Michigan Law Review

Volume 67 | Issue 6

1969

Contracts--Consideration--Inadequacy of Consideration As a Factor in Determining Unconscionability Under Section 2-302 of the Uniform Commercial Code

Michigan Law Review

CONTRACTS—CONSIDERATION—Inadequacy of Consideration As a Factor in Determining Unconscionability Under Section 2-302 of the Uniform Commercial Code

Section 2-302 of the Uniform Commercial Code (Code) provides that a court may refuse to enforce all or part of a contract if it finds that the contract, or any part of it, was unconscionable when made.[1] In *American Home Improvement, Inc. v. MacIver*[2] the Supreme Court of New Hampshire apparently held that a price substantially in excess of the value of the goods and services sold was sufficient in itself to constitute unconscionability under this provision of the Code. The high price was at least in part attributable to high time-credit charges, and, as noted by the court, the contract could have been invalidated on the ground that the seller had violated a state law by not disclosing these charges in full.[3] Nevertheless, the language of the opinion leads to the conclusion that the inadequacy of consideration alone constituted unconscionability.[4]

In several other cases[5] striking down contract provisions, it is unclear whether courts viewed inadequacy of consideration as sufficient to make the contract unconscionable within the meaning of section 2-302. Others factors may have been essential to these courts'

1. This section 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.

2. 105 N.H. 435, 201 A.2d 886 (1964).

3. Under the new Truth in Lending Bill (Consumer Credit Protection Act), 15 U.S.C. § 1601-77 (Supp. IV, 1968), disclosure of credit terms is required in all states. *Id.* § 1631.

4. The court stated that there was "[an] independent reason why the recovery should be barred in the present case because the transaction was unconscionable" and then proceeded to document the disproportionate price. 105 N.H. at 439, 201 A.2d at 888.

5. In addition to the cases discussed in the text, *see* FrostiFresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (N.Y. Dist. Ct. 1966) (contract calling for excessive credit charges was held to be unconscionable, the court noting that negotiations were conducted in Spanish, while the contract itself, which was not explained to the defendant, was in English); Robinson v. Jefferson Credit Corp., 4 U.C.C. Rep. Serv. 15 (N.Y. Sup. Ct. 1967) (defendant, after exacting several fees from the plaintiff, refused to return plaintiff's repossessed car; contract held unconscionable and defendant ordered to return the car); *In re* Elkins-Dell Mfg. Co., Inc., 2 U.C.C. Rep. Serv. 1016 (E.D. Pa. 1965); *In re* Dorset Steel Equip. Co., 2 U.C.C. Rep. Serv. 1016 (E.D. Pa. 1965) (referee in bankruptcy refused enforcement of two security agreements under section 2-302 because they were too one-sided in favor of creditors).

decisions. In *In re State v. ITM, Inc.*[6] the defendants sold electrical appliances door-to-door, charging extremely high prices and making misrepresentations which were fraudulent under a state statute.[7] The New York trial court stated that the disparity of consideration was equivalent to that in *MacIver* and was sufficient "to clearly render such transactions unconscionable."[8] However, in the same sentence, the court stated that "when the deceptive practices are also considered, there can be no doubt about the unreasonableness and unfairness of these agreements."[9] In another New York case, *Central Budget Corp. v. Sanchez,*[10] plaintiff seller brought suit to enforce a contract for the sale of a 1959 Buick. The buyer's defense was that after the sale he had discovered several mechanical defects and that therefore the contract price was much more than the car was worth. In denying plaintiff's motion for summary judgment, the court noted that "[e]xcessively high prices may constitute unconscionable contractual provisions within the meaning of Section 2-302 UCC."[11] But the court added that defendants should have an opportunity to present evidence as to the over-all purpose and effect of the contract to aid the court in determining whether it is unconscionable.[12] This latter statement arguably implies that unconscionability should not be found solely on the basis of excessive price.

In a recent case, *Jones v. Star Credit Corp.,*[13] a New York trial court relied on section 2-302 to hold that welfare recipients who had paid almost 620 dollars on the installment purchase of a

---

6. 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966).

