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CONTRACTS—WARRANTIES, UNCONSCIONABILITY, AND THE PAROL EVIDENCE RULE—INDUSTRALEASE AUTOMATED & SCIENTIFIC CORP. v. R.M.E. ENTERPRISES, INC.

Defendant Max Evans, the sole owner of a forty acre picnic grove in Warren, New Jersey, was interested in disposing of the grove's garbage by incineration and contacted Clean Air, Inc., a manufacturer of incinerators. On February 24, 1971, Clean Air and R.M.E. Enterprises (the corporate title of Evans' grove) entered into a lease for two incinerators. This lease preserved for Enterprises the implied warranties of merchantability and fitness for a particular purpose.

On May 13, 1971, with the picnic season at hand, representatives of Clean Air and plaintiff Industralease Automated & Scientific Equipment Corporation visited Evans and presented him with a new lease that he described as being "like the other papers I signed but with a different company's name on the top." The name at the top was that of the new lessor, Industralease. Evans was told that the first lease was "no good," and that he would have to sign the new lease in order to receive the incinerators. Evans signed, though he did not notice that

1. Both Max Evans and R.M.E. Enterprises were defendants.
2. The lease included the following, in bold print:
   9. Lessor makes no warranties with respect to the fitness or suitability of the Leased Property for any purpose or use or with respect to its durability. Lessee acknowledges that the Leased Property is of a size, design and capacity selected by Lessee as suitable for its purposes. Lessor makes no warranties expressed or implied, with respect to the Leased Property other than that, if new, the standard manufacturer's warranty of new equipment is in effect and lessor will exercise its rights thereunder for the mutual benefit of Lessor and Lessee (or if Lessor be the manufacturer, it will comply with the terms and conditions of its warranty).

3. See id. at 489-90, 396 N.Y.S.2d at 432.
4. "[D]efendants were told that the contract in existence between themselves and Clean Air could not be performed for not clearly communicated reasons . . . ." Id. at 489, 396 N.Y.S.2d at 432. Apparently, at the time of performance, Clean Air could not afford to lease the incinerators. See Brief for Plaintiff-Appellant at 4; telephone call by author to Samuel W. Gilman, attorney for Enterprises, on February 9, 1978.
6. Id.
the lease contained an unqualified disclaimer of express and implied warranties\(^7\) and, in addition, a merger clause.\(^8\)

Despite the efforts of Clean Air and Industralease, the incinerators would not incinerate. Evans demanded that they be removed, and when Industralease refused, stopped Enterprises' payments. Industralease brought an action for the balance of the contract price. Enterprises counterclaimed for damages incurred in connection with the installation of the equipment.

At Trial Term, Justice Widlitz found as a matter of law that the disclaimer of warranties by Industralease was not unconscionable,\(^9\) but submitted to the jury the question of whether express warranties, which cannot be disclaimed, had been created, and if so, whether they had been breached.\(^10\) The jury found for Enterprises, and awarded

\(^7\) The provision included the following, in bold print:

2.c. (12) Representations. And Lessee does hereby agree that each unit is of a size, design, capacity, and material selected by Lessee, and that Lessee is satisfied that each such unit is suitable for Lessee's purposes, and sufficiently durable under the conditions of usage thereof by Lessee, and that Lessor has made no representations or warranties with respect to the suitability or durability of any unit for the purposes or uses of Lessee, or with respect to the permissible load thereof, or any other representation or warranty, express or implied, with respect thereto.

\(^8\) Id. at 484 n.2, 396 N.Y.S.2d at 428 n.2. The court noted that the disclaimer was conspicuous. Id. at 487, 396 N.Y.S.2d at 430.

\(^9\) "This agreement contains the entire understanding between lessor and lessee, and any change or modification must be in writing and signed by both parties." Brief for Plaintiff-Appellant at 16 (quoting Record at 17 a). The Second Department never mentioned the presence of a merger clause in the contract. Thus, it is unclear whether the merger clause was conspicuous.


