as the chief reporter and draftsman of the Code, played a significant role in promulgating its provisions. Mooney, *supra* note 27, at 222-24. Llewellyn had a special interest in § 2-302. The first proposed draft is found with a covering letter from Professor Llewellyn. Leff, *supra* note 3, at 489 n.12. Llewellyn was also the most outspoken of the draftsmen. See *Hearings Before the New York Law Revision Commission on the Uniform Commercial Code* 121, 176-78 (1954) [hereinafter cited as *1954 Hearings*]. Llewellyn referred to § 2-302 as "perhaps the most valuable section in the entire Code." *Id.* 121.

<sup>29</sup> See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM REVISED SALES ACT § 24 (3d draft 1943) [hereinafter cited as 1943 DRAFT].

<sup>30</sup> K. LLEWELLYN, *THE COMMON LAW TRADITION* 370-71 (1960). The basic pattern, although not yet fully developed, can also be seen earlier in Llewellyn, *Book Review*, 52 HARV. L. REV. 700 (1939).

The notion of 2 contracts arising out of one transaction is not new to the common law. For over one hundred years a sale transaction with explicit words of warranty created both a sale contract and a warranty contract. The collateral warranty contract was needed at that time to protect the buyer after delivery and payment because the sale contract was thought to be completely executed after payment and delivery. K. LLEWELLYN, *THE COMMON LAW TRADITION* 107 (1960).

<sup>31</sup> See authorities cited in note 5 *supra*.

<sup>32</sup> K. LLEWELLYN, *THE COMMON LAW TRADITION* 370-71 (1960).

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§ 70. EFFECT OF MAKING OR ACCEPTING A WRITTEN OFFER.

One who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation.

RESTATEMENT OF CONTRACTS § 70 (1932).

<sup>34</sup> Section 5A of the *Second Restatement* seems to continue the basic policy of § 70 of the *First Restatement*. See RESTATEMENT (SECOND) OF CONTRACTS § 5A (Tent. Draft No. 1, 1964). But the original § 70 has been deleted and is now covered in §§ 20-23 and chapter 9, and no reference is made to § 5A. Consequently, the full significance of § 5A must await the drafting of chapter 9.

<sup>35</sup> Cf. RESTATEMENT OF CONTRACTS § 19(b) (1932); 1 & 3 A. CORBIN, *CONTRACTS* §§ 33, 607 (1964); 1 S. WILLISTON, *CONTRACTS* §§ 90B, 90C, 90D, 95A (1957).

manifests his assent to all written terms,<sup>36</sup> this reasoning is not inescapable. For example, there is no common understanding that the printing on forms can alter or impair dickered terms. The use of forms in transactions between businessmen indicates little reliance on the force of the printed terms.<sup>37</sup> If there is no such reliance, the signing of a printed form cannot be said to manifest an intention to limit dickered terms.

Llewellyn's concept of the form contract indicates the type of limitation he sought in this area. The assent given to printed terms is limited and known to be limited, and the implicit limitations should be considered by the courts in reading the document. The limitations have two aspects. First, printed terms may not "alter or impair the fair meaning of the dickered terms when read alone."<sup>38</sup> This rule is remarkably similar to the English doctrine of fundamental breach,<sup>39</sup> and comparable to the UCC's limitations on disclaimers of the description of the goods or other expressed affirmations.<sup>40</sup> Second, boilerplate may not be manifestly unreasonable or unfair, either in particular terms or in net effect.<sup>41</sup> The concept of "manifest unreasonableness" is known in commercial law,<sup>42</sup> although it is not a precisely definable term.

The amorphous nature of the terms "unconscionable," "manifestly unreasonable," and "fundamental breach" was certainly intended. Llewellyn made this clear at the New York Law Revision Commission hearings, where he testified that although business lawyers tend to draft form contracts to claim all conceivable rights, their clients do not feel this is necessary. Absent abnormal circumstances, businessmen are satisfied if the boilerplate achieves a "fair" allocation of risks, which Llewellyn characterized as taking no more than "80 per cent of the pie."<sup>43</sup> If a draftsman seeks more of the pie through contract clauses, he is usually being unreasonable, taking more than was commercially

<sup>36</sup> *E.g.*, *Dobler v. Story*, 268 F.2d 274 (9th Cir. 1959); *Rossi v. Douglas*, 203 Md. 190, 100 A.2d 3 (1953); *Rosner v. Zurich Ins. Co.*, 197 Pa. Super. 90, 177 A.2d 30 (1962); 1 S. WILLISTON, *CONTRACTS* § 90A (1957).

<sup>37</sup> See *Apsey, The Battle of the Forms*, 34 *NOTRE DAME LAW.* 556 (1959); *Resnick, Conflicting Boiler Plate—Effect of the Uniform Commercial Code*, 18 *BUS. LAW.* 401 (1963).

<sup>38</sup> K. LLEWELLYN, *THE COMMON LAW TRADITION* 370-71 (1960).

<sup>39</sup> The English doctrine of "fundamental breach" is based on the theory that a primary obligation or core duty arises from the relationship created by the contract regardless of its specific terms. The effect of this doctrine is to invalidate those excepting clauses which nullify the core duty or primary obligation of the contract. For further discussion, see text accompanying notes 64-67 & 129-30 *infra* and authorities cited therein.

<sup>40</sup> UCC § 2-316 (1).

<sup>41</sup> K. LLEWELLYN, *THE COMMON LAW TRADITION* 370-71 (1960).

<sup>42</sup> See UCC §§ 1-102(3); 1-204(1); 4-103(1).

<sup>43</sup> 1954 *Hearings* 177.

justified, and possibly forcing unconscionable terms on the non-drafting party.

Through the unconscionability doctrine, Llewellyn tried to inhibit the businessman or attorney from *automatically* asserting all conceivable rights in all transactions. Such a purpose requires that the doctrine be incapable of exact definition. If exact definition were possible, draftsmen could draft to the threshold of unconscionability, recreating the problem in a slightly different context, and defeating the purpose of the doctrine.

Did Llewellyn then intend to create a completely unlimited doctrine? The answer is uncertain. He believed that the doctrine was adequately safeguarded because unconscionability was a question of law for the courts, not the jury.<sup>44</sup> A case-law gloss was expected to build up quickly around the bare statutory words, establishing precedents to guide courts, and establishing limitations on the doctrine. Consistency within a state would be achieved by appellate court review. The establishment of limitations was left to the discretion of the courts, especially the appellate courts, without explicit guidelines in the statutory language. If one trusts courts to establish reasonable limits in such a situation, the safeguards against unintended expansion are adequate.<sup>45</sup> Without such trust, safeguards seem lacking.

The concept expounded by Llewellyn was related to his view of the actual expectations of the parties in the form contract transaction. Draftsmen were to be deterred from producing contracts embodying abuses similar to the known, but not rigorously defined flaws of fundamental breach and manifest unreasonableness. The printed clauses could not alter or eviscerate the dickered terms, and the printed clauses could not be unreasonable or unfair, either individually or in total effect. The amorphous quality of the unconscionability doctrine was intended, and adequate regulation was left to the discretion of the courts.

If this was the original understanding, the drafting history of section 2-302 shows that the concept was later consistently enlarged.

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<sup>44</sup> UCC § 2-302(1); 1954 Hearings 178.

<sup>45</sup> Llewellyn's trust in the inherent good sense and fairness of courts in reaching such decisions is well documented throughout his COMMON LAW TRADITION. See note 40 *supra*. Courts would also be aided by the fact that the background of any transaction would be admissible to show the purpose and commercial setting of any contract language used, UCC § 2-302(2). See also King, *New Conceptualism of the Uniform Commercial Code: Ethics, Title, and Good Faith Purchase*, 11 ST. LOUIS U.L.J. 15 (1966). For 2 recent decisions insisting on evidence of the commercial setting of the contract see *In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864 (E.D. Pa. 1966); *Central Budget Corp. v. Sanchez*, 53 Misc. 2d 620, 279 N.Y.S.2d 391 (Civ. Ct. 1967).

The civil law cases using the *laesio enormis* doctrine indicate that courts approach such doctrines conservatively. See Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 TUL. L. REV. 345, 364-76 (1937); 12 TUL. L. REV. 42 (1937).

Although originally limited to form contracts,<sup>46</sup> the present version of section 2-302 applies to all contracts.<sup>47</sup> The original version sought to insulate all dickered terms, whether unfair or not,<sup>48</sup> but the present version does not do so. The original version struck down a contract only if it was unfair "in its entirety,"<sup>49</sup> while the section now applies to individual clauses as well as to the entire contract. In fact, the only principle that one can confidently derive from the drafting history of section 2-302 is that the original narrow focus of the doctrine was deliberately expanded in several respects.<sup>50</sup>

Another source of information about the meaning of the statutory language is the Official Comments that accompany the statute.<sup>51</sup> The Official Comment to section 2-302 states: "The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power."<sup>52</sup> This sentence has been pilloried endlessly as inconsistent.<sup>53</sup> The terms "unfair surprise" and "oppression" are no more concretely definable than the term "unconscionable," so the Comment seems to offer slogan words rather than an explanation of the purposes behind the statute. Two terms may be more helpful than one, but "unfair surprise" and

<sup>46</sup> 1943 DRAFT § 24.

<sup>47</sup> UCC § 2-302(1). The form contract limitation disappeared in the 1948 draft. AMERICAN LAW INSTITUTE, THE CODE OF COMMERCIAL LAW § 2-302 (1948) [hereinafter cited as 1948 DRAFT]. It should be noted that all of the UCC unconscionability cases decided to date have involved form contracts.

<sup>48</sup> 1943 DRAFT § 24.

<sup>49</sup> *Id.*

<sup>50</sup> There is a question whether any of the pre-1952 legislative history may be consulted. The 1952 draft stated that it could not be used. UCC § 1-102(3) (g) (1952) [hereinafter cited as 1952 DRAFT]. Subsequent drafts, however, deleted this limitation. The explanation given was that "changes from the text enacted in Pennsylvania in 1953 are clearly legitimate legislative history." AMERICAN LAW INSTITUTE & NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 3 (1957) [hereinafter cited as 1956 RECOMMENDATIONS]. This probably implies that only post-1952 legislative history may be used.

As shown in an exhaustive article by Professor Leff, *supra* note 3, the prior drafts of § 2-302 show little that cannot be gathered from the statutory language itself, except for a constant expansion of the primary concept.

<sup>51</sup> The Official Comments to the Code have been generally accepted as a valid source for guidance when construing a specific section. The 1952 draft of the Code expressly stated that the Comments "may be consulted in the construction and application of this Act . . ." 1952 DRAFT § 1-102(3) (f). Although this provision was later deleted because "the old comments were clearly out of date and it was not known when the new ones could be prepared," 1956 RECOMMENDATIONS 3, and although a similar provision never reappeared, both courts and commentators have agreed that the Comments may be used. *See, e.g.,* Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597, 598 n.3 and cases cited; 1 NEW YORK LAW REVISION COMM'N STUDY OF THE UNIFORM COMMERCIAL CODE 158-60 (1955).

