Los Angeles Lawyer
DECEMBER 1995

Enforcement of a prenuptial agreement in California may founder on three conflicting standards of law

Promises, Promises

By Marshall S. Zolla and Lisa Helfend Meyer

Prenuptial agreements on property rights of prospective spouses have long been recognized and enforced in California and are generally favored as a private means of ordering financial affairs.[1] It is a fact of life that an inherent inequality of some dimension—an age differential, disparity of wealth, a second marriage for one of the parties, perhaps children from a prior relationship—frequently provides the motivation for intended spouses to enter into a premarital agreement. It is precisely these types of inequality that create the possibility of a contract being so one-sided that one party later contends it to be unconscionable and thus unenforceable. Yet, in this emotionally and financially sensitive area, California law is frustratingingly imprecise.

In re Marriage of Dawley,[2] the 1976 benchmark opinion of the California Supreme Court, established the rule that public policy permits parties to define their marital relationship by contract, that an agreement that contemplates divorce is not necessarily "promotive of divorce," and is not, therefore, invalid per se. In *Dawley*, a couple executed a written premarital agreement that provided that all property belonging to either spouse at the commencement of marriage or acquired by a spouse through purchase, gift, or inheritance during marriage, including earnings, would be owned by that spouse as his or her respective separate property. Each disclaimed all rights, including community property rights, in the property of the other spouse. In the subsequent marital dissolution proceeding, the premarital agreement was upheld and property was confirmed to the parties by the trial court pursuant to the premarital agreement. The California Supreme Court affirmed, stating, in part:

> Thus in the Dawley marriage the community or separate character of property is not fixed by the presumption set forth in the Civil Code or by the judicial opinions interpreting those presumptions, but by the terms of the antenuptial contract.[3]

The supreme court thus upheld the right of a couple to contractually define their relationship and, at the same time, disapproved the dictum in *In re Marriage of Higgason*,[4] that stated that there was a requirement of intent of the parties to remain married for an indefinite time and also emphasized that mutuality of bargaining power is a key factor in the validity and enforceability of such agree-

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ments.[5] *Dawley* also set forth the public policy background of California's Uniform Premarital Agreement Act.

Under the Uniform Premarital Agreement Act,[6] a premarital agreement is not enforceable if the party against whom enforcement is sought proves that the agreement was unconscionable when it was executed and establishes certain facts with respect to lack of disclosure prior to execution of the agreement.[7] The burden of proof is on the party who alleges that the agreement is unenforceable.[8] The issue of unconscionability is decided by the court as a matter of law pursuant to Family Code Section 1615(b).

In marked contrast to the provisions of the Uniform Premarital Agreement Act, California Civil Code Section 1670.5 codifies the general contract doctrine of unconscionability and provides a different test to determine if a contract is unenforceable: whether, in light of the general background and needs of the particular case, the provisions involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. This general contract definition of the doctrine of unconscionability has also been codified by the legislature in Commercial Code Section 2-302.

In addition to these statutory standards of unconscionability, case law has established other tests required to find a contract unconscionable and thus unenforceable.[9] Three distinctly different standards of the doctrine of unconscionable contracts therefore now exist in California:

1)The California Uniform Premarital Agreement Act;

2) Contract law codified in Civil Code Section 1670.5 and Commercial Code Section 2-302; and

3) Judicial interpretation embodied in case law.

This means that California law provides three different mechanisms to test whether a prenuptial agreement is unconscionable and therefore unenforceable. As a result, the standards for measuring the enforceability of California prenuptial agreements are far from precise. This imprecision between statutory provisions and case law interpretation creates ambiguity not only in the negotiation and drafting of prenuptial agreements but, more important, in the ultimate test of their enforceability.