7. The defendants violated subsection 12 of section 63 of the Executive Law of New York which provides:

> Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney-general may apply . . . for an order enjoining the continuance of such business activity . . . and the court may award the relief applied for. . . . The word "fraud" or "fraudulent" as used herein shall include any device, scheme, or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretence, false promise or unconscionable contractual provisions.

N.Y. EXEC. LAW § 63(12) (McKinney Supp. 1968-1969). The court found the defendants' statements to be both false and unconscionable within the meaning of this statute. Defendants also violated section 402(2) of N.Y. PERS. PROP. LAW (McKinney Supp. 1968-1969) which provides that "[a] contract or obligation shall contain the entire agreement of the parties with respect to the goods and services," that promises to the buyer to compensate him for referrals must be in the contract, and that the contract must contain a clause permitting compensation earned to be deducted from the outstanding balance otherwise due under the contract.

8. 52 Misc. 2d at 54, 275 N.Y.S.2d at 321.

9. 52 Misc. 2d at 54, 275 N.Y.S.2d at 321.

10. 4 U.C.C. REP. SERV. 69 (N.Y. City Civil Ct. Rec. 1967).

11. 4 U.C.C. REP. SERV. at 70.

12. 4 U.C.C. REP. SERV. at 70.

13. 37 U.S.L.W. 2549 (N.Y. Sup. Ct., March 21, 1969).

freezer with a maximum retail value of 300 dollars[14] were entitled to keep the appliance in spite of the seller's claim that the purchasers still owed nearly 820 dollars in payments. The judge stated that "[t]here is no reason to doubt . . . that [section 2-302] is intended to encompasss the price term of the agreement."[15] But in phrasing the issue for decision, the court asked "whether or not, under the circumstances of this case, the sale . . . is unconscionable as a matter of law."[16] The court held that it was, but not without discussion of the "circumstances."[17] It stressed the huge disproportion between price and retail value, and stated that this mathematical disparity "carries the greatest weight."[18] Thus, the court did not clear up the uncertainty about whether excessive price alone can constitute unconscionability.

Under the general common law of contracts, inadequacy of consideration by itself was simply no basis for legal relief.[19] Even in equity, relief for excessive price was difficult to obtain. In a few cases courts cancelled contracts solely because of inadequacy of consideration, but in these cases the inadequacy was so great as to "shock the conscience."[20] Equity courts were more willing to grant relief, both affirmative and defensive, when an excessive price was accompanied by other inequitable incidents.[21] In both situations, however, the courts based their decisions on the traditional theories of fraud, mistake, and undue influence, and not on inadequacy of consideration.

An affirmative fair exchange doctrine, known as *laesio enormis*, existed in medieval law and has been incorporated into many civil law codes.[22] These codes authorize recision of contracts of sale when it can be shown that there was disproportionate consideration. A precise mathematical standard is sometimes used to evaluate prices, the courts considering a price "disproportionate" if it is a certain percentage greater than the market value of the item for which it is exchanged.[23] Cases under the Louisiana Civil Code,

14. The plaintiffs' (purchasers') proof at trial of the maximum retail value of the freezer was not controverted by the defendant seller. 37 U.S.L.W. at 2549.

15. 37 U.S.L.W. at 2549, citing FrostiFresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966); *In re* State v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966); and American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964).

16. 37 U.S.L.W. at 2549.

17. *See* notes 44-45 *infra* and accompanying text.

18. 37 U.S.L.W. at 2550.

19. 1 A. CORBIN, CONTRACTS §§ 127, 128 (1963 ed).

20. 3 J. POMEROY, EQUITY JURISPRUDENCE § 927, at 634 n.13 (S. Symons, 5th ed. 1941).

21. *Id.* at § 928.

22. 1 A. CORBIN, CONTRACTS § 127, 128 (1963 ed.); 3 J. POMEROY, EQUITY JURISPRUDENCE § 927, at 637 n.18 (S. Symons, 5th ed. 1941). *See* Dawson, *Economic Duress and the Fair Exchange in French and German Law*, (pts. 1 & 2), 11 TUL. L. REV. 345, 364 (1937), (pt. 3) 12 TUL. L. REV. 42 (1937).

