Land & Water Law Review

Volume 1 | Issue 1 Article 11

January 1966

Uniform Commercial Code - Section 2-302 - Unconscionability - Time Element as Test - Williams Walker Furniture Co.

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CASE NOTES

UNIFORM COMMERCIAL CODE—Section 2-302—Unconscionability—Time Element as Test. Williams v. Thomas Walker Furniture Co., 350 F.2d 445 (D.C. Cir. 1965)

Defendant buyer, a woman of limited education and separated from her husband, was maintaining herself and her seven children by means of a $218 monthly stipend from the government. Defendant signed an installment contract with the plaintiff Furniture Company for the purchase of a stereo set, which raised the balance of her running account with the plaintiff from $164 to $678. One clause in the contract had the effect of making every item previously purchased, by the buyer, security on the remaining debt and allowed the seller to repossess all such previously purchased items upon the buyers default in monthly payments. The total amount of payments made by the defendant amounted to $1,400 during the five-year period of the running account. Plaintiff Company, who had knowledge of the defendant's financial position at the time the contract was entered into, sought to repossess all items ever purchased because of defendants' default in monthly payments on the balance of her account. The defendant maintained that specific performance should not be allowed because the contract was unconscionable under these circumstances. The lower court felt unable to hold that the contract was against public policy and granted the plaintiff specific performance. On appeal the United States Court of Appeals for the District of Columbia *held* that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced.

Freedom of contract is generally held sacred by Anglo-American courts.[1] This is said to be "the inevitable counterpart" of an open, competitive economy.[2] Freedom, however, may not be unbridled, and implies a reasonable amount of

1. Printing & Numerical Registering Co. v. Sampson, L. R. 19 Ex. 462, 465 (1875).
2. Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943); See also Williston, *Freedom of Contract*, 6 CORNELL L. Q. 365 (1921).

freedom for both parties to the transaction.[3] Freedom of contract without restraint inevitably leads to power by contract when there are significant conditions of inequality between the parties. Such unrestrained freedom carries the seeds of destruction of the competitive economy which it is supposed to foster.[4]

Historically, equity courts have refused to require specific performance of unfair or unconscionable contracts.[5] Some of the grounds used for denial of this relief included fraud, duress, misrepresentation, undue influence and differences in economic bargaining power.[6] In connection with differences in economic bargaining power, another ground for denial of specific performance was the common law doctrine of intrinsic fraud, *i.e.,* fraud which can be presumed from the grossly unfair nature of the terms of the contract.[7] In applying this doctrine, inquiry into the relative bargaining power of the two parties is not an inquiry wholly divorced from the question of unconscionability, since a one-sided bargain is itself evidence of the inequality of the bargaining parties.[8] A recent expression of this ancient concept was expounded by Justice Frankfurter in *United States v. Bethlehem Steel Corp.,*[9] when in dissent he said: "the law is not so primitive that it sanctions every injustice except brute force and downright fraud. More specifically, the courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other."[10]

The historical progress in this area of the law inevitably reached its high point in the Uniform Commercial Code (hereinafter called the UCC), section 2-302.[11] The effect

3. Llewellyn, *Standardization of Commercial Contracts in English and Continental Law,* 52 HARV. L. REV. 700, 704 (1939).
4. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws,* 58 COLUM. L. REV. 1072, 1089 (1953).
5. CORBIN, CONTRACTS, § 128 (1 vol. ed. 1952); MCCLINTOCK, PRINCIPLES OF EQUITY, § 71 (2nd ed. 1948).
6. CORBIN, CONTRACTS, § 128 (1 vol. ed. 1952).
7. Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (1751): "It [fraud] may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make . . . ."
8. *Ibid.*
9. 315 U. S. 289 (1942).
10. *Id.* at 326.
11. Note, *Unconscionable Sales Contracts And The Uniform Commercial Code, Section 2-302,* 45 VA. L. REV. 583 (1959).

