Pace Law Review

Volume 6
Issue 2 *Winter 1986*

Article 2

January 1986

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I. Introduction

Despite the fact that the typical automobile warranty disclaimer or remedy limitation meets the requirements of sections 2-316[1] and 2-719(1)[2] of the Uniform Commercial Code, such provisions can often be of questionable conscionability. There are a number of factors involved in the usual purchaser-dealer transaction which support this proposition. First, most purchasers neither read nor understand these provisions. Furthermore, even if purchasers read and understand the disclaimer of warranty or limitation of remedy provisions, they cannot bargain for their modification or removal from purchase agreements printed on standardized forms. Nor can they purchase an automobile elsewhere under a contract that does not also contain similar provisions. Thus, the notion that a warranty disclaimer or remedy limitation may not actually represent the agreement between the parties or that its enforcement might unfairly surprise the consumer, or oppressively limit his or her rights, is clearly implicated.

Purchasers of unmerchantable or "lemon" automobiles, however, have seldom successfully challenged the effectiveness of automobile warranty disclaimers and remedy limitations on the basis of an unconscionability analysis. This stems from the current state of confusion which surrounds the concept and the reluctance by the courts to employ an unconscionability analysis in cases involving defective automobiles subject to warranty disclaimers and remedy limitations which are oppressive or result in unfair surprise.

This article will analyze the doctrine of unconscionability

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1. N.Y. U.C.C. § 2-316 (McKinney 1964).
2. N.Y. U.C.C. § 2-719(1) (McKinney 1964).

and its viability as a potential source of relief for purchasers who have found themselves with "lemon" automobiles. In doing so, the relationship of unconscionability to the Uniform Commercial Code within the context of automobile consumer transactions will be considered. The application of unconscionability analysis in such transactions will then be discussed. Finally, it will be concluded that the courts should more often consider the surprisingly potent relief that the doctrine of unconscionability offers in the area of consumer protection.

II. The Scope and Purpose of the Unconscionability Doctrine

Section 2-302(1) of the Uniform Commercial Code incorporates the doctrine of unconscionability by providing:

> 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.[3]

While the Uniform Commercial Code does not explicitly define the term "unconscionability,"[4] the underlying principle is the prevention of oppression and unfair surprise.[5] Despite the failure of the Code to clearly define the concept of unconscionability, it is evident that section 2-302 is intended to allow the courts to police against contracts or contract clauses which they find to be unconscionable and to permit the courts to make a conclusion of law as to the conscionability of a contract or contract clause.[6] This determination, in turn, is to be made against the backdrop of the commercial setting of the particular

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3. N.Y. U.C.C. § 2-302(1) (McKinney 1964).

4. The courts have rarely attempted to define "unconscionability." The definition most frequently employed is the one found in the case of Earl of Chesterfield v. Janssen, 2 Ves. Sr. 125, 18 Eng. Rep. 82 (1750), which defines an unconscionable bargain as one which "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." This definition was adopted by the United States Supreme Court in the case of Hume v. United States, 132 U.S. 406 (1886).

5. N.Y. U.C.C. § 2-302 comment 1 (McKinney 1964).

6. *Id.* Unconscionability is typically raised as an affirmative defense rather than as a basis for damage recovery. *But see* Note, *The Doctrine of Unconscionability: A Sword as Well as a Shield*, 29 BAYLOR L. REV. 309 (1977).

transaction.[7]

The rationale behind the doctrine of unconscionability appears to be the belief that the free enterprise system and freedom of contract are sometimes inadequate to fully protect potential victims from the consequences of an unconscionable contract.[8] Traditional neoclassic microeconomics postulates a market in which consumers are deemed to control the quality of the commodities traded through their rational decisions to accept or reject such commodities.[9] In reality, however, consumer transactions are almost always characterized by transaction costs. Moreover, actual markets are often segmented by limitations of information.[10]

An asymmetry of available information in a given market typically involves questions of quality and uncertainty.[11] When sellers possess better information about the quality of products than do consumers, several possible outcomes may result. Bad products tend to drive out the good products. If consumers cannot distinguish quality until after the purchase has been made, there will be an incentive for sellers to market poor quality products since the returns for good quality accrue mainly to the entire industry rather than the individual seller.[12] As a result, market quality may deteriorate until only "lemons" are available

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7. Instead of looking to the writing to protect against fraud, duress or incompetence, unconscionability looks to the subject matter of the agreement and the social positions of the parties to the agreement. *See generally* Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969).

8. *See* Jones v. Star Credit Corp., 59 Misc. 2d 189, 191, 298 N.Y.S.2d 264, 266 (Sup. Ct. 1969), in which the court stated:

> [W]e have, over the years, developed common and statutory law which tells not only the buyer but also the seller to beware. This body of laws recognizes the importance of a free enterprise system but at the same time will provide the legal armor to protect and safeguard the prospective victim from the harshness of an unconscionable contract.

See also Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975).

9. The concept of perfect competition involves a "perfect market" in which price-taking traders interact under the regime of the "invisible hand." Perfect competition is characterized by costless transactions, instantaneous market-clearing equilibrium, the existence of large numbers of traders on both sides of the market and perfect information. J. HIRSHLEIFER, PRICE THEORY AND APPLICATIONS 234 (2d ed. 1980).

10. Ackerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 490 (1970).

11. *Id.* at 488.

