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Understanding Unconscionability: Defining the Principle*

JEFFREY C. FORT**

INTRODUCTION

The doctrine of unconscionability is firmly entrenched in Anglo-American contract law. However, since its inclusion in the Uniform Commercial Code (UCC or Code),¹ the doctrine has been the subject of much controversy. Literally hundreds of law review articles, comments and case notes have addressed it.² Much of this commentary

* The author would like to acknowledge the invaluable and irreplaceable guidance and criticism furnished by the late Professor Robert Childres of the Northwestern University School of Law in the preparation of this article. This article is a further articulation of some of the views expressed by Professor Childres in his casebook on remedies, though the analysis here differs in several respects. Compare R. CHILDRES & W. JOHNSON, JR., *EQUITY, RESTITUTION AND DAMAGES* 304-05 (2d ed. 1974).

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1. U.C.C. § 2-302 provides:

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

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

An identical provision appears in the Seventh Tentative Draft of the Second Restatement of Contracts § 234, and a similar statute is incorporated in California's laws, CAL. CIV. CODE § 3391 (Deering 1972), which perhaps explains the absence of § 2-302 from the California version of the Commercial Code. And while Louisiana does not have an identical statutory counterpart to § 2-302, its decisions are generally consistent with unconscionability decisions in other states.

2. By 1967 over 130 essays had been published discussing unconscionability in one context or another. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 486 n. 3 (1967) [hereinafter cited as *The Emperor's New Clause*]. Since that time, the number has perhaps doubled, in no small part because of Professor Leff's detailed criticism of the section. Among the more exhaustive articles sparked by Professor Leff were: Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969) [hereinafter cited as Spanogle]; Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969) [hereinafter cited as Murray]; Ellinghaus, *In Defense of Unconscionability*, 78 YALE L. J. 757 (1969) [hereinafter cited as Ellinghaus]; Davenport, *Unconscionability and the Uniform Commercial Code*, 22 U. MIAMI L. REV. 121 (1967). More recent commentary dismisses unconscionability as being inadequate to meet certain needs, or considers it in a narrow context. See, e.g., Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1 (1974) [hereinafter cited as *Lawful Fraud*]; Sweet, *The American Contract System:*

was triggered by the Code's provision that unconscionable contracts or clauses were not to be enforced so as to cause an unconscionable result: unconscionability was defined in terms of itself. Also criticized were the Official Comments to the UCC which identify the principle of unconscionability as intended to prevent oppression and unfair surprise. These writers have attacked or defended the presence of the doctrine in the Code with considerable eloquence and verve. Some condemned it for failing to have an identifiable meaning, while others found that to be its greatest attribute.³ But through it all, no one has identified or defined unconscionability and some have disclaimed or shunned any attempt to do so.⁴

Refusing to undertake a definition of the doctrine does nothing to refute the well-argued position that unconscionability in the Code is amorphous and meaningless.⁵ Nor does it rebut the argument that unconscionability is a "peripheral" remedy.⁶ For unconscionability to be a useful analytical tool, it must be workable, and to be workable, it must be understood. Yet in understanding it, care must be taken not to let one's frame of reference hide the meaning and impact of the doctrine.

The objection to a definition of unconscionability apparently lies in the belief that by defining the notion, it will become outmoded and inapplicable to future abuses. This belief rests upon the assumption that by defining a notion it becomes a rule, *i.e.*, a legal rubric which is either applicable or not in an all or nothing fashion and which is not valid if not applied where the requisite facts are established.⁷ An examination of the shortcomings of the doctrines of fraud, misrepresentation and mistake over the past decades reveals that this fear is well founded. These grounds for justifying avoidance of contract performance became complex rules; failure to prove any one of the elements of the rules barred relief. The rules,

Today & 2001, 7 IND. L. REV. 309 (1973); Eddy, *On The "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)*, 65 CAL. L. REV. 28 (1977) [hereinafter cited as *Limited Remedies*]. Other recent articles have endeavored to prescribe a perspective, including a comparison to German law, and criticize the use of "substantive unconscionability." See Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041 (1976); Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. LAW & ECON. 293 (1975).

3. Compare *The Emperor's New Clause*, *supra* note 2, with Spanogle, *supra* note 2.

4. *E.g.*, Wille v. Southwestern Bell Tel. Co., 219 Kan. 755, 549 P.2d 903 (1976); Note, *The Doctrine of Unconscionability*, 19 MAINE L. REV. 81 (1967).

5. See *The Emperor's New Clause*, *supra* note 2.

6. See *Lawful Fraud*, *supra* note 2. Of course, whether unconscionability is peripheral may depend in large part upon one's perspective. To one wishing to assure the enforceability of a contract, satisfying unconscionability may perforce negate a more limited theory of avoidance of performance.

7. See Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967) [hereinafter cited as Dworkin, *Rules*].

however, failed to keep pace with commercial developments, leaving much room for abuse. Printed, mass-produced forms replaced handwritten, individually drafted documents, and merchants and other contracting parties grew in size. As a result, those who did the purchasing or selling had little authority or competence to bargain over terms. The printed form replaced the traditional bargained exchange of the parties, even as the parties' size and technical expertise made the risks and products more complex. The judges responded with doctrines of constructive fraud or contract construction *contra proferentum*. But these developments merely compounded the problem of complex contracts, and raised the complaint that they were "tools . . . of misconstruction" and, hence, unreliable.⁸

Most writers agree that the doctrine of unconscionability was included in the Code to avoid these circuitous or indirect objections to form contracts, along with other potential abuses of the bargaining process. Whether it was a good idea to define unconscionability in the words of section 2-302 was the subject of dispute.⁹ Surely, unconscionability decisions may be prompted by an emotional reaction to an apparently unjustifiable, unequal exchange. This notion appears to conflict with the policy of freedom of contract which holds that persons should be able to allocate the burdens of the exchange by agreement, including risks of loss. Some took the position that if unconscionability could be invoked at any time to change the prior allocation of the risks, havoc would result in the commercial world; no one would be able to predict their financial exposure, and litigation costs would rise sharply.

This argument might be valid if courts were motivated solely by emotional and intellectual considerations, *i.e.*, doing justice on an *ad hoc* basis. In fact, however, courts appear to be no more and no less concerned with doing justice where a claim of unconscionability is made than in any other dispute. While an intellectual/emotional component is undoubtedly present, the decisions nevertheless point to a definition of the concept of unconscionability. This judicially-developed definition is phrased in terms of what conduct a contracting party can observe in attempting to assure that the written agreement will not be declared unconscionable.¹⁰

An examination of what courts and legislatures have indicated are

8. Llewellyn, *Book Review*, 52 HARV. L. REV. 700, 703 (1939).

9. See generally the articles cited in note 2 *supra*.

10. These emotional factors cannot be read completely out of the equation. But an examination of the cases indicates that courts are not swayed by claims of hardship where the complainant consciously and deliberately assumed certain risks as part of an exchange.

unconscionable contracts or clauses indicates the limits of the notion, and these limits suggest the definition of unconscionability. The definition serves to rebut the charge that unconscionability is an amorphous and peripheral remedy, and makes possible a prediction of what may be held unconscionable and what probably will not be, thereby facilitating commercial certainty. The doctrine is objective, despite the argument that the enforceability of a contract depends upon the judge's "conscience" and experience.

Unconscionability is defined in this article as a principle. Principles are different from rules, such as the rules of fraud and mistake, in that they are valid legal rubrics even though a court may not apply them in all situations in which they may be applicable.¹¹ Defining unconscionability as a principle also provides some perspective and facilitates analysis. If unconscionability is analyzed only in terms of the rules of particular cases, the result would be a most unwieldy list of relevant factors.¹² Finally, a moral and democratic result is achieved because defining unconscionability as a principle rests upon basic contract tenets.¹³

Unconscionability is a tool for the common law, a method of analysis which puts contract law into a better perspective. The importance of unconscionability does not lie in its ability to fill a specific need. This is particularly true where a solution to a problem does not rest upon the application of contract principles. The proper forum is not the courts where goals and policies are the arguments for or against a particular contract or clause.¹⁴

11. Dworkin, *Rules*, *supra* note 7.

12. A striking illustration of what can happen if one resorts to an analysis based upon "standards" of unconscionability appears in *Willie v. Southwestern Bell Tel. Co.*, 219 Kan. 755, 549 P.2d 903 (1976), where the court listed 10 such factors: (1) use of printed form, or boilerplate, contracts drawn skillfully by the party in strongest economic position, which establish industry-wide standards offered on a take-it-or-leave-it basis; (2) significant cost-price disparity or excessive price; (3) a denial of basic rights and remedies to a consumer buyer; (4) inclusion of penalty clauses; (5) circumstances surrounding the execution of the contract, its purpose, and actual effect; (6) hiding of clauses or inconspicuous clauses; (7) incomprehensible phrasing; (8) overall imbalance in obligation and rights created; (9) exploitation of the underprivileged and illiterate; and (10) inequality of bargaining or economic power. *Id.* at 758-59, 549 P.2d at 906-07. This type of unworkable analysis enforces the conclusion that an explanation of unconscionability based on standards by which the enforceability of a contract can be determined does not adequately define unconscionability. Thus, the analysis and approach suggested here sharply differs from that of Professor Ellinghaus. See Ellinghaus, *supra* note 2.

13. *Cf.*, Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975). Professor Dworkin argues that where courts rely on principles to decide disputes, rather than on economic or political considerations, democracy is best served.

14. *Id.* However, the same general principle of contract unconscionability will be applied before a legislative or administrative body to which these arguments may be properly addressed. Unconscionability is not limited to a particular group, but the expertise and func-

The purpose of this article is to define and examine the doctrine of unconscionability in modern contract law. Three propositions will be advocated: (1) unconscionability is embodied in a principle which permits forthright application without the sacrifice of flexibility; (2) the principle represents part of a trend involving changes in the rules of proof used to demonstrate the existence of an enforceable contract; and (3) notions akin to those prominent in tort law in recent years appear in the principle, thus suggesting a basis for the harmonization of tort and contract law in situations where both can apply. While the primary thrust of this article is the establishment of the first proposition, the latter two continually reappear. This is not a critique of what ought to be, but hopefully it will provide a perspective on what is being done by the lawmakers, whether judicial, executive or legislative.

To understand unconscionability and identify the principle, what has been ruled unconscionable must first be examined. From that analysis, four criteria can be identified and a principle stated. The article will then compare the theoretical underpinnings of the principle and its consistency with other theories of contract and avoidance of contract performance. Finally, the principle can be applied to particular problems to better understand those questions and issues, and rules which may be recognized in the years to come can be predicted.

THE BASIS OF THE PRINCIPLE

The appropriate place to begin an elucidation of the doctrine of unconscionability is with a review of what courts and legislatures think is unconscionable. Although the boundaries of unconscionability cannot be articulated,¹⁵ they are comprehensible through an examination of various rules of law. Rules of unconscionability will be examined by identifying situations in which courts or legislatures have declared agreements unenforceable. Even though a particular court or legislature may have difficulty in saying why it considers

tion of the decision-maker in applying the principles of unconscionability to a particular transaction or class of transactions do determine to which governmental body decision-making responsibility properly belongs. Perhaps those who have decried the ability of the judiciary to protect adequately against abuses of the privilege of contract, including those presented in unlitigated matters, and instead have advocated a legislative or administrative remedy have come to the same conclusion but via a different route. See, e.g., Leff, *Contract as Thing*, 19 AM. U.L. REV. 131 (1970); Kirby, *Contract Law and the Form Lease: Can Contract Law Provide the Answer?*, 71 N.W.U.L. REV. 204 (1976).

15. One should distinguish between defining the *boundaries* of unconscionability, i.e., what kinds of circumstances *per se* will not be unconscionable, and defining the *principle* of unconscionability which does not submit to an artificial limit upon the doctrine.

something unconscionable,¹⁶ an analysis of the actions of those bodies will define the doctrine.

In determining which judicially declared rules are within the doctrine, it is necessary to formulate a preliminary definition of an unconscionable contract or clause. The doctrine may be broadly described in terms of contracts or clauses which courts refuse to enforce because enforcement would abuse the judicial enforcement mechanism as applied to consensual agreements. This broad definition encompasses transactions which do not meet one of the traditional grounds for avoidance of contract performance or enforcement.¹⁷ Unconscionability as herein defined thus includes: decisions which explicitly hold a contract or clause unconscionable; cases which suggest that strict *enforcement* of the contract would be unconscionable; and rules which declare a clause unenforceable as against public policy.

Legislatures are a prolific source of rules relating to unconscionability. The legislatures, like the courts, are concerned with the consumer's lack of alternatives and with his or her lack of understanding of form contract terms. Statutes aimed at remedying abuses of the bargaining process proscribe various contract clauses, and are based upon the same concerns that motivate the courts. Many of these statutory rules are patterned after judicial decisions. Other statutes establish a standard of unconscionability.¹⁸ In particular, consumer protection statutes are founded upon the same considerations and arguments as judicial rules of unconscionability.

The next section of this article discusses the rules of unconscionability, segregated into four criteria which comprise the basis of the unconscionability principle. In many cases, an unconscionable contract or clause was found because only one of the criteria was present. In other situations the rule-making authority relied upon the presence of more than one criteria in finding an unconscionable contract or clause. Taken together, these criteria define the principle and identify terms which are not unconscionable.

16. This was candidly admitted by the court in *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969), when it stated that "deciding the issue [of unconscionability] is substantially easier than explaining it." *Id.* at 192, 298 N.Y.S. 2d at 266.

17. *E.g.*, fraud, duress, mistake, lack of capacity and undue influence.

18. See *United States Leasing Corp. v. Franklin Plaza Apts., Inc.*, 65 Misc. 2d 1082, 319 N.Y.S.2d 531 (Civil Ct. 1971), where a New York statute regulating retail installment contracts and giving buyers an unconditional right to assert against an assignee all defenses they had against the seller, was found to state a standard or a measure of unconscionability. *Id.* at 1086, 319 N.Y.S. 2d at 534-35.

Unfair Terms and Exchanges

Many different types of clauses and contracts, dealing with a variety of transactions, have been subjected to an unconscionability defense or attack.¹⁹ Indeed, insofar as a written document may define the parties' expectations of the burdens and risks of the transaction, practically every term could conceivably be unconscionable. However, a review of the rules indicates that only certain types of contracts or clauses have been held unconscionable independently of the bargaining process. In the great majority of situations, clear reliance is placed upon the presence of procedural deficiencies, in addition to substantive imbalance. The significance of the great majority of cases coming within the latter type of analysis will be demonstrated below.²⁰ The basis of the decisions finding substantive exchanges unconscionable *per se* also is significant and clearly suggests a definition of the principle. Hence, review of the rules relying upon the terms of the exchange itself will be divided into these two categories.

1. Exchanges Which are Unconscionable Per Se

Three identifiable classes of contract terms or terms of exchange have been held unconscionable regardless of the bargaining which may have taken place prior to the making of the contract. The first two are unequal exchanges, and terms contrary to a forum's public policy. These two form the basis for the more recently established criterion, commercial unreasonableness.

a. Grossly Unequal Exchanges

The clearest example of the unconscionable *per se* contract is those which are grossly unequal. They provide for the protection of the form contract offeror at every opportunity and deprive the other party of comparable protection. Courts will often say the contract is "one-sided," or that the performance of the promisor is conditioned upon "inadequate consideration." Under this rubric, a contract is unconscionable if it drives too hard a bargain; for example, the contract is unenforceable where the offeror has the sole right to determine whether the delivered goods conform to the contract, and the buyer can refuse tendered goods in certain situations, but the

19. Without providing an exhaustive list, it suffices to note that warranty disclaimers, releases, exculpatory clauses, limitations of liability, liquidated damages terms, waiver of defense clauses, cognovit notes and cross-collateral clauses have been held unconscionable, and also enforced despite a claim of unconscionability.

20. See text accompanying notes 274-306 *infra*.

seller must secure the buyer's permission before reselling, and the contract provides for liquidated damages only if the seller breaches.²¹

In an agreement that the owner of land hold himself ready and able to aid the excavators in their mining of coal from the property, at the latter's unfettered option, it was found there was "not one reciprocal feature" and hence the agreement was unconscionable.²² A similar objection was stated where a purchase-option in a lease back agreement was attempted to be exercised. The court found that the aggrieved operators could only lose since the harder they worked to increase their business' value, the more likely it was that the holder of the option would exercise it and oust them.²³ An employment contract providing that the employee had to give thirty days notice of termination while the employer did not have to give any notice was also held unconscionable.²⁴ An oppressively onerous or one-sided contract may also be unconscionable if other substantive factors appear.²⁵

Other courts have implied that oppressive contracts are unconscionable while finding the contract under consideration enforceable.²⁶ It has been held that the linking of short-term jobber supply

21. *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948). *But see* *Campbell Soup Co. v. Diehm*, 111 F. Supp. 211 (E.D. Pa. 1952) where the same buyer's purchase agreement was upheld. After the *Wentz* decision, the form had been revised to eliminate the liquidated damages clause, provide for an objective standard for acceptability of the goods, and equal or analogous rights were specified for delays or defaults. The *Diehm* court found that under the revised contract the seller and buyer had equal rights, and rejected the seller's claim of unconscionability.

22. *Lear v. Chouteau*, 23 Ill. 37 (1859).

23. *Humble Oil & Refining Co. v. Doer*, 123 N.J. Super. 530, 303 A.2d 898 (1973) (alternate holding was that the plan clogged the lessee's equitable right of redemption). *See also* *Pickerign v. Pasco Marketing, Inc.*, 303 Minn. 442, 228 N.W.2d 562 (1975).

24. *India Tea Co. v. Petersen*, 108 Ill. App. 16 (1903). *But see* *Artman v. Internat'l Harvester Co.*, 355 F. Supp. 482 (W.D. Pa. 1973). The *Artman* court rejected an unconscionability claim where there existed identical 30 day notice periods for termination, apparently because it believed the notice period reasonable and hence proper under § 2-309 of the Code. *See also* *North Penn Oil & Tire Co. v. Phillips Petroleum Co.*, 358 F. Supp. 908 (E.D. Pa. 1973) (90 day reciprocal notice terms not unconscionable).

25. In *Central Ohio Co-op. Milk Producers, Inc. v. Rowland*, 29 Ohio App. 2d 236, 281 N.E.2d 42 (1972), the court stated that to prove unconscionability (in a notice of termination clause) one must show that (1) the terms are onerous, oppressive or one-sided and (2) that the term bears no reasonable relation to the business risks. *See* text accompanying notes 189 to 217 *infra*. Similarly, the court in *In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864 (E.D. Pa. 1966), held that even though the contract was onerous, oppressive or one-sided, it was not unconscionable unless its provisions bore no relation to the business risks involved, a decision which could be made only by examining the commercial setting of the contract.

26. *E.g.*, *R. L. Kimsey Cotton Co. v. Ferguson*, 233 Ga. 962, 214 S.E.2d 360 (1975) (contract price was fair when made and hence not unconscionable); *Wade v. Austin*, 524 S.W. 2d 79 (Tex. Civ. App. 1975) (no lack of reciprocity).

contracts with long-term financing of supply facilities is not so one-sided as to be unconscionable, because at the time of contracting the supply contracts were advantageous to both.²⁷ Similarly, a contract which provided for no interest on accrued but undisbursed royalties was upheld because of risks undertaken by the publisher and the tax advantages to the author from the disbursement formula.²⁸ And a security provision providing that a debtor's payment would be applied against items in the order purchased is not unconscionable.²⁹

Another expression found in many decisions holding a contract unconscionable solely on the basis of the substantive exchange is the absence of adequate consideration to support the performance sought by the form offeror. This was the rationale adopted by an Indiana court in holding that an instrument of guaranty signed by husband and wife when a note secured by a chattel mortgage was executed, did not guarantee a loan for a much larger amount to the husband individually. The agreement made each spouse the agent of the other, waived any demand for payment of a subsequent loan, provided for costs and attorneys' fees, waived the necessity for the mortgagee to resort to legal remedies, and ratified all subsequent acts of the other spouse.³⁰ The court found the guarantee ripe for abuse and limited its application to the note with which it was executed. The court stated that

where one party has taken advantage of another's necessities and distress to obtain an unfair advantage over him, and the latter, owing to his condition, has incumbered himself with heavy liability or an onerous obligation for the sake of a small or inadequate present gain, equity will relieve him.³¹

Many other courts have invoked this concept in finding the purchase price of an item was two or three times as great as the retail price of comparable merchandise.³² One court employed this notion

27. *North Penn Oil & Tire Co. v. Phillips Petroleum Co.*, 358 F. Supp. 908 (E.D. Pa. 1973).