of this section is to allow a court of law or equity to refuse enforcement of a contract found unconscionable, or any portion thereof.[12] In determining whether or not a contract is unconscionable, the parties may present evidence of the contract's commercial setting, purpose and effect.[13] The court may now rule directly on the issue of unconscionability and make its conclusions of law accordingly.[14] The court is to determine "whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[15] By way of conceptual analogy, it can be seen that the power given the courts by section 2-302 is the historic successor of the power equity had in refusing to grant specific performance of a contract found unconscionable.[16]

The name case in the area of unconscionable contracts, which is a pre-UCC case in point, is *Campbell Soup Co. v. Wentz.*[17] Here a court of equity refused to grant specific performance of a contract which provided that a farmer grow Chatenay carrots at a specified price and sell the entire production to the plaintiff Soup Company. At the time of delivery, the market price of these carrots had risen to $90 per ton as contrasted to the contract price of $30 per ton. The court stated that ordinarily specific performance would be the plaintiff's proper remedy. However, specific performance

12. UNIFORM COMMERCIAL CODE § 2-302(1): "If the court as a matter of law finds 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."

13. UNIFORM COMMERCIAL CODE § 2-302(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."

14. UNIFORM COMMERCIAL CODE § 2-302 Comment 1: "In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability . . . ."

15. *Supra* note 14.

16. 1 ANDERSON, UNIFORM COMMERCIAL CODE, § 2-302:3 (1963 Reprint, 1961).

17. 172 F.2d 80 (3d Cir. 1949).

was denied the plaintiff because it had simply driven "too hard a bargain and too one-sided an agreement . . . ."[18]

In the *Wentz* case, the court makes no mention of fraud or mistake to aid in its decision. Besides the pertinent clause,[19] the other terms of the contract taken as a whole show that Campbell had taken advantage of its superior bargaining position, in that all of the risks inherent in the performance of the contract were upon the defendant farmers.

The *Wentz* case illustrates how and when a court will deal with disproportionate allocation of risks arising from a superior bargaining position of one party.[20] Although the UCC comments to section 2-302 express clearly that the courts are not to interfere with such allocation, the citation of the *Wentz* case in the comments produces considerable ambiguity as to the crucial question of interpretation.[21] This ambiguity may be justifiably exploited by a court in dealing with the central problem of the control of disproportionate economic powers.[22]

18. *Id.* at 83. The court found the contract unconscionable for various reasons, one of which it pointed out as being, "It will be noted that Campbell is excused from accepting carrots under certain circumstances. But even under such circumstances the grower, while he cannot say Campbell is liable for failure to take the carrots, is not permitted to sell them elsewhere unless Campbell agrees. This is the kind of provision which the late Francis H. Bohlen would call 'carrying a good joke too far.' What the grower may do with his product under the circumstances set out is not clear. He has covenanted not to store it anywhere except on his own farm and also not to sell to anybody else." *Ibid.*

19. See paragraph 9 of Campbell Soup Co. contract in Campbell Soup Co. v. Wentz, *supra* note 18, at 83.

20. Note, *Unconscionable Contracts: The Uniform Commercial Code*, 45 IOWA L. REV. 843, 861 (1960).

21. UNIFORM COMMERCIAL CODE § 2-302 Comment 2.
The ambiguity is a result of the fact that the court in the *Wentz* case found the Campbell Soup contract unconscionable because of the disproportionate allocation of risks which arose from the superior bargaining power of Campbell. The UCC comments to section 2-302(2) specifically declare that courts are not to disturb such allocations, and despite this limitation the *Wentz* case is cited in the comments as an authoritative case and as a result an inconsistency or ambiguity is created inasmuch as the holding of the *Wentz* case supports or allows a court to disturb allocated risks.