23. *See* Dawson, *supra* note 22, at 364-76.

which adopts the civil law principle of *lesion* by providing that a reasonably proportionate price is required to sustain a contract of sale,[24] illustrate that in practice civil-law courts are reluctant to assess price differentials. The Louisiana courts have refused to interfere with merely highly profitable bargains and have demanded gross disproportion between price and market value before they will set contracts aside. In effect, they thereby limit the doctrine of *laesio* so that it operates to invalidate only those contracts which are supported by no more than nominal consideration.[25] Under such a test even the contracts involved in *MacIver* and the other three cases discussed above could have been upheld. However, it is important to recognize that the *laesio* doctrine, whether applied conservatively or liberally, does focus solely on price.

It is doubtful that the Uniform Commercial Code was intended to authorize a shift to the *laesio* approach. Prior to the adoption of section 2-302 by the Commissioners on Uniform State Laws, there was concern that inclusion of such a provision in the Code would interfere with the freedom of a buyer and seller to contract and that judicial investigation of the adequacy of consideration was inconsistent with our competitive economy.[26] Perhaps in reaction to this fear, the official comment to section 2-302 indicates that, at least in the drafters' opinion, the main function of section 2-302 was merely to reaffirm the propriety of judicial scrutiny in areas pre-

24. LA. CIV. CODE ANN. art 2464 (West 1952), which requires that the price not be "out of all proportion of the thing." For an interpretation of this section, *see* Herbert & Lazarus, *Some Problems Regarding Price in the Louisiana Law of Sales*, 4 LA. L. REV. 378, 412-18 (1942). A number of states have adopted statutes which permit courts to use inadequacy of consideration as a basis for the denial of specific performance. *See, e.g.*, CALIF. CIV. CODE § 3391 (West 1954). In such states, while a legal right to relief theoretically exists, at least one study indicates that when equitable relief was denied, no legal relief was in fact forthcoming. *See* Frank & Endicott, *Defenses in Equity and "Legal Rights,"* 14 LA. L. REV. 380 (1954).

25. *See* Brooks v. Broussard, 136 La. 380, 67 S. 65 (1914) (price which equalled at least one-half the value of the property sufficient to support the contract). *See also* Johnson v. Mansfield Hardwood Lumber Co., 143 F. Supp. 826 (D.C. La. 1956). In cases decided under the California statute relating to the denial of specific performance, courts were more willing to assess the inadequacy. For cases holding that consideration was inadequate, *see* Cornblith v. Valentine, 211 Cal. 243, 294 P. 1065 (1930) (price was two-thirds of the value); Wilson v. White, 161 Cal. 453, 119 P. 895 (1911) (discrepancy of 1,000 dollars in 14,000 dollars transaction sufficient where other elements of overreaching appeared); Dessert Seed Co. v. Garbus, 66 Cal. App. 2d 838, 153 P.2d 184 (1944) (price 3,400 dollars, reasonable market value 5,000 dollars); *cf.* Miami Tribe v. United States, 281 F.2d 202 (Ct. Cl. 1960), *cert. denied*, 366 U.S. 924 (1961) (payment of less than one-half market value is unconscionable).

26. *See, e.g.*, Hogan, *The Highways and Some of the Byways in the Sales and Bulk Sales Articles of the U.C.C.*, 48 CORNELL L.Q. 1, 42 (1962); King, *Suggested Changes in the Uniform Commercial Code—Sales*, 33 ORE. L. REV. 113, 116 (1954); Legislation, *Definition and Interpretation of Unconscionable Contracts*, 58 DICK. L. REV. 161 (1954); Note, *Policing Contracts Under the Proposed Commercial Code*, 18 U. CHI. L. REV. 146, 151 (1950); Note, *Section 2-302 of the Uniform Commercial Code: The Consequences of Unconscionability in Sales Contracts*, 63 YALE L.J. 560 (1954).

viously subject to the courts' supervision—for example, limitations on remedies and disclaimers of warranty.[27] The comment asserts that section 2-302 was designed to prevent "oppression and unfair surprise"; it was not intended to change the "allocation of risks because of superior bargaining power,"[28] nor was it designed to protect the foolish from bad bargains. It appears, therefore, that cases like *MacIver* and *Jones,* which apparently equate excessive price with unconscionability, are beyond the intended purview of section 2-302.