<sup>52</sup> UCC § 2-302, Comment 1.

<sup>53</sup> *See* Leff, *supra* note 3, at 499-501; *cf.* Comment, *Unconscionable Business Contracts: A Doctrine Gone Awry*, 70 YALE L.J. 453 (1961).

"oppression" do not seem to reveal the underlying rationale of unconscionability.

On the other hand, these two terms do offer a useful analytical tool. They focus attention on two different types of abuses in the process of forming a contract. Analysis under section 2-302 can begin with a finding of one of these two varieties of "procedural" abuses. "Unfair surprise" implies some sort of deception by artifice. "Oppression" implies some form of compulsion resulting from a lack of opportunity to codetermine terms. However, merely finding a procedural abuse is insufficient; for the draftsman has indicated that the primary target of the doctrine is the term that is unreasonable or unfair. Thus some sort of "substantive" abuse must also be found.<sup>54</sup>

"Unfair surprise" is a relatively easy concept to visualize. Hiding a clause in a mass of fine print trivia is one method of surprising the non-drafting party with unknown terms. Another method is to phrase the clause in language that is incomprehensible to a layman or that diverts his attention from problems raised or rights lost. A variety of deceptive sales practices and other tactics might be catalogued, but the foregoing should suffice to indicate the type of problem covered by "unfair surprise." Although there are overtones of fraud in such conduct, "unfair surprise" does not require a particular source of surprise, such as a misrepresentation of fact. Instead, "unfair surprise" focuses on the effect of abuses on the non-drafting party, and upon the "fairness" of whatever event caused the surprise. The causal event might be active conduct by the drafting party, or it might be inaction, but it is often difficult to distinguish the two, as in the use of language designed to minimize attention to a clause. Thus the most productive criterion for determining whether the procedural abuse of surprise is present is the reasonableness of the non-drafting party's reaction to the clause, rather than the culpability of the drafting party.

An abuse in the process of forming the contract is not sufficient by itself to create unconscionability. The principle of preventing, not merely "surprise," but "unfair surprise," suggests not only that there must be abuses in forming the contract, but also that such abuses have allowed the drafting party to take unfair advantage of the non-drafting party. Not all deceptively worded clauses in fine print are unconscionable. Such a clause in a security agreement, giving the creditor the

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<sup>54</sup> The terms "procedural" abuse and "substantive" abuse are taken from Leff, *supra* note 3, and are used deliberately to emphasize the differences in the analytical structures each of us perceives. Leff posits a structure in which one focuses on either the procedural or the substantive abuse, but never on both. He then proceeds to demonstrate that the presence of either alone should never be sufficient. This approach may seem reasonable, *but see* text accompanying notes 80-93 *infra*, but it avoids the real question posed by the cases decided under the Code: what should a court do if both types of abuses are present?

right to repossess collateral after default, need not be considered unconscionable. The concept of "unfair surprise" involves both procedural and substantive abuses of the complaining party.<sup>55</sup>

"Oppression" is significantly harder to visualize than "unfair surprise." Although "oppression" connotes duress, there are already techniques for dealing with that. However, there are many transactions in which one party, while having the choice of contracting or not, has no choice of the terms of the contract—the contract of adhesion.<sup>56</sup> Present concepts of duress do not reach such conduct,<sup>57</sup> but opportunities for abuse are abundant, and protection can be provided through a concept of oppression that encompasses non-bargaining of the type generally associated with form contracts.

However, the concept of oppression involves more than non-bargaining over contract terms, because such conduct shows only a procedural abuse. Unequal bargaining power can often produce non-bargaining, or very little serious bargaining, but these need not necessarily cause unconscionable results. As with surprise, the resulting terms must be considered in any attempt to apply the unconscionability doctrine. Only where the surprise or non-bargaining has introduced harsh terms may the contract or clause be attacked. There are at least two distinctions between "oppression" and "allocation of risks because of superior bargaining power."<sup>58</sup> One distinction is the difference between a factual condition (the presence of unequal bargaining power) and conduct (non-bargaining)—a difference well-known in labor law.<sup>59</sup> The second distinction is the difference between reasonable and unreasonable (harsh) resultant contract terms.

This analysis does not answer the most important question of all: what types of contract terms are harsh enough to be subject to attack? Other questions are also unanswered. What standards may be used to measure such harshness? Are these standards different when arising from surprise rather than oppression? Is it possible to apply the unconscionability doctrine to situations in which there were no abuses in the formation of the contract?

It is painfully apparent that section 2-302, and the Official Comments as presently drafted, give very little assistance in answering such questions. The Comment poses the standard that the terms must not

<sup>55</sup> See note 54 *supra*.

<sup>56</sup> See authorities cited in note 5 *supra*.

<sup>57</sup> See Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947); Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

<sup>58</sup> UCC § 2-302, Comment 1.

<sup>59</sup> See Labor Management Relations Act of 1947 §§ 1, 8a, 29 U.S.C. §§ 151, 158(a)5 (1964); Norris-LaGuardia Act § 2, 29 U.S.C. § 102 (1964).

be "so one-sided as to be unconscionable" relative to the "commercial needs of the particular trade or case."<sup>60</sup> This standard seems to relate to Llewellyn's concept of "80 per cent of the pie."<sup>61</sup> The difficulty with its use is that the "needs" of a party in any particular situation are usually determined by a subjective judgment, and a court's review of that judgment is also likely to be subjective. Further, the Comment does not indicate whether the same standard applies to both the surprise and oppression situations.

### A. *Oppressive Terms*

Llewellyn's comments, discussed earlier,<sup>62</sup> spoke precisely to the problem of defining which terms are too one-sided. These comments are limited to the form contract situation, or what the Official Comments call "oppression." In this situation, the printed (non-bargained) terms are too one-sided if they (1) alter or impair the fair meaning of the dickered terms, or (2) are manifestly unreasonable.<sup>63</sup>

The first of these limitations is comparable to the English doctrine of fundamental breach, which holds that primary obligations or core duties arise from the relationship created by a contract, regardless of the contract's specific terms.<sup>64</sup> Any printed clauses that attempt to nullify these core duties are invalidated because they violate a "fundamental term" of the contract.<sup>65</sup> Fundamental terms are discovered by looking at the contract apart from the printed clauses to see

what are the terms, express *or implied*, which impose an obligation on the [drafting] party. If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses.<sup>66</sup>

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<sup>60</sup> UCC § 2-302, Comment 1.

<sup>61</sup> 1954 *Hearings* 177.

<sup>62</sup> See text accompanying notes 30-32 *supra*.

<sup>63</sup> *Cf.* 1949 DRAFT, Official Comment.

<sup>64</sup> See Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178 (1964). Meyer does an excellent job of discussing this doctrine, its similarity to Llewellyn's views, and the simultaneous and analogous growth of the doctrine of unconscionability. The doctrine of fundamental breach may have been restricted recently in *Suissee Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*, [1967] A.C. 361, which stated both that the doctrine was merely a construction technique (disapproving statements in prior cases), and that it was not applicable to the present contract because a liquidated damages clause was involved rather than an exceptions clause. Further enlightenment on the present state of the doctrine must await a consumer transaction. (*Suissee Atlantique* involved a commercial transaction.) In any event, the comparisons made herein are to the doctrine that developed to alleviate the problems arising in the context of the consumer transactions, since only this doctrine is comparable to unconscionability in purpose and scope.

<sup>65</sup> *Karsales Ltd. v. Wallis*, [1956] 1 W.L.R. 936 (C.A.).

<sup>66</sup> *Id.* at 940 (emphasis added).

If one substitutes "dickered terms" for "fundamental terms" in these statements of the doctrine, the effect is the same as Llewellyn's first limitation. The substitution is valid because the method of discovering "fundamental terms" clearly focuses on the "dickered terms" of the contract.<sup>67</sup> The UCC adopts a similar approach to express warranties: a seller may not disclaim them.<sup>68</sup> However, the UCC limitation on disclaimer does not apply to implied terms. Thus the similarity depends upon the extent of the obligation imposed by the "description of the goods."<sup>69</sup>

The second of Llewellyn's limitations is perhaps more familiar, although less subject to analysis. The term "manifestly unreasonable" is used several times in the Code<sup>70</sup> and has not been criticized for vagueness.<sup>71</sup> "Reasonableness" is one of the obligations that may not be disclaimed by agreement under the Code.<sup>72</sup> Although the term could be regarded as a mere abstraction, such a view would overlook the cases that have interpreted the term.<sup>73</sup> Further discussion of the concept of unreasonableness is deferred to the section of this article concerning the UCC's case-law gloss,<sup>74</sup> but it should be noted that the standards of both fundamental breach and manifest unreasonableness are objective to the extent that they depend upon a court's concept of the fairness of contract terms.

### B. *Unfairly Surprising Terms*

If Llewellyn's standards for oppression are applicable in the non-bargaining situation, do the same standards apply to cases involving

<sup>67</sup> There have been difficulties with the English doctrine even in the consumer context, because, to date, it has focused exclusively on exempting clauses. It might be possible under the English version of fundamental breach to limit the fundamental terms initially rather than drawing them broadly and then disclaiming. See Wedderburn, *Contract—Exemption Clauses—Fundamental Breach—Main Objectives of Contracts*, 1957 CAMB. L.J. 16, 20. But even if such formal circumvention of the purpose of the English doctrine is possible, it would not be available under Llewellyn's concept because the latter is not so narrowly drawn. See note 64 *supra*.

<sup>68</sup> UCC § 2-316(1).

<sup>69</sup> *Id.* § 2-313(1) (b).

<sup>70</sup> See *id.* §§ 1-102(3); 1-204; 4-103(1).

<sup>71</sup> Cf., e.g., Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798 (1958); Braucher, *Article One: General Provisions, Symposium, The Uniform Commercial Code*, 4 ANNUAL SURVEY OF MASS. LAW 8 (1957).

<sup>72</sup> UCC § 1-102(3).

<sup>73</sup> See, e.g., *Tu-Vu Drive-in Corp. v. Ashkins*, 61 Cal. 2d 283, 286, 391 P.2d 828, 830, 38 Cal. Rptr. 348, 350 (1964) (reasonable restriction on alienation of stock); *Truesdale v. Friedman*, 270 Minn. 109, 119-21, 132 N.W.2d 854, 861-62 (1965) (reasonable time for notification of breach of warranty under Uniform Sales Act); *Pereault v. Hall*, 94 N.H. 191, 194-95, 49 A.2d 812, 814 (1946) (reasonable contractual restriction on marriage); *Q. Vandenberg & Sons, N.V. v. Siter*, 204 Pa. Super. 392, 397-99, 204 A.2d 494, 498 (1964) (reasonable time for notification of breach of contract under UCC).

