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

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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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I. INTRODUCTION

As the United States Supreme Court has observed on more than one occasion, the Federal Arbitration Act (“FAA”)1 “was enacted in 1925 in response to widespread judicial hostility to arbitration agreements.”2 Even after passage of the FAA, however, there have continued to be cases where courts treat arbitration agreements with more skepticism than other contracts. In fact, legal scholars have long argued that at least some state courts still 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.3 While it is undeniably true that state courts have applied the

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

As stated previously, within the past decade some legal scholars have studied state courts’ application of the unconscionability doctrine to arbitration agreements and have come to the conclusion that courts often apply unconscionability in a way that demonstrates a hostility to arbitration.\(^4\) 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.\(^5\) Their work has provided valuable insights into concerns about inconsistency in how courts apply unconscionability analysis, and why it is important that courts treat 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 not necessarily representative of a state’s general approach.

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\(^4\) See supra note 3.

\(^5\) For example, Professor Susan Randall compared unconscionability claims in cases in 1982-1983 and 2002-2003 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 3, at 186-87. 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 3. 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 Section III.
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 state 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 addresses how, since 1980, state appellate courts have applied the unconscionability doctrine to all types of contracts, including those involving arbitration agreements. In all, I have analyzed the unconscionability case law from twenty states, which were randomly chosen from across the United States. In all, this case law included a total of 465 appellate cases. 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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6 I chose to only address appellate cases, including those from intermediate 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 was applying 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 was applying state substantive law regarding unconscionability. Thus, the only cases included in this number were cases in which a state appellate court applied its own state’s law regarding the unconscionability doctrine. 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 cases in my research.

7 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 3. I wanted to include states that may have been referenced in other scholarly articles, but without the amount of attention that California has received.

8 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. 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 the first part of this paper, I summarize the general law related to the unconscionability doctrine, in both the arbitration and non-arbitration context. The next section 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. The section that follows 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 section draws conclusions about what the numbers show us about how courts apply unconscionability to arbitration agreements. In doing so, I argue that some of the concern

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9 See infra Sec. III.
10 See infra Sec. II.
11 See infra Sec. III.
12 See infra Sec. IV.
13 See infra Sec. V.
about how state courts apply unconscionability may be unnecessary, and I set out what areas of concern still exist for the future.\textsuperscript{14}

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.\textsuperscript{15} However, contract law in general, and the unconscionability doctrine specifically, are primarily products of state law, not federal law.\textsuperscript{16} Thus, in the following section, this paper sets forth the basic relevant principles of federal and state law with respect to arbitration agreements, state contract law, and the unconscionability doctrine.

\textsuperscript{14} See id.


A. The Intersection Between Arbitration Agreements and General Contract Law

Because arbitration agreements are contracts, the rules that apply to other contracts should also apply to arbitration agreements. In general, the construction, interpretation, and enforcement of contracts are governed by state law, not federal law. There is more complexity, however, to cases involving arbitration agreements. As mentioned supra, unlike other types of contracts, the starting point for arbitration agreements is federal law, specifically the FAA. Section 2 of the FAA provides the basis 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.” 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.

Although the FAA provides that ordinary contract defenses, such as unconscionability, may apply in certain circumstances to make arbitration agreements unenforceable, the problem arises when a court applies those defenses differently to arbitration agreements than to other

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17 See AT&T Mobility, 563 U.S. at ___, 131 S.Ct. at 1745-46; Perry, 482 U.S. at 492 n.9.


20 See AT&T Mobility, 563 U.S. at ___, 131 S.Ct. at 1746; Doctor’s Assoc., Inc., 517 U.S. at 686-87. But see Edward P. Boyle & David C. 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 “increases the federal 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”).
types of contract provisions.21 The United States Supreme Court has provided some guidance for other courts in this context.22 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.23 Some cases, however, involve much more complexity than a blatant conflict 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 favors arbitration.24 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.25 Even

21 See Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987) (“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 state: 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.’”) (emphasis in original) (internal citations omitted).


23 See, e.g., Marmet Health Care Ctr., 565 U.S. at ___, 132 S.Ct. at 1203-04 (holding that “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, 563 U.S. at ___, 131 S.Ct. at 1747; Preston, 552 U.S. at 353 (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 Assoc., 517 U.S. at 687 (“Courts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions.”) (emphasis in original).

24 See AT&T Mobility, 563 U.S. at ___, 131 S.Ct. at 1747; Allied-Bruce Terminex, 513 U.S. at 281; Perry, 482 U.S. at 492-93 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, 563 U.S. at ___, 131 S.Ct. at 1747.

25 See Marmet Health Care Ctr., 565 U.S. at ___, 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). See also Perry, 482 U.S. at 492 n.9 (stating that “[n]or 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”).
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.26

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.”27 In fact, the Ohio Supreme Court has noted that Ohio’s “strong policy favoring arbitration is consistent with federal law supporting arbitration.”28 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.29 Other state courts have also echoed 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.30


27 Williams v. Aetna Fin. Co., 700 N.E.2d 859, 865 (Ohio 1998) (holding that “[a]n 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 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).


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 531, 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.
B. 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.31 Traditionally, a bargain was said to be unconscionable in an action at law if it was “‘such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other.’”32 Thus, historically, courts recognized unconscionability as a defense to a claim for breach of contract.33 However, courts were more likely to find a contract unconscionable during the past century than before the twentieth century.34


32 Hume v. United States, 132 U.S. 406, 411 (1889) (quoting Earl of Chesterfield v. Janssen, 2 Ves. Sen. 125, 155, 28 Eng. Rep. 82, 100 (Ch. 1750)). Missouri courts have referenced this definition from Hume. See Swain v. Auto Services, 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, so 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. Serv., Div. of Aging v. Brookside Nursing Ctr., Inc., 50 S.W.3d 273, 277 (Mo. 2001) (quoting Peirick v. Peirick, 641 S.W.2d 195, 197 (Mo. Ct. App. 1982).


The unconscionability doctrine was ultimately codified in the Uniform Commercial Code (UCC). All of the states which are included in this study have adopted the UCC and, specifically, the unconscionability provision. 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. Moreover, state legislatures have also passed other unconscionability statutes over time, such as those addressing unconscionable provisions in residential leases or other types of agreements. 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.” Instead, the Official Comment

question, alter, or reject a contract’s written terms on grounds of unconscionability or unfair surprise.”). See also Knapp, supra note 3, 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; id., cmt. 1. See also 8 Williston on Contracts § 18:1.


37 8 Williston on Contracts § 18:5.

38 See, e.g., OHIO REV. CODE ANN. § 1310.06 (unconscionability and lease contracts); OHIO REV. CODE ANN. §§ 3733.16, 5321.14 (unconscionability and rental agreements); R.I. GEN. LAWS § 6A-2.1-108 (unconscionability and lease contracts); OR. REV. STAT. § 72A.1080 (unconscionability and lease provisions); OR. REV. STAT. § 90.135 (unconscionability and residential leases); NEV. REV. STAT. § 104A.2108 (unconscionability and lease provisions); NEV. REV. STAT. § 118A.230 (unconscionability and rental agreements); N.C. GEN. STAT. § 25A-43 (unconscionability and retail installment sales contracts); S.C. CODE ANN. § 37-4-406 (unconscionability and insurance contracts); and NEB. REV. STAT. § 76-2717 (unconscionability and foreclosure consulting contracts);

39 See 8 Williston on Contracts § 18:8; id., § 18:11; Randall, supra note 3, at 194 (stating 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 be applied 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”); John A. Spanogle, Jr., Analyzing Unconscionability Problems, 117 U. PA. L. REV. 931, 931 (1969) (“The primary problem with [the doctrine of unconscionability] is that the concept of unconscionability is vague, so that neither courts, practicing
to UCC § 302 provides the following basic test: “whether, 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.” The result of this vague instruction is that courts are left with significant latitude in applying the doctrine to specific contracts.

