UNCONSCIONABILITY: A NEW HELPING HAND TO RESIDENTIAL TENANTS

There is growing recognition that real property law, the traditional framework for the landlord-tenant relationship, has failed to recognize adequately the rights of the modern residential lessee.[1] Tenant self-sufficiency has given way to dependence on the landlord for both housing and housing maintenance.[2] The shortage of adequate apartments[3] has increased the landlord's bargaining power and allowed the lessor to use complex form leases replete with clauses favoring himself.[4] The modern residential lease has thus come to resemble an adhesion contract.[5]

Some courts have recently responded to this imbalance by applying the contract theory of unconscionability.[6] Unconscionability first appeared in landlord-tenant cases when courts, noting few distinctions between leases and contracts, applied equitable principles or used contract law to resolve landlord-tenant disputes. Recently, the *Restatement (Second) of Property* has recognized the use of unconscionability,[7] and

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1. *See* notes 12-13, 25 *infra*.

2. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Old Town Dev. Co. v. Langford, 349 N.E.2d 744 (Ind. Ct. App. 1976); Lefrak v. Lambert, 89 Misc. 2d 197, 390 N.Y.S.2d 959 (Civ. Ct. 1976), *modified*, 93 Misc. 2d 632, 403 N.Y.S.2d 397 (Sup. Ct. 1978).

3. *See* note 21 *infra* and accompanying text.

4. *See* note 27 *infra* and accompanying text.

5. *See, e.g.*, Avenue Assocs., Inc. v. Buxbaum, 83 Misc. 2d 134, 138-40, 371 N.Y.S.2d 736, 742-44 (Civ. Ct.), *rev'd on other grounds*, 83 Misc. 2d 719, 373 N.Y.S.2d 814 (Sup. Ct. 1975); Weidman v. Tomaselli, 81 Misc. 2d 328, 332, 365 N.Y.S.2d 681, 687 (Rockland County Ct.), *aff'd*, 84 Misc. 2d 782, 386 N.Y.S.2d 276 (Sup. Ct. 1975); Humbach, *Landlord Control of Tenant Behavior: An Instance of Private Environmental Legislation*, 45 FORDHAM L. REV. 223, 304 (1976); Indritz, *The Tenants' Rights Movement*, 1 N. MEX. L. REV. 1, 107 (1971); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 555-56 (1966); Note, *An Attack, on Confession of Judgment Clauses in Residential Leases Through Section 2-320 of the UCC*, 50 CHI.-KENT L. REV. 482, 484, 489 (1973).

A contract of adhesion is defined as a form contract drafted by the party with the greater bargaining power. The contract terms excessively benefit the stronger party, and it is offered to the weaker party on a take-it-or-leave-it basis. Weidman v. Tomaselli, 81 Misc. 2d at 331, 365 N.Y.S.2d at 687. *See generally* 3 A. CORBIN, CORBIN ON CONTRACTS 271 (1960); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLO. L. REV. 629, 630 (1943); *see also* Standard Oil v. Perkins, 347 F.2d 379 (9th Cir. 1965).

6. *See* notes 72-87 *infra* and accompanying text.

7. RESTATEMENT (SECOND) OF PROPERTY § 5.6 (1977); *see* notes 88-94 *infra* and accompanying text.

New York real property law[8] and the Uniform Residential Landlord and Tenant Act (URLTA)[9] have codified the unconscionability doctrine's application to residential leases.

This Note first explores the need for a new approach to landlord-tenant law, looking to prior legislative and judicial responses to prolandlord clauses typically found in residential leases. Second, it examines the courts' application of unconscionability to residential leases. Next, it looks to the contract-law test of unconscionability and assesses the courts' changes in the doctrine's application to landlord-tenant law. Finally, the Note analyzes the doctrine's potential for restoring a balance between lessors and lessees in residential lease law.

I. THE NEED FOR NEW LEGAL APPROACHES

A. *The Contract Setting Between Landlord and Tenant*

At common law the lease was a conveyance of real property.[10] Real property law held that each party's obligations were independent; thus, the tenant's obligation to pay, for example, was not affected by the landlord's failure to provide a habitable residence.[11] Courts[12] and commentators[13] recently have begun to recognize that the lease is more akin to a contract for necessary goods and services than to a conveyance of real property.

This shift to contract law provides several advantages to the lessee.

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8. 49 N.Y. REAL PROP. LAW § 235-c (McKinney Supp. 1978); *see* notes 95-99 *infra* and accompanying text.

9. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT, §§ 1.101, 1.303, 7A UNIFORM LAWS ANNOTATED (Master ed. 1978) [hereinafter cited as URLTA]; *see* notes 119-23 *infra* and accompanying text.

10. *See generally* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 63-86 (1962); C. SMITH & R. BOYER, SURVEY OF THE LAW OF PROPERTY 47-56 (1971).

11. C. MOYNIHAN, *supra* note 10, at 70-71.

12. *E.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Green v. Superior Ct., 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Lefrak v. Lambert, 89 Misc. 2d 197, 390 N.Y.S.2d 959 (Civ. Ct. 1976), *modified*, 93 Misc. 2d 632, 403 N.Y.S.2d 397 (Sup. Ct. 1978); 57 E. 54 Realty Corp. v. Gay Nineties, 71 Misc. 2d 353, 335 N.Y.S.2d 872 (Sup. Ct. 1973).

13. *See, e.g.*, Kirby, *Contract Law and the Form Lease: Can Contract Law Provide the Answer?*, 71 NW. U.L. REV. 204, 205-06 n.5 (1976); Line, *Implied Warranties of Habitability and Fitness for Intended Use in Urban Residential Leases*, 26 BAYLOR L. REV. 161 (1974); Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444 (1974); Note, *Covenant of Habitability and the Ohio Landlord-Tenant Legislation*, 23 CLEV. ST. L. REV. 539 (1974).

Obligations between the contracting parties require consideration[14] and must be viewed as mutually dependent.[15] The theory of dependent covenants provides that failure by one party to perform as promised constitutes a breach, relieving the other party of its duty to perform.[16] Applied to landlord-tenant law, this theory gives the tenant leverage to assert the rights granted in the lease and implied by law. Additionally, many courts have read into residential leases an implied warranty of habitability,[17] which is similar to the implied warranty of merchantability[18] or fitness for a particular purpose[19] recognized in sales contracts.

Traditional contract law, however, because of its reliance on freedom of contract, does not provide a full solution to the modern tenant's problems. Freedom of contract implies that contracts are "the result of the free bargaining of parties who are brought together by the play of the market and who meet each other on a footing of social and approximate economic equality."[20] In reality a shortage of adequate rental housing in many areas[21] limits the tenant's ability to choose acceptable lease provisions.[22] Because tenants cannot forego housing,[23] landlords possess the greater bargaining power.

Tenant freedom of contract is additionally limited by a second factor. Mass marketing techniques have given birth not only to standard

14. *See generally* 1A A. CORBIN, *supra* note 5, at §§ 160-220.

15. *See, e.g.,* Bayview Estates, Inc. v. Bayview Estates Mobile Homeowners Ass'n, 508 F.2d 405 (6th Cir. 1974); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Kipsborough Realty Corp. v. Goldbetter, 81 Misc. 2d 1054, 367 N.Y.S.2d 916 (Civ. Ct. 1975).

16. 3A A. CORBIN, *supra* note 5, at § 637.

17. *See* cases cited note 12 *supra.*

18. U.C.C. § 2-313.

19. U.C.C. § 2-314.

20. Kessler, *supra* note 5, at 630.

21. *See, e.g.,* Avenue Assocs., Inc. v. Buxbaum, 83 Misc. 2d 134, 371 N.Y.S.2d 736 (Civ. Ct.), *rev'd on other grounds,* 83 Misc. 2d 719, 373 N.Y.S.2d 814 (Sup. Ct. 1975); Steinberg v. Carreras, 77 Misc. 2d 774, 357 N.Y.S.2d 369 (Sup. Ct. 1974); Commonwealth v. Monumental Properties, Inc., 329 A.2d 812 (1974); Indritz, *supra* note 5, at 4-7, 107-09 (noting especially a shortage of low-income housing); Schoshinski, *supra* note 5, at 552 (shortage of low-income housing).

22. In the search for adequate housing, a tenant's freedom of choice is constrained by a number of factors such as size, price, and location. The shortage of housing in a given area further limits housing options. In light of these constraints the chance that a tenant will be able to choose between lease options on several apartments is slight.

23. Unlike earlier times, the vast majority of tenants today are not capable of building their own homes, nor do they have the means or skills required to repair their leased quarters.

sales contracts,[24] but also to standardized form leases.[25] Although apartments may differ in location, size, appearance, and cost, landlords tend to use the same form leases.[26] Use of form leases by one landlord reduces the lessee's ability to bargain with that landlord for favorable terms; use of similar form leases by all landlords in an area reduces the lessee's ability to go elsewhere to obtain favorable terms. Once uniformity of leases occurs, landlords are free to include in the form lease a host of other terms and conditions that may excessively benefit themselves at the expense of tenants.[27] The full extent of this inequality often escapes the tenant because the prolessor terms are often hidden in pages of fine print containing clauses drafted in highly technical legal language.[28]

B. *Lease Terms Favoring Landlords*

Most form leases contain a host of provisions that significantly affect the obligations, rights, and remedies of the parties.[29] A recitation of

24. *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). *See generally* Kessler, *supra* note 5.

25. *See generally* Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 809 (1974).

26. Indritz reports that in Allegheny County, Pennsylvania, which includes Pittsburgh, more than 90% of the realtors use a lease called "a catalogue of do's and don't's" developed by real estate interests. Indritz, *supra* note 5, at 10. *See generally* Berger, *supra* note 25, at 791; Kirby, *supra* note 13, at 204, 225.

27. *See, e.g.,* Weidman v. Tomaselli, 81 Misc. 2d 328, 333, 365 N.Y.S.2d 681, 687 (Rockland County Ct.), *aff'd*, 84 Misc. 2d 782, 386 N.Y.S.2d 276 (Sup. Ct. 1975); Kirby, *supra* note 13, (quoting Steinberg v. Carreras, 74 Misc. 2d 32, 35, 344 N.Y.S.2d 136, 141-42 (Civ. Ct. 1973)).

In the ideal free-housing market, landlords would compete with each other not only on price and appearance, but also on lease terms running with the apartments. Other factors being equal, a landlord could attract tenants by offering more favorable lease terms than competitors offer. Uniform use of the same form not only assures landlords that they will not have to compete on lease terms, but also allows use of increasingly greater prolandlord leases without loss of any competitive advantage.

28. Weidman v. Tomaselli, 81 Misc. 2d 328, 332, 365 N.Y.S.2d 681, 687 (Rockland County Ct.), *aff'd*, 84 Misc. 2d 782, 386 N.Y.S.2d 276 (Sup. Ct. 1975); Berger, *supra* note 25, at 809, 821-35.

A lease held to contain an unconscionable clause in Seabrook v. Commuter Hous. Co., 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. 1972), *aff'd*, 79 Misc. 2d 168, 363 N.Y.S.2d 566 (Sup. Ct. 1973), was 4 legal-size pages long, containing nearly 10,000 words in small, illegible print. If typed on 8½ by 11 inch paper this lease would amount to approximately 50 pages of highly technical terms, not usually understood by the residential lessee who most often signs a lease without the aid of a lawyer.

Usually the tenant's primary concern is with the major lease terms such as price and appearance; if these terms seem to be satisfactory, the tenant often does not attempt to understand the full provisions of the lease document.

29. *See generally* Berger, *supra* note 25, at 821-35 (accumulating and analyzing representa-

landlord remedies in the event of tenant breach or default[30] typically constitutes a large percentage of the text of form leases.[31] Most leases accord the landlord, upon the lessee's default, the right to reenter the premises immediately[32] and to accelerate the balance of the rent due.[33] A lesser number of jurisdictions also permit the use of distress and distraint for rent.[34] Most leases allow the landlord to apply security deposits toward compensation for damage to the premises,[35] but few jurisdictions establish any deadline for refund of the remainder.[36] Should the tenant quit the premises early, many jurisdictions allow the landlord to recover the full amount due under the lease without any requirement of an attempt to relet.[37] Leases commonly award the

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tive standard-form apartment leases from 16 American cities). *See also* Commonwealth v. Monumental Properties, Inc., 329 A.2d 812 (Pa. 1974).

Although each of these form-lease clauses will be treated separately, they often appear together in a single form lease. *Id.*

30. Most leases define tenant default to encompass a wide range of actions. Landlord remedies may be triggered not only by a failure to pay rent, but also by a failure to adhere to an insubstantial regulation imposed by the landlord. This application of the definition frequently renders a remedy onerous in application, though not unfair on its face.

31. Berger found that landlord remedies constituted from 21% to 47% of the provisions of each lease he examined. Berger, *supra* note 25, at 828.

32. Possible methods for reentry include an action for summary judgment, peaceful reentry, and forceful reentry (expelling a tenant without process). *But see* Pine Hill Assocs. v. Malveaux, 89 Misc. 2d 234, 391 N.Y.S.2d 58 (Yonkers City Ct. 1977) (forceable removal contrary to law and public policy), *rev'd and remanded*, 93 Misc. 2d 63, 403 N.Y.S.2d 398 (Sup. Ct. 1978). Frequently, this type of lease provision gives the lessor the right to reenter either immediately or anytime three-to-five days after default. Berger, *supra* note 25, at 828.

33. *See* Commonwealth v. Monumental Properties, Inc., 329 A.2d 812 (Pa. 1974). *See generally* RESTATEMENT (SECOND) OF PROPERTY § 12.1, Comment k (1977).

34. This feudal remedy allows the lessor, in the event of default by the tenant, to enter the tenant's premises without notice and to take possession of, levy upon, or even sell all chattel on the premises to satisfy the tenant's debt. *See generally* Korngold, *Can Distraint Stand Up as a Landlord's Remedy?*, 5 REAL ESTATE L.J. 242 (1977).