Whatever the drafters of the Code may have intended, the cases demonstrate that courts examining contractual arrangements may consider adequacy of consideration an important factor; some courts may go so far as to hold that proof of inadequacy of consideration is enough in itself to establish unconscionability. This recent development raises two major questions: How should a court assess the price charged by the seller to determine whether it is in fact too high for the goods or services offered to the buyer?[29] And, if a court requires other elements than disproportionate price for a showing of unconscionability, what should these other elements be?

A two-step approach can be used to develop a standard for determining whether a seller's price is out of line. The first step is to decide whether a seller's *markup*—the difference between the selling price and the wholesale price of the goods, or his *profit*—the difference between the selling price and the cost of the goods sold (including selling and operating expenses), provides the best measure of the fairness of his price. If markup is used, a seller could legitimately complain that he was denied the same rate of return as other sellers

---

27. *See, e.g.,* Kansas City Wholesale Grocery Co. v. Weber Packing Corp., 93 Utah 414, 73 P.2d 1272 (1937); Hardy v. General Motors Acceptance Corp., 38 Ga. App. 463, 144 S.E. 327 (1928). *See also* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Note, *Unconscionable Contracts Under the U.C.C.,* 109 U. PA. L. REV. 401, 408-15 (1961).

The decision to define unconscionability by reference to those areas in which courts had previously deemed contracts unconscionable—for instance, warranty disclaimers and liquidated damage clauses—is anomalous because the Code deals in detail with what is permissible in these types of clauses. *See* UNIFORM COMMERCIAL CODE §§ 2-316, 2-719 [hereinafter UCC]. Leff, *Unconscionability and the Code—The Emperor's New Clause,* 115 U. PA. L. REV. 485, 516-24 (1967) which suggests that in view of the way the Code regulates such clauses in detail, it is difficult to assume that section 2-302 adds anything in the way of protection from unconscionability. Leff suggests that the reason for the paradox may simply be imprecise drafting.

The only case referred to in the official comment which would support the proposition that inadequacy of consideration should suffice for unconscionability is Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948). If the drafters intended to incorporate this notion into the Code, it is likely they would have made a more substantial reference to it than a *"cf."* *See* Leff, *supra,* at 530, 538.

28. *See* UCC § 2-302, comment 1.

29. The result in *MacIver* emphasizes the need to develop standards for assessing the fairness of the price. The carrying charge in that case, which the court failed to calculate, was apparently only eighteen per cent. *See* Leff, *supra* note 27, at 549-51,

because he had sales expenses, overhead, bad debts, or other costs which were not reflected in this measure of consideration.[30] Consumers may also be adversely affected by the use of a markup standard. Many sellers provide transportation, installation, or other services free of charge when goods are purchased. Such a seller's price may be relatively high, but it may be the best price obtainable for the combination of goods and services which he provides. If this price is deemed unconscionable, as it might well be under a strict markup standard, the seller will probably eliminate or at least reduce his free services, and this would be to the detriment of consumers. A profit standard, by taking all costs into account, presents a fairer picture of the transaction and thus seems to be a better unit of measurement. The only difficulty with using profit is that different accounting methods will often produce different results, even when individual sales are involved. This difficulty is not insurmountable; in other circumstances, courts have weighed the merits of different accounting systems to determine which best reflects a seller's costs.[31] A similar approach should be used in cases involving claims of unconscionability because of excessive price.

The second important step in analyzing a challenged transaction is to develop a standard of fair profit with which the particular seller's profit can be compared. The simplest standard would be a fixed percentage of profit applicable to all sellers, but this seems to be inconsistent with the ideal of a free market economy regulated by the mechanism of competition.[32] According to this ideal, the emergence of abnormally high profits in a particular market will

---

30. The usury laws typically set a flat rate which may be charged for the use of money. This approach resembles the use of a markup standard in that costs are not taken into account in computing the rate of interest. The inflexible rate set by the usury laws has been criticized as unreflective of the true costs and risks involved to the lender. *See, e.g.*, F. RYAN, USURY AND USURY LAWS 9-10, 174 (1924).

