

COMMENTS & NOTES

Unconscionability in Standard Forms

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This Comment argues that many exchanges governed by standard form contracts, though untainted by procedural defects and hence not currently subject to judicial control, may exhibit oppressive clauses or exorbitant prices. The sources of these market imperfections may be more amenable to legislative than judicial correction.

"Practical men . . . are usually the slaves of some defunct economist."¹ With the legal profession this servitude has been to laissez-faire metaphors rather than nineteenth century economists. This Comment examines an area of daily conduct where the law's obeisance to dead doctrine has had significant impact: the enforceability of standard form agreements.

In deciding whether to enforce a contract, courts generally focus not on the content of the exchange regulated by the contract between the individuals but only upon the manner of formation. They typically begin by asking, "Did the parties agree?," and elaborate by inquiring into the existence of offer and acceptance. Further investigation centers upon the competence of the parties, the presence or absence of duress, the accuracy, materiality, and nature of representations made during the negotiations leading to the contract, the presence or absence of a fiduciary relationship between the parties, and the existence of consideration.² What the parties agreed to matters almost not at all; enforceability rests upon the process leading to agreement.

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1. J.M. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* 383 (Harbinger ed. 1964).

2. Courts sometimes speak of inadequacy of consideration. While this phrase hints at a concern for substantive matters it really masks an inquiry into the formation procedure similar to that involved under the unconscionability doctrine discussed in Part II *infra*. The early cases clearly considered inadequacy as an indication of fraud. *McFadden v. Mitchell*, 54 Cal. 628, 202 P. 479 (1880) (failure of consideration not itself enough to justify finding fraud as a matter of law). More recently, courts state that consideration will not be measured if it is "plainly substantial." *Blocksidge v. Broadway Sixth Co.*, 207 Cal. App. 2d 628, 24 Cal. Rptr. 622 (1962), citing in support

This Comment argues that exchanges untainted by failures in the bargaining process can suffer from the same types of oppression—exorbitant prices and unfair clauses—which beset contracts struck down by the courts under the traditional bargaining analysis. A comparison of the economic models which underlie present legal doctrines with more contemporary models that better capture market realities reveals that a new approach to the concept of “unconscionability” is required. Under it, legislative action may more easily remedy market flaws than courts. Before outlining the economic models on which the analysis of exchanges ought to be based, this Comment will examine the theoretical basis for present legal doctrines.

I

ECONOMIC MODELS OF CONTRACT LAW

The notion of contract as a bargaining process arose concomitantly with the doctrines of laissez-faire and of the free enterprise system. Responsibility for these doctrines has commonly been foisted upon the nineteenth century economists.³ In the laissez-faire market place, eco-

of the “plainly substantial” language, *Taylor v. Taylor*, 66 Cal. App. 2d 690, 698 (1944), which states that inadequacy evidences fraud or undue influence.

3. The text equivocates on the responsibility of economists for the vigorous, often cutthroat image of laissez-faire because the demon haunting the legal profession may not be a defunct economist but an outdated myth. Two distinct accounts of nineteenth century economics exist. Legal scholars have asserted the link between laissez-faire and economic theory. G. GILMORE, *THE DEATH OF CONTRACT* 6-7 (1974) cites L. FRIEDMAN, *CONTRACT LAW IN AMERICA* (1965) in support of his contention that contract theory’s individualism is linked to nineteenth century economic theory. Friedman notes that “[t]he law of contract is, therefore, roughly coextensive with the free market. Liberal nineteenth-century economics fits in neatly with the law of contracts so viewed.” *Id.* at 20. Friedman cites no authority for his view of nineteenth century liberal economic theory, however, and the treatment of parties as individual units with complete mobility and freedom of decision does not necessarily imply an institutional arrangement such as contract law.

Twentieth century historians of economic thought emphasize the market aspects, as opposed to the bargaining aspects of nineteenth century economic theory. See, e.g., R. LEKACHMAN, *A HISTORY OF ECONOMIC IDEAS* 136-48 (1959) (on Ricardo and Mill). While these modern accounts cite the original sources, the twentieth century historians may have recast prior theory in light of today’s notions of economics which do not follow the laissez-faire version. The confusion may arise from the nineteenth century theorist’s tendency to illustrate his arguments with examples that lend credence to the laissez-faire notion without actually adopting the position. See, e.g., J. CAIRNES, *SOME LEADING PRINCIPLES OF POLITICAL ECONOMY* 106-07 (1874) (market forces establish a narrow range from which the exact price is determined through the “higgling of the market”); Ingram, *Political Economy*, in 19 *ENCYCLOPAEDIA BRITANNICA* 346, 373 (Twentieth Century ed. 1902) (Ricardo’s hypothetical examples imagine “two contracting savages”); Veblen, *Preconceptions of Economic Science III*, 14 Q.J. ECON. 240, 257-60 (1900).

Another strain of twentieth century economics, game theory, appears to emphasize the negotiation aspect of economic activity. However, it shares the concern of the more classical models, described in text accompanying notes 91-114 *infra*, for the information

conomic agents, unfettered by government restrictions, interacted freely. Agents met, conferred, and, acting in their own self-interest, contracted.⁴ The attribution of laissez-faire to the economists may have resulted from the coincidence of the vocabularies of the nineteenth century economist and his contemporary, the social darwinist.⁵ The language of vigorous competition and of survival of the fittest masked the economists' concern for static equilibria⁶ and for the conditions which marked them;⁷ the predominant economic question was what price equated supply and demand in an unchanging world, not how that price was reached or how it changed over time.

In any case, freedom of contract, "the inevitable counterpart of a free enterprise system,"⁸ arose from this laissez-faire context. Under the influence of Langdell, Holmes, and Williston, contract law evolved into a law of formalities which, if correctly followed, resulted in a legally binding agreement.⁹ Contract law did not, and largely does not, examine the contents of the agreement but merely the manner of formation.¹⁰ When the state wished to regulate the substantive contents of the agreement it looked to a substantive area of law: the law merchant, insurance law, or labor law.¹¹

Actual market behavior increasingly has exhibited deviations from the presuppositions of contract law. This has not gone unrecognized by the legal profession. From Karl Llewellyn,¹² Friedrich Kessler,¹³ and more recent commentators,¹⁴ lawyers have understood that a growing

structures of the market. These structures form one part of the definition of the game. In addition, most game theoretic models look at solutions concepts designed to reveal the characteristics of the final outcome and not the process of reaching it. Yet this process is the heart of contract theory. This Comment's exclusion of game theoretic models, then, does not alter its conclusion. See generally R. LUCE & H. RAIFFA, *GAMES AND DECISIONS* (1957).

4. See L. FRIEDMAN, *CONTRACT LAW IN AMERICA* 20-21 (1965).

5. See R. HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 143-56 (rev. ed. 1955).

6. The concept of "static equilibrium" contemplates an abstract balance in the market. "Static" refers to the unchanging nature of the environment in which prices occur; "equilibrium" refers to the compatibility of agents' decisions. See text accompanying notes 75-76 *infra*.

7. See R. HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 143-56 (rev. ed. 1955); Veblen, *Preconceptions of Economic Science III*, 14 Q.J. ECON. 240, 265-68 (1900).

8. Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943).

9. See G. GILMORE, *THE DEATH OF CONTRACT* 13-34 (1974).

10. See *id.* at 21.

11. Cf. L. FRIEDMAN, *CONTRACT LAW IN AMERICA* 20-24 (1965).

12. Llewellyn, Book Review, 52 HARV. L. REV. 700 (1939).

13. Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

14. See, e.g., Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971) [hereinafter cited as Slawson].

proportion of agreements—one commentator has said 99 percent of all agreements¹⁵—do not conform to the patterns of interaction, dickering and other bargaining required by contract law. The deviant transactions are those concluded upon standard forms. Their flaw has generally been the failure to dicker over terms and the parties' lack of mutual assent to the printed clauses. While the parties have agreed upon some things, they have not upon others. The courts must decide how much, if any, of the standard form to enforce. Presumably, the agreement would be enforceable in its entirety if the parties complied with the formalities of contract law. Consequently, legal solutions have concentrated upon means for determining what reasonable parties would have agreed to or accepted had dickering occurred.¹⁶ Formulations vary from a focus on unconscionability to considerations of the parties' reasonable expectations to a test based on whether any reasonable person would agree to a given clause.¹⁷

Thus, the *laissez-faire* metaphor remains central to the way the law approaches standard form contracts. The courts continue to investigate the actions and the agreement of the parties before them, even though the Uniform Commercial Code admonishes the judiciary to examine the "commercial setting, purpose, and effect" of the agreement.¹⁸ This judicial emphasis on the bargaining process between the immediate parties to a contract may be misdirected. More significantly, legislative reliance on judicial resolutions of the problems prompting such inquiries may be unwarranted.

Contemporary economic models have generally abandoned the personality and exuberance of the *laissez-faire* world. Today both the ideal markets of economic theory and the markets actually operating in the U.S. economy are ones where most agents, though still self-interested, interact only with prices;¹⁹ they do not dicker over terms with other agents. The impersonality of the standard form contract conforms with this impersonal world in which the agent of contemporary theory lives. More importantly, however, failures of the imperfect markets of the real world to supply the "best" contract terms or to charge the competitive price may result from flaws which extend beyond the bargaining process between the two contracting parties.

