

SIGNING IN GLITTER OR BLOOD?: UNCONSCIONABILITY AND REALITY TELEVISION CONTRACTS

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Reality television is a modern phenomenon that can be found on both daytime and primetime television. Using “real” people creates unique problems for production teams. Real people do not have the industry knowledge or legal assistance from industry professionals to actively participate in contract negotiations. As “unscripted” shows, reality television presents new risks the producers must consider while developing contracts. While most entertainment contracts are longer and more restrictive than employment contracts for other industries, reality television contracts are even more complex. Recently, questions about the enforceability of these contracts have begun to emerge. If litigated, the courts, rather than a jury, would decide whether these contracts were void due to unconscionability. This note argues that as currently drafted, reality television contracts are not unconscionable, even though at first read they might seem unfair.

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INTRODUCTION

How fair is the ninety-page, fine print hurdle that a young singer, dancer, or fame-starved twenty-something has to sign in order to fulfill his or her dreams? Reality television contracts are a growing topic for legal discussion. The contracts tend to be extremely long, even for entertainment contracts, and include language protecting the producers and networks from liability in almost any situation. Are these contracts excessive to the point of unconscionability? Should courts be intervening on behalf of the participants to void certain clauses within the agreements?

“No contract can prevent someone from suing. It can prevent them from winning,”¹ is the attitude taken by producers and networks when limiting their liability to contestants of reality television shows. While there have not been many direct attempts to seek legal remedies under the unconscionability doctrine, the mass media and scholars alike have focused on the harshness, constraints, length,

¹ Brian Lowry, *Be Sure to Read the Fine Print*, L.A. TIMES, Aug. 20, 2002, at F1, available at <http://articles.latimes.com/2002/aug/20/entertainment/et-lowry20> (quoting Jonathan Anshell).

and complexity of the contractual language.² One Comment claims that reality television contracts force participants to give up all rights of publicity and should therefore be void.³ Another article, summarizing legal concerns of reality television contracts, argues that courts could, and arguably should, find these contracts unconscionable.⁴ Other articles and Comments, while addressing the possibility that contracts could be found unconscionable, fail to delve into the issue thoroughly.⁵ The explicit question of unconscionability in reality television contracts has only been handled by two courts: the Superior Court of Los Angeles County followed by the Second District of the Court of Appeal of California State, reviewing the Superior Court of Los Angeles County's decisions.⁶

While many of the clauses of reality television show contracts appear excessive, even appalling, in light of the rights and protections the contestants are signing away, these contracts are not currently considered unconscionable. However, the opportunity to bring and win unconscionability claims may arise, especially if the contracts continue to evolve in ways that increasingly violate public policy. There may be a line, not yet established, that even the networks cannot cross.

This note will discuss the development of reality television contracts. Further, it will argue that, at present, the terms of such contracts are not unconscionable because they do not satisfy the two-part test for determining unconscionability: the finding of both procedural and substantive unconscionability. Specifically, this note argues that the "shock the conscience" standard for substantive unconscionability is not met when the risk to the producers, commercial background, benefit, and potential return to the contestants are taken into account. While a lay reader may view the language of the agreements as extreme and unwarranted in isolation, when considered in the larger

² See, e.g., Lin Burrell, *The Bachelor Contract*, TELLING IT LIKE IT IS (March 7, 2010), <http://www.tellinitlikeitis.net/2010/03/the-bachelor-contract-reality-steve's-blog-and-bachelorette-ali-fedotowsky.html>.

³ Porsche T. Farr, Comment, *What Good Is Fame if You Can't Be Famous in Your Own Right?: Publicity Right Woes of the Almost Famous*, 16 MARQ. INTELL. PROP. L. REV. 467 (2012).

⁴ Katie Hopkins, Staff Article, *Unique Legal Considerations in Reality Television*, 13 U. PITT. J. TECH. L. & POL'Y 1, 9-16 (2012), available at <http://d-scholarship.pitt.edu/17865/>.

⁵ See, e.g., Melody Hsiou, *Harsh Reality: When Producers and Networks Should Be Liable for Negligence and Intentional Infliction of Emotional Distress*, 23 SETON HALL J. SPORTS & ENT. L. 187, 218-19 (2013).

⁶ E.g., *Higgins v. Disney/ABC Int'l Television, Inc. (Higgins III)*, No. BC B200885, 2009 WL 692701 (Cal. Ct. App. Mar. 18, 2009).

economic and industry framework of reality television, the terms are not unconscionable.

I

BACKGROUND IN REALITY TELEVISION

More than twenty-five percent of primetime broadcast programming is now comprised of unscripted television shows.⁷ Primetime television has not been so dominated by unscripted shows since the game show fad during the 1950s.⁸ Writers' strikes, actor holdouts, economic downturns, and audience weariness inspired experimentation on the part of the networks to keep their costs down and primetime ratings high.⁹ Reality television shows, which are cheaper and faster to produce, and achieve similar audience numbers, emerged as the new model.¹⁰

The popularity of unscripted television commenced with game shows in the 1950s. Game shows were an "early incarnation of highly profitable TV programming that hinged on the popular appeal of real people placed in dramatic situations with unpredictable outcomes."^{11,12} Next were prank shows, led by *Candid Camera*, followed by makeover and charity shows.¹³ Subsequently, amateur talent contests, pioneered by *Star Search*, entered the viewers' living rooms.¹⁴

⁷ Edward Wyatt, *On Reality TV, Tired, Topsy and Pushed to Brink*, N.Y. TIMES, Aug. 1, 2009, at A1, available at http://www.nytimes.com/2009/08/02/business/media/02reality.html?pagewanted=all&_r=0.

⁸ Susan Murray & Laurie Ouellette, *Introduction to REALITY TV: REMAKING TELEVISION CULTURE 6* (Susan Murray & Laurie Ouellette eds., 2d ed., N.Y. Univ. Press 2009).

⁹ Thomas Fenoglio, *The Economics of Reality TV: Why Is the Genre So Darn Cheap?*, TEX. CHRISTIAN UNIV., [http://www.rtvfmediastudies.tcu.edu/Economics Why the Genre is Cheap.htm](http://www.rtvfmediastudies.tcu.edu/Economics%20Why%20the%20Genre%20is%20Cheap.htm) (last visited Mar. 24, 2013).

¹⁰ Ted Magder, *Television 2.0: The Business of American Television in Transition*, in REALITY TV: REMAKING TELEVISION CULTURE, *supra* note 8, at 142-44.

¹¹ Murray, *supra* note 8, at 6.

¹² Some scholars have questioned whether some reality television contest-like shows should be illegal under 47 U.S.C. § 509 (for competitions of knowledge, skill, or chance). The statute was enacted after the game show scandals in the 1950s of rigging the results. See Kimberlianne Podlas, *Primetime Crimes: Are Reality Television Programs "Illegal Contests" in Violation of Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 141 (2007). Section 509 makes it illegal to prearrange or predetermine outcomes in "contests of knowledge, skill, or chance." 47 U.S.C. § 509. This question is beyond the scope of this paper, but is another proposed argument against reality television.

¹³ Murray, *supra* note 8, at 4.

¹⁴ *Id.*

The model for the contemporary archetypal reality show was MTV's *The Real World*, which first aired in 1991,¹⁵ followed by CBS's *Survivor* and *Big Brother*, both premiering in 2000.¹⁶ The show that arguably initiated the explosion of reality television contest shows, however, was *American Idol*, debuting in 2002 to extraordinary success.¹⁷ "This was 2002, so the only reality shows were really this and *Survivor*. *American Idol* was a breakthrough."¹⁸ Viewers knew of individual shows, but talk of the reality genre was insignificant. However, it did not take long for the large networks to recognize the benefits reality television could bring to their primetime lineups.¹⁹

Several factors contributed to the success of reality television besides simply popularity and creative ideas. In the 1990s, the most profitable advertising spot was Thursday night primetime, which NBC dominated.²⁰ With *Friends* opening the evening at 8:00pm and *ER* closing it at 11:00pm, NBC was all but unbeatable. In fact, NBC had been at the top of the rankings for fifteen years.²¹ However, once CBS put *Survivor* up against NBC's *Friends*, NBC's dominance took a hit.²² *Survivor* had competitive viewership numbers at significantly lower production costs.²³

NBC was slower to adopt reality television as a major component of its headlining shows, but in 2006 NBC announced its new strategy, "NBCU 2.0," whose goal was to cut costs significantly.²⁴ Announcing NBCU 2.0, Jeff Zucker, the then-head of NBC Universal's television division, stated, "[w]e have to

¹⁵ *Id.*

¹⁶ Magder, *supra* note 10, at 142.

¹⁷ *American Idol*, IMDB.COM, http://www.imdb.com/title/tt0319931/?ref_=fn_al_tt_1 (last visited Mar. 11, 2013).

¹⁸ Telephone Interview with Carmen Rasmusen Herbert, former *American Idol* contestant, Season 2 (Sept. 28, 2012).

¹⁹ Fenoglio, *supra* note 9.

²⁰ Magder, *supra* note 10, at 141.

²¹ *Id.* at 141-43 (with *Cheers*, *Seinfeld*, *Hill Street Blues*, *The Cosby Show*, *Will & Grace*, and *Just Shoot Me*).

²² This occurred during the 2000-2001 season when NBC had four of the top five shows in terms of advertising cost. By the end of the season, CBS had doubled its Thursday primetime viewership. Magder, *supra* note 10, at 143.

²³ *Friends* was the most expensive half hour show on television, mainly because of on-air talent: the six celebrity leads were paid \$1 million an episode by the last season, while *Survivor* was paying close to nothing for its "cast" of real people. Madger, *supra* note 10, at 142-44.

²⁴ Magder, *supra* note 10, at 141-42.

recognize that the changes of the next five years will dwarf the changes of the last 50.”²⁵ At this point, it became apparent that reality television was not a passing fad.

