UNCONSCIONABILITY AND STANDARDIZED CONTRACTS

I
INTRODUCTION

Over the past decade, courts throughout the nation have, with the aid of Section 2-302 of the Uniform Commercial Code,[1] confronted and partially resolved a problem which they have long faced: the necessity of developing judicial standards and remedies for controlling the public use of the standardized agreement. With the advent of mass distribution of goods and the consequent use of standardized agreements,[2] a single contract form may control the rights and property of large numbers of individuals. In so doing, standardized contracts act upon the public as law,[3] not private law bargained for and assented to, but rather a form of unchecked commercial legislation enforced in the interests of its maker. Indeed, it is no exaggeration to suggest that standardized contracts often control the behavior of more individuals than do ordinances of many municipalities.

Unfortunately, the arsenal of doctrines and remedies traditionally available to the courts for policing contract abuse fail to offer relief appropriate to the problems arising from the use of standardized agreements. As will be discussed, common law doctrines such as "fraud" and "constructive fraud" direct a court's attention not to factors common to a number of similar transactions, but rather to the particularities of a single transaction. The result of such traditional approaches to standardized agreements is that for every Mrs.

---

1. Section 2-302 provides in full:

> Section 2-302. Unconscionable Contract or Clause
> (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.

UNIFORM COMMERCIAL CODE [hereinafter UCC] § 2-302.

2. Short discussions of the economic origins of standardized contracts may be found in Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943); Llewellyn, Book Review, 52 HARV. L. REV. 700, 701 (1939).

3. Various courts and commentators have independently viewed the standardized contract as private legislation. Siegelman v. Cunard White Star, 221 F.2d 189, 205-06 (2d Cir. 1955); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 389, 161 A.2d 69, 86 (1960); Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 587 (1933); Kessler, *supra* note 2, at 640-41; Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 731 (1931).

Williams[4] or Mrs. Owen[5] relieved of the burden of an unconscionable contract, many others remain intimidated by the same contract, and the maker continues to profit at their expense.

States have attempted to confront the public ramifications of the standardized contract by enacting consumer protection acts which give to courts the power to enjoin the use of contracts which are either deceptive or which breach standards of fair dealing.[6] However, it is presently unclear whether courts will use these powers to render invalid contract forms judged to be harsh or inequitable or to continue simply to remedy wrongs on a case-by-case basis. Considering the concern which many courts have of becoming regulators of economic behavior, the likelihood that the former course will be taken —extending remedies to classes of consumers—depends heavily upon the availability of legal standards and rules which treat standardized contracts as public instruments, yet safeguard judges from becoming, in effect, commissioners of consumer affairs.

This Note contends that § 2-302 of the Uniform Commercial Code[7] provides courts with a framework which allows them to examine standardized con-

---

4. A necessitous welfare mother rescued by the courts in Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

5. A gullible consumer saved by the courts in Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967).

6. As of 1975 the following states had passed such legislation: ARIZ. REV. STAT. ANN. §§ 44-1522, -1528 (1967); ARK. STAT. ANN. §§ 70-906, -911 (Supp. 1973); CONN. GEN. STAT. ANN. §§ 42-115(d)(a)(10), -115(e) (Supp. 1975); FLA. STAT. ANN. §§ 501.204, .207 (Supp. 1975); ILL. ANN. STAT. ch. 121½, §§ 262, 267, 312(12) (Smith-Hurd Supp. 1975); ME. REV. STAT. ANN. tit. 5, §§ 207, 209 (Supp. 1973); MASS. GEN. LAWS ANN. ch. 93A, §§ 2, 4, 9 (1972), ch. 93A, § 9 (6)-(8) (Supp. 1975); MINN. STAT. ANN. § 325.141 (1966), § 325.907 (Supp. 1975); MO. ANN. STAT. §§ 407.020, .100 (Vernon Supp. 1975); MONT. REV. CODES ANN. §§ 85-402, -408 (Supp. 1974); NEB. REV. STAT. §§ 87-302, -303 (1971); N.H. REV. STAT. ANN. §§ 358-A: 2, 4(III) (Supp. 1975); N.C. GEN. STAT. §§ 75-1.1, -14, -16 (1975); OHIO REV. CODE ANN. §§ 1345.03, .07 (Page Supp. 1974); ORE. REV. STAT. §§ 646.535, .608, .632 (1973); PA. STAT. ANN. tit. 73, §§ 201-1 *et seq.* (1971); R.I. GEN. LAWS ANN. §§ 6-13.1-1(e), -13.1-5 (Supp. 1974); S.C. CODE ANN. §§ 61-71.1, -71.4 (Supp. 1974); S.D. COMPILED LAWS ANN. §§ 37-23-6, -24-6 (1967); UTAH CODE ANN. §§ 13-11-5, -11-19 (Supp. 1975); VT. STAT. ANN. tit. 9, §§ 2453, 2458 (1970); WIS. STAT. ANN. §§ 426.108, .109 (1974).

7. Section 2-302 has grown to be a leading vehicle for articulating and extending the law of contract to standardized agreements. The case law is extensive and well developed. Though the section governs only sales contracts, courts have looked to it as authority for a variety of other types of contracts. *See* (security agreements) *In re* Johnson, 13 UCC REP. SERV. 953 (D. Neb. 1973); (leases) Bill Stremmel Motor, Inc. v. IDS Leasing Corp., 89 Nev. 414, 514 P.2d 654, 13 UCC REP. SERV. 435 (1973); Carter v. Jackson, 11 UCC REP. SERV. 983 (D.C. Super. Ct. 1972); Fairfield Lease Corp. v. Umberto, 164 N.Y.L.J. 10 at 10, 7 UCC REP. SERV. 1181 (Civ. Ct. 1970); (bank signature cards) David v. Manufacturers Hanover Trust Co., 55 Misc. 2d 1080, 287 N.Y.S.2d 503 (Civ. Ct. 1968), *rev'd*, 59 Misc. 2d 248, 288 N.Y.S.2d 847, 4 UCC REP. SERV. 1145 (App. T. 2d Dept. 1969); (real estate contracts) Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967); and (service contracts) Nosse v. Vulcan Basement Waterproofing, Inc., 35 Ohio Misc. 1, 299 N.E.2d 708 (Mun. Ct. 1973).

Similarly, the type of clauses which have been contested under the section is quite varied. *See* (limitations on liability) Walsh v. Ford Motor Co., 59 Misc. 2d 241, 298 N.Y.S.2d 538 (Sup. Ct. 1969); K & C, Inc. v. Westinghouse Electric Corp., 437 Pa. 303, 263 A.2d 390, 7 UCC REP. SERV. 679 (1970); (warranties) U.S. Fibre v. Proctor & Schwartz, Inc., 509 F.2d 1043 (6th Cir. 1975); (waivers of rights against assignees) Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967); (choice of law clauses) Paragon Homes of New England v. Langlois, 157 N.Y.L.J. 40 at 23, 4 UCC REP. SERV. 16 (Sup. Ct. 1967); (restricted borrowing clauses) *In re* Elkins-Dell Manufacturing Co., 253 F. Supp. 864 (E.D. Pa. 1966); (acceleration clauses) Fairfield Lease Corp. v. Umberto, *supra*;

tracts as public instruments and deal with them accordingly. Properly applying § 2-302, courts need not be afraid to use broadly the powers recently granted them by many state legislatures in consumer protection acts.

The Note begins with a discussion of *Kugler v. Romain*,[8] a case which reveals not only the tension between the need for public remedies and the limited ability of common law doctrines to provide them, but also one court's resolution of that tension by applying the doctrine of unconscionability as embodied in § 2-302 of the UCC. The next section discusses the common law roots of unconscionability; the necessity that arose for developing a new doctrine based upon commercial considerations; and § 2-302, the foundation of that doctrine. The final discussion concerns the standards of reasonable expectations and commercial oppression which have emerged from the case law of § 2-302, standards which are peculiarly applicable to problems arising from the use of form contracts.