Some states’ statutes may also provide additional guidance regarding the application of the unconscionability doctrine. Thus, the statutes in the states that are part of this study make clear that the courts are to look at the time that the contract was made 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. 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)

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40 U.C.C. § 2-302; id., cmt. 1.

41 8 Williston on Contracts § 18:8.

“so limit the application of any unconscionable clause as to avoid any unconscionable result.”

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.” Some courts have interpreted this statutory provision to require an evidentiary hearing for 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.

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

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create another layer of complexity.\textsuperscript{46} Aside from the FAA, other federal laws may also affect state courts’ unconscionability analysis. Thus, the Nevada Supreme Court recently held that, in the healthcare contract context, the Federal Medicare Act can preempt Nevada’s unconscionability law.\textsuperscript{47} 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\textsuperscript{48} and federal regulations related to the Federal Crop Insurance Act.\textsuperscript{49} Finally, an Illinois appellate court held that a consumer’s claim that the arbitration clause in a long-distance telephone carrier’s service agreement was unconscionable was preempted by the Federal Communications Act.\textsuperscript{50}

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


\textsuperscript{50} Ramette, 812 N.E.2d at 513-14.
standards as other types of contracts. The case law in these states also echoes this theme, regardless of how each state’s courts actually apply the unconscionability doctrine.

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. For example, the Ohio Supreme Court has summarized unconscionability as

Id. (emphasis added). See also ALASKA STAT. §§ 09.43.010, 09.43.330; ARK. CODE ANN. § 16-108-206; COLO. REV. STAT. § 13-22-206; 710 ILL. COMP. STAT. § 5/1; ME. REV. STAT. tit. 14, § 5927; MD. CODE ANN. § 3-206(a); MINN. STAT. § 572B.06; MO. REV. STAT. § 435.350; MONT. CODE ANN. § 27-5-114; NEB. REV. STAT. § 25-2602.01; NEV. REV. STAT. § 38.219; N.H. REV. STAT. ANN. § 542:1; N.M. STAT. ANN. § 44-7A-7(a); N.C. GEN. STAT. § 1-596.6; OR. REV. STAT. §§ 36.454(5), 36.620(1); R.I. GEN. LAWS § 10-3-2; S.C. CODE ANN. § 15-48-10; S.C. CODE ANN. § 15-48-10(a); and VT. STAT. ANN. tit. 12, § 5652. Mississippi does not have an equivalent statute.

See, e.g., Raper v. Oliver House, LLC, 637 S.E.2d 551, 554 (N.C. Ct. App. 2006) (citations omitted) (“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.”); Taylor Bldg. Corp. of Am. v. Benfield, 884 N.E.2d 12, 20 (Ohio 2008) (quoting OHIO REV. CODE ANN. § 2711.01(A)) (“Arbitration agreements are ‘valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.’”).

See, e.g., Freedman v. Comcast Corp., 988 A.2d 68, 85 (Md. Ct. Spec. App. 2010) (citing Doyle v. Fin. Am., LLC, 918 A.2d 1266 (Md. Ct. Spec. App. 2007) (“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.”); Hayes v. Oakridge Home, 908 N.E.2d 408, 412 (Ohio 2009) (holding that a “quantum” of both procedural and substantive unconscionability must be established in order for a provision to be unconscionable); Burch v. 2nd Jud. Dist. Ct. of State ex rel. Cnty. of Washoe, 49 P.3d 647 ( Nev. 2002). However, Nebraska’s case law suggests that, outside of the commercial context, Nebraska courts might not require both substantive and procedural unconscionability. See
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.’”\footnote{Hayes, 908 N.E.2d at 412 (quoting Lake Ridge Acad. v. Carney, 613 N.E.2d 183, 189 (Ohio 1993)).} However, a minority of states’ courts do not require both procedural unconscionability and substantive unconscionability in order to invalidate a contract on unconscionability grounds.\footnote{For example, Vermont courts do not require procedural unconscionability to find a contract provision to be unconscionable. See Glassford v. BrickKicker, 35 A.3d 1044 (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. Id. at 263. Missouri courts also appear to not require both procedural and substantive unconscionability. See Manfredi v. Blue Cross & Blue Shield of Kan. City, 340 S.W.3d 126, 138 (Mo. Ct. App. 2011) (Ahuja, J., concurring) (stating that “[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, 907-08 (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”).} Some states use a sliding scale approach, such that, if there is a significant amount of substantive unconscionability, less procedural unconscionability is required.\footnote{See E. Allen 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, Missouri, Nevada, New Mexico, Vermont, and North Carolina. See, e.g., Razor v. Hyndai Motor Am., 854 N.E.2d 607, 622 (Ill. 2006); Brewer v. Mo. Title Loans, Inc., 323 S.W. 3d 18, 22 (Mo. 2010) (en banc), vacated on other grounds, 131 S.Ct. 2875 (2011); Gonski v. 2nd Jud. Dist. Ct. of Nev. ex rel. Washoe, 245 P.3d 1164, 1169-70 (Nev. 2010) (citing D.R. Horton, Inc. v. Green, 96 P.3d 1159, 1162 (Nev. 2004)) (“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.”); Cordova, 208 P.3d at 907-08; Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362, 370 (N.C. 2008); and Glassford, 35 A.3d at 1049. 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).}
Procedural unconscionability refers to the making of the contract. Therefore, in determining whether procedural unconscionability exists, court often consider, among numerous factors: (1) whether there was a meeting of the mind as to the formation of the agreement; (2) the experience, intelligence, age, and education of the parties; (3) the parties’ relative bargaining power and whether there was the presence or absence of meaningful choice on the part of the weaker party; (4) the conspicuousness and clarity of the contract terms and whether attention was drawn to the challenged terms when the agreement was signed; and (5) whether the party challenging the agreement was represented by counsel when the agreement was made.


58 See, e.g., Wascovich v. Personacare of Ohio, 943 N.E.2d 1030, 1035 (Ohio Ct. App. 2010) (quoting Porpora v. Gatliiff Bldg. Co., 828 N.E.2d 1081, 1083 (Ohio Ct. App. 2004)) (explaining that “[p]rocedural unconscionability concerns the formation of the agreement and occurs when no voluntary meeting of the minds is possible”); Dan Ryan Builders, Inc. v. Nelson, ___ S.E.2d ____, 2012 WL 5834590, *7 (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”); Brewer v. Missouri Title Loans, 364 S.W.3d 486, 500 (Mo. 2012) (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 meetings of the minds to bind each other to the terms of the writing”).

59 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, “[t]he relevant 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) (quoting Best v. U.S. Nat’l Bank, 739 P.2d 554 (Or. 1987)) (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”). 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 agreement aside from the signatory’s advanced age).


signed. Although the fact that a contract is a contract of adhesion may factor into a court’s analysis of whether procedural unconscionability exists, most state courts have held that a contract of adhesion is not per se unconscionable.

