DEMYSTIFYING UNCONSCIONABILITY: A HISTORICAL AND EMPIRICAL ANALYSIS

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ABSTRACT

The doctrine of unconscionability is encrusted with myths. First-year law students are taught that the doctrine was created in the twentieth century. Unconscionability is often presented as a novel one, born in the Uniform Commercial Code's adoption of Section 2-302 in the mid-twentieth century. Even those scholars who are willing to look a bit further afield than the twentieth century for the origins of the unconscionability doctrine typically only reach the mid-eighteenth century. In addition to myths surrounding its origin, the doctrine has been presented as a dangerously vague and imprecise concept. Commentators and scholars have likewise characterized the doctrine as a license for courts to refuse, unpredictably and arbitrarily, to enforce some contracts. Some claim its application has the potential to destroy all of contract law. Beyond the fearmongering myths, another standard myth taught to first-year law students is that to succeed on a claim of unconscionability a party must offer at least some proof of both procedural and substantive unconscionability.

This Article will thus attempt to dispel the following three myths about unconscionability:

- It is a new, modern doctrine of law,
- Its application is unpredictable and arbitrary, and
- To prevail a party must prove both procedural and substantive unconscionability.

The best way to dispel myths is through facts. This Article attempts to clear the clouds of confusion and fear surrounding the doctrine by turning to historical and empirical fact. Part I of this Article looks to the an-

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cient past and finds that the idea that justice, and hence the law, should grant a remedy to at least some people who enter into inequitable bargains, is as old as philosophizing about justice itself (and certainly older than the mid-eighteenth century). Rather than a dangerous modern innovation, this principle of justice has ancient philosophical roots in Aristotle and ancient legal roots in Roman law. Part II of the Article summarizes prior attempts to assess the doctrine of unconscionability through empirical research by summarizing the results of prior work and identifies the limited scope of those projects. Part III contains the results of the comprehensive empirical analysis of what appears to be happening in cases involving claims of unconscionability in the period 2013–2017. A comprehensive coding process was undertaken for all reported federal and state cases decided over this five-year period. The results of the data analysis of 463 federal and state cases suggest that whatever the casebooks and law review articles claim about the doctrine, its application in real courts on the ground is very predictable and simpler than a two-part requirement suggests. The Article concludes with a proposal to reformulate the doctrine to conform better to both its historical roots and its application by courts in real cases.

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INTRODUCTION

THE doctrine of unconscionability is encrusted with myths. First-year law students are taught that "no explicit doctrine of unconscionability surfaced until the twentieth century."[1] The doctrine is presented as a novel one, born in the Uniform Commercial Code's (UCC) adoption of Section 2-302 in the mid-twentieth century.[2] Even those scholars who are willing to look a bit further afield than the twentieth century for the origins of the unconscionability doctrine typically only reach the mid-eighteenth century.[3] In addition to myths surrounding its origin, commentators have presented the doctrine as a dangerously vague and imprecise concept. Beginning with Arthur Leff's seminal article on the topic, this attack on the doctrine began to take root. Leff's frontal assault on the doctrine is summed up in the following conclusion: "If reading this section [UCC 2-302] makes anything clear it is that reading this section alone makes nothing clear about the meaning of 'unconscionable' except perhaps that it is pejorative."[4] Leff considers the first batch of cases decided after the adoption of UCC Section 2-302 as exhibiting a "dangerous . . . tendency."[5] Following in Leff's footsteps, later commentators and scholars have likewise characterized the doctrine as a license for courts to refuse, unpredictably and arbitrarily, to enforce some contracts. For example, Colleen McCullough documents that courts and scholars worry that the doctrine "lacks predictability and consistency, and that [its] liberal use could swallow all of contract law."[6] Professor William D. Hawkland calls UCC Section 2-302 "the most controversial section in the entire Code"[7] and claims that this doctrine "violates freedom of contract and creates instability."[8] From such quotations one would conclude that unconscionability is a potential cancer that could destroy the entire field of contract law.

Beyond the fearmongering myths, another standard myth taught to first-year law students is that to succeed on a claim of unconscionability, a

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1. BEN TEMPLIN, CONTRACTS: A MODERN COURSEBOOK 372 (2d ed. 2019). Templin does acknowledge that a precursor to the doctrine existed in the refusal of courts of equity to specifically enforce unfair bargains. *Id.*

2. *Id.*

3. *See, e.g.*, Richard J. Hunter Jr., *Unconscionability Revisited: A Comparative Approach*, 68 N.D. L. REV. 145, 145 (1992) (claiming that unconscionability "had been developed as early as the mid-1750s to deal with essentially unequal contractual situations"). Professor James Gordley is an exception to this general observation. *See infra* Section I.D.

4. Arthur A. Leff, *Unconscionability and the Code—the Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

5. *Id.* at 488–89.

6. Colleen McCullough, *Unconscionability as a Coherent Legal Concept*, 164 U. PA. L. REV. 779, 782 (2016).

7. WILLIAM HAWKLAND ET AL., U.C.C. SERIES § 2-302:1 Art. 2 (Carl S. Bjerre ed., 1997–1999).

8. *Id.*

party must offer at least some proof of both procedural and substantive unconscionability.[9] One of Leff's arguments appears to hit the mark: there is unresolved ambiguity in the text and history of UCC Section 2-302 as to whether or to what extent it is designed to police "bargaining naughtiness" or "evils in the resulting contract."[10] This unresolved tension has resulted in a myth that at least some level of both types of "naughtiness" are necessary to prevail with courts.

This Article will thus attempt to dispel the following three myths about unconscionability:

- It is a new, modern doctrine of law,
- Its application is unpredictable and arbitrary, and
- To prevail a party must prove both procedural and substantive unconscionability.

The best way to dispel myths is through facts. This Article attempts to clear the clouds of confusion and fear surrounding the doctrine by turning to historical and empirical fact. Part I of this Article looks to the ancient past and finds that the idea that justice, and hence the law, should grant a remedy to at least some people who enter into inequitable bargains is as old as philosophizing about justice itself (and certainly older than the mid-eighteenth century). Rather than a dangerous modern innovation, this principle of justice has ancient philosophical roots in Aristotle and ancient legal roots in Roman law. Leff may be right that Section 2-302 cannot be read "alone" for its meaning to be clear. If read in the larger historical context, its meaning may become clearer. Part II of the Article summarizes prior attempts to assess the doctrine of unconscionability through empirical research by summarizing the results of prior work and identifies the limited scope of those projects. Part III contains the results of the comprehensive empirical analysis of what appears to be happening in cases involving claims of unconscionability in the period 2013–2017. A comprehensive coding process was undertaken for all reported federal and state cases decided over this five-year period. The results of the data analysis suggest that despite what the casebooks and law review articles claim about the doctrine, its application in real courts on the ground is very predictable and simpler than a two-part requirement suggests.

9. *See, e.g.*, TEMPLIN, *supra* note 1, at 372 ("Unconscionability requires *both* (1) procedural unconscionability, and (2) substantive unconscionability.").

10. Leff, *supra* note 4, at 487.

I. ANCIENT HISTORICAL ROOTS: JUSTICE AND VOLUNTARY EXCHANGE

A. *Ancient Philosophical Roots*

As early as Aristotle, philosophers recognized that exchange transactions were necessary for the flourishing of a society[11] but argued that justice required that things exchanged be equal in value.[12] As each party mutually benefits from an exchange (each needs what the other possesses), one party should not disproportionately bear the costs.[13] Aristotle explains: "But in dealings of exchange justice is such that it includes reciprocation according to proportionality but not according to equality."[14] By proportionality, Aristotle means that things exchanged must equate in value—not mere quantity. It seems obvious that to exchange one pair of shoes for one house would be an unjust exchange, even if it involves the exchange of one item for one item. The shoemaker would acquire a great increase in wealth in exchange for his pair of shoes. Thus, Aristotle argues a proportionate equality of value must be maintained.[15] Commutative justice does not require that all people possess equal wealth; the distribution of wealth in a community is a matter not of commutation but of distributive justice.[16] It may be that certain individuals in a society should possess greater honor or wealth than others "according to a certain merit."[17] Yet, this distribution is judged just or unjust (and thereby adjusted) by taking into account the relationships among the members of a society such as their talents and status. Once a principle of just distribution is established, distributions should be adjusted according to the principle.[18] If unequal exchange transactions were to occur, these transactions would result in a

11. *See* Aristotle, *Nicomachean Ethics*, *in* ST. THOMAS AQUINAS, COMMENTARIES ON ARISTOTLE'S NICOMACHEAN ETHICS V 1133a5–14 (C.J. Litzinger, O.P. trans., Dumb Ox Books 1964) [hereinafter Aristotle, *Nicomachean Ethics*]; ST. THOMAS AQUINAS, COMMENTARIES ON ARISTOTLE'S NICOMACHEAN ETHICS Lecture VIII, 975 (C.J. Litzinger, O.P. trans., Dumb Ox Books 1964) [hereinafter AQUINAS, COMMENTARIES].

12. Aristotle, *Nicomachean Ethics*, *supra* note 11, at V, 1131b27–32 ("[I]n transactions the just thing is an equal—and the unjust thing an unequal . . . .").

13. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. II–II, Q. 77, art. 1 (Fathers of the English Dominican Province trans., Burns Oats & Washbourne Ltd. 2d rev. ed. 1912–1927) (1265–1274) [hereinafter AQUINAS, SUMMA THEOLOGICA] ("Now whatever is established for the common advantage, should not be more of a burden to one party than to another.").

14. Aristotle, *Nicomachean Ethics*, *supra* note 11, at V, 1132b31–33.

15. This necessity explains the invention of money. Because a homebuilder would likely not want to receive the number of shoes proportionate to the value of one house, money was invented to facilitate such exchanges. Instead of exchanging many shoes, the shoemaker can sell many pairs of shoes to different people for a standard medium of exchange, or money, and then exchange the amount of money equal to a house with the homebuilder. *See id.* at V, 1133a19–1133b29.

16. *Id.* at V, 1130b30–33, 1131a15–29.

17. *Id.* at V, 1131a24–29.

18. Aristotle acknowledges that different societies may select different principles of distribution by adopting different understandings of merit (such as noble birth or degree of freedom or virtue). *Id.*

random redistribution of wealth not necessarily consistently with distributive justice. If wealth should be redistributed at all it should be done according to a normative scheme, not on the basis of random exchange transactions.[19] Although Aristotle does not work out a complete explanation for the practical calculation of values and for rectifying unequal exchanges, he does suggest that one of the functions of the law (in the form of justice meted out by a judge) is to correct redistributions of wealth caused by unjust exchanges (voluntary and involuntary).[20]

An apparent contradiction exists in the philosophy of Aristotle (as well as Plato). Although recognizing society's need for exchanges, Aristotle was skeptical of tradesmen (those engaged in exchange for an occupation) and only reluctantly allowed them into his ideal community.[21] The theory of the Just Price can be seen as a reconciliation of the recognition of the necessity of exchange transactions but wariness of those who facilitate them. A reader can interpret Aristotle as arguing that exchange is necessary for society, but an exchange economy is not sustainable unless proportionality is maintained.[22] Yet, Aristotle recognizes that many tradesmen had a penchant for regularly engaging in unjust exchanges. It was those unequal exchanges that must be constrained by the law to sustain the system.

B. *Ancient Legal Roots*

Aristotle's notion of justice in commutations was transmitted through Roman civilization but only in a limited fashion. Roman jurisprudence accepted the notion that parties to a transaction could take advantage of one another to achieve a gain from their dealings: in buying and selling, natural law permits the "one party to buy for less and the other to sell for more, and thus each [party] is allowed to outwit the other."[23] As a result, Roman law would enforce "an agreement concluded with mutual consent"

19. *See* James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587, 1591 (1981).

20. *See* Aristotle, *Nicomachean Ethics*, *supra* note 11, at V, 1132a19–25. This direction to bring an unjust commutation to a judge for adjustment clearly contemplates its application to voluntary exchange transactions. Aristotle states, "when men are in doubt they have recourse to a judge." *Id.* An involuntary exchange such as theft would not involve the parties doubting the equality of their actions and Aristotle must have in mind the context of a voluntary exchange such as a sale.

21. *See* DIANA WOOD, MEDIEVAL ECONOMIC THOUGHT 71, 111 (Cambridge Univ. Press 2002); *see also* ARISTOTLE, POLITICS bk. I, ch. 8, 1256a–b, 1257a–b, at 63–70 (Oxford ed., B. Jowett trans., Clarendon Press 1905) [hereinafter ARISTOTLE, POLITICS].

22. *See* Aristotle, *Nicomachean Ethics*, *supra* note 11, at V, 1133a.21–25 ("If this [reciprocal equality] is not observed, there will be neither exchange nor sharing."); *see also* AQUINAS, COMMENTARIES, *supra* note 11, at V, Lecture IX, 980; WOOD, *supra* note 21, at 71.

23. Gordley, *supra* note 19, at 1601 (quoting JUSTINIAN, DIGEST, 19.2.22 para. 3); *see also* JUSTINIAN, DIGEST, 4.4.16 para. 4 ("[I]t is naturally permitted to parties to circumvent each other in the price of buying and selling.").

even if the price agreed were "a little less than its true value."[24] Although these texts seem to contradict Aristotle, Roman law also contained other principles that mitigated this one. The Roman jurist Pomponius stated, "By the law of nature it is equitable that no person becomes rich by the loss and injustice to another."[25] Thus, freedom of contract (legal enforceability of unjust exchange transactions) was in tension with the principle that nobody should profit by the loss to another. Although Roman law would not generally grant a legal remedy solely on the basis of an unequal exchange, texts do acknowledge the recognition that disproportionate exchanges were unjust, by referring to a thing's "true price" (*verii pretii*) or a "just price" (*justi pretii*).[26] Finally, in at least the context of the sale of land at less than one half the true value, Roman law did permit the seller to bring a legal action, *lesio enormis*, either to refund the price received and regain the land, or receive increased compensation up to the just price, at the buyer's option.[27] Thus, Roman law, although embodying the idea that bargains should be enforced regardless of their injustice, did constrain the application of that principle in the context of unjust purchases of real estate. As subsequent legal history will demonstrate, the difference between Aristotle and Roman law is not one of principle but in its practical application. Philosophy requires consistency of principles, whereas law as a practical discipline need not be as consistent in its proscriptions.[28]

C. *Christian Development of the Ancient Roots*

Whereas Roman law was, except for *lesio enormis*, tolerant of many unjust exchanges, Christianity reinvigorated the Aristotelian principle only partially present in Roman law. St. Paul, in a passage that strikingly parallels a text in Roman law,[29] teaches that the divine law is contrary to such permissiveness. He says:

> For you know what precepts I have given to you by the Lord Jesus. For this is the will of God, your sanctification . . . that no man overreach, nor circumvent his brother in business: because the Lord is the avenger of all these things, as we have told you before, and have testified.[30]

Christians are obligated by divine "precept" and the "will of God" not to overreach or circumvent in transactions, even if such outwitting is per-

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24. JUSTINIAN, CODEX, 4.44.8.

25. JUSTINIAN, DIGEST, 50.17.206 (author's translation of "*Iure naturae aequum est neminem cum alterius detrimento et injuira fieri locupletiorem*").

26. JUSTINIAN, CODEX, 4.44.2, 4.44.8.

27. *Id.*

28. *See infra* text accompanying notes 41–49.

29. JUSTINIAN, DIGEST, 4.4.16 para. 4 ("[I]t is naturally permitted to parties to circumvent each other in the price of buying and selling.").

30. 1 *Thes.* 4: 2–3, 6 (Douai Rheims ed.) (omitted intervening verses referring to precepts against sins of the flesh).

mitted by civil law. As the Western legal tradition developed, jurists, relying on Aristotelian theories of justice[31] and divine revelation prohibiting "overreaching" in exchange transactions, began to expand the limited applicability of *lesio enormis* beyond the sale of real estate under the rubric of the doctrine of the just price. Medieval jurists, who came to understand the remedy of *lesio enormis* in the Roman *Codex* as a limited embodiment of Aristotle's principle of proportionality in exchange, worked to expand the application of the Roman remedy to more settings beyond the sale of land.[32] By the time of the late scholastics of the sixteenth century and the modern natural law scholars of the seventeenth century, a general consensus among jurists and theologians existed that held that justice required, and in many cases law should require, correction of unjust contractual exchanges, although different authors might disagree as to particular aspects of the consensus.[33] The general consensus of scholars justified the limitation of a remedy only to exchanges that involved only a great difference from the just price (as opposed to any difference) by explaining that, although any variation from the just price is against the virtue of justice, for practical reasons, the law can only correct great variations from justice.[34]

St. Thomas Aquinas masterfully integrates Aristotelian philosophy with legal practice by defending the universality of the principle of the just price and its limited application in human law. He argues that every sale at any variation from the just price violates the virtue of justice that requires proportionality in exchange,[35] but that human law can only enforce restitution when either an exchange is agreed with knowledge that the price is unjust[36] or when the variation from the common estimation of the just price is great ("*nimius excessus*") regardless of knowledge.[37] One inference drawn from this two-part analysis of when human law should correct unjust prices—intentional and large variations from just price—is that the

31. John W. Baldwin, *The Medieval Theories of the Just Price*, 49 TRANSACTIONS AM. PHIL. SOC'Y, 10 (1959).

32. Gordley, *supra* note 19, at 1638–39.

33. *Id.* at 1603–04.

34. *See, e.g.*, AQUINAS, SUMMA THEOLOGICA, *supra* note 13, at Q. 77, art. 1, Reply to Obj. 1; Gordley, *supra* note 19, at 1641.

35. *See* AQUINAS, SUMMA THEOLOGICA, *supra* note 13, at Q.77, art. 1.

36. *See id.* (St. Thomas uses the word deceit (*fraus*), a term which requires acting with knowledge); *see also* Huguccio, *Summa Decretorum*, to *Causa* X, q.2, c.2 *Hoc ius, quoted in* Baldwin, *supra* note 31, at 56 n. 118 (1959) ("[*C*]*redo tamen nec ecclesiam nec aliquem hominem ex scientia certa debere plus accipere quam res valeat, presertim si plus offertur per licitationem*,"—meaning, "I believe, nevertheless, neither a church nor any man, *with certain knowledge*, ought to accept more than a thing is worth, especially if more is offered in the bidding" (emphasis added in translation)).

37. *See* AQUINAS, SUMMA THEOLOGICA, *supra* note 13, at Q.77, art. 1, Reply to Obj. 1 ("Accordingly, if without employing deceit the seller disposes of his goods for more than their worth, or the buyer obtain them for less than their worth, the law looks upon this as licit, and provides no punishment for so doing, unless the excess be too great.").

law should correct even some unintentional violations when the difference is great.

Putting aside difficulties of determining with precision the common estimation of the value of something, the thing sold may have a hidden defect that makes the item exchanged worth less than the common estimation of the value of such things in general. St. Thomas explains that if the defect is later discovered, the seller must repay a portion of the price attributable to the impairment of value resulting from the defect.[38] Although one is not subjectively culpable for unwittingly selling something at an unjust price (due to the latent defect), once the defect is discovered, the seller is obligated to compensate for the defect. St. Thomas explains:

> But if any of the foregoing defects be in the thing sold, and he knows nothing about this, the seller does not sin, because he does that which is unjust materially, nor is his deed unjust, as shown above . . . . *Nevertheless, he is bound to compensate the buyer, when the defect comes to his knowledge.* Moreover, what has been said of the seller applies equally to the buyer. For sometimes it happens that the seller thinks his goods to be specifically of lower value, as when a man sells gold instead of copper, and then if the buyer be aware of this, he buys it unjustly and is bound to restitution . . . .[39]

Thus, the obligations of the Just Price doctrine are applicable to transactions independent of the obligation not to lie or commit fraud (by, for example, denying or concealing a known defect). This point makes a clear distinction between the traditional doctrine synthesized by Aquinas that understood the disparity in value as a reason for a remedy in and of itself and the nineteenth century approach, discussed *infra*,[40] that came to see disparity of value not as justifying a remedy in itself but as mere evidence of some intentional deceit.

