CONSUMER PROTECTION—STATE ATTORNEY GENERAL'S CLASS ACTION: EXORBITANT PRICE TO UNCONSCIONABILITY TO FRAUD—*Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (1971).

> No longer do we believe that fraud may be perpetrated by the cry of "caveat emptor". We have reached the point where "Let the buyer beware" is a poor business philosophy for a social order allegedly based upon man's respect for his fellow man. Let the seller beware, too! A free enterprise system not founded upon personal morality will utimately lose freedom.[1]

This action was brought by the State Attorney General in the Chancery Division of Superior Court pursuant to New Jersey's "Consumer Fraud Act."[2] This Act authorizes proceedings by the Attorney General to enjoin the use of certain deceptive practices in conjunction with the advertisement, sale, or rental of goods or services.[3] It also provides for administrative hearings to uncover fraud and for the imposition of civil penalties upon violators.[4] Specific authorization for injunctive proceedings is derived from N.J. STAT. ANN. § 56:8-8 (1964), which states in pertinent part:

> Whenever it shall appear to the Attorney General that a person has engaged in, is engaging in or is about to engage in any practice declared to be unlawful by this act he may seek and obtain in an action in the Superior Court an injunction prohibiting such

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1 State v. ITM, Inc., 52 Misc. 2d 39, 54, 275 N.Y.S.2d 303, 321 (Sup. Ct. 1966).

2 N.J. STAT. ANN. §§ 56:8-1 *et seq.* (1964).

3 N.J. STAT. ANN. § 56:8-2 (Supp. 1971-72) provides in part:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale . . . of any merchandise or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice . . . .

This section has subsequently been amended. *See* note 14 *infra*.

4 N.J. STAT. ANN. § 56:8-4 (1964) provides in part:

> To accomplish the objectives and to carry out the duties prescribed by this act, the Attorney General . . . may . . . conduct hearings in aid of any investigation or inquiry . . . .

N.J. STAT. ANN. § 56:8-3.1 (Supp. 1971-72) provides in part:

> [T]he Attorney General . . . is empowered to . . . assess a penalty against the person alleged to have committed such violation . . . .

N.J. STAT. ANN. § 56:8-13 (Supp. 1971-72) provides:

> Any person who violates any of the provisions of the act to which this act is a supplement shall, in addition to any other penalty provided by law, be liable to a penalty of not less than $50.00 or more than $100.00 for the first offense and not less than $100.00 or more than $250.00 for the second and each subsequent offense.

person from continuing such practices or engaging therein or doing any acts in furtherance thereof . . . .[5]

The defendant, an attorney doing business as a New York company, was engaged in the door-to-door solicitation of orders for a set of "educational" books.[6] Defendant's sales personnel concentrated their efforts on minority-group consumers residing in Newark, Paterson, Elizabeth and Rahway and consumers of limited income and education. The general mode of solicitation was replete with misrepresentations and deceptions concerning the sponsorship of the sales program, the value of the books, and the terms of the contract of sale. Defendant's salesmen represented that the books were connected with a "special federal grant," that they were being sold for project "Head Start," for the Newark Board of Education, or for some named, but nonexistent, school. They represented that the total contract price was $49.50, that the contract was cancelable at will, and that the purchase of the books would lead to a high school equivalency certificate.[7] The actual price charged for the complete package was $279.95, while the fair retail price was between $108 and $110. The wholesale cost to the defendant was between $35 and $40. There was uncontradicted expert testimony that the books were "very poor," of "extremely little use," "obsolete," of "no relevance" and "useless."[8]

These sales practices were alleged to be violative of Section 2 of the Consumer Fraud Act.[9] The Attorney General sought relief not only on behalf of the 24 consumers named in the complaint and on whose behalf the suit was brought, but also on behalf of *those consumers similarly situated,* that is, all those who had entered into contracts with the defendant.[10]

The trial court found that the proofs fully supported the allegations

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5 N.J. STAT. ANN. § 56:8-8 (1964).