<sup>74</sup> See text accompanying note 136 *infra*.



"unfair surprise"? It would seem that the non-drafting party needs additional protection where subterfuge has been used, whether or not a form contract is involved. The gravamen of the complaint is that the non-drafting party did not and should not have expected the term, not that he was compelled to accept it. His expectations may have been violated in a manner not related to a "core duty" or manifestly unreasonable, and yet this violation of expectations may be unreasonable considering the deceptive circumstances involved. Therefore, the standard applicable in the unfair surprise situation should take account of whether the term was expected or not.

The pre-1952 drafting history, if it can be used to interpret the Code,<sup>75</sup> points to the same analysis. For example, when the Comments limited the concept to "the prevention of unfair surprise,"<sup>76</sup> unconscionability was defined to depend upon whether clauses were "so one-sided as not to be expected."<sup>77</sup> Only when the purposes of the doctrine were expanded to include oppression as well as unfair surprise was "unexpectedness" abandoned as a definitional criterion.<sup>78</sup> However, this abandonment should not prevent use of that criterion in the unfair surprise situation. The abandonment does not imply a rejection of the criterion in all cases, but only a recognition that it could not apply to both the oppression and the surprise situations when the purposes of the doctrine were expanded. "Unexpectedness" would not be a useful criterion in defining unconscionability in the nature of oppression because a finding of oppression must depend upon a more objective view of the terms.<sup>79</sup>

Thus different substantive standards are applicable in situations involving different procedural abuses in forming the contract. In the non-bargaining situation, the substantive standards relate to the court's view of the reasonableness of the unbargained terms as compared to the bargained terms of the contract. The non-drafting party has opted to contract, but has had no choice as to the nature of many terms, and the court may examine the boilerplate to determine whether it subverts the fundamental duties expressly worried over. In the unfair surprise situation, the emphasis shifts from the court's view of the terms to the objecting party's reaction. He has been made unaware of a contract term, and the court must consider whether that hidden

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<sup>75</sup> *But see* note 50 *supra*.

<sup>76</sup> 1950 DRAFT § 2-302, Comment 1.

<sup>77</sup> *Id.*

<sup>78</sup> The Official Comment to the 1952 DRAFT included, as a purpose, the prevention of "oppression." The same Comment stated the criterion to be whether "the clauses involved are so one-sided as to be unconscionable." 1952 DRAFT § 2-302, Comment 1.

<sup>79</sup> See text accompanying note 74 *supra*.

term violates his, not the court's, reasonable expectations under the contract.

### C. *Substantive Abuses Only*

There are instances in which the contract does contain some form of "harsh term" even though there has been no significant abuse in the formation of the contract. May a contract be unconscionable without the procedural abuses of deception or non-bargaining? The Comment to section 2-302 states that "the principle is one of the prevention of oppression."<sup>80</sup> There are at least two different connotations of the word "oppression," and the definition of the word will vary according to which of them is emphasized. A court may find that "oppression" connotes only those harsh terms obtained through oppressive means, so that the definition of the term depends upon procedural abuses. But a court may also interpret "oppression" to mean terms, however obtained, that will create oppressive effects, so that procedural abuses are irrelevant. Under this interpretation, the real question is whether enforcement of the contract terms will result in oppression, rather than whether those terms were caused by objectionable procedures. Although either a result-oriented or a cause-oriented definition is arguably correct, the case law supports at least a limited use of the former definition.

There was an analogous, albeit limited, use of the unconscionability doctrine in the pre-Code common law and equity cases. Although it has been suggested that there is no valid relationship between the unconscionability doctrine under the Code and that in the prior case law, it is at least arguable that such a relationship is set forth in the Comments.<sup>81</sup> Nor would lack of such a relationship preclude its independent use as a method of attacking abusive contract terms under the terminology of unconscionability. The case law doctrine was not particularly limited, being used at law and in equity, in realty and non-realty cases, for damages as well as specific perform-

<sup>80</sup> UCC § 2-302, Comment 1.

<sup>81</sup> Notwithstanding the alleged coyness of a *cf.* reference, the Official Comment citation of *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948), does indicate that the draftsmen were aware of the case law concept of unconscionability. That the remaining cases cited do not expressly deal with unconscionability but are commercial transaction disputes decided in law courts indicates the draftsmen's intention that the Code's unconscionability concept not be limited merely to equity cases, but that it be used as a broad equitable tool to inject fairness into the whole range of commercial dealing.

The conclusion that prior cases are relevant is buttressed by the apparent understanding of the various enacting state legislatures. See authorities cited in *Leff*, *supra* note 3, at 528 n.166. Various practice commentaries to annotated state statutes also indicate this understanding. See, e.g., Comments to DEL. CODE ANN. tit. 5A, § 2-302 (Spec. UCC Pamphlet 1967); FLA. STAT. ANN. § 672.2-302 (1966); ILL. ANN. STAT. ch. 26, § 2-302 (Smith-Hurd 1963); WIS. STAT. ANN. § 402.302 (1964).

ance.<sup>82</sup> The general purposes of the two unconscionability doctrines seem identical: to prevent oppressive results through abuse of legal technicalities. There is, in any event, much overlap, and interchange of concepts must be expected in two doctrines that are so closely related in purpose, coverage and effect.<sup>83</sup>

The older cases set forth no concrete criteria for defining unconscionability. However, most of the cases indicate that some form of procedural abuse in the formation of the contract is required, as well as a substantive abuse. In the formation of contracts, there are examples of concealment of important facts and other trickery that do not meet common law fraud requirements.<sup>84</sup> There are also examples of one party's taking unfair advantage of his position, and of other overreaching not sufficient to create duress.<sup>85</sup> In certain stylized fact situations, where the contracting party was weak, illiterate, or old, the courts would almost assume abuses in contract-formation.<sup>86</sup> Different types of harsh terms were recognized. An entire contract might be considered too one-sided to enforce,<sup>87</sup> or individual clauses might be regarded with disfavor.<sup>88</sup> Another harsh feature was inadequate consideration based on disparity of price, usually in a land sale transaction.<sup>89</sup>

<sup>82</sup> See authorities cited in notes 18-23 *supra*.

<sup>83</sup> As long ago as 1908, Dean Roscoe Pound espoused the theory that statutory language and concepts would and should be reasoned from analogously just as court decisions and arguments are currently utilized. Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908). A purposive theory of statutory interpretation more in tune with Pound's prediction has been heralded in some recent case law. See, e.g., *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964), noted in 64 COLUM. L. REV. 1336 (1964); *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *United States v. Perma Paving Co.*, 332 F.2d 754 (2d Cir. 1964), noted in 65 COLUM. L. REV. 339 (1965). For a deeper discussion of this theory of statutory interpretation, see Comment, *The Doctrine of Unconscionability*, 19 MAINE L. REV. 81, 86-91 (1967).

An example of exchange between doctrines that are closely related in purpose, coverage and effect is the growth of warranty concepts from their beginnings to the present, characterized by the recurring interchange of ideas between contract and tort. See Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Judicial Eclipses, Pigeonholes, and Communication Barriers*, 17 W. RES. L. REV. 5 (1965); Littlefield, *Some Thoughts on Products Liability Law: A Reply to Professor Shanker*, 18 W. RES. L. REV. 10 (1966); Donovan, *Recent Development in Products Liability Litigation in New England: The Emerging Confrontation Between the Expanding Law of Torts and the Uniform Commercial Code*, 19 MAINE L. REV. 181 (1967).

<sup>84</sup> See, e.g., *Thornborow v. Whitacre*, 92 Eng. Rep. 270 (K.B. 1706); *James v. Morgan*, 83 Eng. Rep. 323 (K.B. 1664); *Baxter v. Wales*, 12 Mass. 365 (1815); 5 J. POMEROY, EQUITY JURISPRUDENCE §§ 2206-08 (4th ed. 1919).

<sup>85</sup> See, e.g., *Gierth v. Fidelity Trust Co.*, 93 N.J. Eq. 163, 115 A. 397 (1921); *Caivano v. Brill*, 171 Misc. 298, 11 N.Y.S.2d 498 (N.Y. Mun. Ct. 1939). See generally Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947).

<sup>86</sup> See 3 J. POMEROY, EQUITY JURISPRUDENCE § 948 (5th ed. 1941).

<sup>87</sup> See, e.g., *Pope Mfg. Co. v. Gormully*, 144 U.S. 224 (1892); *Clark v. Rosario Mining & Milling Co.*, 176 F. 180 (9th Cir. 1910); *Miller v. Laneda*, 75 Ore. 349, 146 P. 1090 (1915); 5 J. POMEROY, EQUITY JURISPRUDENCE § 2208 n.98 (4th ed. 1919).

<sup>88</sup> See, e.g., *Jacklich v. Baer*, 57 Cal. App. 2d 84, 135 P.2d 179 (1943).

<sup>89</sup> See authorities cited in note 21 *supra*.

Where the court considered the terms especially harsh, only a slight procedural abuse would be necessary.<sup>90</sup> A sliding scale was used: the harsher the terms, the less concerned the court seemed about the method used to create those terms. In some cases the courts found the contract terms unconscionable without expressly examining the process by which the contract was formed.<sup>91</sup> Even *Campbell Soup Co. v. Wentz*,<sup>92</sup> cited in the Official Comment to section 2-302, does not dwell at any great length on contract formation problems, except to state that Campbell supplied the contract.<sup>93</sup> Apparently, especially harsh terms alone could be sufficient, although this approach was reserved for unusual cases. This type of case supports limited use of a result-oriented definition of "oppression."

Unfortunately, the cases do not define such concepts as "harsh terms" or "overreaching." They do furnish many examples of fact situations that are or are not unconscionable, but there is little effort either to explain why the court thought a contract too one-sided, or to establish criteria of how one-sided a contract could not be. However, the analytical structure that may be derived from the pre-Code cases is roughly analogous to the structure that may be derived independently from the Official Comments to analyze unconscionability under the Code. In the typical case both abuses in contract formation and harshness in the contract terms are required. Contract formation abuses arise from factors akin to either of the criteria in the Code's Official Comment: unfair surprise (concealment of important facts) or oppression (taking unfair advantage of one's position). Harshness in terms arises from overall imbalance of the entire contract or from a particularly unreasonable individual clause.

Although the analytical structure from the cases is basically similar to that previously derived from the Comments, there are some interesting additions and modifications. The most important of these is the courts' handling of procedural abuses. In addition to surprise and oppression, contract formation abuses were found present in certain stylized types of situations commonly recognized by equity courts to protect particular classes of parties deemed unable to fully protect themselves. Further, in many cases the courts did not expressly determine whether procedural abuses were present or not, but concentrated

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<sup>90</sup> See *Schroeder v. Young*, 151 U.S. 334, 337-38 (1896): "While mere inadequacy of price has rarely been held sufficient . . . courts are not slow to seize upon *other circumstances* impeaching the fairness of the transaction, . . . especially if the inadequacy be so gross as to shock the conscience." (emphasis added) Compare 3 J. POMEROY, EQUITY JURISPRUDENCE § 926 (5th ed. 1941) with *id.* § 927.

