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THE JUDICIAL EXPANSION OF AN OLD TOOL TO COMBAT PREDATORY LENDING IN NEW MEXICO

Adriel D. Orozco*

“The language of the [Unfair Practices Act] evinces a legislative recognition that, under certain conditions, the market is truly not free, leaving it for the courts . . . to stop and preclude those who prey on the desperation of others from being rewarded with windfall profits.”¹

Justice Edward Chavez

I. INTRODUCTION

States across the country are struggling to reign in the exploitative practices of predatory lenders.² In 2007, the New Mexico Legislature adopted changes to the Small Loan Act of 1955, which limited the interest rates that small lenders could charge for payday loans.³ Savvy business owners, however, easily curtailed this law by simply providing loans outside of the payday loan definition.⁴ Despite a growing movement across the country and within the state to prevent the high costs of these loans,⁵ the New Mexico Legislature has not capped the interest rates that other small loan lenders can charge their customers.⁶

*State ex rel. King v. B & B Investment Group, Inc.*⁷ (*B & B*) evinces an interest by New Mexico courts to use the judiciary to curtail predatory lending

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1. *State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 34, 329 P. 3d 658.

2. *See, e.g.*, Creola Johnson, *Congress Protected the Troops: Can the New CFPB Protect Civilians from Payday Lending?*, 69 WASH. & LEE L. REV. 649, 654–55 (2012) (explaining generally the hardships faced by consumers and state legislatures’ difficulty in addressing predatory lending). Predatory lending encompasses a host of “onerous lending practices, which are targeted at vulnerable populations and often result in devastating losses [to the borrowers]”; KATHLEEN C. ENGLE & PATRICIA A. MCCOY, A FEDERAL RESERVE SYSTEM COMMUNITY AFFAIRS RESEARCH CONFERENCE 156–57 (2012) (indicating that examples of “predatory” practices or loan terms are: loans that result in no net benefit to the borrower, loan terms designed to earn supranormal profits, loans involving fraud or deceptive practices, loans involving other misleading nondisclosures that are nevertheless legal).

3. *See* Nathalie Martin, *Public Opinion and the Limits of State Law: The Case for a Federal Usury Cap*, 34 N. ILL. U. L. REV. 260, 274 (2014) (discussing the passage of the Payday Loan Reform Act). *See also* N.M. STAT. ANN. §§ 58-15-32 to -39 (2007).

4. Martin, *supra* note 3, at 274–75.

5. *See* Mike Bush, *New Mexico Urged to Limit ‘Payday’ Loan Rates*, ALBUQUERQUE J., Nov. 28, 2014, <http://www.abqjournal.com/502692/news/nm-urged-to-limit-payday-loan-rates.html>.

6. *Id.*

7. *State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, 329 P. 3d 658.

against consumers.⁸ In an effort to limit the excessive interest rates that small lenders charge low-income New Mexicans, the New Mexico Supreme Court held that quadruple-digit interest rates are against the state's public policy and invalidated their use.⁹ This note argues that the *B & B* decision exemplifies an expansion of the unconscionability doctrine because the court dispensed with its traditional case-by-case application and held that, regardless of individual borrower circumstances, certain interest rates are unconscionable as a matter of law.¹⁰ It also argues that the Legislature, through a patchwork of statutes, particularly through the Unfair Practices Act¹¹ that empowers the Attorney General to bring cases of unfair trade practices on behalf of the public,¹² laid the groundwork for courts to use the unconscionability doctrine to police such excessive interest rates. Nevertheless, the New Mexico Supreme Court missed the mark in *B & B* by not providing a strong framework for lower courts to determine whether loans with below-quadruple-digit interest rates are unconscionable.

II. FACTS AND HOLDING

Cash Loans Now, operated by B & B Investment Group, Inc., an Illinois-based company, started to provide payday loans in New Mexico in 2001.¹³ New Mexico, at the time, did not regulate payday loans¹⁴ nor did Illinois.¹⁵ In 2005, the Illinois Legislature passed the Payday Loan Reform Act to cap finance charges on payday loans.¹⁶ Even though New Mexico did not amend its laws until 2007 to include similar provisions,¹⁷ in January 2006, B & B, following the trend of many other payday lenders faced with such regulation, converted its payday loans to

8. In fact, other state courts have pending cases with similar questions faced by the New Mexico Supreme Court in *B & B*. In California, a court certified a class for a class action lawsuit against a consumer lender CashCall, which provided small online loans at high-interest rates of 90% or more, which were three to four times the actual amount borrowed. *See O'Donovan v. CashCall, Inc.*, No. C 08-03174 MEJ, 2009 WL 1833990, at *1 (N.D. Cal. Nov. 15, 2011). In Wisconsin, the Wisconsin Supreme Court is being asked to review whether the absence of a state-wide interest rate cap can be held unconscionable as a matter of law. *See Williams v. Valued Services of Wisconsin, LLC*, No. 2012AP2115, 2013 WL 4016941, at *1 (Wis. Ct. App. Aug. 8) *cert. granted*, 842 N.W.2d 363 (2013); *see also Payday Loan Stores of Wisconsin, Inc. v. Mount*, No. 2010AP2298, 2011 WL 2577365, at *1 (Wis. Ct. App. Jun. 30), *cert. granted*, 804 N.W.2d 82 (2011), *cert. denied*, 804 N.W.2d 717 (2012) (previous case certified to the Wisconsin Supreme Court regarding the unconscionability of excessive interest rates).

9. *B & B*, 2014-NMSC-024, ¶ 52.

10. *Id.*

11. *See* N.M. STAT. ANN. §§ 57-12-1 to -16 (2003).

12. *See infra* note 30 and accompanying text.

13. *B & B*, 2014-NMSC-024, ¶ 4.

14. *Id.*

15. *Id.* ¶ 5; *see* DEPT. OF FINANCIAL AND PROFESSIONAL REGULATION, DIV. OF FINANCIAL INSTITUTIONS, ILLINOIS PAYDAY LOAN REFORM ACT THREE YEAR REPORT 3 (2009), <https://www.idfpr.com/dfi/ccd/3YearPLRARReportDFI.pdf>.

16. ILLINOIS PAYDAY LOAN REFORM ACT THREE YEAR REPORT, *supra* note 15; *see B & B*, 2014 NMSC-024, ¶ 5.

17. Martin, *supra* note 3, at 274.

installment signature loans in both Illinois and in New Mexico.¹⁸ These were small unsecured loans ranging from \$50 to \$300 with a term of 12 months.¹⁹

On December 2, 2008, Oscar Wellito walked into Cash Loans Now in Farmington, New Mexico.²⁰ Wellito lived paycheck to paycheck and needed money to buy gas and feed his children.²¹ He went to Cash Loans Now because its advertisements made the process for obtaining a loan and paying it off “look so easy.”²² With just a signature, he obtained a 12-month signature loan for \$100.²³ The loan called for twenty-six bi-weekly installments of \$40.16, with a final “balloon” payment of \$55.34.²⁴ At the end of the term, Wellito was expected to pay \$999.71 in interest, which represented a 1,147.14% effective annual percentage rate (APR).²⁵ After making four payments, which totaled \$160.64, Wellito had only paid down \$0.02 on the principal amount.²⁶ At that time, he informed Cash Loans Now that he was unable to continue paying the loan and he was told that due to an acceleration-upon-default provision,²⁷ he had to pay the loan off in full or he would have to face collections.²⁸ Wellito then filed a complaint with the Office of the Attorney General’s Consumer Protection Division.²⁹

On June 18, 2009, the New Mexico Attorney General, representing the State of New Mexico under the Unfair Practices Act (UPA),³⁰ filed a complaint against B & B in the First Judicial District Court.³¹ On November 20, 2009, the Attorney General amended its complaint to include American Cash Loans, LLC, another small

18. *B & B*, 2014-NMSC-024, ¶ 5. See Martin, *supra* note 3, at 275–76.

19. *B & B*, 2014-NMSC-024, ¶¶ 3, 5. (Cash Loans Now offered three types of loans: silver, gold and platinum with each carrying an annual interest rate of 1,500 %, 1,300 % and 1,147.14 %, respectively). See Brief in Chief of Appellant at 6, State *ex rel.* King v. B & B Inv. Grp., Inc., 2014-NMSC-024 (No. 34,266).

20. First Amended Complaint for Violations of the New Mexico Unfair Practices Act, for Restitution and Civil Penalties, and for Declaratory, Preliminary and Permanent Injunctive Relief at 4, State *ex rel.* King v. B & B Inv. Grp., No. D-01010-CV-2009-01916 (1st Dist. N.M. Nov. 20, 2009) (hereinafter cited as First Amended Complaint).

21. Decision at 1, 2, State *ex rel.* King v. B & B Inv. Grp., No. D-01010-CV-2009-01916 (1st Dist. N.M. Dec. 03, 2010) (hereinafter District Court Decision).

22. *Id.*

23. *Id.* at 1.

24. First Amended Complaint, *supra* note 20, 4.

25. *Id.*

26. *Id.* at 7.

27. *Id.*

28. *Id.* at 5.

29. *Id.* at 7.

30. The Attorney General is authorized to bring an action in the name of the state under N.M. STAT. ANN. § 57-12-8(A) (1978) if he has “reasonable belief” that a person is “us[ing] any method, act or practice which is declared by the Unfair Practices Act to be unlawful, and that proceedings would be in the public interest.” The Attorney General is also empowered by his statutory authority under N.M. STAT. ANN. §§ 8-5-2(B), (J) (1978).