II

KUGLER V. ROMAIN:[9] AN EXPOSITION OF THE PROBLEM AND SOLUTION

The Educational Services Company carried on the profitable business of selling sets of books to the poor at two and one-half times the retail value.[10] Door-to-door salesmen combed selected neighborhoods telling potential buyers that the "educational package" they were selling was used in Head Start programs and was being sold to the public under a federal grant. The representatives also attested to benefits to be derived from use of the books such as obtaining a high school equivalency diploma.[11] Swayed by the unfounded statements, many families soon found themselves burdened by a set of useless books and a debt of $279.[12] Not surprisingly, most of the purchasers failed to meet the payment obligations and were sued in enforcement proceedings. For too many the matter was settled only after wages had been garnisheed.[13]

Under New Jersey's Consumer Fraud Act,[14] the Attorney General brought suit on behalf of twenty-four persons who had purchased the sets.[15] The trial court was asked to rescind the contracts on two grounds: that they were obtained through fraud and deception, explicit violations of the Act; and that they were unconscionable as to price under § 2-302 of the UCC.[16] The Attorney

---

(waivers of rights) David v. Manufacturers Hanover Trust, *supra*; (rights of repossession) Robinson v. Jefferson Credit Corp., 157 N.Y.L.J. 1 at 1, 4 UCC REP. SERV. 15 (Sup. Ct. 1967); and (terms of payment) Ellsworth Dobbs, Inc. v. Johnson, *supra*.

8. 58 N.J. 522, 279 A.2d 640, 9 UCC REP. SERV. 559 (1971).

9. *Id.*

10. *Id.* at 528-29, 279 A.2d at 644.

11. *Id.* at 531-32, 279 A.2d at 645-46.

12. *Id.* at 528, 279 A.2d at 643-44.

13. The defendant had to bring suit to enforce 70 percent of its New Jersey contracts. A sample of 24 contracts entered into by persons who testified at trial indicated 8 garnishments. *Id.* at 532-33, 279 A.2d at 646.

14. N.J. STAT. ANN. 56:8-1 *et seq.* (1968).

15. Kugler v. Romain, 110 N.J. Super. 470, 266 A.2d 144 (Ch. 1970), *modified*, 58 N.J. 522, 279 A.2d 640 (1971).

16. N.J. STAT. ANN. 12A:2-302 (1968). For a summary of the early cases concerning uncon-

General sought relief upon the second ground because unconscionability as to price could be proved to be common to all outstanding contracts, while fraud, perpetrated by salesmen, could be proved only on a case by case basis. He understood that if relief were granted only to those persons appearing before the court, an untold number of individuals would continue to be intimidated and coerced by the very same contracts. Therefore, he argued that § 2-302 was embodied in the Act and that under this section the court was entitled to avail itself of liberal powers granted to it by the Act[17] and to grant relief to all persons who entered these contracts containing an unconscionable disparity between the price and value of the books.[18]

The trial court readily provided remedies for those persons who testified as to deception.[19] However, feeling restrained by the wording of the statute, the court would not rule on the conscionability of any of the contracts. Defying precedent, the trial court argued that unconscionability as to price was concerned solely with disparities between price and value which it stated were not necessarily indicative of fraud and deception,[20] the fundamental elements of the Consumer Fraud Act. Consequently, questions of conscionability would have to be raised in separate, private actions outside of the ambit of the Act.

The implication of the lower court's holding was ironic as well as disappointing. Because the price terms were the same in every contract, unconscionability as to price could be proved to exist in all contracts, permitting a broad remedy extending to all purchasers. Fraud, on the other hand, was an abuse particular to each transaction. Thus, under the holding, unconscionability, the only abuse which could be conclusively said to exist throughout the market, was severed from a statue which granted courts remedial powers capable of extending beyond individual cases and to the market.[21]

On appeal, the Supreme Court of New Jersey recognized that the twenty-four persons who testified at trial were "fungible" litigants,[22] representatives of a much larger class, all of whom had been subjected to identical contracts. The pricing abuse was seen as a public, as well as a private, matter requiring public as well as private remedies. The court stated this position succinctly: "Obviously, giving the consumer rights and remedies which he must assert individually in the courts would provide little therapy for the overall public aspect of the problem."[23] Overturning the lower court, the Supreme Court ruled that deceit, false pretense and other similar elements contained in the Consumer

---

scionability as to price, *see* McQuoid, *UCC 2-302 and the Pricing of Goods: Are the Courts More than the Market Will Bear?*, 33 U. PITT. L. REV. 589, 589-95 (1972).

17. Consumer Fraud Act § 8, N.J. STAT. ANN. 56:8-8 (1968) states that "[t]he Court may make such orders or judgments as may be necessary to prevent the use or employment by a person of any prohibited practices . . . . "

18. 110 N.J. Super. at 480-83, 266 A.2d 149-51.

19. The court enjoined the defendant from enforcing the recovery of moneys from any party who testified in the case. The court also fined the defendant $2,400 ($100 per violation) under N.J. STAT. ANN. 56:8-13 (1966) *as amended*, N.J. STAT. ANN. 56:8-13 (Supp. 1975). *Id.* at 486-87, 266 A.2d at 152-53.

20. *Id.* at 480, 266 A.2d at 149-50. The correctness of this ruling is questionable. At common law, a discrepancy between price and value established a presumption of fraud. *See* J. POMEROY, EQUITY JURISPRUDENCE § 927 (5th ed. Symons 1941).

21. *See* note 17 *supra*.

22. The concept of the "fungible transaction" appears in Llewellyn, *supra* note 3, at 731.

23. 58 N.J. at 537, 279 A.2d at 648.

Fraud Act could be equated with departures from the broad business ethic of honesty-in-fact and fair dealing, the standards of § 2-302.[24] Accordingly, the court held that the Act did encompass § 2-302, citing a consistent body of cases which had earlier utilized § 2-302 to find similar price terms unconscionable.[25] Supported by this precedent, the Supreme Court further held "the sales contract invalid as to all consumers who executed it."[26]

Fortunately, in *Kugler v. Romain*,[27] the Supreme Court of New Jersey understood the importance of publicly controlling standardized contracts. The court, taking a broad view of the Act's purpose,[28] ruled that it manifested a legislative intent to provide courts with the power to stop all unfair business practices and breaches of fair dealing, not merely those violations which were enumerated in the Act.[29] With the purpose of the statute so defined, the court ruled that, under New Jersey's Consumer Fraud Act, unconscionability was "equally" unlawful as fraud.[30] The fortuitous joinder of § 2-302 with the Consumer Fraud Act now gives New Jersey a solid foundation upon which to develop effective controls over the public use of standardized agreements, the market perspective of § 2-302[31] being a practical complement to the public remedies provided in the Act.[32]

Unfortunately, there is no assurance that the many consumer protection statutes which have been enacted within the past decade will be interpreted as broadly as the New Jersey statute.[33] Many courts fear becoming regulatory

24. Before it was amended, N.J. STAT. ANN. 56:8-2 (1968) prohibited the following: "[D]eception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact . . . ." This was amended as a result of *Kugler* to include "unconscionable commercial practice." L. 1971, c. 247, § 1 (1971).

25. Cases cited by the court at 58 N.J. 522, 279 A.2d 640, in support of its position include: American Home Improvement v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964); Toker v. Perl, 103 N.J. Super. 500, 247 A.2d 701, 5 U.C.C. REV. SERV. 1171 (L. Div. 1968), *aff'd on other grounds*, 108 N.J. Super. 129, 260 A.2d 244 (1970); Toker v. Westerman, 113 N.J. Super. 452, 274 A.2d 78, 8 U.C.C. REP. SERV. 798 (Dist. Ct. 1970); State v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966). For the substantive problems of a rule based solely on price-value ratio, *see* text accompanying notes 101-11 *infra*.

26. 58 N.J. at 547, 279 A.2d at 654.

27. *Id.* at 522, 279 A.2d at 640.

28. *Id.* at 544, 279 A.2d at 653.

29. *Id.* at 537-41, 279 A.2d at 648-52.

30. *Id.* at 544, 279 A.2d at 652.

31. Comment 1 to UCC § 2-302 states in part:

> The basic test [for unconscionability] 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. (Emphasis added.)

This sentence has been interpreted by some courts as requiring a hearing concerning the commercial setting of the contract before judgment can be rendered. *See* Cone Mills Corp. v. Hurdle, 369 F. Supp. 426, 437 (N.D. Miss. 1974); Zicari v. Joseph Harris Co., 33 App. Div. 2d 17, 24, 304 N.Y.S.2d 918, 925, 6 UCC REP. SERV. 1246 (Sup. Ct. 1969); Central Budget Corp. v. Sanchez, 53 Misc. 2d 620, 279 N.Y.S.2d 391, 4 UCC REP. SERV. 69 (Civ. Ct. 1967).

