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UNCONSCIONABILITY UNDER THE UNIFORM COMMERCIAL CODE—TWO TRENDS IN CASES DECIDED ON UNCONSCIONABILITY GROUNDS

INTRODUCTION

The debates on the wisdom underlying the Uniform Commercial Code's doctrine of unconscionability¹ as contained in section 2-302, and the draftsmanship involved in that section have been protracted and thorough. The controversy has drawn many authorities into the arena, for the most part, to discuss the theoretical analyses of the section and the possibilities for its misinterpretation and abuse.² Any attempt to add to the controversy at this time would, at best, only cause confusion. However, a practical look at what the courts have done and are doing with the concept of unconscionability and with section 2-302, the Code's version of unconscionability, reveals some interesting trends.

The purpose of this note then, is to identify two such trends discernable from a study of the cases involving section 2-302 of the Code. The first trend is the expansion of the section 2-302 concept of unconscionability to areas that appear to be outside the domain of Article 2 of the U.C.C. The section has been applied in some jurisdictions prior to the Code's enactment,³ and it has been applied to contracts other than for the sales of goods.⁴ Some commentators have

1. The UNIFORM COMMERCIAL CODE will hereafter be referred to as the CODE or the U.C.C. Section 2-302 presents the CODE's doctrine of unconscionability. In the 1962 draft it reads:

§ 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 of 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.

2. Some of the major articles on the subject include: Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); Davenport, *Unconscionability and the Uniform Commercial Code*, 22 U. MIAMI L. REV. 121 (1967); Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969).

3. See, e.g., *Fairbanks, Morse & Co. v. Consolidated Fisheries Co.*, 190 F.2d 817, 822 n.9 (3rd Cir. 1951).

4. Section 2-102 of the U.C.C. explains that Article 2 applied to "transactions in goods;" see notes 10 & 15 *infra* for cases on expansion.

suggested that there is no justification for the expansion of the 2-302 concept of unconscionability to areas beyond the purview of Article 2.⁵ Others have observed that for various reasons, it is an anticipated and welcomed development.⁶

The second area to be discussed involves the requirement of 2-302(2) that a hearing on commercial circumstances be held when unconscionability is put in issue.⁷ Thus, while many courts have been exacting in their demands that hearings on commercial circumstances be held when unconscionability is in issue, other courts have indicated that an excessively high price can constitute unconscionability per se.⁸ In analyzing these two apparently contradictory lines of decisions, a trend toward judicial protection of the consumer seems discernable.

THE EXPANSION OF SECTION 2-302(1) BEYOND ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE

Article 2 of the Code is entitled "Sales"; furthermore, section 2-102 defines the scope of the article as "transactions in goods." However, while some authorities and at least one court decision have restricted the application of section 2-302 to the scope of Article 2,⁹ the majority of decisions and commentators favor the expansion of the Code's unconscionability concept to contract law in general. By the use of various rationales, unconscionability has been found applicable to franchise contracts and distributorships,¹⁰ equipment leases,¹¹ real es-

5. Leff, *supra* note 2, discusses the "emotionally satisfying incantation" at 533-537.

6. King, *New Conceptualism of the Uniform Commercial Code*, 10 St. L.U.L.J. 30 (1965) and 11 St. L.U.L.J. 15 (1966); Note, 48 ORE. L. REV. 209 (1969).

7. See note 1, *supra* for the full text of 2-302(2); Comment 1 explains that "Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions." Comment 3 notes that: "The commercial evidence referred to in subsection (2) is for the court's consideration, not the jury's. Only the agreement which results from the court's action on these matters is to be submitted to the general triers of the facts." The "basic test" is explained in Comment 1 as "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."

8. The line of cases finding high price unconscionable per se began with *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964). The cases demanding a hearing can be traced back to *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

9. See, e.g., *In re Advance Printing & Litho Co.*, 4 U.C.C. REP. 838 (3rd Cir. 1967); Leff, *supra* note 2, at 533; Ireton, *The Commercial Code*, 22 Miss. L.J. 273 (1951).

10. *Triple T Service v. Mobile Oil Corp.*, 60 Misc. 2d 720, 304 N.Y.S.2d 191 (Sup. Ct. 1969); *Sinkoff Beverage Co. v. Schlitz Brewing Company*, 51 Misc. 2d 446, 273 N.Y.S.2d 364 (Sup. Ct. 1966).