The history of the doctrine of unconscionability of contracts has been well documented;[10] it is a doctrine that applies to all contracts.[11] As such, unconscionability, as defined by general contract law, is applicable to California premarital agreements, although, surprisingly, no reported California case has applied an unconscionability standard to a prenuptial agreement.[12]

Civil Code Section 1670.5 does not expressly define unconscionability; instead, it provides the court with authority to rule directly on the unconscionability of a contract or a particular clause of a contract and to render a legal conclusion as to its unconscionability. The Legislative Committee Comment to Civil Code Section 1670.5 explains the basic test for a court to determine unconscionability: "The basis [sic] test is whether, in light of the general background and the needs of the particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[13]

The *Restatement (Second) of Contracts* Section 208 mirrors the provisions of Civil Code Section 1670.5. The comments to the *Restatement* provide relevant factors to determine whether a contract or a material contractual term is unconscionable. One such factor is the weakness in bargaining power. In this regard, Comment (d) states:

> [A] gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.

Civil Code Section 1670.5(b) further provides that the parties shall have the opportunity to present evidence on the "commercial setting, purpose, and effect" of the contract in order "to aid the court in making the determination." This invitation to present evidence is limited by the rules of evidence with respect to the admissibility or inadmissibility of parol evidence. Recent case law makes clear that parol evidence is inadmissible to prove a meaning to which contract language is not reasonably susceptible.[14]

Two alternative approaches to determine whether a contract is unconscionable, and therefore unenforceable, have emerged from applying Section 1670.5 in California case law. Under the first approach, established in *Graham* v. *Scissor-Tail, Inc.*, the initial component of the analysis is to determine whether the contract is one of adhesion.[15] Since even a contract of adhesion may be enforceable, the next step is to determine whether enforcement should be denied for either of two reasons: 1) the contract, or one of the contract's provisions, falls outside the reasonable expectations of the weaker party; or 2) the contract, or one of the contract's provisions, falls within the reasonable expectations of the weaker party, but is unduly oppressive or unconscionable.[16]

Under the second approach provided by case law, established in *A & M Produce Co.* v. *FMC Corporation*, the determination of what renders the contract or contractual provision unconscionable and, thus, unenforceable, is based upon the definition of unconscionability in Civil Code Section 1670.5.[17] In analyzing the applicability of Section 1670.5, it must be kept in mind that this section did not create an affirmative cause of action, but was intended to codify the defense of unconscionability.[18] Unconscionability is determined by both procedural and substantive components.[19] Substantive unconscionability refers to the actual terms of the agreement, while procedural unconscionability pertains to the bargaining process.[20]

The California Supreme Court attempted to harmonize these two approaches in *Perdue* v. *Crocker National Bank*. The court said, "*Graham* v. *Scissor-Tail, Inc.* comports somewhat more closely to the California precedent; *A&M Produce* conforms more closely to the Uniform Commercial Code and the cases decided under that code. Both pathways should lead to the same result."[21]

Graham v. *Scissor-Tail, Inc.* arose out of a series of four concert promotion contracts executed on standardized forms supplied by the American Federation of Musicians. At issue in the contractual dispute was the sharing of losses incurred from the initial two concerts. The supreme court determined that the contract was a contract of adhesion but pointed out that a contract of adhesion is fully enforceable according to its terms unless the contract is unconscionable. The contract would be unconscionable if either 1) the terms do not meet the reasonable expectations of the weaker party; or 2) even if they do, the terms are unduly oppressive or unconscionable. The supreme court held the contracts in *Graham* to be unconscionable and, as such, unenforceable.

In *A & M Produce*, a contract drafted by the seller, a large corporation, was found to be unconscionable and therefore unenforceable in light of the totality of the circumstances, the inequality of bargaining power, lack of negotiation, disclaimer of warranties, and the exclusion of consequential damages. To discern the nature of unconscionability, the court defined two elements of unconscionability: the "procedural" element and the "substantive" element.

The procedural element of unconscionability focuses upon the factors of oppression and surprise. Oppression is found to arise "from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice.'"[22] The element of surprise comes into play where "supposedly agreed-upon terms of the

bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms."[23]

Procedural unconscionability alone will not provide a basis to deny enforcement of a contract; substantive unconscionability must also be found. The *A&M Produce* court noted that a contractual term would be substantively suspect if the risks of the bargain were reallocated in an objectively unreasonable or unexpected manner. Not all unreasonable risk allocations are unconscionable; thus, enforceability of a contract clause is tied to the procedural aspects of unconscionability such that the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk allocation. The court further noted that substantive unconscionability must be evaluated at the time the contract is made.

