Unconscionability Redefined: California Imposes New Duties on Commercial Parties Using Form Contracts

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Standardized form contracts are the inevitable result of mass production and mass distribution of goods.\(^1\) Form contracts are beneficial because they can be tailored to fit a particular line of business. Moreover, they eliminate the costs involved in negotiating individual contracts by incorporating accumulated experience and avoiding or reducing legal risks.\(^2\) Unfortunately, when form contracts reduce the legal risks of one party they inevitably increase the legal risks of another party. The drafters of such contracts frequently seek to allocate most of the business risks to the non-drafting party,\(^3\) often by means of complex, legalistic language that is hidden in fine print.\(^4\) As a result of "over-drafting" by attorneys, the courts have had to develop a variety of theories under which they can refuse to enforce those terms that would lead to harsh results.\(^5\)

The broadest of these theories is unconscionability. By using this theory a court can refuse to enforce an entire contract or any clause thereof if the court finds that it operates in too harsh or one-sided a manner.\(^6\) Relying on this theory, the California Court of Appeal in \textit{A \& M Produce Co. v. FMC Corporation}\(^7\) refused to enforce a disclaimer of warranties and an exclusion of consequential damages contained in an agricultural equipment sales contract.

The \textit{A \& M Produce} court's holding is controversial because it invalidated exculpatory clauses contained in a contract between two commercial entities. These clauses are expressly permitted by the Uni-

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4. Llewellyn, \textit{supra} note 3, at 702-03 n.5.
5. \textit{Id.} at 702-03. Some theories used by the courts to achieve the same results were described by Professor Llewellyn as "covert tools": adverse construction of language, manipulation of the rules of offer and acceptance, or determinations that a clause was contrary to the dominant purpose of the contract. \textit{See id.} at 702-03; U.C.C. § 2-302 comment 1 (1978).
form Commercial Code. Moreover, broad language in the holding suggests the imposition of new duties upon the party who submits a form contract to another, including the duty to obtain the express agreement of the other party to the allocation of risks embodied in the contract. In addition, the risks should be allocated in a "commercially reasonable" manner; the party best able to avoid the loss should be the party who bears the risk.

This Note first sets out the background of the unconscionability doctrine. Second, the Note discusses the facts and holding of the A & M Produce case. The Note then critically examines the A & M Produce court's analysis and concludes that the court misapplied the unconscionability doctrine in order to protect a commercial party from its unprofitable bargain. Finally, the Note suggests some drafting techniques to protect a contract from a finding of unconscionability under this court's analysis.

The Unconscionability Doctrine

The doctrine of unconscionability originated with the equity courts that refused to grant specific performance of contracts that were such as "no man in his senses, [and] not under delusion, would make . . . and which no fair and honest man would accept." Both equity courts that refused to grant specific performance of contracts that were such as "no man in his senses, [and] not under delusion, would make . . . and which no fair and honest man would accept." Both equity

9. See infra notes 54-79 & accompanying text.
10. See infra notes 54-79 & accompanying text. Some California cases do require the drafter of an adhesion contract, see infra note 32, to call the weaker party's attention to the provision at issue before the provision will be enforced. These cases are very different from A & M Produce, in that the weaker party was a consumer and the provision at issue was an arbitration provision contained in a hospital "Conditions of Admission" form or a prepaid medical care contract. Because arbitration is consensual in nature, strong public policy requires that an agreement to arbitrate be entered into openly and fairly. See Beynon v. Garden Grove Medical Group, 100 Cal. App. 3d 698, 704, 161 Cal. Rptr. 146, 149 (1980) (court refused to enforce arbitration provision contained in a prepaid medical care contract that gave the health care provider the right to reject the arbitrators' decision and to require disputes to be resubmitted to another arbitration panel); Wheeler v. St. Joseph Hospital, 63 Cal. App. 3d 345, 356, 133 Cal. Rptr. 775, 783 (1976) (court refused to enforce arbitration provision contained in hospital "Conditions of Admission" form that patient signed but did not read or receive a copy of).
11. See infra notes 97-152 & accompanying text. California cases have not previously required that contract provisions be commercially reasonable by allocating the risks to the party best able to avoid them. Rather, courts have focused on the reasonable expectations of the weaker party to an adhesion contract and whether the provision in question defeats those expectations. See, e.g., Steven v. Fidelity & Casualty Co., 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962) (limitation of liability in flight insurance policy); Beynon v. Garden Grove Medical Group, 100 Cal. App. 3d 698, 705, 161 Cal. Rptr. 146, 149 (1980) (arbitration provision contained in prepaid health care contract).
and law courts have expanded the scope of the doctrine to make it applicable to many types of contracts and to protect broad classes of people, notably consumers.

The drafters of the Uniform Commercial Code codified the unconscionability doctrine in section 2-302 of the article on sales. The purpose of the drafters, as set out in the official comments, was to provide the courts with a means to "police explicitly against the contracts or clauses which they find to be unconscionable." Their focus, at least in preliminary drafts of section 2-302, was on form contracts because of the recognized dangers of overreaching. However, the final form of section 2-302 applies not only to form contracts but to all sales contracts governed by article 2.

The basic test of unconscionability, as expressed in official comment 1 to section 2-302, 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 . . . . The principle is one of the prevention of oppression and unfair surprise . . . and

14. Section 2-302 provides:
(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

15. U.C.C. § 2-302 comment 1 (1978). The drafters intended the unconscionability section to apply to situations in which common law unconscionability doctrine had previously applied and to situations in which the court had previously used "covert tools" to achieve the same results. Id. See supra note 5.
17. Almost all of the cases that arise under § 2-302 involve form contracts. Spanogle, supra note 13, at 942 n.47.

Litigants have argued that U.C.C. § 2-302 should apply to agreements that are beyond the scope of the Code's sales article. In response, courts have invoked analogous principles of equity either to refuse to enforce "unconscionable" contracts, Weaver v. American Oil Co., 257 Ind. 458, 461-62, 276 N.E.2d 144, 146-47 (1971) (involving an exculpatory clause in service station lease), or at least to allow inquiry (as contemplated by the Code) into the commercial context in which the contract was entered before making the ultimate determination of unconscionability, In re Elkins-Dell Mfg. Co., 253 F. Supp. 864 (E.D. Pa. 1966) (involving a financing agreement).
not of disturbance of allocation of risks because of superior bargain-
ing power.\textsuperscript{18}

Although the official comments provide a basic test, neither the
Code nor the comments define the term “unconscionability.”\textsuperscript{19} Faced
with a need for a working definition of unconscionability, many com-
mentators have adopted the approach of the late Professor Leff, who
analyzed the doctrine in terms of a procedural-substantive dichot-
omy.\textsuperscript{20} “Procedural unconscionability” is a result of what Professor
Leff termed “bargaining naughtiness”: the unconscionability arises
from the way the contract as a whole was formed or the offensive clause
became a part of the contract. “Substantive unconscionability,” on the
other hand, refers to “evils in the resulting contract”: the terms of the
contract itself are harsh or one-sided.\textsuperscript{21} Most courts require the pres-
ence of both substantive and procedural unconscionability before they
will refuse to enforce a contract or clause.\textsuperscript{22}

In determining the existence of procedural unconscionability, the
two key questions generally asked\textsuperscript{23} are, first, whether the party was
“unfairly surprised” by the terms of the contract because he or she was

\textsuperscript{18} U.C.C. § 2-302 comment 1 (1978).
\textsuperscript{19} \textit{See} U.C.C. § 2-302 & comments (1978); \textit{see also} Spanogle, \textit{supra} note 13, at 940-41. Professor Spanogle argues that the drafters of the Code purposefully omitted any precise definition of unconscionability to prevent parties from drafting contracts that reach “to the threshold of unconscionability, recreating the problem in a slightly different context, and defeating the doctrine’s purpose.” \textit{Id.} \textit{See}, \textit{e.g.}, Wille v. Southwestern Bell Tel. Co., 219 Kan. 755, 549 P.2d 903 (1976).