The abstractness of the current model may make it unsuitable for determining whether a contract should be enforced. Indeed, the world

15. *Id.* at 529.

16. See text accompanying notes 54-69 *infra*.

17. See *Slaughter v. Jefferson Fed. Sav. & Loan Ass'n*, 361 F. Supp. 590, 597 (D.D.C. 1973).

18. UNIFORM COMMERCIAL CODE § 2-302(2).

19. See G. DEBREU, *THEORY OF VALUE* (1959).

does not look or perform like the abstract economies which form the basis of modern economic theory. The forces which determine the quality of goods offered by the market and the prices at which they are exchanged may be impersonal, but real people are their instruments. Some person sets a price. But the price-setting process, though it may involve contact with or information about other economic agents, rarely involves arm's-length negotiation.²⁰ The economy is neither the abstraction of the neo-classicist nor the teeming market of *laissez-faire*.

Why then consider any economic model, *laissez-faire* or impersonal, in formulating rules on the enforceability of contracts? Economic theories, unlike physical theories, are not "truth" or accurate models of the world; they should not be taken as such. One must determine the range of problems to which they apply and when to abandon their teachings. To a certain extent economics merely rationalizes post hoc the prevailing pattern of distribution and production. It describes the world and thereby assumes a normative power. Its more useful function, however, is as parable. Economic models are stories with morals. Each lays bare some aspect of the complex social structure which rations the use of resources among consuming and producing agents. It suggests questions to ask about the functioning of the machine. Economic theory does not provide an infallible guide to the resolution of highly complex problems; it may suggest how minor tinkering can improve performance.

The *laissez-faire* model suggests one class of agreements which should be refused enforcement. Duress and misrepresentation can produce unconscionable results in contracts bargained for in their entirety. Current law deals adequately with this class of exchanges. Other exchanges, however, may also be "tainted;" the market may break down outside the bargaining relation of the parties. The resulting contract may exhibit, if courts knew where and for what to look, characteristics such as exorbitant prices or oppressive clauses which would be unconscionable had they resulted from defects in formation.

Part II of this Comment shows in greater detail how the traditional analyses of the unconscionability doctrine are encrusted with the vestiges of the *laissez-faire* image of the market place. Despite 40 years of self-consciously wriggling about in the grip of the free market paradigm of the nineteenth century the law has only begun to emerge from its constraints. Courts continue to rely upon the negotiation process between the parties to determine whether a clause or entire form

20. Contracts between large corporations governing uncommon transactions are dickered over. But many other contracts between large corporations simply involve an exchange of forms containing contingency terms; UNIFORM COMMERCIAL CODE § 2-207 gives rules for determining which terms govern.

should be voided and to decide what language should govern circumstances to which no acceptable term in the form applies. The decision not to enforce rests on an examination of the actual contracting behavior; the reasonable allocation of risks relies on idealized, hypothetical behavior.

Next, more contemporary economic models are discussed and the questions they raise examined. These models reveal that markets may produce "unconscionable" results even though the formalities of contract law are observed. Under current law, contracts with oppressive clauses or for exorbitant prices are unconscionable when more equal terms or a lower price would have been achieved had the bargaining process been adequate. Yet, imperfect markets may also produce oppressive terms or exorbitant prices—as measured against that available in a *perfect* market. While the absence of fraud, duress, and misrepresentation constitutes a standard which all transactions should meet, the realities of the modern marketplace suggest that transactions should meet market tests as well. Why should society condition its disapproval of transactions involving oppressive clauses or exorbitant prices upon the presence of bargaining defects? The legal concept of unconscionability should be expanded. Exchanges made in an imperfect market, though meeting present formational requirements can be "unconscionable" in result, and the term will be used throughout the Comment in this expanded context.

A market-induced unconscionable result may not, however, always justify intervention by either a court or a legislature. Two factors exist which may suggest conditioning the enforceability of contracts on deviation from the norms of formation. Analysis of these factors would require empirical investigations beyond the scope of this Comment. First, market imperfections arise because markets do not function without friction. Dissemination and acquisition of information, which play important roles in the setting of prices,²¹ involve costs. Imperfections arise from rational agents economizing on these costs. Remedies, whether they be judicial or legislative, involve costs as well. One must ask which remedy, if any, most improves market performance in proportion to its costs.²² The cost of judicial or legislative intervention to perfect a market may exceed the benefits such perfection brings.²³

Second, the efficient functioning of the market need not be the sole or even the primary concern of the law. For example, society may be

21. See text accompanying notes 90-108 *infra*.

22. Policy makers may have certain target levels of market performance. As long as markets achieve these levels policy makers ignore them.

23. Arguments against government intervention in economic affairs frequently rest on the assumption that the costs of market imperfections are less than the costs of government remedies. *E.g.*, R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972).

willing to sacrifice efficiency for equity. In a world with given technological capabilities and with a variety of individual preferences, many of the possible uses of the productive capacity and the resultant distribution of goods and services will be efficient in the economic sense. No person could be made better off without making another person worse off. Since the final distribution of goods and services at which an efficient market arrives depends upon the initial distribution of wealth, the market may arrive at an efficient result which society finds objectionable on equity grounds: some people have too small a share in the overall output of the economy. Asked to choose between an efficient market result with gross inequalities in wealth and an inefficient market result with a more even distribution of the economic product, a society might choose the inefficient but more equitable state. In any case, while a change from the legal doctrines currently applied to contracts to alternative doctrines that focus on market structure and behavior might improve efficiency, it will also surely redistribute income. Producers who before sold above competitive prices will now relinquish to consumers that share of their incomes derived from this excess.

II

TRADITIONAL ANALYSES OF UNCONSCIONABILITY

This section details the law's focus on the contract formation process in determining the unconscionability of a clause or of a whole contract, and describes existing remedies for defects. It seeks to show that legal emphasis has rested on contract formation and hence the law has made little effort to deal with the market failures suggested in Part III.

The discussion parallels the concerns of the law, each segment of which—statute, case-law, and commentary—examines the relation of the two contracting parties in order to resolve the three questions that arise: (1) can a contract or clause within one be unconscionable if no defects accompanied the formation of the contract; (2) how does one distinguish the legitimate from the illegitimate clauses in a form; and (3) by what language should illegitimate terms be replaced?

A. *Article 2 of the U.C.C.*

The approach of the Uniform Commercial Code was foreshadowed by the insights of Karl Llewellyn, its leading drafter. His views, more fully adumbrated in his writings than in the Code's comments, stress the importance of dickering over terms and require that unassented to form clauses not "alter or eviscerate the reasonable meaning of the dickered terms."²⁴

24. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960).

The warranty sections in the Code also adopt a strict "dickering" perspective on the form contract. They emphasize bargained for terms and negotiation between the parties, and allow a court to ignore or strike down specific clauses to which a party did not agree. Accordingly, section 2-316 "seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise."²⁵ A comment to section 2-313 on express warranties further emphasizes the importance of dickered aspects of the individual bargain. Where an express warranty has been given, further "words of disclaimer in a form are repugnant to the basic dickered terms."²⁶ Any warranty, however, can be disclaimed in conspicuous language and in writing. These sections, though directing the courts to the actual agreement of the parties, leave unresolved the problem of interpolating language to govern circumstances formerly controlled by the expurgated clauses.

Section 2-302 on the "Unconscionable Contract or Clause" constitutes the article's primary deviation from contract law's traditional emphasis upon the form, rather than the content, of the bargain.²⁷ It seems to permit a court to examine the substantive effect of the contract and its individual provisions. The Code's use of "unconscionable," however, is unclear. A comment states that "the principle is one of the prevention of oppression and unfair surprise."²⁸ "Unfair surprise" points to the formation conduct while "oppression" might refer either to the substantive effect of the clause or the bargaining process. The next clause further exacerbates the confusion by stating that the section's purpose is "not of disturbance of allocation of risks because of superior bargaining power."²⁹ This equivocation mirrors a split among the drafters as to the scope of the section. Arthur Leff, in a detailed examination of the history of the section, notes that the drafters at first used language that clearly indicated the court's power to rewrite the

25. UNIFORM COMMERCIAL CODE § 2-316, Comment 1.

26. *Id.* § 2-313, Comment 1.

27. UNIFORM COMMERCIAL CODE § 2-302 reads as follows:

(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.

28. UNIFORM COMMERCIAL CODE § 2-302, Comment 1.

29. *Id.*

substance of the contract even if the parties knowingly and willingly agreed, but subsequently drafted the more ambiguous section that appears in the current Code.³⁰ The Code consequently equivocates on whether a court may find unconscionable a contract which exhibits no irregularities in its formation. One of the drafters admitted that such a result is theoretically possible but simultaneously emphasized that his primary concern lay with the correction of bargaining irregularities.³¹ However, many other commentators, frequently pointing to the cases holding contracts unconscionable for having too high a price, have stated unambiguously that the Code allows a court to hold a bargained for contract or clause unconscionable.³²

B. The Case Law

The Code left three major problems for the courts to resolve. First, should (or could) the unconscionability doctrine be used to strike down clauses or entire contracts even when the formation process is untainted? Second, how does one distinguish the acceptable contract term or clause from the unacceptable? Courts must confront this question independently of their resolution of the desirability of substantive unconscionability. Third, once a clause has been deemed unconscionable or otherwise been stricken from the contract, what language shall be interpolated in its place?

