

1974

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## Recommended Citation

2 Loyola Consumer J. 5-24 (1974).

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## A CONSUMER'S GUIDE TO UNCONSCIONABLE SALES CONTRACTS

*Martin A. Frey\**

Traditional contract law has provided the consumer with relief in some of the more severe unconscionable contract situations; for example, usury, fraud and duress. Unfortunately for the consumer, not all unconscionable contracts come within established doctrines. Some sympathetic courts have strained to give the consumer relief by construing the contract language adversely to the merchant, by manipulating the rules of offer and acceptance, and by determining the unconscionable clause to be contrary to public policy or to the dominant purpose of the contract!<sup>1</sup> The drafters of the Uniform Commercial Code have supplied the consumer with relief;<sup>2</sup> under section 2-302, courts now can pass directly on the unconscionability of the contract or on a particular clause in that contract.<sup>3</sup>

Section 2-302 expressly authorizes the trial court to make a finding as a matter of law that a contract or a contract clause was unconscionable at the time it was made. Upon this finding, the court may tailor the contract to avoid the unconscionable result; it may refuse to enforce the contract; or it may delete the unconscionable clause and enforce the remainder of the contract.<sup>4</sup> At face value, this section seems a very potent weapon in the consumer's arsenal when faced with a merchant

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1. UNIFORM COMMERCIAL CODE § 2-302, Comment 1.

2. The unconscionability doctrine of 2-302 is broad enough to encompass the traditional doctrines of usury, fraud and duress as well as those situations which were not within the established doctrines. In application, however, the courts have shown a tendency to use the established doctrine when the facts so indicate rather than strike off into the uncharted sphere of 2-302. An example is *Toker v. Perl*, 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968), *aff'd*, 108 N.J. Super. 129, 260 A.2d 244 (App. Div. 1970). The trial court held the installment sales contract unenforceable on two grounds: (1) fraud; and (2) unconscionability. The appellate court affirmed holding that the fraud ground was sufficient and therefore it was unnecessary to express an opinion on unconscionability.

3. UNIFORM COMMERCIAL CODE § 2-302, Comment 1. Unconscionability is a question of law and must be determined by the court and not by the jury. *Asco Mining Co. v. Gross Contracting Co.*, 3 UCC. REP. SERV. 293, 296 (Pa. Ct. C.P., Butler County 1965), holding that it was error for the Trial Court to submit the issue of unconscionability to the jury.

4. UNIFORM COMMERCIAL CODE § 2-302:

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

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

armed with a form contract. But is it? When can a contract be attacked as unconscionable? Are consumers in California under a severe disability since their legislature deleted 2-302 from the California version of the Code?

This article will not attempt to explore the history of 2-302; other authors have labored at that task and their efforts are readily available.<sup>5</sup> Nor will it prophesize on the future of this provision. Instead, this article is written for the consumer's attorney. It is intended to supply him with a check-list and guidelines for testing whether his client has a possible case of unconscionability. Before getting to the check-lists, however, it is necessary to take a moment to isolate the type of contract that will be dealt with and to put unconscionability in its factual setting.

The contracts under consideration involve the sale of goods by a merchant to a consumer. Implicit is the fact that non-sale of goods contracts will not be considered. This approach is consistent with the formal scope of article 2 of the Code (Sales).<sup>6</sup> The exclusion of non-sales contracts does not mean that these contracts cannot be held unconscionable under 2-302; the Code's influence extends far beyond its formal scope, and some non-sales contracts have been held unconscionable.<sup>7</sup>

5. E.g., Braucher, *The Unconscionable Contract or Term*, 31 U. PITT. L. REV. 337 (1970); Davenport, *Unconscionability and the Uniform Commercial Code*, 22 U. MIAMI L. REV. 121 (1967); Ellinghaus, *In Defense of Unconscionability*, 78 YALE L. J. 757 (1969); Leff, *Unconscionability and the Code--The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); Leff, *Unconscionability and the Crowd--Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970); Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969); Shulkin, *Unconscionability--The Code, The Court and The Consumer*, 9 B. C. IND. & COM. L. REV. 367 (1968); Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969); Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359 (1970).

6. "Unless the context otherwise requires, this Article applies to transactions in goods. . . ." UNIFORM COMMERCIAL CODE § 2-102. "'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale. . . ." *Id.* § 2-105(1). "In this Article unless the context otherwise requires 'contract' and 'agreement' are limited to those relating to the present or future sale of goods. 'Contract for sale' includes both a present sale of goods and a contract to sell goods at a future time. A 'sale' consists in the passing of title from the seller to the buyer for a price (Section 2-401). . . ." *Id.* § 2-106(1).

7. Contracts held unconscionable: *Fairfield Lease Corp. v. Pratt*, 6 Conn. Cir. Ct. 537, 278 A.2d 154 (1971) (lease agreement); *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964) (home improvement contract); *Educational Beneficial, Inc. v. Reynolds*, 324 N.Y.S. 2d 813 (Civ. Ct., N.Y. County 1971) (enrollment agreement between a school and a student); *David v. Manufacturers Hanover Trust Co.*, 4 UCC REP. SERV. 1145 (N.Y. Civ. Ct., Kings County 1968) *rev'd*, 59 Misc. 2d 248, 298 N.Y.S. 2d 847 (App. T. 1969) (checking account contract); *cf. In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864 (E.D. Pa. 1966) (contract to advance money against the assignment of accounts receivable). *Contra, In re Advance Printing & Litho Co.*, 387 F.2d 952 (3d Cir. 1967) (holding that § 2-302 applies to sales but not to security transactions); *Hernandez v. S.I.C. Fin. Co.*, 79 N.M. 673, 448 P.2d 474 (1968) (holding that § 2-302 applies to sales but not to security transactions); *cf. Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S. 2d 264 (Sup. Ct. 1969) (in which an attempt to make the sales contract into a security agreement failed). *See also E.F. Lynch, Inc. v. Piccirilli*, 28 Mass. App. Dec. 49 (Boston Mun. Ct. 1964) (lease agreement: reversed because trial court failed to hold a hearing on unconscionability); *United States Leasing Corp. v. Franklin Plaza Apartments, Inc.*, 319 N.Y.S. 2d 531 (Civ. Ct., N.Y. County 1971) (lease agreement: plaintiff's motion for summary judgment denied because a hearing on the

Their exclusion from this article means only that the results in these cases may or may not be dictated by factors relevant to 2-302 and this, at least in the first instance, may be misleading when isolating the indicators for unconscionability under 2-302.

