The Doctrine of Unconscionability: Alive and Well in California

PETER D. ROOS*

> But is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice? Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other?[1]

The Uniform Commercial Code, as adopted in most states, contains a provision, section 2-302, which expressly grants a court the right to inquire into the conscionability of a contract or parts thereof.[2] The California Legislature, however, omitted section 2-302 from the California version of the UCC. Consequently, there has been concern among California attorneys representing consumers respecting the viability of the unconscionability doctrine in California. Such concern appears to be unfounded. This Article will explore the development of the doctrine of unconscionability in California. It will demonstrate that unconscionability is a viable doctrine in California despite the fact that section 2-302 was not enacted into law. It should be noted, however, that the author feels the concept of unconscionability should be incorporated into a statutory pronouncement such as section 2-302; anything that needlessly creates uncertainty in the law of consumer rights should be eliminated.

The second half of this Article will review some of the leading unconscionability cases in other states. This material is in-

* Staff Attorney, Center for Law and Education, Harvard University.

1. United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting).

2. UNIFORM COMMERCIAL CODE § 2-302 provides:

> 1. If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> 2. When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

cluded in the belief that it will aid both the bench and bar in understanding where the doctrine of unconscionability can lead.

It is difficult to define exactly what is meant by the term "unconscionability." Since it is intended to be a flexible tool by which a judge may exercise traditional equity powers, the term is best defined by the situations where a court has found a contract to be unconscionable. Traditionally, and under the UCC, unconscionability has been found in two situations: when one party is unfairly surprised by a term of a contract, or when the contract or a term thereof is oppressive.[3] Upon a finding of either unfair surprise or oppression, a court may either enforce the contract without the oppressive or surprising element, declare the contract rescinded and order restitution, or take alternative measures to eliminate the defect.

I. THE EARLY CASE LAW AND THE LEGISLATIVE HISTORY OF THE FAILURE TO ADOPT SECTION 2-302

An analysis of the doctrine of unconscionability in California must necessarily include the report filed with the legislature by the Senate Fact Finding Committee commissioned to determine the propriety of the Uniform Commercial Code in California.[4] The Committee was assisted by Professors Marsh and Warren of UCLA who submitted an analysis of section 2-302. The Committee Report also contained an analysis by the Office of the Legislative Counsel and position papers by the State Bar and the Bankers Association. The analysis by the Office of the Legislative Counsel stated:

> This section in its use of the term "unconscionable" is New Law and permits the court wide latitude in the enforcement of sales contracts. Actually, it may simply be a restatement of the broad equity powers which the California courts have always assumed they held. The related devices of reformation, constructive trusts and other equitable remedies are similar in nature to this section. The section also is an aid to interpretation as well as enforcement of the contract. This is another expression of an intent to introduce commercial practices as primary legal aids.[5]

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

4. SIXTH PROGRESS REPORT TO THE LEGISLATURE BY THE SENATE FACT FINDING COMMITTEE ON JUDICIARY (1959-61), PART I, THE UNIFORM COMMERCIAL CODE [hereinafter cited as SIXTH PROGRESS REPORT]. For a brief review of the contents of this report, *see* the annotation following CAL. COM. CODE § 2302 (West 1964). This annotation sets forth the salient arguments made by the contributors to the Report, but fails to evaluate such arguments in the context of whether unconscionability exists in the absence of adoption of section 2-302.

5. SIXTH PROGRESS REPORT, *supra* note 4, at 41-42.

The State Bar Committee on the Commercial Code urged that section 2-302 not be adopted on the ground that the concept of unconscionability would introduce an unnecessary element of uncertainty into commercial transactions and would result in frequent attempts to renegotiate contracts. The Bar Report's authors did, however, acknowledge that, arguably, a doctrine of unconscionability already existed in California.[6] The State Bankers Association proposed that contracts be measured against a "good faith" standard rather than the unconscionability standard. They asserted that "good faith," as a result of prior judicial interpretation, provided a court with a more exact rule.[7]

The analysis by the Counsel to the Committee was by far the most complete. Professors Marsh and Warren analyzed the judicial precedents in California to determine the necessity for the adoption of section 2-302. They concluded:

> Although California judges already possess doctrinal tools to achieve the result that this section calls for, it is preferable to allow what has previously been done by indirection, if not subterfuge, be done openly.[8]

It is important to note that each of the reports either implicitly or explicitly acknowledges the prior existence of a doctrine of unconscionability in California at the time that section 2-302 was being considered. Even the Bar Committee Report, which was opposed to enactment of section 2-302, acknowledged the normal judicial development of the concept.

