

## UNCONSCIONABILITY AS A CONTRACT POLICING DEVICE FOR THE ELDER CLIENT: HOW USEFUL IS IT?

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An elder law symposium provides an opportunity to consider ways that the various areas of the law provide protection for the older client. This raises the question of whether the Uniform Commercial Code (hereafter U.C.C. or the Code) protects the unique interests of the older consumer. Such consideration naturally leads to the contract policing device specifically included in the Code—unconscionability.<sup>1</sup> The doctrine of unconscionability provides a way for courts to police grossly unfair contracts and contract provisions. It is found not only in the U.C.C. but also in the tenets of general contract law.<sup>2</sup> However, its application is not limited to the elderly. This piece will focus on the use of this contract policing mechanism to protect this one segment of the consumer population.

Section 2-302 of the U.C.C., the unconscionability section most widely used and discussed, permits a court to refuse to enforce an entire contract, or specific provisions of the contract, if the court finds that the contract or provision is unconscionable. It provides:

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.

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1. See U.C.C. § 2-302 (unconscionability provision for contracts for the sale of goods) and U.C.C. § 2A-108 (unconscionability provision for lease contracts).

2. RESTATEMENT (SECOND) OF CONTRACTS § 208.

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.<sup>3</sup>

Unconscionability, as provided for in the Code, arose from the common law.<sup>4</sup> Initially, the concept of refusing to enforce perceived unfair bargains was limited to courts of equity.<sup>5</sup> Courts of law were seen as being unable to refuse to enforce otherwise valid contracts because of an alleged unfairness.<sup>6</sup> This led to courts of law searching for indirect ways to achieve the same result. When presented with unfair contracts arising from perceived overreaching, some courts would refuse to enforce the offensive provisions through a variety of legal mechanisms, for example, by using the rules of contract construction, including the precept to construe a contract against the drafter, to prevent enforcement of an objectionable term, or by finding a particular provision against “public policy.”<sup>7</sup> These types of machinations created inconsistent and unpredictable results.<sup>8</sup>

Against this backdrop, drafters of the U.C.C. decided to include a provision permitting courts to rule directly on the unconscionability of a contract or a provision of a contract.<sup>9</sup> The drafters believed that permitting direct inquiry into the unconscionability of a contract would result in more consistent decisions.<sup>10</sup> Section 2-302 was included in the very first version of Article 2 and enacted as part of the Code in the late 1950s and early 1960s by all except two states.<sup>11</sup> Section 2-302 has

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3. U.C.C. § 2-302.

4. Carol B. Swanson, *Unconscionability Quandary: UCC Article 2 and the Unconscionability Doctrine*, 31 N.M.L. REV. 359, 361 (2001).

5. See Evelyn L. Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 COMM. L.J. 287, 289-90 (2000) (discussing the early use of equitable powers of court to regulate “unconscientious” contracts).

6. See Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 468 (1999) (discussing the powers of the equity courts to police unfair problems, but the inability of courts of law to similarly do so).

7. U.C.C. § 2-302 cmt. See also Swanson, *supra* note 4, at 362.

8. Brown, *supra* note 5, at 290.

9. U.C.C. § 2-302 cmt. (explaining section intended to permit courts to explicitly determine unconscionability of a contract or its provisions).

10. See Brown, *supra* note 5, at 288 and Donald R. Price, *The Conscience of Judge and Jury: Statutory Unconscionability as a Mixed Question of Law and Fact*, 54 TEMP. L.Q. 743, 744 (1981).

11. See Brown *supra* note 5, at 290 (discussing drafting history of unconscionability section in Article 2 of U.C.C.). California and North Carolina did not initially enact the unconscionability provision of Article 2 but both have since done so. See Prince, *supra* note 6, at 464, 490-91 (noting California and North Carolina were only two states that did not adopt section 2-302 when enacting

since been the basis for extending the doctrine of unconscionability into the law of leases in section 2A-108 of the U.C.C.,<sup>12</sup> the common law as reflected in the Restatement (Second) of Contracts section 208,<sup>13</sup> consumer protection statutes,<sup>14</sup> and even the laws of other countries<sup>15</sup> and international law through U.N. Guidelines.<sup>16</sup>

This Code provision permits a court to police an “unconscionable contract or provision,” but what is unconscionability? Section 2-302 does not define unconscionability, nor do most statutes or cases which address the issue. It seems a court is supposed to “know it when the court sees it.” The comments to 2-302 provide a test for determining unconscionability, which is “whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”<sup>17</sup> Essentially, this test says a provision is unconscionable if it is unconscionable and provides little guidance to the court.

Being left on their own to determine the meaning of unconscionability, courts have defined unconscionability as “an absence of meaningful choice on the part of one of the parties together with contract terms that are unreasonably favorable to the other party.”<sup>18</sup> An unconscionable contract clause is one where there is “the absence of meaningful choice for the contracting parties, coupled with draconian

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the U.C.C. and discussing the history of section 2-302 in California).

12. U.C.C. § 2A-108.

13. RESTATEMENT (SECOND) OF CONTRACTS § 208.

14. *See, e.g.*, OHIO REV. CODE ANN. § 1345.03 (prohibiting supplier from committing an unconscionable act or practice in a consumer transaction) and N.J. STAT. ANN. §56:8-2 (West 2004) (making the use of unconscionable commercial practice in the sale of goods or real estate an unlawful practice).

15. *See* *Bridgewater v. Leahy*, 194 C.L.R. 457, 1998 WL 1672011 (High Ct. Australia 1998) (setting aside certain land transfers and options given by an elderly uncle to his nephew on the basis of unconscionability).

