Walker-Thomas Strikes Back: Comment on the Pleading and Proof of Price Unconscionability

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I. Introduction

It is startling to find, as late as the year 1970, a judge, whether of a trial or appellate court, flatly ruling that the concept of unconscionability embodied in Section 2-302 of the Uniform Commercial Code does not encompass price terms of sales contracts. Such a holding is surprising in light of the language of section 2-302 which makes no exception for price terms, the long history of the concept prior to its embodiment in the Code, as well as precedent. Nevertheless, a judge of the District of Columbia Court of General Sessions, is sustaining objections to a defendant's interrogatories relative to prices charged by the plain-
tiff, ruled last year that "the defense of unconscionability based on price is not recognized in this jurisdiction."6

Had this ruling been sustained on appeal, it would have created grave dis-
uniformity in the construction of a critical section of what its drafters had
hoped would truly be a Uniform Commercial Code.7 Fortunately, in Patter-
son v. Walker-Thomas Furniture Co., Inc.8 the District of Columbia Court
of Appeals, while affirming the final judgment of the trial court in favor of
the plaintiff-seller on what I believe to be a doubtful ground,9 rejected
in the abstract the idea that price terms were exempted from the coverage
this second Walker-Thomas case10 the defendant-buyer purchased from the
plaintiff-seller personal and household merchandise of a total price of
$597.25. The defendant defaulted in her payments after she had paid
$248.40 toward the agreed contract price. In answer to the seller furniture
company's action to recover the unpaid balance, the defendant alleged,
inter alia, that she had paid an amount in excess of the fair value of the
goods and that the goods themselves were so grossly overpriced as to render
the contract terms unconscionable and the contracts unenforceable under
the District of Columbia Code. Because of the lower court's refusal to recog-
nize the defense, all preliminary maneuvers by the defendant to obtain dis-
covery of the plaintiff's internal pricing data and policies failed. A trial
judge subsequently held that the prior rulings on defendant's attempts to
obtain discovery established the law of the case. Since the defendant's then
sole defense was that the goods were grossly overpriced and no proof on this
issue was presented, the court entered judgment for the seller.11

In taking issue with the approach of the trial court, the Court of Appeals
said:

We conclude that in a proper case gross overpricing may be raised in defense
as an element of unconscionability. Under the test outlined in Williams v. Walker-
Thomas Furniture Co. price is necessarily an element to be examined when deter-
mining whether a contract is reasonable.

Necessarily following from this conclusion, according to the court, is the
availability of discovery techniques to obtain relevant information when the
price term of a sales contract is challenged.

This much of the Walker-Thomas (II) decision hopefully will put to rest
the rather metaphysical disputation whether there can ever be an unconscion-
able price term in a situation wherein the parties, without actual fraud or
duress present, have apparently agreed to the term. Had the Court stopped

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6Walker-Thomas Furniture Co., Inc. v. Patterson (GS 4872-69 District of Columbia Court of General
Sessions). Record, p. 78.
7UCC Section 1-102 provides:
(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
(2) Underlying purposes and policies of this Act are
(c) to make uniform the law among the various jurisdictions.
9See text and notes infra at pp 308.
10The first one was the celebrated Williams v. Walker-Thomas Furniture Co., Inc. 350 F.2d 445 (D.C. Cir.
1965), which attempted to define what "reasonable choice" meant in the context of the defense of unconscion-
ability.
11277 A 2d at 113.
at this point and remanded the case for discovery proceedings and a hearing pursuant to Section 28: 2-302 (2), there would be little if anything in the Court's opinion to question.

However, the District's high court made two further points which may seriously limit the availability of the defense of price unconscionability under the District of Columbia U.C.C.