The growth in reality television necessitated protections for production companies and the networks. As the number of lawsuits and threatened lawsuits increased, so too did the number of contract pages, resulting in a common complaint that reality television contracts are excessively lengthy and contain clauses that are unfair to the contestants.²⁶ This led to questions of unconscionability. Is the contract unfair to the participant? Are reality television contracts generally contracts of adhesion? Do these contracts violate public policy or shock the conscience in a way that is extraordinary for the commercial context? Could a reality television star win a case claiming his contract is unconscionable, rendering it void? Thus far, no reality television contract has been held unconscionable, even when it is found to be a contract of adhesion.

A. *Defining Reality Television as a Genre*

Scholars writing on reality television have made attempts to define and categorize the genre. “This fixation with ‘authentic’ personalities, situations, problems, and narratives is considered to be reality television’s primary distinction from fictional television and also its primary selling point.”²⁷ Reality television is split into many sub-genres, as well as what can only be described as sub-sub-genres.²⁸ The initial shows fit within the established categories, but now shows are blurring the lines, leading to even more sub-genres. While a comprehensive list is impossible, there is a common core of sub-genres. There is the “gamedoc,” which includes programs like *Survivor*, *America’s Next Top Model*, and *Project Runway*.²⁹ There are also talent contests, including *American Idol*, *The X Factor*,

²⁵ At this time, reality television was capturing fifteen hours of primetime, while sitcoms were only ten hours per week. *Id.* at 142.

²⁶ See, e.g., Camille Doderer, *We Have Obtained a Copy of MTV’s Standard Real World Cast-Member Contract*, THE VILLAGE VOICE BLOG (Apr. 1, 2011, 7:45 PM), http://blogs.villagevoice.com/runninscared/2011/08/mtv_real_world_contract.php; Breeanna Hare, *The ‘Real World’ of Reality Show Contracts*, CNN.COM (Dec. 30, 2009), http://articles.cnn.com/2009-12-30/entertainment/legal.reality.contracts_1_show-hopefuls-reality-show-contracts/3?_s=PM:SHOWBIZ.

²⁷ Murray, *supra* note 8, at 5.

²⁸ *Id.*

²⁹ These shows have similarities to game shows, with an ultimate winner based on some sort of skill or knowledge. However, producers must be careful to avoid any conflict with quiz show laws that were enacted after the game show scandals of the 1950s, as it is a federal crime to rig contest shows with the intent of deceiving the public. See 47 U.S.C. § 509.

and *So You Think You Can Dance*, which incorporate a popular vote.^{30, 31} Others are dating programs, like *The Bachelor* and *Beauty and the Geek*; makeover programs, including *What Not to Wear* and *Made*; “docusoaps,” such as *The Real World*, *The Real Housewives* series, and *Teen Mom*; reality sitcoms like *The Osbournes*, *Kendra*, and *Joan and Melissa: Joan Knows Best?*; reality investigation shows; court programs; and charity programs, including *Oprah’s Big Give* and *Extreme Makeover: Home Edition*.

1. *The Scope of Reality Television in This Note*

Because many shows are borrowing attributes from multiple sub-genres, categorization by cast type rather than subject structure is more effective for the purposes of this paper. The broadest definition used by the networks is “unscripted television,” but reality television in a colloquial context tends to exclude the more traditional unscripted formats, such as talk shows and game shows. In particular, this note focuses on unscripted shows featuring “real people” as contestants (as opposed to unscripted shows using celebrities/personalities like *Dancing with the Stars* or *Keeping Up with the Kardashians*).³² Aside from this distinction in casting, there is little else excluded from the broad category of reality television discussed here, and the references to “reality television” or “reality TV” within this note will reflect that definition only. The focus for discussion is the contracts that underlie shows that “provide non-scripted access to ‘real’ people in ordinary and extraordinary situations.”³³

Contestants in these types of programs have less familiarity with the language of the industry and are less able to negotiate individual contracts. Most sign form contracts that are essentially contracts of adhesion created by production companies and networks. This is very different from the contract negotiations for established actors like the cast of *Friends*, particularly as the show approached its

³⁰ Some shows, such as *America’s Next Top Model*, are now combining the original gamedoc format with popular talent vote to blur these lines further. In Season 19, the show incorporated audience vote as a component of the models’ results each week (along with point value scores from the judges and “challenges”).

³¹ A sub-sub-genre extending from both of the aforementioned categories is a contest program with expert infusion, where contestants are “coached” by experts in the relevant field.

³² “Real people” being those who do not have celebrity status. This is mostly for the purpose of discussing the unconscionability of the contracts, of which bargaining power is an important factor. The bargaining power of celebrities is arguably significantly different and enables more contract-specific negotiation on behalf of the celebrity-contestant.

³³ Murray, *supra* note 8, at 3.

final seasons.³⁴ Mark Andrejevic, former professor in the Department of Communication Studies at University of Iowa, believes “[r]eality TV cast members are subject to totally unequal terms of negotiations. They are essentially a disposable commodity, and if they don’t sign the contract there are hundreds of other people lining up for their spot.”³⁵ There is little to no bargaining power for the contestants in the contract signing process for reality television.

While their lack of bargaining power may give the contestants pause, the networks, too, have concerns when approaching these contracts. They must protect themselves from the significant risks posed by reality television production, namely that they are dealing with people who are naïve about Hollywood processes and who lack a reputation in the industry sufficient to carry the show or to demonstrate that they will perform to a certain level. Most importantly, the fact that these shows are unscripted means, beyond editing, the networks have little control over what is said or done on screen.³⁶ Producers have to keep in mind that “[they] are shooting real people with real emotions and [they] can be 100% certain they will often do or feel things that are not part of your plan. This will and should happen.”³⁷ Writer and producer Pamela Berger has equated creating a reality show to the Heisenberg Uncertainty Principle.³⁸ The more “care and focus” the producers put into creating a reality television show, the more they “interfere with the very realness [they] are trying to convey.”³⁹ Therefore, to achieve the best show, producers have to allow for more uncertainty and insecurity, which leads to the incredible breadth of the contracts they draft.

B. Legal Activity in Reality Television

To date, the discussion and legal action surrounding reality television has had little to do with contract theory. However, networks and producers are using the contracts as a defense, stating that the participants consented to any consequences resulting from their involvement.

³⁴ Bill Carter, ‘*Friends*’ Deal Will Pay Each Of Its 6 Stars \$22 Million, N.Y. TIMES, Feb. 12, 2002, at C1, available at <http://www.nytimes.com/2002/02/12/business/friends-deal-will-pay-each-of-its-6-stars-22-million.html> (the six stars were able to hold out contract negotiations with, arguably greater bargaining power than the network).

³⁵ Wyatt, *supra* note 7.

³⁶ Pamela Berger, *What It Takes to Make Good Reality TV*, CNN.COM (Oct. 27, 2011, 10:42 AM), <http://www.cnn.com/2011/10/27/showbiz/tv/good-reality-tv-berger>.

³⁷ *Id.*

³⁸ The more precisely one property is measured, the less precisely the other can be controlled, determined or known.

³⁹ Berger, *supra* note 36.

The actions contestants have brought against producers cover a wide range of claims and are not all governed by the same laws.

State law claims involving reality television shows include common law and statutory right of publicity claims, defamation, intentional infliction of emotional distress, fraud, trademark infringement, and even violation of civil rights. Much of the recent focus in these cases, however, has been on claims that producers and broadcasters have violated the plaintiffs' common law or statutory rights of publicity.⁴⁰

Contestants have also sued for defamation based on "frankenbiting,"⁴¹ (such as the BBC *Castaway* case⁴² and Fox's *Temptation Island* case⁴³). As previously mentioned, the networks' response is that in signing their contracts, the parties consented to any reputational results. The Writers' Guild of America (WGA) also sued over "frankenbiting," insisting that this extensive editing is actually writing the show and, therefore, should be done by union members.⁴⁴ Other common claims are privacy and right of publicity,⁴⁵ racial discrimination,⁴⁶ breach of

⁴⁰ William Archer, *Getting Real Reality TV Shows Continue to Be Sued by Unwilling Participants and Wannabe Producers*, L.A. LAW., May 2012, at 28.

⁴¹ Frankenbiting is the rearranging of dialogue and sequences of events to make the situation more dramatic. The WGA argued that this is a form of writing for reality shows. *See, e.g.*, Newsday, 'Frankenbiting' Scares up Reality Controversy, CHI. TRIB (July 21, 2005), http://articles.chicagotribune.com/2005-07-21/news/0507210334_1_bachelor-producer-show-runners-reality.

⁴² Joel Ugolini, *So You Want to Create the Next Survivor: What Legal Issues Networks Should Consider Before Producing a Reality Television Program*, 4 VA. SPORTS & ENT. L.J. 68, 75-76 (2004).

⁴³ Jennifer L. Blair, *Surviving Reality TV: The Ultimate Challenge for Reality Show Contestants*, 31 LOY. L.A. ENT. L. REV. 1, 22 (2011).

⁴⁴ Newsday, *supra* note 41.

⁴⁵ *See, e.g.*, *Nieves v. Home Box Office, Inc.*, 817 N.Y.S.2d 227 (App. Div. 2006).

⁴⁶ *Reality TV Show Subject of Breach of Contract Lawsuit*, PAYTON & ASSOCIATES, LLC (Oct. 25, 2012),

<http://www.payton-law.com/blog/2012/10/reality-tv-show-subject-of-breach-of-contract-lawsuit.shtml>.

contract,⁴⁷ abnormally dangerous activities,⁴⁸ invasion of privacy, slander and intentional infliction of emotional distress.⁴⁹

In a recent and highly publicized case, contestant Tanya Cooley of the *Real World/Road Rules Challenge: The Ruins*, sued Viacom and MTV, claiming she was raped during filming. Cooley alleged that when she notified the show's producers, they told her to "just deal with it" and eventually sent her home.⁵⁰ In her claim Cooley stated producers encouraged intoxication and "scandalous behavior."⁵¹ MTV responded by claiming "affirmative defenses including Cooley's assumption of risk, consent, a waiver, a release and the argument that there were legitimate business reasons for sending her home—that she was removed from the show because 'she violently struck another contestant,'" behavior that Cooley did not deny.⁵² The case settled in October 2012⁵³ but had it gone to trial, could Cooley have successfully argued that the waiver violated public policy or that it was unconscionable? Based on current case law, it is unlikely that she could have succeeded on those claims. This is not to say there were no other potentially successful claims outside the realm of contract waivers that Cooley could have brought.