Contracts involving sales between merchants also will not be considered except for the following discussion on how to determine whether the contract concerns a "consumer" or a "between merchants" sale. The merchant is a person with special knowledge or skill peculiar to the practices or goods involved in the transaction.<sup>8</sup> The "between merchants" transaction occurs when both parties are chargeable with the knowledge or skill of merchants.<sup>9</sup> The indicators in a "between merchants" case, because of knowledge and skill of both contracting parties, may be slightly different from those in the consumer-merchant situation and may instill a possible source of distortion, and therefore are excluded from consideration.<sup>10</sup>

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unconscionability issue was necessary); *Fairfield Lease Corp. v. George Umbrella Co.*, 8 UCC REP. SERV. 184 (N.Y. Civ. Ct., N.Y. County 1970) (lease agreement: reversed because trial court failed to hold a hearing on unconscionability); *Fairfield Lease Corp. v. Umberto*, 7 UCC REP. SERV. 1181 (N.Y. Civ. Ct., N.Y. County 1970) (lease agreement for coffee machines); *Kaye v. Coughlin*, 443 S.W. 2d 612 (Tex. Civ. App.--Eastland 1969, no writ) (contract for sale of real estate: no unconscionable provision).

The Uniform Consumer Credit Code § 5.108 is similar to UCC § 2-302 but is applicable to consumer credit sales, consumer leases, and consumer loans. It provides:

(1) With respect to a consumer credit sale, consumer lease, or consumer loan, if the court as a matter of law finds the agreement or any clause of the agreement to have been unconscionable at the time it was made the court may refuse to enforce the agreement, or it may enforce the remainder of the agreement without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

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

(3) For the purpose of this section, a charge or practice expressly permitted by this Act is not in itself unconscionable.

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8. A "merchant" is defined by the Code to be "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." UNIFORM COMMERCIAL CODE § 2-104(1).

9. *Id.* § 2-104(3).

10. Several illustrations of merchant-merchant cases are: *County Asphalt, Inc. v. Lewis Welding & Eng'r Corp.*, 323 F. Supp. 1300 (S.D.N.Y. 1970); *Romine, Inc. v. Savannah Steel Co.*, 117 Ga. App. 353, 160 S.E.2d 659 (1968); *Architectual Aluminum Corp. v. Macarr, Inc.*, 70 Misc. 2d 495, 333 N.Y.S.2d 818 (Sup. Ct., N.Y. County 1972); *Division of Triple T. Serv., Inc. v. Mobil Oil Corp.*, 60 Misc. 2d 720, 304 N.Y.S.2d 191 (Sup. Ct., Westchester County 1969); *Whitestone Credit Corp. v. Barbory Realty Corp.*, 5 UCC REP. SERV. 176 (N.Y. Sup. Ct., Queens County 1968); *Sinkoff Beverage Co. v. Jos. Schlitz Brewing Co.*, 51 Misc. 2d 446, 273 N.Y.S.2d 364 (Sup. Ct., Suffolk County 1966); *Central Ohio Co-op Milk Producers, Inc. v. Rowland*, 29 Ohio App. 2d 236, 281 N.E.2d 42 (1972).

It is important to note at this juncture that the cases that have raised the unconscionability argument fall into several factual patterns. The most common involves a merchant who has sold goods to a consumer on a time payment contract. The consumer makes a number of payments and then fails to make the next payment when due. The merchant brings a contract action against the consumer for the balance due or to recover the goods. The consumer answers by raising the unconscionability of the price term as a defense to the contract action.<sup>11</sup>

Under these same facts, the consumer need not wait for the merchant to sue. The consumer may take the initiative. He could bring suit against the merchant to reform the price term so that the contract sales price (and service charges) would correlate to the price paid. By these tactics, the consumer could retain the merchandise and free himself from making further payments.<sup>12</sup> While these two illustrations refer to the unconscionability of the price term, other terms, as will be discussed later, may be unconscionable as well.

## I. THE CHECK-LISTS

The text of the Code, by its silence in defining what are unconscionable contracts and clauses, has led to uncertainty and speculation concerning definition. A number of cases, by being merely conclusionary, shed no light on the definition and its components.<sup>13</sup> A few other cases do refer to definitions. Two similar yet different formulations currently

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11. *E.g.*, *Toker v. Westerman*, 113 N.J. Super. 452, 274 A.2d 78 (N.J. Dist. Ct. 1970); *Jefferson Credit Corp. v. Marcano*, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on the damage issue*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. T. 1967).

12. *E.g.*, *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct., Nassau County 1969).

13. *E.g.*, *In re Jackson*, Bankruptcy No. 40666, 9 UCC REP. SERV. 1152 (W.D. Mo. 1971) (title retention provisions of a charge-all agreement for the entire amount was unconscionable); *Dean v. Universal C.I.T. Credit Corp.*, 8 UCC REP. SERV. 1113 (N.J. Super. Ct., App. Div. 1971) (dictum stated that a clause not to assert defenses against an assignee and a clause providing a 5-day time limit for claiming collateral in a repossessed automobile were unconscionable); *Kosches v. Nichols*, 327 N.Y.S.2d 968 (Civ. Ct., N.Y. County 1971) (dictum stated that clauses limiting the right of the consumer to move, or permitting the merchant to declare a default if the consumer dies or the merchant with reasonable cause determines the goods to be in jeopardy, or giving the merchant the right to enter a consumer's residence and seize the goods without a court order, may be unconscionable); *Zachary v. R.H. Macy & Co.*, 66 Misc. 2d 974, 323 N.Y.S.2d 757 (Sup. Ct., N.Y. County 1971) (credit contract not unconscionable); *Paragon Homes of New England, Inc., v. Langlois*, 4 UCC REP. SERV. 16 (N.Y. Sup. Ct. 1967) (dictum stated that a clause specifying jurisdiction for litigation purposes would have been unconscionable were not the action dismissed on other grounds).

are developing: one emanates from the comments to the Code and the other from the pre-Code case of *Williams v. Walker-Thomas Furniture Co.*<sup>14</sup> In the following material these formulations will be isolated and discussed separately and then brought together and compared for similarities and differences.