The source of the express warranties is not clear from the court's opinion. The appellate division did not discuss how the express warranties were created, but simply relied on the jury finding of their existence. Industralease Automated & Scientific Equip. Corp. v. R.M.E. Enterprises, Inc., 58 A.D.2d 482, 487-88, 396 N.Y.S.2d 427, 430-31 (2d Dep't 1977). Judging by the content of the Brief for Plaintiff-Appellant, see, e.g., id. at 8, 11, the express warranties were created by oral representations. Oral representations may give rise to express warranties, if the oral statements become "part of the basis of the bargain." N.Y. U.C.C. § 2-313(1) (McKinney 1964).

On appeal, Industralease responded to the jury finding of express warranties with the following arguments: first, "no admissible testimony was provided with respect to any expressed representations or warranties made by Clean Air . . . ." Brief for Plaintiff-Appellant at 10-11; and second, without an agency relationship between Clean Air and Industralease, any oral representations made by the former may not
damages of $1,342.76. On appeal by Industralease, the Appellate Division, Second Department, affirmed on other grounds: the disclaimer was unconscionable and therefore not enforceable.\textsuperscript{11} \textit{Industralease Automated \& Scientific Corp. v. R.M.E. Enterprises, Inc.}, 58 A.D.2d 482, 396 N.Y.S.2d 427 (2d Dep't 1977).

Justice Hopkins, writing for the Second Department, applied the provisions of the Uniform Commercial Code to the writing, thus following the trend of extending the application of the Code.\textsuperscript{12} His rea-
soning, however, was confusing. Justice Hopkins seems to have interpreted section 2-102 as precluding the application of article 2 of the Code when the writing includes the retention of a security interest. But, section 2-102 excludes from article 2 coverage those transactions intended solely as a security transaction. The Official Comment to section 2-102 points out that article 2 is applicable to the "general sale aspects of such transactions." Justice Hopkins then examined the "nature" of the contract between Enterprises and Industrialease, and held it was not a security transaction or a lease, but rather a sale. "[T]hough cast in form as a lease, [the transaction] assumed the true model of a sale." The lease was merely a device employed to finance the purchase.

In sharp contrast to the conclusions of Justice Widlitz, Justice Hopkins interpreted section 2-316 as allowing the disclaimer of both

13. N.Y. U.C.C. § 2-102 (McKinney 1964) states in part: "Unless the context otherwise requires this Article applies to transactions in goods; it does not apply to any transactions which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction . . . ."


15. 58 A.D.2d at 487, 396 N.Y.S.2d at 430. When an interest in property is retained, the contract may be called either a security transaction or a lease. See N.Y. U.C.C. § 1-201(37) (McKinney 1964). See generally J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE, § 22-3 (1970). Neither characterization, however, precludes the application of Article 2: if a lease, Article 2 may be applied under the rationales suggested in note 12 supra; if a security transaction, Article 2 is applicable to the underlying sales aspects of the transaction, R. ANDERSON, supra note 14, § 102:3 at 207-08. The court was therefore incorrect in finding the contract to be neither a security transaction nor a lease; further, it was unnecessary for the court to determine whether the contract was a lease or a sale.

16. "The lease was one in name only . . . ." 58 A.D.2d at 487, 396 N.Y.S.2d at 430. The lease provided for 60 monthly rental payments of $319.70, plus sales tax with an option to purchase the equipment for $1,390 at the lease's expiration. Id. at 484, 396 N.Y.S.2d at 428.

17. N.Y. U.C.C. § 2-316 (McKinney 1964) states:

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is
express and implied warranties. He held that because the questions submitted to the jury conflicted "with the language of the disclaimer, which excluded reliance by the defendant on any such warranties," the decision of Trial Term would have to be reversed, unless, of course, the disclaimer was unconscionable.

Express warranties can never be disclaimed; discussion of their sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)
(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

19. Id. at 488, 396 N.Y.S.2d at 430. Two inferences of questionable validity can be drawn from this statement. The first is that if a contract contains a written express warranty and a disclaimer of express warranties, the latter will control. In view of § 2-316(1), that inference is clearly mistaken. See note 20 infra. A perhaps more difficult situation arises when there is a conflict between a disclaimer of express warranties and an oral express warranty. Under § 2-315 express warranties may be created orally. Notwithstanding the parol evidence rule, there should be no difference in result, since § 2-316(1) does not distinguish between modes of creating express warranties. Parol evidence will affect the result, of course, but Justice Hopkins did not indicate that he had the parol evidence rule in mind when he made the quoted statement.

