Unconscionability

Even when parties appear to have struck a deal, there remain, of course, limits to the bargains enforceable under contract law. Thus, as discussed in other modules, contract defenses stemming from defects in mutual assent include mistake, misrepresentation, and duress, to name a few. In addition to these, the doctrine of unconscionability allows courts to deny enforcement of contracts or particular contract terms that they deem unacceptably harsh, oppressive, one sided, or "shocking to the conscience."

The Uniform Commercial Code first expressly articulated this form of equitable relief as defense to contract formation in the context of the sale of goods. Specifically, UCC Section 2-302 authorizes courts to refuse to enforce a contract or a particular term that it finds unconscionable. Section 2-302(2) states that parties should be given "a reasonable opportunity to present evidence as to [the] commercial setting, purpose and effect" of a contract "to aid the court in making the determination" of unconscionability.

"The basic test" of unconscionability, according to Comment 1 to Section 2-302, "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 Comment explains, "The principle is one of the prevention of oppression and unfair surprise (Cf. Campbell Soup Co. v. Wentz, 172 F.2d 80, 3d Cir. 1948) and not of disturbance of allocation of risks because of superior bargaining power."

The *Campbell Soup* case cited in the Code involved a standard-form contract in which Pennsylvania farmers George B. Wentz and Harry T. Wentz agreed to sell the season's crop of carrots to the Campbell Soup Company for not more than $30 a ton. When the market price hit $90, the Wentzes refused to sell carrots to Campbell Soup at the contract price. Campbell Soup then sought specific performance, an equitable remedy, which the court denied. The court acknowledged that the carrots were all but impossible to obtain in the open market but viewed the form contract presented by the company to the farmer as "too hard a bargain and too one sided an agreement" to grant specific performance. In particular, the court pointed to a provision in the standard agreement that excused Campbell from accepting carrots but restricted the farmers from selling their crop elsewhere without Campbell's approval. Invoking the doctrine of unconscionability to deny an equitable remedy (as opposed to damages), the court stated,

> We are not suggesting that the contract is illegal. Nor are we suggesting any excuse for the grower in this case who has deliberately broken an agreement entered into with Campbell. We do think, however, that a party who has offered and succeeded in getting an agreement as tough as this one is, should not come to a chancellor and ask court help in the enforcement of its terms. That equity does not enforce unconscionable bargains is too well established to require elaborate citation. Campbell, 172 F.2d at 83.

The Restatement (Second) of Contracts incorporates the principle of unconscionability in terms similar to those in the UCC. Section 208 of the Restatement (Second) states, "If a contract or term thereof is unconscionable at the time the contract is made, a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result." Comment (a) to the Restatement (Second) asserts that the policy "applies to a wide variety of conduct." Courts have extended the unconscionability defense to contracts broadly. State codes typically establish unconscionability as a basis for courts to deny enforcement of contracts (or particular terms) across contract types. That said, unconscionability doctrine has developed primarily in the context of consumer contracts and the phenomenon of standard form or "boilerplate" terms. *Williams v. Walker-Thomas Furniture Co.* has become the emblematic unconscionability case in contracts courses, and, as discussed in the notes below, the subject of scholarship concerning the doctrine and beyond.

Williams v. Walker-Thomas Furniture Co.

198 A.2d 914 (District of Columbia Court of Appeals 1964)

QUINN, Associate Judge.

Appellant, a person of limited education separated from her husband, is maintaining herself and her seven children by means of public assistance. During the period 1957–1962 she had a continuous course of dealings with appellee from which she purchased many household articles on the installment plan. These included sheets, curtains, rugs, chairs, a chest of drawers, beds, mattresses, a washing machine, and a stereo set. In 1963 appellee filed a complaint in replevin for possession of all the items purchased by appellant, alleging that her payments were in default and that it retained title to the goods according to the sales contracts. By the writ of replevin appellee obtained a bed, chest of drawers, washing machine, and the stereo set. After hearing testimony and examining the contracts, the trial court entered judgment for appellee.

Appellant's principal contentions on appeal are (1) there was a lack of meeting of the minds, and (2) the contracts were against public policy.

Appellant signed fourteen contracts in all. They were approximately six inches in length and each contained a long paragraph in extremely fine print. One of the sentences in this paragraph provided that payments, after the first purchase, were to be prorated on all purchases then outstanding. Mathematically, this had the effect of keeping a balance due on all items until the time balance was completely eliminated. It meant that title to the first purchase remained in appellee until the fourteenth purchase, made some five years later, was fully paid.

At trial appellant testified that she understood the agreements to mean that when payments on the running account were sufficient to balance the amount due on an individual item, the item became hers. She testified that most of the purchases were made at her home; that the contracts were signed in blank; that she did not read the instruments; and that she was not provided with a copy. She admitted, however, that she did not ask anyone to read or explain the contracts to her.

We have stated that 'one who refrains from reading a contract and in conscious ignorance of its terms voluntarily assents thereto will not be relieved from his bad bargain.' Bob Wilson, Inc. v. Swann, D.C. Mun. App., 168 A.2d 198, 199 (1961). 'One who signs a contract has a duty to read it and is obligated according to its terms.' Hollywood Credit Clothing Co. v. Gibson, D.C. App., 188 A.2d 348, 349 (1963). 'It is as much the duty of a person who cannot read the language in which a contract is written to have someone read it to him before he signs it, as it is the duty of one who can read to peruse it himself before signing it.' Stern v. Moneyweight Scale Co., 42 App. D.C. 162, 165 (1914).

A careful review of the record shows that appellant's assent was not obtained 'by fraud or even misrepresentation falling short of fraud.' Hollywood Credit Clothing Co. v. Gibson, supra. This is not a case of mutual misunderstanding but a unilateral mistake. Under these circumstances, appellant's first contention is without merit.

Appellant's second argument presents a more serious question. The record reveals that prior to the last purchase appellant had reduced the balance in her account to $164. The last purchase, a stereo set, raised the balance due to $678. Significantly, at the time of this and the preceding purchases, appellee was aware of appellant's financial position. The reverse side of the stereo contract listed the name of appellant's social worker and her $218 monthly stipend from the government. Nevertheless, with full knowledge that appellant had to feed, clothe and support both herself and seven children on this amount, appellee sold her a $514 stereo set.

We cannot condemn too strongly appellee's conduct. It raises serious questions of sharp practice and irresponsible business dealings. A review of the legislation in the District of

Columbia affecting retail sales and the pertinent decisions of the highest court in this jurisdiction disclose, however, no ground upon which this court can declare the contracts in question contrary to public policy. We note that were the Maryland Retail Installment Sales Act, Art. 83 §§ 128–153, or its equivalent, in force in the District of Columbia, we could grant appellant appropriate relief. We think Congress should consider corrective legislation to protect the public from such exploitive contracts as were utilized in the case at bar.

Affirmed.

Williams v. Walker-Thomas Furniture Co.

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

SKELLY WRIGHT, Circuit Judge.

Appellee, Walker-Thomas Furniture Company, operates a retail furniture store in the District of Columbia. During the period from 1957 to 1962 each appellant in these cases purchased a number of household items from Walker-Thomas, for which payment was to be made in installments. The terms of each purchase were contained in a printed form contract which set forth the value of the purchased item and purported to lease the item to appellant for a stipulated monthly rent payment. The contract then provided, in substance, that title would remain in Walker-Thomas until the total of all the monthly payments made equaled the stated value of the item, at which time appellants could take title. In the event of a default in the payment of any monthly installment, Walker-Thomas could repossess the item.

The contract further provided that "the amount of each periodical installment payment to be made by (purchaser) to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by (purchaser) under such prior leases, bills or accounts; and all payments now and hereafter made by (purchaser) shall be credited pro rata on all outstanding leases, bills and accounts due the Company by (purchaser) at the time each such payment is made." The effect of this rather obscure provision was to keep a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated. As a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of the previous dealings.

On May 12, 1962, appellant Thorne purchased an item described as a Daveno, three tables, and two lamps, having total stated value of $391.10. Shortly thereafter, he defaulted on his monthly payments and appellee sought to replevy all the items purchased since the first

transaction in 1958. Similarly, on April 17, 1962, appellant Williams bought a stereo set of stated value of $514.95.[1] She too defaulted shortly thereafter, and appellee sought to replevy all the items purchased since December, 1957. The Court of General Sessions granted judgment for appellee. The District of Columbia Court of Appeals affirmed, and we granted appellants' motion for leave to appeal to this court.

Appellants' principal contention, rejected by both the trial and the appellate courts below, is that these contracts, or at least some of them, are unconscionable and, hence, not enforceable. In its opinion in Williams v. Walker-Thomas Furniture Company, 198 A.2d 914, 916 (1964), the District of Columbia Court of Appeals explained its rejection of this contention . . .

[Judge Skelly quotes the last two paragraphs of Associate Judge Quinn's opinion here.]

We do not agree that the court lacked the power to refuse enforcement to contracts found to be unconscionable. In other jurisdictions, it has been held as a matter of common law that unconscionable contracts are not enforceable.[2] While no decision of this court so holding has been found, the notion that an unconscionable bargain should not be given full enforcement is by no means novel. In Scott v. United States, 79 U.S. (12 Wall.) 443, 445, 20 L. Ed. 438 (1870), the Supreme Court stated:

"If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to."

Since we have never adopted or rejected such a rule, the question here presented is actually one of first impression.

Congress has recently enacted the Uniform Commercial Code, which specifically provides that the court may refuse to enforce a contract which it finds to be unconscionable at the time it was made. 28 D.C. CODE § 2-302 (Supp. IV 1965). The enactment of this section, which occurred subsequent to the contracts here in suit, does not mean that the common law of the District of Columbia was otherwise at the time of enactment, nor does it preclude the court from adopting a similar rule in the exercise of its powers to develop the common law for the

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[1] At the time of this purchase her account showed a balance of $164 still owing from her prior purchases. The total of all the purchases made over the years in question came to $1,800. The total payments amounted to $1,400.

[2] Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948); Indianapolis Morris Plan Corp. v. Sparks, 132 Ind. App. 145, 172 N.E.2d 899 (1961); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 84–96 (1960). Cf. 1 CORBIN, CONTRACTS Section 128 (1963).

District of Columbia. In fact, in view of the absence of prior authority on the point, we consider the congressional adoption of § 2-302 persuasive authority for following the rationale of the cases from which the section is explicitly derived.[5] Accordingly, we hold that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced.

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.[6] Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power.[7] The manner in which the contract was entered is also relevant to this consideration. 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, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain.[8] But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it

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[5] See Comment, Sec. 2–302, Uniform Commercial Code (1962). Compare *Note*, 45 VA. L. REV. 583, 590 (1959), where it is predicted that the rule of Sec. 2–302 will be followed by analogy in cases which involve contracts not specifically covered by the section. *Cf.* 1 STATE OF NEW YORK LAW REVISION COMMISSION, REPORT AND RECORD OF HEARINGS ON THE UNIFORM COMMERCIAL CODE 108–110 (1954) (remarks of Professor Llewellyn).

[6] See Henningsen v. Bloomfield Motors, Inc., *supra* Note 2; Campbell Soup Co. v. Wentz, *supra* Note 2.

[7] See Henningsen v. Bloomfield Motors, Inc., *supra* Note 2, 161 A.2d 69 at 86, and authorities there cited. Inquiry into the relative bargaining power of the two parties is not an inquiry wholly divorced from the general question of unconscionability, since a one-sided bargain is itself evidence of the inequality of the bargaining parties. This fact was vaguely recognized in the common law doctrine of intrinsic fraud, that is, fraud which can be presumed from the grossly unfair nature of the terms of the contract. See the oft-quoted statement of Lord Hardwicke in Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (1751):

". . . (Fraud) may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make . . . "

And *cf.* Hume v. United States, supra Note 3, 132 U.S. at 413, 10 S. Ct. at 137, where the Court characterized the English cases as 'cases in which one party took advantage of the other's ignorance of arithmetic to impose upon him, and the fraud was apparent from the face of the contracts.' See also Greer v. Tweed, *supra* Note 3.

