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## Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements

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# **MUCH ADO ABOUT NOTHING?: WHAT THE NUMBERS TELL US ABOUT HOW STATE COURTS APPLY THE UNCONSCIONABILITY DOCTRINE TO ARBITRATION AGREEMENTS**

SUSAN LANDRUM\*

*This Article evaluates how state courts have applied the unconscionability doctrine to contracts, including those involving arbitration agreements. Numerous scholars have been critical of state courts' application of the unconscionability doctrine to arbitration agreements and have argued that, because state courts are often skeptical or even hostile to arbitration, at least some state courts have used the unconscionability doctrine more often to invalidate arbitration agreements than other types of contract provisions. These assumptions hold true for some individual states or limited time periods, but further research was necessary to determine if the assumptions are true more broadly. For purposes of this study, I analyzed the unconscionability case law, a total of 460 cases, from twenty states—Alaska, Arkansas, Colorado, Illinois, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, and Vermont—during the time period from 1980 to 2012. The results of my research demonstrate that there is significant variation in how courts apply the unconscionability doctrine. Moreover, this Article shows that, for many of these states, the assumptions that scholars have had regarding state courts' hostility to arbitration agreements, and those courts' willingness to use the unconscionability doctrine as a means of invalidating arbitration provisions, are not always supported by the case law. Instead of applying*

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*generalized assumptions, it is necessary to delve deeper into the case law of each individual state to understand that state's use of the unconscionability doctrine in the context of arbitration agreements.*

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## I. INTRODUCTION

As the United States Supreme Court has observed on more than one occasion, the Federal Arbitration Act (FAA)<sup>1</sup> “was enacted in 1925 in response to widespread judicial hostility to arbitration agreements.”<sup>2</sup> Even after passage of the FAA, however, there have continued to be cases where courts treat arbitration agreements with more skepticism than other contracts.<sup>3</sup> In fact, legal scholars have long argued that at least some state courts routinely view arbitration agreements with more hostility than other types of contract provisions and, thus, are more likely to use contract defenses—most specifically, the unconscionability doctrine—to invalidate arbitration clauses.<sup>4</sup> While it is undeniably true

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1. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012).

2. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011); Federal Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2012)); *see also* Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 581 (2008); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (noting that the FAA’s “purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts”). Legal scholars have also discussed the history of courts’ treatment, prior to the passage of the FAA, of arbitration agreements. *See, e.g.*, Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 97–102 (2012); Kenneth F. Dunham, *Southland Corp. v. Keating Revisited: Twenty-Five Years in Which Direction?*, 4 CHARLESTON L. REV. 331, 333–35 (2010) (discussing treatment of arbitration by British and early United States courts); Preston Douglas Wigner, Comment, *The United States Supreme Court’s Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499, 1502 (1995) (same).

3. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974) (“The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal.”); Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 201–03, 205 (1956) (“For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State.”); *see also* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1422 (2008) (“Some lower courts (mostly certain state courts, but also a few federal courts) view arbitration with more skepticism, especially in cases involving consumers or employees who have signed nonnegotiated arbitration agreements embedded in standard-form contracts.”); Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035, 2035, 2044–46 (2011) (“While arbitration provisions are favored under the FAA, they are viewed far more skeptically by courts applying unconscionability to refuse enforcement of one-sided arbitration provisions.”).

4. *See generally* Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006); Bruhl, *supra* note 3, at 1466–68; Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469; Friedman, *supra* note 3, at 2045, 2067; Sandra F. Gavin, *Unconscionability Found: A Look at Pre-Dispute*

that state courts have applied the unconscionability doctrine to arbitration clauses,<sup>5</sup> often in a way that is different than those same courts have applied the doctrine to other types of contracts,<sup>6</sup> the story of the unconscionability doctrine in recent decades is far more complex than it may first appear on the surface.

As previously mentioned, within the past decade some legal scholars have evaluated state courts' application of the unconscionability doctrine to arbitration agreements and have come to the conclusion that courts still often apply unconscionability in a way that demonstrates hostility to arbitration.<sup>7</sup> Usually these scholars have focused on a very limited number of cases or have analyzed only a small time period in coming to this conclusion.<sup>8</sup> Their work has provided valuable insights regarding inconsistencies in state courts' unconscionability analysis and the importance of courts treating arbitration agreements the same way that they treat other types of contracts. At the same time, however, such an approach may have the tendency to focus on outliers that are

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*Mandatory Arbitration Agreements 10 Years After Doctor's Associates, Inc. v. Casarotto*, 54 CLEV. ST. L. REV. 249 (2006); David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387 (2012); Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609 (2009); Lucille M. Ponte, *Getting a Bad Rap? Unconscionability in Clickwrap Dispute Resolution Clauses and a Proposal for Improving the Quality of These Online Consumer "Products,"* 26 OHIO ST. J. ON DISP. RESOL. 119 (2011); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004). In *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court cited Broome's and Randall's articles for the proposition that California courts are more likely to declare arbitration agreements unconscionable than other types of contracts. *AT&T Mobility LLC*, 131 S. Ct. at 1747 (citing Broome, *supra* at 54, 66; Randall, *supra* at 186–87).

5. See, e.g., *Wigginton v. Dell, Inc.*, 890 N.E.2d 541 (Ill. App. Ct. 2008); *Brown v. MHN Gov't Servs., Inc.*, 306 P.3d 948 (Wash. 2013).

6. See Broome, *supra* note 4, at 54.

7. See *supra* note 4 and accompanying text.

8. For example, Professor Susan Randall compared unconscionability claims in cases from 1982 to 1983 and from 2002 to 2003 and concluded that, during the earlier period, courts found nonarbitration and arbitration agreements unconscionable at the same rate, but, twenty years later, courts were twice as likely to find arbitration agreements to be unconscionable than other types of contracts. See Randall, *supra* note 4, at 187, 194. More recently, Professor Lucille M. Ponte evaluated the special legal challenges associated with applying the unconscionability doctrine to clickwrap dispute resolution clauses in online consumer contracts. See generally Ponte, *supra* note 4. However, Ponte's article discussed a range of examples of how various courts have addressed the issue rather than taking a quantitative approach. See *id.* For further discussion of the relevant scholarly research on this topic, see *infra* Part III.

not necessarily representative of a state's general approach to the enforceability of arbitration agreements, or it may illustrate a short-term trend in unconscionability analysis that is not representative of the courts' approach to this issue over a longer period of time.

In order to have a fuller understanding of how state courts apply the unconscionability doctrine to arbitration agreements, it is necessary to analyze those courts' approaches to unconscionability analysis over an extended period of time, comparing the application of the doctrine to both arbitration agreements and other types of contracts. This Article does just that. Specifically, this Article explores how, since 1980, state appellate courts have applied the unconscionability doctrine to all types of contracts, including those involving arbitration agreements.<sup>9</sup> In all, I have analyzed the unconscionability case law from twenty states, which were chosen from across the United States.<sup>10</sup> All together, this case law included a total of 460 appellate cases.<sup>11</sup> From this case law I have determined that (1) some state courts have rarely, if ever, used the unconscionability doctrine to invalidate contract provisions, whether or

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9. I chose to only address appellate cases, including those from intermediate state appellate courts and state supreme courts, because very few trial court opinions are accessible on Westlaw. This study utilizes both published and unpublished state appellate court opinions to the extent that they are available on Westlaw. I did not include cases in which the state appellate court applied the unconscionability law of another state, i.e., an Ohio court applying Kentucky unconscionability law. I also did not include cases in which a federal court applied state substantive law regarding unconscionability. Thus, the only cases included in this study were cases in which a state appellate court applied its own state's law regarding the unconscionability doctrine. Moreover, because courts often apply the unconscionability doctrine differently in domestic relations cases, such as those dealing with prenuptial agreements or marital settlement agreements, than they do to other types of cases, I did not include domestic relations unconscionability cases in my research.

10. The twenty states include: Alaska, Arkansas, Colorado, Illinois, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, and Vermont. I consciously chose not to include California, as Stephen Broome's article has already looked at California's unconscionability case law in significant detail, albeit for a shorter period of time than the instant study. *See generally* Broome, *supra* note 4. I wanted to include states that may have been referenced in other scholarly articles, but without the amount of attention that California has received.

11. This number does not include cases where unconscionability was merely mentioned as a legal concept, i.e., as one of the possible defenses in a breach of contract action, but the unconscionability doctrine was not actually applied in the case. I have included three types of cases in this study: (1) cases in which the court determined that the challenged contract provision was unconscionable; (2) cases in which the court determined that the challenged contract provision was not unconscionable; and (3) cases in which the court considered the unconscionability issue but remanded to the trial court because the issue needed to be considered there in the first instance.

not the challenged provisions are associated with arbitration; (2) other states have evenly applied the unconscionability doctrine to all types of contracts; (3) at some points in their history, some state courts may have been more inclined to hold an arbitration clause unconscionable, but that inclination does not reflect their long-term tendencies or the current status of their law; and (4) a small number of states' cases do reflect the stereotype of hostility towards arbitration, at least in some form.<sup>12</sup> Thus, the immediate lesson to take from this analysis is that there is much more complexity to the issue than what might appear on the surface.

In Part II of this Article, I summarize the general law related to the unconscionability doctrine in both the arbitration and non-arbitration context. Part III provides a little more context for the scholarly debate over the application of the unconscionability doctrine to arbitration agreements by setting up what we have learned so far from this scholarship and what questions still remain unanswered. Then, Part IV discusses the results of the instant study, including (1) the large-scale numbers demonstrating what has happened collectively throughout the time period of the study, and (2) the numbers broken down by state, focusing on the range of state court approaches to unconscionability issues. Having set out the numbers, the final part draws conclusions about what the numbers show us about how courts apply unconscionability to arbitration agreements.<sup>13</sup> In doing so, I argue that some of the unease regarding how state courts apply unconscionability may be unnecessary, and I set out what areas of concern still exist for the future.<sup>14</sup>

## II. THE GENERAL LAW ON UNCONSCIONABILITY IN THE CONTEXT OF BOTH ARBITRATION AND NON-ARBITRATION AGREEMENTS

In order to have a context for this Article's analysis of unconscionability outcomes in state courts' contract cases, it is important to understand the intersection of the law governing arbitration agreements and general contract law. That relationship is dictated, at least to a certain extent, by federal law, including the FAA and U.S. Supreme Court case law interpreting that Act.<sup>15</sup> However,

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12. See *infra* Part IV; *infra* Table 2.

13. See *infra* Part V.

14. See *infra* Part V.

15. See, e.g., Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012); *Marmet Health Care Ctr.*,



contract law in general and the unconscionability doctrine specifically are primarily products of state law, not federal law.<sup>16</sup> Thus, in the remainder of Part II, this Article sets forth the basic relevant principles of federal and state law with respect to arbitration agreements, state contract law, and the unconscionability doctrine.

*A. The Intersection of Arbitration Agreements and General Contract Law*

Because arbitration agreements are contracts, the rules that apply to other contracts should also apply to arbitration agreements.<sup>17</sup> In general, the construction, interpretation, and enforcement of contracts are governed by state law, not federal law. There is more complexity, however, in cases involving arbitration agreements. As mentioned *supra*, unlike other types of contracts, the starting point for arbitration agreements is federal law, specifically the FAA.<sup>18</sup> Section 2 of the FAA provides the foundation for courts' evaluations of arbitration agreements by requiring that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>19</sup> Courts have interpreted this provision to mean that contract defenses such as duress, unconscionability, and mistake apply to arbitration agreements, just as those defenses apply to other types of contracts.<sup>20</sup>

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*Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

16. See *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2784 n.7 (2010) ("The question of unconscionability . . . is one of state law." (citing *Perry*, 482 U.S. at 492 n.9)); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 174 (1982) (Rehnquist, J., dissenting) ("Contract and real property law are traditionally the domain of state law." (citing *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979); *Butner v. United States*, 440 U.S. 48, 55 (1979))).

17. See *AT&T Mobility LLC*, 131 S. Ct. at 1745–46; *Perry*, 482 U.S. at 492 n.9.

18. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012); see also *supra* note 15 and accompanying text.

19. 9 U.S.C. § 2. The New Mexico Supreme Court has noted that this provision requires consideration of both state contract law and federal law interpreting the FAA. *Rivera v. Am. Gen. Fin. Servs., Inc.*, 259 P.3d 803, 810 (N.M. 2011).

20. See *AT&T Mobility LLC*, 131 S. Ct. at 1746; *Doctor's Assocs., Inc.*, 517 U.S. at 686–87. But see Edward P. Boyle & David N. Cinotti, *Beyond Nondiscrimination: AT&T Mobility LLC v. Concepcion and the Further Federalization of U.S. Arbitration Law*, 12 PEPP. DISP. RESOL. L.J. 373, 374 (2012) (arguing that *AT&T Mobility LLC* "increases the federal

Although the FAA provides that ordinary contract defenses, such as unconscionability, may make arbitration agreements unenforceable in certain circumstances, the problem arises when a court applies those defenses differently to arbitration agreements than to other types of contract provisions.<sup>21</sup> The U.S. Supreme Court has provided some guidance for other courts in this context.<sup>22</sup> The most obvious situation that would run afoul of the FAA is where a state's statutory or case law prohibits outright the arbitration of a particular type of claim.<sup>23</sup> Some cases, however, involve much more complexity than a blatant conflict

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restraints on state contract law by holding that even the application of a generally available contract defense like unconscionability, as interpreted by a state's highest court, can be preempted under the FAA" (citing *AT&T Mobility LLC*, 131 S. Ct. at 1761 (Breyer, J., dissenting))). One scholar speculated that, after *AT&T Mobility*, the unconscionability doctrine may no longer have the same potential to challenge arbitration agreements. See Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion, and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 380 (2011) ("In the wake of *Concepcion*, one wonders what if anything is left of the doctrine of unconscionability in the realm of arbitration agreements. Coupled with *Rent-A-Center*, *Concepcion* appears to have dramatically diminished the potential scope of this primary tool for judicial policing of overreaching."). However, as this study demonstrates, courts have continued to apply the unconscionability doctrine to arbitration agreements post-*AT&T Mobility LLC* and it is unclear what the long-term effect of this case will be.

21. See *Perry*, 482 U.S. at 492 n.9 ("We note . . . the choice-of-law issue that arises when defenses such as . . . unconscionability arguments are asserted. In instances such as these, the text of § 2 provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of that statute: An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.' Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." (internal citations omitted) (quoting Federal Arbitration Act, 9 U.S.C. § 2 (1982)) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983))).

22. See generally *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam); *AT&T Mobility LLC*, 131 S. Ct. 1740; *Preston v. Ferrer*, 552 U.S. 346 (2008); *Doctor's Assocs., Inc.*, 517 U.S. 681; *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Perry*, 482 U.S. 483; *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1; *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

23. See, e.g., *Marmet Health Care Ctr., Inc.*, 132 S. Ct. at 1203–04 ("West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA."); *AT&T Mobility LLC*, 131 S. Ct. at 1747; *Preston*, 552 U.S. at 353, 362–63 (holding that the FAA preempts state law granting the state commissioner exclusive jurisdiction to decide an issue that the parties agreed by contract to arbitrate); *Doctor's Assocs., Inc.*, 517 U.S. at 687 ("Courts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.").

with the FAA. Specifically, the Supreme Court has observed that a generally applicable contract defense could still be preempted by the FAA if courts apply it in a way that disfavors arbitration.<sup>24</sup> One example of this would be if a court found a contract unconscionable solely because it determined that an arbitration clause violated public policy in a way that other contracts would not.<sup>25</sup> Even prior to the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, scholars remarked that, in many cases, there was significant difficulty in determining whether a court had inconsistently and unfavorably applied a generally-applicable contract doctrine to an arbitration agreement.<sup>26</sup>

Furthermore, in applying the U.S. Supreme Court's precedents regarding the FAA, some state courts have also articulated a strong policy in favor of enforcing arbitration agreements. For example, on multiple occasions the Ohio Supreme Court has affirmed this presumption in favor of arbitration agreements, noting that "an arbitration clause is to be upheld just as any other provision in a contract should be respected."<sup>27</sup> In fact, the Ohio Supreme Court has

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24. See *AT&T Mobility LLC*, 131 S. Ct. at 1747–48; *Allied-Bruce Terminix Cos.*, 513 U.S. at 281; *Perry*, 482 U.S. at 492 n.9. To illustrate this point, the Supreme Court provided the following examples that would be preempted by the FAA: (1) a court refusing to enforce a consumer arbitration agreement because the agreement did not have a provision allowing judicially monitored discovery; (2) a court determining that an arbitration agreement that did not follow the Federal Rules of Evidence; and (3) a court invalidating an arbitration agreement that did not allow a determination by a jury panel or its equivalent. *AT&T Mobility LLC*, 131 S. Ct. at 1747.

25. See *Marmet Health Care Ctr., Inc.*, 132 S. Ct. at 1204 (noting that, to the extent that the state court's unconscionability finding was based on the court's determination that "a predispute arbitration agreement that applies to claims of personal injury or wrongful death against nursing homes 'clearly violates public policy,'" such a finding would be preempted by the FAA (quoting *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 294 (W. Va. 2011), *vacated sub nom. Marmet Health Care Ctr., Inc.*, 132 S. Ct. 1201)); see also *Perry*, 482 U.S. at 493 n.9 ("Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.").

26. *AT&T Mobility LLC*, 131 S. Ct. 1740 (2011). See, e.g., Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. Rev. 1189, 1201, 1202 n.75 (2011); Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 408–11 (2004); David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 558–62, 568–70 (2004). Legal scholars have continued to express concern about this issue after *AT&T Mobility LLC*. See, e.g., Michael J. Yelnosky, *Fully Federalizing the Federal Arbitration Act*, 90 OR. L. REV. 729, 743–44 (2012).

27. *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859, 865 (Ohio 1998) ("An arbitration clause in a contract is generally viewed as an expression that the parties agree to arbitrate disagreements within the scope of the arbitration clause, and, with limited exceptions, an arbitration clause is to be upheld just as any other provision in a contract should be

noted that “Ohio’s strong policy favoring arbitration is consistent with federal law supporting arbitration.”<sup>28</sup> Because there is such a strong presumption in favor of arbitration, the Ohio Supreme Court has instructed that “all doubts should be resolved in its favor.”<sup>29</sup> Other state courts have also echoed the principle that, because of the FAA and U.S. Supreme Court precedents applying that Act, there is a strong presumption in favor of enforcement of arbitration agreements.<sup>30</sup>

### *B. The Unconscionability Doctrine*

In addition to managing the potentially complex legal issues created by the intersection of the FAA and general contract law, courts also must navigate the murky depths of the unconscionability doctrine itself. As discussed *infra*, the unconscionability doctrine’s evolution over time has not always resulted in clarity of terms or consistency of application. The result is that, even without the arbitration context, states have developed varying approaches to the unconscionability doctrine.

#### 1. The Historical and Statutory Basis of the Unconscionability Doctrine

For purposes of this Article, it is also important to understand the unconscionability doctrine more generally. The concept of unconscionability has roots going back to English common law.<sup>31</sup> Traditionally, a bargain was said to be unconscionable in an action at

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respected.”); *see also* *Hayes v. Oakridge Home*, 908 N.E.2d 408, 411–12 (Ohio 2009); *Taylor Bldg. Corp. of Am. v. Benfield*, 884 N.E.2d 12, 19 (Ohio 2008); *Schaefer v. Allstate Ins. Co.*, 590 N.E.2d 1242, 1245 (Ohio 1992) (plurality opinion).

28. *Taylor Bldg. Corp. of Am.*, 884 N.E.2d at 19 n.1.

29. *Hayes*, 908 N.E.2d at 412 (citing *Ignazio v. Clear Channel Broad., Inc.*, 865 N.E.2d 18, 22 (Ohio 2007)).