#### A. The Comment 1 Formulation

The closest the Code comes to a definition for unconscionability is in the comments to 2-302. Comment 1 provides the following circular and somewhat obscure statement:

"The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise. . . . and not of disturbance of allocation of risks because of superior bargaining power."<sup>15</sup>

Based on this language and the cases which will be discussed subsequently, the following *check-list for unconscionability* can be developed:

1. Identify the one-sided clause. This will be a term for which the merchant is bargaining.
2. Identify the general commercial background (also known as the commercial setting) at the time of the contracting. Include facts about this contract and related contracts and dealings between the parties.
3. Identify the commercial needs of the particular trade or case at the time of contracting. Include facts which explain or tend to justify the merchant's position regarding the one-sided clause.

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14. 350 F. 2d 445 (D.C. Cir. 1965). *Toker v. Westerman*, 274 A.2d 78 (N.J. Dist. Ct. 1970), refers to neither Comment 1 nor *Walker-Thomas*. Instead it refers to the following passage in *Carter v. Boone County Trust Co.*, 338 Mo. 629, 92 S.W.2d 647, 657 (1936), which appears in WORDS AND PHRASES. An unconscionable contract has been defined as:

one such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other. To what extent inadequacy of consideration must go to make a contract unconscionable is difficult to state, except in abstract terms, which gives but little practical help. It has been said that there must be an inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it.

In *Toker*, a price term with a price-value disparity of 2.2 or more to 1 was held to be unconscionable.

15. UNIFORM COMMERCIAL CODE § 2-302, Comment 1. For criticism of this test, see J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 116 (1972).

4. Evaluate the one-sidedness of the clause in the light of the general commercial background and the commercial needs of the trade or case. Was the clause a product of the merchant's oppressive practices and, if so, would the clause shock the conscience of the court?

Based on the limited number of consumer-merchant sales cases which have discussed Comment 1,<sup>16</sup> the following materials develop and illustrate the check-list's rough guidelines. The first, and probably the simplest step, is the identification of those clauses that the consumer will claim to be one-sided in favor of the merchant. These are the clauses for which the merchant was bargaining. Illustrative are price terms, conditions precedent to warranties, waivers of defenses, and title retention provisions.

Next, identify the general commercial background at the time of contracting. The commercial background or commercial setting should include the events leading up to the contracting, and will help to explain how and why the one-sided term found its way into the contract. For example, in *Frostifresh Corp. v. Reynoso*,<sup>17</sup> the contract for the refrigerator-freezer was negotiated orally in Spanish between the consumers and a Spanish speaking salesman representing the merchant. In that conversation the consumer husband told the salesman that he had but one week left on his job and he could not afford to buy the appliance. The salesman distracted and deluded the consumers by advising them that the appliance would cost them nothing because they would be paid bonuses or commissions of \$25 each on the numerous sales that would be made to their neighbors and friends. Thereafter the consumers signed a retail installment contract entirely in English, which was neither translated nor explained to them. In that contract there was a cash sales price of \$900 and a credit charge of \$245.88, making a total of \$1145.88. The refrigerator-freezer cost the merchant \$348.

The commercial background need not be limited to the one contract in which the one-sided term appears. It may include related contracts and dealings between the parties. If the consumer desires to go beyond the one contract, then he must supply facts which show that this extrinsic material is relevant. *Milford Finance Corp. v. Lucas*<sup>18</sup> presents an excellent illustration of the expansion of the scope of the general commercial background beyond the single contract in question. In *Milford*

16. *Milford Fin. Corp. v. Lucas*, 8 UCC REP. SERV. 801 (Mass. App. Div. 1970) (judgment for merchant's assignee reversed since the trial court erred in excluding evidence of commercial background relevant to the decision of unconscionability); *Melcher v. Boesch Motor Co.*, 188 Neb. 522, 198 N.W.2d 57 (1972); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. T. 1967).

17. 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966).

18. 8 UCC REP. SERV. 801 (Mass. App. Div. 1970).

*Finance* the consumers (husband and wife), in response to a post card informing them that they had "won a free Miami Beach vacation for two," called a telephone number to redeem the vacation. They were subsequently visited by a salesman for Northeast Food Service. He inquired how much they spent each week on meat for the family and if they might be interested in a frozen food plan. He stated that Northeast would supply them with the finest choice of meats delivered to their home for \$12 per week, or 20¢ per week more than they had been paying. The consumers asked how often the meats were delivered and were told every six months. When they said that the freezer section of their refrigerator was not capable of holding such a large quantity of food, the salesman said that if they agreed to purchase frozen meat from Northeast for three years, they would be supplied a freezer at no extra charge.

The salesman presented the consumers with a Northeast Food Service Membership Bond and Guarantee and then produced two documents which he requested the consumers to execute. One was entitled "consumer note" and was in the amount of \$195.24, payable in four equal payments of \$48.81. The other was the retail installment sales agreement in the amount of \$1,050.84 payable in 36 equal payments of \$29.19. When the consumers saw the latter they said it was too much to pay for a freezer. The salesman said the freezer payments were included in the food payments and both amounted to \$12 per week. The salesman said the only reason that they were required to sign the retail installment sales agreement was to insure that they purchased their meats from Northeast for at least three years. The consumers subsequently paid \$624 (\$12 x 52 weeks) and received one year's supply of meat. Northeast then went out of business and no further meat deliveries were made.

In the interim, the installment sales agreement had been assigned from Northeast to Milford Finance. When the consumers did not receive deliveries, they refused to make any further payments and requested that Milford Finance remove the freezer. Milford, as assignee of the freezer contract, brought action against the consumers for the unpaid balance. The consumers contended that the total time sales price of \$1,050.84 was so excessively high as to make the entire retail installment sales agreement unconscionable and unenforceable. From *Milford Finance* it may be seen that evidence is relevant to expand the scope of the hearing from the one contract being challenged to include other contracts and other dealings between the parties which comprise a greater transaction.