Since even the reports opposed to enactment of 2-302 recognized the case law development of the unconscionability doctrine, and since these reports presumably furnished the basis for the legislature's decision not to adopt section 2-302, it seems reasonable to infer that prior case law was not intended to be abrogated by the non-passage of the provision. Moreover, it is apparent that the legislature intended that the courts retain their traditional equity powers in the field of unconscionable contracts. Subsequent developments of case law, and the enactment of protective consumer legislation clearly reinforce such a view.

The Marsh-Warren report cites three primary cases in which the California courts have avoided an unconscionable result.[9]

6. California State Bar Committee on the Uniform Commercial Code, *The Uniform Commercial Code*, 37 J. ST. B. CALIF. 117, 135-36 (1962).
7. SIXTH PROGRESS REPORT, *supra* note 4, at 403.
8. *Id.* at 457.
9. *See id.* at 456.

In *Burr v. Sherwin Williams Co.*,[10] the plaintiff grower hired a company to spray his fields. The evidence was clear that some foreign element found its way into the insecticide while it was still in the control of the defendant. As a consequence of this foreign element the plaintiff's crop was ruined. The case was a clear *res ipsa loquitur* liability situation but for one factor—a disclaimer. The defendant had conspicuously placed upon the label of the insecticide container the following words: "Buyer assumes all risk from use." The supreme court, obviously bothered by the unconscionable result which would follow from the enforcement of this rather clear and complete disclaimer, concluded that the defendant had warranted the description of the product, that he had violated the warranty and that the disclaimer did not affect liability on the warranty. It is apparent that the court was applying an unconscionability standard in utilizing this tortured interpretation.

A second case relied upon by the Marsh-Warren Report is *Monarco v. Lo Grego*.[11] This decision involved the common situation whereby one person promises to devise certain property to another person in consideration for work at a menial salary. Upon the death of the promisor it was discovered that his will left nothing to the promisee. The plaintiff was faced at the threshold by the Statute of Frauds. The court held that the Statute could not be used to perpetrate a fraud and ruled in favor of the plaintiff. The court stated:

> [N]ot only may one party have so seriously changed his position in reliance upon, or in performance of, the contract that he would suffer an unconscionable injury if it were not enforced, but the other may have reaped the benefits of the contract so that he would be unjustly enriched if he could escape its obligations.[12]

The court thus used the doctrine of estoppel to avoid an unconscionable result.

A case directly in point for the consumer advocate is *State Finance Co. v. Smith*.[13] In *Smith*, a finance company was suing for a deficiency after having repossessed its collateral, an automobile. The underlying debt had arisen when the defendant purchased a greatly overpriced automobile. The appellate court, obviously impressed with the great discrepancy between the value of the automobile and the sale price (although specifically find-

10. 42 Cal. 2d 682, 268 P.2d 1041 (1954).
11. 35 Cal. 2d 621, 220 P.2d 737 (1950).
12. *Id.* at 624, 220 P.2d at 740.
13. 44 Cal. App. 2d 688, 112 P.2d 901 (1st Dist. 1941).

ing that the loan was supported by consideration),[14] held for the defendant on a theory of fraud. The court reasoned:

> Although inadequacy of consideration alone is no defense to the enforcement of a contract voluntarily made, it is also true that gross inadequacy of consideration is some evidence of fraud . . . . "Where the inadequacy is so gross as to shock the conscience and common sense of all men, it may amount both at law and in equity to proof of fraud, oppression, and undue influence."[15]

The *Smith* court thus seems to have created a strong presumption of fraud, oppression, or undue influence in the instances where consideration is unconscionably inadequate. It has generally been held in cases outside of California that a price two or three times in excess of value is unconscionable.[16] It should further be noted that the *Smith* court specifically characterized this transaction as "unconscionable" thus clearly setting the tenor for the decision.[17]

