

Contractual Unconscionability: Identifying and Understanding Its Potential Elements

BY PAUL BENNETT MARROW

Imagine appearing before a court on behalf of a litigant. The theory for your position is grounded in a statute that lacks any statement of criteria. You have no idea what the legal elements of your position are. You have checked the case law, and not one opinion suggests a criteria or lists any of the elements. Yet you have found decisions that say your pleadings should be dismissed if they recite mere unsubstantiated conclusions.

If this isn't enough, you have found many decisions indicating that courts know a valid claim arising under this statute when they see one! Now you are before the court and compelled by the enabling statute to limit your proof to matters that appear to have no direct relationship to the facts that brought your client into your office in the first place.

This nightmare scenario becomes all too real every time someone claims that a contract or lease, or a provision in a contract or lease, is unconscionable.

Anyone who asserts a claim of contractual unconscionability is, by definition, acknowledging that someone made a bad deal. Courts do not normally act to protect contracting parties from mistakes in judgment.¹ Exceptions are made only when the court is persuaded that the faulted action is *per se* unfair or that it resulted from unusual circumstances usually beyond the control of the complainant.

Fairness and restraint are the watchwords that are said to govern this process. When is a contractual provision so unfair as to be offensive? It's far from clear.

Much has been written about the theoretical existence of contractual unconscionability,² but little has been said about what components actually make up such a claim. Rules do exist, but few courts have formally identified them. This article is designed to help both draftsman and litigants identify and understand potentially unconscionable elements.

Background

At common law, traditional doctrines such as fraud, duress and mutual mistake went only so far. They did

not cover every situation in which a contract might be oppressive. Developed to resolve specific types of strife, the doctrines required litigants to accommodate technical elements. The doctrine of unconscionability evolved to fill the gaps.

Contractual unconscionability was thought to involve contracts "as no man in his senses and not under delusion would make on the one hand and as no honest and fair man would accept on the other."³ Unfortunately, this abstraction was short on details, which were thought best left to the judgment of courts on a case-by-case basis. But what standards were to be applied? Uncertainty was the order of the day.

Until recently the situation had not changed much. In 1951 the New York Court of Appeals declared that an unconscionable contract is one that is "so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms."⁴

Commentators have struggled to provide clarity. Most notable has been the contribution by Professor Arthur Allen Leff, who suggested a two-step framework for any analysis.⁵ First the parties negotiate terms, then they incorporate the final terms into a definitive agreement. He characterized the first stage as procedural, the second as substantive. Using this approach, courts sometimes identify offensive conduct during the first stage as being procedurally unconscionable. Coarse substantive terms are frequently referred to as being

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substantively unconscionable. These descriptions fall short in that they merely tell us where in the process the unconscionability is thought to have occurred. What is missing is any information about what makes the provision *per se* unconscionable.

In 1962, the legislature attempted to include the concept of unconscionability in New York's commercial jurisprudence when it passed § 2-302 of the Uniform Commercial Code⁶ (UCC) governing sales contracts. In 1976, N.Y. Real Property Law § 235-c⁷ (RPL), a provision similar in content to the UCC, was enacted to govern real estate leases. Although the official comments and much of the legislative history state otherwise,⁸ the litigants are told only that courts have the power to do what the legislature has failed to do, *i.e.*, define and defeat unconscionability when and if they see it. This was a power the courts already possessed, raising the question of whether these statutes contributed anything of substance.

New York courts still reserve for themselves the common law power to review covenants that fall outside the scope of these statutes. Challenges based on unconscionability are commonplace in the context of agreements involving matrimonial disputes,⁹ covenants not to compete found in employment agreements,¹⁰ and arbitration agreements found in agreements relating to mergers and acquisitions,¹¹ to name a few. In disposing of these "non-statutory" cases, the courts appear to use the same equitable principles that apply in cases arising under the statutes.