In *Milford Finance*, the following acts demonstrated that the scope should be expanded. The post card which informed the consumers that they had "won a free Miami Beach vacation for two"; the subsequent visit by a salesman for Northeast; the lead into the frozen food plan; the signing of the note, bond and guarantee and the sales agreement, all on the same day; and the fact that the food was a necessary requirement of the freezer contract, demonstrated that the contract for the freezer was an integral part of the food contract. The evidence surrounding the manner in which the consumers were induced to sign up for the food service and for the purchase of the freezer was admissible, to show that the freezer payments were included in the food payments. The evidence concerning the Northeast Food Service Membership Bond and guarantee was introduced to show that Northeast's agent was not merely selling a freezer unit to the consumers, but also that he had made certain representations about a frozen food plan, upon which representations the consumers had relied. Once the scope was expanded, evidence surrounding the manner in which the consumers were induced to become involved with any aspect of the whole transaction was relevant to show that the merchant had engaged in deceptive practices during the negotiation of the freezer contract. Finally, the fact that the consumers paid the monthly payments up until the time that they were unable to procure any more food demonstrated their good faith.

Next, identify the commercial needs of the particular trade or case at the time of contracting. These facts will be used to explain the merchant's position regarding the one-sided clause. Are there facts that justify such a clause? Consider, for example, the commercial needs that influence the setting of the ultimate price to the consumer. Included are the net cost of the goods to the merchant, a reasonable profit, commissions to be paid to salesmen, possible collection and legal fees, trucking and service charges necessarily incurred, reasonable finance charges, and other matters of overhead.<sup>19</sup>

Finally, evaluate the one-sidedness of the clauses in the light of the general commercial background and the commercial needs of the trade or case. Was the clause so one-sided at the time of contracting as to be unconscionable? Comment 1 states that a finding of unconscionability will lie only when it is necessary to prevent oppression and unfair surprise. While this language is conjunctive -- "oppression *and* unfair

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19. *Frostifresh Corp. v. Reynoso*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. T. 1967).

surprise" -- the cases refer only to oppression and thus treat the terms as disjunctive.<sup>20</sup>

Most cases provide little help in evaluating whether a clause is so one-sided as to be unconscionable.<sup>21</sup> Of the few that have referred to the Comment 1 formulation, some have been cases where the trial court has erroneously excluded evidence relevant to the unconscionability finding, and therefore are of little help in pinpointing unconscionability. Two cases, *Melcher v. Boesch Motor Co.*<sup>22</sup> and *Frostifresh v. Reynoso*, do shed some light on the application of the Comment 1 formulation. In *Melcher*, a consumer purchased a new pickup truck from a dealer. From the beginning, the truck used an abnormal amount of oil. When it had been driven nearly 25,000 miles, it threw a connecting rod and destroyed the engine. The consumer brought action against the dealer and the manufacturer for damages for breach of the manufacturer's express warranty that the vehicle was free from defects in material and workmanship. The dealer and the manufacturer defended on the ground that the consumer had failed to comply with the conditions precedent to the warranty -- that is, the service requirements and the required certification of such compliance. The consumer replied that he had performed the required maintenance and that the requirement that he obtain from the dealer a certification of compliance was unconscionable and unreasonable and therefore unenforceable.

After quoting the Comment 1 formulation, the court held that the certification requirement was not unconscionable. It must be emphasized that the court found the requirement not unconscionable, not by discussing whether it was "oppressive" or led to "unfair surprise", but instead by whether it was "unreasonable." In finding the basis for the certification clearly reasonable, the court noted that the requirement of a consumer that he maintain the engine of his vehicle properly, in exchange for a warranty that the vehicle be free of defect in material and workmanship at time of delivery, go hand-in-hand. Also, the required certification did not put the manufacturer and the dealer in the position of sole arbiters as to what is sufficient maintenance. The manufacturer and the dealer did not have the unqualified right under the clause to refuse the certification and defeat the consumer's claim.

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20. *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966). For a discussion of "unfair surprise" and "oppression," see D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 710-12 (1973).

21. *Milford Fin. Corp. v. Lucas*, 8 UCC REP. SERV. 801 (Mass. App. Div. 1970) (Based on the discussion on appeal, the unconscionability decision would appear to hinge on the merchant's deceptive practices versus the consumer's good faith).

22. *Supra* note 16.

While the consumer must furnish the dealer with evidence of performance of the required maintenance services, the dealer may not unreasonably withhold the certification. If the manufacturer and the dealer could arbitrarily refuse to recognize the fact that the service was properly performed and thus deny the certification, the certification requirement would be unreasonable and the condition precedent that the consumer obtain the certification would be waived. Thus construed, the certification provision is not unreasonable.

While the *Melcher* contract was not unconscionable, the *Frostifresh* contract was. *Frostifresh* provides the following clue to unconscionability: It is not oppression alone, according to the Comment 1 formulation, that causes a contract to be unconscionable. If it were, then the problem would seem to revert to a reallocation of the risk, which Comment 1 expressly rejects. Instead, it is *oppression that shocks the conscience of the court*. In *Frostifresh*, the court noted that the service charge (\$245.88), which almost equalled the price of the refrigerator-freezer (\$348), was in and of itself indicative of the oppression which was practiced on the consumers. In addition, the consumers were handicapped by a lack of knowledge both as to the commercial situation and as to the nature and terms of the contract, which was submitted in a language foreign to them. These oppressive practices led the court to conclude that the contract was "too hard a bargain". The sale of the appliance at the contract price was shocking to the conscience of the court. The conscience of the court would not permit the enforcement of the contract as written.<sup>23</sup>

#### B. The *Walker-Thomas* Formulation

The more commonly cited formulation, emanating from the case of *Williams v. Walker-Thomas Furniture Co.*, defines unconscionability as including *an absence of meaningful choice* on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.<sup>24</sup> The following check-list directs attention to the relevant factors:

1. The consumer must have had a meaningful choice at the time of contracting.

- a. The consumer must have had a reasonable opportunity to understand the contract terms. An important term must not have been hidden in a maze of fine print; nor must an important term have been

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23. *Frostifresh v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966); cf. *Star Credit Corp. v. Molina*, 59 Misc. 2d 290, 298 N.Y.S.2d 570 (Civ. Ct., N.Y. County 1969) (consumer failed to submit evidence of the freezer's actual value, which made a determination of the unconscionability of the price term impossible).