In contrast, substantive unconscionability refers to the contract’s specific terms. A contract may be substantively unconscionable if it includes harsh, one-sided, or oppressive terms. Like in procedural unconscionability analysis, courts are ordinarily unwilling to declare terms to be substantively unconscionable per se, instead choosing to analyze challenged contract terms in light of the individual circumstances of each case.

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.

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62 See, e.g., Eagle, 809 N.E.2d at 1180; Small, 823 N.E.2d at 24; Porpora, 828 N.E.2d at 1084. 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).

63 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”); 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 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.”) (internal citations and quotations omitted); 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 equity alone generally cannot establish procedural unconscionability.”).


67 Williams v. Aetna Fin., 700 N.E.2d 859, 866 (Ohio 1998); Porpora v. Gatliff Bldg. Co., 828 N.E.2d 1081, 1083 (Ohio Ct. App. 2004); Tillman, 655 S.E.2d at 272-73 (holding that an arbitration agreement was substantively unconscionable in part because agreement exempted foreclosure actions and claims of less than $15,000, which unfairly benefited the defendant); 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
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. Courts also weigh carefully provisions that would prevent the plaintiffs from seeking the same remedies that would be available in court, particularly if there are specific statutory rights involved. Unreasonable or prohibitively high arbitration costs are another reason for finding an arbitration provision substantively unconscionable. In considering whether a contract provision is substantively unconscionable, Ohio courts may evaluate the challenged provision is commercially reasonable. Finally, courts powerless to resolve a large class of claims, or fail to provide an adequate remedy for the dispute,“ were substantively unconscionable”).

68 See, e.g., 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”) (emphasis in original); Walther v. Sovereign Bank, 872 A.2d 735, 748 (Md. 2005) (holding that arbitration agreement in mortgage agreement did not lack mutuality even though agreement allowed mortgage company to bring foreclosure actions in court).

69 See, e.g., Eagle v. Fred Martin Motor Co., 809 N.E.2d 1161, 1175 (Ohio Ct. App. 2004); Hayes v. Oakridge Home, 886 N.E.2d 928, 930, 932 (Ohio App. 8th Dist. 2008), judgment reversed by 908 N.E.2d 408 (Ohio 2009); Gonski v. 2nd Judicial Dist. Ct. of State ex rel. Washoe, 245 P.3d 1164, 1171-72 (Nev. 2010) (holding that arbitration agreement was unconscionable where it impermissibly waived most statutory protections regarding residential construction defects).

70 See Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91-92 (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 v. Commercial Credit Loans, Inc., 655 S.E. 2d 362, 371-72 (N.C. 2008) (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 Oregon, Inc., 152 P.3d 940, 952 (Or. 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”). Cf. Westmoreland v. High Point Healthcare Inc., 721 S.E.2d 712, 722 (N.C. Ct. App. 2012) (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 vs. litigating her claims).

are more likely to find arbitration agreements substantively unconscionable if the agreements do not provide enough information about the arbitration process.\textsuperscript{72}

III. The Scholarly Debate Regarding How State Courts Apply the Unconscionability Doctrine

As mentioned supra, a lot has been written about how state courts apply the unconscionability doctrine to arbitration agreements, with many scholars being critical of state courts’ purportedly uneven approach.\(^{73}\) This critique has been echoed by federal courts, especially the U.S. Supreme Court.\(^{74}\) These concerns provide a good starting point for this long-term study and, thus, merit some further discussion.

The one state that has drawn the most attention is California, in part because of empirical research by Stephen A. Broome\(^ {75}\) and Susan Randall,\(^ {76}\) and in part because of the U.S. Supreme Court’s 2011 decision in AT&T Mobility LLC v. Concepcion.\(^ {77}\) Broome’s study analyzed the unconscionability case law of the California Courts of Appeal, the intermediate level appellate courts, for the time period from August 27, 1982, the date of the first case adopting a “modern” approach to the unconscionability doctrine, and January 26, 2006.\(^ {78}\) In all, Broome analyzed a total of 160 cases, including 114 cases in which there was an unconscionability challenge to an arbitration agreement, and forty-six cases involving unconscionability challenges to non-arbitration contract provisions.\(^ {79}\)

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\(^{73}\) See supra note 3.

\(^{74}\) See, e.g., AT&T Mobility LLC v. Concepcion, 563 U.S. ___, ___, 131 S.Ct. 1740, 1747 (2011) (noting that California courts are more likely to find an arbitration agreement unconscionable than other types of contracts.

\(^{75}\) See generally Broome, supra note 3.

\(^{76}\) See generally Randall, supra note 3.

\(^{77}\) See generally AT&T Mobility, 563 U.S. ___, 131 S.Ct. 1740.

\(^{78}\) Broome, supra note 3, at 44 n.33. Broome defined the “modern” approach to the unconscionability doctrine as one that requires a showing of both procedural and substantive unconscionability. See id.

\(^{79}\) Id. at 44-47.
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.” Specifically, he determined that California Courts of Appeal found arbitration provisions unconscionable in fifty-eight percent of the cases but only held non-arbitration contract provisions unconscionable eleven percent of the time. Although Broome’s study is useful for a greater understanding of 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.

In contrast, Randall took a somewhat broader approach than Broome, by analyzing all states’ approach to unconscionability in the arbitration context, but limiting her study to a comparison of two two-year time periods, 1982-1983 and 2002-2003. Randall asserted that, as of 2004, the date that her article was written, “judges currently find arbitration agreements unconscionable at twice the rate of non-arbitration agreements.” In comparison, twenty years earlier, judges found arbitration and non-arbitration contract provisions unconscionable at the same rate. Specifically, Randall argued that judges found forum selection clauses, confidentiality requirements, and punitive damages limitations unconscionable in arbitration agreements where they would routinely find them unobjectionable in contracts that did not have arbitration clauses.

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80 Id. at 1.
81 Id. at 48.
82 See generally, Randall, supra note 3.
83 Id. at 186, 194-95.
84 Id. at 186.
85 Id.
Randall acknowledged that a “significant number” of the cases that she relied on were decided by state and federal courts in California, but her study determined that a total of seventeen different state courts found arbitration agreements unconscionable in 2002-2003.\textsuperscript{86} 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.”\textsuperscript{87}

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. One of the study’s limitations, however, is its very narrow date range. By focusing on such 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 summary to come to many larger conclusions.\textsuperscript{88} Knapp conducted a survey of published state and federal case law in which

\textsuperscript{86} 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. \textit{Id.} at 195 n.35.

\textsuperscript{87} Id. at 196.

\textsuperscript{88} \textit{See generally} Knapp, \textit{supra} note 3.
contract unconscionability was an issue, covering the time period from 1990 through 2008.\textsuperscript{89} Similar to some of Randall’s observations, Knapp noted, as a general trend, that the number of unconscionability cases have 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.\textsuperscript{90} Moreover, he noted a significant increase in the “success” of unconscionability arguments during that time period, due almost entirely to cases involving arbitration agreements.\textsuperscript{91}

Echoing Broome’s conclusions, Knapp found that unconscionability claims were more likely to succeed in the California state appellate courts, with California state cases representing over one-third, or thirty-two out of eighty-eight, state unconscionability cases nationwide during that time period.\textsuperscript{92} Furthermore, most federal court decisions in which unconscionability arguments were successful came out of California federal courts or the Ninth Circuit.\textsuperscript{93} However, Knapp also found that twenty-two other states’ courts, as well as federal courts outside of the Ninth Circuit, have made decisions in favor of party’s unconscionability arguments.\textsuperscript{94}

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 “such outward shows of animosity have for the most part given way to a more measured response, in which the lower courts carefully attempt to

\textsuperscript{89} See id. at 620.