What the Statutes Say

Both the UCC as adopted in New York and the RPL follow a similar format. They:

- Give courts the power to define and identify *as a matter of law* if contracts or leases, or their provisions, were unconscionable *when made*.
- Give courts the power to refuse to enforce any unconscionable provision or to enforce the contract or lease so as to avoid any unconscionable result.
- When either someone claims unconscionability, or the court on its own suspects unconscionability, the parties are afforded a reasonable opportunity to present evidence:
 - in the case of a contract, about its commercial setting, purpose and effect;
 - in the case of a lease, about its purpose and effect, so as to aid the court in making a determination about unconscionability.¹²

On its face, the legislation appears almost mystical in that it assumes that the lack of definition notwithstanding, unconscionability nevertheless exists and that courts can spot and defeat it. It's a bit like religion: unconscionability exists in the minds of true believers. This seems to leave the draftsman with the charge of predicting the whims of mysterious forces.

What is clear is that courts are empowered to police and protect against whatever *they* perceive to be unconscionable covenants. The courts are given the power to (1) *define* what as a matter of law is unconscionable, (2) decide whether to enforce a covenant if doing so would lead to an unconscionable result given (a) the court's definition and (b) where appropriate, receive proof offered by the parties.

Both statutes require a plenary hearing for the introduction of evidence if a party raises the issue in pleadings *or* the court on its own suspects that unconscionability *may* be present. Presumably this means that the court on its own has the power at any time to determine that, as a matter of law, unconscionability *is* present, in which case a plenary hearing is not required.

Rules for Defining Unconscionability

Within the context of cases decided under these statutes, now examine the rules the courts have fashioned to define what they believe is meant by unconscionability. Bear in mind that these rules appear to have application to "non-statutory cases."

Inherent in the statutory scheme is the assumption that unconscionability, whatever it is, actually exists. Given the failure of the legislature to define what it meant by unconscionability, the courts appear free to apply any equitable standard developed prior to the legislation, together with whatever standards are developed thereafter. This reality is the basis for the question of whether the statutes actually add anything of substance to the debate.¹³

Although it is not stated in the statutory text, the legislative history does provide a hint regarding what unconscionability was actually thought to involve. The draftsman of the Uniform Commercial Code declares:

The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise and not of the disturbance of allocation of risks because of superior bargaining power.¹⁴

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Thus, under the statutes at least, the question is not whether a covenant is or is not unconscionable, but rather is it so one-sided or oppressive and likely to result in unfair surprise that it becomes unconscionable. The primary judicial responsibility therefore is to create rules that define the transgression.

When looking for clauses that are one-sided, oppressive and result in unfair surprise, what should courts watch for?

For the most part, the issue of when a contract is one-sided involves a review of only the substance of the questionable provision. What makes a contract one-sided is most often tied directly to the substantive result of the language in question, such as when contractual language is profoundly discriminatory in its effect on one of the parties. In making this determination, the court normally looks no further than the substance of the covenant itself. But does this mean that no questions of fact exist? This issue is discussed below.

By contrast, determining oppression or the possibility for unfair surprise will almost always necessitate a consideration of the factual circumstances leading up to the contract and the substantive provision itself.

It appears that there are at least three threshold rules leading to a conclusion that a covenant is actually unconscionable — i.e., one-sided, oppressive and likely to result in unfair surprise.

Oppression bespeaks trying to sanction abusiveness, arbitrariness or the imposition of a needlessly burdensome condition. The evaluation exercise usually requires considering the circumstances that led to the agreement. Usually, but not always, neither the substance nor the circumstances alone leads to the conclusion that unconscionability exists. To reach such a result, there is a need to couple the two. Because the circumstances are rarely self-evident from the terms of an agreement, a hearing of some sort is needed for the presentation of facts.

A contract results in unfair surprise when the real meaning of its terms are intentionally obscured from one of the parties, thereby precluding the complainant from making a reasoned choice. Here again the evalua-

tion often requires consideration of the substantive provision itself and the circumstances leading to the actual agreement.

From the above, it thus appears that there are at least three threshold rules leading to a conclusion that a covenant is actually unconscionable — *i.e.*, one-sided, oppressive and likely to result in unfair surprise:

- Its effect is profoundly discriminatory to one of the contracting parties.
- It contains language that attempts to sanction abusiveness, arbitrariness or the imposition of a needlessly burdensome condition.
- It contains language the real meaning of which is intentionally obscured from one of the parties.

All three elements justify judicial interference because they have the appearance of being unfair, they have an unfair consequence, and there is no reasonable basis for enforcing the contested covenant.