In *A & M Produce*, the court interpreted the essential purpose of Civil Code Section 1670.5 and held that the doctrine of unconscionability is to apply to all contracts, not just those arising under the Commercial Code. The court determined that unconscionability is a doctrine fundamental to the operation of contract law, irrespective of the particular application. In apparent recognition of this fact, the legislature's decision to adopt Uniform Commercial Code Section 2-302 codifies the unconscionability doctrine in Civil Code Section 1670.5, applicable to all types of contracts, rather than as part of the Commercial Code.[24]

In recent cases, courts have applied the principles established in the *Graham* and *A & M Proauce* decisions. A court may find a contract unconscionable by applying either standard, but it does not have to reach the same result under both tests.[25] In *Patterson* v. *ITT Consumer Financial Corp.*,[26] for example, the court applied both tests, and under each the subject contracts were found to be unconscionable. In *Ellis* v. *McKinnon Broadcasting Co.*,[27] the court applied only the *A & M Produce* test and found the commission forfeiture provision of an employment contract unconscionable. In *California Grocers Association, Inc.* v. *Bank of America*,[28] the *A & M Produce* approach was rejected and the contract in question was held not to be unconscionable. Reviewing prior case law concerning unconscionability, the *California Grocers* court determined that the proper test is whether the contract in question "shocks the conscience." The trial court decision in *Buchwald* v. *Paramount Pictures* shocked the entertainment community when the trial judge ruled that Paramount had imposed a contract with unconscionable terms; the court reformed the agreement to reach a just result.[29]

In *Patterson*, the court of appeal affirmed a trial court decision holding an arbitration clause in a standard loan agreement unconscionable and unenforceable.[30] The court first analyzed the facts according to the *Graham* model and found that the contract was indisputably one of adhesion. Plaintiffs were individuals of modest means, some self-employed or temporarily unemployed, who borrowed small amounts of money in response to advertising promising guaranteed loans. Next, the court analyzed whether the adhesion contract was considered to be within the reasonable expectations of the parties and held that it was not. Thus, applying the *Graham* test, the court held that the contracts were adhesive, unconscionable, and therefore unenforceable.

The court also found the contracts unenforceable under the alternative analysis of applying the *A & M Produce* test of Civil Code Section 1670.5. The court found the contract, in fact, to be both procedurally unconscionable and substantively unconscionable. Thus, under both the *Graham* and the *A & M Produce* approach, the result was the same: the arbitration clause was held unconscionable and unenforceable.

In *Ellis*, the court determined that a commission forfeiture provision in an employment agreement between a salesman and employer was unconscionable and unenforceable.[31] In its analysis of procedural and substantive unconscionability, the court noted that a compelling case of substantive unreasonableness will overcome a relatively weak showing of procedural unconscionability.[32]

The *California Grocers* court expressed its preference for the *Graham* v. *Scissor-Tail* approach in holding that a depositor's contract with a bank was not unconscionable. In declining to use the *A & M Produce* approach, the court adhered to what it called "the traditional standard of unconscionability."[33] The court followed the *Graham* approach by focusing on the oppressiveness of the contract, utilizing a "shocks-the-conscience" standard.

A Model Contract

Careful practitioners can avoid the uncertainty of enforcing prenuptial agreements caused by inconsistencies in California law through creative drafting techniques. Until the California legislature acts to resolve these inconsistencies, the following clause should be considered for inclusion in all prenuptial agreements:

A. This Agreement is executed within the State of California and shall be subject to and interpreted under the laws of the State of California.

B. This Agreement is intended to and shall be governed by the California Uniform Premarital Agreement Act (Family Code Sections 3, 1601, 1610-1617) and applicable California statutes and case law.

C. The parties expressly acknowledge and agree, in conformity with California Family Code Section 1615, that this Agreement is being executed by the parties voluntarily, that neither party waived in writing the right to disclosure of the property or financial status and obligations of the other party, and that both parties had adequate knowledge of the property and financial obligations of the other party.