28. *In re Estate of Young*, 367 N.Y.S.2d 717 (Surrogate's Court, 1975); *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*, 89 Nev. 414, 514 P.2d 654 (1973) (tax advantages to complainant from lease mechanism, as opposed to purchase; hence deliberate choice made). See text accompanying notes 189-217 *infra*.

29. *Singer Co. v. Gardner*, 65 N.J. 403, 323 A.2d 457 (1974).

30. *Indianapolis Morris Plan Corp. v. Sparks*, 132 Ind. App. 145, 172 N.E.2d 899 (1961).

31. *Id.* at 154, 172 N.E.2d at 903. It should be noted that this rule may not be proven substantive in view of the court's reliance upon the necessities of the obligor in that case, a factor perhaps related to the bargaining defect of lack of choice, to be discussed later.

32. *Toker v. Westerman*, 113 N.J. Super. 452, 274 A.2d 78 (1970); *Central Budget Corp. v. Sanchez*, 53 Misc. 2d 620, 279 N.Y.S.2d 391 (1967) (*dicta*); *cf. Star Credit Corp. v. Molina*, 59 Misc. 2d 290, 298 N.Y.S. 2d 570 (1969) (failure of proof on this issue caused court to reject

where it found that the purchasers had to pay a large price in exchange for goods and services of little or no value.³³ While this latter case has been criticized,³⁴ the court's language suggests what other courts probably meant. The lack of consideration necessary to support a contract is not the real reason for refusing enforcement. It makes little sense to claim there is not enough "consideration" when courts generally refuse to inquire whether the parties have made a provident bargain, and when the court, though finding the "consideration" inadequate, nevertheless does not void the entire transaction. Rather, the contract should not be enforced because it is simply too unfair.³⁵

Interest rates have also been found unconscionable or usurious.³⁶ Interest has been found not collectable where it would not accrue on an installment contract until after the security had been repossessed, or until after foreclosure had been effected.³⁷ The rationale is that such interest is "unearned," and that to permit the creditor to collect interest on money of which it has the use would amount to a forfeiture or a penalty.³⁸

The law has disfavored the notion of forfeiture under a contract because of its "harsh results."³⁹ Contractual requirements in themselves harmless, but which if breached would trigger other clauses

unconscionability claim). In *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (1971), the court ruled that a fixed contract price of two and one-half times the retail price rendered the contracts at issue invalid. However, the action was brought by the New Jersey Attorney General under a statute authorizing such actions where business practices in consumer goods amounted to "deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such." N.J. STAT. ANN. § 56:8-2 (West 1967). The court found the statute impliedly authorized a suit to set aside unconscionable contracts. While the case was decided on the substantive terms of the contracts in question, the statute seems directed as much at procedural abuses, perhaps indicating that the contracts were not unenforceable merely because of the substantive imbalance.

33. *American Home Improvement, Inc. v. Maciver*, 105 N.H. 435, 201 A.2d 886 (1964) (alternate holding barred the seller from securing the balance due because of its failure to comply with applicable disclosure statutes).

34. See, e.g., *Murray*, *supra* note 2.

35. But see *Russell v. Park City Utah Corp.*, 548 P.2d 889 (Utah 1976), and *Diamond Housing Corp. v. Robinson*, 257 A.2d 492 (D.C. 1969), which held, in essence, that a clause permitting termination of one's lease rights was not unconscionable or unfair.

36. See, e.g., *Dreyer v. Goldy*, 62 Ill. App. 347, 353 (1896), *appeal dismissed*, 171 Ill. 434, 49 N.E. 560 (1898).

37. See, e.g., *Glacier Lincoln-Mercury, Inc. v. Freeman*, No. 70-1579 (D. Alas. 1970); *Block v. Ford Motor Credit Co.*, 286 A.2d 228 (D.C. 1972); *Atlas Thrift Co. v. Horan*, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (1972) (failure to resell in commercially reasonable manner also cited as ground for refusing to permit collection of unaccrued interest as a deficiency).

38. *Mann v. Earls*, 226 Cal. App. 3d 155, 37 Cal. Rptr. 877 (1964).

39. See, e.g., *Tilbert v. Eagle Lock Co.*, 116 Conn. 357, 165 A. 205 (1933); *Psutka v. Michigan Alkali Co.*, 274 Mich. 318, 264 N.W. 385 (1936); *Mabley & Carew Co. v. Borden*, 129 Ohio St. 375, 195 N.E. 697 (1935).

giving the form offeror cumulative remedies, have been held unenforceable because the contract as a whole was "rooted in forfeiture," inflicted a penalty and was therefore unconscionable.⁴⁰ Similarly, unreasonable liquidated damage clauses were found to inflict a penalty and to be unconscionable prior to the adoption of the UCC.⁴¹ Additionally, unreasonable time periods (which may lead to a forfeiture) are invalid under the Code.⁴² And in a situation analogous to a forfeiture, a contract clause designating a forum so inconvenient as to deprive the other party of an opportunity to be heard has been held unconscionable.⁴³

b. Public Policy

Many unconscionability decisions rest upon the public policy of the jurisdiction, as reflected in its constitution, statutes and precedent. Public policy considerations may carry great weight either in finding a contract unconscionable or in finding that it should be enforced. For example, the "previous balance" method of computing finance charges was held not unconscionable where it was found to be within the contemplation of a consumer protection statute.⁴⁴

Failure to comply with applicable procedures may bar collection of the full amount otherwise due on the contract.⁴⁵ The offeror could be barred from securing a judgment for the contract price if the contract fails to comply with disclosure provisions.⁴⁶ Other statutes have been relied upon as stating a "standard of unconscionability"

40. See, e.g., *Fairfield Lease Corp. v. Prat*, 6 Conn. Cir. Ct. 537, 278 A.2d 154, 156 (1971); *Fairfield Lease Corp. v. Umberto*, 7 U.C.C. Rep. 1181 (Civ. Ct. N.Y. 1970). See also *Weigman v. Tomaselli*, 81 Misc. 2d 328, 365 N.Y.S.2d 681 (County Ct. 1975).

41. See, e.g., *Marshall Milling Co. v. Rosenbluth*, 231 Ill. App. 325 (1924); *Denkin v. Steiner*, 10 Pa. D. & C. 2d 203 (York County, 1956).

42. *Wilson Trading Corp. v. Davis Ferguson Ltd.*, 23 N.Y. 2d 398, 244 N.E.2d 685, 297 N.Y.S.2d 108 (1968) (concurring opinion, Fuld, C.J.).

43. *Paragon Homes, Inc. v. Carter*, 4 U.C.C. Rep. 1144 (Sup. Ct. N.Y. 1968). This case could also reflect the public policy considerations underlying the doctrine of *forum non conveniens*. See also *Tai Kien Indus. Co., Ltd. v. M/V Hamburg*, 528 F.2d 835 (9th Cir. 1976). But see *Paragon Homes, Inc. v. Langlois*, 4 U.C.C. Rep. 16 (Sup. Ct. 1967) and *Paragon Homes of Midwest, Inc. v. Crace*, 4 U.C.C. Rep. 19 (N.Y. Sup. Ct. 1967), holding that the New York court would not exercise jurisdiction given them by a contract identical to the one involved in *Carter*, under the doctrine of *forum non conveniens*, because the parties in those cases were New York residents.

44. *Johnson v. Sears Roebuck & Co.*, 14 Ill. App. 3d 838, 303 N.E.2d 627 (1973) (the statute involved was the Illinois Retail Installment Sales Act, ILL. REV. STAT. ch. 121, §§ 201 et seq. (1976)). Accord, *Zachary v. R.H. Macy & Co., Inc.*, 66 Misc. 2d 974, 323 N.Y.S.2d 757 (Sup. Ct. 1971).

45. E.g., *Mann v. Earls*, 226 Cal. App. 3d 155, 37 Cal. Rptr 877 (1964). See also U.C.C. § 9-504; *Dean v. Universal C.I.T. Credit Corp.*, 114 N.J. Super. 132, 275 A.2d 154 (N.J. App. 1971).

46. *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964).

by which parallel situations could be analyzed, such as a statute prohibiting a waiver of defense clause,⁴⁷ and one imposing various restrictions⁴⁸ in specific types of transactions. One court relied upon the lack of a statutory presumption of unconscionability for limitation of liability clauses in the context of commercial property damage transactions to conclude that such are not unconscionable.⁴⁹ Others have held that disclaimers of implied warranties are not unconscionable because these clauses are permitted by the Code.⁵⁰ One court has even commented that a limitation of liability clause was not unconscionable because there was no statutory public policy against mislabeling in a telephone directory advertisement.⁵¹

Waiver of defense clauses have been subjected to a great deal of analysis in determining whether they are unconscionable or against public policy.⁵² This type of clause has been described as giving an unprotected party the same status as a holder in due course; as being against the spirit of a statute permitting an obligor to assert any defenses against the assignee which it may have against the assignor; and as failing to protect conditional vendees against imposition by vendors in installment sales contracts.⁵³ These cases may also cite a general public policy favoring protection of the consumer.⁵⁴ Other courts have refused to follow this analysis, particularly where the state has no public policy prohibiting contractual holder in due course status, or another policy against such a clause.⁵⁵

A similar pattern appears with respect to the issue of whether a franchise contract can be terminated only for good cause. Where a statute requires good cause before termination of the franchise, the policy has been judicially applied to transactions not within the

47. *United States Leasing Corp. v. Franklin Plaza Apts., Inc.*, 65 Misc. 2d 1082, 319 N.Y.S.2d 531 (Civil Ct. 1971).

48. *Singer Co. v. Gardner*, 121 N.J. Super. 261, 296 A.2d 562 (Dist. Ct. 1972), *rev'd*, 65 N.J. 403, 323 A.2d 457 (1974) (court found that there had not been an attempt to evade the statutory requirements).

49. *Gates Rubber Co. v. USM Corp.*, 351 F. Supp. 329 (S.D. Ill. 1972), *rev'd on other grounds*, 508 F.2d 603 (7th Cir. 1975).

50. *See, e.g., Marshall v. Murray Oldsmobile Co.*, 207 Va. 972, 154 S.E.2d 140 (1967); *Avery v. Aladdin Products Div.*, 128 Ga. App. 266, 196 S.E.2d 357 (1973). *But see generally* text accompanying note 308 *infra*.

51. *The Gas House, Inc. v. Southern Bell Tel. & Tel. Co.*, 298 N.C. 175, 221 S.E.2d 499 (1976).

52. *See generally Quality Fin. Co. v. Hurley*, 337 Mass. 150, 148 N.E.2d 385 (1958).

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

54. *Fairfield Credit Corp. v. Donnelly*, 158 Conn. 543, 264 A.2d 547 (1969).

55. *See, e.g., Holt v. First Nat'l Bank*, 297 Minn. 457, 214 N.W. 2d 698 (Minn. 1973); *Personal Fin. Co. v. Meredith*, 39 Ill. App. 3d 695, 350 N.E.2d 781 (1976). The latter decision rested in part on the allowance of such clauses in the U.C.C. § 9-206(1) and specific authorization for such clauses in consumer transactions via the Illinois Retail Installment Sales Act, ILL. REV. STAT. ch. 121-½, § 517 (1975).

letter of the statute.⁵⁶ But in the absence of such a statutory requirement, other courts have refused to impose it.⁵⁷

Other expressions of public policy derive from precedent and historical notions defining the public interest. For example, considerations of public policy inhere in restraints upon attorney-client contracts, including fee agreements.⁵⁸ Restraint on a former employee's place of subsequent employment is unconscionable when combined with a contrary statutory policy and oppressive, unreasonable terms.⁵⁹

A court may refuse to enforce an exculpatory agreement where the benefited party is under (1) a public duty entailing the exercise of care; and (2) there is a public interest in not enforcing those clauses.⁶⁰ An example of this is a case where a hospital attempted to avoid any responsibility for the negligence of its staff.⁶¹ Similarly, a contract was found unconscionable where it would have effectively eliminated any responsibility for defects in a contractor's work, despite its pre-contract advertisements and representations to the contrary.⁶² The same result obtains where a clause would exculpate

56. See, e.g., *Shell Oil Co. v. Marinello*, 63 N.J. 402, 307 A.2d 598 (1973), *aff'g*, 120 N.J. Super. 357, 294 A.2d 253 (Bergen County 1972), *cert. denied*, 415 U.S. 920 (1974); *Texaco, Inc. v. Appleget*, 63 N.J. 411, 307 A.2d 603 (1973). *Contra* *Marinello v. Shell Oil Co.*, 368 F. Supp. 1401 (D.N.J. 1974), *rev'd*, 511 F.2d 853 (3d Cir. 1975).

57. See, e.g., *Russell v. Shell Oil Co.*, 382 F. Supp. 395 (E.D. Mich. 1974); *Goldinger v. Boron Oil Co.*, 375 F. Supp. 400 (W.D. Pa. 1974); *North Penn Oil & Tire Co. v. Phillips Petroleum Co.*, 371 F. Supp. 676 (E.D. Pa. 1974); *Texaco v. A. A. Gold, Inc.*, 78 Misc.2d 1050, 357 N.Y.S.2d 951 (Sup. Ct.), *aff'd*, 358 N.Y.S.2d 973 (App. Div. 1974). But in *Mobil Oil Corp. v. Rubinfeld*, 72 Misc. 2d 392, 339 N.Y.S.2d 623 (Civil Ct. 1972), *aff'd*, 77 Misc. 2d 962, 357 N.Y.S.2d 589 (App. Term 1974), the court held that a franchise relationship carried with it a duty to act in good faith and not to force the dealer into an anti-trust violation.

58. *Baron v. Sarlot*, 47 Cal. App. 3d 304, 120 Cal. Rptr 675 (1975). The court described such a transaction as not a case of "two ordinary individuals entering into an agreement or bargain governed by principles applicable to horse traders." *Id.* at 309, 120 Cal. Rptr at 678.

59. *Triple D & E, Inc. v. Van Buren*, 72 Misc. 2d 569, 339 N.Y.S.2d 821 (Sup. Ct. 1972), *aff'd*, 346 N.Y.S.2d 737 (App. Div. 1973). See also *Weidman v. Tomaselli*, 81 Misc. 2d 328, 365 N.Y.S. 2d 681 (County Ct. 1975).

60. See, e.g., *Hy-Grade Oil Co. v. New Jersey Bank*, 138 N.J. Super. 112, 117-18, 350 A.2d 279, 281 (App. 1975). But the court also found the parties may still negotiate the standard by which a bank's responsibility is to be measured. Further, a bank may enforce a printed waiver of one's right to a jury trial on a signature card, *David v. Manufacturers Hanover Trust Co.*, 59 Misc. 2d 248, 298 N.Y.S.2d 847 (App. Term 1969), and avoid liability for loss of cash from a safe deposit box by prohibiting the deposit of money in the box. *Radelman v. Manufacturers Hanover Trust Co.*, 61 Misc. 2d 669, 306 N.Y.S.2d 638 (App. Term 1969).

61. *Tunkl v. Regents of University*, 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr 33 (1963). While this case also involved a clear lack of choice, the court indicated that the public interest in the agreement was sufficient to override the clause.

62. *Nosse v. Vulcan Basement Waterproofing, Inc.*, 35 Ohio Misc. 1, 299 N.E.2d 708 (Municipal Ct. 1973). See also *Electronics Corp. v. Lear Jet Corp.*, 55 Misc. 2d 1066, 286 N.Y.S.2d 711 (Sup. Ct. 1967) (possibly unconscionable because of extraordinary limitation of warranties). *Nosse* might also be analyzed as one involving ignorance of the product

one for his own gross negligence.⁶³

c. Commercial Unreasonableness

The adoption of the UCC emphasized the contract law policy of encouraging good faith and commercial reasonableness. Several courts have focused upon these as a standard for defining an unconscionable contract or clause.⁶⁴ While Professor Leff⁶⁵ raised legitimate questions as to what kinds of clauses were not commercially reasonable, that notion as used here will indicate that the clause in question bears no material relationship to the risks involved in the transaction.⁶⁶ This definition continues the development of the previous concepts of gross unfairness and public policy. If the policy of the Code and the courts is to discourage "sharp dealings",⁶⁷ then terms which are not reasonably related to the risks of the form offeror are contrary to that public policy.

Decisions turning solely on this substantive issue generally have found the challenged terms not unconscionable. For example, a contract limiting the buyer's remedy for non-performance to return of the buyer's deposit was upheld because the limitation was reasonable.⁶⁸ A contract which required a non-American corporation to give a first lien on a ship where the entire purchase price was the amount of the loan was also held enforceable as being neither oppressive nor unreasonable.⁶⁹

The foregoing decisions suggest that the terms of exchange, or that the substantive terms of the contract standing alone, are a predominant aspect of the principle of unconscionability. However,

because of the homeowner's lack of knowledge of the risk assumed or as involving ignorance of the contract because of the pre-contract representations and lack of bargaining.

63. *Watsontown Brick Co. v. Hercules Powder Co.*, 265 F. Supp. 268 (M.D. Pa.), *aff'd per curiam*, 387 F.2d 99 (3d Cir. 1967). While the opinion is cast in terms of public policy, another analysis would be that the clause was not enforced because the owner was ignorant of the risk: he did not expect the demolition company to use an allegedly inexperienced and incompetent employee for the job. *See* note 96 *infra* and accompanying text. This is a risk completely within the contractor's control, and hence is a likely target for abuse. *See also* note 288 *infra*, and accompanying text, and *Limited Remedies*, *supra* note 2, at 52-56.

64. *See* cases cited in notes 68-69 *infra*.

65. *The Emperor's New Clause*, *supra* note 2, at 544-46.

66. *See In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864 (E.D. Pa. 1966).

67. *Bekkevold v. Potts*, 173 Minn. 87, 216 N.W. 790 (1927).

68. *See, e.g., Dow Corning Corp. v. Capitol Aviation, Inc.*, 411 F. 2d 622 (7th Cir. 1969); *Gas House, Inc. v. Southern Bell Tel. & Tel. Co.*, 298 N.C. 175, 221 S.E.2d 499 (1976) (commercial loss); *see Cyclops Corp. v. Home Ins. Co.*, 389 F. Supp. 476 (W.D. Pa. 1975). *See also Lowe v. Massachusetts Mutual Life Ins. Co.*, 54 Cal. App. 3d 718, 127 Cal. Rptr 23 (1976) (a retention of "standby deposit" held not unconscionable because it was not unreasonable).

69. *R.C. Craig Ltd. v. Ships of Sea, Inc.*, 345 F. Supp. 1066 (S.D. Ga. 1972). *Accord, Chewning v. Brand*, 230 Ga. 255, 196 S.E.2d 399 (1973).

the contrary is indicated by a review of other decisions involving analogous transactions and an analysis of the status of the aggrieved persons in the above cases. Courts and legislatures, rarely declare that a transaction is unconscionable regardless of the bargaining process or lack thereof. The only clauses which are *per se* unconscionable are those which involve a penalty (including an unreasonable liquidated damages clause) or which involve a "slave" contract,⁷⁰ and exchanges which affront a public interest. However, as opinions and practices change, other abuses will undoubtedly become evident and other notions of public policy will be fashioned.

2. Potentially Unconscionable Exchanges

a. Unfair Terms

While the foregoing list of rules may seem formidable, other courts have relied upon the presence of an unfair exchange or commercially unreasonable term (discussed above) in addition to other factors relating to the bargaining process or the parties' notice of defects in the subject matter. A large proportion of the rules previously considered are paralleled by other rules of unconscionability which indicate that substantive imbalance is not enough.⁷¹ The rules which include bargaining and/or status far outnumber the *per se* rules. Thus, several courts have held that an excessive price is not enough in itself to constitute an unconscionable contract.⁷² The presence of deficiencies in the bargaining process have also been relied on, along with the unfairness of the price, to hold a clause unconscionable.⁷³ Other rules do not specifically refer to any bar-

70. A "slave" contract is like the ones condemned in *Lear v. Chateau*, 23 Ill. 37 (1859), and *Humble Oil & Refining Co. v. Doer*, 123 N.J. Super. 530, 303 A.2d 898 (1973): the form offeror could profit from the transaction no matter what happened, the entire risk or burden being on the aggrieved party. Those situations are analogous to a requirement/output contract for which special implied duties have been established. U.C.C. § 2-306. Section 2-306 essentially provides for reciprocal benefits—the imposition of a duty of reasonableness and good faith on the person who has the exclusive-rights benefit.

71. *E.g.*, *Pickerign v. Pasco Marketing, Inc.*, 303 Minn. 442, 228 N.W.2d 562 (1975); *see* *Sinkoff Beverage Co. v. Jos. Schlitz Brewing Co.*, 51 Misc. 2d 446, 273 N.Y.S.2d 364 (Sup. Ct. 1966).