A close analysis of unconscionability cases reveals that courts have not chosen to interpret section 2-302 broadly. Many cases emphasize that an exorbitant price evidences defects in the formation process of the contract. A Georgia appellate court recently noted that "[u]nconscionability is directly related to fraud and deceit, which in turn may be found where there is great inadequacy of consideration or great disparity of mental ability."³³ It then found fraudulent the contract between a home improvement business and an 87-year old woman. The court noted that the exorbitant price evidenced fraud or deceit on the part of the seller.³⁴ Conversely the District of Columbia Court of Appeals, though confronted with a price far above the value, did not invalidate the contract because of indicia that there was freedom of choice.³⁵

30. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 499-501 (1967).

31. Braucher, *The Unconscionable Contract or Term*, 31 U. PITT. L. REV. 337, 340 (1970).

32. See, e.g., Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 773-75 (1969); Slawson, *supra* note 14, at 565.

33. *F.N. Roberts Pest Control Co. v. McDonald*, 132 Ga. App. 257, 260, 208 S.E.2d 13, 15 (1974).

34. *Id.*

35. *Morris v. Capitol Furniture and Appliance Co.*, 280 A.2d 775 (D.C. Ct. App. 1971).

*Kugler v. Romain*³⁶ illustrates the use of price/value disparity as a proxy for inadequacies in the contract formation process. In *Kugler*, the New Jersey Supreme Court invalidated home solicitation contracts for educational materials suggesting that an exorbitant price unilaterally fixed and not open to negotiation was unconscionable. Elaborating upon the evidentiary impact of a high price, the court stated:

In deciding whether defendant, contrary to the statute, used any deception, fraud, false pretense, or misrepresentation, or whether he concealed, suppressed or omitted any material fact in connection with the sales to book purchasers, the price charged the consumer is only one element to be considered.³⁷

Other elements which the court considered, such as the defendant's costs of distribution and the true "value" of the goods, reinforced the conclusion that the buyers lacked freedom of choice, understanding, and ability to negotiate in a meaningful fashion. The court also emphasized certain market factors, such as the use of home solicitation among low-income, poorly educated families: "Sale at an exorbitant price especially in the market described by the evidence in this case raises a strong inference of imposition."³⁸

The most difficult price case to deal with is *American Home Improvement, Inc. v. MacIver*.³⁹ It is also the least reasoned. The court held the contract unconscionable simply because of the gross disparity between the price charged and the value of the services rendered. The facts, however, reveal that the procedural defects which taint many other unconscionability cases existed in the contract before the court. Defendant had signed a financing application with two blank provisions; one was a power of attorney, the other a promissory note. Although the form gave the amount due and the number of months and monthly payments, it failed to disclose the interest rate charged. This omission violated statutory disclosure requirements.⁴⁰ In short, the gross disparity between price and value was accompanied by circumstances which rendered it questionable whether defendant had assented to the contract.

Courts have, of course, found substantive oppression evidenced by aspects of the contract other than the price term. Warranty disclaimers, limitation of remedy clauses, and particular credit provisions have most troubled the judiciary. Where courts have refused enforcement the oppressive terms have been accompanied by defects in the bargaining

36. 58 N.J. 522, 279 A.2d 640 (1971).

37. *Id.* at 530, 279 A.2d at 644.

38. *Id.* at 545, 279 A.2d at 653.

39. 105 N.H. 435, 201 A.2d 886 (1964).

40. N.H. REV. STAT. ANN. § 399-B:2 (1968).

procedure. In *Williams v. Walker-Thomas Furniture Co.*,⁴¹ the District of Columbia Court of Appeals refused enforcement of an add-on credit clause. The defendants had purchased furniture and other consumer durables from the plaintiff on several occasions. Defendants' payments were allocated pro rata among the several items purchased so that no item was paid off until all had been paid off. The seller retained a security interest in all the goods. The court remanded the case for a determination of whether the defendants had lacked choice and could not have dickered over the terms. Similarly, a disclaimer of warranty clause was not given effect where the disclaimer contradicted explicit representations made by the seller and was hidden within a complex and highly unreadable form.⁴²

The almost exclusive application of the unconscionability doctrine to consumer transactions provides further evidence of the formation-centered analysis used by courts. Where non-consumers have raised unconscionability claims the court treatment has been illuminating. For instance, in *D.H. Overmyer Co. v. Frick Co.*,⁴³ the United States Supreme Court upheld a cognovit clause because the plaintiff was a large corporation which had knowingly negotiated for the clause. The court distinguished the situation in that case from the typical adhesion contract "where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision."⁴⁴

In a more recent case⁴⁵ an insurer, the subrogee of an electric utility, sued a generator manufacturer to recover the consequential damages that the insurer had paid the utility after the defendant's generator malfunctioned. The insurer argued that the contract clause disclaiming liability for consequential damages was unconscionable because only two manufacturers of generators existed and because the insured lacked notice of the provision. The court responded:

This was no purchase of a passenger ticket, a coffee percolator, a washing machine or an automobile. This was no take-it or leave-it transaction. It was one that involved the manufacture and installation of an item at a price in excess of \$10,000,000, with many details that were to be hammered out by knowledgeable parties. It involved two industrial giants of the nation, and the terms of the agreement were the subject of extensive negotiations over a three-year period.⁴⁶

41. 350 F.2d 445 (D.C. Cir. 1965).

42. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). The express representations were advertising statements. *Id.* at 385-86, 161 A.2d at 84.

43. 405 U.S. 174 (1972). In this case the plaintiff offered due process arguments similar to those underlying the unconscionability doctrine.

44. *Id.* at 188.

45. *Royal Indemnity Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 520 (S.D.N.Y. 1974).

46. *Id.* at 524-25.

The court concluded that no irregularities could taint such a contracting process and the parties were held to their agreement.

The few cases in which corporate litigants have escaped contract clauses have involved peculiar circumstances. In *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*⁴⁷ the court invalidated a restrictive definition of "burglary" because it did not conform either to the legal definition or to ordinary language usage. Indeed, the defendant insurance company's agent had agreed with the plaintiff's interpretation of the clause. Further, as is usual in insurance contracts, the insured did not receive the policy until after payment of the premium. Failure to indicate the variant usage in a "prominent" spot or to bargain over the contents of the restrictive clause caused the court to ignore its provisions. Here, particular circumstances in the contract formation process overcame the presumption of validity of corporate contracts.

Thus, despite indications of increasing freedom for courts to manipulate contract terms, the concept of unconscionability still directs judicial inquiry to the bargaining behavior of the parties. Courts search for defects in the formation process—the presence of unfair surprise, the absence of bargaining over a particular term, or disparity in bargaining power. A contract exhibiting one of these aspects of procedural unconscionability is suspect, and surprising, unbargained for, or highly oppressive terms may not be enforced.

Most clauses of standard form contracts are candidates for non-enforcement. Form clauses have not been dickered over and one party, generally the buyer, has little knowledge of their contents. Thus, courts are faced with the problem of isolating unacceptable terms and interpolating language to govern contingencies controlled by the void clauses. This dual task has been difficult because of the distinction drawn between the prevention of oppression and unfair surprise and the allocation of risks that results from superior bargaining power.⁴⁸ Here too the attempts have largely been dominated by the bargaining model of the market and its emphasis upon the parties before the court.

The most comprehensive judicial attempt to identify unacceptable terms appears in one of the earliest cases, *Henningsen v. Bloomfield Motors, Inc.*⁴⁹ At issue was a disclaimer of warranty provision hidden within a detailed and complex form contract written by the automobile dealers trade association. Since all contracts for the sale of new automobiles possessed similar clauses, the purchaser had no choice among various warranty clauses. The New Jersey Supreme Court noted the

47. 227 N.W.2d 169 (Iowa 1975).

48. UNIFORM COMMERCIAL CODE § 2-302, Comment 1; see text accompanying notes 28-29 *supra*.

49. 32 N.J. 358, 161 A.2d 69 (1960).

procedural factors involved in the use of a standard and complex form—lack of choice, unclear and misleading wording, and the absence of bargaining over the clause—and relied upon defects in the formation process in finding for the plaintiff.

In determining whether the clause was inconsistent with or eviscerated other bargained for terms, the court began with Llewellyn's premise of dickered terms and asked three questions. First, did the purchaser know that the clause existed? Second, had he known of its existence, could he have understood the legal effect of the words? And third, did reasonable alternatives to the contract exist?

The first two questions do not distinguish the eviscerating terms of a standard form from the legitimate ones; rather, they consider fraud and procedural oppression without evaluating the substantive desirability of the questioned clause. In general the consumer will not have read any of the clauses, and most will be written in obscure legal terms. The last question, particularly in the context of *Henningsen*, approaches an antitrust rather than a contract test. The inquiry is really directed to whether market concentration has limited the choices available to the buyer. This was the approach of the District of Columbia Court of Appeals in *Williams v. Walker-Thomas Furniture Co.*⁵⁰ The court stated that unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties,⁵¹ and emphasized the disparity of bargaining power between the two parties before it. After *Henningsen* the New Jersey Supreme Court sought to differentiate this concept of inequality of bargaining power from anti-trust considerations.⁵² It developed a four-part test: (1) did the seller have access to expert advice; (2) did he have time to reflect over specific terms of exchange prior to negotiations; (3) did he have experience from which to draft better; and (4) which party constituted the better risk bearer?