Numerous law review articles have pondered the meaning of § 2-302 and the accompa-


\textsuperscript{21} Leff, \textit{supra} note 16, at 487.

\textsuperscript{22} \textit{See} Johnson v. Mobil Oil Corp., 415 F. Supp. 264, 268 (E.D. Mich. 1976); \textit{see also} Eddy, \textit{supra} note 20, at 41 & n.56; Spanogle, \textit{supra} note 13, at 943. Each element need not be present in equal amounts; instead, a “sliding scale” may be used. If, for example, the
terms are especially harsh, the court need be less concerned about how the terms were cre-
at. Eddy, \textit{supra} note 20, at 41-42 n.56; Spanogle, \textit{supra} note 13, at 950, 968.

Both procedural and substantive unconscionability are required because it is commer-
cially impractical to refuse to enforce contracts in which only one element is present. If only
procedural unconscionability were required, every term in a form or adhesion contract could
be stricken upon the nondrafting party’s request. If only substantive unconscionability were
required, most of the important provisions in a normal sales contract could be stricken be-
because they are all potentially harsh; they are inserted to determine who will bear the loss if a
particular event takes place. Leff, \textit{supra} note 16, at 539-40.

\textsuperscript{23} Eddy, \textit{supra} note 20, at 42; Spanogle, \textit{supra} note 13, at 943. \textit{See also} U.C.C. § 2-302 comment 1 (1978) (“[t]he principle is one of the prevention of oppression and unfair sur-
prise”). \textit{But see} Tacoma Boatbuilding Co. v. Delta Fishing Co., 28 U.C.C. Rep. Serv. (Call-
laghan) 26, 31 (W.D. Wash. 1980) (“[t]he two evils contemplated in § 2-302, ‘oppression’ and
‘unfair surprise,’ suggests [sic] a mode of analysis . . . that concentrates upon the challenged
UNCONSCIONABILITY prevented from knowing or understanding the terms by the conduct of
the other;\textsuperscript{24} and, second, whether the party was “oppressed” by such gross inequality of bargaining power that it had no choice but to accept the contract on a take-it-or-leave-it basis.\textsuperscript{25}

Substantive unconscionability of a contract is indicated by terms that are commercially unreasonable or that bear “no reasonable relation to the business risks assumed by the parties.”\textsuperscript{26}

The court in \textit{A \& M Produce} analyzed the unconscionability issue under the framework of Uniform Commercial Code section 2-302 set

terms [substantive unconscionability] and the manner in which they became part of the contract [procedural unconscionability]”).

Other courts consider the procedural aspects of unconscionability without explicitly asking whether the party was unfairly surprised or oppressed. For example, in Fleischmann Distilling Corp. v. Distillers Co. Ltd., 395 F. Supp. 221 (S.D.N.Y. 1975), the court stated that procedural unconscionability depended upon the following factors: “whether the important terms of a contract were understood, whether high-pressure or deceptive sales practices were utilized, whether terms were hidden in fine print, and whether there was gross inequality of bargaining power.” \textit{Id.} at 232 (citations omitted). In Schroeder v. Fageol Motors, Inc., 86 Wash. 2d 256, 544 P.2d 20 (1975), the court noted that the factors to be considered in determining whether procedural unconscionability is present include “the manner in which the contract was entered,” whether each party had a ‘reasonable opportunity to understand the terms of the contract,’ and whether ‘the important terms were hidden in a maze of fine print.’” \textit{Id.} at 260, 544 P.2d at 23 (citations omitted). These factors enumerated by the Fleischmann and Schroeder courts are similar to the criteria for unfair surprise and oppression discussed \textit{infra} notes 24-25 & accompanying text.

24. \textit{See} Ellinghaus, \textit{supra} note 19, at 763-64; Spanogle, \textit{supra} note 13, at 943. Unfair surprise can be created when one party prevents the other from studying the contract and inquiring about its terms, hides important terms in a maze of fine print, or uses complex, legalistic language that the other party does not understand. The “unfair” aspect of the surprise depends on the sophistication of the party claiming to be surprised. \textit{See} Spanogle, \textit{supra} note 13, at 943. For example, an attorney is much less likely to be unfairly surprised than a service station operator with an eighth grade education. \textit{Compare} K \& C, Inc. v. Westhouse ELEC. Corp., 437 Pa. 303, 308-09, 263 A.2d 390, 393 (1970), \textit{with} Weaver v. American Oil Co., 257 Ind. 458, 460, 276 N.E.2d 144, 145-46 (1971). Determination of the fairness of the surprise, therefore, turns on the reasonableness of the non-drafting party’s reaction to the clause in question, with reasonableness determined by a subjective test. Spanogle, \textit{supra} note 13, at 943, 947-48.

25. \textit{See} Spanogle, \textit{supra} note 13, at 944. A finding of oppression often rests on the existence of an adhesion contract. \textit{See} Ellinghaus, \textit{supra} note 19, at 766-68; Leff, \textit{supra} note 16, at 504-08; Spanogle, \textit{supra} note 13, at 944. An adhesion contract is defined as:

\begin{itemize}
  \item a standardized contract prepared entirely by one party to a 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.
\end{itemize}


out above.\textsuperscript{27} However, California had not adopted section 2-302 at the
time the parties entered into the contract in question. It was not until
1979, after this case had been tried twice in the state courts,\textsuperscript{28} that the
legislature adopted the Uniform Commercial Code's unconscionability
provision as part of the California Civil Code. When it did so, it en-
acted both the text of the provision and its official comments and made
them applicable to all contracts, rather than just those governed by arti-
cle 2 of the Uniform Commercial Code.\textsuperscript{29}

The court in \textit{A & M Produce} was undaunted by the legislative his-
tory of section 2-302. It rejected defendant FMC Corporation's conten-
tion that the legislature's failure to adopt section 2-302 until 1979
should have precluded the trial court from applying the unconsciona-
bility doctrine in this case. The court reasoned that it did not need
section 2-302 to empower it to act in this case because unconscionabil-
ity had long been recognized as a common law doctrine in California.\textsuperscript{30}
The court failed to note, however, that unconscionability has developed
along a different path in California than in states that adopted section
2-302. The equivalent of the unconscionability doctrine in California
is adhesion theory:\textsuperscript{31} if the contract at issue is a contract of adhesion, a
court may refuse to enforce some or all of its terms if it finds the terms
unconscionable.\textsuperscript{32}

Nevertheless, the \textit{A & M Produce} court relied on section 2-302,

\textsuperscript{27} A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 484-85, 493, 186 Cal.
190 Cal. Rptr. 204, 209-10 (1983) (quoting the \textit{A & M Produce} court's analysis of procedural
and substantive unconscionability).

\textsuperscript{28} The first trial took place in May, 1977, and resulted in a mistrial due to a hung jury.
The action was tried a second time in February, 1978, and the jury entered a special verdict
for FMC. A & M's motion for a new trial was granted. The third trial took place in Novem-
ber, 1980, and FMC appealed from the adverse judgment. Appellant's Opening Brief at 2,
\textit{A & M Produce Co. v. FMC Corp.}, 135 Cal. App. 3d 473, 186 Cal. Rptr. 114 (1982).