II. THE MODERN CALIFORNIA DEVELOPMENT OF THE DOCTRINE

The recent California decisions applying the unconscionability doctrine invariably involve adhesion or standard form contracts. This seems only proper since a truly bargained for contract, with each side having substantially equal knowledge, ordinarily should not be tampered with. It is only in those situations in which one party has greatly superior knowledge or contractual tools that the courts should step in to protect the other party. The standard contract often represents a manifestation of such superior knowledge and is such a contractual tool. As in *Burr*, a court will occasionally use the doctrine of adhesion to leap into a discussion of the rule that an ambiguous contract is to be construed against the maker. It is submitted that this is often a subterfuge, for in reality there is no ambiguity. Instead, courts use this technique to defeat unconscionable contracts or terms of contracts.

A good example of this sort of subterfuge is found in *Steven*

14. *Id.* at 691, 112 P.2d at 903.
15. *Id., quoting from* 17 C.J.S. *Contracts* § 128 (1963).
16. *See, e.g.*, Miami Tribe of Oklahoma v. United States, 281 F.2d 202 (Ct. Cl. 1960), *cert. denied*, 366 U.S. 924 (1961), *overruled on other grounds sub nom.* Pawnee Indian Tribe v. United States, 301 F.2d 667 (Ct. Cl. 1962); American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964); Toker v. Perl, 103 N.J. Super. 500, 247 A.2d 701 (Sup. Ct. 1968); Jones v. Star Credit Corp., 59 Misc. 2d 189, 289 N.Y.S.2d 264 (Sup. Ct. 1969).
17. 44 Cal. App. 2d at 693, 112 P.2d at 904.

v. The Fidelity and Casualty Co.[18] *Steven* involved a widow's suit on a life insurance policy. The husband had purchased a life insurance policy from a vending machine at the Los Angeles airport just prior to boarding a plane to Dayton, Ohio. The policy explicitly limited coverage to death caused while on a scheduled airliner, a not surprising limitation. The husband was to have flown on scheduled airliners the entire trip. However, on the return, he found himself grounded in Terre Haute, Indiana. Due to inclement weather, the scheduled airliner failed to fly. The husband decided to enlist the services of a non-scheduled flight which crashed, killing him.

The California Supreme Court ruled in favor of the widow. It held, in very tortured reasoning, that the contract was ambiguous and that it should thus be interpreted in favor of the widow. In effect the court concluded that "scheduled airliner" meant "non-scheduled" as well. The court's true colors showed through, however, when it stated:

> In standardized contracts, such as the instant one, which are made by parties of unequal bargaining strength, the California courts have long been disinclined to effectuate clauses of limitation of liability which are unclear, unexpected, inconspicuous or unconscionable. The attitude of the courts has been manifested in many areas of contract.[19]

In *Tunkl v. Regents of the University of California*,[20] the court did not resort to the "interpretation" device, but rather directly held that a disclaimer of liability by a hospital run by the University of California was contrary to public policy and thus unenforceable. The plaintiff in this case was admitted to the hospital in great pain; he was immediately compelled to sign a form purporting to release the hospital from all negligence "if the hospital has used due care in selecting its employees."[21] It was stipulated that the hospital had in fact used due care in selecting its employees. The lower court held the exculpatory clause effective to preclude recovery by the plaintiff for negligence, and the plaintiff appealed. The supreme court reversed holding the exculpatory clause ineffective. The court strongly emphasized the adhesive characteristic of the contract throughout its opinion:

> [T]he patient, as the price of admission and as a result of his inferior bargaining position, accepted a clause in a contract of

18. 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962).
19. *Id.* at 879, 377 P.2d at 295, 27 Cal. Rptr. at 183.
20. 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).
21. *Id.* at 94, 383 P.2d at 442, 32 Cal. Rptr. at 34.

> adhesion waiving the hospital's negligence; the patient thereby subjected himself to control of the hospital and the possible infliction of the negligence which he had thus been compelled to waive.[22]

The court clearly found this to be an unconscionable result and thus denied enforcement of the clause.