D. The parties expressly acknowledge and agree

1) This Agreement and its terms are not standardized nor are the provisions hereof imposed or drafted by a party with superior bargaining power;

2) The parties to this Agreement each had the opportunity to negotiate, and did in fact negotiate, the terms and provisions of this Agreement;

3) The terms and provisions of this Agreement are within the reasonable expectations of the parties with respect to the subject matter of this Agreement;

4) This Agreement and its terms are not one-sided, harsh, oppressive, surprising, or unfair for either party with respect to the subject matter of this Agreement;

5) The parties to this Agreement each had substantially equal bargaining power in negotiating the terms of this Agreement and in meaningfully choosing to enter into this Agreement;

6) The agreement of the parties and all of its terms and provisions are clearly set forth in this Agreement.

E. Although this Agreement is executed in the State of California, and makes reference to separate and community property (and quasi-community property, if applicable), the parties expressly agree that it is their intent that this Agreement cover all rights and property, real or personal, whether such property is situated within or without the State of California, or within or without the United States of America.—**M.S.Z. and L.H.M.**

The *California Grocers* decision has been criticized for allegedly undercutting the doctrine of unconscionability by essentially disregarding the necessity for any showing of procedural unconscionability.[34]

And so the judicial uncertainty with the concept of unconscionability continues, providing little guidance for drafters of contracts and leaving future problems of enforceability unresolved. This confusing pattern formed the background of the trial court decision in *Buchwald* v. *Paramount Pictures Corp.*, after which another trial court, called upon to interpret a similar profit-participation agreement, adopted a different approach and held that the contract at issue was not unconscionable.[35]

Prenuptial agreements executed before January 1, 1986, are governed by the law in effect prior to the enactment of the Uniform Premarital Agreement Act.[36] The validity of a pre-1986 premarital agreement is usually judged by the general contract principles of understanding, fairness, and mutual assent.[37] Accordingly, the unconscionability of a pre-1986 agreement is determined by the general doctrine of unconscionability as defined in *Graham* and *A & M Produce*. In this regard, the discussion of "undue influence" is the most relevant facet of pre-1986 case law in determing the unconscionability of premarital agreements. Undue influence, which is closely related to unconscionability and is arguably the same, is defined in Civil Code Section 1575 as follows:

> 1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining unfair advantage over him;
> 2. In taking an unfair advantage of another's weakness of mind; or,
> 3. In taking a grossly oppressive and unfair advantage over another's necessities or distress.[38]

Cases dealing with undue influence involve the exertion of pressure by a party with superior bargaining power over a weaker party to sign a premarital agreement.[39] The coercion in this instance is arguably the same as that involved in adhesion contracts where the inequality of bargaining power is the focus of the doctrine of unconscionability. For example, in *In re Marriage of Dawley*, the court found that there was no undue influence, that the parties entered the premarital agreement freely and voluntarily, and that there was an equality of bargaining power. As a result, the agreement was neither oppressive, nor unfair, and was upheld.[40]

The court's reasoning in affirming the agreement's validity involved an analysis of the two parties' respective bargaining power. Such an analysis becomes necessary when a party attempts to overturn a premarital agreement by alleging it to have been procured by undue influence.[41] Therefore, when a premarital agreement entered into prior to 1986 is at issue, the pre-1986 family law cases and general contract principles regarding unconscionability, as explained in *A & M Produce Co.* v. *FMC Corp.* and *Graham* v. *Scissor-Tail, Inc.*, should be revisited and reviewed.

On January 1, 1986, the California Uniform Premarital Agreement Act took effect. It declares that an unconscionable premarital agreement will not be enforced and indicates that for a premarital agreement to be unconscionable, it must have been so when executed. Additionally, all of the following must be true for the party challenging the agreement:

> (A) He or she was not provided a fair and reasonable disclosure of the property or financial obligations of the other party.
> (B) He or she did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided.
> (C) He or she did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.[42]

This standard, codified in Family Law Section 1615(b), differs significantly from the standard of Civil Code Section 1670.5 because it defines unconscionability largely in terms of financial disclosure. Under this standard, neither the inherent fairness of the premarital agreement nor the equality of the parties' bargaining power are given weight.