35. Landlords can demand large security deposits and may often commingle these funds with their personal funds without sanction. Berger, *supra* note 25, at 828.

36. *Id.* at 825. In addition, the tenant may have no primary and overriding claim to a particular sum that is set aside. In many jurisdictions tender of the deposit sets up a mere debtor-creditor relationship. If the landlord fails to return the deposit, the tenant is in no better position than a potentially large number of other unsecured creditors with whom the tenant must compete for payment. RESTATEMENT (SECOND) OF PROPERTY § 12.1, Comment *l* (1977); Berger, *supra* note 25, at 825. For the various state statutes relating to security deposits, see RESTATEMENT (SECOND) OF PROPERTY, Statutory Note § 12.1(6) (1977).

37. *See, e.g.*, Simons v. Federal Bar Bldg. Corp., 275 A.2d 545 (D.C. 1971); McIntosh v. Gitomer, 120 A.2d 205 (D.C. 1956); Lefrak v. Lambert, 89 Misc. 2d 197, 390 N.Y.S.2d 959 (Civ. Ct.), *modified*, 93 Misc. 2d 632, 403 N.Y.S.2d 397 (Sup. Ct. 1976); Berger, *supra* note 25, at 829. *See generally* RESTATEMENT (SECOND) OF PROPERTY § 12.1(3) & Comment *l* (1977); Annot., 21

landlord stipulated attorney fees for expenses of enforcement.[38]

A tenant frequently assumes many obligations when signing a lease, including indemnification of the landlord for any liability for damage caused by the rental unit's condition or the landlord's negligence[39] and payment of certain cost increases of the landlord through such devices as tax and labor escalation riders.[40] Additionally, the tenant is required to maintain the premises in good repair[41] and to meet all present and future rules and regulations.[42]

A.L.R.3d 534 (1968 & Supp. 1978). This type of provision is contrary to the traditional doctrine of contract law.

The net effect is that although the premises might have been relet, resulting in little or no damage to the landlord, the tenant may be liable to the lessor for the full amount due under the lease despite the lessor's failure to make any reasonable attempt to relet the premises.

38. Berger, *supra* note 25, at 828. Some attorney fee provisions stipulate that the fee is due at the commencement of an action for default, regardless of the outcome of the court action. *See, e.g.,* Simons v. Federal Bar Bldg. Corp., 275 A.2d 545 (D.C. 1971); McClelland-Metz, Inc. v. Faulk, 86 Misc. 2d 778, 384 N.Y.S.2d 919 (Nassau County Ct. 1976); Weidman v. Tomaselli, 81 Misc. 2d 328, 365 N.Y.S.2d 681 (Rockland County Ct.), *aff'd*, 84 Misc. 2d 782, 386 N.Y.S.2d 276 (Sup. Ct. 1975). When the clause allows minimum attorney's fees at the commencement of the action, which may be defined as mere notice to tenant, a landlord may collect attorney's fees from the unwary tenant without ever really proceeding with the action. *See* note 81 *infra* and accompanying text.

39. An example of an indemnity provision reads as follows:

> Tenant agrees to protect, indemnify and save Lessor and its agents harmless from and against any and all liabilities, damages and expenses arising from injury to persons or property on the demised premises, or in and about the building in which said premises are located, growing out of or connected with Tenant's use and occupancy of the demised premises, or activities in or about the building in which said premises are located.

Rossman v. 740 River Drive, 308 Minn. 134, 135-36 n.1, 241 N.W.2d 91, 92 n.1 (1976).

For the current legal status of indemnification clauses in residential leases, see note 56 *infra* and accompanying text.

40. Graff v. Transitube, 90 Misc. 2d 879, 396 N.Y.S.2d 313 (Civ. Ct. 1977); Graziano v. Tortora Agency, Inc., 78 Misc. 2d 1094, 359 N.Y.S.2d 489 (Civ. Ct. 1974); Atkinson v. Trehan, 70 Misc. 2d 614, 334 N.Y.S.2d 293 (Civ. Ct. 1972). These riders may result in the landlord's recovery of a sum that is greater than the total cost increase. A lease, for example, may stipulate a formula to cover any tax escalation. As long as it uses an unambiguous formula, the lease may stipulate a certain dollar amount for each one percent increase without any correlation between the total amount and the actual increase.

41. "The lessee agrees . . . [to] at all times keep and maintain the leased premises and all . . . equipment and fixtures therein or used therewith repaired . . . and in such good repair . . . as the same are at the very beginning of . . . the term, . . . reasonable wear and tear and damage by unavoidable casualty only excepted." Berger, *supra* note 25, at 832; *see* Jones v. Sheetz, 242 A.2d 208 (D.C. 1968).

42. A typical clause from a Cleveland lease reads:

> Tenant shall observe the [Rules and Regulations]. Failure to keep and observe the said rules will constitute a breach of the terms of lease in the same manner as if the said rules were contained herein as covenants . . . . Tenant shall keep and observe such further reasonable rules and regulations as may later be required by landlord. . . .

In exchange for these covenants, the tenant receives only limited rights to the leased premises and the right to prior notice of lease changes or termination; the tenant typically waives most other rights and remedies.[43] Through exculpation clauses tenants waive the right to suit against the lessor for damage or injury,[44] and through other provisions lessees effectively waive the right to assert breach of the lessor's implied warranty of habitability[45] or to claim damages for late delivery.[46] Confession-of-judgment clauses[47]—clauses waiving any right to

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Berger, *supra* note 25 at 833. "Such further reasonable rules and regulations" may include later additions of such things as prohibitions against pets or piano playing after the tenant has moved in with a cat or a piano. *Id.*

43. The lease is generally silent regarding both tenant rights and tenant remedies. "Where language appears, however, an express waiver of remedy runs well ahead of an express confirmation of remedy." *Id.,* at 827.

44. A typical exculpatory clause provides:

> Lessor and Lessor's agents and servants shall not be liable, and Tenant waives all claims, for damage to person or property sustained by Tenant or any occupant of the building or premises resulting from the building or any part of it or any equipment or appertenance becoming out of repair, or resulting from any accident in or about the building, or resulting directly or indirectly from any act or neglect of any tenant or occupant of the building or of any other person.

Rossman v. 740 River Drive, 308 Minn. 134, 135 n.1, 241 N.W.2d 91, 92 n.1 (1976).

Exculpatory clauses frequently are coupled with indemnification clauses, discussed note 39 *supra* and accompanying text. For the current legal status of these clauses, see *infra* note 56 and accompanying text.

45. Groner v. Lakeview Management Corp., 83 Misc. 2d 932, 373 N.Y.S.2d 807 (Civ. Ct. 1975); Steinberg v. Carreras, 74 Misc. 2d 32, 344 N.Y.S.2d 136 (Civ. Ct. 1973). These provisions effectively shift the burden of repair that the law granted tenants through the implied warranty. For the current status of such waivers, see note 59 *infra* and accompanying text.

46. Seabrook v. Commuter Hous. Co., 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. 1972), *aff'd,* 79 Misc. 2d 168, 363 N.Y.S.2d 566 (Sup. Ct. 1973); Hartwig v. 6465 Realty Co., 67 Misc. 2d 450, 324 N.Y.S.2d 567 (Sup. Ct. 1971). This provision not only enables a landlord to protect himself from liability, but also may require the tenant to accept the apartment when it does become available.

47. "This provision allows the landlord, through his attorney and without notice, to represent the tenant . . . for any alleged failure to pay rent, and to accept the judge's penalty without argument or right of appeal." Note, *supra* note 5, at 482.

A typical lease provision found in a form prepared by the Chicago Real Estate Board reads as follows:

> Tenant . . . irrevocably authorizes any attorney of any court of record in any State of the United States from time to time to appear for Tenant . . . in such court, to waive process, service, and trial by jury, to confess judgment in favor of Owner . . . and against Tenant . . . for any rent due hereunder from Tenant to Owner and for Owner's costs and reasonably attorney's fees, to waive and release all errors in such proceedings and all right of appeal and to consent to an immediate execution upon the judgment.

Id. at 482 n.5.

For the present legal status of confession-of-judgment clauses, see note 58 *infra* and accompanying text.

set-off,[48] counterclaim,[49] or representation in landlord suits—and other clauses containing such waivers as the statutorily required thirty-days notice to quit[50] and the right to jury trial,[51] all eliminate rights often accorded a defaulting party. As a catchall, landlords often add provisions through which the tenant generally and unconditionally waives all unexplained rights, including statutory rights.[52]

C. *Judicial and Legislative Treatment of Prolandlord Clauses*

Lease clauses may gain strength by their mere presence in the signed document, because many tenant arguments about unfair clauses never reach the courtroom. The dollar amounts at issue are usually small in comparison to the time and transaction costs of litigation. The landlord may discourage the tenant's raising potentially successful arguments by merely pointing to a printed clause purporting to control the issue; the lessee, ignorant of the law, has no reason to know that courts might not enforce the designated provision. To aid residential tenants

48. One such clause in a Chicago form lease reads:

> Owner's breach of the covenants set forth in this paragraph . . . shall not affect the obligation of Tenant to pay rent, and Tenant's sole remedy therefor shall be recovery of damages from Owner (it being expressly agreed that . . . Tenant's damages for any such breach may not be set off for the purpose of determining whether any rent is due in a forcible detainer action . . . brought on the basis of unpaid rent).

Berger, *supra* note 25, at 827.

49. *See* Edgemont Assoc. v. Skolnick, 90 Misc. 2d 761, 396 N.Y.S.2d 130 (Justice Ct. 1977); Amazon Management Corp. v. Paff, 166 Misc. 438, 1 N.Y.S.2d 976 (Sup. Ct. 1938). A tenant asserting an implied warranty of habitability argument can force the court to hear affirmative defenses in a summary proceeding. Bianchi v. Savage, 83 Misc. 2d 1007, 373 N.Y.S.2d 976 (White Plains City Ct. 1975); *cf.* Commonwealth v. Monumental Properties, Inc., 329 A.2d 812, 815 (Pa. 1974) (Pennsylvania Consumer Protection law held inapplicable to rental of residential housing).

50. *See* Diamond Hous. Corp. v. Robinson, 257 A.2d 492 (D.C. 1969); Jones v. Sheetz, 242 A.2d 208 (D.C. 1968).

51. *See, e.g.,* Koslowski v. Palmieri, 94 Misc. 2d 555, 404 N.Y.S.2d 799 (Civ. Ct. 1978), *rev'd*, 414 N.Y.S.2d 599 (Sup. Ct. 1979) (per curiam); Avenue Assocs., Inc. v. Buxbaum, 83 Misc. 2d 134, 371 N.Y.S.2d 736 (Civ. Ct.), *rev'd on other grounds*, 83 Misc. 2d 719, 373 N.Y.S.2d 814 (Sup. Ct. 1975); Berger, *supra* note 25, at 829. It must be remembered that a confession-of-judgment clause, discussed notes 47, 58 *supra*, 125 *infra* and accompanying text, limits the tenant's rights even more fully than a waiver of right to a jury trial and, in fact, even disallows tenant self-representation in court.

52. Commonwealth v. Monumental Properties, Inc., 329 A.2d 812, 814 (Pa. 1974). This provision was contained in a form lease used by an overwhelming majority of lessors in the Pittsburgh area, *see* note 26 *supra* and accompanying text. The court did not explain the possible implications of the waiver, but on its face it would appear to disallow any and all rights implied by law or granted by statute unless specifically enumerated in the lease. Utter silence is the usual pattern of tenant rights and remedies. *See* note 43 *supra*.

effectively, therefore, the landlord must be discouraged from overreaching in the lease agreement itself.

The traditional approach in residential lease cases applies three well-settled rules of interpretation: the plain meaning rule,[53] the parol evidence rule,[54] and the principle holding parties bound by their signatures.[55] As a result of this strict approach, prolandlord provisions are usually enforced.

Some courts and legislatures, however, ignore the traditional approach and construe leases to the tenant's advantage. In some instances courts have directly prohibited or limited certain prolandlord lease terms. This approach, however, has been limited to exculpation and indemnification provisions,[56] distress and distraint authoriza-

53. If the court finds as a matter of law that the contract is unambiguous, evidence of the intention and acts of the parties plays no part in the decision of the case. . . . The conduct of the parties may fix a meaning to words of doubtful import. It may not change the terms of a contract.

Graff v. Transitube, Inc., 90 Misc. 2d 879, 881, 396 N.Y.S.2d 313, 314 (Civ. Ct. 1977); *see, e.g.*, Heller & Henretig, Inc. v. 3620-168th St., Inc., 302 N.Y. 326, 330, 98 N.E.2d 458, 459 (1951); Luna Park Hous. Corp. v. Besser, 38 A.D.2d 713, 714, 329 N.Y.S.2d 332, 334 (1972) (mem.). *See generally* Berger, *supra* note 25, at 793.

54. The parol evidence rule provides that the written lease embodies the total agreement between the parties; evidence of any contrary agreements or understandings is inadmissable. *See* Weaver v. American Oil Co., 257 Ind. 458, 463, 276 N.E.2d 144, 147 (1971). *See generally* 4 WILLISTON, CONTRACTS §§ 631-632A (3d ed. 1961).

55. This principle disallows any defense that the tenant failed to read or understand the lease. McIntosh v. Gitomer, 120 A.2d 205 (D.C. 1955); Carbone v. Sparkes, 350 Ill. App. 56, 111 N.E.2d 567 (1953); Weaver v. American Oil Co., 257 Ind. 458, 472, 276 N.E.2d 144, 152 (1971) (Prentice, J., dissenting); Harwood v. Lincoln Square Apartments Section 5, Inc., 78 Misc. 2d 1097, 359 N.Y.S.2d 387 (Civ. Ct. 1974). *See generally* 1 WILLISTON, *supra* note 54, at §§ 631-632A.

