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A Reevaluation of the Decision Not to Adopt the Unconscionability Provision of the Uniform Commercial Code in California

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A REEVALUATION OF THE DECISION NOT TO ADOPT THE UNCONSCIONABILITY PROVISION OF THE UNIFORM COMMERCIAL CODE IN CALIFORNIA

On the advice of the appointed fact-finding committee the California Legislature did not adopt the “unconscionability” section of the official version of the Uniform Commercial Code. Many scholars as well as practitioners opposed its adoption, fearing that it would lead to unrestricted and unguided judicial interference in the commercial arena, and believing that it posed serious threats to the “freedom of contract.” This position is supported by the obvious fact that “unconscionability” is not defined in the Code, and no specific criteria for evaluating the conscionability of contracts are provided. Yet, despite the

1. The Official Text reads:
   Section 2-302. Unconscionable Contract or Clause.
   (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
   (2) When it is claimed or appears to the court that the contract 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. In order to evaluate the proposed Official Version of the Uniform Commercial Code the Legislature established a special Senate Fact Finding Committee. The committee requested evaluations from several sources including the State Bar, the Banker’s Association, and Professors Marsh and Warren of the School of Law, University of California at Los Angeles. See, text accompanying notes 39-53 infra for discussion of their recommendations. For the complete text of the reports, discussions, and the committee’s final recommendations see the SIXTH PROGRESS REPORT TO THE LEGISLATURE BY THE SENATE FACT FINDING COMMITTEE ON THE JUDICIARY (1959-1961), THE UNIFORM COMMERCIAL CODE [hereinafter cited as the SIXTH PROGRESS REPORT].

3. Section 2-302 has been controversial since its very inception in the early drafts of the Uniform Commercial Code. It has provoked an extensive amount of commentary in legal periodicals. The following are good sources for general reference and historical background: 109 U. PA. L. REV. 401, 45 VA. L. REV. 583, 45 IA. L. REV. 843, 9 WM. & MARY L. REV. 1143, 9 B.C. IND. & COM. L. REV. 367.
controversy and prolonged debate all but two states—California and North Carolina—have adopted section 2-302.

After the slow start 2-302 is emerging as an important aspect of commercial law. The increase in case activity as well as the diversity of potential uses arguably compels a reevaluation of California's position on 2-302. Thus, the purpose of this note is to reexamine the efficacy of the arguments against the adoption of 2-302 in light of recent judicial interpretations in other jurisdictions and the growing importance of 2-302 in the contemporary commercial setting.

I. DEVELOPMENT, USE AND INTERPRETATION IN OTHER JURISDICTIONS

For a time the widespread adoption of 2-302 did not have a significant impact on commercial law. No doubt the prevailing controversy concerning the predicted effect of 2-302 inhibited lawyers and courts alike—caution seemed to be in order. As a practical matter cases involving contracts which might have been held unconscionable in whole or in part often contained interest or credit charges in violation of other less controversial, more specific, and previously tested statutory provisions. As a result, courts could decide the cases based on the older statutes.

Gradually, however, courts began to comment in dictum that contract provisions might also be unconscionable, using 2-302 as an alternative to lend additional support to decisions. Despite the slow start, courts are now beginning to rely solely on 2-302—particularly New York courts. Jones v. Star Credit Corp., a recent case, is of significance because it exemplifies the developing trend. In Jones the court reversed the process of using

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5. REPORT No. 3 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 37 (1967).
6. See, text accompanying notes 7-23, infra.
2-302 as alternative authority and used it as the primary rationale for the decision. In passing, the court mentioned that the credit charges were also statutorily too high.\textsuperscript{11}

Plaintiffs, welfare recipients, contracted with one of the defendant's door-to-door salesmen to purchase a home freezer for $900.00. The total price including credit charges was $1,234.80. The court allowed the parties to present evidence as to the commercial setting at the time of the formation of the contract, from which it was determined that, at the time of the sale, the freezer had a fair market value of $300.00. In an opinion emphasizing the need to protect the "uneducated" and "illiterate" consumer from a "small but hardy breed of merchants who would prey on them,"\textsuperscript{12} the court held the contract price was unconscionable as a matter of law under 2-302 and directed that the contract "be reformed and amended by changing the payments called for therein to equal the amount of payment actually so paid by the plaintiffs."\textsuperscript{13} At the time of trial the plaintiffs had paid $619.00.

