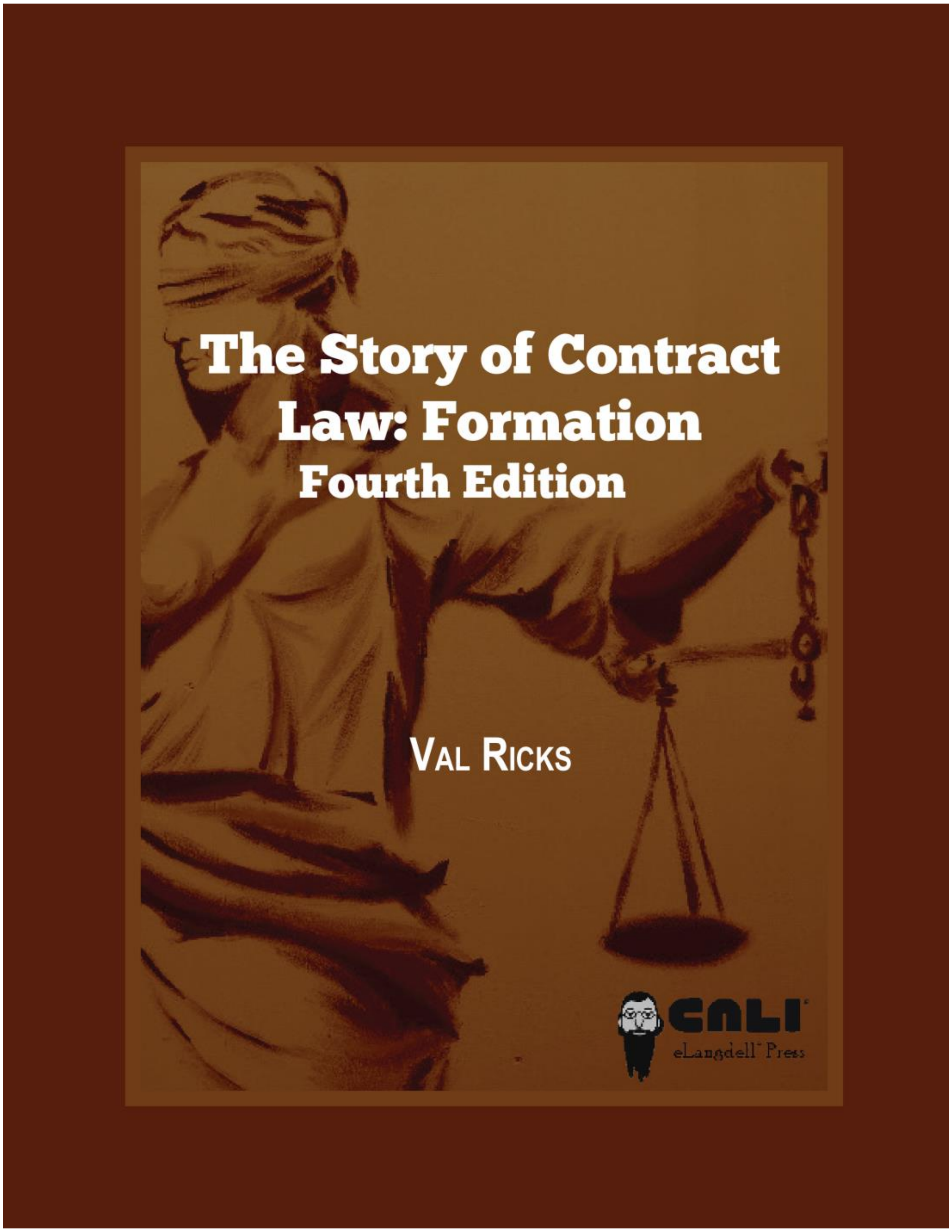
The Story of Contract Law: Formation
Fourth Edition
Val Ricks
CALI
eLangdell Press

The Story of Contract Law: Formation

Fourth Edition

by Val Ricks
Professor of Law
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About the Author

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Notices

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Preface

Contract law is famously baffling—put together haphazardly, with no central theory or goal. Welfare theorists, Kantians, and moralists have been battling for decades over whose theory ought to trump, and some commentators have given up.

Sixteen years ago, I wondered whether teaching the materials chronologically would allow a better understanding. After some study, I composed a book that taught the doctrines of contract law from original materials, roughly chronologically, but confirmed and expanded on the way with contemporary cases and statutes. Teaching from this book revealed a remarkable coherence in contract doctrines, mostly centered around bargain, a concept that, in itself, is neither theory nor goal. The coherence is primarily doctrinal—it is legal coherence. The policies and goals of the law differ from judge to judge, lawyer to lawyer, and among litigants. But the doctrine remains coherent despite its ability to absorb and instantiate the various theories and ends of contracting parties, arguing lawyers, and opining judges. In this, contract law is an incredible achievement.

The issues contract law addresses have not changed in the nearly 500 years during which the doctrines have developed. These issues include which promises to enforce, how much evidence to require of a plaintiff before the defendant must answer, and what evidence of hard bargaining and hard bargain will suffice to unwind what would otherwise be a binding promise. Given the length of time we have addressed these issues, it is perhaps not surprising that the law has worked out a coherent structure. Given the length of time, however, it is also not surprising that parts of that structure remain obscure.

Thanks to Jody Pratt, Sarah Humphrey, Jeff Kaiser, John Bohannan, and Derick Lancaster for helping with the search for cases and reading the manuscript. And thanks also to the hundreds of law students who have already learned from its pages. Learning with you has been one of the delights of my life.

VDR, 2015

Introduction

Sources of Contract Law

Before the American Revolution, the American states were British colonies. English law, including English contract law, applied in each of the thirteen colonies. The Revolutionary War freed the colonies from the British crown, but each of the new states continued to apply primarily English contract law. The federal government came into existence in the 1780s as a government of limited powers. Various attempts have since been made to promulgate a federal contract law, but none have as yet succeeded.

That means that states control contract law. Contract law is fashioned by state courts and state legislatures. The English law of contracts was created one case at a time in England's courts, and our states have generally carried on that tradition. Court-created law is usually called "common law" because English medieval royal courts supposedly adopted as law the common customs of the people, and also because that law applied nationally. The name stuck several hundred years ago. Now, our court-made law is called "common law" even if it is contrary to the customs of the people and applies only in a single jurisdiction within the United States. State legislatures also get in the act by passing statutes that codify or change the common law. Law promulgated by legislatures is called "statutory" law as opposed to "common law.” Most of the law we study will be common or statutory law, adopted or promulgated by state courts or state legislatures. Here and there a federal statute or regulation will intrude.

In the last hundred years, two groups of lawyers have somewhat successfully influenced the process of contract-law-making in America. The first is the National Conference of Commissioners on Uniform State Laws (NCCUSL). The Conference includes 50 state-appointed commissioners who draft and recommend legislation to state legislatures. Please look over NCCUSL's website at http://www.uniformlaws.org/.

The second group is the American Law Institute (ALI). The ALI is an organization of lawyers, judges, and legal academics dedicated to clarifying, simplifying, and reforming law. Please look at the ALI website also, at http://www.ali.org/. (The "About ALI" link is especially helpful.) The ALI's primary vehicle for accomplishing its mission is to "restate" the common law; that is, to boil down all the common law from court opinions into black letter rules that lawyers can better understand. The first Restatement of Contracts was published in 1932. The Restatement (Second) of Contracts was published in 1981. Sometimes the ALI merely restates the common law. The first Restatement of Contracts tried to do that. But often the ALI "restates"(?) as law what isn't yet law, in the hope that courts will adopt the ALI position. The Restatement (Second) (affectionately referred to as “R2K”) proposed more of this reforming than did the first Restatement. But courts have drawn (and will draw) on the wisdom of both documents. The Restatement and Restatement (Second) are not law but only commentary, unless something in them has been adopted by courts. The common law comes from decided cases, as it always has. Sections and comments of the R2K are sometimes referred to in bold in this book. When you find a reference in bold (for examples, see pages listed with a R2K section in the Table of Contents), please find the materials referred to in the statutory supplement recommended by your teacher and study them as if they were written out in this book itself.

Between 1940 and 1952, NCCUSL and the ALI teamed up to draft the Uniform Commercial Code (UCC), which they then proposed to state legislatures. This statute has been wildly successful: eventually all fifty state legislatures passed it, with only some local variation (though Louisiana did not pass Article Two). The result is that for most commercial transactions, the law of all fifty states is uniform. The UCC governs such things as sales of goods (Article 2), negotiable instruments (Article 3), and secured transactions (Article 9). Excerpts from the UCC are included in your statutory supplement. When you see an excerpt from the UCC referred to in bold in this book (for examples, see pages listed with a UCC section in the Table of Contents), please find it in the statutory supplement and study it as if it were written out in this book.

The rest of contract law is unspoken. It exists in the practices, morals, prejudices, theories, and goals of the lawyers, judges, litigants, and facts involved in its making and application. In this course you will study not only the rules themselves, which make up the body of contract law proper, but also the culture in which contract law exists, is applied, and is a part.

How This Book Is Organized

To understand the materials that follow, you must first know something about the history of American contract law. Our law of contracts includes (1) several hundred rules, formulated in both case law and statutes (I estimate we will study roughly 350 in this book, depending on what one counts as a rule); (2) the application of those rules in many thousands of cases (of course we won’t read all of them, just those in the Table of Contents); and (3) a good deal of theory and culture.

The rules, applications, theory, and culture of contract law have developed over roughly four and a half centuries. Some of the authorities we study will be reports of cases from the 1500s—these are the authorities that created the rules, and they still give the best descriptions of those rules and the reasons the rules exist. Most of our common law of contract is traceable to one of two sources: (1) English common law developed from the practices of the English royal courts between 1500 and 1800, and (2) the combination of Roman law and Aristotelian personality theory worked out by sixteenth century scholars in Spain and later adopted as an overarching legal theory by European scholars in the 1600s and 1700s. These two sets of authority were then combined in the 1800s as judges in the new American republic gathered what they thought was the best in legal wisdom from around the world.

You must read carefully what is here. Most of it is case law, but some is statutes. You will be unable to understand the materials adequately unless you ask and answer questions of the material. For instance, for both cases and statutes you will have to ask such questions as "What is the issue here?" "What rule is the court following?" "Which facts determine the result under this rule?" "How can I change the facts so that the rule does not (or does) apply?" These kinds of questions will guide your learning so that the knowledge you take from the materials will be useful to you on the class exam, on the bar exam, and in practice. I have listed questions below many items in the reading, also. These are questions that I ask in class, and they are the kinds of questions that a lawyer should be able to answer from the materials. Near the beginning of the semester, I would expect some of you to need help determining the answers to these questions from the materials. As the semester progresses, however, you should become able to answer these questions from the materials yourself. If you cannot, you have missed something and you should study harder (or smarter?) for the next assignment so that you can.

The organization of the casebook reflects the way that contract law developed. Studying chronological development helps you make sense of contract law. But the law of contract formation breaks down into different but easy (though slightly false) categories around which you can begin to build an outline of the law. (These categories did not develop chronologically, so your outline of the law *should not* follow the Table of Contents exactly.) First, three different theories of liability exist: I. Consensual Contract (often called simply "Contract"), II. Promissory Estoppel, and III. Unjust Enrichment. I suggest you begin your outline of the course as soon as possible, with these three general categories.

Second, I suggest you have two main categories under Consensual Contract: A. Elements, and B. Defenses to Formation. A consensual contract has at least five elements, all of which are necessary for a binding contract. Four of these regularly appear in lists in judicial opinions. For example: "The fundamentals of a legal contract are *competent parties, legal subject-matter, valuable consideration, and mutual assent*. There can be no contract if any of these elements [is] lacking." *Virginian Export Coal Co. v. Rowland Land Co*., 131 S.E. 253, 262 (W.Va. 1926) (italics added). To these four, I would add *definiteness* (or *specificity*), a topic we will study near the end of the semester. You also need to fit defenses in your outline. Sometimes things happen to prevent a contract from coming into existence even when the elements of a contract exist, and rules that capture these facts are called defenses to formation. Nearly every rule we study will fit in your outline if it includes all of these categories. The Table of Contents may help you place the rule in the right category, though this will not always be true.

Contract Law Theories

I always wonder just how much theory to push on first-semester students. I propose to give you just a little theory here so that you can discuss it occasionally as we move along through the course. For the most part, contract law decisions can be theorized as applications of three sets of ideas:

1) Autonomy

Autonomy theorists propose that the exercise of human will is a good in itself and that enhancing the ability of individuals to determine their own future is a worthy goal of law. The Kantian who believes that all reasoning beings are inherently deserving of the respect that we ourselves desire is an example of an autonomy theorist. Contract law, under this view, aids individuals in their attempts at self-determination. People can—without contract law—make commitments to each other, but contract law allows them (1) to make commitments that a court will enforce and (2) to receive legally enforceable commitments from others. The law thus confers on them extra power to influence others and create change. Under this theory, liability is based on individuals' consent.

2) Welfare

Welfare theorists are not content to spend public resources on contract enforcement solely for the benefit of individuals and their autonomy. They believe that only a public benefit can justify action by the state. Adam Smith, the founder of classical economics, posited a relationship between the individual pursuit of self-interest and the public welfare under certain conditions:

> Every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. ... [B]y directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was in no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good. It is an affectation, indeed, not very common among merchants, and very few words need to be employed in dissuading them from it.

ADAM SMITH, An Inquiry into the Nature and Causes of the Wealth of Nations 423 (1776).

The primary conclusion of classical economics is that "there is a sort of pre-established harmony between the good of all and the pursuit by each of his own selfish economic gain."[*] Some legal scholars in the last century have retained this central conclusion of Smith's argument, then examined it in detail to show that it rests on certain premises. Here is one list of premises:

1) people act in their own self-interest;

2) in the pursuit of self-interest, people act rationally;

3) people have access to perfect information (meaning the information necessary to act rationally);

4) people and resources are freely moveable;

5) there are no artificial restrictions on entry to the marketplace.[†]

If these assumptions (or ones like them) hold in a transaction or set of transactions, these scholars conclude that such transactions will put resources (including labor) to a more efficient use, meaning that the transactions will generate greater economic wealth than if those assumptions were not true. That does not mean that both parties or even either party will gain from any individual transaction. Nor does it mean that the smarter will get richer faster: it assumes all parties are rational and have access to perfect information. Also, these scholars take the current distribution of wealth and resources as a given. (The theory does not try to change that distribution. Thus, the theory does not mean that anyone gets a bigger slice of the pie. Instead, it means that the pie itself gets bigger; that is the claimed public benefit.)

As you might expect, others raise a number of objections to this paradigm:

- No one can agree on what counts as wealth (though the theory is useful in practice only if it rests on something quantifiable; most law and economics scholars agree that ability and willingness to pay in money is the most useful surrogate for expression of preferences; most decision makers are greedy enough or wealthy enough not to care if other ends are not served; also, other ends are frequently served by other areas of law than transactional law).
- Similarly, the values people attach to things exchanged differ depending on what other resources those people have (e.g., a person’s only dollar is probably worth a lot more than someone else’s millionth dollar). This makes it hard to conclude much about the efficiency of certain kinds of transactions.
- For a variety of reasons—individual preferences and needs, current wealth, the epistemological challenges of getting into someone else’s mind,

[*]Morris Cohen, The Basis of Contract, 46 Harv. L. Rev. 553, 558 (1933).

[†]Robin Paul Malloy, Law and Economics: A Comparative Approach to Theory and Practice 54-55 (1990).

and that values assigned to things usually extend over a range and are dependent on unrevealed other preferences and conditions, for example—it is unlikely that any person's wealth (the value they attach to anything) is measurable on the same scale as or measurable against any other person's wealth. Individuals' wealth is incommensurable. This fact probably makes it impossible to draw conclusions about the efficiency of individual transactions, the very transactions that contract law judges are asked to address.

• If all of the assumptions listed above were true, the courts would have no role to play at all. Parties would maximize wealth without government intervention, and that is all anyone would care about. In some ways the very existence of contract law is contrary to this kind of lassez faire approach. (The rebuttal to this objection is that sometimes one or more of the assumptions listed above do not hold, and that contract law's purpose is to correct such failures in order to ensure efficiency.)

• No one has access to perfect information. Therefore, neither courts nor parties to transactions can decide clearly whether a transaction (or a rule employed in a decision) promotes wealth or not. Other assumptions may also break down: people may not act rationally, or people and resources may not be freely moveable. Artificial restrictions on the market may exist. Some participants begin with less wealth or information than others, creating inequalities in the marketplace that inhibit free bargaining and influence the values attached to what is exchanged (making it difficult or impossible to determine whether wealth is created in a given set of transactions).

• Occasionally, especially given that information is not perfect, people act opportunistically, meaning that they try to take advantage of others' lack of perfect information, failure to act rationally, inability to move, artificial restrictions on the marketplace, or poorer distribution of wealth.

Economic theories of contract law are called "consequentialist," meaning that they seek a public benefit beyond a benefit to the contracting parties, and if one is not obtained by a law, the law is not justified under the theories.

One thing welfare theories do that other theories do not is recognize explicitly that exchanges have social value.

3) Justice/Morality

A common and ancient meaning of the term *justice* is *giving to each according to his due*. This very unhelpful definition has been augmented to include a number of moral rules that reflect ways in which a person might fail to give another their due. For instance, the first, "keep your promises," reflects that failure to keep a promise might do real harm to another. That harm should be remedied by requiring the person who caused harm and perhaps gained by breaking a promise to recompense the person harmed. This is a just result. Consider the following:

- Keep your promises.
- Do not deceive.
- Do not coerce.
- Protect reasonable reliance. Ensure that no one is enriched unjustly (which means roughly that A gets something for nothing from B and B did not intend to give it to A as a gift).
- Have concern for the other party's interest.
- Do not cheat: Do not violate a rule of any social practice that you are engaged in, unless the rule has been clearly waived by the other party.
- Communicate before taking action that may impair the other party's interests.
- Compromise disputes; acknowledge that the other party may have a differing but reasonable interpretation.
- Follow contractual intent.

Can you think of any others?

Ready, Set . . .

BYRNES v. MANN'S ESTATE
Supreme Court of the State of Relative Clarity
65 R.C. Rptr. 67 (2017)

[¶1] Attorney Timothy Mann was driving his longtime friend, orthopedic neurosurgeon Dr. Sandra Byrnes, in a very fast boat along one of our rockier coastlines. The boat hit an unexpectedly large wave and flipped over. The boat was wrecked. Both Mann and Byrnes were thrown from the boat. Byrnes skidded across the water and landed where it was deep; though shaken, she was essentially unharmed. Mann was thrown high into the air and landed in a shallow section. Passing quickly through the water, Mann's body hit sharp rocks. The impact severed Mann's spinal cord in two places, and he suffered multiple lacerations and contusions. The accident immediately paralyzed him from the chest down.

[¶2] Amazingly, both Byrnes and Mann remained conscious. Both were wearing flotation devices. Byrnes, emerging from the water, quickly found Mann floating face down about twelve feet away. The shallow rocks under the water were keeping Mann's flotation device from flipping his face above water. Swimming toward Mann then climbing over the rocks, Byrnes gently turned Mann face up. He sputtered, saw Byrnes, and said, "Thanks. Please help me. Please he . . . ." Mann then lost consciousness.

[¶3] By this time, passersby had noticed the accident and called for help. Within 30 minutes, an emergency crew arrived, and Byrnes and EMTs carefully lifted Mann from the water. Within another 45 minutes, Mann had arrived at the operating room at St. Matthews, the nearest hospital offering neurosurgical services, and

Dr. Byrnes and a team of doctors set about doing what they could to treat Mann's injuries. After four hours of procedures, the team moved Mann to post-op and later to intensive care.

[¶4] Mann regained consciousness two days later. Dr. Byrnes was in the room at the time. The following conversation occurred:

> Mann: "Sandra?"
>
> Byrnes: "Tim? You're awake!"
>
> Mann: "I'm so sorry." (Tears welled up in Mann's eyes.)
>
> Byrnes: "Tim, no! Please don't! This is not your fault! I'd do anything to help you."
>
> Mann: "I'm so sorry." (He began to sob.) "I will make this up to you. You must have saved me. I will make this up to you! I'll repay you! I am so sorry!"

[¶5] As Mann began to sob uncontrollably, Byrnes leaned over and gently put her arms around Mann.

[¶6] Five seconds later, Mann's body went limp, his heart stopped, and he passed away. Byrnes and her team later determined that the cause of death was subarachnoid hemorrhage in the brain stem area that developed after the surgery but was worsened by Mann's sobbing.

[¶7] Some weeks later, Byrnes's office billed Mann's estate for his medical bills. Mann's insurance covered everything in excess of $45,000, but the $45,000 remains unpaid. Mann's executor is Mann's widow, Amanda Allan. Allan refused to pay the bill. When Byrnes sued, Allan moved to dismiss under Rule 12(b)(6) for failure to state a claim. The trial court granted the motion. Byrnes has appealed. We reverse.

CALEB, Justice.

[¶1] On waking, Mann recognized his friend; appeared to recall the accident; acted as if he were at fault (he was driving at the time, after all); seemed to recall Byrnes's role in flipping him over; and appeared to feel the moral pull of gratitude for Byrnes's help. All of these facts suggest Mann understood his situation. Despite Mann's injuries, that he had just awakened from a coma, and his obvious vulnerability—all of which limited his capacity to act, he volunteered a promise to Byrnes that he would pay her. This promise, moreover, followed his two-day-old request for help. Mann had plenty of motive to promise. Enough evidence exists, therefore, to allow a jury to decide whether Mann, an adult citizen, exercised his autonomy to express an intent to be bound. Mann (through his estate) has wealth; he can do with it as he pleases. Our respect for his dignity as a fellow citizen requires us to respect that right.

[¶2] Mr. Mann owns his own property. He earned it. Mr. Mann through his own initiative bartered his natural talents and hard work for the wealth he accumulated. It was not given to him, not discovered in or leveraged from some other property other than his own person—it was earned by him in free exchange with others who deemed his services worth their money. Autonomous decisions with regard to this kind of wealth above all others deserve our respect. For all of these reasons, the decision of the trial court should be reversed.

DUNN, Justice.

[¶1] Dr. Byrnes was Mann's friend, but she was also a doctor, granted a license to practice medicine by the state. Though under the law she was not required to assist the injured Mann, our laws should encourage licensed medical persons to do so. The law shields from civil damages any person who in good faith administers emergency care during an emergency. R.C. Civ. Prac. & Rem. Code § 74.151. But the law has an additional interest in encouraging the medically trained and licensed to assist. We are all better off if doctors trained and licensed to help with medical emergencies actually do so. Dr. Byrnes was a licensed physician and Mann was in obvious need of services she could render. Mann himself recognized Dr. Byrnes's power to assist him when he asked for her help.

[¶2] When a medically trained and licensed individual assists another who reasonably appears to require her professional skills, under the law she has a reasonable expectation of compensation for the service rendered and therefore the right to that compensation. *See Cotnam v. Wisdom*, 104 S.W. 164 ¶¶ 5-6 (Ark. 1907). Dr. Byrnes was medically trained and licensed. Mann reasonably appeared to require her professional skills. This is true even though Mann did not ask for any particular care and was unconscious during all of it. The source of Dr. Byrnes's right is not Mann's promise or the exercise of his will but the law's desire to encourage physicians to assist and the justified assumption that a reasonable person in need of medical assistance would ask for it. See id. ¶6.

[¶3] After such medical services were provided, who should pay for them? As between the doctor and the patient, the burden should fall on the patient if he has the assets. To place the burden on the doctor when the patient has the means to pay would discourage doctors from assisting and encourage the ill to manipulate the medically-trained.

[¶4] These laws encourage us to treat each other fairly and to work together to flourish. For these reasons, the trial court's judgment should be reversed and Byrnes's case should go forward.

[¶5] Justices Caleb, Fadel, and Gonzalez concur in this opinion.

ELLIOTT, Justice.

[¶1] I am sympathetic to the policies Justice Dunn celebrates, but I believe in the principles Justice Caleb articulates, too. In a clash, Caleb's principles destroy Dunn's, for what if the ill person wakes and says not, "I will repay you" but "why did you not let me die?" *Cotnam* overrides basic autonomy. We are presuming a lot when we presume that everyone wants a doctor to save her life; that presumption cannot help but override the autonomy of the patient from time to time. I would overrule *Cotnam*.

[¶2] Justice Dunn, on the other hand, would give people what he thinks they want. But it is very difficult to say with any certainty what Mr. Mann wanted, given his ambiguous statements and state of mind. That is flimsy evidence on which to order the payment of $45,000. Moreover, as much as we like to think of ourselves as free people, we do not have unfettered autonomy. We especially do not have the right to law backing up our unfettered autonomy. The mere evidence that a person made a promise has never, by itself, warranted a recovery under the common law. A mere promise does not give the state any reason to interfere with private persons' lives.

[¶3] Unlike Justice Fadel, I believe that neither judges nor litigants can say whether a transaction is, on net, beneficial. The litigants will say in litigation what is in their favor legally, and a judge's imagining that he can tell what the litigant valued is just that—imagination. Relying solely on evidence of a party's assent at the time of the transaction collapses analysis of utility into an examination of autonomy. Besides, this transaction impacted not just the parties but also the public. To examine the true cost of the transaction, the judge must know all of its impacts, including its true effects on Mann's physical well-being, but that is something no judge could know. The judge should also take into account the cost of emergency services that rescued Mann and Byrnes, the cost of transporting him to the hospital, the cost imposed on other medical persons and facilities, and the opportunity costs of whatever else all of those other persons would be doing if they were not caring for Mr. Mann, and that is just a beginning. Facts introduced in litigation between two individuals do not begin accurately to catalog these costs. Absent this information, there is no way to discover whether the persons involved were made better off and no one else was made worse off.

[¶4] I would affirm. Byrnes would have helped Mann even had he never asked for help. She was his friend. He did not offer to pay her when he asked for help. She offered the help without any promise of reward, and he received it without ever promising one. Generally, contract law is about trust. When a promise is made under circumstances that justify a costly response to it, the law should protect that reliance. In this case, however, Byrnes helped her friend regardless, and the promise was not made until after the services were given. The law should encourage trust (and encourage doctors to assist), but the law also should encourage friendship, not cheapen it by encouraging friends to sue each other over payment for gifts freely given.

[¶5] I am somewhat sympathetic to Justice Gonzalez's argument, but I believe the ground of that line of cases is that the request and later promise induce the action just as much as a promise made at the time of the action taken in reliance. In this case, however, Byrnes had already begun to help her friend when he asked for help, and she would have helped him, anyway. No one, I think, would or should assume that Byrnes suddenly was induced to help her friend only by his pleading and her anticipation that he might later promise to repay. His request played no role at all in inducing her actions; she would have done just the same. Because nothing here was done in reliance on a request or a promise that needs the law's support, there should be no recovery.

[¶6] I am authorized to say that Justices Hagopian and Jurgens concur in this opinion.

FADEL, Justice.

[¶1] I vote to reverse, but I lack the moral intuitions of my fellow judges. Enforcement is best when a transaction is beneficial—specifically, when the transaction, here the provision of medical services, benefits one party and at least does not make anyone else worse off.

[¶2] Obviously Mann meant for Byrnes to assist him in a medical emergency, and he intended to pay her. Byrnes, for her part, meant to assist and charge Mann. As they said it, Byrnes was to do what was necessary to help Mann, as she saw fit, and Mann was to compensate Byrnes. Though Mann's judgment on the value of the benefits he would receive is expressed only in his request for assistance and in his promise to pay after assistance was received, this is sufficient to raise the issue. That Byrnes's efforts benefitted Mann are suggested by his waking up to thank her and by the assistance of so many other medical professionals who concurred implicitly in her decisionmaking. The transaction as contemplated would benefit each. As between the parties and the government, the parties know best whether their own transactions benefit them, and the expressions of Mann and Byrnes are sufficient to show that judgment.

[¶3] The evidence is not conclusive. After all, Mann is dead from a cause Byrnes did not see, and Mann in the ocean and in the hospital was hardly in the state of mind or with the necessary information to judge conclusively whether the transaction provided a benefit to him, particularly before it had occurred. Having wrecked the boat he was driving in a spectacular crash that broke his own back in two places, only to be barely rescued from certain drowning, Mann was probably not able to make a difficult decision about his own medical care. His instability was only confirmed by the emotional upheaval displayed when he awoke two days later.

[¶4] Mann's knowledge is also questionable. When he was rolled over in the water, he could obviously sense his helplessness, though what else is unclear. Later, when he awoke in the hospital, it was obvious something had been done to him, though he remained helpless and could have had no awareness of the care given him other than his transport to the hospital. We might strongly suspect Mann lacked knowledge to judge the value of what was given him. It is possible Byrnes made Mann worse off, overall. We might know how we would value Byrnes's services, but our preferences are less reliable than Mann's in determining whether he was made better or worse off.

[¶5] The inconclusivity of the evidence regarding Mann's expressed preferences creates an issue for the finder of fact. Mann's estate can certainly try to prove the transaction made him worse off, or even that it was, on net, negative. But Byrnes has shown enough to get a hearing.

[¶6] In short, we have sufficient reasons to believe that Mr. Mann was not made worse off by this transaction, though the issue is not free from doubt. If no one was made worse off by this voluntary transaction, then it should be enforced. But that is an issue ultimately for the factfinder.

For these reasons, and because I concur with Justices Dunn and Gonzalez, I vote to reverse.

GONZALEZ, Justice.

[¶1] I would reverse. I also concur in Justice Dunn's opinion but write to add another line of cases in support.

[¶2] For nearly five hundred years, a prior request to do something, followed by the requestee's fulfillment of the request, followed by the requestor's promise to the requestee to pay for the action taken in fulfillment has by law been the equivalent of promise and consideration. *See Hunt v. Bate*, 3 Dyer 272a (C.P. 1568). This is clear precedent. In this case, Mr. Mann requested his friend, a doctor, to help. He was in obvious medical need. She helped as best she knew how. When he later awoke, found his friend, and realized she had fulfilled his request, he promised to pay her for it. The law requires that we grant her a recovery.

[¶3] Some on this court act as if this case presents an open question. It does not. Moreover, we are not legislators. Our constitution requires that legislative power rest with the Legislature. Nor are we Platonic philosopher-kings paid to impose our wisdom on the unlearned masses. We are judges in a republic, and we took an oath to uphold the laws of this state. There are certainly times when we must call on our learning, experience, and judgment to fill in the interstices of the common law and even of statutes and constitutional provisions, but this is not one of them.

[¶4] The law requires reversal, so I vote to reverse.

The judgment is reversed.

Questions:

1. With which opinion do you most agree?

2. Please pick out what you believe is the main theme of each opinion—the motivating idea, the "big" idea that causes each judge who wrote to vote for the result that judge chooses. Please be prepared to report for each opinion.

3. Do you find in any of the opinions a statement that looks like a rule of law? I can find at least two in particular.

4. If a judge does not decide according to law (in other words, if the judge in making a decision is not following a rule), then how is the judge deciding? Do you think it more appropriate for the judge to follow the law or something else?

5. Why do the facts identify Mann as an attorney? Byrnes as an orthopedic neurosurgeon?

6. Why does Justice Dunn refer to Byrnes as "Dr. Byrnes"?

7. From what sources did the law cited by the judges come? Where did it come from before that? Where do legal arguments come from before they become law?

Chapter 1. Consideration: Contract & Bargain

A. Introduction

The doctrine of consideration is somewhat of a mystery for many law students. Many never get it. I introduce it first partly because your understanding of it will become clearer with several weeks to think about it. But I also introduce it first because it came first chronologically and the logic of contract doctrine is based on it.

Originally, the common law of contract was very simple. The plaintiff had to show only three things:

Golding's Case (1586)
2 Leon. 72, 74 ER 367

> ... [Egerton, Solicitor-General:] In every action on the case [upon an assumpsit], there are three things considerable: consideration, promise and breach of promise. ....

Besides promise (a commitment to do or not do something) and breach (breaking the promise), about which you should have some understanding, only consideration had to be shown. Why? Briefly put, the doctrine of consideration was used to determine which promises should be enforced. Only a promise with consideration was enforceable.

Some historical background is helpful for you to understand why the word *consideration* came to be so important in contract law. *Consideration* in a general sense can mean something like "an important reason for doing something," as in "I decided for all these considerations to do X." This is most likely the way contract law originally used the word, in the mid-1500s.

Courts in England in 1539 first required that consideration be alleged by plaintiffs in order to show an actionable promise. English contract law retains the requirement to this day. When American states became independent, state legislatures and courts adopted the contract law of England, including the consideration requirement. That means that in order to recover damages for breach of a promise in an American court, the plaintiff usually must prove that the promise was given for a consideration. To understand why a consideration was first required, one must know something of English law regarding the enforcement of promises.

1. Medieval Law of Promise Enforcement

In medieval England, promise enforcement law was grounded in agreement, custom, and religion. Many courts could hear contract disputes: manor courts (e.g., a lord's court), borough courts, county and hundred courts, ecclesiastical courts, some civil law courts with very limited geographical jurisdiction (such as at Oxford), the court of England's chancellor, and the royal courts. Each of these medieval courts revolved around a power center: the local lord, the city government, the county government, the church, a university, or the king or queen. Also, each of these courts had its own jurisdiction, so that disputes did not arise between them, but each was empowered to enforce promises to some degree or another.

By the fourteenth century, three distinct royal courts had formed: the Common Pleas, the King's (or Queen's) Bench, and the Exchequer. (Each court had a distinct history and original purpose, but by 1539 those purposes had largely disappeared and other differences existed. When differences in the courts' jurisdictions and practices are relevant, they are noted below.) The royal courts gained preeminence among these other courts, for a number of reasons: backing by the monarch (who eventually came to dominate all other institutions in England), national geographical jurisdiction, and jurisdiction over broad subject matters. By 1539, the royal courts were by far the most prominent in England. The contract law of both England and the United States developed first in these royal courts.

Beginning law students often think that legislatures make law and that courts enforce laws, but medieval England had no legislature as we understand that term. Occasionally, the king would meet with powerful lords and heads of other powerful institutions, and these people in power would agree to change existing custom, writing out their decisions. But in the medieval period this happened relatively rarely. Most law resulted from the less powerful people seeking help from the more powerful people, each of which sat in his (and it was nearly always a man) "court." When too many people sought help for the powerful person to grant relief in person, the powerful person appointed ministers to hear pleas for help. The English king's ministers to hear pleas were called "justiciars" or "justices." The justices could receive pleas for help even when the king was not around, but the king was said to be "in court" where his justices sat to receive pleas. Eventually, all the justices sat at Westminster, near London, the largest city in England. The practices of these justices in response to pleas became law.

In this system, a plaintiff (one who complains) might complain to the royal justices about a breach of promise in a couple of different ways. The most obvious way was to allege that the defendant promised or agreed to do something and had not done it. If the plaintiff's case rested solely on the breach of promise, the justices called this a case of covenant. (*Covenant* is a translation of the Latin word *con-*

ventiones, which means literally agreements.) If the plaintiff's case appeared to be one of covenant, then the justices applied the following rules (at least after about the year 1350): (i) Trial of factual issues was by jury in the county where people would know something related to the transaction. The jury could be counted on to know the customs of the country. (ii) The plaintiff's case failed unless the promise or agreement was in a sealed writing. (Other courts might grant relief on an unwritten promise, but not the king's courts.) (iii) The jury would set damages for the breach. (iv) The justices would not order the defendant to perform the promise.

There were other ways to allege breach of promise. Another way was to allege that the defendant was indebted to the plaintiff. The justices called this a case of debt. Debt was a property-related concept in medieval England: If a transaction occurred which indebted the defendant to the plaintiff, the plaintiff could go to court to get the defendant to pay the property owed. Various transactions would cause the defendant to be in debt, and most involved some sort of breach of promise: i.e., an informal sales contract in which the goods had been delivered, a loan, a service agreement performed, a lease. But if these transactions involved breach of promise, why were they not cases of covenant? Because they also involved one other element: a *quid pro quo*, a "something for which" the defendant's promise was made and the plaintiff's action was appropriate. In the case of a loan, the lender had already lent the money, and, coupled with the agreement to pay, this *quid pro quo* justified the lender's suing for the property owed. The *quid pro quo* separated debt from covenant.

When a plaintiff alleged a debt, the justices applied the following rules: (i) The plaintiff could not proceed unless the amount of damages was certain. (ii) Trial of factual issues was by jury or by "wager of law," as the defendant may elect. A defendant waged his law by (a) swearing an oath that he was not indebted to the plaintiff and (b) producing eleven other "compurgators" or oath-helpers to swear that the defendant's oath was credible. If the defendant could swear and find eleven others to swear with him, he could go free and never pay. It was possible to lie one's way out of a debt, though in practice this probably did not happen often. But only fear of God and possible loss of reputation kept defendants from lying. The common law courts did not punish perjury until 1563. Naturally, plaintiffs would have preferred another method of recovery to debt had one been available.

You would think that given the uncertainty of debt actions, potential plaintiffs would have been wise to put their transactions in writing and under seal. In fact, many transactions were put in writing and under seal. Cautious people even went one step further and, instead of having the person promising (the "promisor") merely promise something in the writing, they would have the promisor promise to pay a penalty if the promisor did not do the desired act. For instance, if the cautious plaintiff had sold the defendant a house for 40£, the cautious plaintiff would have the defendant promise to pay 80£ if the defendant had not paid 40£ by a certain date. The defendant's writing, called a penal bond, was enforceable in a special debt action called *debt sur obligacion*. No wager of law was available in a case of *debt sur obligacion*, and the defendant had very few defenses. Factual issues went to the jury, but the bond itself set the damages.

This state of the law kept contract law from developing further. In covenant actions, the sealed document answered all the hard questions about whether a promise was made and made fairly, and the jury answered all the difficult questions about damages. In debt actions on a penal bond, the bond itself set both the obligation and the damages, and occasionally a jury was allowed to step in to grant a defense. In other debt actions, all factual disputes either went to the jury or disappeared when the defendant waged his law. In fact, if a difficult legal issue arose when the lawyers were discussing the plaintiff's debt claim for the first time, the defendant would opt to wage his law rather than risk a decision against him; lawyers opted not to force the court to decide legal questions. Thus, nearly all questions were settled by the parties, the jury, or by wager of law. If a defendant waged his law unfairly, God punished. Agreement, custom, and God were in the end the arbiters of nearly all disputed cases. No one either asked or answered many of the questions we will ask for the rest of this semester.

2. Changes in the Renaissance

The situation changed in the early 1500s, when the royal courts settled on another means for remedying a breached promise. The common law had long given a remedy for a trespass. You know what *trespass* means: it's when you walk on someone else's property against that person's express will. But *trespass* also means more generally to commit some other wrong against another personally (as in "For if ye forgive men their trespasses, your heavenly Father will also forgive you: But if ye forgive not men their trespasses, neither will your Father forgive your trespasses."—Matt. 6:14-15, KJV). The English lawyers came to think of a breach of promise as a trespass in the sense used in the KJV of Matthew. When plaintiffs alleged a trespass in the royal courts, a jury resolved the factual disputes and set the damages. The trespass action was very broad, and the royal courts purposefully allowed one strand of it, called trespass on the case, to expand to cover pleas warranting relief not covered by any other action. It is this strand of trespass on the case that came to cover breaches of promise.

This occurred in some cases by 1500. The resulting sub-category of trespass on the case was called "trespass on the case in assumpsit," or simply "assumpsit," which means in Latin literally "he has undertaken." The gist of the assumpsit action was that the defendant had undertaken to do something and had not done it, to the plaintiff's damage. The defendant could undertake a task by promising to do it. Thus, to promise a performance and then later not perform it warranted relief in assumpsit—it could be a trespass. By 1500, the king's courts had approved this kind of action in cases of breach by a building contractor, and other kinds of cases soon followed. Assumpsit cases involving breach of promise became commonplace by the late 1530s. Assumpsit proved a great boon to plaintiffs. In the assumpsit action, the defendant was not allowed to wage law, no sealed writing was required, oral promises were routinely actionable, and the jury set the damages according to the plaintiff's proof of injury. (Assumpsit grew to cover other actions as well, including many now called unjust enrichment.)

There may have been social reasons for the rise of assumpsit: One is perhaps that the Reformation and Henry VIII's break with the Catholic Church and confiscation of church lands decreased the authority of ecclesiastical courts in England. The courts of the Catholic Church in England are known to have enforced many kinds of promises, including commercial arrangements, on penalty of excommunication. With ecclesiastical courts out of power, plaintiffs previously seeking relief there would have had to seek it elsewhere. Henry also began appointing common lawyers as chancellors. Chancellors had generally been ecclesiastics previously. Common lawyers as chancellors were more likely to enforce common law than ecclesiastical law in the chancellor's court, and thus more likely to send suitors back to the royal common law courts if they could.

Still another reason may have been that the economy was growing. From 1540 until 1600 the size of the English economy doubled several times. The population also increased by sixty percent, from 2.5 million to around 4 million. On the other hand, the supply of coinage did not keep up with the general economic growth (although the supply of coins did increase substantially during this time). The result was that the increased wealth took the form of credit (which, of course, is only a promise to pay). Credit became increasingly important in local, national, and international economies during this period, so much so that the royal courts probably felt the need to adapt the law to contracting parties' expectations.

They probably felt this need particularly when they saw loopholes in the law that left some deserving plaintiffs without remedy. For instance, actions on installment contracts breached after some but before all installments came due could not be brought in debt. The debt action assumed that the debt was just one thing, not a number of things put together. In waging law the defendant would swear he owed nothing, but he was not allowed to swear he did not owe part of something. Thus, a plaintiff could not bring an action of debt until after the last installment had already become due. In the mid-sixteenth century the courts remedied this problem by granting relief in assumpsit on installment contracts breached midstream. The courts used assumpsit to patch other leaks in the debt-covenant dam. At any rate, breach of promise eventually became actionable in assumpsit.

Soon after it did, the requirement of a consideration arose. At first, the problem was rather formal. Plaintiffs' lawyers wanted to make sure that the covenant and debt rules did not apply to their cases, because they preferred the assumpsit rules. How were courts to tell whether the action arose in covenant, debt, or trespass when each of those involved an allegation that a promise had been breached? The assumpsit action could not rest on mere agreement, for then the action was based on a covenant and the covenant rules should apply. Lawyers resolved this problem by omitting any reference to agreement in their pleadings in assumpsit. But this raised another difficulty. A bare promise did not overlap with any other action, but why should the court enforce a bare promise? The common law courts had for centuries been claiming that on a nudum pactum or bare promise no action would lie. To allege a wrong worth remedying, the plaintiff had to allege something besides the promise or undertaking that would make the promise worth enforcing. At first they alleged *quid pro quo* or *consideration* or just *for* (*pro*), but eventually (in the 1550s and 60s), they realized that *quid pro quo* should be off limits, because that was the requirement for a valid debt action when no sealed writing existed. *For* (or *pro*) may not have been specific enough, and it was part of *quid pro quo*. So courts instead required that a consideration be alleged. The word initially meant something like "any good reason for an act that had legal consequences," but that is not its meaning today. The word as used by the courts in breach of promises cases in assumpsit quickly developed a more specialized, complicated meaning which we will study in our next few classes. Today, still, a promise, to be enforceable, must be given for a consideration:

Regions Bank v. Bric Constructors, LLC (2011)
Tenn. Ct. App.
380 S.W.3d 740, 761

> Consideration is indeed a necessary element to the formation of a legal contract, and in general a contract that is unsupported by consideration is unenforceable.

B. The General Test

Joseph VIAN v. Mariah CAREY (1993)
Not Reported in F. Supp.
United States District Court, S.D. New York
No. 92 Civ. 0485 (MBM)

OPINION AND ORDER

[¶1] Defendant Mariah Carey is a famous, successful and apparently wealthy entertainer. Plaintiff Joseph Vian was her stepfather before she achieved stardom, but at the start of this litigation was in the process of becoming divorced from defendant's mother. He claims defendant agreed orally that he would have a license to market singing dolls in her likeness, and sues for breach of that agreement. Defendant moves for summary judgment pursuant to Fed.R.Civ.P. 56, claiming that no contract existed and that the damages plaintiff seeks are not recoverable as a matter of law. For the reasons discussed below, defendant's motion is granted.

I.

[¶2] Plaintiff claims that he and Carey had an oral contract for him to receive a license to market "Mariah dolls." These dolls would be statuettes of the singer and would play her most popular songs. Plaintiff claims that the contract was in consideration of his financial and emotional support of defendant, including picking her up from late-night recording sessions, providing her with the use of a car, paying for dental care, allowing her to use his boat for business meetings and rehearsals, and giving her various items, including unused wedding gifts from his marriage to her mother, to help furnish her apartment. (Complaint ¶ 6)

[¶3] The alleged basis of the oral contract is that on at least three occasions, twice in the family car and once on Vian's boat, Vian told Carey "Don't forget the Mariah dolls," and "I get the Mariah dolls." (Liebman Aff. Exhs 2, 4, 5, 6.) According to Vian, on one occasion Carey responded "okay" and on other occasions she merely smiled and nodded. (*Id*.) Although Carey admits Vian mentioned the dolls two or three times, she testified that she thought it was a joke. (Carey Depo., Liebman Aff. Exh. 7.) For 30 years plaintiff has been in the business of designing, producing, and marketing gift and novelty items. (Pre-Trial Order at 3.)

II.

[¶4] Summary judgment will be granted if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc*. 477 U.S. 242, 250 (1986). "Summary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed.R.Civ.P. 1).

[¶5] In determining whether there is a genuine issue of material fact, a court must resolve all ambiguities, and draw all inferences, against the moving party. *See United States v. Diebold, Inc*., 369 U.S. 654, 655 (1962) (per curiam). * * * *

[¶6] [Here], the necessary consideration for the contract is wholly lacking. Consideration is a bargained for exchange. "In other words, the promise and the consideration must purport to be motive each for the other, in whole or at least in part; it is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting." *Banque Arabe et Internationale D'Investissement v. Bulk Oil (USA), Inc*., 726 F. Supp. 1411, 1419 (S.D.N.Y. 1989) (citations omitted) (emphasis in original). Plaintiff admits that he did not express to defendant that his help to her was a quid pro quo for a license. (Liebman Aff. Exhs 13 & 14.) Plaintiff specifically acknowledged that the household gifts and permission to use the car plaintiff purchased for defendant's mother were bestowed out of affection, not in consideration for a vague share in defendant's financial success or a more specific license for "Mariah dolls." (Liebman Aff. Exhs

16 & 20.) Nor did plaintiff ever tell defendant that her use of the boat was in consideration for a contract. (Liebman Aff. Exh. 22.) As to the dental care, plaintiff does not claim that he told defendant he expected anything in return for the money he gave her through her mother to go to a dentist. (Liebman Aff. Exh. 24.) Plaintiff further concedes that defendant may have repaid her mother. (Liebman Aff. Exh. 23.) Particularly when plaintiff was acting in a quasi-parental relationship to defendant, it is impossible to interpret plaintiff's gifts and acts as consideration for a contract.

[¶7] In sum, plaintiff has not raised a triable issue of fact as to the existence of a contract. * * * * [Among other objections,] consideration is lacking * * * *

[¶8] [D]efendant's motion for summary judgment is granted.
SO ORDERED.

Questions:

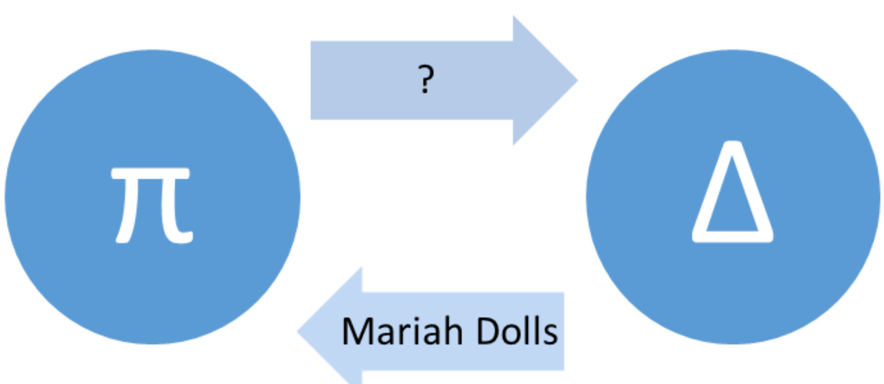
1. Is there consideration for Carey's promise? (Again, please formulate in your answer the rule of law that the court applies.)

2. Does the court discuss why it requires a consideration—the policies underlying the consideration requirement?

3. Do you think the court knows why it must require a consideration?

4. Does the court note that the consideration requirement is now 450 years old, and that times have changed?

5. Do you think this court reached the wrong result? *Vian v. Carey* is a very typical example of a modern consideration decision. In another part of the decision, the court held that Carey also failed to assent and that the contract as described here did not have the required definiteness.



PROBLEM 1. *Mona v. Harry*: Harry and Mona, both widowed and elderly, met, dated, and married. One year later, Harry contracted Alzheimer's disease. He steadily went downhill until he died eleven years later. Mona cared for him during all his years of illness and gave him some financial assistance. Two years after he contracted the disease, Harry signed a promissory note in which he promised to pay Mona $2 million. Six months later, Harry was declared incompetent and Mona was appointed as his guardian. After Harry died, his children, who controlled his estate, refused to pay Mona the $2 million, so Mona sued Harry's estate. When the estate's lawyer deposed Mona, he asked her why Harry gave her the note. Mona replied, "I was his wife. He wanted to take care of me." When asked whether she took care of Harry because of the note, Mona said, "No. I gave him my life, my love, my devotion, taking care of him because I loved him and he loved me." Is there any consideration for Harry's promise? *See Wagner v. Golden*, 1993 WL 350027 (Ct. App. Ohio 1993).

PROBLEM 2. *Leah v. Samuel*: Samuel, a married man, promised in writing to purchase an apartment for Leah, his female companion, in return for the "love and affection" that she provided him during the prior three years. Is there consideration for Samuel's promise? *See Rose v. Elias*, 576 N.Y.S.2d 257 (N.Y. Supr. App. 1991). Whether Samuel's promise formed a contract or not, why might the court have frowned on this agreement?

C. Consideration Theory and Policy

Why do we have this rule focused on exchange? The following materials, mostly from the 1500s, give reasons for why the courts formulated the consideration requirement as they did. Even today these are the most accurate set of materials describing the doctrine's purposes.

Christopher St. German, DOCTOR AND STUDENT (1531)
Second Dialogue, ch. 24
(punctuation and spelling modernized)

[¶1] [Question from the Doctor of the civil law:] What is a nude contract or a naked promise after the laws of England, and whether any action may lie thereupon.

[¶2] Student [of the common law]: .... And a nude contract is where a man maketh a bargain or a sale of his goods or lands without any recompense appointed for it. As, if I say to another, "I sell thee all my land (or all my goods)," and nothing is assigned that the other shall give or pay for it, that is a nude contract, and (as I take it) it is void in the law and conscience. And a nude or a naked promise is where a man promiseth another to give him certain money such a day or to build him a house or to do him such certain service and nothing is assigned for the money, for the building, or for the service. These be called naked promises because there is nothing assigned why they should be made. And I think no action lies in those cases, though they be not performed.

Questions:

1. Does an action lie on—meaning "can suit be brought to remedy"—a "naked" promise or contract?

2. What is a naked or nude promise? Or, conversely, what clothes a promise? Why use the nudity metaphor?

3. What's so bad about a naked promise? Could anything else clothe a promise?

4. Why would anyone make a naked promise?

5. In this passage the doctor is a Doctor of the Civil Law and the student is a Student of the Common Law. By "civil law," St. German meant the law in force in continental Europe, as opposed to the common law of England. Does either the Doctor or the Student say anything about the promise being in writing?

6. Recently, US federal district court judge Philip Simon opined, "There is no socially useful reason for a legal system to enforce agreements that are not supported by consideration." *Yessenow v. Hudson, Opinion and Order*, 2012 WL 2990643 *10 (N.D. Ind., July 18, 2012). In what sense is this true?

SHARINGTON v. STROTTON (1565)
Queen's Bench
Plowden 301, 75 English Reports [ER] 454

[¶1] [Arguments of Fletewood and Wray, counsel for one of the parties:] ... [N]othing new is here done on one side or the other, as is requisite in contracts and also in a covenant upon consideration. For instance, if I sell my horse to someone for money, or for some other recompense, here is a thing given on both sides (namely, one gives the horse and the other the money or other recompense), and therefore it is a good contract. Likewise in the case of the covenant upon consideration: for instance, if I covenant with you that if you marry my daughter you will have my land, ... here is an act on each side (namely, you shall marry my daughter, and in return for that I grant you the use). Thus there is an act done and a fresh cause arising from each side. .... The common law ... requires a new cause, whereof the country may have intelligence or knowledge for trial if need be; and thus it is necessary for the public good ...

[¶2] [Argument of Plowden, counsel for the opposing party:] ... [T]he law of the land has two ways of making contracts or agreements for land or chattels. One is by words, which is the lower, and the other is by [sealed] writing, which is the higher. And because words are often spoken or uttered by a man without great advisement or deliberation, the law has provided that a contract by words shall not bind without consideration. Thus, if I promise to give you £20 to rebuild your hall, here you shall not have an action against me for the £20 ..., for it is a naked pact, et nudo pacto non oritur actio. And the reason is because the agreement is by words, which pass from men lightly. But where the agreement is made by deed [that is, by sealed writing,] there is more stay. .... [T]here is great thought and deliberation in the making of deeds, and therefore we receive them as a final tie of the party and adjudge them to bind the party without thinking what cause or consideration there was for making it.

Christopher Wray (1524-92) became a law student at Lincoln's Inn at age 20 or 21. He served in Parliament from 1553-67. In 1571, he was appointed Speaker. Wray was appointed justice of the Queen's Bench in 1572, at about age 48, and chief justice in 1574. He remained chief justice for 17½ years, until he died in 1592.

Edmund Plowden (1518-85) was a skilled and admired attorney. He produced the first modern law reports, *Les comentaries, ou les reportes de Edmunde Plowden*, written in law French. It is rumored that Plowden would have been appointed judge had he not remained a Catholic.

Questions:

1. Here you have no decision by a court, but only some of the arguments of counsel in a case you know nothing about. We can learn a few things from the arguments of counsel, however, if you will read closely. What do Fletewood & Wray argue should count as a consideration (see if you can find at least three descriptions of it)?

2. What reasons do Fletewood & Wray give for requiring a consideration?

3. What reason does Plowden give for requiring a consideration?

4. Are the reasons given by Fletewood, Wray, and Plowden for the consideration requirement different from the policy concern with naked promises shown in DOCTOR AND STUDENT?

5. Which policy trusts promisors more, DOCTOR AND STUDENT's or Plowden's? (Which question by a parent trusts a child more: (i) "Why did you do that?" ("What were you thinking?") or (ii) "Did you think about that carefully before you did it?")

D. More on Bargain or Exchange

Now we will take a closer look at two other famous applications of the rule requiring bargain or exchange.

HUNT v. BATE (1568)
Common Pleas
Dyer, 272a, 73 ER 605, B&M 494

The servant [let's call him Employee] of a man [let's call him Employer] was arrested, and imprisoned in the Compter[*] in London for a trespass; and he [Employee] was [let out of the Compter when two other citizens of London (one of whom was plaintiff; let's call him Pledge) who knew Employer took Employee's place in jail],[†] in consideration that the business of [Employer] should not go undone. And afterwards, before judgment and condemnation [of the two citizens], [Employer] ... upon the said friendly consideration promised and undertook to [Pledge] ... to save him harmless against the party plaintiff from all damages and costs if any should be adjudged, as happened afterwards in reality; whereupon the surety [Pledge] was compelled to pay the condemnation, s. thirty-one pounds, &c. And thereupon he [Pledge] brought an action on the case ... [against Employer, and the jury found for Pledge]. And now in arrest of judgment it was moved that the action does not lie. And by the opinion of the Court it does not lie in this matter, because there is no consideration wherefore the defendant [Employer] should be charged for the debt of [Employee], unless [Employer] had first promised to discharge the plaintiff [Pledge] before the enlargement, and ... [Pledge became human bail], for [Employer] did never make request of the plaintiff [Pledge] for [Employee] to do so much, but he did it of his own head ....

Listen to a summary of the facts here: http://cca.li/QI

Questions:

1. Why wasn't Employer's promise enforceable? (You should be able to formulate your answer as a declarative sentence, a rule of law: There is no valid consideration when ____________.)

