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submitted that the theory adopted by the court in the principal case, supplemented by the retrospective valuation formula suggested herein, will be adequate as long as the section 1378 right remains an element in condemnation proceedings.

UNCONSCIONABILITY IN CONSUMER SALES CONTRACTS—A DEFENSE TO ACTIONS AT LAW, AND UNDER THE UCC

Plaintiff, operator of a retail furniture store, sold a five hundred dollar stereo set on installment contract to defendant Williams, knowing that defendant supported herself and seven children on a two hundred eighteen dollar monthly welfare payment.[1] At the time defendant bought the set, she owed plaintiff one hundred sixty four dollars on thirteen prior purchases.[2] The form contract provided that plaintiff would retain title to all items purchased until the purchaser had paid all amounts due in full, and that the debt on each item was secured by the right to repossess all items purchased.[3] When defendant defaulted shortly after purchasing the stereo, plaintiff sued to replevy all items purchased by her since 1957. The trial court granted judgment for plaintiff, rejecting defendant's contention that the contract was not enforceable because unconscionable. The District of Columbia Court of Appeals affirmed. The United States Court of Appeals for the District of Columbia reversed, and remanded for the taking of evidence

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[1] The name of defendant's social worker and the amount of her monthly stipend were written on the back of the contract.

[2] Since December 1957, defendant had purchased thirteen items for a total of $1800.

[3] The contract set out the value of the item and purported to lease it to the purchaser for a monthly rental payment. However, title was to pass to the purchaser when the total of the payments made equalled the stated value. The contract further provided that:

> the amount of each periodical installment payment to be made by [purchaser] to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by [purchaser] under such prior leases, bills or accounts; and all payments now and hereafter made by [purchaser] shall be credited pro rata of all outstanding leases, bills and accounts due the Company by [purchaser] at the time each such payment is made.

The court analyzed the provision as follows, 350 F.2d at 447:

> The effect of this rather obscure provision was to keep a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated. As a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of the previous dealings.

on possible unconscionability. *Held:* A contract is unenforceable if there was present an element of unconscionability at the time the contract was made. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).[5]

Traditionally, the equitable defense of unconscionability has been available in actions at law only in regard to contracts "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."[6] The courts' refusal to extend the defense to other types of contracts has generally been attributed to their respect for the principle of freedom of contract.[7] In practice, however, courts have frequently avoided enforcement of unconscionable contracts by strained interpretation of the contractual provisions, and by manipulation of the flexible doctrines of assent, mutuality, and consideration.[8] To avoid the difficulties inherent in such approaches to the problem,[9] and to make it possible for the courts "to police explicitly against the contracts or

[4] Williams v. Walker-Thomas Furniture Company, 198 A.2d 914 (D.C. Ct. App. 1964). The court explained its rejection of defendant's contention of unconscionability as follows, *id.* at 916:

> We cannot condemn too strongly appellee's conduct. It raises serious questions of sharp practice and irresponsible business dealings. A review of the legislation in the District of Columbia affecting retail sales and the pertinent decisions of the highest court of this jurisdiction disclose, however, no ground upon which this court can declare the contracts in question contrary to public policy. . . . We think Congress should consider corrective legislation to protect the public from such exploitive contracts as were utilized in the case at bar.

[5] 54 GEO. L. J. 703 (1966), 79 HARV. L. REV. 1299 (1966), 17 So. CAR. L. REV. 774 (1965).

[6] Earl of Chesterfield v. Janssen, 2 Ves. 125, 155, 28 Eng. Rep. 82, 100 (Ch. 1750). *Accord*, Thornborow v. Whitacre, 2 Ld. Raym. 1164, 92 Eng. Rep. 270 (K. B. 1706); James v. Morgan, 1 Lev. 111, 83 Eng. Rep. 323 (K. B. 1664); Hume v. United States, 132 U. S. 406 (1889) (dictum).

[7] See, *e.g.*, Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 633, 637 (1943); Llewellyn, Book Review, 52 HARV. L. REV. 700, 702 (1939); Note, 45 IOWA L. REV. 843, 844-45 (1960).

[8] 1 CORBIN, CONTRACTS § 128 (1963); LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 364-65 (1960); Llewellyn, Book Review, *supra* note 7, at 702.