Only one California case has considered a prenuptial agreement on the basis of the disclosure standard of the Uniform Premarital Agreement Act. However, this case did not actually judge the validity of the agreement because the wife did not allege that the agreement was unenforceable under the Uniform Premarital Agreement Act.[43]

With no California case to serve as a guide, the application of the Uniform Premarital Agreement Act can be gleaned from a case arising in Texas, where virtually identical language was enacted into law. In *Chiles* v. *Chiles*,[44] the Texas Court of Appeal applied the factors established in the act to determine the validity of a premarital agreement. The parties were married in 1985 and signed a premarital agreement approximately two weeks before the ceremony. The premarital agreement stated that it was the parties' intent that during their marriage they would not own any community property. The parties separated almost two years later, and the trial court found that the premarital agreement was invalid because the agreement was unfair.

The court of appeal, however, modified the trial court's decision because the issue was not the unfairness of the agreement, but the factors set forth in the Uniform Premarital Agreement Act, i.e., the voluntary execution of the agreement, its unconscionability, and adequate disclosure. The court of appeal found that the premarital agreement was valid because there was no evidence that the agreement was involuntarily executed. The party seeking to invalidate the agreement was represented by counsel in extensive negotiations and drafts of the agreement. The agreement was also valid because there was no evidence that it was unconscionable or that there was inadequate disclosure.[45]

Similarly, in *DeLorean* v. *DeLorean*,[46] a New Jersey case applying California law and the Uniform Premarital Agreement Act, the court found the agreement valid based upon its analysis of California law and what was considered adequate disclosure, despite the bargaining disparities between the parties. The groom, 25 years older than the bride, was a senior executive of General Motors; the bride was in the modeling and entertainment industry. A few hours before the parties' wedding in California, the groom requested the bride to sign a premarital agreement that provided that there would be no community property. The agreement also provided that it would be construed under the laws of California. The only disclosure involved was the information stated in the agreement that "Husband is the owner of substantial real and personal property and he has reasonable prospects of earning large sums of monies; these facts have been fully disclosed to Wife."[47]

The bride was represented only by the groom's friend, an attorney, who advised her not to sign the agreement. The bride signed the agreement anyway, and the parties remained married for 13 years. The court held that the agreement was valid because the agreement was voluntarily signed, was not unconscionable, and adequately disclosed assets and liabilities. The court reasoned that the "general idea of the character and extent of the financial assets and income of the other" spouse "is sufficient in California."[48] The New Jersey court thus found, applying the California Uniform Premarital Agreement Act, that only minimal disclosure is required.[49]

In *Marriage of Leathers*[50] the bride quit her job and moved with her children into her perspective husband's home in anticipation of marriage. The parties had discussed the possibility of a premarital agreement about two years before marriage, but the husband did not present the agreement until the eve of the

wedding. The husband's attorney advised the wife that the intent of the agreement was to protect the property the husband was bringing to the marriage, that the agreement would have no legal effect if the parties remained married for more than a few years, and that the agreement did not apply to property acquired after marriage.

The Oregon Supreme Court noted that the parties never discussed the specifics of the agreement and that the husband, who sought and approved the agreement, never advised his prospective wife of the consequences of her rights in absence of the agreement.

> As a practical matter, [the wife] had no time to consult independent counsel. She had committed her family's future to the marriage by quitting her job and moving into a home acquired by [the husband] in contemplation of the marriage. If the marriage did not take place, her financial condition and the children's future would be precarious. She had been involved with husband for several years and, it was reasonable to assume, was anxious that there should be no impediment to the marriage.[51]

The court stated, "This premarital agreement probably would be an adhesion contract in the business arena under analogous circumstances; it is lopsided, between parties of greatly different bargaining power, and presented for execution down the barrel of a premarital shotgun. Surely the fiduciary relationships of the parties in this case demand a higher standard of conduct than a business relationship and than that approved by the lower courts here."[52]

Prospective spouses seeking to minimize future potential disagreements by ordering their personal and property relationships in prenuptial agreements should not later face questions of enforceability clouded by conflicting doctrines of law. The imprecision in the law does little for the sanctity of contracts and the confidence of those who rely upon prenuptial agreements in entering into the marriage contract itself. The California legislature should act to resolve these inconsistences. In the absence of legislative action, attorneys, by recognizing the potential problems of enforceability, can counsel their clients in drafting agreements (see "A Model Contract," page 35) that avoid the pitfalls of current California law. ■

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[1] In re Marriage of Dawley, 17 Cal. 3d 342 (1976).