[8] See RESTATEMENT, CONTRACTS §70 (1932); *Note*, 63 HARV. L. REV. 494 (1950). See also Daley v. People's Building, Loan & Savings Ass'n, 178 Mass. 13, 59 N.E. 452, 453 (1901), in which Mr. Justice Holmes, while sitting on the Supreme Judicial Court of Massachusetts, made this observation:

". . . Courts are less and less disposed to interfere with parties making such contracts as they choose, so long as they interfere with no one's welfare but their own. . . . It will be understood that we are speaking of parties standing in an equal position where neither has any oppressive advantage or power. . . . "

is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned[9] should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.[10]

In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. The terms are to be considered "in the light of the general commercial background and the commercial needs of the particular trade or case."[11] Corbin suggests the test as being whether the terms are 'so extreme as to appear unconscionable according to the mores and business practices of the time and place.' 1 Corbin, op. cit. supra Note 2.[12] We think this formulation correctly states the test to be applied in those cases where no meaningful choice was exercised upon entering the contract.

Because the trial court and the appellate court did not feel that enforcement could be refused, no findings were made on the possible unconscionability of the contracts in these cases. Since the record is not sufficient for our deciding the issue as a matter of law, the cases must be remanded to the trial court for further proceedings.

So ordered.

DANAHER, Circuit Judge (dissenting):

The District of Columbia Court of Appeals obviously was as unhappy about the situation here presented as any of us can possibly be. Its opinion in the Williams case, quoted in the majority text, concludes: 'We think Congress should consider corrective legislation to protect the public from such exploitive contracts as were utilized in the case at bar.'

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[9] This rule has never been without exception. In cases involving merely the transfer of unequal amounts of the same commodity, the courts have held the bargain unenforceable for the reason that "in such a case, it is clear, that the law cannot indulge in the presumption of equivalence between the consideration and the promise." 1 WILLISTON, CONTRACTS Sec. 115 (3d ed. 1957).

[10] See the general discussion of 'Boiler-Plate Agreements' in LLEWELLYN, THE COMMON LAW TRADITION 362-371 (1960).

[11] Comment, Uniform Commercial Code § 2–307.

[12] See Henningsen v. Bloomfield Motors, Inc., *supra* Note 2; Mandel v. Liebman, 303 N.Y. 88, 100 N.E.2d 149 (1951) . The traditional test as stated in Greer v. Tweed . . . , 13 Abb.Pr., N.S. (N.Y.1872), at 429, is "such as no man in his senses and not under delusion would make on the one hand, and as no honest or fair man would accept, on the other."

My view is thus summed up by an able court which made no finding that there had actually been sharp practice. Rather the appellant seems to have known precisely where she stood.

There are many aspects of public policy here involved. What is a luxury to some may seem an outright necessity to others. Is public oversight to be required of the expenditures of relief funds? A washing machine, e.g., in the hands of a relief client might become a fruitful source of income. Many relief clients may well need credit, and certain business establishments will take long chances on the sale of items, expecting their pricing policies will afford a degree of protection commensurate with the risk. Perhaps a remedy when necessary will be found within the provisions of the 'Loan Shark' law, D.C. CODE §§ 26-601 et seq. (1961).

I mention such matters only to emphasize the desirability of a cautious approach to any such problem, particularly since the law for so long has allowed parties such great latitude in making their own contracts. I dare say there must annually be thousands upon thousands of installment credit transactions in this jurisdiction, and one can only speculate as to the effect the decision in these cases will have.[1]

I join the District of Columbia Court of Appeals in its disposition of the issues.

Notes and Questions

1. Reread the term of the contract at issue in this case, quoted in the second paragraph of D.C. Circuit Judge Skelly Wright's opinion. Is the meaning of this provision readily ascertainable to a consumer? To a law student? Can you parse how the specific language of the contract leads to the outcome at issue in this case?

2. The underlying legal issue of the cross-collateral provision is even more complicated than it might seem because it applies to property that is otherwise exempt from foreclosure. Professor Douglass Baird explains:

> This provision gave Walker-Thomas a security interest in both the stereo and all the other furniture that [Williams] bought from it over the years….

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[1] However the provision ultimately may be applied or in what circumstances, D.C. CODE § 28-2-301 (Supp. IV, 1965) did not become effective until January 1, 1965.

> If the household furniture that Walker-Thomas had previously sold Williams were ordinary property subject to creditor levy, the cross-collateralization clause would be meaningless. If Williams fails to pay for the stereo, Walker-Thomas can reduce its claim to judgment, obtain a writ of execution, and require the sheriff to seize all of Williams's non-exempt assets, including the furniture . . . .Walker-Thomas took the security interest in Williams's other household goods because these assets were exempt and could otherwise not be reached in the event of default.

Douglas G. Baird, *The Boilerplate Puzzle*, in BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 131, 137 (Ben-Shahar ed., 2007).

3. Judge Skelly Wright's opinion refers to the contract term referenced above as a "rather obscure provision." What is the problem with the way the payments were structured? The opinion also asserts that "[w]hether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction." What circumstances, if any, could have changed Judge Skelly Wright's opinion?

4. What questions was the trial court charged with resolving on remand? This case settled. Had it not, how would you expect it to be decided?

5. Would a demonstration by Walker-Thomas Furniture Co. that it could not remain profitable if it changed the terms of sale be a relevant factor for a trial court? Would it matter if this was the only furniture and household items store in the neighborhood? What if it was the only household goods store affordable to its customers? Would proof that the store could remain profitable with different terms of sale matter to the author of the dissenting opinion, Judge Danaher?

6. As part of a project considering the economic implications of housing and credit in poor Black neighborhoods, Professor Duncan Kennedy has challenged the economic argument that people in Williams' community would be worse off as a result of the holding in Williams. Looking at the particular context of the transaction, Professor Kennedy argues that the intolerance to a price hike of the typical buyer/borrower in a community of poor people and "the practices of one-on-one in store bargaining and door-to-door sales made compensating price hikes unlikely." As a result, "the ex post benefit of safety from blanket repossession was likely large." *See* Duncan Kennedy, *The*

Bitter Ironies of Williams v. Walker-Thomas Furniture Co. in the First Year Law School Curriculum, 71 BUFF. L. REV. 225, 261 (2023).

7. Judge Skelly Wright's opinion asserts that "when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms." According to the trial transcript, Williams testified that she was not given the contract terms in writing and, in response to cross examination about her understanding of the terms, she stated, "But how could I read things that I did not have[?] You are asking me about reading things that I never had to read." Transcript of Record at 45, Williams v. Walker-Thomas Furniture Co., 198 A.2d 914 (D.C. 1964) (No. 3389) (quoted in Anne Fleming, *The Rise and Fall of Unconscionability As the "Law of the Poor,"* 102 GEO. L.J. 1383, 1411 (2014)). How should the fact that she was not given a copy of the terms affect the outcome of the case, if at all?

8. Would it change the opinion of the court if customers were presented with a "plain language" explanation of the payment structure and signed an agreement indicating that they understood the terms? What if the terms were provided via a hyperlink on an app, as is typical today—would that change the analysis? Should it, in your opinion?

9. Judge Danaher asserts that this case involves many aspects of public policy, and his dissenting opinion (along with that of the majority) echoes the lower court's assertion that "Congress should consider corrective legislation to protect the public from such exploitive contracts as were utilized in the case at bar." Is this a distinctive feature of the doctrine of unconscionability or are there other aspects of contract doctrine that engage public policy (implicitly or explicitly)? What role—if any—should "public policy" play in contract doctrine given the goals and objectives of contract law, and the law more generally, as you understand them?

10. Can you imagine a payment structure that would be less offensive to the court? Promulgated in 1968, after this decision, the Uniform Consumer Credit Code ¶ 3-303(1) required that payments pursuant to any cross-collateral clauses be "applied first to the payment of the debts arising from the sales first made." Eleven states have adopted the Code or similar provisions. For an analysis of this case and its impact on public law, see Anne Fleming, *The Rise and Fall of Unconscionability As the "Law of the Poor,"* 102 GEO. L.J. 1383 (2014).

11. How does the opinion of District of Columbia Court of Appeals Judge Quinn characterize Williams? What presumptions do the courts seem to make about her and how do they relate to the doctrine of unconscionability?

12. Scholars have expressed concern about the unintended consequences of teaching (and learning) the doctrine of unconscionability through *Williams v. Walker Thomas-Furniture Co.* Some have pointed to the potential of the case to promote stereotypes, including those involving race. In Professor Muriel Morisey Spence's words,

    > The particular stereotypes implicated in Williams are associated primarily with African-American women: that we are disproportionately on welfare, irresponsible with money and likely to raise large families as single parents. The concerns could apply equally, however, to stereotypes of any group. It is important to note that the following discussion is premised on the belief that stereotypes, even when arguably complimentary, are inherently troubling, for they give legitimacy to the prejudging of people which can, in turn, lead to bias and invidious discrimination.

    Muriel Morisey Spence, *Teaching Williams v. Walker-Thomas Furniture Co.*, 3 TEMP. POL. & CIV. RTS. L. REV. 89, 90 (1994).

    As Spence points out, the opinions make no explicit mention of the racial identities of the parties, though readers have tended to assume that Williams was Black. Does that make the risk of perpetuating bias through a focus on this case more or less resonant?

13. Professor Deborah Waire Post has written about her own childhood experiences "as a poor black person living among other working class white and black families on an integrated street in a small city" and how they "bear no relation at all to the language of the lower court decision or the dissent on appeal. Nor do they have a strong resemblance to the relationships described by Judge Skelly Wright in his decision." Deborah Waire Post, *The Square Deal Furniture Company*, https://lawprofessors.typepad.com/contractsprof_blog/ 2020/07/guest-post-by-deborah-post-on-williams-v-walker-thomas.html, *published in* Amy Kastely, Deborah Post, Nancy Ota & Deborah Zalesne, Contracting Law (5th ed. Carolina Academic Press 2015). Post recounts,

    > I did not experience retail sales as impersonal or arms-length transactions. And I certainly did not view my parents as unsophisticated

purchasers. My parents were poor, not stupid—and like Ora Williams they dealt regularly with a person from a company like Walker-Thomas. I am pretty sure the extension of credit to my parents had nothing to do with income, assets, debts, or prior credit history. It had a lot to do with the personal relationship between them and the salesman from the Square Deal Furniture Company.

Mrs. Williams was a good credit risk because she had a personal relationship with Walker-Thomas and its agents. There is a lot less risk of default in a personal relationship. . . .

The point is the relationship that you develop with someone who is given the privileged status of "friend." You pay unless there is a catastrophe—an illness or loss of employment or something like that. And if you can't pay, you return what you did not pay for. But you certainly wouldn't expect someone to show up at your house with a truck and remove everything you had ever purchased.

In contract law, lawyers and judges talk as if the expectations individuals have of one another are created by the pieces of paper they sign. The Walker-Thomas Furniture Company did violence to Mrs. Williams and to the people with whom it dealt on a regular basis. It did violence by charging too much; it did violence by pressuring people to buy more than they could afford; it did violence by threatening harm; it did violence by disregarding friendships. There was bargaining. It was "business." But there was also trust. A salesperson who knows who you are and what you have to do to survive is not going to take more than you can afford to give. And in return, for years at a time, you faithfully make payments that amount to two, three, or even thirty times the market value of the goods you buy. You pay because you can get it on credit and because he will wait to be paid.

These sales are not entirely "arms-length" nor are they completely self-interested. They are based on personal friendship and they depend on personal loyalty. The trial court in *Williams* called the cross-collateralization clause a "sharp practice." Skelly Wright talked about an absence of meaningful choice. But the key to the decision in *Williams* is surprise. I might even go so far as to call it betrayal.