12. *Id.*

for exchange.[13]

In the case of the automobile market, an asymmetry of information has developed. Automobile manufacturers have more knowledge about the quality of an automobile than the consumer.[14] However, "good" automobiles and "bad" automobiles must sell at the same price since it is impossible for the average purchaser to tell the difference between an automobile of good quality and one of poor quality.[15] Consumers who discover that they have a "lemon" will attempt to sell it in the used automobile market to an unsuspecting buyer. The consumer who owns an automobile of sound quality, conversely, will not sell his or her automobile since it is indistinguishable from a "lemon" and must therefore sell for the price of an automobile of average or inferior quality.[16] A spillover effect of quality deterioration in the new automobile market permeates into the market for used automobiles. Again, "bad" automobiles drive out the "good."[17]

The conclusion that markets with asymmetric information will under-provide quality relative to the level which is socially optimum is ostensible. Moreover, the failure of sellers of inferior goods to internalize the external social costs to the consumer leads to both market failure and a general decline in social welfare.[18] Accordingly, various institutions have emerged to counteract the effects of quality uncertainty, the most prevailing counteracting remedy being the warranty. Warranties can be used to provide the consumer some assurance of quality and will maximize market efficiency if they prevent good products from being driven from the market.[19] This objective is accomplished by making sellers liable for poor quality goods. Ideally, product quality will be determined by the scope of the warranty protection so that sellers will use warranties to signal or advertise the

13. *Id.*
14. *Id.* at 489.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 491. Asymmetric markets will reach equilibrium at suboptimal quality levels with a concurrent undersupply or oversupply of goods relative to the social optimum, depending upon whether opportunity costs increase or decrease with the seller's quality level. *Id.*
19. *Id.* at 499.

quality of their product to potential consumers.[20]

Unfortunately, the availability of devices to limit remedies and disclaim warranties tends to restore informational uncertainty and remove the incentive for sellers to market quality goods. Thus, the courts have become more willing to intervene in the contracting process to protect consumers from the consequences of an unconscionable transaction.[21] In contrast, the courts have generally been reluctant to find unconscionability in commercial, or merchant-to-merchant settings.[22]

Although section 2-302 of the Uniform Commercial Code does not enumerate the elements or components of unconscionability, the concept is often distinguished by form: procedural versus substantive unconscionability.[23] As such, the courts have indicated that they will generally not void a contract or contract clause unless they find both substantive and procedural unconscionability.[24]

Procedural unconscionability which addresses the process of contract formation requires the consideration of such factors as unequal bargaining power, lack of meaningful choice, pressured situations, conspicuousness of contract terms, and the consumer's level of education, experience or economic status.[25] The pertinent inquiry in transactions involving procedural uncon-

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20. *See supra* note 8. Consider the following "warranty" by Ford Motor Co.:

> [Ford Motor Co. warrants] that the Selling Dealer, at his place of business, and using new Ford parts or Ford authorized re-manufactured parts, will repair or replace, free of charge . . . any of the following parts that are found to be defective . . . within a period of: 12 months from the date of the original retail delivery or 12,000 miles of operation, whichever occurs first . . . Ford assumes no responsibility for the loss of use of the vehicle, loss of time, inconvenience or other consequential expense. This warranty is expressly IN LIEU OF any other express or implied warranty, condition, or guarantee on the vehicle or any part thereof, including any implied WARRANTY OF MERCHANTABILITY OR FITNESS, and of any other obligation on the part of Ford or the Selling Dealer.

Reprinted in Riley v. Ford Motor Co., 442 F.2d 670, 671 n.1 (5th Cir. 1971)

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

22. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 43 (1981).

23. This distinction is credited to Arthur Leff. *See generally* Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

24. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 164 (2d ed. 1980) [hereinafter cited as WHITE & SUMMERS].

25. *Id.* at 150-55.

scionability is, therefore, whether one party failed to disclose facts not reasonably available to the other party, and whether that failure prevented the other party from assessing the risks involved.[26]

Substantive unconscionability, by contrast, arises when overly harsh or one-sided terms are found within the contract itself. In general, substantive unconscionability most frequently involves excessive price terms,[27] or remedy exclusions or limitations.[28] Thus, contract clauses which can be considered as being unreasonably favorable to one party or overly oppressive relate to substantive unconscionability while the absence of meaningful choice directly bears upon procedural unconscionability.[29]

III. Consumer Protection Under the Uniform Commercial Code

The Uniform Commercial Code provides for the creation of both express and implied warranties of quality in the sale of goods.[30] The function of these warranties is to delineate the rights and remedies of the consumer with respect to the purchase of goods.[31] Section 2-313 of the Code permits the creation of express warranties by a promise or an affirmation of fact,[32] by a description of the goods,[33] or by a sample or model which becomes a part of the basis of the bargain.[34] The consumer need not prove reliance since all representation of quality

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26. Goldberg, *Unconscionability in a Commercial Setting: The Assessment of Risk in a Contract to Build Nuclear Reactors*, 58 WASH. L. REV. 343-44 (1983).

27. *See, e.g.*, Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969); Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966); American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964).

28. *See, e.g.*, McCarty v. E.J. Korvette, Inc., 28 Md. App. 421, 347 A.2d 253 (1975) (limitation of consequential damages as unconscionable); Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967) (waiver of defense clause as unconscionable).

29. WHITE & SUMMERS, *supra* note 24, at 152.

30. N.Y. U.C.C. § 2-313 (McKinney 1964) (express warranty); N.Y. U.C.C. § 2-314 (McKinney 1964) (implied warranty of merchantability); N.Y. U.C.C. § 2-315 (McKinney 1964) (implied warranty of fitness for a particular purpose).