Again, the first three of these criteria propose tests that do not distinguish the vast number of standard form clauses that might be unconscionable. Only the final criterion, risk-bearing ability, is directed at identifying those clauses that actually offend. It approaches the "disturbance of allocation of risks because of superior bargaining power" that the Uniform Commercial Code, according to the comments to it, did not intend to disturb.⁵³

50. 350 F.2d 445 (D.C. Cir. 1965).

51. *Id.* at 449.

52. *Unico v. Owen*, 50 N.J. 101, 110, 232 A.2d 405, 410 (1967).

53. UNIFORM COMMERCIAL CODE § 2-302, Comment 1; see text accompanying notes 28-29 *supra*.

C. *The Commentators*

The Uniform Commercial Code raised the question of whether substantive unconscionability may exist independently of procedural faults; courts have concentrated their efforts on adumbrating standards to distinguish the "good" from the "bad" contract clause. While the extensive literature on unconscionability has also considered these two problems, this section focuses upon the commentators' responses to the question of rewriting "bad" unbargained for clauses. These responses generally rely on some idealization of the contracting process.

Of the commentators, Murray⁵⁴ most explicitly relies upon the Llewellyn framework of dickered terms and the New Jersey court's concern for the assignment of risk. Murray speaks of circles of assent. He then defines three classes of risk allocation: expected, not unexpected, and unexpected. The first method of allocation arises either from trade usage or course of dealing or from express intention. An allocation is not unexpected if it is not surprising to the party against whom it operates. Unexpected allocations constitute the residual and suspect category. To be struck down by a court the risk allocated by the clause must be material, unassented to, and unexpected.

The major problem with the Murray analysis lies in its ambiguity. The determination of which allocations are not unexpected and which are unexpected is critical. This simply reformulates the dilemma: which terms, bargained for or not, are so one-sided as to need judicial revision? The determination seems to depend upon the reasonable expectations of the parties. These expectations must arise from experience in or the practice of the world and from court affirmation of particular contractual arrangements. The former source of expectations is simply normal market behavior while the second is precisely the question before the court: should it affirm the allocation of risk when market practice probably uniformly allocates the risk against the consumer?

Professor Spanogle⁵⁵ substantially agrees with Murray's analysis. The essence of procedural unconscionability is the notion of surprise and oppression in bargaining. Thus, while he recognizes that the Code may permit condemnation of certain substantive abuses independent of bargaining conduct, he feels that "in the typical case both abuses in contract formation and harshness in the contract terms are required."⁵⁶ His test looks to the parties to determine whether they had the ability to codetermine the terms of the contract. If this condition fails the unilat-

54. Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969).

55. Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969).

56. *Id.* at 950.

erally determined terms must not abuse the reasonable expectations of the parties or alter or impair the dickered terms.

Some dissent from the bargain model of unconscionability has arisen. Speidel⁵⁷ has offered a nonbargaining solution to the problem of consumer transactions. At first it may seem that he espouses the current unconscionability doctrine:

In a market economy, the game is bargaining and its object is exchange. . . . The more disruptions in the bargaining process, the more concern is manifested when substantial disparities appear. In this regard UCC 2-302 may be thought of as an effort to redress what amounts to be a zero sum game where the opportunity of one party to pay has been substantially limited.⁵⁸

However, Speidel proposes that "the element of assent be excised from the determination of unconscionability in consumer transactions"⁵⁹ because the approach is inconsistent with current trends in consumer protection legislation. Such legislation has increasingly placed these transactions under administrative control; unconscionability then must act only interstitially. As a test, Speidel suggests that after the buyer has established a *prima facie* case of oppression the seller should have the burden of proving that the term is commercially reasonable.

This commercial reasonableness test has one major flaw. It has been pointed out that all businesses pursue profit and those tactics which maximize profit are by definition commercially reasonable.⁶⁰ The contract model relies upon bargaining to insure the fairness of the exchange: a bargained for clause is commercially reasonable. Speidel must look to other safeguards, but he fails to provide any. While market structure might provide one guideline, even markets with many sellers can produce noncompetitive prices⁶¹ or "commercially unreasonable" contract clauses.⁶²

Slawson has attempted to avoid the vacuity of the "commercial reasonableness" test by partially rejecting the bargaining model. He retains the need to inquire into what would have been the result had there been bargaining or at least complete and understandable disclosure of terms. But in an article on standard form contracts,⁶³ he has urged that the unconscionability doctrine be used solely to police writ-

57. Speidel, *Unconscionability, Assent, and Consumer Protection*, 31 U. PITT. L. REV. 359 (1970).

58. *Id.* at 359-60 n.3.

59. *Id.* at 374.

60. Leff, *Contract as Thing*, 19 AM. UNIV. L. REV. 131 (1970). Economists of course have been saying the same thing for over 200 years.

61. See text accompanying notes 90-108 *infra*.

62. See text accompanying notes 109-14 *infra*.

63. Slawson, *supra* note 14.

ings and terms to which a party has actually assented. Slawson, then, would view section 2-302 as permitting courts to impose substantive requirements. He fails, however, to develop standards for determining which terms should not be enforced.

Slawson also confronts the problem of unassented to terms in a standard form. He begins by asserting that the standard form is not a contract.⁶⁴ This will have, he says, three consequences: (1) courts will freely strike down portions of form contracts; (2) industry will no longer believe that simple redrafting will restore the enforceability of the clause; and (3) sellers will be encouraged to represent more accurately the onerous terms of the form.⁶⁵ Though Slawson has apparently rejected the bargaining nexus as a source of terms, he proposes a test that would replace unassented to terms by inquiring into what bargaining would have produced. To every transaction he would attach an implied warranty of fitness for intended use. To discover the import of the implied warranty courts must ask: "what would a reasonable buyer under the circumstances have chosen to buy had he the range of choice that the industry-imposed adhesion had denied him?"⁶⁶

Problems similar to those raised by Speidel's analysis plague Slawson's test. The buyer's expectation about the product, Slawson suggests, should govern the terms. These expectations arise from the advertising and other representations of the seller as well as from "[t]he general expectations of almost all consumers as to the kind of product concerned"⁶⁷ Unfortunately, often the seller will neither advertise nor make other representations about a wide range of contract terms. Also, many terms relate to unlikely contingencies; consumers may lack sufficient information to evaluate such terms. Further, it is costly for consumers to compare products along every characteristic of complex contracts. Finally, the general expectations of almost all consumers rest largely on industry performance,⁶⁸ but by assumption actual performance has been deemed inadequate. Slawson does not elaborate on how a court would determine what choice would be available in the absence of industry-wide coercion. Such a determination is necessarily complex because with suitable uniformity of tastes, an optimally functioning market would produce a single form contract.⁶⁹

64. *Id.* at 541.

65. Slawson, *Mass Contracts: Lawful Fraud in California*, 48 So. CAL. L. REV. 1, 15-19 (1974). This article explicates many of the ideas in Slawson, *supra* note 14.

66. Slawson, *supra* note 14, at 560.

67. Slawson, *Mass Contracts: Lawful Fraud in California*, 48 So. CAL. L. REV. 1, 21 (1974).

68. UNIFORM COMMERCIAL CODE § 2-314, Comment 2.

69. LANCASTER, *CONSUMER DEMAND: A NEW APPROACH* 50-93 (1971). In addition, one must assume a small variance in income across households as one might encounter in poor neighborhoods.

III

RECENT MODELS OF ECONOMIC BEHAVIOR

Over 30 years ago Friedrich Kessler correctly observed that "the stereotypical contract of today reflects the impersonality of the market."⁷⁰ He then noted that "[s]tandard form contracts are typically used by enterprises with strong bargaining power."⁷¹ The buyer cannot select because there is a monopoly or the industry offers only one standard clause. Thus the standard form indicates the decline of free enterprise and the concomitant rise of monopoly power.⁷²

Only the conclusion fails to follow necessarily. While industrial concentration has increased since the nineteenth century,⁷³ the Darwinian conception of free enterprise as the active interchange of fiercely rational agents has yielded, at least for economists, to a more impersonal world of competition with which the standard form contract is a consonant development. This section demonstrates that a smoothly functioning competitive world, devoid of industrial concentration, might equally well have standard form contracts.

A. *The Basic Model*

The neoclassical world⁷⁴ consists of two classes of nameless agents: firms and households. Households supply factors—varying types of capital and labor—to firms and consume final output. The sale of these factors at prevailing prices yields each household an income which constrains its consumption of final goods sold at given market prices. Similarly, a firm's use of capital and labor is determined by the prevailing prices of these factors, its desire to maximize profits, and the market price of its output. Within this environment each household decides the type and amount of factors it will supply and goods it will consume, while each firm must choose the amount and mix of factors to use in production and the quantity of output desired. The question naturally arises whether a set of prices exists such that all agents' actions are compatible. Such a set of prices and the resultant distribution of output among households is called an equilibrium. Equilibrium exists

70. Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943).