Limiting a legal remedy only to an exchange knowingly at variance with the just price or an exchange unintentionally (but at a great difference) did not mean abandonment of the more rigorous normative principle of justice. As St. Thomas reminds his readers, "On the other hand the Divine law[41] leaves nothing unpunished that is contrary to virtue. Hence, according to the divine law, it is reckoned unlawful if the equality of justice be not observed in buying and selling."[42] Thus, one who discovers a

38. *See id.* at Q. 77, art. 2.

39. *Id.* (emphasis added).

40. *See infra* Section I.D.

41. One of the purposes of the divine law is to make known more clearly primary moral principles of action contained in the natural law. *See* Brian M. McCall, *Consulting the Architect When Problems Arise: The Divine Law,* 9 GEO. J.L. & PUB. POL'Y 103 (2011).

42. AQUINAS, SUMMA THEOLOGICA, *supra* note 13, at Q.77, art. 1, Reply to Obj. 1 ("On the other hand the Divine law leaves nothing unpunished that is contrary

slight unintended benefit from an unjust exchange may not be obligated under human law to make restitution but may still be obligated in justice and by divine law to restore the difference. Yet, even the divine law may not demand restitution of small differences in particular cases. This is due to the practical difficulties in determining, with precision, the just price that may make it difficult or impossible to know with moral certainty that one has benefited slightly from a disproportionate exchange. As a result, Aquinas concludes that restitution even under the divine law may be obligatory only if the variation is notable (i.e., great enough that it can be ascertained with reasonable certainty).[43]

St. Thomas, in drawing a distinction between the requirements of human law and divine law, emphasizes that divine law condemns as immoral any unrestored notable variation from the just price even if, for practical and prudential reasons, human law tolerates greater variations in value than mere notable ones. One reason for the circumspection of human law originates in the recognition that the just price can change over time[44] and cannot always be determined with precision but only estimated. An estimate implies a defined range between a high and low price. These practical difficulties require human law to mandate restitution only when the unjust exchange is intentional or the variance from the just price is great.[45] Thus, for example, Roman law considered only a variation of more than one half of the just price of land to be great enough to intervene.[46] The post-Roman period of Western Catholic law in Europe saw the gradual expansion of this remedy to a wider range of great variations than the original Roman remedy, yet it never required remediation of all

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to virtue. Hence, according to the Divine law, it is reckoned unlawful if the equality of justice be not observed in buying and selling.").

43. *See id.* ("[H]e who has received more than he ought must make compensation to him that has suffered loss, if the loss be considerable [*notabile damnum*]. I add this condition, because the just price of things is not fixed with mathematical precision [*punctaliter determinatum*], but depends on a kind of estimate [*aestimatione*], so that a slight addition or subtraction would not seem to destroy the equality of justice.").

44. *See* JUSTINIAN, DIGEST, 35.2.63.2 ("Sometimes place or time brings a variation [*uarietatem*] in value; oil will not be equally valued at Rome and in Spain nor given the same assessment [*aestimabitur*] in periods of lasting scarcity as when there are crops . . . .") (author's translation); *see also* AQUINAS, SUMMA THEOLOGICA, *supra* note 13, at Q. 77, art. 3, Reply to Obj. 4.

45. For a discussion of why human law must be in accord with divine law but need not always strictly enforce the principles of justice in all cases, see AQUINAS, SUMMA THEOLOGICA, *supra* note 13, at Q. 96, art. 2 ("Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and such like.").

46. JUSTINIAN, CODEX, 4.44.2, 4.44.8.

deviations from the just price.[47] Although there appears to be no historical data to quantify how often a contract party prevailed in obtaining relief under Just Price doctrine in civil or ecclesiastical courts in the ancient and medieval world,[48] Professor Odinet characterizes the use of the French version of the doctrine in the seventeenth and eighteenth centuries as "rampant in the French courts."[49] Thus, we can conclude in general that after its expansion in the medieval period, the remedy was more widely available on the eve of its disappearance from Anglo-American law.

D. *Modern Distortions of the Principles*

The modern era beginning in the late eighteenth century witnessed the contraction of the Just Price doctrine in civil law countries and its disappearance in Anglo-American law. In the modern era, both the French code and the German civil codes have preserved some limited aspects of the original Roman law remedy (as developed by later Christian jurists) to grant some relief to parties on the basis that the bargain was too oppressive or the values exchanged too disproportionate.[50] Although attempts were made to abolish any remedies for disproportionate exchanges from both the Napoleonic Code and the German Civil Code, late interventions (by Napoleon himself[51] in the case of France) restored provisions providing a remedy in at least some cases to both countries' codes.[52]

Even though some provisions granting a remedy in limited circumstances remained in the continental codes, jurists attempted to explain the remedy not in classical terms of justice in exchange but rather in terms of correcting some flaw in the contracting process such as fraud or mistake that impaired effective consent to contract.[53] This elevation of the principle of consent over substantive justice was strongest in the common law systems.[54] In the common law courts of England after it broke from the Roman-based, European legal tradition at the Reformation, and in American courts that inherited the English tradition, judges insisted that the law

47. *See* Baldwin, *supra* note 31, at 22–27; Christopher K. Odinet, *Commerce, Commonality, and Contract Law: Legal Reform in A Mixed Jurisdiction*, 75 LA. L. REV. 741, 777 (2015). For a lengthier discussion of the development of Just Price jurisprudence in European jurisprudence, see Brian M. McCall, *It is Just Price: Entender Los Males Económicos Modernos a La Luz de La Doctrina Social Católica,* [*Understanding Modern Economic Woes in Light of Catholic Social Doctrine*], *in* UTRUMQUE JUS: DERECHO, DERECHO NAT. Y DERECHO CANÓNICO 487 (Miguel Ayuso ed. 2014) (Spain).

48. After attempting to locate any historical studies that would permit a quantification of use of the doctrine in ancient and medieval courts, I contacted Professor James Gordley who confirmed to me that he believed no sources presently existed that would permit such a quantification.

49. Odinet, *supra* note 47, at 778.

50. *See* Gordley, *supra* note 19, at 1625–26.

51. *See* Odinet, *supra* note 47, at 778.

52. *See* Gordley, *supra* note 19, at 1593, 1626.

53. *See id.* at 1592–93.

54. *See id.* at 1594.

would not evaluate the adequacy of the consideration exchanged but would inquire only if consideration of any value were present in formation of a contract.[55]

Yet, even though the old Roman tradition of granting relief for extremely inequitable bargains was absent from the common law, a faint shadow of the doctrine remained until the dawn of the nineteenth century. The courts of equity prior to the nineteenth century refused to order specific performance of contracts in which the bargain to be enforced was unconscionable, by which equity meant a bargain that was hard or oppressive.[56] Thus, although no remedy could be obtained at law for an unjust exchange, equity at least refused to assist one who would benefit from an oppressive exchange by compelling the other party to complete the exchange. Even in the nineteenth century when English and American courts had seemed to abandon the older tradition of granting relief (or at least denying specific performance) in the case of greatly disproportionate exchanges, remedies were sometimes granted (and specific performance denied) in cases of hard bargains; the difference was that courts claimed they were not acting on the fact of the unfair bargain itself but on the basis of some flaw in contract formation such as fraud or mistake and treated the unfairness of the exchange as being merely proof of the flaw in formation.[57]

Common both to the Anglo-American and continental jurists of the eighteenth and nineteenth centuries was a growing belief that value was simply imponderable—no comparison of values was possible—and therefore no unjust exchange that the law should correct could ever exist.[58] Whereas Aquinas recognizes in practice the difficulties of proving with precision the variation from the just price in particular cases of small variation, he still believed that every variation in value was in theory unjust and subject to correction by law (even if only by the divine law and not human law). These later jurists conflated the practical difficulty of calculation with the possibility of an unjust exchange existing in principle due to a radical skepticism about the objective nature of value at all.[59]

Throughout the nineteenth century, the belief that value was imponderable resulted in a belief that no remedy could be based on a disparity of value.[60] Yet, even if their existence were denied in theory, unjust exchanges appeared before courts that, when faced with clearly disproportionate exchanges and unable to grant relief on this basis alone,

55. *Id.* at 1594–98; *see also* Brian M. McCall, *The New Protestant Bargain: The Influence of Protestant Theology on Contract and Property Law*, *in* LUTHER AND HIS PROGENY: 500 YEARS OF PROTESTANTISM AND ITS CONSEQUENCES FOR CHURCH, STATE, AND SOCIETY (Dr. John C. Rao ed., Angelico Press 2017).

56. Gordley, *supra* note 19, at 1598–99.

57. *See id.* at 1599.

58. *See id.* at 1598–99.

59. *See id.*

60. *See id.*

entertained arguments that perceived disparities in value as evidence of some flaw in the contracting process.[61] In this way, courts could claim they were not policing the substance of bargains but only the contract formation process. Thus, the fragments of Just Price doctrine had to hide in the shadow of contract formation.

This new exaltation of contract formation over substance was reinforced by another argument. Jurists in Europe and the United States seeking to abolish remedies for unfair exchanges introduced a new legal value of autonomy that vitiated against remedying one-sided bargains.[62] As Professor Gordley explains, the claim about the imponderable nature of value and this new virtue of autonomy were connected:

> For one who took the argument about value seriously, this argument about party autonomy was almost a corollary. If value is "subjective," then there is no source outside the agreement of the parties by which one could judge the fairness of exchange. Interference by a court would not only be improper but arbitrary.[63]

If there is no such thing as objective value, no bargain can be inequitable. Thus, when considering unequal exchanges, the nineteenth century approach did so as a proxy for finding a flaw in the autonomous bargaining process. This approach vitiated the formation of any contract at all rather than finding a contract existed but ordering a remedy for a substantively unfair term.

E. *Resurrection of a Concept in the Uniform Commercial Code*

Out of this historical background, the concept of providing a remedy for unfair contract terms officially reemerged with the promulgation of the UCC in 1951.[64] Section 2-302 of the UCC authorizes courts that find a contract or term thereof unconscionable to choose among three possible remedies: (1) to "refuse to enforce the contract," (2) to "enforce the remainder of the contract without the unconscionable clause," or (3) to "limit the application of any unconscionable clause."[65] Yet, this section

61. *See id.*

62. *See id.* at 1599–1601.

63. *Id.* at 1600.

64. *See* Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 LA. L. REV. 123, 149–50 (2005) ("[Unconscionability's] acceptance as a mainstream doctrine, a ready aid in contract limitation, dates back only to its inclusion in the UCC.").

65. U.C.C. § 2-302 (AM. LAW INST. & UNIF. LAW COMM'N 1977) (stating "(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination").

does not provide a definition of what makes a contract or clause "unconscionable." The seeds of a two-part definition involving procedural and substantive unconscionability were present in one of the earliest modern cases engaging with the doctrine, *Williams v. Walker-Thomas Furniture Co.*[66] The U.S. Court of Appeals for the District of Columbia defined an unconscionable contract as one involving "an absence of meaningful choice on the part of one of the [contracting] parties together with contract terms unreasonably favorable to the other party."[67] From this seed, the prevailing wisdom developed that evaluating a clause or agreement for unconscionability requires a "two-pronged analysis: traditionally, a provision must be both procedurally and substantively unconscionable to be held unenforceable."[68] A quotation from a New Jersey Superior Court opinion exemplifies the contemporary wisdom about what most courts require: "For the most part, the unconscionability cases follow *Williams v. Walker-Thomas* and look for two factors: (1) unfairness in the formation of the contract, and (2) excessively disproportionate terms . . . . Most courts have looked for a sufficient showing of both factors in finding a contract unconscionable."[69] Procedural unconscionability refers to some aspect of unfairness in the contract formation process.[70] Substantive unconscionability refers to the unfairness of the terms of the contract itself regardless of the process for forming the contract.[71] The general consensus is that at least some finding of both types of unconscionability must exist to prevail on this claim, although courts may apply a sliding scale or balancing test that would require less evidence of one type if proof of the other type is overwhelming.[72] Even if not explicitly required by all courts, Professor Hunter speculates that:

> [I]n reality, there will be few instances where a contract is so one-sided as to "shock the conscience of the court" (substantive unconscionability) absent some strong evidence of unfair surprise, clauses hidden in fine print, or the exercise of grossly unequal

66. 350 F.2d 445 (D.C. Cir. 1965).

67. *Id.* at 449.

68. McCullough, *supra* note 6, at 781 (first citing Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 11 (2012); then citing Leff, *supra* note 4, at 487) (coining the terms "procedural unconscionability" and "substantive unconscionability").

69. Sitogum Holdings, Inc. v. Ropes, 800 A.2d 915, 921 (N.J. Super. Ct. Ch. Div. 2002).

70. *See* TEMPLIN, *supra* note 1, at 371.

71. *See id.* at 375.

72. *See, e.g.*, Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1074 (2006) (explaining that this approach "implies that a minimum of one type of unconscionability will suffice when there is overwhelming evidence of the other type").

> bargaining power during the process of contract formation (procedural unconscionability).[73]

Thus, although the ancient doctrine that the law could correct unfair exchanges reappeared, it still remained in the shadow of party autonomy and contract formation.

In addition to the introduction of the concept of unconscionability into the UCC, courts by the mid-twentieth century began to grant relief under the common law for contracts or terms thereof deemed to be oppressive or unconscionable. After noting that the contract at issue was not governed by the UCC because the parties formed the contract before the District of Columbia adopted the UCC, the court in *Williams* remarked, "[w]e 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."[74] The Restatement (Second) of Contracts includes a section authorizing courts to refuse to enforce unconscionable bargains.[75]

Yet, since these developments came on the heels of the eighteenth and nineteenth centuries' strong concerns for respecting the results of bargaining and autonomy regardless of the injustice that resulted therefrom, the modern doctrine of unconscionability was, unlike its Roman law ancestor, strongly rooted in the idea that some defect in the bargaining process was a necessary condition for a court to refuse to enforce an agreed term, even if the term was grossly unfair. Professor Eisenberg is representative of the modern lens through which the modern doctrine is understood. In 1982, he explained the centrality of the bargain principle to contract law. By the bargain principle, he meant that "in the absence of a traditional defense relating to the quality of consent (such as duress, incapacity, misrepresentation, or mutual mistake), the courts will enforce a bargain according to its terms."[76] Although Eisenberg endorses the bargain principle, he does argue for an expanded set of exceptions to the strict enforcement for cases of unconscionability. Yet, his expansion of cases in which deviation from strict enforcement would be justified is limited only to cases involving "exploitation of distress, transactional incapacity, susceptibility to unfair persuasion, and price-ignorance."[77] All of these cases involve procedural elements, not the substantive unfairness of the

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73. Hunter Jr., *supra* note 3, at 169.

74. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448 (D.C. Cir. 1965).

75. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981) ("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.").

76. Melvin Aaron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 742 (1982) (footnote omitted).

77. *Id.* at 754.

term itself. Thus, even those arguing for a more expansive exception to the bargain principle are only drawing the distinction between actual consent and some form of apparent, but not real, consent (as a result of coercion or unfairness in the bargaining process). Eisenberg's approach would deny relief to one who agreed to a greatly unfair contract if the agreement was completely untainted by any coercion or bargaining flaw. The bargain principle remains firmly entrenched at the heart of the unconscionability doctrine, and a remedy is considered appropriate only when the bargain in a case is tainted.[78] Thus, the doctrine of unconscionability is both new and old. It represents the reemergence of an ancient principle that the law can correct unjust contracts. Yet, it has reemerged in a different form and based on very different philosophical justifications, autonomy and freedom to bargain rather than commutative justice.

II. PRIOR EMPIRICAL STUDIES

This Article now turns from the historical to the empirical approach. Before reporting the findings of the case coding project, it is necessary to place this project in the context of prior empirical work. Prior to the case coding project reported in this Article, several studies analyzed cases involving unconscionability. Some of these were limited geographically or by court type, and others were limited to certain types of contracts or clauses at issue. This Part summarizes the results and limitations of the prior studies. None of these prior studies are directly comparable to the present study, as they all focus either on a limited type of unconscionability case (price) or type of court (federal only or only certain state courts). In contrast, the study reported in this Article looked at all reported cases in federal and state courts and coded for more factors than any of the prior studies.[79]

A. *The Federal Case Study*

In 2006, Larry A. DiMatteo and Bruce Louis Rich published an empirical study of 187 federal cases (the Federal Case Study) drawn from two time periods (1968–1980 and 1991–2003) in which the federal courts considered the issue of unconscionability of a contract.[80] Their data set was limited to cases decided by federal (as opposed to state) courts and to cases that mentioned UCC Section 2-302.[81] Of the 187 reported cases that met their criteria, they coded 148 cases after eliminating some cases as inappropriate.[82] The coding for these cases demonstrated that 56 cases

78. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a, b (AM. LAW INST. 1981).

79. The Federal Case Study did code for many characteristics, but it examined only federal cases.

80. DiMatteo & Rich, *supra* note 72.

81. *Id.* at 1092.

82. *Id.* at 1093.

(37%) resulted in the claim of unconscionability succeeding, of which 40 cases (71.43% of the successful cases) were coded as exhibiting both procedural and substantive unconscionability.[83] Even though they limited their data set to cases mentioning UCC Section 2-302, only 30% of the 148 cases were actually governed by Article 2 of the UCC as involving a contract for the sale of goods.[84] New York, Connecticut, and New Jersey accounted for the largest percentage of the cases in the study (23%, 11%, and 8% of cases, respectively).[85] DiMatteo and Rich summarize their conclusions thus:

> The findings support the hypothesis that it is very difficult for a merchant to succeed in an unconscionability claim. It also confirmed the importance of section 2-302 methodology to the common law of contracts. The importance of factors such as the use of standard forms and the level of education, sophistication, and socio-economic status of the challenging party was confirmed. In addition, the rarity of use by the courts of the remedy of reformation was confirmed. Finally, the success rate of unconscionability claims has remained remarkably stable over the past three to four decades.[86]

B. *The North Carolina Study*

A more limited study was published in 2014. Brett M. Becker and John R. Sechrist II coded 89 cases that applied North Carolina law (the North Carolina Study) in deciding the issue of unconscionability (drawn both from North Carolina state courts and federal courts applying North Carolina law).[87] Becker and Sechrist found that the claim of unconscionability succeeded in only 3.37% of these 89 cases.[88] They also concluded that cases involving either a standard form contract or an unrepresented party were more likely than other cases to be successful on the unconscionability claim.[89] They also concluded that the data indicated both that "the doctrine of unconscionability has increasingly been applied outside the law of sales"[90] and "unconscionability claims arising out of sale-of-goods contracts are successful less often than are claims arising out of other types of contracts."[91] Finally, they concluded that North Carolina

83. *Id.* at 1096.
84. *Id.*
85. *Id.*
86. *Id.* at 1115.
87. Brett M. Becker & John R. Sechrist II, *Claims of Unconscionability: An Empirical Study of the Prevailing Analysis in North Carolina*, 49 WAKE FOREST L. REV. 633, 639 (2014).
88. *Id.* at 639.
89. *See id.* at 640–41.
90. *Id.* at 643.
91. *Id.* at 640.

law required proof of both procedural and substantive unconscionability.[92]

C. *The Price Provision Study*

In 1994, Frank P. Darr reported on a study limited to unconscionability claims relating to the price paid under a contract (the Price Study).[93] The study examined 44 cases drawn from "three sources: Article 2 of the Uniform Commercial Code, § 208 of the Restatement (Second) of Contracts, and Lexis. The Lexis search was run in July 1993 under the request, 'price w/5 unconscionability and date aft 1979.'"[94] This study concluded that the price was found to be unconscionable in 19 of the 44 cases examined (43.18% of the cases).[95] Only 2 of the 19 cases (10.53% of successful claims) found the price to be unconscionable without also finding some procedural unconscionability.[96]

D. *The Arbitration Study*

Susan Landrum conducted a study focused on the role of unconscionability in arbitration agreements (the Arbitration Study).[97] This study examined decisions coming from state appellate courts located in twenty states between 1980–2012.[98] The study found that of the 460 cases drawn from twenty states, 51.52% involved arbitration agreements.[99] This study found that claims of unconscionability were successful in approximately 23% of the cases studied.[100] The study compared the rate of success between cases involving arbitration agreements and all other contracts and found that of the cases involving arbitration, 25% were determined to be unconscionable, whereas in cases involving issues other than arbitration, courts found contracts or terms unconscionable in only 20% of cases.[101] Based on the findings, Professor Landrum categorized ten of the twenty states included in the study as rarely finding contacts or provisions unconscionable (Colorado, Maine, Maryland, Minnesota, Nebraska, New Hampshire, North Carolina, Oregon, Rhode Island, and South Carolina).[102] She also categorizes the appellate courts of three states (Alaska, Arkansas,

92. *Id.* at 641.