32. N.J. STAT. ANN. 56:8-3.1, -8 (1964), *as amended*, N.J. STAT. ANN. 56:8-3.1, -8 (Supp. 1975).

33. In an earlier case, State v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303, 3 UCC REP. SERV. 775 (Sup. Ct. 1966), the court took steps similar to those of the New Jersey court, although the pertinent statute, N.Y. EXEC. § 63(12) (McKinney 1951), did include the phrase "unconscionable contractual provisions."

agencies and may be apprehensive that following *Kugler* would enmesh them in fair-pricing regulations and other problems which often attend public regulation of economic behavior. This concern may cause courts to limit the substantive scope of these statutes to familiar common law doctrines of fraud which offer no such threat.

In order to ensure the development of public remedies for this public problem, it is important that courts have available rules of law which focus on the public abuse of standardized contracts, rules of law which, in any one case, allow the courts to discern those material elements that are common to the many transactions involving the contested contract. At the same time these rules must guide the courts to remedies which are judicially practicable; § 2-302 provides the foundation upon which these rules have been built.

Though § 2-302 is often regarded as a statute lacking structure,[34] the cases which have cited § 2-302 as authority manifest two overriding judicial policies which may serve as the bases for the substantive structure which is wrongly considered by many to be lacking. First, courts have consistently refused to allow contracts to derogate the reasonable commercial expectations inherent in a transaction.[35] Secondly, courts have often refused to enforce oppressive agreements which parties were compelled to accept because of lack of bargaining power.[36] These policies are not rote rules of law, nor should they be. Neither are they so ambiguous as to be nothing more than expressions of the conscience of the court. They are standards distinct from earlier common law doctrines, standards whose meaning and utility become apparent when applied to the context of the commercial background relevant to a specific case.

III

UNCONSCIONABILITY: ITS SEVERANCE FROM COMMON LAW

Karl Llewellyn, the principal draftsman of Article 2 of the UCC,[37] severed § 2-302 from common law doctrines hoping that the judicial process would develop rules consonant with the section's stated purpose of preventing unfair surprise and oppression and that these rules would lead courts to devise appropriate and practical remedies for the unconscionable use of standardized agreements. Contrary to his intentions, unconscionability, as defined by § 2-302 of the Code, has often been mistaken to be a simple embodiment of one of several common law doctrines.[38] Llewellyn, understanding the need for public con-

34. The leading critiques of § 2-302 have pointed out its lack of any substantive definition of unconscionability. Little attention has been given to the "correctness" of the cases that the section has spawned. *See* 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); Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969).

35. *See* text accompanying notes 92-111 *infra*.

36. *See* text accompanying notes 112-19 *infra*.

37. Though others influenced the development of § 2-302, Karl Llewellyn was the principal draftsman. *See* Leff, *supra* note 34, at 488 n.11.

38. Ellinghaus, *supra* note 34 at 764; Note, *Unconscionability Under the Uniform Commercial Code—Two Trends in Cases Decided on Unconscionability Grounds*, 1 LOYOLA U. CHI. L.J. 313, 318-19 (1970); Comment, *Unconscionability: Uniform Commercial Code Section 2-302*, 36 ALBANY L. REV. 114 (1971). For a lengthy list of earlier articles maintaining this argument, *see* Leff, *supra* note 34, at 528.

trol of form contracts, realized that the common law doctrines governing private contracts could not sufficiently resolve those problems which arise from the use of form contracts.[39] Addressing those problems, he drafted § 2-302[40] upon a commercial foundation rather than upon the traditional concepts of volition and mutual consent. He hoped that proper rules of law would arise from judgments guided by commercial good faith and stated in terms of commercial considerations. By examining the common law doctrines often associated with unconscionability, it becomes evident that the cases spawned by § 2-302 have diverged from common law concepts and have followed Llewellyn's intended direction.

A. Unconscionability in the Common Law

Perhaps the present misconception that unconscionability, as defined by § 2-302, is no different from common law doctrines arises from the use of the term "unconscionable" in pre-UCC days when the word was not commonly used and its meaning was quite flexible. In those times, "unconscionable" was one of several incantations courts utilized to evoke their equitable power.[41] With this power, they could refuse to enforce "unconscionable" contracts abhorrent to their sense of justice, without the support of direct precedent.

For instance, in *Campbell Soup Co. v. Wentz*,[42] the court rescinded a contract because it contained a clause which gave the company extraordinary powers over Wentz, a farmer. Ostensibly, under the contract, if the company did not wish to purchase the farmer's produce, it could refuse to let him sell his crop to anyone. (Apparently, the crop would rot in the fields.) While the court's opinion implied that the company's market power might allow it to drive a hard bargain, the court declared that the provisions of this contract were simply "carrying a good joke too far."[43] Deeming the contract "unconscionable," the court invalidated it. Similarly, in *Carlson v. Hamilton*,[44] another pre-UCC case, the court considered "unconscionable" any contract whose enforcement would result in gross hardship. As used in these cases, the term "unconscionable" did not refer to any developed common law doctrine. Rather, "unconscionable" served as an ambiguous term which allowed the law to be extended to circumstances not properly controlled by existing doctrines.[45]

More often, however, "unconscionability" was associated in the common law with "constructive fraud," a term of equity which includes the doctrines of inadequate consideration, duress, and undue influence among others.[46] In cases

---

39. *See* text accompanying notes 55-61 *infra*.

40. The original title of § 2-302 was "Form Clauses, Conscionable and Unconscionable." 1943 Draft § 24, *quoted in* Leff, *supra* note 34, at 512.

41. *See* POMEROY, *supra* note 20, at § 1405a; S. WILLISTON, CONTRACTS § 1425 (3d ed. Jaeger 1968).

42. 172 F.2d 80 (3d Cir. 1948).

43. *Id.* at 83.

44. 8 Utah 2d 272, 332 P.2d 989 (1958).

45. Professor Ellinghaus' conclusions regarding § 2-302 parallel this particular use of unconscionability in the common law. *See* Ellinghaus, *supra* note 34, at 759-61, 814-15.

46. For an extensive discussion of constructive fraud, *see* POMEROY, *supra* note 20, §§ 922 *et seq.*

where constructive fraud was alleged, the courts examined the "intrinsic nature and subject of the bargain"[47] and the "circumstances and condition of the immediate parties."[48] From this evidence a court might find the presumption of fraud or lack of consent, either of which would render the contract void.

Under a defense of inadequate consideration—the subcategory of constructive fraud with which unconscionability has been most frequently identified[49]—a gross price-value disparity sufficiently shocking to the court would, by itself, be presumptive of fraud. Such a presumption would shift the burden of proof to the party seeking to enforce the contract "to show affirmatively that the price was the result of a deliberate and intentional action by the parties . . . ."[50] If the party attempting to enforce the contract could not sustain this burden, the contract was held "unconscionable" and void. In this sense, "unconscionable" was synonymous with an unrebutted presumption of fraud.

Even if there were no price-value disparity evident in the transaction, evidence of severe duress or undue influence might void a contract. When used with reference to "duress" or "undue influence", unconscionability was synonymous with bargaining abuse resulting from status relationships.[51] If the party against whom the contract was to be enforced suffered a mental, physical, or pecuniary deficiency, was a dependent or fiduciary of the party enforcing the contract, or was simply ignorant and lacking of advice, the court might presume that the agreement was not a result of his/her own independent volition and thus not enforceable.

Therefore, "unconscionability" understood as constructive fraud was founded upon law which held a contract valid only if it were the result of mutual and freely given consent. In order to aid a court in discerning these subjective elements, the common law doctrines attempted to narrow the perspective of the courts to "see as the parties saw, and to think as they must have thought,"[52] and thereby discover whether a valid contract had in fact been formed. Market fairness and commercial reasonability would be pertinent to the validity of a contract only to the extent that they threw light upon the parties' states of mind. This non-commercial view of common law unconscionability is well summarized in a common definition of "unconscionability" first used by the Supreme Court in *Hume v. United States*,[53] in which the Court stated that a contract was unconscionable and thus unenforceable if it was " '. . . such as no man in his senses and not under delusion would make on the one hand, and, as no honest and fair man would accept on the other hand'. . . ."[54] Thus, common law unconscionability in its broadest sense pre-

47. 3 POMEROY, *supra* note 20, at 627.

48. *Id.*

49. *See* A. CORBIN, LAW OF CONTRACTS § 128 (1963); G. W. KEETON & L. A. SHERIDAN, EQUITY, 334 (1969). Compare these authorities to Pomeroy's discussion of inadequate consideration, POMEROY, *supra* note 20, § 927.

50. 3 POMEROY, *supra* note 20, at 637.