II. EXORBITANT PRICE TERMS STANDING ALONE

The first troubling point was made in the following rather cryptic words:

We emphasize, however, that price as an unreasonable contract term is only one of the elements which underpin proof of unconscionability. Specifically, therefore, in the instant case the reasonableness of the contracts is not to be gauged by an examination of the price stipulation alone or any other term of the contract without parallel consideration being given to whether or not appellant exercised a meaningful choice in entering into the contracts. 12

An uninitiated reader of the court's opinion could not be blamed for puzzling over the meaning of the clause "without parallel consideration being given to whether or not appellant exercised a meaningful choice in entering into the contracts." 13

By this language, the court was apparently alluding to the concepts of "oppression" or "unfair surprise"—the words of Official Comment No. 1 to Section 2-302. By "oppression" is meant at least the inability to obtain more favorable terms elsewhere in the relevant market, leaving the prospective purchaser with the choice only of buying or not buying, 14 and not even that if the item sought is a necessity. 15 By "unfair surprise" is meant the thwarting of the reasonable expectations of the buyer relative to the sales contract because important terms of the contract were not brought to his attention 16 or, if they were, the terms were not made comprehensible to him. 17 These concepts (oppression or unfair surprise) have been referred to

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12Id. at 114.
15In Henningen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A. 2d 69 (1960), the New Jersey Supreme Court, in the course of striking down as against public policy the Automobile Manufacturers Association standard warranty, disclaimer and limitation of liability clauses in a sales contract for a Plymouth automobile, noted that these clauses were on the reverse side of the form contract. The only heading was at the top of the page, following which there was 8 1/2 inches of fine print, divided into ten paragraphs and 65 lines, with no attempt made to label the contents of the ten paragraphs except as "conditions". 32 N.J. at ___., 161 A. 2d at 74. Other critical terms were even more obscured. As the Court observed, "They do not attract attention and there is nothing about the format which would draw the reader's eye to them. In fact, a studied and concentrated effort would have to be made to read them. De-emphasis seems the motive rather than emphasis." 32 N.J. at ___, 161 A.2d at 73. See also Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).
16In testing for unconscionable contract clauses, the United States Court of Appeals for the District of Columbia has suggested as one relevant question: "Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract . . .?" Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965). That case involved an add-on security clause of considerable complexity in a form contract signed by a ghetto dweller of limited education. And in Frostfresh Corp. v. Reynoso, 55 Misc. 2d 26, 274 N.Y.S. 2d 757 (Dist. Ct., Nassau Co. 1966), rev'd as to the award of damages, 54 Misc. 2d 119, 281 N.Y.S. 2d 964 (Sup. Ct. 1967), the trial court emphasized that the form contract under attack as unconscionable was printed in English while the defendants were literate only in Spanish and that the contract was neither translated nor explained to the defendants. For a comprehensive analysis of "unfair surprise" and "oppression" see, R. Nordstrom, Sales 127-131 (1970).
as "procedural unconscionability," which may contribute to the ultimate conclusion that a term or contract is indeed unconscionable ("substantive unconscionability").

17 The court's apparent reference to the factors of "procedural unconscionability" raised an as yet unresolved issue under UCC Section 2-302: whether a price term may be so exorbitant in relation to what the buyer is receiving for his money that the contract can be rescinded, the price term reformed or part of the price paid recovered, without consideration of whether there is an absence of meaningful choice to the buyer.

A ruling that "procedural unconscionability" in the making of a contract must always be present as a cause of an unreasonably harsh term or contract before the courts may find such term or contract unconscionable serves to define the fundamental nature of Section 2-302 as "cause oriented" rather than "result oriented." Thus, if procedural unconscionability is absent in a given case, then no matter how shocking to the judicial conscience enforcement of a term or whole contract might be, the courts will not be able to rely on Section 2-302 to avoid the unpalatable result.

It well may be that, upon adequate consideration, the appellate courts will decide that Section 2-302 is concerned only with the cause of unreasonably harsh terms rather than the effect of such terms. Indeed, Official Comment No. 1 to the section states the principle involved to be "one of the prevention of oppression and unfair surprise...and not of disturbance of allocation of risks because of superior bargaining power." Moreover, a strong policy argument can be made against construing Section 2-302 so as to give the courts power to strike down unreasonable price terms without more, i.e., the courts would become price regulators, and whatever is left of freedom of contract would be further severely circumscribed.

On the other hand, some courts confronted with the defense of unconscionable price terms seem to have operated on the premise that they derived power from the Code to strike down or modify price terms because the terms were extremely high in relation to the value received by defendants-

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17 The terms "procedural unconscionability" and "substantive unconscionability" were coined by Professor Arthur A. Leff in his groundbreaking article on Section 2-302 Unconscionability and the Code—The Emperor's New Clause, 115 U. Pa. L. Rev. 485 (1967).