The second principle suggested by Justice Hopkins' statement is that reliance by the buyer is necessary to validate an express warranty. This is in conflict with the Official Comments to section 2-315: "affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown . . . ." N.Y. U.C.C. § 2-313, Official Comment 3 (McKinney 1964). See, e.g., Klein v. Asgrow Seed Co., 246 Cal. App. 2d 87, 102 n.8, 54 Cal. Rptr. 609, 619 n.8 (1966) (dicta); Interco, Inc. v. Randustrial Corp., 533 S.W.2d 257 (Mo. Ct. App. 1976). But see, e.g., Hrosik v. J. Keim Builders, 37 Ill. App. 3d 352, 345 N.E.2d 514 (1976). See also Weintraub, Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the UCC, 53 Tex. L. Rev. 60 (1974).

20. Subdivision 1 of § 2-316 provides that if there is a conflict between an express warranty and a disclaimer of express warranties, and the clauses cannot reasonably be construed to be consistent with one another, the disclaimer is ineffective and the warranty survives. See Berk v. Gordon Johnson Co., 232 F. Supp. 682 (D.C. Mich. 1964); Young & Cooper, Inc. v. Vestring, 214 Kansas 311, 327, 521 F.2d 281, 293 (1974); Chisolm v. J.R. Simplot, 94 Idaho 628, 631 n.4, 495 P.2d 1113, 1116 n.4 (1972); Wilson Trading Corp. v. David Ferguson, Ltd., 23 N.Y.2d 398, 244 N.E.2d 685, 297 N.Y.S.2d 108 (1968); Bowen v. Young, 507 S.W.2d 600 (Tex. Ct. App. 1974); Mobile Housing, Inc. v. Stone, 490 S.W.2d 611 (Tex. Ct. App. 1973); Annot., 17
unconscionability by the court, therefore, was mistaken. Implied warranties, on the other hand, may be disclaimed, and the court here focused on whether in the commercial relationship between Industrial Lease and Enterprises the disclaimer was unconscionable within the meaning of section 2-302.\textsuperscript{21}

\textsuperscript{21}N.Y. U.C.C. § 2-302 (McKinney 1964), the Code's major provision on unconscionability, states:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

For material supporting the application of § 2-302 to disclaimers that otherwise satisfy § 2-316, see Fairfield Lease Corp. v. Colonial Aluminum Sales, Inc., 3 U.C.C. Rep. Serv. 858 (N.Y. Sup. Ct. 1966); Jefferson Credit Corp. v. Marciano, 60 Misc. 2d 1010, § 25(a) at 1073 (1968); Duesenberg, The Manufacturer's Last Stand: The Disclaimer, 20 Bus. Law. 159, 162-65 (1964). Cf. Ford Motor Co. v. Reid, 250 Ark. 176, 465 S.W.2d 80 (1971) (under § 2-316(1), provision in contract for new car tending to limit remedies for breach of express warranty should be read so as to be consistent with express warranty; court interpreted provision to be merely an instruction to dealer from manufacturer). That express warranties may not be disclaimed is in line with the policy underlying § 2-316. See N.Y. U.C.C. § 2-316, Official Comment 1 (McKinney 1964) ("[Section 2-316] seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty ... .") Parol warranties are, however, subject to § 2-202—the parol evidence rule. See notes 39-43 & accompanying text infra.
Justice Hopkins initiated his analysis by reference to the test articulated in the landmark case of Williams v. Walker-Thomas Furniture Co.\textsuperscript{22} The test comprises "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," and characterized 'by a gross inequality of bargaining power' . . . .\textsuperscript{23} Justice Hopkins distinguished procedural and substantive unconscionability,\textsuperscript{24} and concluded that both were present in the instant case.\textsuperscript{25}


22. 350 F.2d 445 (D.C. Cir. 1965). Though the Uniform Commercial Code was held not directly applicable to the contract in Walker-Thomas, the court derived support from § 2-302, and found it to be a restatement of the common law. Id. at 448-49.


24. Procedural unconscionability in general is involved with the contract formation process, and focuses on high pressures exerted on the parties, fine print of the contract, misrepresentation, or unequal bargaining position. Substantive unconscionability, on the other hand, is involved with the content of the terms of the contract per se, such as inflated prices . . . .