2. The court gives no policy reason for this rule, but why is it a good rule? (Use your moral sense, however finely or poorly developed, and speculate as to why a court would require what this court does. I will ask you to do this mental exercise often, because imagining up a policy to support a rule that doesn't appear to have

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[*] The Compter was a jail in London, probably on Wood Street.

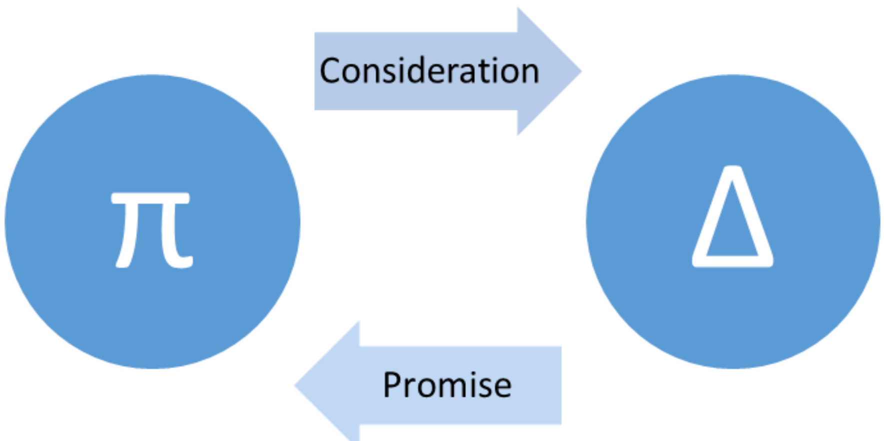
[†] Apparently, the jail was having a 2-for-1 special. By taking the servant's place in jail, Pledge and his fellow citizen became guarantors or sureties for the servant's debt to the plaintiff in the trespass case.

one is a routine task of good lawyers.)

3. Fill in the blank: This is a case of [one word] consideration.

4. Pledge took Employee's place in jail in order that Employer's work not go undone. Why did Pledge allege that Pledge did this "in consideration" that that business not go undone?

5. What caused Employer's promise? What does Pledge allege caused Employer's promise?



6. William Fulbecke, in THE SECOND PART OF THE PARALLELE, OR CONFERENCE OF THE CIVILL LAW, THE CANON LAW, AND THE COMMON LAW OF THIS REALME OF ENGLAND 18b (Thomas Wight 1602), reported that "our Law requireth in all contractes a mutuall consideration, and one part of the contract challengeth and begetteth the other." His first illustration for this principle was *Hunt v. Bate*.

Think English translations of Law French from the 1500s are difficult? See if you can figure out what is really going on in this decision.

Hildegard Lee BORELLI v. Grace G. BRUSSEAU, as Executor (1993)
California Court of Appeal, First District, Division 4
16 Cal. Rptr.2d 16

OPINION
PERLEY, J.

[¶1] Plaintiff and appellant Hildegard L. Borelli (appellant) appeals from a judgment of dismissal after a demurrer was sustained without leave to amend to her complaint against defendant and respondent Grace G. Brusseau, as executor of the estate of Michael J. Borelli (respondent). The complaint sought specific performance of a promise by appellant's deceased husband, Michael J. Borelli (decedent), to transfer certain property to her in return for her promise to care for him at home after he had suffered a stroke.

[¶2] Appellant contends that the trial court erred by sustaining the demurrer on the grounds that the "alleged agreement [appellant] seeks to enforce is without consideration and the alleged contract is void as against public policy." We conclude that the contention lacks merit.

FACTS

[¶3] The only "facts" we can consider on this appeal from the sustaining of a demurrer are those "material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." * * * * Since both parties' briefs wander far from the allegations of the complaint we will set out those allegations in some detail.

[¶4] On April 24, 1980, appellant and decedent entered into an antenuptial contract. On April 25, 1980, they were married. Appellant remained married to decedent until the death of the latter on January 25, 1989.

[¶5] In March 1983, February 1984, and January 1987, decedent was admitted to a hospital due to heart problems. As a result, "decedent became concerned and frightened about his health and longevity." He discussed these fears and concerns with appellant and told her that he intended to "leave" the following property to her.

1. "An interest" in a lot in Sacramento, California.
2. A life estate for the use of a condominium in Hawaii.
3. A 25 percent interest in Borelli Meat Co.
4. All cash remaining in all existing bank accounts at the time of his death.
5. The costs of educating decedent's stepdaughter, Monique Lee.
6. Decedent's entire interest in a residence in Kensington, California.
7. All furniture located in the residence.
8. Decedent's interest in a partnership.
9. Health insurance for appellant and Monique Lee.

[¶6] In August 1988, decedent suffered a stroke while in the hospital. "Throughout the decedent's August, 1988 hospital stay and subsequent treatment at a rehabilitation center, he repeatedly told [appellant] that he was uncomfortable in the hospital and that he disliked being away from home. The decedent repeatedly told [appellant] that he did not want to be admitted to a nursing home, even though it meant he would need round-the-clock care, and rehabilitative modifications to the house, in order for him to live at home."

[¶7] "In or about October, 1988, [appellant] and the decedent entered an oral agreement whereby the decedent promised to leave to [appellant] the property listed [above], including a one hundred percent interest in the Sacramento property. ... In exchange for the decedent's promise to leave her the property ... [appellant] agreed to care for the decedent in his home, for the duration of his illness, thereby avoiding the need for him to move to a rest home or convalescent hospital as his doctors recommended. The agreement was based on the confidential relationship that existed between [appellant] and the decedent."

[¶8] Appellant performed her promise but the decedent did not perform his. Instead his will bequeathed her the sum of $100,000 and his interest in the residence they owned as joint tenants. The bulk of decedent's estate passed to respondent, who is decedent's daughter.

DISCUSSION

[¶9] "It is fundamental that a marriage contract differs from other contractual relations in that there exists a definite and vital public interest in reference to the marriage relation. The 'paramount interests of the community at large,' quoting from the *Phillips* case [*Phillips v. Phillips* (1953) 41 Cal. 2d 869] is a matter of primary concern." * * * *

[¶10] "The laws relating to marriage and divorce (Civ. Code, [former] §§ 55-181) have been enacted because of the profound concern of our organized society for the dignity and stability of the marriage relationship. This concern relates primarily to the status of the parties as husband and wife. The concern of society as to the property rights of the parties is secondary and incidental to its concern as to their status." * * * *

[¶11] "Marriage is a matter of public concern. The public, through the state, has interest in both its formation and dissolution. ... The regulation of marriage and divorce is solely within the province of the Legislature except as the same might be restricted by the Constitution." * * * *

[¶12] In accordance with these concerns the following pertinent legislation has been enacted: Civil Code section 242-"Every individual shall support his or her spouse ...." Civil Code section 4802-"[A] husband and wife cannot, by any contract with each other, alter their legal relations, except as to property. ..." Civil Code section 5100-"Husband and wife contract toward each other obligations of mutual respect, fidelity, and support." Civil Code section 5103-"[E]ither husband or wife may enter into any transaction with the other ... respecting property, which either might if unmarried." Civil Code section 5132-"[A] married person shall support the person's spouse while they are living together. ..."

[¶13] The courts have stringently enforced and explained the statutory language. “Although most of the cases, both in California and elsewhere, deal with a wife’s right to support from the husband, in this state a wife also has certain obligations to support the husband.” * * * *

[¶14] “Indeed, husband and wife assume mutual obligations of support upon marriage. These obligations are not conditioned on the existence of community property or income.” * * * * “In entering the marital state, by which a contract is created, it must be assumed that the parties voluntarily entered therein with knowledge that they have the moral and legal obligation to support the other.”

[¶15] Moreover, interspousal mutual obligations have been broadly defined. “[Husband’s] duties and obligations to [wife] included more than mere cohabitation with her. It was his duty to offer [wife] his sympathy, confidence [citation], and fidelity.” * * * * When necessary, spouses must “provide uncompensated protective supervision services for” each other. * * * *

[¶16] *Estate of Sonnicksen* (1937) * * * * and *Brooks v. Brooks* (1941) * * * * each hold that under the above statutes and in accordance with the above policy a wife is obligated by the marriage contract to provide nursing-type care to an ill husband. Therefore, contracts whereby the wife is to receive compensation for providing such services are void as against public policy; and there is no consideration for the husband’s promise.

[¶17] Appellant argues that *Sonnicksen* and *Brooks* are no longer valid precedents because they are based on outdated views of the role of women and marriage. She further argues that the rule of those cases denies her equal protection because husbands only have a financial obligation toward their wives, while wives have to provide actual nursing services for free. We disagree. The rule and policy of *Sonnicksen* and *Brooks* have been applied to both spouses in several recent cases arising in different areas of the law.

[¶18] Webster’s New Collegiate Dictionary (1981) page 240 defines consortium as “The legal right of one spouse to the company, affection, and service of the other.” Only married persons are allowed to recover damages for loss of consortium. * * * *

[¶19] *Rodriguez v. Bethlehem Steel Corp.* (1974) * * * * held that a wife could recover consortium damages. The Supreme Court’s reasoning was as follows. “But there is far more to the marriage relationship than financial support. ‘The concept of consortium includes not only loss of support or services, it also embraces such elements as love, companionship, affection, society, sexual relations, solace and more.’ [Citation.] As to each, ‘the interest sought to be protected is personal to the wife’ [citation] ....” * * * * “The deprivation of a husband’s physical assistance in operating and maintaining the family home is a compensable item of loss of consortium.” * * * *

[¶20] In *Krouse v. Graham* (1977) * * *, an action for the wrongful death of the wife, the husband was allowed to recover consortium damages "for the loss of his wife's 'love, companionship, comfort, affection, society, solace or moral support, any loss of enjoyment of sexual relations, or any loss of her physical assistance in the operation or maintenance of the home.'" The wife "had recently retired as a legal secretary in order to care for her husband, Benjamin, whose condition of emphysema, in turn, caused him to retire and necessitated considerable nursing services."

[¶21] The principal holding of *Watkins v. Watkins* (1983) * * * * was that a marriage did not extinguish a woman's right to recover the value of her homemaker services rendered prior to the marriage. Much of the opinion is devoted to a discussion of *Sonnicksen* and *Brooks*. Those cases are approved by the court but not expanded to cover the period before marriage. * * * *

[¶22] *Vincent v. State of California* (1971) * * * * held that for purposes of benefit payments spouses caring for each other must be treated identically under similar assistance programs. In reaching such conclusion the court held: "Appellants suggest that one reason justifying denial of payment for services rendered by ATD attendants who reside with their recipient spouses is that, by virtue of the marriage contract, one spouse is obligated to care for the other without remuneration. (Civ. Code, § 5100; *Estate of Sonnicksen* * * *) Such preexisting duty provides a constitutionally sound basis for a classification which denies compensation for care rendered by a husband or wife to his spouse who is receiving welfare assistance. [Citations.] ... [¶] ... But insofar as one spouse has a duty created by the marriage contract to care for the other without compensation when they are living together, recipients of aid to the aged, aid to the blind and aid to the disabled are similarly situated." * * * *

[¶23] These cases indicate that the marital duty of support under Civil Code sections 242, 5100, and 5132 includes caring for a spouse who is ill. They also establish that support in a marriage means more than the physical care someone could be hired to provide. Such support also encompasses sympathy * * * * [,] comfort * * * * [,] love, companionship and affection * * * *. Thus, the duty of support can no more be "delegated" to a third party than the statutory duties of fidelity and mutual respect (Civ. Code, § 5100). Marital duties are owed by the spouses personally. This is implicit in the definition of marriage as "a personal relation arising out of a civil contract between a man and a woman." (Civ. Code, § 4100.)

[¶24] We therefore adhere to the long-standing rule that a spouse is not entitled to compensation for support, apart from rights to community property and the like that arise from the marital relation itself. Personal performance of a personal duty created by the contract of marriage does not constitute a new consideration supporting the indebtedness, alleged in this case.

[¶25] We agree with the dissent that no rule of law becomes sacrosanct by virtue of its duration, but we are not persuaded that the well-established rule that governs this case deserves to be discarded. If the rule denying compensation for support originated from considerations peculiar to women, this has no bearing on the rule's gender-neutral application today. There is as much potential for fraud today as ever, and allegations like appellant's could be made every time any personal care is rendered. This concern may not entirely justify the rule, but it cannot be said that all rationales for the rule are outdated.

[¶26] Speculating that appellant might have left her husband but for the agreement she alleges, the dissent suggests that marriages will break up if such agreements are not enforced. While we do not believe that marriages would be fostered by a rule that encouraged sickbed bargaining, the question is not whether such negotiations may be more useful than unseemly. The issue is whether such negotiations are antithetical to the institution of marriage as the Legislature has defined it. We believe that they are.

[¶27] The dissent maintains that mores have changed to the point that spouses can be treated just like any other parties haggling at arm's length. Whether or not the modern marriage has become like a business, and regardless of whatever else it may have become, it continues to be defined by statute as a personal relationship of mutual support. Thus, even if few things are left that cannot command a price, marital support remains one of them.

Disposition

The judgment is affirmed. Costs to respondents.

POCHE, J., Dissenting.

[¶1] A very ill person wishes to be cared for at home personally by his spouse rather than by nurses at a health care facility. The ill person offers to pay his spouse for such personal care by transferring property to her. The offer is accepted, the services are rendered and the ill spouse dies. Affirming a judgment of dismissal rendered after a general demurrer was sustained, this court holds that the contract was not enforceable because-as a matter of law-the spouse who rendered services gave no consideration. Apparently, in the majority's view she had a preexisting or precontract nondelegable duty to clean the bedpans herself. Because I do not believe she did, I respectfully dissent.

[¶2] The majority correctly read *Estate of Sonnicksen* (1937) * * * * and *Brooks v. Brooks* (1941) * * * * as holding that a wife cannot enter into a binding contract with her husband to provide "nursing-type care" for compensation. * * * * It reasons that the wife, by reason of the marital relationship, already has a duty to provide such care, thus she offers no new consideration to support an independent contract to the same effect. (See Civ. Code, §§ 1550, 1605.) The logic of these decisions is ripe for reexamination.

[¶3] *Sonnicksen* and *Brooks* are the California Court of Appeal versions of a national theme. (*See, e.g.,* [several precedents from around the country].) Excerpts from several of these decisions reveal the ethos and mores of the era which produced them.

[¶4] "'It would operate disastrously upon domestic life and breed discord and mischief if the wife could contract with her husband for the payment of services to be rendered for him in his home; if she could exact compensation for services, disagreeable or otherwise, rendered to members of his family; if she could sue him upon such contracts and establish them upon the disputed and conflicting testimony of the members of the household. To allow such contracts would degrade the wife by making her a menial and a servant in the home where she should discharge marital duties in loving and devoted ministrations, and frauds upon creditors would be greatly facilitated, as the wife could frequently absorb all her husband's property in the payment of her services, rendered under such secret, unknown contracts.'" (*Brooks v. Brooks* * * *.)

[¶5] "A man cannot be entitled to the services of his wife for nothing, by virtue of a uniform and unchangeable marriage contract, and at the same time be under obligation to pay her for those services .... She cannot be his wife and his hired servant at the same time. ... That would be inconsistent with the marriage relation, and disturb the reciprocal duties of the parties." (*In re Callister's Estate* (1897) * * *.)

[¶6] "[I]t is not within the power of husband and wife to contract with each other for the payment for such services .... It is the duty of husband and wife to attend, nurse, and care for each other when either is unable to care for himself. It would be contrary to public policy to permit either to make an enforceable contract with the other to perform such services as are ordinarily imposed upon them by the marital relations, and which should be the natural prompting of that love and affection which should always exist between husband and wife." (*Foxworthy v. Adams* * * *.)

[¶7] Statements in two of these cases to the effect that a husband has an entitlement to his wife's "services" * * * * smack of the common law doctrine of coverture which treated a wife as scarcely more than an appendage to her husband. According to the United States Supreme Court, "At the common law the husband and wife were regarded as one. The legal existence of the wife during coverture was merged in that of the husband, and, generally speaking, the wife was incapable of making contracts, of acquiring property or disposing of the same without her husband's consent. They could not enter into contracts with each other, nor were they liable for torts committed by one against the other." * * * * The same court subsequently denounced coverture as "peculiar and obsolete" * * * *, "a completely discredited ... archaic remnant of a primitive caste system" * * * founded upon "medieval views" which are at present "offensive to the ethos of our society.” * * * * One of the characteristics of coverture was that it deemed the wife economically helpless and governed by an implicit exchange: “‘The husband, as head of the family, is charged with its support and maintenance in return for which he is entitled to the wife’s services in all those domestic affairs which pertain to the comfort, care, and well-being of the family. Her labors are her contribution to the family support and care.’” * * * * But coverture has been discarded in California * * * *, where both husband and wife owe each other the duty of support. (Civ. Code, §§ 242, 5100, 5132.)

[¶8] Not only has this doctrinal base for the authority underpinning the majority opinion been discarded long ago, but modern attitudes toward marriage have changed almost as rapidly as the economic realities of modern society. The assumption that only the rare wife can make a financial contribution to her family has become badly outdated in this age in which many married women have paying employment outside the home. A two-income family can no longer be dismissed as a statistically insignificant aberration. Moreover today husbands are increasingly involved in the domestic chores that make a house a home. Insofar as marital duties and property rights are not governed by positive law, they may be the result of informal accommodation or formal agreement. (See Civ. Code, § 5200 et seq.) If spouses cannot work things out, there is always the no longer infrequently used option of divorce. For better or worse, we have to a great extent left behind the comfortable and familiar gender-based roles evoked by Norman Rockwell paintings. No longer can the marital relationship be regarded as “uniform and unchangeable.” * * * *

[¶9] It is true that public policy seeks to foster and protect that institution * * * * in recognition that the structure of society itself depends in large part upon the institution of marriage * * *. Yet the recognition that marriage is “intimate to the degree of being sacred” * * * * does not mean that the law is oblivious to what occurs within that relationship. Solicitude for domestic harmony is no longer synonymous with blindness to crimes spouses commit against each other * * * *, even when those crimes involve the previously sacrosanct realm of sexual relations. (See Pen. Code, § 262.) Similarly, civil actions are allowed for intentional or negligent torts committed by one spouse against the other. * * * * The same is true for breached contracts. * * * * Thus, when the simple justice of redressing obvious wrongs is involved, the arguments for domestic harmony have been rejected and are now in full retreat, not only in California * * * * , but throughout the entire nation. * * * *

[¶10] Restraints on interspousal litigation are almost extinct. With the walls supposedly protecting the domestic haven from litigation already reduced to rubble, it hardly seems revolutionary to topple one more brick. Furthermore, in situations such as this, where one spouse has died, preserving “‘domestic life [from] discord and mischief’” (*Brooks v. Brooks* * * *) seems an academic concern that no modern academic seems concerned with.

[¶11] Fear that a contract struck between spouses "degrades" the spouse providing service, making him or her no better than a "hired servant" justifies the result in several cases. * * * * Such fears did not prevent California from enacting a statute specifying that "either husband or wife may enter into any transaction with the other, or with any other person, respecting property, which either might if unmarried." (Civ. Code, §§ 5103, subd. (a), 4802.) This is but one instance of "the utmost freedom of contract [that] exists in California between husband and wife ...." * * * *

[¶12] Reduced to its essence, the alleged contract at issue here was an agreement to transmute Mr. Borelli's separate property into the separate property of his wife.* Had there been no marriage and had they been total strangers, there is no doubt Mr. Borelli could have validly contracted to receive her services in exchange for certain of his property. The mere existence of a marriage certificate should not deprive competent adults of the "utmost freedom of contract" they would otherwise possess.

[¶13] Then there is the concern about "frauds upon creditors." (E.g., *Brooks v. Brooks* * * *.) Our Supreme Court has repeatedly rejected the notion that the mere possibility of interspousal fraud or collusion at the expense of third parties bars an entire category of interspousal litigation. Instead, the truth finding role of the judiciary has been deemed adequate to deal with the problem in individual cases. In other words, whether or not a contract was induced by fraud is decided by not demurrer, but by human beings called jurors after they hear evidence. * * * * This modern approach completely undercuts one more of the doctrinal underpinnings of *Sonnicksen* and *Brooks* and is obviously applicable here. Since this shift in the law occurred after those cases were decided, it is one more reason to reconsider them and to reject their contemporary force. As Justice Holmes put it: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." (Justice Oliver Wendell Holmes, Collected Legal Papers (1920) p. 187.)

[¶14] No one doubts that spouses owe each other a duty of support or that this encompasses "the obligation to provide medical care." * * * * There is nothing found in *Sonnicksen* and *Brooks*, or cited by the majority, which requires that this obligation be personally discharged by a spouse except the decisions themselves.

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* Plaintiff makes reference in her complaint to a "1980 written antenuptial contract" that she alleges she "signed ... one day before her wedding." Although the record does not include a copy of this contract, it seems obvious from the context of this litigation that its general import was to segregate and preserve substantial assets as to Mr. Borelli's separate property.

The possibility that the agreement is ineffective to transmute the character of Mr. Borelli's property because of noncompliance with various statute of frauds provisions (see Civ. Code, §§ 1624, 5110.730; Code Civ. Proc., §§ 1971-1972) need not be addressed here in light of plaintiff's allegation that defendants are estopped to claim the benefit of these provisions. * * * *

However, at the time *Sonnicksen* and *Brooks* were decided—before World War II—it made sense for those courts to say that a wife could perform her duty of care only by doing so personally. That was an accurate reflection of the real world for women years before the exigency of war produced substantial employment opportunities for them. For most women at that time there was no other way to take care of a sick husband except personally. So to the extent those decisions hold that a contract to pay a wife for caring personally for her husband is without consideration they are correct only because at the time they were decided there were no other ways she could meet her obligation of care. Since that was the universal reality, she was giving up nothing of value by agreeing to perform a duty that had one and only one way of being performed.

[¶15] However the real world has changed in the 56 years since *Sonnicksen* was decided. Just a few years later with the advent of World War II Rosie the Riveter became not only a war jingle but a salute to hundreds of thousands of women working on the war effort outside the home. We know what happened thereafter. Presumably, in the present day husbands and wives who work outside the home have alternative methods of meeting this duty of care to an ill spouse. Among the choices would be: (1) paying for professional help; (2) paying for nonprofessional assistance; (3) seeking help from relatives or friends; and (4) quitting one's job and doing the work personally.

[¶16] A fair reading of the complaint indicates that Mrs. Borelli initially chose the first of these options, and that this was not acceptable to Mr. Borelli, who then offered compensation if Mrs. Borelli would agree to personally care for him at home. To contend in 1993 that such a contract is without consideration means that if Mrs. Clinton becomes ill, President Clinton must drop everything and personally care for her.

[¶17] According to the majority, Mrs. Borelli had nothing to bargain with so long as she remained in the marriage. This assumes that an intrinsic component of the marital relationship is the personal services of the spouse, an obligation that cannot be delegated or performed by others. The preceding discussion has attempted to demonstrate many ways in which what the majority terms "nursing-type care" can be provided without either husband or wife being required to empty a single bedpan. It follows that, because Mrs. Borelli agreed to supply this personal involvement, she was providing something over and above what would fully satisfy her duty of support. That personal something—precisely because it was something she was not required to do—qualifies as valid consideration sufficient to make enforceable Mr. Borelli's reciprocal promise to convey certain of his separate property.

[¶18] Not only does the majority's position substantially impinge upon couples' freedom to come to a working arrangement of marital responsibilities, it may also foster the very opposite result of that intended. For example, nothing compelled Mr. Borelli and plaintiff to continue living together after his physical afflictions became known. Moral considerations notwithstanding, no legal force could have stopped plaintiff from leaving her husband in his hour of need. Had she done so, and had Mr. Borelli promised to give her some of his separate property should she come back, a valid contract would have arisen upon her return. Deeming them contracts promoting reconciliation and the resumption of marital relations, California courts have long enforced such agreements as supported by consideration. * * * * Here so far as we can tell from the face of the complaint, Mr. Borelli and plaintiff reached largely the same result without having to endure a separation.[*] fn. 3 There is no sound reason why their contract, which clearly facilitated continuation of their marriage, should be any less valid. It makes no sense to say that spouses have greater bargaining rights when separated than they do during an unruptured marriage.

[¶19] What, then, justifies the ban on interspousal agreements of the type refused enforcement by *Sonnicksen*, *Brooks*, and the majority? At root it appears to be the undeniable allure of the thought that, for married persons, "to attend, nurse, and care for each other ... should be the natural prompting of that love and affection which should always exist between husband and wife." * * * * All married persons would like to believe that their spouses would cleave unto them through thick and thin, in sickness and in health. Without question, there is something profoundly unsettling about an illness becoming the subject of interspousal negotiations conducted over a hospital sickbed. Yet sentiment cannot substitute for common sense and modern day reality. Interspousal litigation may be unseemly, but it is no longer a novelty. The majority preserves intact an anomalous rule which gives married persons less than the utmost freedom of contract they are supposed to possess. The majority's rule leaves married people with contracting powers which are more limited than those enjoyed by unmarried persons or than is justified by legitimate public policy. In this context public policy should not be equated with coerced altruism. Mr. Borelli was a grown man who, having amassed a sizeable amount of property, should be treated—at least on demurrer—as competent to make the agreement alleged by plaintiff. The public policy of California will not be outraged by affording plaintiff the opportunity to try to enforce that agreement.

Questions:

1. What is the rule of law the court applies?

2. Which opinion do you think has the better argument?

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[*] Plaintiff's allegation in her complaint that she forewent the opportunity "to live an independent life in consideration of her agreement" with Mr. Borelli carries the clear implication that she would have separated from him but for the agreement.

3. How would this case come out if the rationales for the doctrine of consideration, and not the doctrine itself, were the law?

4. Are you interested in the political leanings of the judges in this case? Which judge do you think leans which way?

5. If Mrs. Borelli came to you and asked you to write an enforceable contract requiring Mr. Borelli to pay according to his agreement, what sort of agreement would you write? [The answer to this question is not in the reading, but it is the kind of question you should be thinking about. Please ask me this question in class. I will answer it.]

PROBLEM 3. *Abe v. Juanita*: Abe is a police officer. Juanita owns a jewelry store in Abe's jurisdiction, where Abe patrols. Juanita's store was burglarized, and Juanita offered a $5,000 reward to anyone with information leading to the arrest and conviction of the burglars. Abe, while working part-time as a security guard at a nearby store, found evidence that led to the arrest and conviction of the burglars. Can Abe claim Juanita's reward, based on the rule from *Borelli v. Brusseau*? Is there some other public policy that counsels against Abe's recovering the reward?

Restatement (Second) of Contracts § 71(1)-(2) & cmt. b (1981)

Questions:

1. What does "bargained for" mean in the language of the Restatement (Second) of Contracts (affectionately known as "R2K")?

2. Is Hunt's promise in *Hunt v. Bate* bargained for?

3. Comment b mentions mutual assent. As noted in the Introduction, assent is considered to be one element of contract formation. We will study assent later, in Chapters 5, 6, and 7.

4. The comment also mentions promises enforceable without consideration. We will study these, too, some in this Chapter, in Chapters 2 and 3, and others sprinkled throughout the book.

E. Proper Form

Notwithstanding a clear requirement of a bargain, courts from early on expressed the consideration rule primarily in terms of consideration's form. Consideration was (and still is) also required to be in a certain form: benefit to the promisor, detriment to the promisee, or mutual promise.

STONE v. WITHEPOOLE (1588)
Queen's Bench
1 Leon. 113, 74 ER 106, Cro. Eliz. 126, 78 ER 383, Owen 94, 74 ER 924,
Latch, 82 ER 254

... [Edward Coke (pronounced Cook):] .... The consideration is the ground of every action on the case, and it ought to be either a charge to the plaintiff or a benefit to the defendant ....

PLAINS BUILDERS, INC. v. STEEL SOURCE, INC. (2013)
Texas Court of Appeals
408 S.W.3d 596, 602

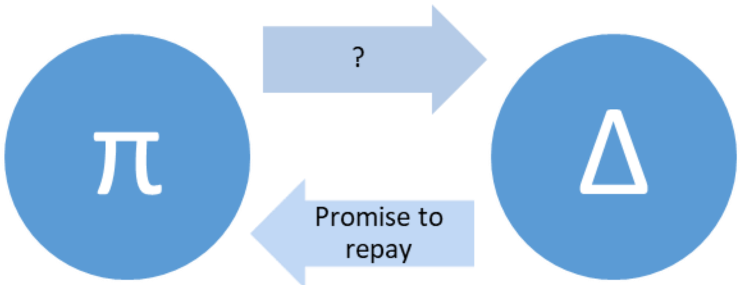
Consideration is a present exchange bargained for in return for a promise. It consists of either a benefit to the promisor or a detriment to the promisee. The detriment must induce the making of the promise, and the promise must induce the incurring of the detriment.

Note: Coke's pronouncement of the rule in *Stone* was fairly typical for the time. The rule you see recited in *Plains Builders* is a typical statement of the consideration rule as it is used today. They are the same rule. In 16th century procedure, the promisor was always the defendant, and the promisee was always the plaintiff—in all assumpsit, debt, and covenant actions: all actions on contracts. So it makes sense for us to pronounce the same rule as we do now, as benefit to the promisor or detriment to the promisee. We also include the element of bargain, because we have recognized that bargain was implicit in the law at least since the time of *Hunt v. Bate*.

1. Benefit

GAME v. HARVIE (1605)
King's Bench
Yelverton 50, 80 ER 36

[Plaintiffs loaned defendant money, to be paid back on request. Defendant refused to pay when requested, so plaintiffs sued in assumpsit, winning a judgment.] ... [I]n arrest of judgment, Yelverton shewed that the consideration was not sufficient; for it is to pay ... upon request; so that it appears that the defendant was not to have any benefit by it, for it might be lent with one hand, and immediately demanded .... But *tota Curia* clearly *contra*; for when the intent of the parties may stand with the law, it shall be expounded accordingly; ... and ... here ... (as Popham [J.] said) the promise is grounded upon an accommodation, viz. a loan, which implies an use of the [money] by the defendant. .... But if a man delivers to J.S. a bag sealed with money, and the defendant promises to redeliver it upon request, no *assumpsit* lies upon this; for the defendant has not any benefit by it, for the money being in a bag has only a charge imposed by the keeping, *vide* P. 44 Eliz. before, the case of Riches and Brigges, which Yelverton cited to be reversed, and Gaudy and the Court [the King's Bench] said it was erroneously reversed. ....



[Translation guide from legal to common English: *In arrest of judgment* means, more or less, "on appeal." *Shewed* means "argued." *Tota curia* is Latin for "the whole court." *Contra* means "against." *Viz.* is an abbreviation for the Latin "videlicet," which is a contraction of "videre licet," which means "you may see;" in English writing, *viz.* often is a synonym for "namely" or "that is." *J.S.* is short for John of Style, a fictitious name lawyers used in their reports to describe anyone whose name wasn't really relevant. John Doe is the equivalent. *Assumpsit* is a cause of action or suit for breach of promise or for unjust enrichment, as the historical intro described; *assumpsit* is still current usage in many states. *See, e.g.*, *Nevarez v. USAA Federal Savings Bank*, No. 08-19-00120-CV, 2021 WL 837624 at *4 (Tex. App.—El Paso Mar. 5, 2021) ("Money had and received is a category of general assumpsit.").]

Questions:

1. As a young associate, I used to examine loan documents to determine their enforceability. Many loans I examined were based on demand notes, promissory notes that required the borrower to pay the money back whenever it was demanded by the creditor. "What a silly provision," I thought, "The borrower could have the money tied up in a building project and have no means to pay it back! If we took this demand provision literally, the borrower would be unable to use the money, and the loan would be of no use to her." That is exactly Yelverton's objection. What is Popham's response?

Christopher Yelverton (1536-1612) was a younger son of a lawyer and entered law school in his late teens. His break into public service came when he married Margaret Catesby. Margaret's father used his influence to get Yelverton elected to Parliament, where he served several times, eventually as Speaker. He and Margaret had twelve children. Queen Elizabeth appointed him to the Queen's Bench, where he served until he died. http://www.oxforddnb.com/view/printable/30213

2. How does the court describe the category of things that will count as a consideration?

3. The defendant possessed the money. That is a sort of detriment or "charge," the word the court uses for detriment. Is the promisor's possession of the money the kind of detriment that will make a promise enforceable?

4. What does "intent of the parties may stand with the law" mean? (Clue: Comment b to Restatement (Second) of Contracts § 71 says the same thing.)

RICHES v. BRIDGES (1602)
Queen's Bench & Exchequer Chamber
Cro. Eliz. 883, 78 ER 1108

[¶1] *Assumpsit*. For that [the plaintiff] was indebted to J.S. in twenty combs of barley, to be delivered unto [J.S.] at such a day, in consideration that [the plaintiff] would deliver it to the defendant before the day; the defendant assumed, and promised to deliver it at the day to J.S.: and alledgeth in fact, that [the plaintiff] delivered it to the defendant, and the defendant had not delivered it to J.S. It was moved in arrest of judgment, that this was not any consideration to deliver the same corn which he had received, for he cannot have any use of it, nor any benefit by it.

[¶2] But the whole Court [the Queen's Bench] held it to be a good consideration; for in regard he received it, and made such a promise, it shall be intended that he had some benefit thereby, viz. that he had the better credit to retain it in his hands; or otherwise he would not make such a promise: and if by any intendment it can be, the law will well intend it. Wherefore it was adjudged for the plaintiff. Note, afterwards upon a writ of error in the Exchequer Chamber, it was reversed for this cause; for that there was not any sufficient consideration whereof the law takes any regard.

Yelverton 4, 80 ER 4:

... [by the whole Queen's Bench:] the very possession of the wheat might be a credit and good countenance to the defendant to be esteemed a rich farmer in the country, as in case of the delivery of the 1000*l*. in money to deliver again upon request; for by having so much money in his possession he may happen to be preferr'd in marriage. *Quaere*, for it seems a hard judgment; for the defendant has not any manner of profit to receive but only a bare possession. .... But nota, the judgment was reversed in the Exchequer, ... as Hitcham told Yelverton.

Listen to a summary of the facts here: http://cca.li/QJ

Questions:

1. The Queen's Bench found consideration in this case. Was the consideration set forth in the plaintiff's allegations (which are all set forth in the first sentence)?

2. Do we know for what reason the defendant made this promise? Why would the defendant make such a promise (you may speculate on this one)?

3. Do we know that the defendant deliberated before making the promise?

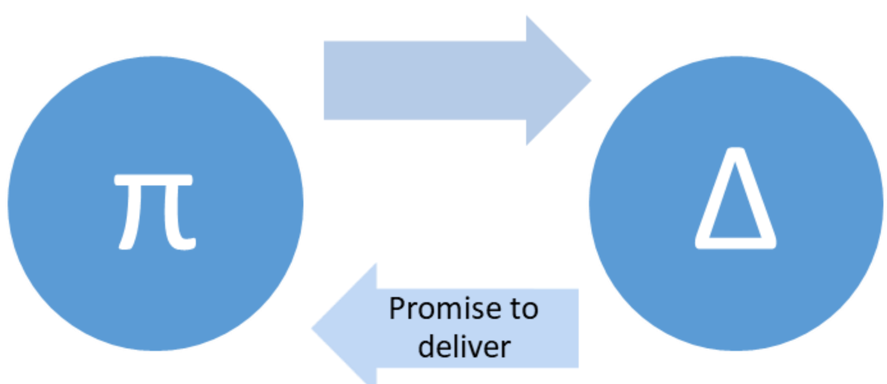
4. Does the consideration relied on by the court show that a promise probably was made?

5. What does "shall be intended" mean? How does a court "intend" something?

6. Is there any reason to think that this transaction was efficient?

7. What happened to this case in the Exchequer Chamber, which was the court of appeals that in 1602 reviewed cases from the Queen's Bench?

8. Why does Croke, the first reporter, report that both barley or corn are at issue but Yelverton reports that it was wheat? [This is a trick question, and a non-legal one.]



REYNOLDS v. PINHOWE (1594)
Queen's Bench
Cro. Eliz. 429, 78 ER 669

Assumpsit. Whereas the defendant had [obtained a judgment of] five pounds against the plaintiff;* in consideration of four pounds given him by the plaintiff, ... the defendant assumed to acknowledge satisfaction of that judgment† before such a day; and ... he had not done it. And it was thereupon demurred: for it was moved, that there was not any consideration. —But all the Court held it to be well enough; for it was a benefit unto him to have it without suit or charge: and it may be there was error in the record, so as the party might have avoided it. Wherefore it was adjudged for the plaintiff.

Moore 412, 72 ER 663:

... But it was adjudged good, because speedy payment excuses & prevents travail & expense of suit.

Listen to a summary of the facts here: http://cca.li/QK

Questions:

1. What form must the consideration take, says the Queen's Bench?

2. Is there any mention of "bargain" in *Reynolds*, *Riches*, and *Game*?

3. Does a "bargain" exist in these three cases?

4. How is this case different from *Borelli*?

5. *Reynolds* has the right rule, but the application of it is controversial. Some American jurisdictions would follow *Reynolds*, but most would have held that no consideration existed here. They would follow *Borelli* on these facts. We will study those jurisdictions later. Please remember that *Reynolds* is a minority position.

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* Most disputed lawsuits end with a "judgment," a document signed by a judge dismissing the suit or directing the defendant to do something such as pay money. After the court issues a judgment that a defendant pay money to a winning plaintiff, if the defendant refuses to pay then the plaintiff must initiate collection procedures, which are separate from and collateral to the lawsuit that resulted in the judgment. The defendant in *Reynolds* was a winning plaintiff in a prior lawsuit. He had obtained in that prior suit a judgment against the *Reynolds* plaintiff.

† Acknowledging satisfaction of the judgment debt probably meant that the defendant give the plaintiff a signed and sealed writing that would have provided the *Reynolds* plaintiff with a defense to any further collection procedures by the *Reynolds* defendant.

PROBLEM 4. A tractor dealer sells a tractor to a farmer. The farmer takes immediate possession, and in return promises to pay for the tractor over the next five years. Is there consideration?

ASSOCIATED BUILDERS, INC. v. William M. COGGINS et al. (1999)
Supreme Judicial Court of Maine
722 A.2d 1278

DANA, J.

[¶1] Associated Builders, Inc. appeals from a grant of a summary judgment entered in the Superior Court * * * * in favor of the defendants William M. Coggins and Benjamin W. Coggins, d/b/a Ben & Bill's Chocolate Emporium. Associated contends that the court erred when it held that despite a late payment by the Cogginses, an accord and satisfaction relieved the Cogginses of a contractual liability. The Cogginses argue that the three-day delay in payment was not a material breach of the accord and, even if the breach was material, Associated waived its right to enforce the forfeiture. We agree with the Cogginses and affirm the judgment.

[¶2] Associated provided labor and materials to the Cogginses to complete a structure on Main Street in Bar Harbor. After a dispute arose regarding compensation, Associated and the Cogginses executed an agreement stating that there existed an outstanding balance of $70,005.54 and setting forth the following terms of repayment:

> It is agreed that, two payments will be made by [the Cogginses] to [Associated] as follows: Twenty Five Thousand Dollars ($25,000.00) on or before June 1, 1996 and Twenty Five Thousand Dollars ($25,000.00) on or before June 1, 1997. No interest will be charged or paid providing payments are made as agreed. If the payments are not made as agreed then interest shall accrue at 10% [ ] per annum figured from the date of default. There will be no prepayment penalties applied. It is further agreed that Associated Builders will forfeit the balance of Twenty Thousand and Five Dollars and Fifty Four Cents ($20,005.54) providing the above payments are made as agreed.

The Cogginses made their first payment in accordance with the agreement. The second payment, however, was delivered three days late on June 4, 1997. Claiming a breach of the contract, Associated filed a complaint demanding the balance of $20,005.54, plus interest and cost. The Cogginses answered the complaint raising the affirmative defense of an accord and satisfaction and waiver. Both parties moved for a summary judgment. The court granted the Cogginses' motion and Associated appealed.

[¶3] The trial court must enter a summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by [M.R. Civ. P.] 7(d) show that there is no genuine issue as to any material fact set forth in those statements and that any party is entitled to a judgment as a matter of law." M.R. Civ. P. 56(c). "On appeal from a grant of summary judgment, we view the evidence in the light most favorable to the nonprevailing party, and review the trial court decision for errors of law." * * * *

[¶4] "An accord 'is a contract under which an obligee promises to accept a substituted performance in future satisfaction of the obligor's duty.'" * * * * Settlement of a disputed claim is sufficient consideration for an accord and satisfaction. * * * * Here, the court correctly found the June 15, 1995 agreement to be an accord.

[¶5] Satisfaction is the execution or performance of the accord. See Restatement (Second) of Contracts § 281(1) (1981). If the obligor breaches the accord, the obligee may enforce either the original duty or any duty pursuant to the accord. See *id.* § 281(2) (1981); *see also* Arthur L. Corbin, 6 Corbin on Contracts § 1271, at 93-94 (1961). * * * *

[¶8] Even if the [Cogginses breached and Associated had a right to disregard the accord and enforce the original obligation (—Ricks)], Associated waived that right when it accepted the late payment. A waiver is a voluntary or intentional relinquishment of a known right. * * * * If a party in knowing possession of a right does something inconsistent with the right or that party's intention to rely on it, the party is deemed to have waived that right. * * * * A party waives a contractual right arising from a breach because of a late payment when that party accepts tender of the late payment. * * * * Here, because Associated accepted the final $25,000 payment, it waived its right to enforce the forfeiture.

[¶9] The trial court, therefore, did not err when it held that a satisfaction of the accord occurred when Associated accepted the final payment.

The entry is:

Judgment affirmed.

Questions:

1. What is an accord?

2. What is consideration for the accord in this case?

3. Was consideration here a performance or a promise?

4. If the obligor breaches the accord, what remedies does the obligee have?

5. What act constituted waiver?

6. What should Associated have done after it received the check if it wanted to sue for the other $20,005.54?

—A long aside: Moral Obligation

Please review *Hunt v. Bate, supra*.

EDMONDS CASE (1587)
3 Leon. 164

In an action upon the case against Edmonds, the case was, that the defendant being [a minor], requested the plaintiff to be bounden for him to another, for the payment of 30l., which he was to borrow for his own use; to which the plaintiff agreed, and was bounden, [as requested]; afterwards, the plaintiff was sued for the said debt [of Edmonds], and paid it; and afterwards, when the defendant came of full age the plaintiff put him in mind of the matter aforesaid, and prayed him that he might not be damnified so to pay 30l., it being the defendant's debt: whereupon the defendant promised to pay the debt again to the plaintiff; upon which promise, the action was brought. And it was holden by the Court, that although here was no present consideration upon which the assumpsit could arise; yet the Court was clear, that upon the whole matter the action did lie, and judgment was given for the plaintiff.

Questions:

1. What was consideration for the second promise?

2. The word consideration is by 1587 a technical legal word. Commonly, or non-legally, it may mean "a thing to consider." Does this report use it technically or by its common meaning?

This next case is an aside (technically an aside to an aside). It deals with a problem of capacity. Can a minor contract? Or, why did the infant in *Edmonds Case* need to promise again? *Ex Parte Odem* discusses the capacity of infants.

Ex parte: Iris ODEM
(Re: The CHILDREN'S HOSPITAL OF BIRMINGHAM v.
Vincent KELLEY and Iris Odem) (1988)
Supreme Court of Alabama
537 So.2d 919

[¶1] We granted this petition for writ of certiorari in order to review the limited issue of whether a minor who executes a contract for a "necessary" is obligated to comply with the express terms of the entire contract, including those provisions regarding attorney fees and waiver of personal exemptions.

[¶2] The facts of this case are set forth in the opinion by the Court of Civil Appeals, 537 So.2d 917, and we agree that medical services provided to an infant child of a minor are "necessaries" for which the minor parent may be obligated to pay, but we hold that the attorney fees for enforcing the contract are not "necessaries" for which the minor is legally obligated to pay.

[¶3] The general rule of law is that contracts of minors are voidable. That is, the contract may be avoided or ratified at the election of the minor. *Flexner v. Dickerson*, 72 Ala. 318 (1882). In the instant case, Iris Odem disaffirmed, or avoided, the contract she had executed with Children's Hospital. Consequently, Iris Odem's obligation to pay for necessaries, i.e., the medical services rendered to her infant son, is not the result of the express contract between the parties, but arises from a quasi-contractual relationship created by operation of law which enforces the implied contract to pay. 43 C.J.S. Infants § 180 (1978). Therefore, a minor is not liable on any portion of the contract, or for what was agreed to be paid, except that the minor is liable for the just value of the necessaries.

[¶4] In *Wiggins Estate Co. v. Jeffery*, 246 Ala. 183, 19 So.2d 769 (1944), this Court, with approval, quoted the following from 18 Am.St.Rep. p. 650 et seq.:

> "It is for the court to determine, as a matter of law, in the first place, whether the things supplied may fall within the general classes of necessaries, and if so, whether there is sufficient evidence to warrant the jury in finding that they are necessary. If either of these preliminary inquiries be decided in the negative, it is the duty of the court to nonsuit the plaintiff who seeks to recover from the [minor]. If they be decided in the affirmative, it is then for the jury to determine whether, under all the circumstances, the things furnished were actually necessary to the position and condition of the [minor], as well as their reasonable value, and whether the [minor] was already sufficiently supplied...."

Therefore, the class and character of articles that are necessaries are issues of law. *Wiggins Estate Co.*, *supra*.

[¶5] Do the attorney fees in this case fall within the general classes of necessaries? Stated differently, are the attorney fees necessary to the position and condition of the minor?

[¶6] Under Alabama law, attorney fees are recoverable from an opposing party only when provided for by contract or by statute. * * * * Thus, any contractual provision regarding the recovery of attorney fees in this case is for the benefit of Children's Hospital, because the attorney fees would not otherwise be recoverable. Accordingly, attorney fees are not necessary to the position and condition of the minor and are not recoverable from Iris Odem.

> "It is the policy of the law to protect infants against their own mistakes or improvidence, and from designs of others, and to discourage adults from contracting with an infant." 43 C.J.S. Infants § 180 (1978).

Accordingly, when an infant executes a contract, the infant is liable only on his implied promise to pay for necessaries, and all other provisions of the contract are voidable at the election of the infant. Further, attorney fees are not necessaries, because they are not necessary for the position and condition of the infant. We reverse the judgment of the Court of Civil Appeals to the extent that it holds that Iris Odem is obligated under all of the terms of the contract, and we affirm that portion of the judgment that holds that she is obligated for the reasonable value of the medical services rendered to her infant son.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.
TORBERT, C.J., and MADDOX, JONES, BEATTY, ADAMS, HOUSTON and STEAGALL, JJ., concur.

Questions:

1. Is a contract by a minor void?

2. Is medical care for a minor a necessary?

3. Are attorney's fees specified in the contract for medical care necessaries?

4. Are clothes necessaries?

5. Is an apartment a necessary?

6. Infancy and intoxication (the rule for which is described later) are actually as close as we will get to incapacity. Other than in these cases, you should presume capacity to contract. The age of majority for contract is 18 for most states. Every individual of the age of majority and over is presumed competent to contract unless they are proved incompetent in court. Business entities (corporations, limited liability companies, limited partnerships, etc.) in good standing with the state have capacity to contract. Also, please note: If a contract is voided for infancy, normal-

ly the infant or new adult must return the item purchased, if possible; exact rules for restitution of benefits received by infants under avoided contracts differ state to state.

Aside to the aside over—now we are going back to moral obligation.

The next source, from the U.S. Bankruptcy Code, addresses the status of promises to pay debts that have previously been discharged in bankruptcy.

PROBLEM 5. J.S. takes possession of a truck and promises in return to pay for it in installments. Then J.S. is laid off from work, abandons his $400,000 home (on which he owes $390,000), and drinks heavily. He fails to make his truck payments. He also does not pay his credit card bills. The bank takes the house back. The truck dealer takes the truck back, but J.S. owes more for the truck than the truck is worth. J.S.'s creditors, including the truck note claim holder, file suits against him. To escape liability to them, J.S. files for bankruptcy. Soon after J.S. files a bankruptcy case, the bankruptcy court grants him a discharge (http://cca.li/QL). This means that J.S. is no longer liable to pay for the truck or the credit cards. But, J.S. is plagued by guilt and wants to live an honorable life. He also wants to drive a truck again, and he hopes that paying off the truck debt, even though it is discharged, will influence someone to lend to him again. J.S. writes to the truck note claim holder and promises to pay the debt for the truck. Is this promise enforceable? See the following statute.

11 U.S.C. § 524. Effect of discharge

Questions:

1. What is the consideration for the agreement mentioned in subsection (c)?

2. May J.S. rescind the agreement? Why?

3. Must the debtor have an agreement in order to repay a debt that has been discharged in bankruptcy?

4. The following excerpt from *In re Ray*, 26 B.R. 534, 537 (Bankr. D. Kan. 1983), details why § 524 was passed. Bankruptcy was thought to bar only collection of the debt, but the moral obligation to pay it remained. Note that the court names a third exception to the moral-obligation-is-no-consideration rule, besides the two we have studied. What is it?

[¶1] At common law, it was generally believed "that a promise made in recognition of a moral obligation, arising out of a benefit previously received, was not enforceable." Comment, *Reaffirmation Agreements: A Fight for Enforceability Under the New Bankruptcy Code*, 12 Cumberland L. Rev. 431, 433-34 (1982) (hereinafter cited: Comment, *Reaffirmation Agreements*). Exceptions, however, were developed. In *Ball v. Hesketh*, 90 Eng.Rep. 541 (K.B.1697), a promise to pay a debt contracted during infancy was enforced. In *Hyleing v. Hastings*, 91 Eng.Rep. 1157 (K.B.1699), a promise to pay a debt barred by the statute of limitations was enforced. English attorneys then began arguing that a bankrupt had a moral obligation to repay discharged debts. See generally, Boshkoff, *The Bankrupt's Moral Obligation to Pay His Discharged Debts: A Conflict Between Contract Theory and Bankruptcy Policy*, 47 Ind. L.J. 36, 39-44 (1971) (hereinafter cited: Boshkoff, *Moral Obligation*). In *Truemon v. Fenton*, 98 Eng.Rep. 1232 (K.B.1777), Lord Mansfield declared that a bankrupt was morally obligated to pay discharged debts, and a new promise to pay a discharged debt was sufficient consideration to revive the enforceability of the debt.

[¶2] After *Truemon*, "creditors began to use reaffirmations to escape [the effect of] the bankruptcy discharge. . . ." Comment, *Reaffirmation Agreements*, *supra* at 435. In an effort to control the problem, Parliament first required that the reaffirmation agreement must be in writing, 5 Geo. 4, c. 98, § 128 (1824), and later declared unenforceable all such reaffirmation agreements. 12 & 13 Vict. c. 106, § 204 (1849). Comment, *Reaffirmation Agreements*, *supra* at 435, n.21-23.

[¶3] Just before reaffirmations were banned in England, their use began to grow in the United States, helped by *Scoutland v. Eislord*, 4 N.Y.Com.L.Rep. 241, 7 Johns. 36 (1810), in which Lord Mansfield's doctrine of moral obligation was followed. Even after Congress passed the Bankruptcy Act of 1898, most states, "by statute or case law, recognized the theory that a discharge did not prohibit collection of the debt or erase the debt." Comment, *Reaffirmation Agreements*, *supra* at 436.

[¶4] Often, creditors harassed debtors by using the doctrine of moral obligation and the theory that discharged debts were not erased. Sometimes, creditors would sue debtors on the discharged debt in state court "in the hope that the debtor would rely upon the discharge and fail to appear in the subsequent action." Comment, *Reaffirmation Agreements*, *supra* at 437. Other times, secured creditors would obtain a reaffirmation agreement from the debtor under threat of repossession of collateral. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 164 (1977), U.S. Code Cong. & Admin. News 1978, p. 5787. Thus,

> (t)he resulting practices under the 1898 Act were similar to those experienced by the English courts in the eighteenth century. Reaf-

> firmations tended to frustrate severely the debtor's purpose for seeking a discharge from the bankruptcy court.

Comment, *Reaffirmation Agreements*, *supra* at 437. Where the secured creditor used the threat of repossession as leverage to coerce the discharged debtor into reviving and reaffirming his entire personal liability to the creditor, the collateral was generally worth only a portion of the amount owed. The secured creditor did not want to enforce its in rem rights against the collateral. Rather, the secured creditor desired to use the threat of enforcing its in rem rights as a means of coercing the debtor into reviving his in personam obligation which had been discharged. See Boshkoff, *Moral Obligation*, *supra* at 37, n.5.

[¶5] Consider, for example, *In Re Thompson*, 416 F. Supp. 991 (S.D.Tex.1976). A secured creditor was scheduled by the bankrupt in his bankruptcy petition, and filed a proof of claim. The bankrupt was discharged, and was purportedly relieved of any personal liability to the secured creditor. After discharge, the secured creditor began sending letters to the debtor, threatening civil and criminal action if the discharged debt was not paid. *Id.* at 993. The simple fact is that such coercion by creditors has always been built into the system of debtor-creditor relations, and non-judicial coercion has always been viewed by creditors as an effective and certainly inexpensive method of enforcing and reviving a debtor's in personam obligations. See Leff, *Coercive Collection*, *supra* at 5-9.

[¶6] In 1970, Congress attempted to curtail creditor abuse. Under the Act of Oct. 19, 1970, Pub.L. No. 91-467, sec. 2, 14, 15, 17, 38, 58, 84 Stat. 990 (amending 11 U.S.C. sec. 11, 32, 33, 35, 66, 94 (1964)), bankruptcy courts were given exclusive jurisdiction to determine the right to and effect of a discharge, removing jurisdiction from state courts. No longer could creditors sue debtors in state court on discharged obligations hoping for default judgments. But reaffirmations by non-judicial leverage or coercion were not controlled. See, e.g., *In Re Thompson*, *supra*.

[¶7] It is with this history of creditor coercion and abuse in mind that Congress sat down to draft § 524 of the Code. See H.R. Rep. 95-595, *supra* at 164.

5. Many lawyers have rationalized these moral obligation cases on a ground other than moral obligation. They claim that moral obligation is not the true ground of these decisions. What is their argument? Well, these lawyers take note that infancy, discharge in bankruptcy, and the statute of limitations are legal defenses to a creditor's breach of contract case against the promisor. These lawyers then argue that something happened to the defense when the second promise was made by the promisor to pay the prior debt. They claim that the second promise did something to the defense. What happened to the defense? Can you finish this argument? You have the necessary bits of information to finish it.

Now here is one more possible moral obligation exception, from the rest of the *Hunt v. Bate* report:

HUNT v. BATE (1568)
Common Pleas
3 Dyer 272a

* * * * But in another like action on the case brought upon a promise of twenty pounds made to the plaintiff by the defendant in consideration that the plaintiff, at the special instance of the said defendant, had taken to wife the cousin of the defendant, that was good cause, although the marriage was executed and past before the undertaking and promise, because the marriage ensued at the request of the defendant. * * * * And therefore the opinion of the Court in this case this Term was, that the plaintiff should recover upon the verdict, &c. And so note the diversity between aforesaid cases.

Questions:

1. What was consideration for the promise?

2. Was there a bargain?

The meaning can be hard to wrench
From cases that were in Law French
In language so dense
They rarely made sense
To anyone not on the bench

—Jim Woodward, STCL Class of 2003

WEBB v. McGOWIN (1935)
Court of Appeals of Alabama
168 So. 196

BRICKEN, Presiding Judge.

[¶1] This action is in assumpsit. The complaint as originally filed was amended. The demurrers to the complaint as amended were sustained, and because of this adverse ruling by the court the plaintiff took a nonsuit, and the assignment of errors on this appeal are predicated upon said action or ruling of the court.

[¶2] A fair statement of the case presenting the questions for decision is set out in appellant's brief, which we adopt.