[9] Professor Llewellyn pointed out the difficulties in his Book Review, *supra* note 7, at 703 (1939):

> First, since they all rest on the admission that the clauses in question are permissible in purpose and content, they invite the draftsman to recur to the attack. . . . Second, since they do not face the issue, they fail to accumulate either experience or authority in the needed direction; that of marking out for any given type of transaction what the *minimum decencies* are which a court will insist upon as essential to an enforceable bargain of a given type .... Third, since they purport to construe, and do not really construe, nor are intended to, but are instead tools of intentional and creative misconstruction they seriously embarrass later efforts at true construction, later efforts to get at the true meaning of those wholly legitimate contracts and clauses which call for their true meaning to be got at instead of avoided. The net effort is unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy. Covert tools are never reliable tools.

clauses which they find to be unconscionable,"[10] section 2-302 was included in the Uniform Commercial Code:[11]

> (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.
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> (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.

The court in the principal case approached the issue, whether to refuse enforcement to unconscionable contracts, as a matter of first impression. From decisions in other jurisdictions, the court observed that the idea that unconscionable bargains should not be fully enforced was neither novel[12] nor uncommon.[13] Although the Uniform Commercial Code was not enacted in the District of Columbia until after the contract in issue had been executed,[14] the court reasoned that enactment of section 2-302 did not necessarily change the law, nor preclude the court from adopting a similar rule "in the exercise of its powers to develop the common law."[15] The court concluded that, in the absence of prior authority on the question, the enactment of section 2-302 supplied persuasive authority for following the rationale of the cases from which the section was derived.[16]

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[10] Uniform Commercial Code [hereinafter cited as UCC] § 2-302, Comment 1.

[11] WASH. REV. CODE § 62A.2-302 (1965). California enacted the UCC without this section.

[12] The court cites, 350 F.2d at 448 n.3: Hume v. United States, 132 U.S. 406 (1889) (dictum) (discussion of English authorities); Scott v. United States, 79 U.S. (12 Wall.) 443 (1870); Schnell v. Nell, 17 Ind. 29 (1861); Luing v. Peterson, 143 Minn. 6, 172 N.W. 692 (1919); Greer v. Tweed 13 Abb. Pr. (n.s.) (N.Y.C.P. 1872).

[13] For this proposition, the court cites, 350 F.2d at 448 n.2: Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948); Indianapolis Morris Plan Corp. v. Sparks, 132 Ind. App. 145, 172 N.E.2d 899 (1961); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). Of the three, only *Henningsen* directly supports the proposition that enforcement in actions at law may be refused on grounds of unconscionability. *Campbell Soup* was an action for specific performance, and the court stated that, had the action been at law, its decision would have been different. In *Indianapolis Morris Plan*, the court refused enforcement for lack of consideration, and indicated that, although it would have liked to hold the clauses in question void as against public policy, it was unable to do so because it could conceive of situations in which such clauses could be valid.

[14] The UCC was enacted on December 30, 1963, and went into effect on January 1, 1965. 77 Stat. 630 (1963). The contract in question was executed in April of 1962.

[15] 350 F.2d at 449.

[16] See UCC § 2-302, Comment 1.

The primary importance of the decision in the principal case lies in the court's discussion of unconscionability. Since the term "unconscionable" is not defined in the Uniform Commercial Code,[17] the court's analysis provides valuable precedent for cases subsequently arising under section 2-302. The court's conception of unconscionability is comprised of two major components: "absence of meaningful choice on the part of one of the parties," and "contract terms which are unreasonably favorable to the other party."[18]

The question of meaningful choice in the context of form contracts normally arises in relation to particular clauses of a contract, rather than to the transaction as a whole.[19] "Absence of meaningful choice," as used by the court in the principal case, may mean either that the purchaser had no choice as to inclusion of particular clauses in the contract, or that he exercised no choice as to their inclusion because he was unaware of their meaning, full import, or presence.[20] In exploring this first component of unconscionability, the court stressed several factors which may lead to the conclusion that the purchaser either had no choice, or exercised no choice.

The relative bargaining power of the parties is the most important factor in determining whether the purchaser had any choice as to the inclusion of particular clauses in the contract. The court in the principal case pointed out that "in many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power."[21] *Henningsen v. Bloomfield Motors, Inc.*[22] furnishes an example of such a situation. On grounds of unconscionability, the court in *Henningsen* refused to enforce an express warranty, coupled with a disclaimer of all other warranties, in a contract for the sale of a new automobile, as a limitation of liability.[23] The warranty involved was used by all

[17] For discussions of § 2-302, see 58 DICK. L. REV. 161 (1954); 45 IOWA L. REV. 843 (1960); 18 U. CHI. L. REV. 146 (1950); 45 VA. L. REV. 583 (1959).