To the extent that the repossession proved unexpected to the consumer, how, if at all, do Professor Post's experiences relate to the goals of the doctrine, and specifically those articulated in Section 2-302 of "the prevention of oppression and unfair surprise"?

14. *Williams* is a mainstay of contracts casebooks, even though it has been identified as "a case that was not typical of Black people's dealings with contract law and [one that] was already doctrinally marginal." Dylan Penningroth, *Race in Contract Law*, 170 U. PA. L. REV. 1199, 1210 (2022). It also stands out in contract law courses as a case that prompts students' awareness of race, if indirectly. Professor Penningroth traces the hidden history of race and slavery in the development of contract doctrine. Notwithstanding the elision of race in contracts cases and doctrine, Black people have long participated in contract law, tracing back to the 1600s. As archival research shows, cases involving Black people and circumstances impacted by the treatment of race in the United States have shaped contract doctrine. For a discussion of the ways in which race figures in influential cases that expunged racial facts, *see id.*

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Early unconscionability cases reflect courts' concern with consumer protection and disparities in bargaining power. For example, in *Weaver v. American Oil Co.*, 276 N.E.2d 144 (Ind. 1971), the Supreme Court of Illinois held unconscionable a "printed form" gas station franchise contract "prepared by American" between the oil company and Weaver, a gas station operator, who "left high school after one and a half years and spent his time, prior to leasing the service station, working at various skilled and unskilled labor oriented jobs." *Id.* at 145. The form contract included provisions exculpating the company for its negligence and indemnifying the company for damages and loss. When Weaver suffered burns and injuries as a result of being sprayed with gasoline by an employee of the oil company, the oil company sought to enforce the exculpatory and indemnifying provisions. In addition to Weaver's background, which suggested to the court that he "was not one who should be expected to know the law or understand the meaning of technical terms," the court noted the circumstances in which the contract was formed:

> The ceremonious activity of signing the lease consisted of nothing more than the agent of American Oil placing the lease in front of Mr. Weaver and saying 'sign', which Mr. Weaver did. There is nothing in the record to indicate that Weaver read the lease; that the agent asked Weaver to read it; or that the agent, in any manner, attempted to call Weaver's attention to the 'hold harmless' clause in the lease. Each year following, the procedure was the same. A salesman, from

> American Oil, would bring the lease to Weaver, at the station, and Weaver would sign it. The evidence showed that Weaver had never read the lease prior to signing and that the clauses in the lease were never explained to him in a manner from which he could grasp their legal significance. The leases were prepared by the attorneys of American Oil Company, for the American Oil Company, and the agents of the American Oil Company never attempted to explain the conditions of the lease nor did they advise Weaver that he should consult legal counsel, before signing the lease. The superior bargaining power of American Oil is patently obvious and the significance of Weaver's signature upon the legal document amounted to nothing more than a mere formality to Weaver for the substantial protection of American Oil. *Id.* at 145-46.

The dissenting opinion criticized the court for recognizing a new category of excuse. It pointed to established mechanisms of policing a bargain in circumstances such as fraud, concealment, or illegality of the subject matter, and noted the fact that Weaver "never read the lease, [although] he had able opportunity to do so and to obtain counsel." *Id.* at 152.

Today, unconscionability remains difficult to establish and the "duty to read" pervades caselaw. Courts tend to be reluctant to find a contract unconscionable, especially when they perceive knowledgeable parties negotiating terms, as in the following case.

American Software, Inc. v. Ali

54 Cal. Rptr. 2d 477 (Court of Appeal, California 1996)

KING, Associate Justice.

The appellant, American Software, Inc., appeals from a decision of the trial court granting a former employee, respondent Melane Ali, unpaid commissions based upon software sales she generated while in American Software's employ but which were remitted by customers after she voluntarily severed her employment. The key issue in this appeal is whether a provision of Ali's employment contract which, generally speaking, terminates her right to receive commissions on payments received on her accounts 30 days after severance of her employment is unconscionable, and therefore, unenforceable. The trial court found that Ali was entitled to recover the disputed commissions because this contractual provision was unconscionable. We disagree and reverse.

Facts

Ali was an account executive for American Software from September 5, 1991, to March 2, 1994. The employment relationship commenced after Ali was approached by a professional recruiter on behalf of American Software and was terminated when Ali voluntarily resigned because she had a job offer from one of American Software's competitors. Ali was hired to sell and market licensing agreements for software products to large companies. These products are designed to the customer's specifications for the purpose of integrating the customer's accounting, manufacturing, sales and distribution processes.

In exchange for her services, American Software agreed to pay Ali a base monthly salary plus a draw. If products were sold during the month, any commissions paid were reduced by the amount of the draw. However, the draw portion of the salary was paid regardless of whether or not the salesperson earned commissions to cover the draw. Any negative amount would be carried over from month-to-month until such time as the commissions were large enough to cover the previous draws, or until such time as the employment relationship was severed. If the amount of draws exceeded commissions at the time of termination, American Software would suffer the loss. At the time of her resignation, Ali's annual guaranteed salary, exclusive of commissions, was $75,000. Her base monthly salary was $3,333 per month and her nonrefundable draw was $2,917.

The terms and conditions of Ali's employment were set out in a written contract which was prepared by American Software. Ali reviewed the contract, and had an attorney, who she described as a "buddy," review it prior to employment. Of pertinence to the instant controversy, the contract included the specific circumstances under which Ali was to receive commissions after termination of employment with American Software. The employment agreement first states that "[c]ommissions are considered earned when the payment is received by the Company." It goes on to provide: "In the event of termination, the right of all commissions which would normally be due and payable are forfeited 30 days following the date of termination in the case of voluntary termination and 90 days in the case of involuntary termination."

Based on her testimony at trial, there is no question that Ali was aware of this provision prior to her execution of the agreement and commencement of work at American Software. She testified she reviewed the two and one-half page contract for one-half hour and caused certain handwritten deletions and revisions to be made to it, most notably deleting a provision requiring her to reimburse American Software $5,000 for the recruiter's fee in the event that she terminated her employment within a year. Ali testified that she signed the employment contract even though she believed certain provisions were unenforceable in California.

After Ali left American Software's employment, she sought additional commissions in connection with transactions with IBM and Kaiser Foundation Health Plan. American Software received payment from both companies more than 30 days after Ali's resignation.

After Ali's claim for unpaid commissions was denied by the Labor Commissioner, she sought de novo review in the superior court. The trial court awarded Ali approximately $30,000 in unpaid commissions after finding that the contract provision regarding post-employment commissions was unconscionable and thus, unenforceable. The trial court found the evidence "overwhelming that the forfeiture provision inures to the benefit of the party with superior bargaining power without any indication of a reason for tying such benefit to the timing of a payment, rather than to the service actually provided in completing the sale." American Software timely appealed.

Discussion

In 1979, our Legislature enacted Civil Code section 1670.5, which codified the established doctrine that a court can refuse to enforce an unconscionable provision in a contract.[3] While the term "unconscionability" is not defined by statute, the official comment explains the term as follows: "The basic test is whether, in the light of the general background and the needs of the particular 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 [citation] and not of disturbance of allocation of risks because of superior bargaining power." (Civ. Code, § 1670.5, Legis. Com. comment 1.)

Most California cases analyze unconscionability as having two separate elements—procedural and substantive.[4] (See, e.g., *Shaffer v. Superior Court* (1995) 33 Cal. App.4th 993, 1000, 39 Cal. Rptr.2d 506; *Vance v. Villa Park Mobilehome Estates* (1995) 36 Cal. App.4th 698, 709, 42 Cal. Rptr.2d 723.) Substantive unconscionability focuses on the actual terms of the agreement,

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[3] The statute provides in pertinent part: "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." (Civ. Code, § 1670.5, subd. (a).)

[4] Our Supreme Court has noted that the division of the unconscionability analysis into procedural and substantive elements should lead to the same result as the analytical framework expressed in *Graham v. Scissor–Tail, Inc.* (1981) 28 Cal. 3d 807, 819–820, 171 Cal. Rptr. 604, 623 P.2d 165. (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 925, fn. 9, 216 Cal. Rptr. 345, 702 P.2d 503.)

while procedural unconscionability focuses on the manner in which the contract was negotiated and the circumstances of the parties. California courts generally require a showing of both procedural and substantive unconscionability at the time the contract was made. (See *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal. App. 3d 473, 487, 186 Cal. Rptr. 114.) Some courts have indicated that a sliding scale applies, for example, a contract with extraordinarily oppressive substantive terms will require less in the way of procedural unconscionability. (*Ilkhchooyi v. Best* (1995) 37 Cal. App. 4th 395, 410, 45 Cal. Rptr.2d 766; *Carboni v. Arrospide* (1991) 2 Cal. App. 4th 76, 83, 2 Cal. Rptr.2d 845; *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal. App. 3d 758, 768, 259 Cal. Rptr. 789.)

Indicia of procedural unconscionability include "oppression, arising from inequality of bargaining power and the absence of real negotiation or a meaningful choice" and "surprise, resulting from hiding the disputed term in a prolix document." (*Vance v. Villa Park Mobilehome Estates, supra,* 36 Cal. App.4th at p. 709, 42 Cal. Rptr.2d 723.) Substantive unconscionability is indicated by contract terms so one-sided as to "*shock the conscience.* " (*California Grocers Assn. v. Bank of America* (1994) 22 Cal. App.4th 205, 214, 27 Cal. Rptr.2d 396, italics in original.) A less stringent standard of "reasonableness" was applied in *A & M Produce Co. v. FMC Corp., supra,* 135 Cal. App.3d at pages 486–487, 186 Cal. Rptr. 114. This standard was expressly rejected by Division Two of this court in California Grocers Assn. as being inherently subjective. (*California Grocers Assn., supra,* at p. 214, 27 Cal. Rptr.2d 396.) We agree. With a concept as nebulous as "unconscionability" it is important that courts not be thrust in the paternalistic role of intervening to change contractual terms that the parties have agreed to merely because the court believes the terms are unreasonable. The terms must shock the conscience.

The critical juncture for determining whether a contract is unconscionable is the moment when it is entered into by both parties—not whether it is unconscionable in light of subsequent events. (Civ. Code, § 1670.5.) Unconscionability is ultimately a question of law for the court. [Citations omitted.]

In assessing procedural unconscionability, the evidence indicates that Ali was aware of her obligations under the contract and that she voluntarily agreed to assume them. In her business as a salesperson it is reasonable to assume she is familiar with contracts and their importance. In fact, in Ali's testimony, she indicated that as part of her responsibilities for American Software, she helped negotiate the terms of a contract with IBM representing over a million dollars in sales. The salient provisions of the employment contract are straightforward, and

the terms used are easily comprehensible to the layman. She had the benefit of counsel.[5] Nor is this a situation in which one party to the contract is confronted by an absence of meaningful choice. The very fact that Ali had enough bargaining "clout" to successfully negotiate for more favorable terms on other provisions evidences the contrary. She admits that she was aware of the post-employment commissions clause, but did not attempt to negotiate for less onerous terms.[6] In short, this case is a far cry from those cases where fine print, complex terminology, and presentation of a contract on a take-it-or-leave-it basis constitutes the groundwork for a finding of unconscionability.

Nor do we find substantive unconscionability. Ali's arguments of substantive unconscionability rest largely on events that occurred several years after the contract was entered into—her loss of sizable commissions on sales she had solicited during her employment but where payment was delayed for various reasons so that it was not received within 30 days after her departure. However, as indicated by the very wording of California's unconscionability statute, we must analyze the circumstances as they existed "at the time [the contract] was made" to determine if gross unfairness was apparent at that time. (Civ. Code, § 1670.5, subd. (a).)

