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A & M PRODUCE CO., Plaintiff, Cross-defendant and Respondent, v. FMC CORPORATION, Defendant, Cross-complainant and Appellant

Civ. No. 24731

Court of Appeal of California, Fourth Appellate District, Division One

135 Cal. App. 3d 473; 186 Cal. Rptr. 114; 1982 Cal. App. LEXIS 1922; 38 A.L.R.4th 1; 34 U.C.C. Rep. Serv. (Callaghan) 1129; CCH Prod. Liab. Rep. P9401

August 27, 1982

SUBSEQUENT HISTORY: [***1] A petition for a rehearing was denied September 24, 1982, and appellant's petition for a hearing by the Supreme Court was denied December 15, 1982. Richardson, J., was of the opinion that the petition should be granted.

PRIOR HISTORY: Superior Court of Imperial County, No. 45205, William E. Lehnhardt, Judge.

DISPOSITION: The judgment is affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant manufacturer challenged the judgment of the Superior Court of Imperial County (California), which granted damages, attorney's fees, and prejudgment interest to respondent purchaser in respondent's action for breach of express warranties, breach of implied warranty for a particular purpose, and misrepresentation arising from the sale of farm machinery.

OVERVIEW: Respondent purchaser bought farm equipment from appellant manufacturer. When the equipment did not work, respondent tried to return it for a refund. However, appellant insisted on payment of the full purchase price. Respondent brought an action against appellant for breach of express warranties, breach of implied warranty for a particular purpose, and misrepresentation. The trial court awarded consequential damages, attorney's fees, and prejudgment interest to respondent. On appeal, the court affirmed the judgment and held that the trial court's refusal to allow the disclaimer of warranty and limitation of damages clauses into evidence was proper because the clauses were unconscionable under the facts of the case. The manner in which the provisions were presented in the agreement was sufficient evidence to find that respondent was surprised by the provisions. Although respondent had the opportunity to read the back of the contract or consult a lawyer, the length, complexity, and obtuseness of the form contract rendered respondent's surprise unfair. The court held that attorney's fees and prejudgment interest were available and were appropriate under the circumstances.

OUTCOME: The court affirmed the trial court's judgment, which awarded consequential damages, attorney's fees, and prejudgment interest to respondent in his action against appellant manufacturer for breach of warranties and misrepresentation. The contract provisions disclaiming warranties and limiting damages were unconscionable. The court also determined that attorney's fees and prejudgment interest were appropriate remedies in the breach of contract.

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CORE TERMS: warranty, unconscionability, disclaimer, unconscionable, consequential damage, buyer, tomatoes, attorney fee, seller's, disclaimer of warranty, bargaining power, express warranty, prejudgment interest, machinery, conspicuous, implied warranties, crop, reverse side, contractual, machine, breach of warranty, unfair surprise, breached, preprinted form, substantive unconscionability, misrepresentation, consequential, negotiation, printed, bargain

LexisNexis(R) Headnotes

Commercial Law (UCC) > Sales (Article 2) > Contract Terms > General Overview

[HN1] See Cal. Com. Code § 1201(10).

Commercial Law (UCC) > Sales (Article 2) > Remedies > Limitation & Modification > Unconscionable Limitations
Contracts Law > Sales of Goods > Damages & Remedies > Buyer's Damages & Remedies > Limitation & Modification > Unconscionable Limitations
Contracts Law > Sales of Goods > Damages & Remedies > Seller's Damages & Remedies > Limitation & Modification > Unconscionable Limitations

[HN2] See Cal. Com. Code § 2719(3).

Commercial Law (UCC) > Sales (Article 2) > Contract Terms > General Overview

Commercial Law (UCC) > Sales (Article 2) > Warranties > Warranty Cumulation & Conflict

[HN3] See Cal. Com. Code § 2316.

Commercial Law (UCC) > Sales (Article 2) > Contract Terms > Unconscionable Agreements

Contracts Law > Defenses > Unconscionability > General Overview

[HN4] U.C.C. § 2-302.

Commercial Law (UCC) > Sales (Article 2) > Contract Terms > Unconscionable Agreements

Commercial Law (UCC) > Sales (Article 2) > Warranties > Exclusion & Modification

Contracts Law > Defenses > Unconscionability > General Overview

[HN5] An unconscionable disclaimer of warranty may be denied enforcement despite technical compliance with the requirements of Cal. Com. Code § 2316.

Commercial Law (UCC) > General Provisions (Article 1) > Definitions & Interpretation > General Overview

Commercial Law (UCC) > Sales (Article 2) > Contract Terms > General Overview

Contracts Law > Defenses > Unconscionability > General Overview

[HN6] 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. Phrased another way, unconscionability has both a procedural and a substantive element.

Commercial Law (UCC) > Sales (Article 2) > Contract Terms > General Overview

Contracts Law > Defenses > Unconscionability > General Overview

[HN7] The procedural element of unconscionability focuses on two factors: oppression and surprise. Cal. Com. Code § 2302. "Oppression" arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. "Surprise" involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms. Characteristically, the form contract is drafted by the party with the superior bargaining position.

Commercial Law (UCC) > Sales (Article 2) > Contract Terms > General Overview

Contracts Law > Defenses > Unconscionability > General Overview

[HN8] Of course the mere fact that a contract term is not read or understood by the nondrafting party or that the drafting party occupies a superior bargaining position will not authorize a court to refuse to enforce the contract. Although an argument can be made that contract terms not actively negotiated between the parties fall outside the circle of assent

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constitutes the actual agreement, commercial practicalities dictate that unbargained-for terms only be denied enforcement where they are also substantively unreasonable. No precise definition of substantive unconscionability can be proffered. Cases have talked in terms of overly harsh or one-sided results.

***Commercial Law (UCC) > Sales (Article 2) > Contract Terms > Unconscionable Agreements
Contracts Law > Defenses > Unconscionability > General Overview***

[HN9] A contract is largely an allocation of risks between the parties, and therefore that a contractual term is substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner. But not all unreasonable risk reallocations are unconscionable; rather, enforceability of the clause is tied to the procedural aspects of unconscionability such that the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk reallocation which will be tolerated.

Contracts Law > Defenses > Unconscionability > General Overview

Contracts Law > Sales of Goods > Damages & Remedies > Buyer's Damages & Remedies > Limitation & Modification > Unconscionable Limitations

Contracts Law > Sales of Goods > Damages & Remedies > Seller's Damages & Remedies > Limitation & Modification > Unconscionable Limitations

[HN10] While unconscionability is ultimately a question of law, numerous factual inquiries bear upon that question. The business conditions under which the contract was formed directly affect the parties' relative bargaining power, reasonable expectations, and the commercial reasonableness of the risk allocation as provided in the written agreement.

Civil Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview

Commercial Law (UCC) > Sales (Article 2) > Contract Terms > General Overview

Contracts Law > Defenses > Unconscionability > General Overview

[HN11] To the extent there are conflicts in the evidence or in the factual inferences which may be drawn therefrom, the reviewing court must assume a set of facts consistent with the court's finding of unconscionability if such an assumption is supported by substantial evidence.

Commercial Law (UCC) > Sales (Article 2) > Contract Terms > General Overview

Contracts Law > Remedies > Compensatory Damages > Consequential Damages

Contracts Law > Sales of Goods > Damages & Remedies > General Overview

[HN12] A party should be able to rely on the existence of consequential damages as a remedy in the absence of being informed to the contrary.

Commercial Law (UCC) > General Provisions (Article 1) > Application & Construction > Damages

Commercial Law (UCC) > Sales (Article 2) > Remedies > Buyer's Remedies > Damages > Incidental & Consequential Damages

Commercial Law (UCC) > Sales (Article 2) > Remedies > Limitation & Modification > General Overview

[HN13] In the absence of an exclusion, the California commercial code provides that consequential damages are generally recoverable. Cal. Com. Code §§ 2714(3) and 2715(2).