[18] 350 F.2d at 449.

[19] The typical consumer sales contract transaction may be divided analytically into two parts: the bargained-for items such as price, quantity, and quality; the written form containing the collateral provisions which limit the seller's risks and promote his security. Typically, it is as to these collateral provisions that the question of meaningful choice arises. LLEWELLYN, *op. cit. supra* note 8, at 371; Llewellyn, *supra* note 8, at 700; 18 U. CHI. L. REV. 146-47 (1950).

[20] See 350 F.2d at 449.

[21] 350 F.2d at 449.

[22] 32 N. J. 358, 161 A.2d 69 (1960).

[23] The warranty clause read, 161 A.2d at 74:

> The manufacturer warrants each new motor vehicle (including original equipment placed thereon by the manufacturer except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty being limited to making good at its factory any part or parts thereof which shall, within ninety

major American automobile manufacturers and dealers. Thus, if the purchaser wished to buy an American automobile, he had no choice but to accept the warranty. The gross inequality of bargaining power between the individual consumer and the automobile industry precluded any choice by the consumer as to inclusion or exclusion of the warranty clause.

Campbell Soup Co. v. Wentz[24] furnishes another example of a case in which meaningful choice was largely vitiated by inequality of bargaining power. In *Campbell,* the court refused to grant specific performance of a contract to grow and deliver carrots because Campbell Soup Co. had driven "too hard a bargain and too one-sided an agreement."[25] Campbell had used its superior bargaining power to allocate virtually all risks of performance to the grower.[26]

Several factors are important in determining whether a purchaser exercised any choice as to the particular clauses in the contract. Basically, the question is whether the purchaser had a reasonable opportunity to understand the terms of the contract.[27] His education is obviously relevant. The language used may be crucial. If it is either unintelligible to a layman,[28] or misleading as to the import of the clause,[29] the purchaser may not have been able to understand it.

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(90) days after delivery of such vehicle to the original purchaser or before such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its part . . . .

[24] 172 F.2d 80 (3d Cir. 1948), 58 YALE L. J. 1161 (1949).

[25] *Id.* at 83.

[26] The court's emphasis on bargaining power as an important determinant of unconscionability may be interestingly compared with the statement in Comment 1 to § 2-302:

> The principle is one of the prevention of oppression and unfair surprise (Cf. Campbell Soup Co. v. Wentz . . .) and not of disturbance of allocation of risks because of superior bargaining power.

It is argued in a note, 45 IOWA L. REV. 843, 849, 862 (1960), that a literal interpretation of this Comment would largely vitiate the more significant potentialities of § 2-302 because "the problem of unconscionable contracts is inseparably linked to the problem of controlling economic bargaining power." However, the author suggests that citation of the *Wentz* case introduces an ambiguity into the Comment which a progressive court can justifiably exploit to develop "an effective tool for dealing with the central problem in unconscionable commercial contracts—the control of disproportionate economic power." Although the court in the principal case did not discuss this ambiguity, it may be inferred from its emphasis on bargaining power that it is a "progressive court."

[27] 350 F.2d at 449.

[28] The "add-on" clause used in the principal case, reprinted *supra* note 3, was couched in language which would seem unintelligible to the average layman.

[29] In Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 92-93 (1960), the court pointed out that, although an ordinary layman reading the warranty (reprinted *supra* note 23) might well conclude that the manufacturer would replace defective parts within a specified period only, he would not realize that, by accepting

Other factors which are indicative of the purchaser's opportunity to understand the terms of the contract are the size of the print used and the placement of critical clauses on the form. An extreme example of a contract form which gave the purchaser little opportunity to understand its terms was *New Prague Flouring Mill Co. v. Spears*,[30] in which a four thousand word contract was printed on one eight-by-five inch sheet of paper.

Sales practices may also be used to divert the purchaser's attention from important clauses in the contract, and thus deprive him of a reasonable opportunity to understand the terms of the contract. All of these factors—sales practices, bargaining power, purchaser's education, print size, clause placement, language—must be considered together with all other circumstances[31] surrounding the transaction in order to determine whether there was "an absence of meaningful choice on the part of one of the parties."