Covenants having a profoundly discriminatory effect on one of the contracting parties have been found to exist where:

- There is exploitation, *i.e.*, where one party receives all the benefits and the other none at all, such as where a consumer receives a product that does not work but is barred from a refund by virtue of a clause disclaiming warranties,¹⁵ or where a party turns over title to property in exchange for an open-ended promise to pay at the option of the person receiving the property.¹⁶
- The offending provision entitles one party to a benefit that bears no reasonable relationship to the subject matter of the agreement. Examples are clauses that require arbitration in a foreign jurisdiction where the filing fee exceeds the amount of the substantive claim,¹⁷ or a labor escalation provision that bears no relationship to actual labor cost.¹⁸
- The provision imposes a condition that cannot be met, thereby relieving one party from any obligation.
- One party to the contract has the unfettered power to act arbitrarily and unilaterally, such as where the agreement on price is left blank and the seller has the right to fill in any price he wishes, whenever he wishes.¹⁹
- The parties to the contract agree to deny a court the power to exercise judicial discretion when such denial interferes with the courts' otherwise lawful ability to administer judicial business.²⁰
- Holding otherwise would sanction an act that is unto itself against public policy.²¹

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Clauses seeking to sanction abusiveness, arbitrariness or the imposition of a needlessly burdensome condition have been found to exist where:

- One party is entitled to abuse the dignity and well-being of the other, such as an agreement granting one party the right to physically injure the other.²²
- The nature of the offending provision suggests that one party has grossly overreached and taken unfair advantage, such as where an unknowing consumer pays a price that is greater than four times the retail value paid by others.²³
- The contract is one of adhesion.²⁴

Generally, courts put aside claims of unconscionability where the nature of the business makes the contested clause commercially reasonable.

Provisions have been found to be intentionally obscure where:

- One party is profoundly handicapped and unable to understand the terms agreed to, such as where a buyer is presented with an agreement in a language that he cannot read,²⁵ or lacks sufficient education to understand what he has read,²⁶ or is mentally or physically impaired and unable to make a reasoned decision.²⁷
- One party is profoundly handicapped by virtue of non-disclosure of circumstances that have a bearing on the meaning of the contractual language, thereby depriving that party of the ability to make a meaningful choice.²⁸
- One party is denied all recourse from defects discovered upon delivery, such as an agreement in which a buyer contractually cannot object to defects once merchandise is delivered and signed for, even if the signature is given before the packaging is opened.²⁹

Rules for Rejecting Claims of Unconscionability

Equally important and informative are cases that have rejected claims of contractual unconscionability. Generally, courts put aside claims of unconscionability

where the nature of the business makes the contested clause commercially reasonable.³⁰

Building on this approach, courts rebuff claims of unconscionability in situations where a commercially reasonable bargain has been struck and one party's obligations were fulfilled pursuant to that bargain before the claim of unconscionability. Such situations include:

- Cases where the party defending against a claim of unconscionability has performed as required by the bargain and to that party's detriment.³¹
- Cases where the claim of unconscionability is founded solely upon an assertion of superior bargaining power in a contract that is otherwise commercially reasonable.³²
- Cases where a party has exchanged something of value for the waiver of a right.³³
- Cases where the party claiming unconscionability failed to negotiate the terms before the agreement was signed.³⁴
- Cases where the party claiming unconscionability failed to inquire about circumstances that preceded the challenged agreement.³⁵

Courts will reject claims of unconscionability where the court is required to imply a condition not agreed to by the parties. Such situations include:

- Cases where a party regrets having accepted a risk imposed by an otherwise commercially reasonable agreement.³⁶
- Cases where the complaining party fails to prove circumstances under which courts would otherwise imply the covenant sought.³⁷

Courts have rejected assertions of unconscionability when a covenant has the effect of merely recognizing a condition or status otherwise permissible by law.³⁸

Using this analysis, it is possible to conclude that there are at least four general rules associated with the denial of claims of unconscionability:

- As a general rule, commercially reasonable agreements are not unconscionable simply because there is a disparity in bargaining power or because a given provision is exacting in nature.
- Contracts will not be struck as unconscionable if they require the implication of a condition not agreed to by the parties.
- If a party to a commercially reasonable bargain has completed its obligations before the claim of unconscionability is made, the contract will be upheld.
- A covenant that has the effect of merely recognizing a condition or status otherwise permissible by law will be upheld.