All of these suits and settlements in which the networks and production companies escaped liability have raised general awareness regarding reality television contracts. Discussion revolves around the validity of the actual terms of the contract, examining whether or not the contracts are just an example of the "big guys" taking advantage of the average Joe.⁵⁴

II

WHAT IS THE UNCONSCIONABILITY DOCTRINE?

Unconscionable contracts are those that "no man in his senses and not under delusion would make on the one hand and as no honest and fair man would accept

⁴⁷ Martin Auster Muhle, *Woman Sues MTV for Depiction on The Real World D.C.*, DCIST.COM (Mar. 5, 2010, 10:06 AM), http://dcist.com/2010/05/woman_sues_mtv_for_depiction_on_the.php

⁴⁸ Ugolini, *supra* note 42, at 77.

⁴⁹ Eric Gardner, *The Bachelor Racial Discrimination Lawsuit*, THE HOLLYWOOD REP. (Apr. 18, 2012, 12:05 PM), <http://www.hollywoodreporter.com/thr-esq/the-bachelor-lawsuit-racial-discrimination-313734>.

⁵⁰ Eric Gardner, *MTV Settles Lawsuit with 'Real World' Cast Member Who Alleged Rape*, THE HOLLYWOOD REP. (Oct. 24, 2012, 1:49 PM), <http://www.hollywoodreporter.com/thr-esq/real-world-rape-mtv-tanya-382809>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Blair, *supra* note 43, at 18.

on the other.”⁵⁵ The unconscionability doctrine is meant to extend protection to parties that sign unfair contracts and are not otherwise protected under contract law by duress, fraud, or misrepresentation.⁵⁶ For a contract to be unconscionable, an exacting standard must be met in order to prevent exploitation by parties who have simply exercised bad judgment.⁵⁷

The unconscionability doctrine allows a court to refuse to enforce contracts.⁵⁸ However, the court’s ability to intervene raises the inherent conflict between freedom of contract and protection from lack of bargaining during the formation of contracts.

There exists an unavoidable tension between the concept of freedom to contract, which has long been basic to our socioeconomic system, and the equally fundamental belief that an enlightened society must to some extent protect its members from the potentially harsh effects of an unchecked free market system... [T]he law has developed the concept of unconscionability so as to prevent the unjust enforcement of onerous contractual terms which one party is able to impose under the other because of a significant disparity in bargaining power.⁵⁹

The majority of discussions and case law concerning unconscionability focus on Section 2-302 of the Uniform Commercial Code (“UCC”) and involve the sale of goods. However, this provision is not applicable to service contracts and therefore contracts involving personnel in the entertainment industry.⁶⁰ The Restatement (Second) of Contracts takes the UCC language, but applies it to contracts generally rather than limiting it to sale-of-goods contracts.⁶¹ The Restatement (Second) of Contracts Section 208 states:

⁵⁵ Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (Ch. 1750).

⁵⁶ Paul Bennett Marrow, *Contractual Unconscionability: Identifying and Understanding Its Potential Elements*, N.Y. ST. B.J., Feb. 2000, at 18; RESTATEMENT (SECOND) OF CONTRACTS §164 (1981); RESTATEMENT (SECOND) OF CONTRACTS §175 (1981).

⁵⁷ Marrow, *supra* note 56, at 18.

⁵⁸ Larry A. Dimatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1068 (2006).

⁵⁹ Rowe v. Great Atl. & Pac. Tea Co., 385 N.E.2d 566, 569 (N.Y. 1978).

⁶⁰ Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 462, 492 (1999).

⁶¹ RESTATEMENT (SECOND) OF CONTRACTS §208 (1981). The Reporter’s Note to §208 observes that while §2-302 is literally inapplicable outside of sale of good contracts, it has proven very influential in non-sales cases. *Id.*

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.⁶²

Although the Restatement is not legally binding, most states have adopted its principles and extended the applicability of the unconscionability doctrine to all contracts.⁶³ The theory behind unconscionability and Section 208 is based on the concepts of freedom of contract⁶⁴ and laissez-faire doctrine.⁶⁵ There is a tension between being permitted to sign any contract and being limited and controlled by the government and the courts out of paternalistic, but perhaps necessary, protection.⁶⁶ The unconscionability doctrine is an attempt to strike a balance between these two extremes, allowing the courts to police contracts without causing undue interference.⁶⁷

A. *The Test for Unconscionability*

“Whether a contract or any clause of the contract is unconscionable is a matter for the court to decide against the background of the contract’s commercial setting, purpose, and effect.”⁶⁸ Most courts “have shown restraint in examining contracts or clauses for unconscionability” to avoid encroaching on the parties’ freedom of contract.⁶⁹ But how far courts should be allowed to go in their interpretation of contracts has yet to be settled.

“Usually, but not always, neither the substance nor the circumstances alone leads to the conclusion that unconscionability exists. To reach such a result, there

⁶² *Id.*

⁶³ See e.g., *Perdue v. Crocker Notional Bank*, 702 P.2d 503, 511-12 (Cal. 1985); *Soltani v. Western & Southern Life Ins. Co.*, 258 F.3d 1038, 1042 (9th Cir. 2001).

⁶⁴ See generally A.H. Angelo and E.P. Ellinger, *Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States*, 14 LOY. L.A. INT’L & COMP. L. REV. 455 (1992), available at <http://digitalcommons.lmu.edu/ilr/vol14/iss3/3> (discussing the origins of unconscionability doctrine in the United States and European Civil law countries).

⁶⁵ Richard Craswell, Professor of Law, University of Chicago, *Freedom of Contract*, Ronald H. Coase Lecture at the University of Chicago Law School (Dec. 6, 1994).

⁶⁶ *Id.*

⁶⁷ Prince, *supra* note 60, at 461-62.

⁶⁸ *Wilson Trading Corp v. David Ferguson, Ltd.*, 24 N.E.2d 685, 688 (N.Y. 1968).

⁶⁹ Prince, *supra* note 60, at 463.

is a need to couple the two.”⁷⁰ Unconscionability includes abuse of both procedural and substantive contract terms.⁷¹ In *Williams v. Walker-Thomas Furniture Co.*,⁷² the leading case on the subject of unconscionability, in order to demonstrate unconscionability Williams, the petitioner, had the burden of showing “an absence of meaningful choice ... together with contract terms which [were] unreasonably favorable to the” defendant.⁷³

Professor Arthur Allen Leff laid out the test for unconscionability by separating it into two components: substantive unconscionability, which “refers to the actual terms of the agreement,” and procedural unconscionability, which “pertains to the bargaining process.”⁷⁴ The “Leff Test” has been applied not only to unconscionability questions covered by the UCC §2-302, but also to those agreements that do not pertain to the sale of goods.⁷⁵ In most states, both procedural and substantive unconscionability must be found for a contract as a whole to be found unconscionable.⁷⁶

1. Procedural Unconscionability

Procedural unconscionability consists of the “absence of meaningful choice,” whereby one party has no option but to sign the contract.⁷⁷ Often, procedural unconscionability results from “haste and high pressure tactics” or signing “for the sole benefit of the defendants,” ignoring any benefit or necessity of the less powerful party.⁷⁸

One common way for courts to find procedural unconscionability is by determining that the contract is a contract of adhesion. “The term [contract of

⁷⁰ Marrow, *supra* note 56, at 22.

⁷¹ 8 RICHARD LORD, WILLISTON ON CONTRACTS § 18:10 (4th ed.) (substantively unconscionable contracts contain terms that “unreasonably [favor] the more powerful party... or otherwise contravene the public interest or public policy”).

⁷² *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (note, this case is a sales-of-goods case).

⁷³ *Id.* at 449.

⁷⁴ Prince, *supra* note 60, at 472-74. See also Arthur Allen Leff, *Unconscionability and the Code-The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

⁷⁵ See, e.g., *Higgins v. Disney/ABC International Television (Higgins II)*, No. BC 338017 (Cal. Super. Ct. Jul. 7, 2007), *aff'd*, *Higgins III*, No. B200885, 2009 WL 692701 (Cal. Ct. App. Mar. 18, 2009).

⁷⁶ See, e.g., *Soltani v. Western & Southern Life Ins. Co.*, 258 F.3d 1038, 1042 (9th Cir. 2001); *Scovill v. WSYX/ABC*, 425 F.3d 1012, 1017 (6th Cir. 2005); *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 322-23 (6th Cir. 1998).

⁷⁷ *Williams*, 350 F.2d at 449.

⁷⁸ *Croce v. Kurnit*, 565 F. Supp. 884, 893 (S.D.N.Y. 1982).

adhesion] signifies a standardized contract, which imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.”⁷⁹ Although contracts of adhesion are used as evidence to demonstrate a disparity in bargaining power, a factor in establishing procedural unconscionability, they are not per se procedurally unconscionable.⁸⁰

2. *Substantive Unconscionability*

Establishing substantive unconscionability requires looking “to the terms of the contract itself (the contract's substance), . . . ask[ing] . . . whether those terms are unreasonably favorable to the stronger party.”⁸¹ The Southern District of New York (affirmed by the Second Circuit) in *Croce v. Kurnit* explained that substantive unconscionability requires that the terms of the contract “shock the conscience” or be “grossly” different from “industry norms.”⁸² Being “complex in nature” is not sufficient for unconscionability so long as the terms are not intended to “obfuscate or confuse.”⁸³

Courts tend to be most hesitant to step in regarding the substantive unconscionability aspect of the Leff Test. Substantive unconscionability is often viewed to be the heart of the unconscionability doctrine and, in some states, is enough to find an agreement unconscionable on its own, although it is often still accompanied by a finding of procedural unconscionability.⁸⁴

Factors courts consider when deciding if a contract is substantively unconscionable, include, but are not limited to, commercial setting, bargaining power, opportunities for the signing parties, who requires more protection, as well as to whom rights or privileges are given or payment is made (as specified by the contract in question). This factor-driven test creates a sliding scale, making the plaintiff's burden of proving unconscionability highly dependent on the importance of the rights involved. When fundamental and constitutional rights are bargained

⁷⁹ *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000) (citing *Neal v. State Farm Ins. Cos.*, 188 Cal. App. 2d 690, 694, 10 Cal. Rptr. 781 (1961).