11. *Electronics Corporation of America v. Lear Jet Corp.*, 55 Misc. 2d 1066, 286 N.Y.S.2d 711 (Sup. Ct. 1967); *Fairfield Lease Corp. v. Colonial Aluminum Sales, Inc.*, 3 U.C.C. Rep. 858 (N.Y. Sup. Ct. 1966).

tate broker contracts,¹² secured transactions,¹³ bank deposit contracts,¹⁴ and loans to corporations.¹⁵

One of the methods used to apply section 2-302 to contracts other than those for transactions in goods is the concept that the rationale underlying a statute, even one which does not apply to the instant fact situation, should be given, at least, the same consideration as existing case authority. The concept is not novel, for one of the more famous analyses of this proposition is Dean Pound's *Common Law and Legislation* which was published in 1908.¹⁶ Before the turn of the century, legal scholars began to realize that the sophisticated, scientifically prepared legislation that was being enacted was valuable not only in the limited scope where it had to be applied, but also in analogous situations. There are several instances in which American and English common law have been based on reasoning derived from ancient analogous statutes.¹⁷ In general, however, Pound's prediction that legislation will exceed case precedent as a source of authority for practical decisions, has not yet come to pass.¹⁸ This may be because the legislatures generally have not yet developed into the scientific developers of enlightened legislation that had been envisioned. The multiplicity of jurisdictions, reams of legislation, and inadequate catalogue and cross reference systems have made attempts at legislative research difficult. Moreover, the judiciary has been reluctant to change from the tradition of *stare decisis*.¹⁹ Consequently, judicial application of legislation beyond its particular subject remains exceedingly narrow.²⁰

Pound's example of statutes which should be used by the courts as authority in analogous situations was the Uniform Acts.²¹ Proponents of the concept have continued to use uniform acts as prime examples because they are generally thoughtfully drafted, comprehensive legislation. They indictate implementation of well established concepts, and are prepared by committees of professional experts. Thus, it has been argued, although a uniform act may not specifically apply to a par-

12. *Kaye v. Coughlin*, 443 S.W.2d 612 (Tex. Ct. App. 1969).

13. *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967).

14. *David v. Manufacturers Hanover Trust Co.*, 59 Misc. 2d 248, 298 N.Y.S.2d 847 (Sup. Ct. 1969).

15. *Whitestone Credit Corp. v. Barbory Realty Corp.*, 5 U.C.C. Rep. 176 (N.Y. Sup. Ct. 1968).

16. 21 HARV. L. REV. 383 (1908).

17. See Traynor, *Statutes Revolving in Common Law Orbits*, 17 CATH. U. AM. L. REV. 401, 405-423 (1968), for a discussion of some of these instances.

18. Pound, *supra* note 16, at 400, 407.

19. Traynor, *supra* note 17, at 425-427; See Note, 65 COLUM. L. REV. 880 (1965).

20. See Note, 65 COLUM. L. REV. 880, 894 (1965); Note, 78 HARV. L. REV. 1595, 1605 (1965) for an example of one area of strict statute interpretation.

21. Pound, *supra* note 16, at 405.

ticular case, its underlying rationale should be authoritative, and its principles applied.

The Uniform Commercial Code is the most extensive and successful uniform act.²² Its application to "transactions in goods"²³ covers so much of the commercial realm that analogy to the remainder is almost inevitable. The drafters of the Code apparently envisioned that it would be authority for judicial decisions in areas it did not explicitly cover.²⁴ Various sections and comments indicate that intention. Section 1-102(2)(b) explains that the act is to be liberally interpreted for "continued expansion of commercial practices through custom, usage and agreement of parties."²⁵ Comment 1 of section 2-105 suggests application of sections of Article 2 by analogy to investment securities where it may be proper.²⁶

Most uniform acts have one or more general principles that permeate their structure. Section 1-203 of the Code expressly makes "good faith" such a principle. This general principle appears to be the type of provision most likely to be applied by courts to situations beyond those required by the statute, since, by its very nature, it is applicable to a broad range of problems.²⁷

While some decisions indicate an unwilling attitude toward expansion of the Code's authority,²⁸ the general trend has been to the contrary. Courts in some jurisdictions have brought the common law into line with the Code even prior to its enactment.²⁹ Federal cases concerning government contracts and bankruptcy are applying the

22. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 6-12 (1967); the CODE has been enacted in every state except Louisiana, and it has been enacted into law in the District of Columbia and the Virgin Islands.

23. See, U.C.C. section 2-102 and note 3 *supra*.

24. See, U.C.C. section 1-102 and Comment 1, section 2-105 and Comment 1, section 2-313 and Comment 2.

25. Although one might view section 1-102 and its comments as not suggesting any expansion of the CODE's scope, the court in *Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House*, 59 Misc. 2d 226, 298 N.Y.S.2d 392 (Civ. Ct. 1969), used this section as an example of the drafters expressed intention of encouraging expansion of the CODE to areas not specifically covered.