<sup>91</sup> See authorities cited note 87 *supra*.

<sup>92</sup> 172 F.2d 80 (3d Cir. 1948).

<sup>93</sup> *Id.* at 83.

on judging the fairness of the contract terms. In effect, they used a sliding scale, concerning themselves greatly with procedural abuses if the harshness of the terms was open to some dispute, but disregarding them where the terms were patently unreasonable. Thus the older case law analysis indicates that the presence of sufficiently harsh terms can constitute unconscionability, without regard to an examination of the contract formation process. They therefore support the limited use of a result-oriented definition of "oppression."

#### D. Price Disparity

Price disparity is usually considered a unique form of "harsh term,"<sup>94</sup> because neither form of procedural abuse is thought to be present. The price term is often expressly agreed upon so that surprise cannot be claimed, and absent a monopoly situation, a refusal to bargain over price is thought justifiable. Since the Comments do not make any reference to price disparity, it is difficult to argue from them that the abuse should or should not be considered in determining whether a contract is unconscionable. The older case law doctrine did recognize price disparity as a potential abuse,<sup>95</sup> but relief was not usually granted unless the price disparity was accompanied by other inequitable factors.<sup>96</sup> Price disparity was considered a form of substantive abuse subject to equitable relief if induced by a procedural abuse. However, a sufficiently gross price disparity would be sufficient to require relief, even though not accompanied by other inequitable factors.<sup>97</sup> A result-oriented definition of unconscionability using a sliding scale approach would similarly allow extreme disparity of price to constitute unconscionability, but even if the result-oriented definition is not accepted, price disparity is one form of inequitable factor to be considered in determining whether contract terms are harsh or not.

A result-oriented approach is analogous to the civil law doctrine of *laesio enormis*.<sup>98</sup> Although there is no direct link between *laesio enormis* and either the Code or the common law unconscionability doctrines, the influence of civil law on those writers who tried to deal

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<sup>94</sup> See Leff, *supra* note 3, at 548-49; Comment, 78 HARV. L. REV. 895 (1965); Comment, 20 MAINE L. REV. 159 (1968); Annot., 18 A.L.R.3d 1305 (1968).

<sup>95</sup> Price disparity amounting to "unconscionable consideration" has been made grounds for granting recovery to certain Indian tribes in suits against the United States. The Indian Claims Commission Act, 25 U.S.C. § 70(a) (1964), expressly provides for recovery in this unique unconscionability situation. See, e.g., *Sac & Fox Indian Tribe v. United States*, 340 F.2d 368 (Ct. Cl. 1964); *Miami Tribe v. United States*, 281 F.2d 202 (Ct. Cl. 1960).

<sup>96</sup> 3 J. POMEROY, EQUITY JURISPRUDENCE § 926 (5th ed. 1941).

<sup>97</sup> *Id.* § 927.

<sup>98</sup> See, e.g., Dawson, *supra* note 13, at 364-76; Leff, *supra* note 3, at 549.

with adhesion contract problems is obvious.<sup>99</sup> Each of the doctrines seeks the same purpose, to prevent oppressive results, and each is founded on the unwillingness of courts to enforce a very hard bargain.

In summary, the unconscionability doctrine perceived through this conceptual approach has a structure, and concrete fact situations are subject to analysis under it. In the usual unconscionability case, both procedural and substantive abuses occur, and the type of substantive abuse required depends upon the type of procedural abuse present. Terms procured by artifice may be unconscionable if the complaining party's reasonable expectations were violated ("unfair surprise"). Artifice is therefore considered a particularly heinous procedural abuse, so the harshness of the terms is dependent upon the complaining party's reaction to them. Terms procured by non-bargaining may be unconscionable if they are manifestly unreasonable or if they impair the fair meaning of the dickered terms ("oppression"). Non-bargaining is therefore considered a less serious procedural abuse, so substantive abuses are judged according to the court's view of their fairness. In all cases, a sliding scale is used, so that unconscionability may be found in a severely harsh term although the procedural abuse was mild, and *vice versa*. Price disparity may also be considered a substantive abuse.

It is arguable that a court should be able to find unconscionability in especially severe substantive abuses alone, without expressly considering procedural abuses. The older case law furnishes precedent for such an analysis, and exchange of concepts between the two doctrines should be expected. One ramification of such a theory is that a gross price disparity, without any other abuse, may constitute unconscionability.

### III. WHAT IS THE DOCTRINE?—THE CASES

There is now a case law gloss on the statute, and the draftsmen expected this to provide substance to the unconscionability concept.<sup>100</sup> Any discussion of the doctrine must determine whether the conceptually derived analytical structure explains the cases, and whether the cases have added to that structure. It should consider not only the cases that announce holdings under section 2-302, but also the cases outside article 2 that rely on the same concepts.<sup>101</sup>

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<sup>99</sup> See, e.g., Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072, 1074-75 n.15, 1077 n.23, 1080 n.44 (1953); Lenhoff, *Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law*, 36 TUL. L. REV. 481 (1962); Wilson, *Freedom of Contract and Adhesion Contracts*, 14 INT'L & COMP. L.Q. 172, 179-81 (1965).

<sup>100</sup> 1954 Hearings; K. LLEWELLYN, *THE COMMON LAW TRADITION* 178 (1960).

<sup>101</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *In re Elkins-Dell Mfg. Co.*, 253 F.Supp. 864 (E.D. Pa. 1966); *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967).

There are several methods of comparing an analytical structure to the case decisions. One approach is to analyze the reasoning of the opinions and attempt to fit the expressed analysis of the judges into the analytical framework. However, a reading of the cases in the area will show that this is not possible, because the decisions do not enunciate their reasoning in sufficient detail. The typical opinion carefully states what facts the complaining party might rely upon to show the presence of unconscionability, but, because of the procedural setting of the cases on appeal, cannot rigorously evaluate the legal effect of the facts.

The majority of the cases on appeal present records that do not completely set forth the commercial setting, purpose and effect of the contracts or clauses being attacked, so that the appellate court cannot rule upon the presence of unconscionability.<sup>102</sup> For example, in *Williams v. Walker-Thomas Furniture Co.*,<sup>103</sup> evidence on these matters had not been presented at the trial, and the appellate court was unable to pursue its analysis further than to announce criteria for the trial court to follow in determining whether the contract was unconscionable.<sup>104</sup>

Many of the cases raise unconscionability only as an alternative ground of decision,<sup>105</sup> and therefore do not present a rigorous or detailed analysis of the unconscionability issue.<sup>106</sup> *American Home Improvement, Inc. v. MacIver* illustrates the technique.<sup>107</sup> The court first voided the contract for failure to comply with a disclosure statute, and then held the contract unconscionable. It is unrealistic to expect a detailed analytical structure in such circumstances, since neither the statute itself nor the law reviews have provided one.

A second method of comparing an analytical structure to case decisions, and the one that will be used here, is to analyze the fact

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<sup>102</sup> Some cases present incomplete data for deciding the unconscionability issue, forcing remand: *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *In re Elkins-Dell Mfg. Co.*, 253 F.Supp. 864 (E.D. Pa. 1966); *Fairfield Lease Corp. v. Colonial Aluminum Sales, Inc.*, 3 U.C.C. Rep. Serv. 858 (N.Y. Sup. Ct. 1966). In other cases unconscionability was discussed but not made the stated ground of the decision: *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. 1967) (citing UCC § 1-102(3) rather than § 2-302); *Romine Inc. v. Savannah Steel Co.*, 117 Ga. App. 353 (1968); *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967); *Granite Worsted Mills, Inc. v. Aaronson Cowen, Ltd.*, 29 App. Div. 2d 303, 287 N.Y.S.2d 765 (1968) (arbitrator's decision binding on court as well as parties); *Paragon Homes, Inc. v. Crace*, 4 U.C.C. Rep. Serv. 19 (N.Y. Sup. Ct. 1967); *Paragon Homes, Inc. v. Langlois*, 4 U.C.C. Rep. Serv. 16 (N.Y. Sup. Ct. 1967).

<sup>103</sup> 350 F.2d 445 (D.C. Cir. 1965).

<sup>104</sup> *Id.* at 450.

<sup>105</sup> *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964); *David v. Manufacturers Hanover Trust Co.*, 55 Misc.2d 1080, 287 N.Y.S.2d 503 (Civ. Ct. 1968); *Robinson v. Jefferson Credit Corp.*, 4 U.C.C. Rep. Serv. 15 (N.Y. Sup. Ct. 1967); *State ex rel. Lefkowitz v. ITM, Inc.*, 52 Misc.2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1967).

<sup>106</sup> K. LLEWELLYN, *THE COMMON LAW TRADITION* 306-09 (1960).

<sup>107</sup> *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964).

situations presented in the cases according to the conceptually derived structure. If this analysis leads to the same results provided by the cases, the two can fairly be said to be compatible. The factual analysis could then provide more solid statements of the basic concepts involved by illustrating the criteria used in a more detailed manner than is possible in a conceptual approach. Analysis of the cases may also indicate additions to the conceptually derived structure or preferences between alternatives available under it.

The cases furnish many examples of both of the procedural abuses, surprise and oppression. Surprise has been found in fine-print clauses of significant importance to the non-drafting party that the court felt would not normally come to his attention during the consummation of the transaction.<sup>108</sup> Another example of surprise is the inclusion of a promise in a document that would not be taken as a contract by the non-drafting party.<sup>109</sup> Courts have found unconscionable surprise where a salesman has deliberately emphasized other aspects of the transaction to such an extent that the buyer was misled about the true import of the obligation he assumed.<sup>110</sup> Other examples are the contract written in a language not understood by the non-drafting party,<sup>111</sup> and a clause drafted in language so technical that the layman could not be expected to understand it, or at least to appreciate its full meaning.<sup>112</sup> Perhaps surprise also includes the drafting of terms, such as price terms, so that their full import cannot be understood by the non-drafting party.<sup>113</sup>

It has been argued that regardless of its availability in cases involving surprise, the unconscionability doctrine should not be used in other situations to invalidate the terms of a contract, especially where the meaning of the terms is understood by both parties.<sup>114</sup> It is clear that the courts are willing to review contracts for oppressive terms,

<sup>108</sup> *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 365-67, 161 A.2d 69, 73-74 (1960); *Unico v. Owen*, 50 N.J. 101, 111, 232 A.2d 405, 410 (1967). It should be noted that the courts in these cases did not articulate the concept of "surprise."

<sup>109</sup> *David v. Manufacturers Hanover Trust Co.*, 55 Misc.2d 1080, 287 N.Y.S.2d 503 (Civ. Ct. 1968).