Commercial Law (UCC) > Sales (Article 2) > Remedies > Limitation & Modification > Unconscionable Limitations

Commercial Law (UCC) > Sales (Article 2) > Warranties > Exclusion & Modification

Contracts Law > Defenses > Unconscionability > General Overview

[HN14] When nonnegotiable terms on preprinted form agreements combine with disparate bargaining power, resulting in the allocation of commercial risks in a socially or economically unreasonable manner, the concept of unconscionability as codified in U.C.C. § 2-302, and Cal. Com. Code § 2719(3), furnishes legal justification for refusing enforcement of the offensive result.

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Contracts Law > Remedies > Compensatory Damages > Consequential Damages

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[HN15] See Cal. Civ. Code § 3301.

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

[HN16] Where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

[HN17] See Cal. Civ. Code § 1717.

Civil Procedure > Remedies > Judgment Interest > General Overview

[HN18] See Cal. Civ. Code § 3287(b).

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY A produce company brought suit against an agricultural equipment company from which it had bought a weight sizing machine, alleging breach of express and implied warranties. The machine had been purchased for use in processing plaintiff's tomato crop and the action arose when it failed to operate properly, causing loss of the crop. At trial, the court ruled that clauses in defendant's preprinted contract disclaiming all warranties and excluding consequential damages were unconscionable and evidence of such provisions was not presented to the jury. A general verdict in plaintiff's favor was thereafter returned by the jury, in addition to which the trial court awarded plaintiff attorney fees and prejudgment interest. (Superior Court of Imperial County, No. 45205, William E. Lehnhardt, Judge.)

A produce company brought suit against an agricultural equipment company from which it had bought a weight sizing machine, alleging breach of express and implied warranties. The machine had been purchased for use in processing plaintiff's tomato crop and the action arose when it failed to operate properly, causing loss of the crop. At trial, the court ruled that clauses in defendant's preprinted contract disclaiming all warranties and excluding consequential damages were unconscionable and evidence of such provisions was not presented to the jury. A general verdict in plaintiff's favor was thereafter returned by the jury, in addition to which the trial court awarded plaintiff attorney fees and prejudgment interest. (Superior Court of Imperial County, No. 45205, William E. Lehnhardt, Judge.)

The Court of Appeal affirmed. The court first held that the doctrine of unconscionability was applicable to the warranty disclaimer, even though the Uniform Commercial Code (UCC) section on unconscionability had not been adopted as part of California's Commercial Code, since unconscionability is a common law doctrine which may be applied in the absence of specific statutory authorization. In addition, Civ. Code, § 1670.5, which is applicable to all contracts, contains language identical to the UCC section. The court further held that the warranty disclaimer and the exclusion of consequential damages were properly found to be unconscionable, noting that both clauses appeared on the back page of a long preprinted contract, that the parties did not enjoy equal bargaining power, and that defendant's salesmen were not authorized to negotiate any of the terms appearing on the reverse side of the contract. Thus, the court held the requirements of procedural unconscionability were satisfied. As to substantive unconscionability, the court held that the disclaimer and exclusion of damages were both unreasonable under the circumstances. The court also held plaintiff was properly awarded attorney fees, since its action was one to enforce a written agreement within the meaning of the reciprocal attorney fee statute (Civ. Code, § 1717). Finally, the court held that the trial court properly exercised its discretion in awarding plaintiff prejudgment interest (Civ. Code, § 3287, subd. (b)), noting that the litigation had spanned over seven years and that defendant's refusal of an offer to settle could be viewed as placing prejudgment interest at risk. (Opinion by Wiener, J., with Reed, J., concurring. Separate concurring opinion by Staniforth, Acting P. J.)*

* Assigned by the Chairperson of the Judicial Council.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series.

(1) Sales § 41--Warranties--Disclaimer--Conspicuousness. -- --A disclaimer of warranty which is printed in boldface type twice as large as the other terms of the agreement is conspicuous (Com. Code, § 1201, subd. (10)).

(2) Sales § 44--Warranties--Actions for Breach--Evidence--Admissibility of Unconscionable Disclaimer. -- --In a breach of warranty action arising out of the sale of certain agricultural machinery in which the conscionability of a warranty disclaimer was at issue, evidence of the disclaimer's presence in the contract was not admissible, assuming its unconscionability, to suggest that no warranty was ever created by action of the parties. The disclaimer's value toward proving the factual proposition that no warranty was created was slight and was substantially outweighed by the disclaimer's tendency to unfairly prejudice and mislead the jury (Evid. Code, § 352).

(3) Sales § 41--Warranties--Disclaimer--Unconscionability. -- --An unconscionable disclaimer of warranty may be denied enforcement, despite technical compliance with the requirements of Com. Code, § 2316 (regarding disclaimers of warranties). Thus, in a damage action for breach of express and implied warranties arising out of the sale of certain agricultural machinery, the trial court properly concluded the doctrine of unconscionability was applicable to both the consequential damage exclusion and the warranty disclaimer contained in the underlying contract. Although the general Uniform Commercial Code section on unconscionability was not adopted as part of California's Commercial Code, Civ. Code, § 1670.5, which is applicable to all contracts, contains identical language. In addition, unconscionability is a common law doctrine which may be applied in the absence of specific statutory authorization. Even assuming a warranty disclaimer may not be declared unconscionable, the trial court's conclusion to the contrary was harmless error, where it was not reasonably probable the jury could have found breach of an implied warranty without also finding breach of an express one. Under such circumstances, even had evidence of the disclaimer been before the jury, Com. Code, § 2316 (providing that an express warranty takes precedence over an attempted disclaimer), would have required them to disregard it to the extent the disclaimer conflicted with the express warranty.

(4) Sales § 2--Definitions--Unconscionability. -- --While the Uniform Commercial Code does not attempt to precisely define what is or is not unconscionable, unconscionability includes 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. The procedural element of unconscionability focuses on oppression, which results from an inequality of bargaining power, and surprise, which involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix form drafted by the party seeking to enforce the disputed terms. However, unbargained for terms may only be denied enforcement when they are also substantively unreasonable. Further, while a contractual term may be substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner, not all unreasonable risk reallocations are unconscionable. Rather, enforceability is tied to the procedural aspects of unconscionability, such that the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk reallocation which will be tolerated.

(5) Sales § 41--Warranties--Disclaimer of Warranties--Exclusion of Consequential Damages. -- --In a damage action for breach of express and implied warranties arising out of the sale of certain agricultural machinery for use in processing harvested tomatoes, the trial court properly concluded that clauses in the seller's form contract disclaiming all warranties and excluding consequential damages were unconscionable. The evidence was sufficient to support a conclusion that the buyer was surprised by the warranty disclaimer and the consequential damage exclusion, both of which appeared in the middle of the back page of a long preprinted form contract which the buyer never read. Even ignoring any suggestion of unfair surprise, given that the buyer could have read the contract or sought legal advice,

there was ample evidence of unequal bargaining power between the buyer, an established farming enterprise, and the seller, an enormous diversified corporation whose salesmen were not authorized to negotiate any of the terms appearing on the reverse side of the contract. Thus, the requirements of procedural unconscionability were satisfied. As to substantive unconscionability, the record supported the trial court's conclusion that the disclaimer was commercially unreasonable, where the warranty allegedly breached went to the basic performance characteristics of the product, and where the buyer, who had no previous experience with the machinery at issue, was forced to rely on the seller's performance representations. The exclusion of consequential damages was also unreasonable, where such damages were explicitly obvious if the seller's warranty was breached, given the need to harvest and pack the buyer's tomatoes in a relatively short period of time, and where the seller was the only party reasonably able to prevent the loss of the buyer's crop by not selling it a machine inadequate to meet its expressed needs.

