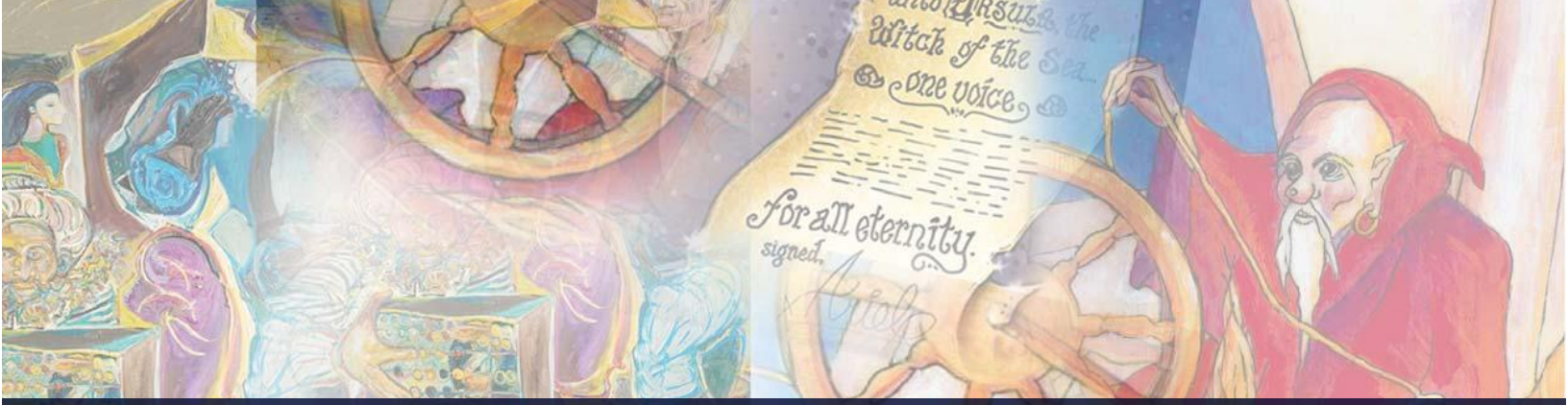
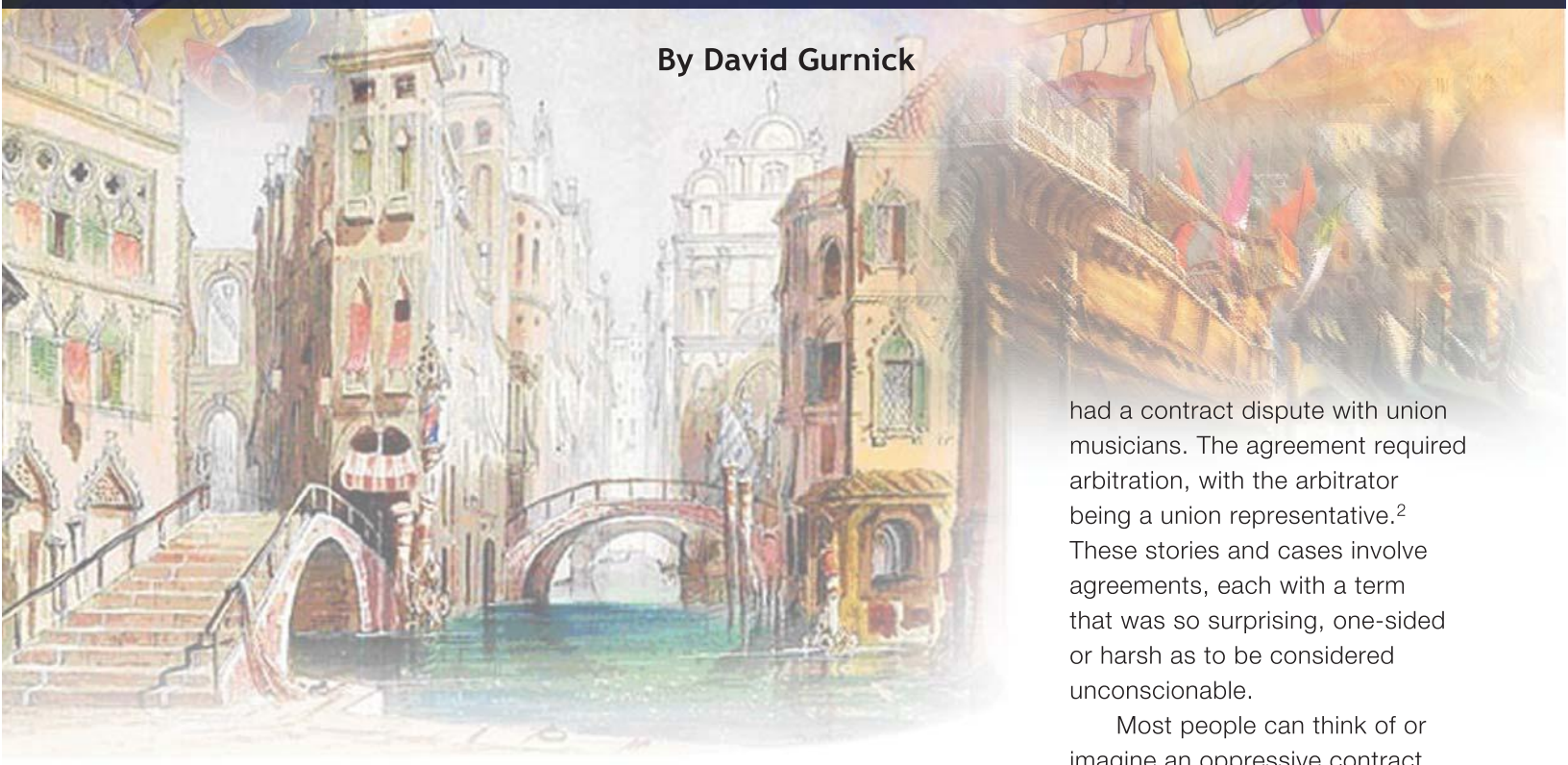