25. Id. at 489, 396 N.Y.S.2d at 431. Rarely has the presence of either procedural or substantive unconscionability alone been sufficient to support a finding of unconscionability. Spanogle, supra note 10, at 948-52, 955-56, 968-69. One court has specifically required that both "must be particularized in some detail." Patterson v. Walker-Thomas
The court's discussion strayed from the Walker-Thomas unconscionability standard, however. The Walker-Thomas test requires a careful examination of the bargaining situation before finding procedural unconscionability, while Industralease found procedural unconscionability in a summary fashion, based solely on "[t]he atmosphere of haste and pressure on the defendants ... ." The appellate division failed to discuss fully the existence or nonexistence of an absence of meaningful choice or a gross inequality in bargaining power. Findings of this kind are usually necessary in transactions between businessmen where, unlike consumer transactions, there is a presumption that the parties have negotiated on an equal basis. In discussing the gross inequality of bargaining power, the court referred to the defendants' lack of expertise in buying incinerators; the possibility that the plaintiff was inexperienced in selling incinerators was ignored. Furthermore, Max Evans might have been estopped from


26. 58 A.D.2d at 489, 396 N.Y.S.2d at 432. The court suggested three facts to support its statement. First, the court referred to the switch in lessors, "for not clearly communicated reasons ... ." Id.; see note 4 supra. Second, "with the beginning of the season ... at hand, the defendants were clearly at a disadvantage to bargain further ... ." 58 A.D.2d at 490, 396 N.Y.S.2d at 432. Finally, defendants had little expertise in dealing with the equipment. Id.


29. Industralease "was not a merchant in goods of the sought [sic] leased" to Enterprises. Supplemental Brief for Plaintiff-Appellant at 8.
arguing such a gross inequality of bargaining power, since Evans, the owner of a business grossing over one million dollars annually, neither read the lease nor showed it to his attorney.\textsuperscript{30} On the other hand, the court might have justified a finding of procedural unconscionability by questioning whether Evans, when presented with the new contract, had any real choice other than to sign the contract.\textsuperscript{31}

Justice Hopkins also deviated from the Uniform Commercial Code's test of substantive unconscionability. Section 2-302 of the Code requires that a court determine "whether . . . the clauses involved are so one-sided as to be unconscionable \textit{under the circumstances existing at the time of the making of the contract}."\textsuperscript{32} Since the contract term in question is the disclaimer of implied warranties, and since section 2-316 of the Code specifically permits the seller to disclaim implied warranties, it is difficult to see how this disclaimer in isolation can be substantively unconscionable.\textsuperscript{33} Instead of addressing the circumstances at the time the contract was created, Justice Hopkins fo-
cused on the end result: "[W]e cannot divorce entirely the events which occur later . . . . In effect the equipment was worthless . . . ."

This sort of reasoning, however, leads to unpredictable results. Parties should have the right, especially in commercial situations, to allocate the risks as they see fit. Absent gross inequities, the agreed upon allocation should be respected. The court's conclusion that the disclaimer of implied warranties was unconscionable thus strayed from proper use of that doctrine and is questionable.

A more traditional, predictable, and therefore more satisfying analysis would have disclosed the presence of express warranties, and why such warranties were not excluded by the parol evidence rule. Such an analysis would focus on whether the parties intended to discharge the previous agreement by executing the second contract. More precisely, primary consideration would have to be given to the orally created express warranties and the reasons for their continued existence.

Two theories would prevent the interposition of the parol evidence rule by Industralease. First, section 2-202 requires that before parol testimony inconsistent with a term of the contract is excluded from evidence, the court must find that the parties intended the writing to be a final statement of their agreement. Second, the parol evidence rule could be avoided through reference to the common law doctrine of mistake. In this case, it is doubtful that the parties intended the instant writing to be final, and even if it were, plaintiff's apparent knowledge that Evans would be mistaken about

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34. 58 A.D.2d at 490, 396 N.Y.S.2d at 432 (citing Vlases v. Montgomery Ward & Co., 377 F.2d 846 (3d Cir. 1967)).

