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USE OF NON-CONFIDENTIAL RELATIONSHIP UNDUE INFLUENCE IN CONTRACT RECISION

I. Introduction

Apparently in agreement with Cicero that "No one can give you better advice than yourself," courts have long given relief to one who has entered into an agreement as the result of undue influence. 2 Recision of the contract is the normal form of relief, which is granted on the premise that one who has been unduly influenced has not given valid assent to the bargain. 3 The question of when another's actions and words cease to be simple advice and become undue influence has long puzzled both courts and legal scholars. 4 The common law has sought to give solace to the victim of undue influence without allowing a person to seek redress under the theory of undue influence merely because he has been persuaded to enter into a bad bargain. 5 Historically this control has come in the form of a requirement that the parties to the transaction stand in some fiduciary or confidential relationship to one another; the abuse of this relationship, rather than its existence, was said to lead to undue influence. 6 Some leniency was shown by not requiring that the benefit of the bargain run directly to the person alleged to have done the influencing and finding undue influence where the person pleading it had himself initiated the transaction. 7 Modern courts have lessened, and in some cases eliminated, the need for confidential relationship; it is this phenomenon that is the subject of this note. After examining the traditional use of undue influence in contract recision, the note will discuss recent California decisions as examples of how a state has expanded the use of undue influence beyond confidential relationship. Finally, the California holdings will be examined in the light of some of the more important trends in general contract law.

II. Traditional Use of Undue Influence in Contract Recision

Inherent in a bargain contract is the ability to make a free choice. When one's ability to freely choose is overborne by another's undue influence, the agreement entered is void. 8 Perhaps out of fear that the doctrine would be abused or evaded, courts have been reluctant to state an absolute rule as to when this over-

1 Cicero, Select Letters 25 (2d ed. A. Watson, 1874).
2 See, e.g., Meldrum v. Meldrum, 15 Colo. 478, 24 P. 1083 (1890).
6 See, e.g., Hedrick v. Hedrick, 350 Mo. 716, 168 S.W.2d 69 (1943).
7 5 S. Williston, Williston on Contracts § 1625 (2d Rev. Ed. 1937) [hereinafter cited as Williston].
8 See K. York & J. Bauman, Remedies 906 (1973) [hereinafter cited as York].
bearing of the will occurs. Although the most frequent application has been in the area of wills, there is a long line of cases that have rescinded contracts for undue influence. This use has generally been restricted to such confidential relationship areas as: parent-child, husband-wife, trustee-cestue que trust, guardian-ward, attorney-client, administrator-legatee, physician-patient, pastor-parishioner, and fiance-fiancee. Courts circumvented an absolute rule that confidential relationship was a prerequisite to the finding of undue influence by stating the relationship only gave rise to the presumption that there had been undue influence. By making the confidential relationship an element of the burden of proof, the judges were able to control the doctrine and keep parties from pleading it simply when they had made a bad bargain. As W.H. Page explained this requirement in 1920:

If the parties to a transaction do not occupy relations of trust and confidence, there is no presumption of undue influence; and the burden of proof rests upon the party who claims existence of undue influence as a fact. The party . . . must establish its existence by clear and convincing evidence.

Page then proceeded to list twelve examples of parties not being able to meet this burden of proof. He did not cite one case in which the courts had found undue influence in the absence of a confidential relationship. Williston also failed to find such a case; though he too stated that confidential relationship was not a prerequisite. Williston summed up undue influence with the following language that he incorporated into Restatement of Contracts § 497:

Where one party is under the domination of another, or by virtue of the relation between them is justified in assuming that the other party will not act in a manner inconsistent with his welfare, a transaction induced by unfair persuasion of the latter, is induced by undue influence, and is voidable.