93. *See* Frank P. Darr, *Unconscionability and Price Fairness*, 30 HOUS. L. REV. 1819 (1994).

94. *Id.* at 1842 n.141.

95. *Id.* at 1843.

96. *See id.*

97. *See* Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751 (2014).

98. *Id.* at 756.

99. *Id.* at 776.

100. *Id.* at 779.

101. *Id.*

102. *See id.* at 781 (classifying the states as "conservative" because they "rarely find provisions unconscionable").

and Vermont) as having "shown a significant tendency to be sympathetic to unconscionability defenses."[103] She categorized four states (Missouri, Nevada, New Mexico, and Illinois) as having appellate courts that appear "to be very sympathetic to unconscionability arguments, but only if the challenged provision is part of an arbitration agreement. However, if the challenged contract provision is not related to arbitration, these courts rarely, if ever, find the challenged provision unconscionable."[104] Finally, she characterizes Ohio and Mississippi as willing to entertain arguments of unconscionability in a variety of cases, however "those arguments have not had nearly the level of success that they have had in Alaska, Arkansas, Vermont, Missouri, New Mexico, and Nevada."[105]

E. *The California Study*

In 2006, Stephen Broome published the results of a study of cases involving unconscionability decided by California's Court of Appeals (the intermediate appellate court) between August 27, 1982 and January 26, 2006 (the California Study).[106] Broome examined 160 cases and found that the unconscionability claim was successful (either by rendering the entire agreement unenforceable or by striking a particular provision) in 61 of those cases (38.13% of the cases).[107] Broome's main argument was that California was more likely to find agreements to arbitrate (or an aspect of such an agreement) unconscionable than any other type of contact.[108] He concluded:

> [U]nconscionability challenges succeeded in about fifty-eight percent of cases in the arbitration context. In the non-arbitration context, by contrast, unconscionability challenges succeeded only eleven percent of the time. Thus, as a purely empirical matter, unconscionability challenges succeed with far greater frequency when the contractual provision at issue is an arbitration agreement.[109]

III. THE EMPIRICAL STUDY

This Part explains the methodology employed for the empirical study and then reports and analyzes the results that emerged from the project of coding the cases. A preliminary note about this Article's approach to un-

103. *Id.* at 786.

104. *Id.* at 787 (footnote omitted).

105. *Id.* at 792. This study also included Montana but could not group the results from this state into any of the foregoing categories.

106. Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 68 n.33 (2006).

107. *See id.* at 44–48.

108. *See id.* at 40.

109. *Id.* at 48.

conscionability is necessary. This research was neutral about the existence of unconscionability, the requirement of its substantive and procedural prongs, and all the variables considered hereinafter. The literature on the topic is quite limited. The few authors who have considered this issue have constrained their research to a single type of unconscionability case (such as price) or a type of court/jurisdiction (solely federal or a sample of state courts). This Article offers a comprehensive study on unconscionability by analyzing state and federal courts and several types of clauses (arbitration agreements, price, among others). Data about each unconscionability case and court was gathered from Westlaw, with neutral code words and without interference with the results.

A. *Methodology*

The following search was conducted on October 29, 2018 in the Westlaw "All States" database and on March 25, 2019, in the "All Federal" database:

> All reported cases that contain the words "contract" and "unconscionability" at least five times (and searching for variations on the ending of "unconscionability" such as "unconscionable") and dated between January 1, 2013 and December 31, 2017.

This resulted in 440 state cases and 401 federal cases. Of the state cases, 178 were eliminated as false positives, leaving 262 cases.[110] The search in the "All Federal" database returned 401 cases, of which 200 were identified as false positives leaving 201 federal cases to be analyzed.

This search was selected after trying several different searches. A search for cases using the West Key Number System with an unconscionability headnote produced a lower number of results and appeared to omit some state cases that had not been given headnotes. A search using only the word "unconscionability" appeared to produce more false positives, and thus the word "contract" was added. To ensure the case discussed the topic and did not merely refer to the terms in passing, the search was limited to cases showing a minimum of five occurrences of the search terms.

The time frame of 2013–2017 was selected to examine a significant length of time and to eliminate any potential distorting effects of the 2007–2008 financial crisis. To the extent the financial crisis caused more

110. A case was considered a false positive if the majority opinion did not clearly decide an issue of contractual unconscionability. Some examples of false positives include a case in which the issue of unconscionability of a contract provision was only discussed in a concurring opinion, *see, e.g.*, *Ex parte* First Exch. Bank, 150 So.3d 1010 (Ala. 2013), and a case in which behavior was evaluated as "unconscionable" under the Ohio Consumer Sales Practices Act (but not under the contract doctrine of unconscionability), *see, e.g.*, Taylor v. First Resolution Invest. Corp., 72 N.E.3d 573 (Ohio 2016).

litigation or more claims of unconscionability to be filed, any such distorting effect should be diminished six years after the crisis began.

Each case was then coded to identify the year of the decision, the court rendering the decision, and if a federal court, which state's law was applied. Appendix Table A lists the number of cases decided by each type of court and the number of decisions reported in each of the years included in the study. Appendix Table B contains data on the number of decisions and successful claims of unconscionability in each state's courts and under that state's law when being applied by a federal court. Appendix Table C includes the number of federal cases by federal circuit and district.

The cases were coded to distinguish those governed by the UCC (Article 2) and cases decided under the common law. The cases were also coded for attributes or characteristics of the party claiming a contract or clause to be unconscionable. Appendix Table D contains the results of this coding. The cases were also coded to identify attributes of the contract negotiation process. Appendix Table E contains the results of this coding. Appendix Table F contains a list of clauses that were coded by the term or clause alleged to be unconscionable (e.g., price, interest rate, exculpation clause, agreement to arbitrate). Each decision was reviewed to determine if the opinion explicitly required the finding of both procedural and substantive unconscionability (and if using a sliding scale) and whether in fact the court explicitly found both types of unconscionability to be present. Finally, each opinion was coded to distinguish cases in which at least one claim of unconscionability was successful and, if so, whether the court simply struck down the unconscionable clause or rewrote the provision to be legally enforceable.

B. *Summary of Overall Findings*

Of the 463 cases analyzed, 25.70% of the decisions resulted in at least one claim of unconscionability succeeding (Success Rate). There was a somewhat higher Success Rate in state courts as opposed to federal courts. State court cases had a 28.63% Success Rate (75 successful cases) compared to only a 21.89% Success Rate in federal court (44 successful cases). The Success Rate for state courts is slightly higher than the 23% Success Rate reported in the Arbitration Study (which was based on cases from only twenty states).[111] This Success Rate for federal cases is significantly lower than the 37% Success Rate reported in the Federal Case Study. With respect to the 119 total successful claims in both types of courts, the courts rewrote the offending contract term to make it enforceable in only 11 cases (9.24% of successful claims) and simply struck down or severed the clause as unenforceable in the remaining 108 cases. Thus, both federal and state courts seemed more reluctant to rewrite unconscionable clauses than to simply strike or sever them as unenforceable. Of the 11

111. *See supra* Section II.D.

cases in which the offending clause was rewritten to be enforceable, only 3 were in state court. Almost all of the cases (8) involved an agreement to arbitrate or a waiver of a right or related cause of action in connection with an agreement to arbitrate.[112] Chart 1 summarizes the overall findings comparing state and federal cases, and Chart 2 reports the action taken by the court in successful cases.

CHART 1: OVERALL FINDINGS

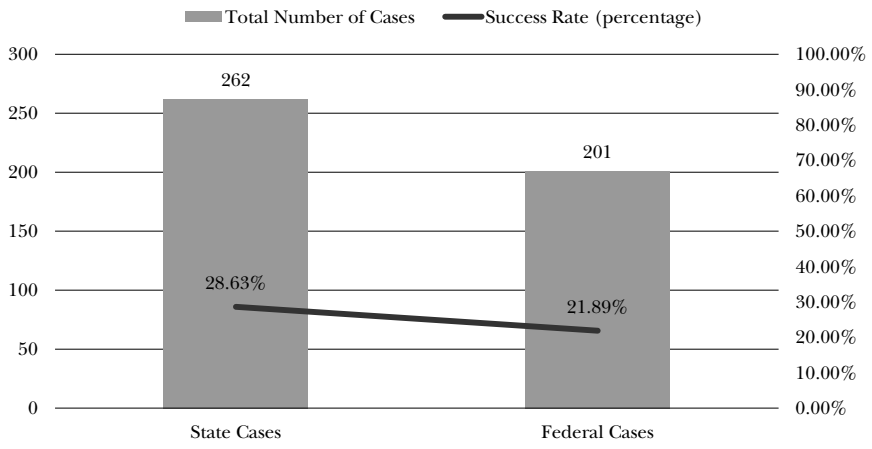
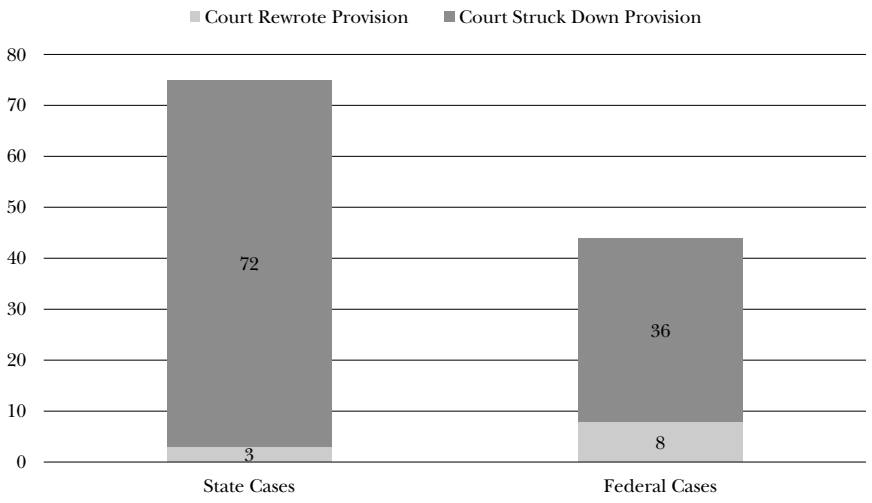


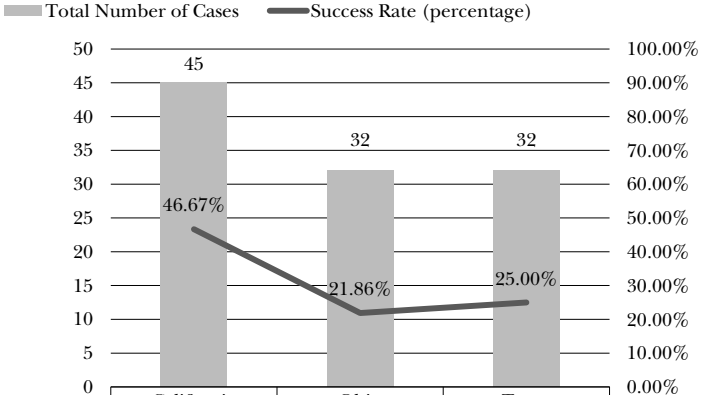
CHART 2: ACTION TAKEN IN SUCCESSFUL CASES



112. Two of the 11 cases were price-related (1 involving an interest rate). A third case involved the ability to extend the term of the agreement coupled with an unfair commission structure. The other 8 cases involved an arbitration provision or a waiver of a right that was severed from the agreement to arbitrate.

The three states that reported more cases than any other were California, Ohio, and Texas. Chart 3[113] presents the number of cases and Success Rates for this states.

CHART 3: STATES REPORTING THE MOST CASES



	California	Ohio	Texas
Total Number of Cases	45	32	32
Success Rate (percentage)	46.67%	21.86%	25.00%

Interestingly, these states are all different from the top three jurisdictions in the Federal Case Study, which were New York, Connecticut, and New Jersey (although that study only examined federal courts located in those states).

California is clearly the major outlier in that it decided more cases than any other state, and its Success Rate was approximately twenty percentage points higher than the overall Success Rate for all cases in this study. The Success Rate in California increased slightly from the period covered in the California Study, which reported only a 38.13% Success Rate compared to 46.67% in this study.[114] The increase in the Success Rate in California seems to be attributable mostly to a significant increase in the Success Rate for provisions other than an agreement to arbitrate. The California Study reported a Success Rate for challenges to agreements to arbitrate of 58% (roughly equivalent to the current results) but only an 11% Success Rate for other provisions;[115] whereas, this study found Suc-

113. California's total becomes 46 if the Washington case applying California law is included with the California results, and California's Success Rate rises to 47.8% if the Washington case applying California law is included. Texas's total falls to 31 if the case applying Arizona law is excluded from the Texas results, and Texas' Success Rate rises to 25.81% if the Texas case applying Arizona law is excluded.

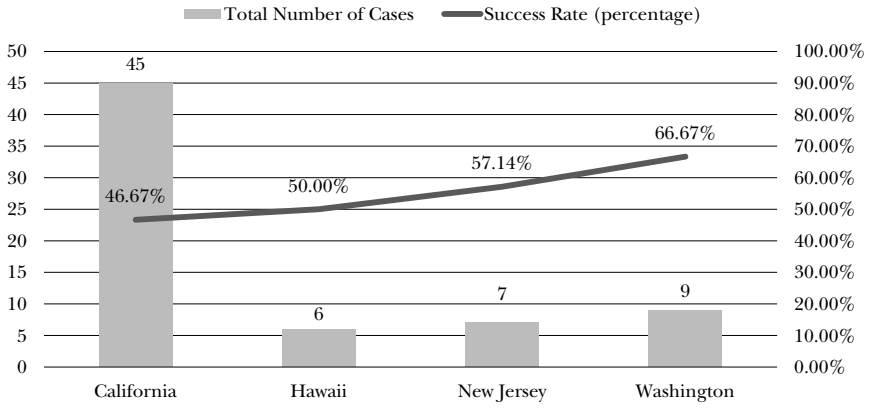
114. The figures are not precisely comparable, as the California Study only considered opinions from the California Court of Appeals (the intermediate appellate court), whereas this study included 2 cases from the Supreme Court of California as well.

115. *See* Broome, *supra* note 106, at 48.

cess Rates of 45.45% and 50% for arbitration and other clauses, respectively. If California's results are excluded from the data, the Success Rate for all other state cases falls to 24.88% from 28.63%.

Ohio's Success Rate, in comparison, is only a few percentage points below the overall Success Rate for all cases in the study and approximately seven percentage points lower than the state court Success Rate. Texas's Success Rate is slightly lower than the Success Rate for state cases and virtually the same as the overall Success Rate. The variation from the overall Success Rate of both Ohio and Texas is significantly smaller than California's variance. Chart 4 presents the Success Rates for all states, other than states that reported fewer than five cases, that had a higher Success Rate than the national average.

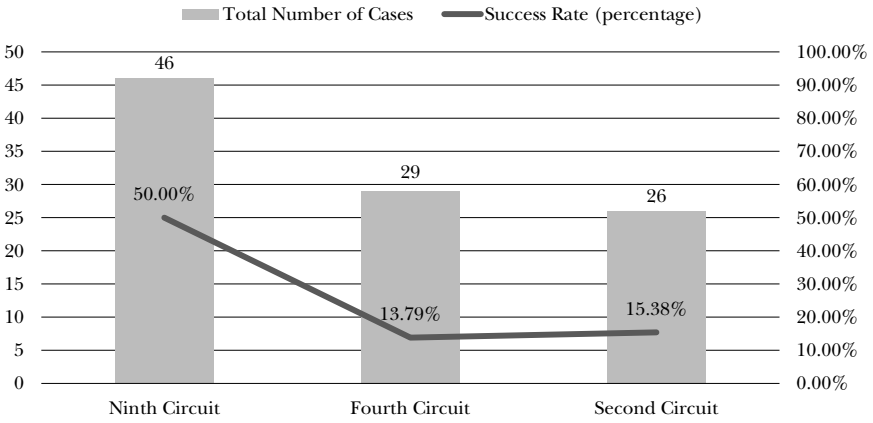
CHART 4: STATES WITH SUCCESS RATES GREATER THAN THE NATIONAL AVERAGE



Interestingly, none of these states that reported significantly higher Success Rates were included among the twenty states studied in the Arbitration Study.[116] The district and courts of appeals of the Ninth, Fourth, and the Second Circuits decided the most cases out of all thirteen federal circuits. Chart 5 presents the number of cases and Success Rates for these circuits.

116. *See* Landrum, *supra* note 97, at 756 n.10.

CHART 5: FEDERAL CIRCUITS REPORTING THE MOST CASES



These three Circuits accounted for slightly less than half of all federal cases. These results differ from the Federal Case Study, which found that most cases were decided in federal courts located in New York and Connecticut (the Second Circuit) and New Jersey (the Third Circuit). There was not a significant difference between the Success Rate in federal appeals courts as opposed to district courts. Of the 31 appellate court decisions, only 7 involved successful unconscionability claims for a 22.6% Success Rate. Of the 170 district court decisions, at least one claim of unconscionability succeeded in 37 cases for a 21.8% Success Rate.

The circuit that clearly stands out as an outlier is the Ninth Circuit, with a 50% Success Rate for all cases in its appellate and district courts (23 cases with at least one successful claim out of 46 cases). At the appellate level, the Ninth Circuit Court of Appeals vindicated at least one claim of unconscionability in 4 out of the total 7 successful cases decided by all federal appellate courts combined. This means the Ninth Circuit accounted for 57.1% of the successful cases in all federal appellate courts. If the Ninth Circuit cases are removed from the calculation, the overall federal court Success Rate drops from 21.89% to 13.55%. Excluding all cases from the Ninth Circuit, there were twenty-one cases in which at least one claim was successful out of 155 total cases. Thus, the Ninth Circuit influenced the overall federal Success Rate more than California affected the state court Success Rate.

Charts 6 and 7 compare the results in state and federal court for cases applying California, Ohio, and Texas law (the states that reported the most cases in the study).