72. *See, e.g.*, *Contract Buyers League v. F & F Investment*, 300 F. Supp. 210 (N.D. Ill. 1969); *Slaughter v. Jefferson Fed. Sav. & Loan Ass'n*, 361 F. Supp. 590 (D.D.C. 1973); *Morris v. Capitol Furniture & Appliance Co.*, 280 A.2d 775 (D.C. Ct. App. 1971); *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111 (D.C. 1971); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on other grounds & aff'd*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. Div. 1967); *Toker v. Perl*, 103 N.J. Super. 500, 247 A.2d 701 (Super. Ct. 1968); *Central Budget Corp. v. Sanchez*, 53 Misc. 2d 620, 279 N.Y.S.2d 391 (Civil Ct. 1967); *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (1969); *see* *Star Credit Corp. v. Molina*, 59 Misc. 2d 290, 298 N.Y.S.2d 570 (Civil Ct. 1969).

73. *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 236 A.2d 843 (1967); *In re Estate of Vought*, 70 Misc. 2d 781, 334 N.Y.S.2d 720 (Surrogate Court 1972), *aff'd*, 360 N.Y.S.2d 199

gaining deficiencies, but because these rules are limited to consumer transactions, there is undoubtedly a presumption that bargaining over contract terms is absent.⁷⁴ Examination of the cases holding excessive price in itself unconscionable reveals that these decisions involved persons of apparent disparate status and bargaining ability.⁷⁵ The same conclusion can be drawn from decisions involving the rubric of a one-sided or grossly unfair contract.⁷⁶

Cases concerning clauses challenged as being commercially unreasonable have also considered the bargaining process. Courts have found terms which are unreasonably favorable to the form offeror⁷⁷ and which bear no rational relationship to the risks of the transaction⁷⁸ to be unconscionable when a lack of meaningful choice is also present.⁷⁹ Similarly, decisions which reject a commercially unreasonable challenge have noted the bargaining abilities of the parties, but find that a meaningful choice was made by the aggrieved party.⁸⁰ Others have rejected such a challenge where there is no evidence of a lack of real choice,⁸¹ or have required proof of uncon-

(App. Term, 1974); *Nu Dimensions Figure Salons v. Becerra*, 73 Misc. 2d 140, 340 N.Y.S.2d 268 (Civ. Ct. 1973) (dicta). See also *In re Marriage of Hines*, 525 P.2d 517 (Colo. App. 1974) (divorce property settlement where parties represented by counsel is not unconscionable).

74. See generally the UNIFORM CONSUMER CREDIT CODE. See also 16 C.F.R. § 433 (1977) (preservation of consumers' claims and defenses under authority of the Federal Trade Commission).

75. See cases cited in note 32 *supra* dealing with purchases of consumer goods.

76. *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948) (food processor and farmer); *Indianapolis Morris Plan Corp. v. Sparks*, 132 Ind. App. 145, 172 N.E.2d 899 (1961) (lender and consumer).

77. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111 (D.C. 1971); *Seabrook v. Commuter Housing Co., Inc.*, 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. 1972), *aff'd on other grounds*, 79 Misc. 2d 168, 363 N.Y.S.2d 566 (App. Term 1973).

78. See, e.g., *Educational Beneficial, Inc. v. Reynolds*, 324 N.Y.S.2d 813 (Civ. Ct. 1971). But see *Truck Rent-a-Center, Inc. v. Puritan Farms 2d, Inc.*, 41 N.Y.2d 420, 393 N.Y.S.2d 365, 361 N.E.2d 1015 (1977), where the court upheld a liquidated damages clause because it bore reasonable relation to the risks of the transaction, *i.e.*, the probable actual harm of a breach by the lessee. The court also noted the contract had been negotiated in other respects and that there appeared no disparity in bargaining power. *Id.* at 427, 393 N.Y.S.2d at 370, 361 N.E.2d at 1019.

79. Just what constitutes a lack of meaningful choice will be considered more fully below. See text accompanying notes 188-217 *infra*. For present purposes, this concept should be understood as occurring where the offeree of a form contract does not have the ability or does not have the opportunity to negotiate the terms of the agreement. But see *M/S Bremen v. Zapata Off-shore Co.*, 407 U.S. 1 (1972).

80. See, e.g., *Geldermann & Co. v. Lane Processing, Inc.*, 527 F.2d 571 (8th Cir. 1975); *Dow Corning Corp. v. Capitol Aviation, Inc.*, 411 F.2d 622 (7th Cir. 1969); *County Asphalt, Inc. v. Lewis Welding & Eng'r Corp.*, 323 F. Supp. 1300 (S.D.N.Y. 1970), *aff'd*, 444 F.2d 372 (2d Cir. 1971); *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361 (S.D.N.Y. 1975); *King v. South Jersey Nat'l Bank*, 66 N.J. 161, 330 A.2d 1 (1974); *Barnes v. Helfenbein*, 548 P.2d 1014 (Okla. 1976).

81. See, e.g., *Fleischmann Distilling Corp. v. Distillers Co. Ltd.*, 395 F. Supp. 221

scionability in the "commercial setting" of the contract.⁸²

Even where public policy is applied by the courts, deficiencies in the bargaining process are frequently relied upon in discussing the unconscionable nature of a contract or clause. For example, disparity in bargaining positions in addition to a state's public policy has resulted in a warranty disclaimer being declared unjust, inequitable, and unenforceable.⁸³ Another court held that a contract may relieve one of liability for the consequences of his own negligent acts if he can show that the terms do not contravene public policy *and* that the contract clearly and unequivocally "spell[s] out the *intent* to grant such immunity and relief from liability."⁸⁴ Additionally, a person under a "public duty" may not contract away his obligation to exercise care where there is unequal bargaining power.⁸⁵ However, some courts have rejected a claim of unconscionability based upon the public interest where a knowledgeable waiver was found.⁸⁶

It should not be surprising that considerations other than the substantive terms of the agreement are important in finding a term unconscionable. It is difficult to assess whether an exchange is fair,⁸⁷ and perhaps even dangerous or counter-productive.⁸⁸ Courts have not abandoned the notion of freedom of contract⁸⁹ and a contract can be declared unconscionable only if this is the conclusion reached within the context of the appropriate commercial setting.⁹⁰ Commercial setting is an ambiguous standard,⁹¹ but clearly it does include considerations of the industry's customs and needs. The latter appear to relate to the reasonableness of a specific term and the former to the aggrieved party's constructive knowledge of the term

(S.D.N.Y. 1975); *W.L. May Co., Inc. v. Philco-Ford Corp.*, 273 Or. 701, 543 P.2d 283 (1975).

82. *E.g.*, *Fredonia Broadcasting Corp., Inc., v. RCA Corp.*, 481 F.2d 781 (5th Cir. 1973); *Haugen v. Ford Motor Co.*, 219 N.W.2d 462 (N.D. 1974).

83. *Steele v. J.I. Case Co.*, 197 Kan. 554, 419 P.2d 902 (1966).

84. *Dilks v. Flohr Chevrolet*, 411 Pa. 425, 436, 192 A. 2d 682, 688 (1963). *Accord*, *Sutter v. St. Clair Motors, Inc.*, 44 Ill. App. 2d 318, 194 N.E.2d 674 (1963).

85. *Hy-Grade Oil Co. v. New Jersey Bank*, 138 N.J. Super. 112, 350 A.2d 279 (App. 1975). As will be discussed later, unequal bargaining power is one of the situations where there exists no meaningful choice for the disadvantaged person. *See* text accompanying notes 264-273 *infra*.

86. *See, e.g.*, *Hicks v. Ocean Drilling & Exploration Co.*, 512 F.2d 817 (5th Cir. 1975); *Hewitt v. Miller*, 11 Wash. App. 72, 521 P.2d 244 (1974); *see K & C, Inc. v. Westinghouse Elec. Corp.*, 437 Pa. 303, 263 A.2d 390 (1970).

87. *See Schwartz, Seller Unequal Bargaining Power and the Judicial Process*, 49 IND. L.J. 367 (1974) [hereinafter cited as Schwartz].

88. *See Epstein, Unconscionability: A Critical Reappraisal*, 18 J. LAW & ECON. 293 (1975) [hereinafter cited as Epstein].

89. *See Dewey, Freedom of Contract: Is It Still Relevant?*, 31 OHIO ST. L.J. 724 (1970).

90. *See* note 1 *supra*.

91. *See The Emperor's New Clause, supra* note 2, at 541-46.

and the risk transferred by that term. These concepts are related to the purposes of the bargaining process.

b. Commercially Reasonable Terms

Many terms which are commonly used may also be held unconscionable. Included in this category of reasonable risk-shifting terms which can become the subject of abuse are contract provisions such as limitation of remedy, exculpatory, indemnification, waiver of defense and confession of judgment clauses.⁹² While use of several of these terms in a single contract may cause the agreement to be one-sided and unconscionable for that reason,⁹³ most disputes involving these terms are not based upon lopsided transactions. Instead, the usual involves a term which, if enforced, would alter the usual damages rules for the particular transaction. These terms may be unconscionable where the aggrieved party did not intelligently, knowingly and voluntarily agree to them. In the extreme case, such terms might be unconscionable only because to enforce them would be unfair.⁹⁴

It thus appears that few unconscionability decisions rest upon the substantive terms of an exchange. The most frequent disputes involve other components of the principle: ignorance of the risk; ignorance of the contract; and lack of choice.

Ignorance of the Risk

If parties to an agreement are to transfer intelligently the risks of the exchange they must know what it is they are receiving or promising. An intelligent transfer is impossible if the parties do not appreciate the significance of a defect or even know of its existence. A similar difficulty arises if the contract is unintelligible or imprecise. Although both classes of events could be described as instances where the aggrieved party was ignorant of the *risks*, only the former are so defined here.⁹⁵ The latter are more properly considered as factors indicating the parties' ignorance of the *contract*—*i.e.*, the

92. *E.g.*, *Architectural Cabinets, Inc. v. Gaster*, 291 A.2d 298 (Del. Super. Ct. 1971); *Personal Fin. Co. v. Meredith*, 39 Ill. App. 3d 695, 350 N.E.2d 781 (1976) (*dicta*).

93. *See cases cited in note 63 supra*.

94. Such a case has not been reported, and it seems that in view of the courts' deference to intelligent, knowing and voluntary risk allocation, that unfairness alone would not overcome the parties' agreement, absent an adverse effect on the public generally.

95. On an extremely general level, it might be noted that *mutual* mistake cases have involved the former group while *unilateral* mistake cases involve the latter. Those cases deal with mistakes made in the course of preparing a contract; for example, the misplaced decimal cases. There seems to be no real reason why an unilateral mistake concerning the inherent risks of the product or thing exchanged could not occur, which is precisely what is being done via the principle of unconscionability.

terms of the exchange—and will be dealt with below.

The classic example of ignorance of the risk is the case excusing non-performance where a mutual mistake was found as to the things exchanged.⁹⁶ Where goods are sold, the same situation may occur if there is a hidden defect in the goods.⁹⁷ As an Illinois court expressed it:

The complexities of today's machines are far too subtle to allow a lay purchaser to deal at arm's length with a skilled merchant. . . . It would be unconscionable to say that he must have the skill necessary to know that he must reject a new car or other machine tendered for sale.⁹⁸

Furthermore, this basis of unconscionability is closely related to considerations supporting the requirement that merchants be subject to implied warranties.⁹⁹ It is also related to considerations of public policy, and to the historic judicial remedy of mutual mistake. But while ignorance of the risk is closely related to these notions of public policy,¹⁰⁰ it is more properly perceived as a separate basis of the principle of unconscionability. Where a person cannot negotiate for better protection than the disclaimer of liability contained in a form contract, considerations of ignorance of the risk and lack of choice require that the contract be held unconscionable.¹⁰¹

96. *E.g.*, *Jackson v. Seymour*, 193 Va. 735, 71 S.E.2d 181 (1952).

97. If the seller knew of the defect but did not disclose it, there could perhaps be an action for fraud or misrepresentation. As a practical matter, however, courts frequently apply the notion of a mutual mistake even when it is clear that the party seeking to enforce the contract knew of the risk or burden involved and imposed upon the other party. *Id.* Five of the ten cases cited in the Code Comments to § 2-302 as representative of results which would be required under that section can be characterized as involving product defects of which the buyer was reasonably ignorant: *Kansas City Wholesale Grocery Co. v. Weber Packing Corp.*, 93 Utah 414, 73 P.2d 1272 (1937); *Meyer v. Packard Cleveland Motor Co.*, 106 Ohio 328, 140 N.E. 118 (1922); *Bekkevold v. Potts*, 173 Minn. 87, 216 N.W. 790 (1927); *F.C. Austin Co. v. J. H. Tillman Co.*, 104 Or. 541; 209 P. 131 (1922), *Hardy v. General Motors Acceptance Corp.*, 38 Ga. App. 463, 144 S.E. 327 (1928).

98. *Sutter v. St. Clair Motors, Inc.*, 44 Ill. App. 2d 318, 194 N.E.2d 674 (1963). *See also Ford Motor Co. v. Pittman*, 227 So.2d 246 (Fla. App. 1969), where the court did not determine the question of "whether the disclaimer of the implied warranty on an expensive, complicated, dangerous instrumentality capable of effecting human injury or death and designed to be purchased and used by persons lacking knowledge in mechanics is an unconscionable provision in a contract for sale." *Id.* at 249-50.

99. *See Bekkevold v. Potts*, 173 Minn. 87, 216 N.W. 790 (1927).

100. *E.g.*, *Dessert Seed Co. v. Drew Farmers Supply Inc.*, 248 Ark. 858, 454 S.W.2d 307 (1970) (unequal ability to minimize or foresee the occurrence of the risk). *See also* notes 64 *supra*, and 107, 217.1, *infra* and accompanying text.

101. *See, e.g.*, *Sarfati v. M.A. Hittner & Sons, Inc.*, 35 A.D. 2d 1004, 318 N.Y.S.2d 352 (1970), *aff'd*, 30 N.Y.2d 613, 331 N.Y.S.2d 40, 282 N.E.2d 126 (1972); *Ford Motor Co. v. Tritt*, 244 Ark. 883, 890A, 430 S.W.2d 778 (1968). While *Sarfati* also indicates a reliance upon a lack of choice, the appellate division relied on *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 297 N.Y.S.2d 108, 244 N.E.2d 685 (1968), which is clearly a case involving an

Contract terms may be unconscionable where they transfer the risk of latent defects, or defects which are not reasonably discoverable upon tender of the goods.¹⁰² The most frequently stricken clauses are those which limit the time within which the purchaser must reject the goods or make a claim of imperfect tender.¹⁰³ Other decisions hold limitation of remedy clauses invalid because the remedy provided is illusory.¹⁰⁴ The problem with the latter clauses is that they purport to provide a remedy, but it proves ineffective because of an unknown defect.¹⁰⁵ Similarly, other courts have found terms unconscionable which would have protected a seller against a claim that the goods were non-conforming where that fact could not reasonably have been discovered within the time allowed.¹⁰⁶ Further, if the performance of a service contract is not "conforming" to the other party's reasonable expectations of the manner in which the contract should be performed, an exculpatory clause benefitting the actor may be unconscionable.¹⁰⁷

ignorance of the risk situation. Further, the general narrowness with which courts apply the lack of choice basis of unconscionability, *see* text accompanying notes 189-217 *infra*, would indicate that *Sarfati* is an ignorance of the risk case.

102. *Ford Motor Co. v. Tritt*, 244 Ark. 883, 430 S.W.2d 778 (1968); *Neville Chem. Co. v. Union Carbide Corp.*, 294 F. Supp. 649 (W.D. Pa. 1968); *Hardy v. General Motors Acceptance Corp.*, 38 Ga. App. 463, 144 S.E. 327 (1928).

103. *Kansas City Wholesale Grocery Co. v. Weber Packing Corp.*, 93 Utah 414, 73 P.2d 1272 (1937); *Wood, Stubbs & Co. v. Kaufmann*, 233 Ill. App. 138 (1924); *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 297 N.Y.S.2d 108, 244 N.E.2d 685 (1968) (*dicta*); *Velez v. Craine & Clarke Lumber Corp.*, 41 App. Div. 2d 747, 341 N.Y.S.2d 248 (1973) (*dissenting opinion*).

104. *E.g.*, *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 297 N.Y.S.2d 108, 244 N.E.2d 685 (1968); *Adams v. J.I. Case Co.*, 125 Ill. App. 2d 388, 261 N.E.2d 1 (1970). *See generally Limited Remedies, supra* note 2. Professor Eddy examines the proper mode of analysis for clauses challenged as failing their essential purpose under § 2-719(2). The failure of essential purpose rule in § 2-719(2) is closely related to unconscionability and in a sense is a rule of unconscionability. *But see id.* at 77 n.177. Professor Eddy argues that clauses challenged as failing their essential purpose should be analyzed using a three-step approach: (1) whether the risk is actually allocated by the challenged term; (2) if so, what is the proper interpretation and application of that term; and (3) if applied to the loss at hand, whether that would produce an unconscionable result, *i.e.* whether the clause is enforceable. The essential purpose doctrine is an analytical process used to separate those terms which should and should not be scrutinized by unconscionability, and, at the same time, a specialized form of a broader doctrine of unconscionability. *See id.* at 83, 89, 91.

105. *E.g.*, *Eckstein v. Cummins*, 41 Ohio App. 2d 1, 321 N.E. 2d 897 (1974).

106. *See, e.g.*, *Meyer v. Packard Cleveland Motor Co.*, 106 Ohio 328, 140 N.E. 118 (1922); *F.C. Austin Co. v. J.H. Tillman Co.*, 104 Or. 541, 209 P. 131 (1922); *Bowen v. Young*, 507 S.W.2d 600 (Tex. Civ. App. 1974); *Mobile Housing, Inc. v. Stone*, 490 S.W.2d 611 (Tex. Civ. App. 1973); *see Jefferson Credit Corp. v. Marcano*, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969). *See also Overland Bond & Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972); *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441, 240 A.2d 195 (1968) where the courts held there was a timely revocation of acceptance under § 2-609 of the Code, despite the presence of a term indicating acceptance of the auto by the buyer.

107. *See Watsontown Brick Co. v. Hercules Powder Co.*, 265 F. Supp. 268 (M.D. Pa.),

Terms disclaiming implied warranties and limiting the other's remedy are unconscionable if they would preclude the buyer from having a meaningful remedy solely because he could not precisely specify, despite repeated efforts, the defective part whose replacement would remedy the defect.¹⁰⁸ "It cannot be presumed that a buyer will voluntarily and knowingly agree to pay a full and adequate consideration for a pseudo-obligation."¹⁰⁹ But where the aggrieved party knew of the defect in the product, a risk-shifting term is not unconscionable on the basis of ignorance of the risk.¹¹⁰ The status of the aggrieved party may also be relied upon to indicate that he knew and appreciated the risk of the transaction.¹¹¹

Where the parties bargained over the contract terms and were knowledgeable as to the risks involved,¹¹² disclaimers have been enforced. Conversely, if the term was not bargained for, it may be unconscionable even if the parties were aware of it.¹¹³ Other courts disagree, refusing to hold unconscionable a clause protecting a seller for a loss due to a latent defect where there was negotiation as to some of the contract terms,¹¹⁴ or reasonable notice of the exculpatory clause.¹¹⁵

Ignorance of the Contract

Most of the rules of unconscionability rest in part upon the aggrieved party's ignorance of the terms of the written instrument. Many of these rules are express; others make an implicit assumption of lack of knowledge. The most obvious example of the latter variety is consumer protection laws. Sometimes this assumption of lack of knowledge is limited to the lack of compliance with type-size and warning requirements for consumer contracts.

aff'd per curiam, 387 F.2d 99 (3d Cir. 1967); *see also* *Lazan v. Huntington Townhouse, Inc.*, 69 Misc. 2d 1017, 332 N.Y.S.2d 270 (Dist. Ct. 1969), *aff'd*, 330 N.Y.S.2d 751 (1972) (*per curiam*); *Robinson v. Jefferson Credit Corp.*, 4 U.C.C. Rep. 15 (N.Y. Sup. Ct. 1967).

108. *Eckstein v. Cummins*, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974).

109. *Id.* at 12, 321 N.E.2d at 904.

110. *See Robinson v. Branch Moving & Storage Co.*, 28 N.C. App. 244, 221 S.E.2d 81 (1976); *Harison-Gulley Chevrolet, Inc. v. Carr*, 134 Ga. App. 449, 214 S.E.2d 712 (1975).