Linking the Rules Together

Is there a relationship between the rules that permit a finding of unconscionability and those that do not? Are these rules mutually exclusive of one another? It appears that the answer is that there is a relationship and that the rules operate in a mutually exclusive manner.

The rules that apply when unconscionability is not established revolve around determinations of reasonableness and recognition of a condition or status otherwise permissible by law. The rules that support findings of unconscionability are applied in situations emphasizing factors that make a given contract unreasonable. This group of rules actually defines what is unreasonable and what is not. They also suggest conditions that must be met prior to a finding of unconscionability.

A provision cannot be reasonable and unreasonable at the same time. It's one or the other. Thus, for example, in the case of a one-sided agreement, the complainant must show that the agreement is unreasonable because it is profoundly discriminatory in its effect. But a contract by definition cannot be both reasonable and discriminatory if the latter condition is *per se* unreasonable. Likewise, a contract cannot be found to be reasonable if facts are shown to establish that there was an attempt to intentionally obscure terms from one of the parties.

Taken together, these rules suggest some important guidelines. Practitioners should advise their clients that these principles should always be considered from the outset and that the mere appearance of a disparity between the parties and/or an exacting provision is not enough to establish a claim of unconscionability.

It should be explained that the complainant must be able to establish that the contested covenant is not commercially reasonable and/or that the disparity or the result is so profoundly unfair as to require judicial review.

The circumstances and conditions that exist when a potentially suspect provision is agreed upon should be carefully and completely documented.

Recitations in the contract regarding the basis for its terms and conditions, while not always unassailable, should assist in containing attempts to set an agreement aside on grounds of unconscionability.

Some Unresolved Issues

Some decisions handed down by the courts have left open technical questions that will have to be resolved in the future.

Questions of fact or law? Although statutes may not contribute much to the definition of what is or is not unconscionable, they do make it clear that the courts must afford the parties a reasonable opportunity to present evidence, in the case of a contract, about its commercial setting, purpose and effect, and in the case of a lease, about its purpose and effect when: (a) unconscionability is raised by a party in pleadings, or (b) the court on its own suspects that unconscionability *may* be present.

Regardless of the statutory language, some confusion exists about whether the issue of unconscionability is for the court to decide without a plenary hearing.³⁹ The better rule appears to be that if there is any question about whether unconscionability may exist, such a hearing is appropriate as a pre-condition to any final decision by the court.⁴⁰ The scope of such a hearing is ap-

parently limited because both statutes appear to bar evidence that goes beyond the setting, purpose and effect of the covenant. This constraint may have unintended consequences.

As illustrated here, some of the rules defining unconscionability require a review of only the substance of the challenged provision, with the court free to make a ruling thereupon as a matter of law. Other rules require a review of both the substantive provision and its factual circumstances. For this latter group, a plenary hearing is required before any determination can be made.⁴¹

But what about situations involving the rules of unconscionability that deal only with an interpretation of the substantive provision itself? Is there room under the existing statutory scheme for a plenary hearing on issues that go beyond setting, purpose and effect?

Consider, for example, *Leonidas Realty Corp. v. Brodowsky*.⁴² Here there was

no question that the respondent, Brodowsky, was living at the demised premises with a man to whom she was not married. The lease in question contained a “singles only” restriction that the court found to be discriminatory on its face in violation of § 296(5)(a) of the N.Y. Executive Law and § B1-7.0(5)(a) of the New York City Administrative Code and therefore unconscionable. There was no question about who was or was not living at the premises. Nor was there any issue regarding marital status. These issues were conceded by the parties.

Suppose, however, that a factual issue had been presented by a denial. The resulting threshold question would have been whether there could be any discrimination in the first place. Would this issue have fit within the statutory restriction that evidence presented must be limited to “setting,” “purpose” and “effect?” A plausible argument can be made that the answer is no, in which case logically any pleading raising the issue should be dismissed. But this objection notwithstanding, can the court nevertheless proceed to hear evidence relevant to the question even though the grounds for doing so lie outside the statutory limitations? While it is far from clear, especially in cases where unconscionability is the sole issue, the better answer would appear to be “yes.” The statutes give the courts full powers to develop rules against unconscionable covenants, and it follows that the statutes should be interpreted in the broadest manner possible to assure that the courts can carry out that mission. It serves no useful purpose to place technical

constraints on the legislature’s designee to police against unconscionability.