\textsuperscript{29} CAL. CIV. CODE § 1670.5 & legislative committee comment (West Supp. 1982).

\textsuperscript{30} A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d at 484-85, 186 Cal. Rptr. at
120-21.

\textsuperscript{31} See \textit{Roos, The Doctrine of Unconscionability: Alive and Well in California, 9 CAL.
W.L. Rev. 100 (1972).

\textsuperscript{32} Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 623 P.2d 165, 171 Cal. Rptr. 604
(1981). A contract of adhesion is defined \textit{supra} note 25. See \textit{Steven v. Fidelity & Casualty
Co.}, 58 Cal. 2d 862, 882, 377 P.2d 284, 293, 27 Cal. Rptr. 172, 185 (1962); \textit{Neal v. State

A court may also refuse to enforce adhesion contract provisions on other grounds. If
the court finds the provisions ambiguous, it may interpret the ambiguity against the drafter.
701, 706 (1978); \textit{Neal v. State Farm Ins. Co.}, 188 Cal. App. 2d 690, 695, 10 Cal. Rptr. 781,
784 (1961). The court may also refuse to enforce adhesion contract provisions that are con-
trary to public policy, \textit{Tunkl v. Regents of Univ. of Cal.}, 60 Cal. 2d 92, 383 P.2d 441, 32 Cal.
Rptr. 33 (1963), or that are not within the reasonable expectations of the weaker party, \textit{see
supra} note 11.
and the case law and commentary that had developed around it, to support its holding that the disclaimer of warranties and exclusion of consequential damages was unconscionable. This approach contributes to the significance of the opinion, which represents the first in-depth analysis of the Uniform Commercial Code’s unconscionability provision as contained in California Civil Code section 1670.5.\textsuperscript{33}

The determination of unconscionability under section 2-302 is delegated to the courts as a question of law, yet it rests on an inherently factual inquiry. This is emphasized by the text of section 2-302, which instructs the court to focus its inquiry on the time the contract was made, and to afford the parties a reasonable opportunity to present evidence of the contract’s commercial setting, purpose and effect.\textsuperscript{34} Therefore, before considering the court’s analysis, the circumstances surrounding the contract’s formation must be set out in detail.

\textbf{The Facts of A & M Produce}

In 1974, A & M Produce Company and FMC Corporation entered into a contract for the sale of weight-sizing equipment.\textsuperscript{35} A & M needed a weight-sizer because its sole owner, Alex Abatti, had decided to grow tomatoes, which required weight-sizing equipment for sorting and packing the produce for sale. Before contacting FMC, Abatti obtained from a competitor a bid of $60,000 to $68,000 for both a weight-sizer and a hydro-cooler (which the competitor recommended to keep the fruit cooled during processing).

FMC submitted an initial bid of approximately $15,000 which was subsequently increased to over $32,000. This price covered the weight-sizer only; Abatti testified that an FMC representative recommended the FMC equipment because the speed at which it operated made a hydro-cooler unnecessary, thereby saving Abatti $25,000 on the equipment.

Abatti accepted FMC’s bid after he had discussed the capacity of FMC’s equipment with its representatives. He signed a “field order,” a

\textsuperscript{33} \textit{Cal. Civ. Code} § 1670.5 (West Supp. 1982). Although the U.C.C. unconscionability provision is codified in California Civil Code § 1670.5, the court in its opinion referred to U.C.C. § 2-302. In the interest of clarity and consistency, this Note will do the same.

In addition, this Note will focus on the same authority relied on by the court: out-of-state cases that applied § 2-302 and the commentary that aided in its development. This approach will be most useful to the reader who is concerned with how § 2-302 will be applied in California. The courts in most other states have been applying § 2-302 for nearly 20 years. \textit{See} Hurd & Bush, \textit{Unconscionability: A Matter of Conscience for California Consumers}, 25 \textit{Hastings L.J.} 1 (1974). California courts will likely rely on these precedents until they have developed their own.

\textsuperscript{34} U.C.C. § 2-302 (1978).

\textsuperscript{35} Weight-sizing equipment is used in the weighing and selection part of the tomato harvesting process.
standard printed form with terms identical to the later contract, and
gave FMC a $5,000 deposit. Abatti received by mail the form contract,
which consisted of two sheets of paper. The first sheet was the form
contract, the front of which resembled an order form with blanks to be
filled in,36 the back of which contained the “Terms and Conditions,”
including a disclaimer of warranties and an exclusion of consequential
damages.37 An attached order sheet listed additional equipment. Abatti
did not read the reverse side of the form contract, even though
the front of the contract contained a legend referring him to the terms
on the reverse side.38 Nor did he consult an attorney, although he had
an opportunity to do so with an attorney whom he regularly con-
sulted.39 He signed the contract and returned it to FMC with an addi-
tional $5000 payment.

Problems with the equipment began when A & M started harvest-
ing the tomatoes. The equipment damaged the tomatoes when oper-
ated at normal speed. The damage was reduced by starting and
stopping the machine to reduce the processing speed. However, when
run more slowly, the machine could not process the fruit as quickly as
it was harvested, and the fruit piled up in the field. Abatti was unable
to obtain additional equipment to process the fruit or other packing

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36. A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d at 498 app., 186 Cal. Rptr. at
130 app. (contract attached to opinion as appendix).
37. Id. The terms and conditions printed on the reverse side were standard contract
provisions. The provisions covered title, protection of seller’s security interest, seller’s reme-
dies, warranties and disclaimer of warranty, disclaimer of consequential damages, conting-
gencies, risk of loss, patented process, patent infringement, taxes, promissory notes,
additional charges, non-waiver, cancellation charges, approval, and trade-in allowance. The
provisions in controversy were the disclaimer of warranties and exclusion of consequential
damages. The disclaimer provided:

There are no understandings, representations, or warranties of any kind, express,
implied, statutory or otherwise, including, but without limitation, the implied war-
ranties of merchantability and fitness for a particular purpose, not expressly set
forth herein, and seller specifically disclaims the implied warranties of
merchantability and fitness for a particular purpose.

Id. The exclusion of consequential damages provided:

Seller in no event shall be liable for consequential damages arising out of or in
connection with this agreement, including without limitation breach of any obliga-
tion imposed on seller hereunder or in connection herewith. Consequential dam-
age for purposes hereof shall include, without limitation, loss of use, income or
profit, or losses sustained as the result of injury (including death) to any person, or
loss of or damage to property (including without limitation property handled or
processed by the use of the equipment). Buyer shall indemnify seller against all
liability, cost or expense which may be sustained by seller on account of any such
loss, damage or injury.

Id.
38. Id.
3d 473, 186 Cal. Rptr. 114 (1982). All other facts are drawn from the opinion, unless other-
wise noted.
operators to handle it. He closed the packing shed because the return on the fruit was inadequate to cover costs.