CHART 6: OVERALL FINDINGS OF STATE COURTS REPORTING THE MOST CASES

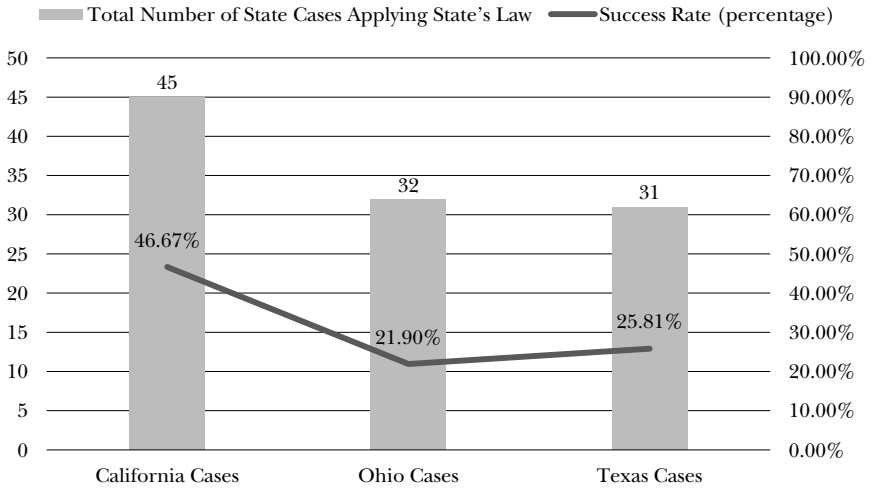
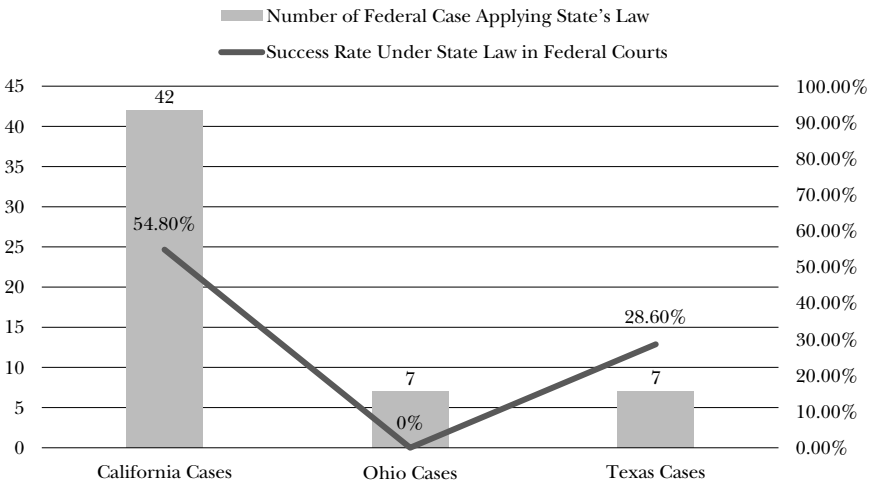


CHART 7: OVERALL FINDINGS OF FEDERAL COURTS APPLYING THE APPLICABLE STATE'S LAW



There were no cases in which even one claim of unconscionability succeeded in the First Circuit (6 total cases), Third Circuit (13 total cases), or Sixth Circuit (15 total cases). Excluding districts whose courts decided fewer than 5 cases, the districts that had the highest Success Rates were the Central District of California (6 out of 9 cases or 66.7%) and the Northern District of California (9 out of 16 cases or 56.3%). The two districts that recorded the lowest Success Rates, excluding districts with too few cases (fewer than 5), were the Eastern District of Pennsylvania—with no success-

ful cases in 6 total cases—and the Southern District of New York—with one successful out of 12 cases (8.3%).

C. *Nature of the Cases*

Of the 201 federal court decisions, circuit courts of appeals decided 31 (15.4%) and federal district courts decided the remaining 170 (84.6%) cases. Of the state court cases, 75.6% were decided by intermediate appellate courts, 23.3% were decided by the highest state court, and 1.1% by trial courts. The study only reviewed reported cases and this fact likely explains the few state trial court decisions.

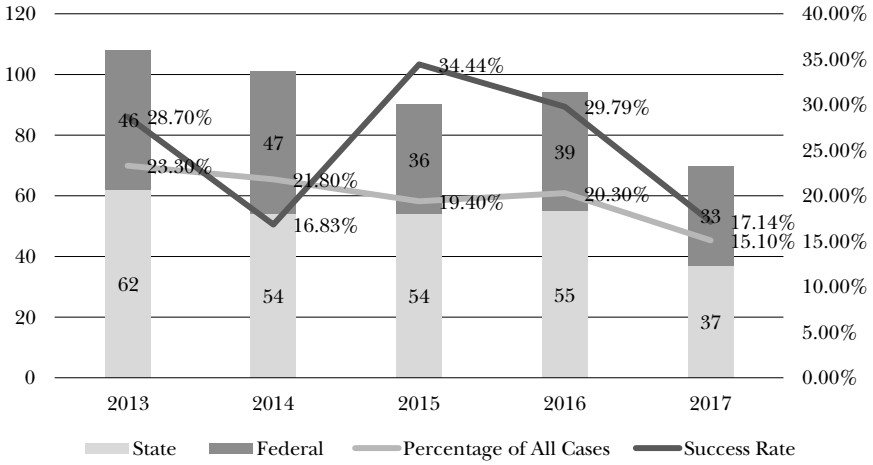
Of the state court cases, only seven decisions concluded that Article 2 of the UCC was applied to the issue of unconscionability (one case each from California, Iowa, Missouri, Montana, New Mexico, Texas, and West Virginia). In 3 of these cases the claim was successful rendering a 42.86% Success Rate. Of the federal cases, only 11 decisions were rendered in which Article 2 of the UCC was applied to the issue of unconscionability. Only 1 case was successful producing a 9.09% Success Rate. The overall Success Rate for the 18 cases was 22.22%. Thus, although the overall Success Rate on claims governed by Article 2 of the UCC is consistent with the entire data set, there was a great disparity between federal and state cases, although this result is based upon a small number of cases.

The UCC was relevant for only 3.9% of all cases in the five-year period under review, a much smaller percentage than the 30% reported in the Federal Case Study in the two time periods it examined (1968–1980 and 1991–2003).[117] This suggests that cases directly applying the UCC have been declining since the adoption of the UCC in the 1950s.

The total number of all cases reported declined throughout the five-year period. In the year 2013, 108 cases (46 in federal court and 62 in state court) were reported, but by 2017, only 70 cases were reported (33 in federal court and 37 in state court). Chart 8 presents the number of cases by year as well as showing the percentage of all cases in the study represented by each year and the overall Success Rate by year.

117. *See* DiMatteo & Rich, *supra* note 72, at 1069, 1100.

CHART 8: CASES BY YEAR AND SUCCESS RATES



Some of this decline in number of cases may be explained by the delay in reporting decided cases although such a cause was mitigated by running the search in October 2018 for state cases and March 2019 for federal cases. Thus, it seems likely that most cases would have been reported by that time. One explanation might be that some cases resulting from the financial crisis of 2007–2008 were still in the system by 2013, but such a conclusion is only speculative. Still, a final possibility is that as cases are decided, fewer parties are raising unconscionability challenges. In comparison with the number of cases (which is generally trending down) the Success Rate was somewhat volatile over the period ranging from a high of 34.44% in 2015 and a low of 17.14% in 2017.

D. *Common Characteristics of the Parties or Contracts*

Each case was coded if the opinion revealed any of a predefined list of possible characteristics of a party or the transacting process. The goal was to determine if the types of cases litigated shared any common characteristics. Appendix Table D contains the results of this coding. The most common characteristic of the parties alleging a clause to be unconscionable was that the party was a natural person, as opposed to a legal entity such as a corporation or limited liability company. In 75.81% of all cases, the party seeking to invalidate a term as unconscionable was a natural person. There was not a significant variation between state and federal court with respect to this attribute (77.1% in state cases and 74.13% in federal cases).

The second most common characteristic (at 19.01% of all cases) was that the party alleging unconscionability was described as vulnerable in some way. A party was considered vulnerable if, for example, the party was described as having weakened mental capacities, being in an emotionally vulnerable state, or being particularly susceptible to undue influence. With respect to a party's vulnerability, there was a significant difference

between federal and state court. Of all state court cases, 27.10% involved a party described as vulnerable, but in federal court cases, only 8.46% of the cases included this description. This suggests that vulnerable persons are more likely to be able (for costs reasons perhaps) or willing to file suit in state court. One factor that was significantly more common in state court as opposed to federal court was economic status. Of the state court cases, 12.21% described the party alleging unconscionability as being economically or socioeconomically deprived, weaker, or of a lower socioeconomic or economic status, whereas only 2.99% of federal cases included such a description. Further, only 2.38% of the cases involved a merchant alleging unconscionability. This is unsurprising given how few cases involved contracts governed by Article 2 of the UCC.

As to attributes of the contract negotiating process, the most common feature of cases in the data set is that the contract was described as a preprinted form in 46.89% of the cases, without much variation between state and federal courts (49.24% of state court cases and 43.78% of federal court cases). Interestingly, the contract was described as entered into online or digitally[118] in only 7.34% of all cases. A higher percentage of federal cases as compared to state court cases involved digital contracting (3.05% of state court cases but 12.94% of federal cases). This low percentage of cases is surprising, given that almost half of the cases involved a standardized or form contract, and one would assume that most online contracts are standardized or form contracts. Although not the primary focus of this study, it was interesting to note that 76.47% of the 34 contracts identified as being entered into online or digitally required some action like a click to agree[119] to form the contract.[120] This suggests an active process of agreement is becoming a standard practice for online contracting rather than simply disclosing terms and conditions that apply. Other characteristics of the formation process that were statistically significant were (1) the party claiming unconscionability was not represented by counsel in the negotiations (23.97%); and (2) the negotiations were described as involving an inequality of bargaining power between the parties (24.19%). Of these two factors, the first was inconsistently common in state and federal court. Of all state court cases, 78.63% noted that the

118. Online or digital was defined as a contract entered into on a website or through a phone, app, or other digital means of contracting.

119. Active action meant that the online formation process required the party agreeing to the proposed contract to perform some active action such as clicking an "I agree" box or a confirmation of having read the terms of the contract as opposed to the website merely stating that purchases were subject to terms and conditions without any required click or other acknowledgment.

120. There was a significant disparity between federal and state court cases with respect to the percentage of online contracts that required active agreement to terms. Only 25% of the 8 contracts in state court required an action like click to agree, whereas 92.31% of online contracts in federal court so required. This disparity may be a function of the very few cases in state court involving online contract (8 cases as opposed to 24 cases in federal court).

party alleging unconscionability was unrepresented in the negotiations, whereas only 17.91% of federal cases noted this factor.

The foregoing analysis considers how often these attributes appear in claims, but how successful are claims that involve these attributes? There are two ways to consider this question: (1) how many successful claims involve these attributes or characteristics; and (2) what is the Success Rate of cases with these attributes?

As to the first perspective, claims made by natural persons accounted for 85.71% of all successful cases. There was very little variation between state and federal cases on this issue. This means that being a natural person is the most common characteristic of all successful claims. The second most common characteristic is vulnerability. Of all 119 successful cases, 39.50% of the successful cases shared this attribute. Yet, regarding this characteristic, there was a significant difference between successful state and federal claims. Of all 75 successful state claims, 52.00% involved a party described as vulnerable; whereas, of the 44 successful federal cases, only 18.18% involved parties described as such. This disparity is likely explained by the fact that cases with this characteristic accounted for a significantly higher percentage of all state cases decided as opposed to federal cases, as discussed *supra*. Finally, although the attributes of lower economic status and lower levels of education did not account for significant percentages of all successful claims (17.65% and 8.40%, respectively), these factors were present at significantly higher rates in successful state cases as opposed to federal cases. Lower economic status appeared in 25.33% of all successful state claims, but only 4.55% of federal cases. The court noted lower levels of education in 12.00% of state cases but only 2.27% of federal cases.

Yet, how successful were cases with various attributes relative to other cases exhibiting the same attribute? Appendix Table G contains comparative Success Rate data for these attributes. Comparing the overall Success Rate of all state and federal cases of 25.70% to the Success Rate of all cases sharing a particular party attribute, cases sharing five different party characteristic exhibited Success Rates greater than the overall Success Rate: lower education level (55.56%), economic status (55.26%), a language disparity (54.17%), vulnerable party (53.41%), and claimant being a natural person (29.06%). For each of these case categories, the Success Rate of such cases in state courts was always higher than the Success Rate in federal courts.[121] Several of these findings are consistent with the Federal Case Study's conclusion: the level of education, sophistication, and socioeconomic status of the challenging party was important.[122] Consistent with the conclusions of the Federal Case Study, merchants tended to be

121. Appendix Table G contains the data comparing the Success Rate in federal and state courts.

122. *See supra* note 86 and accompanying text.

unsuccessful in alleging unconscionability, with only 9.09% of the cases involving merchants as the alleging party succeeding.

Turning to characteristics or attributes of the contract or negotiations, Appendix Table H contains comparative Success Rate data for these attributes. The three most common attributes shared by all 119 successful cases were the contract was a preprinted form (58.82%), an inequality of bargaining power (44.54%), and an unrepresented party in the contract negotiations (33.61%). The first finding is consistent with the conclusion of the Federal Case Study that the presence of a standardized form contract was significant.[123] Except for the second of these three attributes, with respect to which federal and state cases exhibited the same level of these cases within their respective set of successful claims, state court cases saw a higher percentage of successful claims involving preprinted forms and unrepresented parties than federal court cases.

Cases that exhibited any of the negotiation or contract attributes, listed in Appendix Table H, all had a higher Success Rate (calculated based on the total number of cases exhibiting the applicable attribute) than the overall 25.70% Success Rate. The three highest Success Rates were in categories of cases involving (1) legalese as the language of the contract (80%), (2) unconscionable language described as not conspicuous (70%), and (3) inequality of bargaining power (47.32%). The attribute with the most significant variation of Success Rate between federal and state court was the contract being formed digitally. Cases involving such methods of contracting had a Success Rate in state courts of 75% but only 26.92% in federal courts. It must be noted that there were only 8 such cases in state courts that involved electronic contracting as opposed to 26 in federal court. Two other categories with marked differences between federal and state court were (1) inequality of bargaining position (58.93% Success Rate for state cases but only 35.71% for federal cases) and (2) contract language written in legalese (83.33% Success Rate in state court compared to only a 66.67% Success Rate in federal courts).

Chart 9 summarizes the total number of cases that contained an attribute that was in the five most common characteristics of all cases and the Success Rate for cases involving each attribute. Chart 10 compares the percentage of all cases involving these five characteristics to the Success Rate for cases involving the characteristic.

123. *See* DiMatteo & Rich, *supra* note 72, at 1097.

CHART 9: OVERALL FINDINGS OF CASES INVOLVING MOST COMMON CHARACTERISTICS

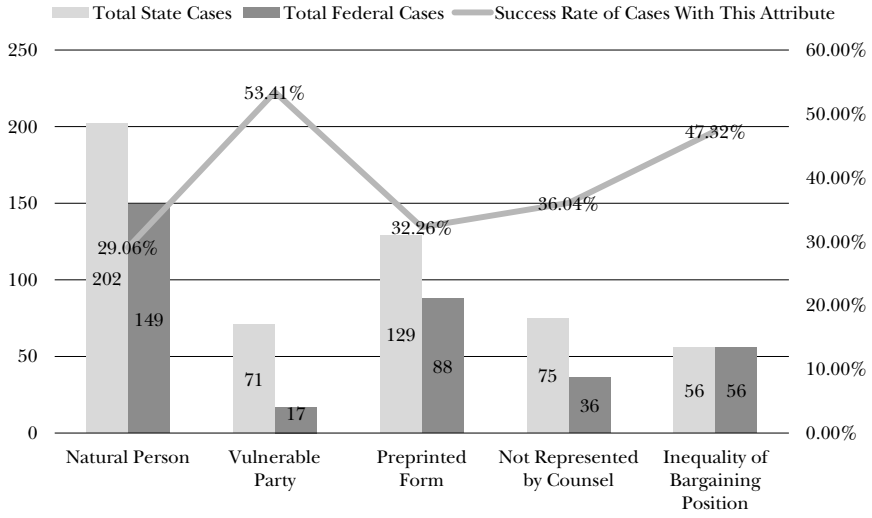
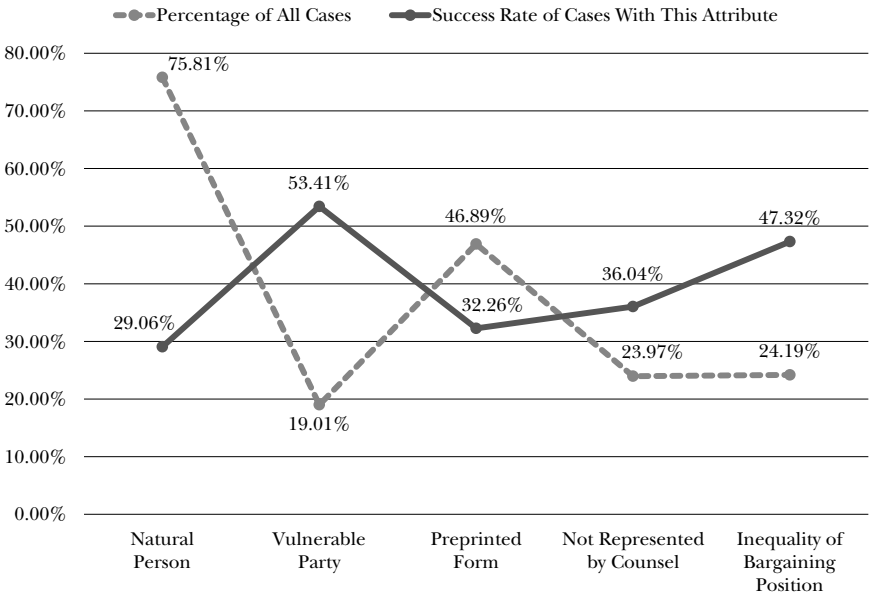


CHART 10: COMPARISON OF THE PERCENTAGE OF ALL CASES EXHIBITING A PARTICULAR CHARACTERISTIC TO THE SUCCESS RATE FOR EACH CHARACTERISTIC



E. *Types of Unconscionable Clauses*

The contracts or clauses reviewed by the 463 cases in the data set were coded as belonging to one of the 14 categories listed in Appendix Table F.

In the data set, there were 479 clauses that were reviewed. Of these 479 clauses, 154 (32.15%) were found to be unconscionable. Chart 11 presents the 3 most frequently challenged clauses in the data set, the total number of times the clause was alleged to be unconscionable (broken down between challenges in state and federal court), and the Success Rate for cases involving such clauses. Chart 12 contrasts the percentage each of these 3 clauses represents of all challenged clauses in the data set compared to the Success Rate for each clause.

