

I. Avoidance

A. Unconscionability (UCC 2-302)

1. UCC 2-302
 - a. If a K or any clause of it is was unconscionable at creation, ct. may refuse to enforce the K or the portion deemed unconscionable or may limit the application of the unconscionable portion to avoid any unjust result.
 - b. All parties may present evidence re: circumstances surrounding the formation of K.
2. Must show in each case;
 - a. Procedural unconscionability- unfair entrance into K (fine print, hidden terms, etc..), **AND**
 - b. Substantive unconscionability-unfair deal/terms/allocation of risk
3. Burden of proof is upon the one asserting unconscionability. Therefore the consumer must est. a prima facie case.
 - a. Substantial disparity b/w the value of the bargain as measured by the price agreed, **AND**
 - b. The value of the bargain when the seller invokes a particular K term against the consumer
4. If a prima facie case is est. to the satisfaction of the ct. the burden shifts to the professional to persuade the ct. that the K, or term, was conscionable at the time of contracting.
 - a. The burden will be on him to show that regardless of real or apparent assent, the term is commercially reasonable.
5. Restate 205: Every K imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.
 - a. UCC 2-103(1)(b): Honesty in fact & the observance of reasonable commercial standards of fair dealing in the trade. (Good faith)
 - b. UCC 2-309: Prevention of
 - (1) Oppression, **AND**
 - (2) Unfair surprise (Obj. Test)

B. Illegality: Agreements unenforceable on grounds of public policy

1. Central illegality
 - a. K itself, **OR**
 - b. Purpose of K
2. Tangential illegality
 - a. Related matter
 - (1) ex: licensing
3. Test for illegality
 - a. Restate 178

178(1): A promise or other term of an agreement is unenforceable on grounds of