Despite this broad definition, courts continued to place the burden of proving

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9 E.g., Shipman v. Furness, 69 Ala. 555 (1881); Verner v. Mosely, 221 Ala. 36, 127 So. 527 (1929); Hendricks v. Porter, 110 N.W.2d 421 (N.D. 1961).
10 For a collection of these cases see 25 Am. Jur.2d Duress and Undue Influence §§ 35-49 (1966).
12 E.g., Hassell v. Hassell, 201 Ala. 190, 77 So. 716 (1917); Shackleford v. Shackleford, 144 Ark. 365, 223 S.W. 561 (1920); Ashton v. Thompson, 32 Minn. 25, 18 N.W. 918 (1884).
13 E.g., Harraway v. Harraway, 136 Ala. 499, 34 So. 836 (1903); Stenger Benev. Ass'n v. Stenger, 54 Neb. 427, 74 N.W. 846 (1898).
14 E.g., Ingram v. Lewis, 37 F.2d 259 (10th Cir. 1930), cert. den. 282 U.S. 842 (1930).
15 E.g., Williams v. Canary, 249 F. 344 (8th Cir. 1918).
16 E.g., White v. Tolliver, 110 Ala. 300, 20 So. 97 (1896).
17 E.g., Mayrand v. Mayrand, 194 Ill. 45, 61 N.E. 1040 (1901).
19 E.g., Ross v. Conway, 92 Cal. 632, 28 P. 785 (1892).
20 E.g., Baber v. Caples, 71 Or. 212, 138 P. 472 (1914).
22 Id.
24 5 WILLISTON § 1625A (2d ed. 1937).
25 RESTATEMENT OF CONTRACTS § 497 (1932).
undue influence on the person seeking rescission where no confidential relationship existed, and plaintiffs continued to be unable to meet this burden.  

To complicate the matter further, judges have always had problems in distinguishing undue influence from the other doctrines that have been used to prove a failure of assent and exercise of free will in contracting. Some courts have characterized undue influence as a species of fraud or constructive fraud; others have viewed it as a form of duress. Duress involves the threat of an illegal or unlawful act; undue influence may occur though all acts threatened or contemplated are perfectly lawful. Both fraud and constructive fraud involve misrepresentation of fact; undue influence may occur even when the dominant party clearly sets out all facts. Part four of this note will examine how modern courts have frequently confused undue influence with inadequacy of consideration and unconscionability.

When states codified their common law rules on contracts, the impression that undue influence could be found where there was no confidential relationship continued. The most common statute, based on the old Field Code, states:

Undue influence consists: 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 an 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 of another's necessities or distress.

While the first definition covered the confidential relationship case in which courts had been finding undue influence, the second and third only codified the dicta to the effect that there was no requirement of confidential relationship. Most case interpretation of such statutes simply carried forth the traditional thinking on the subject and the last two definitions were glossed over by the courts. Some attempts to apply the latter criteria were made; South Dakota, in the case of Redford v. Wheller, went as far as dicta could without actually finding undue influence. Yet, it was California that made the clear break in 1966 by literally interpreting "unfair advantage of another's necessities or distress" 94 years after those words were enacted into law.

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27 See, e.g., Harris v. Harris, 154 Ga. 271, 114 S.E. 333 (1922).
28 E.g., Noel v. Noel, 229 Ala. 20, 155 So. 362 (1934).
29 E.g., National Bank v. Wheeleock, 52 Ohio St. 534, 40 N.E. 636 (1895).
30 See Restatement of Contracts § 497 (1932).
31 In Re Shell's Estate, 28 Colo. 167, 63 P. 413 (1900); Terry v. Buffington, 11 Ga. 337 (1852); Ginter v. Ginter, 79 Kan. 721, 101 P. 634 (1909).
32 York, supra note 8. For an account of the relationship of the South Dakota provision to the original Field Code, see Redford v. Weller, 27 S.D. 394, 131 N.W. 296 (1911).
34 E.g., Davies v. Toms, 75 S.D. 273, 63 N.W.2d 406 (1954).
36 The California statute, cited in note 33, was originally enacted in 1872; the case referred to is Odorizzi v. Bloomfield School District, 246 Cal. App.2d 123, 54 Cal. Rptr. 533 (1966). This case is discussed at length in part III of this Note.
III. California Makes a Clean Break With Confidential Relationship

In 1966 the California District Court of Appeals decided the case of Odorizzi v. Bloomfield School District and clearly broke with the quasi-requirement of confidential relationship that had long haunted courts. Before examining the Odorizzi case, it is helpful to review the earlier cases which allowed the Odorizzi court to disguise the uniqueness of its decision.