CHART 11: TYPES OF CLAUSES AND SUCCESS RATES

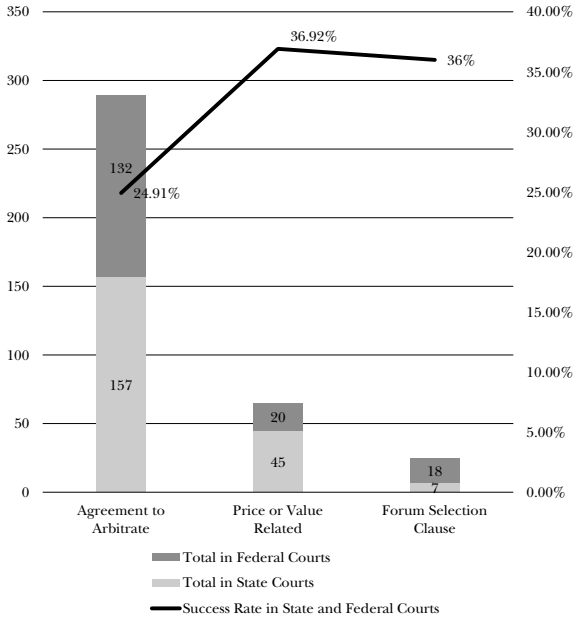
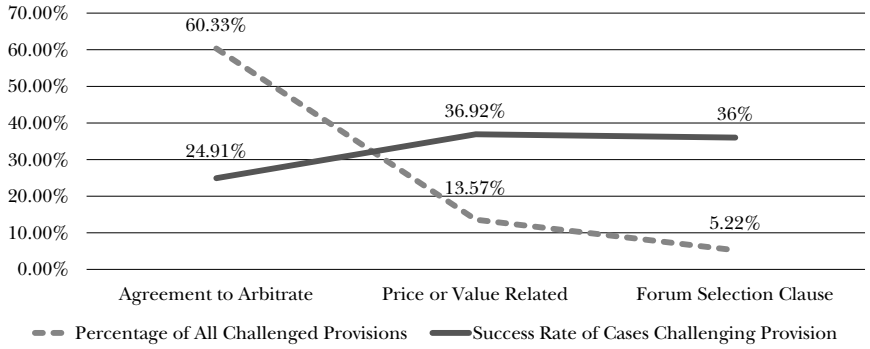


CHART 12: FREQUENCY AND SUCCESS RATE



As is evident from both Charts 11 and 12, the type of clause most often alleged to be unconscionable in the data set was an agreement relat-

ing to arbitration (289 clauses or 60.33% of the clauses considered), but this clause was found unconscionable only seventy-two times or 24.91% of the time.[124] This indicates that although agreements to arbitrate were the most litigated clause, they were found unconscionable at a lower rate than the average for all clauses reviewed. These results were roughly consistent with the Arbitration Study, which found that arbitration was at issue in 51.52% of the cases in its data set and found challenges to arbitration succeeded 25% of the time. This relatively unchanged data suggests that the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*[125] has not had as significant an effect on unconscionability challenges to agreements to arbitrate as may have been anticipated.

In an appeal from the Ninth Circuit, the Supreme Court held that federal law preempted, and thus prevented, courts from applying the "*Discover Bank*" rule.[126] In *Discover Bank v. Superior Court*,[127] the Supreme Court of California held that, when coupled with a class action waiver, certain agreements are per se unconscionable. Although *Concepcion* only dealt with one type of agreement to arbitrate (one that involved a waiver of a right to class action arbitration), scholars predicted the decision would have a dramatic impact in preventing unconscionability challenges to agreements to arbitrate.[128] Some scholars predicted that *Concepcion* eliminated all challenges to any agreements to arbitrate, not just those including class action waiver as in *Concepcion*, on the grounds of unconscionability.[129] On the other hand, Christopher R. Drahozal argues that

124. This coding for agreements to arbitrate was the most difficult and involved the most subjective judgment. This is because an agreement to arbitrate is often intertwined with the waiver of other rights or the limitation of remedies. Thus, a court might invalidate an aspect of the arbitration agreement that functions as an unconscionable limitation of remedies. Courts often blur the distinction between invalidating an agreement to arbitrate and in fact invalidating the waiver of some other right or remedy that is connected to the agreement to arbitrate. In coding we tried to adhere to the language and categorization of the court opinion. If the court described the unconscionability claim as being raised against an agreement to arbitrate, the case was coded that way. After completing the data analysis, I have concluded that the label agreement to arbitrate is a broad genus that includes a variety of species of clauses that although differing from each other all arise in the context of an agreement to arbitrate. A follow-up project to this Article could involve drilling down in the agreement to arbitrate cases to more particularly code each one.

125. 563 U.S. 333 (2011).

126. *See id.* at 352; *see also* Discover Bank v. Superior Court, 113 P.3d 1100, 1103 (Cal. 2005) (holding that under certain circumstances class action waivers in consumer contracts of adhesion are unenforceable under California law).

127. 113. P.3d 1100 (Cal. 2005).

128. *See, e.g.*, Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703 (2012); Maureen A. Weston, *The Death of Class Arbitration under* Concepcion*?*, 60 U. KAN. L. REV. 767 (2011).

129. *See, e.g.*, Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielsen, Rent-A-Center, Concepcion *and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 380 (2011) (arguing that after *Concepcion* "one wonders what if anything is left of the doctrine of unconscionability in the realm of arbitration

Concepcion "does not preempt all or even most state unconscionability doctrine as applied to arbitration agreements."[130] The results of this study support Drahozal's prediction that the case, notwithstanding its importance, would not have a dramatic effect on state law unconscionability challenges to agreements to arbitrate. All of the cases in this study were decided after *Concepcion*, and almost all of the cases in the Arbitration Study were decided before *Concepcion*.[131] If *Concepcion* wrought the death of all or most unconscionability challenges to agreements to arbitrate, we would have expected (1) the percentage of unconscionability cases that involved arbitration to decline (if lawyers understood these claims to be preempted), (2) the Success Rate for these clauses to decline if more of these challenges were dismissed as preempted, or (3) both the percentage and Success Rate to decline altogether. In fact, agreements to arbitrate constituted a higher percentage of all coded clauses than in the Arbitration Study and the Success Rate remained relatively unchanged. Thus, *Concepcion* seems not to have dramatically reduced the number of challenges to agreements to arbitrate based on claims of unconscionability or reduced the Success Rate.

Beyond arbitration clauses, price terms were evaluated a significant number of times in the data set. There were 65 clauses (13.57% of all clauses)[132] relating to price, of which 24 (36.92%) were found unconscionable. This Success Rate is a little lower than the 43.18% Success Rate reported in the Price Study for the cases alleging the contract price to be unconscionable.[133] Excluding categories of clauses with fewer than ten examples in the data set, the price terms category contained the highest number of unconscionable decisions. Forum selection clauses also exhibited a higher than average Success Rate (36%). Yet, even though they were the third most frequent clause to be challenged in the dataset, they represented only 5.22% of all challenged clauses. Of the types of clauses considered, the following categories exhibited Success Rates greater than the overall Success Rate: (1) limitation of consequential damages (50%);[134] (2) a penalty clause (40%);[135] (3) price charged (36.92%); (4)

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agreements"); Arpan A. Sura & Robert A. DeRise, *Conceptualizing* Concepcion*: The Continuing Viability of Arbitration Regulations,* 62 U. KAN. L. REV. 403, 408 (2013) (arguing that *Concepcion* "threatens to jeopardize a bevy of facially neutral contract laws as they are applied to arbitration agreements").

130. Christopher R. Drahozal, *FAA Preemption after* Concepcion, 35 BERKELEY J. EMP. & LAB. L. 153, 173 (2014).

131. The Arbitration Study included cases through 2012, and *Concepcion* was decided in 2011. *See* Landrum, *supra* note 97, at 751; *Concepcion*, 563 U.S. at 333.

132. Agreements to arbitrate and price related terms accounted for 73.90% of all clauses alleged to be unconscionable.

133. *See supra* Section II.C.

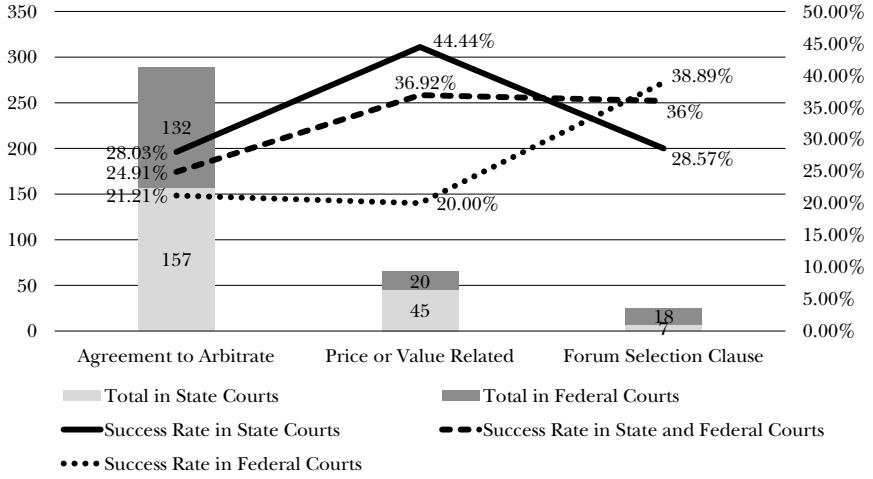
134. There were only 8 cases involving such clauses (1.67%), and 6 of them were in federal court.

135. There were only 5 cases involving such a clause (only 1.04%), and all of them were in state court.

forum selection clause (36%); (5) exculpatory clause (33.33%); (6) limitation of liability (31.58%); and (7) a unilateral right to terminate (30%).

Chart 13 summarizes the Success Rates in federal court, state court, and state and federal combined for the three most commonly challenged clauses.

CHART 13: CHALLENGED CLAUSES



Of the clauses litigated in state court, there were 260 different clauses alleged to be unconscionable. Of these clauses, 40% were found to be unconscionable, which is greater than the 32.15% rate for the entire set of state and federal cases involving these clauses. The data shows that courts found decisions involving agreements to arbitrate and price terms as most likely to be unconscionable. This is consistent with the entire set of state and federal cases involving these clauses. Agreements to arbitrate accounted for 50.38% of the coded clauses considered in state court, and price terms accounted for 17.31%. Together, these two categories accounted for 67.69% of all clauses considered. On the merits, price terms were considered unconscionable at a higher Success Rate than both the overall Success Rate and the Success Rate for challenges to price terms in the combined state and federal cases data set. Of all price terms reviewed, 44.44% were found to be unconscionable in state courts. Agreements to arbitrate were found unconscionable at a slightly higher rate in state court than in the combined data set, at 28.03% compared to 24.91% in the combined data set. Other categories of clauses that included at least five examples in state court and that had significantly higher Success Rates in state courts compared to the Success Rate of all cases in state courts included (1) limitations on the amount of liability of a party (45.45% out of 11 clauses); (2) exculpation clauses (38.46% out of 13 clauses); and (3) elimination of an implied warranty (40% of 5 clauses). Only 1 type of

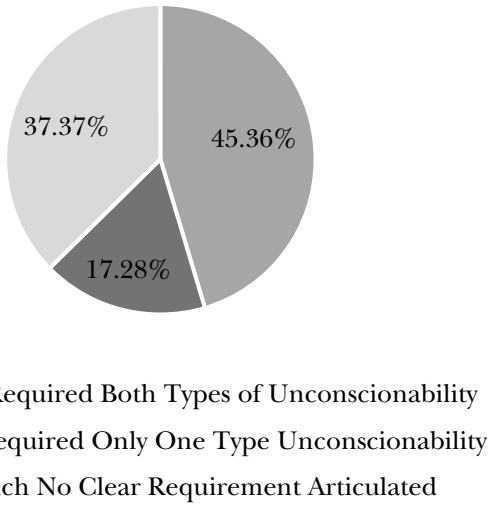
clause—forum selection clauses—had a lower Success Rate in state court (28.57%) than the combined state and federal court set Success Rate (36%).

In federal cases, litigants challenged arbitration agreement clauses the most, accounting for 60.27% of all clauses challenged in federal court. Price terms were the second most challenged provision at 9.13%, but such clauses represent a smaller proportion of federal claims than such provisions represented in state cases (17.31% of clauses challenged in state courts). There was a significantly lower Success Rate in federal court for price-related terms, with only a 20% Success Rate compared with 44.44% Success Rate in state courts. Other categories of clauses that included at least five federal cases and had significantly different Success Rates from the federal and state combined data set for such clauses were (1) elimination of an implied warranty (with no cases succeeding compared to 20%); (2) limitation of the amount of liability (12.5% compared to 31.58%); (3) exculpatory clauses (20% compared to 33.33%); (4) choice of law (16.67% compared to 25%); (5) class action waiver (4.57% compared to 17.65%); and (6) a unilateral right to terminate (37.5% compared to 30%). Except for clauses giving a unilateral right to terminate (the Success Rate for which was 7.5 percentage points higher in federal court), every other clause in this list had a lower federal Success Rate than the Success Rate for state and federal courts combined. The Success Rate for challenges to forum selection clauses was marginally higher in state court (38.89% compared to 36% for combined cases). These results are consistent with the overall conclusion that unconscionability challenges are generally more likely to succeed in state court.

F. *Legal Standard for Assessing Unconscionability*

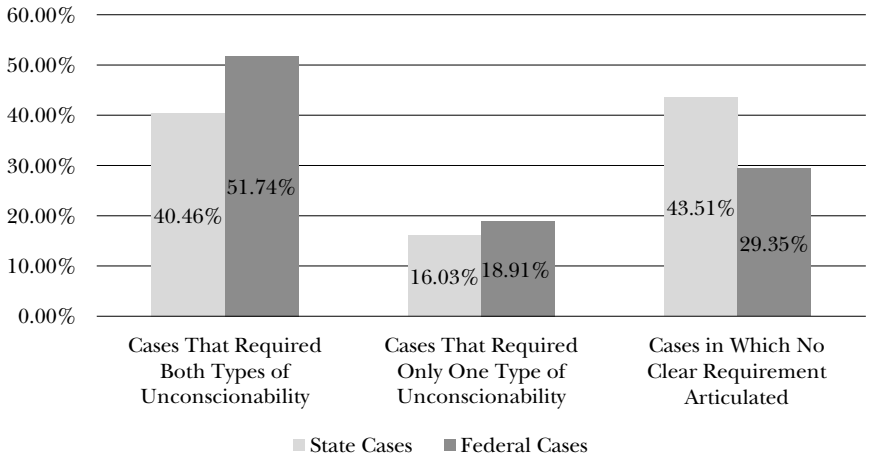
To test the validity of the myth that to succeed on a claim of unconscionability both procedural and substantive unconscionability must be proven, all 463 cases were coded to identify whether the court explicitly required evidence of both procedural and substantive unconscionability. Chart 14 shows the percentage of cases in the study that explicitly required proof of both types of unconscionability as opposed to those that explicitly required only one type. It also highlights cases that did not clearly state whether both or single type of unconscionability was required.

CHART 14: PERCENTAGE OF CASES USING DIFFERENT PROOF REQUIREMENTS



Fewer than half of the 463 cases in the data set explicitly required proof of both procedural and substantive unconscionability to prevail, which is purportedly the rule in most cases.[136] A significant minority of cases, almost 20%, clearly reject the presumed typical rule of a double requirement. Chart 15 compares the data for state and federal court.

CHART 15: PERCENTAGE OF COURTS REQUIRING PROOF OF TYPES OF UNCONSCIONABILITY

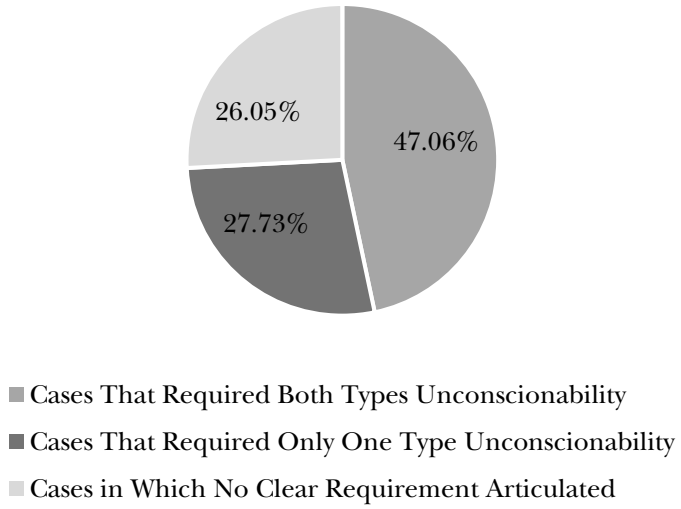


There is some variation between state and federal court, with federal courts more likely to explicitly require both types of unconscionability. Yet, even in federal court, just over half of the courts required proof of

136. *See supra* note 9 and accompanying text.

both types. Chart 16 shows the results of this categorization of only successful cases.

CHART 16: PERCENTAGES OF SUCCESSFUL CASES USING DIFFERENT PROOF REQUIREMENTS



Interestingly, a higher percentage of cases in which claims succeeded explicitly required proof of only one type of unconscionability (27.73% compared to 17.28% in all cases). Although a slightly higher percentage of successful cases required proof of both types, it was still less than half of all cases.

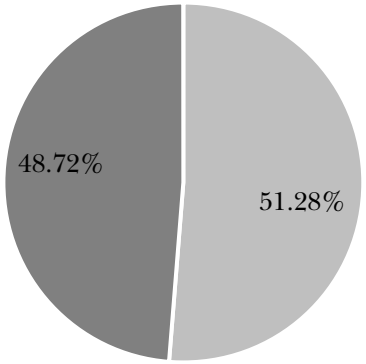
The sliding scale or balancing approach, which requires proof of both types of unconscionability but allows overwhelming proof of one type to compensate for the sparsity of proof of the other, was announced as the applicable rule in only 19.22% of the cases in the study (18.32% of state cases and 20.40% of federal cases). Limiting the data to only successful cases, a greater percentage of successful cases (31.09%) explicitly used a sliding scale or balancing approach. Interestingly, even though approximately the same percentage of all state and all federal cases announced a sliding scale approach, the variation between federal and state courts with respect to only successful cases was greater. Of successful cases in federal court, 43.18% explicitly stated that the court used a sliding scale or balancing approach compared to only 24% of successful state cases.

The foregoing analysis suggests that a two-pronged evidentiary standard for unconscionability may not be as universally entrenched in the law as is commonly believed. The sliding scale approach is not typically announced in most cases, but it appears more often in successful claims.

In addition to what legal standard was articulated in the opinion, the cases were also coded to identify whether the court specifically found pro-

cedural and/or substantive unconscionability in the contract at issue. It was hypothesized that courts in practice might almost always require a finding of both types of unconscionability even if not always explicitly articulating this requirement as a legal standard. This hypothesis was proved false by the coding. Chart 17 shows the breakdown of all successful cases between those in which the court specifically found both types of unconscionability and those in which the court did not specifically find both types of unconscionability.

CHART 17: PERCENTAGE OF SUCCESSFUL CASES THAT EXPLICITLY FOUND BOTH TYPES OF UNCONSCIONABILITY COMPARED TO CASES THAT DID NOT



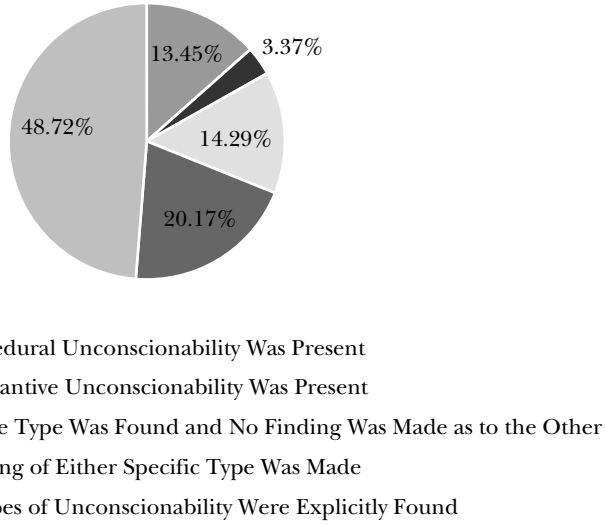
Although 45.36% of all the cases claimed to require proof of both types of unconscionability, 51.28% of all successful claims were successful without the court finding both types were present. If the applicable legal standard were that proof of both is required, it seems surprising that not even half of the claims that succeed meet the requirements of that standard.