51. Compare Pomeroy's discussions of status in §§ 944, 950, 951. 951a to the use of the term "unconscionable" by the following authorities: KEETON & SHERIDAN, *supra* note 49, at 336, 354; R.E. MEGARRY & P.V. BAKER, SNELL'S PRINCIPLES OF EQUITY 551-56 (27th ed. 1973).

52. Scott v. United States, 79 U.S. 443, 444-45 (1870).

53. 132 U.S. 406 (1889).

54. *Id.* at 411, *quoting* Earl of Chesterfield v. Janssen, 2 Ves. Sen. 125, 155 (1750-51).

sumed that either one of the parties lacked the capacity to consent or there was fraud which negated any consent.

B. Severance from the Equitable Doctrines

Because the equitable doctrines associated with the early uses of "unconscionability" are structured to examine the subjective subtleties of a single transaction, one is not surprised that Llewellyn implicitly questioned their pertinence to the control of standardized agreements. He noted that consent plays a severely limited role in a standardized contract where boilerplate is rarely read, much less bargained for.[55] Under such circumstances not only is it difficult to use the common law standard of "a meeting of minds" to measure the validity of such contracts, but more importantly, such a standard is not addressed to the problems which stem from standardized contracts. Private contracting had to be protected against the "pathologfies] of bargaining."[56] Thus, equitable doctrines in the common law protected individuals from deception and other unfair advantages arising from isolated contractual relationships. Standardized transactions, on the other hand, necessitate protection from the "pathologfies] of non-bargaining,"[57] abuses which arise from market circumstances and extend over large groups of similarly situated individuals.

Llewellyn, understanding the differences between private and form contracts, suggested that the validity and control of form contracts should not be based upon private considerations, but rather upon "reasonable commercial standards of fair dealing in the trade."[58] He suggested two appropriate standards for determining a form contract's enforceability: the form contract must neither ignore the reasonable expected value of any dickered terms, nor be unreasonable or unfair in other respects.[59] Llewellyn never explained the practical meaning of these standards. He believed that if courts were guided by the purpose of controlling form contracts[60] and directed towards a commercial context, they would adequately give proper and practical meaning to them.[61]

Llewellyn's confidence in courts' abilities to formulate rules, once given appropriate purpose and direction, was vindicated in the landmark decision,

---

55. Llewellyn saw standardized agreements as two contracts, one composed of dickered terms, the other of undickered terms. *See* K. LLEWELLYN, THE COMMON LAW TRADITION 370-71 (1960). The former is usually comprised of prices, types and quantities of goods; the latter of boilerplate.

56. Leff, *supra* note 34, at 537. For an insightful discussion concerning the different types of properties which were usually involved in private contracts, contrasted with those in form contracts, *see, id.* at 534-37. It might be noted that Professor Leff categorizes equity unconscionability into procedural and substantive categories. This analysis is perhaps comfortable but is not altogether accurate, for in the common law all questions of conscionability revolved around questions of consent, which are procedural. For instance, a "substantive" matter such as a price-value disparity simply raised a presumption of procedural abuse.

57. *Id.* at 537.

58. LLEWELLYN, *supra* note 55, at 369, *quoting* UCC § 2-103(1)(b).

59. *Id.* at 371. These standards were first set forth in Llewellyn, *supra* note 2, at 704: "[W]here bargaining is absent in fact, the conditions and clauses to be read into a bargain . . . are those which a sane man might reasonably expect to find on that paper." He went on to suggest that courts "[mark] out . . . the limits of the permissible" and "[strike] out utterly unreasonable clauses." *Id.*

60. *See* note 40 *supra*.

61. *See* text accompanying notes 77-80 *infra*.

Henningsen v. Bloomfield Motors, Inc.[62] This case, though decided prior to the enactment of the Code, sets forth a framework for adjudicating form contracts, a framework which uncannily parallels Llewellyn's ideas as he embodied them in § 2-302. It does so, however, without reference to Llewellyn's concern that legal principles, severed from the equitable doctrines, were necessary to police standardized agreements. The court in *Henningsen*, concerned with the public problems arising from the uncontrolled use of the form contract, discarded those traditional equitable doctrines and addressed itself to the commercial setting of the transaction. Because the court in *Henningsen* built its framework upon the same considerations to which § 2-302 would direct future courts, an examination of the case allows us to better understand § 2-302 and its progeny.

In *Henningsen*, a car owner and his wife brought suit against an automobile dealer and manufacturer for injuries the wife sustained in a car accident resulting from a defective steering mechanism. The manufacturer attempted to escape liability under a clause in the sales contract which limited its liability to the repair and replacement of defective parts. The clause, used by all of the major automobile companies, was part of a standard contract which was not subject to bargaining. In holding the clause to be void as against public policy, the court took several analytical steps which progressively highlight concepts basic to the doctrine of unconscionability as set forth in § 2-302.

In only one part of the opinion does the court regard the contract as a private contract subject to such common law rules as, "in the absence of fraud, one who does not choose to read a contract before signing it, cannot later relieve himself of its burdens."[63] Within the same paragraph judicial rhetoric transforms the Henningsens from particular individuals into "ordinary consumers," and the transaction is no longer a particular transaction but rather a small part of broad "modern commercial life." In the rest of the opinion, the court, not interested in determining whether there was private volition or mutual consent, seeks to establish whether "consumer and public interests are treated fairly."[64] The court therefore moves from the private perspective to the public.

As the court examines market factors such as the relative bargaining power of the parties and the consequent imposition of unbargained-for terms, the grip of older law is loosened. The requirement that the purchaser prove fraud before the agreement will be invalidated gives way to the requirement that the company prove that the consumer understood the terms of the agreement before it will be enforced.[65] This latter requirement, still based upon elements particular to the parties, is replaced, in turn, by a standard of reasonable expectations. Because the contract was part of a promotional campaign to sell cars to the public, the court finally requires the company to prove that the "buying public" was aware of the purpose of the clause.[66] Thus, after articulating the purpose of controlling the form contract and directing attentions to commercial considerations, the court consciously abdicates the older concept

62. 32 N.J. 358, 161 A.2d 69 (1960).
63. *Id.* at 386, 161 A.2d at 84.
64. *Id.* at 386, 387, 161 A.2d at 85.
65. *Id.* at 391-99, 161 A.2d at 87-92.
66. *Id.* at 399-403, 161 A.2d at 92-94.

of individual, knowing consent and develops a standard of notice measured by *market* expectations.

The court, however, was faced with a predicament. If it rendered relief solely on the failure of the company to give reasonable commercial notice of the effect of the clause, what would stop automobile companies from clearly explaining the clause to future consumers and then imposing upon them those same terms? Reasonable commercial notice can palliate commercial abuse only if the buyer, understanding the terms of the sale, is able to bargain for better terms or take his/her business elsewhere. Notice achieves little if the buyer is in such a position that he/she has no choice but to accept an oppressive contract.

The court in *Henningsen* dealt with this problem by examining whether consumers of automobiles had the market power to avoid the imposition of the unfair terms. The court argued that one has no such power if he/she either cannot "meet the other party on a footing of approximate economic equality"[67] or "is not in a position to shop around for better terms."[68] Because all automobile companies used the same clause and would not bargain over its inclusion, the court found the consumer to have no market power under either of its standards. To the consumer, the disclaimer of liability was then as immutable as the UCC is now. Indeed, the company in effect attempted to substitute its own will against the express policy of the legislature.[69]

If the Henningsens and other consumers had in fact been offered a series of liability clauses, either by one company or several companies, with different price premiums attached to each clause (the price varying in accordance with the risk assumed by the company) perhaps the court would not have held the parties to be without bargaining power. However, because there was no such choice, the court was forced to decide whether the disclaimer was fair or oppressive. The court might have required either the company, the dealer, the owner of the car, or the person injured to pay for the cost of injuries. The court chose to void the disclaimer in its entirety and thus, in effect, required the company to pay on the grounds that the company was in a position both to control the danger of its product and the cost of product failure.[70]

Of importance to understanding § 2-302 is the realization that the court's development of rather sophisticated standards in *Henningsen* was a direct result of its approach to the problem. By discarding the equitable doctrines, the court was able to discern those elements common to all transactions and for-

---

67. *Id.* at 389, 161 A.2d at 86-87.