In 1872 the California legislature enacted a statute similar to the undue influence provision of the Field Code. In 1880 the California Supreme Court in Moore v. Moore disallowed the conveyance of property made by a widow whose husband had just been shot to death to members of her husband's family on the grounds of undue influence. Though the court did not take up the discussion of confidential relationship, it did give recognition to the family ties. Particular emphasis was placed upon the statute, but the language used is ambiguous and it is not clear on what grounds the court reached its result. Later judges were not so lenient. In 1921 the court struck a note of caution by observing that contentions of undue influence would be closely scrutinized and infrequently allowed in the case of claims arising out of business dealings. Weger v. Rocha, a 1934 court of appeals case, allowed recision of a release granted in the hospital to an insurance agent by a woman emotionally distraught over her accident. Applying the undue influence statute in conjunction with arguments related to unconscionability and fraud, the court again used ambiguous language and seemed reluctant to find that undue influence alone would have been sufficient grounds for the recision but preferred to discuss it only in passing. The matter of confidential relationship was simply ignored. Buchmayer v. Buchmayer presented the unusual factual situation of a 74-year-old man petitioning the court to rescind a land conveyance to his 45-year-old wife. After noting that the man was senile, the court found that this was not the type of "weakness of mind" contemplated by the statute. The court also found that the threats of the wife to sue her husband under the Mann Act, the constant nagging she admitted, and the actual physical abuse to which she subjected him were not enough to "constitute taking advantage of one's necessities and distress" but held that they were enough to destroy the confidential nature of the marital relationship and thus destroy the presumption of undue influence. The husband lost on all

38 CAL. CIV. CODE § 1575 (West 1954).
39 81 Cal. 195, 22 P. 589 (1889).
40 Id. at 197-98, 22 P. at 590.
41 Id.
42 Estate of Anderson, 185 Cal. 700, 198 P. 407 (1921).
44 Id. at 114-13, 32 P.2d at 420.
46 Id. at 472, 157 P.2d at 14.
47 18 U.S.C. §§ 2421-24 (1964). The husband and wife, just prior to their marriage, had traveled together from California to Florida. Testimony revealed that both stayed in separate rooms during the entire trip. Nevertheless, one witness testified that the wife had threatened the husband that if he did not "sign over the property to her she would put him in the pen for taking her out of the state." Buchmayer v. Buchmayer, 68 Cal. App.2d 462, 468, 157 P.2d 9, 12 (1945).
three statutory definitions as the court stumbled over itself in contradictions. Citing equivocal Buchmayer dicta to the effect that confidential relationship was not a prerequisite to a finding of undue influence, the court of appeals in the 1953 case of Wells Fargo Bank v. Brady found that a deed executed by an 81-year-old widow to a woman who had lived with her for a number of years was invalid because of undue influence. Noting that the old woman feared that she could no longer take care of her medical and daily needs, the court applied part three of § 1575 and found that another's "necessities or distress" had been taken advantage of. The court pointed out that although there was not what it characterized a "confidential relationship," there was a relationship of "trust and confidence" between the two women. The break was close, but not clear.

Unlike the cases just discussed, Odorizzi v. Bloomfield School District did not involve even a hint of confidential relationship. Odorizzi was an elementary school teacher who petitioned the court to allow rescission of his resignation. The resignation was obtained by the principal of his school and the superintendent of the district who visited Odorizzi in his apartment immediately after he had gone through the process of arrest, questioning by the police, and booking in connection with a charge of homosexual activity that was later dropped. Though Odorizzi had not slept for over 40 hours, the men would not leave until they obtained his resignation. They employed various other techniques which the court characterized as high pressure—threats of publicizing the charge and refusal to wait for an attorney. The court stated in unequivocal terms that it did not view this as a case of confidential relationship: "The absence of a confidential relationship between employer and employee is especially apparent where, as here, the parties were negotiating to bring about a termination of their relationship."

Odorizzi's first four arguments were quickly rejected: (1) duress was not allowed since the school officials had performed no unlawful acts (they had only threatened to bring dismissal proceedings); (2) fraud was denied as a basis for relief since there had been no factual misrepresentation; (3) constructive fraud was rejected since the court found no confidential relationship; and (4) mistake also held no merits since the material facts to the transaction were clearly known by both parties. All of the cases discussed above were cited, and from their dicta and partial holdings a new doctrine was built. The court did not shy away from defining undue influence; rather it clearly stated: "In essence undue influence involves the use of excessive pressure to persuade one vulnerable to such pressure, pressure applied by a dominant subject to a servient object."