A & M offered to return the weight-sizer to FMC in exchange for a refund of the down payment and recovery for the loss of its crop.\(^4\) When FMC rejected this proposal and demanded payment in full, A & M filed suit for breach of express warranty and implied warranty of fitness for a particular use.\(^4\)

To recover for the loss of the tomato crop under the breach of warranty theory, A & M had to overcome two obstacles: the disclaimer of warranties and the exclusion of consequential damages.\(^4\) At trial, A & M argued that the terms were inconspicuous and unconscionable as a matter of law; the trial court agreed. The reverse side of the contract was withheld from the jury,\(^4\) which rendered a verdict in favor of the plaintiff in the amount of $281,326.\(^4\) Defendant FMC appealed. The appellate court, in affirming the trial court's decision, analyzed the unconscionability issue in terms of its procedural and substantive elements. The court's analysis of the procedural element focused on unfair surprise and oppression.\(^4\) Unfair surprise was evidenced by the complexity and insufficient visibility of the provisions at issue, and by FMC's failure to direct Abatti's attention to them.\(^4\)

The court also found "ample" evidence of oppression, alone sufficient to support its holding, from the inequality of bargaining power and the lack of any real negotiation.\(^4\) Unequal bargaining power was demonstrated by the fact that while A & M employed five regular and


\(^{41}\) A & M also sued for misrepresentation but dismissed that cause of action at trial. A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d at 480, 186 Cal. Rptr. at 118.

\(^{42}\) See supra note 37 (text of the exclusion of consequential damages and the disclaimer of warranty).

\(^{43}\) The reverse side of the contract was withheld from the jury to prevent it from considering the disclaimer of warranties and the exclusion of consequential damages. As the A & M Produce court stated, "if the trial court properly applied the unconscionability doctrine to the facts of this case—then the reverse side of the contract was appropriately withheld from the jury." A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d at 482-83, 186 Cal. Rptr. at 119. The court's statement is based on U.C.C. § 2-302(1) that provides: "If the court as a matter of law finds . . . any clause of the contract to have been unconscionable at the time it was made the court may . . . enforce the remainder of the contract without the unconscionable clause." U.C.C. § 2-302(1) (1978). It was within the trial court's discretion under California Evidence Code § 352 to admit evidence of the provisions and instruct the jury as to their effect or to exclude the evidence because it created a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. CAL. EVID. CODE § 352 (Deering 1966).

\(^{44}\) This amount was reduced by stipulation of the parties by $12,090.70. A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d at 481, 186 Cal. Rptr. at 118.

\(^{45}\) Id. at 486, 186 Cal. Rptr. at 121.

\(^{46}\) Id. at 490-91, 186 Cal. Rptr. at 124-25.

\(^{47}\) Id. at 491, 186 Cal. Rptr. at 125.
up to fifty seasonal employees and farmed 8000 acres, the gross sales of FMC's Agricultural Equipment Division alone were $40 million.48

Lack of any real negotiation was found because the parties signed a form contract with standard terms and because FMC salesmen were not authorized to negotiate any of the terms appearing on the reverse side.49

The court also analyzed whether the disclaimer of warranties and exclusion of consequential damages were substantively unconscionable by considering the commercial reasonableness of each provision.50 The court found the disclaimer of warranties commercially unreasonable because the warranties FMC attempted to disclaim went to the basic performance characteristics of the product. The court reasoned that, since a product's performance constitutes the fundamental basis for a sales contract, a buyer would not purchase a product under a contract devoid of any enforceable performance standards. Moreover, the court felt that the risk of loss should be borne by FMC because, as manufacturer of the equipment, FMC was in a better position than A & M to prevent the loss by selling a machine adequate to meet A & M's expressed needs. Finally, the court felt that FMC was attempting to prevent A & M from reasonably relying on the representations made by FMC, representations which were necessary for A & M to make an intelligent choice among the available options. As a result, the court found the disclaimer substantively unconscionable.51

Similarly, the court found the exclusion of consequential damages commercially unreasonable since such damages were likely to occur if the equipment failed to operate properly once harvesting began.52 In addition, the court relied on the risk of loss analysis to conclude that FMC should bear the risk because it was the only party able to prevent the loss. For these reasons, the court found the exclusion of consequential damages substantively unconscionable.53

Criticism of the A & M Produce Court's Analysis

Procedural Unconscionability

Unfair Surprise

Although the court's assessment of the law of procedural unconscionability is well-supported, its application of the law to these facts is strained. To begin with, the court examined the evidence to determine

48. Id.
49. Id.
50. Id. at 491-92, 186 Cal. Rptr. at 125-26.
51. Id.
52. Id. at 492-93, 186 Cal. Rptr. at 126.
53. Id.
whether Abatti was in fact surprised, and whether that surprise could be characterized as unfair. The court first considered the visibility of the provisions and concluded that the disclaimer of warranties was conspicuous as a matter of law, because it was printed in boldface type twice as large as the other terms of the agreement. However, it characterized the exclusion of consequential damages as "not particularly apparent" even though it was printed in capital letters slightly larger than the rest of the contract text (which was printed in lower case letters) and was accurately identified by a title heading in capital letters. The court observed that the visibility of the terms depended not only on the size of the print but on their location in the contract. In the eyes of the court, the placement of the terms "in the middle of the back page of a long preprinted form contract" made them significantly less visible. Yet this "long" form contract was only one legal-sized page printed on both sides.

The court's decision concerning unfair surprise was based less on the visibility of the provisions than on the parties' conduct concerning them. The court believed that Abatti's failure to read the terms on the reverse side of the contract was justified by FMC's failure to direct his attention to them. The court cited an Indiana Supreme Court case, Weaver v. American Oil Co., for the notion that a party submitting a form contract to another must show that the other had knowledge of any unusual or unconscionable terms. Applying this rule, the court concluded that FMC had a duty to point out the disclaimer of warranties and exclusion of consequential damages in the form contract to A & M; its failure to do so supported a finding of unfair surprise.

The broad language of the Weaver case should not have been applied here because the facts of Weaver are readily distinguishable from those of A & M Produce. In Weaver, a service station operator signed a

54. Id. at 482-83 n.5, 186 Cal. Rptr. at 119 n.5.
55. Id. at 490, 186 Cal. Rptr. at 124. But see CAL. COM. CODE § 1201(10) (West 1964). That section defined "conspicuous" as a term or clause "so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals . . . is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color." Under this definition, the exclusion of consequential damages in A & M Produce was conspicuous: its title heading was "[a] printed heading in capitals" and its text was in "larger . . . type." Moreover, its placement directly under the conspicuous disclaimer of warranties and as the only other paragraph printed in capital letters qualified it as a clause that "a reasonable person . . . ought to have noticed."
57. See id. at 498 app., 186 Cal. Rptr. at 130 app. (copy of contract attached as an appendix to the opinion).
58. Id. at 490, 186 Cal. Rptr. at 124.
61. Id. at 490-91, 186 Cal. Rptr. at 124-25.
lease each year that was prepared by the oil company lessor and contained a hold harmless clause. This clause provided that the lessee would hold harmless and indemnify the oil company for any losses resulting from the negligence of the oil company occurring on the leased premises. After one of the lessor's employees sprayed gasoline on the lessee and his assistant, causing them to be burned, the hold-harmless clause was declared unconscionable and unenforceable.⁶²

_Weaver_ is distinguishable from _A & M Produce_ on several grounds. First, it involved a form contract clause exculpating the drafting party from negligence.⁶³ While parties to a contract may agree that one bears the risk of the other's negligence, public policy disfavors such agreements and requires a showing of subjective intent before they are enforced.⁶⁴ Because tort liability may arise independently of contract liability, the public policy against disclaimers and exclusions of warranties is not as strong as that against disclaimers of tort liability.⁶⁵

A second basis for distinguishing _Weaver_ from _A & M Produce_ is the type of injury for which recovery was sought. In _Weaver_, the plaintiff sought to recover damages for personal injuries and to avoid liability for economic loss under the indemnity clause.⁶⁶ In _A & M Produce_, the plaintiff sought to recover for a purely commercial loss.⁶⁷ Courts generally will go to greater lengths to permit recovery to a plaintiff who has been injured in person, not merely in pocket.⁶⁸