When viewed in light of the circumstances as they existed on August 23, 1991, when the instant contract was executed, we cannot say the contract provision with respect to compensation after termination was so unfair or oppressive in its mutual obligations as to "shock the conscience." (*California Grocers Assn. v. Bank of America, supra,* 22 Cal. App.4th at p. 214, 27 Cal. Rptr.2d 396.) If the official notes accompanying Uniform Commercial Code section 2–302, upon which Civil Code section 1670.5 is based, is to be relied upon as a guide,[7] the contract terms are to be evaluated "in the light of the general commercial background and the commercial needs of the particular trade or case, ..." (Cal. U. Com. Code, § 2–302, comment

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[5] Some courts have considered the presence and advice of counsel to constitute circumstantial, if not conclusive, evidence that a contract is not unconscionable. (See e.g., *Resource Management Co. v. Weston* Ranch (Utah 1985) 706 P.2d 1028, 1045; *Bernina Distributors, Inc. v. Bernina Sewing Mach.* (10th Cir.1981) 646 F.2d 434, 440.)

[6] A company representative testified at trial that a number of individuals have successfully negotiated for modification of this provision.

[7] Civil Code section 1670.5 was adopted verbatim from Uniform Commercial Code, section 2–302. The Legislative Committee Comment to section 1670.5 states: "The Assembly declares its intent, therefore, that the Official Code Comments to Uniform Commercial Code Section 2–302 prepared by the American Law Institute and National Conference of Commissioners on Uniform State Laws, ... be used as an aid to interpretation of Section 1670.5." (See *Carboni v. Arrospide, supra,* 2 Cal. App. 4th at p. 81, 2 Cal. Rptr. 2d 845.)

1). Corbin suggests that the test is whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place." (1 Corbin, Contracts (1963) § 128, p. 551.)

Our survey of case law indicates that the contract provision challenged here is commonplace in employment contracts with sales representatives, such as Ali, who have ongoing responsibilities to "service" the account once the sale is made. . . . In briefing below, the rationale for deferring commissions until payment is actually received by the customer was explained by American Software: "[I]f the entire commission were to be deemed earned by merely obtaining buyers, the burden of servicing those buyers pending receipt of revenues would fall on American Software's other salespersons unfamiliar with the earlier transaction who would receive nothing for their efforts." In *Watson v. Wood Dimension, Inc.* (1989) 209 Cal. App.3d 1359, 1363–1365, 257 Cal. Rptr. 816, the court upheld an award of post-termination commissions for a reasonable period of time based on quantum meruit in the total absence of contractual provisions governing the situation. If a court can impose these terms on parties in the absence of an agreement, then it is difficult to see how such terms can be considered "unconscionable" when the parties agree to them.

Nor do we find that the terms of this contract represent "an overly harsh allocation of risks ... which is not justified by the circumstances under which the contract was made." (*Carboni v. Arrospide, supra,* 2 Cal. App. 4th at p. 83, 2 Cal. Rptr. 2d 845.) The contract terms with regard to Ali's compensation involved certain risks to both parties to the bargain. The contract in the instant case placed a risk on Ali that she would lose commissions from her customers if payment was not received by American Software within 30 days after her resignation. American Software took the risk that at the time of Ali's termination, she would not have earned sufficient commissions to cover the substantial draws "credited" to her. This is part of the bargaining process—it does not necessarily make a contract unconscionable. The contract simply does not appear to be "overly harsh or one-sided, with no justification for it at the time of the agreement." (*Vance v. Villa Park Mobilehome Estates, supra,* 36 Cal. App. 4th at p. 709, 42 Cal. Rptr. 2d 723.)

Much of the parties' arguments in this case revolve around *Ellis v. McKinnon Broadcasting Co.* (1993) 18 Cal. App. 4th 1796, 23 Cal. Rptr. 2d 80. In *Ellis* the court examined a provision in an employment contract denying the plaintiff, an advertising salesperson, commissions on advertising if the employer had not yet received payment for the advertising prior to termination of the salesperson's employment. The employer collected nearly $100,000 in advertising fees from the plaintiff's sales after he voluntarily left his employment two years later, which meant that the plaintiff would have been entitled to approximately $20,000 in

commissions had he continued his employment. The court described the pivotal inquiry as assessing "the substantive *reasonableness* of the challenged provision" and proceeded to find elements of procedural unconscionability, unfair surprise, and oppression, as well as substantive unconscionability. (*Id.* at pp. 1805–1806, 23 Cal. Rptr. 2d 80, italics added.)

Despite the many analogous facts and issues, we reach a different conclusion than *Ellis.* In this instance, the conflicting result can most easily be explained by the fact that the *Ellis* court closely followed the *A & M Produce* analytical structure in considering whether the commissions provision was "reasonable"—an approach we have specifically rejected in favor of the more rigorous "shock the conscience" standard enunciated in *California Grocers Assn., supra,* 22 Cal. App.4th at page 214, 27 Cal. Rptr. 2d 396. We also find the result in *Ellis* hard to reconcile with other California appellate decisions which have shown considerable restraint in second-guessing provisions in employment contracts governing payment of sales commissions upon termination of employment. (See e.g., *Chretian v. Donald L. Bren, Co., supra,* 151 Cal. App. 3d at pp. 389–390, 198 Cal. Rptr. 523; *Neal v. State Farm Ins. Cos.* (1961) 188 Cal. App. 2d 690, 10 Cal. Rptr. 781.) A critical review of *Ellis* in the legal literature observes, "[T]he test on unconscionability is not whether the parties could have written a better or more reasonable contract. The proper test in these cases is whether the bargain is so one-sided as to shock the conscience and whether there was some bargaining impropriety resulting from surprise or oppression. The *Neal* and *Chretian* courts, unlike the court in *Ellis,* displayed the proper restraint and deference to agreements that were not egregiously one-sided in the allocation of risks." (Prince, Unconscionability in California: A Need for Restraint and Consistency (1995) 46 Hastings L.J. 459, 545.)

In the present case, there are no unclear or hidden terms in the employment agreement and no unusual terms that would shock the conscience, all leading to the conclusion that the contract accurately reflects the reasonable expectations of the parties. Overall, the evidence establishes that this employment contract was the result of an arm's-length negotiation between two sophisticated and experienced parties of comparable bargaining power and is fairly reflective of prevailing practices in employing commissioned sales representatives. Therefore, the contract fails to qualify as unconscionable.

The judgment is reversed. Costs are awarded to American Software, Inc. . . . .

Notes and Questions

1. Which facts do you think led the trial court to find the provision at issue unconscionable? What standard did the Court of Appeals in *American Software, Inc. v. Ali* apply and which facts proved significant in its analysis?

2. The Court of Appeals describes the contract in this case as "the result of an arm's-length negotiation between two sophisticated and experienced parties of comparable bargaining power." Do you agree? How would you define a "sophisticated party"?

3. It is not easy to mount a successful challenge to contract terms under the doctrine of unconscionability. Courts typically use a two-pronged sliding scale of procedural unconscionability, which considers the formalities of entering into the contract, and substantive unconscionability, which considers the terms of the contract itself. What aspects of this case satisfied the procedural prong for the court? How much of a role did the fact that Ali asked a lawyer "buddy" to review the contract play for the court? What factors might have led the trial court to find otherwise?

4. In footnote 6, the court notes testimony at trial indicating that other employees successfully negotiated the post-employment commissions clause to obtain more favorable terms. What does this suggest to the court? In Ellis v. McKinnon Broadcasting, a case involving similar facts cited in American Software Inc., the court stated that "[t]he mere fact that certain terms of a standardized contract vary among inferior parties does not demonstrate that the objectionable provision was actively negotiated nor eliminate the possibility that such a term is unconscionable." Which approach do you agree with and why?

5. The *American Software Inc.* opinion finds the contested provision to be "commonplace in employment contracts with sales representatives, such as Ali." How does this figure into the assessment of whether the provision is unconscionable? Do you think it should? The court also identifies a rationale for the provision. What is it? Should the purpose of the provision be a relevant factor in determining unconscionability?

The Unconscionability of Arbitration Agreements

Historically, courts were hesitant to enforce mandatory arbitration agreements, even between sophisticated parties. To counteract this resistance, in 1925, Congress passed the Federal Arbitration Act (FAA). The heart of the FAA is section 2, which states:

> … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract …

9 U.S.C. § 2. As the Supreme Court explained, "[t]he effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). A full study of this body of law is well beyond the scope of a basic course in contract law. However, the next few pages illustrate how courts apply the principles of unconscionability to arbitration agreements.

In recent decades, mandatory arbitration provisions have proliferated, especially in employment and consumer contracts. While arbitration provisions appeal to sellers and employers as a cheaper and less public mechanism of dispute resolution than litigation, a trove of scholarship has outlined the ways that mandatory arbitration can deprive parties of recourse, such as the right for a jury trial or the ability to file a class action, and even protections of statutory rights in certain contexts.

Nonetheless, arbitration provisions are presumptively enforceable and are not, absent a showing of circumstances that a court finds so one sided as to "shock the conscience," unconscionable, including in contracts of adhesion. In *Oblix v. Winiecki*, 347 F.3d 488 (7th Cir. 2004), for example, Judge Easterbrook rejected the argument that a one-sided arbitration provision in a "take-it-or-leave-it" employment contract was unconscionable. Instead, he referred to "standard-form agreements" as "a fact of life," and asserted that "in light of the preference for arbitration under the Federal Arbitration Act, arbitration provisions in [employment] contracts must be enforced unless states would refuse to enforce all off the shelf package deals." *Id.* at 491. While some jurisdictions are more concerned with the impact of contracts of adhesion on a weaker party, courts do not find mandatory arbitration provisions unconscionable absent extreme circumstances. Consider the case that follows.

Higgins v. Superior Ct.

45 Cal. Rptr. 3d 293 (Court of Appeal, California 2006)

RUBIN, J.

In this writ proceeding, five siblings who appeared in an episode of the television program "Extreme Makeover: Home Edition" (Extreme Makeover) challenge an order compelling

them to arbitrate most of their claims against various entities involved with the production and broadcast of the program. Petitioners claim the arbitration clause contained in a written agreement they executed before the program was broadcast is unconscionable. We agree. Accordingly, we grant the petition for writ of mandate.

Factual and procedural background

Petitioners Charles, Michael, Charis, Joshua, and Jeremiah Higgins are siblings. In February 2005, when they executed the agreement whose arbitration provision is at issue, they were 21, 19, 17, 16, and 14 years old, respectively.

Real parties in interest, to whom we refer collectively as the television defendants, are (1) American Broadcasting Companies, Inc., the network that broadcasts Extreme Makeover; (2) Disney/ABC International Television, Inc., which asserts it had no involvement with the Extreme Makeover program in which petitioners appeared; (3) Lock and Key Productions, the show's producer; (4) Endemol USA, Inc., which is also involved in producing the program; and (5) Pardee Homes, which constructed the home featured in the Extreme Makeover episode in which petitioners appeared.

Petitioners' parents died in 2004. The eldest sibling, Charles, became the guardian for the then three minor children. (To avoid confusion with his siblings, we refer to Charles Higgins by his first name.) Shortly thereafter, petitioners moved in with church acquaintances, Firipeli and Lokilani Leomiti, a couple with three children of their own. The Leomitis are defendants in the litigation but are not involved in the present writ proceeding.

According to Charles Higgins, after moving in with the Leomitis, he was advised by members of his church that producers of Extreme Makeover had contacted the church and had asked to speak to him about the production of a show based on the loss of petitioners' parents and that petitioners were now living with the Leomitis.[1] In July or August 2004, Charles called and spoke with an associate producer of Lock and Key about the program and petitioners' living situation.

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[1] Lock and Key's executive producer describes Extreme Makeover as a " 'reality' based television series" whose "premise ... is to find needy and deserving families who live in a home which does not serve their needs. The Program takes the selected families' existing homes and land and radically improves them by demolishing and rebuilding the home."