⁸⁰ *Id.*; *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 172 (Cal. 1981).

⁸¹ Richard Craswell, *Two Different Kinds of Procedural and Substantive Unconscionability*, Law and Economics Workshop, Berkeley Program in Law and Economics, UC Berkeley, 1 (Apr. 12, 2010), available at <http://escholarship.ucop.edu/uc/item/0hf7v16t>.

⁸² *Croce v. Kurnit*, 565 F. Supp. 884, 893 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984).

⁸³ *Id.*

⁸⁴ However, it is still most often accompanied by a finding of procedural unconscionability. 8 RICHARD LORD, *WILLISTON ON CONTRACTS* § 18:10 (4th ed.).

away, the context (commercial setting, bargaining power, etc.) is of lesser concern than when other personal privileges are given up as consideration.

Contracts found to be unconscionable, or those that violate public policy, are void or voidable.⁸⁵ While public policy violations and unconscionability are technically different theories for voiding a clause or contract, they are interrelated.⁸⁶ Furthermore, the idea of voiding a contract or clause because it violates public policy fits into the broader understanding of the unconscionability doctrine, particularly into the concept of substantive unconscionability.⁸⁷

3. *Application of the Two-Part Test*

When courts are determining whether a clause is unconscionable, they often combine the procedural and substantive tests into a single analysis. Habitually, courts assume procedural unconscionability in contracts of adhesion and reserve thorough analysis until after the substantive unconscionability discussion. Consequently, a court will often avoid the procedural analysis altogether because it does not find the clause to be substantively unconscionable. On the other hand, a clause may be so clearly substantively unconscionable that procedural unconscionability is only used to tip the scale. Many courts “have suggested a kind of sliding scale, in which even a small amount of procedural unconscionability, when combined with a high degree of substantive unconscionability, [would] be enough to invalidate a challenged clause.”⁸⁸

B. Unconscionability under California Law

California, home to Hollywood, is also the site of most of the nation’s entertainment law disputes. As a result, California state law has one of the most developed unconscionability doctrines in the entertainment industry. Most reality

⁸⁵ See RESTATEMENT (SECOND) OF CONTRACTS §178 (1981); RESTATEMENT (SECOND) OF CONTRACTS §208 (1979) (most states have adopted these provisions of the Restatement or equivalent to apply to all contracts).

⁸⁶ See RESTATEMENT (SECOND) OF CONTRACTS §208 cmt. (a) (“Policing against unconscionable contracts or terms has sometimes been accomplished ‘by adverse construction of language, by manipulation of the rules of offer and acceptance, or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract.’”)

⁸⁷ Public policy violation can be a way to void a contract or clause on its own when the first part of unconscionability, procedural unconscionability, is not satisfied. That distinction is probably not an issue for the context of this paper because procedural will not be difficult to satisfy for reality television contestants, since these contracts are standard, non-negotiable contracts of adhesion.

⁸⁸ Craswell, *supra* note 81, at 2.

television shows are California-based, making California state interpretations of the doctrine binding for any unconscionability claims that may arise. The California courts also tend to be less restrained in their application of unconscionability than courts in other jurisdictions.⁸⁹ California Civil Code §1670.5 covers the unconscionability doctrine, stating:

(a) 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.

(b) 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.⁹⁰

The California courts have applied this statute to *all* contracts.⁹¹ California law requires the finding of both procedural and substantive unconscionability in order to void a provision.⁹² The California courts also apply the Leff Test. “The text of §1670.5 is identical to the text of §2-302 of the 1962 Official Text of the Uniform Commercial Code... The purpose of enacting §1670.5 as part of the Civil Code was to make its provisions applicable to *all* contracts.”⁹³

In *Buchwald v. Paramount Pictures Corp.*, the court found that when Buchwald signed an agreement with very complicated formulas for the calculation of net profits (or net proceeds), he “had been taken advantage of through a commonly used motion picture industry contract.”⁹⁴ The court held the clause to be unconscionable. However because the court in *Batfilm Productions v. Warner Brothers, Inc.* found the same net profits clause not to be unconscionable, the film

⁸⁹ Prince, *supra* note 60, at 493.

⁹⁰ CAL. CIV. CODE § 1670.5 (West 1979).

⁹¹ *See, e.g.*, Perdue v. Crocker Nat’l Bank, 702 P.2d 503, 516 (Cal. 1985).

⁹² 8 RICHARD LORD, WILLISTON ON CONTRACTS § 18:10 (4th ed.); AT&T Mobility, Inc. v. Concepcion, 131 S. Ct. 1740, 1746 (2011) (citing *Amandariz v. Found. Health Psychcare Servs.*, 6 P.3d 669, 690 (Cal. 2000)).

⁹³ 3 ANN TAYLOR SCHWING, CALIFORNIA AFFIRMATIVE DEFENSES § 55:1 (2013 ed.) (emphasis added).

⁹⁴ Prince, *supra* note 60, at 460-61.

industry has done little to change its practices.⁹⁵ Since *Buchwald*, California courts have been reluctant to find entertainment contracts unconscionable, leaving the case as an outlier in the unconscionability sphere of entertainment contracts.

C. Unconscionability under New York Law

New York, another prominent state for entertainment, television, and film activity, is the other state that may eventually play a role in reality television contractual disputes. However, both the New York courts and legislature have been much less active with regards to the unconscionability doctrine than California; thus, there is little precedent to use as a guide. In 1951, the New York Court of Appeals held that an unconscionable contract is one that is “so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms.”⁹⁶ In 1962, New York adopted the UCC §2.302 provision and in 1976, incorporated similar language into the state’s Real Property Law.⁹⁷

In *Gillman v. Chase Manhattan Bank*, the New York Court of Appeals held that both procedural and substantive unconscionability are required to find a contract void for unconscionability.⁹⁸ “The New York Court of Appeals defined procedural unconscionability as an ‘absence of meaningful choice,’”⁹⁹ but also held that a contract of adhesion, without more, is not automatically a procedurally unconscionable contract.¹⁰⁰ Hence, requiring someone to sign a contract in order to participate in a program does not in itself make the contract procedurally unconscionable.¹⁰¹ Substantive unconscionability in New York, while similar, uses a less stringent standard than is used in California.¹⁰² The court in *Gillman* determined that the standard of review in New York is the reasonableness of the terms.

⁹⁵ *Id.* at 493.

⁹⁶ *Mandel v. Liebman*, 100 N.E.2d 149, 152 (N.Y. 1951).

⁹⁷ *Marrow*, *supra* note 56, at 20.

⁹⁸ *Gillman v. Chase Manhattan Bank*, 534 N.E.2d 824, *828 (N.Y. 1988).

⁹⁹ Ian Brereton, Note, *The Beginning of a New Age?: The Unconscionability of the “360 Degree” Deal*, 27 CARDOZO ARTS & ENT. L.J. 167, 175 (2009) (citing *Gillman*).

¹⁰⁰ *Croce v. Kurnit*, 565 F. Supp. 884, 893 (S.D.N.Y. 1982), *aff’d*, 737 F.2d 229 (2d Cir. 1984) (applying New York state court precedent).

¹⁰¹ *Id.* (finding that the contract was not per se unconscionable even though the entertainer lacked bargaining power with the publishing and management companies).

¹⁰² Brereton, *supra* note 99, at 175.

III THE CONTRACTS

The only bona fide protection for producers and networks filming reality television shows is through contract. Union collective bargaining agreements provide baselines in scripted television, but do not apply to reality television cast members. Given the extra risk and uncertainty of reality television, producers and networks feel the need to protect themselves from every possibility for legal action fathomable.

A. *Measures for Protection of Production Companies and Networks*

Over time, the size, number, and depth of the reality television contracts and releases has grown significantly. Producers have learned that they need very elaborate contracts to protect themselves. According to Matt Kunitz, Supervising Producer of *The Real World*, “the second season of *The Real World*, the contract was 12 pages long, and every year it got bigger and bigger.”¹⁰³ Nigel Lythgoe, producer of *American Idol* and *So You Think You Can Dance*, described contract formation as having to be complete in its expectation of transpiring events. “Whenever you do a contract, you have to try to anticipate every angle, because you can’t tell what’s going to happen.”¹⁰⁴ “You’re always dealing with unpredictability,” echoed Chris Sloan of the USA network, leading a practical contract author to ensure protection against all risks.¹⁰⁵ It is clear that comprehensive nature of reality television contracts is a response to the lack of control and unique problems associated with unscripted shows.¹⁰⁶

In addition to the main contract, it is common for contestants to sign a release, full contestant agreement, and non-disclosure agreement.¹⁰⁷ Most contestants also have to submit to a medical examination, background check, psychological evaluation, and personality testing.¹⁰⁸ For example, the Season 4 *Beauty and the Geek* cast had to sign and complete a thirty-five-page agreement and release, a three-page confidentiality agreement, a two-page medical supplies

¹⁰³ Lowry, *supra* note 1.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ SAM BRENTON & REUBEN COHEN, *SHOOTING PEOPLE: ADVENTURES IN REALITY TV* 125 (2003).

