Commercial Decency and the Code - The Doctrine of Unconscionability Vindicated

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THE DOCTRINE OF UNCONSCIONABILITY VINDICATED

One of the most perplexing twentieth-century legal phenomena is the rise of the standard form contract and its attendant capacity for abuse. Often termed a “contract of adhesion,” “such a contract is ‘sold not bought.’” It is a contract the terms of which are imposed upon the weaker party through a disparity of bargaining power. Application of the “freedom of contract” concept to such an agreement would surely be as erroneous as the assumption that the parties’ objective consent was given to all of the terms of the contract. “[I]f it be a contract it is like the Apostle’s conception of the human frame, ‘fearfully and wonderfully made,’ and one upon the construction and effect of which a competent and experienced lawyer may spend days of careful study without exhausting its possibilities.”

Generally, the courts’ response to the dilemma has been less than illuminating. The approach taken has often been one of improvisation and avoidance rather than development of a general principle condemning such abuses.

A court can “construe” language into patently not meaning what the language is patently trying to say. It can find inconsistencies between clauses and throw out the troublesome one. It can even reject a clause as counter to the whole purpose of the transaction. It can reject enforcement by one side for want of “mutuality,” though allowing enforcement by the weaker side because “consideration” in some other sense is present.

1. The pioneering work in this area is Isaacs’ The Standardizing of Contracts, 27 Yale L.J. 34 (1917).
2. Siegelman v. Cunard White Star, 221 F.2d 189, 204 (2d Cir. 1955) (dissenting opinion). Certainly the standardization of contracts has been commercially beneficial and entirely justified when used with discretion. The time and effort of active bargaining is eliminated just as the expenses of administration are reduced. Id. at 205; Llewellyn, Book Review, 52 Harv. L. Rev. 700, 701 (1939). Such contracts have even been used to accomplish an equitable allocation of risk among the parties and to establish a legal regulation tailored to the needs of the parties and the industry. Llewellyn, The Common Law Tradition 362-63 (1960).
6. Llewellyn, Book Review, 52 Harv. L. Rev. 700, 702 (1939). See Note, Grower-
Paying token expression to the traditional bases of contract, the courts have avoided an inequitable result by the device of “interpretation,” particularly against the stronger party seeking to enforce the contract. The results of these decisions, however, are painfully obvious. They have left in their wake “twisted” law which serves only to mislead later courts. Furthermore, they fail to establish a series of reliable precedents from which can be drawn the “minimum decencies” that a court will insist upon as a prerequisite to enforceability.

The courts of equity, however, early developed the doctrine of unconscionability as a defense to a suit for specific performance. Under the doctrine, specific performance was denied where the terms of the contract itself or subsequent events would result in oppression or hardship to the defendant if enforced. Although traditionally employed for the protection of widows and the weak-minded from the insidious


There is sufficient flexibility in the concepts of fraud, duress, misrepresentation, and undue influence, not to mention differences in economic bargaining power to enable the courts to avoid enforcement of a bargain that is shown to be unconscionable by reason of gross inadequacy of consideration accompanied by other relevant factors.


10. Llewellyn, supra note 6, at 703. Pointing out another difficulty of such “twisted” decisions, Llewellyn adds that “... since they all rest on the admission that the clauses in question are permissible in purpose and content, they invite the draftsman to recur to the attack.” Id.


The appropriate section of the Restatement states:

Specific enforcement of a contract may be refused if (a) the consideration for it is grossly inadequate or its terms are otherwise unfair, or (b) its enforcement will cause unreasonable or disproportionate hardship or loss to the defendant or to third persons, or (c) it was influenced by some sharp practice, misrepresentation, or mistake.

RESTATEMENT OF CONTRACTS § 367 (1932). See also § 302, which excuses non-compliance with a provision involving extreme forfeiture or penalty; and § 339 dealing with enforceability of a liquidated damages provision made in advance of breach.
designs of those who would prey upon them, the equitable doctrine of unconscionability has been applied in recent times to the present problem—the standard form contract. There is also some authority to the effect that the doctrine may have been available as a defense at law.