(6) Damages § 5--Compensatory Damages--Prospective Profits--Unestablished Businesses. -- --Although an unestablished business may not, as a general rule, recover damages for prospective profits (Civ. Code, § 3301), anticipated profits dependent on future events are allowed when their nature and occurrence can be shown by evidence of reasonable reliability. Thus, in a successful breach of warranty action arising out of the sale of certain agricultural machinery for use in processing harvested tomatoes, the trial court properly allowed plaintiff farmer to recover his consequential damages, even though plaintiff had never grown tomatoes before, where he was an experienced farmer and where the crop itself was in good condition at harvest time.

(7) Sales § 44--Actions for Breach of Warranty--Attorney Fees. -- --An action against a farm equipment company for breach of express and implied warranties which resulted in a general verdict for plaintiff was an action to enforce a written agreement within the meaning of the reciprocal attorney fee statute (Civ. Code, § 1717), and plaintiff was thus properly awarded attorney fees. A contract includes anything which affects the legal obligation of the parties (Com. Code, § 1201, subd. (11)), and may be a composite of written terms, oral expression and responsibilities implied by law, all of which may be enforced by an action on the contract.

(8) Damages § 10--Compensatory Damages--Interest--In Contract Actions. -- --In a successful breach of warranty action against a farm equipment company in which the exact amount of damages was in dispute, the trial court properly exercised its discretion in awarding plaintiff seven percent prejudgment interest (Civ. Code, § 3287, subd. (b)), where the litigation had spanned over seven years and where the award did not penalize defendant for litigating a bona fide dispute. Rather, it was merely a recognition of an additional amount of damages incurred by plaintiff as a result of the breach of warranty. In addition, the trial court was permitted to view defendant's refusal of an offer to settle as placing the prejudgment interest at risk.

COUNSEL: Paul, Hastings, Janofsky & Walker, Douglas C. Conroy, Claudia A. Carver, Byrd, Sturdevant, Pinney, Caldwell & Kruttsch and Andrew S. Kruttsch for Defendant, Cross-complainant and Appellant.

Thomas M. Heim and Roger T. Benitez for Plaintiff, Cross-defendant and Respondent.

JUDGES: Opinion by Wiener, J., with Reed, J., * concurring. Separate concurring opinion by Staniforth, Acting P. J.

* Assigned by the Chairperson of the Judicial Council.

OPINION BY: WIENER

OPINION

[*477] [**116] Defendant FMC Corporation (FMC) appeals from the judgment entered in favor of plaintiff A & M Produce Co. (A & M) in [*478] the net sum of \$ 225,000 plus \$ 45,000 attorney's fees. ¹ Although this case has a rather humble origin arising from the simple business transaction in 1974 when FMC sold A & M an agricultural

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weight-sizing machine for \$ 32,000, the issues [***2] now require our traversing the labyrinthine complexities of the Uniform Commercial Code, only partially illuminated by California precedent. Because of the nature of this case, we believe it helpful to state the facts before describing the issues and the manner in which they are resolved.

1 For convenience, we have set out only the net amount of the judgment rounding off the figures here as elsewhere in the opinion. The judgment itself provides: "Plaintiff shall have judgment on its complaint against defendant in the sum of \$ 269,235.30 with interest at the rate of 7% from September 18, 1976; [para.] Plaintiff shall recover as reasonable attorney's fees from defendant the sum of \$ 45,000; [para.] defendant shall recover on his cross-complaint as on offset against plaintiff's judgment the sum of \$ 14,320 with interest at the rate of 7% from June 24, 1974."

[**117] I

A & M, a farming company in the Imperial Valley, is solely owned by C. Alex Abatti who has been farming all of his life. In late [***3] 1973, after talking with two of his employees, Mario Vanoni and Bill Billingsley, he decided to grow tomatoes. Although they had grown produce before, they had never grown tomatoes or any other crop requiring a weight-sizer and were not familiar with weight-sizing equipment. At the suggestion of Billingsley, they first spoke with a salesman from Decco Equipment Company regarding the purchase of the necessary equipment. The salesman explained A & M would need a hydrocooler in addition to a weight-sizer and submitted a bid of \$ 60,000 to \$ 68,000 for the equipment. Abatti thought the Decco bid was high, and Billingsley suggested Abatti contact FMC for a competitive bid.

In January 1974, A & M called FMC whose representative, John Walker, met with them at A & M's office. Walker admitted he was not an expert on the capacity or specifics of weight-sizing equipment. Later he brought Edgar Isch of FMC into the negotiations to assist in making the determination on the proper type of equipment. Isch did not say a hydrocooler was required. According to Abatti, Isch recommended FMC equipment because it operated so fast that a hydrocooler was unnecessary thereby saving A & M about \$ 25,000.

[***4] The parties discussed the capacity of the sizing equipment recommended by Isch. Walker and Isch proposed a preliminary bid of [*479] \$ 15,299.55 for the weight-sizer. They obtained Abatti's signature to a "field order" for the equipment to "secure Abatti's consent" to order the equipment. The field order did not state the final price nor list all the necessary material and equipment. The order was on a standard form, printed on both sides, the terms of which were identical to the written contract which Abatti later received. Along with the order, Abatti delivered his \$ 5,000 check as a deposit. Walker and Isch left a copy of the capacity chart for FMC weight-sizers which had been referred to in the negotiations.

The field order was sent to FMC where the proposed layout of the packing shed was analyzed by the engineering department, and a final list of essential materials was compiled. Abatti then received a copy of the form contract in the mail. It contained a list of all the equipment and materials being purchased, either typed in blanks on the front of the contract, or handwritten on an attached order sheet. The total bill was for \$ 32,041.80. An exact copy of the [***5] contract appears as an appendix to this opinion. (See *post*.)

For our purposes the provisions of the agreement which are important are: paragraph 3, "Seller's Remedies" outlining the buyer's obligation to pay seller's reasonable attorney's fees in connection with any defaults by the buyer; paragraph 4, "Warranty" containing a disclaimer of warranties, in bold print; and paragraph 5, "Disclaimer of Consequential Damages" stating in somewhat smaller print that "Seller in no event shall be liable for consequential damages arising out of or in connection with this agreement"

Abatti signed the agreement and returned it to FMC with his check for an additional \$ 5,680.60 as a down payment. He never paid the \$ 21,361.20 due "on delivery of equipment." In April 1974 FMC delivered and installed the machinery.

A 20-foot extension to A & M's packing house was required to house the equipment. A & M's problems with the FMC equipment began during the third week of May, when it started to pick the tomatoes. Tomatoes piled up in front of the singulator belt which separated the tomatoes for weight-sizing. Overflow tomatoes had to be sent through the machinery again, causing damage [***6] to the crop. The damage was aggravated because the tomatoes were not cooled by a hydrcocooler, allowing a fungus to spread more quickly within the damaged fruit. Walker was called out and managed to control the overflow by starting and stopping the machine. This effort was counterproductive, however, because it significantly reduced the processing [*480] speed. Unlike the Decco machinery, the FMC equipment did not have a speed control.

[**118] Abatti unsuccessfully attempted to get additional equipment from FMC and/or Decco. There was insufficient time to set up a new packing shed to hand-pick the tomatoes. Moreover, a search for other packing operators to handle A & M's tomatoes was unavailing. On June 17, A & M closed its shed because the return on the fruit -- some of which had been damaged -- was inadequate to cover costs. Some tomatoes were sold to a canning plant; most were rejected because they were not cannery tomatoes.

Shortly thereafter, A & M offered to return the weight-sizer to FMC provided FMC would refund A & M's down payment and pay the freight charges. FMC rejected this offer and demanded full payment of the balance due.

A & M then filed this action [***7] for damages against FMC for breach of express warranties, breach of implied warranty for a particular use and misrepresentation. A & M dismissed the misrepresentation cause of action at trial. By stipulation the trial was bifurcated to permit the judge to decide FMC's cross-complaint for the balance due on the purchase price and the issue of attorney's fees after the jury returned its verdict on the complaint.