16. U.N. Expanded Guidelines for Consumer Protection, G.A. Res. 54/449, U.N. GAOR, 54<sup>th</sup> Sess., at 21 (1999) (providing governments should, through their internal laws, protect consumers from contractual abuse from, among other improper methods, unconscionable and unfair sales contracts and credit provisions). *See generally* Brooke Overby, *Contract, in the Age of Sustainable Consumption*, 27 J. CORP. L. 603 (2002) (comparing consumer protection under the U.N. Consumer Protection Guidelines with American contract fairness doctrines, including unconscionability).

17. U.C.C. § 2-302 cmt. 1 (stating that judges have the discretion to strike unconscionable contracts).

18. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965). *See also* *Telecom Intern. America, Ltd. v. AT&T Corp.*, 280 F.3d 175, 194 (2d Cir. 2001); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003); *Guthmann v. La Vida Llana*, 709 P.2d 675, 679 (N.M. 1985).

contract terms unreasonably favorable to one party.”<sup>19</sup>

Unconscionability is not intended to erase the doctrine of freedom of contract, but to make realistic the assumption of the law that the agreement has resulted from real bargaining between parties who had freedom of choice and understanding, and the ability to negotiate in a meaningful fashion.<sup>20</sup>

Along that line, courts and commentators generally agree that, under Article 2 of the Code, a finding of unconscionability requires both procedural and substantive unconscionability.<sup>21</sup> That is, the contract must result from a unconscionable process, and the contract or the relevant provision of the contract itself must also be unconscionable – an unfair provision resulting from an unfair process.<sup>22</sup> Article 2A, governing the lease of goods, provides much broader protection in a consumer lease – it permits a court to refuse to enforce a provision or provide another appropriate remedy if the lease resulted from unconscionable conduct.<sup>23</sup> This broader protection is also found in some consumer protection statutes.<sup>24</sup> The absence of such broad protection is one of the limitations of unconscionability under Article 2 and the common law.

Generally, unconscionability is defined by reference to relevant

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19. *Pyle v. Wells Fargo Financial*, 2004 WL 2065652 (Ohio 10th Dist. Ct. App. 2004), *citing* *Colins v. Click Camera & Video, Inc.*, 621 N.E.2d 1294, 1299 (Ohio Ct. App. 1993).

20. *See* U.C.C. § 2-302 cmt. 1 (stating “[t]he principle is one of the prevention of oppression and unfair surprise (case citation omitted) and not of disturbance of risks because of superior bargaining power”); *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 183 (3d Cir. 1999) (denying borrowers’ claim of unconscionability noting that inequality of bargaining power alone is a sufficient basis to invalidate an otherwise valid arbitration provision).

21. *See Harris v. Green Tree Financial Corp.*, 183 F.3d 173 (3d Cir. 1999) (recognizing courts generally require both procedural and substantive unconscionability before upholding a claim of unconscionability); *Anderson v. Delta Funding Corp.*, 316 F. Supp. 2d 554 (N.D. Ohio 2004) (finding procedural unconscionability alone is not enough to invalidate a clause on the basis of unconscionability); *Matthews v. New Century Mortgage Corp.*, 185 F. Supp. 2d 874 (S.D. Ohio 2002) (holding elderly, single female borrowers had sufficiently alleged dual requirements of procedural and substantive unconscionability in their challenge to defendant’s lending practices); and Arthur Allen Leff, *Unconscionability and the Code – The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967) (discussing the requirement of procedural and substantive unconscionability).

22. *See, e.g., Bensalem Township v. International Surplus Lines Ins. Co.*, 38 F.3d 1303, 1312 (3d Cir. 1994) and *Ferguson v. Lakeland Mutual Ins. Co.*, 596 A.2d 883, 885 (Pa. Super. Ct. 1991).

23. U.C.C. § 2A-108 provides, in subsection (2):

With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that the unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.

*Id.*

24. *See* OHIO REV. CODE ANN. § 1345.03 (West 2004) (prohibiting unconscionable practices occurring before, during or after a consumer transaction).

factors to be considered in making the determination.<sup>25</sup> One-sidedness of a provision is one factor to which the Code comments refer.<sup>26</sup> Along this line, some courts have looked at the mutuality of the provision – for instance, whether a limitation of remedy applies equally to both parties.<sup>27</sup> The comments also indicate that the doctrine of unconscionability is meant to prevent oppression and unfair surprise, suggesting that the effect a provision will have on one party, and the likelihood that party was aware of the provision, are important considerations.<sup>28</sup>

In determining when a provision is unconscionable, courts look at a number of factors, including the relative bargaining power of the parties, the conspicuousness of the placement of the disputed term, and the oppressiveness and unreasonableness of the term.<sup>29</sup> However, mere unequal bargaining power is not enough.<sup>30</sup> There must be some evidence that this power was asserted, resulting in overreaching, such as by insisting on an unconscionable provision.<sup>31</sup> The inequality of bargaining power must be so substantial as to render one party's choice in the matter non-existent.<sup>32</sup>

Factors for determining unconscionability in the bargaining process in the Restatement of Contracts include belief by the stronger party that there is no reasonable probability that the weaker party will fully

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25. See *Carter v. Exxon Co. USA*, 177 F.3d 197 (3d Cir. 1999) (noting courts look at a number of factors in determining unconscionability, including the relative bargaining power of the parties, the conspicuousness of the placement of the disputed term, and its harshness and unreasonableness) and *Matthews v. New Century Mortgage Corp.*, 185 F. Supp. 2d 874, 892-93 (S.D. Ohio 2002) (explaining factors relevant to determination of unconscionability, including among others, commercial reasonableness of contract terms, available alternatives to acquire the goods, and the parties' relative bargaining positions, age, education, and business experience).