SECTION 2-302 AND THE CRITICS

Such was the state of the law on the eve of the Uniform Commercial Code. And it was these very deficiencies which prompted the inclusion of section 2-302 by the Code's draftsmen. One of the most controversial and disputed Code provisions, it has been termed by its author "perhaps the most valuable section in the entire Code." The 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.

14. See Campbell Soup Co. v. Wentz, 172 F.2d 80 (3rd Cir. 1948).
16. See UNIFORM COMMERCIAL CODE § 2-302, Comment 1; cf. Llewellyn, The Common Law Tradition 369 (1960). Though not specifically limited in application to form contracts, § 2-302 will undoubtedly find its widest use in such cases. Cf. note 51 infra and cases discussed in notes 73 through 103 infra and accompanying text.
18. UNIFORM COMMERCIAL CODE § 2-302. The policy enunciated in this section is also applied to § 2-309(3) (declaring invalid any agreement dispensing with notification of termination by one party where such would be unconscionable), § 2-718(1) (where a liquidated damages provision may be invalidated when unreasonably large or small) and § 2-719(3) (which invalidates a limitation upon consequential damages where such would be unconscionable).
From its beginnings, this section has inspired a considerable amount of critical commentary,\(^{19}\) some justified and some not. The volume of criticism has caused two states, California\(^{20}\) and North Carolina,\(^{21}\) to deny section 2-302 enactment as a part of their respective Codes. Before assessing this section's actual impact in the courts, it might, therefore, be wise to discuss briefly the criticisms which generally have been leveled at this section.

**Vagueness of the term “unconscionable.”** While it is true that the Code nowhere defines “unconscionable,” it may be profitable to repeat one court's recent definition given in reference to section 2-302. “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... In many cases, the meaningfulness of the choice is negated by a gross inequality of bargaining power.”\(^ {22}\) The vagueness of the term has also been decried as detrimental to commercial certainty.\(^{23}\)

It should be pointed out, in answer, that unconscionability is a concept incapable of exact definition.\(^{24}\) Indeed, it is axiomatic that such a broad codification as the Uniform Commercial Code must contain general clauses expressing a commercial morality which can be applied to a variety of factual situations.\(^ {25}\) Finally, by creating a certain amount of vagueness, it is argued, the draftsman will be forced to leave a margin

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of safety rather than draft dangerously close to the edge of forbidden conduct.\textsuperscript{26}

In a correlative manner, it has been charged that unconscionability under section 2-302 is nothing more than gross inadequacy of consideration.\textsuperscript{27} This view has certainly been given impetus by those cases\textsuperscript{28} in which excessiveness of price is the principal ground of the court in reaching its decision. However, in at least two cases,\textsuperscript{29} deceptiveness of sales practice constitutes at least an equally important basis for holding the Code section applicable. In addition, there have been many cases in which inadequacy of consideration has played little or no part in the courts' decision.\textsuperscript{30}

\begin{enumerate}
\item \textsuperscript{26} Peters, Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two, 73 YALE L.J. 199, 202-03 n.10 (1963). "Some boundaries work best if they are left purposely vague. In contradi\textsuperscript{22} 
\item \textsuperscript{27} See Leff, supra note 19, at 548; see also Comment, 78 HARV. L. REV. 895 (1965).

Certainly, inadequacy of consideration will usually be of some importance in any proceeding under subsection 2-302(2). But just what level of inadequacy will justify a conclusion of unconscionability is at least partially open to conjecture. Generally, mere pecuniary inadequacy of consideration does not render a contract unconscionable. See Chanute Brick & Tile Co. v. Gas Belt Fuel Co., 82 Kan. 752, 109 P. 398 (1910); RESTATEMENT OF CONTRACTS § 367, Comment (b) (1932). However, where the inadequacy is so excessive as to "shock the conscience," a presumption of fraud is raised sufficient to set aside the contract. Sizemore v. Miller, 196 Ore. 89, 247 P. 2d 224 (1952); Schaeffer v. Moore, 262 S.W. 2d 854 (Mo. 1953).