Chart 18 refines the data in Chart 17 by breaking down the cases within the 51.28% of successful cases into (1) cases finding substantive unconscionability but finding no procedural unconscionability; (2) cases finding procedural unconscionability but finding no substantive unconscionability; (3) cases in which one type of unconscionability was found and judgement rendered without even considering the other type;[137] and

137. Within this group, 2 cases in the Ninth Circuit (1.68% of successful cases) found procedural unconscionability and resolved the claim on that basis without determining if the terms were substantively unconscionable. Fifteen cases from the Southern District of Florida and the Bankruptcy District of Missouri (12.61% of successful cases) found substantive unconscionability and decided the

(4) successful cases lacking any finding of either specific type of unconscionability (the court merely found unconscionability in general).[138]

CHART 18: FINDINGS OF TYPES OF UNCONSCIONABILITY PRESENT



Combining these results demonstrates that 31.11%, or almost one-third of all successful claims, were successful notwithstanding either an explicit finding that one type of unconscionability was unproven or at least ruling based on finding only one type of unconscionability without ruling on the other.

Of the 44 successful federal cases, 11 (25.00%) specifically found that the contract was substantively unconscionable but that there was no procedural unconscionability present. Yet these 11 cases concluded that, solely on the basis of substantive unconscionability, the claim should succeed.[139] Two (4.55%) of the 44 successful cases found no substantive unconscionability but nonetheless sustained the claim solely on the basis of procedural unconscionability.[140] One case (2.27%) found procedural unconscionability and resolved the claim on that basis without determining if the terms were substantively unconscionable.[141] Two cases (4.55%) found substan-

issue without making a finding on procedural unconscionability one way or the other.

138. These cases came from the Eighth Circuit Court of Appeals, Central District of California, Northern District of Georgia, and Southern District of New York.

139. These cases were decided by the Ninth and Eleventh Circuit Courts of Appeals and the following district courts: District of Arizona, Central District of California, Northern District of Illinois, District of the District of Columbia, District of New Jersey, District of New Mexico, Eastern District of New York, Western District of New York, and the District of Vermont.

140. Central District of California and District of Mississippi.

141. Ninth Circuit.

tive unconscionability and decided the issue without making a finding on procedural unconscionability one way or the other.[142] There were 4 (9.09%) successful federal cases in which the court did not clearly state whether both types of unconscionability were required and did not make any specific findings as to such types. These 4 cases nonetheless found the contract unconscionable.[143] Of these 24 cases, 19 did not clearly state whether proof of both types of unconscionability was required, 2 affirmatively stated that only one type was required, and 3 stated that both types of unconscionability must be proven. Thus, 36.37% of all successful claims in federal court determined a contract or clause was unconscionable either (1) notwithstanding a finding that one type of unconscionability was lacking, or (2) without making any determination one way or the other with respect to one type. When the 4 cases that made no specific findings on either type of unconscionability are added to this total, 45.46% (slightly less than half) of all successful claims in federal court succeeded without determining that both types of unconscionability were present.

Of the 75 successful state court cases, 5 (6.67%) specifically found that the contract was substantively unconscionable but not procedurally unconscionable. Yet, these 5 cases concluded that, solely on the basis of substantive unconscionability, the claim should succeed.[144] Two (2.67%) of the 75 successful cases found no substantive unconscionability but nonetheless sustained the claim solely on the basis of procedural unconscionability.[145] Thirteen (17.33%) cases found substantive unconscionability and decided the issue without making a finding on procedural unconscionability one way or the other.[146] One case (1.33%) decided the contract was unconscionable on the basis of finding it procedurally unconscionable without specifically deciding if it were substantively unconscionable.[147] There were 20 successful state cases (26.67%) in which the court did not clearly state whether or not both types of unconscionability were proven but nonetheless found the contract unconscionable.[148] Of these 20 cases, 15 did not clearly state whether proof of both types of unconscionability was required, 2 affirmatively stated that only one type was required, and 3 stated that both types of unconscionability must be proven. Thus, 28% of all successful claims in state court were successful notwith-

142. Southern District of Florida and the Bankruptcy District of Missouri.

143. Eighth Circuit Court of Appeals, Central District of California, Northern District of Georgia, and Southern District of New York.

144. These cases were decided by courts in California, Missouri, Ohio, and Texas (2 cases).

145. These cases were decided by a Mississippi and Washington.

146. Cases were decided by state courts in Arizona, Illinois (3 cases), Mississippi, New Jersey, New Mexico (2 cases), Texas (2 cases), and Washington (3 cases).

147. Decided by a Texas court.

148. Eighth Circuit Court of Appeals, Central District of California, Northern District of Georgia, and Southern District of New York.

standing that the court either found one type of unconscionability was not present or made a finding with respect to only one type and ruled on that basis alone. When the 20 successful cases in which the court made no specific determination as to either type but simply ruled the contract unconscionable are added to this total, 54.67% of all successful cases were decided without a specific finding of both types of unconscionability. Although federal courts in the study more frequently overcame a finding that one type of unconscionability was absent and still upheld the overall claim of unconscionability (29.55% compared to 9.34% in state court), a higher percentage of state court claims were successful notwithstanding the absence of an explicit determination of both types of unconscionability being present than in federal court (54.67% compared to 45.45% in federal court).

G. *Logistic Regressions*

In addition to the data analysis performed above, the coded data identified in Appendix Table I was also subjected to a logistic regression (Logit performed in Microsoft Excel using Real Statistics Data Analysis Tools Using Newton's Method and the cut off set at 0.5). The model produced appeared to fit the data. Nagelkerke's R^2 was reported as 0.838509.[149] The model's accuracy predicting successful claims was 0.866667, and its accuracy predicting failed claims was 0.985423. The model reported an overall accuracy of prediction of 0.954644. The logistic regression produced the results for the independent variables identified in Appendix Table I.

Table 1 summarizes the results for the independent variables that appeared to be statistically significant.[150]

149. *See Testing the Fit of the Logistic Regression Model*, REAL STATISTICS, http://www.real-statistics.com/logistic-regression/significance-testing-logistic-regression-model/ [https://perma.cc/7ENP-RV9F] (last visited May 8, 2020) ("$R^2(N)=R^2(CS)/1-e^{2LL0/n}$ . . . Since $R^2(CS)$. cannot achieve a value of 1, Nagelkerke's R^2 was developed to have properties more similar to the R^2 statistic used in ordinary regression.").

150. I considered a variable statistically significant if its p-value was less than .05, its Wald was greater than 1, and its odds ratio was between the upper and lower ranges.

TABLE 1: MOST RELEVANT RESULTS OF FIRST LOGISTIC REGRESSION

	P-value	Coefficient (B)	Exponent (Odds Ratio)	Wald
Natural Person	0.041006	1.44118	4.225678	4.175766
Low Economic Status	0.017422	2.298789	9.962109	5.653363
Vulnerable	0.024418	1.600735	4.956674	5.06472
Preprinted Form	0.007338	-2.09193	0.123448	7.18826
Online or Digital Contracting	0.019434	3.886643	48.74698	5.462006
Online Contract Required Click to Agree	0.027711	-4.51701	0.010922	4.845989
Inequality of Bargaining Position	0.040993	1.428811	4.173732	4.176291
High Profit Margin	0.018452	1.729156	5.635897	5.552747
Elimination of an Implied Warranties	0.026703	2.61706	13.6954	4.909926
Waiver of a Right to Bring a Class Action Lawsuit	0.006877	2.272081	9.699561	7.304705
Penalty Clause	0.002894	5.90427	366.5996	8.873093

Looking at the results in Appendix Table I, the p-values of the following independent variables relating to characteristics of the party claiming unconscionability or the contract formation process suggest they had a statistically significant influence on the outcome of the case: the party claiming unconscionability was a natural person; the party claiming unconscionability was described as being of low economic status; the party claiming unconscionability was described as vulnerable in some way; the contract was a preprinted form; the contract was online or digital; an online contract required click to agree; and the negotiations were characterized as involving an inequality of bargaining power. Except for the contract being a preprinted form and a requirement of click to agree, all

these variables had a positive coefficient, meaning their presence made it more likely that the claim would be successful. Finding a negative coefficient (-4.51701) for the presence of a click or some active indication of agreement with the terms in an online contract is not surprising. In this context, one can expect the more active form of contractual assent to mitigate perceived procedural unconscionability in online contracting. The negative coefficient for the contract being preprinted is somewhat surprising, because a preprinted form suggests a "take it or leave it" negotiation. The negative coefficient means that being a preprinted form made it less likely that the claim would succeed. Perhaps an explanation is that those using preprinted forms draft more cautiously because they are more aware of the risk of unconscionability in the use of preprinted forms. This explanation, however, is mere speculation on my part. The variables with the highest positive coefficient were (1) whether the contract was formed online or digitally (3.886643 which produces an odds ratio of 48.74698); and (2) if the party claiming unconscionability was described as of a low economic status (2.298789 which produces an odds ratio of 9.962109).

Being a natural person rather than a legal entity made it more likely that the claim of unconscionability would succeed. The coefficient for this variable was 1.44118, producing an odds ratio of 4.225678. This characteristic was statistically significant with a p-value of 0.041006. Thus, natural persons were 4.23 times more likely to succeed on claims than legal entities. Although whether the party claiming unconscionability was a merchant was not found to be statistically significant with a p-value of 0.479864, this result may be due to the small number of cases involving merchants (11, which is only 2.38% of all cases in the study). In any event, being a merchant produced a negative coefficient of -5.75294, which indicates that merchants are less likely to succeed on unconscionability claims.

One result that differed from the findings of the logistic regression performed on the Federal Case Study data was the presence of an attorney assisting the party claiming unconscionability in entering into the transaction. The logistic regression in the Federal Case Study found that being represented by counsel in negotiation made it more unlikely that a party would succeed.[151] The analysis performed for this Article asked the question in reverse. It coded, with a value of 1, cases in which the party claiming unconscionability was *not* represented by an attorney in negotiating. Thus, the results of the Federal Case Study would lead us to predict that the coefficient on this variable would be positive (i.e., the absence of representation would make it more likely that the claim would succeed). In fact, this coefficient was negative (-1.09741), which means that being unrepresented made it less likely that the claim would succeed. This unexpected result might be due to the model finding attorney representation not statistically significant (p-value of 0.16615). The unreliability of a neg-

151. The Federal Case Study reported a correlation of -.19 with a p-value less than .01. *See* DiMatteo & Rich, *supra* note 72, at 1118.

ative coefficient is also confirmed by the fact that 33.61% of all 119 successful cases exhibited this characteristic, and the Success Rate for all cases that involved an unrepresented party in negotiation was 36.04%, which is significantly higher than the overall Success Rate. Thus, the finding of a negative coefficient itself seems to lead to an unreliable conclusion on this point.

The p-value of the types of clauses at issue that suggest that cases involving such clauses are more likely to succeed include (1) a price that is disproportionate to the costs of performance (high profit margin); (2) elimination of an implied warranties; (3) waiver of a right to bring a class action lawsuit; and (4) penalty clause.[152] Among these four clauses, penalty clauses had the highest positive coefficient (5.90427, producing an odds ratio of 366.5996).

Whether or not a court explicitly required proof of both procedural and substantive unconscionability appears to have a significant influence on the outcome of the claim. This variable had a p-value of 0.000208 and its coefficient was -3.15874, which indicates that courts explicitly requiring proof of both forms of unconscionability makes it less likely the claim will succeed. An actual finding of substantive unconscionability had a significantly higher positive coefficient (8.583519, producing an odds ratio of 5342.874) than finding procedural unconscionability (4.964441, producing an odds ratio of 143.2285). The p-values for both variables suggest statistical significance.

In addition to running the logistic regression on the independent variables identified in Appendix Table I, a second logistic regression was run on a slightly different data set. Several variables relating to identified characteristics of the party making the claim of unconscionability were combined to form a variable labeled "Lack of Sophistication or Vulnerability." If at least one of the following variables was coded "1," then this resulted in this combined variable being coded 1: (1) Party claiming unconscionability had some language disparity; (2) Party claiming unconscionability was described as elderly; (3) Party claiming unconscionability was identified as being of a lower economic status; (4) Party claiming unconscionability was characterized as having a low education level; and (5) Party claiming unconscionability was described as vulnerable in some way. The idea was to eliminate the finer distinctions among parties in different cases to see the strength of the influence of any type of Lack of Sophistication or Vulnerability upon outcomes. In addition, the independent variables relating to the contract negotiation process were combined into a single independent variable labeled as "Bargaining Inequality or Pressure." If at least one of the following independent variables were coded "1" in a case, this combined independent variable was coded 1: (1) Claim of high pressure sales tactics; (2) Contract was a preprinted form; (3) Lan-

152. The p-value of elimination of consequential damages was just above the .05 cutoff for statistical significance (0.055571).

guage claimed to be unconscionable was described as hidden or not conspicuous; (4) Party claiming unconscionability was not represented by counsel; (5) Language claimed to be unconscionable is described as legalese; and (6) Negotiations were characterized as involving an inequality of bargaining power. In addition, the three ways in which a contract price could be challenged as unconscionable (price, price cost disparity, and an interest rate) were combined into a single "Price Clause" independent variable. In addition to combining some independent variables, a few variables were eliminated from the second logistic regression because they appeared in only a small percentage of cases. These eliminated variables were (1) whether the party claiming unconscionability was a merchant; (2) whether the other party was a merchant; (3) whether online contracts required a click to agree; and (4) whether the UCC was the governing law. Using this combined data set that included fewer variables, the second model did appear to fit the data. The R^2(N) was 0.795163. The model's accuracy at predicting successful claims was 0.8 and for predicting failed claims 0.982507. The overall accuracy of prediction was reported to be 0.935205. The regression produced the results for the independent variables identified in Appendix Table J.

Table 2 summarizes the results for the most statistically significant independent variables.[153]

TABLE 2: MOST RELEVANT RESULTS OF SECOND LOGISTIC REGRESSION

	P-value	Coefficient (B)	Exponent (Odds Ratio)	Wald
Lack of Sophistication or Vulnerability	0.000593	1.666012	5.291023	11.79777
Natural Person	0.027404	1.420643	4.139783	4.86519
Price Provisions	0.007378	1.733772	5.661968	7.178515
Waiver of a Right to Bring a Class Action Lawsuit	0.019935	1.856989	6.404425	5.417612
Penalty Clause	0.001433	4.966746	143.559	10.16285

Looking at the results in Appendix Table J, we can see that, based on p-values, the combined factors comprising Lack of Sophistication or Vulnerability have a statistically significant impact on the outcome of finding

153. I considered a variable statistically significant if its p-value was less than .05, its Wald was greater than 1, and its odds ratio was between the upper and lower ranges.

the contract unconscionable (p= 0.000593). But the combined variables relating to Bargaining Inequality or Pressure do not (p= 0.96791). The coefficient for the combined Lack of Sophistication or Vulnerability was 1.666012, indicating a case in which the party claiming unconscionability exhibited one of the features in this combined variable was positively affected, or more likely to win. The odds ratio for this Lack of Sophistication or Vulnerability variable was 5.291023. A natural person bringing the claim had a statistically significant impact (p=0.027404) on success (coefficient=1.420643 and odds ratio=4.139783). Of the types of clauses at issue, the types that had the most statistically significant impact upon a finding of unconscionability were the combined Price Clause variable, a waiver of a class action right, and a penalty clause (p=0.007378, 0.019935, and 0.001433, respectively). Of these three variables, the clause being a penalty had the highest coefficient (4.966746) meaning it had the largest positive influence on the unconscionability claim being successful. The coefficient for Combined Price and Waiver of class action rights were 1.733772 and 1.856989, respectively.

As with the logistic regression run on the complete list of variables, a court determining that either procedural or substantive unconscionability was present in the case made it more likely that the claim would succeed (positive coefficient), and a finding of substantive unconscionability had a greater impact on the likelihood of success (coefficient of 7.432545) than a finding of procedural unconscionability (coefficient of 3.68461). Finally, as with the first logistic regression on the full set of variables, a court announcing that proof of both types of unconscionability would be required made it more likely that the claim would fail (coefficient of -2.73164, which was statistically significant having a p-value of 0.000123).

Table 3 summarizes the results relating to the two variables regarding the court finding procedural or substantive unconscionability from both logistic regressions.

TABLE 3: RELATIONSHIP BETWEEN PROCEDURAL OR SUBSTANTIVE UNCONSCIONABILITY AND SUCCESS RATE

	P-value	Coefficient (B)	Exponent (Odds Ratio)	Wald
Court Required Proof of Both Procedural and Substantive Unconscionability (First Regression)	0.000208	-3.15874	0.042479	13.76017
Court Required Proof of Both Procedural and Substantive Unconscionability (Second Regression)	0.000123	-2.73164	0.065112	14.7515
Court Found Procedural Unconscionability (First Regression)	0.000241	4.964441	143.2285	13.48256
Court Found Procedural Unconscionability (Second Regression)	5.89E-05	3.68461	39.8296	16.13691
Court Found Substantive Unconscionability (First Regression)	3.47E-12	8.583519	5342.874	48.40342
Court Found Procedural Unconscionability (Second Regression)	1.04E-13	7.432545	1690.103	55.28191

From the results of both logistic regressions, we can draw a few conclusions. Courts explicitly requiring proof of procedural and substantive unconscionability appears to result in more claims of unconscionability failing to prevail. A finding of substantive unconscionability seems to be more important in success than a finding of procedural. This conclusion

is consistent with the finding discussed above that of the 119 successful cases, 13.45% specifically found that the contract was substantively unconscionable but that there was no procedural unconscionability present and 12.61% found substantive unconscionability and decided the issue without making a finding on procedural unconscionability one way or the other which means that over a quarter of all successful cases were decided on the basis of substantive unconscionability alone. This conclusion confirms the similar conclusion drawn from the logistic regression performed in the Federal Case Study that "substantive unconscionability which examines the relative fairness of the obligations assumed can alone support an unconscionability claim."[154]

Although the substantive unfairness of a clause or contract appears to be very important in the outcome, parties that exhibit some characteristic of vulnerability or weakness have a greater likelihood of success and among the types of vulnerability comprising this composite variable, being of a lower economic status had the greatest influence (based on coefficient value) on a successful outcome of the claim. Once aggregated, transaction or negotiation inequality or pressure did not (based on p-value) have a statistically significant influence on outcome (some factors had negative coefficients and others positive). However, when that composite variable is disaggregated, the contract formation occurring online or digitally and a finding of inequality of bargaining power both increase the chances of success on a claim in a statistically significant way. Penalty and price-related clauses (which cases involve a quantitative evaluation of fairness) are more likely to produce successful outcomes. Finally, courts appear to have a predilection for avoiding class action waivers, as those clauses being in dispute appear to increase the likelihood of success.

CONCLUSION

The first part of this Article dispels the myth that the principle that courts should grant a remedy to address unfair or unequal bargains is not a new legal concept (regardless of whether new is defined as mid-twentieth century or the eighteenth century). The fundamental principle of justice on which the unconscionability doctrine should rest dates to ancient times and has roots in Roman law and counterparts in continental European legal systems. The old principles were forgotten or neglected in the era in which party autonomy and the bargain principle dominated contract law. The ancient principles were resurrected in the adoption of Section 2-302 of the UCC and the adoption by the common law (as evidenced by the Second Restatement of Contracts).