26. U.C.C. § 2-302 cmt. 1.

27. See *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854 (W. Va. 1998) (finding arbitration provision which preserved the lender's right to litigate issues while requiring borrowers to submit all claims to arbitration was so one-sided as to be unconscionable).

28. U.C.C. § 2-302 cmt. 1.

29. See *Carter v. Exxon Co. USA*, 177 F.3d 197 (3d Cir. 1999).

30. *Sander v. Alexander Richardson Investments*, 334 F.3d 712 (8th Cir. 2003); *Troy Mining Corp. v. Itmann Coal Co.*, 346 S.E. 2d 749, 753 (W. Va. 1986) (quoting the RESTATEMENT (Second) OF CONTRACTS explanation that inequality of bargaining power, even if it results in inequality in allocation of risks, is not sufficient to find unconscionability); *ABM Farms v. Woods*, 692 N.E.2d 574, 578 (Ohio 1998) (noting even an unsophisticated consumer may be bound to an arbitration provision because unequal bargaining power is not enough to find provision unconscionable).

31. *Id.* (stating: "A finding that the transaction was flawed, however, still depends on the existence of unfair terms in the contract. A litigant who complains that he was forced into a fair agreement will find no relief on grounds of unconscionability."). See also *Bd. of Educ. of Berkeley Co. v. W. Harvey Miller, Inc.*, 236 S.E.2d 439 (W.Va. 1977) (describing an unconscionable contract as one between "the rabbits and foxes").

32. *Guthmann v. La Vida Llena*, 709 P.2d 675 (N.M. 1985).

perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; and knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.<sup>33</sup>

Consumer protection statutes, such as the Ohio consumer protection statute,<sup>34</sup> generally list factors, similar to those considered by the courts under the U.C.C. or common law, to be weighed in making a determination of unconscionability under the statute. The factors in the Ohio statute include:

- (1) Whether the supplier has knowingly taken advantage of the inability of the consumer reasonably to protect his interests because of his physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement;
- (2) Whether the supplier knew at the time the consumer transaction was entered into that the price was substantially in excess of the price at which similar property or services were readily obtainable in similar consumer transactions by like consumers;
- (3) Whether the supplier knew at the time the consumer transaction was entered into of the inability of the consumer to receive a substantial benefit from the subject of the consumer transaction;
- (4) Whether the supplier knew at the time the consumer transaction was entered into that there was no reasonable probability of payment of the obligation in full by the consumer;
- (5) Whether the supplier required the consumer to enter into a consumer transaction on terms the supplier knew were substantially one-sided in favor of the supplier;
- (6) Whether the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to his detriment;
- (7) Whether the supplier has, without justification, refused to make a refund in cash or by check for a returned item that was purchased with cash or by check, unless the supplier had conspicuously posted in the establishment at the time of the sale a sign stating the supplier's refund

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33. RESTATEMENT (SECOND) OF CONTRACTS § 208.

34. OHIO REV. CODE ANN. § 1345.03 (West 2004).

policy.<sup>35</sup>

For the elderly, there are several of these factors that may be relevant. Obviously, the fact that most inquiries into unconscionability determine the identity of the weaker party by reference to her situation, including any physical and mental conditions, may be relevant when considering unconscionability in a transaction involving an elderly consumer. However, other factors that may come into play in such a situation include whether the other party knew at the time of the contract that there was no reasonable probability of payment of the obligation in full by the consumer or knew of the inability of the consumer to receive a substantial benefit from the subject of the consumer transaction.<sup>36</sup>

A number of cases involving mortgage refinancing and dance studios illustrate how courts use these factors. In the 1990s, consumers reported mortgage financing schemes that charged excessively high rates and costs to elderly borrowers who, because of fixed incomes, were unlikely to qualify for conventional refinancing or home equity loans and were therefore particularly susceptible to unscrupulous lenders.<sup>37</sup> One suggestion for attacking the validity of these contracts is based on the lender's knowledge that the elderly borrower on a fixed income is unlikely to be able to meet the payments associated with these loans.<sup>38</sup>

There were a number of unconscionability cases involving elderly women and dance studios, which frequently involved dance lessons for life at a cost of tens of thousands of dollars, in the 1970s and 1980s. In finding these contracts unconscionable, some courts considered the fact that the dance studio knew that it was unlikely that the elderly customer would ever reap the full benefit of the contract given the customer's age and physical condition.<sup>39</sup>

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35. *Id.*

36. *See* Bennett v. Bailey, 597 S.W.2d 532 (Tex. App. 1980) (upholding jury determination of unconscionable conduct in pressuring elderly widow to purchase expensive dance lessons). *See also* Vockner v. Erickson, 712 P.2d 379 (Alaska 1986) (upholding trial court's determination of unconscionability in sale of apartment building to experienced real estate purchaser when current payments were insufficient to cover accrued interest on unpaid sale balance and elderly grantor would have been 103 when the balloon payment became due).

37. *See* Kathleen E. Keest, *House Rich Elderly*, NAT. BAR ASSOC. MAG. 14 (Jan./Feb. 1994) (describing "equity-skimming" home improvement and mortgage scams perpetrated against elderly homeowners, viewed as house-rich but cash-poor) and Overby, *supra* note 16, at 616 (noting elderly have increasingly become targets of fraud, predatory and abusive lending and financial abuse).