31. See *generally* Complaint for Violations of the New Mexico Unfair Practices Act, for Restitution and Civil Penalties, and for Declaratory, Preliminary and Permanent Injunctive Relief at 4, State *ex rel.* King v. B & B Inv. Grp., No. D-01010-CV-2009-01916 (1 Dist. N.M. June 18, 2009) (hereinafter cited as Complaint).

loan lender with offices in Farmington, Albuquerque, and Hobbs.³² In its complaint, the State alleged that the signature loans provided by the defendants were unconscionable under the common law and were also statutorily unconscionable under the UPA.³³ First, it alleged that the interest rate of 1,147.14% was “grossly unfair and contrary to New Mexico public policy” and thus substantively unconscionable.³⁴ Further, the State alleged that because the contract was offered on a “take-it-or-leave-it” basis, the defendants relied on their “superior bargaining power” to “impose an oppressive and unconscionable rate of interest” on their borrowers making the contracts procedurally unconscionable.³⁵ Similarly, the State claimed that the loans were “unconscionable trade practices” under the UPA because the defendants took “advantage” of the borrowers to a “grossly unfair degree” and provided a product with a “gross disparity between the value received by a person and the price paid.”³⁶ In particular, the State presented evidence that the defendants misled borrowers about the costs of the loans and in the marketing of their products, aggressively pursued borrowers to renew their debt, and hid costs.³⁷

Since 2006, the defendants had issued 3,822 signature loans.³⁸ The State asked the district court to enter a permanent injunction by preventing B & B from making “any loans that share[d] the same or similar terms” and to require the company to “pay restitution to *all* consumers determined . . . to have been injured by [B & B].”³⁹ Allowing the latter would have placed the defendant’s out of business—a goal the State openly adopted.⁴⁰

At trial, the State presented the testimony of two other individuals who had borrowed from the defendants. First, it presented Henrietta Charley, a medical assistant who struggled financially to provide for her three children.⁴¹ She earned \$10.71 per hour working thirty-two hours per week.⁴² In total, she earned about \$615 every two weeks to pay for her monthly expenses, which exceeded \$1,000.⁴³ Charley said she took out a \$200 signature loan because she needed money for groceries and gas.⁴⁴ Including the finance charges, her total for the one-year loan was \$2,360.04.⁴⁵

The second witness was Rose Atcitty who also faced a tough financial situation. As a Navajo bilingual educator, Atcitty was making only \$800 to \$900 per

32. See First Amended Complaint, *supra* note 20, at 1–4. The complaint alleged that American Cash Loans had the same principle, the same policies and procedures, and offered loan products similar to Cash Loans Now.

33. *Id.* at 7–9.

34. *Id.* at 7–8.

35. *Id.* at 8.

36. *Id.* See N.M. STAT. ANN. §§ 57-12-2(E)(1)-(3) (2009).

37. District Court Decision, *supra* note 21, at 18.

38. Appellee’s Answer Brief at 38, State *ex rel.* King v. B & B Inv. Grp., 2014-NMSC-024 (No. 34,266).

39. *Id.* at 10–12.

40. Brief in Chief of Appellant at 42, State *ex rel.* King v. B & B Inv. Grp., 2014-NMSC-024 (No. 34,266) (“There is nothing remotely inequitable about putting [the] Defendants out of business.”).

41. State *ex rel.* King v. B & B Inv. Grp., 2014-NMSC-024, ¶ 8, 329 P. 3d 658.

42. *Id.*

43. *Id.*

44. District Court Decision, *supra* note 21, at 2.

45. *Id.*

month.⁴⁶ Because of summer recess, she was laid off that July.⁴⁷ In addition to having to care for herself, she also took care of her two children and many grandchildren.⁴⁸ Atcitty had a bad credit history and took out a loan because she needed money and thought that it would improve her credit.⁴⁹

The defendants argued that because their customers knew the loans' contractual terms and not all of them were in such financial distress as the State's witnesses, their loan products or practices were not contrary to New Mexico law or its public policy.⁵⁰ To support this proposition, the defendants presented two other borrowers who were able to pay off their loans.⁵¹ Through expert testimony, they also claimed that because the New Mexico Legislature had not capped the interest rates for installment signature loans, they could legally charge up to a million percent interest rates.⁵² Furthermore, the defendants asserted that even if the borrowers had financial problems, because the loans provided essentials like buying food for their children and gas, or paying for their cellphone, the value received was higher than the amount paid and thus did not present a gross disparity between price and value under the UPA.⁵³

Ultimately, the district court declined to find the high-interest loans substantively unconscionable.⁵⁴ It agreed with the defendants that it could not find the high interest rates unconscionable as a matter of law because it believed that doing so would "deprive a class of consumers a choice" of obtaining such loans and that the legislature was the proper forum to determine when those individuals were "making a poor choice."⁵⁵ Nevertheless, the district court agreed with the State that the defendants had engaged in procedurally unconscionable practices under the common law and Section 57-12-2(E)(1).⁵⁶ The court enjoined these practices in the future.⁵⁷

The State appealed and the defendants cross-appealed to the New Mexico Court of Appeals.⁵⁸ On July 25, 2013, the Court of Appeals certified the question to the New Mexico Supreme Court.⁵⁹ The Supreme Court approved certification and decided the case on June 26, 2014.⁶⁰

46. *Id.* at 3.

47. *Id.*

48. *Id.*

49. *Id.*

50. Appellees' Answer Brief, at 14–16, *State ex rel. King v. B & B Inv. Grp.*, 2014-NMSC-024 (No., 34,266).

51. *Id.* at 14.

52. *State ex rel. King v. B & B Inv. Grp.*, 2014-NMSC-024, ¶ 37, 329 P. 3d 658.

53. *Id.* ¶ 34.

54. *Id.* ¶¶ 37–45.

55. District Court Decision, *supra* note 21, at 13.

56. *Id.* at 20.

57. *B & B*, 2014-NMSC-024, ¶ 28.

58. Certification to Supreme Court at 2, *State ex rel. King v. B & B Inv. Grp.*, 2014-NMSC-024 (No. 34,266).

59. *Id.*

60. *B & B*, 2014-NMSC-024, ¶ 11.

III. PRIOR LAW AND PERSPECTIVE

A. The Unconscionability Doctrine

The unconscionability doctrine has deep roots in the English common law and was developed primarily through the courts of equity.⁶¹ The doctrine was meant to police against contracts 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 on the other.”⁶² As an equitable doctrine, contractual unconscionability developed to “fill the gaps” when litigants were unable to “accommodate [the] technical elements” of traditional contract doctrines such as fraud, duress, and mutual mistake.⁶³ Courts of law, however, seldom used the concept of unconscionability to find a contract unenforceable and would rather “resort[] to imaginative flanking devices to defeat the offending contract.”⁶⁴ This led to “strained interpretations” and “highly unreliable and unpredictable” approaches.⁶⁵

In the early twentieth century, a culmination of movements led to the creation of the Uniform Commercial Code (U.C.C.),⁶⁶ a uniform act meant to harmonize the laws of sales and other transactions among the states.⁶⁷ The U.C.C.’s chief reporter and draftsman, Karl Llewellyn,⁶⁸ was concerned with the increased use of boilerplate commercial contracts and sought to include a version of the unconscionability doctrine to prevent businesses from “*automatically* asserting all conceivable rights in all transactions.”⁶⁹ In 1957, the U.C.C. codified the unconscionability doctrine in Section 2-302.⁷⁰ The official comment stated that “[t]he basic test is whether, in the light of the general commercial background and

61. JOSEPH M. PERILLO, CORBIN ON CONTRACTS, 380 (rev. ed. 1993).

62. Paul Bennett Marrow, *Contractual Unconscionability: Identifying and Understanding Its Potential Elements*, COLUM. U. Feb. 2000, at 18, <http://www.columbia.edu/~yc2271/files/teaching/unconsc.pdf>.

63. *Id.*

64. JOSEPH M. PERILLO, CORBIN ON CONTRACTS, §29.2, 380 (rev. ed. 1993).

65. *Id.* at §29.2, 380-81. See John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 934 (1969).

66. As part of a movement to “simplify, clarify, and modernize the law governing commercial transactions,” Karl Llewellyn aimed to make commercial law more consistent across the country in drafting the Uniform Commercial Code (U.C.C.). See Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 628 (1975) (quoting U.C.C. § 1-102(2) (1962)).

67. See Danzig, *supra* note 66, at 622.

68. Spanogle, Jr., *supra* note 65, at 939 n.28.

69. Spanogle, Jr. *supra* note 65, at 941 (emphasis in original).

70. See Note, *Unconscionability Sales Contracts and the Uniform Commercial Code, Section 2-302*, 45 VA. L. REV. 583, 584-85 n.8 (1959) (citing U.C.C. § 2-302, Comment (May, 1949 draft)).

U.C.C. § 2-302 reads as follows:

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

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

the commercial needs of the particular trade or 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.”⁷¹ Courts were to focus on the “prevention of oppression and unfair surprise and not of the disturbance of allocation of risks because of superior bargaining power.”⁷²

Section 2-302 provided a statutory vehicle to the courts “to police explicitly against the contract clauses which they find to be unconscionable.”⁷³ Some thought that by “[a]llowing the courts to pass *directly* on unconscionability,” Section 2-302 would “permit the development of precedents which lawyers [could] rely upon in determining what might or might not be considered unconscionable.”⁷⁴ Courts have traditionally provided a two-part test for unconscionability by distinguishing the procedural, related to the circumstances surrounding the loan formation, from the substantive, which is principally concerned with the one-sidedness of the contractual terms.⁷⁵ Some courts require that both be present, however in New Mexico, courts only require one or the other.⁷⁶

Because unconscionability was “abstract” in nature, it was best thought to be applied by the courts on a case-by-case basis.⁷⁷ This “traditional” application of the doctrine is exemplified in Section 2-302’s requirements that a hearing be conducted by the court to determine whether unconscionability was present.⁷⁸ It states that “the parties shall be afforded a reasonable opportunity to present evidence” before the court makes a determination on unconscionability.⁷⁹ In fact, legal scholars note that “[e]ach case *must* be judged on its own particular facts.”⁸⁰

Throughout the 1950s and 1960s, almost all of the states adopted Section 2-302, evincing legislative recognition of the need for judicial policing of unconscionable commercial contracts.⁸¹ In 1967, the U.S. Court of Appeals for the

71. Bennett Marrow, *supra* note 62, at 20 (footnote omitted).

72. *Id.*

73. The Comment goes on further:

In the past such policing has 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. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability.