18 This issue has been well considered by the law reviews, if not by the courts, See, e.g., M. Ellinghaus, In Defense of Unconscionability, 78 Yale L.J. 757, 786-793 (1969) (concluding that what case authority there was supported the proposition that a sufficient disparity between "value" and price might, by itself be a species of unconscionability. M. Shanker & M. Abel, Consumer Protection Under Article 2 of the Uniform Commercial Code, 29 Ohio St., L.J. 689, 706-07 (1968) (concluding from the cases that at present price-value disparity alone is probably not enough to establish unconscionability); J. Spanogle, Jr., Analyzing Unconscionability Problems, 117 U. Pa. L. Rev. 931, 964-967 (1969) (concluding that the cases provide alternative methods of analyzing the issue).

19 Yet in the same comment, the drafters also say, "The basic test is whether...the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." This language seems to suggest that procedural unconscionability may not be essential to finding a contract or term thereof unconscionable.
buyers. The clearest example is *Jones v. Star Credit Corp.*, 2 in which the plaintiffs, seeking reform of a sales contract, were obligated to make total payment of $1,234.80 for a home freezer having a maximum retail value of approximately $300. At the time of suit, the plaintiffs had paid $619.88 toward the purchase, which was made from a door-to-door salesman. The contract was reformed to provide a price term of $619.88. There is nothing in the decision to suggest that the plaintiffs did not understand the price term or that they had no opportunity to obtain better terms elsewhere. 21 From aught that appears, the plaintiffs, welfare recipients, simply got involved in a very bad deal.

Neither *Jones* nor any other case to date has faced the bedrock question of what is the true nature of the concept of unconscionability embodied in Section 2-302, i.e., is it solely "cause oriented." The answer to that question will have considerable meaning to all consumer-buyers, and especially those in the ghettos who are more likely to be imposed upon in commercial transactions than middle class consumers. 22 With such a fundamental Code issue at stake, resolution by the court in the terse and unconsidered language previously quoted 23 can only make a proper uniform construction of Section 2-302 more difficult to achieve. While my own predilection is for a construction not necessarily requiring procedural unconscionability, my concern here is that careful consideration be given to this close and critical question by our appellate courts, especially now during the formative years of the Code. Hopefully, since its statement was not necessary to the decision, the D.C. Court of Appeals will not feel itself bound thereby but will reconsider the matter when it is next presented.

20 Misc. 2d 189, 298 N.Y.S. 2d 264 (Sup. Ct. Nassau Co. 1969). See also *American Home Improvement, Inc. v. Maclver*, 105 N.H. 435, 201 A.2d 886 (1964). In *Maclver*, the financing application furnished the defendant buyers was in violation of the New Hampshire disclosure statute (N.H.Rev. Stat. Ann. §399-B: 2 (Supp. 1965)), and the case could have been decided solely on that ground. However, the court ruled in the alternative that the price term was unconscionable because the goods and services had a value of $959 while the defendants was obligated to make a total payment of $2,568.60. "Inasmuch as the defendants have received little or nothing of value and under the transaction they entered into they were paying $1,609 (beyond retail value) for goods and services valued at far less, the contract should not be enforced because of its unconscionable features." 105 N.H. at 439, 201 A.2d at 889. The case would provide stronger support for the proposition that great price disparity alone was enough to justify labeling a price term unconscionable if the alternative ground of statutory violation had not been present.

21 The thrust of the decision is found in the following paragraph of the opinion:
"(3) Concededly, deciding the issue is substantially easier than explaining it. No doubt, the mathematical disparity between $300, which presumably includes a reasonable profit margin, and $900, which is exorbitant on its face, carries the greatest weight. Credit charges alone exceed by more than $100 the retail value of the freezer. These alone, may be sufficient to sustain the decision. Yet, a caveat is warranted lest we reduce the import of Section 2-302 solely to a mathematical ratio formula. It may, at times, be that; yet it may also be much more. The very limited financial resources of the purchaser, known to the sellers at the time of the sale, is entitled to weight in the balance. Indeed, the value disparity itself leads inevitably to the felt conclusion that knowing advantage was taken of the plaintiffs. In addition, the meaningfulness of choice essential to the making of a contract, can be negated by a gross inequality of bargaining power. (Williams v. Walker-Thomas Furniture Co., 121 U.S.App.D.C. 315, 350 F.2d 445)."