The case is important for several reasons: (1) The court openly acknowledged that fraud was not present; (2) the need to protect the unknowing consumer was emphasized; and, (3) unconscionability of price was straight-forwardly declared. This decision exemplifies the need for legislation such as 2-302. It can be lauded as an occasion when the court clearly held the bargain unconscionable without having to strain older statutory or case authority to fit the factual circumstances. But Jones is vulnerable to critical attack as an example of the use of 2-302 to "rewrite" a contract to read as the court feels it should have read, leaving no criteria for establishing unconscionability in future cases.

The Jones facts present such an outrageous disparity between "fair market value" and the selling price that the result is not troublesome; the apparent lack of a definitive unconscionability test is. The dictum, however, suggests factors to be considered when evaluating the conscionability of a bargain. These include: The buying power of the consumer (or lack of it); the education or commercial experience of the buyer; and, closely following that, his literacy. Undeniably, a test for unconscionability that weighs such factors entrusts a court with broad discretionary powers. In

\textsuperscript{11} Id. at 192, 298 N.Y.S.2d at 266-67.
\textsuperscript{12} Id. at 190, 298 N.Y.S.2d at 265.
\textsuperscript{13} Id. at 193, 298 N.Y.S.2d at 268.
lieu of mathematical formulae for the rate of interest or the
amount of credit charges in relation to sales price, as in many of
the existing consumer protection statutes, a balancing approach
will enable courts to act in the "gray areas" not covered by
specific statutes; areas that are exploited by sellers such as the
defendant in Jones.

If Jones does foreshadow the future of 2-302 an examination
of the significant cases leading up to it and cited in the opinion
as authority is valuable. In American Home Improvement, Inc.
v. Maclver,14 decided on a disclosure statute relating to finance
charges and the first case to cite 2-302, it was stated:

In as much as the defendants have received little or nothing of
value and under the transaction they entered into were paying
$1,069 for goods and services valued at far less, the contract
should not be enforced because of its unconscionable features.15

Another important case cited in Jones was Williams v.
Walker-Thomas Furniture Company.16 Ora Lee Williams began
purchasing items at the Walker-Thomas store in 1958. While
making her first purchase the salesman encouraged her to sign
"some papers" and pay for the items on an installment plan. The
important provision in the form she signed, held unconscionable
on appeal, read as follows:

If I am now indebted to the company on any prior leases, bill
or accounts, it is agreed that the amount of each periodic
installment to be made by me to the company under this
present lease shall be inclusive of and not in addition to the
amount of each installment payment to be made by me under
such prior leases, bills, or accounts, and all payments now and
hereafter made by me shall be credited pro rata on all
outstanding leases, bills and accounts carried by me at such a
time as payment was made.17

From 1958 to 1962 Ora Lee made purchases totaling $1800
at Walker-Thomas and payments totaling $1400. She did so with
a monthly welfare income of $258.00 for herself and her six

15. Id. at 439, 201 A.2d at 889.
16. 350 F.2d 445 (1965). For a complete discussion of the case by the attorney who
handled the appeal see, Dostert, Case Studies In Consumer Fraud, THE BUSINESS LAWYER,
children. In 1962 Ora Lee defaulted on a payment. A writ of replevin was issued resulting in the seizure of all items purchased from Walker-Thomas over the four-year period. Strongly condemning the business practices of the furniture company, the court, on appeal, relied on 2-302, found the contract "commercially unreasonable," and refused to enforce its unconscionable terms. 18

Two important New York cases, *New York v. ITM* 19 and *Frostifresh v. Reynoso*, 20 followed *Walker* and set the stage for *Jones*. *ITM* involved a complex fraudulent retail sales promotion scheme. The customers, erroneously believing that they could not only cover the cost but profit as well, purchased goods from ITM. ITM charged prices ranging from two to six times their cost on products. The court determined that the prices were unconscionably high. Dictum in the case contained strong condemnation of those who hide behind a business philosophy of "Buyer Beware." The court said, "Let the seller beware too!" 21