\textsuperscript{90} Id. at 621-23.

\textsuperscript{91} Id. at 622-23.

\textsuperscript{92} Id. at 623-24.

\textsuperscript{93} Id. at 624-25.

\textsuperscript{94} Id.
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.”

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 courts’ application of the unconscionability to arbitration agreements. One of the problematic aspects 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.” Thus, data from cases in which the court found the challenged provision unconscionable was lumped in with cases where the appellate court determined that the trial court should have considered a party’s unconscionability argument and remanded for further consideration of the issue. In cases in which the appellate court remanded to the trial 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 this cases as a separate, third category of case law.

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95 Id. at 626-27.

96 Id. at 621.

97 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.”).
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, it provides less understanding of how individual states have approached this issue, and the extent to which individual states follow those larger trends. Therefore, although the instant article draws some larger 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 and when analyzing individual states’ unconscionability case law, I set out on this research project. As discussed infra, the numbers proved somewhat surprising. 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. Nor did the fact that, collectively, state courts were slightly more likely to find arbitration agreements unconscionable than other types of contract provisions fully answer my questions about this issue. Instead, when the numbers are broken down, a much more complex picture of state courts’ application of the unconscionability doctrine emerges. That complexity demonstrates that many of the assumptions that both courts and scholars have had about state courts’ use of the unconscionability doctrine need reconsideration.
A. The Big Picture: The Overall Numbers

In order to have 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. 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 general status of these cases. In further subsections, the 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 465 cases between 1980 and 2012.98 Of those cases, 229, or 49.25 percent, involved non-arbitration contract provisions.99 The remaining 236 cases, or 50.75 percent, involved arbitration agreements.100 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

98 See Table 1.

99 See id. See also Graph 1.

100 See Table 1. See also Graph 1.
doctrine in an attempt to challenge arbitration agreements than other types of contracts, and, to a
certain extent, at least in the last ten or fifteen years, they are correct.\(^\text{101}\) In the non-arbitration
context, there are numerous different types of contract clauses at issue, such as provisions that
limit damages,\(^\text{102}\) limit liability,\(^\text{103}\) or provide for liquidated damages in the event of a breach.\(^\text{104}\)
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 cases
would therefore come from the decades prior to 1980.\(^\text{105}\) Thus, by focusing solely on the last
thirty-two years, it is possible that this study, as well as the work of other scholars, has made the
arbitration issue seem greater than it would be if put in 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

\(^{101}\) See, e.g., Randall, \textit{supra} note 3, 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 . . . .”).

\(^{102}\) See, e.g., \textit{Scott Reising Jewelers, Inc. v. ADT Sec. Serv., Inc.}, Nos. C-050322, C-050329, 2006 WL

\(^{103}\) See, e.g., \textit{Scott Reising Jewelers, Inc.}, 2006 WL 6576746; \textit{Fireman’s Fund Am. Ins. Co.}, 93 Ill.App.3d
298; \textit{Hurst v. Enter. Title Agency, Inc.} 809 N.E.2d 689 (Ohio Ct. App. 2004); \textit{Nat’l Fire Ins. Co. of Pittsburgh,
Beechcraft, Inc.}, 59 S.W.3d 505 (Mo. 2001); \textit{Reuben H. Donnelly Corp. v. Krasny Supply Co., Inc.}, 592 N.E. 2d 8

\(^{104}\) See, e.g., \textit{Buckingham v. Ryan}, 953 P.2d 33 (N.M. 1998) (holding that a liquidated damages provision
in a real estate contract was not unconscionable); \textit{Hartford Fire Ins. Co. v. Architectural Mgmt., Inc.}, 550 N.E.2d

\(^{105}\) See \textit{Knapp, supra} note 3, at 612-13.
larger trend in litigation—that is, there have been an ever-increasing number of cases in litigation over time. 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.

Moreover, the unconscionability case law numbers—whether involving arbitration agreements or non-arbitration provisions, did not remain constant for the duration of the study. Parties rarely used the unconscionability doctrine to challenge arbitration agreements in the 1980s, and the number of unconscionability challenges to arbitration agreements still remained relatively low throughout the 1990s. Although the number remained relatively low in 2000 and 2001, the number of unconscionability cases involving arbitration agreements climbed steadily between 2002 and 2007. After the peak in 2007, the number of unconscionability cases involving arbitration agreements have declined somewhat and appear to have stabilized, at least for now.

106 See, e.g., Diarmuid F. O’Scanlan, 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).

107 See 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. Id. There were no unconscionability cases involving arbitration agreements for the years 1980-1982 and 1984-1985. Id. See also Graphs 1, 4.

108 See Table 1. Although there were more unconscionability cases involving arbitration agreements in the 1990s than in the 1980s, the numbers still remained relatively low. Id. 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. Id. However, there were no unconscionability cases involving arbitration agreements in 1990, 1996, and 1997. Id. See also Graphs 1, 4.

109 See Table 1. There were six unconscionability cases involving arbitration agreements in 2000, and three more cases in 2001. Id. See also Graph 4.

110 See Table 1. The arbitration unconscionability case numbers for the time period from 2002 through 2007 are as follows: thirteen cases in 2002, eleven in 2003, twenty-two in 2004, nineteen in 2005, twenty-one in 2006, and twenty-nine in 2007. Id. See also Graphs 1, 4.

111 See Table 1. There were twenty-six unconscionability cases involving arbitration agreements in 2008, seventeen in 2009, fourteen in 2010, and fifteen in 2011. Id. See also Graphs 1, 4.
In contrast, the numbers for non-arbitration unconscionability cases have a different pattern, basically resembling a wave.\textsuperscript{112} The number of non-arbitration unconscionability cases remained relatively constant and significantly higher than the arbitration unconscionability case numbers throughout the 1980s and 1990s and were at their highest during those decades during 1981, 1987, and 1999.\textsuperscript{113} The number of non-arbitration cases remained consistent with the numbers from the previous decades for the years of 2000 through 2004, and again rose to ten cases each year in 2005 and 2006.\textsuperscript{114} After declining a small amount in 2007 and more significantly in 2008, the number of non-arbitration unconscionability cases hit their highest peak in 2009 and 2010 with fourteen and thirteen cases, respectively.\textsuperscript{115}

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’s now get down to business. 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 appear on the surface. Although the overall numbers suggest that state courts have been more inclined to find arbitration agreements unconscionable than other types of

\textsuperscript{112}See Table 1. See also Graphs 1, 3.

\textsuperscript{113}See Table 1. See also Graphs 1, 3.

\textsuperscript{114}See Table 1. See also Graphs 1, 3.

\textsuperscript{115}See Table 1. See also Graphs 1, 3.
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.

In all, courts found contract provisions, whether involving arbitration or not, unconscionable in approximately twenty-three percent of cases.\(^{116}\) That number further breaks down as follows. Out of the 236 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 fifty-nine cases.\(^{117}\) Thus, in twenty-five percent of arbitration cases, the courts determined that the challenged clause was unconscionable.\(^{118}\) In contrast, courts found unconscionability in forty-seven out of 229 non-arbitration cases, amounting to 20.52 percent of those cases.\(^{119}\) 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, that difference is not huge, and, in fact, may not be considered that significant.