6 1. Questions Children Ask (1 Vol.)
2. Child Horizons (4 Vols.)
3. New Achievement Library (5 Vols.)
4. High School Subjects Self-Taught (4 Vols.)
5. Science Library (1 Vol.)
6. Play-Way French and Spanish Records (2 45 r.p.m. Records)
7. Tell Time Flash Card Set.
Additionally a "bonus" volume—a Negro History, a World Atlas or a Bible—was offered either along with the original package or after completion of payment. Kugler v. Romain, 58 N.J. 522, 528, 279 A.2d 640, 643 (1971).

7 *Id.* at 527-28, 531-32, 279 A.2d at 643, 645-46.

8 *Id.* at 528-30, 279 A.2d at 644-45.

9 *Id.* at 525, 279 A.2d at 641-42. Section 2 of the Act is N.J. STAT. ANN. § 56:8-2 (Supp. 1971-72). *See* note 3 *supra.*

10 58 N.J. at 526, 279 A.2d at 642.

that fraudulent and deceptive practices had been perpetrated upon the 24 customers who testified at the trial, and it granted relief to some of those persons.[11] No relief was granted to those customers similarly situated who had not participated in the action. The court held that although the sales price appeared to be excessive, this fact *per se* did not constitute fraud within the meaning of the Consumer Fraud Act;[12] nor could the Attorney General assert the unconscionability of the contract or a clause thereof under the Uniform Commercial Code, since this statute contemplates only private relief.[13] Because of this interpretation of the statute, it was not necessary for the court to consider whether the price charged was unconscionable.[14]

In modifying the judgment and order of the trial court, the New Jersey Supreme Court held that the Attorney General was entitled to a judgment that the defendant's sales contracts were invalid with respect to the entire class of persons who had entered into them.[15] The court found that unconscionability of contract was implicitly included within the fraudulent practices proscribed by the Consumer Fraud Act, and therefore it was not necessary to reach the question of the Attorney General's authority to invoke the unconscionability section of the UCC.[16] The court further held that the legislative purposes of the Act could most effectively be accomplished by recognizing the authority of the Attorney General to obtain relief on behalf of all consumers adversely affected by the fraudulent practices.[17] Finally, it was decided that the price of the books was unconscionable in relation to their value and cost to the defendant.[18]

The primary emphasis throughout the *Kugler* opinion is upon

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11 Kugler v. Romain, 110 N.J. Super. 470, 478, 266 A.2d 144, 148 (Ch. 1970). Some of the 24 customers had settled the suits brought against them by the defendant to recover the balance due under their contracts. As to these persons no restoration orders were made. The trial judge felt that "fully performed voluntary settlement agreements . . . should not be disturbed." *Id.* at 483, 266 A.2d at 151. This portion of the judgment was not appealed. 58 N.J. at 534 n.2, 279 A.2d at 646.

12 110 N.J. Super. at 480, 266 A.2d at 149.

13 *Id.* at 481, 266 A.2d at 150. The unconscionability section of the UCC is N.J. STAT. ANN. § 12A:2-302 (1962).

14 However, on June 29, 1971, one day after the supreme court rendered its decision, N.J. STAT. ANN. § 56:8-2 was amended by the insertion of the words "unconscionable commercial practice" before the "deception, fraud, false pretense," which had hitherto been proscribed. Law of June 29, 1971, ch. 247, § 1, [1971] N.J. Laws 1175. *See also* N.Y. EXEC. LAW § 63 (12) (McKinney Supp. 1971) which specifically mentions unconscionable practices. *Cf.* State v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966).

15 58 N.J. at 547, 279 A.2d at 654.

16 *Id.* at 545, 279 A.2d at 652.

17 *Id.* at 538-39, 279 A.2d at 649.