38. *Id.*

39. *See, e.g.,* Bennett v. Bailey, 597 S.W.2d 532 (Tex. App. 1980) (determining there was evidence to support jury's finding of unconscionable conduct where dance instructors' excessive pressure on a lonely, elderly widow to purchase excessively expensive dance lessons resulted in the dance studio taking advantage of the customer's vulnerability).

A challenge to the enforceability of a provision on the grounds of unconscionability has been attempted in numerous cases involving elderly clients who were allegedly the victims of high-pressure sales tactics and overreaching. Two cases have found provisions in these situations unconscionable. In *Matthews v. New Century Mortgage Corp.*,<sup>40</sup> the U.S. District Court for the Southern District of Ohio held that elderly, unmarried female borrowers' allegations that they were targeted for unfair loans based on their age, gender and marital status sufficiently stated claims that the loan contracts were unconscionable.<sup>41</sup> The borrowers, all single, elderly females, were pressured into home improvement loans by representatives of related home improvement and mortgage companies. The transactions generally followed the pattern of the contract involving Ruth Morgan, an 87-year-old single woman.<sup>42</sup> An employee of a home improvement company contacted Ms. Morgan and advised her the siding on her home was dirty and not "up to code."<sup>43</sup> He had her sign a contract for new siding at a cost of \$17,325, after another employee assured her she could finance the siding.<sup>44</sup> Ms. Morgan was not provided copies of the loan documents before closing on the loan nor, allegedly, at the closing.<sup>45</sup> She was not informed of her three-day right to cancel.<sup>46</sup> Although the terms were not explained to her, she felt obliged to sign the papers because the siding had already been removed from her house.<sup>47</sup> It was only later that she learned that the home loan was not in an amount to cover the home improvements (plus a small sum to buy a used car), but refinanced her entire home mortgage for \$49,000.<sup>48</sup> She also learned that the loan application misstated her income and her employment.<sup>49</sup> The monthly payment was initially set at \$459.97, but shortly after she began making payments, she was advised her payment would go up.<sup>50</sup> A number of months later, two of her

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40. 185 F. Supp. 2d 874 (S.D. Ohio 2002).

41. *Id.* at 892-93.

42. *Id.* at 877.

43. *Id.* at 877.

44. *Id.* at 877.

45. *Matthews v. New Century Mortgage Corp.*, 185 F. Supp. 2d 874, 877 (S.D. Ohio 2002).

46. *Id.* at 877.

47. *Id.* at 877-78.

48. *Id.* at 878.

49. *Id.* at 878-79. The application indicated the 87-year-old Ms. Morgan was employed as a "quilt-maker" with American Quilt and had a monthly income of \$1,500. *Id.* at 879. A business card "supporting" her employment was included in the mortgage file. *Id.* Ms. Morgan did not work, had never been employed in the quilting industry, and had a monthly income of only \$713 from social security benefits. *Id.*

50. *Matthews*, 185 F. Supp. 2d at 878.

payments of \$457.97 were returned as insufficient and shortly thereafter the mortgage company's trustee filed a complaint to foreclose on her home.<sup>51</sup>

Morgan and other plaintiffs sued, alleging violations of the Fair Housing Act,<sup>52</sup> Equal Credit Opportunity Act,<sup>53</sup> Truth-in-Lending Act,<sup>54</sup> Ohio's fair housing statute,<sup>55</sup> the Ohio Pattern of Corrupt Activities Act,<sup>56</sup> and claiming civil conspiracy and unconscionability. The defendants moved to dismiss all claims.<sup>57</sup> On the unconscionability claim, the court denied the motion.<sup>58</sup> The court found the plaintiffs' factual allegations, such as those discussed above, were sufficient to support a claim that the terms of the contracts were so one-sided as to be substantively unconscionable.<sup>59</sup> Additionally, the allegations supported a claim of procedural unconscionability because the mortgage representatives had significantly greater bargaining power, experience and business acumen than the elderly, unsophisticated borrowers.<sup>60</sup>

In another case, the West Virginia Supreme Court of Appeals refused to enforce an arbitration provision in a consumer loan contract because the provision was unconscionable.<sup>61</sup> The arbitration provision required the borrowers to submit all claims to arbitration, but preserved for the lender the right to litigate most issues in court.<sup>62</sup> The court considered unconscionability under the Consumer Credit Protection Act as enacted in West Virginia.<sup>63</sup> The court noted the borrowers were unsophisticated, elderly consumers,<sup>64</sup> while the lender was a national corporate lender. Therefore, the court found that their relative bargaining strengths were "grossly unequal."<sup>65</sup> Also important was evidence that the plaintiffs did not seek a loan, but were instead solicited by the lender, and the lack of evidence of any other alternative presented

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51. *Id.* at 878.

52. 42 U.S.C. §§ 3604-05.

53. 15 U.S.C. § 1691.

54. 15 U.S.C. §§ 1601 *et. seq.*

55. OHIO REV. CODE § 4112.02(H) (West 2004).

56. OHIO REV. CODE § 2923(E) (West 2004).

57. *Matthews v. New Century Mortgage Corp.*, 185 F. Supp. 2d 874, 893 (S.D. Ohio 2002).

58. *Id.*

59. *Id.* at 892-93.

60. *Id.* at 893.