It is true that there is no exact dividing line between what is unconscionable and what is not. The disparity between the price paid and the fair market value . . . must be very great. We think that the Commission was correct when it said in this case that payment of less than half the true value is unconscionable.


\item \textsuperscript{28} American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A. 2d 886 (1964); Central Budget Corp. v. Sanchez, 53 Misc. 2d 620, 279 N.Y.S. 2d 391 (Civ. Ct. Rec. 1967). The former case is briefly discussed in notes 73 through 76 infra and the accompanying text.

\item \textsuperscript{29} State by Lefkowitz v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S. 2d 303 (Sup. Ct. 1966); Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S. 2d 737 (Dist. Ct. 1966). These two cases are discussed more fully in notes 79 through 86 infra and the accompanying text.

\item \textsuperscript{30} Robinson v. Jefferson Credit Corp., --- Misc. 2d ---, --- N.Y.S.2d --- (Sup. Ct.
Radical novelty to the theory of sales law. Although this section was early criticized as "embodying new social concepts," at least one court points out that its policy has long been to declare an unconscionable or oppressive clause void. Furthermore, it is generally agreed that the equitable doctrine of unconscionability has been the precursor for this section.

Tendency to create excessive litigation. Section 2-302 was written amid dire predictions that it would lead to an excessive amount of litigation, partially due to its vagueness. Quite the reverse has been the case, leading some authorities to comment upon the near absence of cases decided under this section. This fact is all the more interesting when one surveys the number and breadth of factual situations encompassed by the illustrative cases cited in the official comment to the section. It is evident that section 2-302 has not found application in the majority of the type of cases contemplated by its draftsmen.

Determination as a matter of law. In answer to early fears of a de-
termination of unconscionability by a jury, provision was made that it shall be a conclusion of law for the court. Although this has generally been regarded as a strength of the section, some question may remain, small as it may be, as to the constitutionality of restricting the determination of unconscionability to the courts' consideration.

Determination as of the time the contract is made. Section 2-302 was also criticized as allowing the court to determine unconscionability of a contract or clause at the time of the action rather than at the time the contract was made. The section was then clarified to indicate that the determination of unconscionability relates to the time the contract was made. Thus corrected, at least one court has refused to declare

37. Uniform Commercial Code § 2-302(1) and Comment 1. Comment 3 provides: "The present section is addressed to the court, and the decision is to be made by it. The commercial evidence referred to in subsection (2) is for the court's consideration, not the jury's. Only the agreement which results from the court's action on these matters is to be submitted to the general triers of facts."

38. Clifford, supra note 31, at 591-94. Despite this fact the North Carolina rejection of section 2-302 seems to be due partially to the fact that unconscionability is to be a matter of law. Id.

Karl Llewellyn points out that since this is a reviewable court action, anything done under section 2-302 will be a precedent which will serve as a guide in subsequent cases. 1954 N.Y. Report of The Law Revision Commission, Report of Hearings on the Uniform Commercial Code 178.


The Code cannot, by legislative fiat, turn a true question of fact into a question of law in any state where the Constitution guarantees the right to a jury trial on questions of fact.

It seems to this consultant that the fair intendment of the language as it reads... is that if the facts are undisputed, or the evidence is such that any jury verdict that unconscionability did not exist would have to be set aside, then the court may refuse to enforce the contract or make [sic] strike or limit the effect of the unconscionable clause.

Obviously, this severely limits the application of subsection (1), confining it to cases where unconscionability is indisputable, one might say to "extreme" cases. To this extent, the change may be a good one, and help to meet some of the objections to the prior version of Section 2-302 as being too broad.

Id. at 733-34.