24. 350 F.2d 445 (D.C. Cir. 1965).

obscured by deceptive sales practices; nor must the consumer have been denied the opportunity to understand the term due to a lack of education or some other disability.

b. In addition, the consumer must have had the power to bargain about the term. He must not have lacked the power to shop comparatively due to limited financial resources or because all merchants dealing in the desired item uniformly use the same commercial form or charge the same price.

c. If the consumer lacked a meaningful choice at the time of contracting, then an inequality of bargaining power existed. However, only a *gross* inequality of bargaining power will constitute the requisite absence of meaningful choice. Was the inequality of bargaining power gross?

2. The merchant must not have taken advantage of the customer's absence of meaningful choice by including a term unreasonably favorable to himself in the contract.

a. Identify the favorable term. This will be a term for which the merchant is bargaining.

b. Identify the circumstances that existed at the time of contracting. Did these circumstances make the favorable term *unreasonably* favorable to the merchant? Specifically, did the merchant *knowingly* take advantage of the consumer's absence of meaningful choice? Considering only the consumer's evidence of circumstances, does this advantage appear unreasonable? Were there commercial needs for the particular trade or case that justified the merchant in including into the contract what appeared to be an unreasonably favorable term? If the advantage appears unreasonable and there are no commercial needs that justify the merchant's position, then the term is unconscionable.

The following materials develop and illustrate the rough guidelines of the check-list: (1) For unconscionability, the consumer must lack a meaningful choice at the time of contracting. (2) Whether a meaningful choice is present in a particular case can only be determined by considering all the circumstances surrounding the transaction.<sup>25</sup> (3) Meaningful choice is directly related to bargaining power, and bargaining power is a composite of knowing what to bargain for and the ability to bargain for it.

The consumer, when signing the contract, must at least have had a reasonable opportunity to know and understand its terms. This

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25. *Id.* The consumer is entitled to a hearing to present evidence as to the commercial setting. Therefore, the merchant is not entitled to a summary judgment. *Central Budget Corp. v. Sanchez*, 53 Misc. 2d 620, 279 N.Y.S.2d 391 (Civ. Ct., N.Y. County 1967).

opportunity may not exist if the important terms are hidden in a maze of fine print, or if they are minimized or obscured by deceptive sales practices. An example of the latter occurred in *Toker v. Perl*,<sup>26</sup> where the merchant's salesman arrived at the consumer's home for a prearranged appointment. For the first two and one-half hours of the three hour interview, the discussion centered around food plans that could be arranged by the merchant. No mention was made of a freezer. Sometime within the last one-half hour, when it became apparent that the plan called for the purchase of 18 weeks of food at a time, the consumers mentioned that they had no facilities to store such a large quantity of food. The salesman replied that a freezer was included in the food plan. Following the explanation of the food plan, the salesman presented three forms for signing. He informed the consumers that the documents were for 18 weeks of food. The forms were placed one on top of the other, leaving visible only the signature line on the lower two forms. The top page was the food plan contract. The next day when the consumers examined the papers, they discovered that in addition to the food plan they had signed a financing application and an installment contract for a freezer.

The opportunity to understand the terms may not exist when the consumer suffers from a lack of education or a language barrier. For example, a Spanish-speaking consumer, with at best a sketchy knowledge of the English language, may neither know nor understand when he signs a contract printed entirely in English that he is waiving all implied warranties, despite the fact that the waiver is printed in the contract in large black type.<sup>27</sup> At times even a consumer with a sound basic education and without language problems may be unable to understand the contract even if he reads it, due to the drafting skill of the merchant's form writer.<sup>28</sup> In either case, the consumer who signs the contract with little or no knowledge of its terms, signs without choice.<sup>29</sup>

A "smart" consumer knows and understands what is in the contract. But what terms can this consumer get? Is the consumer free to indulge in comparative shopping? The answer may be that he is physically able but, due to his very limited financial resources<sup>30</sup> or the fact that all merchants dealing in the desired items uniformly use the same commercial form, or charge the same price,<sup>31</sup> comparative

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26. 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968), *aff'd on other grounds*, 108 N.J. Super. 129, 260 A.2d 244 (App. Div. 1970).

27. *Jefferson Credit Corp. v. Marcano*, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969).

28. *Urdang v. Muse*, 114 N.J. Super. 372, 276 A.2d 397 (1971).

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

30. *Block v. Ford Motor Credit Co.*, 286 A.2d 228 (D.C. Ct. App. 1972), *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).

31. *Urdang v. Muse*, 114 N.J. Super. 372, 276 A.2d 397 (1971).

shopping is not practiced. Or, the consumer may be physically able to shop comparatively, but be psychologically unable to do so because the merchant calls on the consumer in the consumer's own home.<sup>32</sup> Without the power to do effective comparison shopping, the consumer has little bargaining power, little real choice.

Only a gross inequality of bargaining power will constitute the requisite absence of meaningful choice.<sup>33</sup> Although our research did not uncover a case which defined the distinction between *gross* and *less-than-gross* inequality of bargaining power, some guidance can be gleaned from the ultimate conclusions of the courts on the unconscionability issue. It appears from these cases that only one of the factors from the check-list is necessary for the inequality of bargaining power to be gross.<sup>34</sup> If more than one factor is present at the time of contracting, all the better. What is critical is the *severity* of the inequality developed within that factor. Showings of deceptive sales practices, language barriers, and limited financial resources have been sufficient to support conclusions of unconscionability; but it appears that the psychological factor of being trapped by a salesman in one's own home is not strong enough by itself to be relied upon to show gross inequality, and should only be used in conjunction with another factor to strengthen that other factor.

Absence of meaningful choice alone will not warrant a finding of unconscionability. Absence of meaningful choice is only one-half of the two-pronged *Walker-Thomas* test. For a clause to be unconscionable, the merchant must *knowingly* have taken advantage of the consumer's absence of meaningful choice by including in the contract a term unreasonably favorable to the seller.

Was the term favorable to the merchant? Illustrative are such terms as waiver of implied warranties of merchantability and of fitness for a particular purpose, acceleration clauses, and price terms. The merchant benefits at the consumer's expense.

A term favorable to the merchant does not automatically make the term unconscionable. Freedom to contract permits and encourages

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32. *See* Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969); Toker v. Perl, 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968), *aff'd on other grounds*, 108 N.J. Super. 129, 260 A.2d 244 (App. Div. 1970).

33. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).