30. *See, e.g., Falls v. 1CI, Inc.*, 57 A.3d 521, 529 (Md. Ct. Spec. App. 2012) (noting that the federal courts have interpreted the FAA to create a presumption of arbitrability); *Pressler v. Duke Univ.*, 685 S.E.2d 6, 10 (N.C. Ct. App. 2009) (same); *Greater Canton Ford Mercury, Inc. v. Ables*, 948 So. 2d 417, 422 (Miss. 2007) (stating that the Mississippi Supreme Court has followed the U.S. Supreme Court in recognizing “the established federal policy favoring arbitration agreements” (citing to *Terminix Int’l, Inc. v. Rice*, 904 So. 2d 1051, 1055 (Miss. 2004))); *Kan. City Urology, P.A. v. United Healthcare Servs.*, 261 S.W.3d 7, 12 (Mo. Ct. App. 2008) (stating that, under federal law, an arbitration clause’s “broad scope creates a strong presumption in favor of arbitrability”); *Int’l Ass’n of Firefighters, Local No. 1285 v. City of Las Vegas*, 929 P.2d 954, 957 (Nev. 1996) (“There is a presumption of arbitrability when a contract contains an arbitration clause.” (citing *Int’l Ass’n of Firefighters, Local No. 1285 v. City of Las Vegas*, 764 P.2d 478, 480–81 (Nev. 1988))).

31. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. b (1981) (quoting *Hume v. United States*, 132 U.S. 406, 411 (1889) (quoting *Earl of Chesterfield v. Janssen*, (1750) 28 Eng. Rep. 82 (Ch.) 100; 2 Ves. Sen. 125, 155)).

law if it was “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”<sup>32</sup> Thus, historically, courts recognized unconscionability as a defense to a claim for breach of contract.<sup>33</sup> However, courts have been more likely to find a contract unconscionable during the past century than before the twentieth century.<sup>34</sup>

The unconscionability doctrine was ultimately codified in the Uniform Commercial Code (UCC).<sup>35</sup> All of the states which are included in this study have adopted the UCC and, specifically, the unconscionability provision.<sup>36</sup> Although the UCC unconscionability doctrine applies specifically to contracts for the sale and lease of goods, courts have extended the doctrine to other types of contracts as well.<sup>37</sup> Moreover, state legislatures have also passed other unconscionability statutes over time, such as those addressing unconscionable provisions

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32. *Hume*, 132 U.S. at 411 (quoting *Earl of Chesterfield*, 28 Eng. Rep. at 100; 2 Ves. Sen. at 155). Missouri courts have referenced this definition from *Hume*. See, e.g., *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 108 (Mo. Ct. App. 2003) (quoting *Hume*, 132 U.S. at 415). In another case, the Missouri Supreme Court stated that unconscionability is “an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequity of it.” *Mo. Dep’t of Soc. Servs., Div. of Aging v. Brookside Nursing Ctr., Inc.*, 50 S.W.3d 273, 277 (Mo. 2001) (en banc) (quoting *Peirick v. Peirick*, 641 S.W.2d 195, 197 (Mo. Ct. App. 1982)) (internal quotation marks omitted).

33. 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 18:1 (4th ed. 2010).

34. See Scott R. Peppet, *Freedom of Contract in an Augmented Reality: The Case of Consumer Contracts*, 59 UCLA L. REV. 676, 708–09 (2012) (“[M]odern courts are more likely than their classical predecessors to question, alter, or reject a contract’s written terms on grounds of unconscionability or unfair surprise.”); see also Knapp, *supra* note 4, at 612–13 (describing how the unconscionability doctrine saw the most use in the period after states’ adoption of the UCC, before undergoing “a decade or two of relative dormancy” beginning in the 1970s).

35. U.C.C. § 2-302 & cmt. 1 (2012–2013); see also 8 WILLISTON & LORD, *supra* note 33, § 18:1.

36. See ALASKA STAT. § 45.02.302 (2012); ARK. CODE ANN. § 4-2-302 (2001); COLO. REV. STAT. § 4-2-302 (2013); 810 ILL. COMP. STAT. ANN. 5/2-302 (West 2009); ME. REV. STAT. ANN. tit. 11, § 2-302 (1995); MD. CODE ANN., COM. LAW § 2-302 (LexisNexis 2002); MINN. STAT. ANN. § 336.2-302 (West 2002); MISS. CODE ANN. § 75-2-302 (2002); MO. ANN. STAT. § 400.2-302 (West 1994); MONT. CODE ANN. § 30-2-302 (2013); NEB. REV. STAT. § 2-302 (2001); NEV. REV. STAT. ANN. § 104.2302 (LexisNexis 2013); N.H. REV. STAT. ANN. § 382-A:2-302 (2011); N.M. STAT. ANN. § 55-2-302 (1993); N.C. GEN. STAT. § 25-2-302 (2011); OHIO REV. CODE ANN. § 1302.15 (LexisNexis 2012); OR. REV. STAT. § 72.3020 (2013); R.I. GEN. LAWS § 6A-2-302 (2001); S.C. CODE ANN. § 36-2-302 (2003); VT. STAT. ANN. tit. 9A, § 2-302 (2011).

37. 8 WILLISTON & LORD, *supra* note 33, § 18:5.

in residential leases or other types of agreements.<sup>38</sup> Regardless of the widespread adoption of the unconscionability doctrine, however, one of the challenges that courts face is the fact that the UCC does not define what makes a contract “unconscionable.”<sup>39</sup> Instead, the Official Comment to UCC section 302 provides the following basic test: “[W]hether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”<sup>40</sup> The result of this vague instruction is that courts are left with significant latitude in applying the doctrine to specific contracts.<sup>41</sup>

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38. See, e.g., NEB. REV. STAT. § 76-2717 (2009) (unconscionability and foreclosure consulting contracts); NEV. REV. STAT. ANN. § 104A.2108 (unconscionability and lease provisions); NEV. REV. STAT. ANN. § 118A.230 (LexisNexis 2010) (unconscionability and rental agreements); N.C. GEN. STAT. § 25A-43 (unconscionability and retail installment sales contracts); OHIO REV. CODE ANN. § 1310.06 (unconscionability and lease contracts); OHIO REV. CODE ANN. § 4781.48 (LexisNexis 2013) (unconscionability and rental agreements); OHIO REV. CODE ANN. § 5321.14 (LexisNexis 2004) (unconscionability and rental agreements); OR. REV. STAT. § 72A.1080 (unconscionability and lease provisions); OR. REV. STAT. § 90.135 (unconscionability and residential leases); R.I. GEN. LAWS § 6A-2.1-108 (unconscionability and lease contracts); S.C. CODE ANN. § 37-4-106 (2002) (unconscionability and insurance contracts).

39. See 8 WILLISTON & LORD, *supra* note 33, §§ 18:8, 18:11; Randall, *supra* note 4, at 194 (observing that “[u]nconscionability is an open-ended, undefined concept subject to judicial definition case-by-case”). The lack of definition has historically led to some criticism about the application of the unconscionability doctrine to individual cases, both before and after courts began to apply the doctrine to arbitration agreements. See generally Carol B. Swanson, *Unconscionable Quandary: UCC Article 2 and the Unconscionability Doctrine*, 31 N.M. L. REV. 359 (2001); see also Evelyn L. Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 COM. L.J. 287, 288 (2000) (complaining that the unconscionability doctrine gives courts “wide latitude,” which they may “manipulate . . . in order to reach the equitable results they desire”); Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 488 (1967) (describing the difficulties in defining and applying the unconscionability doctrine in light of section 2-302 of the Uniform Commercial Code’s “amorphous unintelligibility”); John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 931 (1969) (“The primary problem with [the unconscionability doctrine] is that the concept of unconscionability is vague, so that neither courts, practicing attorneys, nor contract draftsmen can be certain of its applicability in any particular situation.”). Moreover, Professor Charles Fried has criticized the unconscionability doctrine as paternalistic and inconsistent with the concept of contractual obligation. See Charles Fried, *Contract as Promise Thirty Years On*, 45 SUFFOLK U. L. REV. 961, 976 (2012); cf. Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 205–06 (2000) (describing some examples where the unconscionability doctrine may be applied in a paternalistic manner but concluding that not all examples are paternalistic).

40. U.C.C. § 2-302 cmt. 1.

41. 8 WILLISTON & LORD, *supra* note 33, § 18:8.

Some states' statutes may also provide additional guidance regarding the application of the unconscionability doctrine. For instance, the statutes in the states that are part of this study make clear that the courts are to look to the circumstances at the time of contract formation to determine whether the contract is unconscionable, not the circumstances at the time that one party seeks to enforce the contract or another seeks to avoid it.<sup>42</sup> Furthermore, depending on the state, if a court finds the challenged contract provisions to be unconscionable, the court may have the latitude to choose from several possible statutory remedies. For example, the court may (1) refuse to enforce the contract; (2) excise the unconscionable clause and enforce the remainder of the contract; or (3) "so limit the application of any unconscionable clause as to avoid any unconscionable result."<sup>43</sup> Finally, in cases where a party argues unconscionability, some states' statutes specifically direct the courts to give the parties "a reasonable opportunity to present evidence as to [the contract's] commercial setting, purpose, and effect to aid the court in making the [unconscionability] determination."<sup>44</sup> Some courts have interpreted this type of statutory provision to require an evidentiary hearing for

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42. See ALASKA STAT. § 45.02.302(a) (2012); ARK. CODE ANN. § 4-2-302(1) (2001); COLO. REV. STAT. § 4-2-302(1) (2013); 810 ILL. COMP. STAT. ANN. 5/2-302(1) (West 2009); ME. REV. STAT. ANN. tit. 11, § 2-302(1) (1995); MD. CODE ANN., COM. LAW § 2-302(1) (LexisNexis 2002); MINN. STAT. ANN. § 336.2-302(1) (West 2002); MISS. CODE ANN. § 75-2-302(1) (2002); MO. ANN. STAT. § 400.2-302(1) (West 1994); MONT. CODE ANN. § 30-2-302(1) (2013); NEB. REV. STAT. § 2-302(1) (2001); NEV. REV. STAT. ANN. § 104.2302(1) (LexisNexis 2013); N.H. REV. STAT. ANN. § 382-A:2-302(1) (2011); N.M. STAT. ANN. § 55-2-302(1) (1993); N.C. GEN. STAT. § 25-2-302(1); OHIO REV. CODE ANN. § 1302.15(A) (LexisNexis 2012); OR. REV. STAT. § 72.3020(1); R.I. GEN. LAWS § 6A-2-302(1); S.C. CODE ANN. § 36-2-302(1) (2003); VT. STAT. ANN. tit. 9A, § 2-302(1) (2011).

43. OHIO REV. CODE ANN. § 1302.15(A); see also ALASKA STAT. § 45.02.302(a); ARK. CODE ANN. § 4-2-302(1); COLO. REV. STAT. § 4-2-302(1); 810 ILL. COMP. STAT. ANN. 5/2-302(1); ME. REV. STAT. ANN. tit. 11, § 2-302(1); MD. CODE ANN., COM. LAW § 2-302(1); MINN. STAT. ANN. § 336.2-302(1); MISS. CODE ANN. § 75-2-302(1); MO. ANN. STAT. § 400.2-302(1); MONT. CODE ANN. § 30-2-302(1); NEB. REV. STAT. § 2-302(1); NEV. REV. STAT. ANN. § 104.2302(1); N.H. REV. STAT. ANN. § 382-A:2-302(1); N.M. STAT. ANN. § 55-2-302(1); N.C. GEN. STAT. § 25-2-302(1); OR. REV. STAT. § 72.3020(1); R.I. GEN. LAWS § 6A-2-302(1); S.C. CODE ANN. § 36-2-302(1); VT. STAT. ANN. tit. 9A, § 2-302(1).

44. OHIO REV. CODE ANN. § 1302.15(B); see also ALASKA STAT. § 45.02.302(b); ARK. CODE ANN. § 4-2-302(2); COLO. REV. STAT. § 4-2-302(2); 810 ILL. COMP. STAT. ANN. 5/2-302(2); ME. REV. STAT. ANN. tit. 11, § 2-302(2); MD. CODE ANN., COM. LAW § 2-302(2); MINN. STAT. ANN. § 336.2-302(2); MISS. CODE ANN. § 75-2-302(2); MO. ANN. STAT. § 400.2-302(2); MONT. CODE ANN. § 30-2-302(2); NEB. REV. STAT. § 2-302(2); NEV. REV. STAT. ANN. § 104.2302(2); N.H. REV. STAT. ANN. § 382-A:2-302(2); N.M. STAT. ANN. § 55-2-302(2); N.C. GEN. STAT. § 25-2-302(2); OR. REV. STAT. § 72.3020(2); R.I. GEN. LAWS § 6A-2-302(2); S.C. CODE ANN. § 36-2-302(2); VT. STAT. ANN. tit. 9A, § 2-302(2).

unconscionability issues, or at least a specific opportunity for parties to present evidence regarding the alleged unconscionability and to respond to the opposing party's submissions.<sup>45</sup>

A state court's application of the state's unconscionability statutes may be affected by other statutes as well. For example, if the contract at issue is a consumer contract, some states have consumer protection laws that may interact with the court's unconscionability analysis to create another layer of complexity.<sup>46</sup> Aside from the FAA, other federal laws may also affect state courts' unconscionability analysis.<sup>47</sup> Thus, the Nevada Supreme Court recently held that, in the healthcare contract context, the Federal Medicare Act can preempt Nevada's unconscionability law.<sup>48</sup> The Nebraska Supreme Court recently determined that its unconscionability analysis of an arbitration agreement, which was part of a crop insurance contract, was governed not only by state law governing insurance contracts and the FAA, but also by the McCarran-Ferguson Act<sup>49</sup> and federal regulations related to

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45. See, e.g., *Hollingshead v. A.G. Edwards & Sons, Inc.*, 920 N.E.2d 1254, 1261–62 (Ill. App. Ct. 2009) (holding that, “absent an evidentiary hearing, the circuit court could not have found the arbitration provisions at issue to be procedurally unconscionable based on the allegations of the complaint standing alone”); *Bargman v. Skilled Healthcare Grp., Inc.*, 292 P.3d 1, 6 (N.M. Ct. App. 2012) (remanding to the trial court for an evidentiary hearing regarding whether a challenged contract provision was substantively unconscionable); *Olah v. Ganley Chevrolet, Inc.*, 2006-Ohio-694, ¶ 29 (Ct. App.) (“[W]hen the circumstances of the sale are not developed sufficiently in the record to ascertain unconscionability, the trial court should conduct a hearing to decide the issue.” (citing *Molina v. Ponsky*, 2005-Ohio-6349, ¶ 18 (Ct. App.))); cf. *Moran v. Riverfront Diversified, Inc.*, 968 N.E.2d 1, 5 (Ohio Ct. App. 2011) (holding that the trial court did not commit reversible error by failing to hold an evidentiary hearing on the unconscionability argument, when both parties submitted affidavits in support of their written arguments and, thus, had been heard).

46. See, for example, the Ohio Consumer Sales Practices Act, OHIO REV. CODE ANN. §§ 1345.01–1345.13 (LexisNexis 2012 & Supp. 2013), and cases discussing the intersection between the Ohio Consumer Sales Practices Act and unconscionability, *Bozich v. Kozusko*, 2009-Ohio-6908, ¶¶ 14–20 (Ct. App.); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1169–70 (Ohio Ct. App. 2004); see also *Ramette v. AT&T Corp.*, 812 N.E.2d 504, 507 (Ill. App. Ct. 2004) (reviewing customer asserted claims of unconscionability and violations of Illinois' Consumer Fraud and Deceptive Business Practices Act); and *Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 364 (S.C. 2001) (discussing intersection between the FAA and South Carolina's Consumer Protection Code).

47. For a recently-published analysis of the intersection between the FAA and the National Labor Relations Act, see generally Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013 (2013).

48. See *Pacificare of Nev., Inc. v. Rogers*, 266 P.3d 596, 601 (Nev. 2011); *Pacificare of Nev., Inc. v. Meana*, No. 55754, 2011 WL 5146064 (Nev. Oct. 27, 2011).

49. McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15 (2012). Under the McCarran-



the Federal Crop Insurance Act.<sup>50</sup> Finally, an Illinois appellate court held that a consumer's unconscionability claim—regarding the arbitration clause in a long-distance telephone carrier's service agreement—was preempted by the Federal Communications Act.<sup>51</sup>

Moreover, although none of the states in this study have statutes that specifically address unconscionability in the context of arbitration agreements, in keeping with U.S. Supreme Court precedent and other cases interpreting the FAA, almost all of the twenty states do have statutes that make it clear that, generally, arbitration agreements are to be held to the same legal standards as other types of contracts.<sup>52</sup> The case law language in these states also echoes this theme, regardless of how each state's courts actually apply the unconscionability doctrine.<sup>53</sup>

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Ferguson Act, "state law regulating the business of insurance preempts federal law that does not specifically govern insurance." *Kremer v. Rural Cmty. Ins. Co.*, 788 N.W.2d 538, 550 (Neb. 2010).

50. Federal Crop Insurance Act, 7 U.S.C. §§ 1501–24 (2012). *See generally Kremer*, 788 N.W.2d 538.

51. *Ramette*, 812 N.E.2d at 513–14.

52. *See, e.g.*, OHIO REV. CODE ANN. § 2711.01(A) (LexisNexis 2008). That statute provides:

A provision in any written contract . . . to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit, from a relationship then existing between them or that they simultaneously create, *shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.*

*Id.* (emphasis added); *see also* ALASKA STAT. §§ 09.43.010(a), 09.43.330(a) (2012); ARK. CODE ANN. § 16-108-206(a) (Supp. 2013); COLO. REV. STAT. § 13-22-206(1) (2013); 710 ILL. COMP. STAT. ANN. 5/1 (West 2007); ME. REV. STAT. ANN. tit. 14, § 5927 (2003); MD. CODE ANN., CTS. & JUD. PROC. § 3-206(a) (LexisNexis 2006 & Supp. 2012); MINN. STAT. ANN. § 572B.06(a) (West Supp. 2014); MO. ANN. STAT. § 435.350 (West 2010); MONT. CODE ANN. § 27-5-114(1) (2013); NEB. REV. STAT. § 25-2602.01(a) (2008); NEV. REV. STAT. ANN. § 38.219(1) (LexisNexis 2012 & Supp. 2013); N.H. REV. STAT. ANN. § 542:1 (2007); N.M. STAT. ANN. § 44-7A-7(a) (2007); N.C. GEN. STAT. § 1-569.6(a) (2011); OR. REV. STAT. §§ 36.454(5), 36.620(1) (2013); R.I. GEN. LAWS § 10-3-2 (2012); S.C. CODE ANN. § 15-48-10(a) (2005); VT. STAT. ANN. tit. 12, § 5652(a) (2002). Mississippi does not have an equivalent statute.

53. *See, e.g.*, *Raper v. Oliver House, LLC*, 637 S.E.2d 551, 554 (N.C. Ct. App. 2006) ("The essential thrust of the Federal Arbitration Act, which is in accord with the law of our state, is to require the application of contract law to determine whether a particular arbitration agreement is enforceable . . ." (quoting *Futrelle v. Duke Univ.*, 488 S.E.2d 635, 638 (N.C. Ct. App. 1997)) (internal quotation marks omitted)); *Taylor Bldg. Corp. of Am. v. Benfield*, 884 N.E.2d 12, 20 (Ohio 2008) ("Arbitration agreements are 'valid, irrevocable, and

## 2. Procedural Unconscionability and Substantive Unconscionability

There are two types of unconscionability: procedural unconscionability and substantive unconscionability. Most states' unconscionability doctrines require both procedural unconscionability and substantive unconscionability before a court will refuse to enforce a contract.<sup>54</sup> For example, the Ohio Supreme Court has summarized unconscionability as including both "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."<sup>55</sup> However, a minority of state courts do not require both procedural unconscionability and substantive unconscionability in order to invalidate a contract on unconscionability grounds.<sup>56</sup> Some states use a sliding scale approach,

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enforceable, except upon grounds that exist at law or in equity for the revocation of any contract." (quoting OHIO REV. CODE ANN. § 2711.01(A) (LexisNexis 1992))).

54. See 8 WILLISTON & LORD, *supra* note 33, §§ 18:9–10. See, e.g., *Freedman v. Comcast Corp.*, 988 A.2d 68, 85 (Md. Ct. Spec. App. 2010) ("The prevailing view is that both procedural and substantive unconscionability must be present in order for a court to invalidate a contractual term as unconscionable." (citing *Doyle v. Fin. Am., LLC*, 918 A.2d 1266, 1274 (Md. Ct. Spec. App. 2007))); *Burch v. Second Jud. Dist. Ct.*, 49 P.3d 647, 650 (Nev. 2002); *Hayes v. Oakridge Home*, 908 N.E.2d 408, 412 (Ohio 2009) (stating that a "quantum" of both procedural and substantive unconscionability must be established in order for a provision to be unconscionable (citing *Collins v. Click Camera & Video, Inc.*, 621 N.E.2d 1294, 1299 (Ohio Ct. App. 1993))). However, Nebraska's case law suggests that, outside of the commercial context, Nebraska courts may not require both substantive and procedural unconscionability. See *Myers v. Neb. Inv. Council*, 724 N.W.2d 776, 799 (Neb. 2006) (citing *Adams v. Am. Cyanamid Co.*, 498 N.W.2d 577, 590 (Neb. Ct. App. 1992)).