31. R. NORDSTROM, J. MURRAY & A. CLOVIS, PROBLEMS AND MATERIALS ON SALES 213-14 (1982).

32. N.Y. U.C.C. § 2-313(1)(a) (McKinney 1964).

33. *Id.* at § 2-313(1)(b).

34. *Id.* at § 2-313(1)(c). Specific use of the terms "guarantee" or "warrant" and a specific intent to create a warranty are not required. *Id.* at § 2-313(2).

by the seller becomes part of the basis of the bargain[35] unless "good reason is shown to the contrary."[36]

In addition, the Code recognizes the implied warranties of merchantability and fitness for a particular purpose. The implied warranty of merchantability requires that goods be "fit for the ordinary purpose for which such goods are used."[37] An implied warranty of fitness arises where the seller has reason to know of the consumer's specific purpose for which the goods are required and the consumer is relying on the seller's skill or judgment in selecting or furnishing goods for that purpose.[38] Despite the broad protection these warranties provide to consumers, the Code also allows the seller to disclaim warranty liability and to limit or modify the remedies of the consumer for breach of warranty.[39]

Disclaimers are primarily directed toward the negation or exclusion of implied warranties of quality.[40] Section 2-316 of the Code sets forth requirements for disclaiming warranties in order to "protect a buyer from unexpected and unbargained language of disclaimer[s]."[41] Thus, the purpose of this section is to ensure that warranty disclaimers serve as accurate manifestation of the agreement.[42] Any written warranty disclaimer must be conspicuous. The implied warranty of fitness for a particular purpose must be disclaimed in writing while a disclaimer of the implied warranty of merchantability must mention the term "merchantability."[43] Similarly, warranties may be disclaimed by "language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that

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35. *Id.* at § 2-313 comment 3. *See also* Murray, *"Basis of the Bargain": Transcending Classical Concepts*, 66 MINN. L. REV. 283 (1982); Note, *"Basis of the Bargain"—What Role Reliance?* 34 U. PITT. L. REV. 145 (1972).

36. N.Y. U.C.C. § 2-313 comment 8 (McKinney 1964).

37. *Id.* at § 2-314(2)(c).

38. *Id.* at § 2-315.

39. *Id.* at § 2-316.

40. A disclaimer may be described as a contractual provision that negates or varies any right, duty, or liability arising out of a transaction. Avenell v. Westinghouse Electric Corp., 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974).

41. N.Y. U.C.C. § 2-316 comment 1 (McKinney 1964).

42. *Id.* at § 1-201(3). This section recognizes the agreement process as culminating in the "bargain of the parties in fact as found in their language or by implication from other circumstances . . . ."

43. *Id.* at § 2-316(2).

there is no implied warranty."[44] Additionally, warranties will be effectively disclaimed when the consumer examines, or is provided with an opportunity to examine the goods,[45] or "by course of dealing or course of performance or usage of trade."[46]

Although section 2-316(1)[47] of the Code appears to prohibit disclaimers of express warranties by denying effect to such language when inconsistent with the language of the express warranty, sellers are easily able to exclude such warranties by including printed merger clauses which state that the contract constitutes the complete and final agreement between the parties.[48] Of course, such provisions have no effect on post-formation statements which relate to quality since most consumers expect the seller's representations to apply even if made after the sale.[49]

Disclaimer provisions, therefore, may significantly reduce a warranty protection available under the Uniform Commercial Code with the potentially harsh consequence of the purchase of a "lemon" automobile. Moreover, consumers rarely comprehend the effect of disclaimers and, in any event, typically cannot bargain to have such provisions removed from the purchase agreement.[50] As such, automobile warranty disclaimers may often be characterized by both substantive and procedural unconscionability.

Remedies for breach of warranty can also be limited or ex-

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44. *Id.* at § 2-316(3)(a).

45. *Id.* at § 2-316(3)(b).

46. *Id.* at § 2-316(3)(c).

47. *Id.* at § 2-316(1).

48. *Id.* at § 2-202. If a merger clause is given effect, all prior representations of quality are not part of the contract.

49. Murray, *supra* note 35, at 313, 317-22. N.Y. U.C.C. § 2-313 comment 7 (McKinney 1964) also states that "[t]he sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal . . . the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable . . . ." It is doubtful, however, that the purchaser of a new automobile intends to eliminate all of the express warranties for which he or she has specifically bargained and on which he or she relies. Merger clauses, therefore, should be considered substantively unconscionable. *See* Dorman v. Int'l Harvester Co., 46 Cal. App. 3d 11, 120 Cal. Rptr. 516, 523 (2d Dist. 1975). *But cf.* Seibel v. Lane S. Bowler, Inc., 56 Or. App. 387, 641 P.2d 668 (1982).

50. Murray, *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735, 777-78 (1982).

cluded under the Uniform Commercial Code.[51] Section 2-719(1)(a) provides, in pertinent part, that:

> [T]he agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts.[52]

Moreover, Section 2-719(3)[53] allows the seller to limit or exclude consequential damages in the case of a commercial loss. Nevertheless, a seller must provide "at least a fair quantum of remedy for breach of [warranty]"[54] as failure to do so will require the remedy limitation to be deleted as unconscionable.[55]

Unfortunately, many courts have failed to discover the initial analytical relationship between warranty disclaimers and remedy limitations. In *Crume v. Ford Motor Co.*,[56] for instance, the plaintiff asserted an action for breach of the implied warranty of merchantability based on failure of essential purpose,[57] despite the fact that all implied warranties were effectively disclaimed.[58] While rejecting this argument, the court adopted a reverse order of reasoning: "If the limited remedy provided by the manufacturer failed of its essential purpose, that does not render the goods non-conforming . . . absent a warranty of merchantability."[59]

The court failed to realize that circumstances which cause a limited repair and replacement remedy to fail of its essential purpose could only arise when there has been a breach of the

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51. N.Y. U.C.C. § 2-316(4) (McKinney 1964). A remedy limitation serves to restrict the remedies available to one or both parties once a breach of contract is established. WHITE & SUMMERS, *supra* note 24, at 472.