34. In Toker v. Perl, 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968), the price term was found unconscionable since it had been obscured by deceptive sales practices. In Jefferson Credit Corp. v. Marcano, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969), the waiver of warranties was found unconscionable because the consumer was denied the opportunity to understand the waiver clause due to a lack of education in English. In Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969), the price term was held unconscionable as the consumer, a welfare recipient, had only very limited financial resources.

each contracting party to bargain for terms most favorable to himself. The limitation (in addition to good faith)<sup>35</sup> is that circumstances must not exist at the time of contracting which would make the favorable term *unreasonably* favorable to the merchant. In determining reasonableness or fairness of the terms, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. Existing circumstances encompass the general commercial background and the commercial needs of the particular trade or case.<sup>36</sup> Did the merchant knowingly take advantage of the consumer's absence of meaningful choice?<sup>37</sup> The merchant knowingly takes advantage when he leads the consumer to believe that his signature to a contract is not for the purchase of merchandise, when in fact it is.<sup>38</sup> Knowingly taking advantage may be implied when a merchant, dealing at arms length with the consumer who has a severe language barrier, fails to explain the terms favorable to the merchant so the consumer can understand. Or it may be implied from the price-value disparity when the merchant knows that the consumer's limited financial resources make it impossible for him to buy from others.

Considering only the consumer's evidence of circumstances, does the advantage gained by the merchant appear unreasonable? In *Jones v. Star Credit Corp.*,<sup>39</sup> a price-term case, the court considered whether the mathematical price-value disparity was exorbitant on its face and concluded that it was oppressive. The court then used the language that the price imposed on these consumers for this appliance shocked the conscience of the court. This occurred when the price-value disparity was in excess of 2.5 to 1.

Commercial needs provide the merchant with an opportunity to justify the existence of favorable terms. When the challenged term is price, the merchant's defense may be based on the necessity and even the desirability of installment sales and the extension of credit. There are many, including but not necessarily limited to the poorest members

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35. The Code provides that "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." UNIFORM COMMERCIAL CODE § 1-203. This obligation of good faith underpins the entire Code. The consumer's obligation of good faith means "honesty in fact in the conduct or transaction concerned." *Id.* § 1-201(19). The merchant has a higher obligation. "'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." *Id.* § 2-103(1)(b).

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

37. *Urdang v. Muse*, 114 N.J. Super. 372, 276 A.2d 397 (1971); *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct., Nassau County 1969).

38. *Toker v. Perl*, 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968), *aff'd on other grounds*, 108 N.J. Super. 129, 260 A.2d 244 (App. Div. 1970).

39. 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969); *accord*, *Toker v. Westerman*, 274 A.2d 78 (N.J. Dist. Ct. 1970) (2.2-2.5 to 1); *Toker v. Perl*, 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968) (2.7 to 1). *Contra*, *Morris v. Capitol Furniture & Appliance Co.*, 280 A.2d 775 (D.C. Ct. App. 1971) (2.5 to 1 was not unconscionable).

of the community, who would be deprived of even the most basic conveniences without the use of these devices. Similarly, the retail merchant selling on installment or extending credit is expected to establish a pricing factor which will afford a degree of protection commensurate with the risk of selling to those who might be default-prone.<sup>40</sup> In addition, mark-ups vary from industry to industry. A high mark-up in one industry might be low in another.<sup>41</sup> To be successful in his unconscionability claim, a consumer must know the mores and business practices of the time and place or the merchant may readily justify his favorable term.

### C. A Comparison

The Comment 1 and the *Walker-Thomas* formulations are similar in that both focus on the term favorable to the merchant. Under both, the favorable term must be considered in light of the circumstances existing at the time of contracting that would make the favorable term so oppressive or unreasonably favorable to the merchant that the conscience of the court is shocked. In both, the merchant is given an opportunity to present evidence of the circumstances that would justify his inclusion into the contract of what appears to be an oppressive or unreasonably favorable term.

The difference between the formulations is that the Comment 1 test appears to end with what already has been said. The *Walker-Thomas* test adds a second area of consideration which must be considered even before the favorable term: There must be an absence of meaningful choice. The merchant, when including the unreasonably favorable term must have done so in the spirit of knowingly taking advantage of the consumer's lack of meaningful choice. Therefore, in comparison, the *Walker-Thomas* test appears more restrictive.

What significance does this have for the consumer who is attempting to raise a defense of unconscionability? Based on the limited num-

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40. *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969); *accord*, *Toker v. Westerman*, 274 A.2d 78 (N.J. Dist. Ct. 1970) (less overhead due to door-to-door salesmen and no showroom or store).

41. *Morris v. Capitol Furniture & Appliance Co.*, 280 A.2d 775 (D.C. Ct. App. 1971). Before a merchant is required to divulge his pricing policies through interrogatories or through the production of records in court, the consumer must assert his claim with some degree of detail. *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111 (D.C. Ct. App. 1971).

*Jacobs v. Metro Chrysler-Plymouth, Inc.*, 125 Ga. App. 462, 188 S.E.2d 250, 253 (1972), gives some pointers in the warranty area:

There is obviously a point at which the warranty limitation must be considered unconscionable--for example if, due to defective manufacture or failure to repair by failing to place a 25 cent nut on the proper bolt, the brakes fail and a collision occurs resulting in heavy property damage and personal injury, courts might well be loath to limit the manufacturer's or seller's liability to the sum of twenty five cents.



ber of reported decisions, the choice of tests does not appear to be jurisdictional. The same courts have used both formulations on different occasions.<sup>42</sup> Nor does the choice appear to be based on the type of term being challenged. Both tests have been used for price terms<sup>43</sup> and for non-price terms.<sup>44</sup>

Does this mean that there is only one test -- a test which requires the merchant to have included the unreasonably favorable term in the spirit of knowingly taking advantage of the consumer's lack of meaningful choice? Based on the three cases that have used the Comment 1 test, all would come to the same result under *Walker-Thomas*. In *Milford Finance*, the food plan/freezer case, the consumers lacked a meaningful choice at the time of contracting since the price term was obscured by deceptive sales practices. In *Frostifresh Corp.*, the refrigerator-freezer case, the consumers lacked a meaningful choice at the time of contracting since they could not understand the contract terms due to a lack of education. In *Melcher*, the automobile warranty case, the consumer lacked a meaningful choice since he did not have the power to do comparison shopping, due to the fact that all merchants dealing in the desired item uniformly used the same commercial form. Unlike the other two cases, the advantage gained by the merchant in *Melcher* was not unreasonable under the circumstances. The certification, which was the condition precedent to the validity of the warranty, could not be denied arbitrarily.