26. The relevant paragraph of Comment 1 section 2-105 reads:

'Investment securities' are expressly excluded from the coverage of this Article. It is not intended by this exclusion, however, to prevent the application of a particular section of this Article by analogy to securities . . . when the reason of that section makes such application sensible and the situation involved is not covered by the Article of this Act dealing specifically with such securities.

27. King, *supra* note 6 contends that the three underlying principles of the U.C.C. are good faith, unconscionability and responsibility.

28. *Hamm Brewing Co. v. First Trust and Savings Bank of Kankakee*, 103 Ill. App. 2d 190, 242 N.E.2d 911 (1968); See note 9, *supra*.

29. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Galler v. Galler*, 32 Ill. 2d 16, 203 N.E.2d 577 (1965); *Kanton v. U.S. Plastics*, 248 F. Supp. 353 (D.N.J. 1965).

Code by analogy because of its authority.³⁰ Cases involving commercial transactions not expressly governed by the Code are being decided with an ever expanding interpretation of its applicability.³¹

Section 2-302 has often been cited as an example of a Code section which lends itself particularly well to expansion into areas previously not covered by the Code. The section lends itself to expansion because of its broad language and because it enumerates an underlying principle of the Code.³²

Some of the cases extending the application of section 2-302 have used this rationale. In the two bankruptcy cases of *In re Elkins-Dell Manufacturing Co.* and *In re Dorset Stell Equipment Co.*,³³ the referee found that the finance company which the bankrupts had been dealing with had used their necessitous financial situation to its undue advantage. The finance contracts were found to be unconscionable because many of the terms were oppressive. The referee reached his decision in these cases on the authority of the good faith principles of U.C.C. section 1-102 as implemented in section 2-302. Alternatively, he found that the principles of equity permitted him to refuse to enforce the contracts. On appeal, the district court specifically required that the hearing procedure of section 2-302(2) be applied to the cases. Although it based its order remanding for the hearing on its equity powers, the court relied heavily on the rationale embodied in 2-302.³⁴

In *Triple T Service, Inc. v. Mobil Oil Corp.*,³⁵ the court noted that:

At first blush one might assume that the Uniform Commercial Code does not reach franchise or distributorship agreements However, the courts have not been reluctant to enlarge the type of commercial transaction clearly encompassed within the spirit and intentment of the statute.³⁶

The plaintiff in this case claimed that a clause in a distributorship contract permitting the defendant to terminate the contract without cause was unconscionable. The court decided that unconscionability, as expressed in section 2-302, could apply to distributorship contracts. However, because the plaintiff failed to claim unfair surprise or op-

30. See *United States v. Wegematic Corp.*, 360 F.2d 674 (2nd Cir. 1966); *In re Yale Express System, Inc.*, 370 F.2d 433 (2nd Cir. 1966).

31. See note 25, *supra*.

32. Traynor, *supra* note 17; King, *supra* note 6, Harrington, *Unconscionability under the Uniform Commercial Code*, 10 S. TEX. L.J. 203 (1968); Note, 65 COLUM. L. REV. 880 (1965); Note, 42 TUL. L. REV. 193 (1967); Note, 48 ORE. L. REV. 209 (1969).

33. U.S. District Court E.D. Pa. 1965, Bankruptcy Nos. 26532 and 26109, 2 U.C.C. REP. 1016, 1021 (1965); on appeal, 253 F. Supp. 864 (E.D. Pa. 1966).

34. 253 F. Supp., at 871, 874.

35. See note 10, *supra*.

36. 304 N.Y.S.2d, at 199.

pression, the court found it had no reason to find the contract unconscionable.³⁷

In *Unico v. Owen*,³⁸ the court interpreted section 9-206 of the Code, which deals with the holder in due course status of assignees of conditional sales contracts. It explained that, "[S]ection 9-206 in the area of consumer goods sales must as a matter of policy be deemed closely linked with section 2-302."³⁹ The reasons for this link were the "opportunities for misuse that the purchasers must be protected against."⁴⁰

The courts in the preceding cases have explained their apparent expansion of the scope of section 2-302 by emphasizing its general nature as a principle of commercial law, rather than merely as a technical defense in strictly defined circumstances. They contend that because of its general relevance, the principle's authority should extend beyond Article 2.