52. N.Y. U.C.C. § 2-719(1)(a) (McKinney 1964).

53. *Id.* at § 2-719(3).

54. *Id.* at § 2-719 comment 1.

55. *Id.* A limitation of remedies provision is not, however, per se unconscionable. *See* Koperski v. Husker Dodge, Inc., 208 Neb. 29, 47, 302 N.W.2d 655, 665 (1981).

56. 60 Or. App. 224, 653 P.2d 564 (1982).

57. OR. REV. STAT. § 72.6080 (1961); *See also* N.Y. U.C.C. § 2-719 comment 1 (McKinney 1964).

58. This approach was attempted without success in Lankford v. Rogers Ford Sales, 478 S.W.2d 248 (Tex. Civ. App. 1972).

59. Crume v. Ford Motor Co., 653 P.2d 564, 567 (1982).

express warranty. Thus, goods must be non-conforming — the express warranty must have been breached — before the failure of a limited remedy's purpose becomes possible, as the purpose of the remedy is to provide conforming goods within a reasonable time.[60]

A similar state of confusion arose in *Adams v. J.I. Case Co.*[61] where the court, in disallowing the effect of clauses disclaiming warranties and excluding consequential damages upon failure of a limited repair or replacement remedy, stated that "[t]he limitations of remedy and of liability are not separable from the obligations of the warranty" since the "[r]epudiation of the obligations of the warranty destroy[s] its benefits."[62] The court presented a cogent argument for not enforcing an independent consequential damage exclusion when a seller willfully breaches a warranty. However, this does not require the renewal of implied warranties which have been disclaimed.

Such confusion points up the seeming inconsistency of permitting different standards for disclaiming warranties and limiting remedies despite their apparent substantive relationship.[63] In *Tuttle v. Kelly-Springfield Tire Co.*,[64] the court attempted to explain this incongruency:

> This illusive inconsistency may be clarified in the framework of public policy concerning consumer protection. In the case of consumer goods to give what looks like relief in the form of an express warranty, but is not [because of an unduly restrictive remedy limitation], is unconscionable as a surprise limitation and is therefore against public policy.[65]

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60. *See* Beal v. General Motors Corp., 354 F. Supp. 423 (D. Del. 1973).

61. 125 Ill. App. 2d 388, 261 N.E.2d 1 (1970).

62. *Id.* at 402, 261 N.E.2d at 7.

63. *See* K-Lines, Inc. v. Roberts Motor Co., 273 Or. 242, 246, 541 P.2d 1378, 1381 (1975) (noting that warranty disclaimers and remedy limitations are "substantially identical").

64. 585 P.2d 1116 (Okla. 1978).

65. *Id.* at 1119. Several courts, however, have managed to distinguish warranty disclaimers and remedy limitations. For instance, the court in Murray v. Holiday Rambler, Inc., 83 Wis. 2d 406, 414, 265 N.W.2d 513, 517-18 (1978), acknowledged the similarity but noted:

> conceptually, however, they are distinct. A disclaimer of warranties limits the seller's liability by reducing the number of circumstances in which the seller will be in breach of the contract; it precludes the existence of a cause of action. A limitation of remedies, on the other hand, restricts the remedies available to the

Since warranty disclaimers and remedy limitations operate to the same effect by limiting the extent of a seller's warranty obligations to the consumer, it would seem that the controls of both sections 2-316 and 2-719 should be extended to all attempts at warranty liability limitation, whether in the form of a disclaimer or remedy limitation.[66] Further, a liberal approach to the use of unconscionability could provide a common standard for policing both warranty disclaimers and remedy limitations despite judicial confusion as to their distinctions.[67]

IV. Unmerchantable Automobiles, Unconscionability, and the Uniform Commercial Code

A. *Unconscionability versus Failure of Essential Purpose*

In the area of automobile warranties, as well as the area of product warranty liability in general, there exists a fundamental misunderstanding of the distinction between unconscionability and failure of essential purpose analysis. Under the Uniform Commercial Code, "where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to [the remedies under the Code]."[68]

The courts will, if at all possible, avoid analyzing warranty disclaimers and remedy limitations in terms of unconscionability analysis if such clauses can be overcome with a failure of essential purpose analysis. Indeed, consumers who have attempted to argue that an automobile warranty disclaimer or remedy limitation is unconscionable without advancing the argument that it had failed of its essential purpose have met with little success.[69] Thus, in *Volkswagen of America, Inc. v. Harrel,*[70] the court concluded that a remedy limitation will be unenforceable if it fails of its essential purpose *or* is unconscionable.[71] In that case, the

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buyer once a breach is established.

66. Note, *Legal Control on Warranty Liability Limitation Under the Uniform Commercial Code,* 63 VA. L. REV. 791, 801-03 (1977).

67. *Id.* at 807.

68. N.Y. U.C.C. § 2-719(2) comment 1 (McKinney 1964).

69. *See* K-Lines, Inc. v. Roberts Motor Co., 273 Or. 242, 541 P.2d 1378 (1975).