U.C.C. § 2-302, Comment I.

74. *See* Note, *supra* note 70, at 588 (1959) (emphasis in original). However, Section 2-302 has also be highly criticized. Perhaps one of the strongest critics is commercial law professor Arthur Allen Leff who wrote that “[i]f this section [2-302] makes anything clear it is that reading this section alone makes nothing clear about the meaning of ‘unconscionable.’” *See also* Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

75. Leff, *supra* note 74, at 487.

76. *See* Cordova v. World Fin. Corp. of N.M., 2009-NMSC-021, ¶ 24, 208 P.3d 901 (“[T]here is no absolute requirement in our law that both [substantive and procedural unconscionability] must be present to the same degree or that they both be present at all.”)

77. Bennett Marrow, *supra* note 62, at 18.

78. *See* U.C.C. § 2-302(2).

79. *Id.* *See* Spanogle, Jr., *supra* note 65, at 937.

80. *Id.*

81. Forty-nine States ultimately adopted the Uniform Commercial Code with California and North Carolina omitting § 2-302. *See* Martin B. Shulkin, *Unconscionability – The Code, the Court, and the*

District of Columbia used Section 2-302 to support its finding that a consumer contract was unconscionable, despite the statute not having been adopted by the jurisdiction when the contract at issue was made.⁸² Noted as one of the first cases to apply unconscionability in the consumer context, *Williams v. Walker-Thomas Furniture, Co.* exemplified a court's willingness to use its equitable powers to interpret public policy and hold a contract void as unconscionable.⁸³

In *Williams*, Walker-Thomas Furniture Company (Walker-Thomas), a retail furniture store, entered into agreements with two individuals allowing them to pay in installments for furniture.⁸⁴ The terms were provided on a printed form contract and stated that Walker-Thomas would maintain an ownership interest in each item, which it would relinquish once it received full payment.⁸⁵ The terms also provided that the company would maintain a security interest in any furniture purchased at its store, regardless of when it was bought, until any and all installments were finalized.⁸⁶ One of the plaintiffs, Ora Lee Williams, purchased a stereo for \$514.95 and had reduced her balance to \$164 before she defaulted.⁸⁷ Subsequently, Walker-Thomas attempted to repossess not only the stereo, but all of the items Williams had purchased for the past four years.⁸⁸ The trial court questioned Walker-Thomas' "sharp practice and irresponsible business dealings," but found that it could not rule against Walker-Thomas because "[a] review of the legislation in the District of Columbia affecting retail sales and the pertinent decisions of the highest court in this jurisdiction disclose, however, no ground upon which this court can declare the contracts in question contrary to public policy."⁸⁹

On appeal, the Court of Appeals disagreed with the trial court's finding that there was no legislative or judicial framework under which it could refuse to enforce the contract.⁹⁰ Particularly important to the Court of Appeals was that, even though U.C.C.'s Section 2-302 had not been adopted by Congress at the formation of the Williams agreement, its adoption was "persuasive authority" that Congress approved of the courts' ability to find contracts unconscionable.⁹¹ Ultimately, the court noted that Williams lacked a "meaningful choice" because Walker-Thomas had sold her the \$514 stereo set with "full knowledge" that she only received a \$218 monthly stipend used to "feed, clothe, and support both herself and seven children."⁹² In applying the UCC to the consumer contract at issue, the Court of Appeals held that the ability to develop the common law, particularly its use of the unconscionability

Consumer, 9 B.C. L. Rev. 367, 367 n.2 (1968). New Mexico enacted its U.C.C. unconscionability provision, § 55-2-302, under 1961 New Mexico Laws, Ch. 96, § 2-302.

82. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 448 (D.C. Cir. 1965), *reversing* 198 A.2d 914 (D.C. Ct. App. 1964).

83. *See generally* Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor"*, 102 GEO. L.J. 1384, 1387 (2014).

84. *Williams*, 350 F.2d at 447.

85. *Id.*

86. *Id.*

87. *Id.* *See* Fleming, *supra* note 83, at 1395.

88. *Williams*, 350 F.2d at 447.

89. *Id.* at 448.

90. *Id.*

91. *Id.*

92. *Id.*

doctrine.⁹³ Holding that the clause was unconscionable, the majority remanded the case.⁹⁴

The dissent exemplified the tension between allowing the courts to police such contracts and waiting for the legislative body to pass corrective legislation. Judge Danaher noted that he was as “unhappy” as the majority with Walker-Thomas’ practices,⁹⁵ but he believed that the court should wait until Congress considered “corrective legislation to protect such exploitative contracts.”⁹⁶ In his view, the majority had not made an adequate finding that there “had actually been sharp practice” because it seemed that Williams had “known precisely where she stood.”⁹⁷ Because he believed that many aspects of public policy were involved, he noted the “desirability of a cautious approach to any such problem.”⁹⁸ However, the majority did not believe it had to wait as Congress had recently passed Section 2-302, indicating its approval of courts finding unconscionable contracts unenforceable.

B. States’ Regulation of Consumer Marketplace: State Usury Caps, Small Loans Acts, and Unfair Deceptive Acts and Practices Statutes⁹⁹

In the early to mid-20th Century, state legislatures aimed to limit high cost loans with interest rate caps or usury caps. Usury, a statutory creation, is generally defined as “the charging or receiving of an interest rate in excess of the statutory maximum.”¹⁰⁰ In New Mexico, the usury law established a 12% cap on interest rates.¹⁰¹ However, due to “a variety of complex historical, macroeconomic, and cultural reasons, these [caps] increasingly yielded to a new, largely unregulated credit marketplace.”¹⁰² For example, in 1965 every state had a usury limit on

93. *Id.*

94. *Id.* at 448.

95. *Id.* at 450.

96. *Id.*

97. *Id.*

98. *Id.* at 450–51.

99. The federal government also passed a several laws meant to curb predatory lending, however, most were geared toward governing residential mortgages (Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA), 12 U.S.C. § 1735f-7a; Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. §§ 3801-3806 (1994)), insured banks (Federal Deposit Insurance Act, 12 U.S.C. §§ 1811-1835a (1994)), federal credit unions (Federal Credit Union Act, 12 U.S.C. § 1785 (1994)), federal banks (National Bank Act, 12 U.S.C. § 84 (1994)), and other banks associated with the Federal Reserve System (Interstate Banking and Branching Efficiency Act of 1994, 12 U.S.C. §§ 36, 43 (1994)); Truth in Lending Act, 15 U.S.C. §§ 1601-1693r (1994) (adopted in 1968 to standardize the mechanism for communicating the terms of consumer credit agreement) and Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. § 1961 n. 1 (1991) (passed in 1970 to combat organized crime, prevent corrupt operation of businesses and its resultant impact on interstate commerce, and discourage racketeering). See Charles A. Bruch, *Taking the Pay Out of Payday Loans: Putting an End to the Usurious and Unconscionable Interest Rates Charged by Payday Lenders*, 69 U. CIN. L. REV. 1259, 1261–62 (2001).

100. Bruch, *supra* note 99, at 1259.

101. Brief in Chief of Appellant at 28, *State ex rel. King v. B & B Inv. Grp.*, 2014-NMSC-024 (No., 34,266).

102. Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Slight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1111 (2008).

consumer loans and none authorized rates above 300%.¹⁰³ By the late 2000s, seven states completely deregulated interest rates and at least 35 states allowed lenders to charge more than 300% on a typical payday loan.¹⁰⁴

One of the deregulating forces of the consumer loans industry was the enforcement problems of the usury caps in the early 1920s.¹⁰⁵ High cost lenders, known commonly as loan sharks, found ways to evade the laws and charged high prices for loans that “frequently turned into crippling long-term debt.”¹⁰⁶ As a means to incentivize lenders to become regulated, a reformer named Arthur Ham argued that “the best course for reform would be to raise the old traditional usury limits to a point where more mainstream financial institutions could profitably lend small amounts to working-class borrowers.”¹⁰⁷ Working with the Russell Sage Foundation, Ham proposed a model law that was adopted by many states throughout the twentieth-century.¹⁰⁸ These statutes authorized lenders to exceed usury rates and charge higher interest rates for consumer loans.¹⁰⁹ New Mexico passed the Small Loan Act, its version of Ham’s act, in 1955.¹¹⁰ Coupled with “aggressive enforcement by courts and state regulators,” mainstream lenders created more competition under higher rate caps and were able to out compete the loan sharks.¹¹¹

Another deregulating force against usury caps was inflation. In the late 1970s, inflation caused interest rates to artificially increase.¹¹² As a result, many states were pressured to eliminate their interest rate caps.¹¹³ In 1981, New Mexico repealed the cap it had on all written contracts.¹¹⁴ The largely and newly deregulated consumer marketplace led to the proliferation of the high cost loans at issue in *B & B*.¹¹⁵

In the mid-1960s and 70s, state legislatures across the country also attempted to curb predatory, deceptive and unscrupulous business practices against consumers beyond the small loans industry by adopting Unfair Deceptive Acts and Practices (“UDAP”) statutes.¹¹⁶ These laws were specifically developed to provide

103. *Id.* at 1138–39.

104. *Id.*

105. *Id.* at 1119.

106. *Id.*

107. *Id.* at 1120.