61. *Arnold v. United Companies Lending Corp.*, 511 S.E. 2d 854 (W.Va. 1998).

62. *Id.* at 860.

63. W. VA. CODE §§ 46A-2-121 *et. seq.* (1996).

64. The court noted the plaintiffs were a married couple in their sixties with limited education, the husband having completed the fifth grade and the wife the eighth grade. *Arnold*, 511 S.E.2d at 861 n.7.

65. *Id.* at 861.

to the borrowers.<sup>66</sup>

The court also found that the provision was “unreasonably favorable” to the lender because the borrowers were limited to binding arbitration regardless of the basis of their claim, but the lender retained its right to litigate virtually any claim it might have against the borrowers.<sup>67</sup> This deprivation of the borrowers’ access to the courts while preserving the lender’s “is inherently inequitable and unconscionable.”<sup>68</sup> Finding both procedural and substantive unconscionability, the court refused to require the borrowers to submit to arbitration.<sup>69</sup>

Other cases have rejected unconscionability challenges to contract provisions under similar situations however. In *Harris v. Green Tree Financial Corp.*,<sup>70</sup> the U.S. Court of Appeals for the Third Circuit found an arbitration provision in a home improvement contract enforceable against the homeowners’ challenges that the provision lacked mutuality and was unconscionable.<sup>71</sup> The plaintiffs sued Green Tree Financial Corporation, Green Tree Discount Company (Green Tree Financial’s subsidiary), and several affiliated building contractors, alleging fraud, jointly perpetrated by the defendants, in selling and financing home improvements.<sup>72</sup> Allegedly, Green Tree recruited building contractors to sell home improvements to homeowners to be financed by high interest, secondary mortgage contracts, which were in turn sold to either Green Tree Financial or Green Tree Discount.<sup>73</sup> The contractors were to target “relatively unsophisticated, low- to middle-income senior citizens.”<sup>74</sup> The plaintiffs claimed that, to close the deals, Green Tree instructed the contractors to use high-pressure sales tactics, such as in-home sales and telemarketing, and to assure the customer that the cost of the improvements would be reasonable and that no payments had to be made until the customer was completely satisfied.<sup>75</sup> The plaintiffs also alleged that these standard contracts, provided by Green Tree for the contractor’s use, had misleading and fraudulent provisions.<sup>76</sup>

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66. *Id.*

67. *Id.*

68. *Id.* at 861-62.

69. *Arnold v. United Companies Lending Corp.*, 511 S.E. 2d 854, 861 (W.Va. 1998).

70. 183 F.3d 173 (3d Cir. 1999).

71. *Id.*

72. *Id.* at 174.

73. *Id.* at 176.

74. *Id.* at 176.

75. *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 176-77 (3d Cir. 1999).

76. *Id.* One such provision was a provision charging high premiums for collateral protection insurance. *Id.* at 176. Another contested provision, the one at issue in this case, was an arbitration

The plaintiffs entered into a contract with one of the contractors and signed loan documents, including a secondary mortgage on their home that was promptly assigned to one of the Green Tree companies.<sup>77</sup> The plaintiffs contended that some of the work was not completed as promised and other work was unsatisfactory. Despite repeated complaints to Green Tree, nothing was done.<sup>78</sup>

Despite not receiving the agreed-upon work, the plaintiffs were forced to continue paying Green Tree Financial on the loan to avoid losing their home in foreclosure.<sup>79</sup> The plaintiff sued Green Tree and the alleged associates in the scheme, alleging violations of RICO,<sup>80</sup> the Pennsylvania consumer protection statute,<sup>81</sup> and numerous common-law causes of action including breach of contract and fraudulent and negligent misrepresentation.<sup>82</sup> Green Tree moved to compel arbitration based on an arbitration provision in the contract that required the borrowers to arbitrate all claims but permitted Green Tree to seek judicial relief to enforce either the debt or the mortgage and to foreclose.<sup>83</sup> The borrowers challenged the provision on the grounds that it lacked mutuality and was unconscionable.<sup>84</sup>

The borrowers prevailed in the district court and the lenders appealed.<sup>85</sup> The United States Court of Appeals for the Third Circuit rejected both the borrower's arguments, reversing the decision of the district court and remanding with directions to compel arbitration.<sup>86</sup> On the mutuality argument, the court noted that mutuality does not require equivalency of obligation, that is, that both parties are bound to arbitrate to the exact same extent.<sup>87</sup> As long as there is consideration for the

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provision which required the homeowners to arbitrate all disputes but permitted the lender to use judicial proceedings to enforce the loan or the mortgage. *Id.* at 177-78. Because collection of the debt and enforcement of the mortgage would be the only actions commenced by the lender, essentially the homeowners waived their right to a jury trial and were compelled to arbitrate all disputes, while the lender waived none of its comparable rights. *Id.*

77. *Id.* at 176-77.

78. *Id.* at 177.

79. *Id.* at 177.

80. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et. seq.*

81. Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 PA. STAT. ANN. § 201-1 *et. seq.* (West 2004).

82. *Harris*, 183 F.3d at 177.

83. *Id.*

84. *Id.*

85. The district court found the arbitration provision to be an unconscionable one-sided arrangement. *Harris v. Green Tree Financial Corp.*, 1997 WL 805254 (E.D. Pa. 1997).

86. 183 F.3d at 184.