This appeal is the result of a third trial. In the earlier two cases special verdict forms were used. The first case resulted in a hung jury; a new trial was ordered in the second.²

² This court has also seen this case before. The order granting a new trial was affirmed in *A & M Produce Co. v. FMC Corporation* (Aug. 31, 1979) 4 Civ. 18292 [unpub. opn.].

After hearing evidence presented to the jury, and additional evidence in the absence of the jury on the nature of the contract's formation and the bargaining position of the respective parties, the court ruled: "[It] would be unconscionable [***8] to enforce [the waivers of warranties and waiver of consequential damage] provisions of the agreement, and further that they are not set out in a conspicuous fashion.

"The Court's ruling is based on all of the circumstances in this case in connection with how the negotiations were conducted, the fact that [*481] initially a down payment of -- a substantial down payment of \$ 5,000 was made and later on the contract was signed." Accordingly, the jury viewed only the front of the contract, not the reverse side with its lengthy provisions.

The jury returned a general verdict for \$ 281,326 which the parties agreed to reduce by \$ 12,090.70, the amount already paid to FMC for the machinery. The court found for FMC on its cross-complaint, but awarded plaintiff \$ 45,000 in attorney's fees and prejudgment interest from September 18, 1976.

II

The history of this litigation reveals a grueling and time consuming path. The inability of the jury in two earlier trials to successfully resolve the issues in dispute is not totally surprising. The evidentiary record is long and complex; the intricacies of commercial agricultural technology are not easy to comprehend. To compound the difficulties, [***9] the court was required to make several preliminary fact determinations as the predicate for ruling on legal motions. To

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a significant extent, these preliminary factual questions overlap the critical factual issues before the jury and correspondingly increase the importance of the trial judge's role. We wish to stress the factual nature of the issues substantially limits our appellate role. Where the resolution of several key legal issues turns largely on inferences drawn from the facts presented, we are hesitant to interfere with the sound judgment of the trial court.

The major issues in this case involve the validity of FMC's purported disclaimer of warranties and limitation on the buyer's ability to recover consequential damages resulting from a breach of warranty.³ Resolution [*482] [**119] of both these issues turns largely on the proper application of the doctrine of unconscionability, which the trial court utilized in precluding enforcement of the warranty disclaimer and the consequential damage limitation. Although FMC concedes that California Uniform Commercial Code section 2719⁴ allows a court under proper circumstances to declare a consequential damage limitation [***10] unconscionable, it argues that unconscionability is inapplicable to disclaimers of warranty, being supplanted by the more specific policing provisions of section 2316. We conclude otherwise, however, and turn our attention to the nature of this often-amorphous legal doctrine, outlining the analytic framework to be used in determining whether a particular contractual provision is unconscionable. That framework is then utilized in finding that the facts of this case, involving a preprinted form sales contract, support the trial court's conclusion that both the disclaimer of warranties and the limitation on consequential damages were unconscionable. We also reject FMC's argument that the consequential damages alleged by A & M were too speculative to be the basis for any damage award.

³ There exists some considerable confusion between the concept of disclaiming warranties and the concept of limiting or excluding remedies for breach of warranty. (See discussion in White and Summers, Uniform Commercial Code (2d ed. 1980) § 12-11, pp. 471-472.) The former subject deals with the seller's attempt to limit the situations for which he can be held liable for breach. The latter subject assumes a breach has been established but attempts to limit the remedies available to the complaining party. In the instant contract, for example, we find much language located in the "Warranty" section which actually amounts to limitations on remedies available to the buyer. When the terms are properly sorted out, the only warranty appearing in the written document is that the material and workmanship of new equipment will be free from defects for various specified periods of time. Other language in the section purports to limit the remedy for breach of this single warranty to repair or replacement of defective parts, provided the buyer pays for shipping the equipment to the seller and back at the seller's request. (See appen., *post*.)

[***11]

⁴ All statutory references are to the California Uniform Commercial Code unless otherwise indicated.

We then proceed to examine FMC's final contentions relating to the trial court's decision to award attorney's fees and prejudgment interest to A & M, concluding that the claimed breach of warranty is an "action on a contract" within the meaning of California's reciprocal attorney's fees statute, Civil Code section 1717, and that the trial court properly exercised its discretion under Civil Code section 3287, subdivision (b) in awarding prejudgment interest. Accordingly the judgment must be affirmed.

III

FMC's initial attack on the judgment alleges prejudicial error by the trial court in not allowing the jury to see the reverse side of the written agreement which contained both a disclaimer of all warranties as well as a provision stating that in the event a warranty was made, the buyer was precluded from recovering consequential damages resulting from a breach of the warranty. (1) (See fn. 5.) The trial court's decision to exclude evidence of the contents of the agreement's reverse side [***12] was based on its determination that the warranty disclaimer and the consequential damage exclusions were unconscionable and therefore unenforceable.⁵ (2) (See fn. 6.) If this determination was correct -- [**120] that is, if the [*483] trial court properly applied the unconscionability doctrine to the facts of this case -- then the reverse side of the contract was appropriately withheld from the jury.⁶

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5 The court's ruling was also based on the inconspicuousness of the disclaimer and exclusion provisions. (See *ante*, p. 482.) As to the disclaimer of warranty, we agree with FMC that a disclaimer printed in boldface type twice as large as the other terms of the agreement is conspicuous. [HN1] Section 1201, subdivision (10), specifically provides: "A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: Nonnegotiable Bill of Lading) is conspicuous. *Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color.*" (*Italics added.*) This definition by its terms precludes the trial court's ruling on this issue. (See *FMC Finance Corp. v. Murphree* (5th Cir. 1980) 632 F.2d 413, 419.)

In contrast to the provisions of section 2316, subdivision (2), which require that a warranty disclaimer be conspicuous, the code imposes no similar requirement as to consequential damage limitations. This is not to say the conspicuousness of such a term is irrelevant; rather, it is one of several factors bearing on the procedural unconscionability of the limitation. (See *post*, pp. 485-486.) It will therefore be considered in that context rather than as an independent basis for denying enforcement to the consequential damage exclusion.

***13]

6 FMC has also argued that even if the disclaimer of warranty was unconscionable, evidence of the disclaimer clause's presence in the contract was admissible to suggest that no warranty was ever created by action of the parties. But assuming the unconscionability of the disclaimer, its value toward proving the factual proposition that no warranty was created is slight, and substantially outweighed by the disclaimer's tendency to unfairly prejudice and mislead the jury. (Evid. Code, § 352.)

A

(3) Acknowledging that a limitation on consequential damages may be unconscionable (§ 2719, subd. (3)), ⁷ FMC asserts the trial court erred in applying that doctrine to the disclaimer of warranties. It contends unconscionability is irrelevant to warranty disclaimer provisions, having been eliminated by the specific statutory requirements of section 2316. ⁸ (See *White and Summers, supra*, at pp. 475-481; *Leff, Unconscionability and the Code -- The Emperor's New Clause* (1967) 115 [*484] U.Pa.L.Rev. 485, 516-528.) Alternatively, FMC suggests the California Legislature's failure to adopt the [*14] general Uniform Commercial Code section on unconscionability (§ 2-302) as part of California's Uniform Commercial Code precludes the trial court's reliance on the doctrine in this instance. ⁹

7 [HN2] Subdivision (3) of section 2719 provides: "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is invalid unless it is proved that the limitation is not unconscionable. Limitation of consequential damages where the loss is commercial is valid unless it is proved that the limitation is unconscionable."

8 [HN3] Section 2316 provides in relevant part: "(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this division on parol or extrinsic evidence (Section 2202) negation or limitation is inoperative to the extent that such construction is unreasonable.

"(2) Subject to subdivision (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, . . . Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'"

***15]

9 [HN4] Section 2-302 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."