> [¶a] "On the 3d day of August, 1925, appellant while in the employ of the W.T. Smith Lumber Company, a corporation, and acting within the scope of his employment, was engaged in clearing the upper floor of Mill No.2 of the company. While so engaged he was in the act of dropping a pine block from the upper floor of the mill to the ground below; this being the usual and ordinary way of clearing the floor, and it being the duty of the plaintiff in the course of his employment to so drop it. The block weighed about 75 pounds.
>
> [¶b] "As appellant was in the act of dropping the block to the ground below, he was on the edge of the upper floor of the mill. As he started to turn the block loose so that it would drop to the ground, he saw J. Greeley McGowin, testator of the defendants, on the ground below and directly under where the block would have fallen had appellant turned it loose. Had he turned it loose it would have struck McGowin with such force as to have caused him serious bodily harm or death. Appellant could have remained safely on the upper floor of the mill by turning the block loose and allowing it to drop, but had he done this the block would have fallen on McGowin and caused him serious injuries or death. The only safe and reasonable way to prevent this was for appellant to hold to the block and divert its direction in falling from the place where McGowin was standing and the only safe way to divert it so as to prevent its coming into contact with McGowin was for appellant to fall with it to the ground below. Appellant did this, and by holding to the block and falling with it to the ground below, he diverted the course of its fall in such way that McGowin was not injured. In thus preventing the injuries to McGowin appellant himself received serious bodily injuries, resulting in his right leg being broken, the heel of his right foot torn off and his right arm broken. He was badly crippled for life and rendered unable to do physical or mental labor.
>
> [¶c] "On September 1, 1925, in consideration of appellant having prevented him from sustaining death or serious bodily harm and in consideration of the injuries appellant had received, McGowin agreed with him to care for and maintain him for the remainder of appellant's life at the rate of $15 every two weeks from the time he sustained his injuries to and during the remainder of appellant's life; it being agreed that McGowin would pay this sum to appellant for his maintenance. Under the agreement McGowin paid or caused to be paid to appellant the sum so agreed on up until McGowin's death on January 1, 1934. After his death the payments were continued to and including January 27, 1934, at which time they were discontinued. Thereupon plaintiff brought suit to recover the unpaid installments accruing up to the time of the bringing of the suit.

> [¶d] "The material averments of the different counts of the original complaint and the amended complaint are predicated upon the foregoing statement of facts."

[¶3] In other words, the complaint as amended averred in substance: (1) That on August 3, 1925, appellant saved J. Greeley McGowin, appellee's testator, from death or grievous bodily harm; (2) that in doing so appellant sustained bodily injury crippling him for 'life; (3) that in consideration of the services rendered and the injuries received by appellant, McGowin agreed to care for him the remainder of appellant's life, the amount to be paid being $15 every two weeks; (4) that McGowin complied with this agreement until he died on January 1, 1934, and the payments were kept up to January 27, 1934, after which they were discontinued.

[¶4] The action was for the unpaid installments accruing after January 27, 1934, to the time of the suit.

[¶5] The principal grounds of demurrer to the original and amended complaint are: (1) It states no cause of action; (2) its averments show the contract was without consideration; (3) it fails to allege that McGowin had, at or before the services were rendered, agreed to pay appellant for them; (4) the contract declared on is void under the statute of frauds.

[¶6] 1. The averments of the complaint show that appellant saved McGowin from death or grievous bodily harm. This was a material benefit to him of infinitely more value than any financial aid he could have received. Receiving this benefit, McGowin became morally bound to compensate appellant for the services rendered. Recognizing his moral obligation, he expressly agreed to pay appellant as alleged in the complaint and complied with this agreement up to the time of his death; a period of more than 8 years.

[¶7] Had McGowin been accidentally poisoned and a physician, without his knowledge or request, had administered an antidote, thus saving his life, a subsequent promise by McGowin to pay the physician would have been valid. Likewise, McGowin's agreement as disclosed by the complaint to compensate appellant for saving him from death or grievous bodily injury is valid and enforceable.

[¶8] Where the promisee cares for, improves, and preserves the property of the promisor, though done without his request, it is sufficient consideration for the promisor's subsequent agreement to pay for the service, because of the material benefit received. *Pittsburg Vitrified Paving & Building Brick Co. v. Cerebus Oil Co.*, 79 Kan. 603, 100 P. 631; *Edson v. Poppe*, 24 S.D. 466, 124 N.W. 441, 26 I.R.A.(N.S.) .534; *Drake v. Bell*, 26 Misc. 237, 55 N.Y.S. 945.

[¶9] In *Boothe v. Fitzpatrick*, 36 Vt. 681, the court held that a promise by defendant to pay for the past keeping of a bull which had escaped from defendant's premises and been cared for by plaintiff was valid, although there was no previous request, because the subsequent promise obviated that objection; it being equivalent to a previous request. On the same principle, had the promisee saved the promisor's life or his body from grievous harm, his subsequent promise to pay for the services rendered would have been valid. Such service would have been far more material than caring for his bull. Any holding that saving a man from death or grievous bodily harm is not a material benefit sufficient to uphold a subsequent promise to pay for the service, necessarily rests on the assumption that saving life and preservation of the body from harm have only a sentimental value. The converse of this is true. Life and preservation of the body have material, pecuniary values, measurable in dollars and cents. Because of this, physicians practice their profession charging for services rendered in saving life and curing the body of its ills, and surgeons perform operations. The same is true as to the law of negligence, authorizing the assessment of damages in personal injury cases based upon the extent of the injuries, earnings, and life expectancies of those injured.

[¶10] In the business of life insurance, the value of a man's life is measured in dollars and cents according to his expectancy, the soundness of his body, and his ability to pay premiums. The same is true as to health and accident insurance.

[¶11] It follows that if, as alleged in the complaint, appellant saved J. Greeley McGowin from death or grievous bodily harm, and McGowin subsequently agreed to pay him for the service rendered, it became a valid and enforceable contract.

[¶12] 2. It is well settled that a moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor. *Lycoming County v. Union County*, 15 Pa. 166, 53 Am.Dec. 575, 579, 580 j *Ferguson v. Harris*, 39 S.C. 323, 17 S.E. 782, 39 Am.St.Rep. 731, 734; *Muir v. Kane*, 55 Wash. 131, 104 P. 153, 26 L.R.A. (N.S,) 519, 19 Ann.Cas. 1180; *State ex rel. Bayer v. Funk*, 105 Or. 134, 199 P. 592, 209 P. 113, 25 A.L.R. 625, 634; *Hawkes v. Saunders*, 1 Cowp. 290; *In re Sutch's Estate*, 201 Pa. 305, 50 A 943 *Edson v. Poppe*, 24 S.D. 466, 124 N.W. 441, 26 L.R.A(N. S.) .534; *Park Falls State Bank v. Fordyce*, 206 Wis. 628, 238 N.W. 516, 79 AL. R. 1339; *Baker v. Gregory*, 28 Ala. 544, 65 Am.Dec. 366. In the case of *State ex rel. Bayer v. Funk, supra*, the court held that a moral obligation is a sufficient consideration to support all executory promise where the promisor received an actual pecuniary or material benefit for which he subsequently expressly promised to pay.

[¶13] The case at bar is clearly distinguishable from that class of cases where the consideration is a mere moral obligation or conscientious duty unconnected with receipt by promisor of benefits of a material or pecuniary nature. *Park Falls State Bank v. Fordyce, supra*. Here the promisor received a material benefit constituting a valid consideration for his promise.

[¶14] 3. Some authorities hold that, for a moral obligation to support a subsequent promise to pay, there must have existed a prior legal or equitable obligation, which for some reason had become unenforceable, but for which the promisor was still morally bound. This rule, however, is subject to qualification in those cases where the promisor having received a material benefit from the promisee, is morally bound to compensate him for the services rendered and in consideration of this obligation promises to pay. In such cases the subsequent promise to pay is an affirmance or ratification of the services rendered carrying with it the presumption that a previous request for the service was made *McMorris v. Herndon*, 2 Bai1ey (S.c.) 56, 21 Am.Dec. 515; *Chadwick v. Knox*, 31 N.H. 226, 64 Am.Dec. 329; *Kenan v. Holloway*, 16 Ala. 53, 50 Am.Dec. 162; *Ross v. Pearson*, 21 Ala. 473.

[¶15] Under the decisions above cited, McGowin's express promise to pay appellant for the services rendered was an affirmance or ratification of what appellant had done raising the presumption that the services had been rendered at McGowin's request.

[¶16] 4. The averments of the complaint show that in saving McGowin from death or grievous bodily harm, appellant was crippled for life. This was part of the consideration of the contract declared on. McGowin was benefited. Appellant was injured. Benefit to the promisor or injury to the promisee is a sufficient legal consideration for the promisor's agreement to pay. *Fisher v. Bartlett*, 8 Greenl. (Me.) 122, 22 Am.Dec. 225; *State ex rel. Bayer v. Funk, supra*.

[¶17] 5. Under the averments of the complaint the services rendered by appellant were not gratuitous. The agreement of McGowin to pay and the acceptance of payment by appellant conclusively shows the contrary. * * * *

[¶18] From what has been said, we are of the opinion that the court below erred in the ruling complained of; that is to say in sustaining the demurrer, and for this error the case is reversed and remanded.

Reversed and remanded.

SAMFORD, Judge (concurring).

The questions involved in this case are not free from doubt, and perhaps the strict letter of the rule, as stated by judges, though not always in accord, would bar a recovery by plaintiff, but following the principle announced by Chief Justice Marshall in *Hoffman v. Porter*, Fed. Cas. No. 6,577, 2 Brock. 156, 159, where he says, "I do not think that law ought to be separated from justice, where it is at most doubtful," I concur in the conclusions reached by the court.

WEBB v. McGOWIN (1936)
Supreme Court of Alabama
168 So. 199

FOSTER, Justice.

[¶1] We do not in all cases in which we deny a petition for certiorari to the Court of Appeals approve the reasoning and principles declared in the opinion, even though no opinion is rendered by us. It does not always seem to be important that they be discussed, and we exercise a discretion in that respect. But when the opinion of the Court of Appeals asserts important principles or their application to new situations, and it may be uncertain whether this court agrees with it in all respects, we think it advisable to be specific in that respect when the certiorari is denied. We think such a situation here exists.

[¶2] Neither this court nor the Court of Appeals has had before it questions similar to those here presented * * * *. * * * *

[¶3] The opinion of the Court of Appeals here under consideration recognizes and applies the distinction between a supposed moral obligation of the promisor, based upon some refined sense of ethical duty, without material benefit to him, and one in which such a benefit did in fact occur. We agree with that court that if the benefit be material and substantial and was to the person of the promisor rather than to his estate, it is within the class of material benefits which he has the privilege of recognizing and compensating either by an executed payment or an executory promise to pay. The cases are cited in that opinion. The reason is emphasized when the compensation is not only for the benefits which the promisor received, but also for the injuries either to the property or person of the promisee by reason of the service rendered.

Writ denied.

ANDERSON, C.J., and GARDNER and BOULDIN, JJ., concur.

Questions:

1. What is the law in Alabama after these two decisions?

2. Why is the Supreme Court's decision important if it simply approves the reasoning and principles set forth in the Court of Appeals' decision?

3. How is this case different than *Hunt v. Bate* 1?

HARRINGTON v. TAYLOR (1945)
Supreme Court of North Carolina
36 S.E.2d 227

PER CURIAM.

[¶1] The plaintiff in this case sought to recover of the defendant upon a promise made by him under the following peculiar circumstances:

[¶2] The defendant had assaulted his wife, who took refuge in plaintiff's house. The next day the defendant gained access to the house and began another assault upon his wife. The defendant's wife knocked him down with an axe, and was on the point of cutting his head open or decapitating him while he was laying on the floor, and the plaintiff intervened, caught the axe as it was descending, and the blow intended for defendant fell upon her hand, mutilating it badly, but saving defendant's life.

[¶3] Subsequently, defendant orally promised to pay the plaintiff her damages; but, after paying a small sum, failed to pay anything more. So, substantially, states the complaint.

[¶4] The defendant demurred to the complaint as not stating a cause of action, and the demurrer was sustained. Plaintiff appealed.

[¶5] The question presented is whether there was a consideration recognized by our law as sufficient to support the promise. The Court is of the opinion that, however much the defendant should be impelled by common gratitude to alleviate the plaintiff's misfortune, a humanitarian act of this kind, voluntarily performed, is not such consideration as would entitle her to recover at law.

[¶6] The judgment sustaining the demurrer is
Affirmed.

Question: Can you find a factual distinction between *Harrington* and *Webb v. McGowin*?

2. Detriment

WEBBS CASE (1576)
4 Leonard 110, 74 ER 763

In action upon the case, the plaintiff declared, that whereas Cobham was indebted to J.S. and J.S. to the defendant, the said defendant in consideration that the plaintiff would procure the said J.S. to make a letter [or power] of attorney to the defendant to sue the said Cobham, promised to pay and give to the plaintiff 10£. It was objected, here was not any consideration for to induce the assumpsit; for the defendant by this letter of attorney gets nothing but his labour and travel. But the exception was not allowed of. For in this case not so much the profit which redounds to the defendant, as the labour of the plaintiff in procuring of the letter of attorney, is to be respected.

Questions:

1. This opinion is not really that difficult, but all of the words matter. Diagraming the relationships between the parties in this case helps understanding greatly. Who is J.S.'s creditor?

2. A power of attorney is a document in which one person, called a principal, appoints another to be her agent, usually for a certain purpose(s) named in the document. In *Webbs Case,* the power of attorney was to be signed by J.S., the principal, who would appoint the defendant to be J.S.'s agent to sue Cobham. The defendant claims that the power of attorney is worth nothing. That's plausible, isn't it, given that the defendant may never obtain anything from Cobham? The counterargument is that if it were actually worth nothing, the defendant never would have promised 10£ for it. If the plaintiff has given defendant nothing, then shouldn't the court agree that no consideration exists? Is there a bargain here?

Christopher St. German, DOCTOR AND STUDENT (1531)
Selden Soc. vol. 91, pp. 230-31, B&M 483

Student: ... [A]fter divers that be learned in the laws of the realm, all promises shall be taken in this manner, that is to say: if he to whom the promise is made have a charge by reason of the promise, which he hath also performed, then in that case he shall have an action for that thing that was promised, though he that made the promise have no worldly profit by it. As, if a man say to another, 'Heal such a poor man of his disease', or 'Make such a highway, and I shall give thee thus much', and if he do it I think an action lieth at the common law.

Questions:

1. This is not a case, but St. German mentions two actual cases. What are they?

2. In this passage, what counts to make a promise actionable (enforceable)?

3. Do the two cases involve enforceable promises?

STORER'S CASE (1615)
Dyer 272a, 272b n.32, 73 ER 605, 607

In an action upon the case, on assumpsit against one Storer, an agreement was between A. and B. that A. should have a lease of B. with [various] covenants; at the day of sealing A. refused, on account of the insertion of a new covenant concerning repairs, whereupon [Storer], standing by, took upon himself, if A. would seal it, to make the repairs; and it was adjudged for the plaintiff a good consideration, although the sealing of the deed was of no consequence to [Storer].

Questions:

1. This is a very brief report, just one sentence long. I'm pretty sure that B is the plaintiff, but it could be A. What about the application of consideration doctrine would make A or B a proper plaintiff?

2. Can you be sure there was a bargain here? Did Storer's promise induce A to sign the lease? Did the prospect of A's signing the lease induce Storer to promise? Why would Storer care?

KEYME v. GOULSTON (1664)
King's Bench
1 Levinz 140, 83 ER 338

Assumpsit, [in which the plaintiff alleged that] in consideration [that] the plaintiff would put out the plaintiff's daughter's daughter to a school-mistress, he the defendant would pay for her board for a year. And that he put out his daughter for three quarters of a year, which came to 101. and that the defendant had not paid: after verdict for the plaintiff, it was moved in arrest of judgment, that the consideration is not performed, for when he promised to pay for a year, it ought to be intended, that he should put her out to school for a year, otherwise the plaintiff might put her out for a week only, and yet oblige the plaintiff [defendant?] to pay for a year. But by Twysden and Wyndham, it may be intended, Put her there to school, and I will pay for a year, stay she more or less; and by Hyde, Chief Justice, it may be intended, Set her to school, and I will pay for a year or less, according to the rate she stays. And thereupon by all the three, judgment was given for the plaintiff.

Questions:

1. Is there a bargain here? What induced the room and board for nine months? What induced the promise?

2. Did the possibility of the lack of a bargain trouble the judges at all?

Note: Just as non-bargained-for benefit sometimes counts as a reason to enforce a promise, so does non-bargained-for detriment. But non-bargained-for detriment is now not thought of as consideration as much as part of the doctrine of promissory estoppel, an alternate theory of liability that we study in the next chapter.

Settlement Cases

This case and the next are somewhat difficult, but only because their analyses depend on non-contract law that we have not studied. The non-contract law in both cases is extremely clear and not in dispute. The first case, *Kim v. Son*, relies on rules from corporate law. A corporation is, in the law, a person or entity separate from and not dependent for its existence on any real person, including its shareholders, directors, officers, or employees. So a shareholder of that corporation is no more liable for the debts of the corporation than you are for your neighbor's debts, absent special circumstances not relevant here. In *Kim v. Son*, a party with no right thought it had a right and proceeded to bargain away what it thought it had. Whether this activity has any legal effect is the issue.

The second case is more straightforward, and you should be able to determine the validity of the plaintiff's claims from the case's context. Did the plaintiff in the second case have anything to bargain with?

Jinsoo KIM v. Stephen SON
2009 WL 597232
Court of Appeal, Fourth District, Division 3, California
No. G039818
(Super. Ct. No. 06CC02419).
March 9, 2009

OPINION

O'LEARY, J.

[¶1] Jinsoo Kim begins his opening brief by stating, "Blood may be thicker than water, but here it's far weightier than a peppercorn."[*] Kim appeals from the trial court's refusal to enforce a gratuitous promise, handwritten in his friend's own blood, to repay money Kim loaned and lost in two failed business ventures. He faults the trial court for not discussing or deciding in its statement of decision the issue of whether Kim's forbearance (waiting over a year to file a meritless lawsuit against his friend, Stephen Son), supplied adequate consideration for

[*] The obscure peppercorn reference can be found in Hobbs v. Duff (1863) 23 Cal. 596, 602-603 ["'What is a valuable consideration? A peppercorn; and for aught that appears by the pleadings in this case, there was no greater consideration than that for the supposed assignment,' etc."].

Son's blood-written document. We conclude the trial court's statement of decision sufficiently set forth the facts and law supporting its ultimate conclusion Son's promise to repay the money was entirely gratuitous and unenforceable, even when reduced to blood. Forbearance to sue cannot supply consideration to what the trial court determined was an invalid claim. In the context of this contract dispute, Son's blood was not weightier than a peppercorn.

I

[¶2] Son was the majority shareholder (70 percent owner) and operated a South Korean company, MJ, Inc. (MJ). He was also the sole owner of a California corporation, Netouch International Inc. (Netouch). After several months of investigation, Kim loaned money and invested in these companies. It was undisputed he wired the money directly to the corporate bank accounts. Son did not personally receive any of the funds. Kim invested 100 million won,* and later loaned 30 million won to MJ. He loaned $40,000 to Netouch. There was no evidence these investments or loans were personally guaranteed by Son.

[¶3] Unfortunately, these businesses failed and Kim lost his money. In October 2004, Son and Kim met in a sushi bar where they consumed a great deal of alcohol. When they were at the bar, Son asked the waiter for a safety pin, used it to prick his finger, and then wrote a "promissory note" with his blood. The document, translated from Korean to English, reads, "Sir, please forgive me. Because of my deeds you have suffered financially. I will repay you to the best of my ability." At some point that same day, Son also wrote in ink "I hereby swear [promise] that I will pay back, to the best of my ability, the estimated amount of 170,000,000 [w]ons to [Kim]."

See copies of the promises at http://cca.li/QC.

[¶4] Well over a year later, in June 2006, this blood-written note became the basis for Kim's lawsuit against Son alleging: (1) default of promissory note; (2) money had and received; and (3) fraud. He claimed Son agreed in the "promissory note" to pay Kim 170 million won, which is approximately equivalent to $170,000.

[¶5] After holding a bench trial, the court ruled in Son's favor. In its statement of decision, the court determined the "blood agreement" was not an enforceable contract. The court made the following findings: There was no evidence Son agreed to personally guarantee the loan or investment money. Son wrote the note in his own blood "while extremely intoxicated and feeling sorry for [Kim's] losses." The blood agreement lacked sufficient consideration because it "was not a result of a bargained-for-exchange, but rather a gratuitous promise by [Son] who took personally that [Kim], his good friend, had a failure in his investments that [Son] had initially brought him into." The court reasoned the agreement lacked

* The won (원) (sign: ₩; code: KRW) is the currency of South Korea.

consideration because Son "was not required to and did not guarantee these investments and loans. The [c]ourt refuses to enforce a gratuitous promise even when it is reduced to blood." The court also rejected the fraud claim, relying on "credible evidence" Son intended for the businesses to succeed, and he never made any promises to Kim without the intent of performing them.

[¶6] Kim filed objections to the statement of decision, claiming inter alia, the court failed to address whether Kim's forbearance from suing Son in 2003 and 2004 was consideration for the blood written promissory note. The court did not modify its statement of decision and entered the final judgment in July 2007. Kim appealed.

II

[¶7] Kim raises two issues on appeal: (1) Did the trial court erroneously fail to consider or apply Kim's forbearance as consideration of Son's blood agreement? and (2) Did the statement of decision adequately address the forbearance issue?

(1) Forbearance

[¶8] "Consideration may be forbearance to sue on a claim, extension of time, or any other giving up of a legal right, in consideration of some promise. [Citations.]" (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 211, p. 246.) "The slightest forbearance will suffice: 'Even though the forbearance is for one day only, there is sufficient consideration as the law does not weigh the quantum.' [Citations.]" (*Id*. at pp. 246-247.) Moreover, "The compromise of a claim, either valid, doubtful, or disputed (but not void) is good consideration, the claimant giving up his or her asserted right to recover the whole amount as consideration for a promise to pay a lesser amount. [Citations.]" (*Ibid*.)

[¶9] "However, if the forbearance has no value, it will not suffice. [Citation.]" (1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 211, p. 247.) And relevant to this case, "If a claim is wholly invalid, neither forbearance to sue nor a compromise thereof can be good consideration. (*Union Collection Co. v. Buckman* (1907) 150 C[al]. 159, 164 . . . .) *City Street Imp. Co. v. Pearson* (1919) 181 C[al]. 640, [649] . . . applied this doctrine with great strictness. A promissory note was given in consideration of forbearance to foreclose a lien upon a street assessment, which both parties believed was valid. However, the assessment was void for technical reasons that were ascertainable from the public record. Held, the note was unsupported by consideration. . . . (*See Orange County Foundation v. Irvine Co.* (1983) 139 [Cal. App.]3d 195 . . . [promise to compromise wholly unfounded claim is not valuable consideration . . .] . . . .)" (1 Witkin, Summary of Cal. Law, *supra*, § 220, pp. 253-254.)

[¶10] Here, the purported forbearance to sue cannot be good consideration because Kim's claims against Son were wholly invalid. As determined by the trial court, any claim Son personally owed Kim money was invalid. The statement of decision noted it was undisputed the corporations (MJ and Netouch) were valid separate corporate entities and those businesses received Kim's loans and investment money. The court concluded Son did not guarantee the money on behalf of the two corporations. He did not personally receive any of Kim's money. And, Kim does not dispute a shareholder/owner generally is not personally liable for the debts of a corporation. (*See Mesler v. Bragg Management Co*. (1985) 39 Cal.3d 290, 301 [society legally recognizes the benefits of individual limitation of business liability through incorporation, so "the corporate form will be disregarded only in narrowly defined circumstances," and only when justice so requires]; *Pacific Landmark Hotel, Ltd. v. Marriott Hotels, Inc.* (1993) 19 Cal.App.4th 615, 628.) Consequently, any debt collection or breach of contract claim Kim may have had against the corporations, could not be legally imputed to Son, individually. In other words, Kim's forbearance in filing a meritless lawsuit cannot supply adequate consideration for Son's gratuitous promise.

[¶11] Moreover, Kim does not dispute the trial court's conclusion credible evidence established Son was not liable for fraud. Accordingly, his alleged forbearance to sue on the clearly unfounded tort claim would not constitute valuable consideration. We conclude the trial court properly decided Kim's lawsuit was based entirely on a gratuitous unenforceable promise, and as such, the court did not need to address the immaterial issue of forbearance.

(2) Statement of Decision

[The court determined that the trial court's opinion adequately addressed the forbearance issue.]

III

The judgment is affirmed. Respondent shall recover his costs on appeal.

WE CONCUR: SILLS, P.J., and RYLAARSDAM, J.

Questions:

1. Did the court ask whether Kim believed in good faith that Son was liable for the debts at and after the time the money was invested and lent? Did the court ask whether Kim believed in good faith, before Son signed the document in the bar, that Kim had valid grounds to sue Son with regard to the investments and the loan?

2. The court addressed whether forbearance to sue was consideration, but Kim provided Son's companies with $170,000 in financing. Why wasn't Kim's making

the investment and loan consideration?

3. Did it matter that the contract was in writing?

4. Son was drunk when he wrote this document, but is there any doubt that, at the time he wrote the document, he intended to create a binding legal document? Did that matter?

Fannie B. KALIS v. COLGATE-PALMOLIVE COMPANY
Ill. App., 1st District
787 N.E.2d 182
March 10, 2003

JUSTICE McNULTY delivered the opinion of the court:

[1] The instant appeal arises from a simple set of undisputed facts: a plaintiff in a products liability action received an offer of settlement from the defendant manufacturer, but did not respond before the defendant prevailed in its motion for summary judgment. Since the settlement proposal had contained no time limit or other conditions for acceptance, the plaintiff notified the defendant that she would take the offer and was promptly informed that the offer was no longer open. While the products liability litigation continued, the plaintiff filed the action underlying this matter: a claim against the defendant for breach of the settlement agreement. The question presented for our review is whether the plaintiff's promise to settle her lawsuit lost its value, and thus its ability to serve as consideration for a settlement payment, once the defendant prevailed in its motion for summary judgment. The trial court answered this question affirmatively. We disagree and reverse the grant of summary judgment in favor of the defendant on the breach of contract claim.

[2] Plaintiff Fannie Kalis was injured by the explosion of a container of fuel and in December 1995 filed an action in the United States District Court which sought damages from the alleged manufacturer, defendant Colgate-Palmolive Company (Colgate). On March 13, 1998, Colgate moved for summary judgment. On April 27, 1999, while that motion was pending, Colgate, via letter from its counsel to Kalis's counsel, offered $100,000 to settle the claim. The offer contained no conditions, did not refer to the pending summary judgment motion in any way, and did not purport to expire at any specific time.

[3] On May 10, 1999, the district court granted Colgate's motion, and on May 14, Kalis's attorney sent defense counsel a letter accepting Colgate's offer. Colgate's May 18 response advised Kalis that "the moment the judge ruled summary judgment in our favor and against the plaintiff, the offer of $100,000 was no longer valid."

[4] Kalis sought reconsideration of the summary judgment ruling, and when that motion was denied, she appealed. The United States Court of Appeals for the Seventh Circuit heard arguments on the case in April 2000 and affirmed the judgment in Colgate's favor on November 3, 2000.

[5] On the same date she filed notice of her appeal of the summary judgment on her products liability claim, Kalis also filed in the circuit court of Cook County the action underlying the instant case: she alleged that Colgate's offer and her acceptance combined to create a binding agreement to settle her claim for $100,000.

[6] Kalis and Colgate both moved for summary judgment: Kalis alleging that the formation of a contract and Colgate's subsequent breach were undisputed; Colgate contending that she had no consideration to offer for a settlement agreement after the summary judgment ruling and that an implied condition of its offer was that it be accepted before the motion was decided. The trial court agreed with Colgate, ruled that there was no consideration for the settlement agreement, and granted summary judgment in favor of the company. In our view, established principles of contract law dictate the opposite conclusion.

[7] Any act or promise that benefits one party or disadvantages the other is sufficient consideration to support the formation of a contract. *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 330 (1977). A promise to forego pursuit of a legal claim will be determined to be adequate consideration to support formation of a contract even if the claim is invalid, provided that it is asserted in good faith. *Keller v. State Farm Insurance Co*., 180 Ill. App. 3d 539, 546 (1989).

[8] Such forbearance provides consideration sufficient to support the formation of a contract even if, at the time of the promise, a court has already found the claim to be without merit. "The fact that a lower court has decided against the claim, or that a court has held adversely to it in a suit to which the claimant was not a party, does not prevent the forbearance to press a claim from being consideration." 2 J. Perillo & H. Bender, Corbin on Contracts, §7.17, at 436 (1995).

[9] Accordingly, a promise to relinquish a right to appeal has also been recognized as providing consideration sufficient to support contract formation. "Forbearance to appeal or to litigate the question anew, as the claimant is privileged to do, is consideration if the claim was such that forbearance to press it by suit would originally have been consideration." 2 J. Perillo & H. Bender, Corbin on Contracts, §7.17, at 436-37 (1995). In *Kerns v. Engelke*, * * * this court, though ultimately declaring an agreement void on public policy grounds, found that sufficient consideration to form the agreement had been provided by a party's promise to abandon an appeal. * * * *

[10] In *F.H. Prince & Co. v. Towers Financial Corp*., 275 Ill. App. 3d 792 (1995), we held that the release of an arguably uncollectible debt provided con-

sideration to support a settlement agreement and highlighted an additional element of value provided by settlement of even a questionable claim: "Settlement of the [plaintiff's] litigation also relieved [defendants] of the need to continue to defend against that claim and to incur additional defense costs related thereto." 275 Ill. App. 3d at 802.

[11] In our view, the foregoing principles are readily applicable to the facts presented in the instant case. Though her claim failed to survive Colgate's summary judgment motion, Kalis retained the right to seek reconsideration of that ruling in the district court as well as the right to seek appellate review, and her promise to compromise these rights provided consideration for the offer of settlement as long as they were asserted in good faith. We believe that the good-faith basis for continued pursuit of her claims at these stages was demonstrated by each court's need for extensive analysis of the merits of those claims. Given that fact, and the fact that the expense of months of additional active litigation of the reconsideration motion and appeal would have been avoided with a settlement, we have little difficulty concluding that Kalis's promise to abandon her claims offered a compromise of her own legal rights, a benefit to Colgate, and thus, consideration. We are therefore unable to share the trial court's view that the summary judgment motion ruling left Kalis with nothing to offer as consideration for the settlement payment. * * * *

[12] Finally, although Kalis invites us to direct the trial court to grant her summary judgment motion, she has not demonstrated the absence of issues of fact material to disposition of her claim, and indeed concedes the existence of at least one triable issue of material fact on the record assembled to date. Accordingly, we decline the invitation to order entry of summary judgment in her favor, reverse the entry of summary judgment for Colgate, and remand the cause to the circuit court for further proceedings consistent with this order.

Reversed and remanded.

Questions:

1. How do you distinguish this case from *Kim v. Son*?

2. When the court says “provided that it is asserted in good faith,” does the court mean merely that the person asserting the claim must be asserting it honestly? Or must the claim have some objective basis?

3. When do we judge that “good faith”—at the time of the promise or later after all appeals are exhausted?

4. In *Atlantic Trust Co. v. Graver*, No. 2-09-0589, 2011 WL 10109585 at *7 (Ill. App. Jan. 31, 2011), the court said,

> In *Kalis*, the plaintiff *retained the right* to seek reconsideration of the summary judgment ruling in the trial court as well as the right to seek appellate review, and her *promise to compromise these rights* constituted consideration for the offer of settlement as long as they were asserted in good faith. * * * * In other words, the plaintiff's promise to abandon her claims offered a compromise of her legal rights, a benefit to the other party, and thus consideration.

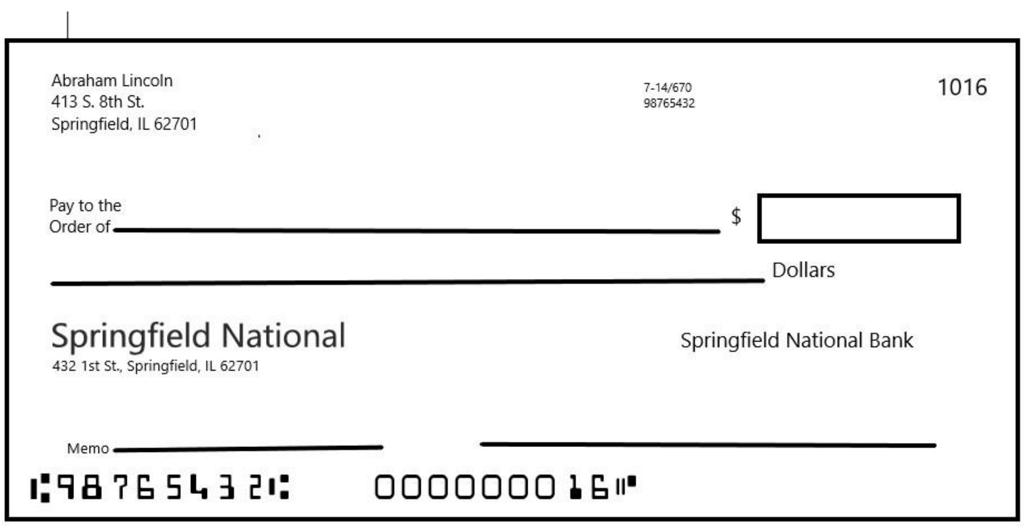
If consideration exists in a compromise of rights case, will the compromise of rights be both benefit and detriment?

5. Would the settlement agreement have been binding if Kalis had waited to accept it until Nov. 4, 2000?

Uniform Commercial Code § 1-308. Performance of Acceptance Under Reservation of Rights, and cmt. 3.

Uniform Commercial Code § 3-104. Negotiable Instrument.

Question: This is a common bank check. Would it qualify as a negotiable instrument under § 3-104(a)?



Uniform Commercial Code § 3-311. Accord and Satisfaction by Use of Instrument.

Steven D. HAVARD and Judy A. Havard v. KEMPER NATIONAL INSURANCE COMPANIES et al. (1995)
S.D. Miss., 945 F. Supp. 953, *aff'd*, 71 F.3d 876 (5th Cir. 1995)

MEMORANDUM OPINION AND ORDER

WINGATE, District Judge.

[¶1] Before the court is the defendants' motion for summary judgment pursuant to Rule 56(b), Federal Rules of Civil Procedure. Plaintiffs Steven D. Havard and Judy A. Havard filed a complaint in the instant lawsuit seeking actual and compensatory damages and punitive damages against the defendants, Kemper National Insurance Companies d/b/a American Manufacturers Mutual Insurance Company ("Kemper"), Brown & Haynes Insurance, Inc., ("Haynes"), Hatch, Jones & Associates, Inc., ("Hatch"), and Midsouth Home Service, Inc., ("Midsouth"), for bad faith, fraud, gross negligence, negligent misrepresentation, deceit and other wrongful conduct. The genesis of this dispute began when plaintiffs' home, insured by Kemper, was damaged by an accidental fire. Plaintiffs are unhappy with Kemper's response to their claim under their fire policy and unhappy with the alleged activities of Hatch and Midsouth whose employees acted as appraisers in this matter. All defendants move for summary judgment on the ground that by cashing Kemper's check tendered to plaintiffs in full satisfaction of their policy claim for fire damage to their home, plaintiffs now have fully discharged their claims under the doctrine of accord and satisfaction codified by Miss. Code Ann. § 75-3-311 (Supp.1994). Defendant Hatch moves for summary judgment on the additional ground that at all times it was an agent acting for a known and disclosed principal, and that, as such, it is shielded from any liability in plaintiffs' bad faith suit. Both Hatch and Midsouth move for summary judgment on the ground that plaintiffs have no evidence to support any of the plaintiffs' claims made against them. Plaintiffs oppose the motion. Nevertheless, this court is persuaded to grant the motions in all respects. * * * *

FINDINGS OF FACT

[¶2] A fire damaged the home of the Havards, plaintiffs in this suit. The Havards had a homeowners' policy of insurance with Kemper, so following the fire, they submitted an insurance claim with Kemper. Kemper processed the Havards' claim and tendered a check for $5,374.45 for the claim on the damage to the dwelling. An accompanying letter dated June 25, 1993, informed the Havards:

> Please find enclosed a check in the amount of $5,374.45 for the repairs to your house. We stand by our letter dated April 30, 1993, which stated the loss settlement and appraisal provisions of your policy. We have reviewed the repair estimates you sent and feel the damage repairs can be properly repaired in accordance with Mr. Meadows' appraisal of $5,874.45.

Later, an attorney for Kemper, Larry Gunn, wrote a letter to plaintiffs' attorney, stating the following:

> A check was previously tendered to Mr. and Mrs. Havard in the sum of $5,374.45. The check has not been cashed.
>
> The Havards are not happy with this check. Thus Kemper has elected to rely upon the appraisal provision of the policy. I enclose a copy of the page from the policy showing the terms and provisions of the appraisal provision of the policy. I also enclose a copy of *Hartford Fire Insurance Company v. Conner*, 79 So.2d 236 (Miss. S. Ct.1955) holding the appraisal provision of homeowner's insurance policies to be valid and enforceable.
>
> Please let me know if your clients would like to cash the check for $5,374.45 or if they would like to enter into an appraisal proceeding.

[¶3] After receiving the check, the June 25, 1993, letter from Kemper, and the following letter from Larry Gunn, the Havards cashed the Kemper check. The Havards apparently attempted to reserve their rights to sue by marking on the back of the check "in partial payment and accepted with reservation."

[¶4] Later, after the check had been cashed, plaintiffs sued all parties connected with the insurance claim for bad faith, fraud, gross negligence, negligent misrepresentation, deceit and other wrongful conduct. In short, the plaintiffs claim that Kemper did not properly evaluate their claim and that the other defendants acted with Kemper to undervalue plaintiffs' loss.

PROCEDURE FOR SUMMARY JUDGMENT

[¶5] In response to a motion for summary judgment, the non-moving party is required to respond with proof of a prima facie case, sufficient for a jury to enter a verdict in their favor. * * * *

[¶6] Rule 56(c) of the Federal Rules of Civil Procedure mandates summary judgment in any case where a party fails to establish the existence of an element essential to the case and on which that party has the burden of proof. * * * * Rule 56(c) further requires that the court enter summary judgment if the evidence favoring the non-moving party is not sufficient for the jury to enter a verdict in the non-moving party's favor. * * * * When the moving party has carried the Rule 56(c) burden, the opposing party must present more than a metaphysical doubt about the material facts in order to preclude the grant of summary judgment. * * * *

CONCLUSIONS OF LAW

[¶7] The doctrine of accord and satisfaction recently has been codified in Mississippi, Miss. Code Ann. § 75-3-311 (Supp.1994). The new statute effective after January 1, 1993, provides:

> (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.
> (b) ... the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

[¶8] The evidence received by this court convincingly establishes that plaintiffs' claim has been discharged under an accord and satisfaction. Here, there was a bona fide dispute, a good faith tender of a check in full satisfaction of the plaintiffs' claim, and the plaintiffs accepted payment of the check. A letter, accompanying the check, contained a conspicuous[*] statement to the effect that the check was tendered in full satisfaction of the claim.

[¶9] Not only did the letter accompanying the check inform the Havards that Kemper was paying no more money on the claim, a subsequent letter written by Kemper's attorney, Larry Gunn, informed the Havards' attorney that the Havards should either cash the check or enter into an appraisal proceeding in accordance with the provisions of the insurance policy.[†] Moreover, the check itself stated on its face that it was "Payment for Fire Damage—Building."

[¶10] Throughout this entire period, when plaintiffs received the Kemper check and accompanying correspondence, plaintiffs were actively represented by counsel. Hence, before cashing the Kemper check they had ready access to a legal opinion on the possible consequences.

[¶11] But, presence of counsel, while important, is not the key point here. The pivotal fact here is that the correspondence accompanying the check and that sent subsequently certainly told the plaintiffs that Kemper had determined their loss to be no more than $5,394.45; that this was Kemper's final offer; and that if plaintiffs refused to accept this amount, Kemper was prepared to submit the matter to

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[*] Mississippi Code Annotated § 75-1-201(10) provides:

> (10) "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.

[†] Section I, Condition (6), of the insurance agreement between the parties provides:

> [i]f you and we fail to agree on the amount of loss, either party may demand an appraisal of the loss ... The two appraisers will choose an umpire. If they cannot agree on an umpire within 15 days, you or we may request that the choice by [sic] made by a judge of a court of record in the state where the resident premises is located ...

an appraisal proceeding. When plaintiffs cashed the check under these circumstances, plaintiffs showed accord and satisfaction as a matter of law.

[¶12] Plaintiffs seemingly knew that by cashing the check they could be compromising their case. When the Havards cashed the check, they attempted to reserve their rights through notations on the back of the check. However, Miss. Code Ann. § 75-1-207(2)7 (Supp.1994)* specifically states that accord and satisfaction is an exception to the general rule that a party may reserve its rights on an instrument. So, while the plaintiffs failed to preserve the vitality of their dispute through this means, by these actions in attempting to do so, they showed an appreciation for the operation of the principle of accord and satisfaction. On this issue of accord and satisfaction, then, this court finds that there are no genuine issues of material fact, and all defendants are entitled to summary judgment on the ground of accord and satisfaction. * * * *

IT IS, THEREFORE, ORDERED AND ADJUDGED that all defendants are entitled to summary judgment, and all claims against all of the defendants are dismissed WITH PREJUDICE. A separate judgment shall be entered in accordance with the local rules.

Questions:

1. Did the Havards assent?

2. What is consideration for the accord and satisfaction?

3. Does one have to find consideration in a full payment check case to which § 3-311 applies?

4. What should the Havards have done with the check?

3. Mutual Promises

WEST v. STOWELL (1577)
Common Pleas
2 Leonard 154, 74 ER 437, B&M 494

In an action upon the case, by Thomas West against Sir John Stowell, the plaintiff declared, that the defendant, in consideration that the plaintiff promised to the defendant, that if the defendant shall win a certain match at shooting, made between

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* Mississippi Code Annotated § 75-1-207(2) provides:

(2) Subsection (1) does not apply to an accord and satisfaction.

the Lord of Effingham and the defendant, then the plaintiff should pay to the defendant 10l. and promised to the plaintiff, that if the said L. Effingham shall win the same match of the defendant, that then the defendant would pay to the plaintiff 10l. and farther declared that the Lord Effingham won the match, for which the action is brought. It was moved, that here is not any sufficient consideration; for the promise of the plaintiff to the defendant, [is not equally actionable], for there is not any consideration upon which it is conceived, but it [is] only nudum pactum, upon which the defendant could not have an action against the plaintiff. And then here is not any sufficient consideration for the promise of the defendant. Mounsen, Justice, conceived that here the consideration is sufficient, for here this counter promise is a reciprocal promise, and so a good consideration, for all the communication ought to be taken together. Manwood [, J.:] Such a reciprocal promise betwixt the parties themselves at the match is sufficient; for there is consideration good enough to each, as the preparing of the bows and arrows, the riding or coming to the place appointed to shoot, the labour in shooting, the travel in going up and down between the marks: but for the bettors by, there is not any consideration, if the bettor doth not give aim. ....

Roger Manwood (1525-92) was appointed judge of the Common Pleas in 1572. He was knighted and appointed lord chief baron of the Exchequer in 1578. Manwood was famously corrupt. He offered to buy the position of Chief Justice of the Queen's Bench in 1592, just before he died, and rumor has it he offered to buy the position of chief justice of the Common Pleas ten years earlier. See http://cca.li/QD. Manwood was also a philanthropist. He founded a grammar school in Kent, Sir Roger Manwood's School, still in operation. The school's web page can be found http://cca.li/QE.

Questions:

1. Ok, *West* is a little confusing. Perhaps the most confusing part of it is that the reporter, Leonard, doesn't tell you who won. In fact, no one knows. I give you the case so that you can see that the rule that a promise can be consideration for another promise is quite different than the consideration rules we have just studied. The key to understanding the case is that Stowell's counsel is objecting that there is no consideration because there is no detriment to West. That's Manwood's objection, too. But Manwood doesn't think all wagers would be unenforceable. Manwood thinks West could have sued if he had participated in the match. Why would that have made a difference?

2. In this case, if West wins, does he win because otherwise Stowell would get away with a benefit he hadn't paid for? Does he win because otherwise West will have performed a labor Stowell hadn't paid for? What principle(s) of justice supports recovery here?

3. Who do you think should win this case?

STRANGBOROUGH v. WARNER (1589)
Queen's Bench
4 Leonard 3, 74 ER 686 (1589)

Note, that a promise against a promise will maintain an action [in assumpsit], as in consideration that you do [promise to] give me £10 on such a day, I promise to give you £10 the day after.

Question: How are the facts named in the example different from those of *Game v. Harvie*?

NICHOLAS v. RAYNBRED (1615)
King's Bench and Exchequer Chamber
Jenk. 296, 145 ER 215, Hob. 88, 80 ER 238

[¶1] A sells a cow to B for 5l. and assumes to deliver her to him at a certain day; at the same time B assumes to A to pay him 5l. for the said cow, at the said day. A brings an assumpsit for the 5l. not paid, and does not aver delivery of the cow: it need not be averred; but the writ ought to aver the mutual assumpsit; for they are reciprocal assumpsits: and such mutual assumpsits are a good consideration, and each of them has a remedy against the other; one for the cow, and other for the 5l.

[¶2] Judged in both courts [the King's Bench and the Exchequer].

[¶3] ... [B]ut such mutual assumpsits ought to be made at the same time; for they make the consideration, and the consideration and the promise always ought to be together: otherwise it is nudum pactum.

Questions:

1. Okay, this opinion always throws students, perhaps because it is so counter-intuitive. We don't really think like this about binding promises, anymore. Does A have to deliver the cow before he sues for the money? The answer the court gives to this question is "no," but this is no longer good law. It was modified in the early 1700s in a case you will probably read when you get to the second semester of Contracts. I want you to read *Nicholas*, though, so you can understand that, in its simplest form, contract law is really only about the enforcement of one promise, not about the enforcement of an agreement.

2. If A does not have to deliver the cow before suing B for the money, how will B get the cow?

3. Is there a bargain here?

4. Why must the promises be made at the same time, do you think? That rule is also no longer good law, but we will pinpoint later in the semester the exact date on which this rule was changed. The reason for the rule is still with us, though, but that reason is enforced through another rule, one we have already studied.

5. Can a promise to accept a gift be consideration for a promise to give a gift? It may help you to know the additional rule of law, here stated somewhat roughly, that the thing promised as consideration must itself be adequate consideration if exchanged for the promise at the time the promise was made. *E.g.*, Restatement (Second) of Contracts § 75 (1981).

PROBLEM 6. Farmer promises to buy a tractor and seller promises to sell that tractor. Is there consideration here?

ESSENTIAL ACCOUNTING SYSTEMS, INC. v. DEWBERRY (2013)
Ark. Ct. App.
428 S.W.3d 613, 617

**** Mutual promises constitute consideration, each for the other. ****

Note: This rule is the modern statement of the mutual promise rule, which holds that a promise can be consideration for another promise. The rule has been more or less the same since *West v. Stowell*.

The following cases and problems (derived from actual opinions) are an interesting subset of the mutual promise cases. Often the issue in these cases is described as "illusory promise" or "lack of mutuality." These are only other names for lack of consideration in a case in which what might have been the consideration was a mutual promise. If there is no real mutual promise, but only an illusory one, then there is no consideration (assuming, of course, that no performance was consideration). That is what these cases discuss, for the most part.

There is another aspect of these cases reflected in the phrase "lack of mutuality." Remember *Nicholas v. Raynbred*? How many times did that case say "mutual assumpsit"? Recall that, early on, if mutual promises were alleged as consideration, one did not have to perform first before suing on the promise. That was fair only because the defendant could turn around and sue the plaintiff for breach of the plaintiff's mutual promise. (The requirement of two actions to reach a just result is probably why one can generally no longer collect for breach of promise without alleging performance of one's own obligation.) But if the defendant could never recover on the plaintiff's promise, then it didn't seem right that the plaintiff could sue the defendant, so if the plaintiff's promise did not bind the plaintiff, courts sometimes held that the defendant's promise lacked mutuality and threw out the plaintiff's suit. That seemed fair, too, conversely.

JOHNSON ENTERPRISES OF JACKSONVILLE, INC., a Florida corporation v.
FPL GROUP, INC., a Florida corporation, FPL Group Capital, Inc.,
a Florida corporation, and Telesat Cablevision, Inc., a Florida corporation (1998)
U.S. Court of Appeals, 11th Circuit
162 F.3d 1290, 1311

[¶1] * * * * It is a fundamental principle of contract law that a promise is not enforceable unless it is supported by consideration. See Restatement (Second) of Contracts § 17 (1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."). In a bilateral contract, the exchange of promises by both parties constitutes consideration. * * * *. * * * *

[¶2] If, however, "one of the promises appears on its face to be so insubstantial as to impose no obligation at all on the promisor—who says, in effect, 'I will if I want to'"—then that promise may be characterized as an "illusory" promise, i.e., "a promise in form but not in substance." Farnsworth, Contracts § 2.13, at 75-76 (1990). An illusory promise does not constitute consideration for the other promise, and thus the contract is unenforceable against either party. *See id.*; Williston on Contracts § 7:7, at 88-89 ("Where an illusory promise is made, that is, a promise merely in form, but in actuality not promising anything, it cannot serve as consideration …. In such cases, where the promisor may perform or not, solely on the condition of his whim, his promise will not serve as consideration." (footnote omitted)).

In re ADIRONDACK RAILWAY CORPORATION, Debtor (1988)
N.D. N.Y.
95 B.R. 867, 874

* * * * It is hornbook law that illusory promises or mere statements of intention, which by their terms make performance entirely optional with the 'promisor' whatever may happen, or whatever course of conduct in other respects he may pursue, do not constitute a promise. Although such words are often referred to as forming an illusory promise, they do not fall within the present definition of promise. They may not even manifest any intention on the part of the promisor. Even if a present intention is manifested, the reservation of an option to change that intention means that there can be no promisee who is justified in an expectation of performance.

Id. at [Restatement (Second) of Contracts] § 2 comment e. Hence, the State's return promise imposes no obligation on itself since it amounts to an "I will if I want to", rendering the settlement, as a matter of law, anything but binding. * * * * It is a promise in form but not in substance.

Note: These cases contain probably the best definitions of illusory promises I have seen in case law, perhaps because they are direct quotes from Williston and the Restatement (Second) of Contracts. Here is an illustration of their application:

RIDGE RUNNER FORESTRY v. VENEMAN (2002)
Fed. Cir.
287 F.3d 1058

[¶1] Ridge Runner Forestry appeals from the decision of the Department of Agriculture Board of Contract Appeals dismissing its cause of action for lack of jurisdiction * * * *. * * * * Because no contract had been formed, we affirm the board's decision.

[¶2] Ridge Runner Forestry is a fire protection company located in the Pacific Northwest. In response to a request for quotations ("RFQ") issued by the Forestry Service, Ridge Runner submitted a proposal and ultimately signed a document entitled Pacific Northwest Interagency Engine Tender Agreement ("Tender Agreement"). The Tender Agreement incorporated the RFQ in its entirety, including the following two provisions in bold faced lettering: (1) "Award of an Interagency Equipment Rental Agreement based on response to this Request for Quotations (RFQ) does not preclude the Government from using any agency or cooperator or local EERA resources"; and (2) "Award of an Interagency Equipment Rental Agreement does not guarantee there will be a need for the equipment offered nor does it guarantee orders will be placed against the awarded agreements." Request for Quotation, No. R6-99-117 (March 29, 1999). Additionally, because the government could not foresee its actual equipment needs, the RFQ contained language that allowed the contractor to decline the government's request for equipment for any reason: "Because the equipment needs of the government and availability of contractor's equipment during an emergency cannot be determined in advance, it is mutually agreed that, upon request of the government, the contractor shall furnish the equipment offered herein to the extent the contractor is willing and able at the time of order." *Id.* (emphasis added). The RFQ also included a clause informing bidders that they would not be reimbursed for any costs incurred in submitting a quotation. Ridge Runner signed Tender Agreements in 1996, 1997, 1998, and 1999. In 1999, it presented a claim for $180,000 to the contracting officer alleging that the Forestry Service had violated an "implied duty of good faith and fair dealing" because Ridge Runner had been "systematically excluded for the past several years from providing services to the Government." In response, the contracting officer told Ridge Runner that she lacked the proper authority to decide the claim. Ridge Runner timely appealed the decision to the

Department of Agriculture Board of Contract Appeals. The board granted the government's motion to dismiss concluding that because no contract had been entered into, it lacked jurisdiction under the Contract Disputes Act ("CDA"), 41 U.S.C. §§ 601-613.

[¶3] We have jurisdiction over an appeal from a decision of an agency board of contract appeals by virtue of 28 U.S.C. § 1295(a)(10). The board's jurisdiction under the CDA requires, at a minimum, a contract between an agency and another party. * * * * Therefore, the threshold matter is whether the Tender Agreements constituted contracts between the parties, which is a question of law that we review de novo. * * * *

[¶4] Ridge Runner argues that the Tender Agreement was a binding contract that placed specific obligations upon the government; namely, the government was obligated to call upon Ridge Runner, and the other winning vendors, for its fire fighting needs, and in return, the vendors were to remain ready with acceptable equipment and trained staff to answer the government's call. This, Ridge Runner argues, places the alleged contract squarely within our holding in *Ace-Federal*, 226 F.3d 1329.

[¶5] *Ace-Federal* involved a requirements contract whereby the government was obligated to use, with limited exceptions, enumerated suppliers. Following a request for proposals, Ace Federal, as well as other vendors, contracted with the government to provide court reporting and transcription services for various federal agencies. Included in each of the contracts was the standard requirements clause found in Federal Acquisition Regulation § 52.216-21(c) which provides "[e]xcept as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule." 48 C.F.R. § 52.216-21(c) (1988). Each contract also included a termination for convenience clause that limited government liability should the General Services Administration ("GSA") choose to cancel any contract. During the relevant term, some of the covered agencies contracted for transcription services from non-contract sources without obtaining the necessary waiver. We held that "each time an agency that did not obtain a GSA waiver arranged for services covered under the contract from a non-contract source, the government did not act within the limited exception and breached the contract." Ace-Federal, 226 F.3d at 1332-33.

[¶6] The contract in *Ace-Federal* is quite distinct from the Tender Agreements at issue in this case. That contract obligated the government to fulfill all of its requirements for transcription services from enumerated vendors or obtain a waiver. The Tender Agreements here are nothing but illusory promises. By the phrase illusory promise is meant words in promissory form that promise nothing; they do not purport to put any limitation on the freedom of the alleged promisor, but leave his future action subject to his own future will, just as it would have been had he said no words at all. *Torncello v. United States*, 231 Ct.Cl. 20, 681 F.2d 756, 769

(1982) (quoting 1 Corbin on Contracts § 145 (1963)). The government had the option of attempting to obtain firefighting services from Ridge Runner or any other source, regardless of whether that source had signed a tender agreement. The Agreements contained no clause limiting the government's options for firefighting services; the government merely "promised" to consider using Ridge Runner for firefighting services. Also, the Tender Agreement placed no obligation upon Ridge Runner. If the government came calling, Ridge Runner "promised" to provide the requested equipment only if it was "willing and able." It is axiomatic that a valid contract cannot be based upon the illusory promise of one party, much less illusory promises of both parties. See Restatement (Second) of Contracts § 71(1).

[¶7] Accordingly, the decision of the Department of Agriculture Board of Contract Appeals is affirmed.

Question: Is this case about the government not promising anything, or about Ridge Runner Forestry not providing any consideration?

The result in *Ridge Runner Forestry* seems acceptable, but consider the following problems. See if you can predict the right result. The answers, taken from real cases, can be found in an Appendix at the end of this volume. A note of caution: Some of these cases are controversial. The rule they cite might be acceptable, but the application may be erroneous, or at least problematic. Some courts myopically look for only a promise when some performance might in fact be the sought-for exchange.

PROBLEM 7. Miami Coca-Cola Bottling Co. ("Bottler") agreed with Orange Crush Co. ("Crush") as follows: Crush would give Bottler a perpetual and exclusive license within a designated territory to make, bottle, and distribute Orange Crush under Crush's trademark. Crush would supply concentrate at stated prices and do certain advertising. Bottler agreed to buy a specified quantity of concentrate, maintain the bottling plant, solicit orders for Orange Crush, promote its sale, and "develop an increase in the volume of sales." The license "contained a proviso to the effect that [Bottler] might at any time cancel the contract."

Bottler bought a quantity of concentrate and performed for about a year. Then, Crush gave written notice to Bottler that Crush would no longer be bound. In response to Bottler's suit, Crush claimed that Bottler's promise was illusory and that its own promise was therefore without consideration. What result?