108. *Id.*

109. Bruch, *supra* note 99, at 1260 n. 37 (“The Uniform Small Loan Laws were drafted between 1916 and 1942 to stem the proliferation of loan sharking in the United States. These statutes authorize lenders to exceed usury rates and charge as much as 36% APR for small consumer loans.”) (internal citation omitted).

110. See N.M. STAT. ANN. §§ 58–15–31 to –39 (1978).

111. Peterson, *supra* note 116, at 1120.

112. *Id.* at 1123.

113. *Id.* at 1138.

114. See 1981 N.M. Laws, ch. 263; see also N.M. Laws ch. 44, § 1.

115. See *infra* Part III.C.

116. Patrick J. Somers, *Unfair and Deceptive Acts and Practices Statutes as a Mechanism for State Attorneys General to Use to Combat Predatory Lending*, COLUMBIA LAW SCHOOL, Aug. 7, 2008, at 13, <http://web.law.columbia.edu/sites/default/files/microsites/career-services/Unfair%20and%20Deceptive%20Acts%20and%20Practices%20Statutes%20as%20a%20Mechanism%20for%20State%20Attorneys.pdf>. UDAP statutes were based on the Uniform Deceptive Trade

“greater consumer protection by ‘preventing consumer deception and abuse in the marketplace.’”¹¹⁷ Before their adoption, “neither consumers nor state agencies had effective tools against fraud and abuse” to protect consumers.¹¹⁸ In fact, most states did not have a state agency with a mandate to root out consumer fraud and abuse.¹¹⁹

New Mexico’s version, the Unfair Practices Act (UPA), was enacted in 1967.¹²⁰ It is mirrored off Section 5 of the Federal Trade Commission Act¹²¹ and is enforced by the Attorney General.¹²² The UPA explicitly prohibits “unconscionable trade practices,”¹²³ defined, in pertinent part, as:

an act or practice in connection with the sale, lease, rental or loan, or . . . the extension of credit or in the collection of debts that to a person’s detriment:

- (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or
- (2) results in a gross disparity between the value received by a person and the price paid.¹²⁴

New Mexico’s UPA statute, unlike other UDAPs, is not limited to goods or services,¹²⁵ but specifically applies to the extension of credit and the collection of

Practices Act developed by the American Bar Association and the Uniform Consumer Sales Practices Act developed by the National Conference on Uniform Laws. *Id.* at 13, n.67.

117. *Id.* at 13 quoting Glenn Kaplan & Chris Barry Smith, *Patching the Holes in the Consumer Product Safety Net: Using State Unfair Practices Laws to Make Handguns and Other Consumer Goods Safer*, 17 YALE J. ON REG. 253, 275–76 (2000) (“In the mid-1960s and mid-1970s UDAP statutes developed as a way to increase the states’ ‘traditional police power arsenal’ and ‘parallel developments in consumer law at the federal level.’”) See CAROLYN L. CARTER, CONSUMER PROTECTION IN THE STATES: A 50-PAGE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 5 (Feb. 2009), https://www.nclc.org/images/pdf/udap/report_50_states.pdf.

118. Carter, *supra* 101, at 5.

119. *Id.*

120. *State v. Gurley*, 1987-NMCA-063, ¶ 8, 737 P.2d 1180 (“The New Mexico Legislature enacted a comprehensive Unfair Practices Act, Sections 57-12-1 to -16, in 1967.”)

121. Paul L. Biderman, *Consumer Class Actions Under the New Mexico Unfair Practices Act*, 4 N.M. L. REV. 49, 50 (1973) (referring to Section 5(a)(1)). The UPA is modeled after Section 5 of the Federal Trade Commission Act, which was enacted in 1938. *Id.* The legislature allows courts to construe the UPA in line with the FTC. See N.M. STAT. ANN. § 57-12-4 (1967) (“It is the intent of the legislature that in construing Section 3 of the Unfair Practices Act the courts to the extent possible will be guided by the interpretations given by the federal trade commission and the federal courts.”)

122. See N.M. STAT. ANN. § 57-12-15 (1967) (“In order to promote the uniform administration of the Unfair Practices Act in New Mexico, the attorney general is to be responsible for its enforcement, but he may in appropriate cases delegate this authority to the district attorneys of the state and when this is done, the district attorneys shall have every power conferred upon the attorney general by the Unfair Practices Act.”); see also N.M. STAT. ANN. § 57-12-8(A) (1978) (“Whenever the attorney general has reasonable belief that any person is using, has used or is about to use any method, act or practice which is declared by the Unfair Practices Act to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the state alleging violations of the Unfair Practices Act.”).

123. *Gurley*, 1987-NMCA-063, ¶ 8. See N.M. STAT. ANN. § 57-12-3 (1978) (prohibiting unconscionable trade practices).

124. N.M. STAT. ANN. § 57-12-2(E) (1978).

125. Somers, *supra* note 100, at 19–20.

debt in New Mexico.¹²⁶ Despite prohibiting “grossly unfair” practices or “gross disparities” in price and value paid, it does not define these terms. Similarly to the unconscionability doctrine,¹²⁷ UDAPs have been criticized for being vague.¹²⁸ However, some believe that this is desirable as these statutes are “meant to be flexible and broad so that the laws can ‘adapt to unfair and deceptive practices.’”¹²⁹

C. The Rise of the Payday Loan

Though there are competing theories on the origins of payday lending,¹³⁰ the modern industry first emerged in the South in the late 1980s and quickly spread the following decade.¹³¹ This growth, among other deregulatory factors, was partially attributed to the elimination of interest rate caps.¹³² By 2002, the industry exploded “with over twenty-five thousand retail outlets nationwide, more than McDonald’s, Burger King, Sears, J.C. Penny, and Target stores combined.”¹³³

Payday loans are short-term loans, usually fourteen to thirty days in duration, for amounts ranging between \$300 to \$500 that are secured by a consumer’s post-dated check or debit authorization.¹³⁴ These loans are usually accompanied by triple-digit interest rates or higher.¹³⁵ For example, in 2007 average annual interest rates for payday loans varied between 390% and 7,300%, with an average of 500%.¹³⁶ Another feature of the payday loan is the “rolling over” of debt. If, after the short term of the loan, the borrower is unable to pay back the loan in its entirety, the lender can either deposit the check or allow the borrower to rollover or extend the loan for a new term.¹³⁷ The importance of the repeat customer has been shown in several studies, indicating that these customers make up from 46% to 91% of payday lenders’ clients.¹³⁸ One report notes that the industry relies on the repeat customer as loans do not become profitable until customers have borrowed four or

126. Press Release, Gary L. King, Statement of Attorney General King Regarding Adoption of Title 12, Chapter 2, Part 12 NMAC (Collection of Time-Barred Debt), (Dec. 15, 2010), <https://www.dbainternational.org/news/StatementfromNMAGregCollectionofTimeBarredDebts.pdf>. See N.M. STAT. ANN. § 57-12-2(D) & (E) (1978).

127. *Id.*

128. Somers, *supra* note 100, at 22. See also Kaplan, *supra* note 67, at 276 (“These UDAP statutes generally do not attempt to define the contours of this broad authority, but instead provide for meanings of unfairness and deception that can adapt to future business practices.”).

129. Somers, *supra* note 100, at 14.

130. Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 571 (2010) (discussing two theories that situate payday lending as an outgrowth of loan sharking in the early twentieth century or check cashing businesses).

131. *Id.* at 572.

132. Scott Andre Schaaf, *From Checks to Cash: The Regulation of the Payday Lending Industry*, 5 N.C. BANKING INST. 339, 340 (2001).

133. Peterson, *supra* note 116, at 1111 (citations omitted).

134. Martin, *supra* note 130, at 564.

135. *Id.*

136. Aaron Huckstep, *Payday Lending: Do Outrageous Prices Necessarily Mean Outrageous Prices*, 12 FORDHAM J. CORP. & FIN. L. 203, 207 (2007).

137. *Id.* at 207.

138. Martin, *supra* note 130, at 573.

five times.¹³⁹ The problem is that “most borrowers do not have the funds to pay off the original loan,” and get trapped into cycles of debt.¹⁴⁰

As a result of these consequences of payday lending, almost every state has passed a payday loan reform law to protect consumers. In 2005, Illinois, the home-state of B & B Investment Group, Inc., passed its Payday Loan Reform Act.¹⁴¹ In 2007, the New Mexico legislature, after years of debate, amended the New Mexico Small Loan Act of 1955 to similarly restrict payday lending practices.¹⁴² At that time, New Mexico was one of only two states that still did not regulate that industry.¹⁴³ The payday loan provisions defined these loans as those with terms lasting at least fourteen but no more than thirty-five days and capped the interest rates applied against such loans at 390%, prohibited the rolling over of debt, and required payday lenders to register with the Financial Institutions Division.¹⁴⁴

The payday loan provisions, however, were easily circumvented by payday lenders. A study showed that small loan lenders in New Mexico “quickly switched to loan products that fell outside the statute, namely longer loans or those not involving a post-dated check.”¹⁴⁵ As a result, even with the 2007 amendments, small loan lenders are able to charge above the 390% annual interest rate cap that current law mandates for payday loans.¹⁴⁶ Those loans, called installment signature loans, are the focus of the *B & B* case.

IV. DECISION

In a unanimous decision, the New Mexico Supreme Court addressed both the State’s appeal and the defendants’ cross-appeal. The court first noted New Mexico’s statutory history attempting to curtail payday lending targeted at New Mexico’s working poor.¹⁴⁷ It further noted that the defendants had “converted” their payday loans to signature loans both in New Mexico and in Illinois after or near these states’ passage of their payday reforms.¹⁴⁸ After discussing the procedural history of the case, the court then divided its analysis into three principal parts: first, it

139. THE PEW CHARITABLE TRUSTS, PAYDAY LENDING IN AMERICA: POLICY SOLUTIONS 5 (2013), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2013/PewPaydayPolicySolutionsOct2013pdf.pdf.