35. Section 2-302 was intended to allow the courts to police contracts explicitly, rather than through the covert twisting of traditional contract law. N.Y. U.C.C. § 2-302, Official Comment 1 (McKinney 1964); Fort, Understanding Unconscionability: Defining the Principle, 9 Loy. Chi. L.J. 765, 767 (1978). There is nothing in the history of § 2-302 to indicate that unconscionability should be used to invalidate a contract when a more traditional theory is appropriate.

36. See A. Corbin, 3 CORBIN ON CONTRACTS, § 582 at 455 (1960). What seems to have been most unfair in Industralease was the violation of buyer's reasonable expectations through the substitution of the second contract for the first. Yet, this alone is insufficient to support a finding of unconscionability. The analysis suggested in text, by exploring more closely the expectations of the parties, seeks to ascertain their intentions, and therefore the terms of the agreement.

37. The court found the disclaimer, not the parol evidence, to be a bar to Enterprises' recovery. As discussed above, this was incorrect; oral express warranties may not be disclaimed, though they are subject to the parol evidence rule. See note 20 & accompanying text supra. If the court had framed the question as whether the parol warranties should be excluded by the parol evidence rule, it could have requested supplementary briefs on this issue, as it did on the issue of unconscionability.
the terms of the contract would allow as evidence plaintiff’s oral representations.

As noted above, express warranties may not be disclaimed;\(^{38}\) they are subject, however, to the parol evidence rule.\(^{39}\) Section 2-202 provides that if the writing is intended to be the “complete and exclusive statement of the agreement,” parol evidence will be excluded.\(^{40}\) If the writing is intended to be the final but not exclusive expression of an agreement, consistent\(^{41}\) additional terms that explain or supplement the terms of the final agreement may be introduced.\(^{42}\) Unfortunately, the Code neither defines nor provides a test for determining whether a writing was intended to be final. It will be assumed here that a writing is a final expression of the agreement if both parties intended it to supersede all prior oral agreements.\(^{43}\)

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38. See note 20 supra.

   Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
   
   (a) by course of dealing or usage of trade (Section 1—205) or
   
   (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.


40. N.Y. U.C.C. § 2-202(b) (McKinney 1964). This exclusionary effect is mitigated by paragraph (a) of § 2-202, which “makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing . . . .” N.Y. U.C.C. § 2-202, Official Comment 2 (McKinney 1964).

41. The meaning of “consistent” is unclear. It is not defined by the Code. New York courts have formulated the test as follows: “To be inconsistent the term must contradict or negate a term of the writing. A term or condition which has a lesser effect is provable.” Hunt Foods and Indus., Inc. v. Doliner, 26 A.D.2d 41, 43, 270 N.Y.S.2d 937, 940 (1966). See Whirlpool Corp. v. Regis Leasing Corp., 29 A.D.2d 395, 288 N.Y.S.2d 337 (1968). See generally J. White & R. Summers, supra note 15, § 2-10.

42. See, e.g., George v. Davoli, 91 Misc. 2d 296, 397 N.Y.S.2d 895 (Geneva City Ct. 1977).

Intent need not be determined by the document alone. Even if the writing contains a merger clause and a disclaimer, parol evidence may be admitted to demonstrate that the writing is not final. The burden of proof may be heavy, but the parol evidence rule should not exclude convincing evidence of an oral agreement that contradicts a writing. A finding that a writing is not final could therefore "be based solely on the fact of the existence of the prior oral warranty." While such an argument may seem circular—parol warranties are introduced to show that the writing is not final, and then are reintroduced to prove a breach of contract—this result "seems to be intended by the Code, or, at least, if not intended one that is left open to a court to achieve." Furthermore, the Code's policies favoring the survival of express warranties and limiting the operation of the parol

44. Professor Corbin has stated: "[T]he courts' assumption or decision as to the completeness and accuracy of the integration may be quite erroneous. The writing cannot prove its own completeness or accuracy. Even though it contains an express statement to that effect, the assent of the parties thereto must still be proved." 3 A. CORBIN, supra note 36, § 582 at 448-49 (footnotes omitted). See J. MURRAY, JR., supra note 43, § 106.