Over the next several months, there were additional contacts between petitioners and persons affiliated with the production of the program, including in-person interviews and the filming of a casting tape. By early 2005, petitioners and the Leomitis were chosen to participate in the program in which the Leomitis' home would be completely renovated.

On February 1, 2005, a Lock and Key producer sent by Federal Express to each of the petitioners and to the Leomitis an "Agreement and Release" for their signatures.[2] The Agreement and Release contains 24 single-spaced pages and 72 numbered paragraphs. Attached to it were several pages of exhibits, including an authorization for release of medical information, an emergency medical release, and, as Exhibit C, a one-page document entitled "Release." To avoid confusion with the one-page Exhibit C Release, we refer to the 24–page Agreement and Release simply as the "Agreement," and to Exhibit C as the "Release."

At the top of the first page of the Agreement, the following appears in large and underlined print: "NOTE: DO NOT SIGN THIS UNTIL YOU HAVE READ IT COMPLETELY." The second-to-last numbered paragraph also states in pertinent part: "I have been given ample opportunity to read, and I have carefully read, this entire agreement.... I certify that I have made such an investigation of the facts pertinent to this Agreement and of all the matters pertaining thereto as I have deemed necessary.... I represent and warrant that I have reviewed this document with my own legal counsel prior to signing (or, IN THE ALTERNATIVE, although I have been given a reasonable opportunity to discuss this Agreement with counsel of my choice, I have voluntarily declined such opportunity)."

The last section of the Agreement, which includes 12 numbered paragraphs, is entitled "MISCELLANEOUS." None of the paragraphs in that section contains a heading or title. Paragraph 69 contains the following arbitration provision:

> 69. I agree that any and all disputes or controversies arising under this Agreement or any of its terms, any effort by any party to enforce, interpret, construe, rescind, terminate or annul this Agreement, or any provision thereof, and any and all disputes or controversies relating to my appearance or participation in the Program, shall be resolved by binding arbitration in accordance with the following procedure. . . . All arbitration proceedings shall be conducted under the auspices of the American Arbitration Association. . . .

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[2] The version of the agreement intended for the three minor petitioners was slightly different than the one intended for the two adult petitioners and the Leomitis. The slight variations between the two versions are not relevant to the issue before us. In this opinion, we quote from, and cite to, the adult version.

> I agree that the arbitrator's ruling, or arbitrators' ruling, as applicable, shall be final and binding and not subject to appeal or challenge. . . . The parties hereto agree that, notwithstanding the provisions of this paragraph, Producer shall have a right to injunctive or other equitable relief as provided for in California Code of Civil Procedure [section] 1281.8 or other relevant laws.

There is nothing in the Agreement that brings the reader's attention to the arbitration provision. Although a different font is used occasionally to highlight certain terms in the Agreement, that is not the case with the paragraph containing the arbitration provision.[4] Six paragraphs in the Agreement contain a box for the petitioners to initial; initialing is not required for the arbitration provision.

The Agreement also contains a provision limiting petitioners' remedies for breach of the Agreement to money damages.

The one-page Release is typed in a smaller font than the Agreement. It consists of four single-spaced paragraphs, the middle of which contains the following arbitration clause:

> I agree that any and all disputes or controversies arising under this Release or any of its terms, any effort by any party to enforce, interpret, construe, rescind, terminate or annul this Release, or any provision thereof, shall be resolved exclusively by binding arbitration before a single, neutral arbitrator, who shall be a retired judge of a state or federal court. All arbitration proceedings shall be conducted under the auspices of the American Arbitration Association, under its Commercial Arbitration Rules, through its Los Angeles, California office. I agree that the arbitration proceedings, testimony, discovery and documents filed in the course of such proceedings, including the fact that the arbitration is being conducted, will be treated as confidential....

There is no evidence that any discussions took place between petitioners and any representative of the television defendants regarding either the Agreement or the Release, or that any of the television defendants directly imposed any deadline by which petitioners were required to execute the documents.

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[4] Three other paragraphs in the Agreement are printed in bold and capitalized letters, substantial portions of four other paragraphs are printed in bold letters, and a few words in other paragraphs are printed in bold or capitalized letters.

On February 5, 2005, a field producer from Lock and Key and a location manager for the program went to the Leomitis' home and met with the Leomitis. Although physically present at the house, petitioners did not participate in the meeting. During the meeting, one of the Leomitis asked about the documents they had received, and the producer and location manager advised the Leomitis that they should read the documents carefully, call if they had questions, and then execute and return the documents.

According to Charles, after this meeting, the Leomitis emerged with a packet of documents, which they handed to petitioners. Mrs. Leomiti instructed petitioners to "flip through the pages and sign and initial the document where it contained a signature line or box." Charles stated that from the time Mrs. Leomiti "handed the document to us and the time we signed it, approximately five to ten minutes passed." The document contained complex legal terms that he did not understand. He did not know what an arbitration agreement was and did not understand its significance or the legal consequences that could flow from signing it. He did not specifically state whether or not he saw the arbitration provisions contained either in paragraph 69 or the Release before he signed the documents.

Each of the petitioners executed the Agreement and signed all exhibits, including the Release.

On February 16, 2005, representatives from the show appeared and started to reconstruct the Leomitis' home. When the new home was completed, it had nine bedrooms, including one for each of the five petitioners. The existing mortgage was also paid off.

The program featuring petitioners and the Leomitis was broadcast on Easter Sunday, 2005.

Petitioners allege that, after the show was first broadcast, the Leomitis informed petitioners that the home was theirs (the Leomitis'), and the Leomitis ultimately forced petitioners to leave. Charles contacted Lock and Key's field producer and asked for help. The producer responded that he could not assist petitioners. Sometime thereafter, the Extreme Makeover episode was rebroadcast.

In August 2005, petitioners filed this action against the television defendants and the Leomitis. According to the record before us, the complaint includes claims for, among other things, intentional and negligent misrepresentation, breach of contract, unfair competition, and false advertising. With respect to the television defendants, the complaint appears to allege that those defendants breached promises to provide petitioners with a home, exploited petitioners, and portrayed petitioners in a false light (by rebroadcasting the episode when they knew the episode no longer reflected petitioners' living situation).

The television defendants petitioned to compel arbitration pursuant to the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.). The television defendants maintained that all claims against both them and the Leomitis should be arbitrated. The Leomitis joined in the petition. . . . .

Petitioners opposed the petition, claiming, among other things, that the arbitration provision was unconscionable. They claimed it was procedurally unconscionable because the parties had unequal bargaining power, the arbitration provision was "buried" in the Agreement, petitioners were given only five to ten minutes before they were asked to sign the Agreement, none of the television defendants explained the Agreement to them, and copies of the executed documents were "withheld" from them.[6]

Petitioners also argued the Agreement was substantively unconscionable because its terms were so one-sided as to shock the conscience. They claimed the Agreement requires only them and not the television defendants to arbitrate, limits petitioners' remedies to damages (while the television defendants' remedies are not so limited), precludes only petitioners from appealing, provides that the arbitration will be in accordance with the rules of the American Arbitration Association (which unfairly requires arbitration costs to be borne equally by the parties), and allows the television defendants to change the terms of the Agreement at any time.

After argument, the trial court issued an order granting the petition in most respects, conditioned on the television defendants' paying all arbitration costs. . . . The court reasoned that although petitioners "argue that the 'arbitration agreements' are … unenforceable". . . , their argument is directed not at the arbitration provisions but at the releases themselves."[7] The court then cited United States and California Supreme Court decisions holding that under the FAA, where a party seeks to avoid application of an arbitration provision on the ground that the agreement in which the provision it is contained is unenforceable, that claim must be considered by the arbitrator, not the court. The trial court also stated that "since defendants have shown that plaintiffs signed the releases having had an opportunity to read them, the arbitration provisions are found by this court to be enforceable." The court did not address petitioners' other specific claims of unconscionability, presumably because it construed petitioners' opposition to the petition to compel arbitration as an attack only on the entire

[6] There is no evidence that anyone refused to give petitioners a copy of the Agreement. The withholding claim appears to be based on the fact that petitioners did not receive an additional copy of the Agreement, either before or after signing it.

[7] The court's use of the term "releases" appears to refer to the Agreement. . . .

Agreement and one-page Release, not on the arbitration provisions contained in those documents.

Petitioners then filed this writ petition challenging the trial court's ruling. We issued an alternative writ, received additional briefing from the parties, and heard oral argument.

Discussion

A. Unconscionability as a Defense to Enforcement of Arbitration Provisions

The trial court ruled, and petitioners do not dispute, that the enforceability of the arbitration clause is governed by the FAA. Federal law applies to arbitration provisions in contracts involving interstate commerce . . . . Numerous cases observe that arbitration is generally favored under both the FAA and California law. . . . At the same time, our Supreme Court has emphasized that "although we have spoken of a 'strong public policy of this state in favor of resolving disputes by arbitration' [citation], Code of Civil Procedure section 1281 makes clear that an arbitration agreement is to be rescinded on the same grounds as other contracts or contract terms. In this respect, arbitration agreements are neither favored nor disfavored, but simply placed on an equal footing with other contracts." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 126–127, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (*Armendariz*) . . . . Thus, under both the FAA and California law, "arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (*Armendariz, supra*, 24 Cal. 4th at p. 98, 99 Cal. Rptr. 2d 745, 6 P.3d 669, fn. omitted.)

One ground is unconscionability, the basis asserted by petitioners below and in this writ proceeding. (See *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal. App. 4th 846, 856, 113 Cal. Rptr. 2d 376.) "The 'strong public policy of this state in favor of resolving disputes by arbitration' does not extend to an arbitration agreement permeated by unconscionability". (*Ibid.*) As is frequently the case with inquiries into unconscionability, our analysis begins—although it does end—with whether the Agreement and Release are contracts of adhesion. . . . Petitioners contend that they are and that the arbitration provisions are unconscionable. A contract of adhesion is a standardized contract that is imposed and drafted by the party of superior bargaining strength and relegates to the other party " 'only the opportunity to adhere to the contract or reject it.' " (*Ibid.*, quoting *Neal v. State Farm Ins. Cos.* (1961) 188 Cal. App.2d 690, 694, 10 Cal. Rptr. 781.) Adhesion contracts are routine in modern day commerce, and at least one commentator has suggested they are worthy of neither praise nor condemnation, only analysis. (1 Corbin on Contracts (1993) § 1.4, p. 14.) If a court finds a contract to be

adhesive, it must then determine whether " 'other factors are present which, under established legal rules—legislative or judicial—operate to render it' " unenforceable. (*Armendariz*, at p. 113, 99 Cal. Rptr.2d 745, 6 P.3d 669, citing *Graham v. Scissor–Tail, Inc.* (1981) 28 Cal. 3d 807, 820, 171 Cal. Rptr. 604, 623 P.2d 165 (*Graham*).)

One "established rule" is that a court need not enforce an adhesion contract that is unconscionable. (*Graham*, *supra*, 28 Cal. 3d at p. 820, 171 Cal. Rptr. 604, 623 P.2d 165.) As our Supreme Court explained in *Armendariz*, the Legislature has now codified the principle, historically developed in case law, that a court may refuse to enforce an unconscionable provision in a contract. (Code Civ. Proc., § 1670.5.)[8] Because defenses to arbitration provisions under the FAA are on equal footing with defenses to any other contract, unconscionability is neither favored nor disfavored as a reason to refuse enforcement of an arbitration clause. . . .

Recent appellate decisions have focused more on what is unconscionable and less on what is adhesive. (See *Trend Homes, Inc. v. Superior Court* (2005) 131 Cal. App. 4th 950, 958, 32 Cal. Rptr.3d 411 . . . *Harper v. Ultimo* (2003) 113 Cal. App.4th 1402, 1409, 7 Cal. Rptr. 3d 418 ["Adhesion is not a prerequisite for unconscionability"].)