55. *Hayes*, 908 N.E.2d at 412 (quoting *Lake Ridge Acad. v. Carney*, 613 N.E.2d 183, 189 (Ohio 1993)) (internal quotation marks omitted).

56. For example, Vermont courts do not require procedural unconscionability to find a contract provision unconscionable. See *Glassford v. BrickKicker*, 35 A.3d 1044, 1049 (Vt. 2011). Although Illinois courts appear to have required both procedural and substantive unconscionability in the past, see *Zobrist v. Verizon Wireless*, 822 N.E.2d 531, 540 (Ill. App. Ct. 2004), in *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250 (Ill. 2006), the Illinois Supreme Court held that a finding of unconscionability can be based upon procedural unconscionability, substantive unconscionability, or both. *Kinkel*, 857 N.E.2d at 263 (citing *Razor v. Hyundai Motor Am.*, 854 N.E.2d 607, 622 (Ill. 2006)). Missouri courts also appear to not require both procedural and substantive unconscionability. See *Ruhl v. Lee's Summit Honda*, 322 S.W.3d 136, 139 n.2 (Mo. 2010) ("[U]nconscionability can be procedural, substantive, or a combination of both. There is no need in all cases to show both aspects of unconscionability."). The New Mexico Supreme Court has also suggested that both substantive unconscionability and procedural unconscionability are not required. See *Cordova v. World Fin. Corp. of N.M.*, 208 P.3d 901, 908 (N.M. 2009) (holding that, "[w]hile there is a greater likelihood of a contract's being invalidated for unconscionability if there is a combination of both procedural and substantive unconscionability, there is no absolute requirement in our law that both must be present to the same degree or that they both be present at all").

such that if there is a significant amount of substantive unconscionability, less procedural unconscionability is required.<sup>57</sup>

Procedural unconscionability refers to the making of the contract as opposed to the substance of the contract.<sup>58</sup> Therefore, in determining whether procedural unconscionability exists, courts often consider, among numerous factors: (1) whether there was a meeting of the minds as to the formation of the agreement;<sup>59</sup> (2) the experience, intelligence, age, and education of the parties;<sup>60</sup> (3) the parties' relative bargaining

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57. See E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.28, at 302 (4th ed. 2004). States that have appeared to advocate a sliding scale approach to unconscionability analysis include Illinois, Nevada, New Mexico, and North Carolina. See, e.g., *Razor*, 854 N.E.2d at 622; *Gonski v. Second Jud. Dist. Ct.*, 245 P.3d 1164, 1169–70 (Nev. 2010) (“Although a showing of both types of unconscionability is necessary before an arbitration clause will be invalidated, . . . a strong showing of procedural unconscionability mean[s] that less substantive unconscionability [is] required.” (citing *D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1162 (Nev. 2004))); *Cordova*, 208 P.3d at 908; *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 370 (N.C. 2008). Professor Melissa Lonegrass, in particular, has advocated the use of a sliding scale approach to the unconscionability doctrine. See generally Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1 (2012).

58. See, e.g., *Freedman*, 988 A.2d at 85 (“Procedural unconscionability ‘deals with the process of making a contract . . .’” (quoting *Walther v. Sovereign Bank*, 872 A.2d 735, 744 (Md. 2005)) (internal quotation mark omitted)); *Shaffer v. Royal Gate Dodge, Inc.*, 300 S.W.3d 556, 559 (Mo. Ct. App. 2009). Alternatively, Professor Arthur Allen Leff once defined procedural unconscionability as “bargaining naughtiness.” Leff, *supra* note 39, at 487.

59. See, e.g., *Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 500 (Mo. 2012) (en banc) (Price, J., dissenting) (stating that “[p]rocedural unconscionability . . . deals with the formalities of making the contract and focuses on whether the parties had a voluntary and sufficient meeting of the minds to bind each other to the terms of the writing”); *Wascovich v. Personacare of Ohio, Inc.*, 943 N.E.2d 1030, 1035 (Ohio Ct. App. 2010) (explaining that “[p]rocedural unconscionability concerns the formation of the agreement and occurs when no voluntary meeting of the minds is possible” (quoting *Porpora v. Gatloff Bldg. Co.*, 828 N.E.2d 1081, 1083 (Ohio Ct. App. 2005)) (internal quotation marks omitted)); *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 558 (W. Va. 2012) (stating that “[p]rocedural unconscionability arises from inequities, improprieties, or unfairness in the bargaining process and the formation of the contract, inadequacies that suggest a lack of a real and voluntary meeting of the minds of the parties”).

60. See *Moran v. Riverfront Diversified, Inc.*, 968 N.E.2d 1, 6 (Ohio Ct. App. 2011) (noting that, in determining whether a contract is procedurally unconscionable, the “[r]elevant considerations include the parties’ age, education, intelligence, [and] business acumen and experience”); *Motsinger v. Lithia Rose-FT, Inc.*, 156 P.3d 156, 161 (Or. Ct. App. 2007) (noting that evidence of the parties’ unequal bargaining power was insufficient to demonstrate that a contract was procedurally unconscionable, where there was “no evidence that the depositors were not of ordinary experience and intelligence” (citing *Best v. U.S. Nat’l Bank of Or.*, 739 P.2d 554, 556 (Or. 1987))); cf. *Hollingshead v. A.G. Edwards & Sons, Inc.*, 920 N.E.2d 1254, 1261 (Ill. App. Ct. 2009) (holding that procedural unconscionability was not established where plaintiff failed to present circumstances surrounding the making of the

power and whether there was the presence or absence of meaningful choice on the part of the weaker party;<sup>61</sup> (4) the conspicuousness and clarity of the contract terms and whether attention was drawn to the challenged terms when the agreement was signed;<sup>62</sup> and (5) whether the party challenging the agreement was represented by counsel when the agreement was signed.<sup>63</sup> Although a court may ultimately determine that a contract of adhesion is procedurally unconscionable, most state courts have held that a contract of adhesion is not *per se* unconscionable.<sup>64</sup>

In contrast to procedural unconscionability, substantive unconscionability refers to the contract's specific terms.<sup>65</sup> A contract may be substantively unconscionable if it includes harsh, one-sided, or oppressive terms.<sup>66</sup> Just as in their procedural unconscionability

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agreement aside from the signatory's advanced age).

61. See, e.g., *Freedman*, 988 A.2d at 85; *Manfredi v. Blue Cross & Blue Shield of Kan. City*, 340 S.W.3d 126, 132–33 (Mo. Ct. App. 2011); *D.R. Horton, Inc.*, 96 P.3d at 1162–63; *Westmoreland v. High Point Healthcare Inc.*, 721 S.E.2d 712, 717 (N.C. Ct. App. 2012); *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859, 866–67 (Ohio 1998).

62. See, e.g., *Freedman*, 988 A.2d at 86; *D.R. Horton, Inc.*, 96 P.3d at 1162, 1164; *Tillman*, 655 S.E.2d at 370; *Porpora*, 828 N.E.2d at 1084–85; *Small v. HCF of Perrysburg, Inc.*, 823 N.E.2d 19, 23 (Ohio Ct. App. 2004); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1177–78, 1180 (Ohio Ct. App. 2004).

63. See, e.g., *Porpora*, 828 N.E.2d at 1084; *Small*, 823 N.E.2d at 24; *Eagle*, 809 N.E.2d at 1180; cf. *Westmoreland*, 721 S.E.2d at 718 (holding that an arbitration agreement was not procedurally unconscionable where the contract “affirmatively advise[d] a party to seek legal advice or to consult with the admissions coordinator if she [had] any questions” about the terms of the agreement).

64. See, e.g., *Walther v. Sovereign Bank*, 872 A.2d 735, 746 (Md. 2005) (holding that “[a] contract of adhesion is not automatically deemed *per se* unconscionable”); *Westmoreland*, 721 S.E.2d at 717 (“An imbalance in bargaining strength is one of many factors that must be considered to determine whether there is procedural unconscionability. But bargaining inequity alone generally cannot establish procedural unconscionability.” (internal citation omitted) (citing *Tillman*, 655 S.E.2d at 370)); *Taylor Bldg. Corp. of Am. v. Benfield*, 884 N.E.2d 12, 24 (Ohio 2008) (“To be sure, an arbitration clause in a consumer contract with some characteristics of an adhesion contract ‘necessarily engenders more reservations than an arbitration clause in a different setting,’ such as in a collective-bargaining agreement or a commercial contract between two businesses. However, even a contract of adhesion is not in all instances unconscionable *per se*.” (emphasis added) (internal citation omitted) (quoting *Williams*, 700 N.E.2d at 866)).

65. See, e.g., *Phoenix Ins. Co. v. Rosen*, 949 N.E.2d 639, 647 (Ill. 2011); *Livingston v. Metro. Pediatrics, LLC*, 227 P.3d 796, 806 (Or. Ct. App. 2010); *Rivera v. Am. Gen. Fin. Servs., Inc.*, 259 P.3d 803, 817 (N.M. 2011) (“Substantive unconscionability concerns the legality and fairness of the contract terms themselves . . . .” (quoting *Cordova v. World Fin. Corp. of N.M.*, 208 P.3d 901, 907 (N.M. 2009))).

66. See *Phoenix Ins. Co.*, 949 N.E.2d at 647; *Manfredi*, 340 S.W.3d at 132, 134; *Rivera*, 259 P.3d at 817 (citing *Cordova*, 208 P.3d 901); *Westmoreland*, 721 S.E.2d at 719.

analysis, courts are ordinarily unwilling to declare terms to be per se substantively unconscionable, instead analyzing challenged contract terms in light of the individual circumstances of each case.<sup>67</sup>

With respect to arbitration agreements specifically, courts disfavor arbitration provisions that are one-sided and have the effect of benefiting one party much more than the other.<sup>68</sup> However, although courts will often closely scrutinize a contract that has one-sided contract provisions, especially in the context of consumer contracts, they do not normally require that contract provisions equally benefit the parties.<sup>69</sup> Courts have also carefully weighed provisions that prevent the plaintiffs from seeking the same remedies that would be available in court, particularly if there are specific statutory rights involved.<sup>70</sup> Unreasonable or prohibitively high arbitration costs have been another justification for finding an arbitration provision substantively unconscionable.<sup>71</sup> In considering whether a contract provision is

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67. See, e.g., *Tillman*, 655 S.E.2d at 371–72; *Livingston*, 227 P.3d at 807.

68. *Manfredi*, 340 S.W.3d at 134–35 (holding that arbitration agreement provisions, which allowed the defendant to “unilaterally revise the arbitration rules, render the arbitrator powerless to resolve a large class of claims, or fail to provide an adequate remedy for the dispute,” were substantively unconscionable); *Tillman*, 655 S.E.2d at 372–73 (holding that an arbitration agreement was substantively unconscionable in part because the agreement exempted foreclosure actions and claims of less than \$15,000, which unfairly benefited the defendant); *Williams*, 700 N.E.2d at 866; *Porpora*, 828 N.E.2d at 1085.

69. See, e.g., *Walther*, 872 A.2d at 748 (holding that arbitration agreement in mortgage agreement did not lack mutuality even though agreement allowed mortgage company to bring foreclosure actions in court); *Motsinger v. Lithia Rose-FT, Inc.*, 156 P.3d 156, 164 (Or. Ct. App. 2007) (concluding that “an approach that focuses on the one-sided *effect* of an arbitration clause—rather than on its one-sided *application*—to evaluate substantive unconscionability is most consistent with the common law in Oregon regarding unconscionability of other kinds of contractual provisions and with state and federal policies regarding arbitration”).

70. See, e.g., *Gonski v. Second Jud. Dist. Ct.*, 245 P.3d 1164, 1171–72 (Nev. 2010) (holding that the arbitration agreement was unconscionable where it impermissibly waived most statutory protections regarding residential construction defects); *Hayes v. Oakridge Home*, 886 N.E.2d 928, 930, 932 (Ohio Ct. App. 2008), *rev’d*, 908 N.E.2d 408 (Ohio 2009); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1175 (Ohio Ct. App. 2004).

71. See *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90–91 (2000) (observing that “the existence of large arbitration costs” might serve as a basis for a determination that an arbitration agreement was unenforceable); see also *Tillman*, 655 S.E.2d at 371–72 (holding that the arbitration agreement, which stated that the loser would bear the costs of any arbitration lasting more than eight hours, was substantively unconscionable where the evidence showed that the plaintiff had limited financial resources and a two-day arbitration hearing would cost several thousand dollars); *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940, 952 (Or. Ct. App. 2007) (holding that an arbitration agreement’s cost-sharing provision was “sufficiently onerous to act as a deterrent to [the] plaintiffs’ vindication of their claim”);

substantively unconscionable, Ohio courts may evaluate the challenged provision's commercial reasonableness.<sup>72</sup> Finally, courts are more likely to find arbitration agreements substantively unconscionable if the agreements do not provide enough information about the arbitration process.<sup>73</sup>

### III. THE SCHOLARLY DEBATE REGARDING HOW STATE COURTS APPLY THE UNCONSCIONABILITY DOCTRINE

As introduced *supra*, much has been written about how state courts apply the unconscionability doctrine to arbitration agreements, with many scholars critical of state courts' purportedly uneven approach.<sup>74</sup> This critique has been echoed by federal courts, especially the U.S. Supreme Court.<sup>75</sup> These concerns about uneven application of the unconscionability doctrine provide a good starting point for this long-term study and, thus, merit some further discussion.

California has drawn the most attention, in part because of empirical research by Stephen A. Broome<sup>76</sup> and Susan Randall,<sup>77</sup> and in part because of the U.S. Supreme Court's 2011 decision in *AT&T Mobility LLC*.<sup>78</sup> Broome's study analyzed the unconscionability case law of the California courts of appeal, the state's intermediate appellate courts, for the time period from August 27, 1982, the date of the first case adopting a "modern" approach to the unconscionability doctrine, to January 26, 2006.<sup>79</sup> In all, Broome analyzed a total of 160 cases, including 114 cases in which there was an unconscionability challenge to an arbitration

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*cf. Westmoreland*, 721 S.E.2d at 722 (determining that the trial court erred in finding an arbitration agreement's cost-shifting provision unconscionable where the plaintiff did not present evidence of arbitration costs or comparisons between the costs of arbitrating versus litigating her claims).

72. See, e.g., *Collins v. Click Camera & Video, Inc.*, 621 N.E.2d 1294, 1299 (Ohio Ct. App. 1993).

73. See, e.g., *Felix v. Ganley Chevrolet, Inc.*, 2006-Ohio-4500, ¶ 22 (Ct. App.).

74. See *supra* note 4.

75. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011) (noting that California courts are more likely to find an arbitration agreement unconscionable than other types of contracts).

76. See generally Broome, *supra* note 4.

77. See generally Randall, *supra* note 4.

78. See generally *AT&T Mobility LLC*, 131 S. Ct. 1740.

79. Broome, *supra* note 4, at 44 n.33 (citing *A&M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 121-22 (Cal. Ct. App. 1982)). Broome defined the "modern" approach to the unconscionability doctrine as one that requires a showing of both procedural and substantive unconscionability. See *id.*

agreement and forty-six cases involving unconscionability challenges to non-arbitration contract provisions.<sup>80</sup>

Having done the math, Broome concluded that “unconscionability challenges before the California appellate courts succeed with far greater frequency when the contractual provision at issue is an arbitration agreement.”<sup>81</sup> Specifically, he determined that California courts of appeal found arbitration provisions unconscionable in fifty-eight percent of cases but only held non-arbitration contract provisions unconscionable eleven percent of the time.<sup>82</sup> Although Broome’s study is useful in understanding California courts’ application of the unconscionability doctrine, its narrow focus on one state prevents it from contributing to a broader understanding of state courts’ unconscionability analysis.

Professor Randall took a different approach than Broome, analyzing all states’ approaches to unconscionability in the arbitration context, but limiting her study to a comparison of two two-year time periods, 1982 to 1983 and 2002 to 2003.<sup>83</sup> Randall asserted that as of 2004, the date that her article was written, “judges [found] arbitration agreements unconscionable at twice the rate of non-arbitration agreements.”<sup>84</sup> In comparison, she determined that twenty years earlier, judges found arbitration and non-arbitration contract provisions unconscionable at the same rate.<sup>85</sup> Specifically, Randall argued that judges found forum selection clauses, confidentiality requirements, and punitive damages limitations unconscionable in arbitration agreements, but they would routinely find them unobjectionable in contracts that did not have arbitration clauses.<sup>86</sup>

Randall acknowledged that a “significant number” of the cases that she relied on were decided by state and federal courts in California, but she determined that a total of seventeen different state courts found arbitration agreements unconscionable between 2002 and 2003.<sup>87</sup>

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80. *Id.* at 44–47.

81. *Id.* at 40.

82. *Id.* at 48.

83. Randall, *supra* note 4, at 187.

84. *Id.* at 186.

85. *Id.*

86. *Id.*

87. *Id.* at 194–95. Those state courts included Alabama, California, Florida, Idaho, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, New Mexico, Nevada, Ohio, Pennsylvania, Tennessee, Texas, Washington, and West Virginia. *Id.* at 195 n.35.

Although Randall recognized that a number of factors could be responsible, at least in part, for the increased number of cases involving unconscionable arbitration agreements—such as increases in the number of cases generally and escalating aggressiveness in the drafting of arbitration agreements—she argued that “increased judicial willingness to find unconscionability in arbitration agreements suggest[ed] a latent judicial hostility to arbitration and use of unconscionability contrary to the Federal Arbitration Act’s mandate.”<sup>88</sup>

Like Broome’s study of the California appellate courts’ unconscionability case law, Randall’s study also makes important contributions to a fuller understanding of how state courts apply the unconscionability doctrine. Because Randall does not focus on just one state, her study suggests a larger problem with the uneven application of the unconscionability doctrine to arbitration agreements versus other types of contracts.<sup>89</sup> One of the study’s limitations, however, is its very narrow date range.<sup>90</sup> By focusing on two such limited time spans, it is difficult to conclude if the patterns that she observed hold true for the long term.

Most recently, contracts scholar Charles L. Knapp conducted the largest scale study of unconscionability cases, although his study is still too cursory to come to many broader conclusions.<sup>91</sup> Knapp conducted a survey of published state and federal case law in which contract unconscionability was an issue, covering the time period from 1990 through 2008.<sup>92</sup> Similar to some of Randall’s observations, Knapp noted as a general trend that the number of unconscionability cases has increased in terms of absolute numbers since 1990, although that increase was due for the most part to an increase in unconscionability arguments related to arbitration agreements.<sup>93</sup> Moreover, he noted a significant increase in the “success” of unconscionability arguments during that time period, due almost entirely to cases involving arbitration agreements.<sup>94</sup>

Echoing Broome’s conclusions, Knapp found that unconscionability claims were more likely to succeed in the California state appellate

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88. *Id.* at 196.

89. *See generally id.*

90. *Id.* at 187.

91. *See generally* Knapp, *supra* note 4.

92. *See id.* at 620.

93. *Id.* at 621–23.

94. *Id.* at 622–23.



courts, with California state cases representing over one-third, or thirty-two out of eighty-eight, of state unconscionability cases nationwide during that time period.<sup>95</sup> Furthermore, most federal court decisions in which unconscionability arguments were successful came out of California federal courts or the Ninth Circuit.<sup>96</sup> However, Knapp also found that twenty-two other states' courts, as well as federal courts outside of the Ninth Circuit, decided in favor of parties' unconscionability arguments.<sup>97</sup> Although Knapp recognized that during the early years of arbitration unconscionability jurisprudence at least some state courts used the unconscionability doctrine to express their suspicion of arbitration, he concluded that:

[S]uch outward shows of animosity have for the most part given way to a more measured response, in which the lower courts carefully attempt to identify which aspects of a particular arbitration scheme should be viewed as so fundamentally unfair that either the clause as a whole or those particular components of it should be deemed unconscionable and therefore unenforceable.<sup>98</sup>

Because Knapp's research encompasses the largest number of states over the longest period of time of any study to this point, it adds to our understanding of state courts' application of unconscionability to arbitration agreements. However, one problematic aspect of Knapp's study is that he divided the case law, whether involving arbitration agreements or non-arbitration contract clauses, into only two basic categories: "those in which the claim failed completely and those in which it succeeded to some extent—actually or at least potentially."<sup>99</sup> Thus, data from cases in which the court found the challenged provision unconscionable was lumped in with cases where the appellate court simply determined that the trial court should have considered a party's unconscionability argument and remanded for further consideration of that issue.<sup>100</sup> In cases in which the appellate court remanded to the trial

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95. *Id.* at 623–24.