<sup>110</sup> *State ex rel. Lefkowitz v. ITM, Inc.*, 52 Misc.2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1967); *Frostifresh Corp. v. Reynoso*, 52 Misc.2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on issue of damages*, 54 Misc.2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967).

<sup>111</sup> *Frostifresh Corp. v. Reynoso*, 52 Misc.2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966). The proposed Uniform Consumer Credit Code would promote the same result. U3C § 6.111(3)(e).

<sup>112</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 447 (D.C. Cir. 1965).

<sup>113</sup> *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964); *Frostifresh Corp. v. Reynoso*, 52 Misc.2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on issue of damages*, 54 Misc.2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967).

<sup>114</sup> See *Leff*, *supra* note 3, at 499-501.



without regard to whether or not the parties are aware of the terms or appreciate their oppressiveness. Where two businessmen contract, even though one is in necessitous circumstances, surprise does not seem to exist. However, in this situation the courts have been willing to order hearings on the unconscionability issue,<sup>115</sup> indicating that surprise is not the only procedural abuse within the doctrine.

The courts seem to recognize different varieties of oppression, and may consider some non-bargaining techniques more oppressive than others. The most typical example of non-bargaining is the form contract of adhesion in which the drafting party does not bargain over the fine-print, boilerplate clauses. However, the oppressiveness of the situation cannot be judged only by the presence or absence of a form contract. A stronger case of form contract oppression is presented when the transaction involves purchasing a necessity rather than a luxury,<sup>116</sup> dealing with a quasi-public institution rather than a private entrepreneur,<sup>117</sup> or dealing with a necessitous borrower or buyer rather than one in a position to bargain and choose.<sup>118</sup> The strongest case for form contract oppression seems to be presented by the poor, naïve consumer confronted with high-pressure sales tactics.<sup>119</sup> Perhaps this indicates the creation of a new class of persons to whom the courts will grant special protection.<sup>120</sup>

Some opinions have not expressly examined abuses in contract formation at any length, concentrating instead on the abusiveness of the substantive terms of the contract.<sup>121</sup> Such an approach parallels

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<sup>115</sup> *In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864, 871-75 (E.D. Pa. 1966); *Fairfield Lease Corp. v. Colonial Aluminum Sales, Inc.*, 3 U.C.C. Rep. Serv. 858 (N.Y. Sup. Ct. 1966). *But cf.* *Sinkhoff Beverage Co. v. Jos. Schlitz Brewing Co.*, 51 Misc.2d 446, 273 N.Y.S.2d 364 (Sup. Ct. 1966).

<sup>116</sup> *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 386, 161 A.2d 69, 85 (1960).

<sup>117</sup> *David v. Manufacturers Hanover Trust Co.*, 55 Misc.2d 1080, 1085, 287 N.Y.S.2d 503, 508-09 (Civ. Ct. 1968).

<sup>118</sup> *In re Elkins-Dell Mfg. Co.*, 253 F. Supp., 864 (E.D. Pa. 1966). *See also* authorities cited note 119 *infra*.

<sup>119</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *State ex rel. Lefkowitz v. ITM, Inc.*, 52 Misc.2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1967); *Frostifresh Corp. v. Reynoso*, 52 Misc.2d 26, 274 N.Y.S.2d 757 (Nassau County Dist. Ct. 1966), *rev'd on issue of damages*, 54 Misc.2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967).

<sup>120</sup> Among those previously sheltered by the unconscionability rationale have been the unsophisticated farmer, careless sailors, the naive young, the easily defrauded old and the unfortunate physically disabled. *See* 3 J. POMEROY, *EQUITY JURISPRUDENCE* § 948 (5th ed. 1941). The U3C would protect certain types of consumers in this manner. U3C § 6.111(3) (e).

<sup>121</sup> *In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864 (E.D. Pa. 1966); *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964); *Paragon Homes, Inc. v. Carter*, 56 Misc.2d 463, 288 N.Y.S.2d 817 (Sup. Ct. 1968); *Frostifresh Corp. v. Reynoso*, 52 Misc.2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on issue of damages*, 54 Misc.2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967).

that of the pre-Code cases.<sup>122</sup> However, analysis of the facts reveals that contract formation abuses were present in these cases, so that failure to discuss this aspect of the cases does not necessarily indicate that the decisions were based on substantive abuses alone.<sup>123</sup>

#### A. *Oppressive Terms—Impairment of Dickered Terms*

The cases illustrate procedural aspects of unconscionability (abuse in the formation of the contract), and most of them involve some such abuse. They also furnish examples of substantive abuses under unconscionability. There are examples of terms that alter or impair the fair meaning of the dickered terms, and examples of unreasonable terms. A prominent example of a term that impairs the dickered terms is the warranty disclaimer clause. One court has struck down a disclaimer in an automobile sales contract when the car "would not move."<sup>124</sup> Although there were, as usual, multiple grounds for invalidating the disclaimer, such as lack of conspicuousness,<sup>125</sup> the court stated that the seller's obligation extended beyond the written terms.<sup>126</sup> The opinion relies heavily upon *Henningsen v. Bloomfield Motors*, which voided a limitation of remedy clause as unconscionable because it provided only illusory relief.<sup>127</sup> The remedies provided could not protect the buyer of defective products, and did not perform the essential purposes of such contract terms.<sup>128</sup>

The resemblance of these cases to the English cases on fundamental breach is striking. The English courts have also held that warranty disclaimer clauses will not protect the seller of an automobile where "the car will not go."<sup>129</sup> The purchaser of an automobile expects a piece of machinery that can be used for transportation, and the English courts will protect this expectation regardless of boilerplate clauses in the contract. A defect of this magnitude is held to "go to the root of the contract," which can be ascertained by "looking at the

<sup>122</sup> See text at notes 83-93 *supra*.

<sup>123</sup> *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964) could be interpreted as not involving any procedural abuse. However, this seems a misreading of the opinion. See note 172 *infra*. For further discussion, see text accompanying notes 171-73 *infra*.

<sup>124</sup> *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441, 240 A.2d 195 (1968).

<sup>125</sup> *Id.* at 447, 240 A.2d at 197. A full draft of the disclaimer was not presented to buyer until after the contract was executed. *Id.* at 448, 240 A.2d at 199.

<sup>126</sup> *Id.* at 448, 240 A.2d at 199.

<sup>127</sup> *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

<sup>128</sup> *But see* UCC § 2-719(2) & (3).

<sup>129</sup> *Karsales Ltd. v. Wallis*, [1956] 1 W.L.R. 936, 939 (C.A.). A case even more similar on the facts is *Yeoman Credit, Ltd. v. Apps*, [1962] 2 Q.B. 508 (C.A. 1961). See note 63 *supra* regarding recent possible limitations on the fundamental breach doctrine.

contract apart from" the disclaimer clauses.<sup>130</sup> The same result could be obtained under the UCC warranty provisions by interpreting the description of the automobile to require the seller to furnish a moving vehicle in operating condition.<sup>131</sup> Such a warranty by description could not be disclaimed.<sup>132</sup>

It has been argued that disclaimer clauses that meet the technical requirements of section 2-316 should not be subject to any scrutiny under the unconscionability doctrine,<sup>133</sup> but this argument conflicts with the statute, the Comments, and the cases. According to the Official Comment, the purpose of section 2-316 is "to protect a buyer from *unexpected or unbargained* language of disclaimer . . . ." <sup>134</sup> An analogous problem is presented by the good-faith requirement of section 1-203, which is applicable to all conduct subject to the Code. Under this good-faith requirement, a Court should not ignore the use of deceptive sales practices to procure even a technically perfect disclaimer under section 2-316. Similarly, since article 2 does not limit the applicability of the unconscionability doctrine, it could be used to defeat disclaimer clauses where surprise or oppression surrounded the formation of the contract.<sup>135</sup> Since section 2-316 deals only with the form of the final written contract, it cannot isolate either bad faith or unconscionable conduct in the contract formation process. The form of the agreement reflects only a small aspect of the seller's conduct, and a section with such a narrow focus should not preempt a doctrine that considers all aspects of the seller's conduct. The courts have clearly seen this distinction, and although the disclaimer clauses presented for review have not met the technical requirements of the Code, their

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<sup>130</sup> *Karsales Ltd. v. Wallis*, [1956] 1 W.L.R. 936 (C.A.).

<sup>131</sup> UCC § 2-313(1) (b).

<sup>132</sup> UCC § 2-316(1).

<sup>133</sup> "It appears to be a matter of common assumption that section 2-302 is applicable to warranty disclaimers. I find this, frankly, incredible." Leff, *supra* note 3, at 523.

<sup>134</sup> UCC § 2-316, Comment 1 (emphasis added). These are the same two types of situations dealt with by the unconscionability doctrine.

<sup>135</sup> One typical example is the consumer who does not read English, and who cannot obtain the assistance of a neutral party to read the contract to him. Cf. *Frostifresh v. Reynoso*, 52 Misc.2d 26, 274 N.Y.S.2d 757 (Nassau County Dist. Ct. 1966), *rev'd on issue of damages*, 54 Misc.2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967). If the seller represents to this consumer that he is buying a car "which will go," without calling his attention to the disclaimer and its full import, there would seem to be an impairment of the fundamental terms of the contract, no matter how conspicuous or correctly drafted the disclaimer and merger clauses of the form. A less obvious case, but one that is probably within the ambit of the earlier analysis, involves the inconspicuous use of the words "as is." Although this seems to protect the seller completely under § 2-312(3), it is unlikely to do so in a context in which the buyer would not understand the words to mean that all warranties are disclaimed. It should also be noted that this avenue of construction has been deliberately and expressly closed in the unconscionability sections of the U3C. U3C §§ 5.108(3), 6.111(4).

language indicates that better technical wording of overreaching or hidden clauses would not succeed.<sup>136</sup>

### B. *Oppressive Terms—Unreasonable*

The decisions illustrate the concept of "manifest unreasonableness." This concept has many facets, but it is primarily based upon a balancing of interests rather than a comparison of different terms within the contract. The court must weigh the legitimate interests of the drafting party against identifiable public policies that the terms may contravene. Manifestly unreasonable terms range through a continuum from those whose paramount defect is lack of support by legitimate interests of the drafting party ("commercially unjustified"), to those whose defect is that they are contrary to a public interest recognized by the courts ("void as against public policy"). Between these two poles there is an infinite number of permutations containing various degrees of both types of defects.

Perhaps the best illustration of the commercially unjustified contract term is the overdrafted clause, which automatically claims special privileges for the drafting party in all situations, whether the privileges are relevant to the contract or not, and whether or not they are supported by any legitimate interest of the drafting party. In short, the draftsman has not bothered to analyze his client's needs, substituting overkill. For example, a lender can claim the right to open and dispose of all the borrower's mail, but such a clause does not reflect any legitimate relationship between the loan agreement and the borrower's non-business mail,<sup>137</sup> and has been labelled unconscionable if the lender attempts to apply it to personal mail.<sup>138</sup>

A more serious example is presented by the combination of clauses that permits the lender to refuse future loans and prohibits the bor-

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In the opinion of a majority of the court, the provisions on the front of the purchase order did not make adequate reference to the provisions on the back of the order to draw attention to the latter. Hence the provisions on the back of the order cannot be said to be conspicuous although printed in an adequate size and style of type. The disclaimer was not effective.