18 *Id.* at 547, 279 A.2d at 654.

the relative helplessness of the economically disadvantaged consumer. In the forums of the marketplace and courtroom, the state is frequently the only champion available to the poor. Due to lack of education they do not have the legal sophistication to realize that their claim may be litigable. Additionally, the potential recovery is, in most cases, insufficient to interest a private attorney.[19] Legal Aid Offices, assuming that the consumer can qualify financially for their help,[20] are usually so overworked and understaffed that they would rather compromise than litigate.[21] The present case offers a compelling example of this practice; of the 24 named consumer-plaintiffs, eight had previously been represented by Legal Aid attorneys in actions against them by the defendant. They all settled their cases. Four others, presumably represented by private counsel, succeeded in having the defendant's complaints dismissed when he failed to answer interrogatories.[22]

The strong language used by the court in confirming the Attorney General's authority to bring the action shows clearly how heavily the plight of the low-income consumer influenced its decision:

> [T]he deception, misrepresentation and unconscionable practices engaged in by professional sellers seeking mass distribution of many types of consumer goods frequently produce an adverse effect on large segments of disadvantaged and poorly educated people, who are wholly devoid of expertise and least able to understand or to cope with the "sales oriented," "extroverted" and unethical solicitors bent on capitalizing upon their weakness, and who therefore most need protection against predatory practices.[23]

In view of the large number of these persons preyed upon collectively by unscrupulous merchants, it was obvious to the court that:

> [G]iving the consumer rights and remedies which he must assert individually in the courts would provide little therapy for the overall public aspect of the problem.
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19 Eckhardt, *Consumer Class Actions*, 45 NOTRE DAME LAW. 663, 663 (1970).

20 The upper income limits for legal services assistance eligibility vary from state to state, and even within a state. The Newark Legal Services Project, for example, uses as a guideline a maximum income of $3,000 plus $500 per dependent. Telephone Conversation with Robert B. Curtis, Administrator, Newark Legal Services Project, April 12, 1972. *See generally* NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, HANDBOOK OF STANDARDS FOR LEGAL AID AND DEFENDER OFFICES 3-4 (1970).

21 Travers & Landers, *The Consumer Class Action*, 18 KAN. L. REV. 811, 813 (1970).

22 58 N.J. at 532, 279 A.2d at 646.

Presumably the interrogatories made pointed inquiries concerning the defendant's authorization to do business within the State of New Jersey. At the trial level defendant admitted that he had failed to comply with N.J. STAT. ANN. § 56:1-2 (1964), which requires the filing of a certificate of trade name. 110 N.J. Super. at 488, 266 A.2d at 154.

23 58 N.J. at 536, 279 A.2d at 648.

> . . . It has been amply demonstrated that the strongest case for relief from form contract oppression and deceptive and fraudulent misrepresentations is presented by the poor, the naive and the uneducated consumers who have yielded unwittingly to such high pressure sales tactics. The Legislature has decreed that they are a class of persons to whom the courts should give special protection.[24]

Commentators have recently discussed the inadequacy of existing legal remedies in affording protection to the consumer. Their suggestions, however, have generally focused upon the broadening of private class remedies.[25] The possibility of the State, through the Attorney General, protecting the private contractual rights of consumers has received scant attention. It is not clear whether this is due to a supposed lack of authority on the part of state officials,[26] or to fear that the appropriate public offices have neither the inclination nor the manpower to effectively "police" the retail merchants.[27]

The New Jersey Supreme Court, however, encountered little difficulty in finding that the Attorney General had the authority to bring a class action under the Consumer Fraud Act. The Act empowers the court to make a restorative order to *any person in interest.*[28] The Legislature has, by the passage of consumer oriented statutes, expressed

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24 *Id.* at 537-38, 279 A.2d at 648-49.

25 *See, e.g.*, Dole, *Consumer Class Actions Under Recent Consumer Credit Legislation*, 44 N.Y.U.L. REV. 80 (1969); Eckhardt, *supra* note 19; Travers & Landers, *supra* note 21.