96. *Id.* at 624–25.

97. *Id.* at 624.

98. *Id.* at 626–27.

99. *Id.* at 621.

100. *Id.* at 621 n.62 ("Thus the category of successful cases for the purpose of this discussion would include not only cases in which a contract was completely invalidated or a particular term was struck down, but also those in which an appellate court merely held that a lower court had wrongly refused to consider a potentially valid claim of unconscionability.").

court for further unconscionability analysis, however, it is not possible to determine whether the party asserting unconscionability was actually successful upon remand. Thus, categorizing remand cases as “successful” may artificially inflate this category. Instead, in many cases it may be more appropriate to view a remand as a signal that the trial court failed to follow appropriate procedural requirements for a proper analysis of a party’s unconscionability argument. To deal with this uncertainty, the instant study treats these remand cases as a separate, third category of case law.

Finally, although taking a national approach like Randall and Knapp did in their studies provides a perspective of how courts generally apply the unconscionability doctrine, the instant study provides less understanding of how individual states have approached this issue and the extent to which individual states follow broader national trends. Therefore, although this Article draws some broader conclusions about how state courts apply the unconscionability doctrine to both arbitration and non-arbitration contract provisions, it also seeks a greater understanding of the patterns that exist by comparing individual states’ approaches to the doctrine.

#### IV. ACROSS THE SPECTRUM OF UNCONSCIONABILITY ANALYSIS: STATE COURTS’ APPLICATION OF THE UNCONSCIONABILITY DOCTRINE

With the previous scholarly work as a foundation for my research and a curiosity about whether the observed trends held true across longer time periods when analyzing individual states’ unconscionability case law, I set out on this research project. As discussed *infra*, the numbers proved somewhat surprising.<sup>101</sup> Although there were certainly a significant number of unconscionability cases that concerned arbitration agreements—in fact, approximately fifty percent of all unconscionability cases during the period of this study—that number did not tell the entire story.<sup>102</sup> My questions about this issue were not fully answered by the fact that, collectively, state courts were slightly more likely to find arbitration agreements unconscionable than other types of contract provisions. Instead, when the numbers are broken down, a much more complex picture of state courts’ application of the unconscionability doctrine begins to emerge. That complexity demonstrates that many

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101. See *infra* Part IV.A.

102. See *infra* Part IV.A.

assumptions—of both courts and scholars—about state courts’ use of the unconscionability doctrine need reconsideration.

*A. The Big Picture: The Overall Numbers*

In order to obtain a full understanding of the state courts’ application of the unconscionability doctrine, this study first analyzes the breakdown of unconscionability cases in these twenty states by year, separated into cases involving arbitration agreements and those that involve challenges to other types of contract provisions.<sup>103</sup> After gaining a greater understanding of the patterns that exist within unconscionability case law in general, this study then explores the success rates for these unconscionability challenges. Throughout, this subsection remains focused on the more general national trends extrapolated from these cases. In further subsections, those trends will be further broken down by state.

1. Unconscionability Cases in General: The Breakdown Between Arbitration and Non-Arbitration Cases

Within the twenty states surveyed for this study, the appellate courts engaged in unconscionability analysis in 460 cases between 1980 and 2012.<sup>104</sup> Of those cases, 231, or 50.22%, involved non-arbitration contract provisions.<sup>105</sup> Additionally, 237 cases, or 51.52%, involved arbitration agreements.<sup>106</sup> Over the course of more than thirty years, therefore, parties have sought to challenge arbitration and non-arbitration contracts on fairly equal footing.

Of course, these numbers do not tell the entire story. First, some scholars argue that the number of arbitration cases demonstrates that parties are more likely to use the unconscionability doctrine in an attempt to challenge arbitration agreements than other types of contracts, and to a certain extent, at least in the last ten to fifteen years, this assertion is correct.<sup>107</sup> In the non-arbitration context, there are

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103. See *supra* notes 9–10 and accompanying text; see also *infra* Table 1.

104. See *infra* Table 1.

105. See *infra* Table 1; see also *infra* Graph 1.

106. See *infra* Table 1; see also *infra* Graph 1. Eight cases involved both arbitration and non-arbitration provisions and have been counted in each category, explaining why there appear to be more than 100% of the cases being accounted for. See *infra* note 264.

107. See, e.g., Randall, *supra* note 4, at 194 (“Litigants rarely invoked unconscionability prior to the increase in the use of arbitration agreements. . . . However, as the use of arbitration agreements has increased, claims of unconscionability have also increased . . .”).

numerous different types of contract clauses at issue, such as provisions that limit damages,<sup>108</sup> limit liability,<sup>109</sup> or provide for liquidated damages in the event of a breach.<sup>110</sup> If the non-arbitration cases were separated by type of contract provision at issue, the resulting numbers would highlight the current legal interest in arbitration, to be sure. But it is also important to note that the unconscionability doctrine has been around for a very long time, and thus much of the case law in which parties used the doctrine to challenge other types of contracts would therefore come from the decades prior to 1980.<sup>111</sup> Thus, by focusing solely on the case law since 1980, it is possible that this study, as well as the work of other scholars, has made the arbitration issue appear more significant than it would be if put into a long-term context. In fact, it is likely that the use of the unconscionability doctrine has gone through cycles of popularity—at least in terms of its use in pleadings, if not in case outcomes. It is also important to keep in mind the larger trend in litigation—that is, there have been an ever-increasing number of cases in litigation over time.<sup>112</sup> Thus, adjusting for “inflation” of case filings more generally, the number of unconscionability cases, whether involving arbitration clauses or not, may not be as significant as they appear on the surface—but, that’s a potential topic for another article.

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108. See, e.g., *Fireman’s Fund Am. Ins. Cos. v. Burns Elec. Sec. Servs., Inc.*, 417 N.E.2d 131 (Ill. App. Ct. 1980); *Leet v. Totah*, 620 A.2d 1372 (Md. 1993); *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 537 N.E.2d 624 (Ohio 1989); *Scott Reising Jewelers, Inc. v. ADT Sec. Servs., Inc.*, Nos. C-050322, C-050329, 2006 WL 6576746 (Ohio Ct. App. May 10, 2006); *Motorists Mut. Ins. Co. v. ADT Sec. Sys.*, Nos. 14799, 14803, 1995 WL 461316 (Ohio Ct. App. Aug. 4, 1995).

109. See, e.g., *Municipality of Anchorage v. Locker*, 723 P.2d 1261 (Alaska 1986); *Nat’l Union Fire Ins. Co. v. Guardtronic, Inc.*, 64 S.W.3d 779 (Ark. Ct. App. 2002); *Reuben H. Donnelley Corp. v. Krasny Supply Co.*, 592 N.E.2d 8 (Ill. App. Ct. 1991); *Fireman’s Fund Am. Ins. Cos.*, 417 N.E.2d 131; *Purcell Tire & Rubber Co. v. Exec. Beechcraft, Inc.*, 59 S.W.3d 505 (Mo. 2001) (en banc); *Scott Reising Jewelers, Inc.*, 2006 WL 6576746; *Hurst v. Enter. Title Agency, Inc.*, 809 N.E.2d 689 (Ohio Ct. App. 2004).

110. See, e.g., *Hartford Fire Ins. Co. v. Architectural Mgmt., Inc.*, 550 N.E.2d 1110, 1115 (Ill. App. Ct. 1990); *Repair Masters Constr., Inc. v. Gary*, 277 S.W.3d 854, 857 (Mo. Ct. App. 2009); *Reichert v. Rubloff Hammond, L.L.C.*, 645 N.W.2d 519, 527 (Neb. 2002); *Buckingham v. Ryan*, 953 P.2d 33, 36, 38 (N.M. Ct. App. 1997) (holding that a liquidated damages provision in a real estate contract was not unconscionable).

111. See Knapp, *supra* note 4, at 612–13.

112. See, e.g., Diarmuid F. O’Scannlain, *Striking a Devil’s Bargain: The Federal Courts and Expanding Caseloads in the Twenty-First Century*, 13 LEWIS & CLARK L. REV. 473, 474–77 (2009) (describing the dramatic increase in the number of cases filed in the federal courts over the preceding four decades).

Moreover, the unconscionability case law numbers—whether involving arbitration agreements or non-arbitration provisions, did not remain constant for the duration of the time period of the instant study. Parties rarely used the unconscionability doctrine to challenge arbitration agreements in the 1980s,<sup>113</sup> and the number of unconscionability challenges to arbitration agreements still remained relatively low throughout the 1990s.<sup>114</sup> Although the number remained relatively low in 2000 and 2001,<sup>115</sup> the number of unconscionability cases involving arbitration agreements climbed steadily between 2002 and 2008.<sup>116</sup> After the peak in 2008, the number of unconscionability cases involving arbitration agreements declined somewhat and appears to have stabilized, at least for now.<sup>117</sup>

In contrast, the numbers for non-arbitration unconscionability cases have a different pattern, basically resembling a wave.<sup>118</sup> Throughout the 1980s and 1990s, the number of non-arbitration unconscionability cases remained relatively constant, but reached their highest points in 1981, 1987, and 1999.<sup>119</sup> The numbers stayed consistent for the years of 2000 through 2004, before increasing again to ten cases each year in 2005 and 2006.<sup>120</sup> After declining a small amount in 2007 and more significantly in 2008, the number of non-arbitration unconscionability cases hit their

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113. See *infra* Table 1. Among the twenty states included in the survey, there was only one unconscionability case involving an arbitration agreement each year for the years 1983, 1986, 1987, and 1988, and only two arbitration cases in 1989. See *infra* Table 1. There were no unconscionability cases involving arbitration agreements between the years 1980 and 1982 or in 1984 and 1985. See *infra* Table 1; see also *infra* Graphs 1, 4.

114. See *infra* Table 1. Although there were more unconscionability cases involving arbitration agreements in the 1990s than in the 1980s, the numbers still remained relatively low. See *infra* Table 1. There was one arbitration case each in 1994 and 1995, three cases in 1993, four cases in 1991, 1992, and 1999, and five cases in 1998. See *infra* Table 1. However, there were no unconscionability cases involving arbitration agreements in 1990, 1996, and 1997. See *infra* Table 1; see also *infra* Graphs 1, 4.

115. See *infra* Table 1. There were six unconscionability cases involving arbitration agreements in 2000 and four cases in 2001. See *infra* Table 1; see also *infra* Graph 4.

116. See *infra* Table 1. The arbitration unconscionability case numbers for the time period from 2002 through 2008 are as follows: thirteen cases in 2002, eleven in 2003, twenty-two in 2004, nineteen in 2005, twenty-two in 2006, twenty-seven in 2007, and twenty-seven in 2008. See *infra* Table 1; see also *infra* Graphs 1, 4.

117. See *infra* Table 1; Graphs 1, 4. There were seventeen unconscionability cases involving arbitration agreements in 2009, fourteen in 2010, fifteen in 2011, and twelve in 2012. See *infra* Table 1; see also *infra* Graphs 1, 4.

118. See *infra* Table 1; see also *infra* Graphs 1, 3.

119. See *infra* Table 1; see also *infra* Graphs 1, 3. There were ten non-arbitration unconscionability cases in 1981, eleven in 1987, and ten in 1999. See *infra* Table 1.

120. See *infra* Table 1; see also *infra* Graphs 1, 3.

highest peak in 2009 and 2010 with fourteen and thirteen cases, respectively.<sup>121</sup>

## 2. Unconscionability Found: General Comparisons Between Arbitration and Non-Arbitration Cases

Having generally surveyed the lay of the unconscionability landscape over the past thirty-two years, let us now focus on the central issues addressed by this Article. How often do state courts find contract provisions to be unconscionable, and to what extent are they more likely to find arbitration agreements unconscionable than other types of contracts? In reality, the answer to that question is not as simple as it might seem on the surface. Although the overall numbers suggest that state courts have been more inclined to find arbitration agreements unconscionable than other types of contracts, the actual numbers do not demonstrate the type of dramatic contrast that the scholarly literature suggests should exist, and there are also some surprising outcomes.<sup>122</sup>

In all, courts found contract provisions, whether involving arbitration or not, unconscionable in approximately twenty-three percent of cases.<sup>123</sup> That number further breaks down as follows. Out of the 237 arbitration unconscionability cases surveyed, state courts determined that arbitration clauses were unconscionable and refused to enforce the arbitration agreements, either in whole or in part, in sixty cases.<sup>124</sup> Thus, in twenty-five percent of arbitration cases, the courts determined that the challenged clause was unconscionable.<sup>125</sup> In contrast, courts found unconscionability in forty-six out of 231 non-arbitration cases, amounting to twenty percent of those cases.<sup>126</sup> These numbers demonstrate that although there is a difference between the percentage of arbitration agreements with unconscionable provisions and the percentage of non-arbitration provisions found unconscionable, the difference is not huge and, in fact, may not be considered that significant.

There was one major surprise in the statistics, however. Although there was not a significant difference over time in the percentage of

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121. See *infra* Table 1; see also *infra* Graphs 1, 3.

122. Karen Halverson Cross, *Letting the Arbitrator Decide Unconscionability Challenges*, 26 OHIO ST. J. ON DISP. RESOL. 1, 9–10 (2011).

123. See *infra* Table 1.

124. See *infra* Table 1.

125. See *infra* Table 1.

126. See *infra* Table 1.

cases found unconscionable, there was a significant difference in the number of cases in which appellate courts considered the unconscionability issue for arbitration cases but remanded to the trial court for further unconscionability analysis.<sup>127</sup> Since 1980, the state appellate courts remanded only thirteen non-arbitration cases to the trial courts for further unconscionability analysis, amounting to approximately 5.63% of all non-arbitration unconscionability cases.<sup>128</sup> In contrast, appellate courts remanded thirty-five arbitration cases to the trial court for further unconscionability analysis, or just under fifteen percent of arbitration-related unconscionability cases.<sup>129</sup> These numbers suggest that although appellate courts have historically applied the unconscionability doctrine fairly consistently to both arbitration and non-arbitration agreements, trial courts have sometimes struggled with how they should approach this legal concept. Just because appellate courts remand more arbitration cases to the trial court for further unconscionability analysis, however, does not necessarily support a conclusion that the courts are less favorable to arbitration agreements. These cases are almost never appealed a second time, and, therefore, it is unknown what the outcome was in the trial court after remand.<sup>130</sup>

*B. Breaking it Down: Reoccurring Themes Within the Overall Numbers*

The overall numbers do not tell the entire story, however, and, in some ways, are actually misleading. As discussed below, there is significant variation in how individual states' unconscionability numbers play out. When the numbers are broken down state by state, it becomes clear that the overall numbers do not represent how many states approach the unconscionability doctrine, whether applied to arbitration agreements or other types of contracts. States fall at different points along the unconscionability spectrum, with some states' courts rarely, if ever, finding any contract clauses unconscionable and, at the opposite end, other states' courts appearing to be very sympathetic to unconscionability defenses regardless of the type of contract. Although

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127. See *infra* Table 1; Graph 5.

128. See *infra* Table 1.

129. See *infra* Table 1.

130. This uncertainty is one reason why I disagree with Professor Knapp's inclusion of this category of cases with the cases in which courts found contract provisions to be unconscionable. See Knapp, *supra* note 4, at 621 & n.62. Professor Knapp describes this category of cases as the "potentially" successful category, but, as noted previously, the outcome upon remand is merely speculative. See *id.*

four states are definitely more likely to find an arbitration agreement unconscionable than other types of contracts, other states are more moderate in their approaches to unconscionability and fall somewhere in the middle of the spectrum.

### 1. The “Conservative” Approach: A Reluctance to Embrace the Unconscionability Doctrine

On the one end of the unconscionability spectrum are states that have rarely found any contract provision, whether an arbitration provision or some other type of clause, unconscionable. This Article will refer to this approach as the “conservative” approach to the unconscionability doctrine. For obvious reasons, states that are conservative in their approach to unconscionability provide little support for the theory that courts treat arbitration agreements differently with respect to unconscionability analysis than they do other types of contract provisions. Out of the twenty states that I analyzed for purposes of this study, I have classified ten as falling into the conservative category: Colorado, Maine, Maryland, Minnesota, Nebraska, New Hampshire, North Carolina, Oregon, Rhode Island, and South Carolina.<sup>131</sup> Although the appellate courts in some of these states may occasionally find a contract provision unconscionable, it is certainly not a common phenomenon.

A general summary of the unconscionability case law from these ten states during the time period from 1980 to 2012 provides a useful picture of the status of the unconscionability doctrine in these states. As a preliminary matter, it is important to note that the courts in all of the conservative-approach states have recognized unconscionability as a possible contract defense.<sup>132</sup> However, despite that recognition, during

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131. See *infra* Table 2.

132. See, e.g., *Davis v. M.L.G. Corp.*, 712 P.2d 985, 991–92 (Colo. 1986); *Walther v. Sovereign Bank*, 872 A.2d 735, 743 (Md. 2005); *Int’l Fin. Servs., Inc. v. Franz*, 534 N.W.2d 261, 269 (Minn. 1995); *Myers v. Neb. Inv. Council*, 724 N.W.2d 776, 799–800 (Neb. 2006); *Pittsfield Weaving Co. v. Grove Textiles, Inc.*, 430 A.2d 638, 639 (N.H. 1981); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 369–70 (N.C. 2008); *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940, 948 (Or. Ct. App. 2007); *Ruzzo v. LaRose Enters.*, 748 A.2d 261, 269 (R.I. 2000); *Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 365 (S.C. 2001). Although the Supreme Judicial Court of Maine has never applied Maine unconscionability law to a contract provision, the Kennebec County Superior Court-Augusta has held contract provisions to be unconscionable under Maine law. See, e.g., *Newcombe v. Mooers*, No. CV-99-043, 2000 WL 33675662, at \*2 (Me. Super. Ct. Oct. 13, 2000). In *Barrett v. McDonald Investments, Inc.*, 870 A.2d 146 (Me. 2005), the concurrence contained a detailed discussion of the unconscionability doctrine and stated that the contract at issue appeared to be unconscionable. *Id.* at 155-56



the time period of the instant study, four of the ten states had no cases in which appellate courts considered whether the unconscionability doctrine could challenge an arbitration agreement: Maine,<sup>133</sup> Nebraska,<sup>134</sup> New Hampshire,<sup>135</sup> and Rhode Island.<sup>136</sup> During the same time period, appellate courts in three other states—Maryland, Colorado, and Minnesota—considered the unconscionability doctrine in the context of arbitration agreements but found no arbitration provisions unconscionable.<sup>137</sup> Furthermore, since 1980, the appellate courts in

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(Alexander, J., concurring). I have not included *Barrett* in this study because neither the trial court nor the majority opinion identified unconscionability as an issue in the case or described any unconscionability arguments raised by the parties. *See generally* *Barrett v. McDonald Investments, Inc.*, No. CV-03-128, 2003 WL 25794014 (Me. Super. Ct. Dec. 22, 2003); *Barrett*, 870 A.2d 146.

133. *See infra* Table 2. Since 1980, Maine has not had a single case in which the Maine Supreme Judicial Court applied Maine unconscionability law. *See infra* Table 2.

134. *See infra* Table 2. Since 1980, Nebraska appellate courts have considered the unconscionability doctrine in five cases, all involving non-arbitration clauses. *See infra* Table 2. Out of those five cases, the Nebraska Court of Appeals found unconscionability in one situation. *See Adams v. Am. Cyanamid Co.*, 498 N.W.2d 577, 591 (Neb. Ct. App. 1992). That case involved a commercial contract. *See id.* at 589–90.