¹⁰⁸ *Id.*

form, and a three-page medical information form.¹⁰⁹ *So You Think You Can Dance* Season 5 contestant Randi Lynn Strongg (formerly Randi Lynn Evans) said, “[t]he contract that we had to sign once making it onto the show was about 90 pages long.”¹¹⁰ Contestants also completed “a 450-question psych evaluation along with physical tests with a doctor.”¹¹¹ On the first season of *The X Factor*, the contestants had a thick packet to fill out right after boot camp week. If the contestants “[get] past the judges, they take [the contestants] for a screening with a private investigator and they [ask] [the contestants] everything: what religion you are, what drugs you have done, how many people have you had sex with. It’s scandal protection.”¹¹² Production companies thoroughly investigate the contestants’ lives, from their relationships and family, to their driving record and where they lived for the last ten years, to avoid any potential surprises down the line.

B. Typical Contractual Language

There are several common features to reality television contestant: standard warnings about dangers contestants may face along with liability releases; privacy waivers and permission grants for filming any time and place; warnings and releases regarding reputational damage and embarrassing depictions; commitment or exclusivity clauses; and communication limitations.

Standard warnings about the dangers that the contestants face by coming on the show may be part of a larger contestant agreement or may constitute a separate waiver or release. The intention of these clauses is to warn contestants of potential hazards and to release the production company from liabilities stemming from those risks.¹¹³ Contestants on *The Biggest Loser* sign an eleven-page release that covers both physical and psychological risks, waiving the right to sue for virtually any liability related to injury or death.¹¹⁴ Under the release, contestants assume all

¹⁰⁹ Applicant Agreement and Release *Beauty and the Geek*, 3 Ball Productions (Jun. 16, 2007) (unpublished contract) (on file with the author).

¹¹⁰ Email Interview with Randi Lynn Strongg, Former Contestant *So You Think You Can Dance* Season 5 (Oct. 4, 2012).

¹¹¹ *Id.*

¹¹² A member of the group “The Anser,” which was one of the four finalists in the “group” category that worked with Paula Abdul. “The Anser” was eliminated in the Judges’ House portion of the show, the section right before the judges’ final picks go on to the live show. Telephone Interview with Gray Aydelott, Former Contestant, *The X Factor* Season 1 (Oct. 3, 2012).

¹¹³ Production companies remain liable in instances of gross negligence or where there is a lack of reasonable care on their part.

¹¹⁴ May be unenforceable but that is for another discussion.

risks, known and unknown, and acknowledge the “diet, exercise, and/or nutritional” risks associated with the show:¹¹⁵ It further states:

I understand that the Series and my compliance with the Series Rules may cause me mental, psychological and/or emotional distress, and the consents, authorizations of risk and releases set forth in this Agreement and in the Waiver and Release expressly apply to all such potential harms.¹¹⁶

Similar provisions appear in the contract signed by contestants on the fourth season of *Beauty and the Geek*:

I understand that the Series will involve my participation in physically and mentally strenuous activities that may cause me serious bodily injury, illness or death, including, but not limited to exhaustion, dehydration, fatigue, overexertion and sun or heat stroke. I understand and acknowledge that while conduct giving rise to such situations and activities might otherwise constitute an actionable tort, I have freely and knowingly consented to such conduct and to participating in such situations and activities.

I acknowledge that the foregoing is not an exhaustive list of the risks, hazards and dangers I may be exposed to as a result of the Series activities and I voluntarily and freely accept and assume these and all such other risks, hazards and dangers I may encounter or be exposed to and understand and acknowledge that the waivers, releases and indemnities in this Agreement expressly apply to these risks, hazards and dangers.¹¹⁷

Similar clauses may also release the producers of liability from association and interaction with the other contestants or guests on the show. On *The Real World*, guests were required to sign a contract containing the following clause:

I understand that Producer does not make any representations or warranties about the cast members in the Program or of any other person whom I may encounter in connection with my participation in the Program, including but not limited to, the mental or physical health of any such person. If I choose to engage in consensual sexual

¹¹⁵ Applicant Agreement, Release and Arbitration Provisions *The Biggest Loser* Season 11 BL4 Productions, Inc. (Oct. 14, 2010) (unpublished contract) (on file with the author).

¹¹⁶ *Id.*

¹¹⁷ Applicant Agreement and Release, *Beauty and the Geek* Season 4, *supra* note 109.

behavior or intimate contact . . . I do so voluntarily and knowingly and I assume the risk that by engaging in such activity I may contract certain sexually transmitted diseases¹¹⁸

Despite the their ubiquity, Professor Andrejevic of the University of Iowa doesn't believe that such language provides any sort of warning to the participants, stating that it is "disingenuous for producers to suggest that contestants were adequately warned of the conditions they would face."¹¹⁹

Language permitting filming of contestants at any time and place during production is common to most, if not all, reality television contracts. For example:

I grant to Producer and its successors, licensees and assigns, the irrevocable right, but not the obligation, with or without my knowledge, to film, tape and/or photograph, record, exhibit, edit and otherwise use my appearance, name, likeness, voice, singing voice, conversation, sounds and biographical data on or in connection with the Program in any manner in Producer's sole election and discretion, which use shall not entitle me to receive any compensation whatsoever.¹²⁰

Contestants often must explicitly give up all rights of privacy while being filmed for the show:

. . . [I]f I so choose to enter the case house that hidden cameras and microphones may be used and I have no expectation of privacy anywhere in the house, including but not limited to bedrooms, bathrooms and other places I would typically expect privacy.¹²¹

Relatedly, contestants frequently must consent to any personal information or embarrassing depictions that may be revealed over the course of the show. These releases prevent suits for frankenbiting, invasion of privacy, reputational injuries, defamation, and other claims involving emotional and non-physical personal injuries. One such contract reads:

¹¹⁸ Voluntary Participation Agreement (Guest Release) *The Real World*, RW Productions, Inc. (unpublished contract) (on file with the author).

¹¹⁹ Wyatt, *supra* note 7.

¹²⁰ "American Idol" Season 12 – Personal Release, *American Idol* Season 12, American Idol Productions, Inc. (2012) (unpublished contract) (on file with the author).

¹²¹ Voluntary Participation Agreement (Guest Release), *The Real World*, *supra* note 118.

I understand that, in and in connection with the Program... I may reveal and/or relate, other parties... may reveal and/or relate, or the Producer may thus edit, information about me of a personal, surprising, defamatory, disparaging, embarrassing or unfavorable nature. I further understand that my appearance, depiction, and/or portrayal in or in connection with the Program, and my actions and the actions of others displayed in or in connection with the Program, may be disparaging, defamatory, embarrassing or of an otherwise unfavorable nature, and may expose me to public ridicule, humiliation or condemnation. I acknowledge and agree that Producer shall have, in its sole discretion and editorial control, the right to include any such information and any such appearance, depiction, portrayal, actions and statements in and in connection with the Program. I understand and acknowledge that *while such conduct might otherwise constitute a tort, I have freely and knowingly consented to such conduct and waive any action against Producer.*¹²²

Such provisions are common even in talent competitions; the *American Idol* Personal Release states:

I understand that I may reveal and other parties may reveal, information about me that is of a personal, private, embarrassing or unfavorable nature, which information may be factual and/or fictional. I further understand that my appearance, depiction and/or portrayal in the Program may be disparaging, defamatory, embarrassing or of an otherwise unfavorable nature which may expose me to public ridicule, humiliation, or condemnation. I acknowledge and agree that Producer shall have the right to (a) include any or all such information and appearances, depictions or portrayals in the Program as edited by Producer in its sole discretion, and (b) broadcast and otherwise exploit the Program containing any or all such information and appearances, depictions or portrayals in any manner whatsoever in any and all media now known or hereafter devised, or for any other purpose, throughout the universe in perpetuity.¹²³

Various commitment clauses are also common in addition to releases for physical dangers, emotional harm, privacy rights, and other producer liabilities,

¹²² *Id.* (emphasis added).

¹²³ “American Idol” Season 12 – Personal Release, *American Idol* Season 12, *supra* note 120.

especially for talent-based shows. Some clauses restrict activity during production, while others cover post-production activities.

Exclusivity during production and run of the show is common. *American Idol* Season 2 contestants were barred from any sort of vocal performance unrelated to the show during the season's filming and airing. They "couldn't sing anywhere but *Idol*, even family barbecues, while [they] were on the show."¹²⁴ Similarly, *The X Factor* Season 1 contestants had to wait until seven months after the show aired to perform in other contexts.¹²⁵ *The Biggest Loser* contestants had to obtain the show's approval for public appearances or speaking engagements for a year after the conclusion of the show.¹²⁶

Contracts also have commitments that bind the contestants to some combination of the show, network, management company, or production company for a period of time after the show's completion. Pursuant to such a release, contestants on the second season of *American Idol* "were bound to 19 Management for three months after the tour."¹²⁷ For *The Biggest Loser* family, the commitment is mostly social. Prior contestants "can go back every year for the finale... Devin [Alexander] has a big dinner party at her home. [They] also have an alumni group Facebook page so [they] can keep in touch."¹²⁸ However, *The Biggest Loser* also has contractual control over contestants for one year after the final episode airs.¹²⁹

Producer and Network shall have the right and option to require me to participate in any future unscripted, 'reality-based' programs... and all media now known or hereafter devised in which I appear as myself (the "Reality Hold"), according to the following terms and conditions... through the date which is twelve (12) months after the initial exhibition of the final episode of the cycle of the Series in which I appear.¹³⁰

In spite of the contracts, contestants on many of these shows felt that they were well-treated and respected during the show, especially contestants from the early seasons. *So You Think You Can Dance* Season 5 contestant Randi Lynn

¹²⁴ Telephone Interview with Carmen Rasmusen Herbert, *supra* note 18.

¹²⁵ Telephone Interview with Gray Aydelott, *supra* note 112.

¹²⁶ Telephone Interview with Deni Hill, Former Contestant, *The Biggest Loser*, Season 11 (October 1, 2012).

¹²⁷ Telephone Interview with Carmen Rasmusen Herbert, *supra* note 18.

¹²⁸ Telephone Interview with Deni Hill, *supra* note 126.