23 See text at p 310, supra.
III. Pleading the Defense of Unconscionability

The second difficulty concerns the ruling that discovery was properly denied the defendant because she had failed to allege the defense of unconscionability with sufficient specificity. According to the court, "Sufficient facts surrounding the 'commercial setting, purpose and effect' of a contract at the time it was made should be alleged so that the court may form a judgment as to the existence of a valid claim of unconscionability and the extent to which discovery of evidence to support that claim should be allowed."

At the outset it must be noted that Section 2-302 lays down no special requirements for pleading the affirmative defense of unconscionability. This is as it should be since it is not the Code's province to interfere with local rules of civil procedure. Thus, whether the defendant here failed to plead her defense properly is to be determined by reference to and construction of Rule 8 of the District of Columbia Court of General Sessions Civil Rules.

Rule 8(b) provides in pertinent part that "A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." Rule 8(c) states that defenses constituting avoidance or affirmative defenses must be set out affirmatively and lists some of the more common affirmative defenses. The rules are patterned after Rule 8 of the Federal Rules of Civil Procedure. This rule embodies the theory of notice pleading. That theory requires pleadings be generalized summaries of the parties' positions and rejects the concept of fact pleading of defenses and claims.

The defendant's pleading here appears to satisfy notice pleading theory. As an affirmative defense she stated:

Defendant denies any debt or liability to plaintiff because the goods and merchandise sold to her were grossly overpriced. Defendant therefore alleges that she has paid an amount in excess of the fair value of the goods sold. Accordingly, the balance of the sales contract on which plaintiff bases its complaint is void and unenforceable because the terms thereof are unconscionable.

This statement is surely sufficient to advise the plaintiff what defense the defendant is relying on and to show what would be decided by the judgment for res judicata purposes. That is all that notice pleadings requires in a case like this, and, therefore, unless it can be said that affirmative defenses are to be treated differently than other pleadings, the District of Columbia Court of Appeals was plainly wrong in affirming the judgment of the trial court for insufficiency of the defendant's pleading.

\[277 A.2d at 114.\]
\[2\]See UCC§ 1-102(2).
\[2\]Now Rule 8 of the Superior Court of the District of Columbia Civil Rules.
\[2\]The major exception to notice pleading in the Federal Rules is the need to "state with particularity" the circumstances constituting fraud or mistake. F.R.C.P. 9(b).
\[\]Record, p. 5.
\[2\]A third requirement of notice pleading stated by Professor Wright, ibid, sufficiency to indicate whether the case should be tried to the court or to a jury, is not involved here since Section 2-302 makes the issues of unconscionability exclusively one for the judge.
But it is clear from the few cases considering the point that notice pleading theory does apply to affirmative defenses. In *Lehmann Trading Corp. v. J & H Stowlow, Inc.*, defendants interposed in a private antitrust action the affirmative defense of lack of "clean hands" on the part of the plaintiffs. Plaintiffs moved to strike the defense, *inter alia*, on the ground that the allegations were insufficient to give notice of the defendant's position. In denying the motion to strike, the court concluded that the pleading requirements for an affirmative defense were "no more stringent than those for a complaint."

That case provides a very clear analogy. The defendants' allegation of plaintiffs' "unclean hands" were no more detailed than were those of the defendant in *Walker-Thomas (II)*. Moreover, it is difficult to make any distinction on the basis of the types of affirmative defenses involved since both "unclean hands" and "unconscionability" have their roots in the Chancellor's desire to do equity.