41. See 1955 N.Y. Report of The Law Revision Commission, Study of the Uniform Commercial Code 729. Accord, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). "In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when
a contract unconscionable where, at its inception, it was not, even though its enforcement might have led to an unconscionable result.

The New York Law Revision Commission, however, suggests that the result which would follow at the time of application and enforcement of the contract should be taken into consideration. The test, then, should also be in terms of result, for the defense of unconscionability should not be allowed unless enforcement would actually be unconscionable. Whether or not the contract was unconscionable at its inception is an academic question if its subsequent enforcement would not be.

The most reasonable solution to this dichotomy would be to require a showing of unconscionability at both the time of inception and the time of enforcement. While this may somewhat restrict the application of section 2-302, it seems reasonable that courts would hesitate to give effect to the section if the contract was clearly not unconscionable at either of these two periods of time.

Failure to distinguish procedural and substantive unconscionability. Perhaps the most accurate criticism is that neither section 2-302 nor its accompanying comment distinguish between procedural and substantive unconscionability. Or, to express this problem in another way, the Code fails to differentiate the unconscionable provision buried in a maze of fine print, and not pointed out to the party "adhering" to the contract, from the unconscionable provision which one knowingly assents to as a result of disparity in bargaining power. The question becomes whether or not to apply section 2-302 alike to unbarred and bargained-for contracts.

the contract was made." Id. at 450. Although this was pointed out in the Comment to the earlier draft, an insertion of a similar phrase into the body of the section was the result. Compare Uniform Commercial Code § 2-302, Comment 1 (1952 version) with Uniform Commercial Code § 2-302(1), and Comment 1 (1962).


44. See 1955 N.Y. Report of the Law Revision Commission, Study of the Uniform Commercial Code 735-36. Although the test under the present section 2-302 does not clearly encompass consideration of the result at the time of its enforcement, it is very unlikely that a court, in absence of unusually compelling reasons, would strike a contract or clause as unconscionable unless its present enforcement actually would lead to such a result.

45. This point is most effectively made by Leff, supra note 19.

46. See notes 1 through 4 supra and the accompanying text.
Early in the drafting history of this section, the Code comment indicated that procedural or unbargained unconscionability was the intended target, and that there was some level of "bargaining conduct sufficient to insulate from judicial interference a contract which was, arguably, substantively 'unconscionable.'" 47 A later draft, 48 however, brought both procedural and substantive unconscionability within the meaning of the section.

This distinction was omitted from succeeding drafts, 49 suggesting that both forms of unconscionability may come within the Code's meaning. It is most probable that the actual bargaining process has lost its legal relevancy, 50 although in actual practice it is the procedural brand of unconscionability to which the section will most likely find its widest application.51

Difficulty of evaluating evidence under section 2-302(2). Subsection (2) of section 2-302 provides the litigants "... a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making its determination." 62 Once the issue of uncon-
scionability has been raised and accepted by the court, the opportunity to present evidence becomes mandatory rather than discretionary.53

This subsection has been criticized, rather cryptically, by one commentator,54 who apparently agrees that the type of evidence which would be forthcoming under 2-302(2) would be helpful in giving a court insight into the "commercial setting" of the contract provision, but, on the other hand, such evidence would not enable the court to pass judgment on the questions of social policy inherent in a determination of unconscionability. That is, while technical testimony concerning a particular industry may be helpful in "resuscitating a provision which . . . to the uninitiated might appear unreasonable,"55 it would not aid the court in deciding whether a harsh provision is justifiable as a matter of social or economic policy.