There has been extensive debate among the commentators about whether the Code's concept of unconscionability is a codification of previous equity concepts or a new and independent principle.⁴¹ While it is not the purpose of this article to analyze these historical and theoretical arguments, in order to explain the courts' expansive use of section 2-302, it is necessary to note some important points. The May, 1949 Draft, in the first comment on section 2-3302, explained:

This section is intended to apply to the field of Sales the *equity courts' ancient policy of policing contracts for unconscionability or unreasonableness* (emphasis added).

The 1952 comments to section 2-302 added, as an example of oppression, *Campbell Soup Co. v. Wentz*, which is an equity case.⁴²

The word "unconscientious" was used by common law courts as far back as 1663 in cases of unfair contracts.⁴³ The procedure of assuming "the standpoint occupied by the parties *when the contract was made*" and of admitting "*the light of surrounding circumstances*" was established as the procedure in pre—*Erie* federal common law cases involving "unconscionable" contracts by the United States Supreme

37. *Id.* at 201; The court required a claim of unfair surprise or oppression because section 2-302 Comment 1 explains, "The principle (of 2-302) is one of the prevention of oppression and unfair surprise."

38. 50 N.J. 101, 232 A.2d 405 (1967).

39. 232 A.2d, at 418.

40. *Id.*

41. Leff, *supra* note 2, at 528-546; Davenport, *supra* note 2, at 123-126; Ellinghaus, *supra* note 2, at 757-768; Spanogle, *supra* note 2, at 937-942; Note, 45 Iowa L. Rev. at 843, 847 (1960); Note, 109 U. Pa. L. Rev. 401 (1961); These are some examples of commentaries on the source of the CODE's unconscionability doctrine.

42. 172 F.2d 80 (3rd Cir. 1948). See Leff, *supra* note 2, at 529 and 530; this case is in the present comments to section 2-302.

43. Davenport, *supra* note 2, at 125 and 126.

Court in 1870.⁴⁴ The history of the unconscionability section of the Code clearly indicates that the drafters began by limiting the doctrine of unconscionability to a defense against form contract abuses because existing law inadequately handled the problem.⁴⁵ It appears that any analysis of the sources of the Code's unconscionability doctrine that rejects any of these sources cannot readily be justified.

An examination of the relevant cases indicates that the courts have taken a realistic view of the sources of the unconscionability doctrine. The ruling of the United States district court in the cases of *In re Elkins-Dell* and *In re Dorset Steel Equipment Co.* has already been mentioned.⁴⁶ The court used the procedure and rationale of the Code provision but specifically ruled that any decision on unconscionability would be based on the courts' equity powers.

In *Fairfield Lease Corp. v. Colonial Aluminum Sales, Inc.*,⁴⁷ the question of the unconscionability of an equipment lease contract was raised. The court dismissed a motion for summary judgment because the status of the assignee of the contract was unconscionable and more facts were needed. However, the court went on to say that the U.C.C. gives the parties an opportunity to explain the commercial setting of the contract. This, the court explained, was an extension of equity practice into the area of commercial law.⁴⁸

In the case of *David v. Manufacturer's Hanover Trust Co.*,⁴⁹ the court justified the application of the unconscionability doctrine to the signature card contract of a depositor and his bank. In the court's opinion "the thrust of the Uniform Commercial Code vis-a-vis 'unconscionability,' was the same as the common law."⁵⁰ On appeal the New York Supreme Court found that the contract was neither unconscionable nor offensive to public policy. However, the application of the doctrine to depositor-bank contracts was not questioned.⁵¹

A decision by the New Jersey Supreme Court demonstrates the use of three methods of explaining the expansion of section 2-302 beyond the U.C.C. The court in *Unico v. Owen*⁵² refers to: (1) the purposes

44. *Scott v. United States*, 79 U.S. 443 (1870). The emphasis is added to demonstrate the similarity between this case and the comments to section 2-302. See note 7, *supra*.

45. *Leff*, *supra* note 2, at 489-528; *Spanogle*, *supra* note 2, at 936-940; *Ellinghaus*, *supra* note 2, at 761-768; *Note*, 109 U. PA. L. REV. at 403 (1961).

46. See note 33, *supra*.

47. See note 11, *supra*.

48. 3 U.C.C. REP., at 859.

49. 4 U.C.C. REP. 1145 (N.Y. Sup. Ct. 1968), *on appeal*, 59 Misc. 2d 248, 298 N.Y.S.2d 847 (Sup. Ct. 1969)

50. 4 U.C.C. REP. at 1148.

51. 298 N.Y.S.2d 847 (1969).