Unconscionability in California

Contract Power Tool for the Powerless and Powerful



By David Gurnick

IN SHAKESPEARE'S *MERCHANT of Venice,* Antonio guaranteed repayment of a loan, promising a pound of his own flesh to Shylock if the guarantee was breached. In Rumpelstiltskin, an imp agreed to turn straw into gold in exchange for a promise by the miller's daughter to give up her first born.

In modern times, in 1962 Washington, D.C., Ms. Ora Williams, who supported seven children and received government aid, defaulted in paying for a stereo. The contract let the furniture store, which knew her situation, repossess all items she had bought there since 1957.[1] In 1973, concert promotor Bill Graham had a contract dispute with union musicians. The agreement required arbitration, with the arbitrator being a union representative.[2] These stories and cases involve agreements, each with a term that was so surprising, one-sided or harsh as to be considered unconscionable.

Most people can think of or imagine an oppressive contract or clause. Circumstances present in the negotiation and context of many consumer and commercial contracts create a risk of lurking heavy-handed, unfair terms:

- Often people do not read contracts they sign. Even Chief Justice John Roberts admitted

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he doesn't usually read the terms required in accessing computer websites.[3] Few people do.

- They would not know if, buried deep within, was a promise to pay millions of dollars, or give a pound of flesh, or their first child.

- Many contracts are preprinted forms, prepared by one party (or the party's legal team). Think of pre-printed terms in property leases, car rental agreements, or agreements for wireless phone service.

- Many contracts are long and use small print. A Retail Installment Sale Contract people sign to finance a car purchase measures 28 inches in length, both sides filled with text. Agreements for bank or credit card accounts are so lengthy that they are printed in booklets.

- Often there is imbalance of bargaining power between contracting parties. The weaker party needs or wants the stronger party's service or merchandise and is willing to sign onto the terms of service. The stronger party has little to lose from a single lost sale and can therefore include strong, imbalanced terms in its agreement.