45. 3 A. CORBIN, supra note 36, § 585 at 481. See, e.g., Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 400 F. Supp. 273 (E.D. Wis. 1975) ("Parol evidence is always admissible with respect to the issue of integration . . . ." Id. at 278 (quoting Johnson Hill's Press v. Nascon Indus., 33 Wis. 2d 545, 550, 148 N.W.2d 9, 12 (1967)); Shore Line Prop., Inc. v. Deer-O-Paints & Chem., Ltd., 24 Ariz. App. 331, 538 P.2d 760 (1975) ("The reference to the parol evidence rule [in section 2-316(1)] is intended to protect the seller against allegations of oral warranties which are not part of the contract. However, the protection afforded by [§ 2-202] is subject to a significant restriction, that is, the court must first determine that the written agreement of the parties is final, complete and exclusive." Id. at 334, 538 P.2d at 764); RESTATEMENT (SECOND) OF CONTRACTS § 242, comment e at 52 (Tent. Draft No. 6, 1971) ("a [merger] clause does not control the question whether the writing was assented to as an integrated agreement . . . or the interpretation of the written terms." Id.).

46. 3 A. CORBIN, supra note 36, § 585 at 481.

47. R. DUSENBERG & L. KING, supra note 39, § 6.06 at 6-14. See also A. CORBIN, supra note 36, § 582 at 450.

48. R. DUSENBERG & L. KING, supra note 39, § 6.06 at 6-14. The Code's sole reference to the problem is in Official Comment 2 of § 2-316, which states in part: "The seller is protected under this Article against false allegations of oral warranties by its provisions on parol . . . evidence . . . ." N.Y. U.C.C. § 2-316, Official Comment 2 (McKinney 1964). The implication is that the introduction of true allegations of oral warranties is permitted, Broude, supra note 39, at 918, though the Official Comment does seem to place the risk of nonpersuasion squarely upon the party asserting the parol warranties.

49. Special protection is extended to express warranties by the Code. Official Comment 1 to § 2-313 states in part: "Express warranties rest on 'dickered' aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms." N.Y. U.C.C. § 2-313, Official Comment 1 (McKinney 1964). More generally, the Code adopts the policy "of those cases which refuse to recognize a material deletion of the seller's obligation." N.Y. U.C.C. § 2-316, Official Comment 1 (McKinney 1964).
evidence rule support this result.\textsuperscript{50}

A number of cases have permitted the introduction of parol warranties to prove lack of finality despite the inclusion of a disclaimer in the written contract.\textsuperscript{51} One illustrative case is \textit{O'Neil v. International Harvester Co.},\textsuperscript{52} where buyer-plaintiff appealed a summary judgment for seller-defendant to the Colorado Court of Appeals. The defendant had allegedly represented that a used diesel tractor and trailer "had been recently overhauled and would be suitable for operation in the mountains."\textsuperscript{53} The plaintiff encountered many mechanical problems with the truck and, after several attempts at repair by the defendant, the buyer returned it. The bill of sale contained both a merger clause and a disclaimer of all warranties. The court of appeals reversed and remanded: "Where . . . the buyer alleges the existence of oral warranties prior to execution of the written contract, as

\begin{itemize}
\item Section 2-202 was intended to abolish the presumption that a writing is the complete statement of the agreement. \textit{See} Hunt Foods & Indus., Inc. v. Doliner, 49 Misc. 2d 246, 267 N.Y.S.2d 364 (Sup. Ct.), \textit{rev'd on other grounds}, 26 A.D.2d 41, 270 N.Y.S.2d 937 (1966) (§ 2-202 abolished presumption that a writing is a total integration and requires the court to find a total integration); 1955 N.Y. LAW REVISION COMMISSION REPORT, STUDY OF THE UNIFORM COMMERCIAL CODE, at 598 ("The chief purpose of this section is apparently to 'loosen up' the parol evidence rule by abolishing the presumption that a writing (apparently complete) is a total integration . . . ." \textit{Id.}).
\item 52. 575 P.2d 862 (Co. Ct. App. 1978).
\item 53. \textit{Id.} at 864.
well as conduct following the sale . . . which tends to show that warranties were in fact made, there is a material issue of fact for resolution.”

No published opinion in New York, however, has explicitly adopted the above reasoning. One reason may be that courts often hear evidence on the issue of finality, but reject it for lack of credibility, and thus no reference is made to the evidence in the opinion.