31. *See* INT. REV. CODE OF 1954, § 446, which requires that taxable income be computed according to an accounting method which clearly reflects a taxpayer's income. "[W]e read 'clearly reflect the income . . .' to mean . . . that income should be reflected with as much accuracy as standard methods of accounting practice permit [rather than merely fairly and honestly]." Caldwell v. Commissioner, 202 F.2d 112, 114-15 (2d Cir. 1953). *See also* Niles Bement-Pond Co. v. United States, 281 U.S. 357 (1930) (an accrual method was required); Kahuku Plantation Co. v. Commissioner, 132 F.2d 671 (9th Cir. 1942) (allowed a hybrid method to be used); Boynton v. Pedrick, 136 F. Supp. 888 (S.D.N.Y. 1954), *aff'd.*, 228 F.2d 745 (2d Cir. 1954); Motors Securities Co., Inc., ¶ 52,316 P-H Tax Ct. Mem. (1952) (tax court held discounts on notes not to be income to an auto finance company in the year of purchase; instead, the court ruled that it was permissible to spread the income over the life of the notes when that practice had been followed for years and income was not distorted); Bellevue Mfg. Co., ¶ 57,094 P-H Tax Ct. Mem. (1957) (tax court required a cash accounting method).

32. *See* P. AREEDA, ANTITRUST ANALYSIS 3-11 (1967); J. BAIN, PRICING DISTRIBUTION AND EMPLOYMENT 5, 65-66, 130 (rev. ed. 1953). *See also* P. SAMUELSON, ECONOMICS 39-57, 778-93 (1967).

attract new entrants into that market.[33] These will be new enterprises or will come from relatively unproductive segments of the economy, and their entry into the market to take advantage of the demand creating the high profits will achieve a desirable allocation of resources.[34] Their arrival is also supposed to drive profits down to a level consistent with the costs and risks of operating in the particular market.[35] Theoretically, judicial precedent prohibiting profits above a certain percentage of the cost of a good would place an artificial limitation on sellers in the market, with the result that new entrants would not be attracted, economic resources would not be correctly allocated, and price competition would not be stimulated. It may be argued that these theories of a free market economy do not conform to the realities of the economic system.[36] However, these theories are embodied in the antitrust laws[37] and in other state and federal statutes,[38] and inconsistent rules should not be promulgated by the courts.[39]

A better test would be to compare a seller's profit to the profits of similarly situated sellers. This would remove the problem of discouraging market entry, because sellers in the market would not be forced to maintain an artificially low price. However, if a court does not make certain that the sellers used for comparison to the challenged seller are indeed similarly situated, its decision may yet be in conflict with the ideal of a free market economy. Some sellers who are more successful than their competitors should be allowed to reap greater profits; they provide additional benefits for consumers and spur their competitors to emulate them. If other sellers in the market do improve their operations in some manner, there will be increased consumer benefits and, because of the resulting increase in competi-

---

33. *See* P. AREEDA, *supra* note 32, at 3.

34. *Id.* at 11.

35. *Id.* at 4.

36. *See* T. ARNOLD, FOLKLORE OF CAPITALISM (1937). *See also* P. AREEDA, *supra* note 32, at 11.

37. *See* P. AREEDA, *supra* note 32, at 3-4; *see also* A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 29-30 (1966).

38. *See* P. AREEDA, *supra* note 32, at 3.