52. See note 38, *supra* and accompanying text.

for drafting 2-302; (2) "the statutory analogy theory;" (3) and similar powers possessed by the courts in equity and at common law to strike down unconscionable contracts. The court explained that, although the U.C.C. did not expressly apply to the case, the definition of consumer goods under the Code was appropriate analogously for the court's purposes. The Code section legislated against the type of contracts of adhesion which the defendants in this case had signed. In construing this type of contract the court recognized its duty to do equity and not to be a tool of injustice. Finally, the court explained that section 2-302 is a general principle section of the Code, and other sections must be read in light of the standard it establishes. In this case, the court found that the section gave the court the responsibility to apply "common law principles"⁵³ to determine if the contract was so one-sided as to be contrary to public policy.

The decision in *Unico v. Owen* is noteworthy because it suggests the basic rationales which have been the justification for expansion of section 2-302 to areas seemingly beyond the coverage of the U.C.C. Moreover, the decision may be the portent of future developments in this area. It is not unforeseeable that the trend toward extension of the Code's unconscionability concept to contract law in general may evolve to such a degree that it will come to be regarded as a general principle of that law.⁵⁴ Although this might seem to be a bold step in the usually torpid development of contract law, it appears to be a clearly desirable one.

PROBLEMS WITH THE HEARING ON COMMERCIAL CIRCUMSTANCES AND SECTION 2-302(2)

While on its face section 2-302(2) appears to require a hearing on the commercial circumstances at the time the contract was made,⁵⁵ the cases have not been clear on this point. The first case involving unconscionability decided under the Code was *American Home Improvement, Inc. v. MacIver*.⁵⁶ It involved an illegal finance charge arrangement which, because of nondisclosure and the fact that the merchant had not performed his part of the bargain to any substantial degree, was declared unconscionable.⁵⁷ The court stated that:

53. 232 A.2d, at 418.

54. See Note, 48 ORE. L. REV. 209 (1969), this note presents an interesting explanation of the evolution of a principle as well as some analysis of the developing unconscionability principle.

55. See note 7, *supra*.

56. 105 N.H. 435, 201 A.2d 886 (1964). See Leff, *supra* note 2, at 547.

57. The court in *MacIver* found that the contract violated a state disclosure statute

Inasmuch as the defendants have received little or nothing of value and under the transaction they entered into they were paying \$1,609 for goods and services valued at far less. The contract should not be enforced because of its unconscionable features.⁵⁸

MacIver has generally been considered authority for the proposition that value-price disparity alone and without any unfair surprise or other oppression can constitute unconscionability.⁵⁹ In *Frostifresh v. Reynoso*⁶⁰ the court followed the lead of *MacIver* in holding an installment sales contract unconscionable. This case involved a Spanish speaking buyer who signed an installment contract written in English without the benefit of a translation. The court found the price to be "shocking to the conscience."⁶¹ The contract was voided as unconscionable because of the oppressive price.

Unfortunately, both *MacIver* and *Frostifresh*, which have been leading decisions in establishing the proposition that an unconscionable value-price disparity may be the basis for a finding of unconscionability, contained somewhat simplistic financial analysis. For that reason they have suffered some serious criticism.⁶² The concept of excessively high price constituting unconscionability per se has received some questioning analysis from a theoretical viewpoint as well.⁶³ Thus, although there have been instances of application of the price-value disparity test which were based on sound analysis,⁶⁴ most recent decisions which apply a price test rely too heavily on an approach grounded upon narrow precedent and emotional reactions such as "shocked conscience."⁶⁵ For example, in *Toker v. Perl*⁶⁶ the Superior Court of New Jersey was

and as an alternative and independent grounds for voiding the contract, found it unconscionable.

58. 201 A.2d, at 889.

59. Ellinghaus, *supra* note 2, at 787; Spanogle, *supra* note 2, at 965 and 966; Shanker and Abel, *Consumer Protection Under Article 2 of the Uniform Commercial Code*, 29 OHIO ST. L.J. 689, 702-05 (1968).

60. 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966).

61. 274 N.Y.S.2d at 759. According to Spanogle, *supra* note 2, the courts view value-price disparity as an abuse sufficient to constitute unconscionability where the ratio is 1 to 2; or, in other words, the consumer has to pay twice the value of the item. The problem is determining "value". See notes 62 and 64, *infra*.

62. Leff, *supra* note 2, at 547-551; Comment, *Unconscionable Sales Price*, 20 ME. L. REV. 159 (1968); In *MacIver* the court accepted the buyer's theory that value equaled the total price less the salesman's commission which, of course, makes value dependent on a totally irrelevant figure. The court in *Frostifresh* did not consider the seller's salesman commission and fees when it computed his expenses.