Hunt v. Perkins Mach. Co., 226 N.E.2d 228, 232 (Mass. Sup. Ct. 1967). See also Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 404, 161 A.2d 69, 95 (1960); Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 447-48, 240 A.2d 195, 198-99 (1968).

<sup>137</sup> A loan agreement is admittedly outside article 2, but has been held subject to the more general equitable doctrine of unconscionability. *In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864, 873 (E.D.Pa. 1966).

<sup>138</sup> *In re Elkins-Dell Mfg. Co.*, 2 U.C.C. Rep. Serv. 1021, 1024 (E.D. Pa. 1965), remanded for further hearing, 253 F. Supp. 864 (E.D. Pa. 1966). The court did not attempt to explain what business mail of a corporation would not concern the loan agreement. The District Court remanded. See note 139 *infra*.

rower from seeking loans elsewhere, thus potentially permitting the financial strangulation of the borrower.<sup>139</sup> Absent unusual facts, the lender has no legitimate interest in prohibiting loans based on collateral it has refused to accept. The creditor can legitimately claim only a right of first refusal on new discretionary loans. Any assertion of greater rights, not based on legitimate interests of the drafting party, seems commercially unjustified, and therefore subject to the unconscionability doctrine.<sup>140</sup>

Terms that contravene some identified public policy may also be manifestly unreasonable. Courts do not need section 2-302 to void such contracts and clauses, but the unconscionability doctrine furnishes a useful format for decision, and provides extreme flexibility in the remedies available. Regardless of the drafting party's interest in the contract term, the term is unreasonable if the public's interest is found to be paramount. For example, a referral sale contract has been held to be a fraud, a lottery, and unconscionable as against public policy.<sup>141</sup> Clauses waiving defenses against an assignee have been struck down as contrary to specific public policies and unconscionable.<sup>142</sup> It is doubtful that the unconscionability concept either helped or

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<sup>139</sup> If this had been the only overreaching term, a more appropriate response by the court would have been to reform the prohibition clause to effect only a right of first refusal coincident with the lender's interests. However, the agreement allowed the lender: (1) to dispose of all of borrower's mail; (2) to refuse to make future loans while prohibiting borrower from borrowing elsewhere; (3) to unilaterally change the terms of the agreement and (4) to collect unearned interest if the lender deemed itself insecure. This combination of clauses impelled the bankruptcy court to strike down the entire agreement as too one-sided. *In re Elkins-Dell Mfg. Co.*, 2 U.C.C. Rep. Serv. 1021, 1028 (E.D. Pa. 1965). Reformation of all of the harsh terms would have been too difficult and too late.

The bankruptcy court's determination was remanded for further hearings on the commercial setting, primarily to determine whether the lender had ever enforced any of his disproportionate rights. *In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864, 873-74 (E.D. Pa. 1966). Unless the rights had been asserted, the contract would not have created oppressive results, even though its appearance was harsh. The District Court therefore limited the definition of "oppression" to effecting oppressive results, and ignored the *in terrorem* use of such clauses. For a lengthier discussion of the district court's opinion, including other reasons given for the remand, see Comment, *Bankruptcy: Equitable Subordination of Unconscionable Claims*, 40 S. CAL. L. REV. 165 (1967). Regarding the procedural abuses in the case, see text accompanying note 115 *supra*.

<sup>140</sup> The effect of these clauses is almost identical to the effect produced, and struck down, in *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3rd Cir. 1948). Both *Campbell* and *Elkins-Dell* probably resulted from the sloppy drafting caused by a failure to examine a client's needs, rather than from any malice or attempted duress. See *1954 Hearings* 177.

<sup>141</sup> *State ex rel. Lefkowitz v. ITM, Inc.*, 52 Misc.2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966).

<sup>142</sup> The waiver of defense clause was held void as contrary to 3 identified public policies: (1) the requisites of negotiability and preservation of defenses against transferors who are not holders in due course established by the legislature in the Negotiable Instruments Law; (2) the spirit of legislative preservation of defenses against an assignor in a suit by the assignee prior to notification of the assignment; and (3) the state's continued policy of protecting conditional vendees against imposition by conditional vendors and installment sellers. *Unico v. Owen*, 50 N.J. 101, 124, 232 A.2d 405, 417-18 (1967).

hindered the courts' analyses of these problems;<sup>143</sup> the same results have been reached by other courts without using it.<sup>144</sup>

The unconscionability concept may, however, have an effect in less extreme situations. Where the clause is not prohibited by public policy, but is disfavored, the court may examine the facts surrounding the formation of contract for procedural abuse. If such abuse is found, the court may then void the clause in the specific case, using a sliding scale to judge the combined effect of the procedural and substantive abuses. A clause waiving the right to a jury trial has been voided where the court found significant procedural abuses and identified a strong public policy favoring the privilege of jury trials.<sup>145</sup> Although a similar result has been reached in another case without using unconscionability, the court was required to analyze the substantive and procedural abuses separately, and hold as alternative grounds that either would be sufficient to void the term.<sup>146</sup> The unconscionability doctrine furnishes a more subtle analytical tool.

The concept of unconscionability as a balancing of interests will be most useful in analyzing a term supported by a slight interest of the drafting party that is disfavored, but not prohibited, by a public interest. For example, absent further explanation, a submission-to-jurisdiction clause naming a specific court in a state unrelated to the contract could be considered commercially unjustified because unsupported by any legitimate interest. The drafting party had no legitimate interest in requiring disputes to be submitted to the courts of Nassau County, New York, when they arose from a contract made in Massachusetts between Massachusetts resident buyers and a seller doing business in Massachusetts and not authorized to do business in New York.<sup>147</sup> However, since the seller's parent company was a New

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<sup>143</sup> Each court was very careful to identify the precise public policy it found violated. See cases cited in notes 147-48 *infra*. It is obvious that this technique can be abused by a less conscientious court that may hold some term unconscionable and against public policy without identifying the public interest protected. However, the technique is available, and certainly has been used, without reliance on the unconscionability device.

<sup>144</sup> *Quality Fin. Co. v. Hurley*, 337 Mass. 150, 155, 148 N.E.2d 385, 389 (1958); see *Dearborn Motors Credit Corp. v. Neel*, 184 Kan. 437, 439, 337 P.2d 992, 1002 (1959); *San Francisco Sec. Corp. v. Phoenix Motor Co.*, 25 Ariz. 531, 220 P. 229 (1923). For discussion of the public policy rationale, see Annot., 44 A.L.R.2d 8, 167-72 (1955).

<sup>145</sup> *David v. Manufacturers Hanover Trust Co.*, 4 U.C.C. Rep. Serv. 1145, 1147, 1149-50 (N.Y. Civ. Ct. 1968). In discussing this aspect of the case, the court found oppression in the use of a form contract by a quasi-public institution as well as surprise through the use of documents that did not connote that a contract was being executed.

<sup>146</sup> *Frankini v. Bank of America Nat'l Trust & Savings Ass'n*, 31 Cal. App. 2d 666, 88 P.2d 790 (1939).

<sup>147</sup> *Paragon Homes, Inc. v. Langlois*, 4 U.C.C. Rep. Serv. 16 (N.Y. Sup. Ct. 1967); *Paragon Homes, Inc. v. Crace*, 4 U.C.C. Rep. Serv. 19 (N.Y. Sup. Ct. 1967). The original actions were dismissed on the ground of *forum non conveniens*, since neither party was a resident of New York and New York had no interest in the litiga-

York corporation, it might have claimed an interest in centralizing its litigation. An interest-balancing analysis could find such claims counterbalanced by an illegitimate effect, the undue difficulty for the buyer to sue or to defend actions relating to the contract. If the subsidiary corporations held themselves out as independent businesses, doing business within a limited area and with limited liability, the parent corporation's interest in ease of litigation would be subservient, depriving the clause of its asserted commercial justification.<sup>148</sup>

Such interest-balancing is also useful where the public policy is less certain and the absence of legitimate interest on the part of the drafting party is less clear. An example is a provision for cross-collateral in a consolidation agreement that releases no prior purchases until all subsequent obligations are satisfied.<sup>149</sup> It could be argued that there is no public policy against such terms, at least in a state having no applicable provision in a retail installment sales act.<sup>150</sup> But such an argument would have to ignore the large number of retail installment sales acts, each of which prohibits cross-collateral clauses that extend the payment periods of prior purchases.<sup>151</sup> These widespread legislative prohibitions may indicate that such clauses are contrary to recognized business standards, and provide the foundation for ascertaining the public interests to be protected.<sup>152</sup>

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tion. A contract was then assigned to seller's parent company, a New York corporation, which brought suit in its own name against the buyers. The court dismissed the action holding the submission-to-jurisdiction clause unconscionable. *Paragon Homes, Inc. v. Carter*, 4 U.C.C. Rep. Serv. 1144 (N.Y. Sup. Ct. 1968).

<sup>148</sup> The court did not seem to find that the defendants had been surprised by the clause, but the fact that it was a printed clause in a form contract was sufficient to satisfy the procedural requirements of oppression, or non-bargaining. Even though the procedures used were not unduly oppressive, they were sufficient to bring a substantively unjustified clause within the ambit of the unconscionability doctrine.

<sup>149</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

<sup>150</sup> See *Leff*, *supra* note 3, at 544-45.

<sup>151</sup> It has been suggested that the security arrangement permitting all of Mrs. William's prior purchases to be repossessed upon default at any time, even though the payment period for the prior purchases has been extended, was not patently unconscionable because provisions allowing cross-collateral clauses appear in the various state retail installment sales acts. *Leff*, *supra* note 3, at 554-55. This assertion fails to recognize that there are three basic kinds of cross-collateral clauses. (1) The payments may be pro-rated to keep a balance owing on all prior purchases until the final payment is made on the last purchase. Such an arrangement extends the duration of the payments on the first purchase. (2) The first consolidated payments may be applied first to complete the payment on prior purchases. Such an arrangement accelerates payments on the first purchases. (3) The payments may be pro-rated to pay off all the purchases in the order they were made. Under such an arrangement, subsequent purchases do not affect the payment schedule of prior contracts. *Walker-Thomas* involved the first type of arrangement. The retail installment sales acts, however, invariably adopt either the second or the third alternatives, or a combination of them. The acts do not permit the perpetual extension of prior purchase payment periods by subsequent purchase contracts. See the partial enumeration of consolidation provisions in *B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION* 107 n.206 (1965).