In *Gray v. Zurich Insurance Co.*,[23] plaintiff filed suit against his insurer to compel the company to defend him in a pending court action. The action alleged that the insured had committed an intentional tort; the insurance contract specifically excluded coverage for such liability. The supreme court in a unanimous decision seemed to recognize a broader judicial duty to police standard adhesion contracts. The court cited authority,[24] and argued that standard contracts create "status" relationships as opposed to individualized relationships:

> The movement toward status law clashes of course, with the ideal of individual freedom in the negative sense of 'absence of restraint' or *laissez faire*. Yet, freedom in a positive sense of presence of opportunity is being served by social interference with contract.[25]

The court thus proceeded to hold that

> a contract entered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a "take it or leave it basis" carries some consequences that extend beyond orthodox implications. Obligations arising from such a contract inure not alone from the consensual transaction but from the relationship of the parties.[26]

This recognition of a broader duty of the courts when dealing with adhesion contracts indicates that California courts will police contracts for unconscionability.

An appellate court, in *Muelder v. Western Greyhound Lines*,[27] likewise subjected an adhesion contract to tougher scrutiny than is applied in a truly bargained situation. In *Muelder* the plaintiff shipped a suitcase containing valuables on a bus line. The property was lost in transit, and plaintiff sued for its value, an amount well in excess of fifty dollars, the limitation on the re-

22. *Id.* at 102, 383 P.2d at 447, 32 Cal. Rptr. at 39.
23. 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966).
24. *See* Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917).
25. 65 Cal. 2d at 270 n.6, 419 P.2d at 172 n.6, 54 Cal. Rptr. at 108 n.6, *quoting from* Isaacs, *supra* note 24, at 47.
26. 65 Cal. 2d at 269, 419 P.2d at 171, 54 Cal. Rptr. at 107.
27. 8 Cal. App. 3d 319, 87 Cal. Rptr. 297 (4th Dist. 1970).

ceipt given the plaintiff upon depositing the suitcase with the carrier. The court held the fifty-dollar limitation not binding on the plaintiff. It is particularly instructive to note how the court distinguished *Hischemoeller v. National Ice and Cold Storage Co.*,[28] a case involving a similar limitation:

> In such transactions [as in *Hischemoeller*] between knowledgeable businessmen the need to invoke the law's solicitude for persons who unwittingly enter into improvident contracts can be said to be outweighed by the state's interest in the preservation of the integrity of the rate structure.[29]

The *Hischemoeller* court, in holding for the defendant, indicated that the converse would be true if one party occupied a stronger bargaining position. Thus, a court, upon finding an unconscionable provision such as the aforementioned limitation in a standard contract, will not feel constrained to limit its effect.

The recent California Supreme Court decision in *Blair v. Pitchess*[30] strongly indicates that adhesion contracts are subject to sharp scrutiny by the courts. In *Blair* the plaintiffs brought a taxpayers' suit challenging on due process grounds the California claim and delivery law.[31] Under that law a creditor could cause the marshal to take the property of a debtor prior to a hearing on the merits. One defense raised by the creditors was that debtors regularly granted creditors the right to retake the property. Such "grant" was by means of a clause which usually appeared in California retail contracts. The creditors thus argued that any constitutional infirmity in the state was cured by this waiver of rights by the debtor. The court, in rejecting the argument, stated:

> [W]e cannot refrain from observing that most of those contracts appear to be adhesion contracts, the terms of which are specified by the seller or lender. "The weaker party in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party; terms whose consequences are often understood only in a vague way, if at all."[32]

These clauses are apparently fair game. And when they mani-

28. 46 Cal. 2d 318, 294 P.2d 433 (1956).
29. 8 Cal. App. 3d at 332, 87 Cal. Rptr. at 306.
30. 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).
31. *See* CAL. CODE CIV. PRO. §§ 509-21 (West 1954).
32. 5 Cal. 3d at 275-76, 486 P.2d at 1254, 96 Cal. Rptr. at 54, *quoting from* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).

fest overreaching by the merchant or lender they will ordinarily be stricken as in *La Sala v. American Savings and Loan Association.*[33] In *La Sala* the supreme court held that a clause in a deed of trust permitting a lender to accelerate payments, if the borrower encumbered the secured property by a junior encumbrance, was an invalid restraint upon alienation. In so holding, the court made it clear that it was weighing the reasonableness of such a provision against the oppressive consequences on the borrower. The issue was resolved in the borrower's favor. These clauses, it should be noted, were conceded by all parties to be the product of adhesion contracts.