135. *See infra* Table 2. Like Nebraska, New Hampshire has had five appellate cases involving the unconscionability doctrine since 1980, all involving non-arbitration contracts. *See infra* Table 2. New Hampshire also only had one case in which the New Hampshire Supreme Court found unconscionability, a commercial contract case. *See infra* Table 2; *see also Pittsfield Weaving Co.*, 430 A.2d 638. There has only been one appellate case in which a New Hampshire court considered the unconscionability doctrine since 1986. *See infra* Table 2; *see also Pope v. Lee*, 879 A.2d 735 (N.H. 2005).

136. *See infra* Table 2. The Rhode Island Supreme Court has only considered two unconscionability cases since 1980. *See infra* Table 2. *See generally Ruzzo*, 748 A.2d 261; *Ostalkiewicz v. Guardian Alarm*, 520 A.2d 563 (R.I. 1987). The court held that the challenged provision was unconscionable in one of those cases. *See Ruzzo*, 748 A.2d at 269. Although that amounts to a fifty percent success rate for unconscionability arguments, I have classified Rhode Island as a conservative state because it has only held a contract provision to be unconscionable on that one occasion. However, the Rhode Island Supreme Court has not explicitly discussed procedural and substantive unconscionability as part of its unconscionability analysis. *See Ostalkiewicz*, 520 A.2d at 565–66 (discussing several factors in its determination that the terms of a burglary alarm contract were not unconscionable); *Ruzzo*, 748 A.2d at 269 (holding that “in Rhode Island, a disclaimer for personal injuries arising from the use of a consumer product introduced into the stream of commerce [was per se] ‘unconscionable’” (internal quotation mark omitted)).

137. *See infra* Table 2. Since 1980, Maryland appellate courts have analyzed whether arbitration provisions were unconscionable on five occasions but have never found a challenged arbitration provision to be unconscionable. *See infra* Table 2. Colorado has analyzed whether challenged contract provisions were unconscionable on nine occasions, with two of the nine cases involving arbitration agreements. *See infra* Table 2. Although the Colorado appellate courts have never found an arbitration agreement to be unconscionable, on one occasion a Colorado appellate court did remand a case back to the trial court for further proceedings related to an unconscionability argument. *See infra* Table 2; *see also*

Maine and Maryland have not found *any* contract provision to be unconscionable.<sup>138</sup> Although Minnesota courts have considered the unconscionability doctrine on twenty-two occasions, far surpassing the unconscionability case law of the other conservative states, the Minnesota appellate courts have only found a contract provision unconscionable on two occasions, less than ten percent of the time.<sup>139</sup>

Moreover, even among state courts that have found contract provisions to be unconscionable, it has often been many years since their last successful unconscionability case. For example, Minnesota appellate courts last found a contract provision unconscionable in 1991,<sup>140</sup> and the last time that a Nebraska appellate court found a contract clause to be unconscionable was in 1992.<sup>141</sup> New Hampshire's last successful unconscionability case was in 1981,<sup>142</sup> and a Colorado appellate court last found a challenged contract provision unconscionable in 1986.<sup>143</sup> Rhode Island's last successful unconscionability case was in 2000.<sup>144</sup> These statistics show that even as unconscionability challenges to arbitration agreements became more common on the national level in the last decade or so, the trend has not meant that those unconscionability defenses have become more successful in all states.

Although North Carolina and South Carolina appellate courts have each found arbitration agreements unconscionable, their treatment of arbitration agreements, and their application of the unconscionability

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Estate of Grimm v. Evans, 251 P.3d 574, 576, 578 (Colo. App. 2010). Although Minnesota appellate courts have considered whether contract provisions were unconscionable on twenty-two occasions, only one of those cases involved an arbitration agreement, and the court determined that the arbitration provision at issue in that case was not unconscionable. See *infra* Table 2; see also Ottman v. Fadden, 575 N.W.2d 593, 597 (Minn. Ct. App. 1998) (holding that arbitration provision in employment contract was not unconscionable).

138. See *infra* Table 2.

139. See *infra* Table 2; see also Glarner v. Time Ins. Co., 465 N.W.2d 591, 595–96, 598 (Minn. Ct. App. 1991); Zontelli & Sons, Inc. v. City of Nashwauk, 353 N.W.2d 600, 604–05 (Minn. Ct. App. 1984) (holding that contract's remedy provisions were unconscionable), *rev'd*, 373 N.W.2d 744 (Minn. 1985). The Minnesota Supreme Court later reversed the appellate court's unconscionability determination in *Zontelli & Sons, Inc. v. City of Nashwauk*. See *Zontelli & Sons, Inc. v. City of Nashwauk*, 373 N.W.2d 744, 753, 756 (Minn. 1985).

140. See generally *Glarner*, 465 N.W.2d 591.

141. See generally *Adams v. Am. Cyanamid Co.*, 498 N.W.2d 577 (Neb. Ct. App. 1992).

142. See generally *Pittsfield Weaving Co. v. Grove Textiles, Inc.*, 430 A.2d 638 (N.H. 1981).

143. See generally *Davis v. M.L.G. Corp.*, 712 P.2d 985 (Colo. 1986).

144. See generally *Ruzzo v. LaRose Enters.*, 748 A.2d 261 (R.I. 2000).

doctrine more generally, is still much more conservative than the average.<sup>145</sup> For example, South Carolina appellate courts have considered the unconscionability doctrine in nine cases, ultimately finding the challenged contract provisions unconscionable in one case, which happened to be a case in which an arbitration agreement was at issue.<sup>146</sup> Thus, South Carolina appellate courts have found a contract provision unconscionable in 11.1% of its total unconscionability cases.<sup>147</sup> Even if one only considers South Carolina's arbitration unconscionability cases, South Carolina appellate courts found the challenged arbitration provisions to be unconscionable in one out of seven cases, or only 14.29% of the time, which is still far below the average—whether considering arbitration agreements, non-arbitration contract provisions, or both—among the states in this study.<sup>148</sup>

North Carolina courts have had a similar approach to those of South Carolina in this respect. Since 1980, North Carolina appellate courts have considered unconscionability arguments in twenty cases.<sup>149</sup> In only one of those cases, which involved an arbitration agreement, the North Carolina appellate courts found the challenged provision to be unconscionable, amounting to only five percent of the unconscionability cases.<sup>150</sup> Even if considering arbitration agreements, however, North Carolina appellate courts have only found challenged contract provisions to be unconscionable in one out of eight cases, or 12.5% of the time, once again well below the average for states in this study.<sup>151</sup>

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145. See generally *infra* Tables 1–2; see also *supra* text accompanying notes 123–26.

146. See *infra* Table 2; see also *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 673 (S.C. 2007).

147. See *infra* Table 2.

148. See *infra* Tables 1–2; see also *supra* text accompanying notes 125–26. Interestingly, South Carolina has also considered whether a clause in an arbitration agreement banning class action arbitration is unconscionable. See *Herron v. Century BMW*, 693 S.E.2d 394 (S.C. 2010), *vacated sub nom. Sonic Auto., Inc. v. Watts*, 131 S. Ct. 2872 (2011) (mem.), *reinstated by* 719 S.E.2d 640 (S.C. 2011). The South Carolina Supreme Court determined that the challenged provision was not unconscionable but still refused to enforce it on public policy grounds. See *id.* at 398–400. Ultimately, the U.S. Supreme Court vacated the South Carolina Supreme Court's decision and remanded for further proceedings in light of *AT&T Mobility*. See *Sonic Auto., Inc.*, 131 S. Ct. 2872, *reh'g sub. nom. Herron v. Century BMW*, 719 S.E.2d 640 (S.C. 2011).

149. See *infra* Table 2.

150. See *infra* Table 2; see also *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008).

151. See *infra* Table 2; see also *supra* text accompanying note 125. On one other occasion, the North Carolina Appellate Court considered the unconscionability doctrine but ultimately remanded the case to the trial court for further proceedings related to the

The final state that falls within the conservative category is Oregon. Oregon courts applied the unconscionability doctrine to contracts in nine cases between 1980 and 2012.<sup>152</sup> However, all but one of those cases were decided between 2005 and 2012.<sup>153</sup> Two of the cases involved non-arbitration contract clauses,<sup>154</sup> and the Oregon courts found one of those challenged contracts unconscionable.<sup>155</sup> The other seven cases involved arbitration agreements.<sup>156</sup> Oregon courts only held challenged arbitration clauses unconscionable in one of the seven cases, or 14.29% of the time.<sup>157</sup> Although Oregon's overall unconscionability numbers, 22.22% unconscionable, put the state more in keeping with the unconscionability numbers for all twenty states combined, this Article categorizes Oregon as one of the conservative states because it has not been as sympathetic to unconscionability defenses in the arbitration context and has not found any contract provision unconscionable since 2007.<sup>158</sup>

## 2. The Opposite Extreme: States that Appear to Have Embraced the Unconscionability Doctrine in Both Arbitration and Non-Arbitration Contexts

On the opposite side of the spectrum are the states that appear to have embraced the unconscionability doctrine in both the arbitration and non-arbitration context. Admittedly, the number of states that fall into this category is much smaller.<sup>159</sup> Out of the twenty states analyzed

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unconscionability issue. See *Kucan v. Advance Am.*, 660 S.E.2d 98, 103–04 (N.C. Ct. App. 2008).

152. See *infra* Table 2.

153. The nine Oregon unconscionability cases are *Hatkoff v. Portland Adventist Med. Ctr.*, 287 P.3d 1113 (Or. Ct. App. 2012); *Livingston v. Metro. Pediatrics, LLC*, 227 P.3d 796 (Or. Ct. App. 2010); *Hays Grp., Inc. v. Biege*, 193 P.3d 1028 (Or. Ct. App. 2008); *Sprague v. Quality Rests. Nw., Inc.*, 162 P.3d 331 (Or. Ct. App. 2007); *Motsinger v. Lithia Rose-FT, Inc.*, 156 P.3d 156 (Or. Ct. App. 2007); *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940 (Or. Ct. App. 2007); *DEX Media, Inc. v. Nat'l Mgmt. Servs., Inc.*, 150 P.3d 1093 (Or. Ct. App. 2007); *Carey v. Lincoln Loan Co.*, 125 P.3d 814 (Or. Ct. App. 2005); and *Or. Bank v. Nautilus Crane & Equip. Corp.*, 683 P.2d 95 (Or. Ct. App. 1984).

154. See generally *Carey*, 125 P.3d 814; *Or. Bank*, 683 P.2d 95.

155. *Carey*, 125 P.3d at 831–32.

156. See generally *Livingston*, 227 P.3d 796; *Hays Grp., Inc.*, 193 P.3d 1028; *Sprague*, 162 P.3d 331; *Motsinger*, 156 P.3d 156; *Vasquez-Lopez*, 152 P.3d 940; *DEX Media, Inc.*, 150 P.3d 1093.

157. See *Vasquez-Lopez*, 152 P.3d at 948–53.

158. Oregon courts last held a contract provision unconscionable in *Vasquez-Lopez v. Beneficial Or., Inc.*, a case involving an arbitration agreement. See generally *id.*

159. See *infra* Table 3.

for purposes of this study, three states' appellate courts have shown a significant tendency to be sympathetic to unconscionability defenses: Alaska, Arkansas, and Vermont.<sup>160</sup> Although the courts in these states have found arbitration agreements to be unconscionable, they have often also found non-arbitration provisions to be unconscionable.<sup>161</sup> In fact, the Alaska, Arkansas, and Vermont appellate courts have found challenged contract provisions to be unconscionable in almost fifty percent of the unconscionability cases argued before them.<sup>162</sup>

Specifically, the Alaska Supreme Court has considered unconscionability arguments in eleven cases since 1980, three of which involved arbitration agreements and eight of which involved non-arbitration contract provisions.<sup>163</sup> Of those eleven cases, the court has found challenged contract provisions to be unconscionable on five occasions, or in approximately forty-five percent of cases.<sup>164</sup> One of these five cases involved an arbitration agreement,<sup>165</sup> but the other four involved non-arbitration provisions.<sup>166</sup> Arkansas appellate courts have also applied the unconscionability doctrine in eleven cases since 1980 and have found challenged provisions to be unconscionable in five of those cases, or approximately forty-five percent of the time.<sup>167</sup> Just like the breakdown in Alaska, one of the five unconscionable cases in Arkansas involved an arbitration agreement,<sup>168</sup> and the other four involved non-arbitration contract provisions.<sup>169</sup> Finally, the Vermont

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160. *See infra* Table 3.

161. *See infra* Table 3.

162. *See infra* Table 3.

163. *See infra* Table 3.

164. *See infra* Table 3.

165. *See infra* Table 3; *see also* Gibson v. Nye Frontier Ford, Inc., 205 P.3d 1091 (Alaska 2009)

166. *See infra* Table 3; *see also* Pierce v. Catalina Yachts, Inc., 2 P.3d 618 (Alaska 2000); Helstrom v. N. Slope Borough, 797 P.2d 1192 (Alaska 1990); Municipality of Anchorage v. Locker, 723 P.2d 1261 (Alaska 1986); Vockner v. Erickson, 712 P.2d 379 (Alaska 1986). Although the Alaska Supreme Court has historically found contract provisions unconscionable in a large percentage of cases, it may be worth noting that the only case in which the Alaska Supreme Court has found a contract provision unconscionable since 2000 was the 2009 arbitration case. *See Gibson*, 205 P.3d at 1098.

167. *See infra* Table 3.

168. *See infra* Table 3; *see also* Waverly-Ark., Inc. v. Keener, No. CA 07-524, 2008 WL 316149, at \*1 (Ark. Ct. App. Feb. 6, 2008). This is actually the only case that I found in which the Arkansas appellate courts have considered whether an arbitration agreement is unconscionable. *See id.*

169. *See infra* Table 3; *see also* Criner v. Reddell, 2011 Ark. App. 661; Garrett v. Fite, 2009 Ark. App. 869; General Elec. Capital Corp. v. McKiever, No. CA98-581, 1999 WL 96029

Supreme Court has found contract provisions unconscionable in three out of six cases, or fifty percent of the cases in which the Court has applied the unconscionability doctrine.<sup>170</sup> Out of the three cases in which unconscionability was found, one case involved both arbitration and non-arbitration unconscionable provisions,<sup>171</sup> and the other two cases involved non-arbitration contract provisions.<sup>172</sup>

Although appellate courts in Alaska, Arkansas, and Vermont have only had limited opportunities to consider unconscionability arguments since 1980, the outcomes of those cases demonstrate that these states' courts are much more open to an unconscionability defense than the conservative states discussed *supra*.<sup>173</sup> Moreover, these states appear just as likely, if not more so, to find a non-arbitration contract unconscionable as they are to apply that doctrine to arbitration agreements.<sup>174</sup> Although Alaska, Arkansas, and Vermont appellate courts have embraced the unconscionability doctrine, the outcomes in these states' cases do not support the conclusion that state courts are more likely to use unconscionability to invalidate arbitration agreements than other types of contracts.

### 3. States with Appellate Courts that Are Only Sympathetic to Unconscionability Arguments in the Arbitration Context

In an additional four states—Missouri, Nevada, New Mexico, and Illinois—the appellate courts also appear to be very sympathetic to unconscionability arguments, but only if the challenged provision is part of an arbitration agreement.<sup>175</sup> However, if the challenged contract provision is not related to arbitration, these courts rarely, if ever, find the challenged provision unconscionable.<sup>176</sup> Thus, these states appear to illustrate exactly the type of concern that the U.S. Supreme Court, as well as many legal scholars, have expressed regarding state courts'

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(Ark. Ct. App. Feb. 17, 1999); *Associated Press v. S. Ark. Radio Co.*, 809 S.W.2d 695 (Ark. Ct. App. 1991).

170. *See infra* Table 3.

171. *See infra* Table 3; *see also* *Glassford v. BrickKicker*, 35 A.3d 1044, 1054 (Vt. 2011).

172. *See infra* Table 3; *see also* *Colgan v. Agway, Inc.*, 553 A.2d 143 (Vt. 1988); *Val Preda Leasing, Inc. v. Rodriguez*, 540 A.2d 648 (Vt. 1987).

173. *Compare infra* Table 2, *with infra* Table 3. *See supra* Part IV.B.1–2.

174. *See infra* Table 3.

175. *See infra* Table 4.

176. *See infra* Table 4.

application of the unconscionability doctrine to arbitration agreements.<sup>177</sup>

On the surface, Missouri would appear to fall into the previous category of states, as Missouri has found challenged contract provisions unconscionable in twelve out of twenty-four cases, or fifty percent of the time.<sup>178</sup> However, the majority of the contract provisions found unconscionable by Missouri courts were arbitration provisions.<sup>179</sup> Specifically, out of the thirteen arbitration-related cases in which Missouri courts considered an unconscionability defense, ten, or approximately seventy-seven percent, were found unconscionable.<sup>180</sup> In contrast, Missouri courts only found non-arbitration contract clauses unconscionable in two out of eleven cases, or eighteen percent of the time.<sup>181</sup> Although Missouri courts have found challenged arbitration clauses unconscionable in the majority of cases, they often sever the unconscionable provision and enforce the remainder of the arbitration agreement.<sup>182</sup> It is also worth noting that four<sup>183</sup> of the Missouri cases

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177. See, e.g., *supra* notes 2–4 and accompanying text.

178. See *infra* Table 4.

179. See *infra* Table 4.

180. See *infra* Table 4. The ten cases in which arbitration agreements were held unconscionable include *Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 496 (Mo. 2012) (en banc); *Brewer v. Mo. Title Loans, Inc.*, 323 S.W.3d 18, 24 (Mo. 2010) (en banc), *vacated*, 131 S. Ct. 2875 (2011) (mem.); *Ruhl v. Lee's Summit Honda*, 322 S.W.3d 136, 139–40 (Mo. 2010); *Manfredi v. Blue Cross & Blue Shield of Kan. City*, 340 S.W.3d 126, 135 (Mo. Ct. App. 2011); *Shaffer v. Royal Gate Dodge, Inc.*, 300 S.W.3d 556, 561 (Mo. Ct. App. 2009); *Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d 90, 99 (Mo. Ct. App. 2008); *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 861 (Mo. 2006) (en banc); *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 314 (Mo. Ct. App. 2005); *Greenpoint Credit, L.L.C. v. Reynolds*, 151 S.W.3d 868, 876 (Mo. Ct. App. 2004); *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 109 (Mo. Ct. App. 2003). Missouri courts found that challenged arbitration provisions were not unconscionable in only two cases: *Grossman v. Thoroughbred Ford, Inc.*, 297 S.W.3d 918, 924 (Mo. Ct. App. 2009); and *Kan. City Urology, P.A. v. United Healthcare Servs.*, 261 S.W.3d 7, 15 (Mo. Ct. App. 2008). Despite the fact that the *Brewer* decisions involve the same parties and legal issues, I have included both decisions because they are technically different court decisions. See generally *Brewer*, 364 S.W.3d 486; *Brewer*, 323 S.W.3d 18. Despite these numbers, Professor Michael A. Wolff, a former judge on the Missouri Supreme Court, asserts that “Missouri law is not hostile to mandatory arbitration.” Michael A. Wolff, *Is There Life After Concepcion? State Courts, State Law, and the Mandate of Arbitration*, 56 ST. LOUIS U. L.J. 1269, 1269 n.\*, 1275 (2012).

181. See *infra* Table 4. The two cases in which Missouri courts found non-arbitration contract provisions unconscionable are *Repair Masters Constr., Inc. v. Gary*, 277 S.W.3d 854, 859 (Mo. Ct. App. 2009); and *Oldham's Farm Sausage Co. v. Salco, Inc.*, 633 S.W.2d 177, 183 (Mo. Ct. App. 1982).