The businessman. The doctrine of contractual unconscionability was developed in large measure to protect the consumer from any disparity of bargaining power,⁴³ and from a lack of understanding about what contested terms may actually mean (unfair surprise).⁴⁴ But where the parties to a contract are both business people in a commercial setting, it is often said that there is “a presumption of conscionability.”⁴⁵ The reason

given is that business people are thought to be capable of applying whatever resources are needed to assure that their position is protected.

In substance, this “presumption” is a non-sequitur given the reality that all contracts are presumed conscionable unless challenged in court. Anyone raising the issue has the burden of establishing unconscionability. The underlying premise for the “presumption” is that all

business people are equal, and clearly this is not the case. Some business people are quite sophisticated and some are not. Some are victims of the unscrupulous conduct and some are not.

In practice, courts recognize that their role is to police against unconscionability no matter whom the prey might be, as evidenced by rulings that have found unconscionability when terms have been intentionally obscured from business people.⁴⁶ What must be clarified is whether there really is need for special rules where business people are involved. It would appear that the better answer is “no.”

What’s next? Defining what is and what is not an unconscionable contract has been handled by the legislature as if it were a hot potato. The courts were left to fill this void. In meeting that challenge, they created a series of rules that the practitioner can use to evaluate most covenants.

The flexibility that the legislature created when it passed the responsibility on to the courts for the most part has been realized. The doctrine is evolutionary, not static, and with time, no doubt, new scenarios will appear for review, and the courts may be called upon to fashion additional rules. The practitioner should keep in mind that unconscionability is a conclusion reached after a covenant has been agreed to. Its effects are reviewed against the simple standard of what is or is not reasonable under the circumstances. The emphasis is on fairness and restraint. Courts are appropriately reluc-

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tant to interfere when a reasonable basis exists for a seemingly exacting provision. The appearance of inequality itself is not likely to result in a finding of unconscionability. There must be more. The offending covenant must create a profoundly adverse and unfair result before judicial interference is justified.

1. *Rowe v. Great Atlantic & Pacific Tea Co.*, 46 N.Y.2d 62, 67-68, 412 N.Y.S.2d 827 (1978); *State v. Wolowitz*, 96 A.D.2d 47, 468 N.Y.S.2d 131 (2d Dep't 1983).
2. See John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. Pa. L. Rev. 931 (1969); James J. White & Robert S. Summers, *Uniform Commercial Code* (4th ed. 1995); Jonathan A. Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)*, 65 Cal. L. Rev. 28 (1977); Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 Cornell L. Rev. 1 (1981).
3. *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100 (Ch. 1750).
4. *Mandel v. Liebman*, 303 N.Y. 88, 94 (1951).
5. Arthur A. Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 U. Pa. L. Rev. 485 (1967).
6. UCC § 2-302 provides:
 - (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
 - (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

7. RPL § 235-c provides:

(1) If the court as a matter of law finds a lease or any clause of the lease to have been unconscionable at the time it was made, the court may refuse to enforce the lease, or it may enforce the remainder of the lease 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 a lease or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose and effect to aid the court in making the determination.

8. The Official Uniform Comment that accompanied UCC § 2-302 upon its enactment, provides:

This section is intended to make it possible for courts to police explicitly against the contracts or clauses which they find to be unconscionable. 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. *The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.* Subsection (2) makes it clear that it is proper for the court to hear evidence upon 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 power.

(emphasis added) (citation omitted).

Concerning RPL § 235-c, in a memorandum submitted in support the following appears:

The necessity of such legislation has become apparent as a result of the lack of an authoritative court ruling interpreting the unconscionability defense of the U.C.C. § 2-302 as being applicable to real estate leases. The basic test of unconscionability as determined under the U.C.C. can be stated, as whether in the court's determination 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 circumstances existing at the time of the making of the contract. The principle is one of prevention of oppression. *It shall be noted that it would appear that the legislature never intended to define unconscionability since to do so would limit its application.*

Memorandum of Assemblyman Edward H. Lehner, New York State Legislative Annual-1976, at 286-87 (emphasis added) (citations omitted).