Unconscionability has both a procedural and a substantive element, the former focusing on "oppression" or "surprise" due to unequal bargaining power, the latter on "overly harsh" or "one-sided" results. (*Armendariz*, *supra*, 24 Cal. 4th at p. 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669.) "'The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.' [Citation.] But they need not be present in the same degree. 'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Ibid*.). . . .

B. The Standard of Review

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[8] Civil Code section 1670.5, subdivision (a), provides: "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."

. . . Whether an arbitration provision is unconscionable is ultimately a question of law. (*Flores v. Transamerica HomeFirst, Inc.*, *supra*, 93 Cal. App. 4th at p. 851, 113 Cal. Rptr. 2d 376; see also Civ. Code, § 1670.5.) Where, as here, the trial court rules on the question of unconscionability based on declarations that contain no meaningful factual disputes, we review the trial court's ruling de novo. . . . .

D. The Arbitration Provision Is Unconscionable

1. The Adhesive Nature of the Parties' Agreement

We begin with whether the parties' agreement was adhesive. (See *Armendariz*, *supra*, 24 Cal. 4th at p. 113, 99 Cal. Rptr. 2d 745, 6 P.3d 669.) As discussed above, "'[t]he term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' " (*Ibid.*)

In this case, it is undisputed that the lengthy Agreement was drafted by the television defendants. It is a standardized contract; none of the petitioners' names or other identifying information is included in the body of the document. There is no serious doubt that the television defendants had far more bargaining power than petitioners.

The remaining question is whether petitioners were relegated only to signing or rejecting the Agreement. The television defendants note that there is no evidence petitioners were told they could not negotiate any terms of the Agreement or that petitioners made any attempt to do so. Although literally correct, the uncontested evidence was that on the day petitioners signed the Agreement the television defendants initially met with the Leometis [sic] alone. Inferentially, at the television defendants' urging, immediately after the meeting concluded, the Leomitis gave the Agreement and exhibits to petitioners with directions to "flip through the pages and sign." The documents were returned in five to ten minutes. One of the producers testified that he told the Leomitis "that these agreements must be executed as a condition to their further participation in the program."

From these facts, we conclude the Agreement was presented to petitioners on a take-it-or-leave-it basis by the party with the superior bargaining position who was not willing to engage in negotiations. Accordingly, we conclude the Agreement and exhibits constitute a contract of adhesion.

2. Procedural Unconscionability

"Procedural unconscionability focuses on the factors of surprise and oppression [citations], with surprise being a function of the disappointed reasonable expectations of the weaker party." (*Harper v. Ultimo*, *supra*, 113 Cal. App.4th at p. 1406, 7 Cal. Rptr.3d 418.)

In this case, the arbitration provision appears in one paragraph near the end of a lengthy, single-spaced document. The entire agreement was drafted by the television defendants, who transmitted copies of it to the petitioners. The television defendants knew petitioners were young and unsophisticated, and had recently lost both parents. Indeed, it was petitioners' vulnerability that made them so attractive to the television defendants. The latter made no effort to highlight the presence of the arbitration provision in the Agreement. It was one of 12 numbered paragraphs in a section entitled "miscellaneous." In contrast to several other paragraphs, no text in the arbitration provision is highlighted. No words are printed in bold letters or larger font; nor are they capitalized. Although petitioners were required to place their initials in boxes adjacent to six other paragraphs, no box appeared next to the arbitration provision.

It is true that the top of the first page advises petitioners to read the entire agreement before signing it and the second-to-last paragraph states that the person signing acknowledges doing so. This language, although relevant to our inquiry, does not defeat the otherwise strong showing of procedural unconscionability.

We now turn to substantive unconscionability, utilizing our Supreme Court's sliding scale approach. (See *Armendariz*, *supra*, 24 Cal. 4th at p. 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669.) Procedural and substantive unconscionability "need not be present in the same degree. 'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' [Citations.]" (*Ibid.*)

3. Substantive Unconscionability

"Substantively unconscionable terms may 'generally be described as unfairly one-sided.' [Citation.] For example, an agreement may lack 'a modicum of bilaterality' and therefore be unconscionable if the agreement requires 'arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party.' " (*Fitz v. NCR Corp.* (2004) 118 Cal. App. 4th 702, 713, 13 Cal. Rptr. 3d 88, quoting *Armendariz*, *supra*, 24 Cal. 4th at p. 119, 99 Cal. Rptr. 2d 745, 6 P.3d 669.)

In this case, the arbitration provision requires only petitioners to submit their claims to arbitration. The clause repeatedly includes "I agree" language, with the "I" being a reference to the "applicant" (i.e., each of the petitioners). The only time the phrase "the parties" is used is in the last sentence, where "the parties" agree that, notwithstanding the arbitration provision, the producer has the right to seek injunctive or other equitable relief in a court of law as provided for in Code of Civil Procedure section 1281.1 or other relevant laws.

The television defendants claim that the arbitration provision is bilateral, because "all disputes or controversies arising under this Agreement or any of its terms, any effort by any party to enforce . . . this Agreement . . . and any and all disputes or controversies relating to my appearance or participation in the Program, shall be resolved by binding arbitration." (¶ 69.) Thus, "all disputes" are subject to arbitration, and either side may move to compel. But they miss the point: only one side (petitioners) agreed to that clause.[11]

[The court rejects the argument that the television defendants' contractual right to seek injunctive relief shows that they are required to arbitrate.] Under the arbitration provision, the television defendants (though not petitioners) can compel arbitration. The injunction clause is significant because the television defendants can compel arbitration without fearing that doing so would preclude them from seeking injunctive or other equitable relief in a court of record.[12]

Additional elements of substantive unconscionability are found in the provision barring only petitioners from seeking appellate review of the arbitrator's decision and, at least insofar as it could impact petitioners' statutory claims, the provision requiring arbitration in accordance with the rules of the American Arbitration Association, which provide that arbitration costs are to be borne equally by the parties. . . . [13] The harsh, one-sided nature of the arbitration provision, combined with the elements of procedural unconscionability earlier discussed, leads us to conclude that the arbitration provision is unconscionable and, therefore,

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[11] Interestingly, petitioners claim the television defendants did not even sign the Agreement until after the motion to compel arbitration was filed, a point not disputed by the television defendants.

[12] The fact that the injunction provision is one-sided does not necessarily mean that the clause is substantively unconscionable. A "contracting party with superior bargaining strength may provide 'extra protection' for itself within the terms of the arbitration agreement if 'business realities' create a special need for the advantage. [Citation.] The 'business realities,' creating the special need, must be explained in the terms of the contract or factually established." (*Fitz v. NCR Corp.*, *supra*, 118 Cal. App. 4th at p. 723, 13 Cal. Rptr. 3d 88.) We observe that although the television defendants explained why it was important to deny petitioners injunctive relief, they did not attempt to explain why they needed such remedy.

[13] As noted above, the trial court shifted all arbitration costs to the television defendants. (See *Gutierrez v. Autowest, Inc.* (2003) 114 Cal. App. 4th 77, 92–93, 7 Cal. Rptr. 3d 267 [unconscionable requirement for payment of arbitration costs may be severed].)

unenforceable.[14] Accordingly, it was error for the trial court to have granted the petition to compel arbitration.

DISPOSITION

The petition for writ of mandate is granted. . . .

Notes and Questions

1. Why do you think the defendants in *Higgins* fought to arbitrate this case while the plaintiffs preferred to litigate before a court?

2. Which facts proved especially significant in the court's analysis? Can you identify which facts were most significant with respect to each of the procedural and substantive unconscionability prong? What is the significance for the court of the fact that only one side could compel arbitration under the agreement?

3. What role does the fact of an adhesive contract play with respect to a determination of unconscionability? What was the significance for the court of the fact that the orphaned petitioners in Higgins were directed to "flip through the pages and sign" and did so in a matter of minutes? Is it relevant that there is no evidence in the case that they attempted to negotiate or that anyone told them not to bother? What do you make of the warning in the Agreement "in large and underlined print" not to sign until reading the Agreement completely along with the certification that the signers have reviewed this document with their "own legal counsel prior to signing…or… have voluntarily declined such opportunity"? How did the court treat these facts?

4. The court points to the factor of "surprise," as a "function of the disappointed reasonable expectations of the weaker party," and to the fact that the arbitration provision was buried at the end of a "lengthy, single spaced document" with no bolding or highlights and, unlike other provisions, no requirement that the parties initial the terms. If the petitioners had been told explicitly of the arbitration provision, without further explanation of the process, the rules of arbitration, and the implications with

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[14] We disagree with petitioners' argument that the producer's right to change program rules unilaterally means the arbitration agreement is not bilateral. There is nothing to suggest a change in how the program is structured materially affects the parties' arbitration rights and duties.

respect to transparency, appeal, and recourse for harm, do you think that would have significantly altered their expectations?

5. Compare this scenario with the case of *Hicks v. Mission Bay Mgmt. LLC*, No. D058683, 2011 WL 5967290, at *1 (Cal. Ct. App. Nov. 30, 2011). In Hicks, the court declined to find an arbitration provision unconscionable notwithstanding the fact that the employee had been given a letter that outlined the offer of employment with no mention of arbitration. The letter stated, "Your acceptance of this letter and the terms stated herein affirms that there are no other agreements, nor other information upon which you are relying in making your decision." To accept the job, the employee sold her belongings and rented an apartment in a new state, after which she received an employment application that contained a mandatory arbitration provision and a provision stating, "I further understand I have the opportunity and right to consult counsel prior to executing this document." The court found that the employee's "particular circumstances compel a finding of adhesion and heighted procedural unconscionability" but the court found insufficient evidence of substantive unconscionability in this case.

6. How do the facts of these cases compare to the experience of entering an online consumer contract, such as registering for a service or purchasing a product by clicking on a button that includes a hyperlinked notice along the lines of "I agree to the terms"?

7. Unconscionability tends to be hard to establish, especially where courts find formal notice and an opportunity to read. In the context of online consumer contracts, courts accept formal notice such as visible "terms and conditions" to satisfy the procedural prong, even though it is widely accepted that consumers don't read terms and cannot negotiate them. Scholars have expressed concern about the possibility that companies take advantage of this format to include more aggressive terms, *see* NANCY KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS (2013). But, courts do not tend to scrutinize the substance of the terms in this context. Instead, courts tend to focus on the conspicuousness of the notice, finding inquiry notice when a party has "actual notice of circumstances . . . such that a reasonable person" would be on notice as to the existence of terms. *See, e.g.*, *Soliman v. Subway Franchisee Advertising Fund Trust, Ltd.*, 999 F.3d 828, 834 (2d Cir. 2021).

8. In *McFarlane v. Altice USA, Inc.*, 524 F. Supp.3d 264 (S.D.N.Y. 2021), a cable service provider was sued in a class action brought by its employees for negligence and other claims in connection with a security breach. The cable provider sought to compel

arbitration against employees who were also cable service subscribers pursuant to a broadly worded arbitration provision in the cable service agreement. The arbitration provision in the cable service contract purported to cover "[a]ny and all disputes arising" between the cable service customer and Altice [the cable provider], as well as "Altice's parents, subsidiaries, affiliates, agents, successors, and so on—without meaningful exception and for all eternity." *Id.* at 275. As such, the provision took the form of what Professor David Horton has called an "infinite arbitration clause" (*see* David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633, 639-40 (2020)), which, if enforced as written, would, in the court's words, "seem to mandate arbitration of any claim between the parties, including those without any nexus whatsoever to the agreement containing the clause." Noting the "relative novelty" of such a provision, the district court held that as a "matter of general unconscionability doctrine, the Arbitration Provision must be construed to apply only to claims that have some nexus to the contract of which it was part." *McFarlane*, 524. F. Supp.3d at 278. The court noted that "[u]nder New York law, '[a]n unconscionable contract has been defined as one which is so grossly unreasonable or unconscionable in light of the mores and business practices of the time and place as to be unenforceable according to its literal terms," *id.* at 277. The court, however, refrained from engaging in an analysis of the procedural and substantive prongs of the doctrine of unconscionability. How might you apply the prongs to these circumstances?