*Frostifresh* is remarkably similar to *Jones* on the facts. *Frostifresh* brought the action to recover the amount allegedly due on a sales contract for a home freezer unit, attorney's fees and late charges. The contract was "negotiated" or rather the Reynosos were persuaded to buy solely in Spanish. The salesman told them, on learning that Reynoso had only one week left to go on his job, that they would receive a $25.00 commission on the sale of freezers to their neighbors. The contract subsequently signed was in English and was not translated for them. The terms stated the freezer price to be $900.00 plus additional credit charges amounting of a total of $1,145.88. When at trial it appeared the terms might be unconscionable under 2-302 the parties were given an opportunity to present evidence as to the commercial setting. At the conclusion of the presentation the court held that charging a total price of $1,145.88 for an item that cost the seller $348.00 was unconscionable. However, they granted a judgment for the seller for $348.00 plus interest from date of default.

On appeal the court reversed and remanded in order to properly assess damages. The appellate court agreed that the evidence supported a finding of unconscionability under 2-302 but

stated that the seller should be entitled to his cost, plus a "reasonable profit," and shipping costs. Thus, in New York the groundwork for *Jones* was complete.

Admittedly a simple checklist unconscionability test is missing. What is clear is that the developing examination of unconscionability is a broad examination—one that considers all phases of the commercial transaction. It is increasingly apparent that other statutory and case authority is inadequate to provide complete protection for contracting parties in the modern commercial setting, particularly where standardized form contracts are involved. The purpose of 2-302 as stated in the comments accompanying the official draft is "to allow the court to pass directly on the unconscionability of the contract or the particular clause therein and to make a conclusion of law as to its unconscionability." That is exactly what occurred in *Jones*. To be sure, such a position is the result of a policy decision—the benefits of greater consumer protection outweigh the danger of judicial interference with freedom of contract that may result from the adoption of 2-302.

II. UNCONSCIONABILITY IN CALIFORNIA

California consumers, while not protected by 2-302, are not left completely at the mercy of the "hardy breed of merchants" referred to in *Jones*. The assertion that California courts can and do use their broad equity powers to avoid enforcing unconscionable bargains requires more detailed examination. Undeniably California courts do not matter-of-factly enforce all bargains—conscionable or not. California has consumer protection legislation—probably some of the best. The discussion must, then, not merely center on whether unconscionable results can be avoided in some cases but also how they are avoided and what effect the means used has on commercial law generally.

It has been proposed that California courts can, without the aid of 2-302, accomplish the same results with less uncertainty.

22. 54 Misc. 2d 119, 281 N.Y.S.2d 964 (1967).
A review of some of the cases cited and the various theories used as authority for this proposition is necessary to an examination of unconscionability in California. One method employed to avoid enforcing a bargain is to make use of a court's power to "interpret" the agreement. Perhaps the classic "interpretation" case in California is *Burr v. Sherwin-Williams.*

Expert testimony established that the plaintiff suffered crop damage from using pesticide manufactured by the defendant. The defendant relied on his warranty disclaimer printed on the label of the product.

Seller makes no warranty of any kind, express or implied, concerning the use of this product. Buyer assumes all risk in use or handling, whether in accordance with directors or not.

The defendant argued that this disclaimer was a permissible and adequate disclaimer of any "implied" warranty of "merchantable quality." The court, construing the disclaimer strictly against the defendant, concluded that it only limited his liability for the "use" of the product and that it did not disclaim an implied warranty of merchantable quality. As a result, the defendant was held liable for the crop damage.

The opinion did not state that the attempted disclaimer was unconscionable, but it was so strongly implied that the case is now cited as authority for the proposition that California courts can avoid enforcing unconscionable bargains by using their powers of construction and interpretation. The fact remains that there was

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28. Id. at 693, 268 P.2d at 1047 (emphasis added).
29. *Burr* was decided prior to California's enactment of the U.C.C. The Uniform Sales Act was in effect at the time and the "implied warranty" stemmed from Cal. Civ. Code § 1735 (West 1954). Section 1735 has now been replaced by Cal. Comm. Code §§ 2314, 2315, and 2316 (West 1964). For a more recent case with similar facts but a different result see, Mosesian v. Bagdasarian, 260 Cal. App. 2d 361, 67 Cal. Rptr. 369 (1968). The court distinguished the Mosesian facts from the Burr decision on the basis that Burr suffered damage from the application of the liquid while Mosesian's damage resulted from the ineffectiveness of the liquid. See also, Klien v. Asgrow Seed Co., 246 Cal. App. 2d 87, 54 Cal. Rptr. 609 (1966). In Klein, decided after the adoption of the U.C.C but covering facts still controlled by the Uniform Sales Act, dictum indicated that the U.C.C does not curtail the liability imposed by the Uniform Sales Act upon sellers for breaches of warranty nor does it extend their power to disclaim or limit liability for such breaches. Further, the court, citing Burr, commented that despite the failure to adopt 2-302, "California courts exercising equity powers, have always assumed the unenforceability of contracts which are against public policy." Id. at 102 n.8, 54 Cal. Rptr. at 619 n.8.
31. Burr is cited by both the State Bar Report and the Marsh-Warren Report as
no discussion of unconscionability nor were there any standards established for evaluation of the conscionability of future disclaimers.