111. *Kleven v. Geigy Agricultural Chem.*, 303 Minn. 320, 227 N.W. 2d 566 (1975); *see J.D. Pavlak, Ltd. v. William Davies Co.*, 40 Ill. App. 3d 1, 351 N.E.2d 243 (1976).

112. *Cyrogenic Equip., Inc. v. Southern Nitrogen, Inc.*, 490 F.2d 696 (8th Cir. 1974); *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Olvera*, 119 F.2d 584 (9th Cir. 1941); *see J.D. Pavlak, Ltd. v. William Davies Co.*, 40 Ill. App. 3d 1, 351 N.E.2d 243 (1976).

113. *Dobias v. Western Farmers Assoc.*, 6 Wash. App. 194, 491 P.2d 1346 (1971).

114. *Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp.*, 422 F.2d 1013 (9th Cir. 1970); *Hügel v. General Motors Corp.*, 34 Colo. App. 61, 544 P.2d 983 (1976).

115. *E.g., Winant v. Approved Ladder & Equip. Corp.*, 31 App. Div. 2d 965, 298 N.Y.S.2d 796 (1969), *aff'd*, 28 N.Y.2d 529, 319 N.Y.S.2d 72, 267 N.E.2d 885 (1971) (*mem. dec.*).

Congress' reliance on this bargaining deficiency¹¹⁶ is demonstrated in the legislative findings and declaration to the Magnuson-Moss Warranty Act.¹¹⁷ The Illinois Consumer Fraud Act¹¹⁸ evinces a similar concern. The purpose behind the Illinois Act's requirement of notice in ten-point type to consumer buyers who execute a negotiable instrument¹¹⁹ has been described as designed

to increase the likelihood that the consumer debtor would be apprised of his rights, or lack thereof, which he had as a result of executing a negotiable instrument. Assuming that this notice would enable the consumer to comprehend his contractual obligations, he would not be unfairly surprised when he later discovered that the entity to whom the installment payments had to be made was immune from his defense or claim regarding the purchased goods.¹²⁰

The Uniform Consumer Credit Code,¹²¹ California's Unruh Act,¹²² and New York's Personal Property Law¹²³ contain similar notice/warning requirements for consumer transactions. These provisions apparently are intended to increase the likelihood that a consumer will have knowledge of the terms of his or her purchase. Conversely, without the required notice, it is conclusively presumed that the consumer is unaware of the effect of the contract and the particular clause to which the notice relates is unenforceable.

The UCC embodies the same notion. Section 2-302 provides for the non-enforceability of terms altering the usual damages rules of implied warranties when set forth in fine print.¹²⁴ Apparently implementing that principle, section 2-316(2) requires that clauses be conspicuous where they disclaim the implied warranties of merchantability and fitness for a particular purpose.¹²⁵ That is, they must be "so written that a reasonable person against whom [the disclaimer] is to operate ought to have noticed it."¹²⁶ Where the disclaimer is not conspicuous, it may nevertheless be enforced if the

116. H.R. REP. NO. 93-1107, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702.

117. 15 U.S.C. §§ 2301-12 (1975).

118. ILL. REV. STAT. ch. 121 ½, §§ 261 *et seq.* (1975).

119. ILL. REV. STAT. ch. 121 ½, § 262D (1975).

120. Personal Fin. Co. v. Meredith, 39 Ill. App. 3d 695, 698, 350 N.E.2d 781, 786 (1976).

121. *E.g.*, IND. CODE ANN., § 24-4.5-2-404(1) (Burns 1974) (U.C.C. § 2-404).

122. CAL. CIV. CODE §§ 1804.1, 1804.2 (Deering 1977 Supp.).

123. NEW YORK PERS. PROP. LAW § 403 (McKinney 1976 Supp.).

124. New Prague Flouring Mill Co. v. Spears, 194 Iowa 417, 189 N.W. 815 (1922), is cited by the Code Comments as an illustration of the results required by § 2-302.

125. Sections 2-314, 2-315, respectively of the Code.

126. U.C.C. § 1-201(10).

party against whom it operates had knowledge of it.¹²⁷

Of course, the courts have repeatedly emphasized the aggrieved party's ignorance, or lack of demonstrated ignorance, in ruling on claims of unconscionability. While there is a variety of circumstances in which unconscionability claims have been sustained, objective proof is generally required.¹²⁸ The complainant's status is often persuasive corroboration of that parol evidence.¹²⁹

Several types of situations fall under this concept of ignorance of the contract. Three of these were cited by the court in *Wille v. Southwestern Bell Telephone Co.*¹³⁰ inconspicuous clauses; incomprehensible phrasing; and exploitation of the underprivileged and illiterate. Other courts have relied upon proof of one or more of these circumstances, along with other facts, to find ignorance of the contract.¹³¹ However, it is possible to identify several more precise categories.

One of the most obvious situations in which the aggrieved party is justifiably ignorant of the contract is found in cases suggesting fraud, overreaching or misrepresentation.¹³² This may arise where the aggrieved party enters into a contract as the result of high pressure sales tactics. Where those techniques preclude an understanding of the obligations transferred or assumed, the contract terms are unconscionable.¹³³ The existence of such "bargaining" may similarly be an element in a decision holding a clause unenforceable.¹³⁴ These situations are not unique to consumer transactions and may cause invalidation of terms in business deals as well. "Agreements" were

127. *Smith v. Sharpsteen*, 521 P.2d 394 (Okla. 1974). *Contra*, *Fairchild Indus. v. Maritime Air Serv., Ltd.*, 274 Md. 181, 333 A.2d 313 (1975).

128. The relationship between unconscionability and the objective theory of contracts is discussed at text accompanying notes 308-314 *infra*.

129. See generally *Childres & Spitz, Status in the Law of Contract*, 47 N.Y.U.L. Rev. 1 (1972).

130. 219 Kan. 755, 549 P.2d 903 (1976).

131. *E.g.*, *Swarb v. Lennox*, 405 U.S. 191 (1972), *aff'g* 314 F. Supp. 1091 (E.D. Pa. 1970) (reliance upon survey which showed ignorance of the effect of printed contracts, particularly within a given income and level of education group). See also *Star Fin. Corp. v. McGee*, 27 Ill. App. 3d 421, 326 N.E.2d 518 (1975).

132. See, *e.g.*, *Toker v. Perl*, 103 N.J. Super. 500, 247 A. 701 (Super Ct. 1968), *aff'd*, 108 N.J. Super. 129, 260 A.2d 244 (App. Div. 1970); *W. J. Grant Co. v. Walsh*, 100 N.J. Super. 50, 241 A.2d 46 (Dist. Ct. 1968); see *Tai Kien Indus. Co., Ltd. v. M/V Hamburg*, 528 F.2d 835 (9th Cir. 1976).

133. *Nu Dimensions Figure Salons v. Becerra*, 73 Misc. 2d 140, 340 N.Y.S.2d 268 (Civ. Ct. 1973).

134. See, *e.g.*, *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966); *Albert Merrill School v. Godoy*, 78 Misc. 2d 647, 357 N.Y.S.2d 378 (Civ. Ct. 1974); *Western Discount Corp. v. Pliego*, 5 Clearinghouse Rev. 30 (#719743, Wash. Super. Ct. Kings County 1971); *Brooklyn Union Gas Co. v. Jimenez*, 82 Misc. 2d 948, 371 N.Y.S.2d 289 (Civ. Ct. 1975).

held unenforceable where a disclaimer could not be observed prior to execution of the contract¹³⁵ and where a bank representative asked for and secured a contractor's signature to a commitment under circumstances indicating that the contractor had no awareness of the obligations contained therein.¹³⁶

The sophistication of the aggrieved party is significant in determining whether the sales pitch actually prevented or obscured his knowledge of the contract. Difficulties with the English language make a buyer more susceptible to misleading and deceptive sales techniques, and may result in the contract being held unconscionable.¹³⁷ In this situation the buyer also might not understand the terms of the transaction, causing the agreement to be unconscionable if literally enforced.¹³⁸ Even if the complainant can speak English, the contract may be incomprehensible due to lack of sophistication. While one court has ruled that limited education alone is not enough to base a finding of an unconscionable contract,¹³⁹ others rely heavily upon that fact. One with only a ninth grade education may not be able to understand a lease-franchise agreement which contains exculpatory and indemnification clauses.¹⁴⁰ Similarly, an attorney may be held to a referral-bonus contract in connection with a consumer goods purchase while substantially less sophisticated persons have been excused.¹⁴¹ More complex agreements may be beyond the capacity of particular individuals and hence unconscionable.¹⁴² As one court stated, "courts must provide the necessary instrumentality to pierce the shield of caveat emptor when it is sought to be used as a sword at the throats of the poor and the illiterate."¹⁴³

135. *Hunt v. Perkins Mach. Co.*, 353 Mass. 535, 226 N.E.2d 228 (1967).

136. *Bank of Marion v. Robert "Chick" Fritz, Inc.*, 9 Ill. App. 3d 102, 291 N.E.2d 836 (1973), *aff'd*, 57 Ill. 2d 120, 311 N.E.2d 138 (1974).

137. *Jefferson Cred. Co. v. Marcano*, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969); *Albert Merrill School v. Godoy*, 78 Misc. 2d 647, 357 N.Y.S.2d 378 (Civ. Ct. 1974). *But compare Hernandez v. SIC Finance Co.*, 79 N.M. 673, 448 P.2d 474 (1968).

138. *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966); *Irazarry v. Metropolitan School of Law Enforcement*, 5 Clearinghouse Rev. 405 (Ill. Cir. Cook County #70-CH-1281, 1970).

139. *Contract Buyers League v. F & F Inv.*, 300 F. Supp. 210 (N.D. Ill. 1969) (class action).

140. *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971). *Compare K & C, Inc. v. Westinghouse Elec. Corp.*, 437 Pa. 303, 263 A.2d 390 (1970).

141. *Compare Neal v. Lacob*, 31 Ill. App. 3d 137, 334 N.E.2d 435 (1975), *with Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966).

142. *E.g., Urdang v. Muse*, 114 N.J. Super. 372, 276 A.2d 397 (Dist. Ct. 1971); *see Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Seabrook v. Commuter Housing Co., Inc.*, 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. 1972). *But see Washington v. Claassen*, 218 Kan. 577, 545 P.2d 387 (1976).

143. *Star Credit Corp. v. Ingram*, 71 Misc. 2d 787, 789, 337 N.Y.S.2d 245, 248 (Civ. Ct. 1972).

A person's expectations as to the meaning of a contract consists of what he has understood from the terms of the written instrument along with any negotiations or discussions. A contract or clause which in effect is contrary to those reasonable expectations may be unconscionable. Hence, a real estate broker's form contract was held unconscionable as being contrary to the seller's reasonable expectations where it guaranteed the broker a commission even if no sale were made, regardless of whether the lack of a sale was the seller's fault.¹⁴⁴ The court held that the seller should be liable for a brokerage commission only if a sale were made, unless the sale was defeated because of the seller's improper and frustrating conduct. The court thus effectively rewrote the contract to reflect the reasonable expectations of the aggrieved party.¹⁴⁵ Conversely, a stock repurchase agreement was held not unconscionable where it did not frustrate the reasonable expectations of the complainant at the time of contracting.¹⁴⁶

The parties' expectations may also rest upon the perceived bargain, sometimes called the "basis of the bargain." Clauses which would nullify the basic bargained exchange and where the disadvantaged party is not expected to have negotiated for more favorable terms have been held unconscionable. Displaying a model of the product to be purchased may constitute the "dickered" terms of the deal, so that even a conspicuous disclaimer and limitation of liability clause will not shield the seller where the delivered goods do not conform to the model.¹⁴⁷ Similarly, where the specifications of the product were bargained, a court refused to enforce a disclaimer in a consumer contract which would have "eviscerated" that which the buyer had bargained for.¹⁴⁸ Other courts have required that a warranty disclaimer be specifically negotiated,¹⁴⁹ or that the parties have in fact intended to indemnify a manufacturer for its own active negligence.¹⁵⁰ A clause which provided insurance coverage for burglary only if there were "visible marks" on the building's exterior was held unconscionable, in part because the clause altered the fair meaning of an insurance contract.¹⁵¹ Nor is a disclaimer or limita-

144. *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 236 A.2d 843 (1967).

145. *See* U.C.C. § 2-302(1).

146. *Yeng Sue Chow v. Levi Strauss & Co.*, 49 Cal. App. 3d 315, 122 Cal. Rptr 816 (1975).

147. *See, e.g., Bowen v. Young*, 507 S.W.2d 600 (Tex. Civ. App. 1974); *Mobile Housing, Inc. v. Stone*, 490 S.W.2d 611 (Tex. Civ. App. 1973).

148. *Berg v. Stromme*, 79 Wash. 2d 184, 484 P.2d 380 (1971).

149. *See, e.g., Dorman v. Internat'l Harvester Co.*, 46 Cal. App. 3d 11, 120 Cal. Rptr 516 (1975).

150. *See, e.g., Vancouver Plywood Co. v. National Auto. Cas. Ins. Co.*, 387 F. Supp. 311 (W.D. La. 1975).

151. *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Iowa 1975).

tion binding where it is not disclosed to the purchaser until delivery of the goods; it is not part of the parties' agreement as to the terms of the exchange.¹⁵² But where the court believes that because of the status and sophistication of the aggrieved he should have negotiated a disclaimer or limitation of remedy clause, the agreement will be enforced.¹⁵³

Similarly, warranty disclaimers and other risk-shifting clauses are unenforceable if they are not conspicuous.¹⁵⁴ Thus, terms in fine print may be unenforceable where they contain "conditions, stipulations, reservations, exceptions and waivers" which restrict or eliminate a seller's liability.¹⁵⁵ Also unconscionable is a cognovit note placed in a commercial contract in a deceptive manner.¹⁵⁶ And a term in an insurance contract which is contrary to the insured's reasonable expectations as to the coverage of the policy may be

152. See, e.g., *Admiral Oasis Hotel Corp. v. Home Gas Indus., Inc.*, 68 Ill. App. 2d 297, 306, 216 N.E.2d 282, 286 (1965); *Gozales v. Southwest Mobile Homes, Inc.*, 309 So. 2d 780 (La. App. 1975); see *Tropicana Pools, Inc. v. Boysen*, 296 So. 2d 104 (Fla. App. 1974); cf. *Rehurek v. Chrysler Credit Corp.*, 262 So. 2d 452 (Fla. App. 1972). Several courts have also held these clauses unenforceable because they were not part of the "basis of the parties bargain." See *Chemco Indus. Applicators Co. v. E.I. du Pont de Nemours & Co.*, 366 F. Supp. 278 (E.D. Mo. 1973) (applying Arkansas law); *Dessert Seed Co., Inc. v. Drew Farmers Supply, Inc.*, 248 Ark. 858, 454 S.W.2d 307 (1970); *Geo. C. Christopher & Son, Inc. v. Kansas Paint & Color Co., Inc.*, 215 Kan. 185, 523 P.2d 709 (1974); *Tiger Motor Co. v. McMurtry*, 284 Ala. 283, 224 So. 2d 638 (1969); *W & W Livestock Enterprises, Inc. v. Denny*, 179 N.W.2d 484 (Iowa 1970) (disclaimers had no effect upon oral warranties); cf., *Karczewski v. Ford Motor Co.*, 382 F. Supp. 1346 (N.D. Ind. 1974); *Chrysler Corp. v. Wilson Plumbing Co., Inc.*, 132 Ga. App. 435, 208 S.E.2d 321 (1974); *Ford Motor Co. v. Taylor*, 60 Tenn. App. 271, 446 S.W.2d 521 (1969). But see *Smith v. Sharpsteen*, 521 P.2d 394 (Okla. 1974); *Mosesian v. Bagdasarian*, 260 Cal. App. 2d 361, 67 Cal. Rptr 369 (1968); *Boyd v. Thompson-Hayward Chem. Co.*, 450 S.W.2d 937 (Tex. Civ. App. 1970); *Beauchamp v. Wilson*, 21 Ariz. App. 14, 515 P.2d 41 (1973). In *County Asphalt, Inc. v. Lewis Welding & Eng. Corp.*, 323 F. Supp. 1300 (S.D.N.Y. 1970), *aff'd*, 444 F.2d 372 (2d Cir. 1971), the court noted that one of the grounds justifying a claim of an unconscionable contract was where the aggrieved party was misled as to the nature of the bargain. *Id.* at 1308. If disclaimers which were not part of the parties' bargain were considered part of the contract (e.g., a disclaimer which first appeared when the goods were delivered), then the *County Asphalt* rationale would view the aggrieved party as misled as to the nature of the deal. These disclaimers would be held unconscionable and unenforceable, just as the basis of the bargain rationale does, as in the *Rehurek* case.

153. See, e.g., *United States Fibres, Inc. v. Proctor & Schwartz, Inc.*, 358 F. Supp. 449 (E.D. Mich. 1972), *aff'd*, 509 F.2d 1043 (6th Cir. 1975); *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361 (S.D.N.Y. 1975); *Delta Air Lines, Inc. v. Douglas Aircraft Co.*, 238 Cal. App. 2d 95, 47 Cal. Rptr 518 (1965). Cf. *Collins II v. Sears, Roebuck & Co.*, 164 Conn. 369, 374, 321 A.2d 444, 448 (1973) (parties bound by plain language of the contract).

154. "Conspicuous" means the party against whom the clause operates should have noticed it. U.C.C. § 1-201(10).

155. *New Prague Flouring Mill Co. v. Spears*, 194 Iowa 417, 189 N.W. 815 (1922). *Accord*, *Baker v. City of Seattle*, 79 Wash. 2d 198, 484 P.2d 405 (1971). See also *Ford Motor Co. v. Pittman*, 227 So. 2d 246 (Fla. App. 1969).

156. *Architectural Cabinets, Inc. v. Gaster*, 291 A.2d 298 (Super. Ct. 1971). See also *AAACON Auto Transport, Inc. v. Newman*, 77 Misc. 2d 1069, 356 N.Y.S.2d 171 (S.Ct. 1974) (forum selection clause "lost in a solid wall of type").

unenforceable if in fine print.¹⁵⁷ Even if the form contains a conspicuous notice or disclaimer, it may still be unenforceable if the disadvantaged party could not see it before signing the form,¹⁵⁸ or because half the page, including the disclaimer, was underlined.¹⁵⁹ Thus, many courts have required warranty disclaimers and limitation of liability clauses to be brought to the attention and knowledge of the purchaser before the contract is signed.¹⁶⁰ But if a complainant had "reasonable notice" of a disclaimer, that clause may be enforced.¹⁶¹

The requirement of conspicuousness has appeared in other unconscionability decisions in the context of rules requiring a disclaimer or other exculpatory term to be clear and specific. A notice which did not "clearly and unequivocally" disclaim a film manufacturer's liability for its negligence is unenforceable.¹⁶² Another court has held that exculpatory terms are unenforceable unless they clearly and unequivocally spell out the intent to grant such immunity and relief from liability.¹⁶³ An agreement may be unenforceable where it does not constitute an express transfer and assumption of risk by the injured party,¹⁶⁴ though less specificity may be sufficient in a commercial transaction.¹⁶⁵ In a consumer transaction, a warranty can be

157. *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Iowa 1975).

158. *Hunt v. Perkins Mach. Co.*, 353 Mass. 535, 226 N.E. 2d 228 (1967).

159. *Jones v. Abriani*, 350 N.E.2d 635 (Ind. App. 1976).

160. *See, e.g., Tiger Motor Co. v. McMurtry*, 284 Ala. 283, 224 So. 2d 638 (1969); *Walcott & Steele, Inc. v. Carpenter*, 246 Ark. 75, 436 S.W.2d 820 (1969); *George C. Christopher & Son, Inc. v. Kansas Paint & Color Co., Inc.*, 215 Kan. 185, 523 P.2d 709 (1974); *Hob's Refrigeration & Air Conditioning, Inc. v. Poche*, 304 So. 2d 326 (La. 1974); *Sellman Auto, Inc. v. McGowan*, 89 Nev. 353, 513 P.2d 1228 (1973); *Gore v. George J. Ball, Inc.*, 279 N.C. 192, 182 S.E.2d 389 (1971). *See generally* *Dailey v. Holiday Distrib. Corp.*, 260 Iowa 859, 151 N.W.2d 477 (1967); *Jerry Alderman Ford Sales, Inc. v. Bailey*, 154 Ind. App. 632, 294 N.E.2d 617 (1973). *Cf. Callahan v. Keystone Fireworks Mfg. Co.*, 72 Wash. 2d 823, 435 P.2d 626 (1967). *Compare Trane Co. v. Gilbert*, 267 Cal. App. 2d 720, 73 Cal. Rptr 279 (1968) (architects knowledge of limitation of remedy clauses charged to building owner, for whom architect was agent); *Adams v. J.I. Case Co.*, 125 Ill. App. 2d 388, 261 N.E.2d 1 (1970) (no proof that purchase was not made with full knowledge of limitation and disclaimer terms).