9. See *McCaughey v. McCaughey*, 205 A.D.2d 330, 612 N.Y.S.2d 579 (1st Dep't 1994); *Avildsen v. Prystay*, 171 A.D.2d 13 (1st Dep't 1991); *Yuda v. Yuda*, 143 A.D.2d 657 (2d Dep't 1988).
10. See *Carvel Corp. v. Rait*, 117 A.D.2d 485, 503 N.Y.S.2d 406 (2d Dep't 1986); *Aeb & Assocs. Design Group, Inc. v. Tonka Corp.*, 853 F. Supp. 724 (S.D.N.Y. 1994).
11. See *Aviall, Inc. v. Ryder Sys., Inc.*, 913 F. Supp. 826, 831 (S.D.N.Y. 1996), *aff'd*, 110 F.3d 892 (2d Cir. 1997).
12. These statutes only create the defense of unconscionability. Neither was intended to recognize a cause of action for damages. "The doctrine of unconscionability is to be used as a shield, not a sword, and may not be used as a basis for affirmative recovery." *Super Glue Corp. v. Avis Rent A Car Sys., Inc.*, 132 A.D.2d 604, 606, 517 N.Y.S.2d 764 (2d Dep't 1987).
13. See 15 U.S.C. § 3608, which governs judicial determinations respecting unconscionable leases imposed by owners of cooperative apartment associations and condominiums that are subject to federal law.
14. UCC § 2-302 (Official Uniform Comment) (citation omitted). This same concern was deemed to be incorporated into the RPL. The Governor's 1976 Message of Approval, in support of the enactment states:

Section 235-c of the Real Property Law, which would be added by this bill, is substantially similar to section 2-302 of the Uniform Commercial Code. . . . This principle of fairness and restraint, which has been applicable to the area of sales for some time, should equally govern the conduct of the parties contemplating entering into the landlord and tenant relationship.