26 *Cf.* Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. REV. 1, 46 (1969) wherein the author states:

> The state cannot undertake to represent private parties in individual litigations . . . .
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> This and the absence of assured vigorous public enforcement leave and will always leave a continuing need for private enforcement.

27 The Federal Trade Commission's record, for example, indicates that these fears may be well-founded. This agency received about 9,000 complaints in 1968-69. Of these, one out of every eight or nine was investigated and, of these, one out of every ten resulted in a cease and desist order. E. COX, R. FELLMETH & J. SCHULZ, "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION 58-59, (1969). *See also* Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971), where the court quoted the amicus curiae brief of the California Attorney General as stating that his consumer frauds division handles 10,000 complaints per year with a staff smaller than that of an average small law firm. The court went on to state that:

> [A]lthough his office may take legal action in cases of major significance, it cannot undertake to represent private citizens seeking vindication of personal rights.

4 Cal. 3d at 817 n.14, 484 P.2d at 974, 94 Cal. Rptr. at 806. *Compare* Kirkpatrick, *Consumer Class Litigation*, 50 ORE. L. REV. 21, 28 (1970) (citing Oregon decisions in support of the proposition that an attorney general cannot represent private parties in litigation) *with* Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 461 (1960) (criticizing the logic of an attorney general being limited to instituting class actions for injunctions but not for money damages).

28 N.J. STAT. ANN. § 56:8-8 (1964).

quite clearly its intent to broaden the spectrum of possible consumer remedies.[29] When these factors were considered in conjunction with the broad common law powers of the Attorney General,[30] it was most reasonable to conclude that the maintenance of consumer class actions was within his powers.

Having found that the Attorney General was a proper party to bring the suit, the court then considered the propriety of maintaining this specific suit as a class action. It had to find that the *common* question(s) of law or fact predominated over questions relating to *individual* members of the class.[31] The Attorney General attempted to show the existence of such a common element by arguing that the price of the "educational" package, a factor common to all the defendant's contracts, was, in relation to the value of the goods offered, unconscionable.[32]

Two previous New Jersey cases have found a highly excessive price term in a contract unconscionable *per se*. In both cases the same plaintiff brought suit to enforce his retail installment sales contracts for refrigerator-freezers. The price charged was found to be far in excess

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29 *See, e.g.*, Retail Installment Sales Act, N.J. STAT. ANN. §§ 17:16C-1 *et seq.* (1970); Home Repair Financing Act, N.J. STAT. ANN. §§ 17:16C-62 *et seq.* (1970).

30 *Cf.* O'Regan v. Schermerhorn, 25 N.J. Misc. 1, 9, 50 A.2d 10, 15 (Sup. Ct. 1946) (Attorney General defends private libel action against former grand jurors due to the public interest in the questions involved). *See also* Blumrosen, *Antidiscrimination Laws in Action in New Jersey: A Law-Sociology Study*, 19 RUTGERS L. REV. 189, 251 (1965) (discussing cases upholding the authority of the New Jersey Attorney General to initiate or intervene in suits involving the public interest).

31 N.J.R. 4:32-1. Although the New Jersey class action rule is based on the Federal rule (FED. R. CIV. P. 23), the New Jersey courts have historically interpreted their rule more liberally than the Federal courts. *See* Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 101, 275 A.2d 433, 434 (1971) (unincorporated group of apartment residents sued owners of the building alleging mismanagement and poor maintenance).

At least one state, California, specifies by statute the conditions under which a consumer class action may be brought. CAL. CIV. CODE § 1781 (West Supp. 1971).

32 58 N.J. at 541-42, 279 A.2d at 651. The *Kugler* court accepted without question or discussion the Attorney General's contention that this price term created a sufficient "community of interest" to allow a class action to be maintained. This is in sharp contrast to recent New York decisions. *See, e.g.*, Hall v. Coburn Corp. of America, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970). Plaintiff attempted to commence a class action against a finance company alleging that the form contracts used by the company were printed in smaller than legal size type. The New York court reasoned that the proposed class lacked a sufficient "common interest" since

> [s]eparate wrongs to separate persons, though committed by similar means and even pursuant to a single plan, do not alone create a common or general interest in those who are wronged.