22. Note, *Unconscionable Contracts: The Uniform Commercial Code, supra* note 21, at 862. The court in the *Wentz* case precluded plaintiff from equitable relief but does not close the door to legal relief plaintiff may have for the purchase price of the contract. With a judgment obtained at law for the purchase price of the contract plaintiff could then levy on the chattels encumbered by the contract, Frank & Endicott, *Defenses in Equity and 'Legal Rights,'* 14 LA. L. REV. 380 (1954). The authors of this article point out that the results of a special study indicate that in most instances equitable defeat is total defeat and rarely do plaintiffs take advantage of their legal remedies. *Id.* at 381.
By simply denying specific performance to the plaintiff, the court in the *Wentz* case failed to utilize the equitable "clean up" principle. As usually

Recent decisions in point based upon UCC section 2-302 are somewhat sparse.[23] In *American Home Improvement Inc. v. MacIver,*[24] homeowners contracted with builder for supplying labor and materials to improve homeowner's home. The contract price was $1,759. In violation of statute, builder did not send homeowner a statement of interest rates. The court found that with interest, for 60 months, the total price homeowner would have to pay was $2,568.60. The value of goods and services was found to be only $959.00, with commissions valued at $800.00 and interest and carrying charges being $809.60. In granting homeowner's motion to dismiss, the court denied builder recovery because of statutory violation. The court also held that recovery for breach of contract should be denied for the independent reason of the unconscionability of the transaction. The court's authority for this holding was UCC section 2-302.[25]

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stated, the principle is that when an equity court acquires jurisdiction of a case, it will proceed to give whatever remedies are needed for complete and final disposition of all the issues involved. The clearest case for invoking the principle is that in which equitable relief is awarded and the decision of the equity issues will compel the court to receive evidence and decide disputed issues as to claims that were clearly "legal" by historical tests. Thus, in the *Wentz* case the equitable "clean up" principle might have been easily applied by the same court since plaintiff Soup Company was, at the time of the suit, damaged as a result of defendants breach. Also, see Levin, *Equitable Clean Up and the Jury,* 100 U. PA. L. REV. 320 (1951).

23. 1 ANDERSON, UNIFORM COMMERCIAL CODE, § 2-302:3, (1963 Reprint, 1961).
A recent decision of some interest to the area of unconscionable contracts and the UCC is Henningson v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1 (1960), where the wife of a new car purchaser sued the manufacturer on a theory of implied warranty of merchantibility. The plaintiff received injuries in an accident caused by faulty workmanship in the new auto. The New Jersey Supreme Court referred favorably to section 2-302; however, the court did not base its decision upon this section. In holding for the plaintiff on a theory of implied warranty the court called attention to the complete dependence of the buyer upon the manufacturer when buying a new car, because no sale (or contract) is permitted except under the limited uniform warranty of the manufacturer's association. The court in speaking of "boiler plate" contracts and allocation of risks points out, "But in present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position. 'The weaker party, in need of goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood in a vague way, if at all.' " Henningson v. Bloomfield Motors, *supra* 161 A.2d at 86, 75 A.L.R. 2d at 23.

24. 105 N. H. 435, 201 A.2d 886 (1964).

25. *Id.* at 888.
It should be noted that builder is not precluded from amending his complaint and bringing an action (in law) based upon quantum meruit, *i.e.,* for the value of services and materials received by the homeowner.

The court in the principal case remanded the case back to the trial court for further findings on the issue of unconscionability of the contract.[26] The significant facts which led the court to this decision was the fact that the buyer had little education and supported herself and her seven children on $218 per month. Within a period of five years she signed fourteen contracts with the seller. The contracts were approximately six inches in length and each contained a long paragraph in extremely fine print. One of the sentences in this paragraph provided that payments, after the first purchase, were to be prorated on all purchases then outstanding. Mathematically, this had the effect of keeping a balance due on all items until the time balance was completely eliminated. It meant that title to the first purchase remained in the seller until the fourteenth purchase, made some five years later, was fully paid. The total of all purchases made during the five-year running account came to $1,800. The total payments made, amounted to $1,400. Prior to the last purchase, the buyer had reduced the balance in her account to $164. The last purchase, a stereo set, raised the balance due to $678. Significantly, at the time of this and the preceding purchases, the seller was aware of the buyer's financial condition and when the buyer defaulted on her monthly installment payments, the seller sought to repossess all items purchased during the existence of the running account.[27]