This "overwhelming question" has not yet seemed to phase those courts who have shed some light upon the kind of testimony contemplated by subsection (2). Said one court:

The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices?56

Other specific evidence which another court57 has permitted under subsection (2) includes the relative financial and bargaining positions of the parties, the extent of usage of the provisions throughout the industry, the extent to which the contract reflects the risks involved, the availability of other bargaining sources, and the possible effects of invalidating a provision or contract upon similar bargains in the future.58

54. Leff, supra note 19, at 543-46.
55. Id. at 543. Cf. the testimony of Mr. Mason O. Damon in 1954 N.Y. REPORT OF THE LAW REVISION COMMISSION, Record of Hearings on the Uniform Commercial Code 1232.
58. Id. at 874. "It was suggested that a clause be added to the second subsection of the section stating that 'no trade usage or practice shall preclude the court from finding
The implementation of the specific class of evidence anticipated by subsection (2) is certainly not novel in controversies similar to those for which the subsection was fashioned. The *Restatement of Contracts* clearly contemplates this same kind of testimony. Professor Corbin explicitly declares that most of these same questions should be considered by the court in analogous situations. Indeed, Professor Corbin suggests inclusion of the additional evidence of whether or not the parties' attention was called to the provision in question and whether the signer could reasonably expect such a provision to be contained in the contract. A number of recent cases decided under section 2-302 have employed this type of evidence, while a few others have remanded the case to the lower court for a hearing in view of subsection (2).

*Unsuitability of doctrine of unconscionability.* Tracing the ancestry of section 2-302 to the equitable doctrine of unconscionability, one writer points out that the doctrine was peculiarly suited to the dramatic situations of overreaching by the stronger party that can only occur in an individualized bargaining situation. The draftsmen of the Code, on the other hand, contemplate application of section 2-302 to the modern mass transaction characterized by its lack of bargaining. "Equity dealt with the pathology of bargaining. The Code deals with the pathology of nonbargaining."

Let it be shown, in answer, that although the section's roots are in the equitable doctrine, the section is more than a mere codification of that a provision is unconscionable." 1956 N.Y. REPORT OF THE LAW REVISION COMMISSION, Report Relating to the Uniform Commercial Code 374.

59. See *Restatement of Contracts* § 367 and Comment b (1932).
60. 1 *Corbin on Contracts* § 128 (1963).
61. Id.
64. Leff, *supra* note 19 at 537.
66. See notes 33 and 34 *supra* and the accompanying text.
the doctrine of unconscionability. For while the equitable doctrine, by comparison, had all the unwieldiness of a bludgeon, the Code section is designed to be used with the precision of the surgeon's scalpel. More particularly, section 2-302 provides for a selection of remedies to be tailored to the individual needs of the case.

Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results.67 This flexibility permits the court to face the issue squarely by limiting the impact of section 2-302 to the specific problem at hand.68 In this fashion, the rejection of an entire contract due to the unconscionability of a clause not in issue may be avoided.69

THE DOCTRINE OF UNCONSCIONABILITY VINDICATED

The most serious of the charges brought against section 2-302 has been the claim that this new power given the court would lead to generally irresponsible action. The most prominent contention in this respect is that the courts are given unlimited power to "make a contract for the parties to which they have not agreed."70 In short, the section "... could result in the renegotiation of contracts in every case of disagreement with the fairness of provisions the parties had accepted."71

68. Clifford, supra note 31 at 563-64.
69. Id.; 1956 N.Y. Report of the Law Revision Commission, Report Relating to the Uniform Comercial Code 37. Thus, the result anticipated by section 2-302 can be favorably compared with that reached in Campbell Soup Co. v. Wentz, 172 F. 2d 80 (3rd Cir. 1948) (decided under the equitable doctrine of unconscionability) where, as Professor Leff contends, the entire contract was invalidated as a result of the unconscionability of a clause not actually involved in the dispute. Leff, supra note 19, at 538.
71. California State Bar Committee on the Commercial Code, A Special Report, 37 Calif. Bar J. 135-36 (1962). The reaction of the Uniform Commercial Code Permanent Editorial Board to this criticism and the resulting omission of section 2-302 from the California Code was that "... California courts had reached the same kind of result by forced construction. This is an issue of policy which has been fully debated many
In view of the fact that a number of decisions have been handed down employing section 2-302, the time is ripe for a reevaluation of the section's impact. In the words of one writer: "It is time to stop evaluating the Code by the standards of the past and to inquire instead into its own merits, into the adequacy of its solutions to the many commercial problems with which a mid-20th century statute must deal." 72

