Implementation of Section 5108: An Appendix on Unconscionability in California

Mark W. Westra

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation

Available at: https://repository.uchastings.edu/hastings_law_journal/vol25/iss1/2

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.
IMPLEMENTATION OF SECTION 5108: AN APPENDIX ON UNCONSCIONABILITY IN CALIFORNIA

The preceding article by Charles H. Hurd and Phillip L. Bush advocates the adoption of section 5108 in California Senate Bill No. 3, which would establish a statutory doctrine of unconscionability. The authors prefer an expanded version of section 5108: the first part incorporates a provision similar to section 2-302(1) of the Uniform Commercial Code, and a second part provides a list of nine factors relevant to the issue of unconscionability. The authors demonstrate the need for this legislation and the desirability of a flexible application of the doctrine.

In this appendix, Mark W. Westra analyzes the application of the nine factors listed in section 5108 in terms of existing principles of California law. It is shown that the examination of these statutorily enumerated factors in consumer cases should aid in a more consistent application of the doctrine of unconscionability in California.

Section 5108, composed of a general unconscionability provision and also nine factors indicative of unconscionability, has been advanced in order to provide greater protection for consumers. The utility of the proposed statute lies in its ability to aid the judicial decision-making process by listing specific factors which the courts would use in analyzing consumer transactions. This appendix discusses the extent to which prior decisions have dealt with these various factors in cases which, while not explicitly mentioning unconscionability, nevertheless involved patterns of oppression and lack of fairness characteristic of unconscionable transactions.

The Proposed Statute

The unconscionability provision currently under consideration in


California as part of the proposed Consumer Code provides:

(a) If the court, as a matter of law, finds that a consumer transaction, any aspect of the transaction, any conduct directed against the consumer by a party to the transaction, or any result of the transaction is unconscionable, the court shall, in addition to any other remedies available to the consumer under this, or any other act or rule of law, either refuse to enforce the transaction against the consumer, or so limit the application of any unconscionable aspect or conduct so as to avoid any unconscionable result.

(b) Specific practices forbidden by the administrator in regulations promulgated pursuant to Section 6104 shall be presumed to be unconscionable.

(c) Without limiting the scope of subdivision (a), the court shall consider among other things, all the following as pertinent to the issue of unconscionability:

1. The degree to which the practice unfairly takes advantage of the lack of knowledge, ability, experience, or capacity of consumers.

2. Knowledge by those engaging in the practice of the inability of consumers to receive benefits properly anticipated from the goods or services involved.

3. Gross disparity between the price of goods or services and their value as measured by the price at which similar goods or services are readily obtainable by other consumers, or by other tests of true value.

4. The fact that the practice may enable merchants to take advantage of the inability of consumers reasonably to protect their interests by reason of physical or mental infirmities, illiteracy or inability to understand the language of the agreement, ignorance or lack of education or similar factors.

5. The degree to which terms of the transaction require consumers to waive legal rights.

6. The degree to which terms of the transaction require consumers to jeopardize money or property beyond the money or property immediately at issue in the transaction.

7. The degree to which the natural effect of the practice is to cause or aid in causing consumers to misunderstand the true nature of the transaction or their rights and duties thereunder.

8. The extent or degree to which the writing purporting to evidence the obligation of the consumer in the transaction contains terms or provisions or authorizes practices prohibited by law.

9. Definitions of unconscionability in statutes, regulations, rulings and decisions of legislative, administrative, or judicial bodies in this state or elsewhere.

(d) In addition to the protection afforded in subdivision (a), the consumer shall be entitled upon finding of unconscionability to recover from the creditor or person responsible for the unconscionable conduct reasonable attorney's fees. Reasonable attorney's fees shall be determined by the reasonable value of the time.
reasonably expended by the attorney and not by the amount of the recovery on behalf of the debtor.\(^3\)

To predict the application of the nine elements in part (c) of the proposed statute, it is necessary to examine the existing California common law doctrine of unconscionability. In addition, since the ninth element encourages the courts to look elsewhere for definitive rulings on unconscionability,\(^4\) leading cases involving consumer actions in jurisdictions presently operating with an unconscionability statute will be presented.\(^5\) Inasmuch as other jurisdictions have had experience operating under such a statute, their determinations will be particularly instructive both as to the extent to which the doctrine will be utilized and as to the limits which have been defined.

It must be emphasized that the presence of any individual element does not necessitate a finding of unconscionability. The courts will not be limited by subdivisions (a) or (c) in their examination of the facts of a particular case.\(^6\) To the contrary, the ninth element grants considerable latitude to consider additional facts in analyzing any given factual situation.\(^7\) A finding of unconscionability requires an examination of whether,

in the light of the background and setting of the market, the commercial needs of the particular trade or case, and the condition of the particular parties to the contract, the contract or clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. The particular facts involved in each case are of utmost importance since certain contracts or contractual provisions may be unconscionable in some situations but not in others.\(^8\)

---

3. California Senate Bill No. 3, introduced Jan. 3, 1972, as amended, July 27, 1972 [hereinafter cited as S.B. 3]. The bill was reintroduced in substantially similar form on January 8, 1973. In large part, the proposed code is structured around a revised version of the Uniform Consumer Credit Code and various existing statutory protections for the consumer. The basic unconscionability provision of S.B. 3 section 5108(a) is similar to Uniform Consumer Credit Code section 5.108 and also to section 2-302 of the Uniform Commercial Code. The nine factors listed in S.B. 3 section 5108(c)(1)-(9) originated in section 5.107 of the National Consumer Act. Section 5108(d) was derived from section 5.307 of the National Consumer Act.

4. S.B. 3 § 5108(c)(9), supra note 3.

5. The comment to section 5.107 of the National Consumer Act relates the experiences of states operating under section 2-302 of the Uniform Commercial Code: "Nearly fifteen years of experience with this . . . section has shown that 'unconscionability' is so broad and undefined as to enable courts to run roughshod over the legitimate interests of merchants. In fact, the experience has been quite to the contrary; the few cases reported on Section 2-302 have been markedly conservative in their interpretation." NATIONAL CONSUMER ACT § 5.107, Comment 1 (First Final Draft 1970).

6. S.B. 3 section 5108(c), supra note 3, makes it clear that additional factors may arise warranting the consideration of the court.

7. S.B. 3 § 5108(c)(9), supra note 3.

8. UNIFORM CONSUMER CREDIT CODE § 5.108, Comment 2.
Many of these elements of unconscionability are not new, but have been considered by the courts in applying traditional doctrines. Such elements often seem to be the underlying, though often unmentioned, reason for a result reached by construing away an offensive clause. Since the recognition of consumers as a class requiring special protection in many situations is relatively new, the California law on many of these elements is derived from nonconsumer cases. However, there can be no doubt that protections afforded in non-consumer cases have full applicability in cases where a consumer is a party.

The First Consideration

The Degree to which the Practice Unfairly Takes Advantage of Lack of Knowledge, Ability, Experience, or Capacity of Consumers

Some of the problems arising under criterion one are particularly difficult to classify because of the interrelation of the different elements: knowledge, ability, experience, and capacity. For example, the capacity of a consumer is necessarily a summation of many factors, such as his knowledge of commercial transactions, his ability


10. See W Hawkland, Sales & Bulk Sales 23-24 (1958). “Because § 2-302 is not intended to change the results courts have been reaching in cases involving unconscionable contracts, but is intended merely to make it possible for courts to pass directly on the question of unconscionability, the operative results of the section can be predicted by looking to the cases in which the courts have actually employed the doctrine of unconscionability by adversely construing language or manipulating concepts.” See Kessler, Contracts of Adhesion, Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629 (1943) [hereinafter cited as Kessler].


12. “Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society.” Vasquez v. Superior Court, 4 Cal. 3d 800, 808, 484 P.2d 964, 968, 94 Cal. Rptr. 796, 800 (1971). Consumers should expect that existing statutes will be interpreted liberally for their protection. See Morgan v. Reasor Corp., 69 Cal. 2d 881, 447 P.2d 638, 73 Cal. Rptr. 398 (1968).

13. The four words are quite close in meaning. Knowledge is defined as “acquaintance with facts, truths, or principles gained by sight, experience or report.” Experience is “knowledge or practical wisdom gained from what one has observed, encountered, or undergone.” Capacity is the “actual or potential ability to perform, yield or withstand.” Ability is the “power or capacity to do or act physically, mentally, legally, morally, [or] financially [or] competence in an activity.”

to communicate and bargain, and his ability to recognize a fair price or reasonable terms. While problems of knowledge often receive attention, the other three elements rarely receive independent examination by the courts. This is not to say, however, that the ability, experience, and capacity of the consumer are not important elements in contract formation. The common law doctrine of duress involves the capacity of the threatened party to withstand the threat used to overcome his free will. Similarly, undue influence requires a finding that unfair advantage was taken of some incapacity or weakness of the servient person. Unfair advantage is relative to the servient person's ability to protect his own interests. Also, when courts speak of the inequality of bargaining power present in adhesion contract situations, they are referring to the servient person's relative lack of economic strength, his lack of knowledge of the terms or the transaction, and his inability to bargain freely.

Knowledge

Problems involving lack of knowledge generally arise when one of the parties seeks to avoid obligations contained in a contract he signed but did not read or understand, or contained in an instrument he accepted though unaware of its contractual nature. Since he was unaware of his obligations under the agreement, the unknowing party alleges that the element of mutual assent was absent and that a valid contract was never formed.

Traditionally, the general rule has been that the parties to an agreement are bound by the plain import of the language used regardless of their lack of knowledge or understanding of the terms of the contract. This rule was required if the concept of freedom of contract was to dominate economic affairs. In order to achieve the certainty thought necessary, each contracting party was assumed to have the inherent ability to read and to understand the language of an agreement. Further, the signature of a party was considered evidence that he had actually read and understood the contract.

Even before doubts arose concerning the adequacy of the free-

15. See text accompanying notes 170-189 infra.
16. See text accompanying notes 48-107 infra.
17. The effect of the seller's knowledge that the consumer will not be receiving benefits reasonably anticipated under the contract will be considered in the text accompanying notes 191-203 infra.
dom of contract concept,\textsuperscript{20} the courts began to qualify this harsh rule. It has long been recognized that assent gained through fraud, duress, or undue influence is not freely given. Contracts so formed would not be enforced by the courts.\textsuperscript{21} Moreover, courts have been hesitant to enforce a term of a contract when one party had neither actual nor constructive knowledge of the terms.\textsuperscript{22} Thus, a contracting party is bound to the terms of a contract when he has actual knowledge of the terms or when a reasonably prudent man would be familiar with the nature of the document he was signing or accepting.\textsuperscript{23} Whether or not the individual has acted as a reasonably prudent man is, of course, a question of fact to be determined by an examination of the circumstances surrounding the formation of the questioned agreement.\textsuperscript{24} There are two areas in which this problem has arisen: where the party was unaware that the instrument he accepted contained contractual provisions and where the party has signed an instrument thinking it to be of a different nature.

\textit{Acceptance of Instruments Containing Contractual Provisions}

With increasing frequency, contractual provisions are being placed on a myriad of seemingly innocuous forms, such as baggage claim checks, hat checks, parking claim checks, bank passbooks, and admission tickets.\textsuperscript{25} Most people do not read the inconspicuous provisions on a piece of paper not generally thought to have contractual implications, nor is their attention normally directed to the contents by the giver of the document.\textsuperscript{26} Nonetheless, such contractual provisions have been enforced against the lack of knowledge

\begin{thebibliography}{9}
\bibitem{20} Id.
\bibitem{22} \textit{See}, \textit{e.g.}, Merrill v. Pacific Transfer Co., 131 Cal. 582, 587, 63 P 915, 916 (1901).
\bibitem{24} "The jury may take into consideration the age and mental and physical condition of the person signing, as well as mercantile usages of trade and commercial intercourse" C.I.T. Corp. v. Panac, 25 Cal. 2d 547, 559, 154 P.2d 710, 718 (1944); \textit{see} India Paint & Lacquer Co. v. United Steel Prods. Corp., 123 Cal. App. 2d 597, 267 P.2d 408 (1954).
\bibitem{26} Los Angeles Inv. Co. v. Home Sav. Bank, 180 Cal. 601, 613, 182 P 293, 298 (1919). \textit{See} cases cited notes 80-81 \textit{infra}.
\end{thebibliography}
of the receiver if he accepted delivery under such circumstances that a reasonably prudent man could and should have read such provisions.\textsuperscript{27}

It has been asserted that mere acceptance of a form containing contractual obligations creates a presumption of knowledge. If the party accepting such a form did not read it, he has the burden of “satisfactorily explaining his failure to do what the law required him to do.”\textsuperscript{28} However, this has not been followed, and acceptance of a form is only one of many circumstances that must be evaluated in order to determine if the receiver should have been put on notice of the contractual nature of the form.\textsuperscript{29} For example, in California State Automobile Association Inter-Insurance Bureau v Barrett Garages, Inc.,\textsuperscript{30} the owner of a vehicle was given a claim check when he drove into a parking lot at an airport. He never read, nor was his attention ever directed to the printed provision which declared the form to be a contract limiting liability for theft. To the owner of the vehicle, the purpose of the claim check was for identification only. When the owner returned, the car had been stolen. The company operating the parking lot sought to avoid liability because of the limitation contained on the claim check. Under the circumstances, the court held that the owner of the vehicle, acting as a reasonably prudent man, would not be aware of the existence of a contract based on the provisions contained in the claim check. Therefore, he could not be held to the limitation contained therein.\textsuperscript{31} In considering the circumstances under which the instrument was accepted, the following were taken into account: the size of the paper, the type styles of the printed matter, the size and location of signs calling attention to the provisions, the lighting of the area, and the amount of time the acceptor had to read and study the document. If the circumstances indicate that a reasonable man would


\textsuperscript{28}Cunningham v. International Comm. of the YMCA, 51 Cal. App. 487, 491, 197 P 140, 141 (1921). This case was thought to place California within a small minority of states which hold that claim checks are automatically binding. 23 S. Cal. L. Rev. 122 (1949); see U Drive & Tour, Ltd. v. System Auto Parks, Ltd., 28 Cal. App. 2d 782, 71 P.2d 354 (App. Dep't. Super. Ct. 1937).


\textsuperscript{30}257 Cal. App. 2d 71, 64 Cal. Rptr. 699, 704 (1967).

\textsuperscript{31}Id. The owners of the parking lot were not complying with the provisions of the California Civil Code. No bailment contract for auto parking will be effective unless “a copy of the contract in large type, in an area at least 17 by 22 inches, [is] posted in a conspicuous spot at each entrance of the parking lot.” CAL. CIV. CODE § 1630 (West 1973). Compliance with this statute, however, would not by itself create a contract. 257 Cal. App. 2d at 80, 64 Cal. Rptr. at 705 (dictum).
have inquired into the nature and terms of the instrument he accepted, constructive knowledge sufficient for meaningful consent to contract will be found.  

**Misunderstanding of the Nature of the Document**

Also of importance in determining whether a person is negligent in accepting or signing an instrument without reading it are representations made to him about the nature of the document. A misrepresentation of the nature of the document, if reasonably relied upon by the person accepting the document, is sufficient to negate constructive knowledge. For example in *McQueen v Tyler,* a shipper of household goods was presented with a freight bill at dusk, after the loading of the carrier’s truck. The shipper testified that although he could not read the document because of the darkness, he had signed it because of the carrier’s representation that the paper was only an “authorization to take the goods.” The document, however, limited the carrier’s liability for damage to the goods to ten cents per pound. The court held that the shipper’s reliance on the misrepresentation was reasonable under the circumstances and that he could not be bound by the limitation on liability because of his lack of knowledge of the terms.

If the offeree is able to read the contract, but does not do so because of representations by the other party, he may still not be negligent in failing to read the contract if a confidential relation exists between the parties. A confidential relationship is present

---

32. See 257 Cal. App. 2d at 80, 64 Cal. Rptr. at 705. The court in *Barrett Garages* did not think it necessary to discuss the application of adhesion contract language because of their holding that delivery of a claim check to a bailor does not create a contract as a matter of law. *Id.* at 79, 64 Cal. Rptr. at 704.


34. 61 Cal. App. 2d 263, 266, 142 P.2d 466, 468 (1943).