Id. at 400, 259 N.E.2d at 721, 311 N.Y.S.2d at 283 (quoting from Society Milion Athena, Inc. v. National Bank, 281 N.Y. 282, 292, 22 N.E.2d 374, 377 (1939)). The decision is explained and criticized at length in Dole, *supra* note 25, at 105.

of the reasonable retail value of the merchandise. In *Toker v. Perl*[33] the appellate division affirmed the trial court's judgment, which had refused enforcement of the contract, on the alternate finding that the contract was procured through fraud. The question of whether excessive price *per se* could render a contract unenforceable was purposely left open.[34] In *Toker v. Westerman*[35] the sole basis for the trial court's judgment was the excessive price. The plaintiff did not appeal.

The Uniform Consumer Credit Code attempts to provide specific statutory guidelines to enable the courts to determine when an excessive price term may be denied enforcement.[36] Section 6.111 of that Code provides in pertinent part:

> (3) In applying this section, consideration shall be given to each of the following factors, among others:
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> (c) in the case of consumer credit sales or consumer leases, gross disparity between the price of the property or services sold or leased and the value of the property or services measured by the price at which similar property or services are readily obtainable in credit transactions by like buyers or lessees . . . .

At the present time this Code has been enacted in six states, but the section quoted has not been interpreted in any reported decisions.[37] In sharp contrast to the specificity of the UCCC is the UCC, which makes no mention of excessive price (or any other specific abuse) in authorizing nonenforcement of unconscionable contracts or clauses thereof.[38]

In the absence of specific statutory authority, there exists a wide

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33 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968), *aff'd on other grounds*, 108 N.J. Super. 129, 260 A.2d 244 (App. Div. 1970) (plaintiff was charging $1,093 for a refrigerator-freezer worth not more than $300).

34 108 N.J. Super. at 131, 260 A.2d at 245.

35 113 N.J. Super. 452, 274 A.2d 78 (Union County Dist. Ct. 1970) (price was $1,029.76, but amount already paid by defendants, $655.85, was "reasonable").

36 Uniform Consumer Credit Code, 7 UNIFORM LAWS ANNOTATED (West 1970).

37 COLO. REV. STAT. ANN. §§ 73-1-101 *et seq.* (Supp. 1971); IDAHO CODE §§ 28-31-101 *et seq.* (Supp. 1971); IND. ANN. STAT. §§ 19-21-101 *et seq.* (Supp. 1971); OKLA. STAT. ANN. tit. 14A, §§ 1-101 *et seq.* (Supp. 1971); UTAH CODE ANN. §§ 70B-1-101 *et seq.* (Supp. 1971); WYO. STAT. ANN. §§ 40-1-101 *et seq.* (Supp. 1971). The New Jersey Legislature has created a study commission to investigate the desireability of adopting the UCCC in this state. Law of July 1, 1971, ch. 255, [1971] N.J. Laws 1190.

38 N.J. STAT. ANN. § 12A:2-302 (1962). It should be noted that Louisiana is the only state which has not adopted the UCC, but California and North Carolina adopted it without Section 2-302. For a broader, less precise formulation of a price unconscionability rule than the UCCC which is, however, more specific than the UCC, *see* NATIONAL CONSUMER LAW CENTER, NATIONAL CONSUMER ACT §§ 5.107(3)(c), 6.109(3) (1970).

diversity of opinion among the courts concerning the enforceability of an excessive price term in a contract. At least three different analyses have been advanced to justify not enforcing such a term.