140. Huckstep, *supra* note 136, at 207.

141. N.M. STAT. ANN. §§ 58-15-32(B) (2007).

142. N.M. STAT. ANN. §§ 58-15-32 to -39 (1978); *see* Martin, *supra* note 3, at 274.

143. Timothy E. Goldsmith & Nathalie Martin, *Interest Rate Caps, State Legislation and Public Opinion: Does the Law Reflect the Public’s Desires?*, 89 CHI.-KENT L. REV. 115, 117 n.17 (2014).

144. Martin, *supra* note 3, at 275.

145. *Id.* at 274–75. *See* Decision and Final Order at 2, *State ex rel. King v. Fastbucks Holding Corp.*, No. D-01010-CV-2009-01917 (1st Dist. N.M. Sep. 26, 2012). (hereinafter *Fastbucks District Court Decision*) (“After enactment of the 2007 legislative reforms, Defendants fashioned their loans and business practices so as to circumvent regulation of payday loans. They dramatically increased their use of installment loan products and decreased the use of payday loans. Given the obvious reversal in the usage of the two loan products after the legislation was enacted in 2007, this Court rejects as pretextual Defendants’ justification that they promoted installment loan products over payday loans due to customers not having checks.”) (on file with author)

146. Martin, *supra* note 3, at 275.

147. *State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 4–6, 329 P. 3d 658..

148. *B & B*, 2014-NMSC-024, ¶ 5.

addressed procedural unconscionability and UPA Section 57-12-2(E)(1); second, it addressed substantive unconscionability under both common law and UPA Section 57-12-2(E)(2); and third, it addressed restitution.

A. Procedural Unconscionability and UPA Section 57-12-1(E)(1)

The defendants cross-appealed the district court's ruling that it had violated UPA Section 57-12-2(E)(1) and that their loans were procedurally unconscionable.¹⁴⁹ They primarily contended that the State had failed to provide substantial evidence that they took advantage of the borrowers' "lack of knowledge, ability, experience or capacity" to enter into simple interest contracts to a "grossly unfair degree."¹⁵⁰ The defendants also argued that the State failed to show that each "individual" borrower had suffered such detriment.¹⁵¹

Addressing their arguments, the court analyzed the evidence provided by the State, including expert testimony, evidence of the defendants' daily practices, and whether this evidence could be applied in the aggregate. Through expert testimony the State asserted that loan products, like those offered by the defendants, were targeted primarily toward unbanked and underbanked individuals, meaning that they did not have bank accounts or that they used such accounts for simple transactions, like direct deposits.¹⁵² This population tended to be less educated, low income, and were primarily people of color.¹⁵³ It also exhibited certain behavioral and cognitive biases that would make borrowers particularly susceptible to accepting high cost loans, despite their inability to pay the loans back.¹⁵⁴

Focusing on New Mexico, the court cited a study by Professor Nathalie Martin confirming that borrowers of payday and installment loans in New Mexico exhibited these biases.¹⁵⁵ In particular, Professor Martin's study found that 75 percent of small loan borrowers in New Mexico "could not identify the annual

149. *Id.* ¶ 11.

150. *Id.* ¶ 13; *see* N.M. STAT. ANN. §57-12-2(E)(1) (2009).

151. *B & B*, 2014-NMSC-024, ¶ 26.

152. *Id.* *See* Federal Deposit Insurance Corporation, 2011 FDIC National Survey of Unbanked and Underbanked Households, Appendices A–G, Table C–1, 2011 Household Banking Status by State at 126, www.fdic.gov/householdsurvey/. In particular, its loans were exclusively issued to those with steady employment that were unbanked or underbanked. The court noted that unbanked individuals were those without checking or savings accounts and underbanked individuals were those with a bank account, but seldom used it. *B & B*, 2014-NMSC-024, ¶ 16.

153. *B & B*, 2014-NMSC-024, ¶¶ 14–15.

154. *Id.* ¶ 16. The expert claimed that these individuals exhibited behavioral and cognitive biases that lead them to "make decisions that were contrary to their interests." *Id.* For example, these borrowers would have "unrealistic expectations about their ability to pay these loans," meaning that they "overestimate their ability to control future circumstances and underestimate their exposure to risk." *Id.* He further testified that unbanked and underbanked borrowers had intemporal biases, "focus[ing] on short-term gains, while discounting future losses they might suffer." *Id.* Professor Peterson noted other biases exhibited by this population such as "framing and anchoring effects" that "distort the borrower's perception of cost" as well as "information overload," meaning that when these borrowers "presented with a technically complex loan agreement, they cease trying to understand the terms at all because they realize they will not be able to understand all of the pricing features." *Id.* Because of these biases, he contended this demographic would "focus on the promise of quick cash, and fail to make more considered judgments about the long-term costs of the loan." *Id.*

155. *Id.* ¶ 17.

percentage rate (APR) of their small-principal, high interest loan at the point of sale, or mistakenly believed that the interest rate was between one and 100 percent.”¹⁵⁶ In furtherance of this proposition, the court noted that Wellito and Charley’s testimony were consistent with these findings.¹⁵⁷

Having held that the defendants’ consumers lacked the knowledge, experience, ability or capacity in credit transactions, the court examined whether the defendants took advantage of these deficits.¹⁵⁸ The State had presented evidence that the defendants misled the borrowers on the costs of the signature loans. For example, employees were told to tell customers that they would pay between \$1.00 and \$1.50 per day on every \$100 borrowed.¹⁵⁹ At trial, the defendants had admitted that this was a factually inaccurate daily rate.¹⁶⁰ The yearly finance charge at that rate would be \$365 to \$547.50 but, the court emphasized, “the [d]efendants knew that the actual finance charge for one year would be at least \$1,000.”¹⁶¹ The court held that the defendants also used misleading marketing tactics by advertising loans at 50 percent off, “when in fact the only thing that was 50 percent off was the interest on the first installment payment on the loan.”¹⁶²

In addition to misleading borrowers on the costs of the loans, the court held that the defendants “aggressively” encouraged borrowers to stay indebted and withheld cost information by failing to provide the borrowers amortization schedules.¹⁶³ The defendants’ employees were instructed to call borrowers to encourage them to increase the principal on their loans.¹⁶⁴ At least one employee noted that there was a practice to call customers once they were one payment away from paying off their loan.¹⁶⁵ Furthermore, amortization schedules appeared to be purposely withheld from customers.¹⁶⁶ Particularly troubling was that these schedules showed that customers paid only interest for extended periods of time.¹⁶⁷ For example, Charley’s \$200 loan required her to make sixteen bi-weekly payments of \$90.68 to finally pay off the first \$1.56 on her principal, an amount that totaled

156. *Id.*

157. *Id.* ¶ 18. The court noted that the two of them testified that they thought that, despite their low incomes, they could pay off their loans, which showed “unrealistic optimism.” *Id.* Both of these borrowers, also exhibited intemporal biases because they thought that the repayment of their loans would be “easy.” *Id.* At the end of this analysis, the court commented on the limited financial understanding exhibited by Charley and Wellito and another consumer, Atcity and concluded that “these were not sophisticated borrowers, but borrowers who lacked knowledge of basic consumer finance concepts and had little experience in banking and credit markets.” *Id.* ¶ 19.

158. *Id.* ¶ 20.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* ¶¶ 21–22.

164. *Id.* ¶ 21. The script for these “courtesy” calls instructed the employees to tell customers that “[r]enewing your loans with us today . . . would put an extra \$ ___ in your pocket which I’m sure would come in handy with back to school, last minute vacations or anything else the comes up towards the end of Summer.” *Id.*

165. *Id.*

166. *Id.* ¶ 22.

167. *Id.*

\$1,541.56.¹⁶⁸ The court held that these were systematic policies and not isolated incidents in concluding that there was sufficient evidence that the defendants took advantage of these borrowers.¹⁶⁹

However, Section 57-12-2(E)(1) also required the State to show that the “[d]efendants’ practices took advantage of borrowers to a *grossly* unfair degree.”¹⁷⁰ The court stated that, under the UPA, it would “consider whether borrowers were taken advantage of to a grossly unfair degree by looking at practices in the aggregate, as well as the borrowers’ characteristics.”¹⁷¹ The defendants contended that the State had to show that *each* individual borrower had suffered detriment as a result of their practices.¹⁷² However, the court rejected this argument. The court noted that under Section 57-12-4 of the UPA, it was to interpret the UPA in line with FTC decisions. It listed three decisions by the FTC for the proposition that the UPA “does not require a subjective, individualized showing of detriment.”¹⁷³ The court then relied on the defendants’ “pattern of conduct” in “leveraging the borrowers’ cognitive and behavioral weaknesses to [their] advantage, and that the borrowers were clearly among the most financially distressed people in New Mexico.”¹⁷⁴

In addition to their violation of the UPA, the court held that the defendants’ practices were procedurally unconscionable under the common law.¹⁷⁵ Under New Mexico law, procedural unconscionability could be found where there was inequality in the contract formation.¹⁷⁶ Because of the relative unsophistication of the borrowers, the court held that there had been unequal bargaining strength in the formation of the loans.¹⁷⁷ In particular, the court noted that the boilerplate nature of the contracts, despite not being automatically unconscionable, also supported such a holding.¹⁷⁸

As a result, the court agreed with the district court’s decision to impose a permanent injunction, preventing the defendants from engaging in those practices, was an appropriate remedy.¹⁷⁹ In dicta, the court noted that under New Mexico case

168. *Id.*

169. *Id.* ¶ 24.

170. *Id.* ¶ 25 (emphasis added).