56. *See* notes 39, 44 *supra* and accompanying text. Historically, most jurisdictions, in the name of preserving freedom of contract, upheld exculpation and indemnification clauses. *See* RESTATEMENT OF CONTRACTS § 574 (1933). "A bargain for exemption from liability for the consequences of negligence not falling greatly below the standard established by law for the protection of others against unreasonable risk of harm, is legal except in the cases stated in § 575." *Id.* Section 575 forbids exemptions for negligent injury to employees in the course of the employment relationship and in certain instances when a party is charged with a duty of public service. *Id.* § 575.

A trend of voiding or prohibiting these clauses is emerging. *See, e.g.*, Henrioulle v. Marin Ventures, Inc., 20 Cal. 3d 512, 573 P.2d 465, 143 Cal. Rptr. 247 (1978); Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971); Old Town Dev. Co. v. Langford, 349 N.E.2d 744 (Ind. App. 1976); Papakalos v. Shaka, 91 N.H. 265, 18 A.2d 377 (1941); Cardona v. Eden Realty Co., 118 N.J. Super. 381, 288 A.2d 34 (App. Div. 1972); Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 111 A.2d 445 (App. Div. 1955); Billie Knitwear, Inc. v. New York Life Ins. Co., 174 Misc. 978, 22 N.Y.S.2d 324 (Sup. Ct. 1940), *aff'd*, 288 N.Y. 682, 43 N.E.2d 80 (1942). At least 21 states now have passed statutes prohibiting exculpation or indemnity of liability in residential leases.

tions,[57] confession-of-judgment clauses,[58] and waivers of the implied

See RESTATEMENT (SECOND) OF PROPERTY, Statutory Note § 17.3 (1977) (listing of statutes enacted as of June 1, 1976). Section 1.403 of the Uniform Residential Landlord and Tenant Act specifically prohibits inclusion of these clauses.

This trend is based on the argument that the clauses offend public policy. In *Rossman* the Minnesota Supreme Court made enforceability depend on a balancing test:

> The enforceability of a lease clause which exculpates a landlord from liability for negligence is a question of balance. The public policy favoring freedom of contract is weighed against the policy favoring the landlord's observance of the particular duty he is alleged to have breached. Thus, the balance depends on the nature of the particular duty breached. If the landlord's duty is basic and his observance of it is of extreme importance (for example, a duty to maintain the stairs of a common area in safe condition so as to avoid personal injury to tenants), then the policy favoring his observance of that duty may well be stronger than the policy favoring freedom of contract. On the other hand, if the duty the landlord breaches is less basic and his observance of it is not of such grave importance (for example, a duty, if such exists, to maintain the temperature of the premises at such levels as will not injure a tenant's tropical houseplants), then freedom of contract may well be the dominant policy. If the freedom of contract is the dominant policy, then an exculpatory clause may be enforced.

Rossman v. 740 River Drive, 308 Minn. 134, 136-37, 241 N.W.2d 91, 92 (1976).

57. *See* note 34 *supra* and accompanying text.

Many state statutes specifically prohibit use of distress and distraint, particularly in residential leases. *See, e.g.,* ALASKA STAT. § 34.03.250 (1975); ARIZ. REV. STAT. ANN. § 33-1372 (1974); DEL. CODE ANN. tit. 25, § 6301 (1974); FLA. STAT. ANN. § 733.691 (West Supp. 1976); MINN. STAT. ANN. § 504.01 (West 1947). *See also* Price v. Hoyle, 82 Misc. 2d 174, 368 N.Y.S.2d 126 (Rockland County Ct. 1975). URLTA abolishes distress for rent as well. URLTA, *supra* note 9, at § 4.205. *See generally* RESTATEMENT (SECOND) OF PROPERTY, Statutory Note § 12.1 (1977).

Many courts have held distress and distraint unconstitutional under the due process clause. *See, e.g.,* Stroemer v. Shevin, 399 F. Supp. 993 (S.D. Fla. 1973); Ragin v. Schwartz, 393 F. Supp. 152 (W.D. Pa. 1975); Litton Business Sys., Inc. v. Paul L'Esperance, Inc., 387 F. Supp. 1265 (D.C. Pa. 1975); Shaffer v. Holbrook, 346 F. Supp. 762 (S.D. W. Va. 1972); Dielen v. Levine, 344 F. Supp. 823 (D. Neb. 1972); Musselman v. Spies, 343 F. Supp. 528 (M.D. Pa. 1972); Holt v. Brown, 336 F. Supp. 2 (W.D. Ky. 1971); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970); Van Ness Indus., Inc. v. Claremont Painting & Decorating Co., 129 N.J. Super. 507, 324 A.2d 102 (Ch. Div. 1974); Stevenson v. Cullen Center, Inc., 525 S.W.2d 731 (Tex. Civ. App. 1975).

The reasoning basically follows that of the United States Supreme Court in Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), which declared a Wisconsin garnishment statute unconstitutional. The hardship involved and the lack of prior notice and hearing provided the basis for the decision.

This approach, however, is not universal. *See* William v. Stancil, 168 S.E.2d 643 (Ga. App. 1969) (distraint statute must be strictly construed). *See also* RESTATEMENT (SECOND) OF PROPERTY, Statutory Note § 12.1 (1977). A Pennsylvania statute still authorizes the remedy:

> Personal property located upon premises occupied by a tenant shall, unless exempted by article four of this act, be subject to distress for any rent reserved and due. Such distress may be made by the landlord or his agent duly authorized thereto in writing. Such distress may be made on any day, except Sunday, between the hours of seven ante meridian and seven post meridian and not at any other time, except where the tenant through his act prevents the execution of the warrant during such hours.
>
> Notice in writing of such distress, stating the cause of such taking specifying the date of levy and the personal property distrained sufficiently to inform the tenant or owner what personal property is distrained and the amount of rent in arrears, shall be given, within five days after making the distress, to the tenant and any other owner known to

warranty of habitability.[59]

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the landlord, personally, or by mailing the same to the tenant or any other owner at the premises, or by posting the same conspicuously on the premises charged with the rent.

A landlord or such agent may also, in the manner provided, distrain personal property located on the premises but only that belonging to the tenant, for arrears of rent due on any lease which has ended and terminated, if such distress is made during the continuance of the landlord's title or interest in the property.

PA. STAT. ANN. tit. 68, § 250.302 (Purdon 1965).

Section 250.309 further provides that if the tenant fails to replevy the property within the specified five day period, the property can be appraised and sold at public auction six days later by the sheriff to pay the landlord monies owed to him. *Id.* § 250.309.

A typical clause authorizing a sheriff's sale reads in pertinent part:

In the event of *any default* . . . the Lessor, or anyone acting on Lessor's behalf, at Lessor's option: (a) may without notice or demand enter the demised premises, breaking open locked doors if necessary to effect entrance, without liability to action for prosecution or damages for such entry or for the manner thereof, for the purpose of distraining or levying and *for any other purpose*, and take possession of and sell all goods and chattels at auction . . . .

48 TEMP. L.Q. 820, 829 (1975) (emphasis added). Court decisions on the constitutionality of this provision conflict. *Compare* Gross v. Fox, 349 F. Supp. 1164, 1168 (E.D. Pa. 1970) (declaring the statute facially unconstitutional as a violation of fourteenth amendment due process), *vacated*, 496 F.2d 1153 (3rd Cir. 1974) (vacated on procedural grounds as moot), *with* Commonwealth v. Monumental Properties, Inc., 10 Pa. Commw. Ct. 596, 611-12, 314 A.2d 333, 340 (1973) ("As we read these Federal cases [declaring the right to distraint unconstitutional], however, we do not discern any firm holding that all clauses of distraint are unconstitutional."), *modified*, 329 A.2d 812 (Pa. 1974). The scope of the holdings in these cases also conflict, *see* Musselman v. Spies, 343 F. Supp. 528 (M.D. Pa. 1972); Sellers v. Contino, 327 F. Supp. 230 (E.D. Pa. 1971) (holding limited to sales of property only); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970) (finding of unconstitutionality limited to sales and to indigent tenants), and emerge only from the lower courts, *see* Korngold, *supra* note 34, at 244.

58. *See* note 47 *supra* and accompanying text. A few states authorize the use of confession-of-judgment clauses. ILL. REV. STAT. ch. 110, § 50 (Supp. 1976) (general confession-of-judgment statute not limited to landlord-tenant); MO. REV. STAT. § 511.100 (1978) (same); OHIO REV. CODE ANN. §§ 2323.12, .13 (Page 1954 & Supp. 1978) (same). Most states, however, prohibit the clauses. *See, e.g.*, ALA. CODE § 8-9-11 (1977) (agreements declared void); ARIZ. REV. STAT. ANN. § 6-629 (1956) (prohibited in small loans); *id.* § 44-143 (on all instruments authority must be acknowledged and executed subsequent to date confessed indebtedness due); IND. CODE § 34-2-25-1 (1976) (confession under power of attorney illegal on any contract action); *id.* § 34-2-28-1 (procurer of cognovit guilty of misdemeanor and subject to fine and imprisonment); MASS. ANN. LAWS ch. 231, § 13A (Michie/Law. Co-op 1974) (confession of judgment declared void for all instruments); N.M. STAT. ANN. § 39-1-16 (1978) (agreements on any written contract to pay money executed before cause of action accrues declared unlawful and void); *id.* § 39-1-18 (procurer of cognovit guilty of misdemeanor and subject to fine and imprisonment). *See also* Note, *A Clash in Ohio? Cognovit Notes and The Business Ethic of the UCC*, 35 U. CIN. L. REV. 470, 490-91 (1966). Some states that do not prohibit the clauses severely limit their use. *See, e.g.*, CONN. GEN. STAT. § 342-88, 36-236 (1979) (confession of judgment in retail installment contract or installment loan contract invalid and unenforceable); MICH. COMP. LAWS § 493.12 (1948) (confession of judgment in small loans prohibited); *id.* § 600.2906 (requires special instrument) (1948); MINN. STAT. ANN. § 548.22 (1945) (confession of judgment authorized for money due or to secure against contingent liability); *id.* § 541.09 (1945) (one year statute of limitations after cause of action arises; one year statute of limitation on actions on judgments by confession); *id.* § 168.71 (Supp. 1980)

To aid tenants courts also use covert judicial tools[60] to eviscerate the effect of other onerous clauses. For example, the court may find that the landlord, by some action after signing the lease, effectively waived his right to enforce a written provision, even if that waiver was not knowledgeable.[61] Courts may also invoke the contract rule that any

(invalid and unenforceable in retail installment sales contracts); *id.* § 56.12 (Supp. 1980) (use prohibited by small loan licensees) (1947); N.J. STAT. ANN. § 2A:16-9 (1952) (separate instrument required); *id.* § 17.16c-37 (Supp. 1979) (confession of judgment prohibited in retail installment sales contract and retail charge accounts).

Although the Supreme Court has held that confession-of-judgment provisions are not per se unconstitutional, *see* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187 (1972); Swarb v. Lennox, 405 U.S. 191, 200, *rehearing denied*, 405 U.S. 1049 (1972), the Court suggested a standard of constitutionality requiring that waivers be "voluntary, knowing, and intelligently made." D.H. Overmyer Co. v. Frick Co., 405 U.S. at 185.

The *Overmyer* Court avoided a determination that the Constitution mandated the standard because the facts supported a conclusion that the test was met. *Id.* at 187. The party subject to the clause, a corporation, was represented by counsel in negotiations, and did not have lesser bargaining power. *Id.* at 186. The clause, therefore, could not be the type contained in a contract of adhesion. Further, the party received valuable consideration for the waiver. *Id.* at 183. The Court specifically stated, however, "Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity of bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue." *Id.* at 188. This statement indicates that confession-of-judgment clauses in the majority of residential leases will not be enforceable. That result, however, will turn on the courts' interpretation of the word "voluntary" and whether voluntariness is necessarily negated in contracts of adhesion.

In *Swarb*, the companion case, the Court affirmed in part a district court opinion that held confession-of-judgment clauses unconstitutional as applied to persons with incomes of less than $10,000 per year, unless the clauses meet the *Overmyer* test. Plaintiffs stipulated that they were either unaware of the clause, unable to understand its meaning, or unable to bargain for different terms in any case. 405 U.S. at 197. They also introduced evidence from a study almost exclusively of persons with incomes of less than $10,000, a majority of whom lacked high-school degrees. The Supreme Court did not specifically rule on the district court's holding that the clause was unconstitutional as applied to the facts of the case, as that issue was not before the Court, but refused to find the provision unconstitutional on its face or to extend the holding to apply to those persons with incomes of greater than $10,000.

59. *See* notes 17, 45 *supra* and accompanying texts. Most statutes and court decisions recognizing the existence of an implied warranty of habitability have prohibited or limited use of waivers of the warranty in residential leases. *See, e.g.,* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); Houston Realty Corp. v. Castro, 94 Misc. 2d 115, 404 N.Y.S.2d 796 (Civ. Ct. 1978); Fair v. Negley, 390 A.2d 240 (Pa. Super. 1978). *But see* Kamarath v. Bennett, 568 S.W.2d 658 (Tex. 1978). *See also* RESTATEMENT (SECOND) OF PROPERTY, Statutory Note to ch. 5 (1976).

60. *See generally* Berger, *supra* note 25, at 794-813 (analyzing a majority of the reported New York landlord and tenant decisions from 1970 to 1972).