PROBLEM 8. Central Nebraska Public Power and Irrigation District ("Central") and Johnson Lakes Development, Incorporated ("Lakes") entered into a written lease for land owned by Central. The lease term was 31 years. There was no provision for rent, but the lease stated that Central "shall have complete power and authority to cancel or terminate this Agreement at any time it so desires by giving [Lakes] written notice of such intentions at least six (6) months in advance addressed to [Lakes] at its last known corporate address." Sixteen years later, Central decided to begin extracting rent. Central's board directed its officers to modify the lease by agreement with Lakes. If Lakes failed to agree to a modification, Central was to begin the process of terminating the lease. Negotiations for rent failed, and Lakes sued Central. One of Lakes's arguments was that Central's right to cancel rendered the lease illusory. Did it?

PROBLEM 9. Scott offered to the Moragues Lumber Co. as follows: "I am thinking of buying an American shipping vessel of about 1,050 tons, due in Chile. If I buy it, I will charter it to you for the transportation of a cargo of lumber from any port in the Gulf of Mexico to Montevideo or Buenos Aires, for the freight of $65 per thousand feet of lumber, freight to be prepaid, free of discount and of insurance, and the vessel to be furnished within a reasonable time after its purchase." Moragues Lumber accepted this offer, meaning it promised to charter the boat as offered. Scott purchased the vessel. Moragues Lumber was ready, willing, and able to charter it, but Scott chartered it to someone else. In response to Moragues Lumber's suit against Scott, Scott argued that his own promise was illusory. Was it?

Along the same line as these facts, consider the common fact scenario of a real estate purchase contract with a financing condition—the "purchaser is not bound unless the purchaser obtains financing." But the purchaser will never obtain financing unless the purchaser applies for financing and cooperates with the lender.[*] Does the financing condition render the promise to buy illusory?

PROBLEM 10. This problem comes from a case written by Justice (then Judge) Cardozo. Best let him tell it in his own words. The case is *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917):

> The defendant styles herself "a creator of fashions." Her favor helps a sale. Manufacturers of dresses, millinery and like articles are glad to pay for a certificate of her approval. The things which she designs, fabrics, parasols and what not, have a new value in the public mind when issued in her name. She employed the plaintiff to help her to turn this vogue into money.

[*] Nearly all real estate sales transactions occur as follows: The buyer and seller bind themselves to a contract to sell, subject to certain conditions. They then go about seeing if the conditions are met: that the seller owns the property, that the buyer obtains financing, and so on. After a period of time during which the parties can assure that the conditions are met, the parties "close" the transaction by actually trading the real property and the payment given in exchange for it. Often, they will close through an agent who holds the document transferring title to the property (called a "deed," usually) and the money to be paid for the property. We call the holding of these things for a pending transaction an "escrow" and the person holding them an "escrow agent."

> He was to have the exclusive right, subject always to her approval, to place her indorsements on the designs of others. He was also to have the exclusive right to place her own designs on sale, or to license others to market them. In return, she was to have one-half of "all profits and revenues" derived from any contracts he might make. The exclusive right was to last at least one year from April 1, 1915, and thereafter from year to year unless terminated by notice of ninety days. The plaintiff says that he kept the contract on his part, and that the defendant broke it. She placed her indorsement on fabrics, dresses and millinery without his knowledge, and withheld the profits. He sues her for the damages, and the case comes here on demurrer.

Lady Lucy, in demurrer, claimed that Wood never promised to do anything and that the contract was therefore lacking in consideration. True?

PROBLEM 11. White Light Optical promised to sell and Lumenera promised to buy at certain prices all the small lenses that Lumenera needed for the webcams that Lumenera manufactured and sold. Three months later, White Light's glass supplier went out of business, and it was unable to find another supplier at a cost that made the Lumenera contract profitable. White Light wanted out of it. Is Lumenera's promise illusory?

Consider the following sections from the Uniform Commercial Code:

Uniform Commercial Code § 2-306. Output, Requirements and Exclusive Dealings, and cmt. 2.

Uniform Commercial Code § 1-304. Obligation of Good Faith.

Uniform Commercial Code § 1-201(20). General Definitions.

The UCC does not apply to everything. Here is the provision describing the scope of Article 2:

Uniform Commercial Code § 2-102. Scope * * *.

Questions:

Section 2-306 owes an intellectual debt to *Wood v. Lucy, Lady Duff-Gordon*. Wood was not selling goods, but one can apply the rationale of § 2-306(2) to the facts of that case.

1. Under subsection (2), was Wood more like a seller or buyer?

2. Would subsection (2) apply to Lucy?

3. Suppose I buy from Lucy all the dresses that she makes. Does subsection (1) impose any duties on Lucy or me?

PROBLEM 12. Mattei, a real estate developer, was planning to build a shopping center on a tract next to Hopper's land. Mattei wanted to include Hopper's land in the development. For several months, a real estate agent tried to negotiate a sale of Hopper's land to Mattei. After Hopper rejected several proposals, the agent suggested Hopper herself submit a proposal. She did, on a form supplied by the agent. Mattei accepted the offer on the day it was offered. Under the agreement, Mattei was required to deposit $1,000 and pay another $56,500 at closing. The agreement said that the parties would close in 120 days. The agreement also contained the following condition: "Subject to Coldwell Banker & Company obtaining leases satisfactory to the purchaser." Leases for what? For the shopping center. Apparently, Mattei was not going to build it unless leases for space within it were already in place. If he was not going to build, then he did not want to buy Hopper's land.

Mattei paid the $1,000 deposit. While Mattei was securing leases, and before the 120 days had ended, Hopper's attorney gave notice that she would not sell. Later, Mattei gave Hopper notice that satisfactory leases had been obtained. Mattei offered to pay the balance. Hopper refused to tender a deed. Her argument? That Mattei's promise was illusory. Was it?

Here is one last illusory promise case.

FORRESTER'S CASE (1661)
1 Siderfin 41

A minor by his guardian brought an action on the case in assumpsit and [the jury] found for the minor. And it was moved in arrest of the judgment * * * * that the consideration for this promise being it was by a minor to pay a sum of money is void, * * * * so that the promise on which the action is brought lacks consideration. But by the whole Court it was held that if the money was paid according to the promise of the minor it is clear that this action well lies because the consideration is executed. And it was held and ruled by the whole Court that although the money was not paid (whereas it was not in this case) nevertheless the action well lies because it is solely in the election of the minor to make his promise void, and not in the election of the [other] party * * * *. And it was said by Twisden, J., that where a minor made a lease for annual rent that it is not at all in the election of the lessee [to avoid] this lease for the infancy of the lessor, and upon the selfsame reason is our principal case, upon that judgment * * * *.

Questions:

1. Is this case different than *West v. Stowell*? If you recall, in *West* the two parties, a participant and a bystander, bet on an archery match. Only one of the two could win the bet. That meant that only one party's promise could become enforceable. The promise made to the loser of the bet would not be enforceable by definition. What was the result in *West*?

2. According to *Forrester's Case* and Justice Mounsen's position in *West*, does a promise need to be enforceable in order to function as a valuable consideration?

3. A similar problem arises in cases in which the statute of frauds has effect. The statute of frauds, which we will study in Chapter 5, declares certain types of promises unenforceable if not in writing signed by the promisor. Could such an unenforceable promise serve as consideration? For the most part, courts have said "yes," though a few states (such as the great state of Idaho, and also Michigan) dissent. Is it fair that an unenforceable promise serve as consideration? In *Coca-Cola Bottling Corp. v. Kosydar*, 331 N.E.2d 440, 444 (Ohio 1975), the court said, "The uttering of promises does not supply the actual consideration for the bargain. It is the content of the promise or the actual anticipated performance which supplies consideration for the bargain." *Accord* Restatement (Second) of Contracts §§ 75, 78 (1981).

4. Is this case different from *Scott v. Moragues Lumber*, the answer to Problem 9?

Note on Assent

Justinian's DIGEST, 2.14.1.3

> [S]o true it is that the word "agreement" [conventiones*] has a general significance that Pedius neatly says that there is no contract, no obligation which does not consist of agreement, whether it is achieved by the handing over of something or by the use of certain words.

For the last century and a half, courts have routinely held that one party to a contract must assent to another's promise before that promise is enforceable: "The essential elements of a valid contract must be present: competent parties, legal subject matter, valuable consideration, and mutual assent." *Blatt v. Blatt*, Opinion,

* *Conventiones* is the same Latin word the English royal courts used when speaking of a covenant which they would then enforce if it was set forth in writing and sealed by the promisor. Justinian (or one of his scholars) was writing in Latin around 550 C.E.

1988 WL 619305, *2 (Va. Cir. Ct. August 4, 1988). We will study mutual assent in the second half of the semester. But you should wonder, especially given Pedius's opinion about "handing over" things and "certain words," why both consideration and mutual assent are required. Is it possible for consideration to be present without mutual assent existing? Consider the next reading, from the argument of Laurence Tanfielde in *Slade's Case*, which was argued several times before all the justices of England between 1597 and 1602. The judges never resolved the case formally, but Tanfielde's argument must have seemed plausible to him at the time:

> [A]s I have learned, an assumption is nothing but a mutual agreement between the parties for a thing to be performed by the defendant in consideration of [some benefit to the promisor or detriment to the promisee].

J.H. Baker, The Legal Profession and the Common Law 397 (1986, trans. by Baker). Consider also the argument of Saunders for the defendant in *Peters v. Opie*, 2 Keble 837, 84 Eng. Rep. 529, 530 (1671): "A mutual promise is but the construction of law on a mutual agreement." Saunders argued during the age of Hobbes, Locke, and the social contract, and while Pufendorf was conceiving his own theory of contract. It is possible to have assent without consideration. Your next reading is from Pufendorf, who grounds all of contract on consent. Pufendorf was writing from continental Europe, not from England, and he didn't recognize a requirement of consideration. Pothier's theory to some extent follows Pufendorf's.

Samuel von Pufendorf, DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM LIBRI DUO 55-56, 59-60 (Frank G. Moore trans., 1682)

> [T]hat promises and compacts may bind us to give or do something not formerly required of us, or to omit what we previously had a right to do, our voluntary consent is most essential. For, since the fulfillment of any promise and agreement is associated with some burden, there is no better reason to prevent our justly complaining about it, than the fact that we voluntarily consented to do what it was evidently in our own power to avoid. * * * *
>
> Furthermore, consent should be mutual, not only in contracts, but also in promises, so that both promisor, and promisee, must consent. For when the consent of the latter is lacking, or when he has refused to accept the offered promise, the thing promised remains in the hands of the promisor. For he who offers something of his own to another, neither wishes to obtrude it upon him against his will, nor to consider it ownerless. Hence, if the other does not accept it, the right of the promisor over the thing offered is undiminished.

Robert J. Pothier, TREATISE ON THE CONTRACT OF SALE § 31
(1752, transl. L.S. Cushing 1839)

> The consent of the parties, which is of the essence of the contract of sale, consists in a concurrence of the will of the seller, to sell a particular thing to the buyer, for a particular price, and of the buyer, to buy of him the same thing for the same price.

Pothier, Pufendorf and a few others like them wrote treatises that theorized contract law persuasively around consent. These two and another commentator, Grotius, whose treatise was published in 1626, wielded great influence over English and American courts in the early part of the 19th century. America in particular was eager for new ideas from abroad, and some American lawyers tried somewhat successfully to extend French intellectual influence in American politics and law. During this time the common law of contracts adopted a requirement of mutual assent. We will study how that came about later in the semester. Now the following statement from courts is fairly common:

TURNER-BASS ASSOCS. OF TYLER v. WILLIAMSON
932 S.W.2d 219, 222 (Tx. Ct. App. 1996)

> Mutual assent or agreement is the essence of a contract.

BRADDOCK v. MADISON CTY.
34 F. Supp.2d 1098, 1104 (S.D. Ind. 1998)

> At its core and in general, however, the essence of contract law is the enforcement of promises where the parties have manifested their assent to a mutual exchange of consideration.

Actually both of these two recent statements from American courts are fairly common. Courts don't even seem to see the conflict between them. Perhaps that is because so few agreements lack consideration, given most folks' evident self-interestedness, particularly if courts "intend" consideration as did the court in *Riches v. Bridges* (and they do that, as we will see later). Is consideration essential to contract, or is agreement really what it is all about? Believe it or not, this issue is not settled in the law, and we won't settle it in class, though we will revisit it again more carefully in Chapter 5. If you look closely at many of the cases we will study for the remainder of the semester, you will see just below the surface of the doctrines and analyses the tension about whether contract is about assent alone, or something more.

Note on Remedies in Contract Actions

The following are rough definitions of contract law remedies intended only to guide your inquiry this semester, not to substitute for rigorous case analysis here or in any other contracts or other course, especially one in which you might study remedies specifically, as we will not in this book. Damages remedies originated in the English royal law courts and are thus often called legal remedies. Injunctive and declaratory remedies originated, for our purposes, in chancery, meaning the office of the chancellor of England, who was entrusted with that nation's public conscience. Often injunctive and declaratory remedies are called equitable remedies. Restitutionary remedies have a more difficult genealogy. They were granted by both the law courts and the chancery. Because the law courts' paid homage to "justice and conscience" in restitution cases, however, restitution was (and is) often called an equitable remedy. Only tradition stops the courts from rewarding damages outside of these categories, and occasionally courts become very creative in the relief they order. Most courts stick with the following remedies, however, choosing from among them the one(s) they feel would best do justice.

Expectation Damages: a sum of money intended to place the non-breaching party in the position that party would have been in had the promise at issue been performed.

Reliance Damages: a sum of money intended to place the non-breaching party in the position that party would have been in had the promise at issue not been made. Generally two kinds of costs to the non-breaching party form a basis for reliance damages: out-of-pocket costs—direct net costs incurred by a promisee in reliance on a promise prior to breach; and opportunity costs—indirect net value that the promisee would have enjoyed if the promisee had taken an opportunity that the promise led the promisee to forego.

Restitution: an order that the promisor account for a benefit that has been conferred by the injured party on the promisor. Usually the promisor accounts by returning the benefit received or paying a sum of money equal in value to the benefit. The purpose of the restitution remedy generally is to prevent the unjust enrichment of the party in breach, in other words, to put the party in breach back in the position it would have been in had the contract not been made.

Injunction: a court's order that a party do or not do something other than pay money damages. For example, in certain, special cases, a court may order specific performance, that the promisor perform as promised. In other cases, a court may order that a party to a contract refrain from interfering with another party's performance. Courts often say that injunctive relief is inappropriate when legal remedies adequately compensate the plaintiff. The prototypical case in which damages are inadequate and specific performance is appropriate occurs when a promisor breaches a promise to sell land, because each piece of land is unique and determining the appropriate amount of damages involves too much speculation.

Declaratory Relief: a court's statement of a party's legal rights. For example, a court may state that a contract is void or voidable (rescindable) at the option of one or either party.

PROBLEM 13. A hires B to build a house for $100,000. B buys $20,000 worth of materials and does $15,000 worth of work that uses up all $20,000 in materials. Then A fires B for no good reason. The house would have cost B $90,000 to build. What are B's damages? The court will probably let B choose its legal remedy, if one of them is adequate to compensate B, so which should B choose?

In Texas, an additional element of damages is available: "A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for: (1) rendered services; (2) performed labor; (3) furnished material; * * * * (8) an oral or written contract. Texas Civ. Prac. & Rem. § 38.001 (1997). Is this a good idea?

Chapter 2. Assent-Based Niches of Promise Enforcement: Modification and Waiver

A. Modification

1. Modification of Judgment Liabilities

You begin studying modifications with *Foakes v. Beer* because this case shows the legal issue that arises when the parties to a contract modify one parties' (A's) duties but not the other's (B's). A doesn't bargain for what B already has a duty to do—remember *Borelli*? So promises made by A with respect to the modification (i.e., I'll pay you the same, or more (even though you are doing what the contract or some other duty already requires you to do)) are not binding. Yet in many of these cases, such promises serve a commercial purpose, and policy or theoretical reasons for enforcing them exist. What to do?

John Weston FOAKES v. Julia BEER (1884)
House of Lords
9 App. Cas. 605

[¶1] * * * * On the 11th of August 1875 [Beer] [obtained a] judgment against [Foakes] for £2077 17s. 2d. for [a] debt and £13 1s. 10d. for costs. On the 21st of December 1876 a memorandum of agreement was made and signed by [Foakes] and [Beer in which Foakes agreed to pay Beer £500 immediately and the remainder of the judgment principal in installments. In consideration of Foakes's making these payments, Beer agreed to forego interest on the judgment debt, to which she was otherwise entitled. Foakes paid the principal in full according to the agreement, but then Beer tried to initiate collection efforts for the interest. The trial judge refused to allow her to proceed. The initial appellate court to hear the matter affirmed, but the Court of Appeal reversed and entered judgment for Beer. Foakes then appealed to the House of Lords.]

[Holl, counsel for Foakes:]

[¶2] * * * * [T]here is no reason in sense or law why the agreement should not be valid, and the creditor prevented from enforcing his judgment if the agreement be performed. It may often be much more advantageous to the creditor to obtain immediate payment of part of his debt than to wait to enforce payment, or perhaps by pressing his debtor to force him into bankruptcy with the result of only a small dividend. Moreover, if a composition is accepted friends, who would not otherwise do so, may be willing to come forward to assist the debtor. And if the creditor thinks that the acceptance of part is for his benefit who is to say it is not? * * * * *Reynolds v. Pinhowe* * * * * decided that the saving of trouble was a sufficient consideration; "for it is a benefit unto him to have his debt without suit or charge." * * * * *Pinnel's Case* was decided on a point of pleading: the dictum that payment of a small sum was no satisfaction of a larger, was extra-judicial, and overlooked all considerations of mercantile convenience, such as mentioned in *Reynolds v. Pinhowe* * * * *. It is every day practice for tradesmen to take less in satisfaction of a larger sum, and give discount, where there is neither custom nor right to take credit. * * * * Mankind have never acted on the doctrine of [*Pinnel's Case*], but the contrary; nay few are aware of it. By overruling it the House will only declare the universal practice to be good law as well as good sense.

[¶3] [Earl of Selborne, L.C.:-Whatever may be the ultimate decision of this appeal the House is much indebted to Mr. Holl for his exceedingly able argument.]
* * * *

[¶4] Bompas Q.C. (Gaskell with him) for [Beer]:-

[¶5] * * * * There is a strong current of authority that what the law implies as a duty is no consideration. Therefore where a debt is due part payment is no reason for giving up the residue. The doctrine is too well settled to be now overthrown: see a long list of authorities [citations omitted]. * * * * It is contrary to public policy to make the performance of a legal duty a good consideration; see the cases on seamen's wages: [citations omitted]. Where law and practice are so well established this House will not now depart from them * * * *. * * * *

Earl of Selborne, L.C.:- * * * *

[¶6] * * * * The doctrine [of *Pinnel's Case*] itself, as laid down by Sir Edward Coke, may have been criticised, as questionable in principle, by some persons whose opinions are entitled to respect, but it has never been judicially overruled; on the contrary I think it has always, since the sixteenth century, been accepted as law. If so, I cannot think that your Lordships would do right, if you were now to reverse, as erroneous, a judgment of the Court of Appeal, proceeding upon a doctrine which has been accepted as part of the law of England for 280 years.

[¶7] The doctrine, as stated in *Pinnel's Case*, is "that payment of a lesser sum on the day" (it would of course be the same after the day), "in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges, that by no possibility a lesser sum can be satisfaction to the plaintiff for a greater sum." * * * *

[¶8] If the question be (as, in the actual state of the law, I think it is), whether consideration is, or is not, given in a case of this kind, by the debtor who pays down part of the debt presently due from him, for a promise by the creditor to relinquish, after certain further payments on account, the residue of the debt, I cannot say that I think consideration is given, in the sense in which I have always understood that word as used in our law. It might be (and indeed I think it would be) an improvement in our law, if a release or acquittance of the whole debt, on payment of any sum which the creditor might be content to receive * * * * (though less than the whole), were held to be, generally, binding, though not under seal; nor should I be unwilling to see equal force given to a prospective agreement, like the present, in writing though not under seal; but I think it impossible, without refinements which practically alter the sense of the word, to treat such a release or acquittance as supported by any new consideration proceeding from the debtor. * * * *

Lord Blackburn:- * * * *

[¶9] * * * * Lord Coke reports * * * * [in *Pinnel's Case*] "that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum: but the gift of a horse, hawk, or robe, &c., in satisfaction is good, for it shall be intended that a horse, hawk, or robe, &c., might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff; but in the case at bar it was resolved that the payment and acceptance of parcel before the day in satisfaction of the whole would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material; so if I am bound in £20 to pay you £10 at Westminster, and you request me to pay you £5 at the day at York, and you will accept it in full satisfaction for the whole £10, it is a good satisfaction for the whole, for the expenses to pay it at York is sufficient satisfaction."

[¶10] * * * * What principally weighs with me in thinking that Lord Coke made a mistake of fact [as to what the Judges in *Pinnel's Case* decided] is my conviction that all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was no such long-continued action on this dictum as to render it improper in this House to reconsider the question. I had written my reasons for so thinking; but as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them.

[¶11] I assent to the judgment proposed, though it is not that which I had originally thought proper.

[¶12] [Lord Watson and Lord Fitzgerald also voted to affirm, in opinions here omitted.]

Questions:

1. Review *Reynolds v. Pinhowe*, from Chapter 1. How would you distinguish *Foakes* from *Reynolds* factually?

2. Suppose Foakes had complied with the agreement and also given Beer a horse. Would she be bound?

3. Why would a hawk or robe, if given by Foakes, have bound Beer, when payment of part of the money owed would not?

4. Why would payment prior to the due date have been sufficient consideration when payment of part on the due date would not?

5. Why should *Foakes* be overruled? (You can collect several arguments from this case. Please list and be prepared to discuss them.)

6. Why should *Foakes* be retained as law? (Again, please look to the case first.)

SUGARHOUSE FINANCE COMPANY v. Eugene L. ANDERSON and Colleen W. Anderson (1980)
Supreme Court of Utah
610 P.2d 1369

HALL, Justice:

[¶1] Plaintiff Sugarhouse Finance Company appeals the lower court's grant of a motion made by defendant Eugene L. Anderson for an order enforcing the terms of an agreement in settlement of a judgment held against him.

[¶2] On July 7, 1976, plaintiff filed a complaint against defendant for nonpayment of a promissory note. Judgment thereon was rendered in favor of plaintiff on December 17, 1976, in the amount of $2,423.86, plus interest, costs, and attorneys' fees. A copy of the judgment was docketed by plaintiff in Sevier County, defendant's county of residence.

[¶3] Some two years later, on January 29, 1979, plaintiff served defendant with an Order in Supplemental Proceedings, apparently due to the latter's failure during the interim to satisfy the judgment. Two days after receiving this notice, defendant met with plaintiff's president, Mr. Neuman Petty, for the purpose of discussing an alternative to full payment of the judgment. While reports conflict as to the exact content of that conversation, it is clear the defendant informed plaintiff of the existence of numerous outstanding obligations against him, including medical expenses incurred pursuant to treatment for injuries sustained in an automobile accident in 1978. Defendant initially proposed that plaintiff accept $1,500 in full settlement of the claim, which proposal was refused. Defendant then asserted that he was contemplating bankruptcy, and that such a measure would result in plaintiff's judgment being discharged. The parties finally settled on a figure of $2,200 in full satisfaction of the claim. Defendant issued Petty a check for this amount, asking him, however, not to negotiate it immediately, there being some uncertainty as to the sufficiency of funds in the account to cover it. At no time during the conversation did defendant represent to Petty that defendant had any ownership interest in real property, nor did Petty make inquiry in that regard.

[¶4] The day following these negotiations, plaintiff received a telephone call from a title company. Plaintiff learned from that call, allegedly for the first time, that defendant owned part interest in a 12-acre tract in Sevier County, Utah, four acres of which were the subject of a pending sale. The property was owned jointly with another party, and was otherwise encumbered, such that defendant hoped to receive no more than $2,000 from the transaction. The title company had telephoned to request that plaintiff file a satisfaction of judgment in order to clear title to the property in question; plaintiff refused the request.

[¶5] The next day, the defendant called to inform plaintiff that there were then sufficient funds in the account to cover the previously issued check. Plaintiff responded by indicating that it did not intend on going through with the settlement based on what it had learned from the title company. The check was subsequently returned to defendant.

[¶6] Defendant thereafter filed a motion in the original action, asking that the court order plaintiff to comply with the terms of the agreement of settlement. Hearing on the motion was convened on March 13, 1979, at the conclusion of which the motion was granted and the plaintiff was ordered upon receipt of the $2,200 payment, to file a satisfaction of judgment with the court. It is from this order that plaintiff appeals.

[¶7] Plaintiff first challenges the procedural propriety of defendant's petition for judicial redress by means of a motion in the initial action. Under plaintiff's view, defendant should be constrained to raise the alleged accord and satisfaction only as an affirmative defense to further attempts by the plaintiff to enforce the terms of the original promissory note. This contention is in error. * * * *

[¶8] Plaintiff next challenges the validity of the accord allegedly reached between the parties on the basis of adequacy of consideration. Plaintiff points out that, as defendant sought a substitute settlement of an undisputed and liquidated claim, separate and additional consideration was required to support the accord. It is plaintiff's position that no such consideration existed in the present case.

[¶9] Accord and satisfaction arises where the parties to an agreement resolve that a given performance by one party thereto, offered in substitution of the performance originally agreed upon, will discharge the obligation created under the original agreement. Essential to its validity are, (1) a proper subject matter; (2) competent parties; (3) an assent or meeting of the minds of the parties; and (4) a consideration given for the accord. Where the underlying claim is disputed or uncertain ("unliquidated"), the obligor's assent to the definite statement of performance in the accord amounts to sufficient consideration, as it constitutes a surrender of the right to dispute the initial obligation. Where, however, the underlying claim is liquidated and certain as to amount, separate consideration must be found to support the accord; otherwise, the obligor binds himself to do nothing he was not already obligated to do, and the obligee's promise to accept a substitute performance is unenforceable. The original obligation in the present case being of a definite and undisputed amount, the question presented is whether or not separate consideration was given to support the accord reached by the parties.

[¶10] No completely satisfactory and comprehensive definition of "consideration" has ever been devised. It is generally agreed, however, that where a promise is supported by the incurrence, on the part of the promisee, of a legal detriment in order to confer a benefit on the promisor, such is sufficient to serve as consideration, thereby rendering the promise legally enforceable. This is particularly so when an accord and satisfaction is involved, the modern trend among the courts being to uphold such agreements wherever possible. In such cases, consideration is often found in the obligor's agreement to alter the means or method of payment of the obligation initially owed, or to surrender the assertion of a legally enforceable right.

[¶11] It is to be noted that, in the present case, plaintiff held a judgment which had been outstanding for more than two years. Pursuant to the parties' conversation of January 31, 1979, defendant agreed that, for a release of the judgment upon payment of a lesser agreed amount, he would negotiate a loan with a third party to enable him to pay off the substitute obligation immediately. A check was given for the agreed amount at the conclusion of that conversation, and authorization to cash it followed two days later. In effect, defendant had agreed to transfer the debt represented by plaintiff's judgment to a third party, thereby immediately satisfying the obligation owed to plaintiff. This was something defendant had no legal obligation to do; by law, plaintiff could only move by levy of execution against property already owned by the defendant—plaintiff could not legally require defendant to incur additional obligations to satisfy the judgment. By so doing, defendant deliberately incurred the detriment of surrendering his right to limit plaintiff's ability to obtain satisfaction of the underlying judgment, and bestowed upon plaintiff the benefit of immediate payment by means of the incurrence of additional indebtedness. We hold such action to constitute sufficient consideration to support the accord negotiated by the parties.

[¶12] We note, in addition, that this jurisdiction recognizes the doctrine of promissory estoppel, whereby an individual who has made a promise which the individual should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is estopped to deny or repudiate the promise should the promisee or some third party suffer detriment thereby. We note that, in the present case, defendant agreed to incur additional indebtedness pursuant to the terms of the accord, in reliance on plaintiff's promise to accept immediate payment of a lesser amount in full satisfaction of the underlying obligation. As such, plaintiff should now be estopped to deny or reject the promise made.

[¶13] The trial court's decision is hereby affirmed. Costs to defendant.

CROCKETT, C. J., and MAUGHAN, WILKINS and STEWART, JJ., concur.

Questions:

1. What other acts in reliance by a debtor would have the same effect as Anderson's borrowing money?

2. In an accord and satisfaction, what discharges the prior obligation—the accord or the satisfaction?

2. Modification of Contractual Liabilities

ALASKA PACKERS' ASS'N v. DOMENICO (1902)
Circuit Court of Appeals, Ninth Circuit
117 F. 99

ROSS, Circuit Judge.

[¶1] The libel in this case was based upon a contract alleged to have been entered into between the libelants and the appellant corporation on the 22d day of May, 1900, at Pyramid Harbor, Alaska, by which it is claimed the appellant promised to pay each of the libelants, among other things, the sum of $100 for services rendered and to be rendered. In its answer the respondent denied the execution, on its part, of the contract sued upon, averred that it was without consideration, and for a third defense alleged that the work performed by the libelants for it was performed under other and different contracts than that sued on, and that, prior to the filing of the libel, each of the libelants was paid by the respondent the full amount due him thereunder, in consideration of which each of them executed a full release of all his claims and demands against the respondent.

[¶2] The evidence shows without conflict that on March 26, 1900, at the city and county of San Francisco, the libelants entered into a written contract with the appellants, whereby they agreed to go from San Francisco to Pyramid Harbor, Alaska, and return, on board such vessel as might be designated by the appellant, and to work for the appellant during the fishing season of 1900, at Pyramid Harbor, as sailors and fishermen, agreeing to do "regular ship's duty, both up and down, discharging and loading; and to do any other work whatsoever when requested to do so by the captain or agent of the Alaska Packers' Association." By the terms of this agreement, the appellant was to pay each of the libelants $50 for the season, and two cents for each red salmon in the catching of which he took part.

[¶3] On the 15th day of April, 1900, 21 of the libelants signed shipping articles by which they shipped as seamen on the Two Brothers, a vessel chartered by the appellant for the voyage between San Francisco and Pyramid Harbor, and also bound themselves to perform the same work for the appellant provided for by the previous contract of March 26th; the appellant agreeing to pay them therefor the sum of $60 for the season, and two cents each for each red salmon in the catching of which they should respectively take part. Under these contracts, the libelants sailed on board the Two Brothers for Pyramid Harbor, where the appellants had about $150,000 invested in a salmon cannery. The libelants arrived there early in April of the year mentioned, and began to unload the vessel and fit up the cannery. A few days thereafter, to wit, May 19th, they stopped work in a body, and demanded of the company's superintendent there in charge $100 for services in operating the vessel to and from Pyramid Harbor, instead of the sums stipulated for in and by the contracts; stating that unless they were paid this additional wage they would stop work entirely, and return to San Francisco. The evidence showed, and the court below found, that it was impossible for the appellant to get other men to take the places of the libelants, the place being remote, the season short and just opening; so that, after endeavoring for several days without success to induce the libelants to proceed with their work in accordance with their contracts, the company's superintendent, on the 22d day of May, so far yielded to their demands as to instruct his clerk to copy the contracts executed in San Francisco, including the words "Alaska Packers' Association" at the end, substituting, for the $50 and $60 payments, respectively, of those contracts, the sum of $100, which document, so prepared, was signed by the libelants before a shipping commissioner whom they had requested to be brought from Northeast Point; the superintendent, however, testifying that he at the time told the libelants that he was without authority to enter into any such contract, or to in any way alter the contracts made between them and the company in San Francisco. Upon the return of the libelants to San Francisco at the close of the fishing season, they demanded pay in accordance with the terms of the alleged contract of May 22d, when the company denied its validity, and refused to pay other than as provided for by the contracts of March 26th and April 5th, respectively. Some of the libelants, at least, consulted counsel, and, after receiving his advice, those of them who had signed the shipping articles before the shipping commissioner at San Francisco went before that officer, and received the amount due them thereunder, executing in consideration thereof a release in full, and the others paid at the office of the company, also receipting in full for their demands.

[¶4] On the trial in the court below, the libelants undertook to show that the fishing nets provided by the respondent were defective, and that it was on that account that they demanded increased wages. On that point, the evidence was substantially conflicting, and the finding of the court was against the libelants * * * *.

[¶5] The evidence being sharply conflicting in respect to these facts, the conclusions of the court, who heard and saw the witnesses, will not be disturbed. * * * *

[¶6] The real questions in the case as brought here are questions of law, and, in the view that we take of the case, it will be necessary to consider but one of those. Assuming that the appellant's superintendent at Pyramid Harbor was authorized to make the alleged contract of May 22d, and that he executed it on behalf of the appellant, was it supported by a sufficient consideration? From the foregoing statement of the case, it will have been seen that the libelants agreed in writing, for certain stated compensation, to render their services to the appellant in remote waters where the season for conducting fishing operations is extremely short, and in which enterprise the appellant had a large amount of money invested; and, after having entered upon the discharge of their contract, and at a time when it was impossible for the appellant to secure other men in their places, the libelants, without any valid cause, absolutely refused to continue the services they were under contract to perform unless the appellant would consent to pay them more money. Consent to such a demand, under such circumstances, if given, was, in our opinion, without consideration, for the reason that it was based solely upon the libelants' agreement to render the exact services, and none other, that they were already under contract to render. The case shows that they willfully and arbitrarily broke that obligation. * * * *

[¶7] The circumstances of the present case bring it, we think, directly within the sound and just observations of the supreme court of Minnesota in the case of *King v. Railway Co.*, 61 Minn. 482, 63 N.W. 1105:

> "No astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party. Surely it would be a travesty on justice to hold that the party so making the promise for extra pay was estopped from asserting that the

> promise was without consideration. A party cannot lay the foundation of an estoppel by his own wrong, where the promise is simply a repetition of a subsisting legal promise. There can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract. The promise cannot be legally enforced, although the other party has completed his contract in reliance upon it."

* * * *

[¶8] * * * * [T]he supreme court of Vermont [said] in the * * * * case of *Cobb v. Cowdery*, 40 Vt. 25, 94 Am.Dec. 370 * * * * [,]

> "A promise by a party to do what he is bound in law to do is not an illegal consideration, but is the same as no consideration at all, and is merely void; in other words, it is insufficient, but not illegal. Thus, if the master of a ship promise his crew an addition to their fixed wages in consideration for and as an incitement to, their extraordinary exertions during a storm, or in any other emergency of the voyage, this promise is nudum pactum; the voluntary performance of an act which it was before legally incumbent on the party to perform being in law an insufficient consideration; and so it would be in any other case where the only consideration for the promise of one party was the promise of the other party to do, or his actual doing, something which he was previously bound in law to do. Chit. Cont. (10th Am.Ed.) 51; Smith, Cont. 87; 3 Kent, Com.. 185."

* * * *

[¶9] It results from the views above expressed that the judgment must be reversed, and the cause remanded, with directions to the court below to enter judgment for the respondent, with costs. It is so ordered.

Questions:

1. What is the policy behind the pre-existing duty rule as used in this case?

2. Why did the superintendent wait so long to sign? (Please speculate. I don't think the answer is in the case.)

3. Generally, a mutual rescission of a contract in which each parties' duties are executory is binding. (Executory means, roughly, "not yet performed.") For instance, suppose I promise to sell you my cow and you promise to buy the cow for $500. After we have traded promises in assent, we are bound to a contract. But suppose we mutually release each other from our obligations under the contract before either of us performs. In that case, we are more or less mutually promising not to assert rights under the contract. This consensual trade of mutual promises ought to be just as binding as the original agreement, shouldn't it, either as a contract or as a mutual exchange of gifts? Wasn't that what happened in *Domenico*?

SCHWARTZREICH v. BAUMAN-BASCH, INC. (1921)
Court of Appeals of New York
131 N.E. 887

CRANE, J.

[¶1] On the 31st day of August, 1917, the plaintiff entered into the following employment agreement with the defendant:

> "BAUMAN-BASCH, INC.,
>
> "Coats & Wraps,
>
> "31-33 East 32nd Street,
>
> "New York
>
> "Agreement entered into this 31st day of August, 1917, by and between Bauman-Basch, Inc., a domestic corporation, party of the first part, and Louis Schwartzreich, of the Borough of Bronx, City of New York, party of the second part, Witnesseth:
>
> "The party of the first part does hereby employ the party of the second part, and the party of the second part agrees to enter the services of the party of the first part as a designer of coats and wraps.
>
> "The employment herein shall commence on the 22nd day of November, 1917, and shall continue for twelve months thereafter. The party of the second part shall receive a salary of Ninety ($90.00) per week, payable weekly.
>
> "The party of the second part shall devote his entire time and attention to the business of the party of the first part, and shall use his best energies and endeavors in the furtherance of its business.
>
> "In witness whereof, the party of the first part has caused its seal to be affixed hereto and these presents to be signed, and the party of the second part has here-unto set his hand and seal the day and year first above written.
>
> "BAUMAN-BASCH, INC.
>
> S. BAUMAN
>
> "LOUIS SCHWARTZREICH.
>
> "In the presence of:"

[¶2] In October the plaintiff was offered more money by another concern. Mr. Bauman, an officer of the Bauman-Basch, Inc., says that in that month he heard that the plaintiff was going to leave and thereupon had with him the following conversation.

> "A. I called him in the office, and I asked him, 'Is that true that you want to leave us?' and he said 'Yes,' and I said, 'Mr. Schwartzreich, how can you do that; you are under contract with us?' He said, 'Somebody offered me more money.' * * * * I said, 'How much do they offer you?' He said, 'They offered him $115 a week.' * * * * I said, 'I cannot get a designer now, and, in view of the fact that I have to send my sample line out on the

> road, I will give you a hundred dollars a week rather than to let you go.' He said, 'If you will give me $100, I will stay.'"

Thereupon Mr. Bauman dictated to his stenographer a new contract, dated October 17, 1917, in the exact words of the first contract and running for the same period, the salary being $100 a week, which contract was duly executed by the parties and witnessed. Duplicate originals were kept by the plaintiff and defendant.

[¶3] Simultaneously with the signing of this new contract, the plaintiff's copy of the old contract was either given to or left with Mr. Bauman. He testifies that the plaintiff gave him the paper but that he did not take it from him. The signatures to the old contract plaintiff tore off at the time according to Mr. Bauman.

[¶4] The plaintiff's version as to the execution of the new contract is as follows:

> "A. I told Mr. Bauman that I have an offer from Scheer & Mayer of $110 a week, and I said to him, 'Do you advise me as a friendly matter—will you advise me as a friendly matter what to do; you see I have a contract with you, and I should not accept the offer of $110 a week, and I ask you, as a matter of friendship, do you advise me to take it or not.' At the minute he did not say anything, but the day afterwards he came to me in and he said, 'I will give you $100 a week, and I want you to stay with me.' I said, 'All right, I will accept it; it is very nice of you that you do that, and I appreciate it very much.'"

The plaintiff says that on the 17th of October when the new contract was signed, he gave his copy of the old contract back to Mr. Bauman, who said: "You do not want this contract any more because the new one takes its place."

[¶5] The plaintiff remained in the defendant's employ until the following December when he was discharged. He brought this action under the contract of October 17th for his damages.

[¶6] The defense, insisted upon through all the courts, is that there was no consideration for the new contract as the plaintiff was already bound under his agreement of August 31, 1917, to do the same work for the same period at $90 a week.

[¶7] The trial justice submitted to the jury the question whether there was a cancellation of the old contract and charged as follows:

> "If you find that the $90 contract was prior to or at the time of the execution of the $100 contract cancelled and revoked by the parties by their mutual consent, then it is your duty to find that there was a consideration for the making of the contract in suit, viz., the $100 contract and, in that event, the plaintiff would be entitled to your verdict for such damages as you may find resulted proximately, naturally and necessarily in consequence of the plaintiff's discharge prior to the termination of the contract period of which I shall speak later on."

[¶8] Defendant's counsel thereupon excepted to that portion of the charge in which the court permitted the jury to find that the prior contract may have been canceled simultaneously with the execution of the other agreement. Again the court said:

> "The test question is whether by word or by act, either prior to or at the time of the signing of the $100 contract, these parties mutually agreed that the old contract from that instant should be null and void."

[¶9] The jury having rendered a verdict for the plaintiff the trial justice set it aside and dismissed the complaint on the ground that there was not sufficient evidence that the first contract was canceled to warrant the jury's findings.

[¶10] The above quotations from the record show that a question of fact was presented and that the evidence most favorable for the plaintiff would sustain a finding that the first contract was destroyed, canceled or abrogated by the consent of both parties.

[¶11] The Appellate Term was right in reversing this ruling. Instead of granting a new trial, however, it reinstated the verdict of the jury and the judgment for the plaintiff. The question remains, therefore, whether the charge of the court, as above given, was a correct statement of the law or whether on all the evidence in the plaintiff's favor a cause of action was made out.

[¶12] Can a contract of employment be set aside or terminated by the parties to it and a new one made or substituted in its place? If so, is it competent to end the one and make the other at the same time?

[¶13] It has been repeatedly held that a promise made to induce a party to do that which he is already bound by contract to perform is without consideration. But the cases in this state, while enforcing this rule, also recognize that a contract may be canceled by mutual consent and a new one made. Thus *Vanderbilt v. Schreyer* (91 N. Y. 392, 402) held that it was no consideration for a guaranty that a party promise to do only that which he was before legally bound to perform. This court stated, however:

> "It would doubtless be competent for parties to cancel an existing contract and make a new one to complete the same work at a different rate of compensation, but it seems that it would be essential to its validity that there should be a valid cancellation of the original contract. Such was the case of *Lattimore v. Harsen* (14 Johns. 330)."

[¶14] In *Cosgray v. New England Piano Co.* (10 App. Div. 351, 353) it was decided that where the plaintiff had bound himself to work for a year at $30 a week, there was no consideration for a promise thereafter made by the defendant that he should notwithstanding receive $1,800 a year. Here it will be noticed there was no termination of the first agreement which gave occasion for BARTLETT, J., to say in the opinion:

> "The case might be different if the parties had, by word of mouth, agreed wholly to abrogate and do away with a pre-existing written contract in regard to service and compensation, and had substituted for it another agreement."

[¶15] Any change in an existing contract, such as a modification of the rate of compensation, or a supplemental agreement, must have a new consideration to support it. In such a case the contract is continued, not ended. Where, however, an existing contract is terminated by consent of both parties and a new one executed in its place and stead, we have a different situation and the mutual promises are again a consideration. Very little difference may appear in a mere change of compensation in an existing and continuing contract and a termination of one contract and the making of a new one for the same time and work, but at an increased compensation. There is, however, a marked difference in principle. Where the new contract gives any new privilege or advantage to the promisee, a consideration has been recognized, though in the main it is the same contract. (*Triangle Waist Co., Inc., v. Todd*, 223 N. Y. 27.)

[¶16] If this which we are now holding were not the rule, parties having once made a contract would be prevented from changing it no matter how willing and desirous they might be to do so, unless the terms conferred an additional benefit to the promisee.

[¶17] All concede that an agreement may be rescinded by mutual consent and a new agreement made thereafter on any terms to which the parties may assent. Prof. Williston in his work on Contracts says (Vol. 1, § 130a): "A rescission followed shortly afterwards by a new agreement in regard to the same subject-matter would create the legal obligations provided in the subsequent agreement."

[¶18] The same effect follows in our judgment from a new contract entered into at the same time the old one is destroyed and rescinded by mutual consent. The determining factor is the rescission by consent. Provided this is the expressed and acted upon intention, the time of the rescission, whether a moment before or at the same time as the making of the new contract, is unimportant. The decisions are numerous and divergent where one of the parties to a contract refuses to perform unless paid an additional amount. Some states hold the new promise to pay the demand binding though there be no rescission. It is said that the new promise is given to secure performance in place of an action for damages for not performing (*Parrot v. Mexican Central Railway Co*., 207 Mass. 184), or that the new contract is evidence of the rescission of the old one and it is the same as if no previous contract had been made (*Coyner v. Lynde*, 10 Ind. 282; *Connelly v. Devoe*, 37 Conn. 570; *Goebel v. Linn*, 47 Mich. 489), or that unforeseen difficulties and hardships modify the rule (*King v. Duluth*, M. & N. Ry. Co., 61 Minn. 482), or that the new contract is an attempt to mitigate the damages which may flow from the breach of the first. (*Endriss v. Belle Isle Ice Co*., 49 Mich. 279.) * * * *

[¶19] The contrary has been held in such cases as * * * * *Alaska Packers' Association v. Domenico* (117 Fed. Rep. 99); * * * *. In none of these cases, however, was there a full and complete rescission of the old contract and it is this with which we are dealing in this case. Rescission is not presumed; it is expressed; the old contract is not continued with modifications; it is ended and a new one made. * * * *

[¶20] As before stated, in this case we have an express rescission and a new contract.

[¶21] There is no reason that we can see why the parties to a contract may not come together and agree to cancel and rescind an existing contract, making a new one in its place. We are also of the opinion that reason and authority support the conclusion that both transactions can take place at the same time.

[¶22] For the reasons here stated, the charge of the trial court was correct, and the judgments of the Appellate Division and the Appellate Term should be affirmed, with costs.

[¶23] HISCOCK, C. J., and HOGAN, CARDOZO, McLAUGHLIN, and ANDREWS, JJ., concur.
CHASE, J., dissents.
Judgments affirmed.

Questions:

1. What difference factually is there between *Domenico* and *Schwartzreich*?

2. New Hampshire purports not to need a case such as *Schwartzreich.* Consider the following from *Kramas v. Beattie,* 221 A.2d 236 (N.H. 1966):

> A half century ago New Hampshire by judicial decision, quietly and unheralded, modernized a portion of the law of consideration by lopping off one of the historical errors of the common law. It repudiated *Pinnel's Case*, 5 Coke 177a (1602) and *Foakes v. Beer*, 9 App. Cas. 605 (1884) as being neither logical nor just. See, Ferson, *The Rule in* Foakes v. Beer, 31 Yale L.J. 15 (1921); Havighurst, *Consideration, Ethics and Administration*, 42 Colum. L. Rev. 127 (1942). 'The rule that the payment of a less sum can never sustain an agreement to discharge a greater, because without consideration, however well supported by authorities * * * * is based upon misconception, is not founded in reason, and cannot be followed without abandoning the greater principle that reason is the life of the law.' *Frye v.*

> *Hubbell*, 74 N.H. 358, 377, 68 A. 325, 334, * * * *. Consequently, in *Frye v. Hubbell*, *supra*, it was held that payment of part of a debt accepted in full payment discharged liability for the balance. * * * * Whether 'the claim be liquidated or unliquidated, the matter resolves itself into a question as to whether the lesser sum was accepted as satisfaction in full.'
>
> In the present case there is no doubt that the defendant was dissatisfied with the lease, was attempting to 'break the lease,' and wished to terminate the lease with the payment of rent for the month of March by the check which bore the notation 'final and terminating payment under lease.' There is also no doubt that the plaintiffs were aware of these facts because of the defendant's complaints and the letters he had received from the defendant's attorney. If the Presiding Justice had believed the defendant's testimony that she was terminating the lease by the check for the March rent and the [plaintiffs] accepted it as such, there would be an accord and satisfaction.

This last sentence from *Kramas* is dicta; the trial court found that plaintiffs did not accept the last check as a termination of the lease. But can you see how the sentence refuses to follow *Foakes*? If *Foakes* were the rule, what else besides that "the plaintiffs accepted it as such" would be required in order that an accord and satisfaction occur?

An earlier case following *Frye, Watkins & Son v. Carrig*, 21 A.2d 591 (N.H. 1941), involved an excavation contract. When the excavator actually began digging, it struck rock, something not anticipated, so the excavator made an "insistent request" to the property owner for a renegotiation of the contract. The owner renegotiated but later refused to pay the increased price. The court reasoned as follows:

> In common understanding there is, importantly, a wide divergence between a bare promise and a promise in adjustment of a contractual promise already outstanding. * * * * * * * * [P]arties to a valid contract generally understand that it is subject to any mutual action they may take in its performance. Changes to meet changes in circumstances and conditions should be valid if the law is to carry out its function and service by rules conformable with reasonable practices and understandings in matters of business and commerce. * * * *
>
> The foregoing views are considered to meet the reasonable needs of standard and ethical practices of men in their business dealings with each other. Conceding that the plaintiff threatened to break its contract because it found the contract to be improvident, yet the defendant yielded to the threat without protest, excusing the plaintiff, and making a new arrangement. Not insisting on his rights but relinquishing them, fairly he should be held to the new arrangement. The law is a means to an end. It is not the

> law because it is the law, but because it is adapted and adaptable to establish and maintain reasonable order. * * * * It is not practical that the law should adopt all precepts of moral conduct, but it is desirable that its rule and principles should not run counter to them in important conduct and transactions of life.

Is this a better approach?

Alfred L. ANGEL v. John E. MURRAY, Jr.,
Director of Finance of the City of Newport, et al. (1974)
Supreme Court of Rhode Island
322 A.2d 630

OPINION
ROBERTS, Chief Justice.

[¶1] This is a civil action brought by Alfred L. Angel and others against John E. Murray, Jr., Director of Finance of the City of Newport, the city of Newport, and James L. Maher, alleging that Maher had illegally been paid the sum of $20,000 by the Director of Finance and praying that the defendant Maher be ordered to repay the city such sum. The case was heard by a justice of the Superior Court, sitting without a jury, who entered a judgment ordering Maher to repay the sum of $20,000 to the city of Newport. Maher is now before this court prosecuting an appeal.

[¶2] The record discloses that Maher has provided the city of Newport with a refuse-collection service under a series of five-year contracts beginning in 1946. On March 12, 1964, Maher and the city entered into another such contract for a period of five years commencing on July 1, 1964, and terminating on June 30, 1969. The contract provided, among other things, that Maher would receive $137,000 per year in return for collecting and removing all combustible and noncombustible waste materials generated within the city.

[¶3] In June of 1967 Maher requested an additional $10,000 per year from the city council because there had been a substantial increase in the cost of collection due to an unexpected and unanticipated increase of 400 new dwelling units. Maher's testimony, which is uncontradicted, indicates the 1964 contract had been predicated on the fact that since 1946 there had been an average increase of 20 to 25 new dwelling units per year. After a public meeting of the city council where Maher explained in detail the reasons for his request and was questioned by members of the city council, the city council agreed to pay him an additional $10,000 for the year ending on June 30, 1968. Maher made a similar request again in June of 1968 for the same reasons, and the city council again agreed to pay an additional $10,000 for the year ending on June 30, 1969.

[¶4] The trial justice found that each such $10,000 payment was made in violation of law. His decision, as we understand it, is premised on two independent grounds. First, he found that the additional payments were unlawful because they had not been recommended in writing to the city council by the city manager. Second, he found that Maher was not entitled to extra compensation because the original contract already required him to collect all refuse generated within the city and, therefore, included the 400 additional units. The trial justice further found that these 400 additional units were within the contemplation of the parties when they entered into the contract. It appears that he based this portion of the decision upon the rule that Maher had a preexisting duty to collect the refuse generated by the 400 additional units, and thus there was no consideration for the two additional payments.

[¶5] [Analysis of the first ground for appeal is omitted.]

[¶6] Having found that the city council had the power to modify the 1964 contract without the written recommendation of the city manager, we are still confronted with the question of whether the additional payments were illegal because they were not supported by consideration.

A

[¶7] As previously stated, the city council made two $10,000 payments. The first was made in June of 1967 for the year beginning on July 1, 1967, and ending on June 30, 1968. Thus, by the time this action was commenced in October of 1968, the modification was completely executed. That is, the money had been paid by the city council, and Maher had collected all of the refuse. Since consideration is only a test of the enforceability of executory promises, the presence or absence of consideration for the first payment is unimportant because the city council's agreement to make the first payment was fully executed at the time of the commencement of this action. * * * * However, since both payments were made under similar circumstances, our decision regarding the second payment (Part B, infra) is fully applicable to the first payment.

B

[¶8] It is generally held that a modification of a contract is itself a contract, which is unenforceable unless supported by consideration. See Simpson, *supra*, § 93. In *Rose v. Daniels*, 8 R.I. 381 (1866), this court held that an agreement by a debtor with a creditor to discharge a debt for a sum of money less than the amount due is unenforceable because it was not supported by consideration.

[¶9] *Rose* is a perfect example of the preexisting duty rule. Under this rule an agreement modifying a contract is not supported by consideration if one of the parties to the agreement does or promises to do something that he is legally obligated to do or refrains or promises to refrain from doing something he is not legally privileged to do, See Calamari & Perillo, Contracts § 60 (1970); 1A Corbin, Contracts §§ 171-72 (1963); 1 Williston, *supra*, § 130; Annot., 12 A.L.R.2d 78 (1950). In *Rose* there was no consideration for the new agreement because the debtor was already legally obligated to repay the full amount of the debt. * * * *

[¶10] The primary purpose of the preexisting duty rule is to prevent what has been referred to as the "hold-up game." See 1A Corbin, *supra*, § 171. A classic example of the "hold-up game" is found in *Alaska Packers' Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902). There 21 seamen entered into a written contract with Domenico to sail from San Francisco to Pyramid Harbor, Alaska. They were to work as sailors and fishermen out of Pyramid Harbor during the fishing season of 1900. The contract specified that each man would be paid $50 plus two cents for each red salmon he caught. Subsequent to their arrival at Pyramid Harbor, the men stopped work and demanded an additional $50. They threatened to return to San Francisco if Domenico did not agree to their demand. Since it was impossible for Domenico to find other men, he agreed to pay the men an additional $50. After they returned to San Francisco, Domenico refused to pay the men an additional $50. The court found that the subsequent agreement to pay the men an additional $50 was not supported by consideration because the men had a preexisting duty to work on the ship under the original contract, and thus the subsequent agreement was unenforceable.

[¶11] Another example of the "hold-up game" is found in the area of construction contracts. Frequently, a contractor will refuse to complete work under an unprofitable contract unless he is awarded additional compensation. The courts have generally held that a subsequent agreement to award additional compensation is unenforceable if the contractor is only performing work which would have been required of him under the original contract. See, e.g., *Lingenfelder v. Wainwright Brewing Co*., 103 Mo. 578, 15 S.W. 844 (1891), which is a leading case in this area. * * * *

[¶12] These examples clearly illustrate that the courts will not enforce an agreement that has been procured by coercion or duress and will hold the parties to their original contract regardless of whether it is profitable or unprofitable. However, the courts have been reluctant to apply the pre-existing duty rule when a party to a contract encounters unanticipated difficulties and the other party, not influenced by coercion or duress, voluntarily agrees to pay additional compensation for work already required to be performed under the contract. For example, the courts have found that the original contract was rescinded, *Linz v. Schuck*, 106 Md. 220, 67 A. 286 (1907); abandoned, *Connelly v. Devoe*, 37 Conn. 570 (1871), or waived, *Michaud v. MacGregor*, 61 Minn. 198, 63 N.W. 479 (1895).

[¶13] Although the preexisting duty rule has served a useful purpose insofar as it deters parties from using coercion and duress to obtain additional compensation, it has been widely criticized as a general rule of law. With regard to the preexisting duty rule, one legal scholar has stated: "There has been a growing doubt as to the soundness of this doctrine as a matter of social policy. * * * * In certain classes of cases, this doubt has influenced courts to refuse to apply the rule, or to ignore it, in their actual decisions. Like other legal rules, this rule is in process of growth and change, the process being more active here than in most instances. The result of this is that a court should no longer accept this rule as fully established. It should never use it as the major premise of a decision, at least without giving careful thought to the circumstances of the particular case, to the moral deserts of the parties, and to the social feelings and interests that are involved. It is certain that the rule, stated in general and all-inclusive terms, is no longer so well-settled that a court must apply it though the heavens fall." 1A Corbin, *supra*, § 171; see also Calamari & Perillo, *supra*, § 61.

[¶14] The modern trend appears to recognize the necessity that courts should enforce agreements modifying contracts when unexpected or unanticipated difficulties arise during the course of the performance of a contract, even though there is no consideration for the modification, as long as the parties agree voluntarily.

[¶15] Under the Uniform Commercial Code, § 2-209(1), which has been adopted by 49 states, "[a]n agreement modifying a contract [for the sale of goods] needs no consideration to be binding." See G.L. 1956 (1969 Reenactment) § 6A-2-209(1). Although at first blush this section appears to validate modifications obtained by coercion and duress, the comments to this section indicate that a modification under this section must meet the test of good faith imposed by the Code, and a modification obtained by extortion without a legitimate commercial reason is unenforceable.