One other case deserves mention. In *Moriarty v. Curran*, an action for libel, plaintiff moved to strike the defenses and partial defenses of truth, fair comment, qualified privilege and mitigation because they were not alleged specifically enough. In his original ruling the trial judge granted the motion to strike because (1) facts were not alleged to show that the alleged libelous statements were true; (2) no attempt was made to differentiate allegedly true statements from fair comment statements; (3) no facts establishing any privilege were alleged; and (4) the particular mitigating circumstances were not alleged. However, on reconsideration the trial judge reversed himself, saying:

As stated in the previous memorandum, the pleadings in a federal court serve the purpose of mere notice giving. And the Federal Rules of Civil Procedure require that a pleading shall be simple, concise and direct. Rule 8(b) provides, in part: "Defenses; Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies***." Rule 8(c)(1) further provides that: "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Tested by these standards, the defenses are adequately pleaded. The Federal Rules provide quite satisfactorily for the eliciting of detailed facts, and it is an entirely proper practice to leave to these pre-trial procedures the particularization of notice-giving pleadings.

If fact pleading were to be required for affirmative defenses at all, it would seem that a strong case could be made for it with regard to the defense of truth wherein very precise facts are necessary to its establishment. Yet even

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34"Third Defense

14. Plaintiffs have participated to such an extent in the activities complained of and have so enjoyed the benefit thereof, and have themselves so violated the anti-trust laws, as to be disentitled from maintaining any of the alleged rights of action set forth in the complaint." 184 F. Supp. at 22.

35See, e.g., J. Pomeroy, Equity Jurisprudence (5th ed. 1941) §§397-398; Campbell Soup Co. v. Wentz, 172 F. 2d 80 (3d Cir. 1948).


here the modern view of notice pleading appears to have prevailed. *Walker-Thomas (II)* appears to be an *a fortiori* case, requiring approval of the manner in which the affirmative defense of unconscionability was pleaded.

But even assuming the correctness of the conclusion of insufficient pleading, the court can be criticized for failing to set forth standards for pleading this defense. Unconscionability as the court apparently views it involves both negotiational flaws (unfair surprise or economic oppression) and unreasonably harsh terms. How does one plead facts to show that he was unfairly surprised by a contract term? Would it be enough for him to allege, for instance, that he was outraged when he discovered that all of his purchases from one store could be repossessed if he defaulted on one payment long after he thought he had paid for most of the goods? Or must he also allege facts as to why he was unaware of such term or its effect? And how does one allege economic oppression? Must he allege that every other seller in the relevant market charges the same high price for the goods, or is it enough to allege subjective factors such as lack of mobility or a bad credit rating which makes him dependent upon the plaintiff-seller for his goods regardless of the price charged? And must the defendant allege that the goods purchased were necessities of life?

Similarly difficult pleading questions arise regarding the concept of unreasonably high price. How does one establish that a price is unreasonable? Would an allegation that the plaintiff’s price was X times as great as that charged on the average by all dealers in the relevant market suffice? If so, how many “X times” is enough and how does one define the relevant market? If an “X times” greater than average price approach is not acceptable, must the defendant plead facts showing the seller’s profit on the transaction to be inordinate in absolute terms or in comparison with the average profit enjoyed by like merchants on comparable sales in the relevant market? Even the concept of price itself is not without difficulty. Of what components is it made up? Are credit charges part of the price? Are special service charges?

The court also seems to be calling for evidentiary pleading. Using language from Section 2-302(2), providing for an evidentiary hearing by the trial court when the question of unconscionability is raised, the court calls for the pleading of “sufficient facts surrounding the ‘commercial setting, purpose and effect’ of a contract at the time it was made …” But such
facts would be subordinate to and supportive of the ultimate facts of absence of meaningful choice and unreasonably high price and, hence, evidentiary. Although evidentiary pleading has been almost universally rejected in American jurisprudence (whether the system of pleading be that of the common law, the Field Code or the Federal Rules), the court's opinion as it now stands seems to require the pleader to state in his affirmative defense evidentiary matters such as the relative financial positions of plaintiff and defendant at the time they entered into the sales contract; the extent to which the plaintiff's price varies with and reflects anticipated risks; and the availability of other credit purchase opportunities to the defendant at the time he entered into the contracts with plaintiff-seller.