61. Seventy-Second St. Properties, Inc. v. Woods, 67 Misc. 2d 539, 324 N.Y.S.2d 339 (Civ. Ct. 1971). This theory for finding waiver has been especially useful in the past and remains effective

ambiguity is construed against the drafter[62] to yield a protenant result, even if no ambiguity is present in the lease.[63] Although the form lease normally defines breach as failure to fulfill any covenant and thus does not distinguish between substantial and insubstantial tenant obligations,[64] courts may refuse to grant the landlord recourse for an insubstantial breach.[65] Courts may also use the "rule of reason" to read into the lease the court's concept of the intent of the parties, and in the process, obviate the clear language of the lease.[66] Finally, courts may refuse to enforce a landlord's unconscionable conduct.[67]

In the broad perspective, however, covert interpretative tools do not

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to a limited extent in the area of assignment; consent to one assignment waives the landlord's right to refuse consent to later assignments. Moss v. Chappell, 126 Ga. 196, 54 S.E. 968 (1906); Olivero v. Duran, 70 Misc. 2d 882, 334 N.Y.S.2d 930 (Civ. Ct. 1972); Dumpor v. Symms, 76 Eng. Rep. 1110 (K.B. 1603).

62. *See, e.g.,* Union Bank v. Winnebago Indus., Inc., 528 F.2d 95 (9th Cir. 1975); Taft Broadcasting Co. v. NLRB, 441 F.2d 1382 (8th Cir. 1971); John W. Johnson, Inc. v. Basic Constr. Co., 429 F.2d 764 (D.C. Cir. 1970); Float-Away Door Co. v. Continental Cas. Co., 372 F.2d 701 (5th Cir. 1966), *cert. denied,* 389 U.S. 825 (1967).

63. *See* note 60 *supra.* To limit the landlord's recovery to no more than unavoidable consequences of the tenant's abandonment of the premises before the lease's expiration, courts have held that the landlord who reenters must attempt to relet the premises to recover damages. *See, e.g.,* Manley v. Kellar, 47 Del. 511, 94 A.2d 219 (1956); Kanter v. Safran, 99 So. 2d 706 (Fla. 1958); cases listed in Annot., 21 A.L.R.3d 534, 556 (1968). Some courts, however, have construed reentry clauses, which provide that the landlord may reenter, to mean that the landlord *must* reenter. A similar interpretation would also require the landlord to attempt to relet the premises. *See* Crow v. Kaupp, 50 S.W.2d 995 (Mo. 1932); cases listed in 21 A.L.R.3d 534, 540 (1968).

In another case, Bettinelli v. Peterson Kane, Inc., 62 Misc. 2d 444, 308 N.Y.S.2d 1023 (App. Div. 1969) (per curiam), a fire clause permitted termination by the landlord if the premises were rendered wholly untenantable *or* if the building was so damaged that the landlord decided to rebuild it. The court construed the clause to require both circumstances when the tenant's apartment was only partially damaged, so that landlord could not terminate for inconsequential fire damage.

64. *See* note 30 *supra.*

65. Berger, *supra* note 25, at 800; *see* Rossman v. 740 River Drive, 308 Minn. 134, 136-37, 241 N.W.2d 91, 92 (1976).

66. *See* Pine Hill Assocs. v. Malveaux, 93 Misc. 2d 63, 403 N.Y.S.2d 398 (App. Div. 1978), *rev'g* 89 Misc. 2d 234, 391 N.Y.S.2d 58 (Yonkers City Ct. 1977); Seabrook v. Commuter Hous. Co., 79 Misc. 2d 167, 363 N.Y.S.2d 566 (App. Div. 1973), *aff'g* 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. 1972); Hartwig v. 6465 Realty Co., 67 Misc. 2d 450, 324 N.Y.S.2d 567 (App. Div. 1971); SKD Enterprises, Inc. v. L & M Offset, Inc., 65 Misc. 2d 612, 318 N.Y.S.2d 539 (Civ. Ct. 1971); Berger, *supra* note 25, at 804.

67. This use of unconscionability looks not to an unconscionable provision in the lease, but to the unconscionable *acts* of the landlord. Berger, *supra* note 25, at 806; *see* 57 E. 54 Realty Corp. v. Gay Nineties Realty Corp., 71 Misc. 2d 353, 335 N.Y.S.2d 872 (App. Div. 1972); SKD Enterprises, Inc. v. L & M Offset, Inc., 65 Misc. 2d 612, 318 N.Y.S.2d 539 (Civ. Ct. 1971); *cf.* Tai on Luck Corp. v. Ciorta, 35 A.D.2d 380, 316 N.Y.S.2d 438 (1970) (increasing rent from $400 to $2000 per month is unconscionable).

adequately balance the rights, remedies, and obligations imposed by the lease. This ad-hoc method of interpretation fails to set standards for future cases and, as a result, may be unfair to both landlord and tenant by failing to provide adequate or consistent notice of the effect of written provisions. Further, by striking the particular use of a provision and not its principle, courts merely encourage landlords to redraft the same clauses in more definite language. "The net effect is unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy."[68]

Another judicial approach requires that certain types of tenant waivers must be made knowingly, voluntarily, and intelligently.[69] Some courts implementing this standard impose on the landlord an affirmative duty to make the particular clause or clauses known to the tenant.[70] This approach may remedy the tenant's difficulties in reading and understanding the lease, but it does not deal with the tenant's most difficult problems—the lack of meaningful choice caused by the housing shortage, and the relative lack of bargaining power. A lease that clearly identifies for the tenant the prolandlord rights, obligations, and remedies may merely point out the relative lack of power; it does not restore freedom of contract.[71] These approaches thus fall far short of

68. Llewellyn, Book Review, 52 HARV. L. REV. 700, 702-03 (1939).

69. *See* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185 (1972); Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144, 148 (1971); note 58 *supra*.

70. Johnson v. Mobil Oil Corp., 415 F. Supp. 264, 269 (E.D. Mich. 1976); Weaver v. American Oil Co., 257 Ind. 458, 464, 276 N.E.2d 144, 147 (1971); Seabrook v. Commuter Hous. Co., 72 Misc. 2d 6, 11, 338 N.Y.S.2d 67, 73 (Civ. Ct. 1972) (landlord was "also under an affirmative duty to bring clauses 19 and 33 to the attention of the lessee and to explain their meaning before asking lessee to execute the lease."), *aff'd*, 79 Misc. 2d 168, 363 N.Y.S.2d 566 (App. Div. 1973). *Contra,* Diamond Hous. Corp. v. Robinson, 257 A.2d 492, 494 (D.C. 1969); Cailler v. Humble Oil & Refining Co., 117 N.H. 915, 919, 379 A.2d 1253, 1256 (1977). The underlying justification for this approach appears to be concern with the technical and complex form of the lease document itself; unfair surprise is avoided when the landlord must point out and explain the consequences of a given clause.

71. *See* notes 24-28 *supra* and accompanying text. *See also* Comment, *An Attack on Confession of Judgment Clauses in Residential Leases Through Section 2-302 of the UCC*, 50 CHI.-KENT L. REV. 482, 495 (1973).

The Pennsylvania Supreme Court recently adopted an approach that, because it does not extend much beyond the "affirmative duty" approach, is subject to the same criticisms. In Commonwealth v. Monumental Properties, Inc., 329 A.2d 812 (Pa. 1974), the State Attorney General brought suit against 25 major representative landlords and four lease form printers, alleging three counts. First, the Attorney General charged that defendants used leases that employed "archaic and technical language beyond the easy comprehension of the consumer of average intelligence." *Id.* at 814. Second, the Attorney General claimed that the leases contained "illegal, unconscionable and unconstitutional and hence, unenforceable" provisions, including lessor's right to dis-

remedying tenant problems.

III. UNCONSCIONABILITY IN LANDLORD-TENANT LAW: ITS SOURCES AND APLICATIONS

Although unconscionability has long been a part of contract law,[72]

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traint, confession of judgment, unlimited discretion to accelerate rent, waiver of claim for lessor's negligence, waiver of all unexplained rights, waiver of demand, notice, and right of appeal, and waiver of standing to open or strike judgments. *Id.* Third, the Attorney General asserted that the failure to include in the leases notice of statutory rights, some of which are nonwaivable by law, was misleading and confusing. *Id.* The court refused to find these clauses unconscionable, *id.* at 828, but held that the state's consumer protection law, Pennsylvania Unfair Trade Practices Act and Consumer Protection Law, PA. STAT. ANN. tit. 73, §§ 201-1 to 201-9 (1971), was applicable to unfair and deceptive practices involving residential leases.

> [T]he Consumer Protection Law was designed to equalize the market position and strength of the consumer vis-a-vis the seller. A perception of unfairness led the Legislature to regulate more closely market transactions. The mischief to be remedied was the use of unfair or deceptive acts and practices by sellers. As part of the Law's object, fraudulent conduct that would mislead or confuse a consumer was banned.
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> Functionally viewed, the modern apartment dweller is a consumer of housing services. The contemporary leasing of residences envisions one person (landlord) exchanging for periodic payments of money (rent) a bundle of goods and services, rights and obligations.

329 A.2d at 820. The court also remanded the case for a determination of whether the leases' silence on tenants' statutory rights, some of which were nonwaivable, was misleading under the consumer protection law. Use of this statute opens the way for requiring landlords to use clearer language and, perhaps, to inform tenants of their nonwaivable statutory rights; however, it does not relieve the problems caused by the tenant's lack of meaningful choice.

72. *See* Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (1750), *quoted in* Hume v. United States, 132 U.S. 406, 411 (1889). The first codification of unconscionability appeared in the UCC. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. Pa. L. Rev. 485, 489-501, 509-16 (1967) [hereinafter cited as *The Emperor's New Clause*]. Currently, the Code provides:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

U.C.C. § 2-302. The stated purpose of this provision is to avoid the use of covert tools to police lease provisions. The draftsmen's commentary to this section reads:

> This section was intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accompanied by adverse construction of language, by manipulation of the rules of offer and acceptance or by determination that the clause is contrary to public policy or to the dominant purpose of the contract.

its application to residential leases is relatively recent.[73] It may be applied to leases as an equitable doctrine, an extension of the Uniform Commercial Code, an application of the principles in the *Restatement (Second) of Property*, or under New York real property law and the Uniform Residential Landlord and Tenant Act.

A. *Equitable Unconscionability*

The doctrine of unconscionability originated in courts of equity.[74] Equitable unconscionability is defined as that which "no man in his right senses and not under delusion would make on the one hand and . . . no honest and fair man would accept on the other."[75] It encompasses those dealings that shock the conscience of the court.[76] *Weaver v. American Oil Co.*,[77] one of the early cases[78] to use the doctrine to

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Id. Comment 1 (1962 version). *See also* Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 563 (1971).

For a general discussion of U.C.C. § 2-302 unconscionability, see J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 112-13 (1972); Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Leff, *Unconscionability and the Crowd—Consumers and The Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970) [hereinafter cited as *The Common Law Tradition*]; Murray, *Unconscionability*, 31 U. PITT. L. REV. 1 (1969); Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969); Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359 (1970).

73. Weaver v. American Oil Co., 247 Ind. 458, 276 N.E.2d 144 (1971). Unconscionability was used at least ten years ago in an equity suit over a lease. *See* Diamond Hous. Corp. v. Robinson, 257 A.2d 492 (D.C. 1969); Jones v. Sheetz, 242 A.2d 208 (D.C. 1968).

74. *See* Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948); cases listed in U.C.C. § 2-302, Comment 1 (1962 version); note 73 *supra*.

75. Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (1750), *quoted in* Hume v. United States, 132 U.S. 406, 411 (1889).

76. *See* Stiefler v. McCullough, 97 Ind. App. 123, 130, 174 N.E. 823, 826 (1931); Wasserbauer v. Marine Midland Bank-Rochester, 92 Misc. 2d 388, 400, 400 N.Y.S.2d 979, 987 (Monroe County Ct. 1977). The Georgia courts define an unconscionable contract as "one [that is] abhorrent to good morals and conscience. *It is one where one of the parties takes a fraudulent advantage of another.* . . . Unconscionability is directly related to fraud and deceit, which in turn may be found where there is great inadequacy of consideration or great disparity of mental ability." F.N. Roberts Pest Control Co. v. McDonald, 132 Ga. App. 257, 260, 208 S.E.2d 13, 15 (1974) (emphasis in original).

77. 257 Ind. 458, 276 N.E.2d 144 (1972). The exculpation and indemnity clause was similar to the standard form discussed in notes 39, 44, 56 *supra*.

Although this case involved a commercial lease between a service station operator and the oil company owner, it is analogous to the situation of the residential lease to the extent that the court found the lessee "was not one who should be exptected to know the law or understand the meaning of technical terms." 257 Ind. at 460, 276 N.E.2d at 145-46. The operator had only a year-and-a-half of high school, and had held various semiskilled and unskilled labor jobs. Although the

void a lease provision, refused to enforce an exculpation and indemnification clause when the lessor's agent negligently injured the lessee. Other courts[79] have refused to enforce disclaimers of liability for the curtailment or interruption of services[80] and provisions requiring the

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contractual relationship had been renewed for several years, giving lessee more than ample time to read the lease or to have it explained to him by someone else, the court found that "the significance of Weaver's signature upon the legal document amounted to nothing more than a mere formality to Weaver for the substantial protection of American Oil." *Id.* at 461, 276 N.E.2d at 146. In addition, the lease was a form contract written in fine print. The lessor had superior bargaining power and submitted the lease on a take-it-or-leave-it basis, as is typical with modern form contracts. *Id.* at 462, 276 N.E.2d at 147. The court also found that the lease terms taken as a whole were unfair to the extent that in exchange for accepting this liability burden, lessee was bound to operate the service station for long hours, seven days a week, for less than $6000 per year. *Id.* The court indicated that if the UCC were applicable, the lease would be unconscionable under § 2-302. *Id.* at 461, 276 N.E.2d at 146.