[¶16] The modern trend away from a rigid application of the preexisting duty rule is reflected by § 89D(a) of the American Law Institute's Restatement Second of the Law of Contracts,[*] which provides: "A promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made * * *."

[¶17] We believe that § 89D(a) is the proper rule of law and find it applicable to the facts of this case. It not only prohibits modifications obtained by coercion, duress, or extortion but also fulfills society's expectation that agreements entered

[*] The first nine chapters of the Restatement Second of the Law of Contracts were given tentative approval by the American Law Institute at successive meetings from 1964 to 1972. These chapters, which include §§ 1-255, were published by the Institute in 1973 in a hard-cover edition. Herbert Wechsler, Director of the Institute, in a foreword to this edition indicates that although these sections are still tentative and await final approval, it is unlikely that any further changes will be made.

into voluntarily will be enforced by the courts.* See generally Horwitz, The Historical Foundations of Modern Contract Law, 87 Harv. L. Rev. 917 (1974). Section 89D(a), of course, does not compel a modification of an unprofitable or unfair contract; it only enforces a modification if the parties voluntarily agree and if (1) the promise modifying the original contract was made before the contract was fully performed on either side, (2) the underlying circumstances which prompted the modification were unanticipated by the parties, and (3) the modification is fair and equitable.

[¶18] The evidence, which is uncontradicted, reveals that in June of 1968 Maher requested the city council to pay him an additional $10,000 for the year beginning on July 1, 1968, and ending on June 30, 1969. This request was made at a public meeting of the city council, where Maher explained in detail his reasons for making the request. Thereafter, the city council voted to authorize the Mayor to sign an amendment to the 1954 contract which provided that Maher would receive an additional $10,000 per year for the duration of the contract. Under such circumstances we have no doubt that the city voluntarily agreed to modify the 1964 contract.

[¶19] Having determined the voluntariness of this agreement, we turn our attention to the three criteria delineated above. First, the modification was made in

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* The drafters of § 89D(a) of the Restatement Second of the Law of Contracts use the following illustrations in comment (b) as examples of how this rule is applied to certain transactions:

> "1. By a written contract A agrees to excavate a cellar for B for a stated price. Solid rock is unexpectedly encountered and A so notifies B. A and B then orally agree that A will remove the rock at a unit price which is reasonable but nine times that used in computing the original price, and A completes the job. B is bound to pay the increased amount.
>
> "2. A contracts with B to supply for $300 a laundry chute for a building B has contracted to build for the government for $150,000. Later A discovers that he made an error as to the type of material to be used and should have bid $1,200. A offers to supply the chute for $1,000, eliminating overhead and profit. After ascertaining that other suppliers would charge more, B agrees. The new agreement is binding.
>
> "3. A is employed by B as a designer of coats at $90 a week for a year beginning November 1 under a written contract executed September 1. A is offered $115 a week by another employer and so informs B. A and B then agree that A will be paid $100 a week and in October execute a new written contract to that effect, simultaneously tearing up the prior contract. The new contract is binding.
>
> "4. A contracts to manufacture and sell to B 2,000 steel roofs for corn cribs at $60. Before A begins manufacture a threat of a nationwide steel strike raises the cost of steel about $10 per roof, and A and B agree orally to increase the price to $70 per roof. A thereafter manufactures and delivers 1,700 of the roofs, and B pays for 1,500 of them at the increased price without protest, increasing the selling price of the corn cribs by $10. The new agreement is binding.
>
> "5. A contracts to manufacture and sell to B 100,000 castings for lawn mowers at 50 cents each. After partial delivery and after B has contracted to sell a substantial number of lawn mowers at a fixed price, A notifies B that increased metal costs require that the price be increased to 75 cents. Substitute castings are available at 55 cents, but only after several months delay. B protests but is forced to agree to the new price to keep its plant in operation. The modification is not binding."

June of 1968 at a time when the five-year contract which was made in 1964 had not been fully performed by either party. Second, although the 1964 contract provided that Maher collect all refuse generated within the city, it appears this contract was premised on Maher's past experience that the number of refuse-generating units would increase at a rate of 20 to 25 per year. Furthermore, the evidence is uncontradicted that the 1967-1968 increase of 400 units "went beyond any previous expectation." Clearly, the circumstances which prompted the city council to modify the 1964 contract were unanticipated. Third, although the evidence does not indicate what proportion of the total this increase comprised, the evidence does indicate that it was a "substantial" increase. In light of this, we cannot say that the council's agreement to pay Maher the $10,000 increase was not fair and equitable in the circumstances.

[¶20] The judgment appealed from is reversed, and the cause is remanded to the Superior Court for entry of judgment for the defendants.

Questions:

1. Who is Angel? (Just guess. It's not in the case.)

2. If the court had found that lack of consideration meant that the modification was not binding, would Maher have had to repay the first $10,000?

3. If the city's promise to pay the second $10,000 was enforceable, was the promise to pay the first $10,000 likewise enforceable?

4. Does the court adopt the Restatement Rule exactly?

5. Would the rule the court adopts apply to *Foakes v. Beer*?

6. Do you recognize the facts of illustration no. 3 in the second footnote? The facts of illustration no. 1?

Uniform Commercial Code § 2-209. Modification, Rescission and Waiver, and cmts. 1 and 2.

Uniform Commercial Code § 2-104(1). Definitions: "Merchant" * * * .

GROSS VALENTINO PRINTING COMPANY v. Frederick S. CLARKE,
d/b/a Cinefantastique (1983)
Appellate Court of Illinois, First District, First Division
458 N.E.2d 1027

GOLDBERG, Justice:

[¶1] Gross Valentino Printing Company (plaintiff) brought this action against Frederick S. Clarke, doing business as Cinefantastique (defendant), based on an alleged breach of contract. Defendant asserted three affirmative defenses: lack of consideration, fraudulent or innocent misrepresentation, and business compulsion.

[¶2] Plaintiff moved for summary judgment. Both plaintiff and defendant filed depositions in support of their theories. The trial court granted plaintiff's motion with regard to the first [defense] * * * *. * * * * Defendant appeals.

[¶3] Defendant publishes a magazine. After discussion, in July of 1979, plaintiff sent defendant a letter for printing the magazine including a price quotation of $6,695. Defendant accepted the terms. On August 8, 1979, the parties met to discuss the layout. The parties' depositions diverge as to the substance of that meeting. Because plaintiff was the movant for summary judgment, "the court will construe the pleadings, depositions, admissions and affidavits strictly against the movant and liberally in favor of the opponent" to determine if the summary judgment was proper. *Kolakowski v. Voris* (1980), 83 Ill.2d 388, 398, 415 N.E.2d 397.

[¶4] According to defendant's deposition, he brought materials for printing the magazine to plaintiff's office on August 8, 1979. Defendant discussed problems concerning the layout with an agent of plaintiff corporation. The agent told defendant the job could still be done "in house" despite the problems. He also told defendant the price would remain the same over the next six issues of the magazine.

[¶5] Defendant also stated the parties had a telephone conversation on August 14, 1979. Defendant was informed the job "was going to cost more than we thought." Plaintiff's agent told defendant the higher cost was incurred because plaintiff had to "send the stripping out." Defendant did not inform plaintiff's agent he wanted to get another printer because defendant did not believe he could meet his deadline if he changed printers. Defendant was also afraid plaintiff would not return defendant's materials if defendant argued about the price. Those materials were necessary for continued printing of defendant's magazine.

[¶6] Defendant also deposed that sometime thereafter plaintiff sent defendant a letter dated August 15, 1979. The letter specified the same work as represented in the parties' earlier contract. However the price was increased to $9,300. Defendant made no objection to this increase until a later date.

[¶7] On August 30, 1979, plaintiff delivered the first 5,000 magazines to defendant. Defendant signed the purchase order reflecting the new price and paid plaintiff $4,650 on account of the purchase. Defendant subsequently received the complete shipment of 15,000 magazines. However, on October 28, 1979, defendant informed plaintiff he would not accept the price increase.

I

LACK OF CONSIDERATION

[¶8] The parties agree that the sufficiency of defendant's first affirmative defense of lack of consideration depends on the determination of whether the transactions at issue are subject to the Uniform Commercial Code (UCC) (Ill. Rev. Stat. 1981, ch. 26, par. 1-101 et seq.). Under the UCC a modification of an existing contract "within this Article needs no consideration to be binding." (Ill. Rev. Stat. 1981, ch. 26, par. 2-209(1).) The parties also agree that the applicability of the UCC depends on the determination of whether they contracted for "goods" or "services."

[¶9] The UCC defines "goods" as (Ill. Rev. Stat. 1981, ch. 26, par. 2-105(1)):

> "`Goods' means all things, including specially manufactured goods, which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. `Goods' also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107)."

[¶10] The parties have not cited, and our research has not disclosed, any case in Illinois in which the court specifically applied the above definition to printed magazines. However, in *Colony Press, Inc. v. Fleeman* (1974), 17 Ill. App.3d 14, 308 N.E.2d 78, we dealt with the printing and sale of advertising leaflets.: * * * * According to the language in *Colony Press*, the court implied that the printed advertising leaflets were "goods" and that the UCC applied to the contract. * * * *

[¶11] Closer to the point is *Lake Wales Publishing Co. v. Florida Visitor, Inc*. (Fla. App. 1976), 335 So.2d 335. There, the court specifically addressed the issue of whether a contract to compile, edit, and publish printed material constituted a sale of goods. The court concluded that it did (335 So.2d 335, 336):

> "We focus then on whether the printed materials which appellant allegedly furnished to appellee were `goods' under the U.C.C., Fla. Stat. § 672.2-105(1), which defines `goods' as:
>
> > `... all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other

> than the money in which the price is to be paid, investment securities (chapter 678) and things in action.'

> The specific point has not been passed on by the Florida courts; however, the Official Comment to U.C.C. § 2-105 states that the definition of goods is based upon the concept of their movability. The items allegedly furnished by the appellant were specially produced or manufactured and were movable. Moreover, any services rendered were of necessity directed to production of the items."

See also *Cardozo v. True* (Fla. App. 1977), 342 So.2d 1053, 1055, where the court stated "[t]he definition of `goods' under the U.C.C. is sufficiently broad to include books."

[¶12] The court in *Lake Wales* relied on *Carpel v. Saget Studios, Inc*. (E.D. Pa. 1971), 326 F. Supp. 1331. There the court determined that a contract for a photographer to provide photographs, was a contract for goods. 326 F. Supp. 1331, 1333.

[¶13] In the case at bar, we conclude that the primary subject of the contract was the tangible printed magazines and not "printing services." Defendant's deposition indicates he worked with plaintiff in arriving at the "layout" of the magazine. Furthermore, defendant's deposition indicates he "shopped" for printers based solely on which printer submitted the lowest price estimate. Such an admission suggests that to defendant the "printing services" were largely fungible or interchangeable and were merely incidental to delivery of the final product. It is clear that defendant was simply interested in determining who could get him the magazines, the ultimate product, at the lowest possible price.

[¶14] Defendant relies on three cases. We find them inapposite to the case at bar:

[¶15] In *Mallin v. University of Miami* (Fla. App. 1978), 354 So.2d 1227, the court held a contract between an author and a publisher was a contract for services. The court stressed that "[t]his transaction did not involve a sale of goods by the publisher to the author" (354 So.2d 1227, 1229). In fact there was no sale of books except from the publisher to the eventual consumer.

[¶16] In *For Children, Inc. v. Graphics International, Inc*. (S.D.N.Y. 1972), 352 F. Supp. 1280, the court held damages for breach of a contract for the publishing of "pop-up" children's books were not governed by the UCC. The court indicated the manufacture of pop-up books was "a limited field." (352 F. Supp. 1280, 1284.) Therefore, the publishing at issue in For Children was in the nature of a specialty. Such specialized printing requires greater skill and expertise than the simple printing of a magazine as in the case at bar.

[¶17] In *Curtis Publishing Co. v. Sheridan* (S.D.N.Y. 1971), 53 F.R.D. 642, the court denied summary judgment in an action based on a contact for the publication of books. The court concluded there were disputed facts regarding whether the contract was for goods or services. (53 F.R.D. 642, 643.) However, the court noted that the contract included various responsibilities of the publisher other than printing, such as financing and marketing of the books.

[¶18] In all of these cases the responsibility of the publisher went beyond the simple printing of the material. Each of the contracts in the cited cases required more independent judgment, skill, and service than the contract in the case at bar. Therefore we hold that the agreement between these parties for printing the magazines was subject to the provisions of the UCC. It follows that proof of consideration was unnecessary. The trial court properly struck the first affirmative defense. * * * *

Note: As *Gross Valentino Printing Company* describes, the scope of Article Two is limited to transactions in "goods" defined as per UCC § 2-105(1):

Uniform Commercial Code § 2-105. Definitions: * * * "Goods" * * * .

Uniform Commercial Code § 1-201(20). General Definitions: * * * "Good faith" * * * .

Uniform Commercial Code § 1-304. Obligation of Good Faith.

Questions: UCC § 2-209 abandoned consideration in this narrow instance, but it did not abdicate all regulation. What does the code require in place of consideration? See § 2-209 cmt. 2. Did the printing company meet this requirement? Consider the following:

LUMBER ENTERPRISES, INC. v. Duane F. HANSEN and Peggy Hansen,
d/b/a Model Log Homes (1993)
Supreme Court of Montana
846 P.2d 1046

TURNAGE, Chief Justice.

[¶1] This is an action for breach of contract. The District Court for the Eighteenth Judicial District, Gallatin County, granted judgment to Lumber Enterprises, Inc., in the amount of $45,460.50 plus interest and costs. Duane F. Hansen and Peggy Hansen appeal. Lumber Enterprises, Inc., cross-appeals. We affirm. * * * *

[¶2] Lumber Enterprises, Inc., is a Montana corporation with its principal place of business at Gallatin Gateway, Montana. It sells specially prepared logs for log homes through a network of dealers. Duane F. Hansen and his wife Peggy Hansen do business as Heartbilt Homes (formerly Model Log Homes) in Stockton, Illinois, as a dealer of Lumber Enterprises' products.

[¶3] The parties have had a working relationship since 1972. On October 29, 1985, at the request of the Hansens, the parties agreed to a special pricing arrangement for approximately thirty loads of logs to be delivered in January, February and March of 1986. Lumber Enterprises agreed to the reduced price to keep its crews busy during the winter months.

[¶4] The thirty loads were delivered but, at the request of the Hansens, over a much longer period of time than originally agreed. The last load was shipped on October 31, 1988. The price of the last twelve of the thirty loads is the subject of this lawsuit.

[¶5] On April 27, 1987, Lumber Enterprises issued a new price list to the Hansens and told them to "take it or leave it." The practical effect was to raise prices to the Hansens by about 50 percent. After the April 1987 price change, the Hansens ordered twelve loads of logs to complete the thirty-load agreement of October 1985. They paid for the first nine of those twelve loads at the new 1987 prices, but under protest. Mr. Hansen testified he told the office manager for Lumber Enterprises that eventually there would have to be a reconciliation of the 1987 prices. The Hansens did not make payment for the last three loads, contending that this was the only way to force Lumber Enterprises to deal with their concerns.

[¶6] Lumber Enterprises brought suit claiming $45,460.50 was due from the Hansens for logs, catalogs, trusses and insulation, using the 1987 prices. The Hansens contended the twelve disputed loads should have been billed at 1985 prices. They further contended that Lumber Enterprises owed them $859 as part of a professional photography bill: a credit of $9,827.55 for half logs billed as full logs; and a $500 credit for help in photographing and assembling new company catalogues. By the Hansens' calculations, Lumber Enterprises owed them money. * * * *

[¶7] The [trial] court * * * * ruled that the Hansens owe Lumber Enterprises $45,460.50, plus costs of suit. The court denied the credits sought by the Hansens for photography and half logs, the damages sought by the Hansens for breach of good faith and consequential damages, and the request of Lumber Enterprises for attorney fees.

[¶8] The Hansens appeal and Lumber Enterprises cross-appeals.

I

[¶9] * * * * The Hansens claim the April 27, 1987 price increase by Lumber Enterprises was a unilateral modification of a term of the contract, not a termination of the contract. They assert that the attempted modification of the contract was not made in good faith and that the original contract should be enforced. They claim the remedy should have been the one for modification of contract in the absence of good faith.

[¶10] The test of good faith as to merchants includes observance of reasonable commercial standards of fair dealing in the trade. This may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under Sections 30-2-615 and 30-2-616. Official Comment to 5 30-2-209, MCA.

[¶11] A Lumber Enterprises manager testified that the April 27, 1987 price increase was necessary "[b]ecause we were losing money at the 1985 price agreement." He testified that when the original agreement was entered, Lumber Enterprises had never before sold truckloads of logs without the usual trim work done on them, and they believed the price was proper. However, after a year of supplying the Hansens with such logs, they realized they were selling the logs at a price below the cost of production. We conclude that the test of good faith has been met.

[¶12] More importantly, the Hansens ignore that the contract had already been extended indefinitely, with the acquiescence of both parties, at the time of the April 27, 1987 price increase. The indefinite extension placed the contract within § 30-2-309(2), MCA, in that "the contract provides for successive performances but is indefinite in duration." Under that statute, termination is allowed "at any time by either party" in such a contract. * * * *

[¶13] In buying loads of logs more than thirty days after the unilateral price increase, the Hansens effectively entered into a new contract with Lumber Enterprises. Lumber Enterprises brought this suit to collect on the unpaid debt under that contract.

[¶14] We hold that the District Court did not abuse its discretion * * * *. * * * *

Question: Would application of the standard employed by this court have changed the result in *Angel v. Murray*?

Note on Modification of Consumer Transactions

Courts have viewed the good faith requirement with some degree of flexibility. Consider the following from *Palmer v. Safe Auto Sales, Inc.*, 452 N.Y.S.2d 995 (Kings Cty. Small Claims Part 1982). This is the case of the "frugal optometrist." Dr. Palmer, a doctor of optometry, bought a Toyota Tercel, deluxe model, from Safe Auto Sales. He paid a $100 deposit. Balance was due at the time of delivery. Five weeks later, Dr. Palmer was told his car was available but included a rear wiper ($75) and a body molding ($45) not specified in the original agreement. Safe Auto told Palmer that he would have to pay for these additions in order to take the car. He would also have to pay a price adjustment of $150, reflecting increased dealer cost between the time of ordering and delivery. With tax, this came to an additional $291. Dr. Palmer testified that he needed the car at the time but did not want the additions. He took the car but sued for the $291. It is clear that Safe Auto would have lost money had they not charged Dr. Palmer for the extras. The court stated, however,

> Although the comment does not specifically state, it would appear that a modification of a sales price term arising out of a market shift will generally be held enforceable only in a context involving "merchants". The court, in *United States for Use & Benefit of Crane Co. v Progressive Enterprises* (418 F. Supp. 662, 664), observed in a case involving merchants that:
>
> > "In the context of a lengthy, ongoing business relationship, seeking modification of a sales price is not uncommon and, given increased costs, is a fair method of doing business in order to preserve the desirability of the relationship for both parties. In such a situation, the parties must be able to rely on objective, unequivocal manifestations of assent."
>
> However, while such a modification might be expected in a sales transaction between merchants, a different rule is appropriate where one of the parties is a consumer. A merchant "means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction" (Uniform Commercial Code, § 2-104, subd [1]). I hold that where, as here, a sophisticated merchant attempts to coerce a consumer into asserting and paying for a price increase for the vehicle that had previously been contracted for, such a modification does not meet the good-faith requirement of article 2 of the Uniform Commercial Code. The consumer who purchases goods, such as an automobile, makes, it is presumed, a reasoned decision based among other things upon price factors and the necessity of receiving delivery of the vehicle within certain time parameters. The purchase of an automobile entails a large expenditure for the average consumer. It is not a transaction undertaken frequently. Therefore, having signed a contract and furnished a deposit, the consumer reasonably believes that he has contracted for a vehicle at a price certain. The attempt by the dealer to exact a further charge to reflect a price increase to it, is an unfair and manifestly unreasonable requirement. In short, it is a modification lacking in good faith. * * * * The duty of "honesty in fact" is the standard by which all commercial transactions are judged. Good faith is not merely an ideal which is devoutly to be desired but is in fact an obligation which is as much a part of any agreement or contract as are the obligations created by agreement of the parties. In fact, the obligation of good faith

> takes priority over the obligations which the parties may have created. * * * *
>
> While the modification to reflect the price increase might be deemed a modification "honest in fact," I hold that the modification does not conform to the additional standard relevant to this transaction, i.e., "the observance of reasonable commercial standards of fair dealing in the trade" (Uniform Commercial Code, § 2-103, subd [1], par [b]). The transaction must be viewed in the totality of the circumstances: a price increase modification in the context of a single consumer transaction as opposed to one in "a lengthy, on-going business relationship" between merchants. (*United States for Use & Benefit of Crane Co. v Progressive Enterprises, supra*, at p 664.) If both parties were merchants, I would hold otherwise.

Note on the Relationship Between Duress and Good Faith for a Modification

We have not yet studied duress, but obviously there is some connection between the "good faith" standard and the protections offered by the duress doctrine. In the unpublished opinion in *Duffy Tool & Stamping, Inc. v. Bosch Auto. Motor Syst. Corp.*, Opinion, 2000 WL 122225 (Tenn. Ct. App., Feb. 1, 2000), the court stated well the view typical of many courts:

> Commercial parties are undoubtedly free to modify their contracts consensually. See Tenn. Code Ann. § 47-2-209 (1996). Modifications of contracts governed by the Uniform Commercial Code are subject to the general obligation of good faith, which the Code defines as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." Tenn. Code Ann. § 47 -2-103(1)(b) (1996). Thus, a modification of a contract for the sale of goods procured under circumstances of economic duress is voidable by the victim. * * * *
>
> The sort of economic duress that will render a contract voidable is the "imposition, oppression . . . or taking of undue advantage of the business or financial stress or extreme necessities . . . of another . . . [so] that the party profiting thereby has received money, property or other advantage [that in equity the party] ought not be permitted to retain." *Johnson v. Ford*, 147 Tenn. 63, 92-93, 245 S.W. 531, 539 (1922). Tenn. Code Ann. § 47-1-103 (1996) preserves the applicability of economic duress as a defense in dealings between commercial actors. As a general matter, economic duress will make an agreement voidable by the strapped party when that party's assent has been induced by an "improper threat by the other party that [has

> left] the victim no reasonable alternative." Restatement (Second) Contracts § 175(1) (1981).[*]

We will study the doctrine of duress in Chapter 4.

The following case is an aside regarding the scope of Article 2 of the UCC. You know that the UCC does not apply to all contracts, and Article 2 applies only to "transactions in goods." The following case addresses the meaning of that phrase.

Jane PITTSLEY v. Donald HOUSER, dba Hilton Contract Co.;
Hilton Contract Carpet Co., a corporation (1994)
Court of Appeals of Idaho
875 P.2d 232

SWANSTROM, Judge, pro tem. * * * *

[¶1] * * * * The single question upon which this appeal depends is whether the UCC is applicable to the subject transaction. If the underlying transaction involved the sale of "goods," then the UCC would apply. If the transaction did not involve goods, but rather was for services, then application of the UCC would be erroneous.

[¶2] Idaho Code § 28-2-105(1) defines "goods" as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale. . . ." Although there is little dispute that carpets are "goods," the transaction in this case also involved installation, a service. Such hybrid transactions, involving both goods and services, raise difficult questions about the applicability of the UCC. Two lines of authority have emerged to deal with such situations.

[¶3] The first line of authority, and the majority position, utilizes the "predominant factor" test. The Ninth Circuit, applying the Idaho Uniform Commercial Code to the subject transaction, restated the predominant factor test as:

> The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods in-

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[*] One of the examples used by the American Law Institute to illustrate the use of economic duress to induce an increase in the price of goods is strikingly similar to the facts of this case:

> A, who has contracted to sell goods to B, makes an improper threat to refuse to deliver the goods to B unless B modifies the contract to increase the price. B attempts to buy substitute goods elsewhere but is unable to do so. Being in urgent need of the goods, he makes the modification. B has no reasonable alternative. A's threat amounts to duress, and the modification is voidable by B.

Restatement (Second) Contracts, § 175, illustration 5.

> cidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).

* * * * This test essentially involves consideration of the contract in its entirety, applying the UCC to the entire contract or not at all.

[¶4] The second line of authority, which Hilton urges us to adopt, allows the contract to be severed into different parts, applying the UCC to the goods involved in the contract, but not to the nongoods involved, including services as well as other nongoods assets and property. Thus, an action focusing on defects or problems with the goods themselves would be covered by the UCC, while a suit based on the service provided or some other nongoods aspect would not be covered by the UCC. This position was advanced by the Tenth Circuit Court of Appeals in *Foster v. Colorado Radio Corp.*, 381 F.2d 222 (10th Cir. 1967), which involved the sale of a radio station. The court in Foster held that, although there was a single contract for the purchase of a radio station, the UCC applied only to the actual goods that were covered under the contract. Thus, the court applied different analyses and remedies to two different aspects of the same contract.

[¶5] We believe the predominant factor test is the more prudent rule. Severing contracts into various parts, attempting to label each as goods or nongoods and applying different law to each separate part clearly contravenes the UCC's declared purpose "to simplify, clarify and modernize the law governing commercial transactions." I.C. § 28-1-102(2)(a). As the Supreme Court of Tennessee suggested in *Hudson v. Town & Country True Value Hardware, Inc.*, 666 S.W.2d 51 (Tenn. 1984), such a rule would, in many contexts, present "difficult and in some instances insurmountable problems of proof in segregating assets and determining their respective values at the time of the original contract and at the time of resale, in order to apply two different measures of damages." *Id.* at 54.

[¶6] Applying the predominant factor test to the case before us, we conclude that the UCC was applicable to the subject transaction. The record indicates that the contract between the parties called for "165 yds Masterpiece # 2122 — Installed" for a price of $4319.50. There was an additional charge for removing the existing carpet. The record indicates that Hilton paid the installers $700 for the work done in laying Pittsley's carpet. It appears that Pittsley entered into this contract for the purpose of obtaining carpet of a certain quality and color. It does not appear that the installation, either who would provide it or the nature of the work, was a factor in inducing Pittsley to choose Hilton as the carpet supplier. On these facts, we conclude that the sale of the carpet was the predominant factor in the contract, with the installation being merely incidental to the purchase. Therefore, in failing to consider the UCC, the magistrate did not apply the correct legal principles to the facts as found. We must therefore vacate the judgment and remand for further findings of fact and application of the UCC to the subject transaction.

WALTERS, C.J., and CAREY, J. pro tem, concur.

Questions:

1. A contract for a perm—would that be covered by Article 2?
2. A contract for a house?
3. A contract for money?
4. Does Article 2 cover items sold at garage sales?
5. Does Article 2 cover items picked up on the way out of the grocery store, before the checkout counter is reached?

B. Waiver

R. CONRAD MOORE & ASSOCS., INC. v. LERMA
946 S.W.2d 90 (Tex. App.—El Paso 1997, writ denied)

OPINION

Larsen, Justice.

* * * * FACTS

[¶1] On January 30, 1990, the Lermas (Appellees) and R. Conrad Moore & Associates, Inc. (Appellant) entered into an earnest money contract for the purchase of two lots at 1900 Gus Moran in El Paso. The Lermas tendered a check to Moore for $13,500 as part of the earnest money contract. The sale of the lots was contingent upon the Lermas using Moore as a builder. On April 16, 1990, the Lermas and Moore incorporated the previous contract into a new home residential earnest money contract. This contract provided for the construction of a custom home on the lots for a total price, including the lots, of $180,000. The new contract called for an additional payment of $6,500 earnest money, due upon the Lermas' approval of the house plan. Paragraph 4 of the contract required the following:

> FINANCING CONDITIONS: This contract is subject to approval for Buyer of a conventional (type of loan) loan (the Loan) to be evidenced by a promissory note (the Note) in the amount of $180,000. Buyer shall apply for the Loan within 15 days from the effective date of this contract and shall make every reasonable effort to obtain approval from Competitive Mortgage Co., as lender, or any lender that will make the Loan. **If the Loan cannot be approved within 60 days from the effective date of this contract, this contract shall terminate and the Earnest Money shall be refunded to Buyer without delay.** [Emphasis added.]

[¶2] In addition to the standard provision of the preprinted contract, special handwritten provisions were included under Paragraph 11:

> 1) Seller give One Year (1) Builders Warranty and 10-Year H.O.W. warranty
> 2) **On Lot held more than 60 days, Earnest Money is non-refundable.**
> 3) Lot purchase contract dated January 30, 1990 is hereby transferred to this Home construction contract.
> 4) Balance of Down Payment to be made at time of sale of properties located at 1400 Bodega and 3509 Breckenridge. [Emphasis added.]

[¶3] Construction on the house began in December 1990, and was completed in the summer of 1991. The Lermas were ultimately denied credit and were unable to close on the house. In September 1991, after demanding the return of their earnest money, they initiated this suit in November 1992. After trial to a jury, the Lermas were awarded $20,000 in damages. The jury found that Moore breached the contract by failing to return the Lermas' earnest money upon the Lermas' failure to get loan approval within the 60 days contemplated by Paragraph 4 of the contract. Moore appeals.

STANDARD OF REVIEW: LEGAL AND FACTUAL SUFFICIENCY

[¶4] Moore asserts in its first six points of error that the evidence was legally or factual insufficient to support the jury's findings.

[¶5] In reviewing a "no evidence" or legal sufficiency claim, we examine only the evidence favorable to the verdict and disregard all evidence to the contrary. * * * *

[¶6] In reviewing a "matter of law" challenge, we first examine the record to see if any evidence supports the finding, ignoring all evidence to the contrary. If no evidence supports the finding, we then determine whether the evidence conclusively establishes its converse. If so, we must reverse. * * * *

Loan Approval

[¶7] In its first point of error, Moore asserts the evidence is legally and factually insufficient to support the jury finding that the Lermas failed to get loan approval for the purchase of the home. After a diligent search of the record, we have been unable to find any evidence that would support a finding that the Lermas did get financing for the purchase. Moore testified that "someone" at Sun World Savings informed her that the Lermas were approved within the 60 day period. However, Ms. Nancy Montes of Mortgage Plus, who took the Lermas' loan application, testified that they were never approved. She stated that a "take out" letter sent out in October 1990 was not final loan approval but a prequalification report that indicates a conditional approval subject to verification and continuing good credit. Ms. Montes further testified that she exhausted all her sources in attempting to get financing for the Lermas. Ultimately, the Lermas were denied credit and were unable to close on the house. The record overwhelmingly supports the jury's finding that the Lermas did not get loan approval for the purchase of the house. Therefore, Moore's first point of error is overruled.

Waiver

[¶8] In its second point of error, Moore asserts that the evidence establishes as a matter of law that the Lermas waived any right to have the earnest money refunded. We agree.

[¶9] Any contractual right can be waived. *Purvis Oil Corp. v. Hillin*, 890 S.W.2d 931, 937 (Tex. App.-El Paso 1994, no writ). A waiver is an intentional release, relinquishment, or surrender of a known right. *Id*. The following elements must be met to find waiver: (1) a right must exist at the time of the waiver; (2) the party who is accused of waiver must have constructive or actual knowledge of the right in question; and (3) the party intended to relinquish its right. See *Riley v. Meriwether*, 780 S.W.2d 919, 922 (Tex. App.-El Paso 1989, writ denied). Intentional relinquishment of a known right can be inferred from intentional conduct which is inconsistent with claiming the contractual right. *Id.*

[¶10] It has been conclusively established that the Lermas did not obtain financing for the purchase of the house from Moore. Paragraph 4 of the contract clearly states that if the purchasers are unable to obtain financing within 60 days of the effective date of the contract, they had a right to have their money returned. Thus, on June 15, 1990, the Lermas had a right to the return of their earnest money. The Lermas' intention to relinquish their right to the return of the earnest money, however, is clearly established by their conduct after June 15. Between the date the contract was signed and the date construction began on the house, the Lermas participated in the design of the house, approved the blueprints in July 1990, and tendered an additional $6,500 in earnest money to Moore in October. The Lermas were then conditionally approved for financing which allowed Moore to get a construction loan to begin building the house.

[¶11] Additionally, after construction of the house began in December 1990, the Lermas monitored its progress on a daily basis. In March 1991, they requested and paid for an upgrade in tile for the house. In June, Isabel Lerma executed a promissory note in the principal amount of $6,000 to Moore to pay for the addition of another room to the house. During this same time period, the Lermas sold their home and another property, as agreed in the contract, to fund the down payment. Mr. Lerma testified that he fully intended to buy the house that Moore was building, and at no time prior to August 1991 did he consider the contract terminated. Mrs. Lerma also testified that until August 1991, they wanted and intended to purchase the home.

[¶12] Although the Lermas claim that they were unaware that they could get their money back on that date, both Mr. and Mrs. Lerma signed the contract. Mrs.

Lerma testified that she read the contract. Mr. Lerma was not sure if he read the contract, but testified that no one prevented him from doing so. A person who signs a contract is presumed to know and understand its contents; absent a finding of fraud, failure to apprehend the rights and obligations under the contract will not excuse performance. See *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392 (Tex.1982); *Thigpen v. Locke*, 363 S.W.2d 247 (Tex.1962). There is no evidence of fraud, actual or constructive, on the part of Moore. Thus, we conclude the Lermas had knowledge of their right to a refund of the earnest money on June 15.

[¶13] There is no evidence to support the jury's finding that the Lermas did not waive the right to have the earnest money refunded. The Lermas' intentional conduct after the right to the return of the earnest money arose was inconsistent with claiming that right. They intentionally relinquished a known right, and therefore, we find as a matter of law, that the Lermas waived Paragraph 4 of the contract, and the contract continued in effect, including Paragraph 11 allowing Moore to retain the earnest money on the lots.

[¶14] The Lermas argue that Paragraph 4 operates as a condition precedent. When the Lermas failed to obtain financing within 60 days, the contract, including any forfeiture provisions, terminated. Thus, the Lermas assert Paragraphs 16 and 11 never became effective. Many Texas cases have construed provisions similar to Paragraph 4 as conditions precedent. See e.g., * * * *. We agree with the Lermas that Paragraph 16, a simple default clause included in the preprinted sections of the contract, may not have become effective in the event the Lermas failed to obtain financing within 60 days. In this case, however, we have an additional handwritten provision that is somewhat out of the ordinary and distinguishable from the clauses considered in the cases finding conditions precedent. Under Paragraph 11, the "special provisions" section of the contract, the parties added the phrase "on Lot held more than 60 days, Earnest Money is non-refundable." This brief passage is less than a model of clarity. At first blush, it appears in direct contradiction to Paragraph 4, the termination clause.

[¶15] If a contract is worded so that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law. *City of Pinehurst v. Spooner Addition Water Co*., 432 S.W.2d 515, 518 (Tex.1968); *First City Nat'l Bank of Midland v. Concord Oil Co*., 808 S.W.2d 133, 137 (Tex. App.-El Paso 1991, no writ). There is no allegation in this case that the earnest money contract is ambiguous, and it does not appear to us to be so. Generally, the parties to a contract intend every clause to have some effect and the Court may not ignore any portion of the contract unless there is an irreconcilable conflict. *Ogden v. Dickinson State Bank*, 662 S.W.2d 330, 332 (Tex.1983); *Woods v. Sims*, 154 Tex. 59, 273 S.W.2d 617 (1954). In the interpretation of contracts, the primary concern of courts is to ascertain and to give effect to the intentions of the parties as expressed in the instrument. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex.1983); *Deacon, Inc. v. Price*, 817 S.W.2d 147, 149 (Tex. App.-El Paso 1991, writ denied). This requires the court to examine and consider the entire instrument and reach a decision so that none of the provisions will be rendered meaningless. *Id*.

[¶16] By its wording, Paragraph 11 is not merely a forfeiture clause subject to the condition precedent stated in Paragraph 4. Paragraph 11 envisions the non-occurrence of the condition (in this case financing obtained within 60 days), references the 60-day provision, and provides for continuation of the contract beyond 60 days. To give effect to both provisions and render neither meaningless, we must construe the handwritten provision to allow the buyer, at its option, to continue the contract after 60 days in the absence of financing. A condition precedent like any other provision of a contract can be waived. Purvis Oil Corp., 890 S.W.2d at 931. Thus, if financing were not obtained in 60 days, the Lermas could do nothing, the contract would terminate, and the Lermas would be entitled to return of the earnest money. On the other hand, the Lermas could take action to have the lot "held more than 60 days" thereby waiving the right to the return of the earnest money.

[¶17] The record establishes that the Lermas chose the latter option. They worked with Moore on the design of the house, tendered additional earnest money four months after the contract would have expired under Paragraph 4, contracted with Moore to increase the square footage of the house, paid for tile upgrades, and sold both the home they were living in and another property in anticipation of closing on the house when it was completed. The record therefore conclusively establishes that the Lermas waived termination of the contract and instead continued to operate pursuant to the contract under Paragraph 11.
* * * *

[¶18] We must reject the Lermas' arguments and affirm Moore's second point of error.
* * * *

CONCLUSION

[¶19] Having sustained Moore's second point of error, we reverse the judgment of the trial court and render judgment that the Lermas take nothing on their contract * * * * cause[] of action.

Questions:

1. Is this a case of express or implied waiver?

2. What facts show the Lermas' intent? Do you believe the Lermas intended to relinquish their right?

3. Did the Lermas promise to apply for a loan?

4. Is reliance on a waiver necessary for the waiver to have legal effect?

5. What exactly was waived?

6. Can anything be waived? In *Clark v. West*, 86 N.E. 1 (N.Y. 1908), Clark and West contracted for Clark to write a book (and perhaps several books) that West would publish. Clark was to be paid $2 per page “and if [Clark] abstains from the use of intoxicating liquor and otherwise fulfills his agreements as hereinbefore set forth, he shall be paid an additional $4 per page in manner hereinbefore stated.” But, after Clark began writing, he drank, and West knew it, but West told Clark that he would pay $6 per page notwithstanding Clark’s drinking, or at least that is what Clark later alleged. When West paid only $2 per page, Clark sued, and West defended by claiming Clark drank. In response, Clark claimed West had waived the requirement of Clark’s abstinence. In return, West argued that Clark’s abstinence was the consideration for the contract, and could not be waived. While the court agreed that the consideration for a contract cannot be waived, the court said that Clark’s writing books—not Clark’s abstinence—was consideration, and Clark’s abstinence was a waivable point. The point of law, though, is not controversial: the consideration of a contract cannot be waived, though we say it differently now: “A material part of the agreed exchange cannot be waived.” Was what the Lermas waived a material part of the agreed exchange?

Note: Retraction of Waivers

Once a waiver occurs, is it binding in the future? In other words, can it be retracted?

To some extent, a waiver is like a contractual modification. It can be characterized as a promise, namely, a promise to accept something that was not acceptable before. West promised that Clark would not forfeit the $4 per page as a result of Clark’s drinking. If a waiver is viewed in this way, the question is whether the promise is enforceable. One might expect such a promise to be enforceable according to the same doctrines by which any other promise is enforceable.

On the other hand, it is also possible to think of contractual rights as a kind of property, at least after a contract forms. If one thinks this way, then a waiver is like an abandonment of property. West abandoned the contractual right to pay only $2 per page if Clark drank. If a waiver is viewed in this way, the question is whether the abandoned right may be reclaimed. The answer from property law is generally no. Once property is abandoned, the person abandoning it has no more rights in it. To some extent, the property view is more consistent with our manner of speaking about waivers. We do not usually talk of a breach of a waiver, as we would if the waiver was a promise. We do, on the other hand, sometimes talk of waivers as being retracted, although that makes them sound more like a grant of property rather than an abandonment of it.

Either way one thinks about waivers, one must ask if they can be taken back. For instance, suppose after West grants Clark a waiver, Clark drinks to excess and begins turning in work of lesser quality. Let's suppose the work is satisfactory but not as good as Clark's normal work. In that case, West may regret the waiver. If Clark has not finished the book, may West retract the waiver with respect to the remaining pages?

The rule for this scenario is recited in *Fitzgerald v. Hubert Herman, Inc*., 179 N.W.2d 252 (Mich. App. 1970): "[A]n executory waiver being in the nature of a promise or a contract must be supported by consideration to be enforceable. But a waiver ... partaking of the principle of an election needs no consideration ... and cannot be retracted."

Some have had trouble understanding this rule on first reading it. The rule divides waivers into two types: executory and "partaking of the principle of an election." Executory waivers are treated like promises. Those partaking of the principle of an election are treated like abandonments of property. The trick here is to find which waivers are executory, then. What does executory mean? That a thing is incomplete and that some part of it is yet to be done. Contractual performance is executory before it has been fully completed. So does that help establish the meaning of the rule? Of course, as performance continues, what was executory becomes no longer so.

Here are some hypotheticals against which to test your knowledge:

PROBLEM 14. In the facts of *Clark v. West*, West tells Clark that Clark may drink without forfeiting the $4 per page West would otherwise have a right to withhold under the contract. When Clark turns in his next installment, pages 220-230 (out of 3,470), West is not pleased with Clark's work. It is acceptable, but not as good as what Clark had been writing. West therefore sends a letter to Clark stating that West will from the date of the letter's receipt forward insist that Clark not drink on pain of losing the $4 per page. Should Clark now drink?

PROBLEM 15. Marco contracted with Andrea that Andrea would deliver to him 22 tons of long grain rice on November 4, 2020. Andrea delivered the rice on November 7, 2020, at which time Marco accepted it. Two weeks later, Marco called Andrea and informed her that he was declining the rice and that she could pick it up or pay storage for it. He said he was not going to pay her because the rice was late. Must Marco pay?

Chapter 3. Alternate Theories of Recovery: Promissory Estoppel & Unjust Enrichment

Lawyers representing plaintiffs wish to raise every argument supporting their client's case. I have filed simple contract cases resting on five or six different theories of recovery, only one of which was grounded in a consensual contract showing consideration. The forms of action—covenant, debt, and so on—have been abolished, but because of developments over the centuries, it is still possible to recover for breach of promise on several grounds. Now, however, unlike in the medieval period, courts expect plaintiffs to raise every possible theory of recovery, not pick one and stick with it. The same procedures—just general civil procedures—now apply to the litigation of each.

This chapter provides materials for your study of the two most prominent alternative theories. They are related to consensual contract in certain ways. For instance, consensual contracts are founded on a bargain under the doctrine of consideration. Promissory estoppel is akin to detriment consideration. Unjust enrichment, like moral obligation, is akin to benefit consideration. Each of these two alternate theories if proved is grounds for legal enforcement of a promise.

A. Promissory Estoppel

You recall that we almost discussed the effect of non-bargained-for detriment in the first chapter. Some cases hinted at it. Now we return to it.

KIRKSEY v. KIRKSEY (1845)
Alabama Supreme Court
8 Ala. 131

[¶1] Assumpsit by the defendant, against the plaintiff in error. The question is presented in this Court, upon a case agreed, which shows the following facts:

[¶2] The plaintiff was the wife of defendant's brother, but had for some time been a widow, and had several children. In 1840, the plaintiff resided on public land, under a contract of lease, she had held over, and was comfortably settled, and would have attempted to secure the land she lived on. The defendant resided in Talledega county, some sixty, or seventy miles off. On the 10th October, 1840, he wrote to her the following letter:

> Dear sister Antillico—Much to my mortification, I heard, that brother Henry was dead, and one of his children. I know that your situation is one of grief, and difficulty. You had a bad chance before, but a great deal worse now. I should like to come and see you, but cannot with convenience at present. * * * * I do not know whether you have a preference on the place you live on, or not. If you had, I would advise you to obtain your preference, and sell the land and quit the country, as I understand it is very unhealthy, and I know society is very bad. If you will come down and see me, I will let you have a place to raise your family, and I have more open land than I can tend; and on account of your situation, and that of your family, I feel like I want you and the children to do well.

Within a month or two after the receipt of this letter, the plaintiff abandoned her possession, without disposing of it, and removed with her family, to the residence of the defendant, who put her in comfortable houses, and gave her land to cultivate for two years, at the end of which he notified her to remove, and put her in a house, not comfortable, in the woods, which he afterwards required her to leave.

[¶3] A verdict being found for the plaintiff, for two hundred dollars, the above facts were agreed, and if they will sustain the action, the judgment is to be affirmed, otherwise it is to be reversed.

[¶4] ORMOND, J. The inclination of my mind, is, that the loss and inconvenience, which the plaintiff sustained in breaking up, and moving to the defendant's, a distance of sixty miles, is a sufficient consideration to support the promise, to furnish her with a house, and land to cultivate, until she could raise her family. My brothers, however think, that the promise on the part of the defendant, was a mere gratuity, and that an action will not lie, for its breach. The judgment of the Court below must therefore be reversed, pursuant to the agreement of the parties.

Questions:

1. Why did the majority think that the promise was not enforceable?

2. How is this case different from *Keyme v. Goulston*?

3. If Antillico's (actually Angelico's) traveling from Marshall County with her 8+ children was not consideration, what was it? After all, Isaac requested it. A relatively recent case quoted Samuel Williston on this issue:

The difference between a conditional gift and a contract has been famously explained by Samuel Williston as follows:

> If a benevolent man says to a tramp, "If you go around the corner to the clothing shop there, you may purchase an overcoat on my credit," no reasonable person would understand that the short walk was requested as the consideration for the promise; rather, the understanding would be that in the event of the tramp going to the shop the promisor would make him a gift. Yet the walk to the shop is in its nature capable of being consideration. It is a legal detriment to the tramp to take the walk, and the only reason why the walk is not consideration is because on a reasonable interpretation, it must be held that the walk was not requested as the price of the promise, but was merely a condition of a gratuitous promise.
>
> It is often a difficult question to decide whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise.
>
> Although no conclusive test exists for making the determination, an aid in determining which interpretation of the promise is more reasonable is an inquiry into whether the happening of the condition will benefit the promisor. If so, it is a fair inference that the happening was requested as a consideration. On the other hand, if, as in the case of the tramp stated above, the happening of the condition will not benefit the promisor but is obviously for the purpose of enabling the promisee to receive a benefit (a gift), the happening of the event on which the promise is conditional, though brought about by the promisee in reliance on the promise, will not be interpreted as consideration.
>
> 3 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 7:18, at 412-18 (4th ed. 2008).

Fritz v. Fritz, 767 N.W.2d 420 (Table) (2009), at http://statecasefiles.justia.com/documents/iowa/court-of-appeals/8-997-08-1088-(2009-03-26).pdf?ts=1370462790 (last accessed April 20, 2016).

4. What fact(s) would you add to the tramp hypothetical to give the tramp a right to recover in consensual contract? What fact(s) would you add to *Kirksey* to ensure that Angelico had a right to recover?

PROBLEM 16. If Bob says to Alice, “I will give you this new Jaguar if you will accept it,” is Bob’s promise enforceable as a contract? Under the theory set out in R2K § 90 (see the note after the next case)?

RICKETTS v. SCOTHORN (1898)
Supreme Court of Nebraska
77 N.W. 365

ERROR from the district court of Lancaster county. Tried below before HOLMES, J. Affirmed.

SULLIVAN, J.

[¶1] In the district court of Lancaster county the plaintiff Katie Scothorn recovered judgment against the defendant Andrew D. Ricketts, as executor of the last will and testament of John C. Ricketts, deceased. The action was based upon a promissory note, of which the following is a copy:

> May the first, 1891. I promise to pay to Katie Scothorn on demand, $2,000, to be at 6 per cent per annum.
> J. C. RICKETTS.

[¶2] In the petition the plaintiff alleges that the consideration for the execution of the note was that she should surrender her employment as bookkeeper for Mayer Bros, and cease to work for a living. She also alleges that the note was given to induce her to abandon her occupation, and that, relying on it, and on the annual interest, as a means of support, she gave up the employment in which she was then engaged. These allegations of the petition are denied by the executor. The material facts are undisputed. They are as follows: John O. Ricketts, the maker of the note, was the grandfather of the plaintiff. Early in May,—presumably on the day the note bears date,—he called on her at the store where she was working. What transpired between them is thus described by Mr. Flodene, one of the plaintiff’s witnesses:

> A. Well the old gentleman came in there one morning about 9 o’clock,—probably a little before or a little after, but early in the morning,—and he unbuttoned his vest and took out a piece of paper in the shape of a note; that is the way it looked to me; and he says to Miss Scothorn, “I have fixed out something that you have not got to work any more.” He says, “None of my grandchildren work and you don’t have to.”
>
> Q. Where was she?

> A. She took the piece of paper and kissed him; and kissed the old gentleman and commenced to cry.

[¶3] It seems Miss Scothorn immediately notified her employer of her intention to quit work and that she did soon after abandon her occupation. The mother of the plaintiff was a witness and testified that she had a conversation with her father, Mr. Ricketts, shortly after the note was executed in which he informed her that he had given the note to the plaintiff to enable her to quit work; that none of his grandchildren worked and he did not think she ought to. For something more than a year the plaintiff was without an occupation; but in September, 1892, with the consent of her grandfather, and by his assistance, she secured a position as bookkeeper with Messrs. Funke & Ogden. On June 8, 1894, Mr. Ricketts died. He had paid one year's interest on the note, and a short time before his death expressed regret that he had not been able to pay the balance. In the summer or fall of 1892 he stated to his daughter, Mrs. Scothorn, that if he could sell his farm in Ohio he would pay the note out of the proceeds. He at no time repudiated the obligation. We quite agree with counsel for the defendant that upon this evidence there was nothing to submit to the jury, and that a verdict should have been directed peremptorily for one of the parties. The testimony of Flodene and Mrs. Scothorn, taken together, conclusively establishes the fact that the note was not given in consideration of the plaintiff pursuing, or agreeing to pursue, any particular line of conduct. There was no promise on the part of the plaintiff to do or refrain from doing anything. Her right to the money promised in the note was not made to depend upon an abandonment of her employment with Mayer Bros, and future abstention from like service. Mr. Ricketts made no condition, requirement, or request. He exacted no quid pro quo. He gave the note as a gratuity and looked for nothing in return. So far as the evidence discloses, it was his purpose to place the plaintiff in a position of independence where she could work or remain idle as she might choose. The abandonment by Miss Scothorn of her position as bookkeeper was altogether voluntary. It was not an act done in fulfillment of any contract obligation assumed when she accepted the note. The instrument in suit being given without any valuable consideration, was nothing more than a promise to make a gift in the future of the sum of money therein named. Ordinarily, such promises are not enforceable even when put in the form of a promissory note. (*Kirkpatrick v. Taylor*, 43 Ill. 207; *Phelps v. Phelps*, 28 Barb. [N.Y.] 121; *Johnston v. Griest*, 85 Ind. 503; *Fink v. Cox*, 18 Johns. [N.Y.] 145.) But it has often been held that an action on a note given to a church, college, or other like institution, upon the faith of which money has been expended or obligations incurred, could not be successfully defended on the ground of a want of consideration. (*Barnes v. Perine*, 12 N.Y. 18; *Philomath College v. Hartless*, 6 Ore. 158; *Thompson v. Mercer County*, 40 Ill. 379; *Irwin v. Lombard University*, 56 O. St. 9.) In this class of cases the note in suit is nearly always spoken of as a gift or donation, but the decision is generally put on the ground that the expenditure of money or assumption of liability by the donee, on the faith of the promise, constitutes a valuable and sufficient consideration. It seems to us that the true reason is the preclusion of the defendant, under the doctrine of estoppel, to deny the consideration. Such seems to be the view of the matter taken by the supreme court of Iowa in the case of *Simpson Centenary College v. Tuttle*, 71 Ia. 596, where Rothrock, J., speaking for the court, said:

> Where a note, however, is based on a promise to give for the support of the objects referred to, it may still be open to this defense [want of consideration], unless it shall appear that the donee has, prior to any revocation, entered into engagements or made expenditures based on such promise, so that he must suffer loss or injury if the note is not paid. This is based on the equitable principle that, after allowing the donee to incur obligations on the faith that the note would be paid, the donor would be estopped from pleading want of consideration.

[¶4] And in the case of *Reimensnyder v. Gans*, 110 Pa. St. 17, 2 Atl. Rep. 425, which was an action on a note given as a donation to a charitable object, the court said: "The fact is that, as we may see from the case of *Ryerss v. Trustees*, 33 Pa. St. 114, a contract of the kind here involved is enforceable rather by way of estoppel than on the ground of consideration in the original undertaking." It has been held that a note given in expectation of the payee performing certain services, but without any contract binding him to serve, will not support an action. (*Hulse v. Hulse*, 84 Eng. Com. Law 709.) But when the payee changes his position to his disadvantage, in reliance on the promise, a right of action does arise. (*McClure v. Wilson*, 43 Ill. 356; *Trustees v. Garvey*, 53 Ill. 401.)

[¶5] Under the circumstances of this case is there an equitable estoppel which ought to preclude the defendant from alleging that the note in controversy is lacking in one of the essential elements of a valid contract? We think there is. An estoppel in pais is defined to be "a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." Mr. Pomeroy has formulated the following definition:

> Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy. (2 Pomeroy, Equity Jurisprudence 804.)

[¶6] According to the undisputed proof, as shown by the record before us, the plaintiff was a working girl, holding a position in which she earned a salary of $10 per week. Her grandfather, desiring to put her in a position of independence, gave her the note, accompanying it with the remark that his other grandchildren did not work, and that she would not be obliged to work any longer. In effect, he suggested that she might abandon her employment and rely in the future upon the bounty which he promised. He doubtless desired that she should give up her occupation, but, whether he did or not, it is entirely certain that he contemplated such action on her part as a reasonable and probable consequence of his gift. Having intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker, or his executor, to resist payment on the ground that the promise was given without consideration. The petition charges the elements of an equitable estoppel, and the evidence conclusively establishes them. If errors intervened at the trial they could not have been prejudicial. A verdict for the defendant would be unwarranted.

[¶7] The judgment is right and is

AFFIRMED.

Questions:

1. Was there consideration for grandfather's promise?

2. The purpose and function of the doctrine of equitable estoppel or estoppel in pais is to establish statements of fact at trial. Traditionally, the doctrine applies when a person

(1) makes a statement of fact to another,

(2) the other (a) reasonably (b) relies on that statement of fact, and

(3) the reliance results in some detriment.

If the person relying on the statement of fact can prove these three elements, then the person who made the statement may not deny the truth of the statement at trial. A fine example is the case of *Griswold v. Haven*, 25 N.Y. 595 (1862), in which Wright, who ran a storage warehouse, signed a storage receipt for grain purportedly received by Wright from Ford. Wright then introduced Ford to Griswold as a person who wanted to borrow money and to put up grain in the warehouse as collateral. In reliance on Wright's statements, Griswold loaned Ford money and took as collateral an assignment of the grain in Wright's warehouse. When Ford failed to repay, Griswold came to Wright to collect the grain. Wright refused to give Griswold any grain, so Griswold sued Wright for conversion. One element of conversion is the exercise of dominion, if you recall. In defense to Griswold's suit, Wright claimed that he had none of Ford's grain, but then the court imposed equitable estoppel because of Wright's statement in the warehouse receipt that he had received Ford's grain. Wright was thereafter unable to deny in court that he had the grain, and Griswold was relieved of the requirement that he prove exercise of dominion, one element of his conversion case. Which facts support the *Griswold* court's finding that equitable estoppel applied?

3. Equitable estoppel, as set forth traditionally in note 2, does not technically apply to the facts of *Ricketts*. Why not? Consider the following limerick:

Katie's grandfather promised some money,
He said, "You shouldn't have to work, Honey";
Where's the statement of fact
That he couldn't retract?
How the court found estoppel is funny.

—Stacey Severovich, STCL Class of 2013

4. Even if equitable estoppel did apply, would it help Katie Scothorn recover?

5. Is *Ricketts* different from *Kirksey*? *Keyme v. Goulston*?

6. Ms. Scothorn's lost wages during the time she did not work were $520 less interest paid. Should she recover the $520 less interest or the face amount of the note, $2,000? (I'm asking you to speculate here on what the policy should be, but you should look back to the note on contract remedies and pick the one you think is most just.)