39. Suggesting that the theories underlying the unconscionability clause of section 2-302 are the same as those underlying antitrust laws and other statutes does not imply that the unconscionability clause is to be administered as extensively as some of those laws are. Obviously, courts are not to police contracts for unconscionable provisions in the same way that the Federal Trade Commission polices contracts, mergers, and other agreements which restrain trade; courts are to determine unconscionability only when a private litigant has raised the issue. Because most buyers do not know of the unconscionability clause and because most losses which occur as a result of unconscionable contract provisions are not costly enough to warrant a court action, the unconscionability clause will not deter unreasonable commercial practices to any great degree. More regulation may be needed in this field; if so, legislatures will have to provide more effective enforcement machinery than section 2-302. For an example of such legislation, *see* the discussion in note 7 *supra*, of the New York statute which authorizes the state attorney general to bring suit when a seller misleads a buyer.

tion, these benefits may well be available at a lower price. Thus, sellers should not be penalized for higher profits if these profits are attributable to excellent business locations, to particularly efficient operations, or to access to a particular class of customers who are willing and able to pay more for their products;[40] competitors should be encouraged to improve their locations and operations and to seek out high-paying customers. Greater profits would also be justified if the seller offers a high-quality or an unusual product or if he provides a better quantitative or qualitative selection of ancillary services than his competitors.

All of these considerations make it clear that great care must be exercised in deciding which sellers in a given market are "similarly situated." A certain fixed percentage of the average profit of similarly situated sellers could be chosen as the dividing line for determining whether a challenged seller's profit is excessive, but this probably would not be desirable. Because of the possibilities of error inherent in determining a seller's profit and in finding comparable sellers, there can be no certainty to the test suggested above. Moreover, applying a fixed standard based on percentage of profit above cost of goods sold would create only the illusion of certainty. Worse, such a test would be inflexible. Courts should not evaluate the seller's price in a vacuum, as they would in effect be doing if they applied a a fixed standard. The judge should ascertain the extent to which the seller's profit exceeds that of his competitors—that much is clear. However, he should weigh this factor in the context of the particular case, requiring less in the way of excess profits for a finding of unconscionability when certain other factors are present. Factors which a court should consider are those which demonstrate, with more force than the mere presence of high prices and profit margins, that the seller intended to take unfair advantage of the buyer. Because of the imprecision involved in comparing prices and profits, courts should be reluctant to declare contracts unconscionable when such circumstances are not present in the case.

The buyer's inability to comprehend the transaction is one factor which could lead to a finding of unconscionability. In *FrostiFresh Corp. v. Reynoso*,[41] a contract calling for excessive credit charges was

---

40. A seller can cultivate high-paying customers as long as he does not restrict other sellers from dealing with those customers:

> As we see it, the laws of the United States do not require that persons engaged in private trade and commerce must deal with everyone. When they do deal they may not discriminate, but they do have the right to choose their customers. The Clayton Act as amended by the Robinson-Patman Act itself provides in section 2(a) "Nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in constraint of trade." Sec. 13(a), Title 15 U.S.C.A.

Chicago Seating Co. v. S. Karper & Bros., 177 F.2d 863, 867 (7th Cir. 1949). *See also* FTC v. Bausch & Lomb, 321 U.S. 707 (1944).

41. 52 Misc. 2d 26, 274 N.Y.S.2d 757 (N.Y. Dist. Ct. 1966).

held unconscionable. The New York court noted that negotiations for the contract were conducted in Spanish, but the contract itself, which was not fully explained to the defendant, was in English.[42] This factual context presents a substantial possibility that the buyer misunderstood the implications of the contract and that he was in fact exploited by the seller. The court was clearly correct in taking it into account. The question arises, however, whether courts should consider less obvious indicia of a buyer's low degree of commercial sophistication, such as his low intelligence level or his lack of knowledge of the seller's business. Courts are justifiably much more likely to consider these relatively subjective indicia of the buyer's knowledge if it is clear that the seller was aware of the buyer's shortcomings and played upon them. In *Williams v. Walker-Thomas Furniture Co.*,[43] for example, the court held two installment contracts unconscionable on the grounds that the seller knew of the buyers' lack of education and poor financial position and yet inserted in each of the contracts an "obscure" provision which allowed the seller in the event of a default, to repossess all items the buyers had previously purchased from him.[44] In *Jones v. Star Credit Corp.*, discussed above, the New York Supreme Court stated that

> a caveat is warranted lest we reduce the import of Section 2-302 solely to a mathematical ratio formula. It may, at times, be that; yet it may also be much more. The very limited financial resources of the purchaser, known to sellers at the time of the sale, is entitled to weight in the balance. Indeed, the value disparity itself leads inevitably to the felt conclusion that knowing advantage was taken of plaintiffs.[45]

Some sales techniques might be sufficient in themselves, or at least when coupled with excess price, to render a contract unconscionable. A seller's failure to disclose an important aspect of the

42. It is not clear that these facts were necessary to the court's decision.

43. 350 F.2d 445 (D.C. Cir. 1965).