70. 431 So. 2d 156 (Ala. 1983).

71. *Id.* at 164.

consumer's automobile had lost both battery power and its muffler. It required four repair attempts within four months, depriving the consumer of his automobile for thirty-three days while repairs were being made.[72] Nevertheless, the court found that the repair and replacement remedy provided by Volkswagen had failed of its essential purpose so that it was unnecessary to consider the unconscionability of the provision.[73] Similarly, the court in *Stream v. Sportscar Salon, Ltd.*,[74] suggested that if a consumer's remedy was limited to "one repair or replacement,"[75] as was the case therein, such a remedy limitation *might* be found unconscionable.[76] The court, however, based its decision on a failure of essential purpose analysis.

The reluctance of the courts to employ the doctrine of unconscionability apparently stems from the confusion and fear which surround the doctrine itself. Moreover, the courts have blurred the distinction between unconscionability and failure of essential purpose while at the same time refusing to recognize the concerns which may better be addressed under the admittedly amorphous doctrine of unconscionability.[77] Indeed, most consumers do not seek legal redress until circumstances are such that would permit courts to hold that a limited remedy has failed of its essential purpose.[78] However, if a provision has been drafted in a manner that is likely to fail of its essential purpose, then it is at least as likely that such a provision is unconscionable from the outset.[79]

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72. *Id.* at 160.

73. *Id.* at 164.

74. 91 Misc. 2d 99, 397 N.Y.S.2d 677 (Civ. Ct. 1977).

75. *Id.* at 106, 397 N.Y.S.2d at 683.

76. *Id.*

77. *See generally* Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of U.C.C. Section 2-719(2)*, 65 CALIF. L. REV. 28, 31-40 (1977).

78. *Id.* at 58-68.

79. *Id.* For an interesting treatment of the failure of essential purpose versus unconscionability problem involving a "lemon" tractor see Johnson v. John Deere Co., 306 N.W.2d 231 (S.D. 1981), where the court stated that:

> [a]lthough the repair and replacement warranty [on a tractor which was built with the wrong sized bolts on the front wheels, developed oil leaks, transmission problems, internal engine problems, and which also caused the plaintiff to experience delays in repairs while waiting for replacement parts] *may* have subsequently failed of its essential purpose . . . the limitation on remedy was *not unconscionable* at the time the contract was made, either procedurally or substantively, and

B. *The Utility of Unconscionability as "Lemon-Aid"*

Despite the existing state of confusion and reluctance to use it, unconscionability analysis has been applied in a number of cases involving the sale of unmerchantable automobiles.[80] The earlier pre-Code cases involving unconscionable automobile warranty disclaimers and remedy limitations addressed claims for personal injuries. The seminal case in this area is *Henningsen v. Bloomfield Motors, Inc.*[81] In *Henningsen*, the plaintiff was severely injured when her newly-purchased automobile uncontrollably left the road due to a defect in the steering mechanism. The plaintiff sued the manufacturer and dealer for breach of the implied warranty of merchantability and the court allowed recovery despite the presence of a disclaimer in the purchase agreement. The court declared the disclaimer to be "inimical to the public good"[82] partly because of the "gross inequality of bargaining position occupied by the consumer in the automobile industry."[83]

The decision in *Henningsen* appears to have been based on those concerns which normally relate to the procedural form of unconscionability. This rationale, in turn, has been carried over to provide the underpinning of decisions involving automobile remedy limitations.[84] Moreover, *Henningsen* provided important analytical threads which later courts have intertwined with other policy considerations relating to unconscionability.

Matthews v. Ford Motor Co.,[85] a recent personal injury case, involved a plaintiff who purchased an automobile which unexpectedly shifted into reverse gear while traveling forward, resulting in a collision in which he was severely injured. The purchase order at issue contained both a disclaimer of warranty and a

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[would not entitle the purchaser] to recover consequential damages.

Id. at 238 (emphasis added).

80. Merchantability, as applied to automobiles, means the ability to provide safe and reasonable transportation. Taterka v. Ford Motor Co., 86 Wis. 2d 140, 146, 271 N.W.2d 653, 655 (1978).

81. 32 N.J. 358, 161 A.2d 69 (1960).

82. *Id.* at 404, 161 A.2d at 95.

83. *Id.* at 391, 161 A.2d at 87.

84. *See, e.g.*, Haley v. Merit Chevrolet, Inc., 67 Ill. App. 2d 19, 214 N.E.2d 347 (1966); Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (1968); Walsh v. Ford Motor Co., 59 Misc. 2d 241, 298 N.Y.S.2d 538 (Sup. Ct. 1969).

85. 479 F.2d 399 (4th Cir. 1973).

limitation of remedies clause.[86] The court found that the disclaimer was ineffective because it was not conspicuous and that Ford's attempt to limit its responsibility to the repair and replacement of defective parts was also prima facie unconscionable under section 2-719 of the Uniform Commercial Code.[87]

The inconspicuousness[88] of a disclaimer of warranty is not only an indicia of unconscionability, but also an indication that the seller has not complied with the requirement of section 2-316(2) of the Uniform Commercial Code: "[t]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous."[89]

The purpose behind the conspicuousness requirement is to protect the consumer from unfair surprise and unbargained for warranty disclaimers.[90] A consumer will be unfairly surprised by a warranty disclaimer when such a disclaimer was not part of the bargained for agreement between the parties.[91] The conspicuousness requirement, therefore, serves as a means of ensuring either the conscionability of a disclaimer provision or that the

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86. It has been suggested that an absolute disclaimer of warranties would be unconscionable with respect to personal injuries. *See* 2A L. FRUMMER & M. FRIEDMAN, PRODUCTS LIABILITY § 19.07[6] (1985).