There was one major surprise in the statistics, however. Although there is not a significant difference over time in the percentage of cases found unconscionable, there was a significant difference in the number of cases in which appellate courts considered the unconscionability issue but remanded to the trial court for further unconscionability analysis without determining unconscionability.\(^{120}\) Since 1980, the state appellate courts remanded only twelve non-arbitration cases to the trial courts for further unconscionability analysis, amounting

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\(^{116}\) See Table 1.

\(^{117}\) See id.

\(^{118}\) See id.

\(^{119}\) See id.

\(^{120}\) See Table 1.
to just over five percent of all non-arbitration unconscionability cases.\textsuperscript{121} In contrast, appellate courts remanded thirty-five arbitration cases to the trial court for further unconscionability analysis, or more than fifteen percent of arbitration-focused unconscionability cases.\textsuperscript{122} 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, it 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, thus, it is unknown what the outcome was in the trial court.\textsuperscript{123}

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

The overall numbers do not tell the entire story, however, and can actually be somewhat 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

\textsuperscript{121} See id.

\textsuperscript{122} See id.

\textsuperscript{123} 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 3, 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.
rarely, if ever, finding any contract clauses unconscionable, and, at the opposite end, states that appear to be very sympathetic to unconscionability defenses regardless of the type of contract. Four states are definitely more likely to find an arbitration agreement unconscionable than other types of contracts, but 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 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. 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 2011 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
these states have recognized unconscionability as a possible contract defense. However, despite that recognition, during the time period of the instant study, four of the ten states had no cases in which unconscionability was used to challenge an arbitration agreement: Maine, Nebraska, New Hampshire, and Rhode Island. Maryland, Colorado, and Minnesota have considered the unconscionability doctrine in the context of arbitration agreements, but the appellate courts in those three states have never held that an arbitration provision was unconscionable. Furthermore, since 1980, the appellate courts in Maine and Maryland have

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125 See Table 2. Since 1980, Maine has not had a single case in which Maine Supreme Court applied Maine unconscionability law.

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

127 See Table 2. Like Nebraska, New Hampshire has had five appellate cases involving the unconscionability doctrine since 1980, all involving non-arbitration contracts. See id. New Hampshire also only had one case in which the New Hampshire Supreme Court found unconscionability, a commercial contract. See id.; see also Pittsfield Weaving Co., Inc. v. Grove Textiles, Inc., 430 A.2d 638 (N.H. 1981). There has only been one appellate case in which a New Hampshire court considered the unconscionability doctrine since 1986. See id.; see also Pope v. Lee, 879 A.2d 735 (N.H. 2005).

128 See Table 2. The Rhode Island Supreme Court has only considered two unconscionability cases since 1980. See id. It held that the challenged provision was unconscionable in one of those cases. See Ruzzo v. LaRose Enter., 748 A.2d 261 (R.I. 2000). 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 generally Ostalkiewicz v. Guardian Alarm, Div. of Colbert’s Sec. Serv., Inc., 520 A.2d 563, 565-66 (R.I. 1987) (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).

129 See Table 2. Since 1980, Maryland appellate courts have analyzed whether arbitration provisions were unconscionable on four occasions but have never found a challenged arbitration provision to be unconscionable. See
not found any contract provision to be unconscionable.\textsuperscript{130} 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, or less than ten percent of the time.\textsuperscript{131}

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,\textsuperscript{132} and the last time that a Nebraska appellate court found a contract clause to be unconscionable was 1992.\textsuperscript{133} New Hampshire’s last successful unconscionability case was in 1981,\textsuperscript{134} and a Colorado appellate court last found a challenged contract provision unconscionable in 1986.\textsuperscript{135} Rhode Island’s last successful unconscionability case was in 2000.\textsuperscript{136}

\textit{id.} Colorado has analyzed whether challenged contract provisions were unconscionable on nine occasions, with two of the nine cases involving arbitration agreements. \textit{See} 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. \textit{See id.; see also} 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. \textit{See} Table 2; \textit{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).

\textsuperscript{130} \textit{See} Table 2; \textit{see also supra} note 125.

\textsuperscript{131} \textit{See} Table 2; \textit{see also} 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); Glarner v. Time Ins. Co., 465 N.W.2d 591, 595-96, 598 (Minn. Ct. App. 1991). The Minnesota Supreme Court later reversed the appellate court’s unconscionability determination in \textit{Zontelli & Sons}. \textit{See} Zontelli & Sons, Inc. v. City of Nashwauk, 373 N.W.2d 744 (Minn. 1985).

\textsuperscript{132} \textit{See generally} Glamer, 465 N.W.2d 591.


\textsuperscript{136}
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 doctrine more generally, is still much more conservative than the average.\textsuperscript{137} 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.\textsuperscript{138} Thus, South Carolina appellate courts have found a contract provision unconscionable in 11.1 percent of its total unconscionability cases.\textsuperscript{139} 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 percent of the time, which is still far below the average among the states in this study.\textsuperscript{140} Since 1980, North Carolina appellate courts have considered unconscionability arguments in twenty cases.\textsuperscript{141} 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 time.\textsuperscript{142} Even if only considering arbitration agreements, however, North Carolina appellate courts have

\textsuperscript{136} See generally Ruzzo v. LaRose Enter., 748 A.2d 261 (R.I. 2000).

\textsuperscript{137} See generally Table 1, Table 2.

\textsuperscript{138} See Table 2; see also Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663 (S.C. 2007).

\textsuperscript{139} See Table 2.

\textsuperscript{140} See Table 1, Table 2. 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). 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 v. Concepcion. See Sonic Auto., Inc. v. Watts, 131 S.Ct. 2872 (2011).

\textsuperscript{141} See Table 2.

\textsuperscript{142} See Table 2; see also Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362 (N.C. 2008).
only found challenged contract provisions to be unconscionable in one out of eight cases, or 12.5 percent of the time, still well below the average for states in this study.\textsuperscript{143}

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.\textsuperscript{144} However, all but one of those cases were decided between 2005 and 2012.\textsuperscript{145} Two of the cases involved non-arbitration contract clauses,\textsuperscript{146} and the Oregon courts found one of those challenged contracts unconscionable.\textsuperscript{147} The other seven cases involved arbitration agreements.\textsuperscript{148} Oregon courts only held challenged arbitration clauses unconscionable in one out of the seven cases, or 14.29 percent of the time.\textsuperscript{149} Although Oregon’s overall unconscionability numbers, 22.22 percent unconscionable, put the state more in keeping with the unconscionability numbers for all twenty states combined, this paper categorizes Oregon as one of the

\footnotesize{\textsuperscript{143} See Table 2. 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 unconscionability issue. \textit{See} Kucan v. Advance Am., 660 S.E.2d 98, 103-04 (N.C. Ct. App. 2008).}

\footnotesize{\textsuperscript{144} See Table 2.}


\footnotesize{\textsuperscript{146} See generally Carey, 125 P.3d 814; Or. Bank, 683 P.2d 95.}

\footnotesize{\textsuperscript{147} Carey, 125 P.3d at 831-32.}

\footnotesize{\textsuperscript{148} See generally Livingston, 227 P.3d 796; Hays Grp., 193 P.3d 1028; Sprague, 162 P.3d 331; Motsinger, 156 P.3d 156; Vasquez-Lopez, 152 P.3d 940; DEX Media, 150 P.3d 1093.}

\footnotesize{\textsuperscript{149} See Vasquez-Lopez, 152 P.3d at 948-53.}
“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.\textsuperscript{150}

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 are much smaller in number. Out of the twenty states analyzed for purposes of this study, I have identified three states in which the appellate courts have shown a significant tendency to be sympathetic to unconscionability arguments: Alaska, Arkansas, and Vermont.\textsuperscript{151} Although the courts in these states have found arbitration agreements to be unconscionable, they have often also found non-arbitration provisions to be unconscionable.\textsuperscript{152} 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.\textsuperscript{153}

Specifically, the Alaska Supreme Court has considered unconscionability arguments in eleven cases since 1980, three of which involved arbitration agreements and eight involving non-arbitration contract provisions.\textsuperscript{154} Of those eleven cases, the Court has found challenged contract


\textsuperscript{151} \textit{See} Table 3.