9. This decision does not stop other companies from trying similar tactics. In 2024, Jeffrey Piccolo sued Disney for the death of his wife in the company's theme park. Disney filed a motion to compel arbitration, arguing that Piccolo agreed to a mandatory arbitration provision regarding any dispute with Disney when he signed up for a one-month trial subscription to Disney+ in 2019. After a widespread public outcry, Disney backed down and withdrew its motion. *See* Rachel Treisman, *Disney backtracks on request to toss wrongful death suit over Disney+ agreement*, NPR (Aug. 20, 2024), https://www.npr.org/2024/08/14/nx-s1-5074830/disney-wrongful-death-lawsuit-disney.

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As noted, the proliferation of arbitration agreements has piqued concern among scholars and advocates, primarily because arbitration is widely used to deprive people of the ability to seek redress from harm. *See, e.g.*, J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015); Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. TIMES: DEALBOOK (Nov. 1, 2015).

More recently, attorneys have innovated on the plaintiffs' side. By bringing thousands of individual arbitration claims against a single defendant company, which result in exorbitant filing fees for the company, plaintiffs' lawyers have succeeded in pressuring companies to settle. *See* J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283 (2022). As a result, some companies have abandoned arbitration provisions, while others continue to innovate to preclude those so-called "mass arbitration" initiatives by plaintiffs. Arbitral institutions also responded by changing their filling structures in an attempt to account for those initiatives.

A common response to the rise of mass arbitration is the introduction of bellwether provisions in arbitration agreements. These provisions mandate that a small selection of cases (usually between 20 to 50) be arbitrated first while the remaining claims are temporarily paused. The enforceability of bellwether provisions is questionable and is being litigated in multiple jurisdictions. *See, e.g.*, *MacClelland v. Cellco P'ship*, 609 F. Supp. 3d 1024 (N.D. Cal. 2022) (holding Verizon's arbitration agreement unconscionable because it might place some plaintiffs on hold for decades); *McGrath v. DoorDash, Inc.*, No. 19-CV-05279-EMC, 2020 WL 6526129 (N.D. Cal. Nov. 5, 2020) (enforcing DoorDash's bellwether provision because it allows plaintiffs to opt out of arbitration once the first group of cases are resolved by the arbitrator). *See* J. Maria Glover, *Recent Developments in Mandatory Arbitration Warfare: Winners and Losers (So Far) in Mass Arbitration*, 100 WASH. U.L. REV. 1617 (2023); David Horton, *Forced Arbitration in the Fortune 500*, 109 MINN. L. REV. (forthcoming 2025).

Mandatory arbitration provisions have been identified as especially common in long-term care, nursing and assisted living facilities. *See* Paula Span, *Arbitration Has Come to Senior Living. You Don't Have to Sign Up*, N.Y. TIMES (Sept. 24, 2022). As the *New York Times* reports, advocates for the aged point to the fact that arbitrators view the institutions as repeat players; as a result, arbitrators may be incentivized to side with these institutions and generally may prove less sympathetic to facility residents. Moreover, a 2019 Stanford Business School study found that companies, as repeat players, choose arbitrators more favorable to businesses. *Id.* Arbitration is also not appealable and often takes place behind closed doors. Nursing home contracts may include a confidentiality provision, as well, depriving an individual of a chance to make public the harm they have experienced at the hands of a counterparty.

The following case applies the two pronged analysis to the context of a nursing-home contract.

Kohlman v. Grane Healthcare Co.

279 A.3d 42 (Superior Court of Pennsylvania 2022)

COLINS, J.:

Highland Park Care Center, LLC, . . . Grane Healthcare Company . . . (collectively, the Highland Park Defendants) appeal from the order of the Court of Common Pleas of Allegheny County (trial court) overruling their preliminary objection that sought to compel arbitration of claims asserted against them by Debra Kohlman (Plaintiff), Administratrix of the Estate of Fay A. Vincent (Decedent). For the reasons set forth below, we affirm.

This action arises out of Decedent's 2017 admission to and stay at Highland Park, a skilled nursing home facility in Pittsburgh. On January 30, 2017, Decedent was discharged from a Pittsburgh hospital and was admitted to Highland Park for care and rehabilitation. . . . . At the time of her admission, Decedent was 67 years old and was suffering from a number of conditions, including congestive heart failure, diabetes, and pressure ulcers. . . . . Highland Park's assessment of Decedent's condition at the time of her admission reported that she was alert and oriented and had no memory problems or dementia, but that she was also suffering from anxiety and sometimes had trouble concentrating. Highland Park Resident Assessment and Care Screening at 7-10, 22-23. Highland Park's assessment also reported that Decedent's vision was impaired to the point that even with glasses, she was "not able to see newspaper headlines but can identify objects" and listed as one of her diagnoses "[b]lindness, both eyes." *Id.* at 6, 23. Highland Park's assessment reported that Decedent expressed that it was very important to her to have her family or a close friend involved in discussions about her care. *Id.* at 13.

In connection with her admission to Highland Park, Decedent signed a number of documents, including a seven-page Nursing Services Agreement, a two-page Agreement to Arbitrate Disputes (the Arbitration Agreement), and a Resident Representative Agreement concerning the handling of her finances, in which Decedent designated herself as her representative. . . . The Arbitration Agreement provided:

> **PLEASE READ CAREFULLY, YOU ARE GIVING UP YOUR RIGHT TO SUE [HIGHLAND PARK] IN COURT**
>
> Resident and [Highland Park] agree that all matters in dispute between Resident and [Highland Park], its agents, servants, employees, officers, contractors and affiliates (hereinafter "the parties"), including but not limited to claims for personal injuries or any controversy or claim between the parties arising out of

or relating to the agreement for admission and for the provision of nursing facility services, whether by virtue of contract, tort or otherwise, including the scope of this arbitration agreement and the arbitrability of any claim or dispute shall be resolved exclusively by binding arbitration. Such arbitration shall be conducted in the county in which [Highland Park] is located and in accordance with the terms of this Agreement and the Pennsylvania Uniform Arbitration Act, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

To the extent the parties can agree upon a single, neutral arbitrator, that single arbitrator shall hear and decide the controversy. To the extent the parties cannot agree on a single arbitrator, any party may request one to be appointed by the court. The parties shall be entitled to limited discovery, the manner and scope of which shall be governed by the arbitrator.

The parties agree that any administrative fees and costs, including the fees of the arbitrator, shall be split equally between the parties, and that each party shall be responsible for their own attorneys' fees.

In the event a court having jurisdiction finds any portion of this agreement unenforceable, then that portion shall not be effective and the remainder of the agreement shall remain effective.

Resident retains all rights under federal and state law to file grievances with or to complain to authorities or advocacy groups concerning care and treatment

This agreement binds all persons whose claims may arise out of or relate to treatment or service provided by [Highland Park] or whose claim is derived through or on behalf of the Resident including any spouse, parent, sibling, child, guardian, executor, legal representative, administrator, heir, or survivor of the Resident, as well as anyone entitled to bring a wrongful death claim relating to the Resident. This agreement applies to [Highland Park's] agents, servants, employees, officers, contractors and affiliates.

The parties understand that as a result of this arbitration agreement, any claims that the parties may have against the other cannot be brought as a lawsuit in court before a judge or jury, and agree that all such claims will be resolved as described in this agreement.

> Resident understands that he/she has the right to consult legal counsel concerning this arbitration agreement; that execution of this arbitration agreement is not a condition of admission or to the furnishing of services to Resident by [Highland Park]; and that this arbitration agreement may be rescinded by written notice delivered to [Highland Park] within ten (10) days of signature. If not rescinded within ten (10) days, this agreement shall remain in effect for all subsequent stays at [Highland Park], even if Resident is discharged and readmitted to [Highland Park].
>
> The undersigned certifies that he/she has read this arbitration agreement and that it has been fully explained to him/her, that he/she understands its contents, and that he/she is the Resident or a person duly authorized by the Resident or otherwise to execute this agreement and accept its terms.

Arbitration Agreement, 2/1/17 (emphasis in original). Decedent and Highland Park's admissions director both signed the Arbitration Agreement and the admissions director printed their names and dated it. *Id.* at 2 . . . .

Decedent died approximately three months after she was admitted to Highland Park. . . . . On August 27, 2018, Plaintiff, who is Decedent's daughter, filed this negligence action against the Highland Park Defendants, a hospital that had treated her, and the hospital's affiliates asserting survival and wrongful death claims. The Highland Park Defendants filed preliminary objections that sought, *inter alia*, to compel arbitration of Plaintiff's claims. By order entered on January 8, 2019, the trial court denied Highland Park Defendants' preliminary objection to compel arbitration. The Highland Park Defendants appealed this order and the trial court issued an opinion in which it concluded that . . . arbitration of the survival claims could not be required because the Arbitration Agreement was unconscionable. Trial Court Opinion, 3/13/19, at 2-4. The trial court based its conclusion that the Arbitration Agreement was unconscionable on Decedent's condition when she signed it coupled with the requirement that she pay half of the costs of arbitration, which the trial court characterized as an "overreach." *Id.* at 4.

On February 10, 2020, this Court . . . held with respect to the survival claims that the record was inadequate to determine whether the Arbitration Agreement was unconscionable. *Kohlman I*. This Court accordingly vacated the trial court's denial of arbitration with respect to the survival claims and remanded the case for discovery and further proceedings to address, *inter alia*, the following:

• [D]ecedent's physical and mental state at the time that she executed the Arbitration Agreement;

• whether [D]ecedent was accompanied by anyone at this time;

• the nature of the admission agreement that [D]ecedent executed (and whether the Arbitration Agreement was part of, or buried within, a potentially lengthy admissions packet that [D]ecedent was required to complete, while in ill health);

• whether the Hospital sent the ill [D]ecedent directly to Highland Park upon her discharge from the Hospital;

• whether [D]ecedent was aware that she could receive treatment from other skilled nursing care facilities, and whether she had the ability to research other options;

• whether [D]ecedent was economically constrained to enter into an agreement with Highland Park to provide her care (and relatedly, whether she had the means to pay for arbitration).

Id. at 927 (footnote omitted).

On remand, . . . the trial court reaffirmed its conclusion that the Arbitration Agreement was unconscionable and again overruled the Highland Park Defendants' preliminary objection to compel arbitration. Trial Court Order, 11/30/20; Trial Court Opinion, 11/30/20, at 6. With respect to the specific issues raised by this Court, the trial court found that Decedent was not incompetent, but was not well and was in severe pain and medicated at the time that she signed the Arbitration Agreement. *Id.* at 4. The trial court found that Decedent was alone when she was asked to sign the Arbitration Agreement, that Decedent was not given a chance to read the Arbitration Agreement and other admission documents before signing, that Decedent was not given a copy of the Arbitration Agreement after she signed, even though it permitted her to rescind within ten days, and that the admissions director did not read or explain to Decedent all of Arbitration Agreement's provisions. *Id.* at 4-5. The trial court also found that Decedent was transferred directly from the hospital to Highland Park and that it was more likely than not that she did not have awareness of ability to research other nursing care options and concluded that Decedent's financial condition was irrelevant to whether the Arbitration Agreement was unconscionable. *Id.* at 5.

The Highland Park Defendants again timely appealed the trial court's denial of arbitration. . . . .

Our review of a decision denying preliminary objections to compel arbitration is limited to determining whether the court's findings are supported by substantial evidence and whether the court abused its discretion in denying arbitration. . . . Interpretation of the parties' contract is a question of law as to which our review is *de novo* and plenary. *Traver v. Reliant Senior Care Holdings, Inc.*, 228 A.3d 280, 285 (Pa. Super. 2020). The issue of unconscionability is a question of law, but can turn on factual determinations. *Salley v. Option One Mortgage Corp.*, 592 Pa. 323, 925 A.2d 115, 124 (2007) . . . .