The second major component of the court's concept of unconscionability—"contract terms which are unreasonably favorable to the other party"—must also be determined in light of all the circumstances surrounding the transaction.[32] However, not only the immediate circumstances, but also the general commercial background and needs of the trade must be considered.[33] The court recognized that a test for determining reasonableness could not be simple, or mechanically applied.[34] Although not faced with the question of reasonableness,[35] the court adopted the test suggested by Professor Corbin: whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place."[36] Although the court did not devote much discussion to this component of unconscionability, it would seem to be fully as important as the absence of meaningful choice.

In the context of consumer sales contracts, the determination of meaningful choice depends on the peculiar characteristics of the in-

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the warranty, he gave up any personal injury claim arising from a defective automobile. The court stated that "the draftsmanship is reflective of the care and skill of the Automobile Manufacturers Association in undertaking to avoid warranty obligations without drawing too much attention to its effort in that regard."

[30] 194 Iowa 417, 189 N.W. 815 (1922).

[31] Another circumstance, which would obviously be relevant in the principal case, was that the seller knew of defendant's financial condition. See note 2 *supra*.

[32] 350 F.2d at 450.

[33] See UCC § 2-302, Comment 1.

[34] 350 F.2d at 450.

[35] Since no findings as to possible unconscionability had been made below, the court remanded the case to the trial court for further proceedings.

[36] 1 CORBIN, CONTRACTS § 128 (1963).

dividual purchaser. Because of the individualized nature of the determination whether a purchaser had a meaningful choice, a determination that this first component of unconscionability is present will seldom have wider application than to the case before the court.[37] On the other hand, a determination that the terms of the contract are unreasonably favorable to the seller will apply to all similar terms in that trade, because unreasonableness is determined by the commercial background. Thus, a finding that the second component of unconscionability is present has a potentially far greater impact on the business community than a finding that the first component is present.

The decision in the principal case raises interesting questions as to how much care the court will require of the seller. How much care must he take to insure the purchaser of a reasonable opportunity to understand the terms of the contract? Must he explain, at his peril, the contract provisions? Is he bound to inquire into the purchaser's education and financial status? A partial answer to these questions may be found in the comment to section 2-302: "The principle is one of the prevention of oppression and unfair surprise ...." One commentator concluded that "unconscionable," as used in the Code, "is roughly equivalent to 'grossly unfair'."[38] It would seem that, under section 2-302, the courts will require the seller to refrain from grossly overreaching the purchaser, but will not require him to inquire into any peculiar characteristics of the purchaser which are not known or obvious to the seller. Beyond this, further development must be left to the courts in case-by-case application of section 2-302.

The court's adoption of the Corbin test raises a question as to what it would do with contract terms which are socially undesirable, but commercially useful and widespread.[39] Professor Llewellyn has argued that the greatest social need regarding adhesion or form contracts is for the courts to spell out the minimum decencies required in commercial transactions.[40] He suggested that:[41]

[W]here bargaining is absent in fact, the conditions and clauses to be

[37] On the other hand, a finding, such as that in *Henningsen,* that the purchaser had no effective choice because of his inferior bargaining position would probably apply to almost all other individual consumers.

[38] Note, 45 IOWA L. REV. 843, 849 (1960).

[39] The warranty clause in *Henningsen, supra* note 23, is a good example of a socially undesirable clause, but yet reasonable when measured by commercial practices.

[40] Llewellyn, *supra* note 8, at 703.

[41] *Id.* at 704.

> read into a bargain are not those which happen to be printed on the unread paper, but are those which a sane man might reasonably expect to find on that paper. The background of trade practice gives a first indication; the line of authority rejecting unreasonable practice offers the needed corrective.

Thus, although deference would be given to the commercial background, a commercially reasonable, but socially undesirable, contract provision could be refused enforcement when there was an absence of meaningful choice.[42]

Such an approach at present may be too disruptive of commercial practices, however.[43] In this initial stage of development of the concept of unconscionability under the Code,[44] the court's adoption of the Corbin test may represent a wise use of judicial discretion to proceed gradually. If it later appears that there are serious abuses of freedom of contract through widespread commercial practices, which cannot be remedied under the Corbin test, it will be time enough to adopt another test giving more weight to consumer needs.

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[42] See 54 GEO. L.J. 703, 708 (1966) for a brief discussion of the importance of the principal case in giving to indigents needed protection from unethical business practices which are not prohibited by statute.

[43] The dissent in the principal case, 350 F.2d at 450, emphasizes the need for a cautious approach to the problem of unconscionable contracts in light of the great latitude which the law has for so long allowed the parties in making contracts, and in light of the thousands of consumer installment credit transactions which will be affected.

[44] American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964), appears to be the only case decided under § 2-302 to date.