<sup>152</sup> The "business practices" standard was expressly adopted in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965). The use of such legislation as a basis for creating public policies is discussed in note 83 *supra*.

On the other hand, a seller can argue that the additional collateral is necessary protection in a case where repayment is especially insecure. If he reserves use of such clauses for improvident loans, the argument seems based on an assertion of a clearly-perceived interest of the seller. However, if the clause appears on a contract form imposed on all buyers, the seller's legitimate interest in the additional security is open to question. At least the seller has not considered whether such an interest existed in the particular sale, and a balancing approach could find the public interest worthy of protection.<sup>153</sup>

With this approach, courts may now expressly examine problems that were previously felt to be outside their province. For example, the public interest in the preservation of good-faith dealings between parties may be recognized expressly. Since determinations of good faith will most often involve the conduct of the parties, rather than the terms of a contract, the unconscionability doctrine stated in the Code is not precisely applicable.<sup>154</sup> However, there are at least two good-faith problems that involve reliance upon contract clauses. Insecurity clauses may be asserted only in good faith,<sup>155</sup> and may not avoid an agreement to waive a default.<sup>156</sup> Instant termination clauses have caused great difficulties for courts,<sup>157</sup> although not for legislatures,<sup>158</sup> and the unconscionability doctrine will now permit courts to influence the use of such clauses, no matter how broadly drafted.<sup>159</sup>

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<sup>153</sup> This issue was not determined in *Williams*, but the case was remanded for a hearing on the unconscionability issue.

<sup>154</sup> See *Imperial Discount Corp. v. Aiken*, 38 Misc.2d 187, 238 N.Y.S.2d 269 (Kings County Ct. 1963); U3C § 6.111; Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963).

<sup>155</sup> UCC § 1-208.

<sup>156</sup> *Robinson v. Jefferson Credit Corp.*, 4 U.C.C. Rep. Serv. 15 (N.Y. Sup. Ct. 1967).

<sup>157</sup> See, e.g., *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 116 F.2d 675 (2d Cir. 1940); *Riedly v. Hudson Motor Car Co.*, 82 F. Supp. 8 (W.D. Ky. 1949); *Peeler v. Tarola Motor Car Co.*, 170 Ore. 600, 134 P.2d 105 (1943). But cf. *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488, 71 N.W.2d 420 (1955). See also Note, 63 HARV. L. REV. 1010, 1014 (1950).

<sup>158</sup> UCC §§ 1-102, 2-309; *Automobile Dealer's Day in Court Act*, 15 U.S.C. §§ 1221-25 (1964).

<sup>159</sup> Cf. *Sinkhoff Beverage Co. v. Jos. Schlitz Brewing Co.*, 51 Misc.2d 446, 273 N.Y.S.2d 364 (Sup. Ct. 1966), denying a hearing on the asserted unconscionability of an immediate termination clause in a dealership contract. The court noted that a hearing would have been necessary if any grounds for unconscionability had been presented, and apparently found that none were because the contract was "mutually beneficial." The court's criterion seems irrelevant, because the general benefits available through the contract are not necessarily related to the specific abuses possible under a particular clause. After all, Claus Henningsen certainly benefited from his contract to purchase a new Plymouth until it went off the road. A more important factor in the *Sinkhoff* decision is that the hearing was denied on a motion for a preliminary injunction, rather than before final judgment.



### C. *Unfairly Surprising Terms*

Many of the cases discussed above can be analyzed in the terms propounded by Llewellyn concerning form contracts: printed clauses may neither impair the dickered terms nor be unreasonable or unfair.<sup>160</sup> Such a definition conforms to the analytical structure previously derived for oppression cases. However, it was suggested that a different standard might be involved in unfair surprise cases—a standard dependent upon the non-drafting party's expectations.

Although many cases using the unconscionability concept have been decided on policy grounds,<sup>161</sup> some have emphasized the violation of the non-drafting party's expectations. A referral sale contract may be struck down if the buyer was led by deceptive sales practices to believe that he was only enrolling in an advertising scheme, not incurring an obligation.<sup>162</sup> The seller created expectations contrary to the terms of the contract, and where the two conflict, the deliberately created expectations will be enforced.

In the more difficult case, the drafting party has not deliberately created any contrary expectations, but the contract term is both unexpected and obscurely worded, minimized, or hidden in masses of fine print. In this situation the courts have emphasized the lack of understanding on the part of the non-drafting party, and his lack of opportunity to understand the terms, finding an absence of both consent and any objective manifestation of consent to the terms.<sup>163</sup> Such an analysis should conclude that the non-understood, hidden terms cannot be binding without a credible manifestation of assent by the non-drafting party,<sup>164</sup> and therefore cannot be considered terms of the

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<sup>160</sup> See text accompanying notes 27-46 *supra*. It should be noted that all the unconscionability cases to date have involved form contracts.

<sup>161</sup> At least one case, which found both surprise and oppression as possible procedural abuses, framed its instructions on remand to the trial court in terms of policy considerations, and ignored the violation of the non-drafting party's expectations as a standard. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). See also *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967); *Paragon Homes, Inc. v. Carter*, 4 U.C.C. Rep. Serv. 1144 (N.Y. Sup. Ct. 1968).

<sup>162</sup> *State ex rel. Lefkowitz v. ITM, Inc.*, 52 Misc.2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1967).

<sup>163</sup>

Ordinarily, one who signs an agreement without knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But 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.

*Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); see *David v. Manufacturers Hanover Trust Co.*, 4 U.C.C. Rep. Serv. 1145, 1149 (N.Y. Civ. Ct. 1968).

<sup>164</sup> See note 35 *supra* and accompanying text.

contract. But the parties have entered into a contract, and terms settling various possible disputes are needed. If the boilerplate terms are not usable, the traditional approach has been to revert to the common law rules of contracts, or to "fill in the gaps" by imposing the statutory rules of the UCC on the parties.<sup>165</sup>

Such an approach may be sound for contracts that are silent on disputed points, but this is not the situation presented by the form contract with clauses hidden in the boilerplate. The non-drafting party has signed a form covered with printing drafted by another. He has thereby assented to some structuring of the transaction by the drafting party, and to some allocation of risks in that party's favor. He has not, however, assented to the imposition of terms that change other contractual relationships between the parties.<sup>166</sup> Nor has he necessarily assented to waive any of his major rights, such as those regarding the quality of the goods or his remedies for breach of contract.<sup>167</sup> He is entitled to expect that reasonable efforts will be made to bring to his attention any major changes in the normal burdens of the transaction. If no such efforts are made, the court should inquire into his reasonable expectations concerning substantive terms.

#### D. Price Disparity

Although the courts have not explicitly used unexpectedness as a criterion for harsh terms, they have adopted price disparity as such a criterion, but only in cases presenting factors in addition to the price disparity. The courts may have stated the issue as solely dependent upon the price disparity, but their discussion of other facts in most of the cases indicates that this is an oversimplification. Two cases have involved referral sales contracts and flagrant deceptive sales practices,<sup>168</sup>

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<sup>165</sup> UCC § 2-207(3); *Riverdale Fabrics Corp. v. Tillinghast-Stiles Co.*, 306 N.Y. 288, 118 N.E.2d 104 (1954); *Klar v. H & N Parsel Room, Inc.*, 270 App. Div. 538, 61 N.Y.S.2d 285, *aff'd*, 296 N.Y. 1044, 73 N.E.2d 912 (1947); *Cutler Corp. v. Latshaw*, 374 Pa. 1, 97 A.2d 234 (1953).

<sup>166</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (extension of payment period on prior purchase contracts).

<sup>167</sup> *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967) (waiver of defenses against assignee); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (disclaimer of warranty); *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super 441, 240 A.2d 195 (1968) (disclaimer of warranty); *Paragon Homes, Inc. v. Carter*, 4 U.C.C. Rep. Serv. 1144 (N.Y. Sup. Ct. 1968) (waiver of right to use convenient court); *David v. Manufacturers Hanover Trust Co.*, 4 U.C.C. Rep. Serv. 1145 (N.Y. Civ. Ct. 1968) (waiver of right to jury trial).

<sup>168</sup> *State ex rel. Lefkowitz v. ITM, Inc.*, 52 Misc.2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1967); *Frostifresh Corp. v. Reynoso*, 52 Misc.2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on issue of damages*, 52 Misc.2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967).

and the contracts could have been held unconscionable on these grounds alone.<sup>169</sup> One decision expressly considered the abuses arising out of the contract formation process in its determination of unconscionability.<sup>170</sup> However, the courts each placed greater emphasis on the price disparity than on the other factors present.

In so doing, they purported to follow the leading case of *American Home Improvement, Inc. v. MacIver*.<sup>171</sup> Although it is possible to analyze *MacIver* as based upon other aspects of the contract, the finding of unconscionability seems related primarily to the price disparity.<sup>172</sup> Subsequent cases have read *MacIver* as authority for the proposition that price disparity alone is sufficient to support a finding of unconscionability.<sup>173</sup>

The price charged in one case consisted of a cash price incorporating at least a reasonable profit, plus a large (28%), hidden time-price differential, plus the maximum allowable interest charges.<sup>174</sup> The decision seems analogous to cases in other jurisdictions holding that the time-price doctrine may not be used to subvert laws regulating

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<sup>169</sup> See text accompanying notes 141 & 162 *supra*. The contracts in *Lefkowitz* were voided for fraud, illegality and unconscionability; those in *Frostifresh* were not voided and were attacked only on unconscionability grounds. The court was unable to consider fraud because it had not been pleaded, but the court could have considered illegality (lottery), and thereby voided the contract, and did not do so. Therefore, the seller was actually aided by the court's use of unconscionability because he was allowed to recover the value of the merchandise.

<sup>170</sup> State *ex rel.* Lefkowitz v. ITM, Inc., 52 Misc.2d 39, 53, 275 N.Y.S.2d 303, 321 (Sup. Ct. 1967).

<sup>171</sup> 105 N.H. 435, 201 A.2d 886 (1964).

<sup>172</sup> There are at least 2 ways to interpret the opinion. One approach focuses on the fact that the only element of unconscionability discussed by the court is the price differential. Under this approach, the court holds that a sufficiently extreme differential is unconscionable. A second approach focuses on the fact that there was also no disclosure of interest rates. Even though this fact is not relied on in the discussion of the unconscionability issue, nondisclosure is part of the total situation. Under this approach, the decision is narrower, holding only that nondisclosure combined with a large price differential can be considered unconscionable. The large price differential can be regarded as only one form of "harsh term," and perhaps must be analyzed in terms of the commercial necessity or expectations of the non-drafting party. One major problem with the second approach is that the New Hampshire court did not analyze the problem in terms of either "unfair surprise" or "oppression." Thus relating its analysis to the Code's Comments in any meaningful sense is difficult. However, a range of possible rationales must be expected in any decision that first applies a new concept. No analytical structure is available to the court for surveying the new ground. For further discussion of this point, see the text at note 182 *infra*. See also Comment, 9 B.C. IND. & COM. L. REV. 367, 369-71 (1968).