63. Leff, *supra* note 62; Spanogle, *supra* note 53.

64. *State v. ITM, Inc.*, 275 N.Y.S.2d 303 (Sup. Ct. 1966); See Comment, 20 ME. L. REV. 159 (1968). In this case the court used the retail market price as its basis for comparison in determining unconscionable price.

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

66. 103 N.J. Super. 500, 247 A.2d 701 (1968), *affirmed on other grounds*, 108 N.J. Super. 129, 260 A.2d 244 (1970).

faced with an installment sale of a freezer similar to the *Frostifresh* case. The court declared:

The conscience of this court is shocked by the price imposed upon these defendants for this freezer. The testimony in court valued the freezer at no more than \$300. The price charged was in excess of two and one half times the maximum value. . . . In the light of these facts, this court is constrained to hold the price in this contract unconscionable.⁶⁷

In *Jones v. Star Credit Corp.*,⁶⁸ another freezer case, the court cited *MacIver* and *Frostifresh* as precedent for the proposition that value-price disparity alone can render a contract unconscionable as a matter of law. The court, in holding that the contract was unconscionable, agreed that the *MacIver* test fulfilled the requirements of 2-302.⁶⁹

These cases appear to take on a disturbing character when viewed in light of the language employed in 2-302(2), Comments 1 and 3 and a line of cases interpreting the section. Shortly after *MacIver*, the United States Court of Appeals for the District of Columbia handed down its decision in the case of *Williams v. Walker-Thomas Furniture Co.*⁷⁰ There, the court found that while the question of unconscionability had been raised, the lower courts had not addressed themselves to the issue. The case was remanded for further proceedings with the observation that the test of unconscionability was not simple or mechanical. Instead, the court indicated, the contract involved must be tested in light of the commercial circumstances surrounding the transaction. It cited section 2-302 as authority supporting this proposition.⁷¹ The opinion proposes a test apparently in direct contradiction to the mechanical value-price disparity ratio of *MacIver* and *Frostifresh*.

A New York court clarified the issue in the case of *Sinkoff Beverage Co. v. Schlitz Brewing Co.*⁷² The plaintiff in the case was seeking an injunction to prevent the defendant from terminating an exclusive distributorship contract on the theory that the lack of a notification requirement rendered the contract unconscionable. The court denied the motion and explained that when unconscionability is a question, section 2-302 and its comments require a mandatory hearing on "general commercial background" and "commercial need."⁷³

67. 247 A.2d, at 703.

68. 59 Misc 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).

69. 298 N.Y.S.2d, at 266 and 267. The court indicated that, "Concededly, deciding the issue is substantially easier than explaining it."

70. 350 F.2d 445 (D.C. Cir. 1965). This case was decided before the U.C.C. went into effect in the District of Columbia. However, the court relied heavily on the authority of the Code's unconscionability doctrine.

71. *Id.* at 450. The court referred to 2-307 but clearly meant 2-302.

72. 51 Misc. 2d 446, 273 N.Y.S.2d 364 (Sup. Ct. 1966).

73. 273 N.Y.S.2d, at 366.

In re Elkins-Dell and *In re Dorset Stell Equipment Co.* have already been mentioned.⁷⁴ The district court found the referee in those cases in error when:

he viewed the question solely as a matter of law, to be judged from 'terms of the contract which speaks for itself' (Record, *Elkins-Dell* p. 83) Even in the context of unconscionable sales contracts, which the Uniform Commercial Code permits the court to refuse to enforce in whole or in part . . . the parties are afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.⁷⁵

In *Dow-Corning Corp. v. Capital Aviation*,⁷⁶ the court reversed a lower court decision which held a clause in a sales contract unconscionable. The clause disclaimed liability for failure or delay in the delivery of an experimental airplane. The court explained that, "Section 2-302 makes clear that the unconscionability of a clause is to be judged not in the abstract, but rather in its commercial setting."⁷⁷

This line of cases indicates that no contract, and certainly no single clause in a contract, can be isolated and judged unconscionable as a matter of law without consideration of the commercial circumstances surrounding it. Commentators have interpreted the hearing requirement of 2-302(2) as the drafter's one assurance against the court's abuse of the powerful tool of unconscionability.⁷⁸ While it seems clear that the draftsmen had an abiding trust in the courts and that they purposefully drafted the section in broad terms, they intended to insure that the parties would be afforded an opportunity to explain relevant circumstances which might not appear on the face of the contract.⁷⁹

The cases following the *MacIver* decision on value-price disparity seem to be in direct contradiction with the *Williams v. Walker-Thomas* case and decisions requiring a hearing on background and circumstances because they are decided in terms of a price clause being unconscionable per se. They appear to have been decided without the benefit of adequate hearings on commercial circumstances. However, the decision of the court in *Central Budget Corp. v. Sanchez*⁸⁰ suggests a possible approach that would reconcile these two lines of decisions. In *Central Budget*, the court ruled that "excessively high prices may con-

74 See note 46, *supra* and accompanying text.

75. 253 F. Supp., at 873.