161. *Winant v. Approved Ladder & Equip. Corp.*, 31 App. Div. 2d 965, 298 N.Y.S.2d 796 (1969), *aff'd*, 28 N.Y.2d 529, 319 N.Y.S.2d 72, 267 N.E.2d 885 (1971).

162. *Posttape Assoc. v. Eastman Kodak Co.*, 387 F. Supp. 184 (E.D. Pa. 1974), *rev'd on other grounds*, 537 F.2d 751 (3d Cir. 1976). *See also* *Admiral Oasis Hotel Corp. v. Home Gas Indus. Inc.*, 68 Ill. App. 2d 297, 216 N.E.2d 282 (1965). In *Posttape*, the notice was on individual film containers which were in turn packaged in another container, thus making actual notice of the disclaimer at the time of contracting highly remote. However, the Third Circuit reversed the district court's decision on the ground that it erred in excluding evidence as to whether the plaintiff was insured for the loss.

163. *Dilks v. Flohr Chevrolet*, 411 Pa. 425, 436, 192 A. 2d 682, 688 (1963). *Accord*, *Prince v. Paretto Pontiac Co.*, 381 So. 2d 112 (La. 1975).

164. *See, e.g., Barker v. Colorado Region-Sports Car Club*, 532 P.2d 372 (Colo. App. Ct. 1974); *Dillon v. Gen. Motors Acceptance Corp.*, 315 A.2d 732 (Super. Ct. 1974). *But*, *Hewitt v. Miller*, 11 Wash. App. 72, 521 P.2d 244 (1974).

165. *Gates Rubber Co. v. USM Corp.* 508 F.2d 603 (7th Cir. 1975).

modified only if the seller clearly limits its liability, and the contract must clearly convey that the risk of loss falls on the consumer-buyer.¹⁶⁶ Thus, where the aggrieved party is less sophisticated, there may be a greater burden imposed on the form offeror.

Some courts have gone further and require actual notice to the disadvantaged party before a risk-shifting term will be upheld. The requirement that a disclaimer must be conspicuous may mean that it must be brought to the attention of a commercial buyer.¹⁶⁷ A proponent of an unusual contract term which is favorable to the party with superior bargaining power must show a knowing and voluntary agreement to that term.¹⁶⁸ Even fulfilling the "as is" requirement for implied warranty disclaimers¹⁶⁹ may be insufficient unless the disclaimer is shown to have been meant as an intentional relinquishment of a known right.¹⁷⁰ In consumer transactions a general disclaimer must be brought clearly to the buyer's attention and then agreed to.¹⁷¹ Similarly, a contract which does not inform a consumer that he is waiving the right to insist that a product perform properly may be unenforceable.¹⁷² And confession of judgment clauses are not enforceable unless the party intelligently and knowingly waived his right to pretrial notice and hearing.¹⁷³

Risk-shifting terms in negotiated transactions are consistently held enforceable.¹⁷⁴ However, in this situation the parties usually have knowingly allocated the risks of loss. Many courts have not gone so far as to require actual knowledge of the existence and effect of a risk-shifting term before enforcing it. Some have held that if a

166. *Hauter v. Zogarts*, 14 Cal. 3d 104, 120 Cal. Rptr. 681, 534 P.2d 377 (1975); *see Sutter v. St. Clair Motors, Inc.*, 44 Ill. App. 2d 318, 194 N.E.2d 674 (1963).

167. *Fairchild Indus. v. Maritime Air Serv., Ltd.*, 274 Md. 181, 333 A.2d 313 (1975).

168. *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 312 (1974). *See Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971).

169. U.C.C. § 2-316(2), (4).

170. *Turner v. Int'l. Harvester Co.*, 133 N.J. Super. 277, 336 A.2d 62 (Sup. Ct. Law Div. 1975).

171. *Hiigel v. Gen. Motors Corp.*, 544 P.2d 983 (Colo. 1976).

172. *Rehurek v. Chrysler Credit Corp.*, 262 So.2d 452 (Fla. App. 1972).

173. *Star Fin. Co. v. McGee*, 27 Ill. App. 3d 421, 326 N.E.2d 518 (1975).

174. *See, e.g., Vitex Mfg. Corp. v. Cribtex Corp.*, 377 F.2d 795 (3d Cir. 1967); *Cyrogenic Equip. Co. v. Southern Nitrogen, Inc.*, 490 F.2d 696 (8th Cir. 1974); *Royal Indem. Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 520 (S.D.N.Y. 1974); *Potomac Elec. Power Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 572 (D.D.C. 1974); *Sterner Aero AB v. Page Automotive, Inc.*, 499 F.2d 709 (10th Cir. 1974) (disclaimers effective to bar warranty theory of recovery, but not to cut off recovery on strict tort or negligence liability); *Raybond Elec. v. Glen-Mar Door Mfg. Co.*, 22 Ariz. App. 409, 528 P.2d 409 (1974). *See Gates Rubber Co. v. USM Corp.*, 351 F. Supp. 329, 334-35 (S.D. Ill. 1974), *rev'd on other grounds*, 508 F.2d 603 (7th Cir. 1975). *See also Texaco v. A.A. Gold Inc.*, 78 Misc.2d 1050, 357 N.Y.S.2d 951 (Sup. Ct.), *aff'd*, 45 App. Div.2d 1048, 358 N.Y.S.2d 973 (1974).

clause is conspicuous, it is enforceable.¹⁷⁵ Others have upheld a clause which was "sufficiently clear" to apprise the complainant of a waiver, including the right to a jury trial,¹⁷⁶ and have enforced a general disclaimer.¹⁷⁷ Still others have held that even a clause in fine print containing complex and restrictive language is not unconscionable.¹⁷⁸

A person's ignorance or lack of ignorance of the contract is also measured by that person's previous experience, *i.e.* whether the existence of a risk-shifting clause is unexpected or surprising.¹⁷⁹ The existence of the same or similar clauses in previous contracts between the same parties, or between the complainant and other suppliers, may defeat a claim of unconscionability.¹⁸⁰ And a complainant's general knowledge of the risks, whether agricultural or commercial, may result in a limitation of remedy clause (providing for a refund of the purchase price) being enforced.¹⁸¹

Courts generally reject a claim of unconscionability where no ignorance of the contract is shown.¹⁸² Other decisions conclude that the complainant knew of the disputed term¹⁸³ or rely upon the aggrieved's profession and training,¹⁸⁴ business experience,¹⁸⁵ or general

175. *See, e.g.,* *Velez v. Craine & Clarke Lumber Corp.*, 41 App.Div. 2d 747, 341 N.Y.S.2d 248 (1973); *Bakal v. Burroughs Corp.*, 74 Misc. 2d 202, 343 N.Y.S.2d 541 (Sup. Ct. 1972).

176. *See, e.g.,* *David v. Manufacturers Hanover Trust Co.*, 59 Misc. 2d 248, 298 N.Y.S.2d 847 (App. Term. 1969).

177. *See, e.g.,* *Recreatives, Inc. v. Myers*, 67 Wisc. 2d 255, 226 N.W.2d 474 (1975).

178. *See, e.g.,* *Central Ohio Coop. Milk Producers, Inc. v. Rowland*, 29 Ohio App. 2d 236, 281 N.E.2d 42 (1972). *See in re* *Elkins-Dell Mfg. Co.*, 253 F. Supp. 864 (E.D. Pa. 1966).

179. *J.D. Pavlak, Ltd. v. William Davies Co.*, 40 Ill. App. 3d 1, 351 N.E.2d 243 (1976).

180. *See, e.g.,* *Garretson v. United States*, 456 F.2d 1017 (9th Cir. 1972); *Dow Corning Corp. v. Capital Aviation, Inc.*, 411 F.2d 622 (7th Cir. 1969); *Boone Val Coop. Processing Ass'n v. French Oil Mill Mach. Co.*, 383 F. Supp. 606 (N.D. Iowa 1974); *Architectural Aluminum Corp. v. Macarr, Inc.*, 70 Misc. 2d 495, 333 N.Y.S.2d 818 (Sup. Ct. 1972). *See* *County Asphalt, Inc. v. Lewis Welding & Eng'r Corp.*, 323 F. Supp. 1300 (S.D.N.Y. 1970), *aff'd*, 444 F.2d 372 (2d Cir. 1971).

181. *See, e.g.,* *United States Fibers, Inc. v. Proctor & Schwartz*, 358 F. Supp. 449 (E.D. Mich. 1972), *aff'd*, 509 F.2d 1043 (6th Cir. 1975); *Kleven v. Geigy Agricultural Chem.*, 303 Minn. 320 227 N.W.2d 566 (1975).

182. *E.g.,* *Personal Fin. Co. v. Meredith*, 39 Ill. App. 3d 695, 350 N.E.2d 781 (1976); *Gabl v. Alaska Loan & Invest. Co.*, 6 Wash. App. 880, 496 P.2d 548 (1972).

183. *See, e.g.,* *Lundstrom v. Radio Corp.*, 17 Utah 2d 114, 405 P.2d 339 (1965); *First N.J. Bank v. F.L.M. Business Mach., Inc.*, 130 N.J. Super. 151, 325 A.2d 843 (Sup. Ct. Law Div. 1974); *Abel Holding Co. v. Am. Dist. Tel. Co.*, 138 N.J. Super. 137, 350 A.2d 292 (Sup. Ct. Law Div. 1975); *D.O.V. Graphics, Inc. v. Eastman Kodak Co.*, 46 Ohio Misc. 37, 347 N.E.2d 561 (1976). *See* *King v. South Jersey Nat'l Bank*, 66 N.J. 161, 330 A.2d 1 (1974).

184. *See, e.g.,* *K & C Inc. v. Westinghouse Elec. Corp.*, 437 Pa. 303, 263 A.2d 390 (1970); *State Bank v. Hickey*, 29 App. Div. 2d 993, 288 N.Y.S.2d 980 (1968). *But see* *Kaye v. Coughlin*, 443 S.W.2d 612 (Tex. Civ. App. 1969).

185. *See, e.g.,* *Mortgage Investors v. Citizens Bank & Trust Co.*, 278 Md. 505, 366 A.2d 47 (1976); *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*, 89 Nev. 414, 514 P.2d 654 (1973); *Barnes v. Helfenbein*, 548 P.2d 1014 (Okla. 1976); *K & C, Inc. v. Westinghouse Elec. Corp.*,

sophistication¹⁸⁶ to uphold the clause. Finally, some courts have rejected an unconscionability argument simply on the ground that a person is presumed to be bound by a written contract even if that person has not read the contract, or could not have understood it if he had read it.¹⁸⁷

These rules demonstrate that unconscionability is based in part upon situations where the complaining party is excusably ignorant of the purported agreement. Knowledge of the terms of an agreement is of course necessary for actual assent to a contract. Hence actual knowledge is involved in cases which discuss unconscionability in terms of whether the aggrieved party was deprived of a meaningful choice.¹⁸⁸ Logically, before one can exercise a choice as to the terms of an exchange, that person must know and understand those terms.

Lack of Choice

A substantial number of decisions identify unconscionable contracts as those involving lack of choice, or lack of a meaningful choice. In only a limited number of these situations, however, is lack of choice in contract terms, *i.e.*, the "take-it-or-leave-it" adhesion contract, enough in itself to cause a court to declare a contract or clause enforceable. In most of the decisions citing lack of choice in contract terms as ground for a finding of unconscionability, one of the three aforementioned bases of unconscionability coexisted independently as an operative fact. A consideration typically recurring in many decisions is the commercial reasonableness of the terms. Ignorance of the contract is also frequently cited together with a lack of choice, while ignorance of the risk is less commonly articulated in lack of choice cases.¹⁸⁹

Most decisions which cite a lack of alternative terms as a factor in identifying an unconscionable contract also rely upon the ag-

437 Pa. 303, 263 A.2d 390 (1970); *Block v. Ford Motor Credit Co.*, 286 A.2d 228 (D.C. 1972); *State Bank v. Hickey*, 29 App. Div. 2d 993, 288 N.Y.S.2d 980 (1968); *Wedner v. Fidelity Security Sys., Inc.*, 307 A.2d 429 (Pa. Super. Ct. 1973).

186. *See, e.g.*, *Southwest Forest Indus. Inc. v. Westinghouse Elec. Corp.*, 422 F.2d 1013 (9th Cir. 1970); *Cyclops Corp. v. Home Ins. Co.*, 389 F. Supp. 476 (W.D. Pa. 1975). *W.L. May Co. v. Philco-Ford Corp.*, 543 P.2d 283 (Or. Sup. Ct. 1975); *Avenell v. Westinghouse Elec. Corp.*, 41 Ohio App. 2d 150, 324, N.E.2 583 (1974). *See Gelderman & Co., Inc. v. Lane Processing, Inc.*, 527 F.2d 571 (5th Cir. 1975) (aggrieved party a "large corporate entity").

187. *E.g.*, *Washington v. Claasen*, 218 Kan. 577, 545 P.2d 387, 391 (1976).

188. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971).

189. *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d (1971). *See Sarfati v. M.A. Hittner & Sons, Inc.*, 35 App. Div. 2d 1004, 318 N.Y.S.2d 352 (1970), *aff'd*, 30 N.Y.2d 613, 331 N.Y.S. 2d 40, 282 N.E.2d 126 (1972). *Cf.*, *Collins v. Uniroyal, Inc.*, 64 N.J. 260, 315 A.2d 16 (1974).

grieved party's ignorance of the terms. Some decisions merely state that an "unusual" contract term¹⁹⁰ or a risk-shifting clause¹⁹¹ must be knowingly and voluntarily assumed. Other courts state that consumers must be put on fair notice of a disclaimer or modification of warranties and freely agree to those terms.¹⁹² Still others are more explicit, stating that disproportionate levels of education, language and deceptive sales techniques affect the parties' bargaining power and may deprive the buyer of a meaningful choice.¹⁹³ And, to the extent that fraud and overreaching deprive one of a meaningful choice, those clauses are also unconscionable.¹⁴

While they include facts to suggest ignorance of the contract, other decisions depart from this pattern and indicate that lack of choice in itself may cause a contract to be unconscionable. "[A] weaker party [because of a lack of education or financial means] is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly or because all competitors use the same clauses."¹⁹⁵ However, only a few decisions have held a contract or clause unenforceable solely because of a lack of choice. Distinguishing these decisions, perhaps, is that they typically have involved so-called items of necessity:¹⁹⁶ public housing for itinerant workers;¹⁹⁷ apartments in areas where those dwellings are scarce;¹⁹⁸ and even the private automobile.¹⁹⁹ The argument has also been accepted in commercial transactions where there exists a disparity of bargaining position.²⁰⁰ Even a dealer who merely transmits the product to a consumer may have a plea of necessity and lack of choice where a disclaimer or remedy limitation term is held unconscionable as to the buyer.²⁰¹

190. *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 329 A.2d 312 (1974).

191. *E.g.*, *Star Fin. Corp. & McGee*, 27 Ill. App. 3d 421, 326 N.E.2d 518 (1975).

192. *Hauter v. Zogarts*, 14 Cal. 3d 104, 120 Cal. Rptr 681, 534 P.2d 377 (1975).

193. *Albert Merrill School v. Godoy*, 78 Misc. 2d 647, 357 N.Y.S.2d 378 (S. Ct. 1974).
Accord, *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).

194. *See*, *Tai Ken Indus. Co., Ltd. v. M/V Hamburg*, 528 F.2d 835 (9th Cir. 1976).

195. *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E. 2d 144, 147 (1971). But as will be discussed below, the real judicial objection to these clauses may be the risk transferred, a risk of which the aggrieved person may be ignorant or have no control. *See*, text accompanying notes 287-89 *infra*.

196. *E.g.*, *Weidman v. Tomaselli*, 81 Misc. 2d 328, 365 N.Y.S.2d 681 (County Ct. 1975).

197. *Gonzalez v. County of Hildago*, 489 F.2d 1043 (5th Cir. 1973).

198. *Harwood v. Lincoln Square Apts.*, 78 Misc. 2d 1097, 359 N.Y.S.2d 387 (Civ. Ct. N.Y. 1974).

199. *Gibbs v. Titelman*, 369 F. Supp. 38 (E.D. Pa. 1973), *rev'd on other grounds*, 502 F.2d 1107 (3d Cir. 1974). *Contra*, *Block v. Ford Motor Credit Co.*, 286 A.2d 228 (D.C. 1972).

200. *See Monsanto Co. v. Alden Leeds, Inc.*, 130 N.J. Super 245, 326 A.2d 90 (1975).

201. *Sarfati v. M.A. Hittner & Sons, Inc.*, 35 App. Div. 2d 1004, 318 N.Y.S.2d 351 (1970), *aff'd.*, 30 N.Y.2d 613, 331 N.Y.S. 2d 40, 282 N.E.2d 126 (1972).

Another group of decisions have found that the complainant had adequate alternatives such as foregoing the particular purchase²⁰² or an adequate substitute remedy,²⁰³ and hence found the contract to be enforceable. Note that where there are adequate alternatives, there is at least some choice of terms. Similarly, claims may be rejected for failure to prove a lack of choice.²⁰⁴ Finally, courts have refused to consider this type of argument seriously where the contracting parties were able to bargain, and the complainant had bargained successfully on other terms of the agreement.²⁰⁵

Another popular approach to this problem is taken by courts which rely upon the substantive characteristics of the exchange in resolving a claim of unconscionability. Specifically, they consider whether the clause is unreasonable or against public policy, and if the exchange is inadequate or unfair. One court considered unconscionability in terms of economic duress. It refused to hold the contract unconscionable without more evidence as to its commercial reasonableness, despite the aggrieved party's evident lack of choice.²⁰⁶ Conversely, a release executed by a patient which a hospital sought to enforce was condemned because "the releasing party does not really acquiesce voluntarily in the contractual shifting of the risk, nor can we be reasonably certain he receives an adequate consideration for the transfer."²⁰⁷ In a different context, an exchange may be unconscionable if necessities force an individual to execute what amounts to a perpetual guarantee of future loans to another, the problem being "inadequate consideration."²⁰⁸ A lack of bargaining power, together with a public policy to protect the class of persons to whom the aggrieved party belongs, against "the disarm-

202. See *Mortgage Investors of Washington v. Citizens Bank & Trust Co.*, 278 Md. 505, 366 A.2d 47 (1976).

203. *County Asphalt, Inc. v. Lewis Welding & Eng'r Corp.*, 323 F. Supp. 1300 (S.D.N.Y. 1970), *aff'd* 444 F.2d 372 (2d Cir. 1971). See *First N.J. Bank v. F.L.M. Business Machines, Inc.*, 130 N.J. Super 151, 325 A.2d 843 (1974).

204. *Personal Fin. Co. v. Meredith*, 297 Minn. 457, 214 N.W.2d 698 (1973); *Morris v. Capitol Furniture & Appliance Co.*, 280 A. 2d 775 (D.C. App. 1971); *Block v. Ford Motor Credit Co.*, 286 A.2d 228 (D.C. 1972).

205. *Fleishman Distilling Co. v. Distillers Co.*, 395 F. Supp. 221 (S.D.N.Y. 1975). See, *Royal Indem. Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 520 (S.D.N.Y. 1974). In the latter case, the court was impressed by the fact that the aggrieved party had been reimbursed by its insurer for its loss.

206. *In re Elkins—Dell Mfg. Co.*, 253 F. Supp. 864 (E.D. Pa. 1966). *Cf.*, *McNussen v. Graybeal*, 146 Mont. 173, 405 P.2d 447 (1965), *citing* 5 S. WILLISTON, CONTRACTS § 1618 for the proposition that there is no broad doctrine foreholding a person from taking advantage of the adversity of another to drive a hard bargain. 405 P.2d at 454.

207. *Tunkl v. Regents of Univ. of Cal.*, 60 Cal.2d 92, 98, 383 P.2d 441, 446, 32 Cal. Rptr 33, 38 (1963).