¹²⁹ *Id.*

¹³⁰ Applicant Agreement, Release and Arbitration Provisions, *The Biggest Loser*, *supra* note 115.

stated in an interview that, “[j]ust recently, I attended the Season 9 wrap party and got to see everybody there, including Nigel [Lythgoe] and stuff. That was a lot of fun, and I felt that I was greeted with open arms. I feel like everyone who was on the show will always have a special place with Nigel and friends.”¹³¹

Yet, things appear to be different on some newer shows. During *The X-Factor*’s inaugural season in 2011, the producers required the contestants that made it to the final live shows to sign an additional contract with a seven-year producer right-of-first-refusal clause on activities of the top contestants.¹³² Gray Aydelott explained, “[w]e got cut right before the... right of first refusal. That was what scared me the most. If we were offered it, I would have taken it, obviously, but seven years is a long time to be bound.”¹³³ Aydelott understood how the contract could tie the hands of his group, but felt that the opportunity would have been worth it.¹³⁴ It seems that in the wake of *American Idol*’s missed contractual hold on Jennifer Hudson, who didn’t win but went on to have an Oscar-winning career, producers want to ensure no potential opportunities slip away again.¹³⁵

Limitations on contact with the outside world are prevalent; contestants are required to be away from their families and friends for extended periods of time. Despite the emotional hardship this can entail, many shows compound the separation with clauses pertaining to communication. In some cases the restrictions extend communication limits beyond when contestants actually appear on the show (i.e., after they have been eliminated) to ensure confidentiality and maintain the surprise factor for finales. For example, the release for *The Biggest Loser* reads:

I understand the Series Rules may require me to be separated from my family, friends and regular environment for an extensive period of time, to be present at one or more locations... with or without other participants of the Series, and that I may be subject to limitations or prohibitions on my ability to communicate with my family, friends and others, for up to twenty-four (24) hours a day, seven (7) days a week, for a period of approximately nineteen (19) consecutive weeks

¹³¹ *Id.*

¹³² Telephone Interview with Gray Aydelott, *supra* note 112.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

(and possibly longer) tentatively scheduled to begin on or about . . .
¹³⁶

Ultimately, producers are attempting prepare for the fact that the filming experience may not go as they or the participants anticipated. The production company may reveal information on the show that the contestant never imagined producers would find out, and contestants may do or say unexpected things. All of this is reflected in the contracts.

IV

COULD UNCONSCIONABILITY BE USED TO VOID THE CONTRACTS?

“Unconscionability is a question of law for the court.”¹³⁷ If a clause is found unconscionable, courts may address the solution in a variety of ways, including “red-penciling” out the problematic phrase or clause, voiding the entire contract, or narrowing the meaning of the unconscionable term. Under California state law, unconscionable contracts are subject to severability under CA Civil Code §1670.5(a); hence the entire contract would not be void regardless of a finding regarding an individual clause.¹³⁸ Markedly, there is no precedent finding the standard and existing clauses of a reality television contract unconscionable. Reality television’s contemporary development and the tendency to settle disputes have limited the courts’ exposure to this issue. Only the California Superior Court for Los Angeles County, followed by the Second District of the Court of Appeal for California reviewing the County Court’s cases on appeal, has specifically addressed using unconscionability to void clauses other than the arbitration clause in reality television contracts. The Superior Court exhibited a clear and accurate application of the unconscionability doctrine in the *Higgins* cases, in particular, *Higgins II*.

A. *Unconscionability in Reality Television Contracts According to the Los Angeles County Superior Court and the Second District of the Court of Appeal*

1. *The Higgins Cases*

In the series of *Higgins* cases, a family of orphaned children brought suit against ABC and its affiliates over an episode of *Extreme Makeover: Home*

¹³⁶ Applicant Agreement, Release and Arbitration Provisions, *The Biggest Loser*, *supra* note 115.

¹³⁷ *Higgins II*, No. BC 338017, at 10 (Cal. Super. Ct. Apr. 20, 2007) (citing *Vance v. Villa Park Mobile Home Estates*, 36 Cal. Rptr. 2d 723 (Cal. Ct. App. 1995)).

¹³⁸ *Id.* (citing *Abramson v. Juniper Networks, Inc.*, 9 Cal. Rptr. 3d 422, 438 (Ct. App. 2004)).

Edition.¹³⁹ The four Higgins siblings' were orphaned and, with the encouragement of their church, agreed to go on *Extreme Makeover: Home Edition*. Prior to the show, the Leomiti Family had taken the four siblings into their home, thus it was the Leomiti house which was remodeled. Within a year of the remodel, the Leomitis evicted the Higgins children, prompting the siblings to sue the Leomitis and several parties involved in the production of the show, including the production company and the network.¹⁴⁰ In 2006 the children appealed a decision by the Superior Court to the Court of Appeal (*Higgins I*) arguing that they should not be required to arbitrate with the producers and network because the arbitration clause was unconscionable. The Court of Appeals agreed with the children, overturning the Superior Court decision and finding the arbitration clause unconscionable.¹⁴¹ Judge Rubin reversed the Superior Court's requirement to arbitrate, granting the Higgins children's writ of mandate.¹⁴²

In 2007, the children returned to the Superior Court (in *Higgins II*) with seventeen causes of action against defendants Disney and ABC. Of their many claims, those relevant to this note alleged that particular clauses in their contract were unconscionable and rendered the agreement void.¹⁴³ The appeals court disagreed, finding the clauses at issue were *not* unconscionable.¹⁴⁴

In *Higgins II*, the Superior Court accepted the ruling of the Court of Appeals in *Higgins I*, finding that the contract was a contract of adhesion.¹⁴⁵ However contrary to the Court of Appeals' holding, the Superior Court found that under the procedural unconscionability analysis the fact that font changes and formatting made the contract difficult to read did not alone render the contract

¹³⁹ *Higgins v. Superior Court (Higgins I)*, 140 Cal. App. 4th 1238, 1241-43 (2006) (on appeal, the court found the arbitration clause to be unconscionable); *Higgins III*, No. B200885, 2009 WL 692701, at *2-3 (Cal. Ct. App. Mar. 18, 2009).

¹⁴⁰ *Higgins II*, No. BC 338017, at 2-3.

¹⁴¹ Arbitration agreements are commonly found to be unconscionable, particularly if they lack mutuality in bargaining (procedural unconscionability). Many arbitration clauses require that any dispute go to mandatory arbitration and that the result there will be binding on the parties. Courts have held this type of language to be unconscionable (substantial unconscionability) when there is also highly unequal bargaining power (procedural unconscionability) because it forces one party to give up the constitutional right to a trial by jury. *Higgins I*, 140 Cal. App. 4th at 1241-1243.

¹⁴² *Higgins II*, No. BC 338017, at 2-3.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 13.

¹⁴⁵ *Id.* at 10 (According to the Court of Appeals opinion in *Higgins I*, 140 Cal. App. 4th, at 1238, this contract is, in fact, a contract of adhesion).

unconscionable. Therefore, while the contract at issue was a contract of adhesion, it did not meet the requirements for procedural unconscionability.¹⁴⁶

The Higgins children appealed again (*Higgins III*), this time focusing more specifically on several clauses that they claimed were unconscionable, including the Participation Clause¹⁴⁷ and the Release and Indemnity Clauses.^{148, 149, 150} The appeals court affirmed the Superior Court's decision but focused on the question of substantive rather than procedural unconscionability, holding that the agreement

¹⁴⁶ *Id.* at 11.

¹⁴⁷ The Participation Clauses come at paragraphs 12 and 13 where the participants acknowledge that

the show will be recorded and that, as a result, private, personal, and embarrassing matters may be publicly broadcast. The show defendants are granted permission to fully exploit those materials in any way, and they are released from any and all claims that liability based on participant's right of privacy, intentional or negligent infliction of emotional distress, defamation, and any other torts in any way relating to the disclosure and exhibition of personal information about the participant. These provisions are not highlighted or displayed in boldface and appear in sequence with paragraphs 4 through 19 under the heading **PARTICIPATION**.

Higgins III, No. B200885, 2009 WL 692701, at *11 (Cal. Ct. App. Mar. 18, 2009).

¹⁴⁸ Paragraph 56 states that the releasing parties will not sue any of the show participants "for any injury, illness, disease (including, without limitation, any sexually transmitted disease), trespass, damage, loss or harm to me or my property, or my death, howsoever caused, resulting or arising out of or in connection with . . . the [show], . . . whether or not caused by or arising out of the act or omission . . . of the released parties or any of the participants in the program." *Id.* at *12.

¹⁴⁹ Paragraph 57 states that the releasing parties unconditionally release and discharge all show participants and the released parties from "any and all claims, liens, agreements, contracts, actions, suits, costs, . . . and liabilities of whatever kind or nature . . . whether now known or unknown, suspected or unsuspected, and whether or not concealed or hidden . . . arising out of or in connection with" the show. The released claims shall include "those based on negligence or gross negligence of any of the released parties or . . . the other participants . . . wrongful death, personal injury, [negligent and intentional] infliction of emotional distress, . . . products liability, breach of contract, breach of any statutory or other duty of care owed under applicable law, libel, slander, defamation, invasion of privacy, violation of any right of publicity or personality, infringement of copyright or trademark, loss of earnings or potential earnings, kidnapping, false imprisonment, and those based on my dissatisfaction with the improvements or my possession or use thereof." *Id.*

¹⁵⁰ Paragraph 58 "sets forth the waiver of Civil Code section 1542 and releases claims that are not known or suspected. It also states that the releasing parties have either been advised by legal counsel or have chosen not to consult counsel." *Id.*

failed to “shock” or “surprise” in a manner that rendered it unenforceable.¹⁵¹ The court noted that the contract was not “permeated with unconscionability” such that the entire contract could be voided, and that the contested terms, when considered in context, were not in and of themselves unconscionable.¹⁵² That these highly restrictive, and fairly common, clauses were not found unconscionable bodes well for producers with similarly drafted contracts. However, the court did make a point to note that it was not making a ruling as to the unconscionability of provisions other than the specific ones contested in the case.¹⁵³ Hence, what exactly a conflict-free production contract looks like has not yet been established.