35. In *Forte v. Nolfi*, 25 Cal. App. 3d 656, 102 Cal. Rptr. 455 (1972), plaintiff sought rescission of a deed of trust she signed without knowledge of the nature of the document. In allowing rescission, the court found that she was justified in relying upon the representations of the defendant’s agent that she was only signing a contractor’s proposal. *See* Smith v. Occidental & Oriental S.S. Co., 99 Cal. 462, 34 P. 84 (1893) (release signed on representations by defendant’s agent that it was only a receipt); Gardner v. Rubin, 149 Cal. App. 2d 368, 308 P.2d 892 (1957) (elderly, semi-illiterate couple signed a document containing deed of trust on their home in reliance upon representations by defendants); Valdez v Taylor Auto. Co., 129 Cal. App. 2d 810, 278 P.2d 91 (1954) (insured justified in relying on representations made by insurance salesman because of complexity of insurance policies).
"whenever trust and confidence is reposed by one person in the integrity and fidelity of another." The existence of such a relationship justifies reliance on the representations as to the nature or terms of an agreement presented by the person in whom trust is reposed. Therefore, a person who signs a contract in reliance on representations made in such a situation will not have constructive knowledge of the terms of the agreement.

Plain and Conspicuous Notification

Certain types of contracts require a higher standard of knowledge on the part of the offeree. Such a standard may be imposed by statute or by the courts because of the nature of the contract. Contracts containing provisions limiting the liability of a common carrier, an insurance company, a bank, a bailee, or a warehouseman have been held ineffective in the "absence of plain and clear notification to the public." In the case of carriers and bailees, the higher standard is imposed because of public policy prohibitions

37. Kloehn v. Prendiville, 154 Cal. App. 2d 156, 316 P.2d 17 (1957). Plaintiff, aged 63, resided with the defendants, and even though they were not related, plaintiff was regarded as a member of the family. Shortly after being hospitalized for a month and while still under the nursing care of the defendants, plaintiff executed a deed conveying his property to the defendants. Plaintiff did not read the deed, but signed it in reliance upon representations that the defendants would provide a home for him as long as he lived. The deed, however, contained a provision that fifty dollars per month room and board would be charged against a note for the value of the property. Several years later when full payment for the note had been made in this manner, the defendants informed him that he must now pay fifty dollars per month. The court granted rescission of the deed. The plaintiff was justified in not reading the deed based on the confidential relationship that existed with the defendant. See text accompanying note 174 infra.
39. E.g., CAL. CIV. Code § 2176 (West 1954): "A passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire . . . and also to the limitation stated therein upon the amount of the carrier's liability in case property carried . . . is lost or injured, when the value of such property is not named . . . This statute has been interpreted to require knowledge of the terms of the limitation in the contract based on actual or constructive notification. Muelder v. Western Greyhound Lines, 8 Cal. App. 3d 319, 337, 87 Cal. Rptr. 297, 310 (1970); Murray v. Southern Pac. Co., 112 Cal. App. 150, 156, 296 P. 667, 670 (1931).
against limitations on liability for negligence or want of ordinary care.\footnote{42} Insurance policies have long been thought to be so involved and complicated that few people would be cognizant of the terms of their contracts.\footnote{43} Therefore, limitations which would disappoint the reasonable expectations of the policy holder are ineffective unless communicated to the policy holder in unambiguous language that is “conspicuous, plain and clear.”\footnote{44} This requirement places an affirmative duty on the insurer, bailee, or carrier to use methods reasonably certain to make the consumer aware of the contractual terms before he assents.\footnote{45}

Further protections have been afforded consumers in various types of contracts. Recent consumer-oriented legislation seeks to impose a duty of disclosure upon certain sellers,\footnote{46} thereby protecting the consumer against the use of many unfair practices whether he has knowledge of the unfair provision or not. In retail installment sales contracts, a merchant is not permitted to take advantage of a consumer who has in effect waived knowledge of the terms of a contract by signing a standardized contract containing blank spaces to be filled in later by the merchant.\footnote{47} Similarly, retail installment sales contracts containing provisions which confess judgment, agree to a forum inconvenient to the consumer, or waive defenses against the seller are not enforceable against the consumer.\footnote{48} The consumer in such cases is granted protection regardless of his knowledge of the offensive provision.

\footnote{44} Steven v. Fidelity & Cas. Co., 58 Cal. 2d 862, 878, 377 P.2d 284, 294, 27 Cal. Rptr. 172, 182 (1962).
\footnote{46} Unruh Act, CAL. CIV. CODE § 1801 et seq. (West 1973); Automobile Sales Finance Act, CAL. CIV. CODE § 2981 et seq. (West Supp. 1973).
\footnote{47} CAL. CIV. CODE § 1803.4 (West 1973); id. § 2982(a) (West Supp. 1973); see Morgan v. Reasor Corp., 69 Cal. 2d 881, 447 P.2d 638, 73 Cal. Rptr. 398 (1968); Zmak v. Arata Pontiac, 265 Cal. App. 2d 689, 71 Cal. Rptr. 506 (1968).
\footnote{48} CAL. CIV. CODE § 1804.1 (West 1973); id. § 2983.7 (West Supp. 1973).
Doctrine of Adhesion Contracts

The doctrine of adhesion contracts protects both the consumer who is unaware of an oppressive contractual provision and the one who is fully aware of the oppressive term but cannot bargain because of inferior economic strength. A contract of adhesion, by definition, refers to a standardized contract prepared entirely by one party to the transaction for the acceptance of the other; such a contract, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a "take it or leave it" basis, without opportunity for bargaining and under such conditions that the 'adherer' cannot obtain the desired product or service save by acquiescing in the form agreement. 49

In the California cases, however, the doctrine has been applied only where the adhering party was unaware of the oppressive clause. 50 If the dominant party gives clear and plain notification of the oppressive term, or does not use an ambiguous term, California consumers will find no remedy in this doctrine. 51

Inequality of Bargaining Power

Although the use of the doctrine of adhesion contracts is relatively new in California, equality of bargaining power has long been of importance in decisions based on "public policy" considerations. 52 It has been recognized that in normal market situations, the average consumer deals with enterprises having vastly greater economic resources. He normally enters the market in an unequal position vis-à-vis enterprises established to satisfy (and often stimu-


50. See notes 93-94 infra.


California consumers still have a variety of statutory remedies available. Indeed, many of the cases decided in other jurisdictions on the basis of unconscionability could have been disposed of in California by specific statute. Compare Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), with CAL. CIV. CODE §§ 1808.1-6 (West 1973). Also, California courts have found it unnecessary to discuss the adhesive nature of a contract because some other principle of law provided protection for the consumer. See, e.g., California State Auto. Ass'n Inter-Ins. Bureau v. Barrett Garages, Inc., 257 Cal. App. 2d 71, 64 Cal. Rptr. 699 (1967).

late) his demand.53

Because of this inequality of economic strength, the consumer does not enter the transaction with a great deal of power to affect the nature of that transaction. Although he may have some power to affect the price of the item, he likely will have little power to modify the other terms of the contract. As industries grow, and as the use of dealerships, franchises and industry-wide practices become more prevalent, the impotence of the consumer is heightened by the use of intermediaries in the chain of distribution.54 For example, an automobile dealer will bargain with a consumer over the price, but the dealer often lacks any power to bargain away disclaimer provisions provided by the manufacturer.55 Banks,56 insurance companies,57 finance companies,58 and common carriers59 have been found to be dealing on an unequal basis with the average consumer.60 It is not necessary, however, that the enterprise have a dominant market position.61 Inequality may be created by the nature of the service offered rather than by the economic strength of the dominant party. Hospitals62 and escrow companies,63 for example, have a superior bar-

53. See Akin v. Business Title Corp., 264 Cal. App. 2d 153, 158-59, 70 Cal. Rptr. 287, 290-91 (1968). An inequality of bargaining power may also be created by the wrongful conduct of the superior party. However, the doctrines of duress and economic duress have been used in such a situation rather than adhesion doctrines. See text accompanying notes 108-169 infra.


55. Id. at 390, 161 A.2d at 87


60. In Vandermark v. Ford Motor Co., the district court of appeals held that a disclaimer clause in the dealer's warranty would not effectively limit his liability for personal injury caused by a defect in an automobile. The warranty is "no more than a contract of adhesion. The bargaining position of the automobile dealer is overwhelming as compared to the purchaser, who must take or leave an automobile" 34 Cal. Rptr. 723, 731-32 (1963). The Supreme Court, however, did not mention that the warranty was a contract of adhesion, but rather based liability on a theory of strict liability in tort. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).


gaining position not only because of their economic power, but also because of the essential nature of their services.\textsuperscript{64}

\textit{Absence of a Meaningful Choice}

In California, the "take it or leave it" nature of an adhesion contract refers to the party's lack of opportunity to bargain away an oppressive term because of lack of awareness or understanding of that term.\textsuperscript{65} This reasoning assumes that if the consumer were made aware of the unfair clause, he would be able to bargain it away or could obtain similar goods or services elsewhere. These assumptions may often be false.\textsuperscript{66}

The excusable lack of knowledge of a contractual term may be caused by the consumer's inability to read the contract before he has committed himself. The purchaser of an airport vending machine insurance policy,\textsuperscript{67} for example, is unable to read its provisions (which are concealed within the machine) until the policy is purchased; in addition, he is not provided with a copy of the policy to guide his actions in the event of a change in itinerary.\textsuperscript{68}

Because of the consumer's lack of economic clout, his only bargaining weapon may be his ability to seek more favorable terms elsewhere. However, the consumer soon learns that the market for many products is controlled by a limited number of sellers, each offering substantially the same product, price and terms. The consumer's alternatives are thus narrowed. He must either purchase the product at the seller's terms or not purchase the product at all. The nature of the goods or services may eliminate the second alternative, however. The extreme example is the hospital patient who is handed a printed form containing a provision releasing the hospital from liability for its future negligence as a condition of admission.\textsuperscript{69} The

\begin{footnotesize}
\begin{itemize}
\item[64.] See text accompanying notes 69-73 \textit{infra}.
\item[65.] In \textit{Lomanto v Bank of America}, a couple alleged that a clause contained in a deed of trust should not be enforced because of the adhesive nature of the instrument. The husband had no cause of action because his subsequent activities indicated he was aware of the provisions. The wife, however, may have a cause of action if she was ignorant of the restrictive provision. 22 Cal. App. 3d 663, 99 Cal. Rptr. 442 (1972).
\item[68.] \textit{Id}.
\item[69.] Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).
\end{itemize}
\end{footnotesize}
dominant party in such a case is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. As a result of the essential nature of the service, in the economic setting of the transaction, the party possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. California courts have recognized the practical necessity of the services of an escrow company, a common carrier and a bank.

Use of Standardized Contract

All California adhesion contract cases involve the use of printed form contracts drafted by the superior party. Such contracts raise several implications which have warranted the special attention of the court. Standardized contracts are normally drawn by the dominant contracting party and are therefore more likely to contain provisions designed to protect his interests. Moreover, the nature and form of the contract tend to put the consumer at a disadvantage. Such contracts are often a maze of finely printed legal jargon which the consumer is unlikely to read, and even less likely to understand. Often, no effort is made to point out important provisions which affect the consumer's rights under the contract. For exam-

70. Id. at 98-100, 383 P.2d at 445-46, 32 Cal. Rptr. at 37-38.
76. Kessler, supra note 10, at 631.
79. Unico v. Owen, 50 N.J. 101, 111, 232 A.2d 405, 410-11 (1967). Insurance policy holders have long been assumed to be ignorant of the provisions of their policies or even the name of their insurance company. Because of their complexity, such policies "may be veritable traps for the unwary." Raulet v. Northwestern Nat'l Ins. Co., 157 Cal. 213, 230, 107 P 292, 298 (1910).
ple, in *Lomanto v. Bank of America*, a trust deed containing a provision in small print in a multi-page document was declared to be a contract of adhesion. The plaintiffs alleged that they were not aware of the provision because it was crowded in among numerous other conditions and modified by so many clauses that it could not be easily understood. Furthermore, the plaintiffs alleged that the bank did nothing to call their attention to the provision, much less explain its effect.

Similarly, many standardized contracts used by publicly regulated enterprises incorporate limitations on their liability by reference to a tariff on file in some public office. The exact terms of the limitation are not provided in the document, but may be found only through an examination of the tariff. The consumer thus is doubly handicapped: he may not realize that the stub he receives has contractual implications, but even if he does, he will still be unaware of the exact terms of the limitation. For example, bills of lading and shipper's receipts have been denominated contracts of adhesion. Attempts by common carriers to limit their liability by the use of tariffs filed with the appropriate regulatory agency are ineffective, unless adequate notification is given to the customer.

**Limitations of the Adhesion Doctrine in California**

The existence of a gross inequality of bargaining power between contracting parties does not mean that all resulting contracts should not be enforced. The circumstances of each case must be examined, together with a balancing of the needs of the consumer and of the commercial community. The use of standardized contracts arose to meet the needs of a rapidly expanding consumer-goods oriented economy. If goods and services are to be distributed efficiently and economically, standardized contracts must be used.

---

81. 22 Cal. App. 3d 663, 99 Cal. Rptr. 442 (1972). The court commented that the bank was under no duty to explain the provision if it was in the usual form of a trust deed. *Id.* at 667, 99 Cal. Rptr. at 443.


85. This is not to say that the use of standardized contracts is an evil. There are many advantages in such contracts; they save time and trouble in bargaining, they make sales administration simpler and more efficient, they allow a concentration of decision making in the most capable and trusted persons, such as managers and contract
However, the dominant party is not given license to abuse his power in the name of convenience. Nonetheless, contracts of adhesion are executed and enforced quite commonly, either because no conflict arises over an oppressive term or because the contract imposes no harsh provision on the weaker party.

Even though the contractual terms are contained in a standardized form, if it is clear that the agreement was the result of serious negotiation, the adhesion doctrine does not apply. Again, the circumstances under which the contract was formed must be examined. While it is not clear how extensive such negotiations must be, the fact that negotiations took place is evidence that the weaker party was acting with some knowledge of the terms of the contract. The more difficult problem is to reconcile the appearance of negotiation with actual inability to affect the bargain. Serious negotiation on the terms of a contract also casts doubt on the existence of an inequality of bargaining power.

The use of alternative limitations offered at reasonable differences in price may also remove the adhesive nature from the use of a standardized form. However, the consumer must have actual or constructive knowledge of the alternative and a fair opportunity to obtain a less restrictive limitation at a lower price. If these requirements are met, the consumer cannot be said to lack a meaningful choice, nor to be unaware of the terms of the contract he has made. The contract is thus no longer adhesive as to him.

Since the distinguishing characteristic of adhesion contracts is the gross inequality of bargaining power, the doctrine is not applicable when no inequality is found. For example, in Delta Air Lines, Inc. v Douglas Aircraft Co., Delta sought damages for injury to a plane which crashed due to a malfunction of the nose wheel. A
draftsmen rather than salesmen. Furthermore, the savings from this specialization may be passed on to the mass consumer. Llewellyn, Book Review, 52 Harv L. Rev. 700, 701-02 (1939). Contracts formed through the use of such contracts may be enforced. See Schmidt v. Pacific Mut. Life Ins. Co., 268 Cal. App. 2d 735, 74 Cal. Rptr. 367 (1969).

86. In Ury v Jewelers Acceptance Corp., the owner of a jewelry store sought to have an agreement with his financier termed a contract of adhesion. The contract however, was made after extensive negotiations, during which the advice of legal counsel was available. The contract was not "one of those fine print specimens which make comprehension of terms a fiction." Besides, the jeweler had read the contract.


89. Since no personal injury was involved, the theory of strict liability in tort applied in Greenman v Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), did not apply. 238 Cal. App. 2d at 102, 47 Cal. Rptr. at 522-23.
standardized contract of sale had been used which contained a provision waiving Douglas's liability for accidents "whether of not occasioned by Seller's negligence . . ."90 Delta sought to have the contract declared adhesive, thus making the limitation ineffective, but the court did not agree. Both parties to the contract were large corporations, and the contract was made after substantial negotiation attended by Delta executives and attorneys. While the corporations may not have been of equal size, the disparity in bargaining strength did not affect their ability to bargain.91 Similarly, in an action against a warehouseman, an experienced businessman who regularly used such services could not escape the effect of an exculpatory provision in a warehouse receipt. His experience, as well as his economic strength, placed him on an equal footing with the other party.92

Criticism of the Doctrine

As a remedy for the unwary consumer, the doctrine of adhesion contracts will be of assistance only in limited circumstances. Thus far, it is limited in application to standarized contracts between parties of unequal strength which contain either an ambiguous provision or a limitation on the liability of the dominant party 93 Moreover, the

90. 238 Cal. App. 2d at 101, 47 Cal. Rptr. at 522.
91. Although the exculpatory clause was contained in a standard form, Delta was aware of it and voluntarily agreed to the contract. Further, there was no evidence that Delta could not have purchased an aircraft from another manufacturer on terms not including the exculpation. The spectre of "industry-wide contracts" as used in automobile sales was not raised. Compare id. at 103, 47 Cal. Rptr. at 523, with Henningson v. Bloomfield Motors, Inc., 32 N.J. 358, 390-91, 161 A.2d 69, 87 (1960).