87. *Id.* at 180.

promise to arbitrate, the provision is enforceable.<sup>88</sup>

The borrowers also used lack of reciprocal obligations to arbitrate as one of the grounds for their unconscionability claim. The court also rejected this argument, finding that permitting Green Tree to litigate some claims while the borrowers had to arbitrate all claims was not unreasonably favorable to Green Tree, and thus not substantively unconscionable.<sup>89</sup> The court also found the circumstances under which the contract was entered into and the arbitration provision was presented were not procedurally unconscionable. The district court had found that the arbitration clause was in very small print on the reverse side of the contract.<sup>90</sup> Although noting that some cases have considered the placement and conspicuousness of a provision in determining whether the provision is unconscionable, the court found that there was little support in federal case law for finding that this type of arbitration provision, presented in this manner, was procedurally unconscionable.<sup>91</sup> Finding neither procedural nor substantive unconscionability, the court upheld the provision.

Several other courts have enforced arbitration provisions against claims similar to those asserted in *Harris*. In *Napier v. Manning*,<sup>92</sup> the Alabama Supreme Court rejected a challenge to an arbitration provision in a mobile home sales contract raised by two elderly borrowers with little formal education. The court found that there was no evidence that the arbitration provided for in the contract was oppressive or unfair, or that the buyers had requested and been denied assistance in reading and understanding the provision, or that the buyers could not obtain the mobile home without signing the arbitration provision. Further, the court found the other factors the buyers asserted—that they were elderly, had not finished high school and had difficulty reading—insufficient to invalidate the provision.<sup>93</sup>

Similarly, the U.S. District Court for the Northern District of Ohio upheld an arbitration provision in a mortgage transaction against the borrower's claims of unconscionability in *Anderson v. Delta Funding Corp.*<sup>94</sup> The borrower alleged the parties' relative bargaining strength was grossly unequal because she was an elderly, unsophisticated

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88. *Id.* The court also noted that the weight of authority supported this approach. *Id.*

89. *Id.* at 183-84.

90. *Id.* at 182.

91. *Harris*, 183 F.3d at 182.

92. 723 So. 2d 49 (Ala. 1998).

93. *Id.*

94. 316 F. Supp. 2d 554 (N.D. Ohio 2004).

consumer who did not understand the language of the arbitration agreement the experienced lender supplied in the transaction.<sup>95</sup> The court rejected this argument, reasoning that unequal bargaining power alone is not enough and the Arbitration Agreement was contained in a separate document, initialed on each page by the borrower and signed at the end.<sup>96</sup> Additionally, the court noted that the lender had sent the Arbitration Agreement to the borrower four days before closing, giving her ample time to consult an attorney or otherwise familiarize herself with the provision.<sup>97</sup>

The court also rejected an argument, similar to that raised in *Harris*, that the lender's retention of the right to litigate collection and title actions deprived the arbitration agreement of mutuality and was therefore unconscionable. The court found that Ohio courts do not require mutuality of an arbitration provision as long as the underlying contract is supported by consideration.<sup>98</sup> Additionally, the court noted the only mutuality required of an arbitration provision is that both parties be bound by the arbitrator's decision.<sup>99</sup> Finding neither procedural nor substantive unconscionability, the court granted the lender's motion to compel arbitration.

In two cases involving nursing home contracts, courts rejected unconscionability claims raised by elderly residents. In *Owens v. Coosa Valley Health Care, Inc.*,<sup>100</sup> the Alabama Supreme Court rejected a request to find all arbitration provisions in contracts between elderly patients and nursing homes to be unconscionable.<sup>101</sup> In this case, the daughter of the elderly patient reviewed and signed all admission papers on behalf of her mother. The contract provided, in all capital letters, that all disputes relating to the provision of medical care between the parties would be subject to binding arbitration.<sup>102</sup> When the patient later sued the home for failure to provide adequate care, the home moved to compel arbitration. The trial court granted the motion. Noting that the daughter, as guardian, signed the contract containing the clearly outlined arbitration provision, the Court found that the nursing home was under no duty to bypass the daughter and notify the patient directly of the

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95. *Id.* at 564-65.

96. *Id.* at 565.

97. *Id.* at 565.

98. *Id.* at 566.

99. *Anderson*, 316 F. Supp. 2d at 567 n.9 (citing *Raasch v. NCR Corp.*, 254 F. Supp. 2d 847, 856 (S.D. Ohio 2003)).

100. 890 So. 2d 983 (2004).

101. *Id.* at \*5.

102. *Id.* at \*1-2.

arbitration provision.<sup>103</sup> Rejecting a *per se* rule and finding the plaintiff had failed to meet her burden to prove the arbitration provision was unconscionable, the court upheld the decision to compel arbitration.<sup>104</sup>

In *Guthmann v. La Vida Llana*,<sup>105</sup> the New Mexico Supreme Court held that a provision making the entry fee paid to a retirement/life-care facility non-refundable upon the death of the resident was not unconscionable. A 79-year-old woman, with a life expectancy of 7-9 years, paid an entry fee of \$36,950 to LVL Nursing Care Center for a one-bedroom unit.<sup>106</sup> In addition to the initial fee, the resident paid a monthly maintenance fee of \$537.<sup>107</sup> She was also required to have Medicare and at least one supplemental health policy to cover any medical services.<sup>108</sup> The contract provided she could terminate the agreement with 90 days' notice if she was able to live alone.<sup>109</sup> Under those circumstances, she would be entitled to a refund of the entrance fee less ten percent plus one percent for each month of residence.<sup>110</sup> However, the fee was expressly non-refundable if the resident died after moving into the center.<sup>111</sup> The resident took ill and died six months after moving into the residence. The personal representative of her estate sued the retirement facility seeking a refund of the entry fee.<sup>112</sup>

The court rejected the representative's unconscionability claim, finding neither procedural nor substantive unconscionability.<sup>113</sup> The plaintiff admitted the resident was not subject to any high pressure sales tactics, read all the terms of the agreement and understood the implications of the relevant terms.<sup>114</sup> She had engaged in substantial comparative shopping, reviewed the provisions of the center's contract with a representative of the center and a close personal friend and declined an attorney's offer to review it for her.<sup>115</sup> The court noted unconscionability is most successfully raised by consumers who are poor or disadvantaged and the resident in this case was neither.<sup>116</sup> In

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103. *Id.* at \*4.