While FMC's argument is not without force, we conclude that [HN5] an unconscionable disclaimer of warranty may be denied enforcement despite technical compliance with the requirements of section 2316. (See *FMC Finance Corp. v. Murphree, supra*, 632 F.2d at p. 420.) Unconscionability is a flexible doctrine designed to allow courts to directly consider numerous factors which may adulterate the contractual process. Uniform Commercial [*16] Code section

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2-302 specifies that "any clause of the contract" may be unconscionable. The policing provisions of section 2316 are limited to problems involving the visibility of disclaimers and conflicts with express warranties. But oppression and unfair surprise, the principal targets of the unconscionability doctrine (see *post*, pp. 485-486), may result from other types of questionable commercial practices. Moreover, the subtle distinction between an "implied" warranty and an "express" warranty may do precious little to mitigate the exploitation of a party with inferior bargaining power. Yet as long as the warranty remains "implied," section 2316's policing provisions are ineffective.

[**121] FMC's contention regarding the status of the unconscionability doctrine in California is similarly unpersuasive. Unconscionability has long been recognized as a common law doctrine which has been consistently applied by California courts in the absence of specific statutory authorization. (See *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807 [171 Cal.Rptr. 604, 623 P.2d 165]; *Steven v. Fidelity & Casualty Co.* (1962) 58 Cal.2d 862, 879 [27 Cal.Rptr. 172, 377 ***17] P.2d 284.) And although the Legislature did not adopt section 2-302 as part of California's version of the Uniform Commercial Code (see Cal.Code com., 23A West's Ann. Cal. U. Com. Code (1964 ed.) § 2302, pp. 195-198), [*485] the identical language, complete with accompanying commentary, was recently enacted as section 1670.5 of the Civil Code. (See *Graham, supra*, 28 Cal.3d at p. 820, fn. 19.) The only significant difference is that section 1670.5, placed under the "Unlawful Contracts" heading of division 3, part 2, title 4 of the Civil Code, applies to all contracts rather than being limited to those sales transactions governed by the Commercial Code. We think the trial court properly entertained A & M's arguments directed at the unconscionability of both the consequential damage exclusion and the warranty disclaimer.¹⁰

¹⁰ Even were we to accept FMC's position that a warranty disclaimer may not be declared unconscionable, we believe the trial court's decision was harmless error under the circumstances of this case. Subdivision (1) of section 2316 (see *ante*, fn. 8), which FMC admits is applicable, specifically provides that an express warranty takes precedence over an attempted disclaimer where the two are not reasonably reconcilable and where evidence of the express warranty is not precluded by the parol evidence rule. (See § 2202.) At trial, A & M attempted to prove that FMC breached both the implied warranty of fitness for a particular purpose (see § 2315) which may be negated by a conspicuous disclaimer (§ 2316, subd. (2)), and various express warranties made by FMC personnel which may not be disclaimed. But after our "examination of the entire cause, including the evidence" (Cal. Const., art. VI, § 13), we do not think it reasonably probable the jury could have found breach of an implied warranty without also finding breach of an express one. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243]; *Alarid v. Vanier* (1958) 50 Cal.2d 617, 625 [327 P.2d 897].) Under such circumstances, even had evidence of the disclaimer been before the jury, section 2316 would require them to disregard it where it conflicted with the express warranty.

Our conclusion that any error was harmless is supported by a record which contains more than ample evidence that FMC expressly warranted its weight-sizing machine would pack 1200-1250 cartons per hour. The major dispute in the testimony concerned what size cartons the warranty applied to. Thus, the question was not so much whether an express warranty had been made, but rather whether the warranty had been breached. In addition, there was no impediment to proof of the express warranty in view of the trial court's implied finding that the parties did not intend the preprinted form contract drafted by FMC to be the "final expression of their agreement with respect to such terms as are included therein . . ." (§ 2202.)

[***18] B

We now turn to the principal question involved in this appeal: Whether the trial court erred in concluding that FMC's attempted disclaimer of warranties and exclusion of consequential damages was unconscionable and therefore unenforceable. Before we can answer that question however, we must first concern ourselves with the nature of the unconscionability doctrine.

(4) The Uniform Commercial Code does not attempt to precisely define what is or is not "unconscionable." (See *Kugler v. Romain* [*486] (1971) 58 N.J. 522 [279 A.2d 640, 651].) Nevertheless, [HN6] "[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." (*Williams v. Walker-Thomas Furniture Company* (D.C.Cir. 1965) 350 F.2d 445, 449, fn. omitted.) Phrased another way, unconscionability has both a "procedural" and a "substantive" element. (*Industrialease Automated & Scientific Eq. Corp. V.R.M.B. Enterprises, Inc.* (1977) 58

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App.Div.2d 482 [396 N.Y.S.2d 427, 431, fn. 4]; see also Leff, *supra*, 115 U.Pa.L.Rev. at p. 487; White and Summers, *supra* [***19], § 4-3 at p. 151.)

[HN7] The procedural element focuses on two factors: "oppression" and "surprise." [**122] (See U. Com. Code com. No. 1, 23A West's Ann. Cal. U. Com. Code, *supra*, § 2302, p. 198; *Geldermann and Company, Inc. v. Lane Processing, Inc.* (8th Cir. 1975) 527 F.2d 571, 575.) "Oppression" arises from an inequality of bargaining power which results in no real negotiation and "an absence of meaningful choice." (*Williams v. Walker-Thomas Furniture Company, supra*, 350 F.2d at p. 449; *Fleischmann Distilling Corp. v. Distillers Co. Ltd.* (S.D.N.Y. 1975) 395 F.Supp. 221, 232; see Spanogle, *Analyzing Unconscionability Problems* (1969) 117 U.Pa.L.Rev. 931, 944-946.) "Surprise" involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms. (See Ellinghaus, *In Defense of Unconscionability* (1969) 78 Yale L.J. 757, 764-765; Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)* (1977) 65 Cal.L.Rev. 28, 43; Spanogle, *supra*, 117 U.Pa.L.Rev. at pp. 934-935, 943.) Characteristically, the form contract [***20] is drafted by the party with the superior bargaining position. (See Calamari and Perillo, *Contracts* (2d ed. 1977) § 9-40, p. 325.)

[HN8] Of course the mere fact that a contract term is not read or understood by the nondrafting party or that the drafting party occupies a superior bargaining position will not authorize a court to refuse to enforce the contract. Although an argument can be made that contract terms not actively negotiated between the parties fall outside the "circle of assent" ¹¹ which constitutes the actual agreement (see Eddy, *supra*, [**487] 65 Cal.L.Rev. at p. 43), commercial practicalities dictate that unbargained-for terms only be denied enforcement where they are also *substantively* unreasonable. (Ellinghaus, *supra*, 78 Yale L.J. at pp. 766-767; Murray on Contracts, *supra*, at pp. 748-749.) No precise definition of substantive unconscionability can be proffered. Cases have talked in terms of "overly harsh" or "one-sided" results. (See, e.g., *Schroeder v. Fageol Motors, Inc.* (1975) 86 Wn.2d 256 [544 P.2d 20, 23]; *Weaver v. American Oil Company* (1972) 257 Ind. 458 [276 N.E.2d 144, 146, 49 A.L.R.3d 306].) One commentator has pointed [***21] out, however, that ". . . unconscionability turns not only on a 'one-sided' result, but also on an absence of 'justification' for it." (Eddy, *supra*, 65 Cal.L.Rev. at p. 45), which is only to say that substantive unconscionability must be evaluated as of the time the contract was made. (See U. Com. Code, § 2-302.) The most detailed and specific commentaries observe that [HN9] a contract is largely an allocation of risks between the parties, and therefore that a contractual term is substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner. (Murray, *Unconscionability: Unconscionability* (1969) 31 U.Pitt.L.Rev. 1, 12-23; see also Eddy, *supra*, 65 Cal.L.Rev. at pp. 45-51; *Geldermann and Company, Inc. v. Lane Processing, Inc., supra*, 527 F.2d at p. 576.) But not all unreasonable risk reallocations are unconscionable; rather, enforceability of the clause is tied to the procedural aspects of unconscionability (see *ante*, pp. 485-486) such that the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk reallocation which will be tolerated. (See Spanogle, *supra*, 117 U.Pa.L.Rev. [***22] at pp. 950, 968.)