It is evident, however, that no hard and fast rule can be drawn delineating the requisite inequality of bargaining power. For example, a contract of adhesion has been found between a bank and three real estate co-venturers. Tahoe Nat'l Bank v. Phillips, 4 Cal. 3d 11, 480 P.2d 320, 92 Cal. Rptr. 704 (1971); see Goldman v. Ecco-Phoenix Elec. Corp., 62 Cal. 2d 40, 396 P.2d 377, 41 Cal. Rptr. 73 (1964).
servient party must be unaware of the existence of the ambiguous term or the limitation. If he is aware of the questioned provision, California courts will enforce the contract despite its adhesory effect, even if he would not have been able to understand the term had he in fact read it.94 He may have read and understood the term, yet still have been powerless to bargain it away because of his lack of economic strength. Nevertheless, the California adhesion doctrine does not apply regardless of how unreasonably harsh the terms might be.

**Unconscionability in Other Jurisdictions**

In other jurisdictions, section 2-302 of the Uniform Commercial Code, rather than the doctrine of adhesion contracts, is used to protect the interests of the consumer. Both concepts, however, attempt to prevent unfair advantage from being taken of persons entering a contract with little or no bargaining power and with no meaningful choice.95 The comment to section 2-302 suggests a broader test than that used in contracts of adhesion cases:

The basic test is whether, in the 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.96

More than an unequal bargaining relationship is required to find a contract unconscionably oppressive. The courts in these jurisdictions require a showing that some unfair advantage has been taken over the consumer.97 The existence of this factor indicates that the dominant party has obtained benefits (in higher price or otherwise) while assuming no additional risks in performing his side of the deal, and for which he has given little or nothing in return. Specific "unconscionable" abuses will be dealt with in more detail in later sections of this appendix. Of concern here is the interest that other jurisdictions have shown in situations typified by unequal bargaining strength and the absence of a meaningful choice.

When the ordinary consumer enters a market with a gross inequality of bargaining power, "the meaningfulness of choice essential to

---

96. UNIFORM COMMERCIAL CODE § 2-302, Comment 1 (1972 version).
the making of a contract, can be negated . . . ." 98 His alternatives may be further limited if he has very limited financial resources. One important application of the unconscionability doctrine in other jurisdictions has been to give greater protection to persons living at or near the poverty level. 99 These consumers present a more dramatic instance of an economic imbalance. Such persons may be particularly susceptible to the high pressure tactics of unscrupulous merchants. 100 The advancement of credit to individuals who know they are poor credit risks may effectively preclude any desire to bargain for more favorable terms. Since credit is not readily available elsewhere, they cannot afford to shop around for more favorable terms. 101 Furthermore, poverty is often accompanied by noneconomic factors which restrict the ability to bargain effectively, such as illiteracy, lack of education or a language deficiency. 102

The most striking difference between the adhesion doctrine in California and the unconscionability doctrine as applied in other jurisdictions has been the application of the latter to protect persons entering the market with these disabilities. A person with little education may lack the expertise necessary to understand and cope with the tactics of "unethical solicitors bent on capitalizing upon their weakness . . . ." 103 The unconscionability standard was described in Williams v. Walker-Thomas Furniture Co.: 104

[W]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case . . . the court should consider whether the terms of the contract are so unfair that enforcement should be withheld. 105

From the cases decided under 2-302, a new standard of know-


101. Murphy, supra note 99, at 306-07.


104. 350 F.2d 445 (D.C. Cir. 1965).

105. Id. at 449-50. But see Block v. Ford Motor Credit Co., 10 UCC Rep. Serv. 139 (D.C. Ct. App., 1972) (consumer who had attained a doctor of philosophy degree, had the capacity to acquaint himself with the terms of the contract); Capitol Furniture & Appliance Co. v. Morris, 8 UCC Rep. Serv. 321 (D.C. Ct. Gen. Sess. 1970) (consumer was free to indulge in comparative shopping).
ledge can be ascertained. The dominant party is obligated to disclose and perhaps to explain certain crucial terms of a contract "in language that the least educated person can understand" when it is likely that a consumer will be unaware of or will not understand them. If the seller fails to do so and instead seeks to take an unreasonable advantage, the restraint of unconscionability will be used to protect the interests of the consumer.

Duress and Economic Duress: Threats Made Against the Consumer

Where assent to a contract was gained through the use of unlawful economic or physical force or pressure, the consumer may use the doctrine of duress to rescind the contract. A finding of duress allows the threatened consumer to rescind the contract even though he may have had full knowledge of its terms. His consent is thought to be involuntary because it was induced by the wrongful act of another.

A pleading of duress puts at issue the capacity of the consumer to withstand the threatened act and to consent freely despite the threat. The court must determine whether the consumer's will was overcome and whether his assent was not freely given. The capacity to resist a threat is determined in part by his experience in the market, the nature of the threatened action, and his knowledge of and ability to explore other alternatives or legal remedies.

An intentional wrongful act by the dominant party must cause apprehension in the threatened party. It must be caused by some specific act, not by mere speculation on the part of the threatened party. One not actually put in apprehension of some harm by the threatened action may not later claim that he acted under duress.


108. See CAL. CIV. CODE §§ 1569-70 (West 1954). The terms duress and menace, although of separate statutory derivation, are often used interchangeably. See Sistrom v. Anderson, 51 Cal. App. 2d 213, 221, 124 P.2d 372, 376 (1942). When duress or menace are found in contract formation, the remedy allowed is rescission of the contract. CAL. CIV. CODE §§ 1566, 1689 (West 1954). See text accompanying notes 163 infra. Although these code provisions were enacted in 1872, "the courts have seldom mentioned or applied them in the innumerable cases in which they could have been invoked. Consequently, the language of the decisions can rarely be reconciled with the statutory language." 17 CAL. JUR. 2d Duress § 4 (1956).


Nor may one claim duress when his assent was given after his fear had subsided.111

Even when a party consents to a contract while under an apprehension of some economic or physical harm, however, he may not have a valid defense to enforcement of the contract. It is not clear whether California courts have adopted an objective or subjective approach to determine whether the threatened party was justified in acting in response to the threat.112 Under the objective test, this doctrine will be a valid defense only if a reasonably prudent man would have perceived a threat to his interests and assented to a contract to avoid the threat.113 Since a reasonable man is expected to know and to assert any legal remedies available to him, the objective test may lead to harsh results in many situations.114 Other California courts have rejected the harsh objective standard and have instead focused upon the state of mind of the actual party who assents under pressure.115 The question of the appropriate standard of behavior of the weaker party remains undecided.

Economic Duress: Threats to Economic Interests

While the common law doctrine of duress may provide some remedy to a consumer whose consent has been gained through the use of threats of personal injury or property damage or confinement, it is doubtful that the doctrine will be of great use to the consumer in the ordinary market situation. There may well be extreme cases of coercion in consumer transactions, but such cases are thought to

112. Compare Leeper v. Beltrami, 53 Cal. 2d 195, 347 P.2d 12, 1 Cal. Rptr. 12 (1959) (objective test), with Balling v. Finch, 203 Cal. App. 2d 413, 21 Cal. Rptr. 490 (1962) (subjective test). Confusion in the courts of appeals is further illustrated by Goldstein v. Enoch, in which the court applied as its test "whether the defendant intentionally exerted an unlawful pressure on the injured party to deprive him of contractual volition and induce him to act to his own detriment." 248 Cal. App. 2d 891, 894-95, 57 Cal. Rptr. 19, 22 (1967). This restrictive definition of duress was abandoned long ago in Young v. Hoagland, 212 Cal. 426, 298 P. 996 (1931). In Gott v. Gott, the court advanced a dual test, "[T]he California cases have adopted the modern rule of the subjective test of duress under which duress is to be tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim; and that whether the victim acted as a reasonably prudent person was a question for the trier of facts." 270 Cal. App. 323, 327, 75 Cal. Rptr. 514, 516 (1969). See McIntosh v. McIntosh, 209 Cal. App. 2d 371, 26 Cal. Rptr. 26 (1962); Lewis v. Fahn, 113 Cal. App. 2d 95, 247 P.2d 841 (1952).
be rare. The normal consumer may well feel coerced, but normally not because of some overt, wrongful act by the merchant. The typical abuse is more likely to be an advantage taken of the static relationship between the parties caused by inequalities of economic strength.

California courts have expanded the common law doctrine of duress into situations involving threatened pecuniary or property loss. While physical threats may not be common in normal consumer transactions, the consumer may more often feel some threat to his economic interests. Although the limits of this doctrine have not been clearly defined, generally required are some wrongful act and the absence of an adequate remedy to protect one's interests against the threatened harm.

Wrongfulness of a Threatened Act

Economic duress may be utilized when there has been a wrongful act committed by the superior party which harms the economic interests of the weaker party. To some extent, threats to property interests are a normal part of the bargaining process. For example, one may threaten not to contract with another person unless the bargain is in some way altered to his own advantage. Although this may substantially affect the benefits to be derived from the transaction by the threatened party, such a threat is not considered wrongful. However, an act may be so inappropriate that bargaining parties should be free from such pressure. When the economic harm caused

117. It would seem that the use of duress to gain consent creates an extreme inequality of bargaining power. Not only are the parties not bargaining as equals, but also there has been some affirmative action on the part of the dominant party that effectively overcomes the will of the other party.
118. See Sistrom v. Anderson, 51 Cal. App. 2d 213, 124 P.2d 372 (1942). The wrongful detention of property until some demand is met will not be allowed as a bargaining practice. This was known as duress of goods. Ezmirlian v. Otto, 139 Cal. App. 486, 34 P.2d 774 (1934); McTigue v. Arctic Ice Cream Supply Co., 20 Cal. App. 708, 130 P 165 (1912). A loss of property has been recognized as being a sufficiently important interest that a threatened loss may effectively overcome a person's will. However, a threat to pursue some legal action, such as the foreclosure of a due mortgage, does not constitute duress. Burke v. Gould, 105 Cal. 277, 283, 38 P 733, 735 (1894).
121. See, e.g., Hale, Bargaining, Duress, and Economic Liberty, 43 COLUM. L. Rev. 603, 620-21 (1943); 40 CALIF. L. Rev. 425 (1952).
by the wrongful act becomes significant, the threatened party is not bargaining freely.

While a tortious or criminal act is no longer required for economic duress, no clear definition of a wrongful act has yet been advanced by the courts. While many threats, if carried out, may themselves be actionable, it is clear that such a standard is of no help in reconciling economic duress cases. Since no particular threat is, in itself, sufficiently wrongful to support a finding of economic duress, California courts must currently evaluate threats to property interests in light of surrounding circumstances and “prevailing community standards.” Such a test gives the courts great latitude in determining when acts are so wrongful that they should not be allowed as bargaining tactics, but as a tool for understanding California economic duress cases, it is of little help.

As a general guideline, it has been suggested that economic duress should be found when:

1. Defendant has abused his superior bargaining position by an improper threat to plaintiff’s business or property interests in order to force a disproportional exchange of values;
2. Plaintiff has acted as a reasonable man under the circumstances in submitting to the threat, was not previously under any obligation to enter into the contract or pay over money, and his action was taken solely to protect his business or property interests.

Actionable threats

While it may seem that a threat to do anything which would give rise to a cause of action would be “wrongful,” this standard has not been adopted. It has often been mentioned that it is not

122. One of the first extensions of the duress doctrine to include economic threats came in Sun-Maid Raisin Growers v. Papazian, 74 Cal. App. 231, 240 P. 47 (1925). Threats of physical destruction to a farmer’s crops were made to induce him to contract with a sellers’ cooperative which would have set the price to be charged for his crops. This case did not come within the traditional doctrine of duress of goods. At the time, duress of goods was a detention of one’s property until assent was given to a contract.

123. For example, a threat to breach a contract gives rise to a cause of action for damages when the contract is breached, but the threat itself does not constitute economic duress. See text accompanying notes 134-36 infra. On the other hand, an action would lie for a threat of physical injury. Such a threat would constitute duress. McIntosh v. McIntosh, 209 Cal. App. 2d 371, 26 Cal. Rptr. 26 (1962).


126. Id. at 426.

duress to threaten to do that which a person has a legal right to do.\textsuperscript{128} Although a breach of contract gives rise to an action for damages, it is generally held that a person has a "legal right" to threaten not to proceed under a contract and stand suit.\textsuperscript{129} The exercise of this legal right may not be wrongful even though the breach may cause serious economic harm to the other party.\textsuperscript{130} The real basis for such a rule is to forestall suits arising subsequent to every renegotiation of a contract.\textsuperscript{131} A person threatened by a breach of a contract has a remedy: a cause of action on the contract. But as often happens with the average consumer, the alternative may be illusory. He may be unable to pursue the alternative of a court suit because of the expense involved, because of his ignorance of available remedies, because of his immediate need for the product or service, or because he is aware of the long delay and uncertainty attendant to civil actions.\textsuperscript{132} The threatening party is often fully aware of the alternatives available to the other party. By taking advantage of the superior bargaining position created by the threat, he is able to gain the consent of the weaker party.\textsuperscript{133}

For example, in \textit{London Homes, Inc. v Korn},\textsuperscript{134} a real estate developer seeking to purchase real property chose to pay an additional amount over the contract price when faced with the vendor's threatened refusal to convey the property. The developer's alternatives were to pay the extra money, to forfeit the investment already made in the project, or to tie up the project for several years while the matter was being litigated.\textsuperscript{135} The court refused to allow recovery of the

\begin{itemize}
\item \textsuperscript{128} E.g., Marshall v. Packard-Bell Co., 106 Cal. App. 2d 770, 774, 236 P.2d 201, 204 (1951).
\item \textsuperscript{132} Dalzell, \textit{supra} note 119, at 248, 367-82; see McCtigue v. Arctic Ice Cream Supply Co., 20 Cal. App. 708, 719, 130 P 165, 169 (1912) ("delay necessarily incident to the recovery of the property by legal process would result in serious loss to the owner of the property.") The alternative may be so unreasonable in light of the interest threatened that a choice may be effectively precluded. See Leeper v. Beltrami, 53 Cal. 2d 195, 347 P.2d 12, 1 Cal. Rptr. 12 (1959) (plaintiff paid worthless note to prevent a foreclosure sale of her home).
\item \textsuperscript{133} See London Homes, Inc. v. Korn, 234 Cal. App. 2d 233, 44 Cal. Rptr. 262 (1965).
\item \textsuperscript{134} Id.
\item \textsuperscript{135} Id. at 241, 44 Cal. Rptr. at 267
\end{itemize}
additional sum which he paid. It held that the vendor merely had exercised a legal right to breach the contract and stand suit, and that the developer's decision not to tie up his investment pending resolution of such a suit was based upon good business judgment.\textsuperscript{136} However, such reasoning assumes that the plaintiff in such a case can protect his interests adequately by pursuing clear-cut alternatives that are readily available and recognizable.\textsuperscript{137} When the court is faced with circumstances under which the threatened loss of property cannot be adequately remedied by filing suit, the courts have often found economic compulsion.\textsuperscript{138} In \textit{Young v. Hoagland},\textsuperscript{139} a conflict in the directorship of a corporation placed several stockholders in the position of either paying assessments of questionable legality or risking the loss of their stock. In a suit to recover the assessments paid, it was held that the stockholders had been induced to pay the money by duress and that such duress exists where under "the peculiar facts a reasonably prudent man finds that in order to preserve his property or protect his business interests it is necessary to make a payment of money which he does not owe and which in equity and good conscience the receiver should not retain . . ."\textsuperscript{140} It may be reasonable under the circumstances\textsuperscript{141} for a person who is unable to bargain on equal terms to submit to a demand rather than to allow a seizure of his property. He may then sue to recover any payment made to satisfy that demand.\textsuperscript{142}

Similarly in \textit{Thompson Crane & Trucking Co. v. Eyman},\textsuperscript{143} an

\begin{footnotes}
\item[136] Id. at 239, 44 Cal. Rptr. at 266; see Sistrom v. Anderson, 51 Cal. App. 2d 213, 124 P.2d 372 (1942).
\item[137] Compare Western Gulf Oil Co. v. Title Ins. & Trust Co., 92 Cal. App. 2d 257, 206 P.2d 643 (1949), with Lewis v. Fahn, 113 Cal. App. 2d 95, 247 P.2d 831 (1952). Both cases involved demands made by a lessor under threat of termination of the lease. In Western Gulf Oil, the threatened lessee was not allowed to recover payments made because he had a declaratory judgment action available. However, economic compulsion was found in Lewis without discussion of the availability of a declaratory judgment action.
\item[138] Economic duress has been found even when an adequate remedy is technically available, but under the circumstances a reasonable man would accede to the demand rather than pursue that remedy. See Kolias v. Colligan, 172 Cal. App. 2d 384, 362 P.2d 265 (1959). In another case, the plaintiff was allowed to recover a payment made to the threatening party while a suit was pending to determine the validity of the claim. The payment was the only way to prevent a serious economic loss from a threatened cancellation of a contract. Wake Dev. Co. v. O'Leary, 118 Cal. App. 131, 4 P.2d 802 (1931).
\item[139] 212 Cal. 426, 298 P 996 (1931).
\item[140] Id. at 431, 298 P at 998.
\item[141] Id.
\item[142] Id.
\end{footnotes}
alternative was available, but the alternative was so unreasonable that a reasonably prudent man would submit to the demand and later bring suit to recover the payment.\(^{144}\) An accountant demanded an additional percentage of the relief to be granted under a tax protest filed for his client, and overcame the client's objections by reminding him that failure to submit the protest on time would make him liable for the entire tax assessment. Since the demand was made only two days before the allowed period for filing the protest,\(^{145}\) it could not reasonably be said that an adequate alternative (such as hiring a new accountant) was available to the taxpayer. The acts of the accountant were sufficiently wrongful to constitute duress, since he destroyed his client's power to bargain freely by depriving him of the opportunity to exercise a meaningful choice.