71. *Id.* at 632.

72. *Id.*

73. F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 41-44 (1970).

74. See generally G. DEBREU, *THEORY OF VALUE* (1959) for an elegant and now classic formulation of the general equilibrium model. K. ARROW AND F. HAHN, *GENERAL COMPETITIVE ANALYSIS* (1972) is more recent, more comprehensive, and includes results not proven when Debreu wrote. It is also less comprehensible to the layperson.

under ideal circumstances—production conditions that make it equally or more costly to produce larger outputs, consumers with rational preferences,⁷⁵ and many agents all of whom act impersonally and without regard to the actions of other agents.⁷⁶ When an equilibrium does exist, the announcement of a set of prices to all economic agents will call forth a supply of goods in each market equal to the amount demanded; all firms maximize their profits while all households, given their initial wealth, buy their most desired combinations of available goods. This notion of a competitive equilibrium, then, provides a standard against which market performance may be measured.

In this model, the most abstract and formal of modern economics, the agents, unlike those in the *laissez-faire* model, do not bargain with each other over prices or over the physical characteristics of the good. Rather, agents react to prices posted upon detailed specifications of commodities. The economic “commodity” differs from that of ordinary language. It is a very well-defined entity. It includes not only a physical description but also a location and a date. Thus, to an economist, No. 2 Red Winter Wheat available in Chicago on 1 October 1976 is a different commodity than No. 2 Red Winter Wheat available in Chicago on 1 January 1977.⁷⁷ Purchases consummated under standard form contracts better fit this paradigm than the negotiated contract model of the traditionalists. The myriad clauses in fine print represent a detailed description of the commodity to which the price, the decision variable of the agent, attaches. One buys not just a Chevrolet of a given model year, with various options, deliverable in two weeks from a specified dealer, but also a complex of rights and liabilities, risks and insurance outlined by the purchase order form. Certain warranties attach to the physical good; a financing plan often accompanies the automobile. The price refers to this complex of characteristics which constitute the commodity or “thing.”⁷⁸ The consumer in this abstract model of economic equilibrium does not bargain over clauses or dicker over terms. He purchases or fails to purchase.

The standard form contract, therefore, rather than being inimical to this competitive model, fits it remarkably well. If flaws exist in the

75. A consumer has rational preferences if he can compare every pair of commodity bundles and tell which he prefers (he may be indifferent); if he prefers bundle a to bundle b and bundle b to bundle c then he prefers bundle a to bundle c (transitivity); and he always prefers more to less (monotonicity). Less stringent assumptions can be made.

76. G. DEBREU, *THEORY OF VALUE* 74-89 (1959) proves the existence of a competitive equilibrium. Some technical assumptions are needed in addition to those noted in the text.

77. *Id.* at 29.

78. This is Leff's usage. See Leff, *Contract as Thing*, 19 AM. UNIV. L. REV. 131 (1970).

form—if oppressive terms have been written in—the cause must be other than the failure to bargain or the lack of dickering over terms. To elucidate the causes of these “unconscionable” results requires an investigation of how real markets differ from ideal, competitive ones. From an understanding of these causes may develop curative measures different from those ordered by courts focusing on the bargaining process of the parties before them.

As Kessler suggested, one cause of oppressive contract terms may be market concentration or the presence of monopoly power. If only a few sellers exist each will know, or quickly learn, that its behavior affects the behavior of the other sellers and vice versa.⁷⁹ Joint action, arrived at tacitly or expressly, may become desirable as a means of increasing profits beyond the competitive levels. Where market concentration exists one will probably observe “too high” prices (ones above the competitive price), shoddy or less durable goods, or oppressive contract terms assigning risks to buyers that might be borne by sellers were there less market concentration.

Unconscionable clauses may also be found among contracts drafted in apparently unconcentrated markets. David Caplovitz notes that East Harlem has “sixty or so furniture and appliance stores . . . mostly around Third Avenue and 125th Street.”⁸⁰ In addition, canvassers for stores and independent peddlers comb the neighborhood selling door-to-door.⁸¹ Caplovitz notes the plethora of merchants of consumer durables among people with such low income. An economist would more likely be shocked that this market, rife with sellers and hence apparently unconcentrated, should produce goods of too low quality at too high a price with so many oppressive contract terms.

The stores within the low income market in Caplovitz’s study did not act in traditionally oligopolistic fashion. The large numbers of sellers, absent explicit price fixing prohibited by the antitrust laws, almost certainly prevented coordination of price, quality, and contract terms. The unconscionability must arise from other aspects of market behavior. It may be that low income consumers are too uneducated and ill-informed to act rationally. If so, consumer education will provide the long term remedy. Even without irrationality upon the part of the consumers, however, the market may fail. These potential failures shall be discussed in two groups. First, reasons why a price may be “too high” will be canvassed. Second, problems of quality, defined to include the

79. F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 131 (1970).

80. D. CAPLOVITZ, *THE POOR PAY MORE* 12 (1963).

81. *Id.* at 258.

presence of oppressive contract terms, will be analyzed.⁸² In each instance, the examination of economic models more complex than the one summarized in this section will yield some insight into the market mechanisms.

B. Price-setting in Imperfect Markets

Frequently what courts mean when they refer to a price as too high is that a physical good of the same class sells for a lower price to another market. Thus, the courts will compare the contract price offered a low income consumer with the retail price generally available to a middle class consumer⁸³ or to the seller's wholesale price.⁸⁴ While a great price disparity may indicate that a low income consumer has paid too high a price, it may also mean that he has bought a different commodity. The commodity purchased includes more than the physical good; it also includes the risk allocations and financing provisions of the contract. Financing arrangements can increase the purchase price because of the heightened risk of default and the heightened possibility of damage to goods in which the seller retains a security interest. Since it is expensive for a merchant to determine with great accuracy who will repay loans and who will not, he makes broad classifications.⁸⁵ Many low income consumers are thus grouped with high risks and must pay higher credit charges due to their similarity, in terms of selected population characteristics, to consumers with potentially high default rates. In addition, costs of collection may be higher among some groups of consumers, perhaps because the creditor must maintain more contact with the debtor or because he expects payment to be delayed.⁸⁶ In addition, low income consumers may be unable to take proper care of their purchases because they live in more crowded apartments and subject durables to more intensive use or because they cannot afford routine maintenance. Consequently the secured interest of the seller in the durable rapidly decreases in value.

82. See note 129 *infra* for a discussion of why price and quality should be treated separately.

83. See, e.g., *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).

84. See, e.g., *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Sup. Ct. 1966).

85. This is actually an information problem. The lender does not know any given individual's default rate. He does know certain attributes which correlate with default. He thus bunches people together. Akerlof, *The Market for Lemons*, 84 Q.J. ECON. 488 (1970) has an interesting discussion of how this helps "loan sharks" in rural Indian villages.

86. D. CAPLOVITZ, *THE POOR PAY MORE* 23 (1963) notes that merchants "expect the customer to miss about one of every four payments and they compute the markup accordingly."

An additional discrepancy between markets may exist. As Caplovitz notes, low income consumers may be purchasing a particular sales method more amenable to their backgrounds and traditions.⁸⁷ Immigrants from a rural world that is slower and more personal than city life may seek not only the physical good but also a personalized sales method. Prices to consumers will rise with the increased costs of buying from a sales person who knows one's name, one's family, and one's interests and who consents to talk about them. Similarly, door-to-door peddlers provide custom service to people unable to cope with large shopping centers and indifferent salespeople.⁸⁸

Thus, simple comparisons between prices of the same physical good in two different markets⁸⁹ inadequately serve to distinguish the too high from the legitimate price. Moreover, analysis must include not only consideration of risk allocation but also the magnitude of the risk and the cost. Information on the credit characteristics of the merchant's market should be examined. It must be decided as well whether certain types of sales services should be available in the market. Despite these market differences a price can be too high, *i.e.*, above the competitive price. To understand this concept, a more detailed examination of price-setting mechanisms in the market must be made.

87. *Id.* at 77.

88. STUDS TERKEL, *WORKING '136* (Avon ed. 1975). An installment dealer speaking of his customers said:

They cannot go on shopping. They become confused by these large shopping centers. They're confused by the multitude, the plethora of things. It just overwhelms them. It's much easier to buy from somebody like me. If they want a coat, I bring two or three. If they want a ring, I bring one or two or three.

There's a customer who's shy. She would really like to tell people off, but when she goes into a large establishment, she's shy. She's overwhelmed by Marshall Field's, so she tells me off in no uncertain terms what she wants, how she wants it, and don't bring me this or that. It boosts their ego.

Id.

89. Some ambiguity in the definition of a market arises. Normally, one differentiates on the basis of physical good. Problems arise with product differentiation: does one market include cellophane and waxpaper or do the two constitute different markets? *U.S. v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377 (1956) (finding only one market). Similar problems develop from considerations of geography. Does the market for steel in the eastern United States include sellers in the midwest? *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (1958) (finding one geographical market). Here differentiation between commodities is not only along physical characteristic and geographic location but also along contract terms and date of sale. In a technical sense it may appear that no two sellers ever market the same product; every difference is a quality difference. Intuitive notions of what sellers are competing with whom allows us to speak of markets in a more ordinary way and distinguish quality differences among them. Thus, the 60 stores Caplovitz noted in East Harlem selling consumer durables constitute a market for those durables. Each store serves the same population. Costs of searching among those stores by the consuming population are relatively low and constant.