- Often one-sided terms are common in an industry, leaving no realistic alternative. Every provider of particular merchandise or service uses similar onerous terms.

- When the agreement is entered into, the weaker party is pleased or relieved to get the desired consideration—be it utility service, a loan, costly purchase, essential equipment, lease of space, or fulfillment of some other need. The party is in no mood, or position, and has no desire, to carefully review all the terms.

Culturally, Americans have a commitment to performance and enforcement of contracts according to their terms. But California statutory and case law is surprisingly favorable to victims of oppressive contract terms. Civil Code §1670.5 describes the doctrine of unconscionability.

When a court "finds the contract or any clause of the contract to have been unconscionable at the time it was made," the court has authority to "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." This rule "applies to contracts of all types."[4] Moreover, unconscionability is not a

jury question. It is a question of law "to be decided by the court."[5]

Under the principal formulation of unconscionability, two elements must be present: procedural and substantive unconscionability. But they need not be present in the same degree. The more substantively oppressive a contract term, the less evidence of procedural unconscionability is needed for a court to find a term unenforceable, and vice versa.[6]

Procedural unconscionability focuses on "oppression" and "surprise" in making the contract.[7] Oppression arises from unequal bargaining power, so that there is no real negotiation of terms and an absence of meaningful choice. Surprise involves the extent that agreed terms are hidden in a long printed form drafted by the party seeking enforcement. The doctrine's substantive element refers to unfairness or unreasonableness of the term.[8]

To some, it is surprising how broadly California courts have expanded unconscionability to grant relief to businesses. In several cases even seemingly experienced or sophisticated business people have been relieved from oppressive terms.

In the seminal *Graham v Scissor Tail* decision, a prominent, successful concert promoter was granted relief even though he had been a party to thousands of contracts of the type he challenged. The Court of Appeal recognized that he had no choice. Realities of his business as a concert promoter forced him to sign the union's oppressive contract on its nonnegotiable terms, or to not have any deal. "For all his asserted stature in the industry," promotor Bill Graham was "reduced to the humble role of "adherent.""[9]

"To some, it is surprising how broadly California courts have expanded unconscionability to grant relief to businesses."

Other unconscionability decisions have also given relief to businesses from overreaching terms. A longtime farming company bought heavy crop sorting equipment, which turned out to be defective. The company was granted relief from a damages limitation and warranty disclaimer that the manufacturer included in the sale agreement.[10] In the field of business franchising, courts have recognized that agreements often have characteristics that lead to unconscionability, due to "vastly superior bargaining strength" of franchisors.[11]

The theory underlying these decisions is recognition that "experienced but legally unsophisticated businessmen may be unfairly surprised by unconscionable contract terms."[12] Thus, any "suggestion that a contract or clause cannot be unconscionable if it is accepted by a knowledgeable party has been repudiated by our Supreme Court."[13]

In a 1980s trial that got wide media attention, humorist Art Buchwald sued Paramount studios. Buchwald claimed the successful Paramount film *Coming to America*, starring Eddie Murphy, was based on an idea and treatment he submitted.[14] The Los Angeles Superior Court ruled in Buchwald's favor. As a result, he became eligible to receive a share of the film's net profits.[15] But the studio claimed the film, which had earned over $160 million in gross revenue at the time, had no profit, and claimed that under the studio's accounting, it had so far lost millions of dollars.[16]

Art Buchwald challenged the studio's accounting as unconscionable.[17] But Buchwald was an experienced, well-known writer and personality. Moreover, he had been represented by a

professional agent. Through the agent, Buchwald and his partner had been the ones to propose the term they challenged as unconscionable. But they had proposed the term knowing the provision was Paramount's standard term.

The trial court found that the agreement had not been freely negotiated; that Buchwald and his partner, despite their prominence, did not have sufficient clout to negotiate a better deal. The court found the accounting provisions to be overly harsh and one sided.