The first reported case employing Code section 2-302 was the amply discussed case of American Home Improvement, Inc. v. Macliver. 73 The court there alluded to the contract's unconscionable features, principally the gross inadequacy of consideration involved. 74 Admittedly leaving much to be desired in clarity, 75 the case has nonetheless been recognized for its general proposition that extreme inadequacy of consideration may constitute unconscionability. 76

The prominent case of Williams v. Walker-Thomas Furniture Co., 77 however, stands as a landmark in the field of sales law. During the period from 1957 to 1962 the defendant purchased household items totaling $1800 under a contract providing for repossession of all items previously bought in the event of default. With a balance of $164, the defendant bought a stereo set for $514.95, defaulted, and contested the repossession of all previously bought and paid-for items.

Although the features of the contract which the court in the Williams case had termed unconscionable were not specifically identified, it appears most likely that the culprit was the contract's "add-on" provision. The court, however, refused to make a determination of unconscionability as a matter of law, choosing instead to refer the case to the lower court for further proceedings on this issue. 78

72. Peters, supra note 26, at 199-200.
74. See the discussion supra notes 27-30 and accompanying text.
75. See the criticism of this case in Leff, supra note 19, at 547-51.
76. See the criticism of this case in Leff, supra note 19, at 547-51.
77. 350 F. 2d 445 (D.C. Cir. 1965), noted principally in 54 Geo. L.J. 703 (1966) and 79 Harv. L. Rev. 1299 (1966). Although the decision preceded the effective date of the Uniform Commercial Code in the District of Columbia, the court specifically employs section 2-302, calling the enactment persuasive authority for adopting the rule involved as a part of their common law development. Id. at 448-49.
78. Id. at 450.
In addition to these noteworthy cases, a number of more recent decisions on the section have been reported. In State by Lefkowitz v. ITM, Inc., the court implemented section 2-302 to enjoin enforcement of contracts secured by the respondent through a high pressure referral-type sales program coupled with misrepresentations, threats, and prices varying from two to six times the cost. The court stated:

In American Home Improvement Inc. v. MacIver, the Supreme Court of New Hampshire refused to enforce a contract unconscionable on grounds of price alone. The same disparity exists in the transactions in the instant case to clearly render such transactions unconscionable and when the deceptive practices are also considered, there can be no doubt about the unreasonableness and unfairness of these agreements. No longer do we believe that fraud can be perpetrated by the cry of "caveat emptor." 81

That section 2-302 was appropriately applied in this case cannot be doubted. The abuses outlined were blatantly obvious, and the court's refusal to enforce such a contract would seem necessary regardless of the method employed to reach this result. The remedy chosen clearly fits the Code's statement that the court "... may refuse to enforce the contract as a whole if it is permeated by the unconscionability ..." 82

Another case involving both inadequacy of consideration and deceptive sales practice is Frostifresh v. Reynoso. Here, although the negotiation was made orally in Spanish, the standard form contract was written in English and neither translated nor explained to the defendant. Despite the defendant's insistence that he could not afford the appliance, the plaintiff's salesman explained that the refrigerator-freezer would cost nothing due to the "commissions" to be earned by similar sales to the defendant's neighbors and friends. By the contract, however, the sales price was set at $900 plus $245.88 credit charge for the same appliance which admittedly had cost the plaintiff corporation $348. Finding

80. But cf. Lundstrom v. Radio Corporation of America, 17 Utah 2d 114, 405 P. 2d 339 (1965), where the court upheld a referral-type sales contract in a similar factual situation, holding that the excessiveness of price "... has nothing to do with the legality of the contracts" Id. at 119, 405 P. 2d at 342.
81. 52 Misc. 2d at 54, 275 N.Y.S. 2d at 321 (citations omitted).
the contract "permeated with unconscionability," the court refused enforcement, allowing the plaintiff a reasonable price for the appliance. The price alone, said the court, was "... indicative of the oppression which was practiced on these defendants." The court further pointed out the defendant's ignorance of the contractual terms and of the general commercial situation. And here again, the appropriateness of the application of section 2-302 cannot be doubted, for it is such abuses that the Code is focused upon.