87. Mathews v. Ford Motor Co., 479 F.2d 399, 403 (4th Cir. 1973).

88. N.Y. U.C.C. § 1-201(10) (McKinney 1964) provides that a "term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it . . . . [Thus], [l]anguage in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color."

89. N.Y. U.C.C. § 2-316(2) (McKinney 1964). The test is an objective test in that it determines "whether attention can reasonably be expected to be called to [the provision]." N.Y. U.C.C. § 1-201 comment 10 (McKinney 1964). For cases in which this test was satisfied, *see* Hahn v. Ford Motor Co., 434 N.E.2d 943 (Ind. 1982) (disclaimer language in bold face and printed on front page of warranty booklet); Koperski v. Husker Dodge, Inc., 208 Neb. 29, 302 N.W.2d 655 (1981) (disclaimer language printed in red); Ventura v. Ford Motor Co., 180 N.J. Super. 45, 433 A.2d 801 (1981) (disclaimer language in rectangular block with lined borders).

90. Hahn v. Ford Motor Co., 434 N.E.2d 943 (Ind. 1982).

91. McNamara Pontiac, Inc. v. Sanchez, 388 So. 2d 620 (Fla. Dist. Ct. App. 1980). *See also* Schroeder v. Fageol Motors, Inc., 86 Wash. 2d 256, 544 P.2d 20 (1975) (conspicuousness of warranty disclaimer or remedy limitation and presence of bargaining are factors in determining unconscionability).

clause was part of the parties' agreement.[92]

Another factor which is often considered in analyzing the existence of unconscionability in "lemon" automobile cases is inequality of bargaining power. *La Vere v. R. M. Burritt Motors, Inc.*,[93] involved the sale of a truck which broke down three blocks from the dealership. The purchase agreement contained a disclaimer excluding all express or implied warranties. In its opinion, the court stated that "the purchaser was not an equal in terms of knowledge of the product or bargaining power with the seller and was made to sign the contract provided to him by the seller."[94] As such, the court ordered the defendant to repair the vehicle so "as to avoid any unconscionable result."[95]

Conversely, the court in *Seekings v. Jimmy GMC of Tucson, Inc.*,[96] refused to consider the issue of inequality of barging power. The plaintiffs had purchased a motor home with a "Limited One Year Warranty" providing for repair and replacement. When defects appeared, the plaintiffs attempted to revoke their acceptance. In considering the conscionability of the seller's warranty disclaimer, the court concluded that "[m]ere disparity of bargaining power alone does not warrant a finding that a contract is unconscionable."[97] The court further supported its refusal to consider the unconscionability of the contract by declaring:

> [T]he sale documents containing the disclaimers were no different than those which would have been used for any other transaction with any other purchaser. In order to be unconscionable because of the disadvantage in positions the other party must necessarily take advantage of that situation . . . . When a buyer would have

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92. Compliance with § 2-316(2), however, does not necessarily mean that a clause is conscionable. *But see* Leff, *supra* note 23, at 523 (suggesting that compliance with § 2-316(2) precludes a finding that a warranty disclaimer is unconscionable). Additionally, some courts have extended the "conspicuousness" requirement to remedy limitations. *See, e.g.*, Gramling v. Baltz, 253 Ark. 352, 485 S.W.2d 183 (1972); Orange Motors of Coral Gables, Inc. v. Dade County Dairies, Inc., 258 So. 2d 319 (Fla. App. 1972); Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (1968).

93. 112 Misc. 2d 225, 446 N.Y.S.2d 851 (Oswego City Ct. 1982).

94. *Id.* at 229, 446 N.Y.S.2d at 853.

95. *Id.* at 230, 446 N.Y.S.2d at 854 (the court quoted from N.Y. U.C.C. § 2-302(1) (McKinney 1964)).

96. 131 Ariz. 1, 638 P.2d 223 (1981).

97. *Id.* at 8, 638 P.2d at 227.

been unable to purchase from another seller without subjecting himself to like terms, the contract terms are not unconscionable.[98]

Such reasoning manifests a serious misunderstanding of unconscionability analysis. Unconscionability is to be considered in the context of each transaction and the fact that every seller in the automobile market pursues the same practice or conducts business in the same manner should have no bearing on the transaction at issue. Had the court fully comprehended its own reasoning, it would have realized that it had just stumbled over the issue of absence of meaningful choice which is associated with the procedural aspect of unconscionability.[99] The fact that almost all dealers will not even bargain over warranty disclaimers or remedy limitation clauses contained within a standardized purchase agreement leads to the inevitable conclusion that consumers lack any meaningful choice in such transactions and therefore do not "consent" to such provisions so as to allow the contract to represent an accurate manifestation of the agreement.[100]

Substantive unconscionability has also arisen in cases involving "lemon" automobiles. In *Gladden v. Cadillac Motor Car Division*,[101] the plaintiff's new automobile left the road and struck a guardrail and tree after the right rear tire blew out. The purchase agreement contained both a warranty disclaimer and a remedy limitation.[102] These exclusions, stated the court, cut deeply into the substantive effect of the warranty relating to the capacity and quality.[103] Moreover, although the presumption of unconscionability under section 2-719(3) of the Uniform Com-

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98. *Id.*

99. *See supra* note 25 and accompanying text.