68. *Id.*

69. *Id.* at 404, 161 A.2d at 95. The court stated:

> In the area of sale of goods, the legislative will has imposed an implied warranty of merchantability as a general incident of sale of an automobile by description . . . . The law makers did not authorize the automobile manufacturer to use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer, who in effect has no real freedom of choice, the grave danger of injury to himself and others that attends the sale of such a dangerous instrumentality as a defectively made automobile.

Id.

70. 32 N.J. at 379, 161 A.2d at 81. The court's ruling that the company pay for such damage in effect requires the automobile companies to insure purchasers against this risk. Then, through small price increases, the company can redistribute this loss back to the purchasers of the cars.

mulate a sophisticated exposition and solution of the problem, a solution unimaginable under the earlier doctrines of the common law.

C. § 2-302: A Statutory Embodiment of Llewellyn's Thought

The same purpose and direction taken by the court in *Henningsen* without reference to § 2-302 is embodied in that section of the UCC. The drafting history[71] and the wording of this section persuasively argue that Llewellyn consciously attempted to lay the groundwork for a doctrine severed from the traditional concepts of contract law, a doctrine which allowed courts to take the same course of action as taken by the *Henningsen* court. In the drafting history and present text of § 2-302, there is a noticeable absence of any words or terms common to traditional equitable doctrines. Only once during the drafting was "equity" mentioned. The comment to the 1949 draft contained the following sentence:

> This section is intended to apply to the field of Sales the equity courts' ancient policy of policing contracts for unconscionability or unreasonableness.[72]

Professor Leff, referring to the above-quoted sentence, remarks:

> That sentence lasted just about a year. In the very next draft of this comment, though the remainder of the paragraph in which it appeared remained wholly unchanged, the quoted sentence was deleted in its entirety. And that sums up the entire history of overt references to the equity unconscionability doctrine in the Code; it never appeared again.[73]

Moreover, the choice of words used in the text and comment also indicate the drafter's intention to sever "equity" from § 2-302. It appears that the drafters were careful to avoid using any words which had the coloring of common law doctrines. For instance, Comment 1 to § 2-302 states that "[t]he principle [underlying § 2-302] is one of the prevention of oppression and unfair surprise." In this paragraph, "oppression" is used instead of "duress", the latter clearly connoting constructive fraud. Similarly, "unfair surprise", a term open to new interpretation, is used instead of "fraud" or "misrepresentation".

Even the remedies avoid reference to equitable wording. For instance, § 2-302(2) says that the court shall limit the use of a contract to "avoid any unconscionable result." Under the common law it would have been more proper to say that the court had the power to equitably reform the instrument to conform to the intentions of the parties.[74]

Just as the separation of equitable doctrines from § 2-302 was necessary if the statute was to avoid being considered a reiteration of the common law, it was equally necessary for the statute to direct the courts to considerations relevant to the misuse of standardized agreements. This commercial focus was directly introduced into § 2-302(2), which states:

---

71. The drafting history of § 2-302 is well documented in Leff, *supra* note 34, at 509-16.

72. 1949 Draft § 2-302, comment 1, *quoted in* Leff, *supra* note 34, at 529.

73. Leff, *supra* note 34, at 529 (footnotes omitted).

74. *See, e.g.*, Humble Oil & Refining Co. v. DeLoache, 297 F. Supp. 647, 656 (D.S.C. 1969). It may be noted that though divorced from § 2-302, equity was not banished from the UCC. It remains a supplementary doctrine under § 1-103.

> 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.[75]

Moreover, the statute's requirement that the judge, not the jury, rule upon questions of unconscionability[76] tends to emphasize the commercial aspects rather than the peculiarities of a case. Judges regularly face a variety of commercial transactions and, thus, may better understand standards of reasonable commercial conduct than would a body of laypersons. Where a judge may well apply this understanding of the commercial context, a jury might be inclined more toward emphasizing equities peculiar to the case.

With the severance from equity complete and the direction set toward commercial considerations, Llewellyn was probably satisfied that the common law process would give rise to an understanding of the problems he sought to control and would develop the proper standards for that control.

D. § 2-302: Rules and Remedies

Undoubtedly, any misunderstandings concerning § 2-302 would have been mitigated had Llewellyn clearly articulated rules for applying the section. While Llewellyn's failure to define the elements comprising "unfair surprise" and "oppression" can not be explained fully, it is known that his study of the process of common law led him to believe that consistency among judicial decisions arose not from a mechanical use of rigid rules, but rather from a shared judicial purpose.[77] Llewellyn was aware that statutes which offer tight rules are appropriate for areas in which the law is well settled and change slow. However, in an area of law where concepts and circumstances are in flux, an attempt to offer rote rules would be foolhardy. Without a clearly defined purpose and direction, promulgating such rules would provide no "help and guidance" for proper expansion of the law.[78] The rules, rather than reasonably guiding the law, might restrain it with meaningless consistency. Llewellyn intended to avoid this result by allowing rules to develop properly from a coherent body of cases sharing the same sense and purpose.[79] It was Llewellyn's intention to provide § 2-302 with that needed purpose and direction, trusting that courts would more fully define the standards as did the court in *Henningsen*. If Llewellyn had made a statement concerning the future of § 2-302, he might have said no more than that it is "free to meet new conditions with *guidance*; it *presses* the various personnel *toward* resolving questions on newly emergent facts along similar lines, or even the same lines; it *enables* them under the use

---

75. Professor Leff remarks that when one of the draftsmen suggested including this subsection, Llewellyn was "ecstatic." Leff, *supra* note 34, at 542. *See* UCC § 2-302, Comment 2, for a reiteration of this direction.

76. UCC § 2-302(1).

77. The discussion of Llewellyn's philosophy concerning the development and use of legal rules is taken from two sources: *Rules of Thumb and Principle*, the 4th Chapter of an unpublished book entitled THE THEORY OF RULES, *included in* THE KARL LLEWELLYN PAPERS, 81-96 (W. Twining ed. 1968); and LLEWELLYN, *supra* note 55, at 178-84.

78. THE KARL LLEWELLYN PAPERS, *supra* note 77, at 86.

79. *See also* Murray, *supra* note 34, at 37-38.

and guidance of the rules itself, to solve such problems in a satisfying fashion."[80]

If Llewellyn is correct and the objective of policing contracts against unfair surprise and oppression can lead courts to reach palatable and persuasive decisions without acknowledging or depending upon prior, explicated rules, one may ask why it is necessary to draw rules of law from a body of cases which seem to admit to none. Would it not be enough to allow courts to follow *Kugler*, basing their decisions upon an amalgam of fiction and policy? The foregoing comments on the relation of judicial consistency to shared purpose are not meant to argue that rules are not important to unconscionability. It rather suggests that their importance lies elsewhere than in lending consistency to determinations of conscionability.

For example, one might formulate the following rule from the *Henningsen* court's discussion concerning commercial expectations:

> A contract or clause is an unfair surprise and thus unconscionable if a reasonable buyer would be either unaware of such clause or ignorant of its effect upon the transaction.[81]

Courts have reached decisions paralleling that in *Henningsen* without explicitly resorting to such a rule and presumably can continue to do so.[82] The rule is not necessary to direct a court to the unconscionable; rather, the purpose of the rule is to highlight those factors which are the basis of abuse, thus aiding courts in devising the appropriate remedy to correct the problem.

In *Kugler* the court reached a decision of unconscionability not by resorting to any clearly defined rule, but by mechanically citing precedent and stretching, if not fictionalizing, the concept of fraud.[83] While few courts would disagree that the price-value disparity was unjust,[84] the real question was whether the remedy would be effective. For instance, although the company was enjoined in *Kugler* from further use of the unconscionable price terms, would the company be cited for contempt if it distributed new contracts which were $25 less than the illegal ones? At what price would the contract be enforceable? Must the court become the defendant's business manager and set its prices? The rationale of the case affords few answers to these questions.

Had the court in *Kugler* utilized the above rule drawn from *Henningsen*, the underlying basis of the problem and thus the appropriate injunctive relief, would have been clear. That rule not only states what is unconscionable, but why it is unconscionable. Thus guided by the sense of the rule, as stated above, the court might have enjoined future home solicitations, unless the company fully informed its customers of the cost of similar books in retail establishments. Such an order would have solved the general problem of price-value disparities while avoiding the uncertainties of a simple proscription against a particular price-value ratio.[85]

---

80. THE KARL LLEWELLYN PAPERS, *supra* note 77, at 86.
81. 32 N.J. at 392-401, 161 A.2d at 88-93. *See* text accompanying notes 65-66 *supra*.
82. *See* notes 101-06 *infra*.
83. *See* text accompanying note 30 *supra*.
84. *See* note 101 *infra*.
85. This argument assumes that consumers will make proper decisions given correct market information.