Several examples can be found where the court has exercised its selection of remedies tailored to the needs of the case. For example, in Paragon Homes of New England, Inc. v. Langlois, the contract involved contained a provision whereby the parties submitted to New York as the forum for legal redress, the defendants asserting that consent to the provision was unknowingly and fraudulently obtained. No valid reason appears for insertion or enforcement of this provision since the contract was executed and breached in Massachusetts. Furthermore, the plaintiff corporation was licensed in Massachusetts, and not authorized to do business in New York. Finally, the defendant was also a resident of Massachusetts.

Clearly, the provision in question was inserted to vex and harass the defendant in any subsequent attempt either to prosecute or defend any action arising from the contract. As the court, in an alternative holding, stated, such a provision should be stricken as unconscionable under section 2-302. The invalidity of any claim that the court has "made a contract for the parties to which they have not agreed" is painfully obvious.

The case of Robinson v. Jefferson Credit Corp. also employs section 2-302 in preventing what the court characterizes as unconscionable

84. As set out by the Supreme Court on appeal, 54 Misc. 2d 119, 281 N.Y.S. 2d 964 (App. T. 1967).
86. Id.
88. Paragon Homes of New England, Inc. v. Langlois, — Misc. 2d —, — N.Y.S. 2d — (Sup. Ct. 1967). On these facts, the court dismissed the plaintiff's action primarily on the doctrine of forum non conveniens.
89. Id.
90. Id. — Misc. 2d —, — N.Y.S. 2d — (Sup. Ct. 1967).
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conduct even though allowed under the contract. After the plaintiff fell two weeks behind in his payments under a retail installment contract for an automobile, the defendant corporation repossessed the car. The plaintiff subsequently paid the arrears along with late charges and a "repossession fee." The defendant, however, refused to return the car, asserting the plaintiff's financial insecurity.

The court in the Robinson case points out the inconsistency in allowing the defendant corporation's claim for overdue payments, late charges, and a repossession fee while refusing to return the automobile. Such conduct, says the court, "... cannot withstand comparison to the requisite standard of commercially reasonable conduct required under the Code." 91

In light of these cases, it would appear that the general criticism of irresponsibility would have no application. Rather than making contracts to which the parties have not agreed, the Code section could realistically be characterized as preserving the contract which the deceived party had thought he had made. One commentator has reached the conclusion that the reported cases reveal that the courts have not abused their powers under section 2-302, and that such fears have been unjustified.92 Similarly, other writers feel that the section's impact may well be to lessen the courts' willingness to strike or modify the contract,93 for "... the primary purpose of the section was ... to provide a basis on which contracts might be preserved from destruction on grounds of unconscionability." 94

The restraint shown by the courts in employing section 2-302 is further revealed by the fact that several of the cases considered above95 employ the Code section only as an alternative holding. The fact that the same conclusions were reached on other grounds indicates that the Code has not caused the courts to abuse their discretion under the section.

It should also be noted that a few courts,96 though considering section

91. Id.
93. Hogan & Penney, supra note 51 at 31.
96. In Re Advance Printing & Litho Co., — F.2d — (3rd Cir. 1967); In Re Elkins-
have declined to apply the Code in reaching their conclusion. This in itself is evidence that the courts have tended not to abuse the "unlimited" power given them. An obvious example of this is *Sinkoff Beverage Co., Inc. v. Schlitz Brewing Co.*, where the plaintiff had contracted to purchase beer from Schlitz with no exclusive rights granted. The contract provided that either party might terminate the contract at any time. Actually, the plaintiff had exclusive distributorship for the six years during which time he had expanded his facilities in reliance on a continued relationship. When Schlitz gave ten days' notice of cancellation, the plaintiff sought to enjoin Schlitz, demanding the right under section 2-302, as applied in section 2-309(3), to one year's notice of cancellation.