Finally, the supreme court, in *Vasquez v. Superior Court,*[34] impliedly acknowledged the propriety of alleging unconscionability as a ground for rescission. In that decision, the plaintiff alleged that freezers sold by the defendant had been sold in an unconscionable manner, for an amount "not less than twice the reasonable retail price."[35] The court specifically stated that such an allegation was subject to common proof, thus adding credence to the utilization of the class action. By handling the allegation in such a manner, the court implicitly affirmed the existence of a cause of action.

In summary, it is clear that a doctrine of unconscionability exists in California. It probably is a necessary prerequisite to its use that there be either a standard form contract or one party with substantially greater knowledge than the other. These prerequisites are found, however, in almost all consumer transactions.

III. UNCONSCIONABILITY OUTSIDE CALIFORNIA

It is instructive to study the developing case law outside of California in order to understand the present parameters of the doctrine of unconscionability. Such an understanding is helpful in evaluating whether a given fact situation is within the concept; of course, case law from other states is not binding in California. Yet, the emerging definition of unconscionability developed in other states can lead the way to a more precise California definition. It is with this goal in mind that the law of unconscionability from other jurisdictions is considered.

The cases outside California which have upheld a contention of unconscionability can be divided into two categories. In the

33. 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).
34. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).
35. *Id.* at 812, 484 P.2d at 971, 94 Cal. Rptr. at 803.

first category are those cases which hold a price to be unconscionable. In the second category are those cases which hold other provisions of the contract unconscionable. The cases holding unconscionable the price term of a contract would, at first glance, appear to be a radical departure from the rule that a court will not inquire into the sufficiency of consideration. Such is not the case. The lack of choice inherent in an adhesion situation, coupled with the one-sided knowledge possessed by the seller, makes such a contract an imposition rather than an agreement. If such an imposition produces an unconscionable price, the traditional defenses of oppression, fraud and failure to show "meeting of the minds" naturally follow.

The cases holding a contract price to be unconscionable break down into two subdivisions. The first subdivision would establish a per se rule; the second looks to the commercial setting. Under the per se rule, if the sale price is more than twice the value of the goods, the price is per se unconscionable. The first appellate case considering section 2-302 is often cited for this principle. In *American Home Improvement, Inc. v. MacIver*[36] the New Hampshire Supreme Court struck down a home improvement contract which called for payments totalling approximately $2,500. The court determined that the actual value of the improvements was approximately $950; although the additional items such as the salesman's commission and interest did not technically violate usury or similar laws, the court held these charges as well as the markup to be unconscionable. The court apparently did not specifically concern itself with the commercial setting of the contract; however, the facts of the case indicate that a standard form contract was involved. It is suspected that the court was aware of the poor reputation of certain segments of the home improvement industry.

The second case which is regularly cited[37] in support of the per se rule is *Jones v. Star Credit Corp.*[38] In *Jones* the defendant sold to the plaintiff a freezer with a $300 retail value for $900 plus $234 interest and charges. The court held this agreement to be unconscionable and declined to enforce it. Although the court's discussion of the commercial setting of the

36. 105 N.H. 435, 201 A.2d 886 (1964).
37. *See, e.g.*, Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 787 (1969) (citing *McIver*); Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 965-66 (1969) (citing *MacIver*); Note, *Unconscionability Under the Uniform Commercial Code*, 1 LOYOLA CHI. L. REV. 313, 322 (1970) (citing *Jones*).
38. 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).

contract was limited, it was apparent that the contract resulted from a door-to-door solicitation. Since the door-to-door food and freezer business has an unsavory reputation, it is likely that the court did take cognizance of the commercial setting of the contract. It thus appears that both *MacIver* and *Jones* considered, at least in a general sense, the commercial setting of the formation of the contract. The cases seem to reflect not a difference in nature between the per se rule and a commercial setting rule, but rather a difference in emphasis.

Two recent cases from jurisdictions having long reputations of unconscionability inquiry reflect the different emphasis of the commercial setting rule. The first is *Morris v. Capital Furniture and Appliance Co., Inc.*[39] Initially, the *Morris* court recognized the rule established in *Williams v. Walker-Thomas Furniture Co.*,[40] a leading District of Columbia decision, where it was stated:

> Unconscionability has generally been recognized to include 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.[41]

The *Morris* court, faced with the contention that a price component was unconscionable, attempted to define what was meant by "an absence of meaningful choice." It indicated that a review must be made of all the contracts in the general locale. If all such contracts are the same, and all charge an unconscionable price, then, the court indicated, an absence of meaningful choice is present.