Similarly the court's discussion of bargaining power in *Henningsen* would give rise to the following rules:

> A contract or clause is oppressive and thus unconscionable if the consumer is forced to accept, because of lack of bargaining power, a commercially unreasonable risk or obligation. A consumer has no bargaining power if he/she could neither bargain with the seller over terms nor have a choice of terms from among several sellers.[86]

While a court could refuse to enforce an innately one-sided contract without resorting to these rules, the rules' explanation of bargaining power gives insight into the nature of the alleged abuse. The rule assumes that if a buyer were offered various terms by either the same or different sellers, the force of competition would presumably allocate risks and responsibilities fairly between the parties. However, these guidelines give the court notice of instances when there is no choice of terms, and the court must intervene and judge itself whether the contract is commercially reasonable.

A second way in which rules are important to the development of § 2-302 is that they can be treated as restraints on judicial power. Rules tell courts what they can do, to what extent they can take affirmative action, and when they should refrain from action. In the early stages of a developing doctrine, such restraints are not so necessary: the timidity of introducing new law is itself a sufficient restraint upon the judiciary. As a doctrine gains acceptance, however, judicial timidity may give way to temerity; it is then necessary for rules to restrain the courts. For example, did the court in *Kugler* intend future courts to establish price terms and to regulate retail commerce? Had the New Jersey Supreme Court noted its prior discussions in *Henningsen*, it could have clearly answered this question. The court in *Kugler* would have argued that consumers expect to pay "competitive" prices for goods and that if a high pressure salesperson takes advantage of that expectation, he/she has the burden of showing that the consumer was notified of comparable retail prices. In this way the rule frees the court from directly regulating prices, leaving such matters to the market where they belong.

The same questions that have been asked of the opinion in *Kugler* can and should be asked of § 2-302. Does this section require courts to regulate prices, allocate risks, strike some terms and add others, all in the name of unconscionability? If § 2-302 is coupled with the consumer protection acts, will the courts become scattered fair trade commissions compiling lists of the fair and unfair? On the other hand, if the courts refuse to incorporate § 2-302 into their consumer protection statutes, must they relinquish their flexible control of standardized agreements to the dictates of the legislature and examine consumer transactions from a rigid perception of legislated fairness?[87] It is submit-

86. *See* text accompanying notes 67-68 *supra*.

87. Professor Leff, in *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970), speaks quite disparagingly about § 2-302 and the common law tradition, arguing for the enactment of statutes against specified consumer abuses, statutes which can dictate specific market practices. This writer believes that there are many examples of what happens when the government seeks to replace flexible market checks and balances with rigid rules and proscriptions. Nothing can be accomplished with a panoply of rules and regulations that cannot be accomplished with judicious use of § 2-302. Moreover, the dangers posed by

ted that the case law relying upon § 2-302 demonstrates that courts may use it flexibly to remedy numerous forms of standardized contract abuse.

IV
TOWARD A PRINCIPLE OF COMMERCIAL UNCONSCIONABILITY

As one examines the line of cases which have relied upon § 2-302, it is apparent that courts have been reluctant to articulate a set of rules for applying that section. Nonetheless, the courts citing § 2-302 have been guided by the commercial orientation of the section, and consequently their holdings have been quite consistent. Following the sense of the statute, courts have been unconcerned with concepts such as intent, consent, or volition. Instead, they have considered relevant the facts which concern the commercial setting of the cases. Many courts have even refused to render decisions or consider motions to dismiss until a hearing as to the commercial setting has been provided.[88]

From these cases have emerged two nascent concepts of unconscionability. First, as in *Henningsen*, courts have consistently inquired whether a reasonable consumer could be said to understand both the content and practical effect of the signed agreement.[89] Second, courts have examined parties' bargaining power to determine whether the consumer, because of a lack of such power, was forced to accept an oppressive contract or an oppressive clause within an otherwise reasonable contract.[90] When a contract either derogates reasonable expectations or is commercially oppressive, courts may limit the use of the agreement, invalidate part of it, or rule it entirely void.[91]

A. Reasonable Expectation

The abandonment of concepts of volition in favor of considerations of commercial expectation is well illustrated in an Ohio trial court's ruling in *Nosse v. Vulcan Basement Waterproofing Company*.[92] In this case a woman signed two contracts to have the basement of her home waterproofed. One

---

an occasional bad decision in this area, which may be distinguished, overruled or ignored, are less than those posed by a tightly-worded but ill-conceived statute.

As to any charge that § 2-302 relegates the field to case-by-case relief, this simply is not so. *See* Kugler v. Romain, 58 N.J. 522, 279 A.2d 640, 9 UCC REP. SERV. 559 (1971); State v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303, 3 UCC REP. SERV. 775 (Sup. Ct. 1966), where the court used § 2-302 as the standard for triggering a broad injunction and statutory fines in an action brought by the Attorney General.

88. *See* UCC § 2-302(2). As a result, courts have held that normal rules for summary judgment are inapplicable and a hearing as to the commercial setting must be provided. *See* Zicari v. Joseph Harris Co., 33 App. Div. 2d 17, 24, 304 N.Y.S.2d 918, 925, 6 UCC REP. SERV. 1246, 1252 (4th Dept. 1969); Fairfield Lease Corp. v. George Umbrella Co., 164 N.Y.L.J. 89 at 19, 8 UCC REP. SERV. 184 (Civ. Ct. 1970); Central Budget Corp. v. Sanchez, 53 Misc. 2d 620, 622, 279 N.Y.S.2d 391, 393, 4 UCC REP. SERV. 69, 71 (Civ. Ct. 1970). Similarly, demurrers cannot be sustained on the grounds of unconscionability. *See* Fredericks v. Hamm, 45 Pa. D. & C.2d 687, 690-99, 5 UCC REP. SERV. 666, 667 (Ct. of C.P. 1968). *See also* Cone Mills Corp. v. Hurdle, 369 F. Supp. 426, 437, 14 UCC REP. SERV. 1119, 1121 (N.D. Miss. 1974).

89. *See* text accompanying notes 92-110 *infra*.

90. *See* text accompanying notes 112-13 *infra*.

91. *See* UCC § 2-302(1).

92. 35 Ohio Misc. 1, 299 N.E.2d 708 (Mun. Ct. 1973).

contract, aside from a description of work and price, contained four clauses, each a different disclaimer of liability. Together these clauses effectively guaranteed no work unless the customer agreed to accept other, more expensive services. In effect, the contract put an unsuspecting customer on an escalator of needless, costly work.

After minor initial work was done, Mrs. Nosse discovered the ploy and sued for rescission of the contracts. The court found the contracts void under § 2-302 and returned her down payment. There was no question of unequal bargaining power: the facts imply that the woman was affluent and could have sought work elsewhere. Nor where the clauses hidden from view. The contract simply abused the expectations which a reasonable consumer would have held upon entering a contract to waterproof a basement.

Similarly, in *Ellsworth Dobbs, Inc. v. Johnson*,[93] the court refused to enforce a clause in a broker's agreement which required a seller of real estate to pay the broker's fee once a buyer had been found, regardless of whether that buyer finally consummated the deal. The court, relying upon *Henningsen*, stated that contractual obligations which were "at odds with the common understanding of the ordinary and untrained member of the public, are considered unconscionable and therefore unenforceable."[94]

In *Jefferson Credit Corp. v. Marcano*,[95] a case fraught with numerous forms of consumer abuse, a court refused to recognize a disclaimer of any warranties of merchantability, arguing that since this buyer did not understand English, mere awareness of large lettering was not enough to validate a clause.[96] The court held that either reasonable expectations must be fulfilled or the seller must prove that the consumer knew and understood the commercial import of what he was signing. Likewise in *Fairfield Lease Co. v. Umberto*,[97] a court refused to enforce an acceleration clause in a vending machine agreement which sought to force the defendant to pay unaccrued and unearned rent. Concluding that the defendant had no understanding of that clause, the court found the clause unconscionable.