1. *A Model of Price-setting Mechanisms*

In the basic model discussed above,⁹⁰ no mechanism for determining equilibrium prices was given. The most convenient theoretical mechanism to work with, called *tâtonnement*, requires the unrealistic assumption not of an invisible hand but of an energetic auctioneer. This person calls out prices; agents respond with offers to transact at those prices. The auctioneer totals offers to buy and to sell in each market. If all markets clear—the amounts offered for sale equal the amounts demanded for purchase in each market—trades are allowed. If some market does not clear the auctioneer announces a new set of prices and receives a new set of offers to transact. Exchanges occur only at equilibrium prices when all agents' decisions are compatible, every exchange occurs at the same price, and no transacting agent sets the price.⁹¹

Real world processes, however, differ significantly from *tâtonnement* ones. In the real world, there is no energetic auctioneer; transacting agents set prices, and exchanges occur even though all markets do not clear. Thus, trades may occur at disequilibrium prices; sellers can pile up inventories (excess supply) or have order backlogs (excess demand). Two consumers might pay different prices for the same commodity because the economy has been adjusting towards the steady equilibrium price. The consumers may have bought at two different times. Alternatively, they may have bought simultaneously from two different sellers; where a class of persons sets prices,⁹² different price-setters may, at least temporarily, have set different prices. Even where the interaction of price-setters and price-takers does establish an equilibrium price, this might be the "wrong" price in the sense that it differs from the competitive price, the one predicted by the basic model. It is "wrong" because it will be "too high"⁹³ and by rearranging the use

90. See text accompanying notes 74-82.

91. Price adjustment processes like that described in the text are characterized by (1) a rule of price adjustment if the markets fail to clear, and (2) the requirement that trades only be permitted at equilibrium prices. On *tâtonnement* processes generally consult K. ARROW & F. HAHN, *GENERAL COMPETITIVE ANALYSIS* 263-81 (1972).

92. In this discussion it is assumed that sellers set prices. The price-setters could equally well be buyers. For example, one can model the labor market either with firms as price-setters announcing wages and choosing from the pool of workers who respond to the signal or with workers as price-setters announcing what wage they will accept and firms choosing the lowest priced.

93. Can markets produce prices which are too low (below the competitive price)? If firms know their demand curves, then prices will never be set below marginal cost. The demand curve informs the firm of how many units will be bought at any given price. A firm then knows how much additional revenue it will get from lowering its price and what its additional cost of production will be (costs will rise because the firm will sell more units at a lower price). The price will then be set at the profit maximizing price.

In a perfectly competitive market the firm faces a horizontal demand curve; if it raises its price above the market price no units will be sold. Hence it produces until the

of factors and distribution of output everyone could be made better off.⁹⁴ Loss occurs because some people who would buy at the competitive price do not buy at the higher ones. Further, there is no guarantee that the equilibrium will have only one price; a priori two or more might persist.⁹⁵ Thus, the economy might settle into an equilibrium where some or all people are paying a price that is above the competitive price and therefore "too high."⁹⁶ Worse, no guarantee exists that as consum-

additional revenue from the sale just equals its additional production cost. On all other units it earns positive profits; on all subsequent units it earns negative profits. Where price equals marginal cost it maximizes its profits.

In all the models other than the basic one firms have some flexibility in setting prices. As a price rises the firm will not observe a clear cutoff point; increasing a price decreases the quantity sold but not to zero. Revenues rise if the increase in revenue per unit more than offsets the decrease in units sold. If the firm knew its demand curve exactly, *i.e.*, if it knew precisely how many units would be sold at each price, it would set its profit maximizing price. This price would exceed the cost of producing the last unit; the additional revenue from the last unit is less than its price since to sell the unit it must lower the price on all previous units. Hence, if the firm knows its demand curve the price will always be set too high.

Whether a price can be too low therefore depends upon what happens if firms do not know their demand curves. A firm could experiment and thereby discover its demand curve. In a perfectly competitive world a simple method succeeds. If price is above the market price no one will buy. If price is below the market price the firm will observe lines of indefinite length. In the monopolistically competitive world of the models, discovery is more difficult as some people will buy at every price. The problems are exacerbated if a random element also exists in the demand (that is, if the amount sold at any given price fluctuates randomly about some mean value). Here only prolonged experimentation permits exact knowledge of demand.

Discovery of demand, however, incurs costs. First, having a price too high loses customers. Similarly one too low produces unrecoverable losses. The firm must decide whether the improved knowledge of its demand that results from an altered price exceeds the costs incurred by not charging its apparently optimal price. Rothschild, *A Two-Armed Bandit Theory of Market Pricing*, 9 J. ECON. THEORY 185, 186 (1974) [hereinafter cited as Rothschild]. Thus, the firm will most likely have some information about its demand curve but not complete information. It will probably not set its profit maximizing price—the one that it would set if it knew its demand curve completely. But it will try to approximate it. It seems probable therefore that the actual price will exceed the competitive price; the greater the disparity in monopoly and competitive price, the more likely will be this result.

94. As a result of market imperfections, price discrimination arises; some people may be paying different prices for the same good. A perfect discriminator would charge each person the exact price they were willing to pay. The amount sold would equal the competitive quantity. Here it is assumed that the discrimination is not perfect. Hence, the allocation is inefficient.

95. Rothschild, *supra* note 93, at 199-200. The result stems from the assumption that firms do not know their demand curves. Each firm will experiment a while to determine better what price to set but no firm will completely discover its demand curve. Two different prices may persist in equilibrium because different firms (even with identical cost curves and identical "true" demand curves) may get different information from their price-setting experiments. Hence, they will settle on different prices. See note 93 *supra*.

96. C. Futia, *Rational Price Adjustment in Markets with Imperfect Information*, March 1973 (Working Paper IP-176, Institute of Business and Economic Research, University of California, Berkeley).

ers and sellers interact over long periods of time the prevailing price or prices on the market will converge at any one price.

At what prices the system equilibrates, if it does so at all, depends upon the specification of the model.⁹⁷ What rules do sellers use in setting prices and what information do they have when they act? What rules do buyers follow in searching for a low price? How much information do they begin with and how much does it cost to acquire more?

Most models assume that sellers act to maximize their longrun profits, that is, they seek a series of prices (the prices may change over time) which will produce the highest net wealth. Sellers gather information about buyers' demand by observing their customers. At a quoted price some customers will buy and others will simply leave the store.⁹⁸ Similarly, since discovery of actual prices requires the expenditure of time or money by the buyer, buyers are generally assumed to begin with a reservation price, some notion of what a "good" or "fair" price would be. Thus, if a buyer encounters his reservation price or one lower at a store he will purchase; if the store charges a higher price he will walk out. Reservation prices vary with the search experience of the consumer. A consumer who misapprehends the market may initially have set a reservation price too low. After he visits several stores and encounters prices significantly higher than the initial reservation price, one would expect his reservation price to rise and to reflect more accurately the information gathered from prior searches. Thus, a rational consumer may purchase at a price higher than the competitive price. He thinks the commodity worth the price offered; additional search is not worth the cost it would involve.

Rational search has two aspects. First, how does the searcher decide when to stop? Second, how does the price-setting behavior of firms affect the search patterns of consumers? The major difference among the models lies in this second characteristic. Most economic models assume that the searcher has a reservation price and some process of adjusting this price which reflects the buyer's previous search experience. A further rationality condition requires that consumers "remember" where they previously searched; stores offering prices high relative to other stores should expect a smaller percentage of consumers to ask for price quotations. In a mildly irrational world where consum-

97. Rothschild, *Models of Market Organization with Imperfect Information: A Survey*, 81 J. Pol. Econ. 1283, 1285-86 (1973).

98. Until Rothschild in the article cited in note 93 *supra*, the standard assumption in mathematical models was that firms knew with certainty consumer demand curves or that the firms thought they faced infinitely elastic curves (that is, if they priced above the market price, no one would purchase, a highly unrealistic assumption since firms observe that some consumers still purchase even after prices have been raised).

ers have a reservation price mechanism but do not "remember" and where the sellers know how much will be bought at any given price, the price at which all sellers eventually arrive will be identical to the price a monopolist of the same market would set.⁹⁹ Even if buyers have different, perhaps more rational search behavior, the equilibrium price may still be this monopoly price.¹⁰⁰ Alternatively, consumers may "remember." Stores with lower prices will be visited by more people and will be apt to sell more. Under these circumstances the equilibrium price critically depends upon the particular assumptions made about consumer behavior, but at any point in time some buyer may be paying an exorbitant price for a product.¹⁰¹ He has visited a store while the market is still adjusting towards an equilibrium price and has been quoted a price less than his reservation price. Hence he buys. In the most complex world yet examined, where buyers search rationally in that they both "remember" and have reservation prices, and sellers, while ignorant of the consumers' demand curves, seek to profit maximize, the equilibrium at which the system eventually arrives may have more than one price.¹⁰² Obviously, one or more of these prices might be described as "too high." Indeed, all may be above competitive levels.¹⁰³

2. *The Price Model in Practice*

The price models discussed above more closely resemble the real world than does the abstract, basic model. While the behavior of individuals in the economy is still more complex than that captured by these models,¹⁰⁴ the models provide some insight into possible causes of the phenomenon of "too high" prices. To the extent that Caplovitz's consumer purchases durable goods, items infrequently acquired and consequently about which he may have little price information, his search behavior may more closely resemble that of the "forgetful"

99. Diamond, *A Model of Price Adjustment*, 3 J. ECON. THEORY 156, 157 (1971). The model also assumes that firms have identical cost functions. No conflict arises over the profit maximizing price; it is identical for all firms.

