

CONTRACTS--ISSUE OF BREACH--DEFENSE OF UNCONSCIONABILITY.

The (*state number*) issue reads:

"Did the plaintiff deprive the defendant of meaningful choice at the time the [contract was entered into] [*identify term of the contract*] was assented to] with the result that the bargain was overly oppressive?"

(You will answer this issue only if you have answered the (*state number*)<sup>1</sup> issue "Yes" in favor of the plaintiff.)

On this issue the burden of proof is on the defendant.<sup>2</sup> This means the defendant must prove, by the greater weight of the evidence, two things:

First, that, at the time the plaintiff and the defendant entered into the contract,<sup>3</sup> the defendant was deprived of the opportunity to make a meaningful choice as to whether to assent

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<sup>1</sup>See, appropriate, N.C.P.I.--Civil 502.00 (Contracts--Issue of Breach By Non-Performance) or N.C.P.I.--Civil 502.05 (Contracts--Issue of Breach By Repudiation) or N.C.P.I.--Civil 502.10 (Contracts--Issue of Breach By Prevention).

<sup>2</sup>*Rite Color Chemical Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 20, 411 S.E.2d 645, 649 (1992). The facts must show both "procedural" and "substantive" unconscionability. *King v. King*, 114 N.C. App. 454, 458, 442 S.E.2d 154, 157 (1994); *Martin v. Sheffer*, 102 N.C. App. 802, 805, 403 S.E.2d 555, 557 (1991). Whether a contract or a specific provision therein is unconscionable is a question of law for the Court. *King*, 114 N.C. App. at 458, 442 S.E.2d at 157. The jury must decide whether the predicate facts exist except in cases governed by the Uniform Commercial Code, N.C.G.S. §25-2-302(1), where the court must find the facts.

<sup>3</sup>*Rite Color*, 105 N.C. App. at 19, 411 S.E.2d at 648.

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to the terms offered by the plaintiff.<sup>4</sup> In determining whether the defendant was deprived of meaningful choice, you may consider the following:

[whether the plaintiff had superior bargaining power because of size or economic circumstances]<sup>5</sup>

[whether the defendant was forced to accept the plaintiff's terms because (*name service or matter contracted for*) [was] [were] not available from other [providers] [suppliers]]<sup>6</sup>

[whether the defendant entered into the contract as a result of sharp, oppressive, unfair or deceptive conduct (such as the use of [fine print] [inadequate disclosures] [confusing language] [undue influence] [pressure sales tactics] [misrepresentation] [*describe other conduct*))]<sup>7</sup>

[whether the defendant was unfairly surprised by the (*identify term*) in the contract]<sup>8</sup>

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<sup>4</sup>*State Farm Mutual Automobile Ins. Co. v. Atlantic Indemnity Co.*, 122 N.C. App. 67, 73, 468 S.E.2d 570, 573 (1996).

<sup>5</sup>*Brenner v. Little Red School House, Ltd.*, 302 N.C. 207, 213, 274 S.E.2d 206, 210-11 (1981).

<sup>6</sup>*Id.*

<sup>7</sup>*Rite Color*, 105 N.C. App. at 20, 411 S.E.2d at 648-649.

<sup>8</sup>*Id.*

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[whether the defendant, through no fault of *his* own, lacked a reasonable understanding of the (*identify term*) in the contract]<sup>9</sup>

[*state any other factors supported by the evidence*]

And Second, that the resulting bargain between the plaintiff and the defendant was so oppressive that no honest and fair person under the same or similar circumstances would have proposed it and no reasonable person under the same or similar circumstances would have accepted it.<sup>10</sup> In determining whether the bargain was overly oppressive, you may consider

[whether the inequality of the bargain was so great that, under the same or similar circumstances, it would shock the conscience of a person of common sense]<sup>11</sup>

[whether the [contract] [*identify term*] in the contract] required by the plaintiff was reasonable in light of the bona fide (business) interests and needs of the plaintiff]<sup>12</sup>

[*state any other factors as supported by the evidence.*]

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<sup>9</sup>*Id.*

<sup>10</sup>*Brenner*, 302 N.C. at 213, 274 S.E.2d at 210.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.* at 213-14, 274 S.E.2d at 211.

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(A contract is not oppressive if, under the same or similar circumstances, a reasonable person of sound judgment would have assented to its terms.<sup>13</sup> Whether a bargain was good or bad, wise or foolish, is not determinative of whether it is oppressive, because parties on relatively equal footing who are otherwise competent to contract may fairly and honestly enter into an agreement on any lawful subject without regard to the disparity in consequences.<sup>14</sup>

Finally, as to the (*state number*) issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the plaintiff deprived the defendant of meaningful choice at the time the [contract was entered into] [(*identify term of the contract*) was assented to] with the result that the bargain was overly oppressive, then it would be your duty to answer this issue "Yes" in favor of the defendant.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the plaintiff.

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<sup>13</sup>*Id.*

<sup>14</sup>*Id.* (quoting *Roberson v. Williams*, 240 N.C. 696, 700-01, 83 S.E.2d 811, 814 (1954)). See *Crowder Constr. Co. v. Kiser*, 134 N.C. App. 190, 207, 517 S.E.2d 178, 190, *disc. rev. denied*, 351 N.C. 101, 541 S.E.2d 142 (1999) (enforcement of unfavorable provisions of stock restriction and buyout agreement not unconscionable).