This case is most often cited for the proposition that exculpation clauses are against public policy or that the party submitting a package that contains such clauses has an affirmative duty to make the unusual or unconscionable terms known to the lessee. *See* notes 69-71 *supra* and accompanying text. It clearly states a case for equitable unconscionability. The court cites the following as a definition of equitable unconscionability: "where one party has taken advantage of another's necessities and distress to obtain an unfair advantage over him, the latter, owing to his condition, has encumbered himself with a heavy liability or an onerous obligation for the sake of a small or inadequate present gain, there will be relief granted." 257 Ind. at 462, 276 N.E.2d at 146 (quoting Stiefler v. McCullough, 97 Ind. App. 123, 130-31, 174 N.E. 823, 826 (1931)). It is difficult to say how far the court would extend this principle. "Relief" may consist merely of assuring that the party with lesser bargaining power had knowledge of the terms, especially in the case in which the lessee might have had other options. If so, then the court holds only that knowledge alleviates the unfairness. The court's rationale should extend to the landlord-tenant situation in which the lessee has no other options, despite knowledge of the term.

78. Two older District of Columbia cases refused to find unconscionable waivers of 30-day notice-to-quit provisions. Diamond Hous. Corp. v. Robinson, 257 A.2d 492 (D.C. 1969); Jones v. Sheetz, 242 A.2d 208 (D.C. 1968). Both courts noted the absence of extreme one-sidedness when use of the clause was conditioned upon the tenant's failure to comply with the terms of the lease. The *Diamond* court also noted that such clauses were routinely used.

79. Most case law using unconscionability comes from the New York courts. One explanation for this fact is that New York has more renters, harsher leases, or a more severe housing shortage. In light of New York's adoption of Real Property Law § 235-c, a more accurate explanation might be that the New York courts are more predisposed toward use of the doctrine. *See* notes 95-97 *infra* and accompanying text. Another possible explanation is that New York is one of the few states that reports trial court decisions. Because most residential landlord-tenant cases involve small amounts, it is not likely that either party will appeal an adverse judgment. *See* Lefrak v. Lambert, 89 Misc. 2d 197, 204, 390 N.Y.S.2d 959, 964 (Civ. Ct. 1976), *modified*, 93 Misc. 2d 632, 403 N.Y.S.2d 397 (Sup. Ct. 1978).

80. In Harwood v. Lincoln Square Apartments, Section 5, Inc., 78 Misc. 2d 1097, 359 N.Y.S.2d 387 (1974), tenants were allowed to recover the cost of renting air conditioning units during the 16-week period their central air was not in service, despite a disclaimer in the lease. The court emphasized the adhesive nature of the lease and the limited housing market, which offered tenants no meaningful choice among housing or lease provisions. *Id.* at 1099, 359 N.Y.S.2d at 390. The court also noted that the lease impliedly recognized the necessity of air

tenant to pay attorney's fees upon the commencement of proceedings by the landlord.[81]

B. *Extensions of the Uniform Commercial Code*

Section 2-302 of the Uniform Commercial Code (UCC) authorizes courts to refuse enforcement of unconscionable contracts for the sale of goods.[82] Some commentators have urged extension, by analogy, of this provision to residential leases.[83] This approach comports with the trend toward viewing leases as equivalent to contracts for the sale of goods.[84] Use of this rationale has been limited, however, perhaps because some states have adopted statutes explicitly applying unconscionability to leases.[85]

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conditioning as demonstrated by its listing of air conditioning alongside of such services as heat, water, and refrigeration. *Id.* at 1098, 359 N.Y.S.2d at 389. "Where clauses in form leases of this type are unreasonably weighted in favor of the landlord, they may be subject to the defense of unconscionability, and denied enforcement." *Id.* at 1099, 359 N.Y.S.2d at 390.

The court in Groner v. Lakeview Management Corp., 83 Misc. 2d 932, 373 N.Y.S.2d 807 (Civ. Ct. 1975), held the language of a similar clause to be "a classic example of unconscionability." *Id.* at 934, 373 N.Y.S.2d at 809. Unlike the *Harwood* court, however, the *Groner* court provided little reasoning for its holding of unconscionability—indicating that such clauses might be *per se* unconscionable in residential leases. The doctrine, however, proved to be of little aid to the tenant in this case, as the court allowed recovery of only six cents, because of a lack of proof on damages. *But see* Steinberg v. Carreras, 74 Misc. 2d 32, 344 N.Y.S.2d 136 (Civ. Ct. 1973), in which the court found it had responsibility to make the determination, without expert testimony, of injury suffered from the heat being shut off. "A basic rule of damage, particularly appropriate in this kind of situation is that where damage has in fact been unjustifiably sustained, all relief should not be denied because it is not possible to fix with certainty the precise value of the damage." *Id.* at 38, 344 N.Y.S.2d at 144.

The *Steinberg* case also involved a disclaimer in the event of a failure to provide continuous heat. In a summary nonpayment proceeding that followed a concerted withholding of rent by 36 tenants to force restoration of an appropriate level of services, the court awarded the tenants damages for certain days. The court determined that it could provide a just outcome through a reasonable interpretation of the language of the lease, but noted that the pervasive character of form leases and the inability of tenants to negotiate for other terms "call[s] for the unhesitating application of the doctrine of unconscionability when their terms bring about clearly unjust consequences." *Id.* at 36, 344 N.Y.S.2d at 142.

81. McClelland-Metz Management, Inc. v. Faulk, 86 Misc. 2d 778, 384 N.Y.S.2d 919 (Sup. Ct. 1976); Weidman v. Tomaselli, 81 Misc. 2d 328, 365 N.Y.S.2d 681 (Rockland County Ct.), *aff'd*, 84 Misc. 2d 782, 386 N.Y.S.2d 276 (App. Term 1975) (affirmed on the unconscionability issue).

82. *See* note 72 *supra*.

83. *See, e.g.*, Bolgar, *The Contract of Adhesion: A Comparison of Theory and Practice*, 20 AM. J. COMP. L. 53, 70 (1972); Cramer, *Extension of the Uniform Commercial Code's Unconscionable Contract Provision to Exculpatory Lease Clauses*, 5 AM. BUS. L.J. 271, 291-92 (1967); Ellinghaus, *supra* note 72, at 808-12; Comment, *supra* note 71.

84. *See* notes 12-13 *supra* and accompanying text.

85. *See* notes 95-97, 119-23 *infra* and accompanying text.

Seabrook v. Commuter Housing Co.[86] exemplifies this approach. The lease in *Seabrook* contained a clause providing that if the apartment building were not completed by a specified date, the lease obligations would begin upon completion. When the building remained unfinished three months after the specified date of completion, the tenant sought a release from the lease obligations and a refund of money already paid. The court looked to the complexity and length of the lease document, the landlord's greater expertise in lease transactions, the scarcity of apartments, and the adhesive nature of form leases in general, to hold the lease unconscionable because it resembled "a business pattern closely akin to what the drafters of section 2-302 sought to prohibit . . . [which] may be related to the Code by analogy."[87]

C. *The Restatement (Second) of Property*

The *Restatement (Second) of Property* includes a provision allowing parties freedom to contract for obligations and remedies so long as the agreements are neither unconscionable nor against public policy.[88] The commentary to this section suggests guidelines for its application,[89] and notes the following factors as influential in determining the exist-

86. 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. 1972), *aff'd*, 79 Misc. 2d 168, 363 N.Y.S.2d 566 (Sup. Ct. 1973). *See also* Tai on Luck Corp. v. Cirota, 35 A.D.2d 380, 387, 316 N.Y.S.2d 438, 444 (1970).

87. 72 Misc. 2d at 9, 338 N.Y.S.2d at 70.

88. RESTATEMENT (SECOND) OF PROPERTY § 5.6 (1977) provides:

> The parties to a lease may agree to increase or decrease what would otherwise be the obligations of the landlord with respect to the condition of the leased property and may agree to expand or contract what would otherwise be the remedies available to the tenant for the breach of those obligations, and those agreements are valid and binding on the parties to the lease unless they are unenforceable in whole or in part because they are unconscionable or significantly against public policy.

89. *Id.*,Comment e. The guideline factors, presumably not exclusive, that may be used to determine if the lease is unenforceable in whole or in part include:

> (1) Whether and to what extent the agreement will be counter to the policy underlying statutory or regulatory provisions, especially those relating to the public health and safety and those relating to the tenants of moderate income in multi-unit residential or office properties;
>
> (2) Whether the agreement or provision appears in a lease of commercial or industrial property or of an entire building or a large portion of a building, or of a substantial residence or estate designed for single family occupancy, properties concerning which freedom of negotiation is usually permissible;
>
> (3) Whether and to what extent the agreement or provision serves a reasonable business purpose and appears to have been the result of conscious negotiations for the distribution of risks as part of the total bargain contained in the lease;
>
> (4) Whether the provision appears to be part of an unduly harsh and unreasonable standard, "boilerplate" lease document;
>
> (5) Whether and to what extent the parties or either of them, habitually (or on a

ence of unconscionability: the commercial or residential nature of the lease;[90] the presence of counsel in the negotiations; the relative degrees of bargaining power; the purpose of the challenged provision; the lease's imposition of unreasonable burdens on those financially ill-equipped to handle them;[91] and the nature of the lease document itself, *i.e.*, whether it is an "unduly harsh, boiler-plate lease."[92] Although few cases to date have applied or relied on this section,[93] it has the potential to broadly extend the doctrine of unconscionability in landlord-tenant law.[94]

D. *New York's Real Property Law Section 235-c*

The New York legislature, in adding section 235-c[95] to its Real Property Law in 1976,[96] essentially adopted section 2-302 of the UCC.[97] As

discriminatory basis) disregard and do not enforce the agreement or provision in actual operations under the lease or, in the case of a landlord, under similar leases;

(6) Whether and to what extent the agreement or provision (especially if it relates to low or moderate income residential property) imposes unreasonable liabilities or burdens on persons who are financially ill-equipped to assume those burdens and who may have had significant inequality of bargaining power; and

(7) Whether and to what extent the parties were each represented by counsel in the course of negotiating the lease.

90. *Id.* Factor (2), *see* note 89 *supra*, states that when dealing with commercial properties, large parts of a building, or large estates, freedom of negotiation is usually permissible. Although this factor does not preclude use of the doctrine in commercial contexts, it does suggest that a commercial tenant might bear a heavier burden of proof in arguing against enforcement of all or part of the lease.

91. *See* note 89 *supra*. Factor (6), which refers to unreasonable burdens or liabilities imposed on parties with relatively less bargaining power, is tied directly to the tenant's *financial* capacity to bear what is imposed. Although this factor might easily cover exculpation and indemnification clauses, attorney fees, and the like, it apparently would not cover such provisions as confession-of-judgment clauses or unduly restrictive rules and regulations.

92. *See* note 89 *supra* (factor 4).

93. *See* note 156 *infra*.

94. The last cited factor, whether the clause is contained in an "unduly harsh, boiler-plate lease," could support a broad extension of the use of unconscionability in landlord-tenant law if it is heavily weighted by the courts.

95. 49 N.Y. REAL PROP. LAW § 235-c (McKinney Supp. 1978).

(1) If the court as a matter of law finds a lease or any clause of the lease to have been unconscionable at the time it was made the court may refuse to enforce the lease, or it may enforce the remainder of the lease without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that a lease or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose and effect to aid the court in making the determination.

Id.

96. The statute was enacted on July 26, 1976, and is applied retroactively. 1976 N.Y. Laws

is true with section 2-302,[98] section 235-c requires a hearing at which the party claiming unconscionability has the burden of establishing the setting, purpose, and effect of the lease to aid the court in its determination of the issue.[99] Unlike other codifications of unconscionability, the 235-c provision is applicable to both commercial and residential leases.[100]

In residential lease cases, however, New York courts have not been quick to use 235-c to find unconscionability. In *Lefrak v. Lambert*[101] the court originally refused to enforce as "unconscionable on its face" a clause[102] that allowed the landlord to recover more than the unavoidable consequences of early abandonment by the tenant.[103] The court,

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ch. 828, § 2 provides: "This act shall take effect immediately and shall be applicable to all leases, regardless of when executed."

97. Flam v. Herrmann, 90 Misc. 2d 434, 436, 395 N.Y.S.2d 136, 137 (Civ. Ct. 1977).

Governor Carey, in a memo of approval, noted the purpose of applying unconscionability to landlord and tenant proceedings:

> The concept of unconscionability is not new to the law of this state. The Uniform Commercial Code, at the time of its enactment in 1962, codified the doctrine as it related to the law of sales. It has, however, had limited applicability in landlord and tenant disputes until recently. The doctrine is only now beginning to be judicially applied in such cases. . . . This bill would codify the doctrine and establish a defense of unconscionability in landlord and tenant proceedings.

Lefrak v. Lambert, 89 Misc. 2d 197, 203-04, 390 N.Y.S.2d 959, 963 (Civ. Ct. 1976) (citations omitted), *modified*, 93 Misc. 2d 632, 403 N.Y.S.2d 397 (Sup. Ct. 1978). The purpose of § 235-c is to "engraft the spirit of the Uniform Commercial Code into landlord and tenant relationships and to mandate a judicial policing against unconscionable results without strained construction of legal principles." Pine Top Assocs. v. Hirsch & Sons Deli World, Inc., 92 Misc. 2d 470, 472, 400 N.Y.S.2d 665, 666 (Sup. Ct. 1977).

98. *See* note 72 *supra*.

99. Flam v. Herrmann, 90 Misc. 2d 434, 436, 395 N.Y.S.2d 136, 137 (Civ. Ct. 1977).

100. For cases dealing with the provision in a commercial context, see Pine Top Assocs. v. Hirsch & Sons Deli World, Inc., 92 Misc. 2d 470, 400 N.Y.S.2d 665 (Sup. Ct. 1977); Graff v. Transitube, Inc., 90 Misc. 2d 879, 396 N.Y.S.2d 313 (Civ. Ct. 1977); Flam v. Herrmann, 90 Misc. 2d 434, 395 N.Y.S.2d 136 (Civ. Ct. 1977). *See also* Valley Forge Village v. Anthony, 92 Misc. 2d 1007, 401 N.Y.S.2d 978 (Suffolk County Ct.) (§ 235-c does not apply to oral month-to-month tenancies), *aff'd*, 96 Misc. 2d 62, 40 N.Y.S.2d 957 (Sup. Ct. 1978).