Restatement (Second) of Contracts § 90

Note: This section is the result of cases such as *Ricketts v. Scothorn* as well as *Keyme v. Goulston*. In fact, a long line of cases granting relief to plaintiffs who had relied on non-bargained-for promises led to § 90's drafting. Some of these cases involved gifts promised to charitable organizations, mostly churches and schools. *A* would promise church *B* a gift of $100, for instance, to go toward building a meetinghouse. *B* would also obtain pledges from 49 other parishioners, and in reliance on the pledges, begin building. Once the church had begun building, courts often held that detriment consideration existed for the pledgor's promise, so that the promise was binding. But the promise was clearly given as a gift, not in exchange. When contracts scholars and courts began to clarify contract doctrines in the second half of the nineteenth century, these consideration cases emerged as the anomaly that they are. Because no one disagreed with the results in the cases, some new formulation of doctrine was necessary to describe the cases so that they would no longer fall confusingly under the consideration doctrine. Section 90 was the result. Samuel Williston first coined the term *promissory estoppel*, in his 1920 treatise, to describe these cases. Initially, there was some thought that § 90 would only be applied to family and charitable gift cases, but the cases following in our readings show clearly that courts have not limited § 90's reach in this fashion.

Questions:

1. Does § 90, as formulated, apply to give a right to recover to Keyme, "Antillico" Kirksey, and Katie Scothorn?

2. Under § 90, should Katie Scothorn receive $520 for lost wages or $2,000, what she was promised?

John GROUSE v. GROUP HEALTH PLAN, INC. (1981)
Supreme Court of Minnesota
306 N.W.2d 114

OTIS, Justice.

[¶1] Plaintiff John Grouse appeals from a judgment in favor of Group Health Plan, Inc., in this action for damages resulting from repudiation of an employment offer. The narrow issue raised is whether the trial court erred by concluding that Grouse's complaint fails to state a claim upon which relief can be granted. In our view, the doctrine of promissory estoppel entitles Grouse to recover and we, therefore, reverse and remand for a new trial on the issue of damages.

[¶2] The facts relevant to this appeal are essentially undisputed. Grouse, a 1974 graduate of the University of Minnesota School of Pharmacy, was employed in 1975 as a retail pharmacist at Richter Drug in Minneapolis. He worked approximately 41 hours per week earning $7 per hour. Grouse desired employment in a hospital or clinical setting, however, because of the work environment and the increased compensation and benefits. In the summer of 1975 he was advised by the Health Sciences Placement office at the University that Group Health was seeking a pharmacist.

[¶3] Grouse called Group Health and was told to come in and fill out an application. He did so in September and was, at that time, interviewed by Cyrus Elliott, Group Health's Chief Pharmacist. Approximately 2 weeks later, Elliott contacted Grouse and asked him to come in for an interview with Donald Shoberg, Group Health's General Manager. Shoberg explained company policies and procedures as well as salary and benefits. Following this meeting Grouse again spoke with Elliott who told him to be patient, that it was necessary to interview recent graduates before making an offer.

[¶4] On December 4, 1975, Elliott telephoned Grouse at Richter Drug and offered him a position as a pharmacist at Group Health's St. Louis Park Clinic. Grouse accepted but informed Elliott that 2 week's notice to Richter Drug would be necessary. That afternoon Grouse received an offer from a Veteran's Administration Hospital in Virginia which he declined because of Group Health's offer. Elliott called back to confirm that Grouse had resigned.

[¶5] Sometime in the next few days Elliott mentioned to Shoberg that he had hired, or was thinking of hiring, Grouse. Shoberg told him that company hiring requirements included a favorable written reference, a background check, and approval of the general manager. Elliott contacted two faculty members at the School of Pharmacy who declined to give references. He also contacted an internship employer and several pharmacies where Grouse had done relief work. Their responses were that they had not had enough exposure to Grouse's work to form a judgment as to his capabilities. Elliott did not contact Richter because Grouse's application requested that he not be contacted. Because Elliott was unable to supply a favorable reference for Grouse, Shoberg hired another person to fill the position.

[¶6] On December 15, 1975 Grouse called Group Health and reported that he was free to begin work. Elliott informed Grouse that someone else had been hired. Grouse complained to the director of Group Health who apologized but took no other action. Grouse experienced difficulty regaining full time employment and suffered wage loss as a result. He commenced this suit to recover damages; the trial judge found that he had not stated an actionable claim.

[¶7] In our view the principle of contract law applicable here is promissory estoppel. Its effect is to imply a contract in law where none exists in fact. *Del Hayes & Sons, Inc. v. Mitchell*, 304 Minn. 275, 230 N.W.2d 588 (1975). On these facts no contract exists because due to the bilateral power of termination neither party is committed to performance and the promises are, therefore, illusory. The elements of promissory estoppel are stated in Restatement of Contracts § 90 (1932):

> A promise which the promisor should reasonably expect to induce action or forbearance * * * * on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

Group Health knew that to accept its offer Grouse would have to resign his employment at Richter Drug. Grouse promptly gave notice to Richter Drug and informed Group Health that he had done so when specifically asked by Elliott. Under these circumstances it would be unjust not to hold Group Health to its promise.

[¶8] The parties focus their arguments on whether an employment contract which is terminable at will can give rise to an action for damages if anticipatorily repudiated. * * * *. Group Health contends that recognition of a cause of action on these facts would result in the anomalous rule that an employee who is told not to report to work the day before he is scheduled to begin has a remedy while an employee who is discharged after the first day does not. We cannot agree since under appropriate circumstances we believe section 90 would apply even after employment has begun.

[¶9] When a promise is enforced pursuant to section 90 "the remedy granted for breach may be limited as justice requires." Relief may be limited to damages measured by the promisee's reliance.

[¶10] The conclusion we reach does not imply that an employer will be liable whenever he discharges an employee whose term of employment is at will. What we do hold is that under the facts of this case the appellant had a right to assume he would be given a good faith opportunity to perform his duties to the satisfaction of respondent once he was on the job. He was not only denied that opportunity but resigned the position he already held in reliance on the firm offer which respondent tendered him. Since, as respondent points out, the prospective employment might have been terminated at any time, the measure of damages is not so much what he would have earned from respondent as what he lost in quitting the job he held and in declining at least one other offer of employment elsewhere.

[¶11] Reversed and remanded for a new trial on the issue of damages.

Questions:

1. What would have been Grouse's expectation damages?

2. What would have been Grouse's reliance damages?

They offered a job at their shop,
But soon after the offer was dropped;
Grouse yelled, "But I've quit,
And you've hurt me a bit";
The employer was therefore estopped.

—Stacey Severovich, STCL Class of 2013

Frank LEONARDI v. CITY OF HOLLYWOOD (1998)
District Court of Appeal of Florida, Fourth District
715 So.2d 1007

POLEN, Judge.

[¶1] Frank Leonardi, who sued the City of Hollywood ("City") for terminating his prospective employment with the City, appeals from that portion of an amended final judgment which held that the at-will employment doctrine barred his claim for lost wages. The City cross-appeals from that portion of the judgment which awarded Leonardi $10 in nominal damages. We affirm Leonardi's appeal and reverse on the city's cross-appeal.

[¶2] On October 26, 1995, City orally offered Leonardi a position as assistant to the city manager at an annual salary of $47,570 to begin on November 13, 1995. City confirmed the offer via a letter, dated October 30, 1995. The offer did not state the period of employment. As a result of the offer, Leonardi quit his then-current employment the morning of November 3, 1995 and, at a lunch meeting with the city manager on that same date, gave written confirmation of his acceptance of the offer. At that meeting, however, the city manager informed Leonardi that he could not offer him the job any longer. Thereafter, Leonardi was unable to regain his prior employment.

[¶3] Subsequently, Leonardi sued City on the theory of promissory estoppel. Arguing that City should have reasonably expected that its offer of at-will employment would induce him to quit his then existing at-will employment,* he sought lost wages.

[¶4] The trial court found that Leonardi relied on City's promise of employment to his detriment. It determined that the reasonable amount of his damages as a result of City's actions was $90,400, representing his lost wages at his former job from November 13, 1995, the date his employment with City was supposed to begin, through the date of trial. Nevertheless, it held that the employment at-will doctrine barred an award of such damages. It, thus, denied awarding Leonardi his lost wages, but did award him $10 as nominal damages, and $1,466.45 as taxable costs.

[¶5] The basic elements of promissory estoppel are set forth in the Restatement (Second) of Contracts, Section 90 (1979), which states

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

The character of the reliance protected is explained as follows:

> The promisor is affected only by reliance which he does or should foresee, and enforcement must be necessary to avoid injustice. Satisfaction of the latter requirement may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to

* Both parties concede that Leonardi's prior and prospective employment were at-will. The general rule of at-will employment is that an employee can be discharged at any time, as long as he is not terminated for a reason prohibited by law, such as retaliation or unlawful discrimination. Davidson v. Iona-McGregor Fire Protection and Rescue Dist., 674 So.2d 858, 861 (Fla. 2d DCA 1996).

> which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.

Id. (emphasis added) (cited in *W.R. Grace and Co. v. Geodata Services, Inc*., 547 So.2d 919, 924 (Fla.1989)).

[¶6] While the courts of this state have applied promissory estoppel in several different contexts, we have not uncovered any Florida decision which either expressly accepted or rejected the doctrine in circumstances akin to the facts of this case. Although Leonardi, citing *Golden Complete Holdings, Inc*., 818 F. Supp. 1495 (M.D. Fla. 1993), argues that this court should recognize a cause of action for promissory estoppel in the employment at-will context, *Golden* did not address nor concern whether a cause of action for promissory estoppel is actionable either generally in the employment context or specifically under facts similar to those in this case. Thus, we do not believe that *Golden* is controlling.

[¶7] Accordingly, we focus our attention on cases from other jurisdictions, with facts similar to this case. Many of these cases have held that an employee may base a promissory estoppel claim on a promise of at-will employment. In *Grouse v. Group Health Plan, Inc.,* 306 N.W.2d 114 (Minn. 1981), for example, the plaintiff resigned from his employment in reliance on the defendant's at-will employment offer. As in the instant case, the defendant then revoked the offer after the plaintiff had accepted it but before he began to work for the defendant. The plaintiff filed suit and the trial court dismissed the action for failure to state a claim. On appeal, the state supreme court reversed and found that promissory estoppel applied:

> [W]e ... hold ... that under the facts of this case the appellant [plaintiff] had a right to assume he would be given a good faith opportunity to perform his duties to the satisfaction of respondent [the defendant] once he was on the job. He was not only denied that opportunity but resigned the position he already held in reliance on the firm offer which respondent tendered him.

Id.; accord *Bower v. AT & T Technologies, Inc*., 852 F.2d 361 (8th Cir. 1988); *Ravelo by Ravelo v. Hawaii County*, 66 Haw. 194, 658 P.2d 883 (1983).

[¶8] Other courts, however, have reached a contrary result under similar circumstances. For example, in *White v. Roche Biomedical Laboratories, Inc*., 807 F. Supp. 1212 (D.S.C. 1992), aff'd, 998 F.2d 1011 (4th Cir. 1993), the defendant had revoked an offer of at-will employment after the plaintiff had relied on the offer by quitting his job. He subsequently sued for damages based on promissory estoppel, but the trial court granted summary judgment on his claim. On appeal, the district court affirmed, holding that the doctrine of promissory estoppel did not apply to his situation:

> The Court bases this conclusion on the fact that a promise of employment for an indefinite duration with no restrictions on the employer's right to terminate is illusory since an employer who promises at-will employment has the right to renege on that promise at any time for any reason. "A determining factor in deciding whether to enforce a promise under the theory

> of promissory estoppel is the reasonableness of the promisee's reliance." The Court finds that reliance on a promise consisting solely of at-will employment is unreasonable as a matter of law since such a promise creates no enforceable rights in favor of the employee other than the right to collect wages accrued for work performed. Therefore, because plaintiff cannot establish an essential element of his cause of action for promissory estoppel, the Court will grant summary judgment in favor of defendant on this claim.

Id. at 1219-20 (internal citations omitted); accord *Heinritz v. Lawrence University*, 194 Wis.2d 606, 535 N.W.2d 81 (1995).

[¶9] Despite this case law, we need not look any further than § 90 of the Restatement (Second) of Contracts to conclude that Leonardi's reliance on City's offer was unreasonable. Had City allowed Leonardi to begin working, it could have terminated his employment immediately thereafter, before he accrued any wages. Similarly, had he not quit his prior position, his employer also could have terminated him at will. In either scenario, we do not believe the doctrine of promissory estoppel would allow him to recover his lost wages.

[¶10] Accordingly, we affirm the trial court's finding that Leonardi should not be allowed to recover the damages he sought. We reverse, however, the award of nominal damages and costs. Without any actionable claim, there was no basis for the trial court to award any damages or costs to Leonardi. In making such an award, we conclude the trial court erred.

AFFIRMED in part; REVERSED in part and REMANDED to the trial court to enter judgment in favor of City.
DELL and GUNTHER, JJ., concur.

Questions:

1. I have given you *Leonardi* only so that we can talk about the policy differences between this case and *Grouse.* What policies might lead you to choose the result reached in *Leonardi*?

2. What policies might lead you to choose the result reached in *Grouse*?

B. Unjust Enrichment

WHORWOOD v. GYBBONS (1587)
Queen's Bench
Gouldsborough 48

* * * * And the opinion of the whole Court * * * * was, that insomuch as the [promise] was made by [Gybbons,] by whom the debt is due, that it is a good consideration, and that it is a common course in action upon the case against him by whom the debt is due, to [plead] without any words in consideration. * * * *

Note: What? No consideration?! As you might suspect, then, the key to determining whether the *Whorwood* line of cases would apply is answering the question what transaction raised a *debt*.

IRELAND v. HIGGINS (1589)
Queen's Bench
Cro. El. 125

Assumpsit. The plaintiff declareth, that whereas he was possessed of a greyhound, which came to the defendant's hands by [his finding it], and that [the defendant] promised to deliver it upon request, the defendant demurred upon the declaration. —Lee [for the defendant] argued the action did not lie: for being out of the plaintiff's possession, he had no property in it, [it] being *ferae naturae* * * * *. — Tanfield contra. [Tanfield] agreed that if it were *ferae naturae* there was no consideration of the promise, but a dog is a thing that is tame by industry of man, and the law regardeth it as any other beast, and [it] is of as good use: and there are four kinds of dogs which the law regards, viz. a mastiff, a hound, which comprehends a greyhound, a spaniel and tumbler * * * *. * * * * And it was adjudged for the plaintiff.

Questions:

1. What does *ferae naturae* mean? (Unless you speak Latin, you will have to find a Latin or a legal dictionary and look up the phrase *ferae naturae* to understand this case. You should know what it means when you come to class.)

2. What is the consideration in this case?

EDMUNDS v. BARRE (1573)
Queen's Bench
Dalison 104

[¶1] William Edwards brought an action on the case [in assumpsit] against Edmund Burre [sic] & Margaret, his wife, administratrix of the goods and chattels of John Sidwell, her late husband, and declared that the testator [Sidwell], in consideration that the plaintiff [Edwards] lent to the testator 40s., the said testator undertook to pay to him [Edwards] 40s. * * * * [At trial,] the plaintiff gave in evidence that he lent the testator 40s. Wray, Justice [of the Queen's Bench], said to the jury: if it be so [that] the plaintiff lent the said sum, then you ought to find for the plaintiff, because the debt is an undertaking in law.

[¶2] But note that it was said that this is by reason of the custom of the Queen's Bench, because in the Common Pleas he would have to prove the undertaking, and it is not sufficient to prove the debt alone, because for the debt he should have an action for debt and not an action on the case, because the common law will not suffer a man to have an action on the case where he could have another remedy, and also, for * * * * the debtor if he [the creditor] was without [a sealed writing] could [wage] his law, and by an action on the case would be prevented from doing so, which is [not right]. And therefore in the Common Pleas he must prove the undertaking.

Questions:

1. What facts gave rise to Sidwell's indebtedness to Edwards?

2. What does it mean to wage law? If you don't know, go back to Chapter 1 and read again the first essay about the history of consideration.

Note on the Ancient History of Unjust Enrichment

Edmunds is a well-known citation in the historical record of a marvelous feud between two English courts, the Common Pleas and the Queen's Bench. (The first sign of the feud is from a report by Justice Dyer in 1557, proof that the feud continued for at least 48 years, until 1605.) Put briefly, the Common Pleas had traditionally retained sole jurisdiction over debt actions and been managed by very conservative justices. Early in the 16th century the (then) King's Bench began to grant relief in assumpsit on facts that would also have given rise to an action in debt. Assumpsit had traditionally been a Queen's Bench action, though it could be brought in the Common Pleas, too. Wager of law was not available to defendants in assumpsit, so plaintiffs began to shift some debt litigation from the Common Pleas to the Queen's Bench, and from debt to assumpsit. The Common Pleas judges saw that if all litigation for debts could be brought in assumpsit, the debt litigation would dry up and assumpsit litigation would take over. No one is sure just why the Common Pleas opposed this result, but conservatism and a feeling that wager of law worked well in actual practice probably had something to do with it. By having eleven oath-helpers swear with him, a reputable (or wealthy) person could avoid suits brought by liars and thieves (or by anyone else, for that matter). If wager of law was unavailable, alleged debtors would all have to appear before a jury, something aristocrats would, I suspect, rather not have done. The Common Pleas supported those who did not want to have a jury examine their debts. So when the plaintiffs brought what would otherwise be a debt case in assumpsit, the Common Pleas insisted that plaintiffs allege that, subsequent to the transaction that created the debt, the debtor also promised to pay the debt. At least by pointing to this extra promise, the Common Pleas could justify taking away from the defendant the right to wager of law. The Queen's Bench, on the other hand, saw nothing wrong with replacing debt with assumpsit actions. Though the Queen's Bench required that an additional promise be pleaded, they held that pleading the extra promise proved it conclusively, so that no defendant could challenge the statement. This move ensured that all debt cases could be brought in assumpsit, whether or not any extra promise was in fact made. The allegation of an extra promise in the plaintiff's pleading could be a mere fiction, and no Queen's Bench justice would care.

For a long time, the Common Pleas could do nothing about the Queen's Bench practice. Defendants could appeal a Queen's Bench judgment only to Parliament, which was too expensive, and these cases were probably not worth Parliament's time. Then in 1585 Queen Elizabeth signed a law allowing the Common Pleas and the Exchequer to sit together as the Exchequer Chamber to review appeals from Queen's Bench judgments. There were more Common Pleas judges than Exchequer judges, so the Common Pleas views held sway in the new court. The Exchequer Chamber, in order to do away with the Queen's Bench practice, reversed the Common Pleas' own prior practice of allowing assumpsit in debt cases when a subsequent promise was alleged and also proved, and held instead that no debt cases at all could be brought in assumpsit. This position continued in the Exchequer Chamber until all the judges on the Common Pleas who held the conservative view either died, were replaced, or changed their minds (probably only one changed his mind). By 1605 all the judges had come around to the (now) King's Bench view. Because the King's Bench view triumphed, the class of cases in assumpsit that escaped consideration's reach and also escaped the requirement of an actual promise increased and expanded in their own way, until they became today's unjust enrichment cases, in which neither promise nor consideration is required to be alleged. In the sixteenth century, only a *debt* needed to be pleaded and proved. We do not call it *debt* today, but the thought is similar, as you'll learn from the next few cases in this section.

So you can see that we have a class of cases in which breach of contract is remedied but in which neither promise nor consideration need be pleaded or proved, and that this came about as a result of a jurisdictional squabble between courts and one court's preference for a jury trial over wager of law.

GIKAS v. NICHOLIS (1950)
New Hampshire Supreme Court
96 N.H. 177, 71 A.2d 785

KENISON, J.

[¶1] The main issue in this appeal is whether the donor of an engagement ring may recover it from the donee who terminates the engagement. By the great weight of authority recovery is allowed. Anno. 92 A. L. R. 604; *Beberman v. Segle*, 69 A.2d 587 (N. J. 1949). The basis for recovery is quasi contractual, as it is considered that it is unjust for a donee to retain the fruit of a broken promise. Restatement, Restitution, s. 58, comment c.

[¶2] It is not necessary and in the natural course of events it would be unusual for the donor to give the engagement ring upon the expressed condition that marriage was to ensue. Such a condition may be implied in fact or imposed by law in order to prevent unjust enrichment. 29 Cornell L. Q. 401. In this case the defendant did not testify but there is evidence from the plaintiff's testimony from which it can be found that the engagement ring was a token of the expected marriage and was given only as such.

[¶3] R. L., c. 385, s. 11 reads as follows: "BREACH OF CONTRACT TO MARRY. Breach of contract to marry shall not constitute an injury or wrong recognized by law, and no action, suit or proceeding shall be maintained therefor." This statute although copied from the Massachusetts act was passed in 1941 (Laws 1941, c. 150) before any interpretation of the Massachusetts statute had been made. Consequently the decision in *Thibault v. Lelumiere*, 318 Mass. 72 is not necessarily binding here. The same is equally true of the broader New York statute which was construed in *Andie v. Kaplan*, 263 App. Div. 884 affirmed without opinion Per Curiam, 288 N.Y. 68 5. It is the theory of these cases that the so-called heart-balm statutes not only bar actions for breach of marriage contracts but any other proceeding which directly or indirectly arises out of the breach. Under that view gifts in contemplation of marriage may not be recovered even though unjust enrichment may result to the donee. The results of these cases have been almost uniformly criticized as being unnecessary and undesirable. 1947 Annual Survey of American Law 845; N. Y. Law Revision Commission, Report, Recommendations and Studies (1947) pp. 233-247.

[¶4] It was not the intention of the New Hampshire Legislature in outlawing breach of promise suits to permit the unjust enrichment of persons to whom property had been transferred while the parties enjoyed a confidential relationship. To so construe the statute would be to permit the unjust enrichment which the statute is designed to prevent. Apparently for this reason New Jersey which has a similar statute to ours has refused to follow the Massachusetts and New York decisions. *Mate v. Abraham*, 62 A.2d 754 (N. J. 1948). We prefer the view advanced by the Restatement, Restitution, s. 58 which allows the recovery of an engagement ring where the engagement is terminated by the donee. There is nothing in the legislative history of our statute which indicates that any other result was contemplated. * * * *

LOWE v. QUINN (1971)
New York Court of Appeals
27 N.Y.2d 397

Chief Judge FULD.

[¶1] The plaintiff, a married man, sues for the return of a diamond "engagement" ring which he gave the defendant in October of 1968 upon her promise to wed him when and if he became free; he had been living apart from his wife for several years and they contemplated a divorce. About a month after receiving the ring, the defendant told the plaintiff that she had "second thoughts" about the matter and had decided against getting married. When he requested the return of the ring, she suggested that he "talk to [her] lawyer". Convinced of the futility of further discussion, he brought this action to recover the ring or, in the alternative, the sum of $60,000, its asserted value.

[¶2] Following a motion by the defendant for summary judgment dismissing the complaint and a cross motion by the plaintiff to amend his complaint "to include causes of action for fraud, unjust enrichment and monies had and received," the court at Special Term denied the defendant's application and granted the plaintiff's. The Appellate Division reversed and granted the defendant's motion, directing summary judgment against the plaintiff.

[¶3] An engagement ring "is in the nature of a pledge for the contract of marriage" * * * * and, under the common law, it was settled—at least in a case where no impediment existed to a marriage—that, if the recipient broke the "engagement," she was required, upon demand, to return the ring on the theory that it constituted a conditional gift. * * * * However, a different result is compelled where, as here, one of the parties is married. An agreement to marry under such circumstances is void as against public policy * * * *, and it is not saved or rendered valid by the fact that the married individual contemplated divorce and that the agreement was conditioned on procurement of the divorce. * * * * Based on such reasoning, the few courts which have had occasion to consider the question have held that a plaintiff may not recover the engagement ring or any other property he may have given the woman. * * * * Thus, in *Armitage v. Hogan* (25 Wn.2d 672, *supra*), which is quite similar to the present case, the high court of the State of Washington declared (pp. 683, 685):

> "* * * if it be admitted for the sake of argument that [defendant] respondent did agree to marry [plaintiff] appellant, and that the ring was purchased * * * in consideration of such promise, such agreement would be illegal

> and void, as appellant was, at that time, and in fact has at all times since been, a married man. [p. 683]
> * * *
> "Regardless of the fact that appellant states this action is based on fraud and deceit, we are of the opinion that, under the facts in the case, appellant's claimed cause of action is based upon an illegal and an immoral transaction, and that this court should not lend its aid in furthering such transaction. [p. 685]".

[¶4] There are cases, it is true, which refuse to apply the doctrine of "unclean hands"—invoked by the courts in the cited decisions—when the conduct relied upon is not "directly related to the subject matter in litigation" * * * * but it is difficult to see how the delivery of the ring or the action to procure its return may be deemed unrelated to the contract to marry. There can be no possible doubt that the gift of the engagement ring was part and parcel of, directly related to, the agreement to wed.

[¶5] Nor does section 80-b of the Civil Rights Law create a cause of action. That provision, enacted in 1965, recites in part that "Nothing in this article contained shall be construed to bar a right of action for the recovery of a chattel * * * * when the sole consideration for the transfer of the chattel * * * * was a contemplated marriage which has not occurred". That section must, however, be read in connection with section 80-a which effected the abolition of actions for breach of promise to marry. Section 80-b was added to overcome decisions such as *Josephson v. Dry Dock Sav. Inst*. (292 N.Y. 666), in order to make it clear that a man not under any impediment to marry was entitled to the return of articles which he gave the woman, even though breach of promise suits had been abolished as against public policy. (See, e.g., *Goldstein v. Rosenthal*, 56 Misc.2d 311, 314, *supra*.) This statute, however, does not alter the settled principle denying a right of recovery where either of the parties to the proposed marriage is already married.

The order appealed from should be affirmed, with costs.

[This was a 4-3 decision. The dissent is omitted.]

HESS v. JOHNSTON (2007)
Utah Court of Appeals
163 P.3d 747, 2007 WL 1775186

[¶ 2] Hess and Johnston started dating in mid-April 2004 and within three months, they decided to marry. Johnston found an engagement ring she liked, and Hess commissioned a jeweler to craft one like it. The couple planned to marry sometime in November 2004, but mutually decided that they would take their time in planning the wedding to ensure their finances were in order.

[¶ 3] About this time, Johnston told Hess that, during their engagement, she wanted to go on some trips and wanted Hess to have a vasectomy. Hess complied with these requests. Hess began by paying for the couple to take a seven-day cruise to Alaska at the end of July. * * * * And in September, after Johnston expressed an interest in traveling to France to introduce Hess to friends she had met while living there years earlier, Hess paid for the couple to travel to France for three weeks. Before leaving on the trip, Hess paid the balance on the custom engagement ring so that he could present Johnston with it while in France. After returning from France, Hess and Johnston twice rescheduled the wedding, first, from November 2004 to May 5, 2005, and then to July 9, 2005. In October 2004, Johnston also asked Hess to help purchase a vehicle for her son. Hess contributed $2400 toward the automobile.

[¶ 4] In late April 2005, without any forewarning or explanation, Johnston returned the engagement ring to Hess and informed him that she would not be his wife. Hess attempted, numerous times, to obtain an explanation from Johnston, but she refused to offer any excuse for breaking off the engagement.

B. Unjust Enrichment

[¶ 20] Hess's complaint does not allege facts sufficient to sustain a claim for restitution under a theory of unjust enrichment. To state a claim for unjust enrichment, a plaintiff must allege facts supporting three elements: "(1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value." *Jeffs v. Stubbs*, 970 P.2d 1234, 1248 (Utah 1998) (quotations omitted). Although Hess has pleaded facts that support the first two of these elements, his complaint fails to allege facts that can support the conclusion that it would be inequitable for Johnston to retain the benefits of the gifts without payment.

[¶ 21] Unjust enrichment occurs when a person has and retains money or benefits that in justice and equity belong to another; however, "[t]he fact that a person benefits another is not itself sufficient to require the other to make restitution." *Fowler v. Taylor*, 554 P.2d 205, 209 (Utah 1976). Money or benefits that have been "officiously or gratuitously furnished are not recoverable." *Jeffs*, 970 P.2d at 1248 (quotation omitted). A person acts gratuitously when, at the time he conferred the benefit, "there was no expectation of a return benefit, compensation, or consideration." *Id.* at 1246. As previously discussed, Hess's complaint fails to allege that, at the time the vacations * * * * and money for the vehicle were given, he intended anything other than an unconditional gift. "[E]nrichment of the donee is the intended purpose of a gift, [therefore,] there is nothing 'unjust' about allowing [the donee] to retain the gifts she received, in the absence of fraud, overreaching or some other circumstance." 6 Cooper, 155 Ohio App.3d 218, 800 N.E.2d 372, at ¶ 15. Thus, the benefits were gratuitously bestowed on Johnston, and the trial court properly dismissed Hess's unjust enrichment claim.

[Hess appealed to the Utah Supreme Court, which ruled in one word: "Denied."]

Questions:

1. Would Edmunds of *Edmunds v. Barre* recover from Barre under this theory?

2. Would Katie Scothorn of *Ricketts v. Scothorn* recover from her grandfather's estate under this theory?

3. Would Nicholas of *Nicholas v. Raynbred* recover under this theory?

4. William Murray (commonly known as Lord Mansfield), Chief Justice of the King's Bench from 1756-88, said this of the cause of action we are considering:

> This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which *ex aequo et bono*, the defendant ought to refund . . . . [I]t lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through . . . extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice to refund the money.

Moses v. Macferlan, 97 Eng. Rep. 676, 680-81 (K.B. 1760). It wasn't "one word" (it was twenty-one), but the rest of Mansfield's statement is accurate.

PROBLEM 17. Suppose you own a home in another city (say, El Paso) and one day you receive a phone call. The caller says the following, then hangs up: "Hi, I'm Bob the painter. Your house in El Paso is an eyesore! I'm going to paint it and send you a bill. Just wanted to let you know! Bye!" A week later you get a bill from Bob. Must you pay it? (The rule in cases like this has been called the "officious intermeddler" rule. What does *officious* mean?)

COTNAM v. WISDOM ET AL. (1907)
Supreme Court of Arkansas
104 S.W. 164

[¶1] Appeal from Circuit Court, Pulaski County; R. J. Lea, Judge.

[¶2] Action by F. L. Wisdom and another against T. T. Cotnam, administrator of A. M. Harrison, deceased, for services rendered by plaintiffs as surgeons to defendant's intestate. Judgment for plaintiffs. Defendant appeals. Reversed and remanded.

[¶3] Instructions 1 and 2, given at the instance of plaintiffs, are as follows: (1) If you find from the evidence that plaintiffs rendered professional services as physicians and surgeons to the deceased, A. M. Harrison, in a sudden emergency following the deceased's injury in a street car wreck, in an endeavor to save his life, then you are instructed that plaintiffs are entitled to recover from the estate of the said A. M. Harrison such sum as you may find from the evidence is a reasonable compensation for the services rendered. (2) The character and importance of the operation, the responsibility resting upon the surgeon performing the operation, his experience and professional training, and the ability to pay of the person operated upon, are elements to be considered by you in determining what is a reasonable charge for the services performed by plaintiffs in the particular case.

* * * * HILL, C. J. (after stating the facts). * * * *

[¶4] The first question is as to the correctness of this instruction. As indicated therein the facts are that Mr. Harrison, appellant's intestate, was thrown from a street car, receiving serious injuries which rendered him unconscious, and while in that condition the appellees were notified of the accident and summoned to his assistance by some spectator, and performed a difficult operation in an effort to save his life, but they were unsuccessful, and he died without regaining consciousness. The appellant says: "Harrison was never conscious after his head struck the pavement. He did not and could not, expressly or impliedly, assent to the action of the appellees. He was without knowledge or will power. However merciful or benevolent may have been the intention of the appellees, a new rule of law, of contract by implication of law, will have to be established by this court in order to sustain the recovery." Appellant is right in saying that the recovery must be sustained by a contract by implication of law, but is not right in saying that it is a new rule of law, for such contracts are almost as old as the English system of jurisprudence. They are usually called "implied contracts." More properly they should be called "quasi contracts" or "constructive contracts." See 1 Page on Contracts, § 14; also 2 Page on Contracts, § 771.

[¶5] The following excerpts from *Sceva v. True*, 53 N. H. 627, are peculiarly applicable here:

> We regard it as well settled by the cases referred to in the briefs of counsel, many of which have been commented on at length by Mr. Shirley for the defendant, that an insane person, an idiot, or a person utterly bereft of all sense and reason by the sudden stroke of an accident or disease may be held liable, in assumpsit, for necessaries furnished to him in good faith while in that unfortunate and helpless condition. And the reasons upon which this rest are too broad, as well as too sensible and humane, to be overborne by any deductions which a refined logic may make from the circumstances that in such cases there can be no contract or promise, in fact, no meeting of the minds of the parties. The cases put it on the ground of an implied contract; and by this is not meant, as the defendant's counsel seems to suppose, an actual contract—that is, an actual meeting of the minds of the parties, an actual, mutual understanding, to be inferred from language, acts, and circumstances by the jury—but a contract and promise, said to be implied by the law, where, in point of fact, there was no contract, no mutual understanding, and so no promise. The defendant's counsel says it is usurpation for the court to hold, as a matter of law, that there is a contract and a promise, when all the evidence in the case shows that there was not a contract, nor the semblance of one. It is doubtless a legal fiction, invented and used for the sake of the remedy. If it was originally usurpation, certainly it has now become very inveterate, and firmly fixed in the body of the law. Illustrations might be multiplied, but enough has been said to show that when a contract or promise implied by law is spoken of, a very different thing is meant from a contract in fact, whether express or tacit. The evidence of an actual contract is generally to be found either in some writing made by the parties, or in verbal communications which passed between them, or in their acts and conduct considered in the light of the circumstances of each particular case. A contract implied by law, on the contrary, rests upon no evidence. It has no actual existence. It is simply a mythical creation of the law. The law says it shall be taken that there was a promise, when in point of fact, there was none. Of course this is not good logic, for the obvious and sufficient reason that it is not true. It is a legal fiction, resting wholly for its support on a plain legal obligation, and a plain legal right. If it were true, it would not be a fiction. There is a class of legal rights, with their correlative legal duties, analogous to the obligations quasi ex contractu of the civil law, which seem to be in the region between contracts on the one hand, and torts on the other, and to call for the application of a remedy not strictly furnished either by actions ex contractu or actions ex delicto. The common law supplies no action of duty, as it does of assumpsit and trespass; and hence the somewhat awkward contrivance of this fiction to apply the remedy of assumpsit where there is no true contract and no promise to support it.

[¶6] This subject is fully discussed in Beach on the Modern Law of Contracts, 639 et seq., and 2 Page on Contracts, 771 et seq. One phase in the law of implied contracts was considered in the case of *Lewis v. Lewis,* 75 Ark. 191, 87 S. W. 134. In its practical application it sustains recovery for physicians and nurses who render services for infants, insane persons, and drunkards. 2 Page on Contracts, §§ 867, 897, 906. And services rendered by physicians to persons unconscious or helpless by reason of injury or sickness are in the same situation as those rendered to persons incapable of contracting, such as the classes above described. *Raoul v. Newman,* 59 Ga. 408; *Meyer v. K. of P*., 70 N. E. 111, 178 N. Y. 63, 64 L. R. A. 839. The court was therefore right in giving the instruction in question.

Judgment is reversed [for reasons not discussed in the excerpt here], and cause remanded. [The concurring opinion of Battle and Wood JJ., is omitted]

Questions:

1. What policy supports requiring folks such as Mr. Harrison to pay medical bills they never consented to pay?

2. Why should this case be limited to medically trained individuals who try to help (and the case is so limited)?

3. Doesn't this case violate Mr. Harrison's right to autonomy?

4. What should be the measure of damages?

Deadly injury
No consent to operate
Benefit to corpse.

—Amy Hebert, 2001

Chapter 4. Limits on Bargains: Defenses

The cases in this Chapter answer the following question: Does enforcement depend on the bargain being roughly equal in value on both sides, or is the equality of the bargain left to the parties? Is some sort of just price required? You might be surprised at the answer, but to answer that question you must study all of the cases in this chapter. None of them is unusual. Each statement of law in them is mundane. But their doctrines leave in the law a striking contradiction.

A. Introduction: Limits on Bargains?

HAMER v. SIDWAY (1891)
Court of Appeals of New York, Second Division
27 N.E. 256

[¶1] Appeal from an order of the general term of the supreme court the fourth judicial department, reversing a judgment entered on the decision of the court at special term in the county clerk's office of Chemung county on the 1st day of October, 1889. The plaintiff presented a claim to the executor of William E. Story, Sr. for $5,000 and interest from the 6th day of February, 1875. She acquired it through several mesne assignments from William E. Story, 2d. The claim being rejected by the executor, this action was brought.

[¶2] It appears that William E. Story, Sr., was the uncle of William E. Story, 2d; that at the celebration of the golden wedding of Samuel Story and wife, father and mother of William E. Story, Sr., on the 20th day of March, 1869, in the presence of the family and invited guests, he promised his nephew that if he would refrain from drinking, using tobacco, swearing, and playing cards or billiards for money until he became 21 years of age, he would pay him the sum of $5,000. The nephew assented thereto, and fully performed the conditions inducing the promise. When the nephew arrived at the age of 21 years, and on the 31st day of January, 1875, he wrote to his uncle, informing him that he had performed his part of the agreement, and had thereby become entitled to the sum of $5,000. The uncle received the letter, and a few days later, and on the 6th day of February, he wrote and mailed to his nephew the following letter:

Buffalo, Feb. 6, 1875.

> "W.E. STORY, JR: `DEAR NEPHEW Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have five thousand dollars as I promised you. I had the money in the bank the day you was 21 years old that I intend for you, and you shall have the money certain. Now, Willie, I do not intend to interfere with this money in any way till I think you are capable of taking care of it and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. The first five thousand dollars that I got together cost me a heap of hard work. . . . It did not come to me in any mysterious way, and the reason I speak of this is that money got in this way stops longer with a fellow that gets it with hard knocks than it does when he finds it. Willie, you are 21 and you have many a thing to learn yet. This money you have earned much easier than I did besides acquiring good habits at the same time and you are quite welcome to the money; hope you will make good use of it. I was ten long years getting this together after I was your age. Now, hoping this will be satisfactory, I stop....
>
> Truly Yours, "W.E. STORY.
>
> `P.S.-You can consider this money on interest."

[¶3] The nephew received the letter and thereafter consented that the money should remain with his uncle in accordance with the terms and conditions of the letters. The uncle died on the 29th day of January, 1887, without having paid over to his nephew any portion of the said $5,000 and interest."

PARKER, J. (after stating the facts above),

[¶4] The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator William E. Story became indebted to his nephew William E. Story, 2d, on his twenty-first birthday in the sum of five thousand dollars. The trial court found as a fact that 'on the 20th day of March, 1869, * * * * William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of $5,000 for such refraining, to which the said William E. Story, 2d, agreed,' and that he 'in all things fully performed his part of said agreement.'

[¶5] The defendant contends that the contract was without consideration to support it, and, therefore, invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited, the contract was without consideration. A contention, which if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was, in fact, of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber, in 1875, defined consideration as follows: 'A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.' Courts 'will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him.' (Anson's Prin. of Con. 63.)

[¶6] 'In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise.' (Parsons on Contracts, 444.)

[¶7] 'Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise.' (Kent, vol. 2, 465, 12th ed.)

[¶8] Pollock, in his work on contracts, page 166, after citing the definition given by the Exchequer Chamber already quoted, says: 'The second branch of this judicial description is really the most important one. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first.'

[¶9] Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it, but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense.

* * * * The order appealed from should be reversed and the judgment of the Special Term affirmed, with costs payable out of the estate.

All concur.

Order reversed and judgment of Special Term affirmed.

Questions:

1. Does it matter to this court how much of a detriment existed, or how valuable the benefit was to the promisor?

2. What, actually, do you think induced Story Sr. to make his promise?

3. Would application of the rule of *Hamer v. Sidway* change the result in *Kirksey v. Kirksey*? In the Williston's tramp hypothetical?

PROBLEM 18. Duane II's rich uncle Duane I, for whom Duane II was named, promises him in private at a family dinner at which Duane II's parents are the only other guests, that if Duane II will refrain from recreational use of harder drugs—heroin, LSD, cocaine, methamphetamine—until the age of 21, Duane I will pay him $10,000. Enforceable?

BATSAKIS v. DEMOTSIS (1949)
Court of Civil Appeals of Texas, El Paso
226 S.W.2d 673

McGILL, Justice.

[¶1] This is an appeal from a judgment of the 57th judicial District Court of Bexar County. Appellant was plaintiff and appellee was defendant in the trial court. The parties will be so designated.

[¶2] Plaintiff sued defendant to recover $2,000 with interest at the rate of 8% per annum from April 2, 1942, alleged to be due on the following instrument, being a translation from the original, which is written in the Greek language:

> Peiraeus
> April 2, 1942
>
> Mr. George Batsakis
> Konstantinou Diadohou #7
> Peiraeus
>
> Mr. Batsakis:
>
> I state by my present (letter) that I received today from you the amount of two thousand dollars ($2,000.00) of United States of America money,

> which I borrowed from you for the support of my family during these difficult days and because it is impossible for me to transfer dollars of my own from America. The above amount I accept with the expressed promise that I will return to you again in American dollars either at the end of the present war or even before in the event that you might be able to find a way to collect them (dollars) from my representative in America to whom I shall write and give him an order relative to this. You understand until the final execution (payment) to the above amount an eight per cent interest will be added and paid together with the principal.
>
> I thank you and I remain yours with respects.
>
> The recipient,
>
> (Signed) Eugenia The. Demotsis

[¶3] Trial to the court without the intervention of a jury resulted in a judgment in favor of plaintiff for $750.00 principal, and interest at the rate of 8% per annum from April 2, 1942 to the date of judgment, totaling $1,163.83, with interest thereon at the rate of 8% per annum until paid. Plaintiff has perfected his appeal.

[¶4] The court sustained certain special exceptions ... to defendant's first amended original answer on which the case was tried, and struck therefrom paragraphs II, III and V.... The answer, stripped of such paragraphs, consisted of a general denial ... and of paragraph IV, which is as follows:

> ...[T]he consideration upon which said written instrument sued upon by plaintiff herein is founded, is wanting and has failed to the extent of $1975.00, and defendant ... now tenders, as defendant has heretofore tendered to plaintiff, $25.00 as the value of the loan of money received by defendant from plaintiff, together with interest thereon.
>
> ... [D]efendant alleges that she at no time received from plaintiff himself or from anyone for plaintiff any money or thing of value other than ... [a] loan of 500,000 drachmae. That at the time of the loan ... the value of 500,000 drachmae in the Kingdom of Greece in dollars of money of the United States of America, was $25.00, and also at said time the value of 500,000 drachmae of Greek money in the United States of America in dollars was $25.00 of money of the United States of America....
>
> The [defendant] alleg[ed] ... that the instrument sued on was signed and delivered in the Kingdom of Greece on or about April 2, 1942, at which time both plaintiff and defendant were ... residing in the Kingdom of Greece, and that on or about April 2, 1942 [defendant] owned money [in the United] States of America, but was then and there in the Kingdom of

> Greece in straitened financial circumstances due to the conditions produced by World War II and could not make use of her money and property and credit existing in the United States of America. That in the circumstances the plaintiff agreed to and did lend to defendant the sum of 500,000 drachmae, which at that time, on or about April 2, 1942, had the value of $25.00 in money of the United States of America. That the said plaintiff, knowing defendant's financial distress and desire to return to the United States of America, exacted of her the written instrument plaintiff sues upon, which was a promise by her to pay to him the sum of $2,000.00 of United States of America money. ....

[¶5] Defendant testified that she did receive 500,000 drachmas from plaintiff. It is not clear whether she received all the 500,000 drachmas or only a portion of them before she signed the instrument in question. Her testimony clearly shows that the understanding of the parties was that plaintiff would give her the 500,000 drachmas if she would sign the instrument. She testified:

> Q. [W]ho suggested the figure of $2,000.00?
>
> A. That was how he asked me from the beginning. He said he will give me five hundred thousand drachmas provided I signed that I would pay him $2,000.00 American money.

The transaction amounted to a sale by plaintiff of the 500,000 drachmas in consideration of the execution of the instrument sued on, by defendant. It is not contended that the drachmas had no value. Indeed, the judgment indicates that the trial court placed a value of $750.00 on them .... Therefore the plea of want of consideration was unavailing. A plea of want of consideration amounts to a contention that the instrument never became a valid obligation in the first place. *National Bank of Commerce v. Williams*, 125 Tex. 619, 84 S.W.2d 691 (1935).

[¶6] Mere inadequacy of consideration will not void a contract. 10 TEX. JUR., Contracts § 89, at 150; *Chastain v. Texas Christian Missionary Society*, 78 S.W.2d 728, 731 (Tex. Civ. App. 1935).

[¶7] Nor was the plea of failure of consideration availing. Defendant got exactly what she contracted for according to her own testimony. The court should have rendered judgment in favor of plaintiff against defendant for the principal sum of $2,000.00 evidenced by the instrument sued on, with interest as therein provided. We construe the provision relating to interest as providing for interest at the rate of 8% per annum. The judgment is reformed so as to award appellant a recovery against appellee of $2,000.00 with interest thereon at the rate of 8% per annum from April 2, 1942. Such judgment will bear interest at the rate of 8% per annum until paid on $2,000.00 thereof and on the balance interest at the rate of 6% per annum. As so reformed, the judgment is affirmed.

[¶8] Reformed and affirmed.

Question: What facts could you add to Batsakis's situation to make the result of this case appear more just?

PROBLEM 19. In *Embola v. Tuppela*, 220 P. 789 (Wash. 1923), Tuppela obtained land during the Alaska gold rush. After a number of years, he was adjudicated insane and committed in Portland, Oregon. After four years, he was released, but he found that his mining properties had been sold by his guardian. Tuppela soon thereafter found Embola. They had been close friends for thirty years. Embola advanced money for Tuppela's support and brought him back to Seattle. Tuppela tried to raise money so that he could return to Alaska and re-obtain his mine, but no one was willing to lend to him. After a few months, Tuppela proposed to Embola, "You have already let me have $270. If you give me $50 more so I can go to Alaska and get my property back, I will pay you ten thousand dollars when I win my property." Embola agreed and gave Tuppela $50. Three years later, Tuppela recovered his property, which was worth about $500,000. Tuppela asked his trustee to pay $10,000 to Embola, but the trustee refused, so Embola sued Tuppela's trustee. From the analysis in *Batsakis*, what result?

B. Duress

Restatement (Second) of Contracts § 175. When Duress by Threat Makes a Contract Voidable

Restatement (Second) of Contracts § 176. When a Threat is Improper

Consider carefully these two sections. They are widely employed by courts. *See, e.g.*, *Miller* and *Holler*, the next two cases. The two Restatement sections work together. Section 175(1) defines duress as when a manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative. Given that definition, what are the elements of duress?

PROBLEMS 20-26. Section 176 gives examples of what might be improper threats. Please match the following examples with the subsections of section 176:

20. Bob goes to look at a used car, a 1972 Nova, and finds that the seller is the brother of Bob's sister Marsha's employer. As the seller and Bob finish negotiations for this car, which is not in very good shape, the seller says to Bob, "Actually, I have a lot of pull with my brother Al and I really need to sell this car. If you buy the car for $10,000, I'll tell Al what a fine family Marsha has. If you don't, well, Marsha can kiss her job goodbye!" Employment is at-will in the state.

21. Bob embezzles money from Business. The Business sues Bob and threatens to take steps to encourage a criminal prosecution against Bob if he does not sign a promissory note to repay with interest what he took.

22. Bob is visiting his sister Marsha and sitting in the backyard drinking lemonade when Marsha's neighbor Andy walks up. Andy says to Bob, "I want to sell you my Mercedes for $10,000 cash." Bob agrees to look at the car. The car is only a few years old, and appears to be in excellent condition. Still, Bob had hoped to be driving something sportier, like a 1972 Nova, restored, with a big spoiler on the back. "I don't think so," Bob finally says, "I'm not in the market for this kind of car right now." "Yes, you are, "Andy replies, pulling a pistol from his coat. "Sign this contract for my car right now or I'll bury you under the garage." Bob gulps and signs. (Does the excellent price make a difference?)

23. Joe threatens to commence a lawsuit and file a lien on a house Bob just built, unless Bob signs a contract to release Joe from a disputed claim that Bob has against Joe regarding an entirely separate matter. Joe knows that he has no grounds to sue Bob or file a lien.

24. Bob is 82 years old and lives alone in a small apartment in Houston. Bob had no air conditioning until last August, when he was sitting alone one day in his apartment and heard a knock at the door. It was Andy, selling air conditioners. Bob really wanted to buy an air conditioner. Andy said the price for a window box air conditioner was only $1,200. "Twelve hundred!" Bob started, "That's outrageous!" "Don't complain about the price, or I'll take my business elsewhere," Andy said, "and just see if anyone else will sell to you on credit!" Bob knew his credit wasn't the best. "Ok," Bob said, "You stay and I'll sign."

25. Marsha, a fur store employee at Al's Furs, buys furs herself. Both Al's and Marsha store their furs at the same independent warehouse. Marsha has not paid her warehouse bill. Warehouse says to Al's Furs owner, Al, "Unless you sign on to pay for Marsha's fees, we will hold your furs indefinitely." The next time Al went to the warehouse, the warehouse refused to release Al's furs without his signature on a note to pay Marsha's debt. Al signs.

26. Andy intentionally misleads Bob into thinking that Andy will supply goods at the usual price and thereby causes Bob to delay any attempt to buy them elsewhere. Andy then later, when Bob really needs the goods, threatens not to sell them unless Bob promises to pay an outrageous price. Bob, in great need, promises to pay. *See* R2K § 176 illus. 13.

Question: When was it relevant in applying § 176 that the price was too high?

Other formulations of duress besides that found in the Restatement (Second) of Contracts exist, of course. They often focus on subjective traits and are difficult to understand.* You will see an example in the *Holler* case, *infra*.

ALLIED BRUCE TERMINIX CO., INC. v. GUILLORY (1994)
Court of Appeal of Louisiana, Third Circuit
649 So.2d 652

LUCIEN C. BERTRAND, Jr., Judge Pro Tem.

[¶1] Plaintiff, Allied Bruce Terminix Company, Inc., filed suit for injunction and damages against defendant, John R. Guillory, for the alleged breach of a non-compete agreement. The trial court granted a preliminary injunction and Guillory appeals. We affirm.

[¶2] The trial court made the following findings of fact and conclusions of law: * * * *

> The facts show that defendant was employed by Terminix as a pest control technician, and on September 7, 1990, defendant signed an employment agreement setting forth certain limitations on his actions during the course of his employment with Terminix for a period of two (2) years after termination. The agreement specifically provides in pertinent part:
>
> > For a period of two years following termination of employment with Employer, Employee will not, either directly or indirectly, solicit or accept termite and/or pest control work from, or perform termite and/or pest control work for, any customer of employer for himself or for any other person, firm or corporation, nor will Employee engage in, accept employment from, become affiliated or connected with, directly or indirectly, or by any means become interested in, directly or indirectly, any termite and/or pest control business, or any other line of business similar to or of a like nature to any work performed by Employer.

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*Consider the following from *Magoon v. Reber*, 45 N.W. 112 (Wisc. 1890):

> If the plaintiff was induced to sign the notes and power of attorney through compulsion or constraint of personal violence threatened or impending, or under the influence of such fear of actual violence as overcame his mind and will, so that he did not act freely and voluntarily in executing them, they are void in law, though there might be some consideration to support them; for the principle is elementary that a contract made by a party under compulsion is void, because the consent is of the essence of a contract, and where there is compulsion there is no consent, for that must be voluntary.

Magoon is about as useful as any subjective definition of duress, but what qualifies as "personal violence"? "Overcoming of mind and will"? Acting "freely and voluntarily"?

[¶3] The agreement further provides that said prohibition be limited to those parishes in which defendant has worked for Terminix during the term of the agreement. The Court finds these parishes to be Lafayette and Acadia.

[¶4] Defendant resigned from his employment effective July 6, 1993, and has opened up his own pest control service company, which is located in St. Landry Parish. The majority of defendant's client base is in Lafayette Parish, and he freely admits that some of these clients were former clients of Terminix.

[¶5] After considering the law, evidence and arguments of counsel, the Court grants the injunction and denies the Exception of No Cause of Action. The provision at issue is valid and enforceable * * * *. * * * *

[¶6] Further, we find no merit to Guillory's argument that his consent to the contract was vitiated by economic duress, i.e., the threat of his employment being terminated. * * * * [T]he threat of doing a lawful act does not constitute duress. Therefore, we reject the argument that Guillory signed the non-compete agreement under duress and did not consent to its terms. * * * *

[¶7] For the foregoing reasons, the judgment of the trial court is affirmed at defendant's cost.
AFFIRMED.

PROBLEM 27. A debtor threatens a creditor, "Either settle with me for less or I'll file bankruptcy." Is this threat improper?

In re the MARRIAGE OF John W. MILLER and Debra K. Miller,
Court of Appeals of Iowa
2002 WL 31312840
Oct. 16, 2002

MAHAN, J.

[¶1] Debra Miller appeals a district court ruling upholding the validity of a prenuptial agreement she signed prior to her marriage to John Miller. We affirm.

[¶2] **Background Facts and Proceedings**. John and Debra were married in August 1990. At the time of the parties' marriage, Debra had two registered horses, a truck, and household items worth approximately $2000. John had a house located at 1007 College Drive in Decorah, Iowa, a couple of boats, outdoor equipment, and a 401(k) account.

[¶3] Both parties were previously married. As part of the decree dissolving John's first marriage, he was awarded the house located in Decorah, Iowa. In order to maintain the house and other assets from his first marriage as his own property, John asked Debra to sign a prenuptial agreement prepared by his lawyer. This was requested a day before the wedding, and Debra was not aware of the prenuptial agreement until that time. It was clear if she did not sign the prenuptial agreement John would not marry her. John's lawyer apparently advised Debra to have the prenuptial agreement reviewed by independent counsel although she did not do so. Paragraph three of the agreement provides:

> In the event of a dissolution of marriage or death of either party to the marriage, each party hereto waives, relinquishes, and renounces any right, title or interest in the property of another. This includes all rights of dower and courtesy in the estates of one another.

Paragraph four provides:

> All property, both real and personal, which belonged to John W. Miller and Debra L. Fjelstul separately before marriage shall be and remain his or hers and neither party shall have claim to the other person's property. This includes, but is not limited to John W. Miller's interest in a house in Decorah, Iowa, and various items of sports equipment owned by him at the time of this Agreement was executed.

[¶4] As part of the divorce decree issued in November 2001, the district court concluded the prenuptial agreement was valid. The court awarded the Decorah home to John, and he was ordered to pay any debt remaining against the house. The court also awarded each party his/her entire 401(k) account. Debra appeals. * * * *

[¶5] **Duress.** We follow the Restatement's rule concerning the effect of duress on the enforceability of a contract: '"If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.'" *Id*. at 318 (quoting *Turner v. Low Rent Hous. Agency*, 387 N.W.2d 596, 598 (Iowa 1986); Restatement (Second) of Contracts § 175 (1), at 475 (1981)). There are two essential elements one must prove in order to show duress. The first element is the victim had no reasonable alternative to entering into the contract. *Turner,* 387 N.W.2d at 598-99. In the present case, Debra had a reasonable alternative: she could have canceled the wedding. In Spiegel, the supreme court noted "social embarrassment from the cancellation of wedding plans, even on the eve of the wedding, [does not] render that choice unreasonable." *Spiegel*, 553 N.W.2d at 318.

[¶6] The other element of duress is the threat must be wrongful or unlawful. *In re C.K.*, 315 N.W.2d 37, 43-44 (Iowa 1982). Here, John's threat was he would not marry Debra if she did not sign the prenuptial agreement. We find insistence on a prenuptial agreement as a condition of marriage is not a threat or unlawful. See *Spiegel*, 553 N.W.2d at 318; *Liebelt v. Liebelt*, 801 P.2d 52, 55 (Idaho Ct. App. 1990) ("The threat of a refusal to marry is not wrongful in the eyes of the law."). Consequently, while we do not admire John's actions, Debra has failed to show she acted under duress in signing the prenuptial agreement.

AFFIRMED.

Nataliya HOLLER v. William HOLLER
Court of Appeals of South Carolina
612 S.E.2d 469
April 18, 2005

ANDERSON, J.

[¶1] William Holler (Husband) appeals from the family court's determination that a premarital agreement signed by Nataliya Holler (Wife) is not enforceable. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

[¶2] Wife is originally from Ukraine. She was educated in Ukraine and taught college students in that country. English is not Wife's first language. After seeing Husband's picture in "a feminine magazine," Wife wrote a letter to him in English and included her phone number. Thereafter, Husband and Wife talked on the phone for "[a]bout a year." Their conversations were in English. During this time, Husband visited Wife in Ukraine.