76. 411 F.2d 622 (7th Cir. 1969).

77. *Id.* at 626.

78. Spanogle, *supra* note 2, at 914; King, *supra* note 6, 11 St. L.U.L.J., at 15.

79. Ellinghaus, *supra* note 2, at 789-793; Leff, *supra* note 2, at 541-546.

80. 53 Misc. 2d 620, 279 N.Y.S.2d 391 (Civ. Ct. 1967).

stitute unconscionable contractual provisions."⁸¹ After quoting extensively from the *Williams* case, it held that the defendant purchaser had to be given an opportunity to present evidence about the commercial circumstances surrounding the transactions.⁸² The court used the hearing provision of section 2-302(2) to the advantage of the consumer and noted that commercial circumstances include the *consumer's* position at the time of the sale.

All of the decisions following *MacIver* and propounding a value-price disparity test which have been noted, have involved sales to consumers. On the other hand, most of the cases requiring the hearing on commercial circumstances were cases involving disputes between merchants.⁸³ It is also worth noting that the cases decided on value-price disparity or excessively high price alone all indicated that there were other factors of oppression and/or unfair surprise present.⁸⁴ Thus, there seems to be evidenced a recognition that the consumer's financial situation,⁸⁵ bargaining position,⁸⁶ knowledge and experience⁸⁷ are legitimate commercial circumstances for the courts' consideration in determining whether a contractual provision is unconscionable. Moreover, in consumer cases, unlike cases involving disputes between merchants, where a course of dealing or trade usage may be in issue, the relevant circumstances may often be satisfactorily developed without a formal hearing procedure.⁸⁸ Thus, the value-price disparity test, as the courts are using it, may well be more than a touchstone for automatically ruling on contracts; it may be a catch phrase which has come to be used to represent a judgment by the courts that, based on the facts which have been adduced, the transaction in issue violates the precepts of section 2-302 and that the clearest manifestation of the violation is the unconscionable price.

It is not surprising to observe this tendency of the courts in a time when the legal community is becoming more aware of the consumer's un-

81. *Id.* at 392.

82. *Id.* at 393. The court here allowed the buyer to show at a hearing that the contract was unconscionable; interestingly enough, the court cites *Williams* for the proposition that excessive price can constitute unconscionability.

83. The obvious exception is *Williams v. Walker-Thomas*. However, that case can be distinguished because the lower courts never considered the issue of unconscionability.

84. Spanogle, *supra* note 2, at 964 and 965; Shanker and Abel, *supra* note 59 at 702-708.

85. See *Jones v. Star Credit Corp.*, note 68 *supra*, and accompanying text.

86. See *MacIver*, note 56 *supra*, and accompanying text.

87. See *Frostifresh*, note 60 *supra*, and accompanying text.

88. Spanogle, *supra* note 2, at 953, suggests that in analyzing cases on unconscionability, what a court said may not be the best criteria. Because all the information may not be explained in the opinion and because the concept is new and developing, a court's opinion may not properly reflect the reasons for a decision. The court in *Jones v. Star Credit Corp.* comments on the problem. See note 69, *supra*.

fortunate bargaining position.⁸⁹ Usury laws have proved to be inadequate protection,⁹⁰ and even the new Uniform Consumer Credit Code cannot completely protect the necessitous or unsophisticated buyer since that Code regulates credit, not sales practices, quality, prices or advertising.⁹¹

The unconscionability concept of 2-302 is potentially the most effective tool available to the courts for protection of the consumer. The section, in its present form, was drafted with the consumer, and particularly the unsophisticated consumer, in mind.⁹²

It appears that the courts may be adopting the old equity practice of protecting certain classes of people that cannot adequately protect themselves.⁹³ The courts in those cases did not dwell on the inability or inadequacies of the individual involved, nor did they explain the need for protecting the class of people he represented. Instead they merely noted his circumstances and then judged the fairness of the contract in light of them.⁹⁴ This appears to be precisely the procedure adopted in the value-price disparity cases. The courts apparently take judicial notice of the consumer's unequal position⁹⁵ and then decide whether or not the contract or clause is unconscionable. Merely because the court decides that the excessively high price renders the contract unconscionable, one cannot assume the consumer's circumstances were not considered or that the required opportunity to present commercial circumstances has not been afforded both parties. This method is less time consuming, less embarrassing to the consumer, and an effective way to require the seller to deal more fairly. The merchant will soon realize that when he deals with the needy, the uneducated, and the inexperienced, his conduct will be closely scrutinized. The court will note bargaining inequity and to that extent protect the consumer.