This inability to bargain on equal terms is present in other cases which have found that the weaker party had acted reasonably in submitting to an unfair demand made in violation of contractual obligations. Payment of unearned interest under an acceleration clause in order to gain release from a mortgage secured by the debtor's home was held to be made under compulsion. The buyer was attempting to sell the property to prevent a foreclosure. The finance company refused to release the mortgage unless the unearned portion of interest was paid. Recovery of the unearned portion was allowed.\(^{146}\)

It should be noted that the cases discussed above all involve either an illegal assessment or payments in excess of that amount due under the original contract. Demands for payment due under a contract, even if it would involve financial hardship, cannot be said to be actionable economic duress.\(^{147}\) However, when an unreasonable demand is made by one in a superior bargaining position under circumstances where a reasonable man would accede to the demand in order to avoid some pecuniary loss, economic duress will be

\(^{144}\) Id.

\(^{145}\) The protest had taken the accountant 40 days to prepare. He made his demand on the Saturday prior to the Monday the protest had to be filed. Also the accountant made assurances that the claims against the client were asinine. This could only have heightened the client's apprehension of loss. The ultimate assessment against the taxpayer was only $2,500. Id.


\(^{147}\) See London Homes, Inc. v. Korn, 234 Cal. App. 2d 233, 44 Cal. Rptr. 262 (1965). But see Thompson Crane & Trucking Co. v. Eyman, 123 Cal. App. 2d 904, 909, 267 P.2d 1043, 1046 (1954) ("A very real compulsion appears, which is no less real because an incidental breach of contract was also involved.")
found. If this is to be a useful standard, it must be concluded that the circumstances presented in London did not render the defendant's threats improper as judged by "prevailing community standards." In California, economic duress has been found only when some demand has been made in excess of or in conflict with existing obligations. But there is no reason for a distinction on that basis between Thompson and London. Both involved a refusal to proceed as originally agreed unless greater demands were met, and the creation of an unequal bargaining position by the threatened non-performance of the breaching party. In both cases, the weaker party was placed in a position of dependence by the prior actions of the breaching party.

**Nonactionable Threats**

A threat to do or not to do something which is not an actionable wrong generally is not sufficiently wrongful to constitute duress. Within this category are threats to pursue a legal remedy. Even though the threat may effectively overcome volition, the nature of the threatened action is not considered "unlawful" and therefore not a basis for an action for duress. For example, a threat to foreclose a mortgage or to bring suit on a debt or obligation presently due is not coercion or intimidation sufficient to overcome volition at law. That the suit or foreclosure would result in financial embarrassment, ill health, mental distress, or loss of profits is not sufficient to render such threats wrongful.

If a threat to pursue a legal remedy is used to gain assent, however, the remedy must be based on a claim held in good faith. If the threatening party is acting in bad faith by asserting an unfounded

148. See, e.g., Young v. Hoagland, 212 Cal. 426, 298 P. 996 (1931).
151. See Dalzell, supra note 119, at 362-63.
claim, such a threat amounts to duress.\textsuperscript{154} But if a claim is asserted in good faith, although not well founded, the preponderance of authority is that duress is not present.\textsuperscript{155}

Under certain circumstances, it may be a serious injustice not to allow a rescission for duress because of a threat to commit a nonactionable wrong. A standard based on an analysis of the circumstances surrounding the threatened act would allow the doctrine of economic duress to protect the rights of the buyer in a situation where the threatening party was pursuing some “legal right.”

In California, there have been a few exceptions to the rule that a threat to commit a nonactionable wrong is not duress. Such decisions bear out the applicability of the test for duress that there be a disproportionate exchange, an unequal bargaining position and a threat considered wrongful in view of the circumstances of the case. For example in \textit{Rowland v Watson},\textsuperscript{156} the plaintiff sued to recover money paid in excess of the amount due on a promissory

\begin{footnotes}
\item[154] For example, in \textit{Leeper v Beltrami}, a woman was under pressure to pay a forfeited bond for $10,000 secured by her home. In order to raise money, she attempted to sell other ranch properties. The defendants instituted an action to foreclose a previously cancelled mortgage on the ranch properties. Because of the cloud on the title and the impending foreclosure on her house, the woman felt forced to sell one of the properties for one-third of its value. In order to sell the second property the woman paid the mortgage. Later she filed suit to recover that amount and also the property from the first purchaser who had taken advantage of her financial plight. The court allowed recovery of the mortgage payment because of economic duress. Although the woman had an alternative of allowing her house to be sold at the foreclosure sale, such was not a reasonable alternative. The use of a known false claim to gain consent amounted to duress. Although the third party purchaser had taken no part in the threats, he had “no legal right to take advantage, knowingly, of the wrongdoing of third parties.” 53 Cal. 2d 195, 206, 347 P.2d 12, 20, 1 Cal. Rptr. 12, 20 (1959); \textit{accord}, Jack Winter, Inc. v. Koratron Co., 329 F. Supp. 211 (N.D. Cal. 1971); McNichols v. Nelson Valley Bldg. Co., 97 Cal. App. 2d 721, 218 P.2d 789 (1950) (filing a lis pendens solely to cloud title and prevent a sale); Steffen v. Refrigeration Discount Corp., 91 Cal. App. 2d 494, 205 P.2d 727 (1949) (threat of foreclosure used to force payment of unearned interest); Ezmirlian v. Otto, 139 Cal. App. 486, 34 P.2d 774 (1934) (use of known, false claim solely to cloud title and force payment of claim); McTigue v. Arctic Ice Cream Supply Co., 20 Cal. App. 708, 130 P 165 (1912) (detention of property used to force an illegal demand); International Fishermen & Allied Workers v. Stemland, 97 Cal. App. 2d 931, 219 P.2d 554 (App. Dep't Super. Ct. 1950) (threat of strike used to force owner to pay fines of others).

\item[155] Dalzell, \textit{supra} note 119, at 346; \textit{see}, e.g., Fio Rito v. Fio Rito, 194 Cal. App. 2d 311, 14 Cal. Rptr. 845 (1961) (plaintiff asserted what he thought to be a reasonable position). “It is not duress, however, to take a different view of contract rights, even though mistaken, from that of the other contracting party, and it is not duress to refuse, in good faith, to proceed with a contract, even though such refusal might later be found to be wrong.” London Homes, Inc. v. Korn, 234 Cal. App. 2d 233, 240, 44 Cal. Rptr. 262, 266 (1965).

\item[156] 4 Cal. App. 476, 88 P 495 (1906).
\end{footnotes}
note. When the note was due, they agreed to a two-month extension with an additional bonus of fifty dollars for each month the loan was unpaid. Later the defendant demanded fifty dollars for each of sixteen months while the note was unpaid. While the defendant was asserting this claim in good faith, he was also taking advantage of his knowledge that the plaintiff stood to suffer severe financial loss if he could not gain release from all his creditors. The court concluded that under the extension contract, the fifty dollar bonus applied only to the two months' extension originally agreed upon and not to subsequent extensions. Therefore, payments in excess of the amount due, even in satisfaction of a claim asserted in good faith, were paid under compulsion to avoid financial loss and could be recovered.\textsuperscript{187}

Similarly, a threat to refuse to enter into a contract is not an actionable wrong, nor is it generally the basis for economic duress.\textsuperscript{158} To allow such a threat to constitute duress would involve a severe restructuring of traditional notions of freedom of contract. However, there are exceptions to this rule under circumstances involving the "use of unequal bargaining power to force a person in an unusually distressing situation to agree to hard contract terms . . . . "\textsuperscript{159}

For example in Oswald v. City of El Centro,\textsuperscript{160} duress was found in a threat to refuse to modify an existing contract between the parties. When it became obvious that the contractor would be unable to finish a paving job before the deadline, the contractor appeared before the board of trustees of the city to request an extension of time. Such extensions were given as a matter of course if performance under the contract was being carried out diligently. The board, however, refused to approve the request unless the contractor would agree to lease valuable property to the city for ten years at one dollar per

\textsuperscript{157} Id. at 481, 88 P at 497; see Steffen v. Refrigeration Discount Corp., 91 Cal. App. 2d 494, 205 P.2d 727 (1949). Compare Millsap v. National Funding Corp., 57 Cal. App. 2d 772, 135 P.2d 407 (1943), with Powis v. Moore Machinery Co., 72 Cal. App. 2d 344, 164 P.2d 822 (1945). Both cases involved agreements made between an employer and an employee under threat of discharge. Although both employees had employment agreements terminable at will, economic duress was found in Millsap but not in Powis. The cases can be reconciled only on the basis of the difference in the bargaining power of the two employees. In Powis, the employee was a successful salesman earning $41,000 the previous year. The court speculated that he may have signed the agreement knowing that his income would be larger nevertheless. However, in Millsap the employee earned only $35 per week as a notary and had no unique skills which would have enabled her to bargain effectively with her employer.


\textsuperscript{159} Dalzell, supra note 119, at 360.

\textsuperscript{160} 211 Cal. 45, 292 P 1073 (1930).
year. The contractor agreed but later brought suit to have the lease rescinded. Refusing to enforce the lease, the court concluded that his consent was "[c]learly the product of compulsion and the employment of coercive methods by which the exercise of freedom of will, which is always essential to a valid contract, was unquestionably overcome."'

Economic Duress and Unconscionability

The doctrine of economic duress has several shortcomings. First, the only remedy permitted in California duress cases has been complete rescission of the agreement. However, the weaker party may want the contract enforced, but without an oppressive term. Moreover, the unclear standard of "wrongful" acts yields little protection for the consumer faced with a serious abuse of superior power in bargaining. The doctrine also fails to recognize that there can be pressure created by a lawful act of the dominant power, from which the weaker party is entitled to be free.

The application of the unconscionability doctrine in economic duress situations has been utilized to allow the nonenforcement of either the entire contract or only an unconscionable portion of it. The semantic wrangles of defining "wrongful" actions constituting duress are also avoided by the doctrine of unconscionability; instead there is perhaps an equally tenuous examination of the "economic positions of the parties and a finding that the position of one was so vulnerable as to make him the victim of a grossly unequal bar-

161. Because of the nominal value of the rent, the element of inadequate consideration was present. Id. at 52, 292 P at 1076.

162. Id. Duress was also present in an act used solely to interfere with the plaintiff's contractual relations with another. See Ezmirlian v. Otto, 139 Cal. App. 486, 34 P.2d 774 (1934). If the threatened party knows that the demand made by the threatening party is illegal or not well-founded, but nevertheless satisfies the demand under some additional compulsion, he may recover any payments. Sufficient compulsion is found when a person wrongfully detains another's property and "the delay necessarily incident to the recovery of the property by legal process would result in serious loss to the owner of the property." McTigue v. Arctic Ice Cream Supply Co., 20 Cal. App. 708, 719, 130 P 165, 169 (1912).


164. Professor Dalzell suggests that a threat should be considered wrongful based not on whether it is actionable by itself, but rather on whether it fits within one of these categories: "(1) a threat to commit an actionable wrong; (2) a threat to misuse a legal power given for other legitimate ends; (3) a threat to maintain a lawsuit or defense which ultimately proves to be unsustainable; (4) a threat to violate the standards of decent conduct in the community." Dalzell, supra note 119, at 366; see Burke v. Gould, 105 Cal. 277, 38 P 733 (1894).

165. See UNIFORM COMMERCIAL CODE § 2-302(1).
gain." In the case of *In re Elkins-Dell Manufacturing Co.*, the referee in bankruptcy refused to enforce a contract between a creditor and the bankrupt because the referee thought the contract was unconscionable. Several months before bankruptcy, the creditor had entered into the contract with Elkins-Dell. The creditor was to advance 75 percent of the accounts assigned to it, but the creditor retained the power to choose those accounts which it would accept. Elkins-Dell on the other hand, was restricted from seeking financing elsewhere and from disposing of any assets without the consent of the creditor. The creditor reserved the power to receive, open and dispose of all mail addressed to Elkins-Dell. In short, the transaction "spelled ruin to the bankrupt ...." The court hesitated, but declined to enforce the contract because of insufficient evidence of the commercial need for such a contract. The agreement, though apparently harsh and one-sided, must be evaluated in terms of the needs of the creditor to protect his interests when dealing with a debtor of questionable financial strength and in view of the needs of other debtors similarly situated who are in need of credit. The court remanded the claim to the referee for further proceedings to determine the commercial context out of which such a contract arose. The standard to be applied to determine the unconscionability of such a case requires that "there must be a showing, not only that the terms of the contract are onerous, oppressive, or one-sided, but also that the terms bear no reasonable relation to the business risks. This is a showing that depends on the commercial environment and cannot be made from the face of a contract alone."

**Undue Influence**

The doctrine of undue influence is available to consumers in certain situations when they have been induced to assent to a contract by the use of tactics not sufficiently wrongful to constitute duress. However, as a remedy for the consumer in the ordinary transaction involving inequality of bargaining power, this doctrine will be of little use.

---


168. *Id.* at 866.

169. *Id.* at 873.

170. "To make a good contract a man must be a free agent. Pressure of whatever sort which overpowers the will without convincing the judgment is a species of restraint under which no valid contract can be made. Importunity or threats, if carried to the degree in which the free play of a man's will is overborne, constitute undue influence, although no force is used or threatened. A party may be led but not driven, and his acts must be the offspring of his own volition and not the record of someone else's." *Odorizzi v. Bloomfield School Dist.*, 246 Cal. App. 2d 123 130, 54 Cal. Rptr. 533, 540 (1966).
Although California Civil Code section 1575 seems to provide a remedy in some situations where unfair advantage has been taken of the consumer, California case law has failed to extend the language to that extent. By statute, undue influence consists:

1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;
2. In taking unfair advantage of another's weakness of mind; or,
3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

It would seem that this definition of undue influence would be of great help to consumers unable to resist high pressure tactics because of lack of education, inexperience, or poverty. However, the doctrine of undue influence has been limited in application to extreme situations in which a person relied upon and trusts another to such an extent that he is in a completely subservient state of mind. Such a relationship reveals that there has not been a bargain in any real sense of the word. Nonetheless, it is an attempt to deal with a complete lack of knowledge; normal market transactions, however, are not evidenced by such complete subservience.

A confidential relationship exists when one person stands in a special position of trust and deference to another. Because of this relationship, the party's advice and counsel bear added weight. In an intimate relationship such as between relatives, friends or an attorney and his client, the possibility of abusing this position of trust may be particularly great because of the deference accorded the advice given by the dominant person. Although merchants may attempt to gain the "confidence" of potential buyers, it is clear that the doctrine of undue influence will apply only in extreme situations.

The language of *Odorizzi v Bloomfield School District* seemed to expand the scope of the doctrine of undue influence. An element-

171. "The courts have seldom resorted to this code provision [California Civil Code section 1575] and have used language concerning undue influence which is difficult to harmonize with the statutory language. In fact it has been said that the courts will not attempt to define undue influence by any fixed principles, lest the definition itself point out the way by which it may be evaded." 17 CAL. JUR. 2d Duress § 11, at 11-12 (1968).
172. CAL. CIV. CODE § 1575 (West 1954). The remedy available for any agreement reached through the use of undue influence is rescission. *Id.* § 1566; *id.* § 1689 (West 1973).
ary school teacher was arrested on charges of homosexual conduct and endured forty sleepless hours of processing and interrogation by police. Shortly after he was released on bail, he was visited by the principal and superintendent of the school district. They informed him that unless he signed a resignation at once, they would find it necessary to dismiss him for improper conduct. Based on their representations as to the need for haste, their desire only to help him personally, and the dire consequences of his refusal, the teacher signed the resignation.