104. *Id.* at \*5.

105. *Guthmann v. La Vida Mmena*, 709 P.2d 675 (N.M. 1985).

106. *Id.* at 677.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Guthmann v. La Vida Llana*, 709 P.2d 675, 677 (N.M. 1985).

111. *Id.* at 677.

112. *Id.*

113. *Id.* at 680-81.

114. *Id.* at 679.

115. *Guthmann v. La Vida Llana*, 709 P.2d 675, 677 (N.M. 1985).

116. *Id.* at 679-80.

contrast, the resident was financially well off even after payment of the entry fee and had an income more than sufficient to pay the monthly maintenance fee.<sup>117</sup> All these factors warranted, in the court's view, a finding that the contract was not a result of procedural unconscionability.<sup>118</sup>

Additionally, the court found the provision was not substantively unconscionable. The court set a very high standard for substantive unconscionability, noting the "terms must be such as 'no man in his senses and not under delusion would make on the one hand, and . . . no honest and fair man would accept on the other'."<sup>119</sup> As expected after the enunciation of such a high standard, the court found that the provision was not grossly unfair or unconscionable because the resident could pay the fees, the fees were reasonable given the center's financial needs, and the center provided what to the resident what she contracted for—residence in the facility for the remainder of her life, however long that should be.<sup>120</sup> The court noted that nursing homes' finances are based on the law of averages and each party takes a risk that the predicted life span of the resident will vary, the home that the resident will live longer than predicted and the resident that she will live a shorter period of time than anticipated.<sup>121</sup> This reasoning provided a basis for the court's rejection of the estate's argument that the death of the resident *after* the contract was made rendered the contract unconscionable. The court noted that unconscionability must be based on the circumstances existing at the time the contract was entered into, and not based on what happened after the fact.<sup>122</sup> Finding neither procedural nor substantive unconscionability, the court affirmed the trial court's entry of judgment in favor of the retirement center.<sup>123</sup>

These cases demonstrate the difficulty with successfully challenging a contract or its provisions on the grounds of unconscionability. Besides the requirement of proving both procedural and substantive unconscionability, most courts require a number of the

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117. *Id.* at 678.

118. *Id.* at 680.

119. *Id.* (quoting *In re Friedman*, 407 N.Y.S.2d 999, 1008 (1978)). This characterization can be traced back to the 18<sup>th</sup> century through *Hume v. United States*, 132 U.S. 406, 411 (1889) quoting *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 125, 155, 28 Eng. Rep. 82, 100 (Ch. 1750)). See Swanson, *supra* note 4, at 361.

120. *Guthmann v. La Vida Llana*, 709 P.2d 675, 680-83 (N.M. 1985).

121. *Id.* at 682-83.

122. *Id.* at 680.

123. *Id.*

relevant factors be established before a finding of unconscionability will be made.<sup>124</sup> Additionally, and perhaps most important from a litigation standpoint, the issue of unconscionability of a contract provision, at least under the U.C.C. and the common law, is a question of law for the court and cannot be submitted to a jury.<sup>125</sup> Finally, the party claiming unconscionability has the burden of proof on the issue.<sup>126</sup>

Unconscionability does have advantages, however, over other traditional doctrines through which courts police contracts. Courts have long policed contracts that are procured through fraud by permitting rescission of the contract or even awarding damages for losses suffered due to the fraudulent conduct.<sup>127</sup> This is permissible even if a contract would otherwise fall under the U.C.C. Section 1-103 provides that the principles of common law and equity, including fraud, supplement the provisions of the Code unless displaced.<sup>128</sup> However, fraud generally requires a showing of a knowing misrepresentation of fact—not generally opinion—with the expectation that the other party would rely on the representation.<sup>129</sup>

Additionally, in most jurisdictions, fraud must be plead with specificity and be proven by more than a preponderance of the evidence,

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124. See U.C.C. § 2-302 cmt. 1.

125. See U.C.C. § 2-302(2) (providing that the court makes the determination). Official comment 3 to section 2-302 states:

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.

U.C.C. § 2-302 cmt. 3.

See also *Bd. of Educ. of Berkeley Co. v. W. Harley Miller, Inc.*, 236 S.E.2d 439 (W. Va. 1977) (holding that where provision is challenged as unconscionable, whether the provision is valid is a matter of law for the court.) Actions for damages based on unconscionable conduct under consumer protection statutes, however, are generally tried before a jury. See *Bennett v. Bailey*, 597 S.W.2d 532 (Tex. Ct. Civ. App. 1980) (upholding entry of judgment by trial court based on jury's verdict finding unconscionable conduct).

126. See *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 181 (3d Cir. 1999); *Bishop v. Washington*, 480 A.2d 1088, 1094 (Pa. Super. Ct. 1984); *Owens v. Coosa Valley Health Care, Inc.*, 2004 WL 260969 at \*5 (Ala. 2004); *Napier v. Manning*, 723 So. 2d 49 (Ala. 1998).