100. Hey, *Price Adjustment in an Atomistic Market*, 8 J. ECON. THEORY 483, 492 (1974). Each consumer visits a fixed number of stores. Rational search procedures are generally assumed to be those where the searcher has a reservation price but that search methods will be non-optimal in some not unlikely circumstances, e.g., where the cost of search varies over time. *Id.* at 486 n.8.

101. Trades occur at disequilibrium prices and the disequilibrium in the models generally allows for different prices among firms. See text accompanying note 92 *supra*.

102. Rothschild, *supra* note 93.

103. See text accompanying notes 93-96 *supra*.

104. For instance, consumers have sources of information other than a visit to the store. Advertising and trademarks disburse information about prices and qualities to consumers. Also, most retail stores sell more than one commodity and stores acquire reputations as high priced or low priced—there are discount stores and "quality stores."

consumer.¹⁰⁵ Thus, real world prices may be uniformly too high. Where purchases are made more frequently, as with food purchases, consumers may acquire more price information and direct their purchases to lower priced stores. But even here prices may be too high, either in disequilibrium, which may be frequent, or possibly at equilibrium.¹⁰⁶

The difficulty that arises in complex markets is that information on prices cannot be obtained costlessly. Consumers have inadequate knowledge of their price alternatives and the expense of acquiring greater knowledge makes it reasonable to pay a price which may later turn out to be too high. Improving market performance would require increasing the information or decreasing the cost of obtaining it. One can imagine the government acquiring the information from all firms and posting the prices of the firms at some easily accessible spot. Technology has multiplied the number of accessible spots; price reports, like weather reports, could be heard on the telephone or broadcast over public television. Alternatively, a price or maximum price for each good could be externally imposed. To an extent, a court declaration of a price as too high serves this function. Such a system, however, would be inadequate to restore equities throughout the market if buyers continue to make payments on goods previously bought at an exorbitant price. Further, those who failed to buy because they found price levels too high would have no remedy. In addition, setting a price or declaring one exorbitant would require a detailed factual inquiry into the market, its structure, and the cost of producing the good, all of which may be changing rapidly and repeatedly over time.¹⁰⁷

While some consumers may be ignorant of price information, others may be ignorant of the existence of the good or its availability. Door-to-door salesmen disseminate this sort of information and the price of the commodity sold reflects the increased cost of supplying the good to the consumer. Thus, life insurance of the same type and face amount may sell for less if one contacts the company at its home office than if the company tracks one down at home. While the door-to-door sale price appears too high, limiting the price to the home office contract price destroys the door-to-door market. As a result people who were willing to buy at the higher price and hence thought themselves better off with the insurance will not be able to purchase.¹⁰⁸

105. See Diamond, *A Model of Price Adjustment*, 3 J. ECON. THEORY 156 (1971). Diamond's model abstracts from the purchase of durables situation.

106. Rothschild, *supra* note 93.

107. See note 129 *infra* for further discussion of the difficulties a price-setting agency would encounter.

108. Professor Diamond of M.I.T. offered this example in a conversation with the author at the University of California, Berkeley, in Autumn 1974.

This economic analysis clearly indicates that price, as a factor of unconscionability, is a function of forces far more complex than the mere imbalance of bargaining power for which courts have traditionally searched. To the extent that an unconscionable price exists as a result of this market mechanism, relief cannot be found in present judicial remedies.

C. *Quality and the Market Mechanism*

Standard forms may be regarded as commodities rather than as contracts. The detailed writing describes the object purchased. A form which contains an oppressive clause can then be described as a low quality good just as poorly built furniture is described as low quality merchandise. When confronted with an oppressive contract, one must ask why or how did the market arrive at the production of a "bad" or non-optimal good.

Conventional economic theory has few models of product selection. One model suggests that the difficulty is an informational one:¹⁰⁹ the ordinary consumer cannot distinguish between good quality and bad quality goods. Since it is more expensive to produce high quality goods and purchasers cannot distinguish the good from the bad, the market will produce low quality merchandise. Complex, fine-print standard forms might be viewed as goods whose quality people cannot determine. Sellers, even competitors, thus have an incentive to lower costs and increase their profits by producing the low quality or oppressive contract. As consumers are making decisions upon price grounds, a seller offering a better warranty must either suffer a lower profit margin at the same price or charge a higher price and attempt to disseminate information to prevent a loss of sales because of the raised price. Dissemination of information may be difficult; consumers, unfamiliar with the contingencies covered by a particular contract clause, may not be able to evaluate adequately the proffered information.

Concentrated market structure may have an impact. Oligopolies have an interest in coordinating the quality aspects of the product as this facilitates price coordination among firms and hence eases the achievement of monopoly profits.¹¹⁰ While the industry may not succeed in standardizing the product, it may be able to reduce the aspects along which the firms compete; the warranty clause on automobiles seen in *Henningsen*¹¹¹ and the subsequent, but brief competition among manu-

109. Akerlof, *The Market for Lemons*, 84 Q.J. ECON. 488 (1970).

110. F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 186-92 (1970).

111. 32 N.J. 358, 161 A.2d 69 (1960). The contract there in issue was drafted by the National Association of Automobile Dealers. See text accompanying note 49 *supra*.

facturers on the basis of warranty may be evidence of this tacit collusion. Initially the warranty had been uniform among manufacturers. Elimination of the uniformity promoted competition along this line but the brief experience may have been too unsettling to the market stability the manufacturers had previously achieved. Hence, they tacitly agreed to stop competing along this dimension.

In addition, markets may not produce sufficient variations of quality within a product class. Product differentiation is desirable because consumers value differently some specific product characteristic. A producer who differentiates exhibits a certain amount of monopoly power; his unilateral price increases will no longer cause all of his customers to shift to the lower priced, identical good of his competitors. Some consumers will still prefer his slightly different, unique commodity. An optimal strategy in this world is for a seller to produce a product very close to his competitors' products and thereby limit the rival markets. The classic example is a world with a number of stores and the entire population located along a single street. Shoppers prefer to frequent shops near them; they will pay a premium, perhaps small, to do this. A competitor will seek to crowd his rivals into a corner and hence be the shop closest to a larger number of consumers. The result is a clustering of stores together or, more generally, a clustering of products near a single quality of a good. The market is insufficiently differentiated.¹¹²

Another possible source of market failure resulting in non-optimal quality choice stems from the existence of fixed costs. The presence of fixed costs in marketing or in production does not make it profitable to produce the widest range of qualities. Problems arise from the fact that prices charged reflect the valuation of quality of the marginal consumer¹¹³ rather than the valuation of the average consumer. Thus, suppliers will view the price as the appropriate signal of quality while in fact the average consumer would prefer a higher or different quality level in the commodity. In particular, two classes of substitute goods appear to be disfavored. To the extent that higher fixed costs are associated with higher qualities, the market selects against high quality goods. High quality goods may increase fixed costs, because of (1) increased repair costs engendered by better warranties; (2) increased legal costs

112. Hotelling, *Stability in Competition*, 39 *ECON. J.* 41 (1929).

113. As sellers lower the price additional people will buy the product. The marginal consumer is the person just induced to buy by the last price decrease (from say \$5.00 to \$4.99). In some sense, this person values the good at precisely the selling price (e.g., \$4.99) while the other buyers place a greater value upon it. M. Spence, *Product Selection, Fixed Costs, and Monopolistic Competition* 2, January 1975 (Technical Report No. 157, Institute for Mathematical Studies in the Social Sciences, Stanford University).

engendered by an inability to limit remedies or to insure judgment; or (3) increased advertising costs engendered by the need to advertise the superior quality product manufactured. Thus, where high quality contract clauses reflect increased fixed costs, they will yield to clauses less favorable to consumers. Second, the market will select against specialized segments; that is, quality variation of products which appeal to limited audiences will be disfavored.¹¹⁴ In low income markets consumers may prefer low quality goods because they are cheaper. Thus, more expensive, higher quality goods, *e.g.*, standard forms without remedy limitations or with good warranty provisions, will be selected out and not supplied by the market though some people would purchase them if available.

Thus, the marketing of low quality goods or the presence of oppressive contractual terms may result from market imperfections. The parties to a contract may be incapable of bargaining away these problems. Yet, given a perfect formal bargaining process, traditional contract law will prevent the granting of relief. The implications of this problem as it relates both to price and to quality are examined in the next part of this Comment.