When the criminal charges were later dropped, the teacher sued for declaratory relief and rescission of the resignation. The court rejected the claim for duress, but held that the complaint stated a cause of action for undue influence. Although no confidential relationship was found between the parties, such a relationship “need not be present when the undue influence involves unfair advantage taken of another’s weakness or distress.” Undue influence was found in the school official’s use of “overpersuasion and imposition to secure plaintiff’s signature but not his consent to his resignation . . . .”

Since overpersuasion seems to be a common problem for consumers in high pressure sales campaigns, this language would seem significant for consumer actions. Overpersuasion and undue influence are very closely related. Of concern is that type of persuasion that “tends to be coercive in nature . . . which overcomes the will without convincing the judgment. The hallmark of such persuasion is high pressure . . . .” The relative strength of the parties is important in determining whether persuasion has overcome the will of the assenting party. Even though the school officials were not responsible for the teacher’s physical and mental strain, they were aware of it and used it to their advantage. This kind of situation created a position of dominance over the teacher, whose will was overcome against judgment.

The type of persuasion referred to in Odorizzi is generally ac-

---

179. Id. at 128, 54 Cal. Rptr. at 538.
180. Id. at 135, 54 Cal. Rptr. at 543.
181. Id. at 129, 54 Cal. Rptr. at 539.
182. Id. at 130, 54 Cal. Rptr. at 540.
183. Id. at 135, 54 Cal. Rptr. at 543.
186. “In essence undue influence involves the use of excessive pressure to persuade one vulnerable to such pressure applied by a dominant subject to a servient object.
companied by such characteristics as the consummation of the trans-
action at an unusual time or place, often with an emphasis on
haste and the consequences of delay, the use of several persuaders
operating together, and the absence of third party advisors—accomp-
panied perhaps by statements that there "isn't time" for attorneys or
financial advisors.\footnote{\textsuperscript{187}} It is clear, however, that the court had no in-
tention that consumer transactions would normally fit into this pat-
tern. Undue influence is not to be used to avoid bad bargains or to
provide a consumer with a remedy for a contract "about which [he has] second
thoughts."\footnote{\textsuperscript{188}} It is doubtful, therefore, that the
doctrine of undue influence will be of much use in ordinary market
situations which are characterized by lesser degrees of powerless-
ness and ignorance than in the typical undue influence case.\footnote{\textsuperscript{189}}
These characteristics, however, may be present in grossly unfair
consumer contracts. When excessive pressure is used by the domi-
nant party and the will of the servient person is overcome, these
factors should be applicable, and the doctrine of undue influence
may be available.

\textbf{The Second Factor Enumerated in Section 5108}

\textit{Knowledge by Those Engaging in the Practice of the Inability of
Consumers to Receive Benefits Properly Anticipated from the
Goods or Services Involved}

This second criterion pertinent to the issue of unconscionability

In combination, the elements of undue susceptibility in the servient person and ex-
cessive pressure by the dominating person make the latter's influence undue, for it
results in the apparent will of the servient person being in fact the will of the dominant
person.

Whether a person of subnormal capacities has been subjected to ordi-
nary force or a person of normal capacities subjected to extraordinary force, the match
is equally out of balance. If will has been overcome against judgment, consent may be
rescinded." \textit{Id.} at 131-32, 54 Cal. Rptr. at 540-41.

\textsuperscript{187} \textit{Id.} at 133, 54 Cal. Rptr. at 541. These factors were applied in a case de-
cided under a similar factual situation involving the resignation of a police officer after
charges of rape. All the elements except the reference to haste were present, and the
contract of resignation was rescinded. Keithley v. Civil Serv. Bd., 11 Cal. App. 3d 443,
89 Cal. Rptr. 809 (1970).

\textsuperscript{188} 246 Cal. App. 2d 123, 132, 54 Cal. Rptr. 533, 541 (1966). For a discus-
sion of the use of high pressure techniques in door-to-door sales, see Project, \textit{The

\textsuperscript{189} "A woman who buys a dress on impulse, which turns out to be less
fashionable than she had thought, is not legally entitled to set aside the sale on the
ground that the saleswoman used all her wiles to close the sale. A man who buys a
tract of desert land in the expectation that it will become another Palm Sprigs,
an expectation cultivated in glowing terms by the seller, cannot rescind his bargain
when things turn out differently." Odonzzi v. Bloomfield School Dist., 246 Cal.
focuses on the seller's knowledge that the goods or services may not meet the expectations of the consumer. While the first criterion centered on the consumer's lack of knowledge, the second is concerned with the seller's knowledge of the inadequacy of the goods or services. The seller here is not charged with warranting the goods for all purposes. Instead, only his knowledge of the inability of the goods to meet those benefits properly anticipated indicates a possibly unconscionable situation. His knowledge that the goods or services may not operate perfectly, although they satisfy the reasonable expectations of consumers, would not be unconscionable.

To determine those benefits properly anticipated invokes an objective investigation into the nature of the contract and of the goods or services to be derived therefrom. In our consumer-oriented economy, the use of standardized contracts and standardized products is essential for the efficient and economical distribution of goods and services. Sellers in such markets sell to the average consumer, not to each individual. They seek to satisfy the expectations of a broad range of individuals. The seller's knowledge that an individual has unreasonable expectations is not, per se, unconscionable, provided that no misrepresentations have been made regarding the adequacy of the product for the purpose sought.

Even when there has been no misrepresentation made by the seller, criterion two may offer some protection to the consumer. When the seller knows of the inadequacy of the goods or services and says nothing, such knowledge would be unconscionable. The fact that the seller is aware of the inadequacy of the goods or services places him in a superior bargaining position in relation to the consumer.

While it is clear that a seller's actions calculated to deceive the consumer are unconscionable (and perhaps fraudulent), there may also be situations in which the seller does not intend to deceive the

190. See text accompanying notes 13-189 supra.
191. "Grossly unfair contractual obligations... which result in assumption by the other contracting party of a burden which is at odds with the common understanding of the ordinary and untrained member of the public, are considered unconscionable and therefore unenforceable." Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 554, 236 A.2d 843, 856 (1967). A similar standard has been applied in construing ambiguities in insurance policies so as to effect the reasonable expectations of the insured. Steven v. Fidelity & Cas. Co., 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962).
192. See text accompanying notes 74-82 supra.
consumer, but is aware that the terms of the contract operate to his advantage and to the disadvantage of the consumer. The consumer may well be unaware of the harshness of the contract because of his failure to read or to understand the contract. Further, the terms may be hidden in a maze of fine print or couched in legal jargon unfathomable to the average consumer. While the seller is aware of the true nature of the contract he is using, the consumer may be anticipating something quite different based upon the seller's representations or upon his own understanding of those parts of the contract that are obvious and understandable. While an attempt at overreaching combined with conscious efforts to obfuscate the harsh clauses is unconscionable, the use of standardized clauses does not necessarily evidence a conscious effort to defeat the normal expectation of the consumer.

A seller may honestly attempt to protect himself by inserting favorable terms into the contract and relying upon the consumer to protect his own interests. A hidden ambiguity in a term inserted by the seller for his own protection may enable the consumer to interpret the term to his own advantage. Similarly, there may be characteristics of the goods or services themselves which are known to the seller but are not obvious to the buyer. While such activities may not evidence a fraudulent intent to deceive, the consumer nevertheless may deserve protection. To the extent that the courts have begun to recognize that the seller is under a duty to disclose all pertinent facts of the transaction to the consumer, the failure to disclose may result in liability for the seller if he attempts to gain a greater advantage than the consumer has a right to anticipate. Thus, a seller who fails to acquaint the consumer with the terms of the contract may find that the court will discard those terms or will construe them in a way which protects the consumer's interests.

197 For example, the facts may indicate that knowing advantage was taken of the consumers. E.g., Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).
One of the benefits a consumer anticipates from the goods or services purchased is that the value of their use to him approximates their cost. The unconscionability of gross disparity between price and value is discussed in greater detail below. However, the seller generally knows the true value of the goods or services, based on a full knowledge of the risks accepted and the terms of the contract. When the seller takes advantage of the poverty, illiteracy, poor credit standing, or lack of knowledge of the risks contemplated by the consumer and is able to charge a considerably higher price than the product is worth, he is necessarily aware that the consumer will be unable to benefit from the product in a way which is reasonably proportional to the price. To the extent that such a seller attempts to obtain greater advantage than is legitimately related to the risks he is assuming, his knowledge will render his activity unconscionable.

The opportunity for abuse of the superior bargaining position is inherent in a situation where the seller is the only party aware of the true nature of the goods or services the consumer is receiving. Similarly, the fact that the seller is aware that the consumer will not be able to receive those benefits he properly anticipates clearly indicates an abuse of the seller’s superior bargaining position. Such abuse indicates unconscionability under criterion two.

The Third Factor

Gross Disparity between the Price of Goods and Services and Their Value as Measured by the Price at which Similar Goods Are Readily Obtainable by Other Consumers, or by Other Tests of True Value

In California, as elsewhere, the mere existence of a difference between the price and the true value of an object is not a ground for refusal to enforce the contract. Inadequacy of consideration is generally not a defense to a contract voluntarily made. If, however, the disparity becomes so gross that there is a strong likelihood of fraud, or if the disparity is present with other inequitable circumstances, the contract will not be enforced. California courts have long recognized that a gross inadequacy of consideration may be evidence of fraud, undue influence or duress. Further, in an action for specific performance of a contract, the plaintiff has the

203. See text accompanying notes 205-238 infra.
responsibility to show that the consideration bargained for was "just and reasonable."\textsuperscript{208}

In \textit{State Finance Co. v Smith},\textsuperscript{209} a buyer gave a $300 note for payment for a used truck. After the vehicle was delivered, the buyer discovered it was worth about $25 as junk, even though the previous owner had represented it to be in good condition. The court held the difference between price and value was so great as to be evidence of fraud.\textsuperscript{210} The consideration given was not merely inadequate, but was so grossly inadequate "as to shock the conscience and common sense of all men . . ."\textsuperscript{211} After finding the transaction unconscionable because the truck was so outrageously overpriced, the court refused to allow the seller to recover on the note.\textsuperscript{212}

\textit{Smith} demonstrates the general equity power the California courts exercise when deciding whether the terms of a contract merit enforcement.\textsuperscript{213} There seems to be no one standard to gauge the effect of an inadequacy of consideration. Since the degree of inadequacy varies with the circumstances as well as with the dollar amount of the disparity between price and value, the effect of the inadequacy operates along a continuum; as the disparity between price and value becomes grosser, the inadequacy becomes more significant. This continuum has been described as initially treating an inadequacy of consideration:

"as corroborative evidence of fraud or undue influence [or duress]\textsuperscript{214} which will enable a promisor to resist a suit for specific performance or have his agreement set aside. Where mental weakness occurs in connection with inadequacy of consideration, the presumption of undue influence becomes very strong \[W]here the parties stand in a confidential relation, inadequacy of price will raise a presumption of fraud." Inadequacy of consideration may be so excessively gross and unconscionable as to amount to conclusive evidence of fraud.\textsuperscript{215}

The existence of fraud, duress or undue influence, combined with

\textsuperscript{209} 44 Cal. App. 2d 688, 112 P.2d 901 (1941).
\textsuperscript{210} \textit{Id.} at 691-92, 112 P.2d at 903.
\textsuperscript{211} \textit{Id.} at 691, 112 P.2d at 903.
\textsuperscript{212} \textit{Id.} at 693, 112 P.2d at 904.
\textsuperscript{213} \textit{See} Jacklich v. Baer, 57 Cal. App. 2d 684, 135 P.2d 179 (1943). The court refused to enforce an option clause in a contract where there was no benefit moving to the defendant because the terms were "so harsh and unjust that the court could not hold that it was [within the] contemplation of the parties\textsuperscript{214} that . . ." \textit{Id.} at 689, 135 P.2d at 181-82.
\textsuperscript{215} Herbert v. Lankershim, 9 Cal. 2d 409, 476, 71 P.2d 220, 253 (1937), \textit{quoting from} \textit{13 C.J Contracts} § 239 (1917).
an inadequacy of consideration makes the evidence of unconscionable advantage very strong. Absent evidence of other inequitable circumstances, inadequacy of consideration standing alone is not sufficient evidence of fraud to set aside a contract, unless, as stated above, the disparity is so gross as to shock the conscience of the court.

It is clear, therefore, that California courts have gone beyond the traditional cliche that inadequacy of consideration is not a relevant defense to contract formation. However, as an aid in unconscionable consumer contracts, the California cases are of little help in predicting the course to be taken. Because of the paucity of California cases setting aside contracts because of inadequacy of consideration amounting to fraud, the doctrinal basis of the cases is uncertain. While a contract containing grossly inadequate consideration will be closely scrutinized, it is not clear how great a disparity must be present to be termed grossly inadequate. The cases of other jurisdictions which have more closely analyzed the circumstances of contract formation are illustrative of the use of the unconscionability doctrine.

Since no definite quantitative standards can be suggested for a determination of inadequacy, trial courts in other jurisdictions must decide this question based on the circumstances surrounding contract formation and the numerical disparity itself. Of importance are circumstances indicating that an unfair advantage has been taken over one of the parties. A mathematical disparity alone is not sufficient to render the contract unenforceable, since a disparity is not by itself unconscionable.

Section 2-302 of the Uniform Commercial Code grants power to the court to determine that a contract is unconscionable.

---

216. 42 CALIF. L. REV. 345, 347 (1954). For example, in Smith there was evidence that the buyer had relied upon the seller's misrepresentations as to the condition of the truck. 44 Cal. App. 2d at 691, 112 P.2d at 903.


218. Professor Leff suggests that equity cases should not be a guide in analyzing unconscionability decisions. Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U. PA. L. REV. 485, 533 (1967).


220. If such were true, a mathematical formula could easily be used to determine unconscionability. Percentage formulations have been used in Civil Law codes. 67 MICH. L. REV. 1248, 1250 (1969). No such formula has been suggested under Uniform Commercial Code section 2-302.
able as a matter of law, but in examining the terms of the contract, its commercial setting, purpose, and effect are to be taken into account. The disparity must be evaluated in light of the circumstances under which the contract was consummated and of the relationship between the parties. If, in light of these factors, the disparity appears to be so gross as to indicate fraud or imposition, the contract will not be enforced.

The following factors are important to a determination that consideration is inadequate: (1) the relationship between the parties; (2) the absence of a meaningful choice; (3) lack of knowledge of the nature and terms of the contract, commercial experience; (4) the buyer's ability to protect his own interests; (5) the seller's knowledge of the buyer's lack of resources to meet obligations arising under the contract, and (6) the use of other deceptive practices.

The leading case finding inadequacy of consideration in a consumer contract is Frostifresh Corp. v Reynoso. A couple and a salesman orally negotiated a contract for the sale of a refrigerator

221. Inequality of bargaining power existing between the parties is often present. See, e.g., Kugler v. Roman, 58 N.J. 522, 279 A.2d 640 (1971).

222. In Jones v Star Credit Corp., welfare recipients sought to have a contract for the sale of a freezer rescinded because of unconscionability. They purchased the freezer for $1439.69 (including credit charges and sales tax). The retail value of the freezer was $300. The court held the contract unconscionable as a matter of law. The seller was aware of the limited financial resources of the purchaser. That plus the disparity in price "leads inevitably to the felt conclusion that knowing advantage was taken of the plaintiffs." 59 Misc. 2d 189, 192, 298 N.Y.S.2d 264, 267 (Sup. Ct. 1969); accord, Patterson v. Walker-Thomas Furniture Co., 277 A.2d 111, 9 UCC REP SERV. 27 (D.C. Ct. App. 1971). But see Morris v. Capitol Furniture & Appliance Co., 9 UCC REP SERV. 577 (D.C. Ct. App. 1971) (court rejected argument that a 100 percent markup was unconscionable), aff'd 8 UCC REP SERV. 321 (D.C. Ct. Gen. Sess. 1970) (price of $612.70 not unconscionable when cost of product was $234.45 and no evidence that consumer lacked power to shop around).


freezer. Although the conversation was entirely in Spanish, the couple was presented a contract printed in English which was neither translated nor explained to them. Before the contract was signed, the husband told the seller than he had only been working for one week and could not afford the appliance. The salesman, however, “distracted and deluded the defendants by advising them that the appliance would cost them nothing because they would be paid bonuses or commissions of $25 each on the numerous sales that would be made to their neighbors and friends.” The appliance was to cost them $1145.88, comprised of $900 cash sales price plus a $245.88 credit charge. The seller admitted the cost of the freezer was $348. The court refused to enforce the contract against the couple because the seller had attempted to gain “too hard a bargain.” The fact that the service charge almost equals the cost of the appliance is “indicative of the oppression which was practiced on these defendants.” This inadequacy, combined with the buyers’ lack of knowledge of both the commercial situation and the nature and terms of the contract rendered the contract unconscionable.