127. See *Frey v. Onstott*, 210 S.W.2d 87 (Mo. 1948) (requiring, on the basis of fraud, reconveyance of property elderly grantor had conveyed to a friend with the understanding it would be reconveyed upon request even though the deed recited consideration); *Domo v. Stouffer* 580 N.E.2d 788 (Ohio Ct. App. 1989) (explaining fraud can be the basis for equitable rescission or reformation of written agreement); *Devlin v. Kearney Mesa AMC/Jeep/Renault, Inc.*, 202 Cal. Rptr. 204 (Ct. App. 1984) (upholding award of damages, including punitive damages, on basis of fraud and unconscionability).

128. U.C.C. § 1-103.

129. RESTATEMENT (SECOND) OF CONTRACTS §§ 162, 164.

typically clear and convincing evidence.<sup>130</sup> A California case finding fraud against an elderly buyer arose from a sale of a car with a rolled-back odometer – a clear violation of state and federal law and clear evidence of a misrepresentation – to an elderly couple.<sup>131</sup> One advantage to a fraud claim, as demonstrated by the California case, is the availability of punitive damages, a remedy not possible if the claim is merely unconscionability under the Code.<sup>132</sup> However, claims of fraud, though frequently raised, are rarely successful.

Another common-law ground for avoiding a contract is duress. Historically, duress arose when one was physically compelled or physically threatened into entering a contract.<sup>133</sup> Duress, however, is now broader and includes improper threats that deprive a person of any reasonable alternative but to assent to the terms sought by the person making the threat.<sup>134</sup> Difficult circumstances are not enough to establish either economic or physical duress as a basis to rescind a contract.<sup>135</sup> Coercion requires improper threat by one of the parties to the contract that leaves the other with no reasonable alternative but to acquiesce.<sup>136</sup> For duress, the will of the party must be overridden by force, threat of force or other improper threat.<sup>137</sup> Needless to say, proving this level of threat is rarely possible in a contractual setting. Both fraud and duress vitiate a person's consent to a contract – essentially, either requires a finding that the person would not have entered into the contract but for the fraud or duress.<sup>138</sup>

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130. See, e.g., Fed. R. Civ. P. 9(b); RESTATEMENT (SECOND) OF CONTRACTS § 164 and cmts.; 37 AM. JUR. 2D § 493 *Fraud and Deceit* § 493; *Domo v. Stouffer*, 580 N.E.2d 788 (Ohio Ct. App. 1989) (holding clear and convincing evidence of fraud required to support equitable rescission or reformation of written agreement).

131. *Devlin v. Kearney Mesa AMC/Jeep/Renault, Inc.*, 202 Cal. Rptr. 204 (Ct. App. 1984) (upholding award of \$80,000 in punitive damages based on fraudulent and unconscionable conduct of seller in taking advantage of 84-year-old buyer and his 66-year-old wife by selling them an automobile with a rolled back odometer).

132. U.C.C. § 1-106 (providing neither special nor punitive damages may be recovered under the U.C.C.).

133. 28 WILLISTON ON CONTRACTS (4th ED.) § 71:1 (noting early law required threats of loss of life, bodily harm, mayhem or imprisonment as grounds for duress).

134. *Patton v. Wood Cty. Humane Society*, 798 N.E.2d 676, 680 (Ohio Ct. App. 2003). See also Ann T. Spence, *A Contract Reading of Rape Law: Redefining Force to Include Coercion*, 37 COLUM. J.L. & SOC. PROBS. 57, 79-81 (2003) (discussing the shift in contract law from requiring physical threats as a basis for duress to including unlawful threats and economic coercion).

135. *Blodgett v. Blodgett*, 551 N.E.2d 1249 (Ohio 1990).

136. *Id.* See also RESTATEMENT (SECOND) OF CONTRACTS § 175.

137. 28 WILLISTON ON CONTRACTS (4th ED.) § 71:3 (noting duress is wrongful conduct that leaves the victim with no reasonable alternative but to agree to the other party's demands).

138. See 28 WILLISTON ON CONTRACTS (4th ED.) § 71:8 (discussing effect of duress on the enforceability of a contract).

Unconscionability does not require such a showing. A person can “freely” enter into a contract, yet the contract be unconscionable. Additionally, the entire contract does not have to be unconscionable for a remedy to be available – a court can provide protection from an unconscionable provision in an otherwise valid contract.<sup>139</sup> Unconscionability is not susceptible to a higher level of proof beyond a preponderance of the evidence.<sup>140</sup> Unconscionability in some consumer statutes and for consumer leases does not even require an unfair provision, just unfair conduct in the creation of the contract.<sup>141</sup>

Unconscionability as a remedy for the elderly has its own limitations. Under Article 2 and the common law, it requires a finding that both the challenged provision and the process through which it arose are unconscionable; that is, significantly unfair. It is not designed to merely compensate for lack of bargaining power, even when it results in an unbalanced allocation of risks under the contract. There are far more cases denying relief than providing relief for a claim of unconscionability. Although not always successful, unconscionability does provide at least one tool to challenge the validity of a contract or contract terms imposed on elderly consumers.

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139. U.C.C. § 2-302(2) and RESTATEMENT (SECOND) OF CONTRACTS § 208 (both providing, upon a finding that a term in a contract is unconscionable, the court may enforce the contract without the unconscionable term).

140. *Id.*

141. *Id.*