Third, _A & M Produce_ is distinguishable from _Weaver_ on the basis of the business conditions surrounding each transaction. The plaintiff in _Weaver_ worked long hours seven days a week and made only $5,000 to $6,000 per year under the lease.⁶⁹ In light of the plaintiff's limited financial resources, it seemed unreasonable to the court to shift all liability for negligence to him.⁷⁰ Not only would he have been unable to recover for his injuries, but his employee would have been unable to recover as well if he had been forced to look only to _Weaver_ for compensation.⁷¹ In _A & M Produce_, on the other hand, there was no suggestion that the plaintiff was unable to bear the loss.⁷²

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⁶³. _Id._ at 459-60, 276 N.E.2d at 145.
⁶⁶. Weaver v. American Oil Co., 257 Ind. at 459, 276 N.E.2d at 145.
⁶⁷. A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d at 480, 186 Cal. Rptr. at 118.
⁶⁹. Weaver v. American Oil Co., 257 Ind. at 462, 276 N.E.2d at 147.
⁷⁰. _Id._
⁷¹. See _id._ at 459-60, 276 N.E.2d at 145.
A fourth basis for distinguishing the two cases is the manner in which the contracts were entered. Each year when it was time for Weaver to renew his lease, an agent of the lessor brought him the lease agreement, showed him where to sign, and he signed. In contrast, the contract in A & M Produce was mailed to Abatti; he was free to study the contract and sign it at his leisure. The disclaimer of warranties was conspicuous as a matter of law and the exclusion, while not conspicuous, was printed in capital letters larger than the remaining contract text; its title heading accurately identified it as a “Disclaimer of Consequential Damages.”

Finally, the facts of Weaver suggest a different interpretation of the language at issue than the A & M Produce court gave it. Since the exculpatory clause in Weaver was “hidden” in fine print and without a title heading, the requirement that the other party have “knowledge” might be satisfied by more visible contract terms, such as those found in the A & M Produce contract. Furthermore, the terms at issue in Weaver (exculpation of the drafter’s liability for negligence) were indeed “unusual or unconscionable.” In contrast, the disputed terms in A & M Produce are neither unusual in a commercial setting nor prima facie unconscionable under the Uniform Commercial Code.

Oppression

Although the court in A & M Produce recognized the presence of unfair surprise, it seemed to rely more heavily on evidence of oppression to support its finding of procedural unconscionability. The court defined oppression as arising from “an inequality of bargaining power which results in no real negotiation and ‘an absence of meaningful choice.’” It held that a finding of oppression was amply supported by the evidence of FMC’s larger size and proportionately greater

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73. Weaver v. American Oil Co., 257 Ind. at 460, 276 N.E.2d at 146.
74. Id. at 462, 276 N.E.2d at 147.
75. A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d at 490, 186 Cal. Rptr. at 124.
76. See supra note 74.
78. See J. WHITE & R. SUMMERS, supra note 65, §§ 4-9, 12-1.
79. See U.C.C. § 2-719(3) (1978) (“Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.”). This is the only section of the U.C.C. that identifies a provision as prima facie unconscionable.
80. A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d at 486, 186 Cal. Rptr. at 122.
financial resources. However, bargaining power is related to many factors: market conditions, the financial stability and resources of each enterprise, the degree of necessity of the purchase or sale, the relative expertise of each party in the subject of the transaction, and the time pressures faced by each party. If the A & M Produce court had considered some of these other factors, it might have reached a different conclusion.

For example, A & M's consultations with a competitor of FMC suggest that A & M had the power to bargain with FMC because there was a competitive market for the equipment. That A & M was a profitable company suggests that it was not forced to deal with FMC because other companies were unwilling to extend credit. Finally, the fact that A & M shopped around before purchasing the equipment from FMC shows that A & M was not forced by time pressures or extreme necessity to enter into a disadvantageous bargain. None of these factors suggests that A & M lacked bargaining power in relation to FMC. Rather, they indicate that A & M possessed ample bargaining power that it simply failed to exercise to its advantage.

Even if the court were correct in its conclusion that A & M lacked the power to bargain with FMC, it would still be necessary to show that inequality of bargaining power resulted in no real negotiation and an

81. Id. at 491, 186 Cal. Rptr. at 125.

82. See Pittsfield Weaving Co. v. Grove Textiles, Inc., 121 N.H. 344, 430 A.2d 638 (1981) (plaintiff had made previous unsuccessful attempts to negotiate the provision in question with other sellers in the industry and therefore made no attempt to negotiate the provision with the defendant); Henning v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (warranty at issue was the Uniform Warranty of the Automobile Manufacturers' Association; members of the Association represented most of the passenger car production in the year at issue).

83. See Bank of Ind., Nat'l Ass'n v. Holyfield, 476 F. Supp. 104 (S.D. Miss. 1979) (plaintiff was in superior bargaining position because of the defendant's unstable financial position).

84. Allen v. Michigan Bell Tel. Co., 18 Mich. App. 632, 171 N.W.2d 689 (1969) (contractual limitation of liability for errors and omissions in yellow pages directory was unconscionable because no realistic alternative to services was available).

85. Industralease Automated & Scientific Equip. Corp. v. R.M.E. Enter., 58 A.D.2d 482, 490, 396 N.Y.S.2d 427, 432 (1977) (defendants sought a means to meet a necessity arising in their business and plaintiffs undertook to design and build equipment to meet that need).

86. Id. (with the beginning of the season for defendants' operation at hand, defendants were at a disadvantage to bargain further).

87. See K & C, Inc. v. Westinghouse Elec. Corp. 437 Pa. 303, 263 A.2d 390 (1970) (buyer's long and careful study of several manufacturers before entering into a contract with one of them was evidence that contract was not one of adhesion).

absence of meaningful choice. The court found ample evidence of no real negotiation: the FMC salesman admitted that he lacked the authority to negotiate any of the standard contract terms. However, FMC claimed that individual contracts were negotiated in special circumstances. The court dismissed this claim with the response that "A & M was never made aware of that option." Because the issue is whether the lack of real negotiation resulted from inequality of bargaining power, the relevant consideration should be whether A & M inquired about negotiating the terms, or had reason to believe that such an inquiry would be futile, not whether A & M was made aware of the option to negotiate. A & M accepted the terms of FMC's standard contract without negotiation because it failed to exercise its bargaining power, not because it lacked the power to negotiate the terms.

The same argument applies to the issue of whether inequality of bargaining power resulted in the absence of meaningful choice. The court omitted any discussion of this issue from its opinion. Lack of meaningful choice is suggestive of the adhesion doctrine, which includes as a necessary element "the inability of a weaker party to contract with another on more favorable terms or to refrain from contracting because of market factors, timing or other pressures." If the court had addressed this issue, it would have had difficulty showing that A & M lacked a meaningful choice. There was undisputed evidence that A & M had consulted one of FMC's competitors, and had chosen FMC for its low price. There was no showing that A & M could not afford the competitor's machine, or that the competitor's contract would have contained identical non-negotiable terms. Nor was there a showing that by foregoing the purchase, A & M would have jeopardized the profitability of its venture. A & M was not victimized by a lack of meaningful choice; it merely made the wrong choice.

In summary, the evidence does not support a finding of oppression because the cornerstone of oppression, inequality of bargaining power, is missing. In the absence of both oppression and unfair surprise, the court's finding of procedural unconscionability was improper.