<sup>173</sup> State *ex rel.* Lefkowitz v. ITM, Inc., 52 Misc.2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1967); *Frostifresh Corp. v. Reynoso*, 52 Misc.2d 25, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on issue of damages*, 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 (Civ. Ct. 1967).

<sup>174</sup> *Frostifresh Corp. v. Reynoso*, 52 Misc.2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on issue of damages*, 54 Misc.2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967); Comment, 20 MAINE L. REV. 159, 163-67 (1968).

maximum interest charges.<sup>175</sup> The prices charged in another case consisted of a cash price at least double the retail market value, plus interest charges greater than those allowed by statute.<sup>176</sup> Even the *laesio enormis* doctrine in its strictest sense was satisfied by such a 2 to 1 disparity between price and value,<sup>177</sup> and a similar standard has been adopted apparently by many equity courts as a criterion for unconscionability.<sup>178</sup>

The leading case presents greater difficulties of analysis. The court analyzed the total price as consisting of "the value of the goods and services," the salesman's commission, and interest, and found the total price to be more than double the "value of the goods and services."<sup>179</sup> While the original analysis of the price term may cause economists to blush or sputter,<sup>180</sup> the rationale fits into the traditional pattern that a 2 to 1 price-value ratio is too great. Thus the problem is created, not by the legal theory advanced, but by the court's understanding of the economic theories involved.

A price-disparity doctrine is compatible with the conceptually derived analytical structure if unconscionability comprises price disparity accompanied by other inequitable incidents.<sup>181</sup> Unquestionably, in the two referral sale cases, other factors influenced the court. *MacIver* also contained inequitable incidents, including the nondisclosure of either the amount or rate of interest and the executory nature of the

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<sup>175</sup> Although the New York law, N.Y. PERS. PROP. LAW § 411(1) (McKinney 1962), permits sale of accounts at any mutually agreeable price, the legislature could not have intended to permit this discount to be added to the cash sale price in addition to the maximum allowable interest charges in those situations where the seller knows at the time of the sale that he can discount the contract immediately. Some courts have considered such a scheme "but a cloak for usury." See *Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 249 S.W.2d 973 (1952); Littlefield, *Parties and Transactions Covered by Consumer-Credit Legislation*, 8 B.C. IND. & COM. L. REV. 463 (1967).

<sup>176</sup> *State ex rel. Lefkowitz v. ITM, Inc.*, 52 Misc.2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1967); Comment, 20 MAINE L. REV. 159, 168-70 (1968).

<sup>177</sup> Dawson, *supra* note 13, 11 TUL. L. REV. at 364. The German Civil Code today repudiates the strict mathematical formulation, and declares a contract void when the disproportion is obvious. BGB § 138 (C. H. Beck 1966).

<sup>178</sup> *Prudential Life Ins. Co. v. La Chance*, 113 Me. 550, 95 A. 223, (1915); *Linsell v. Halicki*, 240 Mich. 483, 215 N.W. 315 (1927) (\$2200 paid to realize a profit of \$4300); *Teacher's Retirement Fund Assn. v. Pirie*, 150 Ore. 435, 46 P.2d 105 (1935) (\$15,000 paid for land valued at \$20,000-\$26,000); *Serena v. Ruben*, 146 Kan. 603, 72 P.2d 995 (1937) (\$200 paid for lease valued at \$520); *Downing v. State*, 9 Wash.2d 685, 115 P.2d 972 (1941) (\$600 paid for right-of-way valued at \$850-\$3000).

<sup>179</sup> *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964).

<sup>180</sup> See, e.g., Comment, 20 MAINE L. REV. 159, 159-63 (1968).

<sup>181</sup> See authorities cited in notes 21, 94-98 *supra*. The U3C implicitly adopts this position by allowing courts to "consider" "gross" price disparity in determining unconscionability, without, however, expressly stating that such disparity alone is sufficient to establish it. U3C § 6.111(3)(c).

contract. The nondisclosure indicated deception and the possibility that the consumer did not appreciate the full extent of his contractual obligation. The executory nature of the contract facilitated its cancellation on equitable grounds in a manner analogous to the rescission of executory contracts for a unilateral mistake.<sup>182</sup> In fact, the unilateral mistake cases allowing rescission usually include a finding that the contract would have been "unconscionable."

The cases provide alternative analytical structures in the price disparity area. The courts have phrased their opinions in terms of a gross disparity between price and value, usually at least 2 to 1. However, the fact situations have involved other inequitable factors, generally involving deception of the non-drafting party. A requirement of additional factors would conform more closely to the civil-law and pre-Code unconscionability doctrines, and therefore it may be warranted. Under such a requirement, price disparity would be relied on sparingly,<sup>183</sup> and its use would be influenced by the remedy sought. Cancellation of the contract would be more easily obtainable on this ground than damages, and cancellation would be facilitated if the contract were still executory.<sup>184</sup>

If the doctrine is not limited by a requirement of factors in addition to price disparity, the case law gloss has added a new feature to the conceptually derived analytical structure. An expansion of the doctrine from prior case law and the Official Comments should not be surprising, nor should it be rejected merely because it is new. It should be judged on its own merits on a case-by-case basis. The courts would be unwise to undertake price regulation in close cases, but extreme disparity does not present the same problems. In any event, few transactions will contain extreme price disparity without other inequitable incidents,<sup>185</sup> so the analytical problem may not arise in practice.

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<sup>182</sup> *Moffet, Hodgins & Clarke Co. v. City of Rochester*, 178 U.S. 373, 385, 387 (1900); *Franklin Nat. Bank v. Austin*, 99 N.H. 59, 104 A.2d 742 (1954); *Geremia v. Boyarsky*, 107 Conn. 387, 140 A. 749 (1928); *Confrancesco Const. Co. v. Superior Components, Inc.*, 52 Tenn. App. 88, 371 S.W. 2d 821 (1963); Annot., 59 A.L.R. 809 (1929).

<sup>183</sup> See authorities and discussion in note 45 *supra*.

<sup>184</sup> See *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964). Compare the influence of the remedy sought on the availability of recovery through torts doctrine. See *Keeton, Rights of Disappointed Purchasers*, 32 *Tex. L. Rev.* 1 (1953).

<sup>185</sup> The best example of a contract involving extreme price disparity without other inequitable incidents or any procedural abuses is the government procurement contract in which the price charged the government is approximately 10 times the catalog price of the seller. See, e.g., 113 *Cong. Rec.* 10,616-17 (daily ed. Aug. 16, 1967) (remarks of Representative Pike); 113 *Cong. Rec.* 12,253 (daily ed. Aug. 25, 1967) (remarks of Senator Byrd).

## IV. CONCLUSION

The concept of unconscionability is not impossibly vague. It normally requires the presence of both substantive and procedural abuses, and a sliding-scale approach may be used when one type of abuse is especially great.

The first type of procedural abuse is "surprise," a concept that seems to create no analytical problems. The other is "oppression," which does create problems because of its seeming conflict with "freedom of contract." "Oppression" connotes that non-bargaining over terms may be abusive, even though the non-drafting party has manifested a choice to enter into the contract. It implies that "freedom of contract" includes the ability to codetermine terms, and that if this ability is denied, the resulting unilaterally determined terms will be subject to special scrutiny. Since the ability to codetermine terms is denied the consumer in adhesion contracts, special scrutiny has been especially prevalent there.

The substantive abuses also fall into separate identifiable forms. One form of abuse is the term which violates the reasonable expectations of the non-drafting party. It may arise when the drafting party deliberately creates expectations contrary to the contract terms, or when an important contract clause, such as one waiving rights relating to the quality of the goods or remedies for breach, is obscurely worded, hidden or minimized. In effect, the standard forbidding unexpected terms replaces the concept that a man is bound by all that he signs with the concept that either contracts of adhesion (law written by the drafting party) must divide the risks between the parties fairly or the non-drafting party must be adequately warned of any one-sided apportionment. This development is similar to the courts' earlier replacement of *caveat emptor* with implied warranties.

However, not all one-sided clauses can be immunized from attack merely because the non-drafting party has been warned of the harshness of the terms. A second form of substantive abuse is the printed clause that alters or impairs the dickered terms. Courts no longer allow such clauses to contradict basic expectations created by the bargaining process, regardless of the form of the later memorandum. This facet of the unconscionability doctrine is analogous both to the English "fundamental breach" cases and to the UCC provisions prohibiting the disclaimer of express warranties. The primary target of the concept is the warranty disclaimer or limitation of remedy.

Price disparity has also been recognized as one form of substantive abuse. The courts have generally not relied upon this abuse unless they have found a disparity of 2 to 1 between price and "value,"

as they define value. This seems a conservative approach, except that economists would disagree with some of the methods of evaluation used. To date the courts have also limited the use of this facet of the unconscionability doctrine to cases involving other inequitable features in addition to price disparity.

The unconscionability doctrine has been used most frequently to balance the interests of the public and the drafting party. This facet of the doctrine is related to the cases that have voided contract terms for being "contrary to public policy," except that it furnishes a more subtle analytical tool. The court is able to consider not only whether the term under attack contravenes a public interest, but also whether it protects any legitimate interest of the drafting party. In difficult cases, the methods of contract formation may also be considered. Under such an approach, the courts can indicate those policies that have actually influenced their analysis of the problem, rather than use the prior surreptitious methods. Further, the courts have so indicated in the majority of cases decided to date,<sup>186</sup> even when remanding for further hearing because of an incomplete record.<sup>187</sup>

The articulation of policies increases the predictability of result for the draftsman, because he will be advised of the abuses the courts find unacceptable and can avoid them. It also will aid in the adjudication of litigated cases, because the advocate can argue to the problems which actually concern the courts, rather than strike postures about irrelevant technicalities. However, indicating the policies involved in prior cases cannot provide complete predictability of result in the future, nor should it be expected to. As in other areas of the law, public policies may be derived from many sources: prior cases, local and foreign state statutes, and notions of good faith and fair dealing. The variety and scope of the policies that may be asserted are not limited, but are as great as the ability of the draftsman to create unreasonable clauses. Thus, the unconscionability doctrine will require the draftsman to develop and follow his own sense of fairness.

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<sup>186</sup> See, e.g., *In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864 (E.D. Pa. 1966); *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967); *State ex rel. Lefkowitz v. ITM, Inc.*, 52 Misc.2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1967); *David v. Manufacturers Hanover Trust Co.*, 4 U.C.C. Rep. Serv. 1145 (N.Y. Civ. Ct. 1968). See also *Paragon Homes, Inc. v. Carter*, 4 U.C.C. Rep. Serv. 1144 (N.Y. Sup. Ct. 1968).

<sup>187</sup> *In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864 (E.D. Pa. 1966); *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967).