208. *Indianapolis Morris Plan v. Sparks*, 132 Ind. App. 145, 172 N.E.2d 899 (1961).

ment" of the rights of buyers by large corporate sellers through the use of warranty disclaimers may also cause such terms to be unenforceable.²⁰⁹

Finally, the validity of contractual clauses as to which the aggrieved party had no meaningful choice may be tested by inquiring whether the clause is commercially reasonable.²¹⁰ Compare a security clause which provides that a seller can claim a balance due on all items previously purchased from it by a particular buyer so long as the total installment contract price of all the items has not been paid, with a security term which applies installment payments on several items purchased from a single seller to the items first purchased. The former has been held commercially unreasonable,²¹¹ while the latter was not.²¹² Another clause found unreasonably favorable to the offeror granted an apartment builder the unilateral right to extend the time for delivery of possession, while prohibiting the potential tenant from cancelling.²¹³ A contract which provides that a tenant becomes liable for the lessor's attorney's fees as soon as an action is commenced for even an immaterial breach or default is also unconscionable because it is unreasonable.²¹⁴ Nor is there any rational relationship between a contract provision for a non-refundable enrollment fee and any damage a vocational school might sustain as a result of an enrollee dropping out.²¹⁵ But a limitation of liability clause is not commercially unreasonable simply because of the "inherent element of risk" involved in connection with a sale of crop seed.²¹⁶ Nor is it commercially unreasonable to provide that a commodity futures account could be liquidated without demand or notice if an adequate margin were not maintained.²¹⁷

The Principle

The rules of unconscionability identify four factors which alone, or in combination, may make a contract unconscionable. Neverthe-

209. *Steele v. J.I. Case Co.*, 197 Kan. 554, 419 P.2d 902 (1966).

210. *Barnes v. Helfenbein*, 548 P.2d 1014 (Okla. 1976); *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111 (D.C. 1971); *Brooklyn Union Gas Co. v. Jimenez*, 82 Misc. 2d 948, 371 N.Y.S.2d 289 (Civ. Ct. 1975).

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

212. *Singer Co. v. Gardner*, 65 N.J. 403, 323 A.2d 457 (1975).

213. *Seabrook v. Commuter Housing Co., Inc.*, 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. 1972), *aff'd on other grounds*, 79 Misc. 2d 168, 363 N.Y.S.2d 566 (App. Term 1971).

214. *Weideman v. Tomaselli*, 81 Misc. 2d 828, 365 N.Y.S.2d 681 (County Ct. 1975).

215. *Educational Beneficial, Inc. v. Reynolds*, 67 Misc. 739, 324 N.Y.S.2d 813 (Civ. Ct. 1971).

216. *Billings v. Joseph Harris Co.*, 27 N.C. App. 689, 220 S.E.2d 361 (1975).

217. *Gelderman & Co. v. Lane Processing, Inc.*, 527 F.2d 571 (5th Cir. 1975).

less, there are decisions, as the discussion above indicates, which are apparently inconsistent with these rules, even though the underlying fact situations are indistinguishable. It is impossible to harmonize the decisions on a "rule of decision" basis, hence there cannot be a unitary rule of unconscionability. Rather, if the focus is on the literal holding of the courts, the rules of the cases yield the unworkable list of considerations cited at the outset of this article.

Considered together, however, these judicially developed rules do suggest factors and a principle of unconscionability. Where an aggrieved party is ignorant of the risk involved, ignorant of the contract terms which transfer or allocate that risk and/or lacks alternative terms for that risk allocation, the contract or clause may be unconscionable and unenforceable. Also, if the exchange is grossly unfair, against public policy or is commercially unreasonable, the same may be the result. Stated simply, contract terms which transfer risks or the burdens of a transaction from that which might be expected in an exchange, absent a written agreement, are unenforceable unless intelligently, knowingly, and voluntarily assumed. This assumption of risk may either be proved by direct evidence or by inference from the parties' status and surrounding circumstances. And even if there is a lack of this proof, the contract may be sometimes enforced if the terms are, in fact, fair and reasonable.

The rules also reflect upon the utility of relying upon the procedural-substantive unconscionability dichotomy to analyze the cases. To some extent this distinction is helpful. For example, grossly unfair terms may be unenforceable for their substance alone, though such decisions are rare. In point of fact, however, cases are rare in which these lines of distinction between procedure and substance are not blurred. For example, in considering the parties' knowledge of the risk, a procedural consideration, frequent reference is made to considerations of a substantive nature, *e.g.*, the fairness or reasonableness of the exchange. Similarly, where lack of choice is in issue, the most procedural of the factors in theory, the courts often revert to reliance upon fairness and reasonableness of the terms. Contrast this with the cases in which it is the parties' subjective knowledge of the contract terms which is in issue. In such cases, there is often little or no reliance placed upon substantive considerations. Thus, it is evident that the procedural-substantive dichotomy, though of theoretical interest, has little application in practice.

Courts do not decide cases on the basis of "substantive" or "procedural" unconscionability—"naughtiness" if you will^{217.1}—though they sometimes use these terms. Rather they are moved

217.1. The description is Professor Leff's.

by the factors indicated herein. The principle of unconscionability rests not on two legs of procedural and substantive factors, but on four: (1) unfair terms and exchanges; (2) ignorance of the risk; (3) ignorance of the contract; and, (4) lack of choice. Risk-shifting terms must be intelligently, knowingly and voluntarily assumed. Those terms which are not intelligently or voluntarily assumed must be fair.

ANALYZING THE PRINCIPLE

The Principle and the Notion of Contract

It has never seriously been contended that unconscionability is inconsistent with the basic idea of a contract.²¹⁸ Indeed, a review of the foregoing decisions indicates that unconscionability may be considered a "mirror-image" of what is a contract, in that the grounds for a finding of unconscionability reflect the necessary elements of a contract. The nexus, of course, is not whether a contract was made, but the extent to which that contract should be enforced.

1. The Classic Contract

If there is such a thing as a classic contract it is found where there is a manifestation of mutual assent by parties competent to contract to exchange goods, services, money or promises, *i.e.* consideration, and to allocate the risks of that exchange.²¹⁹ The traditional grounds for avoidance of contract performance, *e.g.* fraud, duress and mistake, proceed logically from these elements. Fraud,²²⁰ duress²²¹ and

218. The consistency of the doctrine with the theories of what is proper proof or manifestation of a contract will be dealt with below. See text accompanying notes 249-62, *infra*.

219. See, RESTATEMENT (SECOND) OF CONTRACTS §19(1) (1964), which states: "The formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."

220. The Restatement of Contracts defines fraud as:

- (a) a misrepresentation known to be such, or
- (b) concealment, or
- (c) non-disclosure where it is not privileged by any person intending or expecting thereby to cause a mistake by another to exist or to continue, in order to induce the latter to enter into or refrain him from entering into a transaction; . . .

Id. § 471.

Misrepresentation is defined as:

- (1) any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts.

Id. § 470.

The Restatement further states that:

- Non-disclosure is not privileged by a party who . . .
- (c) occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for.

Id. §472.

The comments to section 471 indicate that the essence of fraud is "conscious misconduct."

221. Duress is defined by the Restatement as:

undue influence²²² are based upon the theory that contracts so induced should not be enforced against the aggrieved party, because it was precluded from exercising its free will and choice in entering into the contract, and because of the wrongful conduct of the other party.²²³ This wrongful conduct includes any conduct which prevents the exercise by the other party of its free will. Whether the rationale is lack of assent or deterrence of improper conduct, the principle is the same: contracts must be the product of actual assent. Similarly, the defenses of mistake²²⁴ and incapacity²²⁵ are based upon a lack of real assent to the exchange in fact, as distinguished from the parties' subjective perceptions and outward manifestations. Finally, illegal contracts,²²⁶ or those agreements which are against public policy, are unenforceable for obvious reasons of sovereignty.

(a) any wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without his volition, or

(b) any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement.

Id. § 492.

Comment (g) to this section states that the acts must be wrongful, i.e. contrary to public policy. Acts fitting this description are those "that involve abuse of legal remedies or that are wrongful in a moral sense; if made use of as a means of causing fear" and that these acts "vitiate a transaction induced by that fear, though not in themselves legal wrongs."

Id. § 492, com. (g).

222. Undue influence is defined by the Restatement:

Where a party is under the domination of another, or by virtue of the relations between them is justified in assuming that the other party will not act in a manner inconsistent with his welfare, a transaction induced by unfair persuasion of the latter, is induced by undue influence and is voidable.

Id. § 497.

Undue influence apparently differs only in the matter of degree from duress, since both have a "wrongful act" with the end result of misconduct overcoming the free will of the injured party. Note, *Duress and Undue Influence—A Comparative Analysis*, 22 BAYLOR L. REV. 572 (1970).

223. Of course, where a third party overcomes the free informed will of the aggrieved party, these theories are still applicable, but the vast majority of the cases implementing these theories involve only the parties to the bargain.

224. Mistake is simply defined as "a state of mind that is not in accord with the facts." RESTATEMENT OF CONTRACTS, § 500 (1932). The Restatement also states that "If B knows or, because of the amount of the bid or otherwise, has reason to know that A is acting under a mistake, the contract is voidable by A; otherwise not." *Id.* § 503. The latter is the rule for unilateral mistake, while the former definition governs for mutual mistake. "Mistake" does not refer to an error in judgment, but a misapprehension of the actual facts. See, *id.* § 500, com. (a).

225. Under Section 18 of the Restatement, a person does not have the capacity to contract when "he is (a) under guardianship, (b) an infant, (c) mentally ill or defective, or (d) intoxicated." RESTATEMENT (SECOND) OF CONTRACTS § 18 (1964).

226. The Restatement of Contracts defines an illegal bargain (and thus one which is unenforceable) as one where "either its formation or its performance is criminal, tortious, or otherwise opposed to public policy." *Id.* § 512.

2. The Unconscionable Contract

The bases of the doctrine of unconscionability closely parallel the notions inherent in the classic contract. For instance, grossly unfair exchanges or exchanges which lack any semblance of reciprocity²²⁷ are like agreements unsupported by consideration. Another instance where a contract is unconscionable due to the aggrieved party's ignorance of the contract terms²²⁸ suggests a lack of capacity to contract. Another example of this parallel is where a term is not part of the basic bargain,²²⁹ thus indicating a lack of real or manifest assent to the "agreement," but also indicative of lack of choice. The most significant parallel, though, is that negotiated transactions and exchanges which should have been negotiated²³⁰ are not unconscionable, just as the classic contract model is normally enforceable.²³¹

The traditional grounds for avoidance of performance are also reflected in the rules and principle of unconscionability. Ignorance of the risk²³² is analogous to mutual mistake, but without the requirement that both parties be mistaken as to the same risk. Ignorance of the contract may be caused by deceptive sales techniques,²³³ which suggests a fraud or misrepresentation. Application is similar in the case of a unilateral mistake, *i.e.*, the non-mistaken party cannot hold the other to the latter's error if the former reasonably should have realized that an error was made. Also present in those situations is the idea that the unmistaken party is abusing the privilege of judicial enforcement of private law and that the advantage stemming from such a substantive imbalance in the transaction should not be exploited.²³⁴ The principles of duress and undue influence also find parallels where a person is confronted with a lack of

227. *E.g.*, cases cited notes 21-25, *supra*.

228. *E.g.*, cases cited notes 131-34, *supra*.

229. *E.g.*, cases cited note 152, *supra*.

230. A party "should" negotiate, or attempt to negotiate, a contract if it has the sophistication and appointments to do so in a meaningful manner. *See also* note 300 and accompanying text, *infra*.

231. *E.g.*, cases cited notes 153 & 174, *supra*.

232. *See* cases cited notes 96-115 and accompanying text, *supra*.

233. *See* cases cited notes 133-36, *supra*.

234. In *John J. Calhan Co. v. Talsma Builders*, 40 Ill. App. 3d 62, 351 N.E.2d 334 (1976), *rev'd on other grounds*, 67 Ill. 2d 213, 367 N.E.2d 695 (1977), the court held that a construction contract could be rescinded because of the unilateral mistake of a subcontractor in its bid because: (1) the mistake was related to a material feature of the contract; (2) the mistake was of such "grave consequence" that enforcement would be unconscionable; (3) the mistake occurred despite the exercise of reasonable care by the subcontractor; and (4) the other party could be returned to its original position.

choice,²³⁵ for in each instance the "free-will" of the disadvantaged party is restricted.

3. Historical and Modern Uses of Unconscionability

This article has thus far focused on recent decisions applying the principle of unconscionability and demonstrated the predominance of the bargaining (or "procedural") aspects in those decisions. While it is arguable that unconscionability historically has been a doctrine primarily oriented towards the fairness of the exchange (the "substantive aspect of the contract), the converse is in fact the situation. Hence, the principle articulated herein is consistent with the courts' longstanding application of the doctrine.

Many cases include references to two Supreme Court opinions and an English case for a statement of the doctrine, a statement which sounds quite oriented towards the fairness of the exchange. In *Earl of Chesterfield v. Janssen*, the court stated that an unconscionable contract is one that "no man in his senses and not under delusion would make on the one hand and no honest and fair man would accept."²³⁶ This concept was adopted in two frequently cited Supreme Court decisions, the majority opinion in *Scott v. United States*,²³⁷ and Justice Frankfurter's dissenting opinion in *United States v. Bethlehem Steel Corp.*²³⁸ Many other courts in the past century have also suggested that unconscionability is triggered by the unevenness of an exchange, ignoring the bargaining process.²³⁹

A closer look at *Janssen*, *Bethlehem Steel* and other cases, however, indicates the primacy of the bargaining process. *Janssen* was a mistake and misrepresentation case. After the statement quoted above, the court went on to discuss species of fraud. It further commented upon the bargaining deficiencies in that transaction, and other situations where one tries to take "surreptitious advantage of

235. See cases cited notes 189-217 and accompanying text, *supra*.

236. 28 Eng. Rep. 82, 100-01 (1750).

237. 79 U.S. (12 Wall.) 443, 445 (1871).

238. 315 U.S. 289 at 326-27 (1941).

239. *E.g.*, *Lear v. Choteau*, 23 Ill. 39 (1859); *Dreyer v. Goldy*, 62 Ill. App. 347 (1896), *appeal dismissed*, 171 Ill. 434, 49 N.E. 560 (1898). In *Lear* the court expressly declined to base its decision on evidence which demonstrated that the aggrieved party had not understood the contract but had been duped into its execution. In *Dreyer*, the court held unconscionable, as usurious, an agreement whereby a broker would receive \$1,000 a year for 10 years or for however long the borrower should live, whichever was longer, for his services in securing for the borrower a \$22,000 loan. In marked contrast to these decisions is *Barnes v. Helfenbein*, 548 P.2d 1014 (Okla. 1976), where the court upheld a note secured by a mortgage, which had an effective rate of interest of about 38%, because the court found a referenced statute to permit an effective interest rate of up to 45% in such a transaction and the borrower was "an astute businesswoman" who had knowingly and voluntarily agreed to the transaction and loan.

the weakness or necessity of another. . . This court therefore relieves against all such underhand bargains."²⁴⁰ In *United States v. Bethlehem Steel Corp.*, Justice Frankfurter complained of the "unconscionable advantage" worked by Bethlehem Steel against the government because of its war needs.²⁴¹ In essence, he was complaining about the government's lack of choice and, perhaps, the commercial unreasonableness of the contract. This tendency to equate unconscionability with shortcomings in the bargaining process is also seen in the Court's decision in the *The Elfrida*.²⁴² In that case it was held that the collection of sums due under a contract for services was not unconscionable or exorbitant in the absence of fraud or mistake. The Court placed great emphasis on the knowing and uncoerced agreement of the shipowners to the agreement. The danger of abuse in salvage contracts was acknowledged, but the knowing and voluntary assent insulated the reasonableness of the compensation from judicial scrutiny.

Many modern decisions which regulate the exchange itself are based upon assumptions and fact patterns involving deficiencies in the bargaining process. A decision that an inconspicuous warranty disclaimer should not be enforced because the party disadvantaged by it could not be expected to be aware of it has been stated as a rule of public policy²⁴³ and has been further endorsed by the Code in section 2-316. Indeed, a great many statutes controlling the terms of commercial exchanges can be traced to legislative concern over recurring deficiencies in the bargaining process.

A classic expression of judicial intolerance for inadequacies in the bargaining process is *Williams v. Walker-Thomas Furniture Co.*²⁴⁴ In *Walker-Thomas*, the court felt an uneducated and unsophisticated person may have had no meaningful choice with regard to the inclusion in an installment sales contract of a cross-collateral security clause, thereby holding that term vulnerable to a claim of unconscionability. The likelihood of such deficiencies occurring in other consumer transactions led to the requirement in the Uniform Consumer Credit Code that installment payments be applied by the seller proportionately and that, once an item was paid for, no security interest could be reinstated simply by another purchase.²⁴⁵ For consumer transactions, many legislatures presume that the con-

240. 28 Eng. Rep. 82, 100-01 (1750).

241. 315 U.S. 289 at 326-27 (1941).

242. 172 U.S. 186 (1898).

243. *E.g.*, *Sutter v. St. Clair Motors*, 44 Ill. App. 2d 318, 194 N.E.2d. 674 (1963).

244. 350 F.2d 445 (D.C. Cir. 1965).

245. *E.g.*, MD. [Com. Law] CODE ANN. § 12-618 (1975).

sumer is not likely to read or understand the contract, or otherwise appreciate the risks which may be transferred by a contract. They presume that the consumer will have no real choice in contract terms, assuming that he or she can and will appreciate the significance of a written document or "contract."²⁴⁶ It is because of these considerations, with the attendant likelihood of abuse where these bargaining factors are absent, that legislation regulates many aspects of the permitted exchanges in the consumer retail market. These rules may appear to be directed only to the substance or terms of the exchange, but the legislative rationale manifests concern over the deficiencies in the bargaining process.²⁴⁷

The consistent rejection of unconscionability attacks upon negotiated exchanges indicates the general inconsistency between abuse transactions (unconscionable contracts) and negotiated exchanges. This is not to say, however, that a negotiated contract is never unconscionable. Though the terms be negotiated, there may be an unknown risk not specifically allocated by the agreement. It is also possible courts might refuse to enforce the agreement, not because of an abuse of the bargaining process between the parties, but for public policy reasons because the agreement would adversely affect the general public. Nevertheless, most decisions rest upon deficiencies in the particular bargaining process involved.²⁴⁸ If these "procedural" unconscionability factors are not satisfied (*i.e.*, there is a knowing, intelligent and voluntary allocation of risks), this "unruly horse" is much more predictable.

When the components of unconscionability are separated and analyzed, the principle is consistent with historical theories of contract, avoidance of contract performance and unconscionability. It also provides a clearer analysis of modern statutes which regulate the contractual relationships of certain classes of contracts, public

246. See also Note, *Standard Form Contracts*, 16 MOD. L. REV. 318 (1953). Also of interest here is OR. REV. STAT. § 83.820 (1973) which provides that an assignee of a contract for the sale or lease of consumer goods is subject to all defenses the consumer, buyer or lessee would have against the seller or lessor. The section also states that this restriction does not apply to any debt instrument owned, guaranteed or insured by any state or federal agency. This evidences an assumption that such agencies either know the effect of making such a guarantee, or that it is not unfair to deprive a governmental agency of the same rights enjoyed by a consumer, and being treated like non-consumers.

247. Section 2-303 of the Code supports this analysis. That section, along with § 1-104, makes clear that transactional risks and burdens may be allocated as the parties choose, subject only to the prohibition against unreasonable time limitations and the general restraint of unconscionability.

248. *E.g.*, *Sutter v. St. Clair Motors, Inc.*, 44 Ill. App. 2d 318, 194 N.E.2d 674 (1963). *Indianapolis Morris Plant v. Sparks*, 132 Ind. App. 145, 172 N.E.2d 899 (1961). See text accompanying notes 83-86 *supra*.

policy decisions, and unconscionability in the Code. The significance of this, and of the presence of bargaining factors to defeat a claim of unconscionability will be detailed below. First, however, the principle and permissible proof of a contract must be considered.

The Principle and the Objective Theory of Contract

Whether an agreement was reached and whether fraud, mistake and the like were present have always been considered outside the parol evidence rule. Despite its similarities to these doctrines, however, the question of unconscionability does not arise until it has been first determined that a non-voidable contract exists.²⁴⁹ Thus, one might conclude that proof of unconscionability is limited by the elements of the objective theory of contract and its corollaries. The cases demonstrate, however, that courts go beyond the four corners of the written agreement to determine whether the agreement is unconscionable.²⁵⁰ The question then becomes whether courts are free to consider any evidence in determining which terms are enforceable and which are not.

1. Status of the Theory

Because of the uncertainties and problems of proof inherent in reliance on oral testimony, courts have long preferred written documents to show what the parties' agreement was at the time of contracting. A written manifestation of assent was considered a more practical way of measuring, or presuming, one's assent, than proof of his or her actual intent. Putting an agreement in writing was also thought to impress upon the parties the significance, and terms, of their exchange. These and other considerations formed the basis of the objective theory of contract. Attendant to this theory were corollary rules including the duty to read and the parol evidence rule.