90. Id. at 491 & n.13, 186 Cal. Rptr. at 125 & n.13.
91. Id. at 491, 186 Cal. Rptr. at 125.
92. Id.
94. A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d at 491, 186 Cal. Rptr. at 125.
Substantive Unconscionability

Assuming, for the sake of argument, the existence of procedural unconscionability in *A & M Produce*, substantive elements of unconscionability must also be present before a court may refuse to enforce a contract or clause thereof.\(^{97}\) The court found both the disclaimer of warranties and the exclusion of consequential damages substantively unconscionable.\(^{98}\) Because different policies relate to each, the court addressed each provision separately.

Disclaimer of Warranties

In its form contract, FMC attempted to disclaim all warranties, express or implied.\(^{99}\) Under Uniform Commercial Code section 2-316, a seller is permitted to disclaim warranties subject to certain restrictions that are imposed to protect the buyer from surprise and from unexpected and unbargained-for disclaimer language.\(^{100}\) Since express warranties “rest on ‘dickered’ aspects of the individual bargain, and go so clearly to the essence of that bargain,”\(^{101}\) express warranty disclaimers are severely restricted.\(^{102}\) They are operative only to the extent that they effectively deprive the words or conduct creating the warranty of

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97. *See supra* note 22 & accompanying text.
98. *See supra* notes 50-51 & accompanying text.
99. Express warranties are created by 1) any affirmation of fact or of promise, 2) any description made by the seller to the buyer, or 3) any sample or model shown by the seller to the buyer, which becomes part of the basis of the bargain. U.C.C. § 2-313(1) (1978). Comment 3 to § 2-313 states that “no particular reliance on [the affirmation or promise] need be shown” in order to make it part of the basis of the bargain. However, Professors White and Summers argue that whether an affirmation or promise is part of the basis of the bargain is determined by the buyer's reliance on the affirmation or promise, because there is no other meaningful standard by which to determine what is part of the basis of the bargain. J. White & R. Summers, *supra* note 65, § 9-4.

100. U.C.C. § 2-316 comment 1 (1978).
101. *Id.* § 2-313 comment 1.
102. U.C.C. § 2-316(1) provides that “[w]ords or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be con-
their status as part of the basis of the bargain.103

Implied warranties can more easily be disclaimed because different policy considerations apply. Since implied warranties are created by operation of law, it is less likely that they are of the "essence" of the bargain; they may be disclaimed "as long as the buyer gets a fair chance to know what is going on."104 To ensure that the buyer has such a fair chance, the Code requires that a disclaimer identify the specific warranty to which it applies; that in the case of implied warranties of fitness the disclaimer be in writing; and that all written disclaimers be conspicuous.105 In addition to the restrictions placed on disclaimers of warranties by section 2-316, some authorities impose the requirement that the disclaimer be conscionable under section 2-302.106

The court found that the disclaimer of all warranties contained in the FMC contract failed on two grounds. The disclaimer was inoperative as to express warranties under section 2-316(1) because the court could not construe the words or conduct that created the warranty as

strued wherever reasonable as consistent with each other; but . . . negation or limitation is inoperative to the extent that such construction is unreasonable." U.C.C. § 2-316(1) (1978).

The operation of § 2-316(1) can best be explained with an example. In United States Fibres, Inc. v. Proctor & Schwartz, Inc., 509 F.2d 1043 (6th Cir. 1975), the seller included a technical description of the product's capacity in the contract of sale. The description failed to create an express warranty because the buyer knew the equipment was experimental and unproven and the contract contained a disclaimer of any warranty. The knowledge of the buyer and the language of the disclaimer operated to prevent the description from becoming part of the basis of the bargain. However, the court indicated that if the product had not been experimental and unproven, the description might have created an express warranty despite the words of the disclaimer. *Id.* at 1046. See Special Project, Article Two Warranties in Commercial Transactions, 64 CORNELL L. REV. 30, 172-73 (1978) (discussing United States Fibres).

103. Special Project, *supra* note 102, at 170-73.

Because the Code specifically regulates the content of disclaimers, it has been forcefully argued that compliance with § 2-316 is sufficient to insulate disclaimers from findings of unconscionability, Leff, *supra* note 16, at 523-24, and some courts have so held. See, e.g., Avery v. Alladin Products Div., Nat. Serv. Indus., Inc., 128 Ga. App. 266, 196 S.E.2d 352 (1973). But see FMC Finance Corp. v. Murphee, 632 F.2d 413, 419-20 (5th Cir. 1980) (court suggested that in a case involving sufficient inequality of bargaining power, it would be willing to declare unconscionable a disclaimer meeting the requirements of § 2-316).

The commentators are also divided on this issue. See, e.g., J. White & R. Summers, *supra* note 65, § 12-11, at 475-83 (the authors disagree on whether a disclaimer of warranties which meets the requirements of U.C.C. § 2-316 is subject to a finding of unconscionability).
consistent with the disclaimer.107 The disclaimer failed as to the implied warranty, even though it technically complied with section 2-316(2), because the court found its operation in this context unconscionable.108 The court in essence held that express or implied warranties that go to the basic performance characteristics of a product cannot be easily disclaimed once they are created.109 Such disclaimers are commercially unreasonable because a buyer would not purchase a "standardized mass-produced product from an industry seller without any enforceable performance standards."110 Moreover, "[f]rom a social perspective," a manufacturer-seller should bear the risk of loss because it is best able to prevent the loss.111

The court relied on two tort cases112 as authority for its risk of loss analysis.113 Such reliance was misplaced. Tort principles regarding the allocation of risks of loss were developed to protect the powerless consumer injured by a defective product,114 not commercial entities that face purely commercial losses. One of the primary purposes of commercial contracts is to allocate the risks between the parties.115 The Uniform Commercial Code permits the parties to structure their bargain as they see fit,116 subject only to certain limited restrictions117 and to the operation of Code provisions to fill in the gaps.118 Not only does
the general policy of the Code permit parties to allocate risks among themselves, \textsuperscript{119} but section 2-316(2) provides that they may do so by disclaiming implied warranties, \textsuperscript{120}

Furthermore, the court in \textit{A & M Produce} relied on tenuous assumptions. The court concluded that the disclaimer was "commercially unreasonable" because it assumed that a buyer would not purchase a product without "enforceable performance standards."\textsuperscript{121} The court's assumption is faulty. Presumably, most commercial buyers who purchase low-priced products know or should know that they are not receiving the same product, accompanied by full guarantees, as they would receive for a higher price. Such buyers choose to risk poor performance in exchange for the potentially greater profits that are attributable to reduced costs.\textsuperscript{122}

The court was not so naive as to be unaware that such choices are made in the marketplace. Its objection was not that a buyer should be prohibited from paying a lower price for a higher risk; rather, it concluded that Abatti did not intend to enter into such an agreement when he purchased the weight-sizing equipment. Abatti purchased the equipment in reliance on the representations of performance capacity made by FMC. The court found the disclaimer unconscionable in order to hold FMC to its representations.\textsuperscript{123}

The court, however, did not need to use the unconscionability doctrine to accomplish its purpose. The court concluded that the jury must have found the creation of both an express and an implied warranty.\textsuperscript{124} Therefore, A & M could have recovered under the express warranty alone because section 2-316 prohibits the disclaimer of express warranties that go to the basis of the bargain.\textsuperscript{125}

Despite the fact that there was an alternate ground upon which A & M could have recovered, the court held the implied warranty disclaimer unconscionable. One reason for the court's holding may be found in its comment that "the subtle distinction between an 'implied' warranty and an 'express' warranty may do precious little to mitigate the exploitation of a party with inferior bargaining power. Yet as long as the warranty remains 'implied,' section 2-316's policing provisions

\textsuperscript{119} See supra note 116; see also U.C.C. § 2-719 comment 3 (1978) (exclusions or limitations of consequential damages are "merely an allocation of unknown or undeterminable risks").