Possibly, the foregoing is an unrealistic and improper restriction on the doctrine of unconscionability. Granted that the two requirements stated in *Williams* provide a proper test for unconscionability, such a narrow interpretation of the "absence of meaningful choice" requirement does not do justice to the very factors underlying the development of the unconscionability doctrine. These factors include a growing recognition that a substantial segment of our society lacks sophistication when dealing with the increasingly technical and standardized tools of the merchant and thus is without the ability to make a meaningful choice. The proper emphasis should be on the bargaining position in each particular transaction. As stated in *Jones*, "the meaningfulness of choice essential to the making of a contract can be negated by a gross inequality of bargaining power."[42]

39. 280 A.2d 775 (D.C. App. 1971).
40. 350 F.2d 445 (D.C. Cir. 1965).
41. *Id.* at 449.
42. 59 Misc. 2d at 192, 298 N.Y.S.2d at 267.

A more enlightened view of the realities of the marketplace is found in *Kugler v. Romain.*[43] In *Kugler* the Attorney General of New Jersey brought a class action seeking rescission of all contracts between a home study school and various consumers throughout the state. The only authority by which the Attorney General could initiate such a class action was found in the New Jersey Deceptive Practice Act[44] which was separate and distinct from that state's equivalent to section 2-302; and the only basis for a class action, given the requirement that there be common questions of law and fact, was that the price for the home study course was unconscionable. The New Jersey Supreme Court upheld the Attorney General's right to maintain the class action, stating:

> The standard of conduct contemplated by the unconscionability clause is good faith, honesty in fact and observance of fair dealing. The need for application of the standard is most acute when the professional seller is seeking the trade of those most subject to exploitation—the uneducated, the inexperienced and the people of low incomes. In such a context, a material departure from the standard puts a badge of fraud on the transaction and here the concept of fraud and unconscionability are interchangeable. Thus we believe that in consumer goods transactions such as those involved in this case, unconscionability must be equated with the concepts of deception, fraud, false pretense, misrepresentation, concealment and the like, which are stamped unlawful under [the Deceptive Practice Act]. We do not consider that absence of the word "unconscionable" from the statute detracts in any substantial degree from the force of this conclusion. That view is aided and strengthened by the plain inference that the Legislature intended to broaden the scope of responsibility for unfair business practices by stating in [the Act] that the use of any of the described practices is unlawful "whether or not any person [the consumer] has in fact been mislead, deceived or damaged thereby."[45]

The holding, and especially the reasoning in *Kugler*, has special meaning in California. California has recently adopted a deceptive practices act[46] which both in its terms and its tenor is similar to the statute interpreted in *Kugler.* It thus may be persuasively argued that an exorbitant price coupled with an adhesive contract is encompassed within the ambit of the California act; and if not there, then in the established statutes providing

43. 58 N.J. 522, 279 A.2d 640 (1971).
44. N.J. STAT. ANN. § 56:8-2 (1964).
45. 58 N.J. at 544, 279 A.2d at 652.
46. *See* CAL. CIV. CODE § 1770 *et seq.* (West 1973).

remedies for fraud.[47] Moreover, it should be noted that the court in *Kugler* did not look to contracts involving similar study courses to determine the meaningfulness of the consumer's choice, a route suggested by *Morris*. It focused instead upon the relative sophistication of the seller and buyer in order to determine whether meaningful bargaining was possible, and whether one party took advantage of the other's lack of sophistication. This is where inquiry is properly focused.

The leading New York case of *Frostifresh Corp. v. Reynoso*[48] deserves special notice. In *Frostifresh* a freezer was sold at a markup of two and one-half times its cost to the seller. In addition, the contract was "negotiated" in Spanish but written entirely in English. The buyer was literate only in Spanish. The court held the contract to be unconscionable. The negotiation of contracts in Spanish with the ultimate written result appearing in English is of course common in California.