2. *The Dr. Phil House Case*

A second California case that touches on unconscionability in reality television contracts is *Dieu v. McGraw*, in which the issue stemmed from Dr. Phil McGraw having built a house in which to gather and film viewers who had written to him for advice.¹⁵⁴ The plaintiffs, who were themselves participants, brought claims of misrepresentation and fraud against Dr. Phil and his fellow producers.¹⁵⁵ The Superior Court denied the defendants' motion to strike because the defense had not met its burden of demonstrating that the plaintiffs' complaints arose out of defendants' protected activity.¹⁵⁶ On appeal, the unconscionability arguments were brought out when the defense's counsel chose to use the plaintiffs' releases as a means for blocking their claims. The plaintiffs rebutted, arguing the releases were unconscionable and void due to the language.¹⁵⁷

¹⁵¹ The court comes to this conclusion even though they note that one of the contested provisions, based on a footnote of the complaint, releases the Producers from any claims resulting from emergency medical care and is “effectively a modified version of the ‘good samaritan’ laws.” *Higgins v. Disney/ABC International Television (Higgins II)*, No. BC 338017, 11 (Cal. Super. Ct. Jul. 7, 2007).

¹⁵² *Higgins III*, 2009 WL 692701, at *11-12.

¹⁵³ *Higgins II*, No. BC 338017, at 13 (“More importantly, the court notes that paragraph 2 (granting the Producers rights to publicity), the first four lines of paragraph 64 (integrating all prior understanding into the contract providing that the contract supersedes them), paragraph 65 (asserting that the contract has not been entered into on the basis of prior promises or representations by the Producers) and paragraph 71 (containing a recitation that the signatory has read the contract) are not alleged to be unconscionable.”).

¹⁵⁴ *Dieu v. McGraw*, No. BC223117, 2011 WL 38031 (Cal. Ct. App. Jan. 6, 2011).

¹⁵⁵ *Id.* at *1-2.

¹⁵⁶ *Id.* at *3.

¹⁵⁷ *Id.* at *2 (“[plaintiffs] will never sue and [plaintiffs] fully release and discharge, [CBS], Peteski Productions, Inc., [McGraw] and/or their respective distributors, assigns, affiliates, licensees, agents, officers, directors, shareholders, employees and attorneys, and each of them for

The court disagreed with the plaintiffs, finding the release was *not* unconscionable.¹⁵⁸ However, it should be noted that the court implied that the reason for their holding was that the plaintiffs had not met their burden of proof. As the appeals court stated: “Plaintiffs have provided no evidence of whether they were relegated only to a take it or leave it scenario with respect to the releases On this basis alone, plaintiffs have failed to satisfy their burden to establish that the releases are unconscionable and, therefore, unenforceable.”¹⁵⁹ The court also found that the language of the releases appeared one-sided and may have been substantively unconscionable. However, it never conclusively addressed that issue because the plaintiffs had already failed to establish procedural unconscionability.¹⁶⁰

The Dr. Phil case illustrates how unconscionability suits are likely to arise in the future. Claims of unconscionability are not common in the initial complaint

any loss, claims or injuries of every kind and nature which [plaintiffs] may now have or may hereafter acquire arising out of or in connection with the [Program] including without limitation: (a) any claims, demands and causes of action for invasion of privacy or publicity, defamation, infliction of emotional distress and any other tort in connection therewith; . . . (d) because [plaintiffs did] not like the questions, responses or outcome of the [Program]; and (e) because [CBS] did not fully disclose the subject matter of the [Program] or the identity of other guests appearing on the [Program]. [Plaintiffs] voluntarily assume the full risk of any loss or injury (including, without limitation, physical or emotional loss or loss of property or income) to [themselves] . . . that may occur as a result of the production, taping and/or broadcast of the [Program]. . . . [Additionally, the releases provided that:] (1) McGraw does not administer individual, group or medical therapies, and that plaintiffs would not be receiving therapy of any kind from him, (2) no promises had been made to plaintiffs other than those expressly set forth in the releases, (3) no promises had been made to plaintiffs about the final or specific content of the Program, and (4) in signing the releases, plaintiffs did not rely on any representations or statements that were not set forth in the releases.”)

¹⁵⁸ *Id.* at *11 (citing *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441 (Cal. 1963)). After determining that the releases were not unconscionable, the court had to determine if the plaintiffs' claims were barred by the release. The defendants argued that the release barred all suits, but the plaintiffs pushed that it was blocked California Civil Code §§1542 and 1668. The court determined that §1542 was not applicable because there was no debtor/creditor relationship. As to §1668, the defendants brought evidence that under this type of case does not apply because §1668 only applies to “public regulation.” The court held that *Tunkl* only applies to negligence claims and not intentional torts, violations of statutory law, or fraud. Therefore, six of the plaintiffs' eight claims were not barred by the releases. As to the other two, which were negligence claims, the court performed a *Tunkl* analysis and concluded that these releases are exempt and not considered of “public interest” under *Tunkl* so the negligence claims were barred by the releases.

¹⁵⁹ *Dieu*, 2011 WL 38031, at *11.

¹⁶⁰ *Id.*

stage, but are instead brought out at a later stage to try to prevent producers from using the contracts as an affirmative defense. Both this case and *Higgins I* and *II* demonstrate the complicated nature of the unconscionability doctrine and the high burden of proof that must be met to win a claim under it. While these two cases were unsuccessful, the Los Angeles County Superior Court and the Second District of the Court of Appeal for California left the door open for future claims so long as they address different contract provisions. If a contestant were to win such a claim, it could drastically alter the nature of reality television contracts and expose the producers and networks to new risks.

B. Applying the Test and Concluding That the Contracts Are Not Unconscionable

Though the potential success of unconscionability claims cannot be discounted if producers and networks continue to push the bounds of acceptable television entertainment, there remains a heavy burden on parties bringing such claims. In addition, several factors make winning a case particularly difficult in the current climate of reality television contracts. First, contestants freely choose to participate and, arguably, have the opportunity to make an informed decision before signing the contract,¹⁶¹ nullifying allegations of procedural unconscionability. Second, the courts weigh the contractual language “against the background of the contract’s commercial setting, purpose, . . . effect,” as well as industry norms.¹⁶² In the entertainment industry, contracts tend to be over-inclusive and favor production companies because they are assuming the majority of the financial risk. Third, courts must find that the language of the contract meets the high standard of “shock[ing] the conscience” in order for the contestant to succeed. Finally, the fact that contestants sign the hefty contracts in hopes of an even heftier return makes any unfairness argument weak. They are giving up a substantial number of privileges, but in exchange the studios and networks are risking a lot of money on the contestants and the show while offering the contestants a potentially life-changing opportunity.

1. Free Will and Informed Decisions in the Procedural Unconscionability Analysis

“The critical principle to keep in mind is that no one is forcing anyone to participate in these shows,” argues Jonathan Anshell, who represented CBS in a claim brought by Stacey Stillman, one of the original contestants on *The Survivor*.¹⁶³ There is no reason, other than desire, for a person to be on reality

¹⁶¹ *But see infra* notes 165, 175.

¹⁶² *Wilson Trading Corp. v. David Ferguson, Ltd.*, 244 N.E.2d 685 (N.Y. 1968)

¹⁶³ Lowry, *supra* note 1.

television. Those arguing that these contracts are unconscionable should consider the fact that the contestants do not have to be on the shows at all. Many, if not all, of the shows offer the contestants the opportunity to make informed decisions either by consulting an attorney provided by the producers, their own attorney, or another informed party. In 2002, when Carmen Rasmusen was on *American Idol* “the show hired a lawyer for the ‘Top 12.’ He went over the about fifty-page contract with us . . . They wanted to make sure we understood. I mean they hired a lawyer to spend hours with all of us on speakerphone to make sure we were okay with everything.”¹⁶⁴

Not everyone has had the experience Rasmusen had. “In some cases, reality show contestants may know very little about the contents of the contracts they sign, given their length, the use of boilerplate and legal jargon, and the relatively short time contestants have to review the contracts.”¹⁶⁵ However, contestants do realize that they have little to no bargaining power to change these contracts of adhesion, due to basic economic supply and demand. If they choose not to participate, there is a line of people around the block, literally, to replace them. They are a highly dispensable piece of the production of the show. Randi Lynn said about participating on *So You Think You Can Dance* that: “Honestly, they are going to do what they want, and they can, because all the power is in their court. I just wanted to be on the show, no matter what. In the end, I can say that I think everything worked out for me great.”¹⁶⁶ “If you wanted to do the show”, she added, “you played by their rules and had to sign it as it was.”¹⁶⁷ Similarly, Will Frank, a *Beauty and the Geek* contestant, knew he had no bargaining power. “[T]his wasn’t a negotiation of equals; it was pretty take-it-or-leave-it. I felt the choice was pretty simple – sign and be on the show, or don’t and don’t.”¹⁶⁸

On the other hand, the contestants on reality television shows do not have agents negotiating their contracts, and most of them have little experience negotiating contracts in general, let alone entertainment and reality television contracts which operate under their own set of unconventional industry practices.¹⁶⁹ When combined with the expendable nature of individual contestants,

¹⁶⁴ Telephone Interview with Carmen Rasmusen Herbert, *supra* note 18.

¹⁶⁵ Blair, *supra* note 43, at 23.

¹⁶⁶ Email Interview with Randi Lynn Strongg, *supra* note 110.

¹⁶⁷ *Id.*

¹⁶⁸ E-mail interview with Will Frank, former *Beauty and The Geek* contestant, Season 4 (Dec. 3, 2012).

¹⁶⁹ See Jonathan Barnett, *Hollywood Deals: Soft Contracts for Hard Markets* (USC Law and Economics Research Paper Series No. C12-9, 2012), available at <http://ssrn.com/abstract=2118918> or <http://dx.doi.org/10.2139/ssrn.2118918>.

this lack of bargaining power makes these agreements contracts of adhesion and increases the likelihood that the terms favor the producers and networks, which could enable the courts to find procedural unconscionability. Even so, the courts are still unlikely to find substantive unconscionability based on these factors alone, and both procedural and substantive unconscionability are required to find a clause or contract unconscionable.