101. 89 Misc. 2d 197, 390 N.Y.S.2d 959 (Civ. Ct. 1976).

102. One of New York's largest apartment owners asserted this clause after the apartment abandoned by the tenant remained vacant for seventeen months. *See generally* note 37 *supra* and accompanying text.

103. 89 Misc. 2d at 202, 390 N.Y.S.2d at 962. The court noted the inequality of bargaining power and, more importantly, the absence of any legitimate reason for leases to be governed by rules different from those that govern contracts in general. *Id.* Further, the court reasoned: "There is something basically unjust, basically unreasonable and, therefore, basically not legal about a landlord in an urban society with a housing shortage having no obligation to try to rerent an apartment and mitigate damages." *Id.* at 205, 390 N.Y.S.2d at 965.

however, later modified this result[104] and permitted recovery of the full amount due under the lease because it found the landlord had made reasonable efforts to relet.[105] Section 235-c apparently remains available for restricting enforcement of clauses like that in *Lefrak* when no reasonable attempt is made by the landlord to relet. This court, however, refrained from deciding whether, as a general rule, the statute mandated that landlords attempt to relet abandoned premises to recover the full lease amount.[106]

Other 235-c cases also have rejected claims of unconscionability. The trial court in *Pine Hill Association v. Malveaux*[107] invoked section 235-c to refuse enforcement of a clause allowing the landlord, without liability, to "immediately re-enter . . . and remove all persons and property thereon, either by summary dispossess proceedings . . . by force or otherwise" upon the tenant's default in rent payment.[108] Because of the illegality of forceful reentry and in the absence of any authority permitting peaceful reentry while the tenant remained in possession, the trial court reasoned that the clause was unconscionable and, therefore, unenforceable as a matter of law.[109] The appellate term[110] reversed the trial court, however, holding peaceful reentry permissible if the lease provides for peaceful reentry and the tenant fails, after demand by the landlord, to pay the rent.[111]

In another New York case, *Koslowski v. Palmieri*,[112] the trial court refused to find unconscionable a form lease provision waiving the tenant's right to a jury trial. Although the clause was printed in type smaller than normally permitted,[113] the court found the print legible

104. Lefrak v. Lambert, 93 Misc. 2d 632, 403 N.Y.S.2d 397 (Sup. Ct. 1978).

105. *Id.* at 633, 403 N.Y.S.2d at 398.

106. *Accord,* Birchwood Assocs. v. Stein, 88 Misc. 2d 937, 938, 390 N.Y.S.2d 505, 506 (Sup. Ct. 1976), *cited in* Lefrak v. Lambert, 89 Misc. 2d 197, 204 & n.1, 403 N.Y.S.2d 959, 963-64 & n.1 (Civ. Ct. 1976), *modified,* 93 Misc. 2d 632, 403 N.Y.S.2d 397 (Sup. Ct. 1978).

107. 89 Misc. 2d 234, 391 N.Y.S.2d 58 (Yonkers City Ct. 1977).

108. *Id.* at 236, 391 N.Y.S.2d at 60. After the tenant defaulted in rent payments, the landlord changed the locks on the apartment while the tenant was away and refused to allow the tenant to reenter.

109. The court found that "actual possession shall not be disturbed except by legal process." *Id.* at 237, 391 N.Y.S.2d at 60. The court envisioned a situation in which the landlord could reenter at anytime of the day or night when the tenant was but one minute deficient in payment.

110. Pine Hill Assocs. v. Malveaux, 93 Misc. 2d 63, 403 N.Y.S.2d 398 (Yonkers City Ct. 1978).

111. *Id.*

112. 94 Misc. 2d 555, 404 N.Y.S.2d 799 (Civ. Ct. 1978), *rev'd on other grounds,* 98 Misc. 2d 885, 414 N.Y.S.2d 599 (App. Term 1979).

113. The appellate term reversed, 98 Misc. 2d 885, 414 N.Y.S.2d 599 (Sup. Ct. 1979), refusing

and, therefore, not unconscionable. As to the substance of the clause, the court balanced the consequences of enforcement and found no real prejudice to the tenant, noting that the clause offered the advantages of less delay and lower trial costs.[114]

Only one New York court has found a lease unconscionable under section 235-c. In *Sidnam v. Washington Square Realty Corp.*,[115] the appellate term restricted the application of an agreement to lease, which had been executed through a broker. The landlord asserted that the agreement allowed him to retain the prospective tenant's rent and security deposit, even though the lease was never signed.[116] Noting that brokers were more like agents of the landlord than of the tenant in a tight housing market and that clauses like the one in question had been held under some circumstances to be only offers to lease subject to acceptance by the tenant, the court concluded that the "situation is one which cries out for the invocation of section 235-c."[117]

Although the New York courts rejected the application of unconscionability to clauses denying the right to a jury trial, permitting reentry while the tenant remained in possession, and granting the landlord recovery of more than unavoidable damages, unconscionability is clearly not a dead-letter doctrine. The courts will probably continue to invoke the doctrine to disallow retention of rental deposits provided for in lease applications and in situations similar to those finding unconscionability under the equitable doctrine.[118]

E. *The Uniform Residential Landlord and Tenant Act*

The Uniform Residential Landlord and Tenant Act (URLTA) is a comprehensive statute regulating many aspects of residential[119] lease law. Although section 1-303[120] of the URLTA closely parallels the lan-

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to enforce the clause because of its small print size. The court did not consider the unconscionability claim.

114. *Id.*

115. 95 Misc. 2d 825, 408 N.Y.S.2d 988 (Sup. Ct. 1978).

116. *Id.*

117. *Id.* at 827, 408 N.Y.S.2d at 989.

118. *See* notes 80-81 *supra* and accompanying text.

119. URLTA is applicable only to residential leases. Commissioners' Comment, URLTA, *supra* note 9, at § 1.101.

120. *Id.* § 1.303 provides:

(a) If the court, as a matter of law, finds

(1) a rental agreement or any provision thereof was unconscionable when made, the court may refuse to enforce the agreement, enforce the remainder of the agreement with-

guage of section 2-302 of the UCC, its coverage also extends to settlements of claims.[121] Sixteen states have adopted the Act,[122] twelve of which have adopted the unconscionability provision.[123]

URLTA directly regulates many of the substantive lease clauses that courts might otherwise readily refuse to enforce on unconscionability or public policy grounds.[124] URLTA prohibits waivers of rights and remedies granted by the Act, use of confession-of-judgment clauses,

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out the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result; or

(2) a settlement in which a party waives or agrees to forego a claim or right under this Act or under a rental agreement was unconscionable when made, the court may refuse to enforce the settlement, enforce the remainder of the settlement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result.

(b) If unconscionability is put into issue by a party or by the court upon its own motion the parties shall be afforded a reasonable opportunity to present evidence as to the setting, purpose, and effect of the rental agreement or settlement to aid the court in making the determination.

121. *Id.*

122. *See* ALASKA STAT. §§ 34.03.010-.380 (1974); ARIZ. REV. STAT. ANN. §§ 33-1301 to -1381 (1974); DEL. CODE ANN. tit. 25, §§ 5101-6504 (1974); FLA. STAT. ANN. §§ 83.40-.73 (West Supp. 1979); HAWAII REV. STAT. §§ 521-1 to -76 (Supp. 1975); IOWA CODE ANN. §§ 562A.1-.37 (Supp. 1979); KAN. STAT. ANN. §§ 58-2540 to -2573 (1976); KY. REV. STAT. ANN. §§ 383-505 to -715 (Baldwin 1978); MONT. REV. CODES ANN. §§ 42-401 to -442 (Cum. Supp. 1977); NEB. REV. STAT. §§ 76-1401 to -1449 (1976); N.M. STAT. ANN. §§ 70-7-1 to -51 (Supp. 1975); OHIO REV. CODE ANN. §§ 5321.01-.19 (Page Supp. 1978); OR. REV. STAT. §§ 91.700-.865 (1977); TENN. CODE ANN. §§ 64-2801 to -2864 (1976); VA. CODE §§ 55-248.2-.40 (Supp. 1979); WASH. REV. CODE ANN. §§ 59.18.010-.900 (Supp. 1978).

123. Four states, Alaska, Delaware, Virginia, and Washington, substantially adopted URLTA, *supra* note 9, but did not enact its unconscionability provision. Enacted unconscionability provisions are codified at: ARIZ. REV. STAT. ANN. § 33-1312 (1974); FLA. STAT. ANN. § 83.45 (West Supp. 1979); HAWAII REV. STAT. § 521-75 (Supp. 1975); KAN. STAT. ANN. § 58.2544 (1976); KY. REV. STAT. ANN. § 383.555 (Baldwin 1978); MONT. REV. CODES ANN. § 42-411 (Cum. Supp. 1977); NEB. REV. STAT. § 76-1412 (1976); OHIO REV. CODE ANN. § 5321.14 (Page Supp. 1978); OR. REV. STAT. § 91.735 (1977); TENN. CODE ANN. § 64.2814 (1976). New Mexico has codified essentially the same concept in its "inequitable agreement provision," N.M. STAT. ANN. § 70-7-12 (Supp. 1975).

Not all states adopting the unconscionability provision enacted the settlement section; some states adopted provisions essentially like U.C.C. § 2-302. Florida, Nebraska, and Ohio omit URLTA § 1.303(a)(2).

124. *See generally* Blumberg & Robbins, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L. L. REV. 1 (1976); Note, *Landlord-Tenant Reform: Arizona's Version of the Uniform Act*, 16 ARIZ. L. REV. 79 (1974); Comment, *The Kentucky Uniform Residential Landlord and Tenant Act: Tenants' New Lease on Life?*, 14 J. FAM. L. 597 (1975-76); Note, *The Uniform Residential Landlord and Tenant Act: Facilitation of Or Impediment to Reform Favorable to the Tenant?*, 15 WM. & MARY L. REV. 845 (1974). *See also Report of Subcomm. on the Model Landlord-Tenant Act of Comm. on Leases, Proposed Uniform Residential Landlord and Tenant Act*, 8 REAL PROP. PROB. & TR. J. 104 (1973).

agreements to pay attorney's fees, and exculpation and indemnification clauses.[125] If the landlord, aware of the prohibition, continues to include the clauses in the lease, the tenant may recover up to three months' rent and reasonable attorney's fees.[126] URLTA also proscribes landlords from taking a lien or security interest in a tenant's household goods, abolishes distraint for rent,[127] and stipulates and regulates landlord obligations,[128] including the obligation to maintain the premises.[129] In addition, the Act limits the amount and use of security deposits,[130] requires that the landlord's rules and regulations be reasonable,[131] and prohibits retaliatory action.[132] Finally, URLTA breaks with common law by making the landlord's full recovery for early abandonment contingent upon a bona fide attempt to relet the premises on the tenant's behalf.[133]

This broad, direct regulation of the landlord-tenant relationship should narrow the role of unconscionability within the Act, but the scope of its use is unsure because only one reported case to date construes section 1-303. In *Zemp v. Rowland*[134] the tenant's form lease required payment of a nonrefundable fee equal to one month's rent in exchange for the right to terminate, without additional liability, on thirty-days notice.[135] The lease terms, however, also granted tenants the last month rent-free if the tenants remained the full term.[136] Although the landlord quickly secured another tenant after the original

125. URLTA, *supra* note 9, at § 1.403.

126. *Id.*

127. *Id.* at § 4.205.

128. *Id.* at §§ 2.101-.105.

129. *See id.*. at § 2.104. If the landlord fails to supply essential services, the tenant has recourse through special remedies provided in the Act. *Id.* at § 4.104.

130. *Id.* at § 2.101. This section stipulates that the amount of the deposit may not exceed one month's rent. It allows the landlord to set off any damages from that amount, but requires the landlord to give an itemized list of damages to the tenant. Kentucky enacted a much stricter version of this section. *Id.* at § 2.101, Commentary. Kentucky requires, among other things, that security deposits be kept in a separate bank account of which tenant knows the location and number, that the landlord list existing damage and prepare the list for signature by the tenant, that the landlord may not retain any portion of the deposit if he fails to keep a separate account, and that only the portion of the deposit that compensates for damages or early abandonment be retained in any event.

131. *Id.* at § 3.102.

132. *Id.* at § 5.101.

133. *Id.* at § 4.203.

134. 31 Or. App. 1105, 572 P.2d 637 (1977).

135. *Id.* at 1107, 572 P.2d at 638.

136. *Id.* at 1108 n.1, 572 P.2d at 638 n.1.

tenants' early termination, he refused to refund the fee.[137] The Oregon appellate court reversed the trial court's finding of unconscionability[138] on the ground that the fee neither violated any specific provision of the Act nor constituted either liquidated damages or a security deposit; rather, the fee was consideration for the right to terminate early. In the court's opinion, the clause presented a reasonable allocation of risk and resulted from free bargaining between the parties.[139]

IV. THE UNCONSCIONABILITY TEST IN THE CONTEXT OF RESIDENTIAL LEASES

Perhaps the most influential factor affecting the application of unconscionability is the test used to judge the enforceability of leases. Without a clear standard, lawyers and judges uncertain of its meaning may be hesitant to apply the doctrine or may apply it in inconsistent ways. The particular test used also will determine by its strictness the ease with which tenants may successfully assert the defense. Unconscionability has proved to be a tool of limited usefulness to consumers in contract law,[140] probably because of the contract-law test for unconscionability. This section examines the contract-law test for unconscio-

137. The tenants gave proper notice and quit the premises early. Five days later the landlord rerented to other tenants. The landlord returned a pro rata amount of that month's rent to the tenants, retaining an amount to compensate for the days unrented. In a strict sense, then, the landlord suffered no damage from the early termination. *Id.* at 1107, 572 P.2d at 639.

138. *Id.* at 1110, 572 P.2d at 640.