Part III dispelled the myth that unconscionability is unpredictable and risks swallowing all the law of contracts. To the contrary, claims of unconscionability seem to be both predictable and in decline, especially if the trend of the five years under review is representative of an overall

154. DiMatteo & Rich, *supra* note 72, at 1107 (footnote omitted).

trend. Certainly, the direct legal relevance of UCC Section 2-302 has substantially declined in the past several decades. The Federal Case Study found that the UCC applied to 30% of unconscionability cases in federal court in the years it reviewed (1968–1980 and 1991–2003), whereas by the time this study was conducted it applied to fewer than 4% of all cases in the study. Thus, notwithstanding initial fears about Section 2-302, the Section seems not particularly relevant to the direct outcome of cases as measured by the number of cases in which it is the governing law.

The unconscionability doctrine, rather than expanding to swallow all contract law, seems to be declining not only due to a declining number of claims being brought but also as measured by a declining Success Rate of claims. There is no comparable prior study with which the overall Success Rate of this study can be compared. The Success Rate for unconscionability of a price-related term somewhat fell from the 1979–1993 time period examined in the Price Study. The Price Study reported a 43.18% Success Rate for price-related terms, but this study found only a 36.92% Success Rate for such claims. If price-related claims are representative of all claims, then one could tentatively conclude that the Success Rate has been declining over the years.

Part III also dispelled the myth that the unconscionability doctrine is unpredictable and inconsistent. The results of cases involving the doctrine seem highly predictable. Both logistic regressions were able to predict outcomes reliably, i.e., with extremely high levels of predictability confidence (higher for predicting claims that would fail than those that would succeed). Approximately 3 out of every 4 claims between 2013 and 2017 were unsuccessful. That means that we can reasonably conclude that most claims will fail.

Not only is it easy to predict that most unconscionability claims will fail, it is also relatively easy to predict which types of claims will prevail. Approximately three-fourths of all cases reported in the five-year period involved a natural person bringing the claim of unconscionability. This suggests that contracts exclusively between legal entities are less likely to result in litigation (at least among reported cases) involving this issue. Cases in which the party alleging unconscionability (1) had attained lower education levels, (2) was of a lower economic status, (3) was vulnerable in some way, or (4) who had some language disparity or disadvantage, succeeded at significantly higher levels than other parties in the cases analyzed. The logistic regression confirmed that the attributes of being a natural person, low economic status, and vulnerability were important in determining outcome, and each of these attributes made it more likely that the party would succeed. Importantly, parties that were characterized as coming from a lower economic status were 9.96 times more likely to succeed on their claim. This suggests that parties contracting with people exhibiting such characteristics should be more concerned about unfair clauses being struck down as unconscionable. Cases that involved form

contracts, digital contracting, the use of high pressure sales techniques, inconspicuous language, language written in legalese, negotiations that involved unequal bargaining power, or negotiations in which one party was unrepresented by counsel all saw higher Success Rates (and in some cases significantly higher Success Rates) than the standard 25.9% Success Rate. The logistic regression confirmed that the following characteristics of the contracting process were statistically significant: The contract was a form, it was created digitally, and there was an inequality of bargaining power. Except for a form contract (which had a negative coefficient),[155] the logistic regression confirmed that the other two factors being present increased the likelihood of success. Parties in cases involving online or digital contracting were 48.75 times more likely to succeed. These observations suggest that parties entering such contracts or negotiations should be even more careful of the fairness of the provisions they include because such cases have a history of at least one provision being found unconscionable.

Although agreements to arbitrate were the most litigated type of clause in the data set, accounting for over 60% of all 463 cases, these types of claims were successful at approximately the same Success Rate as all cases studied. The Success Rate of challenges to agreements to arbitrate does not seem to have been significantly affected by the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*. The following types of clauses were successfully challenged as unconscionable at a Success Rate higher than for all cases: limitations on consequential damages, penalty clause, price charged, forum selection clause, exculpatory clause, limitation of liability, and a unilateral right to terminate. The results of the logistic regression confirm that price-related terms, penalty clauses, and waivers of class action rights are more likely than other clauses to be the subject of a successful unconscionability challenge. This data suggests that parties seeking to include such clauses should be more careful regarding the contract formation process and the fairness of these provisions.

We can conclude based on these detailed observations that, in general, a natural person who (1) appears to be vulnerable in some way, (2) agrees to an unequal price, or (3) agrees to be liable for a penalty, in a context in which it is difficult for such person to find or understand terms agreed to (in an online setting or a confusingly worded form), has a greater likelihood of success in a claim that the contract is unconscionable.

In addition to dispelling these myths, the data analyzed in this study provided some interesting comparisons between federal and state court and may provide some helpful information for litigators who have a choice of venue. The apparent decline in the overall Success Rate is not as evident in state court as opposed to federal court. The Success Rate in fed-

155. I cannot explain the negative coefficient, which seems surprising given the Success Rate for cases with such attribute.

eral court appears to have declined significantly from the 37% reported in the Federal Case Study to the 21.89% Success Rate found for federal cases in this study. It is difficult to conclude whether the Success Rate in state court has changed significantly because there is no fifty state study that has been completed previously. The North Carolina Study[156] reported a 3.37% Success Rate and the current study saw that fall to 0%. Yet, given the small number of cases and the already very low Success Rate reported in the North Carolina Study, it is not possible to extrapolate from this one example whether the Success Rate in state courts has been declining. The Arbitration Study[157] did focus on state cases (although from only twenty states, and as noted it excluded significant states such as California). If the results from the same twenty states examined in the Arbitration Study are extracted from the current study, these twenty states reported a 26% Success Rate (26 out of 100 cases), which is slightly higher than the 23% Success Rate reported for these twenty states in the Arbitration Study (not limiting the Success Rate calculation to solely arbitration cases). Thus, it seems unlikely that the Success Rate in state courts has changed overtime in contrast with federal courts in which the Success Rate seems to have declined.

If filing in state court, a party will have a greater likelihood of success in California, Hawaii, New Jersey and Washington (with California's result being based on the greatest number of cases). Parties in these state courts experienced significantly higher (at least double) Success Rates than the average Success Rate. If filing in or removing to federal court, the Ninth Circuit will most likely increase the likelihood of success with a 50/50 chance of a claim succeeding in that Circuit's courts. Either the Central or Northern District of California seems to be the most favorable federal forum in which to try an unconscionability claim, and the Eastern District of Pennsylvania and the Southern District of New York are the least desirable forums.

The final myth this study dispels is the myth that unconscionability requires not only substantively unfair terms in a contract but some unfairness (or bargaining naughtiness) in the contract formation process. This study confirms one of the conclusions of the Federal Case Study. Although concerns about the true presence of actual consent (procedural unconscionability) are important in the way courts understand and apply the doctrine the Federal Case Study noted the following:

> Even if both elements of consent are present, the needs of consumer protection still dictate judicial intervention in clearly unconscionable contracts. This consent plus paternalism is seen at work when courts intervene to police covenants not-to-compete, antiassignment lease provisions, and liquidated damages clauses. In these areas, courts generally make no distinction between boil-

156. *See supra* Section II.B.
157. *See supra* Section II.D.

> erplate and fully-negotiated clauses. For example, a fully-negotiated penalty (liquidated damages) clause between equally sophisticated parties is just as unenforceable as one in an adhesion contract between parties of highly unequal bargaining power. A penalty is simply unenforceable.[158]

Even though the eighteenth and nineteenth century jurists' emphasis on consent and autonomy over substantive fairness still has a profound influence on how courts explain the doctrine of unconscionability, roughly half of the time (as seen in the fact that only 210 (45.36%) of the cases explicitly required proof of *both* procedural and substantive unconscionability), the ancient philosophical and Roman legal roots of the doctrine still run deep. Although 45% of the time the courts in this study felt compelled to claim procedural unconscionability was necessary in addition to substantive unconscionability to prevail, over a quarter of all successful cases did not actually require a finding of procedural unconscionability to succeed. In practice, some contract terms are simply too unfair to be enforced even if freely and autonomously accepted (without bargaining naughtiness), even when courts feel compelled to recite the incantation that proof of both procedural and substantive unconscionability will be necessary. Yet, we might ask would the doctrine be more understandable and predictable if it shed this two-pronged test? Should the law free itself of the eighteenth and nineteenth centuries jurists' obsession with autonomy and consent and openly admit that the power of the law should not be assured to enforce any bargain no matter how unfair—even if the negotiation process was perfectly and truly consensual and not tainted?

Rather than a double requirement, the law could return to the requirement utilized by Aquinas: a remedy could be available either for intentional unjust exchanges or transactions that were exceedingly unjust. The law could grant a remedy either for intentional exploitation or an unjust exchange that was great in its variation from a proportionate exchange. Evidence of what courts currently label procedural unconscionability (and Leff called bargaining naughtiness)[159] could be used to prove a party intentionally took advantage. Since people's subjective intent can only be proven indirectly from their behavior, many of the characteristics considered procedurally inequitable could be treated as evidence of intentional injustice, and if the court determined enough evidence was present to prove intent, it could order remediation. Thus, when contracting with vulnerable or poorly educated persons or when presenting take-it-or-leave-it contracts, parties would be well-advised to be careful to offer just terms since these factors, if present in sufficient number and intensity to infer intent, could lead to an invalidating of the bargain on the ground of intentional injustice. Further, when the injustice of the exchange is exceed-

158. DiMatteo & Rich, *supra* note 72, at 1110–11.

159. *See* Leff, *supra* note 4, at 487.

ingly great, the law could require a remedy independently of any need to prove intentional injustice. Clear cases of exceedingly unfair contract terms could be decided without the charade of inquiring into the presence of procedural unconscionability. Such a formal change in the articulation of the unconscionability doctrine—from a requirement of both types to one of either procedural or substantive unconscionability—is likely not to significantly affect outcomes since the data suggests courts may in fact be doing what is proposed by ignoring the alleged legal standard in a significant number of cases. The proposal would have the merit of making the doctrine more transparent and returning it to its historical roots more explicitly. Those who either intentionally take advantage of others or reap the benefits of vastly unjust exchanges should not count on the power of the government to enforce their unjust spoils. Doing so would be more transparent and historic (in a broader sense).

APPENDIX

TABLE A: RESULTS BY TYPE OF COURT

Category	**Results/Total Cases**	**Percent**
Federal court issuing opinion	201/463	43.4%
State court issuing opinion	262/463	56.6%
State trial court issuing opinion	3/262	1.1%
State intermediate appellate court issuing opinion	198/262	75.6%
State highest court issuing opinion	61/262	23.3%
Federal District Court	170	84.6%
Federal Circuit Court of Appeals	31/201	15.4%
Supreme Court of the United States	0	
2013 Decisions	108 (Federal 46; State 62)	23.3%
2014 Decisions	101 (Federal 47; State 54)	21.8%
2015 Decisions	90 (Federal 36; State 54)	19.4
2016 Decisions	94 (Federal 39; State 55)	20.3
2017 Decisions	70 (Federal 33; State 37)	15.1%

TABLE B: STATE CASES AND SUCCESSFUL CLAIMS

State	Number of Reported Cases in Period Studied	Number of These Cases in Which at Least One Claim of Unconscionability Was Successful	Percentage of Cases with One Successful Claim	Percentage of Cases Decided by a Federal Court Under This State's Law with One Successful Claim (Successful/ Total Cases)[1]
Alabama	4	0	0%	0% (0/2)
Arkansas	3	0	0%	0% (0/2)
Arizona[2]	3	1	33.3%	28.6%% (2/7)
California[3]	45	21	46.67%	54.8% (23/42)
Colorado	1	1	100%	0% (0/5)
Connecticut	2	0	0%	No Federal Cases
District of Columbia	1	0	0%	12.5% (1/8)
Delaware	3	1	33.3%	0% (0/1)
Florida	10	0	0%	0% (0/7)
Georgia	1	0	0%	40% (2/5)
Hawaii	6	3	50%	No Federal Cases
Iowa	2	0	0%	0% (0/3)
Illinois[4]	13	4	30.8%	25% (2/8)
Indiana	6	1	16.7%	0% (0/1)
Kansas	No Cases	No Cases	NA	0% (0/3)
Kentucky	1	0	0%	0% (0/8)
Louisiana	1	0	0%	No Federal Cases

1. This column includes more than 201 cases because a few federal cases applied the law of multiple states to the issue of unconscionability (typically because multiple plaintiffs were alleging the claim under different state laws). The results were thus included in each state's category.

2. If the one Texas court case applying Arizona law were included in the Arizona results, then the Success Rate is 1 case out of 4, or 25%.

3. If the 1 Washington case applying California law were included in the California results, then 22 out of 46 cases succeeded for a 47.8% Success Rate.

4. If the 1 case applying New York law were excluded, the Success Rate changes to 4 out of 12 for a 33.3% Success Rate.

State	Number of Reported Cases in Period Studied	Number of These Cases in Which at Least One Claim of Unconscionability Was Successful	Percentage of Cases with One Successful Claim	Percentage of Cases Decided by a Federal Court Under This State's Law with One Successful Claim (Successful/ Total Cases)
Massachusetts	2	0	0%	0% (0/3)
Maryland	2	0	0%	28.6% (2/7)
Maine	1	0	0%	No Federal Cases
Michigan	1	0	0%	0% (0/2)
Minnesota	1	0	0%	0% (0/2)
Mississippi	8	2	25%	50% (1/2)
Missouri	5	2	40%	0% (0/4)
Montana	6	2	33.3%	No Federal Cases
North Carolina	4	0	0%	0% (0/3)
North Dakota	1	0	0%	0% (0/1)
Nebraska	2	0	0%	No Federal Cases
New Hampshire	No Cases	No Cases	NA	NA
New Jersey	7	4	57.1%	14.3% (1/7)
New Mexico	4	3	75%	20% (1/5)
New York[5]	9	1	11.1%	5% (1/20)
Nevada	No Cases	No Cases	NA	0% (0/1)
Ohio	32	7	21.9%	0% (0/7)
Oklahoma	1	0	0%	0% (1/0)
Oregon	2	1	50%	33.3% (1/3)
Pennsylvania	5	0	0%	0% (0/6)
Rhode Island	1	1	100%	No Federal Cases

5. If the West Virginia and Illinois cases that applied New York Law were added to these numbers, then there would have been 2 successful cases out of 11 for an 18.2% Success Rate.

State	**Number of Reported Cases in Period Studied**	**Number of These Cases in Which at Least One Claim of Unconscionability Was Successful**	**Percentage of Cases with One Successful Claim**	**Percentage of Cases Decided by a Federal Court Under This State's Law with One Successful Claim (Successful/ Total Cases)**
South Carolina	11	3	27.3%	0% 0/2
South Dakota	No Cases	No Cases	NA	0% (0/2)
Tennessee	4	1	25%	0% (0/1)
Texas[6]	32	8	25%	28.6% (2/7)
Utah	1	0	0%	0% (0/2)
Vermont	No Cases	No Cases	NA	100% (1/1)
Virginia	No Cases	No Cases	NA	50% (2/4)
Washington[7]	9	6	66.7%	42.9% 3/7
Wisconsin	1	1	100%	25% (1/4)
West Virginia[8]	7	1	14.3%	0% (0/5)
Wyoming	1	0	0%	No Federal Cases

6. If the 1 case applying Arizona law were excluded, then 8 out of 31 cases were successful or 25.81%

7. If the 1 case applying California law were excluded, then the Success Rate changes to 5 out of 8 cases for a 62.5% Success Rate.

8. The 1 successful case in West Virginia was decided applying New York law.

TABLE C: FEDERAL CASES BY COURT OF APPEALS CIRCUIT

Federal Court	**Number of Reported Cases in Period Studied**	**Number of These Cases in Which at Least One Claim of Unconscionability Was Successful**	**Percentage of Cases with One Successful Claim**
First Circuit Court of Appeals	2	0	0%
District of Massachusetts	2	0	0%
District of New Hampshire (Bankruptcy)	1	0	0%
District of Puerto Rico	1	0	0%
First Circuit Total	6	0	0%
Second Circuit Court of Appeals	0	0	0%
Eastern District of New York	9	1	11.1%
Northern District of New York	1	0	0%
Southern District of New York	12	1	8.3%
Western District of New York	3	1	33.3%
Bankruptcy of New York	1	0	0%
District of Vermont	1	1	100%
Second Circuit Total	26	4	15.4%
Third Circuit Court of Appeals	0	0	0%
District of New Jersey	5	1	20%

Federal Court	**Number of Reported Cases in Period Studied**	**Number of These Cases in Which at Least One Claim of Unconscionability Was Successful**	**Percentage of Cases with One Successful Claim**
Bankruptcy District of New Jersey	1	0	0%
Eastern District of Pennsylvania	6	0	0%
Virgin Islands	1	0	0%
Third Circuit Total	13	0	0%
Fourth Circuit Court of Appeals	3	0	0%
District of Columbia	8	1	12.5%
Federal Claims	1	0	0%
District of Maryland	3	2	66.7%
Eastern District of North Carolina	4	1	25%
Western District of North Carolina	1	0	0%
District of South Carolina	1	0	0%
Eastern District of Virginia	2	0	0%
Western District of Virginia	1	0	0%
Northern District of West Virginia	2	0	0%
Southern District of West Virginia	3	0	0%
Fourth Circuit Total	29	4	13.8%

Federal Court	**Number of Reported Cases in Period Studied**	**Number of These Cases in Which at Least One Claim of Unconscionability Was Successful**	**Percentage of Cases with One Successful Claim**
Fifth Circuit Court of Appeals	1	0	0%
Northern District of Mississippi	2	1	50%
Southern District of Mississippi	1	0	0%
Northern District of Texas	1	0	0%
Southern District of Texas	5	1	20%
Western District of Texas	1	0	
Fifth Circuit Total	11	2	18.2%
Sixth Circuit Court of Appeals	3	0	0%
Eastern District of Kentucky	4	0	0%
Western District of Kentucky	3	0	0%
Eastern District of Michigan	1	0	0%
Northern District of Ohio	2	0	0%
Southern District of Ohio	1	0	0%
Middle District of Tennessee	1	0	0%
Sixth Circuit Total	15	0	0%
Seventh Circuit Court of Appeals	5	1	20%

Federal Court	**Number of Reported Cases in Period Studied**	**Number of These Cases in Which at Least One Claim of Unconscionability Was Successful**	**Percentage of Cases with One Successful Claim**
Eastern District of Illinois	2	0	0%
Northern District of Illinois	4	1	25%
Eastern District of Wisconsin	1	0	0%
Bankruptcy District of Wisconsin	1	1	100%
Seventh Circuit Total	13	3	23.1%
Eighth Circuit Court of Appeals	7	1	14.3%
District of Arkansas	1	0	0%
Southern District of Iowa	2	0	0%
Eastern District of Missouri	3	0	0%
Bankruptcy Western District of Missouri	1	1	100%
District of South Dakota	1	0	0%
Eighth Circuit Total	15	2	13.3%
Ninth Circuit Court of Appeals	7	4	57.1%
District of Arizona	2	1	50%
Eastern District of California	2	1	50%
Central District of California	9	6	66.7%

Federal Court	**Number of Reported Cases in Period Studied**	**Number of These Cases in Which at Least One Claim of Unconscionability Was Successful**	**Percentage of Cases with One Successful Claim**
Northern District of California	16	9	56.3%
Southern District of California	5	1	20%
District of Oregon	3	1	33.3%
Western District of Washington	2	0	0%
Ninth Circuit Total	46	23	50%
Tenth Circuit Court of Appeals	1	0	0%
District of Colorado	3	0	0%
District of Kansas	1	0	0%
District of New Mexico	4	1	25%
Tenth Circuit Total	9	1	11.1%
Eleventh Circuit Court of Appeals	2	1	50%
District of Alabama	3	1	33.3%
Middle District of Florida	3	0	0%
Southern District of Florida	4	1	25%
District of Georgia	4	1	25%
Eleventh Circuit Total	16	4	25%

TABLE D: CHARACTERISTICS OR ATTRIBUTES OF THE PARTIES

Characteristic or Attribute of a Party	**Number of State Cases that Include This Attribute (Percent of Total State Cases)**	**Number of Federal Cases that Include This Attribute (Percent of Total Federal Cases)**	**Total Number of All 463 Cases that Include This Attribute (Percent of All Case)**
Party claiming the contract to be unconscionable is a merchant	1 (0.38%)	10 (4.98%)	11 (2.38%)
Party defending claim of unconscionability) is a Merchant	7 (2.67%)	13 (6.47%)	20 (4.32%)
Party claiming unconscionability is a natural person	202 (77.1%)	149 (74.13%)	351 (75.81%)
Party claiming unconscionability has some language disparity[9]	16 (6.11%)	8 (3.98%)	24 (5.18%)
Person claiming unconscionability is described as elderly	15 (5.73%)	4 (1.99%)	19 (4.10%)
Party claiming unconscionability is described as being of lower economic status	32 (12.21%)	6 (2.99%)	38 (8.21%)
Party claiming unconscionability is described as having a low level of education	15 (5.73%)	3 (1.49%)	18 (3.89%)
Party claiming unconscionability is described as vulnerable in some way	71 (27.10%)	17 (8.46%)	88 (19.01%)

9. Language disparity means the party cannot read or understand the language in which the contract is made, or it is not the party's first language or multiple languages are used not all of which the party understands. Here language refers to the language of communication and not whether the words used are legalese or hard to understand.