44. *See* Note, *Contracts—Enforcement—Unconscionable Installment Sales Contract Is Unenforceable,* 79 HARV. L. REV. 1299 (1965). The court could not base its decision on section 2-302 because the Code was not in effect in the District of Columbia when the contracts in question were made. It held that the rule of section 2-302 was part of the common law of the district, and, alternatively, that it could adopt this rule pursuant to its power to develop the common law of the district. 350 F.2d at 447-48 (D.C. Cir. 1965). The contract provision referred to in *Williams* is commonly called an "add on" clause. Only one state has a statute forbidding such clauses and Maryland specifically allows them. Leff, *Unconscionability and the Code—The Emperor's New Clause,* 115 U. PA. L. REV. 485, 554-55 (1967).

In *Jones,* discussed at notes 13-18 *supra* and accompanying text, the court cited *Walker* for the proposition that "the meaningfulness of choice essential to the making of a contract, can be negated by a gross inequality of bargaining power." 37 U.S.L.W. at 2550.

45. 37 U.S.L.W. 2550 (N.Y. Sup. Ct. March 21, 1969).

transaction to the buyer is one factor which might support a finding of unconscionability. Thus, in *MacIver* the court was probably influenced by the fact that the seller had failed to disclose finance charges.[46] High pressure sales tactics would also be relevant in determining whether a contract is unconscionable. In *In re State v. ITM, Inc.* the court held that the seller's "deceptive practices," in conjunction with disproportionate price, established grounds for a holding of unconscionability.[47] *MacIver* and *In re State v. ITM, Inc.* were relatively easy cases because the sales practices engaged in were defined as illegal under state statutes.[48] In addition to such state legislation, the courts might examine standards of fair dealer activity developed by government agencies devoted to consumer protection[49] and by trade associations. When such criteria for evaluating particular selling tactics are not relevant or available, the courts should probably consider the practices of other sellers. Before accepting dealer practices as evidence, however, courts should make sure that the practices are designed to provide fair treatment for buyers and are not used simply to promote efficiency.[50]

There is, of course, a counterargument that courts should not consider the buyer's degree of commercial sophistication or the seller's business practices, at least when these practices do not violate state or federal statutes. It may be argued that such an approach eliminates the traditional adversary relationship between buyer and seller and institutes an agency relationship in which sellers have a vague duty to warn and to care for buyers. However, since requiring sellers to conform to statutes which define moral business practices does not seem to be harsh or unjustifiable,[51] administrative guides, trade association rules, and accepted dealer practices should be regarded in the same way. Such requirements certainly do not give rise to agency relationships; nor do they impose new duties. Section 2-302 and other provisions of the Code were apparently intended to eliminate the harsh consequences of a completely adversary relationship between buyer and seller, and this purpose can be accomplished only by allowing courts to inquire into sellers' practices and buyers'

46. *See* notes 2-4 *supra* and accompanying text.

47. *See* note 6 *supra* and accompanying text.

48. The statute involved in *MacIver* required disclosure of time-credit charges. The statute involved in *In re* State *v. ITM, Inc.* is quoted in note 7 *supra.* The Federal Trade Commission, for example, issues guidelines for use in examining the fairness of such dealer practices as price advertising, reduction of prices, and retail price comparisons. *See FTC Guides Against Deceptive Pricing,* 16 C.F.R. pt. 233 (1949).

49. For a general discussion of trade associations and professional codes of ethics, *see* J. BRADLEY, THE ROLE OF TRADE ASSOCIATIONS AND PROFESSIONAL BUSINESS SOCIETIES IN AMERICA (1965); G. LAMB, TRADE ASSOCIATIONS LAW AND PRACTICE (1956).