139. *Id.* at 1109-10, 572 P.2d at 639-40. The tenants contended that they were told the amount was prepayment of the last month's rent. As evidence of their contention, the tenants pointed out that the space provided for the nonrefundable fee was left blank and that the only mention of the fee appeared under the title "Monthly Lease Payments." *Id.* at 1110 n.3, 572 P.2d at 639 n.3. The appellate court, however, accepted the trial court's determination that the parties contemplated the fee as a part of their bargain.

The dissent argued that the lease was misleading and unconscionable as a matter of law. It was a poorly reproduced form contract on two legal-sized pages of single-spaced type. *Id.* at 1111, 572 P.2d at 640. The dissenting judge also did not accept the trial court's determination that the tenants understood the provision. Further, he maintained that the lease tended to conceal the provision and mislead the tenants because the space provided for the nonrefundable fee was blank but an amount was stipulated for monthly payments. *Id.* at 1112-13, 572 P.2d at 641. He concluded: "The pages of history record the upheavals that stem from oppressive landlord tactics. The effort of the legislature to eliminate 'unconscionability' in leases between residential tenants and landlords is subverted by the majority opinion." *Id.* at 1113-14, 572 P.2d at 641.

140. *See* note 170 *infra*.

For a general discussion of unconscionability under U.C.C. § 2-302, see J. WHITE & R. SUMMERS, *supra* note 72, at 112; Ellinghaus, *supra* note 72; *The Emperor's New Clause, supra* note 72; *The Common Law Tradition, supra* note 72; Murray, *supra* note 72; Speidel, *supra* note 72.

nability, its application in landlord-tenant law, and the probable effect of the test on the doctrine's application to residential leases.

A. *The Test and its Source: UCC Section 2-302*

In seeking guidance for the application of unconscionability to residential leases, courts and legislatures looked to the contract-law test developed under UCC section 2-302, the doctrine's first major codification.[141] The test as stated in UCC section 2-302 and appropriate comments, however, does not set a standard for courts to follow;[142] nor does the section define the concept,[143] except that "the principle is one of the prevention of oppression and unfair surprise."[144]

Over time a body of contract case law emerged to fill the definitional void left by the UCC. The leading opinion,[145] *Williams v. Walker-*

141. Because both equitable and statutory unconscionability principles originated in contract law and the modern approach views leases as contracts, it is understandable that courts turned to contract law as the source for the doctrine's test. Furthermore, the commentary to the Restatement unconscionability provision provides: "The Uniform Commercial Code gives statutory authority to policing action by courts of unconscionable agreements (see § 2-302) in sales contracts . . . . The rule of this section extends the concept to leases." RESTATEMENT (SECOND) OF PROPERTY § 5.6, Reporter's Note. The commentary then cites the New York cases that have applied unconscionability to leases. *Id.* Moreover, the Commissioner's Comment to URLTA § 1.303 states that the section is "adapted from the Uniform Commercial Code" and states a test that closely follows the UCC commentary test of "so one-sided as to be unconscionable under the circumstances existing at the time of the making of the agreement or settlement." URLTA, *supra* note 9, at § 1.303, Commissioners' Comment. The only reported case to examine the doctrine found § 1.303's test to be "substantially the same test as provided in the comments to the unconscionability section of the Uniform Commercial Code . . . . The comments to § 2-302 . . . state that the main thrust of the unconscionability section is to prevent oppression and unfair surprise." Zemp v. Rowland, 31 Or. App. 1105, 1109, 572 P.2d 637, 639 (1977).

142. The code section itself merely states the potential consequences of a finding of unconscionability and mandates a hearing on the issue. *See* note 72 *supra*. The commentary to § 2-302 defines the time of contract formation as the relevant reference point for determination and focuses on the specific parties in their particular circumstances. The test is stated as "whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." U.C.C. § 2-302, Comment 1 (1962 version).

143. Kirby, *supra* note 13, at 220; *see The Emperor's New Clause, supra* note 72, at 487 ("If reading this section makes anything clear it is that this section alone makes nothing clear about the meaning of 'unconscionable' except perhaps that it is perjorative."); *id.* at 499 ("By 1952 unconscionability was defined in terms of itself."); Berger, *supra* note 25 at 812 ("In short, 2-302 is not one of the drafting successes of the Uniform Commercial Code. Whatever 'unconscionability' means must be found outside Section 2-302."). *But see* Ellinghaus, *supra* note 72, at 814-15.

144. U.C.C. § 2-302, Comment 1 (1962 version).

145. For cases citing the *Williams* test, see Fleishmann Distilling Corp. v. Distillers Co., 395 F. Supp. 221 (S.D.N.Y. 1975); West Point-Pepperell, Inc. v. Bradshaw, 377 F. Supp. 154 (M.D. Ala.

Thomas Furniture Co.,[146] developed a two-prong test that required plaintiffs to demonstrate "an absence of meaningful choice" and contract terms unreasonably favorable to the stronger of the parties to the contract.[147] Other courts, applying essentially the same test, required the party asserting unconscionability to demonstrate both procedural and substantive unconscionability.[148] Procedural unconscionability depends on the knowledge and experience of the particular parties, their relative bargaining power, their relative control over terms and conditions of the contract, the extent of actual bargaining, and the availability of similar goods from other sources. Substantive unconscionability turns on the reasonableness of the specific contract terms in the individ-

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1974); Rodriguez v. Nachamie, 57 A.D.2d 920, 395 N.Y.S.2d 51 (1977); Brooklyn Union Gas Co. v. Jimeniz, 82 Misc. 2d 948, 371 N.Y.S.2d 289 (Civ. Ct. 1975); Albert Merrill School v. Godoy, 78 Misc. 2d 647, 357 N.Y.S.2d 378 (Civ. Ct. 1974); Lamoille Grain Co. v. St. Johnsbury, 369 A.2d 1389 (Vt. 1976).

146. 350 F.2d 445 (D.C. Cir. 1965).

147. Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of an agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

Id. at 449-50.

148. Procedural unconscionability refers to the first prong of the *Walker-Thomas* test—"absence of meaningful choice"—and substantive unconscionability refers to the second prong—"contract terms unreasonably favorable to the stronger party." J. WHITE & R. SUMMERS, *supra* note 72, at 117. *See, e.g.*, Johnson v. Mobil Oil Corp., 415 F. Supp. 264 (E.D. Mich. 1976); Interstate Security Police v. Citizens & S. Emory Bank, 237 Ga. 37, 226 S.E.2d 583 (1976); Heller & Co. v. Convalescent Home, 49 Ill. App. 3d 213, 365 N.E.2d 1285 (1977); Bunge Corp. v. Williams, 45 Ill. App. 3d 359, 359 N.E.2d 844 (1977); Wade v. Austin, 524 S.W.2d 79 (Tex. 1975); Younger, *A Judge's View of Unconscionability*, 5 U.C.C.L.J. 348 (1973). This distinction first appeared in *The Emperor's New Clause, supra* note 72, at 487. "[S]ome of these defenses have to do with the *process of contracting* and others have to do with the resulting *contract*." *Id.* (emphasis in original) *See* Johnson v. Mobil Oil Corp., 415 F. Supp. 264, 268 (E.D. Mich. 1976); Wade v. Austin, 524 S.W.2d 79, 86 (Tex. 1975); note 147 *supra*.

ual contract setting.[149]

B. *Application of the Unconscionability Test to Residential Leases*

Most courts that have applied unconscionability to residential leases did not explicitly detail the relevant test factors, but merely stated that they were applying "the test" as developed in contract law and under the UCC.[150] In a number of the landlord-tenant cases, however, the courts demonstrated an awareness of the contract-law test by expressing a concern with both the procedural and substantive elements present in their particular fact situations. The court in *Weaver v. American Oil Co.*,[151] for example, acknowledged the basic unfairness of exculpation clauses, particularly when added to the already burdensome obligations imposed upon the lessee.[152] The *Weaver* court also noted as specific procedural problems the lessee's lack of education, his failure to read and understand the lease terms, the basic inequality of bargaining power existing between the parties, and the unbargained nature of the form lease.[153]

That other courts, in finding no evidence of unconscionability, emphasized the absence of both procedural and substantive factors provides further evidence of the pervasiveness of the two-pronged test.[154]

149. *See* Johnson v. Mobil Oil Corp., 415 F. Supp. 264 (E.D. Mich. 1976); Wade v. Austin, 524 S.W.2d 79 (Tex. 1975).

150. *See* note 141 *supra*; *see, e.g.,* Zemp v. Rowland, 31 Or. App. 1105, 1109, 572 P.2d 637, 639 (1977).

151. 257 Ind. 458, 276 N.E.2d 144 (1971); *see* note 77 *supra* and accompanying text.

152. 257 Ind. at 462, 276 N.E.2d at 146-47.

153. *Id. See also* Harwood v. Lincoln Square Apartments Section 5, Inc., 78 Misc. 2d 1097, 359 N.Y.S.2d 387 (Civ. Ct. 1974); Steinberg v. Carreras, 74 Misc. 2d 32, 344 N.Y.S.2d 136 (Civ. Ct. 1973), *rev'd on other grounds,* 357 N.Y.S.2d 369 (Sup. Ct. 1974). The courts referred to both the unfairness of disclaiming liability and the lack of meaningful choice. *See* note 80 *supra*.

154. In Zemp v. Rowland, 31 Or. App. 1105, 572 P.2d 637 (1977), the court, in rejecting unconscionability, noted that the lease arrangement represented a reasonable allocation of risks and was the result of free and open bargaining. *Id.* at 1109-10, 572 P.2d at 639-40. In upholding a waiver of 30-days notice for failure to comply with the lease provisions, the court in Jones v. Sheetz, 242 A.2d 208 (D.C. 1968), held the waiver fair because its use was conditioned upon the tenant's failure to comply. Further, evidence of the tenant's occupancy of the leased property for several years and his completion of law school supported a finding of no procedural unconscionability.

This consistent adherence to the two-pronged test may explain the failure of several courts to find certain clauses unconscionable as a matter of law. When faced with a list of clauses typical of Pennsylvania form leases, for example, the court in Commonwealth v. Monumental Properties, Inc., 329 A.2d 812 (Pa. 1974), refused to hold them unconscionable as a matter of law because each individual provision had been previously enforced under existing law. This decision recog-

Similarly, section 5.6 of the *Restatement (Second) of Property*,[155] acknowledges both the procedural and substantive requirements, combining elements of both in its guideline provisions.[156]

Acknowledging a uniform test, however, is only the first step, for the relative weight accorded to each of the possible facts necessary to the fulfillment of both prongs of the test has a substantial impact on achieving an effective and generally applicable test for unconscionability.

C. *Effect of the Unconscionability Test on Residential Leasing Law*

Contract law recognizes as important components of procedural unconscionability the relative bargaining power and sophistication of the parties, the actual opportunity for bargaining, the alternatives open to the parties, and the parties' opportunity to understand the contractual terms.[157] These same factors have led courts to designate the modern form lease as an adhesion contract.[158] By definition, therefore, the modern lessee is often faced with an absence of meaningful choice.

Many courts appear to have at least implicitly recognized this. In upholding a finding of unconscionability, courts generally emphasize the lack of adequate housing and the adhesive nature of form leases as the most important, if not sole, evidence of procedural unfairness.[159] Without reference to the particular characteristics of the parties to the transaction, these courts follow a pattern of alleging unconscionability in general terms based upon the absence of meaningful choice. The following market description offered by one court, and shared by

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nizes the importance of the procedural aspect; substantive clauses that are unconscionable in some procedural fact situations will not necessarily constitute overreaching in other fact situations.

155. *See* notes 88-94 *supra* and accompanying text.

156. One of the few reported cases to cite § 5.6 is Spallone v. Siegel, 239 Pa. Super. 586, 599, 362 A.2d 263, 271 (1976) (Spaeth, J., in support of per curiam reversal). Judge Spaeth explained that although exculpation clauses are presumed invalid, the landlord can overcome the presumption by demonstrating that the lease resulted from deliberate bargaining. The relative economic powers of the parties, the bargaining history, the extent to which each party was represented by counsel, and the nature of the lease document are some of the factors relevant to determining the absence of adhesion and the presence of bargaining in fact. Thus, the two-pronged test of *Williams* is used to apply the provisions of § 5.6 of the *Restatement*.

157. *See* notes 147, 149 *supra* and accompanying text.

158. *See* notes 21-28 *supra* and accompanying text.

159. *See, e.g.*, McClelland-Metz Management, Inc. v. Faulk, 86 Misc. 2d 778, 384 N.Y.S.2d 919 (Nassau County Ct. 1976); Harwood v. Lincoln Square Apartments Section 5, Inc., 78 Misc. 2d 1097, 359 N.Y.S.2d 387 (Civ. Ct. 1974); Steinberg v. Carreras, 74 Misc. 2d 32, 344 N.Y.S.2d 136 (Civ. Ct. 1973), *rev'd on other grounds*, 77 Misc. 2d 774, 357 N.Y.S.2d 369 (Sup. Ct. 1974).

many, is illustrative of this presumption, which might in fact be termed a "conclusive presumption":

> Unfortunately the limited residential real estate market in New York City, especially Manhattan, allows no such freedom of choice. There is in fact a gross inequality of bargaining power which gives rise to standardized lease forms with some terms unreasonably favorable to the landlord. . . . The residential real estate market leaves no meaningful choice for a tenant and does not provide him with opportunities to bargain for reasonable terms and to avoid adhesive clauses. . . . Where clauses in form leases of this type are unreasonably weighted in favor of the landlord, they may be subject to the defense of unconscionability and denied enforcement.[160]

The courts' tendency to presume the absence of meaningful choice in the residential lease setting is considerably more significant than it first appears. An examination of alternatives to this presumption illustrates that the approach used in finding procedural unconscionability directly

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160. Harwood v. Lincoln Square Apartments Section 5, Inc., 78 Misc. 2d 1097, 1099, 359 N.Y.S.2d 387, 390 (Civ. Ct. 1974). Another court's emotional statement lends additional evidence to this tendency to find that the market setting makes the lease per se procedurally unconscionable.