171. *Id.* ¶ 25, citing *Portales Nat’l Bank v. Ribble*, 2003-NMCA-093, ¶ 15, 75 P.3d 838.

172. *Id.* ¶ 25.

173. *Id.*

174. *Id.*

175. *Id.* ¶ 27.

176. *Id.* citing *Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 23, 208 P.3d 901.

177. *Id.* ¶ 27.

178. *Id.*

179. The district court prohibited the defendants from:

- (1) targeting borrowers to try to increase the amount of their principal debt obligation until the borrower’s file had become inactive for at least sixty days;
- (2) quoting the cost of signature loans “in terms of a daily or other nominal amount . . . or in any other amount than that which is mandated by the federal Truth in Lending Act,” in advertising materials or during loan origination;
- (3) engaging in any practice that focuses the borrower’s attention on the loan’s installment payment obligation “without also clearly, conspicuously, and fully disclosing and explaining the cost of the loan if repaid over the course of the full repayment term”; and
- (4) representing that the loans will be in any way “easy” to repay.

law, the district court could have voided the contract under procedural unconscionability alone.¹⁸⁰ However, refusing to make such a determination, the court analyzed whether substantive unconscionability was also present.

B. Substantive Unconscionability and UPA Section 57-12-1(E)(2)

Next, the court assessed whether there was sufficient evidence to overturn the district court's finding that the interest rates were not substantively unconscionable.¹⁸¹ The district court had concluded that it could not make this determination "absent an express statutory prohibition."¹⁸² The Supreme Court rejected this conclusion. The court noted its equitable powers at common law that empowered it to "render unenforceable an agreement that is unreasonably favorable to one party while precluding a meaningful choice of the other party."¹⁸³ Citing *Cordova* the test for substantive unconscionability was to "simply ask[] whether the contract term is grossly unreasonable and against our public policy under the circumstances."¹⁸⁴ The court explained that the judiciary was not precluded from holding that a contractual term was against public policy "simply because there is not a statute that specifically limits contract terms."¹⁸⁵ It cited the landmark *Williams* case¹⁸⁶ for the proposition that courts may find consumer contracts unconscionable "in the absence of binding precedent or statutory power."¹⁸⁷ *Williams* also supported the notion that the court, based on a public policy alone, could determine whether the defendants' actions were allowed in New Mexico.¹⁸⁸

Id. ¶ 29. The district court also ordered that the defendants perform the following:

- (1) provide all borrowers with a copy of the amortization schedule;
- (2) provide information regarding a substantive legal defense and contact information for the Attorney General's Office when communicating with a borrower in connection with debt collection; and
- (3) revise employee manuals to reflect these changes.

Id.

180. *Id.* ¶ 47. The court relied on recent cases to make this proposition. *See id.* citing *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 56, 259 P.3d 803; *Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 24, 208 P.3d 901. Ultimately, the court determined that substantive unconscionability was also present, but refused to void the loan contracts. *B & B*, 2014-NMSC-024, ¶¶ 47, 49. The court noted that it declined to do so because it did not want to provide a "windfall" to the borrowers. *Id.* ¶ 49. However, this decision was more likely to be taken because, as the State had noted, voiding the contracts would have affected 3,822 of the defendant's loans, putting the defendants out of business. *See* Brief in Chief of Appellant at 42, *State ex rel. King v. B & B Inv. Grp.*, 2014-NMSC-024 (No. 34,266). The court ultimately applied New Mexico's default interest rate at 15% despite comparing the defendant's loans to New Mexico's payday loan provisions, which allow a maximum of 390%. *B & B*, 2014-NMSC-024, ¶¶ 50–51. This presumably was done to further punish the defendants for their actions.

181. *Id.* ¶ 32.

182. *Id.* ¶ 31.

183. *Id.* ¶ 31 citing *Cordova*, 2009-NMSC-021, ¶ 21.

184. *Id.*

185. *Id.* ¶ 33.

186. 350 F.2d 445, 448 (D.C. Cir. 1965), *reversing* 198 A.2d 914 (D.C. Ct. App. 1964). *See supra* Part III.A.

187. *B & B*, 2014-NMSC-024, ¶ 33. *See supra* Part I.A.

188. *B & B*, 2014-NMSC-024, ¶ 33.

In order to determine whether New Mexico's public policy prohibited the defendants' charged interest rates, the court began with the UPA, the statute at issue.¹⁸⁹ Under the UPA, the legislature had empowered courts to adjudicate cases involving claims of unconscionable trade practices.¹⁹⁰ Section 57-12-2(E)(2) expressly prohibits credit extensions that result in "a gross disparity" between the value and the price.¹⁹¹ The district court had determined that the signature loans did not represent a gross disparity.¹⁹² It accepted the defendants' argument that because borrowers could pay the loans off early and received a value "beyond the face value," there was not a gross disparity between the value and the price.¹⁹³ This theory rested on the time value of money, meaning that because the borrowers needed money for essentials like buying food for their children and gas, or paying for their cellphone, the value received was higher than the amount paid.¹⁹⁴

The Supreme Court, however, rejected this argument. It explained that such a subjective theory of value meant that the more desperate a person is for money, the more "value" that person receives from a loan.¹⁹⁵ Such a value theory was erroneous and unworkable because "consumer exploitation would be legal in direct proportion to the extent of the consumer's desperation: the poorer the person, the more acceptable the exploitation."¹⁹⁶ It determined that such a result "cannot be consonant with the consumer-protective legislative intent behind the UPA. It is not the use to which the loan is put that makes its value low or high, but the terms of the loan itself."¹⁹⁷ Instead, the court adopted an objective reading of value.¹⁹⁸ Sidestepping an extensive analysis, the court held that the loan's contractual terms made it particularly low value, including a \$25 dollar fee if a check bounced or for a clearinghouse fee, a 5% penalty for late payments, and the "acceleration-upon-default clause" providing that if borrower fell behind on a payment, the full amount would become due immediately.¹⁹⁹

Next, the court assessed whether New Mexico public policy allowed it to reject such high interest rates.²⁰⁰ The court determined that the loan features, in combination with the quadruple-digit interest rates, made it an "objectively low-value product" regardless of how the borrower used the principal and thus, were "grossly disproportionate to their price."²⁰¹

The defendants claimed that it was not the public policy of the state to prohibit usurious interest rates because the legislature removed the interest rate cap

189. *Id.*

190. *Id.*

191. *Id.* ¶ 34.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* ¶ 35.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* ¶ 36.

200. *Id.* ¶ 37.

201. *Id.*

in 1981.²⁰² This argument relied on the assumption that by removing the interest rate cap, the Legislature believed that there was no interest rate that would violate public policy.²⁰³ The court quickly rejected this argument by stating that “[p]ublic policy is not set by a single statute, or the repeal of a single statute” and concluded that courts determined public policy by looking at “other statutes in *pari materia* under the presumption that the legislature acted with full knowledge of relevant statutory and common law . . . [and] did not intend to enact a law inconsistent with existing law.”²⁰⁴

Under this analysis, the court cited several legislative acts, in addition to the UPA, that supported a policy against such contractual terms for small loans.²⁰⁵ In particular, it cited to the Small Loan Act,²⁰⁶ which indicated a legislative intent to regulate small loans.²⁰⁷ It also noted that New Mexico had adopted Section 2-302 of the U.C.C., which codified the courts’ “broad remedial power to refuse to enforce an unconscionable contract.”²⁰⁸ New Mexico’s Money, Interest, and Usury Act²⁰⁹ further indicated that the legislature had envisioned a 15% default interest rate for contracts without express interest rates.²¹⁰ Lastly, the court noted that in 2007, the legislature had enacted the payday loan provision reforms to the Small Loan Act to prevent the conduct that the defendants engaged in.²¹¹ Under those provisions, it estimated that interest rates were capped at about 400%.²¹² The court emphasized that though the loan-type offered now by the defendants was no longer governed by that act, the defendants’ “success at evading application of the Small Loan Act does not immunize [them] from other laws that prohibit unconscionable loan practices.”²¹³ The court ultimately determined that “contrary to the defendants’ contention that the repeal of the interest rate cap demonstrates a public policy in favor of unlimited interest rates, the statutes when viewed as a whole demonstrate a public policy that is consumer-protective and anti-usurious.”²¹⁴ The court concluded that “as a matter of law, [it is contrary to our public policy] for these historical anomalous interest rates to be charged in our state.”²¹⁵

Because it made such a determination under the unconscionability clause, the court had to decide whether to void the entire contract, void a particular clause or limit the clause’s application.²¹⁶ As it believed that accepting the State’s position to void all of the contracts would provide a “windfall” to all borrowers, it struck the

202. *Id.*

203. *Id.*

204. *Id.* ¶ 38, citing *State ex rel. Quintana v. Schnedar*, 1993–NMSC–033, ¶ 4, 855 P.2d 562.

205. *Id.* ¶¶ 41–42.

206. *Id.* ¶ 42. See N.M. STAT. ANN. § Sections 58–15–31 to –39 (1978).

207. *B & B*, 2014–NMSC–024, ¶ 40, 329 P. 3d 658.

208. *Id.* ¶ 41. See N.M. STAT. ANN. § 55–2–302 (1961).

209. *B & B*, 2014–NMSC–024, ¶ 42, 329 P. 3d at 658. See N.M. STAT. ANN. §§ 56–8–1 to –21 (2004).

210. *B & B*, 2014–NMSC–024, ¶ 42, 329 P. 3d at 658. See N.M. STAT. ANN. § 56–8–3 (1983).

211. *B & B*, 2014–NMSC–024, ¶ 43, 329 P. 3d at 658.

212. *Id.*

213. *Id.* ¶ 44.

214. *Id.* ¶ 43.