¹¹ In the words of Professor Murray: "One of the fundamental concepts of contract law is the concept of *assent*. The basic idea that parties exercise their volition by committing themselves to future action and that the law provides their *circle of assent* with the status of a private law is fundamental to any discussion of contracts. The two basic questions raised are: (1) Did the parties agree to any future action or inaction? (2) If they did agree, what are the terms of their agreement (or, what is their circle of assent)?" (Murray on Contracts (2d ed. 1974) § 352, p. 743; first italics in original, second italics added.)

Although there is little California precedent directly on point, the importance of both the procedural and substantive elements of unconscionability finds support by analogy in the recent decision by the Supreme Court in *Graham v. Scissor-Tail, Inc., supra*, 28 Cal.3d 807 ¹². [**123] Graham, a music promoter, booked concerts for a group of musicians [***23] incorporated under the name of "Scissor-Tail." A standard form contract [**488] drafted by the musicians' union provided that the arbitrator for all contract disputes was to be selected by the union. Graham challenged enforcement of the clause, arguing that an arbitrator so selected was presumptively biased in favor of the musicians.

135 Cal. App. 3d 473, *488; 186 Cal. Rptr. 114, **123;
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12 Although the contract in *Graham* was not governed by the Uniform Commercial Code, and although much of the court's discussion is phrased in noncode terminology, the similarity of factors considered leads to the conclusion that unconscionability is a doctrine fundamental to the operation of contract law, irrespective of the particular application. In apparent recognition of this fact, the Legislature's belated decision to adopt Uniform Commercial Code section 2-302 codifies the unconscionability doctrine in Civil Code section 1670.5, applicable to all types of contracts, rather than as part of the Commercial Code. (See *ante*, p. 484.)

The court first determined that [***24] the contract was one of adhesion, noting that although Graham was a prominent and successful rock music promoter, the union -- which represented nearly all significant musicians -- mandated that promotion agreements be "negotiated" pursuant to standard union-prepared contracts. In language closely approximating the "unequal bargaining power" prong of the procedural unconscionability factor, the court concluded that Graham ". . . was required by the realities of his business as a concert promoter to sign [union] form contracts with *any* concert artist with whom he wished to do business" (*Graham*, supra, 28 Cal.3d at pp. 818-819, italics in original.)

Moving next to a discussion paralleling the "unfair surprise" prong of procedural unconscionability, the court determined that Graham was not surprised by the inclusion of the arbitration clause. It relied on the course of dealing between the parties as well as Graham's vast experience in the music industry in concluding that neither the inclusion of the arbitration clause nor its effect were outside of Graham's "reasonable expectations." (*Graham*, supra, 28 Cal.3d, at p. 821.)

Finally, in a discourse resembling substantive [***25] unconscionability analysis, the court indicated that "contractual machinery [must] operate within some minimal levels of integrity." (*Graham*, supra, 28 Cal.3d, at p. 825, quoting *Hines v. Anchor Motor Freight* (1976) 424 U.S. 554, 571 [47 L.Ed.2d 231, 245, 96 S.Ct. 1048].) The contract in *Graham* did not attain this "minimal level" because the arbitration clause left the "adhering" party without any real and fair opportunity to prevail in the event of a contractual dispute. (*Ibid.*) In the language of substantive unconscionability, all the risks were allocated to Graham who was forced to accept the contract without negotiation. Not surprisingly, the court's conclusion denying enforcement to the arbitration clause on unconscionability grounds ties procedural and substantive elements together: "[We] are of the view that the 'minimum levels of integrity' which are requisite to a contractual arrangement for the nonjudicial resolution of disputes are not achieved by an arrangement which designates the union of one of the parties as the arbitrator of disputes arising out of employment -- especially when, as here, the arrangement is the product of circumstances [***26] indicative of adhesion." (*Id.*, at pp. 826-827.)

[*489] C

(5) With these considerations in mind, we must now determine whether the trial court in this case was correct in concluding that the clauses in the FMC form contract disclaiming all warranties and excluding consequential damages were unconscionable. In doing so, we keep in mind that [HN10] while unconscionability is ultimately a question of law, numerous factual inquiries bear upon that question. (See *Royal Indemnity Co. v. Westinghouse Electric Corp.* (S.D.N.Y. 1974) 385 F.Supp. 520, 524; *Zicari v. Joseph Harris Co.* (1969) 33 App.Div.2d 17 [304 N.Y.S.2d 918, 925].) The business conditions under which the contract was formed directly affect the parties' relative bargaining power, reasonable expectations, and the commercial reasonableness of the risk allocation [***124] as provided in the written agreement. [HN11] To the extent there are conflicts in the evidence or in the factual inferences which may be drawn therefrom, we must assume a set of facts consistent with the court's finding of unconscionability if such an assumption is supported by substantial evidence.

Turning first to the procedural aspects of unconscionability, [***27] we note at the outset that this contract arises in a commercial context between an enormous diversified corporation (FMC) and a relatively small but experienced farming company (A & M). Generally, ". . . courts have not been solicitous of businessmen in the name of unconscionability."

135 Cal. App. 3d 473, *489; 186 Cal. Rptr. 114, **124;
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(White and Summers, *supra*, § 4-9 at p. 170; see also, e.g., *Fleischmann Distilling Corp. v. Distillers Co. Ltd.*, *supra*, 395 F.Supp. at p. 233.) This is probably because courts view businessmen as possessed of a greater degree of commercial understanding and substantially more economic muscle than the ordinary consumer. Hence, a businessman usually has a more difficult time establishing procedural unconscionability in the sense of either "unfair surprise" or "unequal bargaining power."

Nevertheless, generalizations are always subject to exceptions and categorization is rarely an adequate substitute for analysis. With increasing frequency, courts have begun to recognize that experienced but legally unsophisticated businessmen may be unfairly surprised by unconscionable contract terms (see, e.g., *Weaver v. American Oil Company*, *supra*, 276 N.E.2d 144; *Schroeder v. Fageol Motors, Inc.*, *supra*, 544 P.2d at p. 24), and that even large business entities may have *relatively* little bargaining power, depending on the identity of the other contracting party and the commercial circumstances surrounding [*490] the agreement. (See, e.g., *Graham v. Scissor-Tail, Inc.*, *supra*, 28 Cal.3d at pp. 818-819; *Allen v. Michigan Bell Telephone Company* (1969) 18 Mich.App. 632 [171 N.W.2d 689, 693]; *Industralase Automated & Scientific Eq. Corp., etc.*, *supra*, 396 N.Y.S.2d at p. 432.) This recognition rests on the conviction that the social benefits associated with freedom of contract are severely skewed where it appears that had the party actually been aware of the term to which he "agreed" or had he any real choice in the matter, he would never have assented to inclusion of the term. (See *Kugler v. Romain*, *supra*, 279 A.2d at p. 652.)

Both aspects of procedural unconscionability appear to be present on the facts of this case. Although the printing used on the warranty disclaimer was conspicuous (see *ante*, fn. 6), the terms of the consequential damage exclusion are not particularly apparent, being only slightly larger than most of the [***29] other contract text. Both provisions appear in the middle of the back page of a long preprinted form contract which was only casually shown to Abatti. It was never suggested to him, either verbally or in writing, that he read the back of the form. Abatti testified he never read the reverse side terms. There was thus sufficient evidence before the trial court to conclude that Abatti was in fact surprised by the warranty disclaimer and the consequential damage exclusion. How "unfair" his surprise was is subject to some dispute. He certainly had the opportunity to read the back of the contract or to seek the advice of a lawyer. Yet as a factual matter, given the complexity of the terms and FMC's failure to direct his attention to them, Abatti's omission may not be totally unreasonable. In this regard, the comments of the Indiana Supreme Court in *Weaver v. American Oil Company*, *supra*, 276 N.E.2d at pages 147-148 are apposite: "The burden should be on the party submitting [a standard contract] in printed form to show that the other party had knowledge of any unusual or unconscionable terms contained therein. The principle should be the same as that applicable to implied [***30] warranties, namely that a package of goods sold to a purchaser is fit for the purposes intended and contains no harmful materials other than that represented." (See also *Steele v. J. I. Case Company* (1966) 197 Kan. 554 [419 P.2d 902, 910].) Here, FMC made no attempt to provide A [**125] & M with the requisite knowledge of the disclaimer or the exclusion. In fact, one suspects that the length, complexity and obtuseness of most form contracts may be due at least in part to the seller's preference that the buyer will be dissuaded from reading that to which he is supposedly agreeing. This process almost inevitably [*491] results in a one-sided "contract." (See *Klein v. Asgrow Seed Co.* (1966) 246 Cal.App.2d 87, 97 [54 Cal.Rptr. 609].)