\textsuperscript{152} \textit{See} id.

\textsuperscript{153} \textit{See} id.

\textsuperscript{154} \textit{See} id.
provisions to be unconscionable on five occasions, or in approximately forty-six percent of cases.\textsuperscript{155} One of the five cases involved an arbitration agreement,\textsuperscript{156} but the other four involved non-arbitration provisions.\textsuperscript{157} 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-six percent of the time.\textsuperscript{158} Just like the breakdown in Alaska, one of the five unconscionable cases in Arkansas involved an arbitration agreement,\textsuperscript{159} and the other four involved non-arbitration contract provisions.\textsuperscript{160} Finally, the Vermont 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.\textsuperscript{161} Out of the three cases in which unconscionability was found, one case involved both arbitration and non-arbitration unconscionable provisions,\textsuperscript{162} and the other two cases involved non-arbitration contract provisions.\textsuperscript{163}

\textsuperscript{155} See id.

\textsuperscript{156} See Table 3; see also Gibson v. Nye Frontier Ford, Inc., 205 P.3d 1091 (Alaska 2009).

\textsuperscript{157} See Table 3; see also Pierce v. Catalina Yachts, Inc., 2 P.3d 618 (Alaska 2000); Helstrom v. North Slope Borough, 797 P.2d 1192 (Alaska 1990); Municipality of Anchorage v. Locker, 723 P.2d 1261 (Alaska 1986); and Vockner v. Erickson, 712 P.2d 379 (Alaska 1986). Although the Alaska Supreme Court has 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 generally Gibson, 205 P.3d 1091.

\textsuperscript{158} See Table 3.

\textsuperscript{159} See id.; see also Waverly-Ark., Inc. v. Keener, No. CA 07-524, 2008 WL 316149 (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.


\textsuperscript{161} See Table 3.

\textsuperscript{162} See id.; see also Glassford v. BrickKicker, 35 A.3d 1044 (Vt. 2011).
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.\textsuperscript{164} If the challenged contract provision is not related to arbitration, however, these courts rarely, if ever, find the challenged provision to be unconscionable.\textsuperscript{165} 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’ application of the unconscionability doctrine to arbitration agreements.\textsuperscript{166}

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.\textsuperscript{167} However, the majority of the contract provisions found unconscionable by Missouri courts were arbitration provisions. Specifically, out of the thirteen arbitration contract cases in which Missouri courts considered an unconscionability defense, ten, or approximately seventy-seven percent, were found unconscionable.\textsuperscript{168} In contrast, Missouri

\textsuperscript{163} See Table 3; see also Colgan v. Agway, Inc., 553 A.2d 143 (Vt. 1988); and Val Preda Leasing, Inc. v. Rodriguez, 540 A.2d 648 (Vt. 1987).

\textsuperscript{164} See Table 4.

\textsuperscript{165} See id.

\textsuperscript{166} See, e.g., supra notes 2 & 3.

\textsuperscript{167} See Table 4.

\textsuperscript{168} See id. The ten cases in which arbitration agreements were held unconscionable include Brewer v. Mo. Title Loans, 364 S.W.3d 486 (Mo. 2012); Manfredi v. Blue Cross & Blue Shield of Kan. City, 340 S.W.3d 126 (Mo. Ct. App. 2011); Brewer v. Mo. Title Loans, Inc., 323 S.W.3d 18 (Mo. 2010); Ruhl v. Lee’s Summit Honda, 322
courts only found non-arbitration contract clauses unconscionable in two out of eleven cases, or eighteen percent of the time.\(^{169}\) 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.\(^{170}\) It is also worth noting that four\(^{171}\) of the cases involving unconscionable contract provisions were cases in which the Missouri courts determined that provisions barring class action arbitration were unconscionable.\(^{172}\) 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*.\(^{173}\)

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\(^{169}\) See Table 4. The two cases in which Missouri courts found non-arbitration contract provisions unconscionable are: Repair Masters Const., Inc. v. Gary, 277 S.W.3d 854 (Mo. Ct. App. 2009); and Oldham’s Farm Sausage Co. v. Salco, Inc., 633 S.W.2d 177 (Mo. Ct. 1982).

\(^{170}\) See, e.g., *Manfredi*, 340 S.W.3d 126; *Woods*, 280 S.W.3d 90; *Greenpoint Credit*, 151 S.W.3d 868; *Swain*, 128 S.W.3d 103.

\(^{171}\) 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 (Mo. 2012) (holding, in light of the U.S. Supreme Court’s holding in *AT&T Mobility LLC v. Concepcion*, 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 Brewer to the Missouri Supreme Court, in light of *AT&T Mobility*. See *Mo. Title Loans, Inc. v. Brewer*, ___ U.S. ___, 131 S.Ct. 2875 (May 2, 2011). 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. See generally *Brewer v. Mo. Title Loans*, 364 S.W.3d 486 (Mo. 2012).

\(^{172}\) See generally *Brewer*, 323 S.W.3d 18; *Ruhl*, 322 S.W.3d 136; *Shaffer*, 300 S.W.3d 556.

Similar to the outcome in Missouri 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.\textsuperscript{174} Between 1980 and 2011, New Mexico courts considered an unconscionability defense in contract cases on fifteen occasions.\textsuperscript{175} Six of those cases involved challenges to non-arbitration contract provisions, but none of those contracts were found unconscionable.\textsuperscript{176} In contrast, the New Mexico courts found arbitration provisions unconscionable in seven out of nine cases, or approximately seventy-eight percent of the time.\textsuperscript{177} Further, in two of those cases, the New Mexico Supreme Court determined that provisions barring class action arbitration were unconscionable.\textsuperscript{178} 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.