The cases holding unconscionable a term or clause in a contract, other than the price, are numerous. Discussion of a few of the leading cases demonstrates the nature of these unconscionable terms.[49]

In *Williams v. Walker-Thomas Furniture Co.*,[50] the consumer made a series of purchases at different times under a form contract which provided, *inter alia,* that "*all payments now and hereafter made by [purchaser] shall be credited pro rata on all outstanding leases, bills and accounts . . . .*"[51] The effect of this provision was to ensure that the seller could, upon default of the buyer repossess each item sold regardless of the amount of money paid. The consumer maintained that this provision was unconscionable. The trial court, though condemning the entire transaction, refused to apply the doctrine of unconscionability. Section 2-302 was not in effect at the time the contract was consummated, and the trial judge found no precedent for its application. Judge Skelly Wright, on appeal, reversed and remanded. In so doing, he defined the ambit of unconscionability in terms that have been often quoted:

> Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the

47. *See, e.g.,* CAL. CIV. CODE § 1689 (West 1973); CAL. COMM. CODE § 2721 (West 1964).
48. 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966).
49. For a general survey of the status of the doctrine of unconscionability in each of the fifty states, *see* 5 CLEARINGHOUSE REV. 61 (June 1971).
50. 350 F.2d 445 (D.C. Cir. 1965).
51. *Id.* at 447 (emphasis in original).

> parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full 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. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.[52]

In *Unico v. Owen*[53] the buyer signed a contract to purchase a stereo music system and records. The price was exorbitant, and, in addition, the seller only partially performed. Included in the contract was a provision whereby the buyer waived as to an assignee all defenses that might have existed against the seller. Upon suit by an assignee the buyer sought to raise certain defenses, maintaining that the waiver clause was unconscionable. The New Jersey Supreme Court agreed, stating:

> Such contracts, particularly those of the type involved in this case, are so fraught with opportunities for misuse that the purchasers must be protected against oppressive and unconscionable clauses. And section 9-206 in the area of consumer goods sales must as a matter of policy be deemed closely linked with section 2-302 . . . which authorizes a court to refuse to enforce any clause in a contract of sale which it finds is unconscionable. We see in the enactment of these two sections of the Code an intention to leave in the hands of the courts the continued application of common law principles in deciding in consumer goods cases whether such waiver clauses . . . are so one-sided as to be contrary to public policy. . . . [Here] we hold that they are so opposed to such policy as to require condemnation.[54]

52. *Id.* at 449-50 (footnotes omitted).
53. 50 N.J. 101, 232 A.2d 405 (1967).
54. *Id.* at 125, 232 A.2d at 418.

IV. CONCLUSION

In summary, two elements are necessary before a contract or a term thereof will be held unconscionable. First, there must be evidence that the term or the contract was not truly bargained-for. Recent California cases,[55] emphasizing the difference in the sophistication levels between buyers and sellers, seem to follow the approach utilized in *Kugler*. The second element, that of oppression or surprise, is more difficult to define. With regard to price, it is apparently safe to say that a price that is two to three times the going retail price in the vicinity would be declared to be unconscionable. With terms other than price the problem becomes more difficult. Certainly, disclaimers of liability benefiting the seller or waivers of statutory or common law rights by the buyer are most susceptible to an unconscionability attack.[56] Other terms are also subject to attack on a case-by-case basis. Unconscionability is a flexible tool, incapable of routine definition, and thus the instances in which it can be successfully utilized are uncertain. What is certain, however, is that the courts, including those of California, have become increasingly aware of the impositions of certain merchants who prey on the unsophisticated consumer. It is certain that the courts will increasingly scrutinize retail contracts to protect the unsophisticated from overreaching tactics.

Unconscionability is certainly a viable concept in California. This is manifested by the many numerous cases which either explicitly or implicitly apply an unconscionability standard to protect the victimized consumer; but it is also true that confusion has been created by the failure to adopt section 2-302. In this age of standardized contracts and minimal bargaining power, it is certainly preferable to eliminate anything that injects confusion into an area as vital as consumer protection. Legislation should be proposed which statutorily adopts the decisional law of California pertaining to the doctrine of unconscionability.

55. *See, e.g.*, Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971); Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971); La Sala v. American Savings and Loan Ass'n, 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).

56. *See, e.g.*, Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P.2d 1041 (1954); Muelder v. Western Greyhound Lines, 8 Cal. App. 3d 319, 87 Cal. Rptr. 297 (4th Dist. 1970); Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967).