215. *Id.*

216. *Id.* ¶ 49.

quadruple-digit interest rate from the contract.²¹⁷ It then imposed the New Mexico 15% default rate, finding that in Wellito's case, the defendants would have to return to him \$45.64.²¹⁸

V. ANALYSIS

This note analyzes whether the New Mexico Supreme Court's decision in *State ex. rel. King v. B & B Investment Group, Inc.* appropriately applied the unconscionability doctrine to determine that quadruple-digit interest rates are against New Mexico's public policy and thus, cannot be charged in the state. It will argue that the court's application of the unconscionability doctrine dispensed with the case-by-case analysis traditionally undertaken in unconscionability cases; however, it also argues that this expansion is a natural evolution of the unconscionability doctrine in light of modern statutory frameworks used to curtail oppressive business practices.

The history of the unconscionability doctrine, as an equitable doctrine, indicates that courts are willing, if even reluctantly, to override a contractual bargain if it is determined that the contract is unfair or a party lacks a meaningful choice in entering such a bargain.²¹⁹ Courts have the authority to apply the unconscionability doctrine to excessive interest rates.²²⁰ Public policy historically has been an appropriate measure under the unconscionability doctrine to find contracts unconscionable, even if a legislatively mandated cap is not in place.²²¹ However, the novelty of *B & B* is that the Supreme Court applied the doctrine broadly, dispensing with the traditional case-by-case determination of unfair bargains between the contracting parties.²²²

The case-by-case application of the unconscionability doctrine has been highly criticized. Professor Arthur Allen Leff, a critic of Section 2-302,²²³ maintained that the judicial review of "the quality of transactions" through the unconscionability clause posed particular problems because such cases could be "economically trivial," dependent on "several doses of 'the total context of the fact situation' and 'copious examination of the manifestations of the parties and the surrounding circumstances'"²²⁴ For example, he hypothesized that after the D.C. Court of Appeals remanded the *Williams* case, Walker-Thomas, the seller, could merely evade the decision by thereafter "distinguish[ing] the case" and continuing to use the clause is some other variation.²²⁵ This, Professor Leff argued,

217. *Id.*

218. *Id.* ¶ 51.

219. *See supra* Part III.A.

220. *See* Steven W. Bender, *Rate Regulation at the Crossroads of Usury and Unconscionability: The Case for Regulating Abusive Commercial and Consumer Interest Rates under the Unconscionability Standard*, 31 HOUS. L. REV. 721, 736 n.79 (1995)

221. *Id.*

222. *See infra* note 238 for discussion of case where a court upheld an Attorney General's circumvention of the traditional case-by-case determination.

223. *See supra* Part III.A.

224. Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 356 (1969).

225. *Id.*, at 354–55. *See supra* Part III.A. for a discussion of *Williams*.

would create “a new case for case-by-case development” to be litigated.²²⁶ But, assuming that such costly litigation could settle the interpretation of that clause in that particular jurisdiction, “[it did] not mean that [the] seller would necessarily stop using it. After all, under the common-law tradition [sellers] lose only if the other party chooses to litigate, and most consumers don’t.”²²⁷ This is because borrowers may be unfamiliar with the court system and may “likely [be] unaware of the doctrine or their right to challenge unfair contracts.”²²⁸ Professor Leff argued that the relative impact to change widespread unconscionable practices through case-by-case litigation was minimal.²²⁹ He stated that “[o]ne does not cure any serious breakdown in a theoretical market system by case-by-case sniping”²³⁰ Thus, Professor Leff advocated for a more drastic approach regardless of the particular parties in the dispute.²³¹

In *B & B*, the defendants argued that the courts had to assess the circumstances surrounding every one of their 3,822 signature loans in order to find substantive unconscionability.²³² The district court struggled with providing an overall finding against consumers that were not before it.²³³ For example, it conceded that “[t]here is, indeed, something that is shocking about these APRs and about the amount of the charges,” but that it could not find that “as a matter of law for all borrowers that the interest rate charged or the amount paid back always outweighs the value received by the borrower.”²³⁴ Furthermore, the district court stated the under UPA Section 57-12-2(E)(2), “the statutorily mandated evaluation can be made in regard to an individual loan based on the evidence presented as it related to each transaction. In this case, the Attorney General eschewed such a showing for the vast bulk of the borrowers. For these reasons the [c]ourt declines to declare either the interest rates of the repayment terms unconscionable.”²³⁵

The Supreme Court, however, rejected the need to analyze each individual borrower’s circumstances under three theories: First, the district court interpreted the value of the loans based on a subjective theory, one that logically allowed “consumer exploitation . . . in direct proportion to the extent of the consumer’s desperation.”²³⁶ Alternatively, the court applied an objective standard that, as explained in the next section, was not clearly articulated. Second, the UPA was modeled after the Federal Trade Commission Act (FTCA), which did not require it to assess individual borrower’s detriments.²³⁷ Third, it determined that New Mexico has a broad consumer-protective public policy against quadruple-digit interest rates, and could

226. Leff, *supra* note 224, at 354–55.

227. *Id.* at 355.

228. Martin, *supra* note 3, at 284.

229. Leff, *supra* note 224, at 358.

230. *Id.* (footnote omitted).

231. *Id.*

232. Appellees’ Answer Brief at 38, *State ex rel. King v. B & B Inv. Grp.*, 2014-NMSC-024 (No., 34,266).

233. District Court Decision, *supra* 21, at 13.

234. *Id.* at 11, 13.

235. *Id.* at 13–14.

236. *State ex rel. King v. B & B Inv. Grp.*, 2014-NMSC-024, ¶ 35, 329 P. 3d 658.

237. *See supra* Part IV.

proscribe them under the unconscionability clause.²³⁸ The court cited to *Williams* for the proposition that, even absent case law or legislation, the judiciary had the authority to find a contract or clause unconscionable based on public policy considerations.²³⁹ Though *Williams* supports that conclusion, the court does not cite a case where a court used the unconscionability doctrine to find interest rates unconscionable as a matter of law, without the need to assess each individual borrower's circumstances.²⁴⁰ In fact, a salient distinction between *Williams* and *B & B* is that the *Williams* court arrived at its holding in regards to two plaintiffs who had both suffered questionable practices by Walker-Thomas.²⁴¹ Both of their particular circumstances in relation to the offending clause had been presented to the court. In contrast, here, only Wellito had filed a complaint with the Attorney General's Office and only two others of the thousands of other borrowers, Charley and Atcitty were presented as examples of the types of consumers served.²⁴² The defendants presented two witnesses who were able to pay off their loans. The Supreme Court, however, did not mention them in its opinion.

Nevertheless, modern statutory frameworks support the broad application of the unconscionability doctrine in *B & B*. Just like Section 2-302 evinced a revival of the unconscionability doctrine in the mid-twentieth century by the courts in commercial dealings,²⁴³ countless modern statutes clearly support the New Mexico Supreme Court's use of the unconscionability doctrine to broadly contest high cost loans in the consumer market.²⁴⁴ Here, the basis for the court's expansive interpretation was based on New Mexico's Unfair Practices Act and the payday reform laws.²⁴⁵ The *B & B* court was able to dispense with the case-by-case analysis of the doctrine by relying on the UPA's general applicability as a matter of public

238. See *supra* Part IV.

239. *B & B*, 2014-NMSC-024, ¶ 33, 329 P. 3d 658. See Bender, *supra* note 220, at 736 ("One potential argument against applying the unconscionability standard to interest pricing as distinct from other contracts in that the legislature, by creating exceptions to usury or abolishing usury entirely, made a statement of public policy in favor of freedom of contract with no fairness controls.") But see 1 Arthur L. Corbin, CORBIN ON CONTRACTS, § 129 (1993) ("[I]n the absence of a usury statute, a contract that requires the payment of a very high rate of interest will be enforced, up to the point at which 'unconscionability' becomes an operative factor." (footnote omitted)).

240. A possibly analogous case is *Kugler v. Romain*, 279 A.2d 640 (N.J. 1971). Though not directly addressing high interest rates, the New Jersey Supreme Court in *Kugler* determined whether a high cost product sold to consumers violated the Consumer Fraud Act. *Id.* at 642. The defendant there aimed to limit the lower court's decision against it to the 24 consumers named in the complaint. *Id.* However, the New Jersey Supreme Court held that the Attorney General had the "authority and status" to seek "affirmative relief not only for the benefit of specifically named consumers but also for a large number of unnamed consumers similarly situated who wish to be represented and to benefit by the judgment entered therein." *Id.* at 535. It further noted that "[t]he courts, recognizing the current trends in consumer protection legislation, have realized that [statutory relief], as well as with utilization of the common law concepts of fraud and unconscionability, they can assume an active role in strengthening the consumer's limited market leverage." *Id.*

241. See *supra* Part III.A. The *Williams* majority remanded the case so that the circuit court could determine whether the contracts at issue were unconscionable and later settled the case. See also Fleming, *supra* note 83, at 1432 (discussing *Williams* on remand).