Undue influence was characterized as involving two essential elements: (1) a weakened capacity of the object to make a free contract, and (2) the taking advantage of this weakened capacity by the dominant subject's application of excessive
strength. There are three types of weakness that could comprise the first element: (1) total incapacity to contract, (2) partial incapacity, but still not enough to make contracting impossible, or (3) as was the case here, a weakness which affords sufficient reason to rescind a contract for undue influence. Though it was unable to give a more concrete definition of this first element, the court noted that however it is defined, this "weakness of spirit" was the state in which the officials found Odorizzi when they arrived at his apartment. Discussing the second aspect, the court referred directly to § 1575 of the California Civil Code and noted that this is a case of "unfair advantage" being taken of another's "necessity or distress." This unfair advantage was obtained by overpersuasion, a rather amorphous concept that the court refused to define, but characterized as involving the following elements:

(1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on untoward consequences of delay, (5) the use of multiple persuaders by the dominant side against a single servient party, (6) absence of third-party advisers to the servient party, (7) statements that there is no time to consult financial advisers or attorneys.

Continuing its metaphysical-pragmatic approach, the court noted that the "difference between legitimate persuasion and excessive pressure, like the difference between seduction and rape, rests to a considerable extent in the manner in which the parties go about their business." Clearly if the officials had confronted Odorizzi during normal business hours and given him time to think, consult an attorney, and reason out his situation, there would have been no grounds for recision; but since they did not and since the elements of overpersuasion were so clearly present, Odorizzi's reinstatement was ordered. This case did contain an important note of caution with respect to the application of its holdings to business dealings: "Undue influence cannot be used as a pretext to avoid bad bargains or escape from bargains which refuse to come up to expectations."

A classic post-Oodorizzi example of the business transaction limitation is the 1969 case of Sabella v. Litchfield. Here a restaurant owner sought to rescind a labor agreement obtained after the union threatened to picket a very important banquet. Though the court noted that the employer must have been under considerable economic and emotional pressure to sign the contract before the banquet and discussed Odorizzi's criterion for undue influence, it easily distinguished this case.

Here, there had been long standing differences between the employer and the union which culminated with a demand, accompanied by threat of the

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57 Id. at 131-32, 54 Cal. Rptr. at 540.
58 Id. at 131, 54 Cal. Rptr. at 540.
59 Id. at 130, 54 Cal. Rptr. at 539.
60 Id. at 133, 54 Cal. Rptr. at 541.
61 Id. at 134, 54 Cal. Rptr. at 542.
62 Id. at 135, 54 Cal. Rptr. at 543.
63 Id. at 132, 54 Cal. Rptr. at 541.
union's recognized right to picket, that the employer sign a contract of the same sort as that used generally in the country.\textsuperscript{65}

\textit{Sabella} reaffirmed \textit{Odorizzi}'s holding that “we must abide the consequences of the risks inherent in managing our own affairs.”\textsuperscript{66} Though the restaurant owner was experiencing “necessities and distress,” the fact that they were economic necessities and distresses kept him from taking advantage of the expanded definition of undue influence.

An area that has been subject to considerable interpretation since \textit{Odorizzi} is the first element of undue influence discussed by the court: “lessened capacity of the object to make a free contract.”\textsuperscript{67} Like the \textit{Odorizzi} court, later courts have not been able to give a precise definition of this heightened susceptibility to over-persuasion but have made the finding on an ad hoc basis. In \textit{Leithliter v. Board of Trustees},\textsuperscript{68} a psychologist employed by the school system resigned after being assigned a position as a classroom teacher. The court refused to rescind, noting that the emotional upset caused by this action was not the type of weakened capacity that \textit{Odorizzi} was speaking of.\textsuperscript{69} On the other hand, in \textit{Smalley v. Baker}\textsuperscript{70} it was held that although a manic depressive did have the capacity to contract, he was within the type of “still lesser weakness” discussed in \textit{Odorizzi} and could easily be the target of undue influence.

Four years after \textit{Odorizzi}, a California district court of appeals again reaffirmed its holding, and made a few new inroads to expand the use of undue influence. The case was \textit{Keithley v. Civil Service Board},\textsuperscript{71} in which a policeman was persuaded to resign after charges of rape were brought though promptly dropped. The officer involved, Liquori, was taken to the central police office, questioned with respect to the charge, allowed to go home, and then advised by his superior the next day that the charges had been dropped. A deputy chief of police, Brown, called Liquori into his office and asked Liquori what he intended to do. Liquori testified that he feared his wife would hear of the charges, and thus their marriage would be ruined. Liquori was read the police manual and asked if he had not acted against norms set out therein for a police officer. He asked Brown what he should do, but Brown refused to give any advice. Liquori asked for “a few hours to think it over,” but Brown rejected this request. Liquori then tendered his resignation\textsuperscript{72} and later brought suit for rescission of the resignation contract.