[¶3] On September 5, 1997, Wife traveled to the United States to marry Husband. At the time of her arrival, Wife's English was "really poor." Husband disputed Wife's inability to speak English, claiming she spoke "[v]ery well." Upon completing an English course, Wife received a certificate from Central Piedmont College in May of 1998.

[¶4] In October or early November 1997, Wife became pregnant with Husband's child. Wife's visa was scheduled to expire on December 4, 1997, and she would have to return to Ukraine unless she married Husband. Wife came to the United States without money and relied upon Husband to provide support.

[¶5] Wife admitted that, while she was still in Ukraine, Husband told her about the premarital agreement. However, Wife believed she "needed to sign some papers under the law of South Carolina before we g[o]t married." Wife claimed: "[Husband] faxed me some documents for American Embassy, and one page was he told me that we need—when you get to United States we have to sign that agreement before we get married because this is under [the] law of South Carolina." Husband delivered the premarital agreement to Wife sometime before the marriage. Husband first stated he faxed it to her five or six months before she arrived in the United States. Husband maintained he handed her a copy to sign within a week after she arrived. Yet, Wife declared Husband gave her a copy of the premarital agreement only two weeks before she signed it.

[¶6] Prior to signing the premarital agreement, Wife attempted to translate a portion of the agreement from English into Russian, but was unable to complete the translation. "Because it was too hard," Wife became frustrated with the translation and quit. Wife had eleven pages of translation before she determined the effort was futile. Wife professed the agreement "had specific language which [she did not] understand even in Russian." Wife never retained counsel because she had no money to pay someone to review the agreement.

[¶7] Wife signed the agreement on November 25, 1997. The parties were married on December 1, 1997, merely three days before Wife's visa was set to expire.

[¶8] Husband and Wife separated on February 13, 2000. Wife brought this action seeking a divorce, custody of the parties' child, child support, equitable distribution of marital property, and alimony. Husband answered and counterclaimed. Subsequently, he filed a motion to dismiss the claims for alimony and equitable distribution asserting the premarital agreement controlled. After a hearing, the family court denied the motion to dismiss. The court ruled the premarital agreement was invalid and unenforceable because it was signed under duress * * * *.
* * * *

II. PREMARITAL AGREEMENT

[¶9] Husband contends the trial court erred in finding the premarital agreement was invalid and unenforceable as a result of being * * * * signed under duress.

[¶10] Premarital agreements, also called antenuptial or prenuptial agreements, are agreements between prospective spouses made in contemplation of marriage. Black's Law Dictionary defines a prenuptial agreement as "[a]n agreement made before marriage usu[ally] to resolve issues of support and property division if the marriage ends in divorce or by the death of a spouse." Black's Law Dictionary 1220 (8th ed. 2004). Antenuptial settlements are contracts or agreements entered into between a man and woman before marriage, but in contemplation and generally in consideration of marriage, whereby the property rights and interests of either the prospective husband or wife, or of both of them, are determined, or where property is secured to either or to both of them, or to their children. 41 C.J.S. Husband and Wife § 61 (1991).

[¶11] The consideration for a premarital agreement is the marriage itself. Because such agreements are executory, they become effective only upon marriage. * * * * In *South Carolina Loan & Trust Co. v. Lawton*, the Supreme Court explained:

> There is not complete execution of such instruments until actual marriage, and it does not matter how many changes may be made, and how many different instruments may be signed, the settlement, in the last form it assumes before marriage, is the real contract supported by the consideration of marriage.

Id. at 349, 48 S.E. at 283.

[¶12] In *Stork v. First National Bank*, 281 S.C. 515, 316 S.E.2d 400 (1984), the Supreme Court inculcated:

> Antenuptial agreements * * * will be enforced if made voluntarily and in good faith and if fair and equitable. *Rieger v. Schaible*, 81 Neb. 33, 115 N.W. 560 (1908) (citing *Pierce v. Pierce*, 71 N.Y. 154, 27 Am. Rep. 22). Such contracts are not opposed to public policy but are highly beneficial to serving the best interest of the marriage relationship.

Id. at 516, 316 S.E.2d at 401. An antenuptial contract is valid and will be upheld when, and only when, it is entered into freely, fairly, and in good faith by parties legally competent to contract. 41 C.J.S. Husband and Wife § 62 (1991). An antenuptial agreement must be free from duress, fraud, deceit, misrepresentation, or overreaching. *Id*. * * * *

A. Duress

[¶13] Husband avers the family court improperly concluded Wife signed the premarital agreement while under duress. We disagree.

[¶14] Duress is a condition of mind produced by improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or form a contract not of his own volition. *Cherry v. Shelby Mut. Plate Glass & Cas. Co.*, 191 S.C. 177, 4 S.E.2d 123 (1939); *Cox & Floyd Grading, Inc. v. Kajima Constr. Servs., Inc.*, 356 S.C. 512, 589 S.E.2d 789 (Ct. App. 2003); *Willms Trucking Co. v. JW Constr. Co.*, 314 S.C. 170, 442 S.E.2d 197 (Ct. App. 1994).

[¶15] Corpus Juris Secundum defines duress:

> "Duress" may be defined as subjecting a person to a pressure which overcomes his or her will and coerces him or her to comply with demands to which he or she would not yield if acting as a free agent. Some definitions of "duress" contain not only the element of pressure overcoming the victim's will but also the element that the pressure or compulsion consists of improper, wrongful, or unlawful conduct, acts, or threats.

> Further, "duress" has been defined as the condition of mind produced by the wrongful conduct of another rendering a person incompetent to contract with the exercise of his or her free will power, or as the condition of mind produced by an improper external pressure destroying free agency so as to cause the victim to act or contract without use of his or her own volition, or as unlawful constraint whereby a person is forced to do some act against his or her will.

17A C.J.S. Contracts § 175 (1999) (footnotes omitted).

[¶16] The central question with respect to whether a contract was executed under duress is whether, considering all the surrounding circumstances, one party to the transaction was prevented from exercising his free will by threats or the wrongful conduct of another. 17A Am. Jur. 2d Contracts § 218 (2004). Freedom of will is essential to the validity of an agreement. *Id.* A party claiming "duress" can prevail if he shows that he has been the victim of a wrongful or unlawful act or threat of a kind that deprives the victim of unfettered will, with the result that he was compelled to make a disproportionate exchange of values. *Id.*

[¶17] In order to establish that a contract was procured through duress, three things must be proved: (1) coercion; (2) putting a person in such fear that he is bereft of the quality of mind essential to the making of a contract; and (3) that the contract was thereby obtained as a result of this state of mind. *In re Nightingale's Estate*, 182 S.C. 527, 189 S.E. 890 (1937). The fear which makes it impossible for a person to exercise his own free will is not so much to be tested by the means employed to accomplish the act, as by the state of mind produced by the means invoked. *Id.*; *Willms Trucking Co*., 314 S.C. at 179, 442 S.E.2d at 202. If one of the parties to an agreement is in a position to dictate its terms to such an extent as to substitute his will for the will of the other party thereto, it is not a mutual, voluntary agreement, but becomes an agreement emanating entirely from his own mind. *In re Nightingale's Estate*, 182 S.C. at 547, 189 S.E at 898; *Willms Trucking Co.*, 314 S.C. at 179, 442 S.E.2d at 202. If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim. *Willms Trucking Co.*, 314 S.C. at 179, 442 S.E.2d at 202. Whether or not duress exists in a particular case is a question of fact to be determined according to the circumstances of each case, such as the age, sex, and capacity of the party influenced. *Id*.; *see also Santee Portland Cement Corp. v. Mid-State Redi-Mix Concrete Co*., 273 S.C. 784, 260 S.E.2d 178 (1979) (stating whether or not duress was present is a question ordinarily determined on a case by case basis).

[¶18] Duress is viewed with a subjective test which looks at the individual characteristics of the person allegedly influenced, and duress does not occur if the victim has a reasonable alternative to succumbing and fails to take advantage of it. *Blejski v. Blejski*, 325 S.C. 491, 480 S.E.2d 462 (Ct. App. 1997) (citing Restatement (Second) of Contracts § 175 cmt. b & c (1981)). Duress is a defense to an otherwise valid contract. 17A Am. Jur. 2d Contracts § 218. Duress renders a contract voidable at the option of the oppressed party. *Santee Portland Cement Corp.*, 273 S.C. at 784, 260 S.E.2d at 178.

[¶19] Assumptively concluding Wife was allowed the opportunity to view the premarital agreement three months in advance, the evidence in the record indicates: (1) Wife did not understand the contents of the agreement; (2) she did not freely enter into the agreement; (3) she attempted to translate the agreement into Russian in order to better comprehend the document; (4) she became frustrated as she was unable to complete a satisfactory translation; and (5) her notes indicate there are several words for which she could not find a translation, including "undivided," "equitable," and "pro rata." Consequently, Wife could not understand the agreement.

[¶20] Additionally, Husband was aware of the deadline with respect to Wife's visa. According to his own testimony, Husband made it perfectly clear to Wife that she must sign the agreement if she wanted to be married prior to the expiration of her visa. Wife was in the United States with no means to support herself. She relied solely and completely on Husband for support. Wife had no money of her own with which to retain and consult an attorney or a translator. Whether a party obtained independent legal advice is a significant consideration in evaluating whether an antenuptial agreement was voluntarily and understandingly made. See 41 C.J.S. Husband and Wife § 62 (1991). The family court found if Wife was not able to marry, then she would be forced to return to Ukraine. Because she was pregnant with Husband's child, she sought to insure his continued support and to remain in the United States.

[¶21] Wife did not enter into the agreement freely and voluntarily. Ample evidence exists to support the family court's determination that Wife, given the circumstances she faced, signed the agreement under duress and without a clear understanding of what she was signing. The family court did not err in finding Wife signed the agreement under duress.

Question: Why do *Miller* and *Holler* reach different results?

There once was a bride in a bind,
Who felt bad 'bout the prenup she signed;
So she argued duress
Due to her marriage mess;
And the court ruled on her state of mind.

—Stacey Severovich, STCL Class of 2013

BETHLEHEM STEEL CORPORATION, Plaintiff v. Sheldon H. SOLOW, etc., et al.,
Defendants, Diesel Construction, etc., Defendant, Solow Development Corporation, Defendant-Respondent, The Chase Manhattan Bank, N.A., et al., Defendants
Supreme Court, Appellate Division, First Department, New York
63 A.D.2d 611, 405 N.Y.S.2d 80
May 16, 1978

Before BIRNS, J. P., and EVANS, FEIN, MARKEWICH and SULLIVAN, JJ.

MEMORANDUM DECISION.

* * * *

[¶1] Defendants' contentions are that plaintiff submitted a bid to supply and erect structural steel at $420 per ton provided the bid was executed and returned within seven days; that defendants repeatedly attempted to meet with plaintiff until about six weeks after receipt of the initial bid and to their surprise and dismay learned that plaintiff had raised the price of their steel to $474 per ton; that this price was not based upon costs, materials or labor increases, but was an arbitrary inflated price interposed by plaintiff because it knew it was the only structural steel supplier available at the time; that defendants were in immediate need of the steel and had no alternative but to execute the contract under duress.

[¶2] It is not alleged that defendants accepted or responded to plaintiff's initial bid; nor is it alleged that plaintiff had any contractual relationship with defendants of any type prior to the time the parties entered into the contract which serves as the predicate for the economic duress defense.

[¶3] "Duress, in order to render voidable what was done, must involve a wrongful act or threat precluding the exercise of a free will." (17 NY Jur, Duress and Undue Influence, § 3.)

[¶4] The law in New York is clear that in order to have a situation involving "economic duress" there must have been some sort of obligation on the part of the party to perform. (*Salzman v Holiday Inns*, 48 A.D.2d 258, mod 40 N.Y.2d 919; *Muller Constr. Co. v New York Tel. Co.*, 50 A.D.2d 580, affd 40 N.Y.2d 955.)

[¶5] In the instant situation, the original bid was never accepted by defendants in any way, shape or form. Consequently, there is no showing of a prior contractual relationship or a showing that plaintiff had any obligation or duty to deal with defendants. Although it appears defendant was subject to financial pressures and may have lacked equal bargaining power, there nonetheless was an insufficient showing to constitute economic duress. (*Grubel v Union Mut. Life Ins. Co.*, 54 A.D.2d 686.) The law is well stated in *Hugo V. Lowei, Inc. v Kips Bay Brewing Co.* (63 N.Y.S.2d 289), where the defendant claimed that he had been induced to enter into a contract by economic duress because of existing war emergency conditions, leaving him unable to purchase his product from any other source than the plaintiff. The court held (p 290):

> "Assuming the truth of this, it does not constitute duress in law. The plaintiff was under no duty or obligation to do business with defendant and could have refused, arbitrarily, to do business with it, or if it decided to do business with defendant could name its own terms. Defendant could have declined to accept them; it was under no obligation to accept, other than its need to have the hops which it could not obtain elsewhere. Driving a hard bargain in the circumstances is not the type of duress which may be availed of as a ground for avoiding entering into a contract and liability thereunder. This defense is legally insufficient."

[¶6] *Austin Instrument v Loral Corp*. (29 N.Y.2d 124) is not controlling. In the Austin case there was a binding contract which was subsequently renegotiated as a result of the economic duress applied by Austin. Here there is no prior contractual relationship.

[¶7] One who would repudiate a contract procured by duress, must act promptly, or he will be deemed to have elected to affirm it. (*Port Chester Elec. Constr. Corp. v Hastings Terraces*, 284 App Div 966; *Fowler v Fowler*, 197 App Div 572.) Here the defendants waited six years from the commencement of this action before interposing the economic duress defense. In view of the inordinate length of time which has passed between the alleged economic duress and the assertion of that defense, it must be deemed waived. * * * *

Questions:

1. What could be the alleged wrongful act or threat here?

2. Why would a subjective duress defense make sense or not make sense when the promisor is a corporation?

3. In *Austin Instrument, Inc.*, a supplier of electronics components, Austin, contracted to supply a set of parts for radar equipment to Loral, a radar equipment manufacturer. When Loral asked for bids for a second set of parts, Austin stopped performance on the first set and threatened to provide nothing more under its current contracts unless Loral awarded Austin the second set and increased the price on the first. After determining that no one on its approved list of suppliers could fill Austin's obligations, Loral agreed to Austin's demands. Immediately after receiving the last component under the second set of contracts, Loral refused to pay Austin the remainder of what the contracts required. When Austin sued, Loral argued duress. The court agreed with Loral. Can you see the difference between this case and *Bethlehem Steel*? How would you analyze the *Austin* facts under the Restatement (Second) test?

C. Mutual Mistake

CHANDELOR v. LOPUS (1603)
Exchequer-Chamber
Croke Jac 4, 79 ER 3

[¶1] Action upon the case. Whereas the defendant being a goldsmith, and having skill in jewels and precious stones, had a stone which he affirmed to Lopus to be a bezar-stone, and sold it to him for one hundred pounds; [but] it was not a bezar-stone: the defendant pleaded not guilty, and verdict was given and judgment entered for the plaintiff in the King's Bench.

[¶2] But error was thereof brought in the Exchequer-Chamber; because the declaration contains not matter sufficient to charge the defendant, viz. that he warranted it to be a bezar-stone, or that he knew that it was not a bezar-stone; for it may be, he himself was ignorant whether it were a bezar-stone or not.

[¶3] And all the justices and Barons (except Anderson) held, that for this cause it was error: for the bare affirmation that it was a bezar-stone, without warranting it to be so, is no cause of action: and although he knew it to be no bezar-stone, it is not material; for every one in selling his wares will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action, and the warranty ought to be made at the same time of the sale; as F.N.B. 94. c.& 98. b.5 Hen. 7. pl. 41. 9 Hen. 6. pl.53. 12 Hen. 4. pl.1. 42 Ass. 8. 7 Hen. 4. pl.15. Wherefore, forasmuch as no warrant is alledged, they held the declaration to be ill.

[¶4] Anderson to the contrary; for the deceit in selling it for a bezar, whereas it was not so, is cause of action. - But, notwithstanding, it was adjudged to be no cause, and the judgment was reversed.

Questions:

1. What is a bezar-stone?

2. Did Chandelor misrepresent the nature of the stone?

3. Did the parties' mistake about the nature of the stone have any legal effect here?

Note: In equity (that is, in front of the English chancellor) some relief might have been obtainable here. Unfortunately, our published records of English equity are scant. The chancellor was granting relief for mistake at least by 1540, but just under what circumstances is uncertain. Real relief for mutual mistake would not come until American jurists around the turn of the 19th century combined the assent-focused approach to contracts used by natural and civil lawyers (Pufendorf, Grotius, Pothier) with the consideration-focused approach found in the common law.

SHERWOOD v. WALKER and others
Supreme Court of Michigan
July 7, 1887
33 N.W. 919

MORSE, J.

[¶1] Replevin for a cow. Suit commenced in justice's court; judgment for plaintiff; appealed to circuit court of Wayne county, and verdict and judgment for plaintiff in that court. The defendants bring error, and set out 25 assignments of the same.

[¶2] The main controversy depends upon the construction of a contract for the sale of the cow. The plaintiff claims that the title passed, and bases his action upon such claim. The defendants contend that the contract was executory, and by its terms no title to the animal was acquired by plaintiff.

[¶3] The defendants reside at Detroit, but are in business at Walkerville, Ontario, and have a farm at Greenfield, in Wayne county, upon which were some blooded cattle supposed to be barren as breeders. The Walkers are importers and breeders of polled Angus cattle. The plaintiff is a banker living at Plymouth, in Wayne county. He called upon the defendants at Walkerville for the purchase of some of their stock, but found none there that suited him. Meeting one of the defendants afterwards, he was informed that they had a few head upon this Greenfield farm. He was asked to go out and look at them, with the statement at the time that they were probably barren, and would not breed. May 5, 1886, plaintiff went out to Greenfield and saw the cattle. A few days thereafter, he called upon one of the defendants with the view of purchasing a cow, known as "Rose 2d of Aberlone." After considerable talk, it was agreed that defendants would telephone Sherwood at his home in Plymouth in reference to the price. The second morning after this talk he was called up by telephone, and the terms of the sale were finally agreed upon. He was to pay five and one-half cents per pound, live weight, fifty pounds shrinkage. He was asked how he intended to take the cow home, and replied that he might ship her from King's cattle-yard. He requested defendants to confirm the sale in writing, which they did by sending him the following letter:

> "WALKERVILLE, May 15,1886.
>
> "T.C. SHERWOOD,
>
> President, etc.,—
>
> "Dear Sir: We confirm sale to you of the cow Rose 2d Aberlone, lot 56 of our catalogue, at five and a half cents per pound, less fifty pounds after shrink. We inclose herewith order on Mr. Graham for the cow. You might leave check with him, or mail to us here, as you prefer.

“Yours truly,

“HIRAM WALKER & SONS.”

The order upon Graham inclosed in the letter read as follows:

“WALKERVILLE, May 15, 1886.

“George Graham: You will please deliver at Kings cattle-yard to Mr. T.C. Sherwood, Plymouth, the cow Rose 2d of Aberlone, lot 56 of our catalogue. Send halter with cow, and have her weighed.

“Yours truly,

“HIRAM WALKER & SONS.”

[¶3] On the twenty-first of the same month the plaintiff went to defendants' farm at Greenfield, and presented the order and letter to Graham, who informed him that the defendants had instructed him not to deliver the cow. Soon after, the plaintiff tendered to Hiram Walker, one of the defendants, $80, and demanded the cow. Walker refused to take the money or deliver the cow. The plaintiff then instituted this suit. After he had secured possession of the cow under the writ of replevin, the plaintiff caused her to be weighed by the constable who served the writ, at a place other than King's cattle-yard. She weighed 1,420 pounds.

[¶4] When the plaintiff, upon the trial in the circuit court, had submitted his proofs showing the above transaction, defendants moved to strike out and exclude the testimony from the case, for the reason that it was irrelevant, and did not tend to show that the title to the cow passed, and that it showed that the contract of sale was merely executory. The court refused the motion, and an exception was taken. The defendants then introduced evidence tending to show that at the time of the alleged sale it was believed by both the plaintiff and themselves that the cow was barren and would not breed; that she cost $850, and if not barren would be worth from $750 to $1,000; that after the date of the letter, and the order to Graham, the defendants were informed by said Graham that in his judgment the cow was with calf, and therefore they instructed him not to deliver her to plaintiff, and on the twentieth of May, 1886, telegraphed to the plaintiff what Graham thought about the cow being with calf, and that consequently they could not sell her. The cow had a calf in the month of October following. On the nineteenth of May, the plaintiff wrote Graham as follows:

“PLYMOUTH, May 19, 1886.”

MR. GEORGE GRAHAM,

“Greenfield, —

“Dear Sir: I have bought Rose or Lucy from Mr. Walker, and will be there for her Friday morning, nine or ten o'clock. Do not water her in the morning.

“Yours, etc.,

“T. C. SHERWOOD.”

Plaintiff explained the mention of the two cows in this letter by testifying that, when he wrote this letter, the order and letter of defendants were at his house, and, writing in a hurry, and being uncertain as to the name of the cow, and not wishing his cow watered, he thought it would do no harm to name them both, as his bill of sale would show which one he had purchased. Plaintiff also testified that he asked defendants to give him a price on the balance of their herd at Greenfield, as a friend thought of buying some, and received a letter dated May 17, 1886, in which they named the price of five cattle, including Lucy at $90, and Rose 2d at $80. When he received the letter he called defendants up by telephone, and asked them why they put Rose 2d in the list, as he had already purchased her. They replied that they knew he had, but thought it would make no difference if plaintiff and his friend concluded to take the whole herd.

[¶5] The foregoing is the substance of all the testimony in the case.

[¶6] The circuit judge instructed the jury that if they believed the defendants, when they sent the order and letter to plaintiff, meant to pass the title to the cow, and that the cow was intended to be delivered to plaintiff, it did not matter whether the cow was weighed at any particular place, or by any particular person; and if the cow was weighed afterwards, as Sherwood testified, such weighing would be a sufficient compliance with the order; if they believed that defendants intended to pass the title by the writing, it did not matter whether the cow was weighed before or after suit brought, and the plaintiff would be entitled to recover. The defendants submitted a number of requests, which were refused. The substance of them was that the cow was never delivered to plaintiff, and the title to her did not pass by the letter and order; and that under the contract, as evidenced by these writings, the title did not pass until the cow was weighed and her price thereby determined; and that, if the defendants only agreed to sell a cow that would not breed, then the barrenness of the cow was a condition precedent to passing title, and plaintiff cannot recover. The court also charged the jury that it was immaterial whether the cow was with calf or not. It will therefore be seen that the defendants claim that, as a matter of law, the title to this cow did not pass, and that the circuit judge erred in submitting the case to the jury, to be determined by them, upon the intent of the parties as to whether or not the title passed with the sending of the letter and order by the defendants to the plaintiff. * * * *

[¶7] It appears from the record that both parties supposed this cow was barren and would not breed, and she was sold by the pound for an insignificant sum as compared with her real value if a breeder. She was evidently sold and purchased on the relation of her value for beef, unless the plaintiff had learned of her true condition, and concealed such knowledge from the defendants. Before the plaintiff secured possession of the animal, the defendants learned that she was with calf, and therefore of great value, and undertook to rescind the sale by refusing to deliver her. The question arises whether they had a right to do so. The circuit judge ruled that this fact did not avoid the sale, and it made no difference whether she was barren or not. I am of the opinion that the court erred in this holding. I know that this is a close question, and the dividing line between the adjudicated cases is not easily discerned. But it must be considered as well settled that a party who has given an apparent consent to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded, or the contract made, upon the mistake of a material fact,—such as the subject-matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual, 1 Benj. Sales, §§ 605, 606; Leake, Cont. 339; Story, Sales (4th ed.), §§ 148, 377. See, also, *Cutts v. Guild*, 57 H. Y. 229; *Harvey v. Harris*, 112 Mass. 32; *Gardner v. Lane*, 9 Allen, 492; S. C. 12 Allen, 44; *Huthmacher v. Harris' Adm'rs*, 38 Penn. St. 491; *Byers v. Chapin*, 28 Ohio St. 300; *Gibson v. Pelkie*, 37 Mich. 380, and cases cited; *Allen v. Hammond*, 11 Pet. 63, 71.

[¶8] If there is a difference or misapprehension as to the substance of the thing bargained for, if the thing actually delivered or received is different in substance from the thing bargained for and intended to be sold, then there is no contract; but if it be only a difference in some quality or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding. "The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole contract, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." *Kennedy v. Panama*, etc., Mail Co., L. E. 2 Q. B. 580, 588. It has been held, in accordance with the principles above stated, that where a horse is bought under the belief that he is sound, and both vendor and vendee honestly believe him to be sound, the purchaser must stand by his bargain, and pay the full price, unless there was a warranty.

[¶9] It seems to me, however, in the case made by this record, that the mistake or misapprehension of the parties went to the whole substance of the agreement. If the cow was a breeder, she was worth at least $750; if barren, she was worth not over $80. The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding, and of no use as a cow. It is true she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much difference between them for all purposes of use as there is between an ox and a cow that is capable of breeding and giving milk. If the mutual mistake had simply related to the fact whether she was with calf or not for one season, then it might have been a good sale; but the mistake affected the character of the animal for all time, and for her present and ultimate use. She was not in fact the animal, or the kind of animal, the defendants intended to sell or the plaintiff to buy. She was not a barren cow, and, if this fact had been known, there would have been no contract. The mistake affected the substance of the whole consideration, and it must be considered that there was no contract to sell or sale of the cow as she actually was. The thing sold and bought had in fact no existence. She was sold as a beef creature would be sold; she is in fact a breeding cow, and a valuable one. The court should have instructed the jury that if they found that the cow was sold, or contracted to be sold, upon the understanding of both parties that she was barren, and useless for the purpose of breeding, and that in fact she was not barren, but capable of breeding, then the defendants had a right to rescind, and to refuse to deliver, and the verdict should be in their favor.

[¶10] The judgment of the court below must be reversed, and a new trial granted, with costs of this Court to defendants.

CAMPBELL, C.J., and CHAMPLIN, J., concurred.

SHERWOOD, J. (dissenting).

[¶1] I do not concur in the opinion given by my brethren in this case. I think the judgments before the justice and at the circuit were right. * * * *

[¶2] As has already been stated by my brethren, the record shows that the plaintiff is a banker, and farmer as well, carrying on a farm, and raising the best breeds of stock, and lived in Plymouth, in the county of Wayne, 23 miles from Detroit; that the defendants lived in Detroit, and were also dealers in stock of the higher grades; that they had a farm at Walkerville, in Canada, and also one in Greenfield, in said county of Wayne, and upon these farms the defendants kept their stock. The Greenfield farm was about 15 miles from the plaintiff's. In the spring of 1886 the plaintiff, learning that the defendants had some "polled Angus cattle" for sale, was desirous of purchasing some of that breed, and, meeting the defendants, or some of them, at Walkerville, inquired about them, and was informed that they had none at Walkerville, "but had a few head left on their farm in Greenfield, and they asked the plaintiff to go and see them, stating that in all probability they were sterile and would not breed." In accordance with said request, the plaintiff, on the fifth day of May, went out and looked at the defendants' cattle at Greenfield, and found one called "Rose 2d," which he wished to purchase, and the terms were finally agreed upon at five and one-half cents per pound, live weight, 50 pounds to be deducted for shrinkage. The sale was in writing, and the defendants gave an order to the plaintiff directing the man in charge of the Greenfield farm to deliver the cow to plaintiff. This was done on the fifteenth of May. On the twenty-first of May plaintiff went to get his cow, and the defendants refused to let him have her; claiming at the time that the man in charge at the farm thought the cow was with calf, and, if such was the case, they would not sell her for the price agreed upon. The record further shows that the defendants, when they sold the cow, believed the cow was not with calf, and barren; that from what the plaintiff had been told by defendants (for it does not appear he had any other knowledge or facts from which he could form an opinion) he believed the cow was farrow, but still thought she could be made to breed. The foregoing shows the entire interview and treaty between the parties as to the sterility and qualities of the cow sold to the plaintiff. The cow had a calf in the month of October.

[¶3] There is no question but that the defendants sold the cow representing her of the breed and quality they believed the cow to be, and that the purchaser so understood it. And the buyer purchased her believing her to be of the breed represented by the sellers, and possessing all the qualities stated, and even more. He believed she would breed. There is no pretense that the plaintiff bought the cow for beef, and there is nothing in the record indicating that he would have bought her at all only that he thought she might be made to breed. Under the foregoing facts,—and these are all that are contained in the record material to the contract,—it is held that because it turned out that the plaintiff was more correct in his judgment as to one quality of the cow than the defendants, and a quality, too, which could not by any possibility be positively known at the time by either party to exist, the contract may be annulled by the defendants at their pleasure. I know of no law, and have not been referred to any, which will justify any such holding, and I think the circuit judge was right in his construction of the contract between the parties.

[¶4] It is claimed that a mutual mistake of a material fact was made by the parties when the contract of sale was made. There was no warranty in the case of the quality of the animal. When a mistaken fact is relied upon as ground for rescinding, such fact must not only exist at the time the contract is made, but must have been known to one or both of the parties. Where there is no warranty, there can be no mistake of fact when no such fact exists, or, if in existence, neither party knew of it, or could know of it; and that is precisely this case. If the owner of a Hambletonian horse had speeded him, and was only able to make him go a mile in three minutes, and should sell him to another, believing that was his greatest speed, for $300, when the purchaser believed he could go much faster, and made the purchase for that sum, and a few days thereafter, under more favorable circumstances, the horse was driven a mile in 2 min. 16 sec., and was found to be worth $20,000, I hardly think it would be held, either at law or in equity, by any one, that the seller in such case could rescind the contract. The same legal principles apply in each case.

[¶5] In this case neither party knew the actual quality and condition of this cow at the time of the sale. The defendants say, or rather said, to the plaintiff, "they had a few head left on their farm in Greenfield, and asked plaintiff to go and see them, stating to plaintiff that in all probability they were sterile and would not breed." Plaintiff did go as requested, and found there three cows, including the one purchased, with a bull. The cow had been exposed, but neither knew she was with calf or whether she would breed. The defendants thought she would not, but the plaintiff says that he thought she could be made to breed, but believed she was not with calf. The defendants sold the cow for what they believed her to be, and the plaintiff bought her as he believed she was, after the statements made by the defendants. No conditions whatever were attached to the terms of sale by either party. * * * *

Questions:

1. In *Allen v. Hammond*, 36 U.S. (11 Pet.) 63 (1837), a case cited by both the majority and the dissent, the court asked:

> Suppose a life-estate in land be sold, and at the time of the sale, the estate has terminated by the death of the person in whom the right vested; would not a court of equity relieve the purchaser? If the vendor knew of the death, relief would be given on the ground of fraud; if he did not know it, on the ground of mistake. * * * * If a horse be sold, which is dead, though believed to be living by both parties, can the purchaser be compelled to pay the consideration?"

The court thought not, under the doctrine of mutual mistake.

These cases fall into one category of mutual mistake—we might call them cases of present impossibility. In fact, there is no life estate or horse to sell, so the seller's performance is impossible at the time the contract is formed. Some jurisdictions actually have a doctrine called "present impossibility" that will also render a contract voidable.

2. In *Allen v. Hammond* itself, a ship was illegally captured by the Portuguese. Notice of the capture was given to Washington, D.C., but the ship and its cargo by that time had already been sold. This occurred in 1830. News of the capture took time to reach the ship's owner, Hammond. On January 27, 1832, Hammond hired Allen to petition for compensation with the federal government and the government of Portugal. Hammond agreed to pay Allen ten percent of the first $8,000 Hammond obtained and one-third of everything after that. At the time, Hammond and Allen didn't know that federal government agents had already complained to Portugal, which admitted a claim of $33,700 and paid one quarter of that. When Hammond learned this, he sued for a declaration that his contract with Allen was void. The court granted the declaration. This is another category of mutual mistake. The seller's performance is possible, here, because Allen could petition Portugal regarding the ship. But there would be no point to doing so. Allen's performance would be valueless to Hammond. We might call this a case of frustration of purpose. Some jurisdictions also have a doctrine called "present frustration of purpose" that will also render a contract voidable.

3. Does *Sherwood v. Walker* fit into these two categories?

4. Do you think *Sherwood* is correctly decided? Who should bear the risk of the mistake in this case? Is non-assumption of risk an element of mutual mistake? Most cases say it is. The court in *Robert v. Century Contractors, Inc.*, 592 S.E.2d 215, 219 (N.C. App. 2004) stated,

> Likewise, a party who assumed the risk of a mistaken fact cannot avoid a contract. *Id*.
>
> A party bears the risk of a mistake when
>
> > (a) the risk is allocated to him by agreement of the parties, or

> (b) he is aware, at the time the contract is made that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
> (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

Restatement (Second) Contracts, § 154 (1979) * * * *.

Did the purchaser of Rose 2d of Aberlone assume the risk of the mistake? Did the seller? Did any of the judges consider assumption of risk?

5. Suppose a farmer sells his farm to another farmer who discovers oil under the property before closing. (By *closing* I mean the actual transfer of the deed for the farm, on the one hand, and the money used to buy it, on the other.) Can the first farmer sue to rescind the sale on the basis of mutual mistake, do you think?

6. In *Lenawee County Bd. of Health v. Messerly*, 331 N.W.2d 203 (Mich. 1982), the Michigan Supreme Court limited *Sherwood* "to its facts," which more or less takes away all of its precedential value but does not overrule the case.

7. Is *Sherwood* tedious to read? Why?

8. Would applying the test in *Sherwood* to the facts of *Chandelor* change the result?

Note: Consideration, Fairness of Exchange, and How Contract Breach Litigation Works

Now that we have studied duress and mutual mistake, you can begin to understand the courts' hands-off approach to consideration—that a court does not judge consideration's "adequacy" and why that is necessary even while the court later looks at the exchange's fairness under other doctrines. The key lies in your recognition that consideration is an element of the plaintiff's prima facie case; it is something only the plaintiff proves.

"A plaintiff asserting a breach-of-contract claim must prove (1) the existence of a valid contract . . . ." *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 502 n.21 (Tex. 2018). If the plaintiff's complaint does not allege that, or if no evidence supports that existence of a contract against the defendant's motion for summary judgment, then the plaintiff's case is dismissed.

How does the plaintiff allege or prove "the existence of a valid contract"? By alleging and offering evidence of each of the elements of a contract that we are studying: "competent parties, legal subject-matter, valuable consideration, and mutual assent," as well as definiteness or specificity. *See Intro* to this book, page

xvi. Alleging those things, any performance due from the plaintiff, and breach gets the plaintiff into court.

The court must therefore be able to make a judgment about consideration when it has before it only the plaintiff's allegations. The court does this, for example, when the defendant moves to dismiss before answering the complaint. The court also does this when deciding whether to grant relief to the plaintiff when the defendant never shows up in court; in such a case, the court with jurisdiction can issue a judgment against the defendant (called a "default judgment") if the plaintiff's prima facie case is alleged and proved.

Because consideration is an element of the plaintiff's prima facie case, it must be provable on evidence that only the plaintiff would have and would offer. A plausible exchange—consideration—is just that sort of thing. The plaintiff can show the court the exchange.

But no one should expect *the plaintiff* to show that the exchange was unfair. That is defendant's evidence. It is evidence only the defendant has an incentive to show, and much of the time only the defendant would have access to evidence showing unfairness. So when the defendant answers, the defendant alleges doctrines that show that the bargain was unfair—duress, mistake, misrepresentation, unconscionability. These are defenses that the defendant raises by name. After the court has before it evidence from both the plaintiff and defendant regarding unfairness (the bargain and a defense), the court is free to consider unfairness, and the defenses are the tools to address that issue.

Given the way contract litigation works, then, the law is not conflicted when it says it will not consider the adequacy of consideration but will consider whether a threat is improper in part because "the resulting exchange is not on fair terms." R2K § 176(2). Unconscionability, when you get to it, is even more intrusive, and many courts under that doctrine will unwind a contract because the terms unreasonably favor one party. But that does not mean that contract law is contradictory; it merely means that the law is practical and requires judges to make important calls only when the proper evidence is introduced at the appropriate stage of litigation.

D. Unilateral Mistake

FIRST BAPTIST CHURCH OF MOULTRIE v. BARBER CONTRACTING COMPANY et al.
BARBER CONTRACTING COMPANY v. FIRST BAPTIST CHURCH OF MOULTRIE
(Jan. 9, 1989)
Court of Appeals of Georgia
377 S.E.2d 717

McMURRAY, Presiding Judge.

[¶1] The First Baptist Church of Moultrie, Georgia, invited bids for the construction of a music, education and recreation building. The bids were to be opened on May 15, 1986. They were to be accompanied by a bid bond in the amount of 5 percent of the base bid. The bidding instructions provided, in pertinent part: "Negligence on the part of the bidder in preparing the bid confers no right for the withdrawal of the bid after it has been opened."

[¶2] Barber Contracting Company ("Barber") submitted a bid for the project in the amount of $1,860,000. The bid provided, in pertinent part: "For and in consideration of the sum of $1.00, the receipt of which is hereby acknowledged, the undersigned agrees that this proposal may not be revoked or withdrawn after the time set for the opening of bids but shall remain open for acceptance for a period of thirty-five (35) days following such time." The bid also provided that if it was accepted within 35 days of the opening of bids, Barber would execute a contract for the construction of the project within 10 days of the acceptance of the bid.

[¶3] A bid bond in the amount of 5 percent of Barber's bid ($93,000) was issued by The American Insurance Company to cover Barber's bid. With regard to the bid bond, the bid submitted by Barber provided: "If this proposal is accepted within thirty-five (35) days after the date set for the opening of bids and the undersigned [Barber] fails to execute the contract within ten (10) days after written notice of such acceptance ... the obligation of the bid bond will remain in full force and effect and the money payable thereon shall be paid into the funds of the Owner as liquidated damages for such failure ..."

[¶4] The bids were opened by the church on May 15, 1986, as planned. Barber submitted the lowest bid. The second lowest bid, in the amount of $1,975,000 was submitted by H & H Construction and Supply Company, Inc. ("H & H").

[¶5] Barber's president, Albert W. Barber was present when the bids were opened, and of course, he was informed that Barber was the low bidder. Members of the church building committee informally asked President Barber if changes could be made in the contract to reduce the amount of the bid. He replied that he was sure such changes could be made.

[¶6] On May 16, 1986, Albert W. Barber informed the architect for the project, William Frank McCall, Jr., that the amount of the bid was in error—the bid should have been $143,120 higher. In Mr. Barber's words: "[T]he mistake in Barber's bid was caused by an error in totaling the material costs on page 3 of Barber's estimate work sheets. The subtotal of the material cost listed on that page is actually $137,990. The total listed on Barber's summary sheet for the material cost subtotal was $19,214. The net error in addition was $118,776. After adding in mark-ups for sales tax (4 percent), overhead and profit (15 percent), and bond procurement costs (.75 percent), the error was compounded to a total of $143,120 ..." The architect immediately telephoned Billy G. Fallin, co-chairman of the church building committee, and relayed the information which he received from President Barber.

[¶7] On May 20, 1986, Barber delivered letters to the architect and the church. In the letter to the architect, Barber enclosed copies of its estimate sheets and requested that it be permitted to withdraw its bid. In the letter to the church, Barber stated that it was withdrawing its bid on account of "an error in adding certain estimated material costs." In addition, Barber sought the return of the bid bond from the church.

[¶8] On May 29, 1986, the church forwarded a construction contract, based upon Barber's bid, to Barber. The contract had been prepared by the architect and executed by the church. The next day, Barber returned the contract to the church without executing it. In so doing, Barber pointed out that its bid had been withdrawn previously.

[¶9] On July 25, 1986, the church entered into a construction contract for the project with H & H, the second lowest bidder. Through deletions and design changes, the church was able to secure a contract with H & H for $1,919,272.

[¶10] In the meantime, the church demanded that Barber and The American Insurance Company pay it $93,000 pursuant to the bid bond. The demand was refused.

[¶11] On May 26, 1987, the church brought suit against Barber and The American Insurance Company seeking to recover the amount of the bid bond. Answering the complaint, defendants denied they were liable to plaintiff.

[¶12] Thereafter, defendants moved for summary judgment and so did the plaintiff. In support of their summary judgment motions, defendants submitted the affidavit of Albert W. Barber. He averred that in preparing its bid, Barber exercised the level of care ordinarily exercised by contractors submitting sealed bids. In support of its summary judgment motion, the church submitted the affidavit of a building contractor who averred that he would never submit a bid of any magnitude without obtaining assistance in verification and computation.

[¶13] The trial court denied the summary judgment motions, certified its rulings for immediate review and we granted these interlocutory appeals. Held:

[¶14] The question for decision is whether Barber was entitled to rescind its bid upon discovering that it was based upon a miscalculation or whether Barber should forfeit its bond because it refused to execute the contract following the acceptance of its bid by the church. We hold that Barber was entitled to rescind its bid.

[¶15] That equity will rescind a contract upon a unilateral mistake is a generally accepted principle. See Corbin on Contracts, § 609 (1960). As it is said: "Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake ... and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake." Restatement (2d) of Contracts, § 153 (1979).

[¶16] The following illustration demonstrates the rule: "In response to B's invitation for bids on the construction of a building according to stated specifications, A submits an offer to do the work for $150,000. A believes that this is the total of a column of figures, but he has made an error by inadvertently omitting a $50,000 item, and in fact the total is $200,000. B, having no reason to know of A's mistake, accepts A's bid. If A performs for $150,000, he will sustain a loss of $20,000 instead of making an expected profit of $30,000. If the court determines that enforcement of the contract would be unconscionable, it is voidable by A." Restatement (2d) of Contracts, § 153 (1979) (Illustration 1).

[¶17] Corbin explains: "Suppose ... a bidding contractor makes an offer to supply specified goods or to do specified work for a definitely named price, and that he was caused to name this price by an antecedent error of computation. If, before acceptance, the offeree knows, or has reason to know, that a material error has been made, he is seldom mean enough to accept; and if he does accept, the courts have no difficulty in throwing him out. He is not permitted `to snap up' such an offer and profit thereby. If, without knowledge of the mistake and before any revocation, he has accepted the offer, it is natural for him to feel a sense of disappointment at not getting a good bargain, when the offeror insists on withdrawal; but a just and reasonable man will not insist upon profiting by the other's mistake. There are now many decisions to the effect that if the error was a substantial one and notice is given before the other party has made such a change of position that he cannot be put substantially in status quo, the bargain is voidable and rescission will be decreed." Corbin on Contracts, § 609 (1960).

[¶18] Georgia law is no different. It provides for rescission and cancellation "upon the ground of mistake of fact material to the contract of one party only." OCGA § 23-2-31. The mistake must be an "unintentional act, or mission, or error arising from ignorance, surprise, imposition, or misplaced confidence." OCGA § 23-2-21 (a). But relief will be granted even in cases of negligence if the opposing party will not be prejudiced. OCGA § 23-2-32.

[¶19] We can see these principles at work in *M. J. McGough Co. v. Jane Lamb Memorial Hosp*., 302 F. Supp. 482 (SD Iowa 1969). In that case, a bid of $1,957,000 was submitted for a hospital improvement by a contractor. A bond in the amount of $100,000 was given to secure the contractor's bid. The contractor submitted the lowest bid. After the bids were opened, but before its bid was accepted, the contractor informed the hospital that it erroneously transcribed numbers in computing the bid and that, therefore, it underbid the project by $199,800. Nevertheless, the hospital tried to hold the contractor to its bid. When the contractor refused to execute a contract, the hospital awarded the contract to the next lowest bidder. The contractor and surety sought rescission of the bid and the return of the bond. The hospital sued the contractor and surety for damages. The district court allowed the contractor to rescind. Its decision is noteworthy and illuminating. We quote it at length:

> [¶a] "By the overwhelming weight of authority a contractor may be relieved from a unilateral mistake in his bid by rescission under the proper circumstances. See generally Annot., 52 ALR2d 792 (1957). The prerequisites for obtaining such relief are: (1) the mistake is of such consequence that enforcement would be unconscionable; (2) the mistake must relate to the substance of the consideration; (3) the mistake must have occurred regardless of the exercise of ordinary care; (4) it must be possible to place the other party in status quo. [Cits.] It is also generally required that the bidder give prompt notification of the mistake and his intention to withdraw. [Cits.] ...
>
> [¶b] "Applying the criteria for rescission for a unilateral mistake to the circumstances in this case, it is clear that [the contractor] and his surety ... are entitled to equitable relief. The notification of mistake was promptly made, and [the contractor] made every possible effort to explain the circumstances of the mistake to the authorities of [the hospital]. Although [the hospital] argues to the contrary, the Court finds that notification of the mistake was received before acceptance of the bid. The mere opening of the bids did not constitute the acceptance of the lowest bid ... Furthermore, it is generally held that acceptance prior to notification does not bar the right to equitable relief from a mistake in the bid. [Cits.]
>
> [¶c] "The mistake in this case was an honest error made in good faith. While a mistake in and of itself indicates some degree of lack of care or

negligence, under the circumstances here there was not such a lack of care as to bar relief....

[¶d] "The mistake here was a simple clerical error. To allow [the hospital] to take advantage of this mistake would be unconscionable. This is especially true in light of the fact that they had actual knowledge of the mistake before the acceptance of the bid. [Cits.] Nor can it be seriously contended that a $199,800 error, amounting to approximately 10 percent of the bid, does not relate directly to the substance of the consideration. Furthermore, [the hospital] has suffered no actual damage by the withdrawal of the bid of [the contractor]. The Hospital has lost only what it sought to gain by taking advantage of [the contractor's] mistake. [Cits.] Equitable considerations will not allow the recovery of the loss of bargain in this situation." *M. J. McGough Co. v. Jane Lamb Memorial Hosp.*, 302 F. Supp. 482, 485, 486, *supra*.

[¶20] In the case sub judice, Barber, the contractor, promptly notified the plaintiff that a mistake was made in calculating the amount of the bid. The plaintiff had actual knowledge of the mistake before it forwarded a contract to Barber. The mistake was a "simple clerical error." *M. J. McGough Co. v. Jane Lamb Memorial Hosp.*, 302 F. Supp. 482, 485, *supra*. See OCGA § 23-2-21 (a). It did not amount to negligence preventing equitable relief. See OCGA § 23-2-32 (a). Furthermore, it was a mistake which was material to the contract (OCGA § 23-2-31)—it went to the substance of the consideration. (The mistake amounted to approximately seven percent of the bid.) To allow the plaintiff to take advantage of the mistake would not be just. *M. J. McGough Co. v. Jane Lamb Memorial Hosp.*, *supra* at 486. *See also Shelton & Co. v. Ellis*, 70 Ga. 297 (1883).

[¶21] The contention is made that Barber's miscalculation constituted negligence sufficient to prevent relief in equity. See OCGA § 23-2-32(a). Assuming, arguendo, that the error stemmed from such a want of prudence as to violate a legal duty (OCGA § 23-2-32 (a)), we must nevertheless conclude that Barber is entitled to rescission.

[¶22] Relief in equity "may be granted even in cases of negligence by the complainant if it appears that the other party has not been prejudiced thereby." OCGA § 23-2-32 (b). It cannot be said that plaintiff was prejudiced by Barber's rescission. After all, plaintiff "lost only what it sought to gain by taking advantage of [the contractor's] mistake." *M. J. McGough Co. v. Jane Lamb Memorial Hosp.*, *supra* at 486.

[¶23] The plaintiff takes the position that rescission is improper since, pursuant to the language set forth in the bid, Barber agreed not to withdraw the bid for a period of 35 days after the bids were opened. It also asserts that the language set forth in the bidding instructions prohibited Barber from withdrawing the bid on the ground of "negligence." We disagree. "[P]rovisions such as these have been considered many times in similar cases, and have never been held effective when equitable considerations dictate otherwise. [Cits.]" *M. J. McGough Co. v. Jane Lamb Memorial Hosp.*, 302 F. Supp. 482, 487, *supra*.

[¶24] The trial court properly denied the plaintiff's (the church's) motion for summary judgment. It erred in denying defendants' (Barber's and The American Insurance Company's) motions for summary judgment.

[¶25] Judgment affirmed in Case No. 77340; judgment reversed in Case No. 77341.

POPE and BENHAM, JJ., concur.

Question: In what ways is unilateral mistake doctrine different from mutual mistake doctrine?

E. Misrepresentation

<u>Misrepresentation Law</u>

Misrepresentation renders a contract voidable by the party relying on the misrepresentation.

A misrepresentation exists if
1) one party makes a false statement, or omission in breach of a duty to speak,
2) of a material fact (or an immaterial fact if the false statement is made with the intent to mislead),
3) on which the other party relies in entering the contract,
4) reasonably.

No duty to speak exists when the parties deal at arm's length and the underlying facts are reasonably within the knowledge of both parties. Under such circumstances, the other party is obliged to take reasonable steps to inform himself, and to protect his own interests. A duty to speak arises, however, when the omitting party is or should be aware of circumstances that would make an omission misleading.

C. Willard HENDRICK and Hazel E. Hendrick v. Catherine A. LYNN (1958)
Court of Chancery of Delaware, New Castle County
144 A. 2d 147

MARVEL, Vice Chancellor.

[¶1] Plaintiffs as buyers seek rescission of a consummated purchase and sale of real estate. Plaintiffs complain that sometime prior to July 30, 1956 defendant's home at 211 W. 38th Street in Wilmington was put up for sale, that on or about July 16 Miss Grace Ellingsworth, a realtor, arranged to show the premises in question to Mr. Hendrick and that on July 30, plaintiffs entered into a contract to buy the house. After completing the purchase plaintiffs entered into possession on September 10, 1956 and thereupon discovered the house to be infested with termites. The complaint alleges:

> "3. Although the subject premises was, on July 16, 1956, infested with termites and, although defendant knew that it was so infested since the termites had eaten through the hardwood floor between the living room and the sun room and defendant had covered the spot with a rug she fraudulently concealed this fact from Miss Ellingsworth and plaintiff, C. Willard Hendrick, for the purpose of inducing the plaintiffs to purchase the subject premises from her.
>
> "4. On or about Thursday, the 19th day of July, A.D. 1956, John Scott, representing the plaintiffs and Grace Ellingsworth, realtor, visited 211 West 38th Street and again went over the house with the defendant. The said Grace Ellingsworth, in the presence of John Scott, asked the defendant if there were any termites in the house. The defendant informed Mr. Scott and Miss Ellingsworth that there were none.
>
> * * * *
>
> "7. In truth and in fact, 211 West 38th Street was infested with termites which the defendant well knew, for on or about May 8, A.D. 1955, Miss Lynn telephoned a termite exterminator to come and inspect 211 West 38th Street and, on May 11, 1955, said inspection was made of the subject premises; termites were found, and the exterminator quoted defendant a price for exterminating same. Defendant ordered the work done, but on or about May 12, 1955, before the work had been started, she called the exterminator and cancelled the request for termite exterminating in the premises.
>
> "8. Defendant fraudulently represented that 211 West 38th Street was free of termites, where as in truth and in fact said premises were infested with termites.
>
> "9. The fraudulent representations made by defendant were made for the purpose of inducing the plaintiffs to purchase 211 West 38th Street from her and at the time said representations were known to be untrue, and the plaintiffs relied upon said representations as they were entitled to do to their injury and damage."

[¶2] Plaintiffs accordingly ask that their purchase of said house be rescinded taking the position that defendant's alleged statements go beyond those of inducement permitted under the maxim caveat emptor, as applied in *Wiest v. Garman*, 3 Del.Ch. 422, affirmed by the Court of Errors and Appeals, 4 Houst 119, 121.

[¶3] Having denied defendant's motion to dismiss and for summary judgment as well as plaintiffs' motion for summary judgment, this Court on October 11, 1957 directed that certain factual issues be framed for trial before a jury. Questions having been framed and submitted, the jury failed to agree on whether or not the premises in question were infested with termites in July 1956 or whether or not defendant believed there was termite infestation in her home. In answer to another question: "3 Did Miss Grace Ellingsworth, in the presence of Julian Scott, make any inquiry of Miss Lynn on July 19, 1956, concerning the existence of termites in the premises at 211 West 38th Street, Wilmington, Delaware?", the jury reached a negative verdict.

[¶4] Defendant on the basis of such verdict then moved for judgment in this Court. Plaintiff opposes such motion, contending that not only was the jury verdict merely advisory but that it was inconclusive as it left the issue of concealment undisposed of, citing *DeJoseph v. Zambelli*, Ct. of Common Pleas of Montgomery County, Pennsylvania, June Term, 1955.

[¶5] The jury having observed and weighed the testimony of witnesses who testified on the issue of misrepresentation, I adopt the jury's findings on such issue. To retry in this Court the facts on which the claim of misrepresentation is based would merely mean to test my own powers of evaluating the honesty of witnesses in a simple factual situation against those of a petit jury. I decline to do this.

[¶6] On the issue of concealment, on which the jury furnished no aid, and which must be tried if a cause of action has been stated, plaintiffs would have the Court adopt a moral code for vendor and purchaser which to date has no substantial legal sanction. In the case of *Swinton v. Whitinsville Savings Bank*, 311 Mass. 677, 42 N.E. 2d 808, 141 A.L.R. 965, the Supreme Judicial Court of Massachusetts held that allegations of non-disclosure by a vendor dealing at arms' length with a purchaser of the fact that the house there to be sold was infested with termites failed to state a cause of action. The Court stated:

> "If this defendant is liable on this declaration every seller is liable who fails to disclose any nonapparent defect known to him in the subject of the sale which materially reduces its value and which the buyer fails to discover. Similarly it would seem that every buyer would be liable who fails to disclose any nonapparent virtue known to him in the subject of the purchase which materially enhances its value and of which the seller is ignorant. See *Goodwin v. Agassiz*, 283 Mass. 358, 186 N.E. 659. The law has not yet, we believe, reached the point of imposing upon the frailties of

> human nature a standard so idealistic as this. That the particular case here stated by the plaintiff possesses a certain appeal to the moral sense is scarcely to be denied. Probably the reason is to be found in the facts that the infestation of buildings by termites has not been common in Massachusetts and constitutes a concealed risk against which buyers are off their guard. But the law cannot provide special rules for termites and can hardly attempt to determine liability according to the varying probabilities of the existence and discovery of different possible defects in the subjects of trade."

The ruling was followed in *Spencer v. Gabriel*, 328 Mass. 1, 101 N.E. 2d 369, and conforms with the rule of the Restatement of the Law, Contracts, Vol. 2, § 472, comment (b), p. 897, to the effect that, "A party entering into a bargain is not bound to tell everything he knows to the other party, even if he is aware that the other is ignorant of the facts; and unilateral mistake of itself, does not make a transaction voidable".

[¶7] In my opinion this rule of law applies to the case at bar, a case in which plaintiffs had full opportunity to inspect the premises which they later purchased. Inasmuch as plaintiffs have failed to prove misrepresentation and because their allegations as to concealment fail to state a cause of action, final judgment for defendant on plaintiffs' cause of action based on alleged misrepresentation and judgment of dismissal as to that portion of plaintiffs' claim based on concealment will be entered. * * * *

Order on notice.

Jeffrey M. STAMBOVSKY v. Helen V. ACKLEY and Ellis Realty (1991)
Supreme Court, Appellate Division, First Department, New York
572 N.Y.S.2d 672

RUBIN, Justice.

[¶1] Plaintiff, to his horror, discovered that the house he had recently contracted to purchase was widely reputed to be possessed by poltergeists, reportedly seen by defendant seller and members of her family on numerous occasions over the last nine years. Plaintiff promptly commenced this action seeking rescission of the contract of sale. Supreme Court reluctantly dismissed the complaint, holding that plaintiff has no remedy at law in this jurisdiction.

[¶2] The unusual facts of this case, as disclosed by the record, clearly warrant a grant of equitable relief to the buyer who, as a resident of New York City, cannot be expected to have any familiarity with the folklore of the Village of Nyack. Not being a "local", plaintiff could not readily learn that the home he had contracted to purchase is haunted. Whether the source of the spectral apparitions seen by defendant seller are parapsychic or psychogenic, having reported their presence in both a national publication (Readers' Digest) and the local press (in 1977 and 1982, respectively), defendant is estopped to deny their existence and, as a matter of law, the house is haunted. More to the point, however, no divination is required to conclude that it is defendant's promotional efforts in publicizing her close encounters with these spirits which fostered the home's reputation in the community. In 1989, the house was included in a five-home walking tour of Nyack and described in a November 27th newspaper article as "a riverfront Victorian (with ghost)." The impact of the reputation thus created goes to the very essence of the bargain between the parties, greatly impairing both the value of the property and its potential for resale. The extent of this impairment may be presumed for the purpose of reviewing the disposition of this motion to dismiss the cause of action for rescission (*Harris v City of New York*, 147 AD2d 186, 188–189) and represents merely an issue of fact for resolution at trial.