\textsuperscript{120} U.C.C. § 2-316(2) (1978).

\textsuperscript{121} A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d at 491, 186 Cal. Rptr. at 125.


\textsuperscript{123} A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d at 492, 186 Cal. Rptr at 125.

\textsuperscript{124} Id. at 485 n.10, 186 Cal. Rptr. at 121 n.10.

\textsuperscript{125} See supra notes 99-103 & accompanying text.
are ineffective."126

The court was mistaken in de-emphasizing the distinction between express and implied warranties to such an extent. The distinction is clearest when the implied warranty of merchantability is at issue. This warranty arises purely by operation of law; neither party need say or do anything to create it.127 With the implied warranty of fitness for a particular purpose the distinction tends to break down. An express warranty is created when the seller's words or conduct in relation to the goods become part of the basis of the bargain;128 an implied warranty of fitness arises when the seller has reason to know of the particular purpose for which the goods are required and of the buyer's reliance on his skill or judgment to select or furnish suitable goods.129 In its creation, the "implied" warranty of fitness for a particular purpose is more like an "express" warranty because words or conduct of the parties are necessary to create it.130 Examined in this light, it might be fairer to the parties and more consistent as a matter of policy to prohibit disclaimers of both implied warranties of fitness and express warranties in the same fashion. Other implied warranties, such as the implied warranty of merchantability, are clearly distinct from express warranties. There is no basis for placing them in the same context as express warranties with respect to the impermissibility of disclaimers.

Although the Code is drawn to provide flexibility and to make it possible for the courts to develop the law in the light of unforeseen circumstances and practices,131 the course of this development is not unrestricted. To treat disclaimers of express and implied warranties in the same manner, without exceptions, would be contrary to the express policy of section 2-316.132 Consequently, the A & M Produce court was not free to change the law of disclaimers on the basis of policy; the policy-making function was preempted by the Code.

In summary, the court's holding as to disclaimers of warranties is clear: warranties that go to the basic performance characteristics of a product cannot be easily disclaimed once they are created. However, the holding is weakened by the fact that it was unnecessary to the court's ultimate finding of FMC's liability. The court wanted to hold

126. A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d at 484, 186 Cal. Rptr. at 120.
127. See supra note 99.
128. Id.
129. Id.
132. The use of the Code's unconscionability provision as a "covert tool" to implement the court's policy goal is also contrary to the intention of the drafters of the Code. The drafters intended for courts resorting to the unconscionability provision to use it to base their decisions on solid ground, not to mask their disagreement with the Code's other provisions. See id. § 2-302 comment 1; Leff, supra note 16.
FMC to its representations, but it could have accomplished this purpose with the settled rule against disclaiming express warranties since the evidence supported the creation of both express and implied warranties.

Exclusion of Consequential Damages

Whether A & M was permitted to recover damages under the express or implied warranty theory, the measure of its recovery could have been severely limited by the exclusion in the contract of FMC's liability for consequential damages.\textsuperscript{133} Damages for breach of an express warranty were limited by the contract to return of the equipment and recovery of the purchase price.\textsuperscript{134} Damages for breach of an implied warranty were not specified in the contract and therefore were governed by the Code. Section 2-714 permits recovery of the difference between the value of the goods as accepted and the value they would have had had they been as warranted, plus incidental and consequential damages where appropriate.\textsuperscript{135} Therefore, A & M would have been able to obtain partial relief under a breach of express warranty theory and perhaps complete relief under section 2-714. In any event, the commercial loss A & M suffered as a result of the failure of FMC's equipment to operate as warranted would have gone uncompensated had the consequential damage exclusion been allowed to stand.\textsuperscript{136}

Under the Code, remedy limitations are restricted by section 2-719. The official comments to that section make it clear that, although remedies may be limited, they may not be excluded. The contract must provide at least "minimum adequate remedies" or "a fair quantum of remedy." When a seller attempts to limit remedies to less than this minimum, the limitation is unconscionable and subject to deletion.\textsuperscript{137}

Subsection (3) of section 2-719 refers specifically to exclusions or limitations of consequential damages; such exclusions or limitations are

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\textsuperscript{133} It is important to distinguish between warranty disclaimers and remedy limitations or exclusions. A disclaimer clause is a device used to control the seller's liability by reducing the number of situations in which the seller can be in breach of warranty. A remedy limitation or exclusion restricts the remedies available to one or both parties once a breach has been established. J. WHITE & R. SUMMERS, supra note 65, \$ 12-11, at 471-72.

\textsuperscript{134} Neither the court nor the parties raised this issue. Paragraph 4 of the contract provides: "In the event . . . it is determined by a court of competent jurisdiction that an express warranty has been given . . . liability for breach . . . shall be limited to accepting return of such equipment . . . refunding any amounts paid thereon by Buyer . . . and cancelling any balance still owing on the equipment." A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d at 499 app., 186 Cal. Rptr. at 131 app. If this provision were unenforceable, the measure of damages would be as described infra text accompanying note 135.

\textsuperscript{135} U.C.C. \$ 2-714(2)-(3) (1978).

\textsuperscript{136} A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d at 492-93, 186 Cal. Rptr. at 126.

\textsuperscript{137} U.C.C. \$ 2-719 comment 1 (1978).
\end{quote}
valid unless they operate in an unconscionable manner. While the official comments seem to suggest that a limited remedy that provides at least "minimum adequate remedies" or "a fair quantum of remedy" is conscionable, many courts in construing section 2-719(3) ignore this language. They address the unconscionability issue in the same manner as if it were raised by any other contract provision governed by section 2-302. At least one commentator has suggested that even when such a minimal level is met, the contract or clause could still be found unconscionable under section 2-302.

The court in A & M Produce tested the exclusion with the same unconscionability analysis it had applied to the disclaimer. It found the exclusion unconscionable largely on the ground that the exclusion clause served to allocate the risks in a commercially unreasonable manner. The court reasoned that "FMC was the only party able to prevent the loss by not selling A & M a machine inadequate to meet its expressed needs."

Although the court discussed unconscionability in terms of the commercial reasonableness of the provision, it did not thoroughly examine this issue. For example, the court suggested that exclusions are invalid if consequential damages were a foreseeable result of a breach of warranty. It did not consider that the foreseeability of the damages may have been the reason FMC sought to preclude their recovery. The potential exposure to liability for the loss of A & M's crop may have been a greater risk than FMC wanted to bear in exchange for the purchase price of the machine. Contrary to the court's approach, the relationship between the price paid and the risks to be borne by the parties should be an important factor in determining whether a contract provision is commercially reasonable.

138. Id. § 2-719(3).
140. Ellinghaus, supra note 19, at 795.
141. A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d at 492-93, 186 Cal. Rptr. at 126.
142. Id.
143. Id.
144. The relationship between the price paid and the risks to be borne by each party is seldom addressed by the courts in analyzing unconscionability, yet it forms the basis of every bargain or contract between two parties. See Note, supra note 122, at 456-57. In concluding that the price paid for an item is not a legitimate criterion for evaluating the fairness of the transaction, courts conceal the fact that they are making business decisions for the parties by requiring the seller to price his or her product high enough to cover the risk, and by prohibiting the buyer from obtaining a low-priced product in exchange for the risk that his potential losses may not be fully compensated. Id. at 456-58.