While the disparity between price and value may be so great as to warrant a finding of unconscionability per se, lesser inadequacies may be some indication that an inequality of bargaining power has allowed the seller to take some unfair advantage. The disparity

228. 52 Misc. 2d at 27, 274 N.Y.S.2d at 758.
229. Various figures have been used for the comparison: the cost of goods for the seller, Morris v. Capitol Furniture & Appliance Co., 9 UCC REP. SERV. 577 (D.C. Ct. App. 1971); State by Lefkowitz v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966); the reasonable retail or market value, Kugler v. Romam, 58 N.J. 522, 279 A.2d 640 (1971); Toker v. Westerman, 113 N.J. Super. 452, 274 A.2d 78 (Dist. Ct. 1970); Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969); “value” without specification of the derivation, American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964) (alternative holding); Toker v. Perl, 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968), aff’d on other grounds, 108 N.J. Super. 129, 260 A.2d 244 (App. Div. 1970). After a comparison of the consumer’s price and the seller’s cost plus expenses incurred in selling, a reasonable finance charge and a reasonable profit should be allowed. In Frostifresh, since the buyers kept the refrigerator, the trial court awarded the sellers a judgment for only $348 or the cost of the refrigerator to the seller plus interest. On appeal, the court opined that the plaintiff was entitled to the “net cost [of] the refrigerator-freezer, plus a reasonable profit, in addition to trucking and service charges” 54 Misc. 2d at 120, 281 N.Y.S.2d at 965 (App. T. 1967). For a further discussion on analyzing the price and profit derived by a seller in possibly unconscionable situations, see 67 Mich. L. Rev. 1248 (1969).
230. 52 Misc. 2d at 28, 274 N.Y.S.2d at 759.
231. Id. at 27, 274 N.Y.S.2d at 759.
itself may be an indication that unfair advantage was taken over the buyer, particularly when there is a gross inequality of bargaining power. In installment credit contracts, this inequality is particularly evident when the buyer is poor, uneducated or inexperienced. When this is true, the meaningfulness of choice essential to the making of a contract is negated. The requirement of good faith dealing is more pressing for merchants in transactions with persons with little experience, income or education. An exorbitant price is indicative of a material departure from this standard.

The Fourth Consideration

The Fact that the Practice May Enable Merchants to Take Advantage of the Inability of Consumers Reasonably to Protect Their Interests by Reason of Physical or Mental Infirmities, Illiteracy or Inability to Understand the Language of the Agreement, Ignorance or Lack of Education or Similar Facts

California has long recognized that mental infirmities may effectively destroy the capacity of a person to enter into a valid contract. Presently, the level of mental infirmity normally required restricts the use of this remedy by the consumer to situations where the person is severely disabled or where the merchant has knowingly taken advantage of a gross deficiency in the mental process of the consumer. Physical infirmities normally are not an independent ground for relief. However, physical condition is relevant insofar as it is evidence that a mental infirmity exists.

238. Kugler v. Romain, 58 N.J. 522, 545, 279 A.2d 640, 653 (1971). For a critical analysis of the standards evolving from the unconscionability decisions, see Murray, Unconscionability: Unconscionability, 31 U. Pitt. L. Rev. 1 (1969-70), and for responses to this article, see Braucher, The Unconscionable Contract or Term, id. at 337; Leff, Unconscionability and the Crowd—Consumers and the Common Law Tradition, id. at 349; Speidel, Unconscionability, Assent and Consumer Protection, id. at 359.
240. President of Bowdoin College v. Merritt, 75 F 480, 487 (C.C.N.D. Cal.
Total Mental Incapacity

California recognizes three distinct levels of mental incapacity, each of which can be the basis for rescission of a contract. The most severe disability is to be entirely without understanding. Such a person has "no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family." Once a person is declared incompetent by the courts, that person is incapable of making a valid contract. Even if the person later regains competence, his assent remains ineffective until he has been certified as having been "restored to reason . . . ." Alternatively, a person may seek to rescind a contract by seeking a judicial determination of his incompetence.

However, a total lack of understanding is not literally required, for hardly in any case can even the most insane persons be said to be without some degree of understanding . . . rather it is to be understood as restricted to the subject-matter to which the section relates,—which is that of contracts, executed and executory,—and hence . . . to all persons . . . entirely without the capacity of understanding or comprehending such transactions.

More than a mental infirmity must be present. Because of the infirmity, a person must be unable to comprehend business transactions in general. Ability to understand contractual rights and obligations in general, though not those of a particular transaction, is not sufficient. Such a person is not "entirely without understanding."

Inability to Comprehend the Nature of a Particular Contract

A person may not be totally incapacitated as required above, yet he may be suffering from some lesser mental weakness which effectively destroys his capacity to make a contract. The test for

243. Id. § 40 (West Supp. 1973). This incapacity to contract is not because of his incompetence, but rather because the court decree is "notice to the world of his incapacity to make a valid contract." Hellman Commercial Trust & Sav. Bank v. Alden, 206 Cal. 592, 604, 275 P. 794, 799 (1929).
247. See id. at 511, 73 P. at 248.
248. "A conveyance or other contract of a person of unsound mind, but not en-
this lesser weakness is whether the party is mentally competent to deal with the contract immediately before him with a full understanding of his rights.\textsuperscript{249} Contracts made by such persons are not void, but are voidable.\textsuperscript{250}

Again, a person must be suffering from some mental infirmity. Advanced senility\textsuperscript{251} and insanity\textsuperscript{252} are the most common infirmities recognized, but severe emotional trauma caused by sickness or worry will suffice.\textsuperscript{253} The existence of an infirmity is not a sufficient reason to rescind a contract. It must further be shown that the infirmity rendered the person incapable of understanding the "nature, purpose and effect"\textsuperscript{254} of the contract before him. A person may be able to recognize that the paper before him is a contract without fully realizing the effect it will have on him.\textsuperscript{255}

For example, in an action to set aside a conveyance of the plaintiff's ranch property, the plaintiff's guardian alleged that the plaintiff was incompetent at the time of the conveyance. Plaintiff, aged eighty-six, had had his hair singed off and had received a blow on the head in
a fire which caused his mental condition to deteriorate. He then offered to sell his property to the defendant at terms they had discussed six years earlier, although the land was now worth more than twice as much. Shortly after the conveyance, he went berserk and was confined to a state mental hospital. The diagnosis was that he was suffering from a chronic brain syndrome associated with senile brain disease, with psychotic reaction. Further tests showed that the condition had evidently been progressing for years. There was also evidence that at the time of the conveyance he was unable to recognize his friends, that he had made false accusations, had complained of headaches, was suffering from hallucinations and delusions and had become lost. Because of this evidence, the plaintiff was declared incompetent at the time of the conveyance and the contract was rescinded.

Both of these types of mental incompetence require an examination of the individual's cognitive capacity to consent. The first requires a lack of understanding of the nature and effect of contractual obligations in general. The second, lesser form of mental weakness requires only that the person be without understanding of the nature, purpose and effect of the contract presently before him. He may well understand commercial transactions in general. The contract before him, however, is outside his mental grasp. The ability of the person to understand must be analyzed relative to the nature and degree of complexity of the contract. There need be no evidence that the dominant party knowingly took advantage of the weaker party's inability to understand the nature of the bargain. As long as the cognitive capacity of the infirm party falls below the standards for mental competency, that person will be entitled to rescission of the contract.

Undue Influence

A still lesser weakness of mind may be grounds for rescission under the doctrine of undue influence. California Civil Code section 1575(2) defines undue influence as "taking an unfair advantage of another's weakness of mind . . . ." While it is clear that the

257. Id.
261. CAL. CIV. CODE § 1575(2) (West 1954).
standards of incompetence described above could be included in this definition, this doctrine is usually utilized in cases where lesser weaknesses are present.

This particular brand of undue susceptibility need not be long-lasting nor wholly incapacitating, but may be merely a lack of full vigor due to age, physical condition, emotional anguish, or a combination of such factors. This lesser weakness could perhaps be called weakness of spirit. But whatever name we give it, this first element resolves itself into a lessened capacity of the object to make a free contract. In *Odorizzi*, the required lessened capacity was indicated by the exhaustion and emotional turmoil surrounding the arrest and detention of the teacher on criminal homosexual charges.

Since the requirement of mental weakness under section 1575 (2) is for a lesser weakness than that required under the discussion of total incompetence above, a mental illness not affecting the understanding may still render consent invalid. For example, a manic-depressive psychosis is said to impair the judgment, but not the understanding, of the affected person. Since his understanding remains intact, he is not incompetent to contract. However, such a person may be motivated "to enter into ill-advised contracts and thus bring contractual competence into question." Such a weakness of mind is clearly within the scope of 1575(2).

---

262. *Odorizzi v. Bloomfield School Dist.*, 246 Cal. App. 2d 123, 131, 54 Cal. Rptr. 533, 540 (1966); *accord*, *Keithley v. Civil Serv. Bd.*, 11 Cal. App. 3d 443, 89 Cal. Rptr. 809 (1970). While the doctrine of undue influence is normally used by persons of undue weakness, undue influence actually involves an imbalance between a dominant subject and one who is servant. However, it is doubtful that a normal person whose faculties are not in some way impaired through mental disability or emotional stress would have any remedy under the doctrine of undue influence. See *Estate of Anderson*, 185 Cal. 700, 707-08, 198 P. 407, 410 (1921).


265. *Id. at* 833, 69 Cal. Rptr. at 527

266. Other inequitable circumstances are often present in many of the cases granting recovery under undue influence. Even though the mental infirmity may not be serious enough to require rescission, the existence of other factors, such as inadequate consideration or coercion, may strengthen the action. For example, age and infirm health, though not totally incapacitating, may render one less able to resist coercion exerted by the stronger party. See *Stewart v. Marvin*, 139 Cal. App. 2d 769, 775, 294 P.2d 114, 119 (1956); *Shaffer v. Security Trust & Sav. Bank*, 4 Cal. App. 2d 707, 712, 41 P.2d 948, 950 (1935). The additional factor of inadequate consideration may often be present. See, e.g., *Herbert v. Lankershim*, 9 Cal. 2d 409, 476, 71 P.2d 220, 253 (1937); *Peterson v. Ellebrecht*, 205 Cal. App. 2d 718, 720, 23 Cal. Rptr. 349, 350 (1962). The advantage may be gained through the use of fraudulent representations which the weakened party is unable to resist. See, e.g., *Estate of Ricks*, 160 Cal. 467, 481-82, 117 P. 539, 545 (1911).
Although many of the reported cases involve persons who are aged, sick or senile, these conditions alone do not establish incapacity. Although a person of advanced years, for example, has the normal capacity to contract. Sufficient evidence must be advanced to establish that a person's mind has been weakened to the extent that he now has an impaired mental capacity. The age of that person may be of importance, however. Although a person of advanced years may be capable of understanding the nature and effect of a contract, he may be lacking of sufficient vigor to resist constant harassment.

In order to gain rescission of a contract for undue influence of this type, there must have been some unfair advantage taken of the servient person. Knowledge of the weakness and an intent to gain advantage over the weakened party must be shown. The spectre of overpersuasion, the hard sell, is again present. "The hallmark of such persuasion is high pressure, a pressure which works on mental, moral, or emotional weakness to such an extent that it approaches the boundaries of coercion." The actions of the dominant party must effectively overcome the will of the servient party without convincing his judgment. For example, in Weger v. Rocha, the court rescinded a release signed by a woman who was still in the hospital recovering from her injury. She was visited by an agent of the insurance company while she was in a cast, flat on her back and in pain. After a two-hour interview, the woman signed the release in order to terminate the interview. While her infirmities were largely physical, she was found to be in a nervous and hysterical condition. The court found undue influence.

268. See Kelly v. McCarthy, 6 Cal. 2d 347, 57 P.2d 118 (1936).
273. See text accompanying notes 184-86 supra.
275. Id.
When no advantage has been taken of the mental infirmities of the servient party, or when there is no evidence that the dominant party was aware of the weakness of mind, no coercion and thus no undue influence will be found.\textsuperscript{278} Under many circumstances, an undue susceptibility will be obvious to the other party. Indeed, most of the cases involve transactions between persons with full knowledge of another’s weaknesses or predicament. However, in the normal consumer transaction, such familiarity is not present. The average merchant does not transact business with any knowledge of the customer’s weaknesses other than that conveyed by the customer’s appearance and manner. However, when the merchant is aware of the infirmity of his customer and tries to take unreasonable advantage of the customer, the doctrine of undue influence will allow the customer to rescind the contract.

\textbf{Illiteracy, Ignorance, or Other Factors}

Traditionally, the person who is unable to read a contract because of illiteracy or inability to read English has been in the same position as one who fails to read a contract.\textsuperscript{279} If a reasonable man would seek another’s aid in explaining the contractual rights and duties contained in the instrument under consideration, then an illiterate person would be negligent in not so doing. His illiteracy alone does not affect the validity of the contract.\textsuperscript{280} General ignorance and lack of education have the same effect.\textsuperscript{281}


\textsuperscript{280} In fact, it would seem that an illiterate person would automatically be put on notice that he must seek reliable help in learning the nature of the contract. Such a person may need to place a great deal of reliance on the aid of others. To the extent his mability to protect his own interests becomes greater, he becomes increasingly at the mercy of unscrupulous sellers. His ignorance or lack of education may therefore affect the issue of the reasonableness of his reliance on the fraudulent misrepresentations of others. See C.I.T. Corp. v. Panac, 25 Cal. 2d 547, 154 P.2d 710 (1944); Cortez v. Weymouth, 235 Cal. App. 2d 140, 45 Cal. Rptr. 63 (1965); Gardner v. Rubin, 149 Cal. App. 2d 368, 308 P.2d 892 (1957). Furthermore, the illiterate person stands in a position no different from that of a normal man unable to comprehend the effect of a complex agreement.

\textsuperscript{281} “Illiteracy is largely a matter of degree and must be considered in the light of the subject matter to be read or understood.” C.I.T. Corp. v. Panac, 25 Cal. 2d 547, 558, 154 P.2d 710, 717 (1944).

An early case granted recovery to a bank depositor who was unable to read a limitation on a stop payment order he signed. However, the illiteracy was not the decisive factor. Such a limitation was held to be against public policy. Hiroshima v. Bank of Italy, 78 Cal. App. 362, 372-74, 248 P. 947, 951-52 (1926); accord, Grisinger v. Golden State Bank, 92 Cal. App. 443, 268 P. 425 (1928). Illiteracy in combination
Increasingly, however, these factors are taking on an important role in contract formation. For this reason, persons unable to read or understand the terms of contracts because of these factors must be distinguished from others who merely fail to read a contract.\textsuperscript{282} Lack of education, ignorance, inability to understand a contract because of illiteracy or language barriers all indicate an inequality of bargaining position.\textsuperscript{283}

Persons with limitations such as these are often the easy prey of unscrupulous merchants. This has become increasingly true as the use and availability of consumer credit has become widespread, and as the possession of consumer goods has become a symbol of success.\textsuperscript{284} The lack of equality of bargaining power evidenced by an inability to comprehend the terms of a contract is of great weight in determining the unconscionability of a consumer contract.\textsuperscript{285}

For example, in *Jefferson Credit Co. v. Marcano*,\textsuperscript{286} the assignee of an installment credit contract for an automobile brought an action to recover the unpaid balance. The defendant had only a sketchy knowledge of the English language, and did not understand the contractual clauses which "waived both the warranty of merchantability and the warranty of fitness for the purpose for which the motor vehicle was purchased . . . ."\textsuperscript{287} His defense was that the automobile was in a defective condition and that the waiver should be found unconscionable. The New York court utilized section 2-302 to find the contract unconscionable because of the lack of equality between the bargaining parties, the defendants, unknowing and unwitting waiver of the warranties and the defective condition of the automobile.\textsuperscript{288}

\footnotesize

with other inequitable factors may be sufficient for relief. \textit{See} Estate of Ginsberg, 11 Cal. App. 2d 210, 53 P.2d 397 (1936).

282. Failure to read the terms of a contract is still not a sufficient basis for rescission. Fedenco \textit{v.} Frick, 3 Cal. App. 3d 872, 875, 84 Cal. Rptr. 74, 75 (1970). \textit{See text accompanying note 20 supra.}


286. \textit{Id.}

287. \textit{Id.} at 142, 302 N.Y.S.2d at 394.