After rejecting the duress argument, the court cited the statute on undue influence and enunciated this test for proof of undue influence: “direct evidence of undue influence is rarely obtainable and, thus, the court is normally relegated to determination by inference from the totality of facts and circumstances.”\textsuperscript{73}

\begin{footnotes}
\item[65] \textit{Id}. at 198, 78 Cal. Rptr. at 847.
\item[67] \textit{Id}. at 131, 54 Cal. Rptr. at 540.
\item[69] \textit{Id}. at 1100, 91 Cal. Rptr. at 215.
\item[70] \textit{Id}. at 1100, 91 Cal. Rptr. at 215.
\item[71] \textit{Id}. at 1100, 91 Cal. Rptr. at 215.
\item[72] \textit{Id}. at 447, 89 Cal. Rptr. at 811.
\item[73] \textit{Id}. at 451, 89 Cal. Rptr. at 814.
\end{footnotes}
The court discussed *Odorizzi* at length, and then added the following language to the growing definition of the first element of undue influence: “undue susceptibility to such overpersuasive influence may be the product of physical or emotional exhaustion or anguish which results in one's inability to act with unencumbered volition.”

Taking the seven elements enunciated in *Odorizzi* as an established principle of law, the court found that five were present in this case: (1) discussion at unusual or inappropriate time, (2) transaction consummated at unusual place, (3) insistent demand that the business be completed at once, (4) multiple persuaders, and (5) absence of third-party advisors.

The court concluded by placing the following very weak burden on one seeking to establish undue influence: “[T]hese facts reasonably lend themselves to the inference that excessive pressure was used to persuade Liquori, who was vulnerable to such pressure by Brown, a dominant person, so as to overcome Liquori’s will without convincing his judgement.” Since this easy burden was satisfied here, Liquori’s resignation was rescinded.

The *Keithley* case not only reaffirmed *Odorizzi’s* nonconfidential relationship holding, but also lessened the test for determining when undue influence was exerted outside of a confidential relationship. In *Odorizzi* the court found all seven elements of overpersuasion to be present. *Keithley* stands for the proposition that five, or perhaps even fewer, can be enough. *Keithley* did provide a clearer definition for the susceptibility element; but “inability to act with unencumbered volition” may very well prove to be a springboard for more frequent findings of undue influence. *Keithley* did not restate *Odorizzi’s* caution about having to abide by the consequences of a bad bargain, but required only “that the facts reasonably lend themselves to the inference” that there was undue influence.

IV. The California Holdings in Perspective

The criteria for finding undue influence enunciated in *Odorizzi*, and reaffirmed in *Keithley* present several problems when viewed in the general tradition of bargain contract. These problems arise primarily out of the two-pronged test for finding undue influence. The first element, undue susceptibility, is judicially unmanageable because of vagueness in the language used by the court in defining it. The second element, the taking of unfair advantage by overpersuasion, presents two problems: it is easily confused with other legal concepts such as unconscionability; it also lends itself to the recision of contracts on the basis of undue influence in areas that have traditionally been free from such restraints. A final
problem, unrelated to the two tests, is raised by the disclosure standards set forth in Odorizzi.

The capacity of one to make a valid contract has never been an easy question for courts to answer;\textsuperscript{88} undue susceptibility, the first element in the Odorizzi formula, can only serve to heighten the problem. Clearly this element does not require a finding of total incapacity to contract. However, the court could find no stronger language to define this first element than to say it is "a still lesser weakness which provides sufficient grounds to rescind a contract for undue influence."\textsuperscript{89} This is question begging at its worst. The court places an impossible burden on the trial judge\textsuperscript{85} by requiring him to decide first if circumstances warrant rescission of the contract in order to establish that the first element needed to rescind is present.