100. Murray, *supra* note 50, at 777-78.

101. 83 N.J. 320, 416 A.2d 394 (1980).

102. The warranty stated that the tires were "guaranteed for 40,000 vehicle odometer miles" and would be replaced at no charge if "unserviceability" occurs within 8,000 miles. Furthermore, the warranty provided:

> *This guarantee is given* ***in lieu of all other express or implied warranties****, including but not limited to any implied warranties of merchantability or fitness for a particular purpose. It does not cover consequential damages and UNIROYAL'S liability is limited to repairing or replacing the tire in accordance with the stipulations contained in this guarantee.*

Id. at 328-29, 416 A.2d at 398-99 (emphasis added).

103. *Id.* at 333, 416 A.2d at 401.

mercial Code was inapplicable because the limitation excluded property damages rather than damages for personal injury, the court added that "[t]his does not mean . . . that considerations of fairness or unconscionability are any less relevant when reviewing warranties which contain limitations on property damages."[104] As such, the court determined that the warranty was "seriously lacking in clarity."[105] The court characterized the warranty as a "linguistic maze"[106] because it intermixed "affirmations of quality and performance with disclaimers of scope and limitations upon relief."[107]

Similarly, the court in *Evans v. Graham Ford, Inc.*,[108] applied substantive unconscionability to invalidate a disclaimer of an implied warranty of fitness for a particular purpose. The plaintiffs in *Evans* purchased a converted pick-up truck from a Ford dealer pursuant to an agreement which expressly disclaimed "all warranties, either express or implied."[109] When the vehicle proved to be defective and had been subject to repeated unsuccessful repair attempts, the plaintiff brought an action to revoke his acceptance,[110] based on unconscionability. The court was sympathetic, concluding that the defendant had "presented no evidence relating to its commercial needs for such a broad and facially unfair disclaimer."[111]

The courts which have found remedy limitations on prop-

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104. *Id.* at 331-32, 416 A.2d at 400.

105. *Id.* at 333, 416 A.2d at 401.

106. *Id.*

107. *Id.*

108. 2 Ohio App. 3d 435, 442 N.E.2d 777 (1981).

109. *Id.* at 436, 442 N.E.2d at 779.

110. U.C.C. § 2-608. Section 2-608(1) of the Code provides:

> The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it
>
> (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
>
> (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

See generally WHITE & SUMMERS, *supra* note 24, at 301-18. For cases applying this section in consumer automobile transactions, *see* Trost v. Porreco Motors, Inc., 297 Pa. Super. 393, 443 A.2d 1179 (1982); Rozmus v. Thompson's Lincoln-Mercury Co., 209 Pa. Super. 120, 224 A.2d 782 (1966).

111. Evans v. Graham Ford, Inc., 2 Ohio App. 3d 435, 438, 442 N.E.2d 777, 781 (1981).

erty damages to be unconscionable have been strongly influenced by the fact that consumers were misled or deceived or that the warranties were not understandable.[112] Therefore, automobile sellers who employed warranty disclaimers or remedy limitations which are deceptive, confusing, misleading, or unclear risk the possibility that such clauses will be found unconscionable.[113]

C. *Overlay with State Consumer Protection Legislation*

An emerging issue of interest is the relationship between the doctrine of unconscionability and state consumer protection or unfair trade practices acts. Several courts have applied such legislation to hold that warranty disclaimers and remedy limitations are unconscionable. In *Ford Motor Co. v. Mayes*,[114] for instance, a defective and unmerchantable truck sold under an express warranty which limited the consumer's remedy to repair or replacement could not be adequately repaired within a reasonable period of time. The court found that the manufacturer's refusal to recognize the consumer's right to revoke acceptance and receive a refund was, under such circumstances, both unlawful and unconscionable under the Kentucky Consumer Protection Act.[115]

Similarly, the court in *Dale v. King Lincoln-Mercury, Inc.*,[116] construed the Kansas Consumer Protection Act[117] so as

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112. *See* Ford Motor Co. v. Reid, 250 Ark. 176, 465 S.W.2d 80 (1971); McCarty v. E.J. Korvette, Inc., 28 Md. App. 421, 347 A.2d 253 (1975).

113. Unconscionability analyses have been extended to the leasing of automobiles. In Sarfati v. M.A. Hittner & Sons, Inc., 35 A.D.2d 1004, 318 N.Y.S.2d 352 (1970), an action to recover damages for personal injuries suffered when the front section of the plaintiff's rented automobile fell off, the court reasoned that: "[t]he lessor herein, Hittner, is in no better commercial position than the consumer. It is in no position to alter the warranty or negotiate for better protection and, consequently, [the] disclaimer of warranty [by American Motors] is equally unconscionable as to the lessor of the vehicle." *Id.* at 1005, 318 N.Y.S.2d at 354. *See*, Brook, *Contractual Disclaimer and Limitation of Liability Under the Law of New York*, 49 BROOKLYN L. REV. 1, 10 (1982).

114. 575 S.W.2d 480 (Ky. Ct. App. 1978).

115. *Id.* at 486.

116. 234 Kan. 840, 676 P.2d 744 (1984).