In recent years, however, the vitality of the duty to read and the parol evidence rule has diminished. Courts increasingly ignore or discount the duty to read.²⁵¹ The parties' status, bargaining abilities

249. The objective theory of contract has found a contract to exist where a manifestation of assent to contract, to be bound to an exchange which exchange could include terms of risk allocation. See *RESTATEMENT (SECOND) OF CONTRACTS* § 21 (1964). This apparent agreement must be carefully distinguished from the agreement in fact, the Code's definition of an agreement. U.C.C. § 1-201(4).

250. See also Murray, *supra* note 2, where the author suggests an analysis of when a court will go beyond the manifestation of assent to determine whether there is "real assent" to challenged terms. The difference in the present analysis from Professor Murray's lies in the jurisprudential differences between principles and rules and in the combination of commercial reasonableness with choice.

251. Calamari, *Duty to Read—A Changing Concept*, 43 *FORDHAM L. REV.* 341 (1974).

and expectations, are increasingly determinative of whether parol evidence is admissible to show the parties' agreement and contract.²⁵²

The Code itself makes express what some courts had done before its adoption. The focus of the parties' agreement is upon the commercial setting of the transaction, and the parties' course of dealing, usage of trade²⁵³ and course of performance²⁵⁴ are relevant to explain the agreement. As a practical matter, this evidence can change the meaning of a document to a court unfamiliar with these practices. Subsection 2 of section 2-302 of the Code also requires that a court consider the commercial realities of the exchange when a claim of unconscionability is made. Thus the inquiry into the parties' agreement and whether that agreement is unconscionable does not stop with the written document, but extends also to the commercial setting of the transaction. Yet the determination of what constitutes the contract²⁵⁵ is still objective in theory.

2. Unconscionable Contracts in the Commercial Setting—Relevant Inquiries

Courts have examined the factors of unconscionability discussed above in analyzing whether a challenged contract or term was unconscionable in the commercial setting of the exchange. That setting includes the circumstances surrounding the particular transaction under review, and other similar transactions; *i.e.*, the parties' course of dealing and trade customs.²⁵⁶ Where lack of choice is asserted, the commercial setting includes the choice available to the aggrieved party in the transaction at hand, and alternatives available elsewhere in the market.²⁵⁷ As to the parties' knowledge of the

252. Childres & Spitz, *Status in the Law of Contracts*, 47 N.Y.U.L. REV. 1 (1972).

253. See § 1-205 of the Code, and the definition of "agreement" in § 1-201(3).

254. U.C.C. § 2-208.

255. Section 1-201(11) of the Code defines "contract" as "the total legal obligation which results from the parties' agreement as affected by [the Code] and any other applicable rules of law." In contrast, an "agreement" is "the bargain of the parties in fact as found by their language or by implication from other circumstances including course of dealing or usage of trade or course of performance . . .;" and does not determine whether that agreement is enforceable under principles of contract law and the Code, *i.e.*, whether it is a "contract." U.C.C. § 1-201(3).

256. In *Kohlenberger, Inc. v. Tyson's Foods, Inc.*, 510 S.W.2d 555 (Ark. 1974), the court stated: "The question of unconscionability must be determined in light of general commercial background, commercial needs in the trade or the particular case, the relative bargaining position of the parties and other circumstances existing when the contract was made." *Id.* at 566.

257. See *Block v. Ford Motors Credit Corp.*, 286 A.2d 228 (D.C. 1972). See generally Murray, *supra* note 2.

contract, their past course of dealings²⁵⁸ and the existence of insurance to cover the loss²⁵⁹ are relevant and admissible. Also, the knowledge of the practices and customs of an industry in terms of consensual risk-allocation may defeat a claim of unconscionability.²⁶⁰ However, evidence of such usage of trade is not admissible unless the aggrieved party had sufficient notice so as not to be "unfairly surprised."²⁶¹ Of course, implicit in the inquiry whether the risk was knowingly allocated or shifted is the parties' expectations concerning risk-allocation.²⁶² Finally, the reasonableness of a term, including its purpose, effect, and the need for it generally and for the individual parties specifically are included within an inquiry pursuant to section 2-302(2).²⁶³

Status and Bargaining Power

In discussing unconscionability, courts have made frequent reference to the parties' bargaining power in determining whether challenged terms are unconscionable. However, relative bargaining power is merely a question of proof, the resolution of which may suggest the term is unenforceable. The *principle* is not one of superior or unequal bargaining power, rather it is the fact of the complainant's sophistication which may show that a risk has been knowingly and voluntarily transferred. This analysis may appear to be interchangeable with the question of relative bargaining power, but it is entirely distinct, at least in theory.

258. *Schroeden v. Fagoel Motors, Inc.*, 86 Wash. 2d 256, 544 P.2d 20 (1975). *E.g.*, *J.D. Pavlak, Ltd. v. William Davies Co.*, 40 Ill. App. 3d 1, 351 N.E.2d 243 (1976).

259. *Posttape Assoc. v. Eastman Kodak Co.*, 537 F.2d 751 (3d Cir. 1976). *See Abel Holding Co. v. Am. Dist. Tel. Co.*, 138 N.J. Super. 137, 350 A.2d 843 (Sup. Ct. Law Div. 1974). In *Posttape*, the court held the existence of insurance to be an admissible item of proof under rule 408 of the Federal Rules of Evidence, suggesting that this fact in itself could show knowledge of a limitation of liability clause. A slightly different rationale was advanced in *Abel Holding* where the court noted that the real party in interest in that case was the complainant's insurer. The court stated that the *insurer* received premiums for its exposure and must have been aware of the contracted limitation of liability, and hence was bound by that term.

260. *See Dow Corning Corp. v. Capital Aviation, Inc.*, 411 F.2d 622 (7th Cir. 1969).

261. U.C.C. § 1-205(6). Comment 6 of that section states that the subsection applies to implicit clauses or terms which rest on usage of trade, just as the unconscionability requirement applies to express terms. Also, comment 10 states that 1-205(6) is designed "to insure that this Act's liberal recognition of the needs of commerce in regard to usage of trade shall not be made into an instrument of abuse."

262. A risk must be knowingly assumed. If the risk is not recognized by either party, who must bear the risk may nevertheless be determined by the agreement. For example, if all risks are given to one person, that unknown risk could also be assumed by that person, if he or she knowingly and voluntarily did so.

263. *E.g.*, *In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864 (E.D. Pa. 1966); *W.L. May Co. v. Philco Ford Corp.*, 543 P.2d 283 (Or. Sup. Ct. 1975). *See* U.C.C. § 1-205, com. 6.

An examination of several cases demonstrates that unequal bargaining power has been used to determine whether one of the above bases of unconscionability existed. The presence of disparate bargaining power tends to negate any opportunity for meaningful negotiation.²⁶⁴ It may also indicate that the aggrieved party had no meaningful choice.²⁶⁵ Hence, courts have regarded the existence of unequal bargaining power as a significant factor requiring judicial scrutiny of warranty disclaimers, limitation of liability and exculpatory clauses.²⁶⁶ Mere disparity of bargaining power is not enough in itself to establish unconscionability,²⁶⁷ though it does suggest a danger for abuse.²⁶⁸

A precise description of the relationship of unconscionability to situations involving disparate bargaining power must take the status, or relative sophistication of the parties into account, as well as their economic muscle. Without the competence to use one's bargaining power effectively, that power is meaningless. Further, when the courts note the relative economic strength of the parties, they also are recognizing, either expressly or implicitly, the parties' relative sophistication. Sophistication, or status, pertains directly to a person's ability to negotiate and appreciate the significance of contracting, questions intimately connected with the notion of contract. Ultimately, though, whether there is a relative equilibrium of economic power is irrelevant to whether the parties' knowingly, intelligently, and voluntarily allocated the risks and burdens of a transaction. Thus, the principle is not simply one of disparate bargaining power.²⁶⁹

Like the existence of disparate bargaining power, status alone cannot be equated with unconscionability, though it is indicative of its applicability. A person's experience and sophistication in commercial transactions may preclude an unconscionability challenge.²⁷⁰ Such a person cannot excusably ignore the printed terms of a proffered document as the contract prior to an agreement to deal.²⁷¹ A person who has the ability to negotiate or who can be charged with knowledge of the terms of an agreement is in a poor

264. *Cf. Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361 (S.D.N.Y. 1975).

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

266. *E.g., Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976); *Hy-Grade Oil Co. v. N.J. Bank*, 138 N.J. Super. 112, 350 A.2d 279 (App. 1975).

267. *Sinkoff Beverage Co. v. Jos. Schlitz Brewing Co.*, 51 Misc. 2d 446, 273 N.Y.S.2d 364 (S. Ct. 1966).

268. *See Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (S. Ct. 1969).

269. *Accord*, U.C.C. § 2-302, com. 1.

270. *See cases cited notes 184-86 supra.*

271. *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361 (S.D.N.Y. 1975).

position to argue unconscionability later. Similarly, one who successfully negotiates portions of an agreement but cannot alter the terms challenged,²⁷² or one who could have negotiated away a disclaimer but did not attempt to negotiate the terms of the exchange other than those related to the product,²⁷³ is bound to the agreement. A person's status is an indication of whether its claim of unconscionability is well-taken. But, again, it is not the exclusive means of measuring unconscionability. Hence the principle is not one of the disparate status or sophistication.

Towards a More Straightforward Analysis

Identifying unconscionability as a principle has many advantages. It is much easier conceptually to deal with a principle which has four main parts than seven or ten standards.²⁷⁴ Also, because unconscionability is obviously derived from basic contract principles, its application is consistent with principles of democracy.²⁷⁵ Further, facts which call for application of the principle are not static but dynamic. Unconscionability is not a principle based upon inequality of bargaining power; rather the existence of disparate bargaining power, like the parties' status and sophistication, is merely one objective indication of an abuse transaction. As the methods of contracting change, the relevant matters of proof of the principle may also be adapted by the courts. More importantly, the principle as developed in this article provides a straightforward method of analyzing transactions to determine whether a contract is enforceable. It provides not only an analytical framework for deciding, explaining and predicting cases, but also a framework which allows courts to explain exactly why a contract should, or should not, be enforced.

Consistent with the theory of freedom of contract, unconscionability does not impede intelligent, knowing and voluntary risk allocation.²⁷⁶ The only restraint on such transactions is that of pure public policy, *i. e.*, the agreement should not harm the general public. Where the classic contract does not exist, however, the transac-

272. *Fleishman Distilling Corp. v. Distillers Co.*, 395 F. Supp. 221 (S.D.N.Y. 1975).

273. *Delta Air Lines, Inc. v. Douglas Aircraft Co.*, 238 Cal. App. 2d 95, 47 Cal. Rptr 518 (1965).

274. The ten criteria of unconscionability listed in *Wille v. Southwestern Bell Tel. Co.*, 219 Kan. 755, 549 P.2d 903 (1976), would be termed "standards" of unconscionability under Professor Ellinghaus' approach, as would the seven criteria of whether a forum selection clause should be enforced as expressed in *The Breman v. Zapata Offshore Co.*, 407 U.S. 1 (1972).

275. Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

276. See text accompanying notes 217-18 *supra*.

tions should be scrutinized more closely because of the dangers of abuse implicitly present when there is no meaningful negotiation. This can occur when there is a disparity of bargaining power or when there is no reasonable opportunity to negotiate risk-shifting terms. In these potential abuse transactions, risk-shifting clauses are still upheld if the aggrieved party realized the risk and voluntarily assumed the risk.²⁷⁷ If the party was excusably ignorant of the risk or of the contractual risk-allocation, that allocation is ineffective.²⁷⁸ If the disadvantaged party had no alternative terms available, the courts look to the commercial setting to determine the reasonableness and enforceability of the term.²⁷⁹ These inquiries bear directly on the degree to which the transaction reflects the notion of contract. Reduced to its lowest common terms then, application of unconscionability as a principle depends upon commercial realities of assent, expectations and need. Defining unconscionability in this manner explains most judicial decisions and should also permit reasonable, informed settlement of disputed transactions and the avoidance of substantial litigation.

The principle permits determination of the scope of lack of choice as a ground for holding a clause unenforceable, both in terms of the meaning of the principle and its practical application. In theory, determining lack of choice is difficult, notwithstanding Professor Murray's analysis.²⁸⁰ The cases indicate that one's choice is determined with regard to the availability of alternative terms from the other party, and elsewhere in the market. If there is no choice, the commercial reasonableness of the terms is considered, including general needs of the industry and special needs of the parties. Courts have held unconscionable terms which a consumer had no choice but to have in the contract, but have consistently rejected such a claim when made by a sophisticated individual or company. This distinction cannot be justified from a standpoint of choice alone because a sophisticated person can be denied any choice in the transaction as well as an unsophisticated consumer. However, there are two factual distinctions which lie in the two types of cases. The clauses challenged by sophisticated persons have been warranty disclaimers, other commercially useful clauses and clauses which are directly related to the business risks involved. In contrast, ordinary consumers are more frequently subject to terms which bear no relation to the risks involved, clauses which are, therefore, commercially

277. *E.g.*, cases cited notes 184-86 *supra*.

278. *See* text accompanying notes 95-188 *supra*.

279. *See* text accompanying notes 210-17 *supra*, and cases cited therein.

280. Murray, *supra* note 2.

unreasonable. Also, the latter class of cases sometimes involves items found to be necessities, such as housing, an automobile or food. Where such items are involved, an unsophisticated or necessitous person may have no opportunity or ability to otherwise protect himself. A clause which so allocates the legal burdens of these transactions is commercially unreasonable in light of the special needs of the parties,²⁸¹ and such a term should not be enforced.²⁸²

In contrast, a sophisticated individual probably would not have this sympathy. If the aggrieved person is sophisticated and knows of the challenged term at the time of contracting, yet has no choice but to have that term included in the agreement, it arguably ought to take other steps to protect itself, for instance, the procuring of insurance. If it is shown that such a person did insure against the risk, then the real party in interest is the insurer, who voluntarily assumed the risk by its contract to provide coverage for such a loss. Or in the language of insurance law, it would not be unconscionable to enforce the contractual risk-allocation because the aggrieved party knew of the risk and took measures to protect itself. Therefore, though the sophisticated person lacked choice, it is not commercially unreasonable to enforce the terms. Thus, the notion that unconscionability exists to protect those who cannot reasonably protect themselves has validity.

The principle of unconscionability accommodates the practical objections to reliance upon a lack of demonstrated voluntary assumption of risk, *i.e.*, lack of choice.²⁸³ The fact of bargaining over risk-shifting terms, as well as the specifications of the product or the underlying transaction itself, almost by definition involves limitation upon the other's options. The inclusion of disclaimers, exculpatory clauses, and other contractual limitations of remedies, can even be a condition of doing business for many contract-offerors. Such clauses are rapidly becoming a necessity of economic life for some manufacturers, one reason being the soaring cost of product liability insurance. If unconscionability was not intended by the Code draftsmen to preclude the use of contracts to create legal relationships in harmony with the facts and needs of commercial life,²⁸⁴ these realities of commercial life must be recognized by the principle. As detailed above, it does. The commercial setting of a contract, includ-

281. See *W.L. May Co. v. Philco-Ford Corp.*, 543 P.2d 283 (Or. 1975).

282. See *Weideman v. Tomaselli*, 81 Misc. 2d 328, 365 N.Y.S.2d 681 (County Ct. 1975).

283. See Epstein, *supra* note 88 and Schwartz, *supra* note 87. But see Leff, *Contract as Thing*, AM. U.L. REV. 31 (1970), and *Lawful Fraud*, *supra* note 2, for arguments that because there is no real assent in consumer transactions to permit forms, they ought not be considered contracts.

284. See U.C.C. § 2-302(2).

ing the needs of the parties and the industry, is relevant to showing unconscionability. Hence, so long as the disadvantaged party should have known of the contractual risk-allocation, then even in the absence of choice in the matter, a reasonable term is enforceable.²⁸⁵

The realities of the parties' assent or knowledge of risk allocation is also recognized by the principle. The requirement that warranty disclaimers be conspicuous, for example, expressly conditions enforceability of those terms upon the likelihood that the person against whom the term will operate will realize its effect. The basis of the bargain rationale honors the actual agreement or expectations of the parties over a wooden judicial interpretation that what is printed is what was agreed. Likewise, the presence of deceptive sales techniques or an uneducated purchaser may negate the assumption that the printed form represents a consensual risk allocation.

The principle of unconscionability also incorporates one of the most rudimentary purposes of contract: the allocation of attendant risks and burdens. When a party does not realize or appreciate the risk transferred by agreement, and is reasonable in not expecting imposition of that risk upon it, operation of the principle renders ineffectual a contract purporting to transfer that risk. Therefore, attempts to circumvent and void one's implied duties or warranties by contractual language which does not reasonably call to the other's attention such risk shifting clauses are discouraged.²⁸⁶ The undiscoverable and unbargained for nature of the transferred risk may cause the contract to be unconscionable. This combination of knowing assent with attempted risk shifting presents an interesting theoretical link between contract and tort, particularly in the field of products liability.²⁸⁷

285. Note, however, should be made of the needs and circumstances of the other party. See text accompanying notes 1-282 *supra*.

286. *Bekkevold v. Potts*, 173 Minn. 87, 216 N.W. 790 (1927), cited in U.C.C. § 2-302 (off. com.).

287. A comparison of the law of strict liability in tort and contract is beyond the scope of this paper. It suffices to note, however, that the necessary ingredients for strict liability under § 402A of the RESTATEMENT (SECOND) OF TORTS essentially parallels the elements of the principle of unconscionability. That is, the existence of an unreasonably dangerous condition not discoverable by the consumer (ignorance of the risk) and a product sold in a consumer transaction (presumed deficiencies in knowledgeable and voluntary risk-allocation). Compare CHILDRES & JOHNSON, *CASES ON EQUITY, RESTITUTION AND DAMAGES*, 304-05 (2d ed. 1974). The analysis here is not directed, however, to explication of the interface between contract and tort law, as was that comment. Further, the present analysis concerning the role of status differs. Professor Childres would have status be a primary, if not conclusive, indication of an abuse transaction, while the present paper treats it as simply evidence of a lack of an intelligent, knowing and voluntary risk allocation. See text accompanying notes 264-73 *supra*.

The parties' ignorance of the risk is the aspect of the principle which explains why a contract which, if enforced, would create an unconscionable *result*, is unconscionable *when made*. The Code and the Second Restatement prohibit the enforcement of contracts or clauses via the principle of unconscionability only if at the time of contracting they are unconscionable. An example is the situation where market price rises dramatically after contracting but before performance. Such a contract is not unconscionable if at the time of contracting the price was fair.²⁸⁸ However, if the loss subsequent to contracting arises from a risk that was not recognized as being transferred by the agreement, then it may be unconscionable. The distinction is that in the former situation the parties understood that the price at the time of delivery was fixed, although fluctuation in market price was inevitable. The seller assumed the risk of a price rise, while the buyer assumed the risk of a lower price at the time of performance.

In other situations a risk may not have been appreciated at all. Even though risk of loss exists whenever a contract is made, it may or may not have been allocated by the contract. If the risk was not allocated, the ultimate bearer of the risk is obviously determined by contract principles and not by the existence of disparate bargaining power or lack of choice. Consequently, unconscionability is no defense, and the loss would rest upon agreement. The law, in effect, presumes it is "fair" for that party to bear the risk. It is only the shifting of a risk that may be unconscionable. For example, if the resulting loss stemmed from a risk of which the aggrieved party was reasonably ignorant, the contract may be unconscionable.²⁸⁹ Hence the contract was unconscionable when made as to the ultimate loss arising from the exchange.

Finally, identification of these bases of courts' decisions makes the prediction of decisions based upon public policy²⁹⁰ or an unfair exchange rationale easier.²⁹¹ If we discount those rules of decisions which rest upon bargaining deficiencies there is very little left. Courts appear reluctant to say something is too unfair to be enforceable where there has been an intelligent, knowing and voluntary allocation or risk.

288. *E.g.*, R.L. Kimsey Cotton Co. v. Ferguson, 233 Ga. 962, 214 S.E.2d 360 (1975).

289. As indicated in notes 64 and 96 *supra*, a party may also be "ignorant" of a risk that is wholly within the control of another party benefited by a clause which transfers that risk from the latter to the former. Among the most obvious of these terms are a lease term exculpating the landlord for its gross negligence or a service contract clause exculpating the contractor for its negligence.

290. See cases cited notes 45-64, 83-86 *supra*.

291. See cases cited notes 21-44, 71-76 *supra*.

The principle then is a restatement and refinement of the analyses and decision-making processes of courts and legislatures concerning claims that a contract or clause is unconscionable. It is a vehicle by which future decision-makers, public and private, judges and attorneys, can evaluate the enforceability of contracts against a claim of unconscionability.