Even if we ignore any suggestion of unfair surprise, there is ample evidence of unequal bargaining power here and a lack of any real negotiation over the terms of the contract. Although it was conceded that A & M was a large-scale farming enterprise by Imperial Valley standards, employing 5 persons on a regular basis and up to 50 seasonal employees at harvest time, and that Abatti was farming some 8,000 acres in 1974, FMC Corporation [***31] is in an entirely different category. The 1974 gross sales of the Agriculture Machinery Division alone amounted to \$ 40 million. More importantly, the terms on the FMC form contract were standard. FMC salesmen were not authorized to negotiate any of the terms appearing on the reverse side of the preprinted contract.¹³ Although FMC contends that in some special instances, individual contracts are negotiated, A & M was never made aware of that option. The sum total of these circumstances leads to the conclusion that this contract was a "bargain" only in the most general sense of the word. (See *Steele v. J. I. Case Company*, *supra*, 419 P.2d at p. 909.)

135 Cal. App. 3d 473, *491; 186 Cal. Rptr. 114, **125;
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13 The transcript of FMC salesman John Walker's testimony reads as follows:

"Q. All right. Now do you negotiate the terms of those contracts, or are they preprinted and that's the way you use them?"

"A. They are sent by our legal department, with the exception of payment terms are negotiable, but not the 'Whereases' and Wherefores.

"Q. So you don't separately negotiate the terms on the back and the other terms, other than payment terms?"

"A. I'm not empowered to do that, sir."

[***32] Although the procedural aspects of unconscionability are present in this case, we suspect the substantive unconscionability of the disclaimer and exclusion provisions contributed equally to the trial court's ultimate conclusion. As to the disclaimer of warranties, the facts of this case support the trial court's conclusion that such disclaimer was commercially unreasonable. The warranty allegedly breached by FMC went to the basic performance characteristics of the product. In attempting to disclaim this and all other warranties, FMC was in essence guarantying nothing about what the product would do. Since a product's performance forms the fundamental basis for a sales contract, it is patently unreasonable to assume that a buyer would purchase a standardized mass-produced product from an industry seller without any enforceable performance standards. From a social perspective, risk of loss is most appropriately borne by the party best able to prevent its occurrence. [*492] (*Escola v. Coca Cola Bottling Co.* (1944) 24 Cal.2d 453, 462 [150 P.2d 456] (conc. opn. of Traynor, J.); *Rodgers v. Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 618 [124 Cal.Rptr. 143]; [***33] *Holmes*, *The Common Law* (1881) p. 117.) Rarely would the buyer be in a better position than the manufacturer-seller to evaluate the performance characteristics of a machine.

In this case, moreover, the evidence establishes that A & M had no previous experience with weight-sizing machines and was forced to rely on the expertise of FMC in recommending the necessary equipment. FMC was abundantly aware of this fact. The jury here necessarily found that FMC either expressly or impliedly guaranteed a performance level which the machine was unable to meet. Especially where an inexperienced buyer is concerned, the seller's performance representations are absolutely necessary to allow the buyer to make an intelligent choice among the competitive options available. A seller's attempt, through the use of a disclaimer, to prevent the buyer from reasonably relying on such representations calls into question the commercial reasonableness of the agreement and may well be substantively unconscionable. [*126] The trial court's conclusion to that effect is amply supported by the record before us.

As to the exclusion of consequential damages, several factors combine to suggest that the exclusion [***34] was unreasonable on the facts of this case. Consequential damages are a commercially recognized type of damage actually suffered by A & M due to FMC's breach.¹⁴ [HN12] A party ". . . should be able to rely on their existence in the absence of being informed to the contrary, . . ." (*Schroeder v. Fageol Motors, Inc.*, *supra*, 544 P.2d at p. 24.) This factor is particularly important given the commercial realities under which the contract was executed. If the seller's warranty was breached, consequential damages were not merely "reasonably foreseeable"; they were explicitly obvious. All parties were aware that once the tomatoes began to ripen, they all had to be harvested and packed within a relatively short period of time. (See *Steele v. J. I. Case Company*, *supra*, 419 P.2d at p. 910; see also *Wille v. Southwestern* [*493] *Bell Telephone Company* (1976) 219 Kan. 755 [549 P.2d 903, 908].)

14 [HN13] In the absence of an exclusion, the code provides that consequential damages are generally recoverable. (§§ 2714, subd. (3) and 2715, subd. (2).) The general rule regarding limitations on available remedies was stated by the court in *Chemtron Corporation v. McLouth Steel Corporation* (N.D.Ill. 1974) 381 F.Supp. 245, 250: "While parties may agree to limit the remedies for breach of their contract, the policy of the Uniform Commercial Code disfavors limitations and specifically provides for their deletion if they would act to deprive a contracting party of reasonable protection against breach." (Fn. omitted.)

[***35] Another factor supporting the trial court's determination involves the avoid ability of the damages and relates

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directly to the allocation of risks which lies at the foundation of the contractual bargain. It has been suggested that "[risk] shifting is socially expensive and should not be undertaken in the absence of a good reason. An even better reason is required when to so shift is contrary to a contract freely negotiated." (*S. M. Wilson & Co. v. Smith Intern., Inc.* (9th Cir. 1978) 587 F.2d 1363, 1375.) But as we noted previously, FMC was the only party reasonably able to prevent this loss by not selling A & M a machine inadequate to meet its expressed needs.¹⁵ (See *ante*, p. 491.) "If there is a type of risk allocation that should be subjected to special scrutiny, it is probably the shifting to one party of a risk that *only* the other party can avoid." (*Eddy, supra*, 65 Cal.L.Rev. at p. 47, italics in original.)

¹⁵ We recognize that a buyer may be able to restrict the *amount* of consequential damages, but the Code already imposes a duty to mitigate damages. (See § 2715, subd. (2)(a).) In any event there is no contention here that any actions by A & M artificially inflated the consequential loss suffered.

[***36] In summary, our review of the totality of circumstances in this case, including the business environment within which the contract was executed, supports the trial court's determination that the disclaimer of warranties and the exclusion of consequential damages in FMC's form contract were unconscionable and therefore unenforceable. [HN14] When nonnegotiable terms on preprinted form agreements combine with disparate bargaining power, resulting in the allocation of commercial risks in a socially or economically unreasonable manner, the concept of unconscionability as codified in Uniform Commercial Code sections 2-302 and 2-719, subdivision (3), furnishes legal justification for refusing enforcement of the offensive result.

IV

(6) FMC claims that even if the disclaimer of consequential damages is invalid, the damage award should be set aside because it is speculative. [HN15] Civil Code section 3301 provides that "[no] damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." The general rule under this statute is that "... [HN16] where the operation of an unestablished business is prevented or [*494] interrupted, damages for prospective [***37] profits that might otherwise have been made from its operation are not recoverable for the [**127] reason that their occurrence is uncertain, contingent and speculative." (*Grupe v. Glick* (1945) 26 Cal.2d 680, 693 [160 P.2d 832].) However, *Grupe*, which FMC cites, also stands for the exception to the rule: "[A]nticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability." (*Ibid.*)

FMC does not argue on appeal that the evidence the trial court heard on the issue was itself speculative. That evidence included size of the crop and market price of the type of tomato A & M grew. Although A & M had never grown tomatoes before, Abatti was an experienced farmer. Moreover, the crop itself was in good condition at harvest time. There was no evidence of crop damage from harvesting to those tomatoes actually picked, nor was there any evidence that transportation of the crop would have posed a problem. These circumstances make the exception to the rule applicable and provide ample support for the trial court's decision to allow the award of consequential damages.