Both Pennsylvania and federal law impose a strong public policy in favor of enforcing arbitration agreements. *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 532-33, 132 S. Ct. 1201, 182 L. Ed.2d 42 (2012); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983); *In re Estate of Atkinson*, 231 A.3d 891, 898 (Pa. Super. 2020); *Cardinal*, 155 A.3d at 52. Under the Federal Arbitration Act, 9 U.S.C. § 2, our courts are required to compel arbitration of claims that are subject to a valid arbitration agreement. *Taylor v. Extendicare Health Facilities, Inc.*, 637 Pa. 163, 147 A.3d 490, 509 (2016); *Estate of Atkinson*, 231 A.3d at 900; *Kohlman I*, 228 A.3d at 925. Enforcement of an agreement to arbitrate may be denied only where the party opposing arbitration proves that a contract defense that applies equally to non-arbitration contracts invalidates the agreement to arbitrate. *Taylor*, 147 A.3d at 509; *Kohlman I*, 228 A.3d at 925-26; *Saltzman*, 166 A.3d at 471. . . .

The only contract defense that the trial court found applicable to the Arbitration Agreement was the defense of unconscionability. To invalidate or bar enforcement of a contract based on unconscionability, the party challenging the contract must show both an absence of meaningful choice, also referred to as procedural unconscionability, and contract terms that are unreasonably favorable to the other party, known as substantive unconscionability. *Salley*, 925 A.2d at 119-20; *Cardinal*, 155 A.3d at 53; *MacPherson v. Magee Memorial Hospital for Convalescence*, 128 A.3d 1209, 1221 (Pa. Super. 2015). Procedural and substantive unconscionability are assessed under a sliding-scale approach, with a lesser degree of substantive unconscionability required where the procedural unconscionability is very high. *Salley*, 925 A.2d at 125 n.12; *Lomax v. Care One, LLC*, No. 344 WDA 2020, at 8-9, 18, 2021 WL 841041 (Pa. Super. March 5, 2021) (unpublished memorandum).

The Highland Park Defendants argue that the trial court erred in finding the Arbitration Agreement unconscionable because Plaintiff did not prove that the Arbitration Agreement was both procedurally and substantively unconscionable. We do not agree.

The trial court found that the Arbitration Agreement was procedurally unconscionable because Decedent was in pain and was medicated at the time that she signed the Arbitration

Agreement, Decedent was alone when she was asked to sign the Arbitration Agreement, had no opportunity to read the Arbitration Agreement and was not given a copy to review, and the provisions of the Arbitration Agreement were not fully read or explained to Decedent. Trial Court Opinion, 11/30/20, at 4-5. The record supports these determinations.

Decedent's medical records show that she was receiving Oxycodone and Xanax from the day that she was admitted to Highland Park through February 1, 2021. Highland Park Progress Notes, 1/30/17-2/1/17. The admissions director testified that no one else was with Decedent when she obtained Decedent's signatures on the Arbitration Agreement and other documents in the admissions packet. Blasco Dep. at 34. The admissions director did not recall what she and Decedent said or discussed when she presented the Arbitration Agreement and other admissions documents to Decedent for signing and testified to what she generally does with all residents. *Id.* at 32-37, 57-61, 64. The admissions director testified that when she has residents sign the admissions documents, "I usually just sit beside them and go over the paperwork and read -- I guess you can say that I read it to them." *Id.* at 36. The admissions director testified that residents can remain at Highland Park even if they refuse to sign any of the admissions documents and that she tells residents that the whole admission packet is optional, but that she does not tell them that they can sign the other documents and refuse the arbitration agreement. *Id.* at 37-38, 55-56. The admissions director testified that while she can recall residents refusing to sign any of the documents, she does not recall any resident ever refusing only the arbitration agreement or seeking to revoke an arbitration agreement. *Id.* at 27-28, 40, 53. The admissions director testified that she did not tell Decedent that she could consult an attorney before signing the Arbitration Agreement and that she has never told any resident that the resident has a right to revoke the agreement to arbitrate after signing. *Id.* at 38, 40. . . . The admissions director did not testify that she gave Decedent a copy of any of the documents that she had Decedent sign or told her to have a family member or any other person read over the paper work for her.

The incompleteness of the information that was orally provided to Decedent and the fact that Decedent had no family member with her and was not given a copy for a family member to review are particularly significant here given Decedent's physical inability to read the Arbitration Agreement and other documents that she was signing. The record shows that when she arrived at Highland Park, Decedent was sufficiently blind that she was unable to even read newspaper headlines. . . . The admissions director did not testify that she took any additional steps to ensure that Decedent had a full opportunity to know what she was signing in light of her inability to read the documents herself. Rather, the admissions director testified that "[n]othing stands out that there were any issues with [Decedent] signing [the Arbitration

Agreement].” Blasco Dep. at 37. It also does not appear that Highland Park lacked the ability to locate and communicate with family members. Highland Park’s records show that Decedent’s daughter and granddaughters were with her when she arrived at Highland Park from the hospital. Highland Park Progress Note, 1/30/17 22:10.

Given Decedent’s lack of ability to read the Arbitration Agreement, our decisions holding that nursing home arbitration agreements were not procedurally unconscionable are inapposite here. In those cases, there was no evidence or claim that the individuals who signed the arbitration agreements lacked the ability to read them and the written agreements that the signers could have read clearly stated that signing the arbitration agreement was not required for nursing home admission, that they had right to consult a lawyer before signing, and that they had a right to revoke the arbitration agreement. *Cardinal*, 155 A.3d at 52-54 . . . .

Here, in contrast, although the Arbitration Agreement contains such provisions, the record shows that those provisions were omitted from or not fully and accurately stated in the oral information given to Decedent, which was the only information that Decedent had when she decided to sign the Arbitration Agreement. Because Decedent was not fully orally advised of this information and was denied the ability to obtain assistance from a family member or other person not employed by Highland Park who could read the Arbitration Agreement, the process by which Decedent's signature was obtained denied her a meaningful choice and therefore was procedurally unconscionable.

On the issue of substantive unconscionability, the trial court found that the provision requiring that Decedent pay one-half of the costs of any arbitration, including one-half of the arbitrator's fees, was substantively unconscionable because it imposed additional expenses for bringing a claim that Decedent would not have to bear in a court action. Trial Court Opinion, 3/13/19, at 4; Trial Court Opinion, 11/30/20, at 5-6. We agree that imposing this additional expense on all claims for damages brought by a resident unreasonably favors the nursing home and is sufficient to satisfy the requirement of substantive unconscionability where, as here, the record establishes that the resident was not given full information concerning her choices or any opportunity to inform herself of what she was signing or to exercise those choices.

The cases where this Court has rejected claims of substantive unconscionability are not to the contrary. In *Cardinal*, *MacPherson*, and *Glomb*, the arbitration agreements did not require the resident to pay any arbitrator fees to litigate a claim against the nursing home. Rather, in all of those cases, the arbitration agreements provided that the nursing home would pay the arbitrators’ fees and this Court specifically noted this fact in holding that the agreements were

not unconscionable. *Cardinal*, 155 A.3d at 53-54; *MacPherson*, 128 A.3d at 1217, 1222; *Glomb*, slip op. at 7, 9.

In *Riley v. Premier Healthcare Management, LLC*, No. 3538 EDA 2019, 2021 WL 2287464 (Pa. Super. May 28, 2021) (unpublished memorandum), this Court held that an arbitration agreement that required the nursing home resident to pay one-half of the costs of arbitration was not substantively unconscionable. Slip op. at 7-8, 18-19. In *Riley*, however, the arbitration provisions did not require the resident to arbitrate all claims against the nursing home regardless of whether the costs of arbitration would be an impediment to asserting a claim, as they specifically excluded claims under $12,000 from mandatory arbitration. *Id.* at 4, 6. Moreover, in *Riley*, the decedent had the opportunity to read the arbitration provisions, which were set forth in all capital letters, and the plaintiff did not argue that requiring the payment of half of arbitration costs by an individual claimant created an impediment to asserting claims against the nursing home. *Id.* at 3, 12, 16-18. . . .

Because the circumstances under which Highland Park obtained Decedent's signature on the Arbitration Agreement imposed terms unfavorable to her without giving her any meaningful choice to accept or reject the Arbitration Agreement, the trial court correctly concluded that the Arbitration Agreement was unconscionable as a matter of law. Accordingly, we find no abuse of discretion and affirm the trial court's order overruling the Highland Park Defendants' preliminary objection to compel arbitration.

Order affirmed.

Notes and Questions

1. Courts' decisions concerning unconscionability in nursing-home and similar agreements tend to rest heavily on the particular facts of the case. How did this court differentiate the facts before it from the precedent it cited? If a family member had been present and had been read the entirety of the terms of the agreement when Fay Vincent was admitted to the facility, would that have changed the court's determination, based on its reasoning? Which prong of the unconscionability analysis would that fact implicate?

2. What role does allocation of costs play in a determination of unconscionability? In holding an arbitration provision unconscionable, courts have factored in provisions shifting arbitration costs to the losing party or granting the arbitrator "unfettered discretion" to allocate these costs to a consumer. *See, e.g.*, *Tillman v. Com. Credit Loans,*

Inc., 655 S.E.2d 362, 368-73 (N.C. 2008); *Delta Funding Corp. v. Harris*, 912 A.2d 104, 111-13 (N.J. 2006).

3. If you were hired to draft a contract for a nursing-home client and advise about best practices, what, if any, changes might you make to the terms quoted in this case and what advice would you give your client?

4. Contract law is generally governed by state law, thus predominantly developed by state courts. However, arbitration agreements are an exception as they fall under the Federal Arbitration Act (FAA). As a result, the U.S. Supreme Court has jurisdiction and often decides cases concerning the enforceability of arbitration agreements.

   For example, in 2011, in a landmark decision, the Supreme Court considered a line of decisions of California courts, including the state's supreme court, which found class action waivers in arbitration agreements unconscionable. The U.S. Supreme Court held that those cases are preempted by the FAA, thus making the waivers enforceable. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). *Concepcion* is part of a significant body of cases where the Court has curtailed judicial scrutiny of arbitration agreements, emphasizing the FAA's objective of promoting arbitration. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (holding that the National Labor Relations Act does not bar enforceability of class action waivers in employment agreements); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (enforcing a waiver of class arbitration although the plaintiff's cost of individually arbitrating exceeded the potential recovery); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010) (enforcing a provision leaving it to the arbitrator to decide the enforceability of the arbitration agreement as a whole). All those decisions were highly controversial, with the Court's conservative justices in the majority enforcing the arbitration agreements and its liberal justices dissenting and refusing to do so.

5. Although arbitration agreements uniquely invoke federal law issues, the challenge of persuading a court to deem a contract or parts thereof unenforceable due to unconscionability extends beyond those contracts. The cases discussed in this module illustrate the circumstances under which courts might find certain contractual provisions, typically within standard-form agreements, unconscionable and thus unenforceable. However, it is important to remember that those cases are uncommon exceptions to the rule that courts rarely allow parties to avoid performing their contractual obligations due to unconscionability. As Professor Robert Lloyd notes:

> Students are amazed when I tell them that it is virtually unheard of for a sophisticated party, or even a party only moderately sophisticated, to prevail on an unconscionability argument. Yes, you can win an unconscionability case if your client is poor and uneducated, and if the other party is a sleazy organization that preys on poor people, and if you're able to afford an appeal, and if you get Skelly Wright on the bench. But absent these circumstances, the client is going to be stuck with the documents she signs.

Robert M. Lloyd, Making *Contracts Relevant: Thirteen Lessons for the First-Year Contracts Course*, 36 ARIZ. ST. L.J. 257, 267 (2004).