The court in the *Sinkoff* case held that section 2-302 applies the test of unconscionability to the circumstances at the time the contract was made, therefore finding the contract's power of termination not to be unconscionable. In fact, the court noted that the contract was very beneficial to Sinkoff at the time it was executed.

As for the related criticism that section 2-302 prevents a legitimate allocation of risk among the parties to the contract, at least one commentator denies this, even where such allocation results from a disparity of bargaining power. So also does the case of *In Re Elkins-Dell Manufacturing Co.* deny that the parties will not be allowed a legiti-
mate allocation of risk. Though declining to base its decision upon the Code section, the court in *In Re Elkins-Dell* stated that the contractual terms must bear no reasonable relation to the risks involved before they may be struck as unconscionable. In using section 2-302, courts should, as *In Re Elkins-Dell* points out, consider the effects of holding the contract or clause in question unenforceable on the future of similar business contracts. Adding a realistic warning to the use of section 2-302 where the allocation of risk has the aura of legitimacy, the court stated:

It would be an egregious instance of “yielding to pity for the individual case at the cost of a more inclusive rescue.” . . .

To hold these contracts unenforceable on their face would probably be to impose a judicially invented but economically dysfunctional morality upon knowledgeable contracting parties. . . . It would be to add a risk of unenforceability to the other risks inherent in such [contracts].

In short, the courts are painfully aware of the danger of striking down a commercially reasonable allocation of risk. Properly employed, there is little peril that section 2-302 will destroy the ability of the weaker party to make the contract which it needs most and can obtain only by assuming, legitimately, the burden of risks.

**CONCLUSION**

The Code section 2-302 is most certainly not a panacea for the legal implications of the ‘boiler-plate’ contract. Admittedly, the section does have certain shortcomings which may or may not present a handicap in the judicial administration of that section.

However, the breadth of criticism which this section has inspired seems to be out of any reasonable proportion to the timidity with which the courts have accepted the provision. Indeed, it may be surmised that it is this amplitude of commentary which is responsible for the courts’ timidity. The opportunity of 2-302 receiving a just trial in such an atmosphere must accordingly be diminished.

A number of courts have, however, braved the invective surrounding 2-302. On several occasions this Code provision has even been observed as persuasive authority for decisions regarding both contracts made be-

the defendant could not suspend its business or file a Voluntary Petition for Bankruptcy without the plaintiff’s consent.

101. *Id.* at 871-72 (emphasis added).
fore the adopting of the Uniform Commercial Code\textsuperscript{102} and contracts outside the field of sales.\textsuperscript{103} So also, the number of reported cases employing the section seems to be growing as courts gain confidence in the section as an instrument of "commercial decency." Hopefully, this trend will continue, for those cases already reported show promise in the rationality of recourse and result reached.

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\textsuperscript{103} E.g., In Re Elkins-Dell Manufacturing Co., 253 F. Supp. 864 (E.D. Pa. 1966). As to whether the Uniform Commercial Code in general and section 2-302 in particular will fuel judicial reasoning in areas other than sales, see 1 \textsc{Corbin on Contracts} § 128, n.94 (1963).

"Since the problem of distortion and the undesirability of enforcing unconscionable agreements are not at all confined to the sale of goods, the fundamental approach advanced by the \textit{Code} should be considered applicable in a variety of contracting situations beyond its terms." Note, \textit{The Uniform Commercial Code As A Premise for Judicial Reasoning}, 65 \textsc{Columbia L. Rev.} 880, 892 (1965). See generally, Pound, \textit{Common Law and Legislation}, 21 \textsc{Harvard L. Rev.} 383 (1908).