Aside from the difficulties of pleading engendered by *Walker-Thomas (II)*, still another problem is presented. Assuming the ability of the pleader to divine the type of allegations he must make to get past a motion to strike, where is he to get the factual information upon which to base the specific allegations? Without the availability of discovery devices, the plaintiff is unlikely to divulge the method by which it came to price the goods involved and surely will not reveal its profit on the sale. Likewise, other sellers similarly situated in the relevant market are unlikely to provide facts and figures to help the defendant establish his defense. Confronted with such pleading difficulties, a defendant might be tempted to fabricate the necessary allegations to get past a motion to strike and then seek discovery to aid him in resisting a motion for summary judgment. This would be a deplorable result of placing too great a burden on those seeking to rely on the defense of unconscionability. Another result, equally deplorable, might be the practical unavailability of the defense in the District of Columbia. Certainly, most lawyers will not permit themselves to become parties to the fabrication of the necessary allegations, but, at the same time their clients may be unable to obtain sufficient pricing information to allow for utilization of the defense.

The court seems to have created a "chicken or egg" dilemma. As I read its decision, the court is requiring the pleader to allege facts outside his knowledge before he may have access to the discovery devices needed to

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44These and other matters were deemed appropriate for consideration in an evidentiary hearing in an analogous bankruptcy case involving the reasonableness of security agreements. *In re Elkins-Dell Mfg Co.*, 253 F. Supp. 864, 874 (E.D. Pa. 1966). Whether these matters had to be alleged by the trustee in bankruptcy in his petition to have the security agreements set aside is not considered.

45Not surprisingly, the 96 retailers providing data for the FTC's survey, *supra* no. 40, are never identified, and it may be assumed that they received assurances of confidentiality before parting with important information on pricing and profit. It is doubtful that the retailers would divulge the same information to a private litigant, especially when it might eventually become part of the public record.

46See F.R.C.P. 56(f); Superior Court of the District of Columbia Rule 56 (f).
obtain those same facts.\textsuperscript{47} Nowhere in its opinion does the court suggest how the pleader is to overcome this dilemma. Thus, a cryptic opinion of the District of Columbia Court of Appeals seemingly favoring recognition of the concept of price unconscionability in the District may instead sound the death knell for the concept.\textsuperscript{48}

IV. A More Utilitarian Approach to the Pleading and Proof of Unconscionability

If the doctrine of unconscionability embodied in Section 2-302 of the Uniform Commercial Code is to be given the utility intended by its drafters, simplified pleading should be encouraged everywhere\textsuperscript{49} and notice pleading of unconscionability recognized in the jurisdictions which profess to follow the Federal Rules of Civil Procedure. It ought to be enough in Federal Rules jurisdictions for a party to allege that the goods were sold to him at a price so much above the price at which similar goods are normally sold as to be unconscionable and to ask for rescission of the contract, return of that part of the payment made representing the difference between reasonable price and an unconscionable one, or simply reformation of the price term to correspond to the total payment made to date (the relief which, in effect, the defendant in \textit{Walker-Thomas (II)} sought). Such pleading puts the seller on notice of the buyer's defense and the action the buyer wishes the court to take. This is enough to permit the seller to begin plotting out his rebuttal. The specific facts of the defense of unconscionability will be revealed in pretrial discovery proceedings and the issue will be narrowed in those proceedings or at a pretrial conference.\textsuperscript{50}

As with the pleadings, Section 2-302 does not presume to lay down rules to govern the allocation of the burden of proof on the issue of unconscionability. Such allocation is controlled by local rules of procedure. Rather generally the party pleading an affirmative defense shoulders the ultimate

\textsuperscript{47}The thrust of the court's opinion is:

"Sufficient facts surrounding the commercial setting, purpose and effect of a contract at the time it was made should be alleged so that the court may form a judgment as to the existence of a valid claim of unconscionability and the extent to which discovery of evidence to support that claim should be allowed.

Her defendant's verified complaint alleges only that the goods she purchase and still retains were grossly overpriced and that she has already paid appellee a sum in excess of their fair value. There are conclusions without factual support. It cannot be said that the goods were grossly overpriced merely from an examination of the prices which appear on the face of the contracts. No other term of the contract is alleged to be unconscionable, nor is an absence of meaningful choice claimed. We hold that the two elements of which unconscionability is comprised; namely, absence of meaningful choice and contract terms unreasonably favorable to the other party, must be particularized in some detail before a merchant is required to divulge his pricing policies through interrogatories or through the production of records in court..."