Estoppel can also be used to avoid unconscionable results. In Monarco v. Lo Greco the defendants orally promised to will all their property to their step-son if he would remain on the farm and work it with them. He remained, giving up other opportunities for work and further education. The couple died twenty years after making the promise but left the property to a grandson. The court held that the grandson was estopped from asserting the Statute of Frauds against the plaintiff. There had been such a change of position that the grandson should be estopped to prevent an unconscionable result. Alternatively, the decision included dictum implying that where, as here, the plaintiff had performed and others had received the benefits of his performance, it would constitute unjust enrichment to uphold the conveyance.

In addition to interpretation and estoppel, a California court may avoid enforcing an unconscionable contract by a finding of fraud. Undoubtedly many contracts that contain unconscionable elements were obtained by the use of fraud. However, it is possible that no fraud is involved—or at least no fraud that as a practical matter is provable under the traditional concepts of fraud. Such was the case in Jones. What may be provable is that a reasonable man under the circumstances, with all the relevant information necessary to understand the agreement, would not have agreed to the terms. In State Finance Co. v. Smith this dilemma is evident. The court used the gross inadequacy of consideration as evidence of fraud, obviously seeking a way around enforcing what it felt to be an unconscionable contract though it did not speak in terms of unconscionability.

Another possible California alternative may be to attempt to

32. 35 Cal. 2d 621, 220 P.2d 737 (1950).
33. For more recent discussions of the doctrine set forth in Monarco see, Mosekian v. Davis Canning Co., 229 Cal. App. 2d 118, 40 Cal. Rptr. 157 (1964) and White Lighting Co. v. Wolfson, 68 Cal. 2d 336, 438 P.2d 345, 66 Cal. Rptr. 697 (1968). While acknowledging that the party would be estopped from asserting the Statute of Frauds if an unconscionable result would follow, both courts found insufficient evidence to establish a finding of unconscionability.
34. 44 Cal. App. 2d 688, 112 P.2d 901 (1941).
establish a duty of "good faith" on the party in a position to dictate the terms of the agreement. There is some precedent for the proposition that the controlling party must exercise good faith amounting to something like "commercial reasonableness." This doctrine stems from the California Supreme Court's decision in California Lettuce Growers, Inc. v. Union Sugar Company. In a suit to recover damages for the price of beets delivered by the plaintiff growers to the defendant, the defendant acknowledged delivery but refused to pay, alleging he was entitled to set-offs for the amount of the price of the beets. The plaintiff obtained a summary judgment by arguing that it was an illusory contract because it contained no specific provisions for delivery, price, or acceptance of shipments. The trial court agreed that the defendant was not bound by the contract and held for the plaintiff.

The appellate court determined the agreement to be enforceable. The court stated that the parties had dealt with each other before, although they had calculated their prices by a different method, that the method used in calculating price was common in the industry, and that the plaintiff must be charged with knowledge of industry prices. As to the lack of agreed-upon price, delivery and shipments, the court held that the method chosen was reasonable and known to both parties. Both parties were bound because the defendant-buyer was under a duty of "good faith" (something like commercial reasonableness) to fulfill the contractual agreement. It remains to be seen, however, if a California court would accept an argument based upon a theory that the person in a position to dictate the terms in the negotiation process or supply the form is under a duty of good faith (commercial reasonableness) to dictate fair and reasonable terms.