The well known case, *Unico v. Owen*,[98] can also be viewed as a move toward a standard of commercial expectations. In this case a consumer ordered a set of records and a stereo from a mail order firm, the contract calling for monthly payments and monthly shipments of albums. After the company stopped sending the albums, the consumer stopped payments. She was then sued by an assignee of the contract who argued that the contract contained a waiver of defenses against assignees. While the court decided the case upon grounds other than unconscionability,[99] the court also ruled that the waiver and terms of payment were so one-sided as to be contrary to public policy under § 2-302.[100] That the imposition of these one-sided terms did not result from un-

93. 50 N.J. 528, 236 A.2d 843 (1967).
94. *Id.* at 554, 236 A.2d at 856.
95. 60 Misc. 2d 138, 302 N.Y.S.2d 390, 6 UCC REP. SERV. 602 (Civ. Ct. 1969).
96. *Id.* at 140-41, 302 N.Y.S.2d at 393-94, 6 UCC REP. SERV. at 605.
97. 164 N.Y.L.J. 10 at 10, 7 UCC REP. SERV. 1181 (Civ. Ct. 1970).
98. 50 N.J. 101, 232 A.2d 405 (1967).
99. The court held that the assignee was not a holder in due course and was thus not protected by such a waiver. *Id.* at 122, 232 A.2d at 416.
100. *Id.* at 123-26, 232 A.2d at 417-18. In Dean v. Universal C.I.T. Credit Corp., 114 N.J.

equal bargaining power is clear from the market: phonograph records are an extremely competitive product. They easily could have been purchased elsewhere under more favorable terms. The offense to the court's sense of justice seems rather to be the commercial surprise which these terms imposed. The waiver attempted to deny the consumer her most basic self-remedy—the refusal to pay if the contract is not performed. Such a deprivation would clearly transgress § 2-302's standard of reasonable expectation.

The largest single category of fact patterns which has arisen under § 2-302, contracts judged unconscionable as to price, is also best understood as involving breaches of commercial expectations. These cases have remarkably similar facts and holdings, though their rationales are hardly consistent. Among the cases involving questions of unconscionability as to price, six concerned door-to-door sales transactions,[101] and two concerned sales at retail establishments.[102] The former were all declared unconscionable, the latter not. This consistency occurred in spite of a flurry of often mixed rationales. Several courts ruled that a price-value disparity was unconscionable *per se*.[103] Others argued that unconscionability as to price was a matter of "meaningful choice."[104] In other instances, a court would maintain that a price-value disparity was also unenforceable because it was indicative of "fraud"[105] or "oppression."[106] None of these explanations, however, can explain the general consistency of court holdings, nor do they direct the reader to the cause of the abuse and thus, ultimately, to the proper remedy.

For instance, lack of "meaningful choice" is an ambiguous term which might mean either a lack of bargaining power (the inability to shop elsewhere for better terms), which compels a consumer to accept a stipulated set of terms, or a lack of choice resulting from ignorance of available alternatives. In the context of door-to-door sales, it is difficult to find a lack of choice resulting from a lack of bargaining power, for in each case the consumers did have alternative choices available. Indeed, the very evidence used to prove a price-

---

Super. 132, 275 A.2d 154 (App. Div. 1971), the court cited *Unico* for the proposition that waivers of defenses against assignees are per se void in consumer agreements even if the assignee is a holder in due course. *Id.* at 138, 275 A.2d at 157.

101. Kugler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971); Toker v. Perl, 103 N.J. Super. 500, 247 A.2d 701, 5 UCC REP. SERV. 1171 (L. Div. 1968), *aff'd on other grounds*, 108 N.J. Super. 129, 260 A.2d 244 (App. Div. 1970); Toker v. Westerman, 113 N.J. Super. 452, 274 A.2d 78, 8 UCC REP. SERV. 798 (Dist. Ct. 1970); Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969); 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 (Sup. Ct. 1967); State v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303, 3 UCC REP. SERV. 775 (Sup. Ct. 1966).

102. Morris v. Capital Furniture & Appliance Co., 280 A.2d 775, 9 UCC REP. SERV. 577 (D.C. Ct. App. 1971); Patterson v. Walker-Thomas Furniture Co., 277 A.2d 111 (D.C. Ct. App. 1971).

103. Toker v. Perl, 103 N.J. Super. 500, 503-04, 247 A.2d 701, 703, 5 UCC REP. SERV. 1171, 1173-74 (L. Div. 1968); Toker v. Westerman, 113 N.J. Super. 452, 454-55, 274 A.2d 78, 80, 8 UCC REP. SERV. 798, 799-800 (Dist. Ct. 1970); State v. ITM, Inc., 52 Misc. 2d 39, 53, 275 N.Y.S.2d 303, 321 (Sup. Ct. 1966).

104. Morris v. Capital Furniture & Appliance Co., 280 A.2d 775, 776, 9 UCC REP. SERV. 577, 579 (D.C. Ct. App. 1971); Jones v. Star Credit Corp., 59 Misc. 2d 189, 192, 298 N.Y.S.2d 264, 267 (Dist Ct. 1966).

105. State v. ITM, Inc., 52 Misc. 2d 39, 54, 275 N.Y.S.2d 303, 321-22, 5 UCC REP. SERV. 775, 794 (Sup. Ct. 1966).

106. Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 27, 274 N.Y.S.2d 757, 759 (Dist. Ct. 1966).

value disparity shows that the same goods might have been purchased for much less elsewhere.

While "fraud" seems to describe more closely the underlying inequity than does "lack of meaningful choice", "fraud", as discussed above, tends to ask a court to view a transaction as a single act rather than as one of numerous, identical acts. Therefore, a court using fraud as a basis for a decision may fail to render relief which will extend beyond the named parties to all similarly situated consumers who are bound by the same contract.

Unconscionability as to price is best thought of as a seller's failure to fulfill an emerging legal obligation to inform a customer of any terms that depart from common expectations—in these cases the expectancy of being charged a price competitive with other freezers, books, or other consumer products. Thus, in *State v. ITM, Inc.*,[107] the court criticized the defendant for, among other things, misrepresenting that the goods sold were not available elsewhere when, in fact, they were readily available at prices one-half to one-sixth the price for which the defendant was selling them. Consequently, the court held that the price was unconscionable *per se*. Similarly, the court in *Frostifresh Corp. v. Reynoso*[108] refused to enforce the price provisions of a retail contract because the purchaser was unfamiliar with either the commercial setting or the terms of the agreement. Indeed, in none of the cases in which the price was deemed unconscionable did the retailers proffer evidence that the purchaser was given fair notice of competitive prices.

On the other hand, the two cases in which the courts refused to rule a price-value disparity unconscionable involved purchases at retail establishments where the consumer was assumed to have shopped for the best price. In *Patterson v. Walker-Thomas Furniture Co., Inc.*,[109] a defendant claimed to be the victim of unconscionably high prices even though she had established a course of dealing with the store, buying goods on three separate occasions. It may fairly be assumed that under such circumstances the purchaser was able, and should have been expected, to shop for the best price. Indeed, in *Morris v. Capitol Furniture & Appliance Co., Inc.*,[110] the court, refusing to hold the contract price unconscionable under similar circumstances, affirmed the trial court's conclusion that the "defendant was free to indulge in comparative shopping."[111]

The importance of clarifying the common basis of these cases, namely, the derogation of reasonable expectations, again rests upon the importance of bringing to light those factors which tend toward abusive use of standardized agreements. If, for instance, price-value disparities are wrongly viewed as arising from a consumer's lack of alternatives, as the phrase "lack of meaningful choice" might imply, a court might believe it necessary to control the price directly, a judicially burdensome policy. On the other hand, once it is clear that price-value disparities arise because consumers are simply unaware that they

---

107. 52 Misc. 2d 39, 53, 275 N.Y.S.2d 303, 320-21 (Sup. Ct. 1966).

108. 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 (Sup. Ct. App. T. 1967).

109. 277 A.2d 111 (D.C. Ct. App. 1971).

110. 280 A.2d 775 (D.C. Ct. App. 1971).

111. *Id.* at 776.

have been charged prices grossly higher than reasonable alternatives, the proper remedy becomes clear: courts may simply enjoin the sellers from attempting to enforce contracts unless they can show that the consumer was reasonably aware of alternatives and that there was no unfair surprise.

In summary, it may be said that under § 2-302, businesses have the responsibility to offer contracts which make a reasonable consumer aware of both the terms being offered and the practical effect which those terms may have upon the transaction. Moreover, if the business solicits sales at a consumer's home it has the added responsibility of assuring that the consumer is given the same information regarding competitive products that would be reasonably available to a consumer in the market. Contracts which fail to embody these responsibilities have been and should be held invalid in whole or in part and their future use, or attempted enforcement, enjoined.