The buyer's contention was that under these facts and circumstances, the contract was unconscionable and should not be enforced. The lower court declined to give the buyer the relief she requested.[28] On appeal, the United States Court of Appeals stated that the lower court had the power to refuse enforcement of unconscionable contracts.[29] In holding that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced,

1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURES, § 9.30 (Rules edition 1960); Smith v. Bliss, 44 Cal. App.2d 171, 112 P.2d 30, 33 (1941).

26. Williams v. Walker Thomas Furniture Co., 350 F.2d 445, 450 (D. C. Cir. 1965).

27. *Id.* at 448.

28. However, the lower court stated that the contract would have been enforced if the Maryland Retail Installment Sales Act or its equivalent were in force in the District of Columbia. See MD. ANN. CODE art. 83, § 128 (1957).

29. Williams v. Walker Thomas Furniture Co., *supra* note 26, at 448.

the court uses as a basis for its decision the adoption of UCC section 2-302 and the power possessed by the courts of the District of Columbia to develop the common law of that district.[30] The court then pointed out that the unconscionable element is present if one of the parties to the contract has no meaningful choice and the contract terms are unreasonably favorable to the other party. It also states, that a meaningful choice is often negated by a gross inequality of bargaining power.[31] Should this be the case, the court continues, the usual rule, that the terms of the contract are not to be questioned, should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.[32] In concluding its opinion, the court states that the test to be used, in a case where one of the parties to the contract had no meaningful choice upon entering the contract, is whether or not the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place."[33]

The court further stated that the time at which the determination of unconscionability is to be made is when "one of the parties to the contract had no meaningful choice *upon entering the contract.*"[34] (emphasis supplied) This represents

30. *Id.* at 449.
The court further stated that the fact that Congress adopted UCC section 2-302, for the District of Columbia, subsequent to the contract in question is persuasive authority for following the rationale of the cases from which the section is explicitly derived. *Ibid.*
31. *Id.* at 449.
32. *Id.* at 450.
33. This test is derived from 1 CORBIN, CONTRACTS § 128 (1963). On remanding the case to the lower court, the court in the principal case leaves unresolved the question of the sellers relief should the contract or parts of it be found unconscionable, hence unenforceable. Should only a clause of the contract be found unconscionable, the court may refuse enforcement of that clause and enforce the remainder of the contract. On the other hand, should the contract as a whole be unenforceable, the seller is not precluded from other forms of relief. 1 ANDERSON, UNIFORM COMMERCIAL CODE, § 2-302:7 (1963 Reprint, 1961) (Note: Throughout the commentaries there is no indication, by Anderson, that the traditional alternative remedies are to be withheld). The seller may be awarded damages in the same action through the court's use of the equitable "clean up" principle, mentioned in text of note 23 *supra*. The same court of equity may give the seller relief by the establishment of an equitable lien on the chattels which would otherwise unjustly enrich the buyer. RESTATEMENT, RESTITUTION § 161 (1937). Further, the court may simply deny any equitable relief to the seller and leave him to his remedies at law. Frank & Endicott, *Defenses in Equity and 'Legal Rights,'* 14 LA. L. REV. 380 (1954).
34. UNIFORM COMMERCIAL CODE § 2-302 Comment 1. "Subsection (2) makes it clear that it is proper for the court to hear evidence on these questions. The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining

a significant clarification in fixing the time at which the exchange is to be judged. Thus subsequent events or changes in circumstances will not interfere with the enforcement of a contract fair at its inception and is in accord with the avowed purposes of not disturbing reasonable allocations of risk effected because of superior bargaining power.[35]