2. *Commercial Setting and Industry Norms as Part of the Scrutiny for Substantive Unconscionability*

Most of the contestants understand what they are getting into and fully expect to “sign their lives away.”¹⁷⁰ They understand that making it in the entertainment world is extremely difficult, has low chances of success, and requires sacrifices in many forms, including contractual obligations. “It’s everything that goes along with. . . entertainment. The publicity, the television, the interviews, the crowd. It’s part of the business.”¹⁷¹ However, many contestants do feel that “[producers] tried to do what worked for [both] the show and for the contestants. They were looking out for [the contestants’] best interests.”¹⁷²

Still, “Hollywood language is . . . difficult.”¹⁷³ In a letter to the contestants of *Beauty and the Geek* containing the contract they were required to sign, the producers tried to limit anxiety by explaining that the contract language was standard. To do this, they included the following in the letter:

DON’T PANIC!!!! It is a standard show contract and umbrellas a wide set of scenarios and circumstances that you may, or may not, encounter. Much of the language in this agreement is intimidating and difficult to understand. Read through it carefully and feel free to ask us any questions. A LOT OF THIS LANGUAGE SOUNDS FAR WORSE THAN THE ACTUAL CIRCUMSTANCES YOU WILL ENCOUNTER ON THE SHOW.¹⁷⁴

Why have this language at all if it is an exaggeration of what is necessary? The answer is that Hollywood is Hollywood –competitive, risky and uncertain. Those who have invested money have learned that they need to protect themselves

¹⁷⁰ Telephone Interview with Gray Aydelott, *supra* note 112.

¹⁷¹ Telephone Interview with Carmen Rasmusen Herbert, *supra* note 18.

¹⁷² *Id.*

¹⁷³ Telephone Interview with Deni Hill, *supra* note 126.

¹⁷⁴ Letter from Christina Soletti, Production Manager, 3 Ball Productions, LLC, to the contestants of *Beauty and the Geek* Season 4 (June 8, 2007) (on file with the author).

against any peril that may befall the show. The contestants have to accept the quirks of the industry that they are entering, which includes the contracts.

As the *Higgins* court pointed out, analyzing a contract requires viewing it in context of the commercial background and the needs of the trade in question.¹⁷⁵ Thus, when looking at the “nature of the agreement: allowing appellants to appear on the show and receive its benefits in exchange for giving up their publicity rights and limiting respondents’ liability for torts occurring in connection with the show,” the releases are “not surprising or unexpected and, when viewed in the context of the agreement’s primary purpose, were not unconscionable.” Hence, waivers of publicity rights and other rights in exchange for being on a show “is clearly legal.”¹⁷⁶

3. *Shocking the Conscience – The Crux of the Substantive Unconscionability Analysis*

The standard test for substantive unconscionability in California is the “shock the conscience” test. In their case, the Higgins family argued that the contract was one-sided and lacked mutuality. In rejecting their claims, the court made it clear that there is a difference between arbitration clauses, which are often found to be unconscionable, and other provisions pertaining to reality shows.

While [the] Higgins [family] cite[d] two recent decisions concerning unconscionability, the decisions cited typically addressed arbitration clauses, often in the employment context. A contract demanding [a] waiver of the constitutional right to a trial by jury in consideration of allowing the signatory to obtain or keep employment is a far cry from a contract enabling the signatories to participate in the making of an entertainment broadcast carrying with it the potential for fame as well as the potential for cash and other prizes in exchange for which the Producers demand the right to broadcast the program and the waiver of certain liabilities which might arise from the program. As conditions attached to an otherwise completely gratuitous grant of consideration, these waivers do not ‘shock the conscience’ which is the typical test for substantive unconscionability.¹⁷⁷

¹⁷⁵ *Higgins v. Disney/ABC Int’l Television (Higgins II)*, No. BC 338017, 12 (Cal. Super. Ct. Apr. 20, 2007) (citing *American Software v. Ali*, 54 Cal. Rptr. 2d 477 (Cal. Ct. App. 1996)).

¹⁷⁶ *Higgins v. Disney/ABC Int’l Television, Inc. (Higgins III)*, No. BC B200885, 2009 WL 692701, at *12-13 (Cal. Ct. App. Mar. 18, 2009).

¹⁷⁷ *Higgins II*, No. BC 338017, at 12 (citing *California Grocers Association v. Bank of America*, 27 Cal. Rptr. 2d 396 (Ct. App. 1994))

According to the court, shocking the conscience depends largely on the context of the clause. It is not as shocking to sign away rights of publicity and waive liability as it is to contractually forfeit a constitutional right. Whether something shocks the conscience hinges on *what* the clause is about considered in light of the other elements discussed in this section such as commercial setting, industry norms, the opportunities available to the contestants, and which party is bearing the risk.

4. *Available Opportunities to the Participants Weighing in on the Substantive Unconscionability Analysis*

Contestants have “various motives” for being on shows.¹⁷⁸ Many, like Carmen Rasmusen are looking for exposure to advance their careers. “This was before Facebook and YouTube. It was a great way to get heard instead of little county fairs in Orem, Utah.”¹⁷⁹ Another advantage for contestants is the opportunity to be on the show itself. Andrew Bonito from the 2005 season of *Hell’s Kitchen* felt like he had been given the “opportunity to be a part of popular culture.”¹⁸⁰ The motivations that lead contestants to want to be on reality shows vary, and they don’t all come down to simply wanting their fifteen minutes of fame. Some are “excited for the challenge and to prove to [themselves] that [they] could do it.”¹⁸¹ There are “so many opportunities on the [shows] to work with the best of the best in the business.”¹⁸² Contestants have experiences and develop relationships on the show that they will remember for their entire lives. According to Aydelcott, those involved in the first season of *The X Factor* “became like... family. Simon and Paula and all of them.”¹⁸³

The success of previous participants furthers the belief among potential contestants that they can also be among the small percentage that becomes famous. It is possible, as many contestants and participants of reality television shows have gone on “to star in Hollywood films, host television programs, . . . and appear as contestants on [other] . . . reality programs. While participation . . . doesn’t seem to lead to an acting career, it does . . . provide a continuation of the observed life,” since participants continue to be tracked by the media.¹⁸⁴

¹⁷⁸ Lowry, *supra* note 1.

¹⁷⁹ Telephone Interview with Carmen Rasmusen Herbert, *supra* note 18.

¹⁸⁰ Wyatt, *supra* note 7.

¹⁸¹ Email Interview with Randi Lynn Strongg, *supra* note 110.

¹⁸² *Id.*

¹⁸³ Telephone Interview with Gray Aydelott, *supra* note 112.

¹⁸⁴ Murray, *supra* note 8, at 11.

5. *The Production Companies Bear the Financial Risk – Turning Away from Finding of Substantive Unconscionability*

Another piece of the debate worth emphasizing when considering substantive unconscionability is that all of the risk is born by the network. “Until the program airs, it is virtually impossible to predict its success – sunk costs are high, and so is the risk of failure.”¹⁸⁵ Even though reality television is cheaper than dramas or sitcoms, they are not inexpensive. As of 2005, the average cost of producing a drama or sitcom ranged from \$700,000 to \$1.25 million.¹⁸⁶ Those numbers are still running about the same, if not cheaper. Scott Manville of TV Writer’s Vault estimates that reality television programs cost between \$100,000 and \$500,000 depending on the network.¹⁸⁷ It is the production companies and networks that are bearing the entire cost of the shows. The participants on the show are not professional actors risking their reputations; instead they are merely risking their reputational portrayal in exchange for opportunities provided and paid for by the production companies. As in most other areas of contract law, the side bearing the financial risk deserves more protection within the contract.

CONCLUSION

Contestants from reality television shows are bringing suits against production companies and networks when the shows do not go according to plan.¹⁸⁸ These lawsuits are relatively unsuccessful due to the hefty contracts the contestants signed which cover most of the claims at issue in the suits. Recently, this has begun to raise the question of whether these contracts are enforceable at all with the broad and sometimes appalling clauses that release the “all-powerful” networks and producers from nearly all liability. As the courts see it, the formation of the contract determines a complaining party’s fate. A contract can only be unconscionable if it is unconscionable at the time of signing. In hindsight, a contestant may wish he had never agreed to this contract, but that is not enough to make the contract unconscionable. This is especially true since reality television contracts are not something anyone *needs* to sign at all. As Judge Gutman noted in *Higgins II*, an arbitration clause in an employment agreement may be found unconscionable while another clause in a reality television contract will not. To reiterate:

¹⁸⁵ Magder, *supra* note 10, at 147.

¹⁸⁶ *Id.*

¹⁸⁷ Laura Jerpi, *Reality TV – Low Cost Programming that Produces High Ratings*, THE TV ISSUE, South Source, Jan., 2013, available at <http://source.southuniversity.edu/reality-tv-low-cost-programming-that-produces-high-ratings-119585.aspx>.

¹⁸⁸ Hopkins, *supra* note 4.

A contract demanding waiver of the constitutional right to a trial by jury in consideration of allowing the signatory to obtain or keep employment is a far cry from a contract enabling the signatories to participate in the making of an entertainment broadcast carrying with it the potential for fame as well as the potential for cash and other prizes in exchange for which the Producers demand the right to broadcast the program and the waiver of certain liabilities which might arise from the program. As conditions to an otherwise completely gratuitous grant of consideration, these waivers do not “shock the conscience.”¹⁸⁹

Contestants are only signing away personal privileges not constitutional rights, thus reality television contracts are not unconscionable. When considering the opportunities contestants gain from participation in the shows, the commercial setting of the contracts, the free will of the contestants in signing the contracts, and the significant risk the networks and producers are taking on, the robust contractual language is completely justified. As currently written and practiced, though complex and comprehensive, reality television contracts are not unconscionable.

¹⁸⁹ *Higgins v. Disney/ABC International Television (Higgins II)*, No. BC 338017, 12 (Cal. Super. Ct. Jul. 7, 2007)