182. See, e.g., *Woods*, 280 S.W.3d at 99–100; *Greenpoint Credit, L.L.C.*, 151 S.W.3d at 875 n.5; *Swain*, 128 S.W.3d at 109.

involving unconscionable arbitration provisions were cases in which the Missouri courts specifically determined that provisions barring class action arbitration were unconscionable.<sup>184</sup> In fact, in one of those cases, *Brewer v. Missouri Title Loans, Inc.*, the U.S. Supreme Court reversed the Missouri Supreme Court's unconscionability determination and remanded the case for further consideration in light of the U.S. Supreme Court's holding in *AT&T Mobility LLC v. Concepcion*.<sup>185</sup>

Similar to the outcome in Missouri appellate courts, the numbers demonstrate that New Mexico appellate courts are more sympathetic to unconscionability challenges to arbitration agreements than to other types of contract provisions.<sup>186</sup> Between 1980 and 2011, New Mexico courts considered an unconscionability defense in contract cases on fifteen occasions.<sup>187</sup> Six of those cases involved challenges to non-arbitration contract provisions, but none of those contracts were found unconscionable.<sup>188</sup> In contrast, the New Mexico courts found arbitration provisions unconscionable in seven out of nine cases, or approximately seventy-eight percent of the time.<sup>189</sup> Further, in two of those cases, the

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183. See generally *Brewer*, 323 S.W.3d 18; *Ruhl*, 322 S.W.3d 136; *Shaffer*, 300 S.W.3d 556; *Woods*, 280 S.W.3d 90. But see *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 507 (Mo. 2012) (en banc) (holding, in light of the U.S. Supreme Court's holding in *AT&T Mobility LLC*, that the trial court erred by determining that a class action waiver in a consumer arbitration agreement was unconscionable). The U.S. Supreme Court also remanded *Missouri Title Loans, Inc. v. Brewer* to the Missouri Supreme Court, in light of *AT&T Mobility LLC*. See *Mo. Title Loans, Inc. v. Brewer*, 131 S. Ct. 2875 (2011) (mem.). Upon remand, the Missouri Supreme Court determined that the class action waiver was not unconscionable, but, taken as a whole, the arbitration agreement was still unconscionable. *Brewer*, 364 S.W.3d at 488, 495.

184. See generally *Brewer*, 323 S.W.3d 18; *Ruhl*, 322 S.W.3d 136; *Shaffer*, 300 S.W.3d 556; *Woods*, 280 S.W.3d at 99.

185. *Mo. Title Loans, Inc. v. Brewer*, 131 S. Ct. 2875 (2011) (mem.), vacating *Brewer*, 323 S.W.3d 18. In light of the U.S. Supreme Court's decision in *AT&T Mobility LLC*, it is unclear whether Missouri courts will continue to invalidate arbitration provisions at the same rate as they have done in recent years. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); see also *infra* Table 4. However, that decision does not mean that Missouri courts do not still use the unconscionability doctrine to invalidate arbitration provisions. See generally *Brewer*, 364 S.W.3d 486; see also *AT&T Mobility LLC*, 131 S. Ct. at 1745-46; *supra* note 183.

186. See *infra* Table 4.

187. See *infra* Table 4.

188. See *infra* Table 4.

189. See *infra* Table 4. The seven cases in which New Mexico courts found arbitration agreements unconscionable are *Rivera v. Am. Gen. Fin. Servs., Inc.*, 259 P.3d 803, 819 (N.M. 2011); *Cordova v. World Fin. Corp. of N.M.*, 208 P.3d 901, 912 (N.M. 2009); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1222 (N.M. 2008); *Padilla v. State Farm Mut. Auto. Ins. Co.*, 68 P.3d 901, 907 (N.M. 2003); *Clay v. N.M. Title Loans, Inc.*, 288 P.3d 888, 901 (N.M. Ct. App. 2012); *Coulter v. Laurel View Healthcare*, No. 30,249, 2012 WL 4434366, at \*2 (N.M. Ct. App.



New Mexico Supreme Court determined that provisions barring class action arbitration were unconscionable.<sup>190</sup> It is also worth noting that all of the non-arbitration cases were decided in 1998 or earlier, and all of the arbitration cases were decided between 1999 and 2012.<sup>191</sup> Accordingly, for more than a decade, the use of the unconscionability doctrine has been solely focused on challenging arbitration agreements, a trend that is not surprising considering its success in New Mexico appellate courts during that time period.<sup>192</sup>

Although Nevada courts are not as sympathetic to unconscionability challenges to arbitration agreements as Missouri and New Mexico, Nevada unconscionability outcomes still raise the same concerns about uneven unconscionability outcomes as those other states do. Since 1980, the Nevada Supreme Court has considered an unconscionability contract defense on nine occasions.<sup>193</sup> Seven of those cases involved arbitration agreements, and all three cases in which the court found unconscionability involved arbitration clauses.<sup>194</sup> Thus, Nevada courts have found challenged arbitration agreements unconscionable forty-three percent of the time, a percentage far above the average for this study.<sup>195</sup> As discussed *supra*, however, in its most recent two unconscionability cases, the Nevada Supreme Court held that the Federal Medicare Act preempted Nevada contract law, and, therefore, the challenged contract provisions in those two cases were not

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Aug. 17, 2012); and *Felts v. CLK Mgmt., Inc.*, 254 P.3d 124, 139 (N.M. Ct. App. 2011).

190. See *Fiser*, 188 P.3d at 1221–22; *Felts*, 254 P.3d at 137–39.

191. *Rivera*, 259 P.3d 803 (2011, arbitration); *Cordova*, 208 P.3d 901 (2009, arbitration); *Fiser*, 188 P.3d 1215 (2008, arbitration); *Padilla*, 68 P.3d 901 (2003, arbitration); *Guthmann v. La Vida Llana*, 709 P.2d 675 (N.M. 1985) (non-arbitration); *Manzano Ind. v. Mathis*, 678 P.2d 1179 (N.M. 1984) (non-arbitration); *Smith v. Price's Creameries*, 650 P.2d 825 (N.M. 1982) (non-arbitration); *Clay*, 288 P.3d 888 (2012, arbitration); *Coulter*, 2012 WL 4434366 (2012, arbitration); *Felts*, 254 P.3d 124 (2011, arbitration); *Barron v. Evangelical Lutheran Good Samaritan Soc'y*, 265 P.3d 720 (N.M. Ct. App. 2011) (arbitration); *Monette v. Tinsley*, 975 P.2d 361 (N.M. Ct. App. 1999) (arbitration); *Buckingham v. Ryan*, 953 P.2d 33 (N.M. Ct. App. 1997) (non-arbitration); *Nearburg v. Yates Petroleum Corp.*, 943 P.2d 560 (N.M. Ct. App. 1997) (non-arbitration); *Bowlin's, Inc. v. Ramsey Oil Co.*, 662 P.2d 661 (N.M. Ct. App. 1983) (non-arbitration).

192. See *infra* Tables 1, 4.

193. See *infra* Table 4.

194. See *infra* Table 4. The three cases in which the Nevada Supreme Court found arbitration agreements unconscionable include *Gonski v. Second Jud. Dist. Ct.*, 245 P.3d 1164, 1173 (Nev. 2010); *D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1165 (Nev. 2004); and *Burch v. Second Jud. Dist. Ct.*, 49 P.3d 647, 651 (Nev. 2002).

195. See *infra* Table 4; see also the discussion of this study's combined unconscionability numbers for all twenty states, *supra* notes 124–25 and accompanying text.

unconscionable.<sup>196</sup> It is also worth noting that, between 1980 and 2001, Nevada only had one case analyzing unconscionability—one that did not involve an arbitration agreement.<sup>197</sup> The other eight cases were decided since 2001.<sup>198</sup> Thus, Nevada's unconscionability case law follows a similar trend to that of New Mexico in this respect.<sup>199</sup>

The last state that fits in this category is Illinois. Once again, Illinois appellate courts are not as extreme as Missouri and New Mexico courts in their application of the unconscionability doctrine to arbitration agreements, but there is still a significant difference between Illinois courts' favorable unconscionability determinations in the arbitration context versus other types of contracts.<sup>200</sup> Specifically, Illinois courts have considered an unconscionability defense in non-arbitration contracts on twenty-four occasions, and they found unconscionable three of those contracts, or 12.5%.<sup>201</sup> In contrast, Illinois courts considered unconscionability arguments in twenty-one arbitration cases, and, in six of those cases, or approximately twenty-nine percent, the courts held those challenged arbitration provisions unconscionable.<sup>202</sup> However, like the Missouri courts, the Illinois courts often still enforce the arbitration agreements after severing the unconscionable

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196. See *Pacificare of Nev., Inc. v. Rogers*, 266 P.3d 596, 601 (Nev. 2011); *Pacificare of Nev., Inc. v. Meana*, No. 55754, 2011 WL 5146064 (Nev. Oct. 27, 2011); see also *infra* Table 4.

197. See *Mallin v. Farmers Ins. Exch.*, 839 P.2d 105, 118 (Nev. 1992).

198. See generally *Rogers*, 266 P.3d 596; *Meana*, 2011 WL 5146064; *Gonski*, 245 P.3d 1164; *KJH & RDA Investor Grp., LLC v. Eighth Jud. Dist. Ct.*, 281 P.3d 1192 (Nev. 2009) (unpublished table decision); *Clifton v. Eighth Jud. Dist. Ct.*, 238 P.3d 802 (Nev. 2008) (unpublished table decision); *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 169 P.3d 1155 (Nev. 2007); *D.R. Horton, Inc.*, 96 P.3d 1159; *Burch*, 49 P.3d at 651.

199. Compare *supra* notes 193–98 and accompanying text, with *supra* notes 186–92 and accompanying text.

200. See *infra* Table 4.

201. See *infra* Table 4. The three cases in which Illinois appellate courts found non-arbitration contract provisions unconscionable include *Razor v. Hyundai Motor Am.*, 854 N.E.2d 607, 625 (Ill. 2006); *Dubey v. Public Storage, Inc.*, 918 N.E.2d 265, 276 (Ill. App. Ct. 2009); and *Frank's Maint. & Eng'g, Inc. v. C. A. Roberts Co.*, 408 N.E.2d 403, 411 (Ill. App. Ct. 1980).

202. See *infra* Table 4. The six cases in which Illinois courts found arbitration provisions to be unconscionable are *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 278 (Ill. 2006); *Timmerman v. Grain Exch., LLC*, 915 N.E.2d 113, 121 (Ill. App. Ct. 2009); *Keefe v. Allied Home Mortg. Corp.*, 912 N.E.2d 310, 318 (Ill. App. Ct. 2009); *Wigginton v. Dell, Inc.*, 890 N.E.2d 541, 549 (Ill. App. Ct. 2008); *Kinkel v. Cingular Wireless, LLC*, 828 N.E.2d 812, 818 (Ill. App. Ct. 2005), *aff'd*, 858 N.E.2d 250 (Ill. 2006); and *Parker v. Am. Family Ins. Co.*, 734 N.E.2d 83, 86 (Ill. App. Ct. 2000). Despite the fact that the *Kinkel* decisions involve the same parties and legal issues, I have included both decisions because they are technically different court decisions. See generally *Kinkel*, 857 N.E.2d 250; *Kinkel*, 828 N.E.2d 812.

provision.<sup>203</sup> Like Missouri and New Mexico courts, Illinois courts have also been hostile to contract provisions barring class action arbitration.<sup>204</sup>

What these numbers demonstrate is that these four unconscionability-sympathetic states, unlike the states discussed previously, illustrate the exact problem that concerned the U.S. Supreme Court, as well as many legal scholars: the tendency to apply the unconscionability doctrine in a way that invalidates arbitration provisions more often than other types of contract provisions.<sup>205</sup> Certainly, the numbers indicate that the state courts in Missouri, Nevada, New Mexico, and Illinois bear watching in the future. Because Missouri, New Mexico, and Illinois courts have previously found unconscionable provisions barring class action arbitration,<sup>206</sup> it will be interesting to see how those state courts choose react to *AT&T Mobility LLC v. Concepcion* in the long term, and how those reactions affect their application of the unconscionability doctrine to future arbitration cases.

#### 4. The Moderate Approach: The Middle Ground

In comparison to the states discussed *supra*, two other states in this study, Ohio and Mississippi, represent a more moderate approach to the unconscionability doctrine. Specifically, as demonstrated below, since 1980 appellate courts in Ohio and Mississippi have entertained arguments regarding the applicability of the unconscionability defense in numerous cases, and, in some cases, have determined that challenged contract provisions—both arbitration agreements and non-arbitration clauses—were unconscionable. However, although both Ohio and Mississippi appellate courts are willing to consider unconscionability arguments, those arguments have not had nearly the level of success that they have had in Alaska, Arkansas, Vermont, Missouri, New Mexico, and Nevada.<sup>207</sup> Over time, Ohio and Mississippi courts have developed a relatively balanced approach to unconscionability, both in the arbitration and non-arbitration context.

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203. See, e.g., *Kinkel*, 857 N.E.2d at 276–78; *Keefe*, 912 N.E.2d at 320; *Wigginton*, 890 N.E.2d at 549–50.

204. See, e.g., *Kinkel*, 857 N.E.2d at 263–75; *Wigginton*, 890 N.E.2d at 548–49.

205. See *infra* Table 4.

206. See *supra* notes 183–84, 190, 204 and accompanying text.

207. Compare *infra* Table 5, with *infra* Tables 3–4.

*a. Ohio: A Significant Number of Unconscionability Cases, but a Moderate Approach Overall*

Between 1980 and 2012, Ohio appellate courts evaluated unconscionability in any type of contract, whether including arbitration or not, in 208 cases.<sup>208</sup> Of those cases, 122 involved arbitration clauses, or approximately fifty-nine percent, while eighty-eight cases, or approximately forty-two percent, did not.<sup>209</sup> In reality, those figures are skewed because the first unconscionability challenge to an arbitration clause was not heard at the appellate level in Ohio until 1987.<sup>210</sup> If only looking at the time period from 1987 through 2012, Ohio appellate courts heard 195 unconscionability challenges to contracts of various types, including 122 cases involving arbitration clauses, or 62.56%, and seventy-five cases that did not involve arbitration clauses, or 38.46%.<sup>211</sup> These numbers strongly suggest that in Ohio, parties are more likely to use the unconscionability doctrine to challenge contracts when arbitration clauses are at issue.

Having found that parties are more likely to challenge arbitration clauses than other types of contracts on the basis of unconscionability, a second question immediately begs attention: Are Ohio appellate courts more likely to find an arbitration clause unconscionable than they are to find other types of contracts? Based on several scholarly critiques of prominent cases,<sup>212</sup> I expected to find a significant difference in the numbers in this area. Much to my surprise, those expectations were not met. When looking at appellate holdings from 1987 through 2012, I found that appellate courts were slightly more likely to find non-arbitration contracts unconscionable than they were to find arbitration agreements unconscionable. During that time period, twenty out of 122 arbitration clauses were found unconscionable, equating to 16.39% of arbitration clauses evaluated.<sup>213</sup> In comparison, during that same time

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208. See *infra* Table 5.

209. See *infra* Table 5.

210. The first Ohio appellate case involving an unconscionability challenge to an arbitration agreement was *Motorists Mut. Ins. Co. v. Said*, No. 52700, 1987 WL 16532 (Ohio Ct. App. Sept. 3, 1987).

211. See *infra* Table 5.

212. See, e.g., Burton, *supra* note 4, at 491–94 & nn.152, 158, 163, 173 & 180, 499 & n.219; Gavin, *supra* note 4, at 267–68 & nn.136–38; Randall, *supra* note 4 at 194–95 & n.35, 213–14 & n.107.

213. See *infra* Table 5. The twenty cases in which appellate courts found a challenged arbitration clause to be unconscionable include *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859, 865–67 (Ohio 1998); *Schaefer v. Allstate Ins. Co.*, 590 N.E.2d 1242, 1251–53 (Ohio 1992)

period, courts found twelve out of seventy-five non-arbitration contracts unconscionable, equating to sixteen percent of other contracts evaluated.<sup>214</sup> Moreover, if one also considers the contract cases involving unconscionability analysis between 1980 and 1987, between 1980 and 2012, courts found a total of seventeen out of eighty-eight non-arbitration contracts unconscionable, which is 19.32% of cases decided on those grounds.<sup>215</sup> Thus, historically, Ohio appellate courts have been

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(plurality opinion) (Wright, J., concurring); *Rude v. NUCO Educ. Corp.*, 2011-Ohio-6789, ¶ 30 (Ct. App.); *Wascovich v. Personacare of Ohio, Inc.*, 943 N.E.2d 1030, 1039 (Ohio Ct. App. 2010); *Brunke v. Ohio State Home Servs., Inc.*, 2008-Ohio-5394, ¶ 18 (Ct. App.); *Hayes v. Oakridge Home*, 886 N.E.2d 928, 932 (Ohio Ct. App. 2008), *rev'd*, 908 N.E.2d 408 (Ohio 2009); *Bayes v. Merle's Metro Builders/Boulevard Constr., LLC*, 2007-Ohio-7125, ¶ 40 (Ct. App.); *Taylor Bldg. Corp. of Am. v. Benfield*, 860 N.E.2d 1058, 1068 (Ohio Ct. App. 2006), *rev'd in part, aff'd in part*, 884 N.E.2d 12 (Ohio 2008); *Felix v. Ganley Chevrolet, Inc.*, 2006-Ohio-4500, ¶ 28 (Ct. App.); *Schwartz v. Alltel Corp.*, 2006-Ohio-3353, ¶ 36 (Ct. App.); *Porpora v. Gatliff Bldg. Co.*, 828 N.E.2d 1081, 1086 (Ohio Ct. App. 2005); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1185 (Ohio Ct. App. 2004); *Nefores v. BrandDirect Mktg., Inc.*, 2004-Ohio-5006, ¶ 58 (Ct. App.); *Small v. HCF of Perrysburg, Inc.*, 823 N.E.2d 19, 24 (Ohio Ct. App. 2004); *Angione v. Motorists Mut. Ins. Co.*, No. CA-9216, 1993 WL 364831, at \*2 (Ohio Ct. App. Aug. 9, 1993); *Cincinnati Ins. Co. v. Apisdorf*, No. 61075, 1992 WL 333131, at \*1-2 (Ohio Ct. App. Nov. 12, 1992); *Ellison v. Gen. Accident Ins. Co. of Am.*, No. E-90-73, 1991 WL 254232, at \*3 (Ohio Ct. App. Nov. 15, 1991); *Schaefer v. Allstate Ins. Co.*, No. 90AP-178, 1991 WL 19175, at \*3 (Ohio Ct. App. Feb. 12, 1991); *In re Wagle v. J.C. Penney Cas. Ins. Co.*, No. 2518, 1989 WL 49404, at \*1 (Ohio Ct. App. May 8, 1989); *Trupp v. State Farm Mut. Auto. Ins. Co.*, 575 N.E.2d 847, 847 (Ohio Ct. App. 1989), *abrogated by Schaefer*, 590 N.E.2d 1242.

214. See *infra* Table 5. The twelve cases in which appellate courts found a challenged non-arbitration contract or clause to be unconscionable between 1987 and 2011 include *Anderson v. Ballard*, 2010-Ohio-3926, ¶ 47 (Ct. App.); *Swayne v. Beebles Invs., Inc.*, 891 N.E.2d 1216, 1224 (Ohio Ct. App. 2008); *Martin v. Byke*, 2007-Ohio-6816, ¶ 34 (Ct. App.); *Scott Reising Jewelers, Inc. v. ADT Sec. Servs., Inc.*, Nos. C-050322, C-050329, 2006 WL 6576746, at \*3 (Ohio Ct. App. May 10, 2006); *Renken Enters. v. Klinck*, 2006-Ohio-1444, ¶¶ 21, 24 (Ct. App.); *Muscioni v. Clemons Boat*, 2005-Ohio-4349, ¶ 23 (Ct. App.); *Amir-Tahmasseb v. Reyes*, 832 N.E.2d 774, 779 (Ohio Ct. App. 2005); *O'Donoghue v. Smythe, Cramer Co.*, 2002-Ohio-3447, ¶ 31 (Ct. App.); *Taylor v. Eggleston*, No. 92-A-1742, 1993 WL 418489, at \*2 (Ohio Ct. App. June 4, 1993); *Tillimon v. Dukes*, No. L-91-343, 1992 WL 206878, at \*4-5 (Ohio Ct. App. Aug. 28, 1992); *Walker v. D.W. Enters., Inc.*, No. 90-C-38, 1991 WL 142802, at \*2-3 (Ohio Ct. App. July 1, 1991); *Orlett v. Suburban Propane*, 561 N.E.2d 1066, 1070 (Ohio Ct. App. 1989).