\textsuperscript{277} A.2d at 114 (emphasis supplied).

\textsuperscript{48}The court's ultimate decision to affirm the trial court's judgment for the plaintiff-seller is also questionable. The court did recognize in the abstract the possibility of the defense of price unconscionability in the District of Columbia. Since such defense is legally available and since the issue of how to plead it was one of first impression in \textit{Walker-Thomas (II)}, the court should, instead, have remanded the case to the trial court with instructions to permit the defendant to amend his answer to conform to the requirements set down in its opinion.

\textsuperscript{49}But in Code states it will still be necessary to plead the defense of unconscionability with enough particularity to avoid having the allegations labelled "conclusory". Note, 48 Ore. L. Rev. 209, 224 (1969).

burden of establishing the defense by a preponderance of the evidence.\textsuperscript{51} No compelling reason comes to mind why the defendant-buyer should be relieved of the ultimate burden of persuasion on the issue of unconscionability. He is, after all, the party raising and relying on this defense.

The more difficult question is as to what evidence the defendant-buyer must produce to establish a \textit{prima facie} defense, thereby placing the burden of coming forward with rebuttal evidence on the plaintiff-seller. Because of his access to the tools of discovery such as depositions, interrogatories and orders to produce documents for inspection, it would not be wholly unfair to require the defendant-buyer to prove as part of his \textit{prima facie} case all elements of his lack of "meaningful choice" (if the courts do indeed decide that this is a necessary factor in unconscionability) and the unreasonableness of the price charged by the plaintiff.

However, because of the great complexity of pricing policy, the difficulty of determining profit on any given item because of the need to allocate a merchant's fixed costs to each item of sale and the difficulty of establishing the unavailability of real economic choice to the defendant-buyer in his relevant market (however that may be defined), I favor generally the approach to the allocation of the burden of coming forward with evidence taken by Professor Speidel of the University of Virginia Law School.\textsuperscript{52} He suggests that the buyer may make out a \textit{prima facie} case of price unconscionability by establishing only that the agreed retail price of the goods in issue is at least twice that of the average retail price for comparable goods sold in the relevant market.\textsuperscript{53} At this point, the plaintiff-seller, who has by far the better understanding of his own pricing policies and profit margins is required to come forward with the facts and figures to justify the price charged the defendant.

The burden would be on the seller to disclose his actual costs allocated to the particular sale. These disclosures would permit calculation of the seller's net profit on the sale in question. Then a comparison of this net profit with the net profits of similarly situated sellers selling comparable goods would have to be produced by the seller to allow calculation whether his price is unconscionable. A substantially higher net profit to the seller on the sale than that which would be achieved by a comparable merchant would result in a determination of unconscionable price.\textsuperscript{54}

\textsuperscript{51} See F. James, \textit{Civil Procedure} 255-256 (1965). But as Professor James points out there are exceptions. In the federal courts, for instance, the defendant must plead contributory negligence as an affirmative defense. But in diversity cases the federal courts will follow a local rule placing upon the plaintiff the burden of proving his freedom from contributory negligence. Id. at 256.


\textsuperscript{53} The arithmetical ratio of 2:1 is tentatively chosen because it was apparently utilized by the Roman and Civil law in refusing to enforce unreasonable price terms under the doctrine of \textit{laesio enormis}. See J. Dawson, \textit{Economic Duress and the Fair Exchange in French and German Law}, 11 Tul. L. Rev. 345, 364-376 (1937); Note, 42 Tul. L. Rev. 193 (1967). See also A. Squillante, \textit{Just Price}, 75 Case & Comment 53 (no. 5, Sept.-Oct. 1970).