IV

IMPLICATIONS, INDICATIONS, AND INTIMATIONS OF THE MODELS

The economic models developed briefly above have one major lesson: that standard form contracts peculiarly suit the type of market and competition which characterize the modern world. No model depicts the contracting event as one of active negotiation. Consequently, the existence of oppressive terms in the form or the charging of an exorbitant price may reflect not the imperfections of the bargaining process nor the absence of negotiations over terms between buyer and seller but the imperfections of the market mechanism. Economic agents have been supplied with inadequate or incorrect information; rational responses in this environment, whether intended to maximize profits or to optimize utility within a budget constraint, do not lead to optimal results. Even in the presence of bargaining or the absence of unfair surprise and advantage the market would not supply the right goods at the ideal (competitive) price to all consumers because the malfunctions do not lie in the two-person interactions but in the more complex movements of the market as a whole.

A. Judicial Remedies

Correction of market failures will not eliminate fraud, duress, and misrepresentation from the marketplace. Courts must continue policing

114. *Id.* at 55-57.

sales for oppressive conditions. The presence of an exorbitant price or other unfavorable terms can continue to be used as evidence of fraud or other defects in the bargaining process. However, care must be taken. Rather than relying upon reasonable expectations the court should look to comparable markets and adjust for cost differences to the seller. Thus, when comparing a low income with a middle income market, courts should explicitly consider and take evidence on differing costs of credit, collection costs, and costs of whatever additional services may be supplied by the seller in the low income market and not in the middle income one.

Because unconscionability is a function of complex market mechanisms, contract remedies or other remedies directed solely at the parties to a transaction will fail to eliminate completely unconscionable contract clauses. Fraud, duress, and misrepresentation need to be checked, but action to correct oppressive clauses and exorbitant prices resulting from market mechanisms might also be desirable. In the contract context, only people who have suffered direct injury will appear in court, joined perhaps by those who have defaulted on payments. Persons who failed to purchase because of too high prices or too low quality have no cause of action though these unrealized sales represent the efficiency loss of the market. In addition, many inequities will not be rectified. The buyer may have received what he bargained for; that is, though he paid an exorbitant price at the time of contract, he had thought the purchase worth the price. If he has discovered that a better bargain existed and he wishes to void his bad bargain, he will come into court. But this will rarely occur because most purchasers cease searching for a lower price once they have made their purchase. In addition, even consumers whose purchases malfunction may not sue if experience has taught them to expect no better. Thus, where remedies are directed at the parties and not at the market many people will not have bought at all while others may still be paying exorbitant prices or receiving inadequate warranties and shoddy merchandise even though the court would deny enforcement of the clause or contract. The remedy of problems engendered by oppressive clauses and exorbitant prices, then, must lie elsewhere.

B. Legislative Remedies

One type of solution derives from regarding the standard form not as a contract but as a thing like an automobile, a carpet, or a new drug.¹¹⁵ For these "things" the government may mandate certain char-

115. Many problems result from concentration with which the antitrust laws are designed to deal. Another partial solution would be to strengthen the antitrust laws to allow more control of oligopoly situations.

acteristics. Automobiles must have seatbelts¹¹⁶ and, in California, pollution control devices.¹¹⁷ Carpets must meet specific fire standards¹¹⁸ and drugs must have certain purity levels.¹¹⁹ Underlying these governmental prescriptions is either an attitude of paternalism to consumers or a realization that in these instances social mandate can better approximate "perfect market" solutions than the imperfect markets of the real world. Similarly, the state, either legislatively or administratively, should prescribe minimum standards for contract clauses where market failures produce unconscionable results.

The state already does prescribe clauses for certain types of contracts. Judicial attempts at manipulating contract theory to handle inequities occasioned by inadequate insurance warranties led to legislative intervention.¹²⁰ Fire insurance policies are now written by legislatures; only a few terms are left open for the parties to fill in and dicker over.¹²¹ Certain other terms may be negotiated if a separate form is signed, presumably to insure notice and bargaining. Life insurance contracts have to be approved by insurance commissioners and hence fall within broadly established legislative guidelines.¹²² The implied warranties of merchantability¹²³ and fitness for intended uses¹²⁴ also are legislatively drafted contract clauses, though for new consumer goods a more precise delineation of merchantability may be desirable. These examples demonstrate a recognition that it is inadequate to rely upon consumer expectations of product quality when the market producing the good may fail.¹²⁵

Two questions now arise. First, what clauses should be written administratively or legislatively? And, second, what should be their content? Identifying oppressive clauses presents great difficulties. Clearly, any clause currently within a standard form is a candidate for judicial non-enforcement. The parties do not bargain over any of these clauses, nor do they have full and complete knowledge about them. Equally clearly, clauses traditionally found oppressive by the courts are prime candidates. The courts have made a social judgment that these clauses—frequently warranty disclaimers and limitations of remedy—do not reflect social needs or social values. In general, one

116. 49 C.F.R. § 571.207 (1975).

117. CAL. HEALTH & SAFETY CODE §§ 39701, 43212 (West Supp. 1976).

118. 15 U.S.C. §§ 1191-1204 (1970).

119. 21 U.S.C. §§ 351-52 (1970).

120. Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 633 (1943).

121. E.g., CAL. INS. CODE §§ 2070-83 (West 1972).

122. *Id.* § 10160.

123. UNIFORM COMMERCIAL CODE § 2-314.

124. *Id.* § 2-315.

125. See text accompanying notes 109-14 *supra*.

should pay particular attention to clauses which, even if read, relate to contingencies with which the consumer is likely to have had little experience and hence cannot adequately evaluate the protection afforded by the contract. In such circumstances, a consumer is unlikely to be capable of searching effectively even if his attention were directed to the clause.

The contents of the prescribed clauses will depend upon a social evaluation of optimum quality. Presumably, the substitution of a non-market draftsman for market forces indicates a belief that the new draftsman, whether administrative agency or legislative body, has more or better information and can choose more optimal quality levels. In particular, the draftsman may require that a number of forms with varying clauses be offered. Thus, a consumer might have to be offered a choice of warranty provisions, all predrafted, particularly if the market is undersupplying quality variants.¹²⁶ In addition, the draftsman may wish to raise the quality level since the models indicate a tendency in many markets to select against high quality goods.¹²⁷ Thus, the legislature may write standard forms with more extensive warranty provisions, with less extensive limitation of remedy clauses, and with credit terms in some easily understood and standardized formulation. Further, provision may be made for selling products "as is" as the UCC does.¹²⁸

The prescription of warranty and other common provisions of standard forms will have other beneficial effects. It may focus attention on price competition where market structures are adequate and where consumers are more apt to react rationally. It may also lessen incentives to misrepresent benefits supplied by contract terms.

Price presents different problems. Comprehensive price-setting is a difficult and expensive task which may best be left to the market.¹²⁹ What one might do instead is to lower the costs of obtaining information on price by consumers. Thus, an institution might periodically gather and post price information in a relevant market. This would serve a variety of purposes. First, it would ease the acquisition of knowledge of lowest available prices by consumers. This would decrease the number

126. See text accompanying note 112 *supra*.

127. See text accompanying notes 113-14 *supra*.

128. UNIFORM COMMERCIAL CODE § 2-316(3).

129. Several reasons exist for distinguishing the treatment of price and quality. Prices fluctuate much more frequently than the quality levels of goods. Thus, one need not continually rewrite contract clauses while continual investigations of price/cost relations would be necessary to insure that the fixed price were adequate. Second, in markets which are unconcentrated, enforcement of fixed prices is exceedingly difficult. Incentives to cheat are very high. J.K. GALBRAITH, *A THEORY OF PRICE CONTROL* 26 (1952). Third, consumers do search for the lowest price; they can easily spot and understand low prices while understanding contract clauses governing obscure contingencies is unlikely.

of people who buy at exorbitant prices. Second, it would promote price competition among sellers by increasing the effect that price differentials have on sales. Third, it might minimize certain oppressive tactics if contracts for prices above the preposted price of the seller were refused enforcement.

The practice of home solicitation presents a more troublesome problem. Dispersion of price information to those who buy from solicitors might destroy the market for house-to-house sales. Solicitors inform buyers not only of the product price, but also of the product's existence, qualities, and uses. Disseminating price information at the time of solicitation will cause these consumers to buy from the home office rather than from the solicitor. Consequently, solicitation will cease since the additional cost of house-to-house sales will not be compensated by increased prices. This will deprive such consumers of the additional information that solicitors provide and may result in their not purchasing products that they would want to purchase if they were apprised of this additional information. This may not be desirable, although some might believe that door-to-door selling inevitably occasions oppressive and unfair sales techniques independent of increased costs and hence simply wish to ban home solicitation.

CONCLUSION

Contract theory and the associated remedies for unconscionability rest on outdated and simplistic concepts of the marketplace. Curing the inefficiencies and inequities of exorbitant prices and oppressive clauses which arise in today's imperfect markets requires new approaches. These imperfections are so pervasive, however, that the traditional judicial roles may be inadequate to provide the needed remedies. Legislative intervention to mandate minimum contractual provisions and to lower the costs of price search may be necessary. Such an effort may appear antithetical to traditional concepts of "freedom of contract" but present market mechanisms arguably have already made that freedom illusory.

Finally, it is wise to repeat the two caveats with which this Comment began. First, equity concerns may override concerns for efficient functioning of the market and hence undercut some of the foregoing analysis. Second, costs exist in government intervention just as they arise from market imperfection. The cost of administering a remedy should not exceed the cost of the imperfection corrected by it.