The consumer would be well advised to plead and prove both absence of meaningful choice and unreasonable terms.<sup>45</sup> This will avoid the consumer's predicament in *Patterson v. Walker-Thomas Furniture*

42. New York Supreme Court, Nassau County: *compare* *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Sup. Ct. 1966) (Comment 1 formulation) with *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969) (*Walker-Thomas* formulation).

43. Comment 1 formulation: *Milford Fin. Corp. v. Lucas*, 8 UCC REP. SERV. 801 (Mass. App. Div. 1970); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966). *Walker-Thomas* formulation: *Morris v. Capitol Furniture & Appliance Co.*, 280 A.2d 775 (D.C. Ct. App. 1971); *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969); *Toker v. Perl*, 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968).

44. Comment 1 formulation: *Melcher v. Boesch Motor Co.*, 188 Neb. 522 (1972) (condition precedent to the validity of a warranty). *Walker-Thomas* formulation: *Jefferson Credit Corp. v. Marciano*, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969) (waiver of implied warranty); *Urdang v. Muse*, 114 N.J. Super. 372, 276 A.2d 397 (1971) (acceleration clause).

45. Unconscionability, when used as an affirmative defense, must be pleaded by the defendant. *Asco Mining Co. v. Gross Contracting Co.*, 3 UCC REP. SERV. 293, 296 (Pa. Ct. C.P., Butler County 1965). A sufficient factual predicate for the defense must be alleged before wholesale discovery will be allowed. An unsupported conclusory allegation in the answer that a contract is unenforceable as unconscionable is not enough. Sufficient facts which surround the commercial setting of the contract at the time it was made should be alleged so that the court may form a judgment as to the existence of a valid claim of unconscionability and the extent to which discovery of evidence to support that claim should be allowed. *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111, 114 (D.C. Ct. App. 1971) (the answer asserted the affirmative defense of unconscionability only on the basis of a stated conclusion that the price was excessive--held insufficient).

Co.<sup>46</sup> There the consumer alleged only the unreasonable term. The court held that without alleging absence of meaningful choice, the allegations were insufficient to state a claim of unconscionability.

## II. THE CONSUMER'S POSITION IN CALIFORNIA: CAN THERE BE PROTECTION FROM UNCONSCIONABILITY WITHOUT LEGISLATION?

Section 2-302 of the 1962 Official Text of the Uniform Commercial Code was omitted from the California version.<sup>47</sup> A California State Bar Committee explained that the decision to delete was based on the belief that giving courts unqualified power to strike down terms they might consider unconscionable could result in the renegotiation of contracts in every case of disagreement with the fairness of the provisions the parties had accepted.<sup>48</sup>

Are the California consumers severely hampered by the legislature's rejection of 2-302 -- action which prevents the California courts from ruling openly on unconscionability? Naturally, the deletion of 2-302 may dictate that the courts will proceed with caution when faced with a situation which requires an expansion of their power. On the other hand, the courts need not refrain from doing what they have been doing, or from taking advantage of the provisions in the Code which have not been deleted. Case law exists in California that indicates unconscionability, as a public policy doctrine, was a part of California's common law prior to the legislature's adoption of the Code.<sup>49</sup>

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46. 277 A.2d 111 (D.C. Ct. App. 1971); *accord*, *Morris v. Capitol Furniture & Appliance Co.*, 280 A.2d 775 (D.C. Ct. App. 1971), *aff'd*, 8 UCC REP. SERV. 321 (D.C. Gen. Sess. 1970). It should be noted that these cases are from the District of Columbia, the same jurisdiction as *Williams v. Walker-Thomas Furniture Co.* This may explain the court's precision concerning the allegation and proof of an absence of meaningful choice.

47. CAL. COMMERCIAL CODE § 2302 (West 1964). North Carolina originally deleted § 2-302 from its version of the UCC. N. CAR. GEN. STAT. § 25-2-302 (1965); Clifford, *Article Two: Sales*, 44 N. CAR. L. REV. 539, 562-64 (1966). In 1971, North Carolina added it back. N. CAR. GEN. STAT. § 25-2-302 (Supp. 1971). Louisiana has not enacted the Code. All other states and the District of Columbia have § 2-302.

48. California State Bar Committee on the Commercial Code, A Special Report, *The Uniform Commercial Code*, 37 CAL. B. J. 117, 135-36 (1962). § 2-302 was defended on the ground that form contracts were not negotiated in any real sense and therefore the courts must have the power to prevent the merchant from overreaching when dealing with a consumer who has neither the knowledge nor the bargaining position to influence the contract terms. *Id.* at 135. A compromise to place some limitations on the court's power by requiring the contract to be a form contract and by excluding the "between merchants" situations (since they presumably are of more equal bargaining power) failed. See CAL. COMMERCIAL CODE § 2302, Cal. Code Comment at 197-98 (West 1964); Project, *A Comparison of California Sales Law and Article Two of the Uniform Commercial Code*, 10 U.C.L.A. L. REV. 1087, 1130-32 (1963).

49. *Swanson v. Hempstead*, 64 Cal. App. 2d 681, 149 P.2d 404, 407-08 (1964) (the evidence did not justify a finding that the attorney's contingent fee contract was unconscionable); *accord*, *Setzer v. Robinson*, 57 Cal. 2d 213, 368 P.2d 124, 18 Cal. Rptr. 524, 527 (1962); *Youngblood v.*

While the legislature has expressly excluded 2-302, the fears that premised its exclusion have not proven correct. The courts in other states have not run roughshod over negotiated contract rights. This, then, would give the courts some leeway to continue to follow their common law unconscionability doctrine. In addition, there seems to be no reason why the courts could not pattern their common law unconscionability doctrine after that emanating from 2-302. *Williams v. Walker-Thomas Furniture Co.*, the leading case in the area, was itself a pre-Code common law unconscionability case.<sup>50</sup> The impact of the existence of the doctrine, while not dramatic under the restrictive *Walker-Thomas* formulation, would be something that could be useful to the consumer, at least in limited cases.