V

(7) FMC asserts that A [***38] & M did not prevail on an action to enforce the written agreement and therefore that the trial court erred in awarding A & M attorney's fees under California reciprocal attorney's fee statute, Civil Code section 1717.¹⁶ FMC relies on *McKenzie v. Kaiser-Aetna* (1976) 55 Cal.App.3d 84 [127 Cal.Rptr. 275] in arguing that an action based on breach of either an express oral or implied warranty is not an action "to enforce the provisions of [the] contract" within the meaning of Civil Code section 1717 since the written contract which contains the attorney's fee provision says nothing about a warranty. (See also *Stout v. Turney* (1978) 22 Cal.3d 718, 730 [150 Cal.Rptr. 637, 586 P.2d 1228]; *Walters v. Marler* (1978) 83 Cal.App.3d 1, 27-28 [147 Cal.Rptr. 655].)

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16 [HN17] That section provides in relevant part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of that contract, shall be awarded either to one of the parties, or to the prevailing party, then the party who is determined to be the prevailing party, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements."

[***39] The underlying merits of *McKenzie* to one side (compare *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 37 [161 Cal.Rptr. 516]), FMC completely [*495] misreads the case. *McKenzie* involved an action presented to the jury on alternative theories of breach of express warranty, breach of implied warranty and negligent misrepresentation. The jury returned a general verdict in plaintiff's favor. The court concluded that ". . . negligent misrepresentation is not an action to enforce the provisions of a contract. As the jury may have awarded its verdict to appellant on the basis of the negligent misrepresentation theory, appellant cannot recover attorney's fees under section 1717." (*McKenzie, supra*, 55 Cal. App.3d at p. 89.)

Since this case was not presented to the jury on a negligent misrepresentation theory, the holding in *McKenzie* is simply inapplicable. In fact, *McKenzie* can reasonably be read to support the trial court's action here in its implicit suggestion that a jury verdict based on breach of an expressed or implied warranty would have supported the attorney's fee award. (*Ibid.*) That implicit conclusion is entirely correct. The fact that [***40] a warranty is not stated in the written memorandum does not mean it is not part of the contract. Section 1201, subdivision (11) of the California Uniform Commercial Code itself defines "contract" broadly to include anything which affects the legal obligation of the parties. 17 The parties' "total legal obligation" may be a composite of written terms, oral expression and responsibilities [**128] implied by law. All may be enforced by an "action on [the] contract," and the trial court here correctly concluded that Civil Code section 1717 allowed A & M's recovery of attorney's fees. 18

17 That subdivision reads: "'Contract' means the total legal obligation which results from the parties' agreement as affected by this code and any other applicable rules of law."

18 In view of the fact that FMC prevailed on its cross-complaint, we see nothing to preclude application of the same rule in FMC's favor for the portion of its attorney's fees incurred in prosecuting the cross-complaint. It is, of course, for the trial court to determine, on proper application, the reasonable value of the services rendered on that part of the case.

[***41] VI

(8) As its final contention, FMC challenges the trial court's exercise of discretion under Civil Code section 3287, subdivision (b), in awarding prejudgment interest to A & M. 19 Relying on the complex nature of [*496] the case, the previous jury verdict in favor of FMC which was overturned after the court in the second trial granted A & M's motion for a new trial, 20 and the fact that the exact amount of A & M's damages was in dispute, FMC argues that the award of prejudgment interest was inappropriate.

19 [HN18] Subdivision (b) of Civil Code section 3287 provides: "Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed."

20 This characterization is a bit misleading. The jury in the second trial determined that FMC had breached its warranty to A & M but concluded that this breach was not the cause of A & M's damages. The trial judge found the jury's reasoning inconsistent on the facts of the case and granted A & M's motion for a new trial.

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[***42] Before 1967, Civil Code section 3287 (now subd. (a) of that section) provided for the recovery of prejudgment interest only where damages were ". . . certain, or capable of being made certain by calculation" A 1967 amendment added subdivision (b) which, in contrast to the mandatory nature of subdivision (a), granted *discretion* to the trial court to allow prejudgment interest even in cases where the amount of damages was "unliquidated." Thus, by its very terms, subsection (b) was designed to allow trial courts flexibility in circumstances like those in the present case where the exact amount of damage is in dispute. (See *Moreno v. Jessup Buena Vista Dairy* (1975) 50 Cal.App.3d 438, 448 [123 Cal.Rptr. 393]; *Zalk v. General Exploration Co.* (1980) 105 Cal.App.3d 786, 794-795 [164 Cal.Rptr. 647].)

Few cases have discussed the standards by which a trial court's exercise of discretion under Civil Code section 3287, subdivision (b) are to be judged. (See generally *Esgro Central, Inc. v. General Ins. Co.* (1971) 20 Cal.App.3d 1054, 1065 [98 Cal.Rptr. 153].) Nonetheless, we believe several of the factors cited by the trial court support its decision [***43] to award prejudgment interest here. First, over seven years passed between the time A & M filed its first complaint and the time judgment was entered. The fact that the hung jury in the first trial or the granting of the new trial motion after the second trial was not FMC's "fault" is irrelevant. The award of 7 percent interest to A & M does not penalize FMC for litigating a bona fide dispute; rather, it is merely a recognition of an additional amount of damage incurred by A & M as a result of FMC's breach of warranty. The judgment in this action reflects a conclusion that FMC was liable to A & M for the economic loss of A & M's 1974 tomato crop. Were the judicial process devoid of transaction costs, A & M would have been entitled to reimbursement in 1974. FMC can hardly complain that these transaction costs have essentially allowed it to borrow over \$ 325,000 from A & M for 7 years at 7 percent per year. The trial court was permitted to take cognizance of the exceedingly higher market interest rates during this period in exercising its discretion to award prejudgment interest.

[*497] In addition, A & M's 1974 offer to settle the case provides more support for [**129] [***44] the trial court's conclusion. In June of that year, A & M offered to return the weight-sizer to FMC if FMC would refund the down payment and pay the freight charges. To be sure, FMC was free to refuse this offer in good faith reliance on its position that the disclaimers and exclusions on the preprinted form contract made A & M's claim untenable. In our view, however, the trial court was permitted to view FMC's refusal of A & M's offer as placing the prejudgment interest amount at risk. (Compare *Elliano v. Assurance Co. of America* (1975) 45 Cal.App.3d 170, 182-183 [119 Cal.Rptr. 653].) It having been determined that A & M's claim was valid, the trial court properly exercised its discretion in awarding prejudgment interest.

The judgment is affirmed.

CONCUR BY: STANIFORTH

CONCUR

STANIFORTH, Acting P.J. I concur for the following reasons:

The trial court found the FMC form contract clauses disclaiming warranties and limiting damages were unconscionable. The issue on appeal is whether this finding is supported by substantial evidence. If the trial court's application of the doctrine of unconscionability is supported by substantial evidence, it was correct in keeping the [***45] reverse side of the contract from the jury. (See Civ. Code, § 1670.5 and comments.)

Facts fly as "thick as autumnal leaves that strow the brooks of Vallombrosa," in support of the trial court's conclusion these contract clauses were oppressive, contrary to oral representations made to induce the purchase, and unreasonably favorable to the party with a superior bargaining position. No experienced farmer would spend \$ 32,000 for equipment which could not process his tomatoes before they rot and no fair and honest merchant would sell such equipment with representations negated in its own sales contract.

[*498] APPENDIX [SEE FORM IN ORIGINAL]