TABLE E: CHARACTERISTICS OF THE CONTRACT OR NEGOTIATION PROCESS

Characteristic or Attribute of the Contract or Negotiations	**Number of State Cases that Include This Attribute (Percent of Total State Cases)**	**Number of Federal Cases that Include This Attribute (Percent of Total Federal Cases)**	**Total Number of All 463 Cases that Include This Attribute (Percent of All Cases)**
Claim of high-pressure sales practices	26 (9.92%)	14 (6.97%)	40 (8.64%)
Contract was a preprinted form contract	129 (49.24%)	88 (43.78%)	217 (46.89%)
Contract was formed digitally or online[10]	8 (3.05%)	26 (12.94%)	34 (7.34%)
Online Contract requires some active click to agree[11]	2 (25% out of 8)	24 (92.31% of the 26 case)	26 (76.47%)
The language claimed to be unconscionable was hidden or not conspicuous	15 (5.73%)	12 (5.97%)	27 (5.83%)
Person claiming unconscionability was not represented by counsel in entering into the contract	75 (78.63%)	36 (17.91%)	111 (23.97%)
Language of the contract was described as legalese or not easily understandable by nonlawyers	12 (4.58%)	3 (1.49%)	15 (3.24%)
Formation process was characterized by an inequality of bargaining position.	56 (21.37%)	56 (27.86%)	112 (24.19%)

10. The contract in dispute was entered into online, on a website, through a phone, app, or other digital means of contracting.

11. The contract in dispute required before formation of the contract that the party perform some active action such as clicking an "I agree" box button or a confirmation of having read the contract terms. The percentages in this row are calculated out of the total number of cases involving online contracts—not the total number of all cases.

TABLE F: TYPE OF CLAUSE OR PROVISION CHALLENGED

Provision Alleged to Be Unconscionable	**Number of Clauses in State Court (Percent of All Clauses)**	**Number of Clauses Found Unconscionable in State Court (State Court Success Rate for Challenging Such Clauses)**	**Number of Clauses in Federal Court (Percent of All Clauses)**	**Number of Clauses Found Unconscionable in Federal Court (Federal Court Success Rate for Challenging Such Clauses)**	**Total Number of All Clauses (Percent of All Clauses)**	**Total Number of Clauses Found Unconscionable (Success Rate for Challenging Such Clauses)**
Price Related Claims[12]	45 (17.31%)	20 (44.44%)	20 (9.13%)	4 (20%)	65 (13.57%)	24 (36.92%)
Exculpatory Clause	13 (5.00%)	5 (38.46%)	5 (2.28%)	1 (20%)	18 (3.76%)	6 (33.33%)
Elimination of an Implied Warranty	5 (1.92%)	2 (40%)	5 (2.28%)	0 (0%)	10 (2.09%)	2 (20%)
Limitation on the Amount of Liability of the Other Party	11 (4.23%)	5 (45.45%)	8 (3.65%)	1 (12.5%)	19 (3.97%)	6 (31.58%)

12. This category was subdivided into the following three subcategories with the following results:

Provision Alleged to Be Unconscionable	**Number of Clauses in State Court (Percent of Category and Percent of All Clauses)**	**Number of Clauses Found Unconscionable in State Court (Success Rate of challenges to this clause)**	**Number of Clauses in Federal Court (Percent of Category and Percent of All Clauses)**	**Number of Clauses Found Unconscionable in Federal Court (Success Rate of Challenges to This Clause)**	**Total Number of All Clauses (Percent of Category and Percent of All Clauses)**	**Total Number of Clauses Found Unconscionable (Success Rate of Challenges to This Clause)**
Price Charged	16 (35.56% 6.15%)	8 (50%)	5 (25% 2.28%)	0 (0%)	21 (32.31% 4.38%)	8 (38.1%)
Excessive Profit Margin (defined to mean the contract price charged is disproportionate to the cost to produce the goods or provide the services)	24 (53.33% 9.23%)	10 (41.67%)	12 (60% 5.48%)	4 (33.33%)	36 (56.38% 7.52%)	14 (38.89%)
Interest Rate Charged on a Loan	5 (11.11% 1.92%)	2 (40%)	3 (15% 1.37%)	0 (0%)	8 (12.31% 1.67%)	2 (25%)

Provision Alleged to Be Unconscionable	**Number of Clauses in State Court (Percent of All Clauses)**	**Number of Clauses Found Unconscionable in State Court (State Court Success Rate for Challenging Such Clauses)**	**Number of Clauses in Federal Court (Percent of All Clauses)**	**Number of Clauses Found Unconscionable in Federal Court (Federal Court Success Rate for Challenging Such Clauses)**	**Total Number of All Clauses (Percent of All Clauses)**	**Total Number of Clauses Found Unconscionable (Success Rate for Challenging Such Clauses)**
Security Interest or Other Collateral Granted to Secure an Obligation	4 (1.54%)	0 (0%)	1 (0.46%)	1 (100%)	5 (1.04%)	1 (20%)
Agreement to Arbitrate	157 (50.38%)	44 (28.03%)	132 (60.27%)	28 (21.21%)	289 (60.33%)	72 (24.91%)
Forum Selection Clause	7 (2.69%)	2 (28.57%)	18 (8.22%)	7 (38.89%)	25 (5.22%)	9 (36%)
Choice of Law	2 (0.77%)	1 (50%)	6 (2.74%)	1 (16.67%)	8 (1.67%)	2 (25%)
Waiver of Right to a Class Action	7 (2.69%)	2 (25.57%)	10 (4.57%)	1 (10%)	17 (3.55%)	3 (17.65%)
Unilateral Right to Terminate the Contract	2 (0.77%)	0 (0%)	8 (3.65%)	3 (37.50%)	10 (2.09%)	3 (30%)
Penalty Clause	5 (1.92%)	2 (40%)	0 (0%)	0 (0%)	5 (1.04%)	2 (40%)
Limitation on Consequential Damages	2 (0.77%)	1 (50%)	6 (2.74%)	3 (50%)	8 (1.67%)	4 (50%)
Totals[13]	260	104 (40%)	219	50 (22.83%)	479	154 (32.15%)

13. This line represents the number of all these types of clauses evaluated for unconscionability by the cases in the data set, not the number of cases.

TABLE G: PARTY CHARACTERISTICS IN SUCCESSFUL CASES

Characteristic or Attribute of the Party Claiming Unconscionability	**State Court Successful Cases with This Attribute (Percentage of All 75 Successful State Cases)**	**Success Rate of State Cases with this Attribute (Total State Cases with this Attribute)**	**Federal Court Successful Cases with this Attribute (Percentage of All 44 Successful Federal Cases)**	**Success Rate of Federal Cases with this Attribute (Total Federal Cases with this Attribute)**	**Total Successful Cases with this Attribute (Percentage of All 119 Successful Cases)**	**Success Rate of Cases with this Attribute (Total Cases with this Attribute)**
Party claiming the contract to be unconscionable is a merchant	0 (0%)	0% (1)	1 (2.27%)	10% (10)	1 (0.84%)	9.09% (11)
Party defending claim of unconscionability is a Merchant	1 (1.33%)	14.29% (7)	1 (2.27%)	7.69% (13)	2 (1.68%)	10% (20)
Party claiming unconscionability is a natural person	65 (86.67%)	32.18% (202)	37 (89.04%)	24.83% (149)	102 (85.71%)	29.06% (351)
Party claiming unconscionability has some language disparity.	9 (12.00%)	56.25% (16)	4 (9.09%)	50% (8)	13 (10.92%)	54.17% (24)
Person claiming unconscionability is described as elderly	3 (4.00%)	20% (15)	1 (2.27%)	25% (4)	4 (3.36%)	21.05% (19)
Party claiming unconscionability is described as being of lower economic status	19 (25.33%)	59.38% (32)	2 (4.55%)	33.33% (6)	21 (17.65%)	55.26% (38)
Party claiming unconscionability is described as having a low level of education	9 (12.00%)	60% (15)	1 (2.27%)	33.33% (3)	10 (8.40%)	55.56% (18)
Party claiming unconscionability is described as vulnerable in some way	39 (52.00%)	54.93% (71)	8 (18.18%)	47.06% (17)	47 (39.50%)	53.41% (88)

TABLE H: CONTRACT AND NEGOTIATIONS CHARACTERISTICS IN SUCCESSFUL CLAIMS

Characteristic or Attribute of the Contract or Negotiations	**State Court Successful Cases with This Attribute (Percentage of All 75 Successful State Cases)**	**Success Rate of State Cases with This Attribute (Total State Cases with This Attribute)**	**Federal Court Successful Cases with This Attribute (Percentage of All 44 Successful Federal Cases)**	**Success Rate of Federal Cases with This Attribute (Total Federal Cases with This Attribute)**	**Total Successful Cases with This Attribute (Percentage of All 119 Successful Cases)**	**Success Rate of Cases with This Attribute (Total Cases with This Attribute)**
Claim of high-pressure sales practices	11 (14.67%)	42.31% (26)	6 (13.64%)	42.86% (14)	17 (14.29%)	42.5% (40)
Contract was a preprinted form contract	46 (61.33%)	35.66% (129)	24 (54.55%)	27.27% (88)	70 (58.82%)	32.26% (217)
Contract was formed digitally or online[14]	6 (8.00%)	75% (8)	7 (15.91%)	26.92% (26)	13 (10.92%)	38.24% (34)
Online contract requires some active click to agree[15]	1 (1.33%)	50% (2)	6 (13.64%)	25% (24)	7 (5.88%)	26.92% (26)
The language claimed to be unconscionable was hidden or not conspicuous	11 (14.67%)	73.33% (15)	8 (18.18%)	66.67% (12)	19 (15.97%)	70.37% (27)
Person claiming unconscionability was not represented by counsel in entering into the contract	29 (38.67%)	38.67% (75)	11 (25%)	30.56% (36)	40 (33.61%)	36.04% (111)
Language of the contract was described as legalese or not easily understandable by non-lawyers	10 (13.33%)	83.33% (12)	2 (4.55%)	66.67% (3)	12 (10.08%)	80% (15)
Formation process was characterized by an inequality of bargaining position.	33 (44.00%)	58.93% (56)	20 (45.45%)	35.71% (56)	53 (44.54%)	47.32% (112)

14. The contract in dispute was entered into online, on a website, through a phone, app, or other digital means of contracting.

15. Before formation of the contract in dispute, the contracting process required that the party perform some active action such as clicking an "I agree" box button or a confirmation of having read the contract terms.

TABLE I: RESULTS OF LOGISTIC REGRESSION ON FULL SET OF INDEPENDENT VARIABLES

	Coeff b	S.E.	Wald	P-value	Exp(b)	Lower	Upper
Intercept	-4.16612	0.844269	24.35019	8.03E-07	0.015512		
Contract governed by UCC art 2?	-1.56165	1.844573	0.716764	0.397207	0.209789	0.005645	7.796267
PC UC is merchant?	-5.75294	8.142616	0.499173	0.479864	0.003173	3.72E-10	27073.12
Other party merchant?	0.533991	3.477196	0.023584	0.877949	1.705726	0.001871	1554.905
PC UC is natural person	1.44118	0.705261	4.175766	0.041006	4.225678	1.060662	16.83511
PC UC claims some language disparity	1.848827	1.380979	1.792331	0.180642	6.352364	0.424076	95.154
Claim of high-pressure sales practices	0.397351	0.880127	0.203825	0.651651	1.487878	0.265095	8.350896
PC UC is described as elderly	-0.60443	1.120377	0.291044	0.589553	0.546388	0.06079	4.910973
PCUC described a low economic status?	2.298789	0.96682	5.653363	0.017422	9.962109	1.497589	66.26894
PC UC is described as low education level	-0.02117	1.485027	0.000203	0.988627	0.979055	0.053303	17.98309
PC UC is described as vulnerable in some way	1.600735	0.711282	5.06472	0.024418	4.956674	1.22955	19.9818
K is a preprinted form K	-2.09193	0.780254	7.18826	0.007338	0.123448	0.02675	0.56969
K is online K	3.886643	1.663024	5.462006	0.019434	48.74698	1.872315	1269.16
Online K requires some active click to agree	-4.51701	2.051919	4.845989	0.027711	0.010922	0.000196	0.609372
Language hidden; not conspicuous	0.631585	1.290285	0.239603	0.624493	1.880589	0.149969	23.58233
Party claiming unconscionability was not represented by counsel	-1.09741	0.792536	1.917328	0.166152	0.333736	0.070598	1.57765
Language legalese; not understandable by lay-person	2.366611	1.439498	2.70291	0.100165	10.6612	0.634605	179.1057
Inequality bargaining power	1.428811	0.699164	4.176291	0.040993	4.173732	1.060217	16.43063
Price UC at issue	0.206284	1.043196	0.039102	0.843247	1.229102	0.159081	9.496376
Clause UC because Price/cost disparity; excessive profit at issue	1.729156	0.733804	5.552747	0.018452	5.635897	1.337666	23.74534
Interest rate to be charged (including for default) UC at issue	-5.51254	17.30362	0.101491	0.750047	0.004036	7.53E-18	2.16E+12
Exculpatory clause UC at issue	0.240133	1.552126	0.023936	0.877048	1.271418	0.06069	26.63545
Elimination of implied warranty UC at issue	2.61706	1.181072	4.909926	0.026703	13.6954	1.352835	138.6452
Limitation of amount of liability UC at issue	-0.5897	1.909089	0.095414	0.757404	0.554493	0.013149	23.38381

	Coeff b	S.E.	Wald	P-value	Exp(b)	Lower	Upper
Security interest or other collateral granted to secure payment UC at issue	-4.75256	3.457797	1.889105	0.169303	0.00863	9.83E-06	7.57307
Agreement to arbitrate UC at issue	0.184406	0.625354	0.086956	0.768083	1.202505	0.353008	4.096273
Forum selection clause UC at issue	0.316646	1.177423	0.072324	0.787982	1.372517	0.136551	13.79565
Choice of Law clause UC at issue	-0.7613	2.765372	0.075789	0.783087	0.467058	0.002068	105.5018
Waiver of class action right UC at issue	2.272081	0.840664	7.304705	0.006877	9.699561	1.867143	50.38792
Unilateral termination right UC at issue	1.610025	1.505029	1.144395	0.284726	5.002937	0.261904	95.56697
Penalty clause UC at issue	5.90427	1.982114	8.873093	0.002894	366.5996	7.533784	17839.01
Limitation consequential damages UC at issue	3.678007	1.921246	3.664875	0.055571	39.56745	0.916158	1708.856
Did court find procedural unconscionability?	4.964441	1.352023	13.48256	0.000241	143.2285	10.1201	2027.093
Did court find substantive unconscionability?	8.583519	1.23375	48.40342	3.47E-12	5342.874	475.9974	59971.54
Was evidence of substantive and procedural unconscionability required by court?	-3.15874	0.851533	13.76017	0.000208	0.042479	0.008005	0.225426
Did court use sliding scale or balancing test for both substantive and procedural unconscionability	-3.30422	1.37036	5.813924	0.0159	0.036728	0.002503	0.538824

TABLE J: RESULTS OF LOGISTIC REGRESSION ON CONSOLIDATED SET OF INDEPENDENT VARIABLES

	Coeff b	S.E.	Wald	P-value	Exp(b)	Lower	Upper
Intercept	-4.41948	0.797643	30.69909	3.01E-08	0.01204		
Sophistication or Vulnerability of Party	1.666012	0.485041	11.79777	0.000593	5.291023	2.044901	13.69011
Bargaining Inequality or Pressure	0.020338	0.505557	0.001618	0.96791	1.020547	0.37888	2.74893
Price-Related Term	1.733772	0.647105	7.178515	0.007378	5.661968	1.592762	20.12722
PC UC is natural person	1.420643	0.644073	4.86519	0.027404	4.139783	1.171498	14.62897
K is online K	0.927816	0.775027	1.433147	0.231251	2.528981	0.553658	11.55179
Exculpatory clause UC at issue	-0.04995	1.302269	0.001471	0.969403	0.951276	0.074099	12.21237
Elimination of implied warranty UC at issue	2.158958	1.092565	3.904751	0.04815	8.662105	1.017724	73.72535
Limitation of amount of liability UC at issue	-1.17023	1.544533	0.574046	0.448656	0.310296	0.015034	6.404498
Security interest or other collateral granted to secure payment UC at issue	-3.14218	2.695765	1.358616	0.243777	0.043189	0.000219	8.511574
Agreement to arbitrate UC at issue	0.125538	0.553354	0.051469	0.820527	1.133758	0.38327	3.353795
Forum selection clause UC at issue	0.129336	1.105158	0.013696	0.906836	1.138073	0.130454	9.928459
Choice of Law clause UC at issue	-0.87235	2.189627	0.158722	0.690335	0.417969	0.005719	30.5463
Waiver of class action right UC at issue	1.856989	0.797821	5.417612	0.019935	6.404425	1.34083	30.5905
Unilateral termination right UC at issue	1.595869	1.370012	1.356893	0.244077	4.932615	0.33645	72.31592
Penalty clause UC at issue	4.966746	1.557988	10.16285	0.001433	143.559	6.774363	3042.23
Limitation consequential damages UC at issue	1.853371	1.30176	2.027041	0.154521	6.381292	0.497563	81.84062
Did court find procedural unconscionability?	3.68461	0.917237	16.13691	5.89E-05	39.8296	6.598615	240.4136
Did court find substantive unconscionability?	7.432545	0.999645	55.28191	1.04E-13	1690.103	238.2393	11989.83
Was evidence of substantive and procedural UC required by court?	-2.73164	0.711223	14.7515	0.000123	0.065112	0.016154	0.262456
Did court use sliding scale or balancing test for both substantive and procedural UC	-1.84053	1.028372	3.203213	0.073494	0.158733	0.02115	1.191295