288. \textit{Id.} at 142, 302 N.Y.S.2d at 394-95.
The Fifth Consideration

The Degree to which Terms of the Transaction Require Consumers to Waive Legal Rights

Because of the consumer's lack of bargaining power, transactions in which he waives a legal right raise questions of his knowledge of those rights, of his knowing consent to the waiver, and of his free choice to enter such a contract. When such a waiver has occurred, the consumer has a number of common law remedies, regardless of his lack of bargaining power. Further, he may use the adhesion contract doctrine to protect himself where he lacked knowledge of the existence of a provision in a standardized contract. Increasingly, the California consumer may rely on statutory protections against his bargaining away legal rights. The last group of protections are effective as long as the consumer is within the statutory class, regardless of his bargaining power or knowledge of the waiver. Jurisdictions operating under section 2-302 have used the doctrine of unconscionability to allow the consumer to avoid the effect of a waiver of some legal right. However, as will be seen, many of the factual situations would be decided on another statutory basis in California.

Waiver of Jurisdiction of a Court for Future Actions

Attempts by sellers to enforce contracts in distant forums may result in great hardships to most consumers. In a number of cases involving Paragon Homes, Inc., a New York court refused to assert jurisdiction over nonresident consumers. The defendants, residents of Massachusetts, signed a contract with a Massachusetts corporation. The contract contained a clause providing that "[t]his agreement shall be deemed to have been made in Nassau County, New York, and the parties hereby submit to the jurisdiction of the Supreme Court, Nassau County, New York, for the purpose of adjudication of all their respective rights and liabilities hereunder." The court emphasized that the contract was executed and breached in Massachusetts, and that New York was "unsuitable to the accommodations of the parties and the subject of the litigation."

Further, the parties were not contracting on an equal basis, as evidenced by the commercial nature of the plaintiff's activities on the one hand and the purchase of goods for nonbusiness use on the other.

291. Id. at 17-18.
292. Id. at 18.
The use of such a provision in a printed form contract was "for the purpose of harassing and embarrassing the defendants in the prosecution or defense of any action arising thereunder." The court deemed it "grossly unfair and unconscionable."

California courts have long provided that parties may not divest a court of its jurisdiction over future causes of action through private contract. Contracts which stipulate that the courts of State X or County Y shall be used to settle any future disputes arising under the contract are of no effect in gaining dismissal of a suit on the contract brought in another, but appropriate, jurisdiction. Such clauses are thought to be against public policy on the ground that contracts should not be used to "oust courts other than those specified of the jurisdiction which would otherwise be theirs."

There is a growing body of authority outside California advocating that such stipulations should be enforceable as long as the choice of forum is reasonable. However, even this trend toward greater liberality in allowing parties to choose a forum voluntarily in advance of litigation recognizes that if no equality of bargaining power is present, adhesion contract doctrine requires that such clauses be stricken.

California Civil Code section 1804.1 (the Unruh Act) provides additional protection for the consumer in a retail installment sale. No such contract may authorize the seller to bring suit in any county other than "the county in which the contract was in fact signed by the buyer, the county in which the buyer resides at the commencement of the action, the county in which the buyer resided at the time that the contract was entered into, or in the county in which the goods purchased pursuant to such contract have been so

293. Id. at 19.
affixed to real property as to become a part of such real property"  

Confessions of Judgment  

Cognovit notes that permit the appearance of an attorney for the purpose of waiver of service of process and confession of judgment are specifically authorized by statute in California. The use of such instruments, however, has not been favored by California courts. Strict compliance with the procedural aspects of the authorizing statutes is required. For example, in *Barnes v Hilton*, a judgment debtor moved to vacate a judgment entered after default on a note. The debtor had executed promissory notes containing an authorization for any attorney of any court of record to enter an appearance and confess judgment. Later, an attorney confessed judgment and submitted a "verified statement of facts." The court set aside the judgment on the ground that the statute required that the statement be signed and verified by the debtor. The statute, in effect, prevents the use of a clause which allows any attorney to prepare and verify the statement of facts out of which the action arose and to confess judgment. Further limitations are placed on cognovit judgments when used in specific classes of contracts. Clauses which confess judgment

---


302. *Cal. Code Civ. Proc.* §§ 1132-34 (West 1972). "A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:
1) It must authorize the entry of judgment for a specified sum;
2) If it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due " *Id.* § 1133.


306. *Id., see Cal. Code Civ. Proc.* § 1133(2) (West 1955). "The object of the statute in requiring this statement is to put the creditors on the track of inquiry, and to enable them to discover the fraud, if any; and to discourage perjury by requiring a definite and particular account of the transaction " *Cordier v. Schloss*, 18 Cal. 576, 581 (1861).

may be void if included in retail installment sales contracts,\textsuperscript{308} conditional sales contracts for automobiles\textsuperscript{309} and loan agreements for less than $1000.\textsuperscript{310} While these statutory provisions protect the consumer in most of the transactions he normally enters, further protection for the consumer may be available through the adhesion contract doctrine. While no California case has voided a cognovit clause contained in an adhesion contract, the potential for overreaching by a superior bargaining power is evident in the use of such a clause.\textsuperscript{311}

While two recent United States Supreme Court rulings upheld the use of cognovit notes against challenges to their constitutionality on due process grounds, both decisions emphasized that if the contracts had been adhesive, a different result might have been reached.\textsuperscript{312}

Waivers of Defenses

The assignment of consumer paper following a transaction between a consumer and a merchant has become a prevalent part of consumer credit schemes. In order to facilitate this arrangement and in order to protect the assignee, the installment contract may contain a clause waiving defenses against an assignee.\textsuperscript{313} The result of such a clause is that the consumer will be forced to continue payment even though the seller has defaulted.

\textsuperscript{308} CAL. CIV. CODE § 1804.1(c) (West 1973).
\textsuperscript{309} Id. § 2983.7(b) (West Supp. 1973).
\textsuperscript{310} CAL. FIN. CODE § 24468 (West 1968). See also id. § 22467 (loans less than $5000 given by personal property broker); id. § 18673 (loans made by industrial loan company).
\textsuperscript{312} Swarb v. Lennox, 405 U.S. 191, 201 (1972); D.H. Overmeyer Co. v. Frick Co., 405 U.S. 174, 188 (1972); see, Note, The Demise of Summary Prejudgment Remedies in California, 23 HASTINGS L.J. 489 (1972). In Blair v Pitchess, the California Supreme Court held that constitutional protections against unreasonable searches and seizures could not be waived by consent obtained by a contract of adhesion. Thus, clauses contained in a contract of adhesion which permit the seller to enter the buyer's premises and repossess the chattel upon default would not be valid. 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).
\textsuperscript{313} The problem may arise in two respects. First, the buyer may sign a negotiable instrument which the seller negotiates to a holder in due course or one asserting that status. Second, the buyer may sign a contract containing a waiver of defense clause. In either case, the buyer may be precluded from asserting certain defenses against the assignee. See Jordan & Warren, The Uniform Consumer Credit Code, 68 COLUM. L. REV. 387, 433-38 (1968); Knapke, Consumer Credit Regulation: A Consumer-Oriented Viewpoint, 68 COLUM. L. REV. 445, 469-73 (1968); Murphy, Another "Assault upon the Citadel": Limiting the Use of Negotiable Notes and Waiver-of-Defense Clauses in Consumer Sales, 29 OHIO ST. L.J. 667 (1968); Note, Consumer Financing, Negotiable Instruments, and the Uniform Commercial Code: A Solution to the Judicial Dilemma, 55 CORNELL L. REV. 611 (1970).
For example, the facts of *Unico v Owen*\(^{314}\) are typical of the position of the consumer vis-à-vis a defaulting seller. The couple thought they were purchasing 140 stereo albums to be sent in installments over five years and that they would receive a stereo record player without separate charge from Universal Stereo Corporation. In return, they were to make a down payment and thirty-six monthly installments. Universal immediately assigned the contract to Unico. Universal sent the record player and twelve albums and then became insolvent and made no further deliveries. When the consumer ceased payments, Unico brought suit to recover the balance due on the note. When the consumer pleaded the defense of failure of consideration, Unico asserted its freedom from the defense because of its status as a holder in due course and also invoked a clause from the installment contract which stated:

> Buyer hereby acknowledges notice that this contract may be assigned and agrees that the liability of the Buyer to any assignee shall be immediate and absolute and not affected by any default whatsoever of the Seller. Buyer further agrees not to set up any claim against such Seller as a defense, counterclaim or offset to any action by any assignee for the unpaid balance of the purchase price.\(^{315}\)

The California approach to the waiver of defense clauses\(^{316}\) begins with an examination of California Commercial Code section 9206 which provides in part:

1. Subject to any statute which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the division on commercial paper (Division 3).\(^{317}\)

The provisions of the Unruh Act,\(^{318}\) pertaining to retail installment sales, and the Automobile Sales Finance Act\(^{319}\) establish a different rule for buyers of consumer goods in the most common types of transaction.\(^{320}\) The Unruh Act provides:

> No contract or obligation shall contain any provision by which [t]he buyer agrees not to assert against a seller a claim or

---

315. Id. at 123, 232 A.2d at 417
317 CAL. COMM. CODE § 9206 (West 1964).
319. Id. § 2981 et seq. (West Supp. 1973).
320. See Vasquez v. Superior Court, 4 Cal. 3d 800, 823, 484 P.2d 964, 979, 94 THE HASTINGS LAW JOURNAL [Vol. 25
defense arising out of the sale or agrees not to assert against an assignee such a claim or defense other than as provided in [Civil Code] Section 1804.2.321

Section 1804.2 provides:

An assignee of the seller's rights is subject to all equities and defenses of the buyer against the seller arising out of the sale and existing in favor of the buyer at the time of the assignment, notwithstanding an agreement to the contrary, but the assignee's liability may not exceed the amount of the debt owing to the assignee at the time that notice of equities and defenses is given to the assignee.322

The Automobile Sales Finance Act contains provisions of similar import.323 The effect of these acts is to protect the consumer against contracts containing clauses waiving certain defenses against an assignee. Such a clause in an installment sales contract covered by the Unruh Act would be unenforceable.324

However, there are situations affecting consumers not covered by the provisions of either of these acts. For example, contracts for construction or sale of residential or commercial property are exempted.325 Section 1802.2 exempts certain services from the coverage of the act.326 Further, the language of section 1804.2 does not apply to the fact situation presented in the Unico case. The seller in Unico was in default only when the second installment was not received. By this time the note was already assigned to Unico. Thus, the consumer's defense of failure of consideration did not exist in favor of the buyer at the time of the assignment.327

Cal. Rptr. 796, 811 (1971).
322. Id. § 1804.2 (West 1973). Id. § 1812.7 provides: "In case of failure by any person to comply with the provisions of this chapter, such person or any person who acquires a contract or installment account with knowledge of such noncompliance is barred from recovery of any finance charge . . . imposed in connection with such contract or installment account and the buyer shall have the right to recover from such person an amount equal to any of such charges paid by the buyer (emphasis added)."
323. Id. §§ 2983.5, 2983.7 (West Supp. 1973).
324. Id. § 1804.4 (West 1973).
326. "'Services' means work, labor and services, for other than a commercial or business use . . . but does not include the services of physicians or dentists, nor services for which the tariffs, rates, charges, costs or expenses, including in each instance the deferred payment price, are required by law to be filed with and approved by the federal government . . ." CAL. CIV. CODE § 1802.2 (West 1973).
327. The most common defenses that consumers attempt to raise against an assignee are fraud in the execution of the instrument, fraud in the inducement, failure of consideration and unsatisfactory performance by the seller. Littlefield, Good Faith
As a result, the consumer must prove that the assignee did not take the assignment for value, in good faith and without notice of a claim or defense, and therefore was not a holder in due course.\textsuperscript{328} California has long denied status as holder in due course to a financier because of his "close connection" to the seller. For example, in \textit{Commercial Credit Corp. v Orange County Machine Works},\textsuperscript{329} the court denied due course status to a finance company that advanced money to the seller with the understanding that the instruments derived from the sale would be immediately assigned to it. In addition, it supplied the forms to the seller and actively participated in the transaction from its inception. The finance company was so closely connected to the transaction that it was "a moving force in the transaction from its very inception and acted as a party to it."\textsuperscript{330} Holder in due course status was therefore denied.


\textsuperscript{328} A holder in due course is defined by California Commercial Code section 3302 (West 1964) as:

"[A] holder who takes the instrument
(a) For value; and
(b) In good faith; and
(c) Without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person."

For a fuller discussion of the good faith test as it has been used in consumer cases, see Littlefield, \textit{Good Faith Purchase of Consumer Paper: The Failure of the Subjective Test}, 39 S. Cal. L. Rev. 48 (1966) and the articles cited note 313 supra.

The rights of a holder in due course are provided in California Commercial Code section 3305 (West 1964). A holder in due course takes the instrument free from "(2) All defense of any party to the instrument with whom the holder has not dealt except
(a) Infancy . , and
(b) Such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and
(c) Such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and
(d) Discharge in insolvency proceedings; and
(e) Any other discharge of which the holder has notice when he takes the instrument." \textit{Id.}

A comment to Uniform Commercial Code section 3-305 provides that "[i]n determining what is a reasonable opportunity [under (c) above] all relevant factors are to be taken into account, including the age and sex of the party, his intelligence, education and business experience; his ability to read or to understand English, the representations made to him and his reason to rely on them or to have confidence in the person making them; the presence or absence of any third person who might read or explain the instrument to him, or any other possibility of obtaining independent information; and the apparent necessity, or lack of it, for acting without delay." \textit{Uniform Commercial Code} § 3-305, Comment 7

\textsuperscript{329} 34 Cal. 2d 766, 214 P.2d 819 (1950).

\textsuperscript{330} \textit{Id.} at 771, 214 P.2d at 822; \textit{accord}, Morgan v. Reasor Corp., 69 Cal. 2d
Commercial Credit focused on the actual knowledge of the practices used by the seller as an indication that the financier was so involved that he should be denied due course status. In *Morgan v. Reasor Corp.*, this standard of knowledge was greatly revised so that if a "holder possesses knowledge of facts sufficient to put a reasonable man on inquiry," his protected status will not insulate him from defenses arising out of violations of the Unruh Act. In so doing the court recognized that a liberal interpretation of the knowledge requirement may aid in forcing sellers to comply with the provisions of the Unruh Act and may motivate financiers to police the consumer credit market more effectively.

In *Unico*, the New Jersey court found that there was such a
close connection between Unico and Universal that Unico could not be considered a holder in due course. Unico was created expressly to purchase the commercial paper generated by Universal’s sales, and took an active role in the affairs of Universal. It had the power to place a representative on Universal’s premises, to inspect its records at any time, and to set standards for the transactions between Universal and any customer. It also agreed to take a substantial part of the commercial paper generated by Universal. In short, “Unico not only had a thorough knowledge of the nature and method of operation of Universal’s business, but also exercised extensive control over it.”

The court in Unico went on to express a reluctance to enforce the waiver of defense clause because of the unconscionable nature of the transaction. The court recognized that there is almost always a substantial differential in bargaining power between the seller and his financier, on the one side, and the householder on the other because generally there is a substantial inequality of economic resources between them, and of course, that balance in the great mass of cases favors the seller and gives him and his financier the power to shape the exchange to their advantage.