[2] *Id.*

[3] *Id.* at 357.

[4] In re Marriage of Higgason, 10 Cal. 3d 476 (1973).

[5] Dawley, 17 Cal. 3d at 351-52.

[6] FAM. CODE §§3, 1600, 1601, 1610-1617 (formerly, CIV. CODE §§5300-5317), operative Jan. 1, 1986, and applicable to agreements executed on or after that date.

[7] *See*, FAM. CODE §1615(a)(2)(A) to (C).

[8] In re Marriage of Iverson, 11 Cal. App. 4th 1495 (1992).

[9] *See Unconsionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L. J. 459-554 (1995).

[10] *See* Dando B. Cellini & Barry L. Wertz, Comment, *Unconscionable Contract Provisions: A History of Unenforceability from Roman Law to the UCC*, 42 TUL. L. REV. 193 (1967); 46 HASTINGS L. J. 459, n. 14, 32.

[11] A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473 (1982). *But see* Spinello v. Amblin Entertainment, 29 Cal. App. 4th 1390, 1392 (1994) (court holds that "the rules of procedural and substantive unconscionability relied on by the trial court have nothing to do with the enforcement of an agreement to arbitrate.")

[12] Two California appellate cases within the past decade have held foreign, religion-based prenuptial agreements void and unenforceable as being against public policy. *See* In re Marriage of Noghrey, 169 Cal. App. 3d 326 (1985); In re Marriage Dajani, 204 Cal. App. 3d 1387 (1988).

[13] CIV. CODE §1670.5(a) states: "(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 remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause to avoid any unconscionable result."

[14] Consolidated World Investments, Inc. v. Lido Preferred Ltd., 9 Cal. App. 4th 373 (1992); Alling v. Universal Mfg. Corp., 5 Cal. App. 4th 1412 (1992).

[15] Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 819 (1981). Graham v. Scissor-Tail, Inc. is the preeminent case applying the unconscionability doctrine in California after the adoption of COM. CODE §2-302 in 1979. 46 HASTINGS L. J., *supra* note 9, at 502.

[16] Graham, 28 Cal. 3d at 820. A contract of adhesion is 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....Such an agreement does not issue from that freedom in bargaining and equality of bargaining which are theoretical parents of the American law of contracts. General contract law posits inequality of bargaining power as the focal point of the doctrine of unconscionability. The concept of adhesion contracts has grown rapidly in recent years as a basis for modifying or nullifying harsh terms which defeat the reasonable expectations of the parties." Dean Witter Reynolds, Inc. v. Superior Court, 211 Cal. App. 3d 758 (1989).

[17] A & M Produce Co., 135 Cal. App. 3d at 486.

[18] Dean Witter Reynolds, Inc. v. Superior Court, 211 Cal. App. 3d 758 (1989).

[19] A & M Produce Co., 135 Cal. App. 3d at 486.

[20] *See* 46 HASTINGS L. J., *supra* note 9, at 472.

[21] Perdue v. Crocker National Bank, 38 Cal. 3d 913, 925, n.9 (1985).

[22] A & M Produce Co., 135 Cal. App. 3d at 486 (*quoting* Williams v. Walker-Thomas Furniture Co., 350 F. 2d 445, 449 (1965)).

[23] A & M Produce Co., 135 Cal. App. 3d at 486.

[24] *Id.* at 487, n.12; United States Roofing, Inc. v. Credit Alliance Corp., 228 Cal. App. 3d 1431 (1991).

[25] Continuing Education of the Bar, Comment, *Court Applies Dual Unconscionability Analysis to Defeat Provision Requiring Arbitration Under National Arbitration Forum Rules*, CAL. BUS. LAW REP., July 1993, at 23.

[26] Patterson v. ITT Consumer Fin. Corp., 14 Cal. App. 4th 1659 (1993).