APPLYING THE PRINCIPLE

The utility of defining unconscionability as a principle lies in the analysis it provides for predicting what kinds of exchanges will be enforceable, and those which may not. Application of unconscionability will first be demonstrated in terms of general contractual considerations. Second, application will be discussed in specific situations involving warranty disclaimers and limitation of liability clauses.

Insulating Contract Terms Via the Bargaining Process: Negotiation, Notice and Choice

In assessing the enforceability of contract terms a distinction must be made between negotiated transactions and abuse transactions. The unconscionability rules indicate that if the risks and burdens of the transactions are negotiated, then the resulting contract will not be unenforceable in whole or in part on grounds of unconscionability. The reasons for this should be obvious: in a negotiated transaction the risks are intelligently, knowingly and voluntarily allocated. Included in this class of exchanges are those which should have been negotiated since there existed an opportunity to bargain over the risk-allocation terms of a standard form and the aggrieved person was sufficiently sophisticated to negotiate.²⁹² At the opposite end of the spectrum of contract are the abuse transactions, those which contain one or more of the bases of the unconscionability principle. These contracts are unenforceable because they fail to meet the classic concept of consensual risk-allocation or contract. From these distinct types of exchanges we can, via the principle, extract guidelines to plan for the enforceability of risk-shifting terms.

Negotiation is one obvious method of preenforcement planning. Dickering over the terms of an exchange fits the model of contract, and such bargaining conduct is sufficient to insulate most, if not all,

292. Thus, even if these parties did not specifically foresee and negotiate for a particular risk of loss, the loss will be allocated by the court pursuant to the usual rules of contract interpretation and construction.

of the terms which define and allocate the burdens of an exchange.²⁹³ Courts will enforce consensual agreements fairly negotiated by sophisticated persons—freedom of contract is not yet dead.²⁹⁴ The obvious justification is that the terms, and the risks affected by those terms, have been knowingly and voluntarily allocated. This justification also applies to the insulating factors for non-negotiated transactions, *i.e.*, notice and choice. Notice includes not only bargaining conduct which reasonably should cause the other party to realize that the instrument contains terms which transfer a burden to it, but also contemplates that the other party can appreciate the nature of the risk sought to be transferred. These interpretations of notice are implicit in Professor Llewellyn's basic position that boilerplate terms are enforceable if not unexpected by the party against whom they would operate.²⁹⁵

Most courts and legislatures now require the notice to be reasonable; that is, the controversial term must be reasonably apparent in the context of the transaction. This proof may take the form of placing the risk-shifting term itself in conspicuous type on the face of the contract.²⁹⁶ Some authorities require the term be displayed in such a manner before execution of the form agreement that the complainant should notice it.²⁹⁷ Others require that the contract contain a conspicuous admonition of the effect of the printed term,²⁹⁸ or the presence of particular words which would make clear the extent of the risks being disclaimed or transferred.²⁹⁹

The timing of the notice is also important. Obviously a disclaimer which does not appear until after a bargain has been made cannot be presumed to be part of the parties' agreement. Other decisions also suggest that risk-shifting terms must be brought to the attention of the party against whom they would operate.³⁰⁰ But if those terms appear in discussions or documents prior to the time of contracting or in prior dealings between the parties, they will be bind-

293. See cases cited notes 102-88 *supra*, and accompanying text.

294. *Accord, Dewey, Freedom of Contract: Is It Still Relevant?*, 31 OHIO ST. L.J. 724 (1970).

295. Llewellyn, *Book Review*, 52 HARV. L. REV. 700 (1939).

296. In turn, whether a notice is conspicuous may depend upon a flexible standard of reasonableness or a mechanical determination whether the type is of a minimum size. Compare, *e.g.*, U.C.C. §1-201(10) with ILL. REV. STAT. ch. 121 ½, § 262B (1977) and 16 C.F.R. § 433 (1977) which require a notice to be in 10 point type.

297. *Hunt v. Perkins Mach. Co.*, 353 Mass. 535, 226 N.E.2d 228 (1967).

298. *Personal Fin. Co. v. Meredith*, 39 Ill. App. 3d 695, 350 N.E.2d 781 (1976); ILL. REV. STAT. ch. 121 ½, § 262D (1977).

299. *Auto-Teria, Inc. v. Ahern*, 352 N.E.2d 774 (Ind. App. Ct. 1976). The holding in that case was that language in cover letter that "there is no magic" in the product did not effectively disclaim implied warranties of merchantability and fitness.

300. *E.g.*, cases cited notes 167 & 171-72 *supra*.

ing because the aggrieved party should have realized that the other would include such a term in the present contract and objected.³⁰¹ Proof that the aggrieved party was reasonably informed (either because of its own experience or because of the form-offerors efforts) hence is necessary to assure the enforceability of standardized forms. This adds further pressure upon contracting parties to set up methods within its organizational structure to minimize the risk that a form contract will not be enforced. This might be afforded via revised merchandising techniques or other risk-management measures.³⁰²

The third insulating factor, choice, is a difficult matter to prove or disprove. One's choice is necessarily limited by the extent of one's needs, and one's needs are the very motive for contracting for an exchange to fulfill those needs. Further, the defense of duress is of little practical use since the "gun-at-the-head" situation is relatively rare, or at least rarely litigated. Hence, the classic proof of duress is usually unavailable or inapplicable. Moreover, the notion of economic duress, rather than physical duress, can conflict with the economic realities of the impetus for contracting.³⁰³ Thus, in answering the question of what is an impermissible limitation upon another's free will in contracting,³⁰⁴ the courts return to the substantive question of whether the challenged term is commercially reasonable. In turn, commercial reasonableness is identified in terms of the parties' needs and the market's needs.³⁰⁵ This makes sense in light of the Code's policy to encourage commercial reasonableness. Some lack of choice is avoidable, yet if a party lacks a reasonable choice, it is still entitled to reasonable terms.

301. This presumes an ability to understand and notice the terms in the earlier transaction and an opportunity and ability to bargain.

302. This risk of loss appears to be of a random nature—the chance that a given person with whom one contracts would not be sophisticated enough to be held to the written agreement—and hence suitable for actuarial treatment to spread that risk among other transactions.

303. See generally, Epstein, *supra* note 78.

304. Professor Slawson identifies the *legitimate* use of bargaining power as determinative of the question of whether one has permissibly limited, or eliminated, the other's choice via a standardized form. See Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 551 (1971). The question seems to be answered by the Court in *The Elfrida*, 172 U.S. 186 (1898), where it discusses American and English decisions dealing with the enforceability of ship salvage contracts. The Court found a distinction "between contracts corruptly, fraudulently, compulsorily or under a clear mistake of facts and such as merely involve a bad bargain or are accompanied with a greater or less amount of labor difficulty or danger than was originally expected." *Id.* at 195. These circumstances were also apparently equated with circumstances which would make enforcement "contrary to equity and good conscience." *Id.* at 192.

305. *Kohlenberger, Inc. v. Tyson's Foods, Inc.*, 510 S.W.2d 555 (Ark. 1974); *W.L. May Co. v. Philco-Ford Corp.*, 543 P.2d 283 (Or. 1975).

The reasonableness of the parties' needs depends initially upon the ability of the aggrieved party to protect itself. This self-protection is essentially a question of that party's ability to manage its risk exposure, which can be done in a variety of ways. The presence of these abilities appears in the persons whose unconscionability claims on grounds of lack of choice were denied by the courts. These persons' status suggests an ability to avoid the risk involved by passing the cost of exposure on to others. Alternatively, such a party may be able to control or eliminate its risk by securing insurance or by its methods of handling the product.³⁰⁶ Quite obviously if the aggrieved party had no such ability, the other's needs should not be determinative.

The reasonableness of the controversial term should be the lone inquiry only if there is no alternative seller (or buyer) in the market. The existence of these alternatives, or the lack thereof, once again depends on the aggrieved person's sophistication and ability to seek the same exchange elsewhere. To a consumer who makes a decision to buy based upon non-contractual considerations such as model, style and color of the goods, and who is ignorant of the potential of different terms elsewhere (assuming she or he could understand the difference) there may reasonably be no alternative seller. Conversely, a more sophisticated person could appreciate and realize the possibilities of different terms, and hence should be held to what others were offering in determining his or her choice.³⁰⁷ If other dealers should have been considered, and no alternatives were available elsewhere, the question returns to the commercial reasonableness of the term, not only for the parties but also for the industry generally.

While there is ample room to justify a term for which the aggrieved party had no choice, the threat of the term being unconscionable can be removed by the offering of a reasonable choice by the form offeror. For example, price x may be the selling price where all implied warranties are disclaimed, and price $x+y$ being applicable for implied warranty protection (where y is a reasonable increment for this protection and inconvenience to the seller). An election by the buyer, which is assumed here to be knowledgeable as

306. *Compare* Posttape Assoc. v. Eastman Kodak Co., 537 F.2d 751 (3d Cir. 1976) with Sarfati v. M.A. Hittman & Sons, Inc., 35 App. Div. 2d 1004, 318 N.Y.S.2d 352 (1970), *aff'd*, 30 N.Y.2d 613, 331 N.Y.S.2d 40, 282 N.E.2d 126 (1972). And if the real party in interest is an insurer, the courts have consistently rejected a claim of unconscionability, sometimes stating that the insurer knowingly assumed the contractual risk. *See*, Royal Indem. Co. v. Westinghouse Elec. Corp., 385 F. Supp. 572 (S.D.N.Y. 1974); Abel Holding Co. v. Am. Dist. Tel. Co., 138 N.J. Super. 137, 350 A.2d 843 (Sup. Ct. Law Div. 1974).

307. Thus, there appears a different standard for "knaves" and "fools," respectively.

to the risk assumed, to buy at price x might defeat a claim of unconscionability.

The presence then of negotiation or notice and choice, as discussed, insulates practically all substantive terms of exchange from the unconscionability defense. This should enable people who want to ensure the enforceability of the terms to do so. The lack of these efforts, however, may subject the offeror to the vicissitudes of *ad hoc* adjudication, the outcome of which will probably rest upon the status of the other party. In other words, the position of the form-offeror is becoming like that of the tortfeasor in that the contractual remedies and rights of the offeror are becoming dependent upon the deficiencies of other party, *e.g.*, the "egg-shell headed" plaintiff of tort law fame.³⁰⁸ Thus, the importance of this definition of the principle is that it may serve to increase the predictability of contract enforceability, yet it does not sacrifice flexibility in the application of the principle to new modes of contracting.

Interpreting Disclaimers and Remedy Limitation Clauses

1. Warranty Disclaimers

A clause which disclaims the implied warranty of fitness under the Code must meet specific criteria to be enforceable.³⁰⁹ The language used must be specific and such that a reasonable person would notice it. Thus, section 2-316 includes concrete rules for determining the enforceability of disclaimers which are similar to two of the situations indicating an unconscionable clause: ignorance of the contract and risk.

Compliance with the rules embodied in section 2-316 does not remove all grounds for these terms being unconscionable. For example, the method of contracting may negate the conspicuousness of the disclaimers which appear on the contract document or the person against whom the clause would operate might not have had the opportunity to see the full contract or the disclaimer language. Also, compliance with these rules will not preclude the defense that the aggrieved person lacked a choice. And while some decisions, without analysis, conclude that because warranty disclaimers are permitted by the Code they are perforce not unreasonable, the terms can be commercially unreasonable in a particular transaction. If the aggrieved party has no ability to protect itself, the transaction may be

308. The concept of avoidable fault has also recently been suggested as a tool for analysis under § 2-719(2) of the Code dealing with clauses which fail their essential purpose (a rule which is part of the principle of unconscionability). See *Limited Remedies*, *supra* note 2 at 52-56.

309. U.C.C. § 2-316.

commercially unreasonable. The rationale, as also seen in other contexts, is that the transaction would no longer be for the benefit of both persons, but would be a contractual exchange by which the aggrieved party's rights are unilaterally removed.

2. Limitation of Liability Clauses

Although clauses which limit one party's remedies may seem less harsh than warranty disclaimers, in practice there may be little difference. These clauses have greater potential for deception since they may appear to give adequate protection while resulting in no real remedy. Thus, section 2-719 prohibits terms which provide an "illusory remedy."

That section further provides that a limitation of remedy clause in consumer goods transactions is "prima facie" unconscionable where it would limit damages for personal injury. That presumption does not apply where commercial loss is involved. Yet no court has explained why such a limitation of remedy clause is so onerous in the consumer context or decided that such a term is valid in a consumer goods-personal injury litigation, or invalid in a commercial exchange-loss situation.³¹⁰ However, by applying the unconscionability principle one can explain the probable reason for this disparate presumption and suggest when it might be rebutted or when economic loss cannot be so limited.

Section 2-719(2) contains some recognition of the dangers of limitation terms. The dangers are that the aggrieved party may have been ignorant of the risk assumed, or it might reasonably have expected that the remedy provided would protect it in the event of a malfunction eventually ending in default.

Despite such disclaimer and limitation clauses, there are always basic rights to which contracting parties are entitled, in the absence of a showing that the aggrieved party knowingly, voluntarily and intelligently waived or contracted away those rights. Among those rights are the implied warranties of fitness and merchantability in the Code.³¹¹ There are also presumptions of a fair and beneficial

310. See Note, *Presumption of Unconscionability and Nondefective Products Under the Uniform Commercial Code*, 50 N.Y.U. L. Rev. 148 (1975). In *Collins v. Uniroyal*, 64 N.J. 260, 315 A.2d 16 (1974), (upon which the above Note commented) the court essentially held that the presumption of unconscionability was not overcome by the existence in the contract of an express warranty which arguably provided more protection than that required by the Code in the implied warranties of fitness and merchantability. Thus the presumption apparently is not overcome by evidence that the contract as a whole was more "fair" than required by the Code, which would indicate that the unconscionableness of a limitation clause must be rebutted by evidence concerning the bargaining process: negotiation, notice (of risk and terms) and choice.

311. Apparently, less proof is necessary to show a knowing and intelligent assumption of

exchange, indicated by those decisions first discussed under the rules of unconscionability above. In addition, the presumption in section 2-719 that a clause limiting damages for personal injuries stemming from a consumer goods transaction is unconscionable appears directly related to the policy of tort law to protect individuals against the drastic losses which can result from those injuries.³¹² These considerations, together with the recognition that consumer transactions may be particularly subject to abuse and lack of bargaining, most probably led to the presumption in 2-719(3).³¹³

These rights, however, can be bargained away. Neither the Code nor the courts have indicated that damages arising from personal injuries caused by consumer goods can never be limited. Evidence of a knowledgeable and intelligent risk allocation and a choice on the part of the consumer could rebut the presumption. This may indeed be a very heavy burden of proof. But the presumption is rebuttable. Conversely, commercial losses may be unconscionable even without the aid of a presumption. For those losses it may be necessary to show a reasonable lack of knowledge and choice, as the courts do not presume those facts in light of a written agreement.³¹⁴ Nevertheless, the principle is applicable and indicates that these losses too may be held unconscionable.³¹⁵

the risk where a commercial entity is involved than where a consumer is involved. *E.g.*, *Gates Rubber Co. v. U.S.M. Corp.* 508 F.2d 603 (7th Cir. 1975). *See also* text accompanying note 165 *supra*. *See* cases cited notes 21-94 *supra*, and accompanying text; U.C.C. §§ 2-314, 2-315.

312. *E.g.*, *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P. 2d 145, 45 Cal. Rptr 17 (1965); *Alfred N. Kaplan & Co. v. Chrysler Corp.* 49 Ill. App. 3d 194, 364 N.E.2d 100 (1977). These decisions held that the doctrine of strict liability in tort did not cover purely economic losses from malfunctioning equipment. The courts characterized those losses as being suited to a remedy based on the law of contracts and the parties' expectations. Whether or not such a distinction should be drawn is debatable. *E.g.*, *Santo v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965). But that debate does not detract from the presumption of unenforceability of limitation clauses as applied to personal injuries from consumer goods.

313. Besides § 2-719(3), U.C.C. § 9-206(1) (dealing with the negotiability of contracts which contain an express or implied waiver clause) permits the individual state to set its own standards for such instruments in consumer transactions.

314. Although a clause or contract may be found unconscionable in a commercial setting, less proof is generally needed to show that a commercial entity, or other person of personal or apparent sophistication, knowingly and intelligently assumed a risk than is needed to show the same by a consumer. *E.g.*, *Gates Rubber Co. v. U.S.M. Corp.*, 508 F.2d 603 (7th Cir. 1975). *See also* text accompanying note 165 *supra*.

315. This interpretation does not cause § 2-719(a) to be redundant. That subsection makes clear that the parties may establish their own remedies by "agreement," which is defined as the bargain in fact of the parties. U.C.C. § 1-201(4). But unconscionability applies only to "contracts," which are defined as the total legal obligation based upon an agreement (other than unconscionability). U.C.C. §§ 2-302(1), 1-201(11). Thus even though the identification of unconscionable clauses may require that courts go beyond the written terms in order to ascertain the parties' agreement, *e.g.*, *Personal Fin. Corp. v. Meredith*, 39 Ill. App. 3d 695, 350 N.E.2d 781 (1976), it operates at a wholly different level than determining what agree-

CONCLUSION

Unconscionability in contract law is essentially a principle based upon bargaining. It does not give courts a license to restructure the terms of a disputed exchange as they might deem appropriate, but it does protect against the deprivation of basic statutory and common law rights in an exchange. These rights include the presumption that merchants provide certain warranties in the goods they sell, that liquidated damages clauses must be reasonable, that people must have an opportunity to be heard (unless there is an overriding governmental interest) before losing goods in which they have an interest, and the rules on recovery of damages where goods fail to meet the parties' expectations. The principle of unconscionability also requires that where precedent or statute does not provide for the allocation of risk, the exchange should be fair. Yet these rights can be waived and the burdens re-allocated by knowing, intelligent and voluntary action. The principle then requires either fairness and reasonableness or a proper assumption of risk (negotiation or notice and choice). The inverse of this proposition is the statement of the principle in the Official Comments to UCC 2-302: the prevention of oppression and unfair surprise.

This principle is not a panacea for all that ails modern contract law. Mass-produced and standardized contracts inevitably produce exchanges which really are no contracts—i.e. consensual risk-allocations—but which nevertheless may be observed by the parties or enforced by the courts because of a lack of a showing of unconscionableness. But if the solution must depend upon policies and goals, rather than on extant principles, the judiciary is not the appropriate branch of government to make those adjustments. Courts should adhere to the principles established by statute and precedent.³¹⁶

This the courts have done in the decisions here reviewed. The language in those decisions which sounds as if the courts are approving only what they think is an equal or fair exchange is irrelevant, because those and other decisions demonstrate the significance of bargaining to insulate risk-shifting terms. Thus unconscionability is a democratic principle,³¹⁷ and a proper development in the tradition of the common law.

ment or understanding exists in fact. Unconscionability determines what contract terms are enforceable, while the rest of the body of contract principles determines whether the parties' agreement constitutes a legal obligation in the first instance. See also text accompanying notes 249-50 *supra*.

316. See Dworkin, *Hard Cases*, *supra* note 13.

317. *Cf. Id.*

The language of the decisions generally does not admit of the definitional precision advocated in this article. Rather, courts have chosen to use more conventional labels of contract avoidance when in fact they were employing an unconscionability analysis. Those courts would further the development of the principle by expressly acknowledging the principle as the tool of analysis they are following. All parties involved would benefit from this final abandonment of "covert tools."³¹⁸ Not only will the risk of having a clause declared unconscionable be more predictable, litigants would also be less likely to gamble on evoking judicial sympathy to extract themselves from a bargain which they knowingly entered, but which later soured.

Finally, and perhaps most significantly, the principle represents a further departure of contract law from the rules established under the so-called objective theory of contract. Courts increasingly look to the agreement-in-fact of the parties, rather than formbook language. This does not necessarily detract from the importance of objective facts to ascertainment of the contract, but the rules of proof are changing. The courts examine the commercial practices involved, and the status of each litigant in assessing the issue of whether damages rules have been intelligently, knowingly and voluntarily altered.

The methods of business and merchandising, and hence contracting, have changed dramatically over the past decades. This growth has put great pressure on traditional principles of contract avoidance, and they have been found wanting. For better or worse, the principle of unconscionability has been a large portion of the judicial and legislative response.

318. Professor Llewellyn stated that "covert tools are never reliable tools," meaning that judicial "tools" of analysis which do not admit or recognize the thoughts that are actually at work behind a decision are inherently unreliable. Llewellyn, *Book Review*, 52 *HARV. L. REV.* 700 (1939).