Some courts consider price in determining unconscionability in "excessive price" or "price disparity" cases. See Ellinghaus, supra note 19, at 787-93; Spanogle, supra note 13, at 964-67. These cases involve sales of consumer goods, usually under installment sales con-
In addition, the court concluded that the exclusion was unconscionable based on the policy that risks should be allocated to the party best able to avoid their occurrence or to finance their materialization through risk-spreading devices. Under both criteria, FMC was best able to bear the risk: it was better able to avoid the risk because it was more familiar with its equipment's capacity and performance and it was better able to finance the risk materialization by including the cost of the risk in its price.

However, the broader question is whether the principle of risk allocation should be applied at all when determining the validity of an exclusion of consequential damages. The principle is clearly applicable in the strict liability context where it was developed to protect consumers from uncompensated losses resulting from personal injuries. The Code itself expresses this principle when it distinguishes between personal injury and commercial losses in section 2-719(3).

The distinction between personal injury and commercial losses is based on two factors. First, it is not feasible for a consumer to spread the loss, while in a commercial transaction both parties may spread the loss by way of the price charged for the products. Second, the loss in a personal injury case is not truly "fungible": it is different in kind from a commercial or economic loss.

In addition to the distinction between consumer and commercial losses, there is a distinction between businesspersons and consumers as decision-makers. Decisions of businesspersons are generally better informed and more carefully calculated than those of consumers. Businesspersons are generally more qualified to make decisions concerning the risks they choose to face.

Basic differences between personal injury and commercial losses, and between the decision-making processes of businesspeople and consumers, militate against the same application of the principles of risk allocation in all contexts. The tort principles that protect unsophistica-
ted consumers should not be allowed to emasculate the concept of a commercial contract as a risk-allocating device. Since exclusions of consequential damages are recognized as involving "merely an allocation of unknown or undeterminable risks," they should be subject to a lower standard of scrutiny than was applied by the court in A & M Produce.

There is little evidence that the exclusion of consequential damages was commercially unreasonable in the A & M Produce context. The question arises whether the evidence of procedural unconscionability was so strong that it could tip the scale against enforcement of this provision. In light of the previous discussion of procedural unconscionability, the exclusion of consequential damages should have been upheld and A & M should have been precluded from recovering consequential damages under these facts.

Planning Ahead for Commercial Transactions After A & M Produce

The A & M Produce court has indicated that the party who submits a form contract to another has an affirmative duty to obtain the other's knowing, voluntary assent to any unusual or unconscionable terms included in the contract. To fulfill this obligation, the submitting party should point out to the other party any provisions that allocate risks to that party. In addition, sales personnel should be trained to inform buyers of such risks, and the contract should be drafted to give notice to the signer of the contract.

There are a number of ways to draft a contract to assure that the signer receives notice of its terms. First, the contract terms should be written in plain language that a layperson can understand. Second, they should be readily visible in the contract. As suggested by the Uniform Commercial Code's definition of "conspicuous," contract language can be made more visible through the use of larger print and contrasting typeface and color. From the A & M Produce court's discussion it is clear that the location of the provision is also important. Terms located on the front of the contract and near the signa-

151. See supra note 115 & accompanying text.
153. See supra note 22 & accompanying text.
154. See supra notes 54-96 & accompanying text.
155. See supra notes 54-79 & accompanying text.
158. See supra note 55.
ture line fare better than terms located on the reverse side.\textsuperscript{160}

If the provision is not located on the front page, a procedure should be established by which the buyer can initial his or her acceptance of the provision. There should be an indication near the place for initials regarding what the initials signify.\textsuperscript{161} If these suggestions are followed, a court will be hard-pressed to find that any buyer was unfairly surprised.

Avoiding a finding of oppression may be more difficult because it rests in part on the party with whom the contract is made. If the drafter is in a superior bargaining position, one element of oppression is satisfied. Because this element alone is insufficient to support a finding of oppression, attention should be focused on the other elements.\textsuperscript{162} One way to avoid a finding of "no real negotiation" and an "absence of meaningful choice" is to offer the party a choice in the contract. For example, a product could be offered for sale under two prices: one with all of the warranties and remedies of the Uniform Commercial Code intact, the other with only the "minimum adequate remedies."\textsuperscript{163} If the use of two prices is impractical or undesirable, evidence that negotiations were carried on and that the buyer had a choice, either with the seller (\textit{i.e.}, the provision was negotiable) or in the marketplace generally (\textit{i.e.}, the provision was not customary in the line of business and the buyer shopped around), would aid the drafter's case.\textsuperscript{164}

To avoid a finding of substantive unconscionability the seller must show that the provision is "commercially reasonable."\textsuperscript{165} To provide evidence of the commercial reasonableness of the contract, an explanation of the business reasons for the allocation of the risks in a given manner should be included.\textsuperscript{166} In addition to including another clause in the contract, however, the seller may have to structure the transaction differently than he or she would like. No matter what the reason given, it would be difficult to convince a court that it is necessary to shift all of the risks involved in the transaction to the non-drafting party. If both parties are exposed to some portion of the risk, the agree-

\textsuperscript{160} See Wille v. Southwestern Bell Tel. Co., 219 Kan. 755, 764, 549 P.2d 903, 910 (1976) (attention was directed to the terms and conditions on the reverse side by a statement in block letters immediately above the signature line for the purchaser).

\textsuperscript{161} See D. Whaley, supra note 99, at 82-84 (providing good example of a warranty disclaimer).

\textsuperscript{162} See supra notes 80-96 & accompanying text.

\textsuperscript{163} See supra note 137 & accompanying text (discussing "minimum adequate" remedies).

The seller would face the difficult problem of determining the price to be charged under the alternatives. See Note, Warranty Disclaimers and Limitation of Remedy for Breach of Warranty under Uniform Commercial Code, 43 B.U.L. Rev. 396, 407-08 (1963).

\textsuperscript{164} See supra notes 80-96 & accompanying text.

\textsuperscript{165} See supra notes 50-51 & accompanying text.

\textsuperscript{166} D. Whaley, supra note 99, at 243-44.
ment is more likely to be upheld against a challenge based on unconscionability.\textsuperscript{167}

Conclusion

The court in \textit{A & M Produce} has placed a new gloss on the statutory unconscionability provision contained in Uniform Commercial Code section 2-302. It has set higher standards of conduct for drafters of form contracts than were previously applicable to parties operating in a purely commercial setting. To a party who wants to limit his or her potential liability the message is clear: the court disfavors such limitations unless the parties voluntarily agree to their inclusion in the contract. Even then the court may question whether the drafter was in a superior bargaining position and presented the contract on a take-it-or-leave-it basis. If the circumstances are indicative of adhesion, the court may scrutinize the allocation of the risks of loss to determine whether such allocation was commercially reasonable. At its outermost limit, the court may refuse to enforce an agreement between parties of equal bargaining power if it finds the allocation of the risks in the transaction unreasonable. Under this analysis it seems difficult to bring an element of predictability into the use of form contracts. This is unfortunate because predictability is precisely the reason business people use form contracts: they want to control the risks they face, and to relate those risks to the prices they charge in order to assure the profitability of their venture.

Drafters of contracts may have to both rewrite their contracts and restructure their transactions to avoid a finding of unconscionability. As they do so, they should consider the policies underlying the \textit{A & M Produce} decision, and not just the factors that indicate the existence of unconscionability. In the final analysis, unconscionability is a far-reaching doctrine, the limits of which are yet to be tested.

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\textsuperscript{167} \textit{Id.}

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