Some words and phrases used by courts in characterizing unconscionable contract terms include "shocks the conscience," "unreasonably favorable to the other party," "overly harsh," "unduly oppressive," "unfairly one-sided," "unreasonably favorable to the more powerful party," "that seek to negate the reasonable expectations of the non-drafting party," and "unreasonably and unexpectedly harsh having to do with central aspects of the transaction."

The Supreme Court recently summarized formulations of substantive unconscionability. The Court said "the core concern of the unconscionability doctrine is the absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." The doctrine assures that contracts do not impose terms that have been described as "overly harsh," "unduly oppressive," "so one-sided as to shock the conscience," or "unfairly one-sided."

These formulations indicate that unconscionability is concerned with terms that are "unreasonably favorable to the more powerful party." These include provisions that negate the reasonable expectations of the non-drafting party, or unreasonably and unexpectedly harsh terms having to do with "central aspects of the transaction."[18]

Cases are now legion in California, relieving victims from oppressive contract terms relating to arbitration and such other matters as limitation of liability,[19] indemnification,[20] judicial reference,[21] and requirement to give notice before filing suit.[22]

The California Court of Appeal has ruled that the doctrine may be raised initially on appeal, even if not raised in the trial court.[23] The doctrine of unconscionability provides a powerful tool for victims of contract terms that may fairly be characterized as unfair, unduly oppressive, shocking or the like.

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[1] *Williams v. Walker-Thomas Furniture,* 350 F.2d 445 (D.C. Cir. 1965).
[2] *Graham v. Scissor-Tail*, 28 Cal.3d 807 (1981).
[3] Debra Cassens Weiss, *Chief Justice Roberts Admits He Doesn't Read the Computer Fine Print* ABA Journal (Oct. 20, 2010) (http://www.abajournal.com/news/article/chief_justice_roberts_admits_he_doesnt_read_the_computer_fine_print/).
[4] *Carboni v. Arrospide* (1991) 2 C.A.4th 76, 86 fn.5.
[5] *Vance v. Villa Park Mobilehomes Estates* (1995) C.A.4th 698, 709.
[6] *Armendariz v. Foundation Health* (2000) 24 Cal.4th 83, 114.
[7] *A & M Produce Co. v. FMC Corp.* (1982) 135 C.A.3d 473, 486.
[8] *Id.* at 486-487.
[9] *Graham v Scissor Tail supra* 28 Cal.3d at 818.
[10] *A & M Produce Co. v. FMC Corp.* (1982) 135 C.A.3d 473, 486.
[11] *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1282 (9th Cir. 2006); *see also, Postal Instant Press, Inc. v. Sealy* (1996) 43 C.A.4th 1704, 1716–1718.
[12] *A & M Produce Co. v FMC Corp.* (1982) 135 C.A.3d 473, 489–90.
[13] *Stirlen v. Supercuts* (1997) 51 Cal.App.4th 1519, 1534.
[14] See, H.G. Prince, *Unconscionability in California: A Need for Restraint and Consistency,* 46 Hastings L.J. 459, 524 (1995).
[15] See discussion in *Adam J. Marcus, Buchwald v Paramount Pictures Corp. and the Future of Net Profit* 9 Cardozo Arts & Ent. L. J. 545, 559 (1991).
[16] *Id* at 559.
[17] *Id* at 561-562.
[18] *Sonic-Calabasas A, Inc. v Moreno* (2013) 57 Cal.4th 1109, 1145.
[19] *Lihotka v Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816.
[20] *Lennar Homes of California v. Stephens* (2014) 232 Cal.App. 4th 673.
[21] *Pardee Construction Co. v. Superior Court* (2002) 100 Cal.App.4th 1081.
[22] *Soltani v. Western & Southern Life Ins. Co.* 258 F.3d 1058 (9th Cir. 2001).
[23] *Lennar Homes of California v. Stephens* (2014) 232 Cal.App. 4th 673, 686.