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 that those states do. Since 1980, the Nevada Supreme Court has considered an unconscionability contract defense on nine occasions.\textsuperscript{179} Seven of those cases involved arbitration agreements, and all three cases in which

\begin{itemize}
  \item \textsuperscript{174} See Table 4.
  \item \textsuperscript{175} See id.
  \item \textsuperscript{176} See id.
  \item \textsuperscript{178} See Felts, 254 P.3d at 137-39; Fiser, 188 P.3d at 1221.
  \item \textsuperscript{179} See Table 4.
\end{itemize}
the court found unconscionability involved arbitration clauses.\textsuperscript{180} Thus, Nevada courts have found challenged arbitration agreements unconscionable forty-three percent of the time, a percentage far above the average number for this study.\textsuperscript{181} As discussed supra, however, in its most recent two unconscionability cases, the Nevada Supreme Court held that the Medicare Act preempted Nevada contract law, and, therefore, the challenged contract provisions in those two cases were not unconscionable.\textsuperscript{182} It is also worth noting that, between 1980 and 2001, Nevada only had one unconscionability case—one that did not involve an arbitration agreement.\textsuperscript{183} The other eight cases were decided since 2001.\textsuperscript{184}

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 dramatic difference between Illinois courts’ favorable unconscionability determinations in the arbitration agreement context versus other types of contracts.\textsuperscript{185} Specifically, Illinois courts have considered an unconscionability defense in non-arbitration contracts on twenty-one occasions, and they held that three of those contracts,  

\begin{footnotes}
\item[180] See id. The three cases in which the Nevada Supreme Court found arbitration agreements unconscionable include: Gonski v. 2nd Judicial Dist. Ct. of State \textit{ex rel.} Washoe, 245 P.3d 1164 (Nev. 2010); D.R. Horton, Inc. v. Green, 96 P.3d 1159 (Nev. 2004); and Burch v. 2nd Judicial Dist. Ct. of State \textit{ex rel.} Cnty. of Washoe, 49 P.3d 647 (Nev. 2002).

\item[181] See id. See also the discussion of this study’s combined unconscionability numbers for all twenty states, supra notes 98-123.


\item[184] See generally Meana, 2011 WL 5146064 (Table); Rogers, 266 P.3d 596; Gonski, 245 P.3d 1164; KJH & RDA Investor Group, LLC v. 8th Judicial Dist. Ct. of State \textit{ex rel.} Cnty. of Clark, No. 51159, 2009 WL 1455992 (Table) (Nev. Apr. 22, 2009); Clifton v. 8th Judicial Dist. Ct. of State \textit{ex rel.} Cnty. of Clark, 238 P.3d 802 (Table) (Nev. 2008); Boulder Oaks Cnty. Ass’n v. B & J Andrews Enter., LLC, 169 P.3d 1155 (Nev. 2007); D.R. Horton, 96 P.3d 1159; and Burch, 49 P.3d 647.

\item[185] See Table 4.
\end{footnotes}
or fourteen percent of the time.\textsuperscript{186} In contrast, Illinois courts considered unconscionability arguments in thirteen arbitration cases, and, in six of those cases, or forty-six percent, the courts held those challenged arbitration provisions unconscionable.\textsuperscript{187} However, like the Missouri courts, the Illinois courts often still enforce the arbitration agreements after severing the unconscionable provision.\textsuperscript{188} Like Missouri and New Mexico courts, Illinois courts have also been hostile to contract provisions barring class action arbitration.\textsuperscript{189}

What these numbers suggest is that these four states, unlike the states discussed previously, illustrate the exact problem that the U.S. Supreme Court, as well as many legal scholars, are concerned about—the tendency to apply the unconscionability doctrine in such a way to invalidate arbitration provisions more often than other types of contract provisions. 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, it will be interesting to see how those state courts choose to react to \textit{AT&T Mobility v. Concepcion} in the long term.

\begin{footnotesize}
\begin{enumerate}
\item See, \textit{e.g.}, Keefe, 912 N.E.2d at 320; Wigginton, 890 N.E.2d at 549-50; Kinkel, 857 N.E.2d at 276-78.
\item See, \textit{e.g.}, Wigginton, 890 N.E.2d at 548-49; Kinkel, 857 N.E.2d at 263-75.
\end{enumerate}
\end{footnotesize}
4. The Middle Ground

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. Of those, 121 cases involved arbitration clauses, or approximately fifty-eight percent, while the other eighty-seven cases, or approximately forty-two percent, did not. 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. If only looking at the time period from 1987 through 2012, Ohio appellate courts heard 196 unconscionability challenges to contracts of various types, including 121 cases involving arbitration clauses, or 61.73 percent, and 75 cases that did not involve arbitration clauses, or 38.27 percent. These numbers strongly suggest that, in Ohio, parties are more likely to challenge contracts for unconscionability 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, I

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190 See Table 5.

191 See id.


193 See Table 5.

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 121 arbitration clauses were found unconscionable, equating to 16.53 percent of arbitration clauses evaluated.\textsuperscript{195} In comparison, during that same time period, courts found fourteen out of seventy-five non-arbitration contracts unconscionable, equating to 18.67 percent of other contracts evaluated.\textsuperscript{196} Moreover, if one also considers the contract cases involving


unconscionability analysis between 1980 and 1987, between 1980 and 2012, courts found a total of eighteen out of eighty-seven non-arbitration contracts unconscionable, which is 20.69 percent of cases decided on those grounds. 197 Thus, historically, Ohio appellate courts have been more likely to find non-arbitration contracts to be unconscionable than arbitration agreements—20.69 percent to 16.53 percent, respectively. 198

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. 199 Although one finds this result in both arbitration and non-arbitration cases, there are some stark differences between the two. On seven occasions between 1980 and 2012, the appellate courts remanded non-arbitration cases back to the trial courts without determining unconscionability, amounting to 8.05% of this type of cases. 200


198 See Table 5.

199 See infra at notes 200 to 208.

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 25.64 percent of all arbitration clause unconscionability appeals.201 Even more striking, all but eight of these cases were decided between 2003 and 2008, with appellate courts remanding cases ten times in 2007 alone.202 Although the numbers at first may not seem that significant, an analysis


202 See Table 5. See also supra notes 200-08.
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 cases, or fifty percent.\textsuperscript{203} In comparison, the appellate courts did not find any arbitration clauses unconscionable that year.\textsuperscript{204} 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.\textsuperscript{205} Over the next two years, only five cases out of twenty-two were remanded on those grounds.\textsuperscript{206} But in 2007 there was a resurgence—ten out of sixteen cases, or almost two out of three arbitration unconscionability cases heard on appeal, were remanded.\textsuperscript{207} The following year the numbers again declined, and only two out of twelve cases, or 16.67 percent, were remanded.\textsuperscript{208} 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.

\textsuperscript{203} See Table 5. See also Hampton, 2003 WL 22927367, *3; McDonough, 2003 WL 22052777, **3-4; Miller, 2003 WL 21469782, **5-7.

\textsuperscript{204} See Table 5.


\textsuperscript{206} See Table 5. See also Yessenow, 848 N.E.2d at 566; Olah, 2006 WL 350204, *6; Molina, 2005 WL 3219720, **2-4; Barr, 2005 WL 3031723, **2-3.

\textsuperscript{207} See Table 5. See also Goodwin, 2007 WL 4201359, *2; Khoury, 2007 WL 3149174, **3-5; Samoly, 2007 WL 3105246, **5-6; Strader, 2007 WL 2893422, **2-4; Barnes, 2007 WL 2296459, **4-5; Klimaszewski, 2007 WL 2134573, *1; Castro, 2007 WL 1849086, *2; Brunke, 2007 WL 1805026, **2-5; Post, 2007 WL 1290091, **5-6; Bencivenni, 2007 WL 475411, *2.

\textsuperscript{208} See Table 5. See also Roe, 2008 WL 3893563, **4-5; Blubaugh, 2008 WL 509543, *2.
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. 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.