Contracts made under such circumstances are generally “so fraught with opportunities for misuse that purchasers must be protected against oppressive and unconscionable clauses.” Sections 9-206 and 2-302 of the Uniform Commercial Code when read together evidence an intention to leave in the hands of the courts the continued application of common law principles in deciding in consumer goods

336. Id. at 115, 232 A.2d at 413. Insofar as this is true, the philosophy underlying due course protection is defeated. “[T]he more the holder knows about the underlying transaction, and particularly the more he controls or participates or becomes involved in it, the less he fits the role of a good faith purchaser for value the less need there is for giving him the tension-free rights considered necessary in a fast-moving, credit-extending commercial world.” Id. at 109-10, 232 A.2d at 410. For other cases concerning holders in due course in consumer contracts, see United States Fin. Co. v. Jones, 285 Ala. 105, 229 So. 2d 495 (1969); Commercial Credit Co. v. Childs, 199 Ark. 1073, 137 S.W.2d 260 (1940); Financial Credit Corp. v. Williams, 246 Md. 575, 229 A.2d 712 (1967); Universal C.I.T. Credit Corp. v. Ingel 347 Mass. 119, 196 N.E.2d 847 (1964); International Fin. Corp. v. Rieger, 272 Minn. 192, 137 N.W.2d 172 (1965); Westfield Inv. Co. v. Fellers, 74 N.J. Super. 575, 181 A.2d 809 (1962); Burchett v. Allied Concord Fin. Corp., 74 N.M. 575, 396 P.2d 186 (1964); Norman v. World Wide Distrib., Inc., 202 Pa. Super. 53, 195 A.2d 115 (1963).
338. Id. at 125, 232 A.2d at 418.
cases whether such waiver clauses as the one imposed on Owen . . . are so one-sided as to be contrary to public policy.\textsuperscript{339}

The court in \textit{Unico} thus established that Unico was to be denied the status of holder in due course because of the close connection with the seller and that the waiver of defenses clause would not be enforced because it was unconscionable.\textsuperscript{340}

\textbf{The Sixth Criterion}

\textit{The Degree to which Terms of the Transaction Require Consumers to Jeopardize Money or Property beyond the Money or Property Immediately at Issue in the Transaction}

Because of the credit standing of a particular consumer, a merchant may require a consumer to place title to goods previously purchased in the hands of the merchant in order to secure payment for subsequent purchases. In this way the possibility for abuse by an unscrupulous merchant may arise. The merchant may be able to maintain his superior position not only because of the inequality of bargaining power, but also because of the leverage arising from the nature and excess value of the goods securing the purchases. Thus, the merchant is able to overprotect his interests to the possible detriment of the consumer.\textsuperscript{341}

United States Court of Appeals for the District of Columbia case, \textit{Williams v. Walker-Thomas Furniture Co.},\textsuperscript{342} presents an example of a situation clearly within the scope of the sixth criterion. The consumers had purchased furniture and other household items

\textsuperscript{339} \textit{Id.}

\textsuperscript{340} The Uniform Consumer Credit Code attempts to do away with negotiability and problems relating to holder in due course status by providing that: "In a credit sale or consumer lease, other than a sale or lease primarily for an agricultural purpose, the seller or lessor may not take a negotiable instrument other than a check as evidence of the obligation of the buyer or lessee. A holder is not in good faith if he takes a negotiable instrument with notice that it is issued in violation of this section." \textit{Uniform Consumer Credit Code} § 2.403.

The comment to this section adds the caveat to financiers that the prohibition against taking a negotiable instrument "will be well known in the financial community after enactment of this Act [and] professional financiers buying consumer paper will normally not qualify as holders in due course with respect to instruments taken by dealers in violation of this section and negotiated to them." \textit{Id.}, Comment.

\textsuperscript{341} The type and amount of security and the ease of obtaining credit depends on the merchant's assessment of the type of risk area in which he is operating. Merchants operating in high risk areas operate much differently than those in low risk areas. A buyer in a high risk area must expect to compensate the seller for the increased risk. For an empirical study of merchants operating in high risk areas, see Project, \textit{Resort to the Legal Process in Collecting Debts from High Risk Credit Buyers in Los Angeles—Alternative Methods for Allocating Present Costs}, 14 U.C.L.A.L. Rev. 879 (1967).

\textsuperscript{342} 350 F.2d 445 (D.C. Cir. 1965).
on credit from the sellers over a period of years. Before payment for the initial purchases was completed, the consumers purchased other items and signed a printed form contract which provided that title for all the goods, whenever purchased, would remain in Walker-Thomas until payments for all the items were completed. In the event of any default, Walker-Thomas could repossess any item whenever purchased. The contract further provided that the amount of each payment was to be credited pro rata to all outstanding accounts. In this way, all items were to be paid off at once. The title to each item, whenever purchased and regardless of the amount due at the time of any subsequent purchase, would remain in the seller with an outstanding balance owing for that item until all amounts were paid. “As a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of the previous dealings.”

One of the consumers, appellant Williams, had reduced the balance owing for previous purchases to $164. She then purchased a stereo for $514. Her total purchases over a five year period totaled $1800. At the time of her purchases, the furniture store was fully aware of her financial condition. the contract listed the name of her social worker and that she received only $218 monthly in welfare payments. With this amount she was to provide for herself and her seven children, as well as make the payments to Walker-Thomas.

When Williams defaulted, Walker-Thomas sought to replevy all the items for which she had not yet fully paid. The District of Columbia Court of Appeals rejected her contention that the contracts were unconscionable. Although the court acknowledged that the seller had “full knowledge” of the consumer’s financial straits and that the company’s conduct raised “serious questions of sharp dealing and irresponsible business dealings,” the court felt that there was no ground upon which they could declare the contract contrary to public policy. The circuit court disagreed, holding that the court as a matter of common law had the power to declare a contract unconscionable. Although Congress had enacted section 2-302 for the District of Columbia, the contracts under dispute had been signed prior to its enactment. The court reasoned that the enactment of this section did not indicate that the common law “was otherwise at the time of enactment

343. Id. at 447
344. Id. at 448.
345. Id.
346. Id. at 448-49.
The court stated the requisite elements of unconscionability to be "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction."\(^{347}\) However, because the trial and appellate courts failed to make findings on the possible unconscionability of these transactions, the circuit court remanded the cases for further proceedings.\(^{348}\)

No case presenting a situation similar to Williams has been decided in California. Protection is provided purchasers in this state against the "balance due" provision in a contract via statutory limitations on the use of goods purchased under previous contracts as security for goods purchased subsequently.\(^{349}\) In the Williams situation, the provisions of the Unruh Act would have required that payments made after the last purchases be allocated to the outstanding balance for the previously purchased items in the "ratio as the original cash sale prices of the various purchases bear to one another . . . ."\(^{350}\) Thus, appellant Williams, who had purchased $1800 worth of items over five years on which she had made payments totaling $1400, would have been subject only to the replevy of the stereo. The $1400 would have been applied to extinguish the security interest of Walker-Thomas in the previous purchases.

The Seventh Consideration

*The Degree to which the Natural Effect of the Practice Is to Cause or Aid in Causing Consumers to Misunderstand the True Nature of the Transaction or Their Rights and Duties Thereunder*

Practices which tend to cause a consumer to misunderstand his rights or duties under a contract he signs may not be the result of intentional acts by the merchant. The consumer may, however, be

\(^{347}\) Id. at 449.

\(^{348}\) Id. at 450.

\(^{349}\) Article 8 of the Unruh Act, California Civil Code sections 1808.1-1808.6 (West 1973), provides protection for consumers faced with clauses in contracts requiring add-on sales. Section 1808.1 allows goods purchased under previous contracts to be security for subsequent purchases, but only until the item originally purchased is fully paid. Sections 1808.2 and 1808.3 provide for the allocation of total payments among the outstanding balances on goods purchased at various times.

\(^{350}\) CAL. CIV. CODE § 1808.2 (West 1973). As an alternative the section continues "where the amount of each installment payment is increased in connection with the subsequent purchase, the subsequent payments (at the seller's election) may be deemed to be allocated as follows: an amount equal to the original payment to the previous deferred payment price, and an amount equal to the increase, to the subsequent deferred payment price."
so unfamiliar with the language and methods normally used by merchants that he might misunderstand the nature of an instrument even without intentional misrepresentation by the merchant.\textsuperscript{351} The technical language used in a contract may be impossible for the layman to read or understand.\textsuperscript{352} Furthermore, the consumer may be encouraged not to read the contract because of the representations of the merchant, because of the fine print, or because a first glance at the contract may have disclosed language he did not understand.\textsuperscript{353} Criterion seven seeks to incorporate evidence of the practices which may cause the consumer to misunderstand the contract even though the merchant did not intend to deceive the consumer.

This is not to say that any consumer who misunderstands a contract can seek its rescission because of unconscionability. The use of the words "natural effect" invokes a standard not unlike the term "reasonable expectations" often employed in construing ambiguities to protect the insured in an insurance policy.\textsuperscript{354} While many practices may be deceptive and unconscionable per se, it should be expected that the unconscionability of some practices depends on the facts and circumstances involved in each case. The standard does, however, incorporate the notion that deceptive practices cannot be tolerated under the guise of freedom of contract. Even unintentional practices which cause a consumer to misunderstand the nature of the contract will be evidence, though not necessarily conclusive evidence, of the unconscionable nature of the seller's practices. The notion of caveat emptor has long since given way to some recognition of a duty on the behalf of the seller to disclose to the consumer those facts known to the seller that may reasonably be necessary for the consumer to make an informed decision.\textsuperscript{355} The failure of the seller

\textsuperscript{351} The inequality of bargaining power between a merchant and a consumer has been discussed in the text accompanying notes 52-64 supra.


\textsuperscript{355} In State by Lefkowitz v. ITM, Inc., 52 Misc. 2d 39, 54, 275 N.Y.S.2d 303, 321-22 (Sup. Ct. 1966), the court stated: "We have reached the point where 'Let the buyer beware' is a poor business philosophy for a social order allegedly based upon man's respect for his fellow man. Let the seller beware, too! A free enterprise system not founded upon personal morality will ultimately lose freedom. We also believe that it is right, proper, just and equitable to tell the consumer, clearly and adequately, that he is entering into a contract and that he is personally liable for the entire contract price and that he will be required to make stipulated monthly payments, plus carrying charges, etc., in language that the least educated person can understand. And if he chooses not to do so, but instead lures an innocent person into a predicament where a heavy obligation is incurred due to the fraudulent means exercised by the rep-
to do so, especially considering the disparity in bargaining power, may be some evidence that an unconscionable advantage has been taken of the consumer.\textsuperscript{356} The standard created by criterion seven prohibits unfair and deceptive business practices. In this way, criterion seven complements the list of "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer . . ." which are proscribed by the Consumers Legal Remedies Act.\textsuperscript{358} This act allows injunctive relief and any other relief which the court deems proper without a showing that the deceptive acts were intentionally employed.\textsuperscript{359}

Criterion seven should not be limited to these specifically proscribed practices. Instead, it should be regarded as a standard against which any possibly deceptive acts can be judged. For example, the failure to acquaint a consumer with an important fact would not be

\begin{itemize}
  \item \textsuperscript{356} See Kugler v. Romani, 58 N.J. 522, 279 A.2d 640 (1971).
  \item \textsuperscript{357} Cal. Civ. Code § 1770 (West 1973).
  \item \textsuperscript{358} Id. §§ 1750-84 (West 1973).
  \item \textsuperscript{359} The intentional use of a deceptive practice need only be shown if damages are sought. See id. § 1784 (West 1973). Certain portions of this act bear a close resemblance to the 1966 version of the Uniform Deceptive Trade Practices Act. The Uniform Act contains a similar, but shorter, list of proscribed deceptive practices. However, the language of certain of the sections is significantly different. For example, the California act prescribes "Misrepresenting the source, sponsorship, approval, or certification of goods or services." Cal. Civ. Code § 1770(b) (West 1973). The Uniform Act, however, is somewhat broader, including any person who "causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services . . ." Uniform Deceptive Trade Practices Act § 2(a)(2).
  \item The Uniform Act also contains a broad provision intended to permit the courts to develop additional proscribed deceptive practices. Any person who "engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding." Id. § 2(a)(12). The Commissioners' Prefatory Note indicates that the act was based to a large extent on California Civil Code section 3369 (West Supp. 1973), which provides in part: "2. Any person performing or proposing to perform an act of unfair competition within this state may be enjoined in any court of competent jurisdiction. 3. As used in this section, unfair competition shall mean and include unlawful or fraudulent business practice and unfair, deceptive, untrue or misleading advertising . . " The test of what constitutes "unfair competition" or "unfair or fraudulent business practice" is whether the public is likely to be deceived. People v. National Research Co., 201 Cal. App. 2d 765, 772, 20 Cal. Rptr. 516, 521 (1962); accord, Family Record Plan, Inc. v. Mitchell, 172 Cal. App. 2d 235, 342 P.2d 10 (1959). The Uniform Consumer Sales Practices Act also defines and proscribes deceptive sales practices and provides that an unconscionable practice is a violation of the act for which all the remedies provided by the act are available. Uniform Consumer Sales Practices Act §§ 3-4.
\end{itemize}
a representation specifically proscribed by the Consumers Legal Remedies Act unless some misrepresentation of the effect or nature of that fact had been made, yet such an omission may substantially affect the rights and duties of the buyer.

Although fraud and unconscionability are often intertwined, the requirements of fraud need not be met for a deceptive practice to be evidence of unconscionability. If any one of the requirements of fraud has not been satisfied, the deceptive practice is not actionably fraudulent. Such a practice may, nonetheless, cause a distortion in the risks properly allocable between the parties. If, in the opinion of the court, the consumer should be able to transact business free from such deceptive practices, the transaction may be found to be unconscionable.

The Eighth Enumerated Factor in Section 5108

The Extent or Degree to which the Writing Purporting to Evidence the Obligation of the Consumer in the Transaction Contains Terms or Provisions or Authorizes Practices Prohibited by Law

While many of the factors indicating unconscionability necessarily await further interpretation of their precise meaning by the courts in specific factual disputes, the eighth factor requires little interpretation in deciding those circumstances under which it arises. The proliferation of consumer-oriented legislation in recent years has resulted in drastic changes in the drafting of documents for consumer transactions. Certain terms or provisions in a contract which unfairly impose risks or burdens on the weaker party to the transaction are proscribed. Similarly, many of the practices used by unscrupulous merchants in inducing a consumer to enter a transaction are prohibited. Further such tactics may result in criminal as well as civil liabilities.

360. For example, in State by Lejkowitz v ITM, Inc., the seller's activities were found to be fraudulent as well as unconscionable. 52 Misc. 2d 39, 53, 275 N.Y.S.2d 303, 321 (Sup. Ct. 1966).

362. See, e.g., id. § 1804.1.
363. See, e.g., id. § 1770.
364. "Any person who shall willfully violate any provision of this chapter shall be guilty of a misdemeanor." Id. § 1812.6 (emphasis added).

In People v George, the defendants were convicted of conspiracy to cheat and defraud consumers by obtaining signatures on a retail installment contract which provided for a payment of 25 percent of the contract price if the buyer exercised his right to rescind. This was contrary to California Civil Code section 1804.1(h) (West 1973). 257 Cal. App. 2d 805, 65 Cal. Rptr. 368 (1968).

Currently the Unruh Act provides that "[a]ny provision in a contract which is prohibited by this chapter shall be void but shall not otherwise affect the validity of the contract."$^{366}$ While this provision will protect the consumer against the effect of a specific harsh term, the consumer will be unable to rescind the entire contract,$^{367}$ which, even without the illegal term, may not be a fair allocation of the rights and obligations between unequal bargaining parties. The other terms of the contract, though not specifically prohibited, may exact too high a price from the consumer. The prohibited term, rather than merely an attempt to gain some singular advantage, may well be indicative of overreaching on the part of the merchant.

The eighth factor goes beyond the Unruh Act, not in that it renders unconscionable any contract containing a term or authorizing a practice prohibited by some other law, but rather because it emphasizes that such a term may evidence an imbalance in the transaction as a whole. Standing alone, the existence of a prohibited term may not be sufficient to void a contract, but when taken in combination with other evidence of unfair advantage, the contract may be unconscionable.

Conclusion

The nine factors of section 5108 present a useful framework for analyzing possibly unconscionable consumer transactions. Since many of these factors have long been considered relevant in evaluating the fairness of contractual obligations, prior decisions will aid in implementing section 5108. Further, determinations by courts of other jurisdictions presently operating under Uniform Commercial Code 2-302 give some indication of the use of and the limits to be

$^{366}$ Id. § 1804.4. However, in automobile sales financing, failure to comply with the precise requirements for a written conditional sales contract in accordance with California Civil Code section 2982 (West Supp. 1973) is grounds for rescission of the entire contract. Id. § 2983. For example, in Zmak v. Arata Pontiac, 265 Cal. App. 2d 689, 71 Cal. Rptr. 506 (1968), the seller of an automobile offered the buyer $1161 as a trade-in allowance for a new car. The buyers signed the contract for sale in blank. Later, the seller completed the forms and allowed only $200 for the used car. The seller never furnished the buyers with a completed copy of the agreement. He then assigned the agreement. The seller violated section 2982 in not stating the true trade-in value, in inducing the buyers to sign in blank, and in not delivering a copy of the form at the time of the transaction. The court allowed rescission.

$^{367}$ However, in American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964), the court refused to enforce a contract against a breaching consumer because the seller had failed to comply with the credit disclosure laws of New Hampshire. This rendered the contract "void so as to prevent the [seller] from recovering for its breach." Id. at 438, 201 A.2d at 888. Also, in an alternate holding, the court refused to enforce the contract because of the unconscionable price imposed on the buyer. Id.
imposed on the doctrine of unconscionability. While the doctrine of unconscionability has been attacked as a vague, new concept, the use of the specific factors of section 5108 in analyzing consumer transactions will promote clarity, which is often lacking in decisions finding unconscionable conduct.

Mark W Westra*

* Member, Third Year Class.