\textsuperscript{54} The high gross retail prices charged by ghetto merchants is likely to reflect not so much inordinate profits as business inefficiency and low salary draw but high sales commissions to salesmen. See FTC, \textit{Economic Re- port on Installment Credit and Retail Sales Practices of District of Columbia Retailers} p. 8 (1968). The difficult policy question here is whether price unconscionability should encompass price terms inflated by inefficient operation and high sales commissions. Professor Speidel would apparently decide this question in the negative. See R. Speidel, op. cit., supra, no. 48 at 373.
Though agreeing generally with Professor Speidel’s basic *prima facie* defense approach, I diverge from his stand regarding the content of the case. First, the 2 to 1 retail price ratio tentatively chosen by him will seldom allow for the making of a *prima facie* case. The Federal Trade Commission’s recent Economic Report on Installment Credit and Retail Sales Practices of District of Columbia Retailers establishes that the retail price charged by the ghetto or “low-income market retailer” rarely will be double or more than that charged by “general market retailers” (e.g., metropolitan area-wide department stores). The FTC found that, assuming a $100 wholesale cost on an item, the average retail selling price of the item was $159 for the general market retailers in the District of Columbia and $225 for the low-income market retailers, or a difference of approximately 62 percent.\(^\text{55}\)

If the *prima facie* defense approach, based as it is on an arithmetical formula, is to have much meaning the ratio should be less than 2 to 1. I submit that a ratio of somewhere between 1.7 and 1.8 to 1 would provide the defendant-buyer with a real opportunity to make his *prima facie* case and at the same time would not shift the burden to the merchant whose price falls within the average retail price difference between general market retailers and low-income market retailers.

Because of his position that “the element of assent be excised from the determination of unconscionability in consumer transactions,”\(^\text{56}\) Professor Speidel’s burden of proof analysis concentrates on the price factor exclusively. But, as a second point of divergence, if the courts decide that procedural unconscionability is necessary to a determination of price unconscionability, then it would seem that the defendant-buyer’s *prima facie* defense must also include some evidence of the absence of “meaningful choice” or assent before the burden of coming forward with evidence is shifted to the plaintiff-seller. It should be enough to establish the *prima facie* defense for the defendant-buyer himself to testify as to his lack of understanding of the price term or that, for whatever reason, he could not obtain a better deal elsewhere.

Though I express minor reservations about it, a basic approach other than Professor Speidel’s may make the defense of unconscionable price practically inaccessible to the consumer because of the complexity of proof as to the reasonableness or unreasonableness of a given price term. While discovery might be helpful to the defendant in obtaining raw data, proper interpretation of such data is another matter. Therefore, in the interest of making Section 2-302 viable, the burden of coming forward with the evidence should be placed primarily on the party in the best position to bear it—the plaintiff-seller.

V. CONCLUSION

A major purpose of Section 2-302 of the Uniform Commerical Code is to establish “a boundary of fair dealing” in the commercial world.\(^\text{57}\) The

\(\text{\textsuperscript{55}}\) FTC, *Economic Report on Installment Credit and Retail Sales Practices of District of Columbia Retailers*, p. 12, fig. II-1. See also id. at p. 15, fig. II-2.

\(\text{\textsuperscript{56}}\) R. Speidel, op cit., *supra* n. 48 at 374.

\(\text{\textsuperscript{57}}\) R. Duesenberg and L. King, *Sales & Bulk Transfers Under the Uniform Commercial Code* (Student ed. 1966) § 4.08 (2)(b)
Code did not invent or attempt to define the concept of unconscionability, but when a trial judge finds unconscionability present in a contract before him, the Code gives him a straightforward means of avoiding injustice and forcing elevation of the level of practice in the commercial world.

In this regard, Section 2-302 may be said, in a metaphorical sense, to embody the very soul of Article 2 and perhaps the entire Code. And, thus, argument over the construction of the section and its ready availability involves nothing less than a struggle for the soul of the Code. So fundamental a struggle should not be decided in an off-hand manner. Thorough consideration should be given to the question whether a contract term may be so harsh to one party as to be unconscionable even in the absence of unfair surprise or economic oppression.

However this issue is finally resolved, the courts should not place in the path of litigants procedural obstacles to the utilization of the section. The effect of making price unconscionability practically unavailable will be to force the courts to return to the kind of ad hoc scrambling engaged in by them to avoid unconscionable results prior to the advent of the Code.58 No one will benefit from such a turning back of the clock in the realm of commercial law.

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