50. For example, it may be common practice to fill in all the blanks on a credit form simply because doing so tends to insure accuracy later.

51. See *In re* State v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966).

capabilities.[52] Statutes are helpful in determining which events and circumstances make a contract unconscionable, and more comprehensive legislation is certainly needed in this area. However, considering the infinite variety of contract provisions and selling practices, it is doubtful that legislatures could designate all the activities which a court should consider in assessing the cases which come before it. Furthermore, extremely detailed legislation might prevent courts from weighing different dealer practices in light of the effect they have on purchasers with different intelligence levels and backgrounds. For these reasons courts should look beyond legislation to other prevalent definitions of acceptable business practices in determining unconscionability.

It is more questionable whether courts should follow the precedent set in *Williams* and consider the buyer's financial status and the seller's knowledge of it. A buyer's wealth is not necessarily indicative of his ability to bargain with sellers, although, given facts similar to those in *Jones*, a court may suggest that this is the case. However, a buyer's financial position is relevant to some issues arising in these cases and probably should be considered for that reason. In usury cases it has been observed that poor borrowers often do not question the terms set by lenders because they fear they will be refused loans elsewhere.[53] Some lenders probably take advantage of this state of affairs by charging usurious rates and by imposing other difficult contract terms on borrowers. If the poor borrower is buying goods on an installment basis, the seller-lender has the opportunity to exploit the buyer's fear of being refused credit elsewhere. In an attempt to circumvent the usury laws, he may charge an excessive price for the goods instead of imposing high interest rates. Since the buyer's financial status and the seller's knowledge of it are the determinants of the buyer's vulnerability, courts should examine these factors for the limited purpose of ascertaining whether and to what extent coercion and deception exist.[54] It has been argued

---

52. It is nevertheless true that the drafters of section 2-302 may not have envisioned such inquiries. *See* note 27 *supra* and accompanying text.

Some states have also increased their legislation regulating dealer activities. *See, e.g.*, Maryland Retail Installment Sales Act, MD. ANN. CODE art. 83, §§ 132A-52 (Supp. 1968) [referred to in Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965)]; N.Y. EXEC. LAW § 63(12) (McKinney Supp. 1968-1969); N.Y. PERS. PROP. LAW § 402(2) (McKinney Supp. 1968-1969) [referred to in *In re* State v. ITM, Inc.,. 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966)].

53. *See In re* William Sylvester Branch, 40 REF. J. 101, 102 (N.D. Tenn. 1966) (mem.).

54. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 447 (D.C. Cir. 1965):

> Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power.

that a court's consideration of these factors would confuse the issues and create uncertainty as to the basis for the decision;[55] but this criticism holds true only when the court does not make its limited purpose clear, and thus it seems to be mainly a criticism of judicial writing.

In summary, although the draftsmen of the Code did not intend such results, several recent cases seem to hold that excessive price is enough in itself to constitute unconscionability under section 2-302. Since these decisions stress price as the most important factor in the determination of whether or not a contract is unconscionable, standards should be developed for asserting price. It is submitted that a price should be held sufficiently excessive to render a contract unconscionable if it gives the seller a greater profit than similarly situated sellers ordinarily receive. This test presents the most accurate assessment of the transaction in question and it also conforms to the economic theories incorporated in our antitrust laws and other statutes. However, the courts should not apply an inflexible percentage standard to determine in the abstract whether a seller's profit is excessive; instead, they should evaluate the differential between the seller's profit and that of his competitors in the light of such factors as the buyer's ability to understand the transaction and in light of generally accepted commercial practices. Finally, because of the possibilities of error inherent in assessing price, it is suggested that courts ordinarily should not declare contracts unconscionable if there is no evidence of the seller's overreaching other than the excessive price.

---

55. The attorney who argued the *Walker-Thomas* case for Mrs. Williams has stated that the infusion of the financial status of the consumer confuses the issues, "creating a degree of uncertainty" around the decision. *See* Skilton & Helstad, *Protection of the Installment Buyer of Goods Under the Uniform Commercial Code*, 65 MICH. L. REV. 1465, 1480 (1967).