Some courts discuss the question of price unconscionability in the context of the classical contractual requirement of "assent."[39] Briefly stated, the proposition is that those parties who generally face price exploitation, namely the poor, have little bargaining power. This lack of bargaining power greatly limits the choices available to these consumers, with the result that "real assent" may be found lacking.[40] The chief concern of these courts is not specifically with the price, but with the circumstances surrounding the making of the contract.[41] The treatment of these cases is very similar to that used in suits for rescission of contracts based on unilateral mistake.[42] The requirements for such relief are:

> (1) The mistake is of such consequence that enforcement would be unconscionable. (2) The mistake must relate to the substance of the consideration, that is a material feature. (3) The mistake must have occurred regardless of the exercise of ordinary care. (4) It must be possible to place the other party in status quo.[43]

These requisites are more liberal than the requirements for reformation of a contract.[44]

The second approach treats excessive price as a particular form of "harsh term."[45] This is in contrast to an older theory that price

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39 *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Nassau County Dist. Ct. 1966), *rev'd on issue of damages*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. T. 1967); Central Budget Corp. v. Sanchez, 53 Misc. 2d 620, 279 N.Y.S.2d 391 (Civ. Ct. 1967). *See also* Braucher, *The Unconscionable Contract or Term*, 31 U. PITT. L. REV. 337, 338 (1970).

40 Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1, 41 (1969). *But see* Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970) (criticism of Murray's article). *See generally* D. CAPLOVITZ, THE POOR PAY MORE (1963). W. MAGNUSON & J. CARPER, THE DARK SIDE OF THE MARKETPLACE (1968).

41 Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (relative knowledge of the parties); Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Nassau County Dist. Ct. 1966), *rev'd on issue of damages*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. T. 1967) (inability of the defendants to speak and understand English); Panco v. Rogers, 19 N.J. Super. 12, 87 A.2d 770 (Ch. 1952) (inability of plaintiff to understand English); Toker v. Perl, 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968), *aff'd on other grounds*, 108 N.J. Super. 129, 260 A.2d 244 (App. Div. 1970) (non-disclosure and high pressure tactics of the sellers). *See generally* 1 WILLISTON, CONTRACTS § 22, at 46-47 (3d ed. 1957) and cases cited therein.

42 Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 967 (1969).

43 Kenneth E. Curran, Inc. v. State, 106 N.H. 558, 560, 215 A.2d 702, 703-04 (1965).

44 13 WILLISTON, CONTRACTS § 1573 (3d ed. 1970) and cases cited therein.

45 Spanogle, *supra* note 42, at 951. *See also* Comment, *Unconscionable Sales Prices*, 20 U. ME. L. REV. 159 (1968); Annot., 18 A.L.R.3d 1305 (1968).

disparity could be subject to equitable relief only if accompanied by some procedural abuse such as misrepresentation, nondisclosure or high pressure tactics.[46] This doctrine has gradually been eroded until the price term of the contract has been found by some courts to stand in no better position than any other. The landmark case of *American Home Improvement, Inc. v. MacIver*[47] exemplifies this type of decision. The defendants had contracted for home improvements valued at $959. When sales commission, interest and carrying charges were included, the total price became $2,568.60. Before any work was started, the defendants decided to renounce the contract.[48] The court held:

> Inasmuch as the defendants have received little or nothing of value and under the transaction they entered into they were paying $1,609 for goods and services valued at far less, the contract should not be enforced because of its unconscionable features.[49]

Although it was decided prior to the enactment of the UCC, *MacIver* has frequently been cited in support of the proposition that excessive price, absent procedural abuses, is sufficient under UCC § 2-302 to render a contract unconscionable.[50] Such an analysis is in sharp contrast to the official Comments to the Code which indicate that section 2-302 is aimed at the evils of "unfair surprise" and "oppression."[51] The decision has been criticized by a number of commentators because of the complete absence of any discussion of the particular economic factors which produced the end result.[52] Even under the more explicit formulation of the UCCC, the decision is unsatisfying due to its failure to consider the prevailing market price for the improvements.