117. KAN. STAT. ANN. §§ 50-623-644 (1983). The Kansas Consumer Protection Act is based on the Uniform Consumer Sales Practices Act, 7A U.L.A. 233 (1985), which has also been adopted by Ohio and Utah. OHIO REV. CODE ANN. §§ 1345.01-.13 (Page 1979); 1953 UTAH CODE ANN. §§ 13-11-1-23 (1985). Among the policies sought to be advanced by

to prohibit the exclusion, modification, or limitation of any implied warranties of quality. The court reasoned that the purpose of the Act was, ostensibily, to protect consumers from all deceptive and unconscionable business practices.[118] Therefore, concluded the court, the use of a limited express warranty to exclude implied warranties in the sale of automobiles was unconscionable.[119]

In *State of New York v. General Motors Corp.*,[120] the New York State Attorney General initiated an investigation of the "Turbo-Hydra-Matic 200" transmission component which had been installed in various General Motors automobiles. The Attorney General had received numerous complaints from consumers regarding the problematic performance of the component. The court found that "the responsible officers at GM knew that the THM 200 was defective and that its useful life would fall far short of the defendant's own [express warranties]." The court concluded that "if the nature of the defect and the potentially inadequate warranty had been communicated to a consumer, it would have adversely affected his decision to purchase a GM automobile."[121] As such, the court held that the remedy limitation was both a deceptive warranty practice and an unconscionable contractual provision.

Given the present state of confusion surrounding the doctrine of unconscionability and the inability of many courts to conduct properly an analysis based on unconscionability, state consumer protection and unfair trade practices acts may offer an alternative vehicle through which the courts may invoke the doctrine of unconscionability. Furthermore, the recent emergence of state "lemon law" legislation should not serve to preclude a remedy based on unconscionability as such laws do not generally limit or exclude alternative remedies otherwise availa-

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the Uniform Consumer Sales Practices Act is the protection of "consumers from suppliers who commit deceptive and unconscionable sales practices." 7A U.L.A. § 1(2) (1985). Section 4 of the Act proscribes "conduct by which a supplier seeks to induce or to require a consumer to assume risks which materially exceed the benefits to him of a related transaction."

118. Dale v. King Lincoln-Mercury, Inc., 234 Kan. at 843, 676 P.2d at 747.

119. *Id.* at 843, 676 P.2d at 748.

120. 120 Misc. 2d 371, 466 N.Y.S.2d 124 (Sup. Ct. 1983).

121. *Id.* at 375, 466 N.Y.S.2d at 127.

ble to the consumer under either state or federal law.[122]

V. Conclusion

Most courts have demonstrated great hesitance in applying unconscionability analysis in cases involving defective or unmerchantable automobiles which are subject to warranty disclaimers and remedy limitations, despite the fact that such provisions are often oppressive or result in unfair surprise. Moreover, warranty disclaimers and remedy limitations are material cost shifting devices which are designed to place upon the consumer risks which may not have been contemplated or anticipated by him or her at the time of purchase.[123] Nevertheless, many courts feel uncomfortable with the sometimes far reaching implications to a finding of unconscionability and, more importantly, appear to lack a general understanding of the doctrine. As a result, unconscionability has, unfortunately, not been effectively utilized in the area of automobile consumer protection to the extent that would best effectuate the purposes of the Uniform Commercial Code.[124]

If the purpose of the unconscionability doctrine — the prevention of oppression and unfair surprise[125] — is to be effectuated, the courts must realize the surprisingly potent relief that is available to combat the asymmetry of information that has emerged in the automobile market due to the widespread use of

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122. *E.g.*, COLO. REV. STAT. § 42-12-105 (1984); 1984 Conn. Pub. Acts 338 § 3(h); ME. REV. STAT. ANN. tit. 10, § 1162 (1985); MASS. GEN. LAWS ANN. ch. 90, § 7N½(5) (West Supp. 1984-85); MINN. STAT. ANN. § 325F.655(8) (West Supp. 1985); 1984 Mo. Legis. Serv. House Bill No. 992 § 8 (Vernon); MONT. CODE ANN. § 61-4-506 (1983); NEV. REV. STAT. § 610(7) (1983); N.H. REV. STAT. ANN. § 357-D:7 (1984); N.J. STAT. ANN. § 56:12-27 (West Supp. 1985-86); N.Y. GEN. BUS. LAW 198(a) (McKinney Supp. 1984-85); Pa. STAT. ANN. Title 73 § 1962 (Purdon 1984); 1983 Tex. Sess. Law Serv. 4413(36) § 6.07(F) (Vernon); VA. CODE § 59.1-207.13(f) (1985); WASH. REV. CODE ANN. § 19.118.070 (1985); WYO. STAT. § 40-17-101(c) (1985).

123. Murray, *supra* note 50, at 777-78.

124. N.Y. U.C.C. § 2-302 (McKinney 1964) "provides that a court must consider all the surrounding circumstances before deciding whether a contract provision or practice is unconscionable. As a result it is nearly always possible to distinguish any precedent on the ground that some circumstance or another is different." Whitford, *Structuring Consumer Protection Legislation to Maximize Effectiveness*, 1981 WIS. L. REV. 1018, 1020 (1981).

125. N.Y. U.C.C. § 2-302 comment 1 (McKinney 1964).

standardized warranty disclaimers and remedy limitations.[126] Such devices have resulted in a market failure from the perspective of the consumer and have undermined the freedom of contract principles embodied in the Uniform Commercial Code.[127] Moreover, if the courts are unwilling to employ unconscionability analysis as it has evolved through section 2-302 to address these concerns, there is now the option of analyzing the conscionability of automobile warranty disclaimers and remedy limitations under state consumer protection statutes. In short, there is no longer an excuse for judicial avoidance of the unconscionability doctrine when the purchaser of a "lemon" automobile is in need of "lemon-aid."

126. *See supra* notes 10-19 and accompanying text.
127. *See supra* note 8 and accompanying text.