215. See *infra* Table 5. In addition to the cases cited *supra* in note 214, courts found contract clauses in the following non-arbitration cases to be unconscionable: *Lane v. Ultra-Lite, Inc.*, No. L-84-087, 1984 WL 14220, at \*1-2 (Ohio Ct. App. Aug. 24, 1984); *Carl v. DeCapua*, No. 80AP-889, 1982 WL 3979, at \*2-3 (Ohio Ct. App. Feb. 11, 1982); *Chem. Bank v. Mesler*, No. CA79-04-0036, 1981 WL 5115, at \*5 (Ohio Ct. App. July 9, 1981); *Evans v. Graham Ford, Inc.*, 442 N.E.2d 777, 781 (Ohio Ct. App. 1981); and *Youngstown Steel & Alloy Corp. v. Automatic Sprinkler Corp. of Am.*, Nos. 78 C.A. 180, 78 C.A. 181, 1980 Ohio App. LEXIS 13954, at \*18-19 (Ohio Ct. App. Jan. 22, 1980), *aff'd sub. nom.* *Ins. Co. of N. Am. v. Automatic Sprinkler Corp. of Am.*, 423 N.E.2d 151 (Ohio 1981).

more likely to find non-arbitration contracts to be unconscionable than arbitration agreements—19.32% to 16.39%, respectively.<sup>216</sup>

The thing that was most striking in evaluating these cases, however, was the number of cases that could not be fit into either the “unconscionable” or “not unconscionable” category. In a significant number of cases, the appellate court did not determine whether the contract provision at issue, whether an arbitration clause or not, was unconscionable. Instead, in these cases, the court found that the trial court had failed to adequately consider unconscionability and therefore remanded the case back to the trial court for further fact-finding, evidentiary hearings, or other determinations with respect to the unconscionability issue. Although one finds this result in both arbitration and non-arbitration cases, there are some stark differences between the two. On eight occasions between 1980 and 2012, the appellate courts remanded non-arbitration cases back to the trial courts for an unconscionability determination, amounting to 9.09% of this type of case.<sup>217</sup>

In contrast, appellate courts have been much more likely to remand cases dealing with arbitration clauses back to the trial courts for further proceedings related to the unconscionability issue. On thirty occasions the appellate courts have remanded arbitration-clause cases back to the trial court for further unconscionability proceedings, a number that encompasses 24.59% of all arbitration-clause-unconscionability appeals.<sup>218</sup> Even more striking, all but eight of these cases were decided

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216. See *infra* Table 5.

217. See *infra* Table 5. The eight cases in which appellate courts remanded non-arbitration contract cases back to the trial court for an unconscionability determination include *Five Star Fin. Corp. v. Merch.'s Bank & Trust Co.*, 949 N.E.2d 1016, 1019, 1022 (Ohio Ct. App. 2011); *Schamer v. W. & S. Life Ins. Co.*, 2004-Ohio-4249, ¶¶ 17, 20 (Ct. App.); *Info. Leasing Corp. v. GDR Invs., Inc.*, 787 N.E.2d 652, 656–57 (Ohio Ct. App. 2003); *Beneficial Mortg. Co. of Ohio v. Leach*, 2002-Ohio-2237, ¶¶ 74, 87 (Ct. App.) (per curiam); *Nat'l City Bank v. Bailey*, No. 2257-M, 1994 WL 122167, at \*1 (Ohio Ct. App. Apr. 13, 1994); *Norfolk & W. Ry. Co. v. A.B.C. Dock, Inc.*, No. 1809, 1987 WL 10450, at \*6, \*8 (Ohio Ct. App. Apr. 30, 1987); *Irving Leasing Corp. v. M & H Tire Co.*, 475 N.E.2d 127, 133 (Ohio Ct. App. 1984); and *Ins. Co. of N. Am.*, 423 N.E.2d at 156.

218. See *infra* Table 5; see also *Brownell v. Van Wyk*, 2010-Ohio-6338, ¶ 31 (Ct. App.); *Reynolds v. Crockett Homes, Inc.*, 2009-Ohio-1020, ¶ 20 (Ct. App.); *Roe v. Rent-A-Center, Inc.*, 2008-Ohio-4307, ¶ 29 (Ct. App.); *Blubaugh v. Fred Martin Motors Inc.*, 2008-Ohio-779, ¶ 11 (Ct. App.); *Goodwin v. Ganley, Inc.*, 2007-Ohio-6327, ¶¶ 13, 17 (Ct. App.); *Khoury v. Denney Motors Assocs., Inc.*, 2007-Ohio-5791, ¶¶ 20–21 (Ct. App.); *Samoly v. Landry*, 2007-Ohio-5707, ¶¶ 36–37 (Ct. App.); *Strader v. Magic Motors of Ohio, Inc.*, 2007-Ohio-5358, ¶ 31 (Ct. App.); *Barnes v. Andover Vill. Ret. Cmty., Ltd.*, 2007-Ohio-4112 ¶¶ 34–35 (Ohio App. Ct.); *Klimaszewski v. Ganley, Inc.*, 2007-Ohio-3766, ¶ 2 (Ct. App.); *Castro v. Higginbotham*,

between 2003 and 2008, with appellate courts remanding cases nine times in 2007 alone.<sup>219</sup> Although the numbers at first may not seem that significant, an analysis of the percentage of cases remanded for further proceedings or fact finding during this time period is instructive. For example, in 2003, cases remanded to trial courts for further proceedings related to the unconscionability issue totaled three out of six arbitration-clause cases, or fifty percent.<sup>220</sup> In comparison, the appellate courts did not find any arbitration clauses unconscionable that year.<sup>221</sup> During the following year, 2004, appellate courts remanded three out of twelve arbitration cases to the trial courts for further proceedings, or twenty-five percent of those cases.<sup>222</sup> Over the next two years, only four cases out of twenty-two were remanded on those grounds.<sup>223</sup> But in 2007 there was a resurgence—nine out of sixteen cases, or almost two out of three arbitration unconscionability cases heard on appeal, were remanded.<sup>224</sup>

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2007-Ohio-3260, ¶ 11 (Ct. App.); *Post v. ProCare Auto. Serv. Solutions*, 2007-Ohio-2106, ¶ 36 (Ct. App.); *Bencivenni v. Dietz*, 2007-Ohio-637, ¶ 15 (Ct. App.); *Yessenow v. AUE Design Studio, Inc.*, 848 N.E.2d 563, 566 (Ohio Ct. App. 2006); *Olah v. Ganley Chevrolet, Inc.*, 2006-Ohio-694, ¶¶ 31–33 (Ct. App.); *Molina v. Ponsky*, 2005-Ohio-6349, ¶ 24 (Ct. App.); *Barr v. HCF, Inc.*, 2005-Ohio-6040, ¶¶ 17, 21 (Ct. App.); *Pyle v. Wells Fargo Fin.*, 2004-Ohio-4892, ¶ 17 (Ct. App.); *Benson v. Spitzer Mgmt., Inc.*, 2004-Ohio-4751, ¶ 21 (Ct. App.); *McKee v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2004-Ohio-3874, ¶¶ 15–16 (Ct. App.); *Hampton v. Swad*, 2003-Ohio-6655, ¶ 10 (Ct. App.); *McDonough v. Thompson*, 2003-Ohio-4655, ¶ 20 (Ct. App.); *Miller v. Household Realty Corp.*, 2003-Ohio-3359, ¶¶ 40–41 (Ct. App.); *Neubauer v. Household Fin. Corp.*, 2002-Ohio-6831, ¶ 26 (Ct. App.); *Poling v. Am. Suzuki Motor Corp.*, No. 78577, 2001 WL 1075720, at \*2–3 (Ohio Ct. App. Sept. 13, 2001); *Sikes v. Ganley Pontiac Honda*, No. 79015, 2001 WL 1075726, at \*3 (Ohio Ct. App. Sept. 13, 2001), *abrogated on other grounds, as recognized in* *GB AZ 1, LLC v. Ariz. Motors, LLC*, 2011-Ohio-1808, ¶¶ 6–8 (Ct. App.); *Battle v. Bill Swad Chevrolet, Inc.*, 746 N.E.2d 1167, 1172–73 (Ohio Ct. App. 2000); *Haga v. Martin Homes, Inc.*, No. 1998AP050086, 1999 WL 254530, at \*5 (Ohio Ct. App. Apr. 19, 1999); *Dunn v. L & M Bldg., Inc.*, No. 75203, 1999 WL 166023, at \*2 (Ohio Ct. App. Mar. 25, 1999); *Smith v. Ohio State Home Servs., Inc.*, Nos. 16441, 16445, 1994 WL 200801, at \*2 (Ohio Ct. App. May 25, 1994).

219. See *infra* Table 5; see also *supra* note 218.

220. See *infra* Table 5; see also *Hampton*, 2003-Ohio-6655 ¶ 10; *McDonough*, 2003-Ohio-4655, ¶ 20; *Miller*, 2003-Ohio-3359, ¶¶ 40–41.

221. See *infra* Table 5.

222. See *infra* Table 5; see also *Pyle*, 2004-Ohio-4892, ¶ 17; *Benson*, 2004-Ohio-4751, ¶ 21; *McKee*, 2004-Ohio-3874, ¶¶ 15–16.

223. See *infra* Table 5; see also *Yessenow*, 848 N.E.2d at 566; *Olah*, 2006-Ohio-694, ¶¶ 31–33; *Molina*, 2005-Ohio-6349, ¶ 24; *Barr*, 2005-Ohio-6040, ¶¶ 17, 21.

224. See *infra* Table 5; see also *Goodwin v. Ganley, Inc.*, 2007-Ohio-6327, ¶¶ 13, 17 (Ct. App.); *Khoury v. Denney Motors Assocs., Inc.*, 2007-Ohio-5791, ¶¶ 20–21 (Ct. App.); *Samoly v. Landry*, 2007-Ohio-5707, ¶¶ 36–37 (Ct. App.); *Strader v. Magic Motors of Ohio, Inc.*, 2007-Ohio-5358, ¶ 31 (Ct. App.); *Barnes v. Andover Vill. Ret. Cmty., Ltd.*, 2007-Ohio-4112 ¶¶ 34–35 (Ct. App.); *Klimaszewski v. Ganley, Inc.*, 2007-Ohio-3766, ¶ 2 (Ct. App.); *Castro v. Higginbotham*, 2007-Ohio-3260, ¶ 11 (Ct. App.); *Post v. ProCare Auto. Serv. Solutions*, 2007-

The following year the numbers again declined, and only two out of twelve cases, or 16.67%, were remanded.<sup>225</sup> What these numbers suggest is that, at the trial level, courts still struggle with how to apply the unconscionability doctrine to evaluate arbitration clauses and often fail to treat them as they would other contracts. That is true even though trial courts do not seem to face the same problem—that is, at least not to the same degree—when they evaluate other, non-arbitration contract provisions for unconscionability.

*b. Another Moderate State: Mississippi*

Mississippi is another state that has taken a more moderate approach to unconscionability in the context of arbitration agreements. Mississippi has applied the unconscionability doctrine in twenty-eight cases, including: twenty-two cases in which only arbitration provisions were challenged; three cases in which only non-arbitration provisions were challenged; and three cases in which both arbitration and non-arbitration contract clauses were challenged.<sup>226</sup> Although since 1980 Mississippi courts have considered unconscionability arguments much more often in cases involving arbitration agreements than other types of contract provisions, that fact has not made it more likely that the courts were sympathetic to unconscionability arguments in the arbitration context; instead, the opposite is true.<sup>227</sup>

In the six cases in which Mississippi appellate courts considered non-arbitration agreements, the courts found the challenged provisions unconscionable in five cases, or eighty-three percent of the time.<sup>228</sup> In contrast, Mississippi courts found arbitration agreements unconscionable in seven out of twenty-five cases, or twenty-eight

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Ohio-2106, ¶ 36 (Ct. App.); *Bencivenni v. Dietz*, 2007-Ohio-637, ¶ 15 (Ct. App.).

225. See *infra* Table 5; see also *Roe v. Rent-A-Center, Inc.*, 2008-Ohio-4307, ¶ 29 (Ct. App.); *Blubaugh v. Fred Martin Motors Inc.*, 2008-Ohio-779, ¶ 11 (Ct. App.).

226. See *infra* Table 5.

227. See *infra* Table 5.

228. The five cases in which Mississippi courts found non-arbitration provisions unconscionable include *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So. 2d 732, 741 (Miss. 2007), *overruled by* *Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695 (Miss. 2009); *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 525 (Miss. 2005) (en banc), *overruled by* *Estate of Moulds ex rel. Braddock*, 14 So. 3d 695; *Pitts v. Watkins*, 905 So. 2d 553, 558 (Miss. 2005) (en banc); *Entergy Miss., Inc. v. Burdette Gin Co.*, 726 So. 2d 1202, 1208 (Miss. 1998); and *Covington v. Griffin*, 19 So. 3d 805, 817 (Miss. Ct. App. 2009).



percent of the time.<sup>229</sup> In looking solely at the three cases in which the courts considered both types of contract provisions, the courts found non-arbitration provisions unconscionable in all three cases but only found the challenged arbitration provisions unconscionable in one case.<sup>230</sup>

A couple of other trends are also worth noting. Like some of the states in the other categories, even if a Mississippi appellate court finds an arbitration provision unconscionable, it may just sever the offending provision and enforce the remainder of the arbitration agreement.<sup>231</sup> Mississippi courts also seem particularly concerned with possible unconscionability in the context of nursing home contracts, as eight of the cases solely challenging arbitration provisions and two of the cases challenging both arbitration and non-arbitration provisions involved contracts for nursing home care.<sup>232</sup> The courts found unconscionability in five of the nursing home cases involving only arbitration clauses<sup>233</sup> and

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229. The seven cases in which Mississippi courts found arbitration provisions unconscionable include *Estate of Moulds ex rel. Braddock*, 14 So. 3d at 706; *Pitts*, 905 So. 2d at 558; *E. Ford, Inc. v. Taylor*, 826 So. 2d 709, 717 (Miss. 2002) (en banc); *Covenant Health & Rehab. of Picayune, LP v. Lumpkin ex rel. Lumpkin*, 23 So. 3d 1092, 1099 (Miss. Ct. App. 2009) (en banc); *Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 736, 743 (Miss. Ct. App. 2008), *rev'd*, 14 So. 3d 695 (Miss. 2009); *Trinity Mission Health & Rehab. of Clinton v. Estate of Scott ex rel. Johnson*, 19 So. 3d 735, 741 (Miss. Ct. App. 2008); and *Trinity Mission of Clinton, LLC v. Barber*, 988 So. 2d 910, 924 (Miss. Ct. App. 2007). Despite the fact that the *Estate of Moulds ex rel. Braddock* decisions involve the same parties and legal issues, I have included both decisions because they are technically different court decisions. See generally *Estate of Moulds ex rel. Braddock*, 14 So. 3d 695; *Covenant Health & Rehab. of Picayune, LP*, 14 So. 3d 736.

230. See generally *Brown*, 949 So. 2d 732 (only non-arbitration provisions were unconscionable); *Vicksburg Partners, L.P.*, 911 So. 2d 507 (only non-arbitration provisions were unconscionable); *Pitts*, 905 So. 2d 553 (both challenged arbitration and non-arbitration provisions were unconscionable).

231. See, e.g., *Covenant Health & Rehab. of Picayune, LP*, 14 So. 3d at 743; *Estate of Scott ex rel. Johnson*, 19 So. 3d at 741, 743; *Barber*, 988 So. 2d at 924.

232. See *Estate of Moulds ex rel. Braddock*, 14 So. 3d at 701, 706; *Brown*, 949 So. 2d at 741; *Vicksburg Partners, L.P.*, 911 So. 2d at 510, 525; *Lumpkin ex rel. Lumpkin*, 23 So. 3d at 1094, 1099; *Covenant Health & Rehab. of Picayune, LP*, 14 So. 3d at 738, 743; *Estate of Scott ex rel. Johnson*, 19 So. 3d at 741–43; *Forest Hill Nursing Ctr., Inc. v. McFarlan*, 995 So. 2d 775, 778, 784–85 (Miss. Ct. App. 2008); *Cnty. Care Ctr. of Vicksburg, LLC v. Mason*, 966 So. 2d 220 (Miss. Ct. App. 2007); *Barber*, 988 So. 2d at 914, 924; *Covenant Health & Rehab. of Picayune, LP v. Estate of Lambert ex rel. Lambert*, 984 So. 2d 283, 285, 289 (Miss. Ct. App. 2006).

233. See generally *Estate of Moulds ex rel. Braddock*, 14 So. 3d 695; *Lumpkin ex rel. Lumpkin*, 23 So. 3d 1092; *Scott ex rel. Johnson*, 19 So. 3d 735; *Covenant Health & Rehab. of Picayune, LP*, 14 So. 3d 736; *Estate of Barber*, 988 So. 2d 910.

found the regular provisions, but not the arbitration provisions, unconscionable in the two combination cases.<sup>234</sup>

##### 5. Montana: A Different Approach to the Unconscionability Issue

On the surface, Montana does not appear much different from many of the other states analyzed in this study. The Montana Supreme Court has applied unconscionability analysis to contract provisions on fourteen occasions since 1980, including five cases in which arbitration agreements were challenged and nine cases involving other types of contract provisions.<sup>235</sup> The court found that one arbitration agreement and one non-arbitration contract had unconscionable provisions, amounting to twenty percent and a little over eleven percent of those types of provisions, respectively.<sup>236</sup> Thus, it appears that based on these limited numbers, Montana courts are more likely to find arbitration provisions unconscionable than other types of contract provisions.

These numbers, however, do not tell the entire story. First, the only case in which the Montana Supreme Court found an arbitration agreement unconscionable was decided in 1999.<sup>237</sup> Thus, for more than a decade, no party has successfully used the unconscionability doctrine to challenge an arbitration agreement at the appellate level in Montana. Like some of the other states,<sup>238</sup> Ohio being the most notable,<sup>239</sup> Montana trial courts also sometimes failed to properly complete the unconscionability analysis. As a result, on four occasions the Montana Supreme Court remanded cases back to the trial court for further consideration of a party's unconscionability arguments.<sup>240</sup> The remands amounted to one-third of unconscionability cases involving non-arbitration provisions, and one-fifth of those involving arbitration agreement challenges.<sup>241</sup>

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234. See generally *Brown*, 949 So. 2d 732; *Vicksburg Partners*, 911 So. 2d 507.

235. See *infra* Table 6. Because Montana does not have an intermediate court of appeals, the Montana Supreme Court is the only state court with appellate jurisdiction.

236. See *infra* Table 6.

237. See generally *Iwen v. U.S. W. Direct*, 977 P.2d 989 (Mont. 1999).

238. See *supra* notes 127–29 and accompanying text.

239. See *supra* notes 217–25 and accompanying text.

240. See *infra* Table 6. One of those cases involved an arbitration agreement. See generally *Zigrang v. U.S. Bancorp Piper Jaffray, Inc.*, 123 P.3d 237 (Mont. 2005). The other three cases involved challenges to non-arbitration provisions. See generally *Am. Music Co. v. Higbee*, 103 P.3d 518 (Mont. 2004); *Kelly v. Widner*, 771 P.2d 142 (Mont. 1989); *Eigeman v. Miller*, 745 P.2d 320 (Mont. 1987).

241. See *infra* Table 6.

But contract law in Montana has evolved somewhat differently than it has in the other states analyzed in the instant study.<sup>242</sup> Although Montana's unconscionability doctrine has both a procedural and substantive component, like many of the states in this study, the Montana Supreme Court's unconscionability analysis is somewhat more narrowly focused than the general requirements for procedural and substantive unconscionability discussed *supra*.<sup>243</sup> Therefore, the Montana Supreme Court has stated that "[u]nconscionability requires a two-fold determination: that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions."<sup>244</sup> Applying this test, Montana courts first ask whether the contract at issue is a contract of adhesion.<sup>245</sup> If it is, and the contract terms are more favorable to the drafter than the other party, the court will refuse to enforce it on the basis of unconscionability.<sup>246</sup>

What complicates our understanding of Montana's approach to the unconscionability doctrine is how it intersects with Montana courts' application of the theory of reasonable expectations and its significant hostility to contracts of adhesion in general.<sup>247</sup> Although the Montana Supreme Court may use the unconscionability doctrine to invalidate contract provisions, when the case involves a contract of adhesion the analysis rarely reaches an unconscionability determination.<sup>248</sup> Instead, in these circumstances, the court may use the doctrine of reasonable expectations or public policy grounds to invalidate the challenged contract provision.<sup>249</sup>

Even when a contract provision may not be unconscionable, Montana courts will refuse to enforce a contract provision when that

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242. In fact, one scholar has claimed that "the Montana Supreme Court's view of contract law is out of balance." Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L. REV. 139, 150 (2005).

243. See *supra* Part II.B.2.

244. *Summers v. Crestview Apartments*, 236 P.3d 586, 590 (Mont. 2010) (citing *Iwen v. U.S. W. Direct*, 977 P.2d 989, 995 (Mont. 1999)).