Besides this frontal attempt to incorporate 2-302 into California law, there are more subtle approaches. For example, California courts have, by construction and interpretation of contract terms, avoided enforcement of harsh bargains.<sup>51</sup> They also have manipulated the rules of offer, acceptance and consideration to reach pro-consumer results.<sup>52</sup> Another approach is the recognition of unconscionability as an aspect of good faith -- a concept that has not been deleted in California and

Higgins, 146 Cal. App. 2d 350, 303 P.2d 637, 639 (1956). The *Swanson* case defined an "unconscionable contract" as one "such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other." *Swanson v. Hempstead*, 64 Cal. App. 2d 681, 149 P.2d 404, 407 (1964). Authority exists for the premise that § 2-302 codifies the common law doctrine of unconscionability. *In re Jackson*, Bankruptcy No. 40666, 9 UCC REP. SERV. (W.D. Mo. 1971); *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964) (construction contract); *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405, 418 (1967).

50. Although the Code (including § 2-302) had been adopted in the District of Columbia at the time of litigation, it was not enacted until after *Williams* had contracted. This, the time of contracting, was the critical time for determining whether the Code applied. Therefore the Code did not control the decision. The *Walker-Thomas* court looked to legislative history (*i.e.*, Congress' enactment of the Code and § 2-302) and held that this was the way it ought, at common law, to be. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

51. *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 268 P.2d 1041, 1047 (1954) (strict construction of a disclaimer of an implied warranty of merchantable quality).

52. *E.g.*, *Monarco v. Lo Greco*, 35 Cal. 2d 621, 220 P.2d 737 (1950) (estoppel); *State Fin. Co. v. Smith*, 44 Cal. App. 2d 688, 112 P.2d 901 (1941) (gross inequality of consideration was evidence of fraud). Corbin stated:

There is sufficient flexibility in the concepts of fraud, duress, misrepresentation, and undue influence, not to mention differences in economic bargaining power, to enable the courts to avoid enforcement of a bargain that is shown to be unconscionable by reason of gross inadequacy of consideration accompanied by other relevant factors. 1 A. CORBIN, CONTRACTS § 128 (1963). (footnote omitted)

which underpins the entire Code.<sup>53</sup> While achieving results by direction rather than by indirection is desirable, the legislature's rejection of 2-302 has left the consumer and the courts with little alternative.<sup>54</sup>

### CONCLUSION

The consumer-merchant relationship in the sale of goods area has not been greatly affected by 2-302. Only a few reported cases illustrate that the consumer has been benefited by 2-302. Unconscionability, under the *Walker-Thomas* formulation, works little magic for the consumer. The Comment 1 formulation, while appearing to be more readily available to the consumer, may in fact contain (although not verbalized) the same considerations as those found in *Walker-Thomas*. On the other hand, unconscionability does play an important role in those cases which do not fit the established doctrine -- such as fraud, duress and usury -- but which are still so oppressive as to shock the conscience of the court.

One final point needs some reflection. For a consumer who can establish that the contract or clause was unconscionable at the time of contracting, some care must be taken in selecting his remedy. For example, where the price term is unconscionable, does the consumer want

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53. For a discussion of good faith, see note 35 *supra*. An unconscionable contract is inconsistent with good faith. *In re Jackson*, Bankruptcy No. 40666, 9 UCC REP. SERV. 1152, 1158 (W.D. Mo. 1971). "While the unconscionability referred to in § 2-302 may be conduct worse in some degree than the lack of good faith prohibited by § 1-203, both impose the same basic obligations of fair dealing in commercial transactions." *Urdang v. Muse*, 114 N.J. Super. 372, 276 A.2d 397, 401 (1971).

California has not deleted all reference to unconscionability. See CAL. COMMERCIAL CODE § 2719(3) (West 1964).

54. See CAL. COMMERCIAL CODE § 2302, Cal. Code Comment 197 (West 1964). For further details concerning California, see Comment, *A Reevaluation of the Decision Not To Adopt the Unconscionability Provision of the Uniform Commercial Code in California*, 7 SAN DIEGO L. REV. 289 (1970). It should be noted that California does have consumer protection legislation. For a discussion see Project, *Legislative Regulation of Retail Installment Financing*, 7 U.C.L.A. L. REV. 618 (1960).

to return the goods and get his money back, keep the goods and pay what they are worth, or keep the goods and not pay any more (which already may be more than the goods are worth)? Failure to position himself properly before litigation may mean that a finding of unconscionability may not have the potency for the consumer that it could have had. He will not get his full measure of relief.<sup>55</sup>

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55. In the price cases, if the consumer returns the goods, he may be able to get his money back. On the other hand, if he keeps the goods, he may find himself paying what it was worth or possibly more. This may depend on the amount already paid. For example, in *Frostifresh Corp. v. Reynoso*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. T. 1967), *reversing on the damage issue*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), the consumer had paid only the down payment of \$32. He did not attempt to return the refrigerator-freezer. The cost to the merchant was \$348 and the cash sales price was \$900 plus charges bringing the total to \$1145.88. The trial court held the price term unconscionable and gave the merchant judgment for \$348 (his cost) with interest, less the \$32 (paid by consumer). The appeals court reversed the damage issue (still held unconscionable) but permitted the merchant to recover more (merchant should recover his net cost for the appliance plus a reasonable profit, in addition to trucking and service charges necessarily incurred and reasonable finance charges).

In *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct., Nassau County 1969), the consumer did not ask for a set-off and thus paid more for his freezer than did the consumer in *Frostifresh*. The maximum retail value (including a reasonable profit margin) was \$300. The consumer had paid \$619.88 on a contract which called for a cash sales price of \$900 and a total price of \$1234.80. The court said that the merchant had already been amply compensated and reformed the price term to coincide with the amount paid. Should the consumer have been entitled to a refund of \$319.88 (the difference between what he paid and the maximum retail value including a reasonable profit margin) less a reasonable finance charge? The additional amount the consumer paid (\$319) was still more than the entire difference between total price and the cash sales price. *Accord*, *Toker v. Westerman*, 274 A.2d 78 (N.J. Dist. Ct. 1970); *cf.* *Urdang v. Muse*, 114 N.J. Super. 372, 276 A.2d 397 (1971).