The potential ramifications of the undue susceptibility test are mild when compared to those of the second element of undue influence—the taking of unfair advantage by overpersuasion. Words such as unfair have always led to confusion. The doctrine of unconscionability exemplifies this problem. A bargain is unconscionable if it "shocks the conscience of the court."\textsuperscript{86} Opinions seldom explain, however, what activity qualifies as "shocking." Judges normally consider relative relationships of the bargaining parties, adequacy of consideration, and assent to the bargain but fail to indicate which of these factors or combination of factors is sufficient to constitute unconscionability.\textsuperscript{87} This problem is further demonstrated by the approach of the Maine Supreme Judicial Court in Bither v. Packard.\textsuperscript{88} In that case the defendant uncle coerced his plaintiff nephew by threatening foreclosure of mortgages to make him a business partner. The court refused to point to one doctrine as a basis for the rescission granted; rather it chose to utilize a conglomerate of equitable doctrines, none of which alone could justify relief, as support for its holding. The court stated:

There may be such unconscionableness or inadequacy in a bargain as to demonstrate some gross imposition or some undue influence; and in such cases courts of equity ought to interfere, upon the satisfactory ground of fraud. But then such unconscionableness or inadequacy should be made out as would... shock the conscience and amount in itself to conclusive and decisive evidence of fraud.\textsuperscript{89}

The unfair advantage test has potentially the same defect. Courts may cite a group of indicators of unfair advantage with regard to a particular factual situa-

\textsuperscript{88} For a general discussion of capacity to contract see, 2 WILLISTON §§ 222-315 (W. Jaeger ed. 1957).


\textsuperscript{85} "The issue of undue influence should be determined without a jury — again in contrast to duress. There is perhaps a sound reason for this, particularly on such issues as mental weakness, where the nuances of medical psychology should not be entrusted to jury interpretation." YORK, supra note 8, at 907.

\textsuperscript{86} This is the most common test for finding unconscionability. See, e.g., Williams v. Walker-Thomas Furniture Co., 330 F.2d 445 (D.C. Cir. 1965).

\textsuperscript{87} For a general survey of these areas in the context of current law see Cahn, Law in the Consumer Perspective, 112 U. Pa. L. Rev. 1 (1963).

\textsuperscript{88} 115 Me. 306, 98 A. 929 (1916).

\textsuperscript{89} Id. at 314, 98 A. at 933.
tion without pointing out which factors standing alone are adequate to support recission.

A second problem presented by the unfair advantage test is the delineation of standards for its application in business transactions.90 It will be recalled that this unfair advantage is gained by overpersuasion, which is characterized by seven elements.91 A door-to-door salesman who secures a housewife's signature on an installment contract in the kitchen of her home when supper is burning, one child has the flu, and the other is crying for his bottle could be said to have gained unfair advantage because of the "unusual place"92 and "inappropriate time."93 Perhaps it is the prevention of this type of transaction that the draftsmen of the Uniform Consumer Credit Code had in mind when they provided for the recision of contracts made in homes up to three days after the agreement was secured.94 Even transactions outside the consumer area contain some of the other elements. All salesmen "make insistent demands that the business be finished at once."95 Almost all contracts for the sale of fashionable clothing are entered into after someone has pointed out the "untoward consequences of delay."96 A gasoline salesman who brings a company executive along to point out the shortage of fuel could be said to be taking advantage of a station owner's "necessities or distress."97 There would be as many "multiple persuaders"98 present as confronted Odorizzi,

90 The California courts have sought to limit Odorizzi strictly to its facts. In the seven years since Odorizzi, the only direct application has been Keithley v. Civil Service Board, 11 Cal. App.3d 443, 89 Cal. Rptr. 809 (Dist. Ct. App. 1970) discussed in part III of this Note. Other cases referring to, but not directly applying to Odorizzi doctrine include: Twomey v. Mitchem, Jones, and Templeton, Inc., 262 Cal. App.2d 690, 69 Cal. Rptr. 222 (1968); Morrison v. State Board of Education 1 Cal.3d 214, 82 Cal. Rptr. 175, 461 P.2d 375 (1969); Sabella v. Litchfield, 274 Cal. App.2d 195, 78 Cal. Rptr. 845 (1969); Smalley v. Baker, 262 Cal. App.2d 824, 69 Cal. Rptr. 521 (1968); Leithliter v. Board of Trustees, 12 Cal. App.3d 1095, 91 Cal. Rptr. 215 (1970). It is interesting to note that the facts in Keithley were not nearly as compelling as those in Odorizzi. In the Odorizzi case, all seven elements of overpersuasion were present; only five elements were found in Keithley. Officer Liquori was informed of the fact that the charges against him had been dropped; charges against Odorizzi were still pending at the time he resigned. In short, though the deputy chief of police in the Keithley case took many of the precautions recommended in the Odorizzi case (discussed in the text of this Note), the court still found he had unduly influenced Liquori's decision to resign. It is true that the Odorizzi court did sound a note of caution against overapplication of undue influence in business situations, 246 Cal. App.2d 123, 132, 54 Cal. Rptr. 533, 541 (1966), but this idea is not reiterated in Keithley.