Several factors suggest the parties in Industralease did not intend the writing to supersede all prior oral agreements. First, Industralease expended much effort in trying to get the incinerators to work. There was “a daily shuttle” between the manufacturer’s factory and the picnic grove; Clean Air and Industralease were “desperately trying” to start the incinerators. Like the parties in O’Neil, the parties here thought the incinerators were covered by warranty. Since oral representations had been made, and the actions of the parties suggest they believed the warranties still to be binding, the disclaimer in the writing was arguably not intended to supersede those prior oral representations. Furthermore, the first contract signed provided Evans with a warranty that in effect integrated the oral representations. Despite the later disclaimer, nothing in the conduct or the statements of the parties suggest they intended to shift the risk of a defective incinerator to Evans. Rather, the parties believed the second contract to be substantially the same as the first, especially in light of Evans’ belief that the second writing was “like” the first. There is thus no evidence, other than Evans’ signature at the end of a hastily signed document, to indicate that both parties intended the second writing to supersede their earlier agreement regarding the risk of a defective incinerator.

The court could also have admitted the parol warranties using the doctrine of mistake. Under section 1-103, “principles of law and equity” may supplement the provisions of the Code. Where fraud, illegality, accident, or mistake is averred, therefore, parol evidence is admissible.

54. Id. at 865.
55. See note 50 supra.
57. 58 A.D.2d at 484 n.3, 396 N.Y.S.2d at 428 n.3.
58. Id. at 485 n.3, 396 N.Y.S.2d at 429 n.3.
59. Reply Brief of Plaintiff-Appellant at 2; Defendants-Respondents' Brief at 2; Defendants-Respondents' Supplemental Brief at 4.
60. N.Y. U.C.C. § 1-103 (McKinney 1964).
There are three elements to a unilateral mistake argument: first, the person signing or accepting the document must be unaware of its contents; second, the other party must have reason to know of the signer's mistake; and third, the other party must not have "materially changed his position in reliance on the written provision." Evans did not read the second contract; "it was impossible to read the papers before signing them." The first contract, between Enterprises and Clean Air, was "no good"; but, the new contract was "like" the old one. These misrepresentations, combined with the pressure Evans was under to close a deal for incinerators before the start of the new business season, may have provided a basis for concluding that Industralease knew Evans would be mistaken about the terms of the contract. Furthermore, Industralease did not materially change its position in reliance on the disclaimer so as to prevent recovery by Enterprises for the breach of warranties.

Justice Hopkins' analysis exposes an ever present problem with unconscionability doctrine—unpredicability. Section 2-302 was enacted to avoid the covert manipulation of contract law to achieve a desired result. It was intended to increase the predictability of the law; since unconscionability was left undefined, predictability is dependent on the courts' articulation of factors relevant to an unconscionability determination. By relying on hindsight to find substantive unconscionability, the Industralease court introduced a specious element into the doctrine. After the fact examinations of contracts cut against the policy of stability in commercial agreements; legitimately bargained for terms should not be overturned by the courts. Coupled with its finding of procedural unconscionability in a commercial situation between two parties of relatively equal bargaining power, the court's holding is questionable. The preferred analysis would evaluate the applicability of the parol evidence rule and the common law doctrine of mistake—doctrines more closely attuned to the correct point in time, the transformation of the oral agreement into a writing. In-

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607; Annot., 71 A.L.R.3d 1059 (1976); Broude, supra note 39; Sweet, Promissory Fraud and the Parol Evidence Rule, 49 CAL. L. Rev. 877 (1961). Industralease is open to both a fraud and mistake argument, though only mistake is discussed here.

62. 3 A. CORBIN, supra note 36, § 607 at 658-59, 664-65.

63. Defendants-Respondents' Brief at 2.

64. 58 A.D.2d at 484, 396 N.Y.S.2d at 428.

65. Reply Brief for Plaintiff-Appellant at 2; Defendants-Respondents' Brief at 2; Defendants-Respondents' Supplemental Brief at 4.


67. See Spanogle, supra note 10, at 936.
stead of slipping into the quagmire of unconscionability with its loosely defined borders and susceptibility to misuse, the court should have applied traditional contract doctrines that provide well reasoned results.

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