Governor's Memoranda on Bills Approved, New York State Legislative Annual-1976, at 406-7.
15. See *Universal Leasing Servs., Inc. v. Flushing Hae Kwan Restaurant*, 169 A.D.2d 829, 565 N.Y.S.2d 199 (2d Dep't 1991); *Industralease Automated & Scientific Equipment Corp. v. R.M.E. Enterprises, Inc.*, 58 A.D.2d 482, 396 N.Y.S.2d 427 (2d Dep't 1977).
16. *In re Estate of Friedman*, 64 A.D.2d 70, 407 N.Y.S.2d 999 (2d Dep't 1978).
17. *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 676 N.Y.S.2d 569 (1st Dep't 1998); *Teleserve Sys., Inc. v. MCI Telecomm. Corp.*, 230 A.D.2d 585, 659 N.Y.S.2d 659 (4th Dep't 1997).
18. *Ardrey v. 12 West 27th St. Assocs.*, 117 A.D.2d 538, 498 N.Y.S.2d 814 (1st Dep't 1986).
19. *Sunbeam Farms, Inc. v. Troche*, 110 Misc. 2d 501, 442 N.Y.S.2d 842 (Civ. Ct., Bronx Co. 1981); *cf. Nalezenc v. Blue Cross of W. N.Y.*, 172 A.D.2d 1004, 569 N.Y.S.2d 264 (4th Dep't 1991); *Zuckerberg v. Blue Cross & Blue Shield*, 119 Misc. 2d 834, 888, 464 N.Y.S.2d 678 (Sup. Ct., Nassau Co. 1983), *rev'd on other grounds*, 108 A.D.2d 56, 487 N.Y.S.2d 595 (2d Dep't 1985), *aff'd*, 67 N.Y.2d 688, 499 N.Y.S.2d 920 (1986).
20. *Ultrashmere House, Ltd. v. 38 Town Assocs.*, 123 Misc. 2d 102, 473 N.Y.S.2d 120 (Sup. Ct., N.Y. Co. 1984).
21. *Leonidas Corp. v. Brodowsky*, 115 Misc. 2d 88, 454 N.Y.S.2d 183 (Civ. Ct., Queens Co. 1982).
22. James J. White & Robert S. Summers, *Uniform Commercial Code* 117 (4th ed. 1995).
23. *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct., Nassau Co. 1969); *State by Lefkowitz v. ITM, Inc.*, 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct., N.Y. Co. 1966). Under RPL § 235-c a landlord can enter into a lease which calls for rent substantially below the market and those terms alone don't render the lease unconscionable. *Harold Properties Corp. v. Frankel*, 93 A.D.2d 720, 461 N.Y.S.2d 9 (1st Dep't 1983) provided that the landlord's decision isn't the result of undue influence. See *In re Estate of LoGuidice*, 186 A.D.2d 659, 588 N.Y.S.2d 623 (2d Dep't 1992).
24. *Aviall, Inc. v. Ryder Sys., Inc.*, 913 F. Supp. 826 (S.D.N.Y. 1996); *Ilan v. Shearson/American Express, Inc.*, 632 F. Supp. 886, 890-91 (S.D.N.Y. 1985).
25. *Davidovits v. De Jesus Realty Corp.*, 100 A.D.2d 924, 474 N.Y.S.2d 808 (2d Dep't 1984); *D & W Cent. Station Alarm Co. v. Sou Yep*, 126 Misc. 2d 37, 480 N.Y.S.2d 1015 (Civ. Ct., Queens Co. 1984); *Jefferson Credit Corp. v. Marcano*, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct., N.Y. Co. 1969); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct., Nassau Co. 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. Term, 2d Dep't 1967).
26. *Universal Leasing Servs., Inc. v. Flushing Hae Kwan Restaurant*, 169 A.D.2d 829, 565 N.Y.S.2d 199 (2d Dep't 1991); *Fischer v. General Elec. Hotpoint*, 108 Misc. 2d 683, 438 N.Y.S.2d 690 (Dist. Ct., Suffolk Co. 1981).
27. *Currie v. Three Guys Pizzeria, Inc.*, 207 A.D.2d 578, 615 N.Y.S.2d 494 (3d Dep't 1994).
28. *Halprin v. 2 Fifth Ave. Co.*, 101 Misc. 2d 943, 422 N.Y.S.2d 275 (Sup. Ct., N.Y. Co. 1979), *rev'd*, 75 A.D.2d 565, 427 N.Y.S.2d 258 (1st Dep't 1980), *appeal dismissed*, 55 N.Y.2d 937, 449 N.Y.S.2d 175 (1982); *cf. Hollywood Leasing Corp. v. Rosenblum*, 109 Misc. 2d 124, 442 N.Y.S.2d 833 (App. Term, 2d Dep't 1981).
29. *Niemiec v. Kellmark Corp.*, 153 Misc. 2d 347, 581 N.Y.S.2d 569 (Tonawanda City Ct. 1992).