[27] Ellis v. McKinnon Broadcasting Co., 18 Cal. App. 4th 1796 (1993).

[28] California Grocers Association v. Bank of America, Cal. App. 4th 205 (1994).

[29] Buchwald v. Paramount Pictures Corp., L.A. Sup. Ct. Case No. C706083. The trial court issued three Statements of Decision: First Phase on Jan. 8, 1990, which decided that the movie was based on Buchwald's treatment; Second Phase on Dec. 21, 1990, which decided that certain terms in the net profit participation agreement were unconscionable; and Third Phase on Mar. 16, 1992, which decided the amount of damages due to Buchwald and Bernheim under the reformed contract. All the decisions are reprinted as appendices in PIERCE O'DONNELL & DENNIS MCDOUGAL, FATAL SUBTRACTION: THE INSIDE STORY OF BUCHWALD V. PARAMOUNT PICTURES (1992). *See also* 46 HASTINGS L. J., *supra* note 9, at 524.

Art Buchwald and Paramount Pictures recently settled their long-pending case; the court of appeal issued a brief order on Aug. 23, 1995, in which it vacated the judgment that had been entered against Paramount and remanded the action to the trial court with directions to "set aside the [j]udgment and dismiss the action with prejudice pursuant to the parties' stipulation and settlement."

[30] Patterson, 14 Cal. App. 4th at 1169.

[31] Ellis, 18 Cal. App. 4th at 1803.

[32] *Id.* at 1805 (*citing* Carboni v. Arrowspide, 2 Cal. App. 4th 76, 86 (1991)).

[33] California Grocers Association, 22 Cal. App. 4th at 214-215. "The traditional standard of unconscionability, as set forth in Osgood v. Franklin (1816 N.Y.Ch.) I Johns. Ch.1, 21, is that 'the inequality amounting to fraud must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense.'"

[34] Continuing Education of the Bar, *Unjustified Restraints on Unconscionability Doctrine*, CAL. BUS. LAW REP., June 1994, at 236.

[35] ENT. L. REP., Sept. 1994, at 3 (*summarizing and reprinting* the trial court decision in Batfilm Productions v. Warner Brothers, Inc., L.A. Sup. Ct. Case Nos. BC051653 & BC051654 (Mar. 14, 1994); *See* 46 HASTINGS L. J., *supra* note 9, at 535.

[36] FAM. CODE §1503. In re Marriage of Dajani, 204 Cal. App. 3d at n.4.

[37] CIV. CODE §1550; Wenke & O'Hare, *Antenuptial Agreements: Litigating Their Validity Upon Dissolution of Marriage*, 6 ORANGE CNTY. B. J. 216, 219 (1979).

[38] CIV. CODE §1575.

[39] *See* In re Marriage of Saslow, 40 Cal. 3d 848 (1985); In re Marriage of Dawley, 17 Cal. 3d 342. *See generally* O'Neil v. Spillane, 45 Cal. App. 3d 147 (1975) for a discussion of undue influence.

[40] In re Marriage of Dawley, 17 Cal. 3d at 355.

[41] *See* CIV. CODE §1575; Dawley, 17 Cal. 3d at 355; Estate of Sayegh, 118 Cal. App. 2d 327 (1953); Fernandez v. Fernandez, 194 Cal. 2d 782 (1961).

[42] FAM. CODE §1615(a)(2)(A) to (C).

[43] Estate of Gagnier, 21 Cal. App. 4th 124 (1993).

[44] Chiles v. Chiles, 779 S.W. 2d 127, 129 (1989); TEX. FAM. CODE §546.

[45] Chiles, 779 S.W. 2d at 129.

[46] DeLorean v. DeLorean, 511 A. 2d 1257 (1986).

[47] *Id.* at 1260.

[48] *Id.* at 1262.

[49] *Id.* at 1264. Although this case summarizes California law and provides that minimal disclosure is adequate, better practice would be to disclose all assets and liabilities as an exhibit attached to the premarital agreement.

[50] Marriage of Leathers, 309 Ore. 625, 789 P. 2d 263 (1990).

[51] *Id.* at 631.

[52] *Id.* at 632.