In an attempt to harmonize the two viewpoints discussed above, two proposals have been advanced. The first would utilize a "sliding scale" formula in which an equitable sum of procedural abuses and excessiveness of price would be the criterion for rendering a contract unenforceable.[53] Thus, unconscionability could be found in a severely

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46 3 POMEROY, EQUITY JURISPRUDENCE § 926 (5th ed. 1941). However, in the following section Professor Pomeroy warns that a sufficiently gross price disparity may raise a conclusive presumption of fraud. *Id.* at § 927. This is a good example of the "manipulation of the rules of offer" which the common law courts engaged in so that injustice would not result. *See* UCC § 2-302, Comment 1.

47 105 N.H. 435, 201 A.2d 886 (1964). *See also* Jones v. Star Credit Corp., 59 Misc. 2d 189, 191, 298 N.Y.S.2d 264, 266 (Sup. Ct. 1969); Toker v. Westerman, 113 N.J. Super. 452, 274 A.2d 78 (Union County Dist. Ct. 1970).

48 105 N.H. at 439, 201 A.2d at 887.

49 *Id.* at 441, 201 A.2d at 889.

50 *See* cases cited note 47 *supra.*

51 UCC § 2-302, Comment 1.

52 Murray, *supra* note 40, at 60; Spanogle, *supra* note 42, at 966.

53 Spanogle, *supra* note 42, at 952.

harsh term in spite of a relatively mild procedural abuse, and vice versa. The second proposal would allow a party to make a prima facie case of unconscionability by showing gross price disparity.[54] The burden would then shift to the other party to show that, in the light of all the circumstances, the price was commercially reasonable. The *Kugler* court cites both articles but, due to the state of the proofs, did not rely upon either.[55]

The third conceptual framework within which price unconscionability has been examined is based on the civil law concept of *laesio enormis*.[56] Although the doctrine has had no direct influence on the common law unconscionability doctrine, it is interesting to note that the majority of the courts which have voided contracts for excessive price have found price-to-value ratios of at least 2 to 1.[57]

Since *Kugler* was the first case before the New Jersey Supreme Court to raise either the issue of consumer class actions or that of price unconscionability, it would be somewhat unreasonable to expect that it has provided all the answers. Two tentative generalizations can, however, be drawn from the decision.

In treating the issue of price unconscionability, the court was compelled, because of the nature of the case and the state of the proofs, to give little weight to the "unfairly surprising" and "oppressive" aspects of the defendant's sales tactics. An analysis of the price term in relation to the specific circumstances surrounding each sale was effectively precluded due to the fact that the overwhelming majority of the defendant's victims never testified at the trial.[58] The court recognized this

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54 Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359, 372-74 (1970).

55 58 N.J. at 543, 279 A.2d at 652.

56 This phrase is a contraction of *laesio ultra dimidium vel enormis* which in Roman law was "[t]he injury sustained by one of the parties to an onerous contract when he had been overreached by the other to the extent of more than one-half of the value of the subject-matter." BLACK'S LAW DICTIONARY 1017-18 (4th ed. 1951). The doctrine still makes its influence felt in civil law jurisdictions. *Cf.* Dawson, *Economic Duress and the Fair Exchange in French and German Law* (Pts. 1 & 2), 11 TULANE L. REV. 345, 364-76 (1937); Hebert & Lazarus, *Some Problems Regarding Price in the Louisiana Law of Sales*, 4 LA. L. REV. 378, 412-18 (1942).

57 *See* cases cited notes 39 & 47 *supra*. Some courts, however, have not considered such factors as sales commissions, credit charges, etc., in calculating the "value" of the goods. *See, e.g.*, American Home Improvement Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964).