B. Commercial Oppression

In many types of transactions, however, a prohibition against unfair surprise does not always adequately protect the consumer. For instance, where the seller can dictate the terms of the agreement knowing that the consumer has no better alternative elsewhere, the seller is in a position to give notice of the terms of the contract and their import, refusing to change them. Under such circumstances, where the consumer has no bargaining power, the court achieves nothing by simply requiring the seller to give notice in the future. In contrast, a court, confronted with two parties who each have bargaining power, one of whom was the butt of commercial deception, has the relatively easy job of rescinding all contracts entered into under similar circumstances (presumably all, unless the seller can prove otherwise in particular cases) and enjoining the use of future deceptive practices. But a court faced with economic oppression has a much more difficult job. That court, if it wishes to police future wrongs, must allocate risks, as did the court in *Henningsen*.

The court in *Ellsworth Dobbs, Inc. v. Johnson*[112] faced just such a problem. The issue was whether the court should validate a clause in a real estate broker's contract which held a seller of the land liable for the broker's fee as soon as a willing purchaser entered into an agreement to purchase, regardless of whether the sale was consummated. The court ruled the clause in this particular case unconscionable on the grounds that it was at odds with the "common understanding of the ordinary and untrained member of the public."[113] This rationale was sufficient for the holding in point, but the court went on to argue that it would disregard any future clauses even though it might be shown that the buyer had notice of the substance of the clause and consciously agreed to it. Such dictum cannot be based upon the court's antipathy to binding people to unexpected allocations of risk; notice is no longer at issue. Instead, the court believed that there was little chance that the clause would be dickered over; brokers would simply demand its inclusion. This dictum is thus based upon the court's desire to allocate the cost of unconsummated deals in a manner deemed commercially fair. Because the consumers were in no position to demand such an allocation, the court ordered it.

112. 50 N.J. 528, 236 A.2d 843 (1967).
113. *Id.* at 554, 236 A.2d at 856.

The "correctness" of this ruling depends upon the social desirability of distributing certain inherent market risks. In sales of property, every transaction presents the possibility that at the last moment financing may fall through, or other unforeseen circumstances may arise which will terminate the deal. When this happens, who should pay the broker for his lost time? The dictum in *Ellsworth Dobbs* indirectly compels all sellers of land to bear their part of this cost of lost time, rather than having the burden fall, by chance, upon single, unfortunate individuals. The broker, not able to charge these individuals directly, will probably attempt to recoup the cost of this time in slightly higher broker's fees for those sales which are completed.

While such a distribution of risk is compatible with common conceptions of fairness, such excursions into risk allocation must be carefully examined, as a wrong decision will cause the market to suffer damaging price distortions. For example, assume a professional photographer purchased a roll of film which the manufacturer, disclaiming responsibility for any consequential damages, would only guarantee to replace if defective. Further assume that all the sellers of film carried such limitations upon liability, leaving the purchaser no choice but to accept such risk of film failure. The photographer takes this film to an important event, and takes a series of photographs which he/she is under contract to sell to magazines. As it turns out, the most crucial roll is defective, costing the photographer thousands of dollars. Should the court demand the film company to pay for the damage? If the court requires the company to pay such damages, the company may raise the price of its film, causing those who buy the film for family pictures to subsidize the risks of professional photography. What if the film is a special high-cost brand marketed especially for professionals? In such circumstances, perhaps so.

Even more problematic was the decision faced by the court in the bankruptcy proceedings of *In re Elkins-Dell Manufacturing Co.*[114] There a financial institution loaned money to a financially troubled company, demanding that, in return for the loan, the company agree that it would not borrow elsewhere without the lender's permission. Nonetheless, the financial institution was under no obligation to loan further funds. The referee, citing *Campbell Soup*,[115] ruled that such terms were unconscionable. The district court, however, understood that a blanket proscription against such clauses might effectively deny many financially weak companies access to any loans: banks and other lenders would simply refuse to lend money without such restrictions. Was the court in the position to make such a social choice? It determined that it was not, absent an in-depth analysis of the market. The case was thus remanded with the ultimate question being "whether these contracts were, in the light of all the circumstances, reasonable commercial devices."[116] Before reaching this decision, the referee was asked to determine:

> . . . whether the terms of these contracts facilitated commerce by making funds available where they otherwise would not be or impeded commerce by precluding access to other sources of funds; and the effects of holding

114. 253 F. Supp. 864 (E.D. Pa. 1964).
115. 172 F.2d 80 (3d Cir. 1948).
116. 253 F. Supp. at 874.

these contracts unenforceable in bankruptcy on the future financing of similar businesses in need of funds.[117]

These questions are as important as they are difficult and can be safely answered only after a broad study of the lending market, an undertaking better suited to legislative committees than to courts. It is perhaps for this reason that, where parties are commercially sophisticated or where the impact of the decision is unclear, courts usually refuse to tread beyond the perimeter of commercial expectations. For instance, courts have refused to hold unilateral terminations of franchise agreements without cause as unconscionable under § 2-302.[118] These decisions may well have rested on the ground that it would be too difficult to foresee the market-wide consequences of such a holding. Similarly, the comment to § 2-302 cautions courts against allocating such risks.[119]

Section 2-302 need not be read as forbidding courts to allocate obligations and risks where a lack of bargaining power leads to a contract or clause which cannot be reasonably justified. On the contrary, where the risk is unarguably within the control of one party, as was the case in *Henningsen*, or where the risk may be reasonably distributed among many similarly situated parties, as was the case in *Ellsworth Dobbs*, § 2-302 invites judicial intervention. However, if a court finds that a proper ruling can be made only after investigating numerous possible market ramifications of a judicially-stipulated set of terms, as was the case in *Elkins-Dell*, that court is well advised to defer to the legislature the task of sifting and weighing the often complex and far-reaching factors which influence risk allocation among commercially sophisticated parties.

V
CONCLUSION

Over the past thirty years scholars and courts have acknowledged that a model of contract based upon private bargaining and consent can neither adequately describe nor solve the problems arising from the mass use of standardized agreements. Karl Llewellyn, principal architect of Article Two of the UCC, argued that the standardized contract should be evaluated within a commercial context, a context not peculiar to individual litigants but reflective of the considerations and forces which affect all consumers similarly situated.[120] Llewellyn implanted that argument into § 2-302 of the UCC, believing that courts, guided by a principle of fair dealing and directed to the commercial setting, would establish proper standards and rules with which to police contract abuse.[121]

Within the last ten years numerous decisions governed by § 2-302 have fulfilled Llewellyn's expectations. This constellation of cases has gravitated closely to the following rules, rules which first began to emerge in a pre-UCC

---

117. *Id.*

118. Artman v. Int'l Harvester Co., 355 F. Supp. 482 (W.D. Pa. 1973); Div. of Triple T Service, Inc. v. Mobil Oil Corp., 60 Misc. 2d 720, 304 N.Y.S.2d 191 (Sup. Ct. 1969).

119. Paragraph 1 of the comment to Section 2-302 states: "The principle is . . . not of disturbance of allocation of risks because of superior bargaining power."

120. *See* text accompanying notes 58-61 *supra*.

121. *See* text accompanying notes 77-80 *supra*.

case[122] in which the court, as if guided by § 2-302, chose to examine a standardized contract within a commercial context and against standards of fair dealing:

> i. A contract or clause is an unfair surprise and thus unconscionable if a reasonable buyer would be either unaware of such clause or ignorant of its effect upon the transaction.
> ii. A contract or clause is oppressive and thus unconscionable if the consumer is forced to accept, because of lack of bargaining power, a commercially unreasonable risk or obligation. A consumer has no bargaining power if he/she could neither bargain with the seller over terms nor have a choice of terms from among several sellers.

Unconscionability understood within this framework directs courts to considerations relevant to the public nature of standardized contracts. Coupled with the powers given to courts by the many state consumer protection acts, § 2-302 allows courts to render relief to groups of consumers oppressed by identical contracts or clauses. Furthermore, § 2-302 allows such rulings without threatening courts with the burden of regulating prices or juggling complex allocations of commercial risk.

The doctrine of unconscionability, as embodied in § 2-302 was intended to police the use of standardized contracts. It has gained acceptance not because it completely settles all problems related to the use of standardized contracts, but because it promises success for solving one problem, felt to be acute, better than earlier equitable doctrines. We may hope that courts will use this doctrine to protect all those for whom protection is needed, not only those fortunate enough to have their individual cases brought to the attention of the courts.

H. JAMES STEDRONSKY

122. *See* text accompanying notes 62-70 *supra*.