The recent case of *Jones v. Star Credit Corp.*⁹⁶ mentioned previously as a case following the *MacIver* decision and deciding price may be

89. Clovis, *Consumer Protection Symposium Forward*, 29 OHIO ST. L.J. 593 (1968).

90. *Id.* at 594.

91. Bailey, *Substantive Provisions of the Uniform Consumers Credit Code*, 29 OHIO ST. L.J. 597, 614 (1968). However, it should be noted that the UCCC has an unconscionability section: 2.411. It is similar to section 2-302 but applies to consumer loans, leases and sales.

92. Spanogle, *supra* note 2, at 931-936; Ellinghaus *supra* note 2, at 768; see generally Shanker and Abel, *supra* note 59.

93. Pound, *Liberty to Contract*, 18 YALE L.J. 454 (1909); Spanogle, *supra* note 2, at 950 and 951. See Leff *supra* note 2, at 530-541 and 551-559, for an interesting analysis of this equity practice which finds this trend in the cases quite unjustifiable.

94. Spanogle, *supra* note 93.

95. From the pleadings, evidence and conduct of the parties, the court can learn what the circumstances of the contract were. When this information is adequately presented during the proceedings the court need not hold a hearing.

96. See note 68 *supra*.

unconscionable per se is the best example of a court's willingness to explain this type of judicial notice of the characteristics of a needy class:

Concern for the protection of these consumers (welfare recipients) against overreaching by a small but hardy breed of merchants who prey on them is not novel. The damages of inequity of bargaining power were vaguely recognized in the early English common law when Lord Hardwicke wrote of fraud. . . .

The law is beginning to fight back against those who once took advantage of the poor and illiterate without risk of either exposure or interference. . . . This body of law (both statutory and common law) recognizes the importance of a free enterprise system but at the same time will provide the legal armour to protect and safeguard the prospective victim from the harshness of an unconscionable contract.⁹⁷

It has been argued that if courts continue to use value-price disparity as the test of unconscionability in consumer cases, the ultimate injury will be suffered by the poor consumer.⁹⁸ The argument is that decisions finding high prices unconscionable per se will force the merchants who sell to impoverished buyers on credit to cease dealing with them because the return on the investment will not equal the risk involved. However, judicial protection of certain classes of vulnerable people may create a duty, on the part of merchants, not to sell certain goods to certain people. For example, is it too surprising to suggest that a merchant should not sell a \$600 stereo to a welfare recipient with no other source of income and children to support, particularly when the merchant is aware of these circumstances?⁹⁹ The only reasonable solution seems to be legal control. The courts appear to have found the instrument for exercising that control in section 2-302 of the U.C.C.

CONCLUSION

The cases indicate that while the Code's concept of unconscionability is being expanded beyond the areas where it is expressly applicable, it is being used differently under varying circumstances. Generally, when unconscionability is an issue in a case, the court will re-

97. 298 N.Y.S.2d, at 265 and 266.

98. See Comment, 20 ME. L. REV. 159 (1968).

99. These were the facts in the *Williams v. Walker-Thomas* case. See Ellinghaus, *supra* note 2, at 771. See also Danaher's dissent to the *Williams* decision, 350 F.2d at 450. Obviously, if there is no restraint placed on sales to necessitous consumers a vicious circle develops. Because this type of consumer is a greater risk, the price is higher. Because the price is higher, the buyer is more likely to default. Because the buyer defaults, the risk is higher. Because the risk is higher, the seller must make the price higher. The consumer can never win in this type of unregulated market. Concerning the duty of the merchant, see Comment, 114 U. PA. L. REV. 998 (1966).

quire a hearing on the commercial setting, purposes, and circumstances underlying the contract to aid the court in making a determination. However, in the cases involving impoverished, necessitous, illiterate and unsophisticated consumers, particularly when the background and circumstances of the contract are apparent, the court will note the conditions which create the unequal bargaining position as legitimate commercial circumstances. This notice may be taken after a hearing. It will then decide the fairness of the contract, often in terms of value-price disparity.

When the developments which have been discussed in the two primary sections of this note are viewed together, they evidence a tendency toward expanding consumer protection by the courts, particularly in situations where the principles of equity and fair dealing have been violated.

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