245. See, e.g., *Graziano v. Stock Farm Homeowners Ass'n*, 258 P.3d 999, 1004 (Mont. 2011).

246. See, e.g., *Summers*, 236 P.3d at 590–91 (holding that accelerated rent clause in lease agreement was unconscionable because lease was a contract of adhesion and clause unfairly benefited landlord more than tenant).

247. See *id.* at 590–91.

248. See *id.*

249. See *Graziano*, 258 P.3d at 1004.

provision fails to meet the reasonable expectations of the non-drafting party.<sup>250</sup> The doctrine of reasonable expectations was first applied to insurance contracts, but courts have also applied it to many other types of contracts.<sup>251</sup> The Montana Supreme Court has stated that:

Reasonable expectations derive from all of the circumstances surrounding the execution of a contract, such as the business experience and sophistication of the consumer . . . any routine practices between the parties established through prior dealings, whether the consumer studied the agreement and understood it, whether the consumer had the advice or representation of counsel, and whether the provisions of the agreement were explained to the consumer.<sup>252</sup>

Legal scholar Scott Burnham has argued that the Montana Supreme Court has modified the doctrine of reasonable expectations to make it easier to invalidate arbitrate agreements specifically, evidencing the court's ongoing hostility to arbitration.<sup>253</sup>

Although Montana courts separate an inquiry into the parties' reasonable expectations from their unconscionability analysis, these types of circumstances appear to be exactly the types of facts often considered by courts in determining whether a contract is procedurally unconscionable.<sup>254</sup> Thus, although the Montana Supreme Court has not specifically defined its reasonable expectations analysis in terms of the unconscionability doctrine, a reasonable conclusion is that it could fit within that framework. For purposes of this study, however, I based my evaluation of Montana case law solely on the Montana court's definition and use of the unconscionability doctrine. Therefore, these numbers do not include cases where the Montana Supreme Court determined that a contract was unenforceable based upon a determination that the contract did not meet the challenging party's reasonable expectations.

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250. *See id.* Scott Burnham has described these types of contract provisions in this way: "Knowing that I am unlikely to read it, the drafter might . . . take advantage of [his] superior bargaining position to slip in terms which, even though not unconscionable, would not be reasonably expected by a party to that contract." Burnham, *supra* note 242, at 154.

251. *See* Burnham, *supra* note 242, at 153–55.

252. *Graziano*, 258 P.3d at 1004–05 (citing *Woodruff v. Bretz, Inc.*, 218 P.3d 486, 491 (Mont. 2009)).

253. *See generally* Burnham, *supra* note 242.

254. *See supra* notes 58–64 and accompanying text.

## V. CONCLUSIONS

So, the real question is, what do all of these numbers mean? Certainly, one of the first conclusions that can be drawn is that at least some of our understanding of how state courts apply the unconscionability doctrine to arbitration agreements needs to be reconsidered in light of the numbers. Although there are still some states, such as Missouri, Nevada, New Mexico, and Illinois, that are more likely to find arbitration agreements unconscionable than other types of contracts,<sup>255</sup> the vast majority of states do not appear to take that approach.<sup>256</sup> Instead, there is quite a bit of variety in how state courts view the unconscionability doctrine in general, as well as how they apply the doctrine to both arbitration and non-arbitration provisions.

In fact, some states really do not have much of a track record regarding unconscionability at all,<sup>257</sup> especially in comparison to states like California,<sup>258</sup> or, in this study, Ohio.<sup>259</sup> Other states may have cases that, if viewed in isolation, would suggest hostility towards arbitration agreements. However, when viewed in the context of more than thirty years of case law, those cases prove to be outliers that do not represent the whole. Thus, before drawing conclusions about an individual state's application of the unconscionability doctrine to arbitration agreements, it is really necessary to specifically investigate that particular state's case law on the issue.<sup>260</sup>

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255. See *infra* Table 4.

256. See *supra* Part IV.

257. See *infra* Table 2.

258. See generally Broome, *supra* note 4.

259. See *supra* Part IV.B.4.a.

260. This study analyzed the case law from only twenty states. Although a sample of forty percent is substantial and provides a good understanding of the full unconscionability spectrum, it is impossible to know with certainty where other states fall on that spectrum without taking a similar approach to those states' case law. Further, future studies may choose to delve further into the factual bases of these cases and how courts apply the unconscionability doctrine to specific contexts in order to determine what further patterns emerge. For example, it may be possible to develop our understanding of the unconscionability doctrine even further by examining who was more likely to appeal the trial court's determinations regarding unconscionability: (1) the party who asserted unconscionability as a defense, who lost at the trial level, or (2) the party who argued against unconscionability at the trial level, but lost. It would also be useful to further explore the types of provisions the courts have found more and less problematic, and also the general types of contracts found unconscionable or not unconscionable (i.e., nursing home, employment, consumer, insurance, commercial, etc.). Finally, it would also be instructive to look for correlations between the issuance of major U.S. Supreme Court precedents on the

Another conclusion can also be drawn from the numbers. For at least some states that have drawn criticism for their application of the unconscionability doctrine to arbitration agreements, such as Ohio, those cases can be outliers that are not representative of the general rule. And case law further suggests that, at least in some states, there has been an improvement in the courts' analysis of unconscionability issues and the development on a more sophisticated understanding of unconscionability law.<sup>261</sup> These results suggest that other states may moderate their approach to unconscionability in the long term, especially in light of U.S. Supreme Court cases such as *AT&T Mobility LLC v. Concepcion*.<sup>262</sup> Ultimately, this study suggests that it is best to withhold judgment regarding individual states' approaches to unconscionability, at least until it is possible to ground oneself in that state's case law on the issue. Although the unconscionability doctrine has a long history, it is still in flux, particularly in its application to arbitration agreements.

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unconscionability issue.

261. *See supra* Part IV.

262. *See supra* Part IV.

**Table 1**<sup>263</sup>  
**Unconscionability Cases—All 20 States**

Year	Non-arb/ OK	Non-arb/ unc	Non-arb/ remand	Arb/ OK	Arb/ unc	Arb/ remand	All Cases	Total Unc
2012	1	0	0	9	3	0	13	3
2011	5	2	1	10	5	0	22	6
2010	11	2	0	8	4	2	26	6
2009	10	4	0	9	7	1	30	11
2008	2	1	0	15	9	3	30	10
2007	6	2	0	13	4	10	34	6
2006	7	3	0	15	5	2	32	8
2005	5	5	0	12	4	3	27	8
2004	3	0	2	13	5	4	27	5
2003	5	0	1	6	2	3	17	2
2002	5	1	1	10	2	1	19	3
2001	3	0	0	2	0	2	7	0
2000	2	2	0	4	1	1	9	3
1999	9	1	0	1	1	2	14	2
1998	5	1	0	4	1	0	11	2
1997	3	0	0	0	0	0	3	0
1996	6	0	0	0	0	0	6	0
1995	6	0	0	1	0	0	7	0
1994	6	0	1	0	0	1	8	0
1993	4	1	0	2	1	0	8	2
1992	2	2	1	2	2	0	9	4
1991	5	3	0	2	2	0	12	5
1990	7	1	0	0	0	0	8	1
1989	5	1	1	0	2	0	9	3
1988	1	1	0	1	0	0	3	1
1987	7	1	3	1	0	0	12	1
1986	7	3	0	1	0	0	11	3
1985	8	0	0	0	0	0	8	0
1984	6	2	1	0	0	0	9	2
1983	6	0	0	1	0	0	7	0
1982	4	2	0	0	0	0	6	2
1981	6	3	1	0	0	0	10	3
1980	4	2	0	0	0	0	6	2
<b>TOTAL</b>	172	46	13	142	60	35	460 <sup>264</sup>	105

263. For each year of the study, this chart provides the following information: (1) the number of non-arbitration cases in which appellate courts rejected unconscionability arguments; (2) the number of non-arbitration cases in which courts determined that provisions were unconscionable; (3) the number of non-arbitration cases remanded to the trial court for further unconscionability determinations; (4) the number of arbitration cases in which courts rejected unconscionability arguments; (5) the number of arbitration cases in which courts determined that provisions were unconscionable; (6) the number of arbitration cases remanded to the trial court for further unconscionability determinations; (7) the total number of cases in which courts considered unconscionability arguments; and (8) the total number of cases in which courts found any contract provision unconscionable.

264. Eight cases included in this study contain both arbitration and non-arbitration provisions and have thus been accounted for in both the arbitration and non-arbitration columns of Table 1, but appear as a single case for purposes of the total cases column. The years affected by these dual-provision cases include 2000, 2002, 2005 (two cases), 2007, 2009, 2010, and 2011. See *infra* notes 265–68.

**Table 2**  
**The “Conservative” Approach to Unconscionability**

<b>States</b>	<b>Total Cases</b>	<b>Arb Cases</b>	<b>Non-arb Cases</b>	<b>Total arb Unconscionable</b>	<b>Total non-arb Unconscionable</b>
<b>Colorado</b>	9	2	7	0	1
<b>Maine</b>	0	0	0	n/a	n/a
<b>Maryland</b>	10	5	5	0	0
<b>Minnesota</b>	22	1	21	0	2
<b>Nebraska</b>	5	0	5	n/a	1
<b>New Hampshire</b>	5	0	5	n/a	1
<b>North Carolina</b>	20	8	12	1	0
<b>Oregon</b>	9	7	2	1	1
<b>Rhode Island</b>	2	0	2	n/a	1
<b>South Carolina</b>	9	7	2	1	0



**Table 3**  
**States that Generally Embrace the Unconscionability Doctrine**

States	Total Cases	Arb Cases	Non-arb Cases	Total arb Unconscionable	Total non-arb Unconscionable
Alaska	11	3	8	1	4
Arkansas	11	1	10	1	4
Vermont	6 <sup>265</sup>	1	6	1	3

**Table 4**  
**States More Sympathetic to the Unconscionability Doctrine in the Arbitration Context**

States	Total Cases	Arb Cases	Non-arb Cases	Total arb Unconscionable	Total non-arb Unconscionable
Missouri	24	13	11	10	2
Nevada	9	7	2	3	0
New Mexico	15	9	6	7	0
Illinois	43 <sup>266</sup>	21	24	6	3

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265. One of the Vermont cases involved both arbitration and non-arbitration provisions, and the Vermont Supreme Court found that both types of clauses were unconscionable. See *Glassford v. BrickKicker*, 35 A.3d 1044, 1054 (Vt. 2011). Thus, this Table counts that case in both categories.

266. Two of the Illinois cases involve unconscionability analysis of both arbitration and non-arbitration provisions, and, thus, they are counted in both categories. Those cases include *All Am. Roofing, Inc. v. Zurich Am. Ins. Co.*, 934 N.E.2d 679 (Ill. App. Ct. 2010); and *Bishop v. We Care Hair Dev. Corp.*, 738 N.E.2d 610 (Ill. App. Ct. 2000).

**Table 5**  
**States with a Moderate Approach to the Unconscionability Doctrine**

States	Total Cases	Arb Cases	Non-arb Cases	Total arb Unconscionable	Total non-arb Unconscionable
Ohio	208 <sup>267</sup>	122	88	20	17
Mississippi	28 <sup>268</sup>	25	6	7	5

**Table 6**  
**Montana's Approach to the Unconscionability Doctrine**

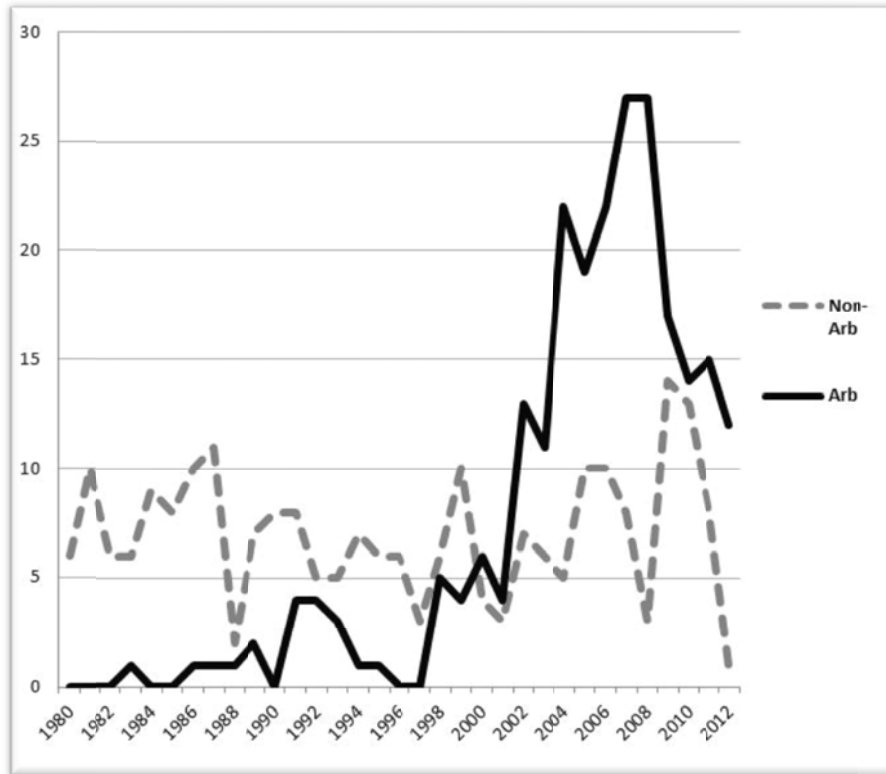
States	Total Cases	Arb Cases	Non-arb Cases	Total arb Unconscionable	Total non-arb Unconscionable
Montana	14	5	9	1	1

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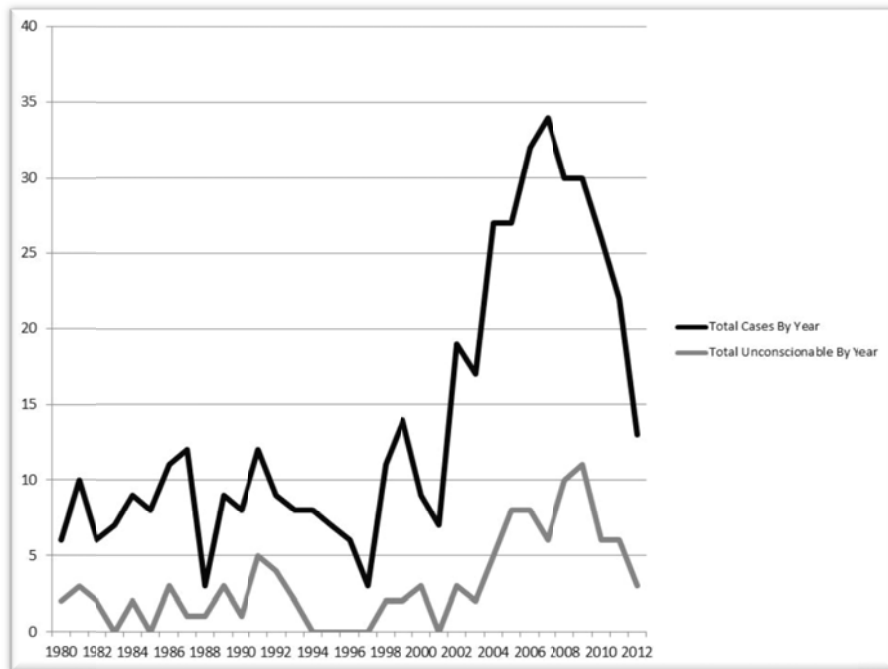
267. Two of the Ohio cases involve unconscionability analysis of both arbitration and non-arbitration provisions, and, thus, they are counted in both categories. Those cases include *Bozich v. Kozusko*, 2009-Ohio-6908 (Ct. App.); and *O'Donoghue v. Smythe, Cramer Co.*, 2002-Ohio-3447 (Ct. App.).

268. Three of the Mississippi cases involve unconscionability analysis of both arbitration and non-arbitration provisions, and, thus, they are counted in both categories. Those cases include *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So. 2d 732 (Miss. 2007), *overruled by* *Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695 (Miss. 2009); *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507 (Miss. 2005) (en banc), *overruled by* *Estate of Moulds ex rel. Braddock*, 14 So. 3d 695; and *Pitts v. Watkins*, 905 So. 2d 553 (Miss. 2005) (en banc).

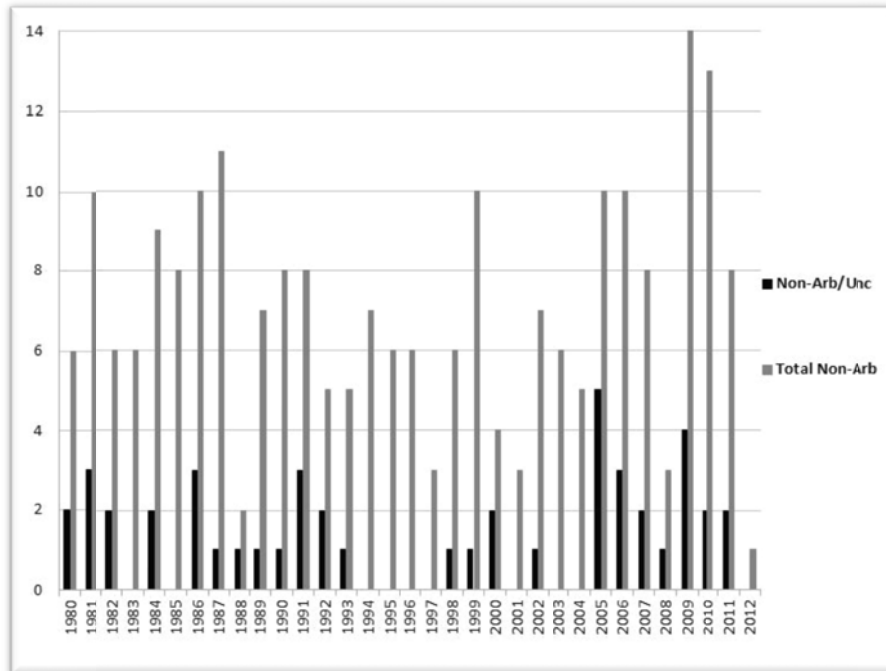
**Graph 1**  
**Total Number of Unconscionability Cases by Year**



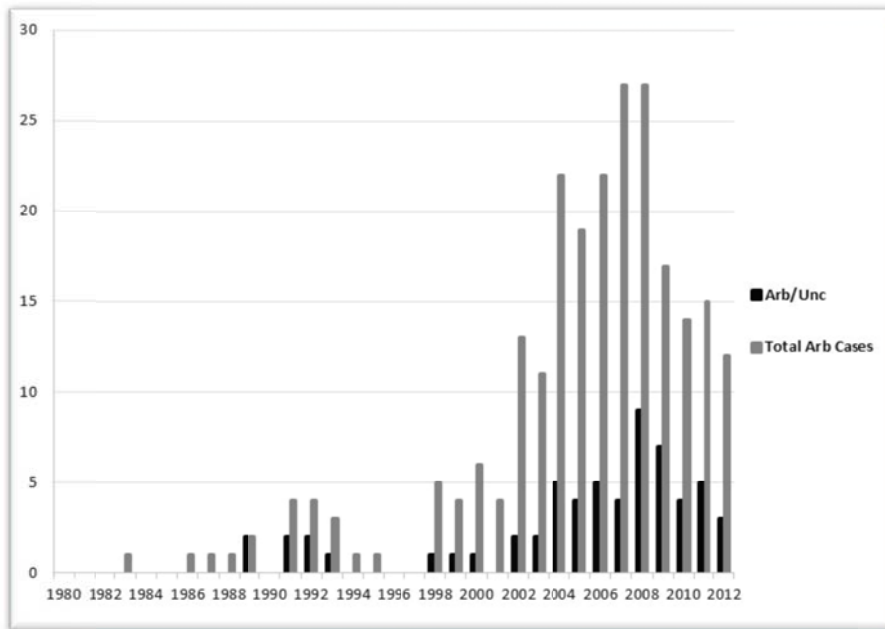
**Graph 2**  
**Total Cases Per Year vs. Total Unconscionable Cases Per Year**



**Graph 3**  
**Non-Arbitration Contracts: Unconscionable Contracts vs. Total**



**Graph 4**  
**Arbitration Agreements: Unconscionable Contracts vs. Total**



**Graph 5**  
**Unconscionability Comparisons**