The significance of the *Williams* case is best seen when compared with the earlier authoritative doctrine as established by the *Campbell Soup Co. v. Wentz* case. Prior (and subsequent) to the adoption of the UCC, the *Campbell Soup Co. v. Wentz* case was considered to be potent authoritative doctrine for the principle of allowing a court to disturb allocated risks in a contract which resulted from one of the parties having a superior bargaining power.[36] As a result of this established doctrine a court could rule on the issue of unconscionability either at the time the contract was entered into, or at a period of time subsequent to the contract where changed circumstances indicated disproportionate allocations of risk. The *Williams* case, on the other hand, establishes that the issue of unconscionability is to be decided only at the time the contract was entered into. This is significant as showing a trend away from the *Wentz* doctrine, and to a large degree disposes of the ambiguity mentioned to be existing in Comment UCC section 2-302 (2).[37]

Wyoming courts and courts in other states which have adopted the UCC, will undoubtedly be swayed by the *Williams* case which will serve as persuasive authority in cases involving

power."

Note: A clarification of UCC § 2-302(2) is made in, Note, *Unconscionable Sales Contracts and the Uniform Commercial Code, Section 2-302*, 45 VA. L. REV. 583, 586 (1959) where the author states: "The section appears to be designed to deal with two distinct situations: (1) *Unfair surprise*, where there has actually been no assent to the terms of the contract; (2) *oppression*, where, though there has been actual assent, the agreement, surrounding facts and/or relative positions of the parties indicate the possibility of gross overreaching on the part of either party."

35. UNIFORM COMMERCIAL CODE § 2-302(1).

36. See Note, *Unconscionable Contracts: The Uniform Commercial Code*, 45 IOWA L. REV. 843, 862, where it is stated, "It can be argued that the *Wentz* case is an illustration of the prevention of 'oppression and surprise.' The promisor was probably not fully aware of the legal implications of the objectional contract clauses. It is even likely that the contracts had not been read by the farmers. But the *Wentz* case is a clearer illustration of an instance where a court has disturbed a disproportionate allocation of risks arising from the superior bargaining power of one party."

37. See note 22 *supra*.

unconscionable contracts. Attorneys with a buyer client, who feels he has been wronged by an allegedly unconscionable contract, will do well to cite the *Williams* case in support of their cause. And finally, merchants who make a practice of using standardized contract forms, which are unreasonably favorable towards themselves, may be well inclined to change this practice in the event a substantial number of buyer's are found to have entered unconscionable contracts by courts which follow the rationale of the *Williams* case.

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CRIMINAL PROCEDURE—Deliberate and Purposeful Delay Between The Date of the Commission of a Crime and the First Filing of Charges as Violation of Defendant's Fifth Amendment Due Process Right To a Fair Trial. Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965).

The defendant was arrested and charged with violation of federal narcotics laws seven months after the date of the alleged offense. Immediately after the commission of the offense, law enforcement officers had probable cause to believe that the defendant was the person who had committed it. He was continuously available during this period of time, but the arrest was purposely delayed in order to prevent disclosure of the identity of the undercover agent who was conducting a continuing investigation of narcotics violations in the area and who was the only witness against the defendant. At the trial the defendant claimed that he was unable to recall his whereabouts and activities on the date of the alleged offense. The government's only evidence, aside from the drugs allegedly sold to the agent by the defendant, was the agent's testimony which he could not give without refreshing his memory from a notebook. The defendant was convicted and he appealed, contending that deliberate and purposeful delay between offense and complaint violated his rights to speedy trial and due process guaranteed by the fifth and sixth amendments to the United States Constitution. Expressly declining to base its decision on the sixth amendment, the Court of Appeals for the District of Columbia *held* that deliberate and purposeful delay between the date of the alleged crime and the date of initiation of criminal proceedings, when