58 Defendant initiated suit to enforce 779 contracts between 1964 and 1968. 58 N.J. at 532, 279 A.2d at 646.

In the case of Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971), plaintiffs were able to circumvent the problem of having all the customers testify at trial. They alleged that the defendant used a printed sales manual in instructing its salesmen in the art of selling home freezers. All salesmen relied on these manuals which

limitation and therefore had to rely primarily on the price aspect of the transaction.[59] But, when considering the general socio-economic milieu in which the defendant operated, the court stated that:

> Sale at an exorbitant price *especially in the market described by the evidence in this case* raises a strong inference of imposition.[60]

This rationale falls halfway between the "sliding scale" approach[61] and the "prima facie unconscionability" analysis.[62] While treating the price as a particular form of harsh term, the court dropped a broad hint that, had the context in which it encountered the problem been different, the circumstances surrounding the transaction would have weighed more heavily in its decision.[63] Without stating exactly the circumstances under which a price-to-value ratio would become unconscionable, the court sounded a strong warning to those who would defraud the consumer:

> [F]reedom to contract survives, but marketers of consumer goods are brought to an awareness that the restraint of unconscionability is always hovering over their operations and that courts will employ it to balance the interests of the consumer public and those of the sellers.
>
> The standard of conduct contemplated by the unconscionability clause is good faith, honesty in fact and observance of fair dealing.[64]

Explicit delineation of New Jersey's treatment of a grossly exorbitant price term in a contract with no accompanying procedural abuse must await future litigation.

On the issue of consumer class actions, the court's attitude was characteristically progressive:

> If the only available route had been pursuit of a private remedy by individual victims . . . such a rule would require an unrealistic expenditure of judicial energy and would be inconsistent with current trends in consumer protective legislation.[65]

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contained allegedly fraudulent misrepresentations. The case is discussed in detail in Comment, *Vasquez v. Superior Court of San Joaquin County: A Class Action in Consumer Fraud*, 8 CALIF. W.L. REV. 165 (1971).

59 58 N.J. at 541-42, 279 A.2d at 651. One can only wonder whether the flagrant deceptions which the defendant perpetrated upon the 24 named consumers had a subconscious effect upon the justices.

60 *Id.* at 545, 279 A.2d at 653 (emphasis added).

61 Spanogle, *supra* note 42, at 961.

62 Speidel, *supra* note 54, at 372-74.

63 We have no doubt that an exorbitant price ostensibly agreed to by a *purchaser of the type involved in this case* . . . constitutes an unconscionable bargain . . . . 58 N.J. at 544-45, 279 A.2d at 652 (emphasis added).

64 *Id.* at 544, 279 A.2d at 652.

65 *Id.* at 538, 279 A.2d at 649.

Since *Kugler* was decided, the New Jersey Consumer Fraud Act has been amended to provide that "[a]ny person who suffers any ascertainable loss of moneys or property" may bring an action under the Act.[66] In addition, the court is authorized to award to the successful consumer treble damages, costs, and attorney's fees.[67] This should serve to greatly reduce the minimum size of a case which an attorney could economically undertake. Thus, in New Jersey, unlike New York where the Field Code provisions have been very restrictively interpreted to effectively bar privately prosecuted consumer class suits,[68] liberal legislation and procedural rules have set the stage for a receptive court to entertain such a suit.

It would be a mistake, however, to suppose, on the basis of *Kugler*, that *privately* prosecuted consumer *class* actions are definitely allowed under the revision to the Consumer Fraud Act. The remedy now available under the Act may possibly have decreased the "need for public remedies" upon which the court relied so heavily. However, this decreased need may also serve to increase a private plaintiff's burden beyond the point required of the Attorney General in *Kugler*. Whatever posture is taken by the court when it faces that issue, there is no question but that the economically disadvantaged New Jersey consumer now stands in a better position as a result of this decision and the legislation which the trial court's opinion engendered.

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66 Law of June 29, 1971, ch. 247, § 7, [1971] N.J. Laws 1177.

67 *Id.*

68 *See* Hall v. Coburn Corp. of America, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970). This case is discussed in note 32 *supra*.