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. In contrast, Mississippi courts found arbitration agreements unconscionable in seven out of twenty-five cases, or twenty-five percent of the time.

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209 See Table 5.

210 See id.

211 The five cases in which Mississippi courts found non-arbitration provisions unconscionable include: Covington v. Griffin, 19 So.3d 805 (Miss. Ct. App. 2009); Covenant Health Rehab. of Picayune, L.P. v. Brown, 949 So.2d 732 (Miss. 2007); Vicksburg Partners, L.P. v. Stephens, 911 So.2d 507 (Miss. 2005); Pitts v. Watkins, 905 So.2d 553 (Miss. 2005); and Entergy Miss., Inc. v. Burdette Gin Co., 726 So.2d 1202 (Miss. 1998).

212 The seven cases in which Mississippi courts found arbitration provisions unconscionable include: Covenant Health & Rehab. of Picayune, LP v. Lumpkin ex rel. Lumpkin, 23 So.3d 1092 (Miss. Ct. App. 2009); Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds, 14 So.3d 695 (Miss. 2009); Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds, 14 So.3d 736 (Miss. Ct. App. 2008); Trinity Mission Health & Rehab. of Clinton v. Estate of Scott, 19 So.3d 735 (Miss. Ct. App. 2008); Trinity Mission of Clinton, LLC v. Barber, 988 So.2d 910 (Miss. Ct. App. 2007); Pitts, 905 So.2d 553; and East Ford, Inc. v. Taylor, 826 So.2d 709 (Miss. 2002).
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.\textsuperscript{213}

A couple of other trends are also worth noting. Like some of the states in the other categories, just because a Mississippi court finds an arbitration provision unconscionable does not mean that arbitration will not take place—Mississippi appellate courts will often sever the offending provision and enforce the remainder of the arbitration agreement.\textsuperscript{214} Mississippi courts also seem particular 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 involve contracts for nursing home care.\textsuperscript{215} The courts found unconscionability in five of the cases involving only arbitration clauses,\textsuperscript{216} and found the regular provisions, but not the arbitration provisions, unconscionable in the two combination cases.\textsuperscript{217}

\textsuperscript{213} See generally Brown, 949 So.2d 732 (only non-arbitration provision was unconscionable); Vicksburg Partners, 911 So.2d 507 (only non-arbitration provision was unconscionable); and Pitts, 905 So.2d 553 (both challenged arbitration and non-arbitration provisions were unconscionable).

\textsuperscript{214} See, e.g., Moulds, 14 So.3d 736; Scott, 19 So.3d 735; and Barber, 988 So.2d 910.

\textsuperscript{215} See Lumpkin, 23 So.3d 1092; Moulds, 14 So.3d 695; Moulds, 14 So.3d 736; Forest Hill Nursing Ctr., Inc. v. McFarlan, 995 So.2d 775 (Miss. App. 2008); Scott, 19 So.3d 735; Cnty. Care Ctr. of Vicksburg, LLC v. Mason, 966 So.2d 220 (Miss. Ct. App. 2007); Trinity Mission, 988 So.2d 910; Brown, 949 So.2d 732; Covenant Health & Rehab. of Picayune, LP v. Estate of Lambert, 984 So.2d 283 (Miss. Ct. App. 2006); Vicksburg Partners, 911 So.2d 507.

\textsuperscript{216} See generally Lumpkin, 23 So.3d 1092; Moulds, 14 So.3d 695; Moulds, 14 So.3d 736; Scott, 19 So.3d 735; Barber, 988 So.2d 910.

\textsuperscript{217} See generally Covenant Health Rehab. of Picayune, L.P. v. Brown, 949 So.2d 732 (Miss. 2007); Vicksburg Partners, L.P. v. Stephens, 911 So.2d 507 (Miss. 2005).
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. 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. 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. Thus, for more than a decade, no party has successfully challenged an arbitration agreement, using the unconscionability doctrine, at the appellate level in Montana. Like the Ohio trial courts, 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. The remands

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218 See Table 6.

219 See id.


amounted to one-third of unconscionability cases involving non-arbitration provisions, and one-fifth of those involving arbitration agreement challenges.

What is most interesting about Montana’s unconscionability case law is that the doctrine appears to have developed somewhat differently in Montana than in the other states that are part of this study. Although Montana’s unconscionability doctrine has both a procedural and substantive component, it is somewhat more narrowly focused than the general requirements for procedural and substantive unconscionability discussed supra.\(^{222}\) 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.”\(^{223}\) Applying this test, Montana courts first ask whether the contract at issue is a contract of adhesion.\(^{224}\) 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.\(^{225}\)

What makes Montana’s approach a little more complicated is that, in cases involving a contract of adhesion, Montana courts will also refuse to enforce contract provisions using other legal bases, including situations where the party challenging the provision is able to demonstrate

\(^{222}\) See supra Section II and accompanying notes.


\(^{224}\) See, e.g., Graziano v. Stock Farm Homeowners Ass'n, Inc., 258 P.3d 999 (Mont. 2011).

\(^{225}\) See Summers, 236 P.3d at 591 (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).
that it was not within his “reasonable expectations,” or when the Court determines that a provision should not be enforced on public policy grounds.\footnote{See Graziano, 258 P.3d at 1004.}

The “reasonable expectations” approach creates a slightly different twist on the unconscionability analysis. 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.”\footnote{Id. at 1004-05.} Although Montana courts separate an inquiry into the parties’ reasonable expectations from their unconscionability analysis, these types of circumstances are exactly the types of things often considered by courts in determining whether a contract is procedurally unconscionable.\footnote{See generally supra Section II, subsection B. 2., & nn. 57-63.} 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. If so, Montana courts may be willing, in some circumstances, to invalidate a contract provision based solely on procedural unconscionability (adhesion contract plus reasonable expectations), without requiring any evidence of substantive unconscionability.\footnote{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.}
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, the vast majority of states do not appear to take that approach. 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, especially in comparison to states like California, or, in this study, Ohio. 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.\(^\text{230}\)

\(^{230}\) 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 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 also be useful to further explore the types of provisions the courts have found more problematic or less so, 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 unconscionability issue.
Another conclusion can also be drawn from the numbers. For at least some states that have had cases that drew careful scrutiny for individual cases that suggested a use of unconscionability to hold arbitration agreements to a different standard than other types of contracts, 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 had been an improvement in the courts’ analysis of unconscionability issues and the development on a more sophisticated understanding of unconscionability law. 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. 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 states 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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The “Conservative” Approach to Unconscionability

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Table 3
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<sup>231</sup> 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 (Vt. 2011). Thus, this Table counts that case in both categories. See Table 3.
Table 4
States More Sympathetic to the Unconscionability Doctrine in the Arbitration Context

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Table 5
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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); Vicksburg Partners, L.P. v. Stephens, 911 So.2d 507 (Miss. 2005); and Pitts v. Watkins, 905 So.2d 553 (Miss. 2005).

Table 6
Montana’s Approach to the Unconscionability Doctrine

<table>
<thead>
<tr>
<th>States</th>
<th>Total Cases</th>
<th>Arb Cases</th>
<th>Non-arb Cases</th>
<th>Total arb Unconscionable</th>
<th>Total non-arb Unconscionable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Montana</td>
<td>14</td>
<td>5</td>
<td>9</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>
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

- Percentage Unconscionable By Year (Total)
- Total percentage unconscionable (non arb)
- Total percentage unconscionable (arb)