> Given the overwhelming need for housing, the respondents must do exactly as the petitioner demands, or shelter will be denied. Had petitioner demanded that the respondents fall to their knees and grovel before him, the respondents perforce would have swallowed their pride and done so, or be condemned to remain outside, never to come in from the cold. Here the petitioner demanded that the respondents grovel not physically, but legally. The petitioner's unbargainable price is that the respondents agree to clause after clause of terms to the excessive benefit of the petitioner.

Weidman v. Tomaselli, 81 Misc. 2d 328, 332, 365 N.Y.S.2d 681, 687 (Rockland County Ct.), *aff'd*, 84 Misc. 2d 782, 386 N.Y.S.2d 276 (Sup. Ct. 1975). The court in Galligan v. Arovitch, 421 Pa. 301, 304, 209 A.2d 463, 465 (1966), in ruling on an exculpation clause, similarly noted that every lease contained such clauses. Thus, the court noted it would have been fruitless for the tenant to seek a lease without one. The court saw this lack of bargaining power as indicative of an adhesion contract.

But see Mury v. Tublitz, 151 N.J. Super. 39, 376 A.2d 547 (App. Div. 1977). The *Mury* court refused to find that the residential housing situation alone warrants a finding of procedural unconscionability.

> The primary issue before us arises from the trial judge's expressed concept that public policy proscribes the enforcement of provisions in a "typical" landlord-tenant contract or lease because it would be unreasonable to do so. We disagree with that concept. Apparently it stems from the judge's private view. No authority is mentioned. Although where suitable housing quarters are at a premium a court may hold that exculpatory lease provisions are invalid, because of the unequal bargaining positions of the parties . . . this is not to say that every lease provision favorable to the landlord is against public policy.
>
> There is nothing in the record . . . which warrants a factual finding that the parties were in unequal bargaining positions when the lease was executed.

Id. at 43-44, 376 A.2d at 549.

affects the scope of application of the unconscionability doctrine and resultant findings.

Instead of conclusively presuming the absence of meaningful choice in the residential lease setting, the courts can evaluate the effect of the general market setting on unconscionability in any one of three ways.[161] The first alternative focuses not on the tenant's ability to obtain alternate terms, but on the tenant's fair opportunity to know and understand the terms;[162] this "unfair surprise" test thus leaves the parties free to contract. A second approach, a derivative of the unconscionability test as it developed under contract law, requires a case-by-case analysis balancing all relevant procedural facts.[163] This approach may result in the identical substantive clause being enforced in one case, limited in another, or voided in a third case, all by the same court,[164] depending on the differing procedural contexts of the cases. The third alternative raises a rebuttable presumption that the present market situation precludes bargaining and meaningful choice.[165] These alternatives differ from each other only in the relative weight each accords to the market setting.

A positive correlation exists between the weight a court accords to

161. Yet another approach builds on the idea that a "class of tenants" should be protected. *See, e.g.,* Graziano v. Tortora Agency, Inc., 78 Misc. 2d 1094, 1096, 359 N.Y.S.2d 489, 491 (Civ. Ct. 1974); Seabrook v. Commuter Hous., 72 Misc. 2d 6, 10, 338 N.Y.S.2d 67, 71 (Civ. Ct. 1972). The ignorant and the indigent would fall into this class. If, however, educated and nonindigent tenants are unable to obtain different terms, there is little reason to draw a class that excludes them.

162. This alternative is analogous to the "affirmative duty" approach. *See* notes 69-71 *supra* and accompanying text.

163. The commentary to ULRTA § 1.303 emphasizes the varying impact that the particular facts may have on the procedural setting:

> The basic test is whether, in light of the background and setting of the market, the conditions of the particular parties to the rental agreement, settlement or waiver of right or claim are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the agreement or settlement. Thus, the particular facts involved in each case are of utmost importance since unconscionability may exist in some situations but not in others.

URLTA, *supra* note 9, at § 1.303, Commissioners' Comment 517 (1978).

164. *See* Mury v. Tublitz, 151 N.J. Super. 39, 43-44, 376 A.2d 547, 549 (App. Div. 1977); note 159 *supra*. Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971), also exemplifies this approach. *See* notes 77-79 *supra* and accompanying text.

165. A similar approach may have been endorsed in Spallone v. Siegel, 239 Pa. Super. 586, 599, 362 A.2d 263, 271 (1976) (Spaeth, J., in support of per curiam reversal). Although the Spaeth opinion based its presumption of invalidity on the presence of a particular substantive clause, it found that the clause could be enforced only upon a showing *by the landlord* that the contract was the result of deliberate bargaining.

the generally recognized adhesive market setting and the degree of difficulty a tenant encounters in demonstrating unconscionability. The test focusing on unfair surprise works specifically to the landlord's advantage, for demonstrating affirmative apprisal of a term is sufficient to bar a tenant's claim. Furthermore, landlords may quickly and easily devise a new, more explicit lease form to frustrate any possibility of a showing of unconscionability. The case-by-case approach, although allowing the tenant to show that bargaining—even with full knowledge—may be essentially futile, places an excessively heavy burden on the tenant. The tenant may have difficulty demonstrating facts such as the unavailability of alternative housing—a showing essential to a finding of unconscionability. In that situation the court may look to factors defeated by a market without alternatives, such as the wealth, experience, or intelligence of the tenant. Moreover, the lack of a definite standard may lead to differing rulings by courts on similar substantive provisions, creating a situation in which the tenant is unable to rely on prior cases to determine his legal position and frame his arguments.

Application of the conclusive and rebuttable presumptions significantly lessen the tenant's burden of proof. To show an absence of meaningful choice, the tenant need only demonstrate a shortage of adequate housing in the area and the use of a form lease. The procedural requirement then ceases to be a barrier; the tenant need only convince the court of the substantive unreasonableness of particular terms or conditions.

What weight, if any, is accorded the general market setting, also affects the consistency of the case law, which, in turn, influences the willingness of both lawyers and judges to use the doctrine of unconscionability. The conclusive and rebuttable presumption approaches lead to greater consistency because the major focus shifts from the multi-faceted procedural aspects of the unconscionability test to the relatively unchanging substantive provisions. The unfair surprise test also encourages consistency, but does so only by allowing market forces to control the substantive provisions. The case-by-case approach obviously results in inconsistency and makes predictability difficult.

Finally, the four different approaches represent different conceptions of both the doctrine of unconscionability and the market setting. The unfair surprise test of procedural unconscionability either assumes an idyllic but unrealistic concept of the free market or chooses to ignore

the effect of market imperfections. If the purpose of applying the unconscionability doctrine to residential leases is to restore a balance between lessors and lessees, this test must be abandoned.

Both the case-by-case and the rebuttable presumption tests assume that the market generally works, but that it breaks down in certain areas. The only difference between the two approaches is their designation of which party bears the burden of showing unconscionability. These tests remain true to the contract-law rule that both substantive and procedural unconscionability must be shown before the court will use its power to balance the lease terms.

A conclusive presumption of the absence of meaningful choice in the residential lease setting makes unwarranted assumptions about the marketplace. It precludes the possibility of enforcing certain clauses by assuming that tenants are not free to negotiate. By placing all tenants in a protective category, the courts covertly decide that certain substantive terms are unenforceable in all residential leases. This role would be more appropriately and effectively left to the legislature.

The rebuttable presumption approach to procedural unconscionability provides the best method for controlling the present inequities in the residential rental market. It eases the burden placed on the tenant by making a demonstration of unconscionability a true possibility. It also leads to a more consistent body of case law, which allows courts and lawyers to apply the doctrine with confidence in its predictability. Finally, the rebuttable presumption achieves these goals without significantly changing the doctrine's test or assuming that the tenant cannot protect himself under any circumstances.

V. CONCLUSION: THE POTENTIAL ROLE OF UNCONSCIONABILITY

The modern tenant may be characterized as a consumer contracting for a life necessity within a market structure that often does not present a meaningful choice. The unconscionability doctrine provides a significant aid in assuring a fair balance of rights and obligations between tenant and landlord in residential leases. Several factors, however, limit its effective and widespread application. Because most applications of the doctrine use a case-by-case approach, problems of consistency limit the doctrine's utility.[166] Other limitations result from the prevalent pat-

166. *See* note 165 *supra* and accompanying text. Use of the doctrine fails to put tenants on notice of their rights by virtue of the litigation of other tenants; similarly, this use encourages

tern of remedying unconscionability. Once unconscionability has been shown, courts may refuse to enforce not only the objectionable clause, but the entire agreement as well.[167] The prevalent response however, has been to refuse enforcement of only the offensive clause;[168] thus, the landlord loses nothing by the inclusion of an objectionable clause.[169] Consequently, this use of the doctrine affords little preventative aid for an unwary tenant and limits relief to an after-the-fact lawsuit applicable only to the parties before the court.

A rebuttable presumption of unconscionability, coupled with a willingness by the courts to extend enforcement beyond the objectionable clause when the facts indicate knowing abuse, would go far in solving the problems. In addition, use of the rebuttable presumption would increase the availability and effectiveness of the unconscionability doctrine and save it from fading into disuse as it has under contract law concerning consumer protection in sales.[170]

Unconscionability should not be used, however, to supplant legisla-

landlords to retain the same lease even after provisions have been held unconscionable, for it becomes easy to distinguish prior cases construing the same clause.

167. *See* notes 72, 88, 95, 120 *supra*.

168. *See, e.g.*, Bernard v. Kuha, 90 Misc. 2d 148, 394 N.Y.S.2d 782 (Rockland County Ct. 1977) (stipulation of legal fees of $110 unconscionable; clause unenforceable); McClelland-Metz Management, Inc. v. Faulk, 86 Misc. 2d 778, 384 N.Y.S.2d 919 (Nassau County Ct. 1976) (provision requiring payment of attorneys' fees upon commencement of action unconscionable; clause unenforceable); Avenue Assocs., Inc. v. Buxbaum, 83 Misc. 2d 134, 371 N.Y.S.2d 736 (Civ. Ct.) (waiver of right to jury trial unconscionable; clause unenforceable), *rev'd*, 83 Misc. 2d 719 (Sup. Ct. 1975); Groner v. Lakeview Management Corp., 83 Misc. 2d 932, 373 N.Y.S.2d 807 (Sup. Ct. 1975) (clause stipulating interruption or curtailment of services does not constitute constructive eviction so as to allow set-off unconscionable and unenforceable; only six cents awarded because tenant failed to prove damages); Harwood v. Lincoln Square Apartments Section 5, Inc., 78 Misc. 2d 1097, 359 N.Y.S.2d 387 (Civ. Ct. 1974) (disclaimer of liability for failure to provide air conditioning unconscionable and unenforceable; tenants allowed to recover cost of renting air conditioning); Steinberg v. Carreras, 74 Misc. 2d 32, 344 N.Y.S.2d 136 (Civ. Ct. 1974) (clause providing interruption or curtailment of heat not constructive eviction so as to allow set-off unconscionable and unenforceable; court to determine value of services and amount value of apartment reduced as set-off).

169. If the tenant takes the issue to court and proves the claim—both of which are unlikely—the court will merely refuse to enforce that provision; thus, landlords are usually not much worse-off than if, knowing of the possibility of nonenforceability, they omitted the clause altogether.

170. An examination of cases applying UCC § 2-302 from 1972 to the present discloses that courts rarely uphold the claim of unconscionability in consumer contracts for goods or services. Cases applying § 2-302 to consumers have been limited for the most part to New York. *See* Bogatz v. Case Catering Corp., 86 Misc. 2d 1052, 383 N.Y.S.2d 535 (Civ. Ct. 1976); Vom Lehm v. Astor Art Galleries, Ltd., 86 Misc. 2d 1, 380 N.Y.S.2d 532 (Sup. Ct. 1976); Brooklyn Union Gas Co. v. Jimeniz, 82 Misc. 2d 948, 371 N.Y.S. 2d 289 (Civ. Ct. 1975); Albert-Merrill School v. Godoy, 78 Misc. 2d 647, 357 N.Y.S. 2d 378 (Civ. Ct. 1974); Nu Dimensions Figure Salons v.

tive action. Even if the above suggestions were followed, the doctrine alone could not effectively or quickly reshape the rights and obligations between landlord and tenant. Many state legislatures have already taken direct action to prohibit some of the most onerous prolandlord lease provisions.[171] A growing minority have taken even more decisive and direct approaches through comprehensive landlord-tenant legislation.[172] This approach, exemplified by URLTA, is not essential, but is the most effective. Not only does URLTA, or URLTA-type legislation, set clear standards of behavior and put all parties on notice of what is acceptable,[173] but it also deters inclusion of prohibited terms.[174]

The problems of unconscionability, however, do not totally emasculate its potential as a valuable aid to residential tenants both within and without URLTA. First of all, if courts conclusively or rebuttably presume procedural unconscionability, tenants will have strong arguments to void clauses presently enforced in jurisdictions not covered by URLTA or similar statutes. Second, the unconscionability doctrine serves as a stopgap means of dealing with new or newly recognized substantive abuses pending legislative action. Third, courts can use unconscionability to deny enforcement of those borderline terms which, although acceptable in some contexts, constitute oppression in certain procedural settings. The two approaches, regulation and unconscionability, together can provide a more equitable balance between the modern landlord and tenant.

Audrey Goldstein Fleissig

Becerra, 73 Misc. 2d 140, 340 N.Y.S.2d 268 (Civ. Ct. 1973); Nosse v. Vulcan Basement Waterproofing, Inc., 35 Ohio Misc. 1, 299 N.E.2d 708 (Euclid Mun. Ct. 1973).

171. *See* notes 56-59 *supra* and accompanying text.

172. *See* notes 119-24 *supra* and accompanying text.

173. *See* notes 124-33 *supra* and accompanying text.

174. *See* note 126 *supra* and accompanying text.