The preceding cases exemplify some of the methods open to California courts to avoid unconscionable results. They are, however, pre-Code cases which were offered to the legislature as evidence that California courts could avoid unconscionable results through the use of their broad equity powers. Today the results in similar fact situations may depend on whether the Code in a

36. Other U.C.C. sections that were enacted are now applicable to facts such as those presented in Lettuce Growers. See, e.g., CAL. COMM. CODE §§ 2204, 2208 (West 1964).
particular area has retained, broadened, or changed pre-Code law. But the means of achieving a fair result open to a California court faced with an unconscionable bargain remain essentially the same. Other sections of the Code cannot prevent unconscionable bargains—a fact which persuaded the drafters to include 2-302. Other jurisdictions are using 2-302 despite the enactment of the Code and consumer protection legislation. Forcing a conscionable result out of a U.C.C. provision rather than a pre-Code Uniform Sales Act provision is still accomplishing a fair result in a circuitous manner. Arguably, a straightforward declaration of unconscionability provides for better results and less uncertainty in commercial law.

III. THE CALIFORNIA DECISION

Section 2-302 read:

Section 2-302. Unconscionable Contract or Clause.
(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
(2) When it is claimed or appears to the court that the contract 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.

In California the proposed Official Version of the Uniform Commercial Code underwent rigorous examination. The legislative subcommittee requested recommendations from three principal sources: 1) The State Bar Association; 2) the Banker’s Association; and, 3) Professors Marsh and Warren of the School of Law, University of California at Los Angeles. An examination of the recommendations made in the respective studies is essential

38. Uniform Commercial Code § 1-103 provides that:
Unless displaced by the particular provisions of this code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.
to an understanding of the position taken by the Legislature, as the responses to the proposed section 2-302 were strong and varied.

A) California Bar Recommendation

The Bar report states:

The decision to delete this section from S.B. 1903 was based on the belief that giving the courts unqualified power to strike down terms they might consider “unconscionable” would result in renegotiation of contracts in every case of disagreement with fairness of provisions the parties had accepted.40

The report rejected the argument that in an “age of form contracts” contracts are not “negotiated” in the traditional sense. The report cited existing statutory provisions such as the Unruh Act41 that provide consumer protection. Also rejected was the argument that codifying the unconscionability powers in the form of 2-302 would be a logical extension of the traditional power of equity courts. Yet the report acknowledged that courts in California have “liberal equity powers” and that these powers are at times used to avoid enforcing what might be defined as unconscionable bargains. Indeed, the report cited cases to support the point that courts in California use “forced construction” to accomplish the results that 2-302 was codified to achieve directly.42 The report’s position was clearly based upon a belief that existing methods of interpretation and construction open to California courts provide built-in safeguards for the “freedom of contract” absent in 2-302.

B) California Banker’s Association

As their final recommendation, the California Banker’s Association offered an alternative draft of the section. In essence, however, the alternative was so fundamentally different that it was not a rewording but a new section derived from the concept of

41. Id. at 36.
42. CAL. CIV. CODE §§ 1801-1812.9, 2981-2984.3 (West 1954).
44. See, Sixth Progress Report, supra note 2, at 402.
“good faith” and not unconscionability. The proposed revision was as follows:

If the court finds that the contract or any clause of the contract was not entered into or agreed upon in good faith the court may refuse to enforce the remainder of the contract without such clause, or it may limit the application of any such clause as to void any result.45

Part two of the proposed section was to be completely deleted.

The report based the recommendation on the thesis that the word or concept of unconscionability is not “a legal word of art.” Nevertheless, it was retained in both the title and the phrase, and thereby probably created more definitional confusion than it eliminated.46

To be sure “good faith” is defined in the Code, but there is by no means unanimous agreement as to what is meant by good faith in either of the two fundamentally different ways it is used in Articles 2 and 3.47 The proposal is in essence a different approach, one which avoids the issue of unconscionability. Indeed, the argument that “good faith” is the corner-stone of the Code and that courts can refuse to enforce contracts not made in good faith to avoid unconscionable results really adds nothing to the Code or to existing California law.