242. See *supra* Part II.

243. See *supra* Part III.A.

244. See Bennett Marrow, *supra* note 62, at 18.

245. See *supra* Part III.B.

policy. For example, the defendants claimed that the State had failed to show that each “individual borrower thought the loan transaction worked at his or her detriment.”²⁴⁶ The court noted that the legislature, through Section 57-12-4 of the UPA, indicated that the act was to be construed in line with interpretations given by the FTC.²⁴⁷ The court cited several FTC cases that indicated that the government can bring an action to deter unfair and deceptive trade practices and obtain restitution for a large class.²⁴⁸ To hold otherwise, the court cited, would require it to rely on “proof of subjective reliance by each individual consumers, [which] would thwart the effective prosecution of large consumer redress actions.”²⁴⁹ Furthermore, the UPA was passed in order to provide attorneys general a mechanism to stop industry-wide abuses by businesses.²⁵⁰ Section 57-12-8 provides that the Attorney General may bring an action against any person when he has “reasonable belief” that that person is violating the UPA.²⁵¹ As such, the legislature empowered the Attorney General to contest any violations of the UPA through the courts.²⁵² This section of the act also allows the Attorney General to seek a temporary or permanent injunction and restitution.²⁵³

Additionally, the court heavily relied on the payday reform laws of 2007.²⁵⁴ Because the defendants’ loan products were virtually identical to the regulated payday loans, the court reasonably inferred that they were created to evade these reforms.²⁵⁵ To come to this conclusion, the court had to ignore the fact that the defendants began to offer the new loan products the year before the laws were passed²⁵⁶ and that these loans were wholly unregulated by them.²⁵⁷ However, just as the *Williams* court construed the passage of Section 2-302 as a legislative declaration of support to finding unconscionable contracts unenforceable, even if it was passed after the loan contract was made, the court in *B & B* reasoned that the mere passage of the law indicated that these types of loans were the type that the legislature meant to regulate.²⁵⁸

Furthermore, the unconscionability doctrine’s origins indicate that *B & B*’s expansive application of the doctrine is a natural and necessary evolution. As noted above, individual contracts were difficult to police when, despite some indication of unfairness, they would not meet the requirements of other traditional doctrines.²⁵⁹ As

246. State *ex rel.* King v. B & B Inv. Grp., 2014-NMSC-024, ¶ 26, 329 P. 3d 658.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Supra* Part III.B.

251. See N.M. STAT. ANN. § 57-12-8(A) (1978).

252. *Id.*

253. See N.M. STAT. ANN. § 57-12-8(B) (1978). See also *supra* note 238 for a discussion of Kugler v. Romain, 279 A.2d 640 (N.J. 1971), where the New Jersey Supreme Court upheld the Attorney General, in his official capacity, act on behalf of 24 consumers to bring a suit and, without certifying a class, to proscribe a lender’s high cost product to other similarly situated individuals. *Id.* at 535.

254. See *B & B*, 2014-NMSC-024, ¶¶ 5, 43.

255. *Id.* ¶ 43–44.

256. *Id.*

257. *Id.* See *supra* Part III.A.

258. *B & B*, 2014-NMSC-024, ¶ 44.

259. See *supra* Part III.A.

scholars have noted, this also provided room for the doctrine to evolve alongside the business practices that were meant to be prohibited.²⁶⁰ For example, commenting on the relatively new use of the unconscionability doctrine to find price disparities unconscionable, one scholar noted that “[a]n expansion of the doctrine from prior case law and the Official Comments should not be surprising nor should it be rejected because it is new.”²⁶¹ Indeed, Llewellyn, the principal drafter of Section 2-302, left the unconscionability term undefined—presumably intentionally with this evolution in mind.²⁶² The *B & B* decision exemplifies just an evolution.

VI. IMPLICATIONS

Despite the New Mexico Supreme Court’s expansive application of the unconscionability doctrine as applied to small-consumer loan interest rates, it may not have as far reaching implications in the state as some might have hoped (or others dreaded). By holding that quadruple-digit interest rates are unconscionable as a matter of public policy in New Mexico, the most obvious effect of *B & B* is that small consumer loans with lower interest rates may be open to attack on similar grounds. The reason for this is that by ignoring the different names and characteristics of the loans in question, the court effectively expanded the reach of the payday loan provisions.²⁶³ As a result, a lower court may only need to establish that the loans are similar enough to the payday loans regulated under the Small Loan Act of 1955 in order to question their validity.²⁶⁴

Thus, it is likely that courts will take a similar position as the *B & B* court in focusing on the particular practices of the lender and terms of the contract rather than on the loan product’s name. In fact, a recent case also filed by the Attorney General’s Office, *King v. Fastbucks Holding Co.*,²⁶⁵ exemplifies this scenario. In that case, Fastbucks provided installment loans with repayment obligations that were three to five times the amount owed.²⁶⁶ Fastbucks claimed that the loans were allowed under New Mexico law as they were not regulated as payday loans under New Mexico’s Small Loans Act of 1955.²⁶⁷ It noted that installment loans are explicitly prohibited from payday limitations under New Mexico law.²⁶⁸ Like in *B & B*, the loan products offered by Fastbucks, however, had many of the characteristics of payday loans that were prohibited under the 2007 reform. For example, Fastbucks’ loans had high interest rates, with annual rates of 520% to 650%,²⁶⁹ and locked consumers into recurring cycles of debt.²⁷⁰ As a remedy, the State argued that the borrowers should receive the excess money collected beyond the principle, minus

260. See Spanogle, *supra* note 65, at 967.

261. *Id.*

262. *Id.*

263. *Id.* ¶¶ 5, 43.

264. See *infra* note 266 and accompanying text.

265. See Fastbucks District Court Decision, *supra* note at 145.

266. *Id.* at 4–5.

267. *Id.* at 2–3.

268. See N.M. STAT. ANN. § 58-15-2(H)(2)(B) (1978).

269. Fastbucks District Court Decision *supra* note 145, at 4–5.

270. *Id.* at 2–3.

any fees.²⁷¹ The district court, however rejected that argument explaining that “the amount of consumer loss is best represented by the difference in the amounts the borrowers paid under the installment loan products and the amounts they would have paid had they taken out payday loans.”²⁷² The *Fastbucks* court further noted that “[i]t appears from the Legislature’s 2007 reforms that its concern was with the costs of loans to consumers, rather than what a lending device is named.”²⁷³ In justifying this reading, the court stated that “it would be difficult for a legislative body to fathom all the clever permutations of lending devices that might be designed or what names such devices might be given.”²⁷⁴ The court ultimately held that these loans were unconscionable and applied the interest rate scheme under the 2007 payday reform laws.²⁷⁵ As *Fastbucks* and *B & B* illustrate, New Mexico courts are willing to focus on the intentions behind statutes to police high cost loans.

However, it will be difficult, in light of the lack of clear framework provided in *B & B*, to determine when an interest rate is excessive to the point of unconscionability.²⁷⁶ For example, though the New Mexico Supreme Court reviewed specific aspects of the loans at issue to determine that they were low value, this review does little to guide lower courts on whether loans with some or similar aspects are also considered low value.²⁷⁷ The closest that the court gets to an applicable value standard is comparing whether a borrower receives “a small amount of principal” with “an enormous amount of risk.”²⁷⁸ It appears relatively clear that a lower court would find that a signature loan, with some or similar characteristics as the *B & B* loans, with a 999% interest rate unconscionable—it would be difficult for a defendant to argue that a percentage point difference is sufficiently dissimilar to the rates in *B & B*. It also seems more likely that in such a case a court would be compelled to allow the remedy provided in *B & B* and strike out the offending contractual provision, while applying New Mexico’s default interest rate of 15%.²⁷⁹ Nevertheless, a lender under this scenario could easily argue that it would be against legislative intent because the payday loan law allows a 390% interest rate. This argument would be particularly powerful if the loans in question were substantially similar to those intended to be regulated.²⁸⁰

Furthermore, though the court’s indication that only one, procedural or substantive unconscionability, need be present to find a clause or contract unconscionable,²⁸¹ may be unworkable—at least from a consumer protective perspective. For example, it was obvious that both, the district court and the Supreme Court, were reluctant to provide broad relief to the State and the borrowers it represented, such as finding that all of the loans by *B & B* were procedurally

271. *Id.* at 6.

272. *Id.*

273. *Fastbucks* District Court Decision *supra* note 145, at 2.

274. *Id.*

275. *Id.* at 5–6.

276. *State ex rel. King v. B & B Inv. Grp.*, 2014-NMSC-024, ¶ 36, 329 P. 3d 658.

277. *Id.* ¶ 36.

278. *Id.*

279. *Id.* ¶ 49.

280. *See supra* note 275 and accompanying text.

281. *B & B*, 2014-NMSC-024, ¶ 47. *See supra* note 187.

unconscionable. The principal reason for this was that its effect would have proven to be particularly harsh to the lender as it would have put it of business. It is important to note that no case in New Mexico history has held a loan provision to be unconscionable solely on the basis of procedural unconscionability.²⁸² The New Mexico Supreme Court, thus, failed to provide enough clarity that would have provided a strong deterrent effect against other types of unconscionable practices.

VII. CONCLUSION

Small loan lenders, across the country, and in New Mexico, have circumvented the legislature to continue to charge the same high interest rates and practices that were meant to be prevented by piecemeal and inadequate legislation. In deciding *State ex rel. King v. B & B Investment Group, Inc.*, the New Mexico Supreme Court accomplished what the legislature had been unable to—curtail quadruple-digit interest rates for small loans. The court's use of the unconscionability doctrine to prohibit *excessively* high interest rates to all New Mexicans, not just those whose cases were presented before it, provides an expansion of the doctrine because it does away with the traditional case-by-case analysis.

The court's expanded use of the doctrine, however, was also a natural progression of the unconscionability doctrine. Its deep roots in equity, coupled with the myriad of statutes passed by the legislature to curb deceptive trade practices and excessive interest rates, laid the groundwork for courts' authority to police such unfair and oppressive practices as the lenders practiced here.

Nevertheless, the *B & B* decision failed to provide a strong framework for lower courts to determine whether other high interest loans target at low income New Mexicans can be invalidated. This is particularly problematic as courts may continue to uphold triple-digit interest rates because the legislature had evinced an acceptance of at least rates as high as 390% under the payday loan reform provisions. In order to protect these New Mexicans, the legislature will have to step up.

282. Appellees' Answer Brief at 36, *State ex rel. King v. B & B Inv. Grp.*, 2014-NMSC-024 (No., 34,266).