91 The seven elements characterizing overpersuasion appear in the Odorizzi case at 246 Cal. App.2d 132, 54 Cal. Rptr. 541.

92 Id.

93 Id.

94 "Under the proposed Uniform Consumer Credit Code, the buyer of goods or services in a home solicitation sale is given the right to cancel the sale 'until midnight of the third business day after the day on which the buyer signs an agreement or offer to purchase,' provided that certain prescribed conditions are met. For example, the solicitation must be made at the 'residence of the buyer,' the buyer's agreement or offer to purchase must be made at the residence and the buyer must give notice of cancellation in a prescribed form. Cancellation is not proper if the buyer requested the goods without delay because of an emergency and the seller made a substantial beginning in good faith. Finally, the seller may retain as a cancellation fee 5 per cent of the cash price but not exceeding the cash down payment." E. Murphy & R. Sprem, Studies in Contract Law, 83-84 (1970), quoting from U. C. C. C. part 5. See also Sher, The "Cooling-Off" Period in Door-to-Door Sales, 13 U. C. L. A. Rev. 717 (1968).


96 Id.

97 Id. at 130, 54 Cal. Rptr. 539.

98 Id. at 133, 54 Cal. Rptr. 541.
and they represent "the dominant side against a single servient party." 99

The final two elements deal with the lack of proper independent advice. 100

This is a more traditional and well-defined area. As Williston notes, "proper independent advice means that the alleged victim had the benefit of a full and private conference with someone who could give competent advice and was disassociated from gain or loss by the transaction." 101

It is still undecided how courts expanding the use of undue influence will construe this element. Clearly there will not have to be a lawyer present in every transaction as in land sales, but how much advice is necessary is another unanswered question.

Finally, without going deeply into the questions of full disclosure and consumer protection, it should be pointed out that expanding undue influence beyond confidential relationships raises significant disclosure problems. The court in Odorizzi noted:

If a day or two after Odorizzi's release on bail, the superintendent of the school district had called him into his office during business hours and directed his attention to those provisions of the Education Code compelling his leave of absence and authorizing his suspension on the filing of written charges, ... had pointed out the alternative of resignation available to him, had informed him he was free to consult counsel or any adviser he wished and to consider the matter overnight and return with his decision the next day, it is extremely unlikely that any complaint about the use of excessive pressure could ever have been made against the school district. 102

If the superintendent needed to do all of the above to make undue influence extremely unlikely, what would he have to do to avoid it altogether? It is unclear how many advantages and disadvantages a businessman must inform his supplier of before he obtains a contract. Certainly one will not require bargaining parties to read each other the latest stock quotations, but the extent to which various facts of which only one party to the bargain has knowledge must be revealed is only alluded to and not settled by Odorizzi.

V. Summary and Conclusion

Though courts were long reluctant to find undue influence where there was no confidential relationship, California clearly broke away in the Odorizzi case. This note has explored some of the possible ramifications of that break. Despite the long-standing tradition in contract law of not allowing one who has made a bad bargain to have it rescinded, courts now possess another powerful doctrine with which to circumvent the strict general rule. How courts will use this weapon, how they will further enlarge, redefine, or restrict it can only be the subject of speculation. The speculation in which this note has engaged was done on the basis

99 Id.
100 The exact language is "(6) absence of third-party advisers to the servient party, (7) statements that there is no time to consult financial advisers or attorneys." Id. at 133, 54 Cal. Rptr. at 541.
of what the author perceives to be two important trends in the law at present: (1) a desire to give consumers and other less powerful parties to a contract equitable treatment within the scope of present law, and (2) a recognition that formal regulation of contracting has never proved effective and certainly does not meet the requirements of our high-speed economy. The manner in which courts balance these two somewhat conflicting principles will determine not only the future use of undue influence but will also affect many other important principles of contract law.

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