C) The Marsh-Warren Report48

The third comprehensive study submitted to the legislature was an analysis of the former recommendations. The report found

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45. Id. at 403.
46. Despite the fears expressed over using the term “unconscionable” in 2-302 the term was not omitted from Section 2719(3). Section 2719 did not provide any more in the way of a definition than did 2-302. Leaving room for speculation as to why the term was less offensive in 2719(3) than in 2-302, the answer may well be that 2719(3) simply does not hold the potential for judicial interference in the commercial transactions that 2-302 did or it may simply be an oversight on the part of the opponents of 2-302. Section 2719(3), as adopted in California, reads as follows:

Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

47. See generally, Uniform Commercial Code, §§ 1-201(19), 1-203, 2-103(b) and 3-302. See also, Farnsworth, Good Faith Performance and Commercial Reasonableness, 30 Chi. L. Rev. 666 (1963) and Summers, Good Faith in General Contract Law and The Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195 (1968).
48. See, Sixth Progress Report, supra note 2, at 455.
the Banker's substitution of good faith for unconscionability unsound, stating that:

[A]t least we have centuries of equity precedent to guide us to when a contract is unconscionable. No case exists to our knowledge wherein a bargain was not enforced because a party lacked honesty.49

Believing as they did, that "good faith" could be as elusive a concept to define as unconscionability, they recommended the section be phrased in terms of unconscionability.

The report also advised against complete deletion of 2-302 as recommended by the Bar. Acknowledging, however, that the most significant danger apparent in the wording of the official version was the possibility that a court could strike down a clause or contract that had been "thoroughly negotiated by the parties," they recommended: 1) The section be limited in its application to "form contracts;" 2) a rewording of part (1); and, 3) that part (2) be unchanged. The suggested rewording of part (1) was:

(1) Except with respect to a contract between merchants, if the court as a matter of law finds the contract to have been unconscionable at the time it was made and if the court finds in addition that the contract was prepared by the party seeking to enforce the contract or such clause, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause as to avoid any unconscionable result.50

Following their recommendation they argued that although California judges already possess doctrinal tools to achieve the result that this section calls for it is preferable to allow what has previously been done by indirection, if not by subterfuge, be done openly.51

The report also counters the argument that courts will interpret the section as giving them greater powers to refuse to enforce unconscionable bargains by taking the position that "this increase in judicial power if it is such, is justified by the proliferation of form contracts in this country within the last few decades."52

49. Id. at 457.
50. Id. at 455.
51. Id. at 457.
52. Id.
D) The Decision

The Legislature was faced with three fundamentally different recommendations on 2-302. That, coupled with the controversial nature of 2-302, undoubtedly convinced the Legislature that a cautious approach was prudent. Since all sides submitted that the courts have the doctrinal tools (limited though they might be) to avoid enforcing unconscionable contracts on certain sets of facts, arguably the wisest or at least the safest course was to adopt the Code without 2-302. However, that decision should not preclude further investigation or future legislation if the dangers prove to be small in comparison to the contemporary need for more far reaching consumer protection than is available under existing law.

IV. Conclusions

The arguments against the adoption of 2-302 seem to have been overstated. The widespread adoption of 2-302 did not bring about sweeping changes in commercial law nor did it lead to an intolerable deluge of renegotiated contracts. The use of 2-302 has been greatest in the retail commercial setting where standardized form contracts are used extensively and the terms in such instruments are not negotiated in the traditional sense. Rather, they are dictated by the seller. Often these contracts are designed to fit in between or to completely avoid areas covered by other more specific statutory or case law. Section 2-302 allows a court to reach a conscionable result without having to resort to imaginative interpretations or a stretching of other legal concepts.

The growing use of 2-302 in other jurisdictions, which like California have other consumer protection legislation, attests to the need for 2-302 in the contemporary commercial setting. The right to freedom of contract holds a high place in Anglo-American legal tradition and care should be taken to protect that right. Nevertheless, the right to freedom of contract should not include the right to bind an unknowing consumer to an unconscionable bargain.

A thoughtful and arguably satisfactory way to protect the

53. The subcommittee report reads:
Your subcommittee questions the advisability of introducing such a vague term without specific definition as to its scope or effect. It is the recommendation of the subcommittee that Section 2-302 in its entirety be deleted from the proposed legislation.
SIXTH PROGRESS REPORT, supra note 2, at 340. See also note 45.
truly negotiated contract and still provide protection for the unknowing consumer is suggested by Professors Marsh and Warren in their proposed amendment to 2-302. In light of the demonstrated need for 2-302 and the apparent overstatement of dangers in adopting it, California would be wise to reevaluate its position and to give strong consideration to the adoption of 2-302 as amended by the Marsh-Warren Report.

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