30. *Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133, 538 N.Y.S.2d 513 (1989).
31. *Albank, FSB v. Foland*, 177 Misc. 2d 569, 676 N.Y.S.2d 461 (Albany City Ct. 1998); *Master Lease Corp. v. Manhattan Limousine, Ltd.*, 177 A.D.2d 85, 580 N.Y.S.2d 952 (2d Dep't 1992); see *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10, 537 N.Y.S.2d 787 (1988).
32. *Polygram, S.A. v. 32-03 Enterprises, Inc.*, 697 F. Supp. 132 (E.D.N.Y. 1988). An interesting offshoot of this and similar cases involves advertising in phone books. Typically, the advertiser is given an agreement that limits the liability of the publisher to a refund of the fee paid by the advertiser. In many markets only one phone book is available. These contracts have not been found unconscionable because advertisers receive the benefit of a lower price for advertising than they would receive if the publisher had to factor in the likelihood of consequential damages. See *Reuben H. Donnelley Corp. v. Krasny Supply Co.*, 592 N.E.2d 8 (Ill. App. Ct. 1991); *Wille v. Southwestern Bell Tel. Co.*, 549 P.2d 903 (Kan. 1976).
33. *Morris v. Snappy Car Rental, Inc.*, 84 N.Y. 2d 21, 614 N.Y.S.2d 362 (1994); see *Aviall, Inc. v. Ryder Sys., Inc.*, 913 F. Supp. 826 (S.D.N.Y. 1996); *Siemens Credit Corp. v. Marvik Colour, Inc.*, 859 F. Supp. 686 (S.D.N.Y. 1994); *Rubin v. Telemet Am., Inc.*, 698 F. Supp. 447 (S.D.N.Y. 1988).
34. *Aeb & Assocs. Design Group, Inc. v. Tonka Corp.*, 853 F. Supp. 724 (S.D.N.Y. 1994).
35. *Hillcrest Realty Co. v. Gottlieb*, 234 A.D.2d 270, 271, 651 N.Y.S.2d 55 (2d Dep't 1996) ("Equity will not relieve a party of its obligations under a contract merely because subsequently, with the benefit of hindsight, it appears to have been a bad bargain.") (quoting *Raphael v. Booth Mem. Hosp.*, 67 A.D.2d 702, 703, 412 N.Y.S.2d 409 (2d Dep't 1979)).
36. *George Backer Mgt. Corp. v. Acme Quilting Co.*, 46 N.Y.2d 211, 413 N.Y.S.2d 135 (1978).
37. *Rowe v. Great Atlantic & Pacific Tea Co.*, 46 N.Y.2d 62, 412 N.Y.S.2d 827 (1978); cf. *Schnee v. Jonas Equities, Inc.*, 109 Misc. 2d 221, 442 N.Y.S.2d 342 (App. Term, 2d Dep't 1981).
38. *Friedman v. Jordan*, 98 Misc. 2d 686, 414 N.Y.S.2d 455 (Sup. Ct., N.Y. Co.), *aff'd*, 71 A.D.2d 554, 418 N.Y.S.2d 552 (1st Dep't 1979).
39. Cf. *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 403-4, 297 N.Y.S.2d 108 (1968) and *Euclid Ave. Assocs. v. City of New York*, 64 A.D.2d 550, 406 N.Y.S.2d 844 (1st Dep't 1978) with *State v. Avco Fin. Servs.*, 50 N.Y.2d 383, 390, 429 N.Y.S.2d 181 (1980); *Carvel Corp. v. Rait*, 117 A.D.2d 485, 503 N.Y.S.2d 406 (2d Dep't 1986); *State v. Wolowitz*, 96 A.D.2d 47, 68-69, 468 N.Y.S.2d 131 (2d Dep't 1983).
40. See *Ardrey v. 12 West 27th St. Assocs.*, 117 A.D.2d 538, 498 N.Y.S.2d 814 (1st Dep't 1986); *Carvel Corp.*, 117 A.D.2d 485.
41. *Wilson Trading Corp.*, 23 N.Y.2d 398; *Euclid Ave. Assocs.*, 64 A.D.2d 550; *Davidovits v. De Jesus Realty Corp.*, 100 A.D.2d 924, 474 N.Y.S.2d 808 (2d Dep't 1984).
42. 115 Misc. 2d 88, 454 N.Y.S.2d 183 (Civ. Ct., Queens Co. 1982).
43. *Fischer v. General Elec. Hotpoint*, 108 Misc. 2d 683, 438 N.Y.S.2d 690 (Dist. Ct., Suffolk Co. 1981).
44. *Jefferson Credit Corp. v. Marcano*, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct., N.Y. Co. 1969).
45. *American Dredging Co. v. Plaza Petroleum, Inc.*, 799 F. Supp. 1335, 1339 (E.D.N.Y. 1992).
46. See *Aviall, Inc. v. Ryder Sys., Inc.*, 913 F. Supp. 826 (S.D.N.Y. 1996); *Ilan v. Shearson/American Express, Inc.*, 632 F. Supp. 886, 890-91 (S.D.N.Y. 1985); *Davidovits*, 100 A.D.2d 924; *D & W Cent. Station Alarm Co. v. Sou Yep*, 126 Misc. 2d 37, 480 N.Y.S.2d 1015 (Civ. Ct., Queens Co. 1984); *Jefferson Credit Corp.*, 60 Misc. 2d 138; *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct., Nassau Co. 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. Term, 2d Dep't 1967).