[¶3] While I agree with Supreme Court that the real estate broker, as agent for the seller, is under no duty to disclose to a potential buyer the phantasmal reputation of the premises and that, in his pursuit of a legal remedy for fraudulent misrepresentation against the seller, plaintiff hasn't a ghost of a chance, I am nevertheless moved by the spirit of equity to allow the buyer to seek rescission of the contract of sale and recovery of his down payment. New York law fails to recognize any remedy for damages incurred as a result of the seller's mere silence, applying instead the strict rule of caveat emptor. Therefore, the theoretical basis for granting relief, even under the extraordinary facts of this case, is elusive if not ephemeral.

[¶4] "Pity me not but lend thy serious hearing to what I shall unfold" (William Shakespeare, Hamlet, Act I, Scene V [Ghost]).

[¶5] From the perspective of a person in the position of plaintiff herein, a very practical problem arises with respect to the discovery of a paranormal phenomenon: "Who you gonna' call?" as a title song to the movie "Ghostbusters" asks. Applying the strict rule of caveat emptor to a contract involving a house possessed by poltergeists conjures up visions of a psychic or medium routinely accompanying the structural engineer and Terminix man on an inspection of every home subject to a contract of sale. It portends that the prudent attorney will establish an escrow account lest the subject of the transaction come back to haunt him and his client—or pray that his malpractice insurance coverage extends to supernatural disasters. In the interest of avoiding such untenable consequences, the notion that a haunting is a condition which can and should be ascertained upon reasonable inspection of the premises is a hobgoblin which should be exorcised from the body of legal precedent and laid quietly to rest.

[¶6] It has been suggested by a leading authority that the ancient rule which holds that mere nondisclosure does not constitute actionable misrepresentation "finds proper application in cases where the fact undisclosed is patent, or the plaintiff has equal opportunities for obtaining information which he may be expected to utilize, or the defendant has no reason to think that he is acting under any misapprehension" (Prosser, Torts § 106, at 696 [4th ed 1971]). However, with respect to transactions in real estate, New York adheres to the doctrine of caveat emptor and imposes no duty upon the vendor to disclose any information concerning the premises (*London v Courduff*, 141 AD2d 803) unless there is a confidential or fiduciary relationship between the parties (*Moser v Spizzirro*, 31 AD2d 537, *affd* 25 NY2d 941; *IBM Credit Fin. Corp. v Mazda Motor Mfg. [USA] Corp.*, 152 AD2d 451) or some conduct on the part of the seller which constitutes "active concealment" (*see*, *17 E. 80th Realty Corp. v 68th Assocs.*, AD2d [1st Dept, May 9, 1991] [dummy ventilation system constructed by seller]; *Haberman v Greenspan*, 82 Misc 2d 263 [foundation cracks covered by seller]). Normally, some affirmative misrepresentation (*e.g.*, *Tahini Invs. v Bobrowsky*, 99 AD2d 489 [industrial waste on land allegedly used only as farm]; *Jansen v Kelly*, 11 AD2d 587 [land containing valuable minerals allegedly acquired for use as campsite]) or partial disclosure (*Junius Constr. Corp. v Cohen*, 257 NY 393 [existence of third unopened street concealed]; *Noved Realty Corp. v A. A. P. Co.*, 250 App Div 1 [escrow agreements securing lien concealed]) is required to impose upon the seller a duty to communicate undisclosed conditions affecting the premises (*contra*, *Young v Keith*, 112 AD2d 625 [defective water and sewer systems concealed]).

[¶7] Caveat emptor is not so all-encompassing a doctrine of common law as to render every act of nondisclosure immune from redress, whether legal or equitable. "In regard to the necessity of giving information which has not been asked, the rule differs somewhat at law and in equity, and while the law courts would permit no recovery of *damages* against a vendor, because of mere concealment of facts *under certain circumstances*, yet if the vendee refused to complete the contract because of the concealment of a material fact on the part of the other, equity would refuse to compel him so to do, because equity only compels the specific performance of a contract which is fair and open, and in regard to which all material matters known to each have been communicated to the other" (*Rothmiller v Stein*, 143 NY 581, 591–592 [emphasis added]). Even as a principle of law, long before exceptions were embodied in statute law (*see*, *e.g.*, UCC 2-312, 2-313, 2-314, 2-315; 3-417 [2] [e]), the doctrine was held inapplicable to contagion among animals, adulteration of food, and insolvency of a maker of a promissory note and of a tenant substituted for another under a lease (*see*, *Rothmiller v Stein*, *supra*, at 592–593, and cases cited therein). Common law is not moribund. *Ex facto jus oritur* (law arises out of facts). Where fairness and common sense dictate that an exception should be created, the evolution of the law should not be stifled by rigid application of a legal maxim.

[¶8] The doctrine of caveat emptor requires that a buyer act prudently to assess the fitness and value of his purchase and operates to bar the purchaser who fails to exercise due care from seeking the equitable remedy of rescission (*see*, *e.g.*, *Rodas v Manitaras*, 159 AD2d 341). For the purposes of the instant motion to dismiss the action pursuant to CPLR 3211(a)(7), plaintiff is entitled to every favorable inference which may reasonably be drawn from the pleadings (*Arrington v New York Times Co.*, 55 NY2d 433, 442; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634), specifically, in this instance, that he met his obligation to conduct an inspection of the premises and a search of available public records with respect to title. It should be apparent, however, that the most meticulous inspection and the search would not reveal the presence of poltergeists at the premises or unearth the property's ghoulish reputation in the community. Therefore, there is no sound policy reason to deny plaintiff relief for failing to discover a state of affairs which the most prudent purchaser would not be expected to even contemplate (*see, Da Silva v Musso*, 53 NY2d 543, 551).

[¶9] The case law in this jurisdiction dealing with the duty of a vendor of real property to disclose information to the buyer is distinguishable from the matter under review. The most salient distinction is that existing cases invariably deal with the physical condition of the premises (*e.g., London v Courduff, supra* [use as a landfill]; *Perin v Mardine Realty Co.*, 5 AD2d 685, *affd* 6 NY2d 920 [sewer line crossing adjoining property without owner's consent]), defects in title (*e.g., Sands v Kissane*, 282 App Div 140 [remainderman]), liens against the property (*e.g., Noved Realty Corp. v A. A. P. Co., supra*), expenses or income (*e.g., Rodas v Manitaras, supra* [gross receipts]) and other factors affecting its operation. No case has been brought to this court's attention in which the property value was impaired as the result of the reputation created by information disseminated to the public by the seller (or, for that matter, as a result of possession by poltergeists).

[¶10] Where a condition which has been created by the seller materially impairs the value of the contract and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject transaction, nondisclosure constitutes a basis for rescission as a matter of equity. Any other outcome places upon the buyer not merely the obligation to exercise care in his purchase but rather to be omniscient with respect to any fact which may affect the bargain. No practical purpose is served by imposing such a burden upon a purchaser. To the contrary, it encourages predatory business practice and offends the principle that equity will suffer no wrong to be without a remedy.

[¶11] Defendant's contention that the contract of sale, particularly the merger or "as is" clause, bars recovery of the buyer's deposit is unavailing. Even an express disclaimer will not be given effect where the facts are peculiarly within the knowledge of the party invoking it (*Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 322, 184 N.Y.S.2d 599, 157 N.E.2d 597; *Tahini Invs., Ltd. v. Bobrowsky, supra*). Moreover, a fair reading of the merger clause reveals that it expressly disclaims only representations made with respect to the physical condition of the premises and merely makes general reference to representations concerning "any other matter or things affecting or relating to the aforesaid premises". As broad as this language may be, a reasonable interpretation is that its effect is limited to tangible or physical matters and does not extend to paranormal phenomena. Finally, if the language of the contract is to be construed as broadly as defendant urges to encompass the presence of poltergeists in the house, it cannot be said that she has delivered the premises "vacant" in accordance with her obligation under the provisions of the contract rider.

[¶12] To the extent New York law may be said to require something more than "mere concealment" to apply even the equitable remedy of rescission, the case of *Junius Constr. Corp. v Cohen* (257 NY 393, *supra*), while not precisely on point, provides some guidance. In that case, the seller disclosed that an official map indicated two as yet unopened streets which were planned for construction at the edges of the parcel. What was not disclosed was that the same map indicated a third street which, if opened, would divide the plot in half. The court held that, while the seller was under no duty to mention the planned streets at all, having undertaken to disclose two of them, he was obliged to reveal the third (*see also*, *Rosenschein v McNally*, 17 AD2d 834).

[¶13] In the case at bar, defendant seller deliberately fostered the public belief that her home was possessed. Having undertaken to inform the public-at-large, to whom she has no legal relationship, about the supernatural occurrences on her property, she may be said to owe no less a duty to her contract vendee. It has been remarked that the occasional modern cases which permit a seller to take unfair advantage of a buyer's ignorance so long as he is not actively misled are "singularly unappetizing" (Prosser, Torts § 106, at 696 [4th ed 1971]). Where, as here, the seller not only takes unfair advantage of the buyer's ignorance but has created and perpetuated a condition about which he is unlikely to even inquire, enforcement of the contract (in whole or in part) is offensive to the court's sense of equity. Application of the remedy of rescission, within the bounds of the narrow exception to the doctrine of caveat emptor set forth herein, is entirely appropriate to relieve the unwitting purchaser from the consequences of a most unnatural bargain.

[¶14] Accordingly, the judgment of the Supreme Court, New York County (Edward H. Lehner, J.), entered April 9, 1990, which dismissed the complaint pursuant to CPLR 3211 (a) (7), should be modified, on the law and the facts, and in the exercise of discretion, and the first cause of action seeking rescission of the contract reinstated, without costs. * * * *

[¶15] All concur except MILONAS, J.P. and SMITH, J., who dissent in an opinion by SMITH, J. [in which Smith argued for the application of caveat emptor].

Images of the house are easy to find online, if you are interested.

Question: The court in *Dana v. Hershey Co.*, 180 F. Supp. 3d 652 (N.D. Cal. 2016), held that Hershey did not have to disclose on its products that its supply chain includes chocolate produced in Ivory Coast using child and slave labor, a fact Hershey had acknowledged in a public statement. What's the difference between that case and this? *See also Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016 (N.D. Cal. 2016).

F. Unconscionability

Gloria JAMES v. NATIONAL FINANCIAL, LLC
Del. Ch. 2016, 132 A.3d 799

—LASTER, Vice Chancellor.

[¶1] Defendant National Financial, LLC ("National") is a consumer finance company that operates under the trade name Loan Till Payday. In May 2013, National loaned $200 to plaintiff Gloria James (the "Disputed Loan"). National described the loan product as a "Flex Pay Loan." * * * *

[¶2] The terms of the Disputed Loan called for James to make twenty-six, biweekly, interest-only payments of $60, followed by a twenty-seventh payment comprising both interest of $60 and the original principal of $200. The total repayments added up to $1,820, representing a cost of credit of $1,620. According to the loan document that National provided to James, the annual percentage rate ("APR") for the Disputed Loan was 838.45%.

[¶3] James defaulted. After National rejected her request for a workout agreement, she filed this action seeking to rescind the Disputed Loan. She proved at trial that the Disputed Loan was unconscionable, resulting in an order of rescission. * * * *

I. FACTUAL BACKGROUND * * * *

A. Hardworking But Poor

[¶4] James is a resident of Wilmington, Delaware. From 2007 through 2014, James worked in the housekeeping department at the Hotel DuPont. In May 2013, when she obtained the Disputed Loan, James earned $11.83 per hour. As a part-time employee, her hours varied. On average, after taxes, James took home approximately $1,100 per month.

[¶5] James' annualized earnings amounted to roughly 115% of the federal poverty line, placing her among what scholars call the working poor. Contrary to pernicious stereotypes of the poor as lazy, many work extremely hard. James exemplified this attribute. She got her first job at age thirteen and has been employed more or less continuously ever since. Her jobs have included stints in restaurants, at a gas station, as a dental assistant, as a store clerk, and at a metal plating company. In 2007, she obtained her position with the Hotel DuPont. She was laid off on December 31, 2014, when the hotel reduced its part-time staff.

B. James' Use Of Credit

[¶6] James is undereducated and financially unsophisticated. She dropped out of school in the tenth grade because of problems at home. Approximately ten years later, she obtained her GED.

[¶7] Around the same time she obtained her position with the Hotel DuPont, James attempted to improve her skills by enrolling in a nine-month course on medical billing and coding. For seven months, she worked from 8:00 a.m. to 4:00 p.m. at the hotel, then attended classes starting at 5:00 p.m. She was also taking care of her school-age daughter. Two months before the end of the program, the schedule became too much and she dropped out. James thought she received a grant to attend the program, but after dropping out she learned she actually had taken out a student loan. She eventually repaid it.

[¶8] James does not have a savings account or a checking account. She has no savings. She uses a Nexis card, which is a pre-paid VISA card.

[¶9] In May 2013, when she took out the Disputed Loan, James had been using high-interest, unsecured loans for four to five years. She obtained loans from several finance companies. She used the loans for essential needs, such as groceries or rent. On at least one occasion, she used a loan from one provider to pay off an outstanding loan from another provider.

[¶10] Before the Disputed Loan, James had obtained five prior loans from National. James believed that she repaid those loans in one or two payments. The payment history for the loans shows otherwise. [She normally repaid in four payments over two months.] * * * *

[¶11] For her fifth loan, James borrowed $200 on December 27, 2012, less than one week after repaying her fourth loan. James failed to make the second payment, failed to make the fourth payment, and finally repaid the loan two months later. Her [seven] repayments [over two months] totaled $393. * * * *

[¶12] Despite James' difficulty in repaying her fifth loan, National sent her text messages soliciting her interest in another loan. A text message on March 29, 2013, stated, "Loan Til [sic] Payday welcomes you with open arms. If you ever need a loan again we want to be your source!:)" A text message on April 5, 2013, stated, "Loan Til [sic] Payday misses you! Call NOW and receive $20 off your first payment."

C. The Disputed Loan

[¶13] On May 7, 2013, James needed money for food and rent. She went to National's “Loan Till Payday” storefront operation at * * *. At the time, National operated fourteen stores in Delaware.

[¶14] James dealt with Ed Reilly, National's general manager. In that capacity, Reilly oversaw National's business operations and supervised its loan approvals. He also filled in at stores from time to time. He happened to be working in the store * * * when James came in for a loan.

[¶15] James told Reilly that she wanted to borrow $200. Reilly looked up James in the computer program that National uses to track its customers and their loans, which is known as the “Payday Loan Manager.” It has a main page for each customer that provides identifying information[, loan status, current and past loans, payment history, and notes].

[¶16] James was a customer in good standing, meaning that she did not have to fill out a new loan application. She provided Reilly with her Nexis card, two recent paystubs, and her driver's license.

[¶17] Using the internet, Reilly pulled up James' Nexis card account history for the preceding sixty days and printed out a copy. It showed that James started the period with a positive balance on her card of $384.70. During the sixty days, she received direct deposit credits totaling $2,216.58 and incurred debits totaling $2,594.38, for negative cash flow of $377.80. Her ending balance was $6.90, and she had a pending authorization for that amount. Her available cash was zero.

[¶18] During the sixty day period, James' Nexis card was declined fourteen times. Reilly testified at trial that if someone's transaction history showed three or four declines, then they probably should not receive a loan.

[¶19] After reviewing her transaction history, Reilly offered to loan James $400 rather than $200. The $400 would have represented almost 40% of James' after-tax monthly income. Reilly offered that amount because National has a policy of loaning borrowers up to 40% of their after-tax monthly income, regardless of their other expenditures. National only checks to “make sure they're positive on payday.” * * * *

[¶20] James declined the offer of $400. She only wanted $200, and she did not believe she could repay $400.

[¶21] James thought she was getting a payday loan with a block rate of “$30 on $100.” As James understood it, this meant she would pay $60 to borrow the $200.

[¶22] Lenders developed the block rate concept to describe the finance charge for a traditional payday loan, which was a single-payment loan designed to be repaid on the borrower's next payday. National's trade name—Loan Till Payday—embodies this concept. Because the loan was technically intended to be outstanding only for a single block of time, payday loan companies described the finance charge by identifying the dollar amount per $100 borrowed that the customer would owe at the end of the period. A block rate of "$30 on $100" meant that a customer who borrowed $100 would repay $130 on her next payday.

[¶23] In May 2013, when James approached National for a $200 loan, National was no longer making traditional payday loans. Effective January 1, 2013, the General Assembly amended Delaware's statutory framework for closed-end consumer credit to impose limits on payday loans. * * * *

[¶24] In response to the Payday Loan Law, National recast its payday loans as non-amortizing installment loans that were structured to remain outstanding for seven to twelve months. The Payday Loan Law only applied to loans designed to be outstanding for sixty days or less, so by making this change, National sidestepped the law. Throughout this litigation, National insisted that it no longer made payday loans.

[¶25] Despite shifting to longer-dated installment loans, National continued to frame its finance charges using a block rate. National adhered to this practice for a simple reason: It made a high cost loan product sound cheaper than it was. On an annualized basis, a customer who repays $100 by making an interest-only payment of $30 every two weeks followed by $130 at the end of a year pays $810 in interest for an annualized rate of 838%. By framing the interest as a block rate, National's employees could tell customers that the interest rate was 30%. Although National's customers eventually saw an APR on the loan agreement, National's employees followed a practice of telling customers that the APR had "nothing to do with the loan." Tr. 335 (Carter). As National pitched it, the APR was "irrelevant" unless the customer kept the loan outstanding for an entire year; if the customer only planned to keep the loan outstanding for a few weeks, National's employees said that the APR "means nothing."[3]

[Footnote 3: It is true that the APR calculation changes depending on when the customer repays the loan, but the APR for a block rate of "$30 on $100" remains high. James originally planned to repay her loan in two payments of $130. Had she done so, the APR would have been 630.3272%.

As National learned the hard way, it is difficult to convert a block rate into an accurate APR. During 2013, the Delaware State Banking Commissioner questioned the accuracy of the APRs in National's loan agreements. After several audits, National changed how it calculates interest on its loan products. Effective January 1, 2014, National no longer uses a block rate. During each payment period, National instead charges simple interest at a

> rate of either 1% or 2% daily, depending on whether the payment period is two weeks or one month. At the end of each payment period, the amount of interest is totaled and either paid by the borrower or added to the loan balance. Using the banking conventions of a 30-day month and a 360-day year, the economic substance of 2% simple interest per day is the same as the block rate: $30 per $100 borrowed. National employees now call its products “1 percent loans” and “2 percent loans.”]

[¶26] When James obtained the Disputed Loan, she focused on the block rate and the concept of $30 in interest per $100 borrowed, just as National intended. She thought she would have to pay back $260. She told Reilly that she would repay the loan in two payments of $130 each. She planned to pay $130 on her next payday of May 17, 2013, and another $130 on May 31.

[¶27] James told Reilly that she wanted to make her payments in cash and that she did not want to have her Nexis card debited. James viewed this as important because she knew from past experience that she could incur additional charges if a lender debited her account when there were insufficient funds to make a payment, particularly if the lender attempted to debit her account multiple times. Reilly entered a note in the Payday Loan Manager reflecting that James did not want to have electronic debits from her account. The note stated “No ACH debits,” using the abbreviation for the automated clearinghouse for electronic payments operated by the Federal Reserve and the National Automated Clearing House Association. He entered another comment stating, “Customer wants to walk in cash payments.”

[¶28] Reilly also entered a note in the Payday Loan Manager reflecting James' plan to repay the loan in two payments. But Reilly's note contemplated different payments than what James understood she would be making. Reilly recorded that James would make one payment of $150 on May 17 and a second payment of $143 on May 31. Reilly's note thus had James repaying $293. James thought she was repaying $260.

[¶29] Reilly printed out a copy of National's standard form loan document and showed James where to sign. The loan document was titled “Delaware Consumer Installment Loan Agreement.” JX 19 at 1 (the “Loan Agreement”). In a box labeled “Type of Contract,” it said “FlexPay.” The repayment schedule did not reflect either the two repayments that James wanted to make or the two repayments that Reilly entered in the Payday Loan Manager. The Loan Agreement instead contemplated twenty-six interest-only payments of $60 each, followed by a balloon payment comprising a twenty-seventh interest payment of $60 plus repayment of the original $200 in principal. The total amount of interest was $1,620. According to the Loan Agreement, the APR for the loan was 838.45%. Using Reilly's planned repayment schedule, the APR was 1,095%.

[¶30] James signed the Loan Agreement, and Reilly gave her a check. From the time James walked into the store, the whole process took about twenty minutes.

D. James Cannot Repay The Loan.

[[¶31] The next day, James broke her hand at work. She missed a week of work normally paid per hour and then asked if she could return to work so that she could be paid. Her supervisor agreed James could return for 2-3 days per week.

[¶32] On May 17, James went to Loan Till Payday and made the first interest payment of $60. She explained to Vasquez, the manager, that she had broken her hand and could not work. She asked for an accommodation. He told her she would have to make the scheduled payments and suggested she pay more, $75. At trial, Vasquez tried to suggest that paying more would help James pay down principal, but James had the right to pre-pay principal at any time and could barely pay $60.]

[¶33] Vazquez also testified [as an explanation] that he wanted James to make payments to “keep[] her active, not past due, so she was still in good standing with our company and able to get loans with us in the future.” Tr. 257 (Vazquez). Yet Vazquez testified later that if a customer missed a payment, then National would stop charging interest and only add a late fee of 5%. This meant that Vazquez proposed an arrangement that kept interest accruing, whereas if James had defaulted, then interest would have stopped and she only would have owed a $3 late fee.

[¶34] At bottom, Vazquez refused to lower James' payments or give her any kind of accommodation. His proposals tried to get National more money and faster.

E. James Defaults.

[¶35] On May 31, 2013, National attempted on four separate occasions to debit James' Nexis account for $60. Each time, the debit was declined. At trial, Vazquez justified the debits by distinguishing between an electronic debit from a Nexis card and an ACH withdrawal from a bank account. Vazquez claimed that James only told National not to make ACH withdrawals. * * * *

[¶36] On June 3, 2013, National tried twice more to debit James' Nexis card, each time for $60. Both debits were declined. On June 7, National tried twice more. At that point, the attempted debits were for $63, which included a $3 late fee. Both were declined.

[¶37] On June 8, 2013, an unidentified National employee called James at the Hotel DuPont and left a message with her employer. National also sent her a “Collection Text” stating, “Gloria, to avoid further occurrences on your account, you must call Tracey, at Loan Till Payday.”

[¶38] On June 13, 2013, an unidentified National employee again called James at the Hotel DuPont and left a message with her employer. That same day, National successfully made an ACH withdrawal of $63, comprising $60 in interest plus a $3 late fee. Recall that James had told National not to make electronic withdrawals, and that Reilly had entered a note on the account stating "No ACH debits." Recall also that National justified debiting her Nexis card on the theory that a debit was different than an ACH withdrawal. At this point, however, National made an ACH withdrawal.

[¶39] On June 14, 2013, the notes in the Payday Loan Manager indicate that an unidentified National representative spoke with James. On June 27, National debited her Nexis account for $75. National also sent James an automated text: "Refer a friend and get $20 credit on your next payment! Call now! Loan Till Payday."

F. James Hires Counsel And Files Suit In Federal Court.

[[¶40] James then contacted counsel, who sent a letter to National opting out of arbitration. James then filed suit in federal court.]

[¶41] Tim McFeeters is the sole owner of National. On July 8, 2013, after being served with the federal action, he entered a note in the Payday Loan Manager: "DONT WORK DONT CALL DONT TAKE ANY $$$." JX 29B at 662.

[¶42] As of July 8, 2013, James had repaid National $197. She has not made any payments on the Disputed Loan since then.

G. This Litigation

[¶43] On September 20, 2013, after voluntarily dismissing her federal action, James filed this lawsuit on behalf of herself and other similarly situated borrowers. Count I of the complaint sought a permanent injunction barring National from collecting on the loans made to James and other class members. Count II sought a declaration that the terms of National's loan documents were unconscionable. * * * *

[[¶44] National admitted in federal court that it had no right to arbitrate, but in state court National moved for arbitration. James moved for Rule 11 sanctions, which the court granted. During discovery, National tried its best not to reveal its practices; it produced misleading information. National also did not comply with a discovery order, resulting in a written decision imposing additional sanctions on National. The trial court later denied class certification, so the case proceeded to trial on James' claims alone.]

II. LEGAL ANALYSIS

[¶45] James proved at trial that the Loan Agreement was unconscionable, and the Disputed Loan is rescinded on that basis. * * * *

B. Unconscionability

[¶46] The doctrine of unconscionability stands as a limited exception to the law's broad support for freedom of contract. "Delaware courts seek to ensure freedom of contract and promote clarity in the law in order to facilitate commerce." e*v3, Inc. v. Lesh*, 114 A.3d 527, 530 n.3 (Del. 2014). * * * *

[¶47] But as with many areas of the law, there are countervailing principles that prevent an indisputably important and salutary doctrine from operating as a tyrannical absolute. One such ground is unconscionability, traditionally defined as a contract "such as no man in his senses and not under delusion would make on the one hand, and no honest or fair man would accept, on the other." *Tulowitzki v. Atl. Richfield Co.*, 396 A.2d 956, 960 (Del. 1978) (quotation marks and citation omitted). It would be difficult to improve on Chancellor Allen's incisive summary of the interplay between the core concept of contractual freedom and the residual protection against unconscionability:

> The right of competent persons to make contracts and thus privately to acquire rights and obligations is a basic part of our general liberty. * * * * But not every writing purporting to contain a promise or every document purporting to make a transfer will be given legal effect. * * * *
>
> . . . .
>
> It is a general rule, recited by courts for well over a century, that the adequacy or fairness of the consideration that adduces a promise or a transfer is not alone grounds for a court to refuse to enforce a promise or to give effect to a transfer. This rule, present in 17th and 18th century cases, achieved its greatest dignity in the jurisprudence of 19th century classical liberalism. Thus, the classical liberal's premise concerning the subjectivity (and thus non-reviewability) of value has plainly been a dominant view in our contract law for a very long time. . . . But as standard as that generalization is, it has not precluded courts, on occasion, from striking down contracts or transfers in which inadequacy of price is coupled with some circumstance that amounts to inequitable or oppressive conduct. That is, the "rule" that courts will not weigh consideration or assess the wisdom of bargains has not fully excluded the opposite proposition, that at some point, courts will do so even in the absence of actual fraud, duress or incapacity.

Ryan v. Weiner, 610 A.2d 1377, 1380-81 (Del. Ch. 1992) (Allen, C.) (citations and footnote omitted).

[¶48] In *Ryan*, Chancellor Allen delineated the history of the doctrine of unconscionability, describing it as "old when Justice Story summarized it in 1835" as part of his Commentaries on Equity Jurisprudence. *Id.* at 1381. After citing a range of cases from the twentieth century, Chancellor Allen observed that

> [s]tatutory developments over the last thirty years reflect an explicit legislative endorsement of this ancient equitable doctrine. The most important example of this mid-twentieth century codification is the unconscionability provision contained in Section 2-302 of the Uniform Commercial Code. That provision has, of course, been adopted in almost all of the states and applies to the sale of all goods.

Id. at 1383. Delaware's version of Section 2-302 states:

> (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.

6 Del. C. § 2-302. Although technically limited in scope to sales of goods, Delaware decisions have applied Section 2-302 more broadly.

[¶49] This estimable pedigree does not mean that the doctrine of unconscionability will be invoked freely. "Unconscionability is a concept that is used sparingly." *Ketler v. PFPA, LLC*, ___ A.3d ___, 2016 WL 192599, at *2 (Del. Jan. 15, 2016). Chancellor Allen's words again capture the essential point:

> The notion that a court can and will review contracts for fairness is apt for good reason to strike us as dangerous, subjecting negotiated bargains to the loosely constrained review of the judicial process. Perhaps for this reason, courts have evoked this doctrine with extreme reluctance and only when all of the facts suggest a level of unfairness that is unconscionable.

Ryan, 610 A.2d at 1381. A finding of unconscionability generally requires "the taking of an unfair advantage by one party over the other." *Tulowitzki*, 396 A.2d at 960 (quotation marks omitted). "A court must find that the party with superior bargaining power used it to take unfair advantage of his weaker counterpart." *Graham v. State Farm Mut. Auto. Inc. Co*., 565 A.2d 908, 912 (Del. 1989). "For a contract clause to be unconscionable, its terms must be so one-sided as to be oppressive." *Id.* (quotation marks and citation omitted).

[¶50] Whether a contract is unconscionable is determined at the time it was made. * * * * The outcome turns on "the totality of the circumstances." *Tulowitzki*, 396 A.2d at 962; see Restatement (Second) of Contracts § 208, cmt. a ("The determination that a contract or term is or is not unconscionable is made in light of its setting, purpose and effect.").

[¶51] This court has identified ten factors to guide the analysis of unconscionability. *See Fritz v. Nationwide Mut. Ins. Co.*, 1990 WL 186448 (Del. Ch. Nov. 26, 1990). In the language of the *Fritz* decision, they are:

> (1) The use of printed form or boilerplate contracts drawn skillfully by the party in the strongest economic position, which establish industry wide standards offered on a take it or leave it basis to the party in a weaker economic position[;]
>
> (2) a significant cost-price disparity or excessive price;
>
> (3) a denial of basic rights and remedies to a buyer of consumer goods[;]
>
> (4) the inclusion of penalty clauses;
>
> (5) the circumstances surrounding the execution of the contract, including its commercial setting, its purpose and actual effect[;]
>
> (6) the hiding of clauses which are disadvantageous to one party in a mass of fine print trivia or in places which are inconspicuous to the party signing the contract[;]
>
> (7) phrasing clauses in language that is incomprehensible to a layman or that divert his attention from the problems raised by them or the rights given up through them;
>
> (8) an overall imbalance in the obligations and rights imposed by the bargain;
>
> (9) exploitation of the underprivileged, unsophisticated, uneducated and the illiterate[;] and
>
> (10) inequality of bargaining or economic power.

Id. at *4-5 (citations omitted). Although this opinion uses the ten *Fritz* factors, it analyzes them in a different order and under two broader headings: substantive unconscionability and procedural unconscionability.

[¶52] The concept of substantive unconscionability tests the substance of the exchange. An agreement is substantively unconscionable if the terms evidence a gross imbalance that "shocks the conscience." *Coles v. Trecothick*, 32 Eng. Rep. 592, 597 (Ch. 1804). In more modern terms, it means a bargain on terms "so extreme as to appear unconscionable according to the mores and business practices of the time and place." *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965) (quoting 1 Arthur L. Corbin, Corbin on Contracts § 128 (1963)).

[¶53] The concept of procedural unconscionability examines the procedures that led to the contract with the goal of evaluating whether seemingly lopsided terms might have resulted from arms'-length bargaining. Courts focus on the relative bargaining strength of the parties and whether the weaker party could make a meaningful choice. The concept is "broadly conceived to encompass not only the employment of sharp bargaining practices and the use of fine print and convoluted language, but a lack of understanding and an inequity of bargaining power." 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, at 583-84 (3d ed. 2004) (footnotes omitted).

[¶54] The two dimensions of unconscionability do not function as separate elements of a two prong test. The analysis is unitary, and "it is generally agreed that if more of one is present, then less of the other is required." *Id.* § 4.28, at 585.

1. Factors Relating To Substantive Unconscionability

[¶55] Six of the *Fritz* factors relate to the concept of substantive unconscionability. They are:

- A significant cost-price disparity or excessive price.
- The denial of basic rights and remedies.
- Penalty clauses.
- The placement of disadvantageous clauses in inconspicuous locations or among fine print trivia.
- The phrasing of disadvantageous clauses in confusing language or in a manner that obscures the problems they raise.
- An overall imbalance in the obligations and rights imposed by the bargain.

Within this lineup, the first factor tests for a threshold indication of fundamental unfairness. The second and third factors examine two types of contract terms where overreaching may occur. The fourth and fifth factors ask about other types of contract terms and whether they are adequately disclosed and comprehensible. The sixth factor examines the agreement as a whole.

a. A Threshold Indication Of Unfairness

[¶56] The first *Fritz* factor considers whether there is a threshold indication of unfairness, such as "a significant cost-price disparity or excessive price." *Fritz*, 1990 WL 186448, at *4. "[G]ross disparity between price and value can be used to demonstrate unconscionability." "Inadequacy of consideration does not of itself invalidate a bargain, but gross disparity in the values exchanged may be an important factor in a determination that a contract in unconscionable. . . ." Restatement (Second) of Contracts § 208, cmt. c. "Such a disparity may also corroborate indications of defects in the bargaining process. . . ." *Id.* * * * *

[¶57] In this case, there are obvious indications of unfairness. The Loan Agreement called for finance charges of $1,620 for a $200 loan, resulting in a disclosed APR of 838.45%. That level of pricing shocks the conscience. Even defenders of fringe credit have recognized that "[a]t first glance, it would seem irrational for any consumer to borrow money at an interest rate exceeding 400% under any circumstance." [National's expert Todd] Zywicki conceded that "to a layman in some sense, it just looks kind of shocking to see a price this high." More broadly, Zywicki and his co-authors admit in their recent book that the finance charges for fringe products "are indeed high when expressed in terms of [APR]." Consumer

Credit, *supra*, at 352. When making this observation, they cited APRs that "often exceed 100 percent." *Id.* The rate for the Disputed Loan was eight times that level.

[¶58] Zywicki recognized that the interest rate on the Disputed Loan was high in other ways as well. He testified that the APRs for unsecured consumer installment loans generally cluster around 150%. Unlike the Disputed Loan, consumer installment loans "are amortized with part of each payment repaying principal so that the loan is paid in full by the last scheduled payment." Consumer Credit, *supra*, at 355. The Disputed Loan was a twenty-six period interest-only loan culminating in a balloon payment at the year mark.

[¶59] The rate charged for the Disputed Loan exceeded even the rates charged for traditional payday loans. Zywicki testified that the industry average for payday loans is a block rate of $15 per $100, half what National charged. Tr. 589-90, 594 (Zywicki). Other sources cite similar figures. The rate for the Disputed Loan also far exceeded what Zywicki and his co-authors report as typical rates for other fringe products.

[¶60] National's efforts to explain the cost of the Disputed Loan were unconvincing. McFeeters would not say what would be an excessive price for a loan. He only would say, "I follow the state laws, and that's what I follow." Tr. at 435 (McFeeters). Delaware does not impose any cap on interest rates, so McFeeters effectively was saying that no price is too high.

[¶61] Zywicki advanced two types of arguments to explain the price of the Disputed Loan. First, he contended that an APR of 838% could, in theory, result from a competitive market. Second, he argued that there could be situations where it would be rational for a consumer to use a high-interest credit product.

i. Arguments About Market Pricing

[¶62] To support his claim about market pricing, Zywicki cited academic studies which have observed that some features of the alternative financial product market are consistent with meaningful price competition, such as low barriers to entry and a large number of stores. Like many aspects of the industry, however, evidence on this issue is mixed, and other researchers have identified evidence consistent with a variety of strategic pricing practices. Importantly for this case, Zywicki did not conduct any analysis of the Disputed Loan itself, nor did he assess the competitiveness of the Wilmington market. At the same time, he admitted that prices in Wilmington were higher than the ranges he expected. He also recognized that consumers who use fringe products generally lack meaningful alternatives.

[¶63] In a variant of his market pricing argument, Zywicki contended that the price of the Disputed Loan should not be viewed as excessive unless National was able to generate supra-normal economic profits, which he equated with monopoly rents. Zywicki emphasized one study that has questioned whether payday loan companies generate supra-normal economic profits. The broader evidence is again mixed, with the authors of a study on payday-loan profitability noting that "a recent private analysis for potential investors . . . asserts that a store set up for $30,000 will generate more than $258,000 in operating cash flow over its first five years of operation, which implies an extraordinary average annual pretax rate of return—around 170 percent—on the initial investment." Flannery & Samolyk, *supra*, at 4 (citation omitted). In their own study, the same authors found that "mature stores appear to earn quite healthy operating profits—on average $18.73 per loan made, or approximately $1.89 per average dollar of loans outstanding." *Id.* at 19. They declined to take a position on whether this level of returns could be described in the abstract as "high" or "reasonable." *Id.* Opponents of fringe products point to other indicators, such as marketing materials from payday loan franchisors that describe high profit levels and the rapid expansion of the industry, which suggests attractive returns. For purposes of this case, Zywicki again did not conduct any analysis specific to Wilmington or National, and he could not offer any opinion as to whether National enjoyed supra-normal profits.

[¶64] As a third basis for his market-pricing claim, Zywicki posited that high-interest loans are very costly to make, due in part to high default risk. He contended at trial that default rates "are usually in the range of 15, 20, to 25 percent." Tr. 505 (Zywicki). A study by the Pew Charitable Trust found that loan loss rates for payday loans are only 3%. See How Borrowers Repay, *supra*, at 6. Zywicki again did not do any analysis specific to this case. He did not analyze default rates in the Wilmington area, nor did he examine National's default rates.

Zywicki's opinion that an APR of 838% could, in theory, result from a competitive market was just that—a theoretical possibility. It was not a persuasive response to the facially shocking price of the Disputed Loan.

ii. Arguments About Hypothetically Rational Uses

[¶65] Zywicki's second explanation for the price of the Disputed Loan rested on the sensible claim that the price of a consumer product should be assessed, among other things, "by reference to the utility of the loan to the consumer." JX 46 at 43. This approach posits that there can be situations where it is rational and wealth-enhancing for consumers to use high-cost loans. Zywicki touched on these justifications at trial when he explained that consumers can use alternative credit products "to avoid what might kind of be bigger catastrophes like eviction and that sort of thing." Tr. 541 (Zywicki).

[¶66] In their book on consumer credit, Zywicki and his co-authors offer an expanded version of this argument which asserts that high-interest, small-dollar loans "can facilitate the accumulation of household assets even when they are not used directly to finance the household investment by enhancing overall liquidity, even at high cost." Consumer Credit, *supra*, at 369; accord Lawrence & Elliehausen, *supra*, at 302. They provide two examples of situations where it could be rational for a consumer to take out a $200 payday loan at a block rate of $15 per $100 (half the rate of the Disputed Loan).

[¶67] The simplest scenario involves a looming bill, such as a utility payment, where non-payment will trigger a late fee exceeding the finance charge for the loan. Assuming the borrower can repay the loan on schedule, the borrower does better by paying the lower finance charge rather than the higher late fee. A slightly more complex variant involves a late fee that may not exceed the finance charge, but where failing to pay the bill will generate other hardships, such as the loss of electricity for a period of time. Again assuming the borrower can repay the loan on schedule, the borrower does better by paying the finance charge and avoiding the combination of the late fee and the negative consequences. See Consumer Credit, *supra*, at 369.

[¶68] A second and more nuanced scenario posits a borrower who can use the loan proceeds to make a net-present-value-positive choice, such as repairing an automobile immediately instead of delaying the repair while saving the money to pay for it. To construct a viable example, Zywicki and his co-authors assume that until the repair is completed, the consumer will (i) pay fees for public transit and (ii) lose leisure time to commuting, which they value at the consumer's hourly wage. Depending on the assumptions, the model supports scenarios where it makes sense for the consumer to use a payday loan with a nominally high APR of 309% to repair the car sooner rather than later. See *id.* at 370-72.

[¶69] In each of these cases, the viability of using high-cost credit rationally depends on the consumer having a use for the funds which generates monetary and non-monetary returns that exceed the price of the loan. To their credit, the authors recognize that the ability of a consumer to overcome a high APR (309% in their model) depends largely on "the very short term to maturity" for a single-period payday loan. *Id.* at 371. They observe that "[t]his would not be the case for a long-term loan," and that "[e]xtended use of this sort of credit is where it becomes most highly controversial." *Id.* at 372.

[¶70] And there's the rub. The Disputed Loan was not structured as a short-term loan. It was a twelve-month, interest-only installment loan. The Disputed Loan also charged an interest rate that was more than double what Zywicki and his co-authors modeled (838% vs. 309%). Zywicki did not identify any scenarios in which it could be rational for a consumer to borrow on the terms contemplated by the Disputed Loan.

[¶71] Perhaps anticipating this disconnect, Zywicki attempted at trial to re-characterize the Disputed Loan as a short-term loan by pointing out that James had the option to prepay. The decision to prepay parallels the decision to pay a traditional payday loan on time. Consumer groups have modeled the likelihood that a typical user of high-cost credit will repay a traditional payday loan in a single period and avoid a cycle of long-term indebtedness. The Center for Responsible Lending provides the example of a borrower making $35,000 per year who obtains a payday loan for $200 plus a finance charge of $20. Assuming average levels of consumer expenditures for food, housing, utilities, transportation, healthcare, and other essentials, and excluding costs such as childcare and clothing, the borrower finishes the next pay period with a $96 deficit, forcing a loan rollover. See Borné et al., *supra*, at 8-9. The same report examines how a payday loan affects the account balance of a typical borrower on a fixed income, such as social security. It demonstrates that although the loan temporarily boosts the customer's bank balance, the combination of the balloon payment and fees makes the borrower worse off and necessitates another loan. A report by the Pew Charitable Trust concludes that

> the lump-sum repayment model appears to make it difficult for borrowers to avoid renewal. Pew's analysis of state and industry data indicates that borrowers are indebted for an average of about five months of the year. According to one study, 76 percent of these loans, including renewals, are borrowed within two weeks following an existing payday loan's due date, meaning the borrower could not pay back the loan and make it to the next payday without another loan. In addition, Pew's analysis of data from Oklahoma finds that more borrowers use at least 17 loans in a year than use just one.

Who Borrows, *supra*, at 7 (footnotes omitted). A follow-up study found that "[o]nly 14 percent of borrowers can afford enough of their monthly budgets to repay an average payday loan," although most could afford to pay the interest-only fee to roll over the loan. How Borrowers Repay, *supra*, at 6. The study observed that "[a]verage borrowers end up indebted for five months, paying $520 in finance charges for loans averaging $375."

[¶72] It may be that a consumer with the wherewithal to repay a high-cost loan after one period could rationally use some high-cost products in a wealth-enhancing way, but that thought experiment does not persuasively justify the pricing and terms of the Disputed Loan. The loan James obtained was a twenty-six period, interest-only loan followed by a twenty-seventh period balloon payment at an APR of 838%. As noted, Zywicki and his co-authors recognize that it is difficult to imagine a situation where it would make sense for a consumer to use a multi-period loan at the interest rates charged for payday loans. See Consumer Credit, *supra*, at 370-72. Zywicki's testimony about the hypothetically rational use of some high-cost credit products failed to legitimize the Disputed Loan's facially disturbing price.

iii. Fundamental Unfairness

[¶73] The economic terms of the Disputed Loan are so extreme as to suggest fundamental unfairness. The price of the Disputed Loan is particularly egregious given its multi-period, non-amortizing structure. The finance charges incurred over the course of the loan are so high that no rational borrower would agree to pay them, unless under duress or operating under a misapprehension of fact. The first *Fritz* factor is satisfied.

b. Contract Provisions Suggesting Unfairness

[¶74] The next four *Fritz* factors focus on contract provisions that can contribute to a finding of unfairness. They include provisions that deny or waive “basic rights and remedies,” “penalty clauses,” and “disadvantageous” clauses that are hidden or difficult to identify and understand. 1990 WL 186448, at *4. The more general question is whether the contract provisions evidence “[a]n overall imbalance in the obligations and rights imposed by the bargain.” *Id.* at *5. Specific provisions might not be unconscionable in isolation or under different circumstances, yet still may contribute to a finding of unconscionability in a given case.

[¶75] The Loan Agreement contains provisions that raise concerns, but they are not sufficiently onerous to support a finding of unconscionability standing alone. They contribute to the overall assessment of the Loan Agreement, but as a secondary factor. [The court here names in particular the arbitration clause and waiver of a jury trial.]

[¶76] The *Fritz* decision also calls for consideration of “disadvantageous” clauses that are “inconspicuous,” as well as “language that is incomprehensible to a layman” or seems designed to “divert his attention from the problems raised by them or the rights given up through them.” 1990 WL 186448, at *4. Two aspects of the Loan Agreement warrant mention.

[[¶77] Fifteen single-spaced paragraphs and subparagraphs in eight-point font give National the right to collect each periodic payment due from a checking or savings account specified in the loan documents (the right to make ACH withdrawals). The agreement also contained a "Credit Card Authorization" giving National the right to charge a credit card. "Despite this language, National does not accept credit cards." Anyway, James did not have a credit card but a debit card, and she had no checking of savings account.]

[¶78] The inconsistent language in the Loan Agreement could easily confuse an unsophisticated customer like James. The difficulties with National's language had particular salience for this case, because when James obtained the Disputed Loan, she told Reilly that she did not want electronic withdrawals made from her account. Reilly made two notes in the Payday Loan Manager. One stated “No ACH debits,” and another stated, “Customer wants to walk in cash payments.” JX 29B at 659. Yet National debited James' Nexis card and made at least one ACH withdrawal from her Nexis account.

[¶79] James' instruction and National's acknowledgement catches National on the horns of a dilemma. To the extent that National's witnesses took a narrow and legalistic view at trial by arguing that James only opted out of ACH withdrawals and not debits from her Nexis card, then the same logic meant that James only granted "Credit Card Authorization," not debit card authorization. To the extent that National's witnesses argued broadly at trial that the "Credit Card Authorization" encompassed all types of electronic withdrawals, then James' insistence that she did not want ACH withdrawals should have been sufficient to opt out. In neither case did National get the authorization it needed to debit James' account.

[[¶80] Worse still, the actual terms of the agreement make opting out of the ACH withdrawal provisions very difficult. The agreement claims that the borrower can opt out only by manually crossing out all ACH authorization language in the agreement. But the formal authorization actually appears only later in the "Credit Card Authorization," which itself makes no reference to "ACH."

[¶81] If the customer authorized ACH transfers but later wanted to stop them, the agreement provided that this could only be done by calling a specific number of by writing to a specific address and "specifying which authorization" the borrower wanted to terminate. Even after a phone call, the authorization would remain in effect until written notification was received. McFeeters insisted on full compliance with this clause.]

[¶82] The Loan Agreement skews the ACH withdrawal provisions in National's favor in another way as well: National can withdraw whatever amount it wants from a customer's account, up to the full amount of the outstanding loan plus fees and charges, without prior notice to the customer that a higher amount will be debited. * * * * National relied on this [language] to debit James' account for amounts greater than her scheduled payment, without prior notice to James. * * * *

[¶83] In my view, the provisions governing ACH withdrawals are "disadvantageous," drafted in "language that is incomprehensible to a layman," and appear designed to "divert [the customer's] attention from the problems raised by them or the rights given up through them." *Fritz*, 1990 WL 186448, at *4. As drafted and implemented, the ACH provisions support a finding of unconscionability. * * * *

[¶84] The final factor relating to the contract terms is whether the agreement evidences "[a]n overall imbalance in the obligations and rights imposed by the bargain." *Fritz*, 1990 WL 186448, at *5. Some insight into this factor can be gleaned from the degree to which the Loan Agreement devoted attention to particular subjects.

[¶85] The Loan Agreement covered six pages. Five contained substantive provisions. The sixth was a signature page. Of the five substantive pages, one full page of text (spanning most of page one and part of page two) created the most significant imbalance in the agreement: the financial terms. In return for a loan of $200, James agreed to repay National $1,820, structured as twenty-six non-amortizing, interest-only payments of $60 followed by a balloon payment of $260. Another full page (spanning part of page two and most of page three) detailed National's ability to make ACH withdrawals. A page and a half (spanning the bulk of page four and the bulk of page five) addressed the arbitration provision.

[¶86] In total, the Loan Agreement devoted nearly two-thirds of its contents to these three subjects, evidencing their importance to National. Through these provisions, National imposed onerous financial terms and gave itself the right to collect unilaterally from James any amount it wished, up to the full amount of the loan plus fees and charges. National ensured that in any challenge to the Disputed Loan, James would not be able to represent a class. She would have to challenge National alone, based on a loan where the amount in question would make the representation economically irrational for a lawyer unless he could recover his fees from National. Moreover, unless James opted out of the arbitration provision within sixty days—something that no customer other than James has ever done—then James would have to challenge the Disputed Loan in arbitration, which was National's chosen forum. Taken as a whole, for purposes of the *Fritz* factors, the Loan Agreement evidences “[a]n overall imbalance in the obligations and rights imposed by the bargain.” *Id.*

2. Factors Relating To Procedural Unconscionability

[¶87] The next four *Fritz* factors shed light on the concept of procedural unconscionability. They are:

- Inequality of bargaining or economic power.
- Exploitation of the underprivileged, unsophisticated, uneducated, and illiterate.
- The use of printed form or boilerplate contracts drawn skillfully by the party in the strongest economic position, which establish industry-wide standards offered on a take it or leave it basis to the party in a weaker economic position.
- The circumstances surrounding the execution of the contract, including its commercial setting, its purpose, and actual effect.

As I see it, these factors help a court test the degree to which a seemingly disproportionate outcome could have resulted from legitimate, arms'-length bargaining. The first and second factors plumb this issue by considering the extent to which the parties to the agreement were capable of bargaining at arms'-length. A court rarely will intervene when the contracting parties are both commercial entities or otherwise sophisticated. By contrast, a court may be more concerned where the contracting process involved significant inequalities of bargaining power, economic power, or sophistication, particularly between a business and a consumer. An aggravated version of this scenario arises when one of the parties is an individual who is underprivileged, uneducated, or illiterate.

[¶88] The third and fourth factors similarly contribute by examining the degree to which actual bargaining took place. The third factor considers whether the agreement is a contract of adhesion. The fourth factor takes into account the contracting environment, including the commercial setting and the purpose and effect of the disputed agreement.

[¶89] Together, these factors weigh an initial showing of unfairness against the bargaining dynamic. If the contract resulted from legitimate negotiation, then a court should not intervene. “There is a significant distinction between an unconscionable contract and a bad bargain.” *Obaitan v. State Farm*, 1997 WL 208959, at *3 (Del. Ch. Apr. 17, 1997). * * * * But if the contract appears fundamentally unfair and there are valid reasons to suspect that the outcome did not result from legitimate negotiation, then a different picture emerges.

a. The Attributes Of The Parties

[¶90] The first two factors that fall under the heading of procedural unconscionability examine the relative attributes of the parties and whether they were capable of bargaining. The first of the two factors examines whether there is an “inequality of bargaining or economic power.” *Fritz*, 1990 WL 186448, at *5. The second considers whether the contract involved “exploitation of the underprivileged, unsophisticated, uneducated and the illiterate.” *Id.* To my mind, the second is an aggravated version of the first.

[¶91] These factors do not mean that the law censures every power imbalance. To the contrary, “[a] bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party.” Restatement (Second) of Contracts § 208, cmt. d. After all, “bargaining power will rarely be equal.” * * * *

[¶92] “But gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, . . . may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.” Restatement (Second) of Contracts § 208, cmt. d. The inequality must be sufficiently great such that one side is placed at a meaningful disadvantage, and the court must find as part of its overall analysis that the stronger party used its position “to take unfair advantage of his weaker counterpart.” *Graham*, 565 A.2d at 912.

[¶93] * * * * [C]ourts are more willing to step in when a contract involves a business and a consumer. Delaware decisions also exhibit sensitivity to situations in which a sophisticated actor has taken advantage of someone who is underprivileged, unsophisticated, uneducated, or illiterate. In the *Ryan* decision, for example, Chancellor Allen recognized that a constellation of attributes such as poverty, financial distress, and lack of sophistication can make an individual vulnerable. *Ryan v. Weiner*, 610 A.2d 1377, 1385 (Del. Ch. 1992) (Allen, C.). He noted that although these disadvantages do not prevent a person from making a valid contract, they are factors that a court can take into account. See *id*.

[¶94] The Disputed Loan was a contract between a business and a consumer. It therefore falls within the category of contracts where courts are relatively more likely to invoke the unconscionability doctrine.

[¶95] More importantly, the Loan Agreement was a contract between (i) a specialized business addressing a target market of underprivileged, cash-constrained, and credit-rationed consumers, and (ii) an unsophisticated member of the target market. The Disputed Loan thus raises concerns about predatory lending. Indeed, the experts and the supporting literature on alternative financial services find rare agreement on two points. First, the consumers who use the products tend to be cash-constrained and credit-rationed, meaning that they have limited resources and few, if any, credit alternatives. Second, consumers typically use high-interest financial products for necessities, such as food, rent, utility bills, and mortgage payments, meaning that they face an urgent need for funds. Defenders and critics of high-interest products differ only in how they spin these facts. Defenders view fringe products as virtuous because they provide a form of credit, albeit at high cost, to consumers who otherwise would not have any. Critics charge that high-interest lenders take advantage of people in economic duress.

i. National

[¶96] National specializes in providing high interest loans to underprivileged consumers who are cash-constrained and lack alternative sources of credit. When McFeeters acquired National, he applied to have National's banking licenses renewed. See JX 4 (the “Licensing Application”). National disclosed in its Licensing Application that many of its customers “have had credit problems in the past or have reached the maximum limit on their bank cards.” *Id.* at 510; see Tr. 371-72 (McFeeters).

[¶97] National is a well-funded operation. The Licensing Application projected that National's business model would generate free cash flow of $1.5 million to $2 million per year. Its actual performance has been on the order of $1 million per year.

[¶98] National's owner and its personnel are sophisticated and knowledgeable. McFeeters acquired National after working in the payday loan industry for approximately ten years. In 2013, National had fourteen stores throughout Delaware, which it ran using a centralized model. At trial, National maintained that it had a manual setting out its policies and procedures. Tracey Annand, a District Manager at National, trained all of National's personnel. National employed legal counsel to draft its loan agreements.

[¶99] National's employees recognize that its customers have difficulty predicting how long their loans will be outstanding and virtually never estimate correctly when they will be able to repay their loans. Customers who believe they will have a loan outstanding typically end up keeping the loan for “a couple months.” See Tr. 341 (Carter).

ii. James

[¶100] James is unsophisticated and undereducated. She dropped out of school in the tenth grade, then obtained her GED approximately ten years later. She tried to improve her skills through a nine-month course on medical billing and coding, but she stopped two months short of graduation. Evidencing her lack of financial sophistication, she believed that the financial aid she received for the program was a grant. It was actually a loan that she struggled to pay back.

[¶101] Further evidence of James' lack of financial sophistication comes from her testimony about why she uses a pre-paid Nexis card. At trial, James explained that she previously had a checking account with PNC Bank but switched to her Nexis card because she did not like paying a monthly fee to maintain the checking account. Before making the Disputed Loan, National obtained a sixty-day transaction history for the Nexis account. It shows that during that period, James paid Nexis a total of $127.07 in transaction fees. Each time the Hotel DuPont paid James by direct deposit, Nexis charged her a load fee equal to 2% of the direct deposit amount. The load fees totaled $44.07. Each time James used her card to pay for a transaction and authorized it with her signature, Nexis charged her a signature transaction fee of $1. She signed for twelve transactions for total signature fees of $12. Each time James used her card to pay for a transaction and authorized it with her pin number, Nexis charged her a PIN transaction fee of $1.50. She completed thirteen PIN transactions for total PIN fees of $19.50. Each time, James attempted a transaction and her card was declined, Nexis charged her a decline fee of $0.50. Her card was declined fourteen times for total decline fees of $7. Each time she withdrew cash, Nexis charged her an ATM usage fee of $2.50. She withdrew cash on twenty-one occasions for total fees of $52.50. The amounts of the cash withdrawals suggest that the ATM provider also charged a withdrawal fee that was incorporated into the amount of the debit.

[¶102] James does not appear to have comprehended the magnitude of the per-transaction fees that Nexis charged her, or the reality that those fees far exceeded the flat monthly fee that a bank would charge for a no-minimum-balance checking account, particularly where the client had direct deposit. She seems only to have considered the headline fee charged for the account each month.

[¶103] James' perception of the financial charge for the Disputed Loan reflected a similar short-term focus. National contended James understood the block rate she would pay, which was $30 on $100. It is true that James could recite the block rate, but that does not mean she understood its implications. To the contrary, the evidence convinced me that National used a block rate and de-emphasized the APR to mislead its customers and make them think their cost of credit was an order of magnitude lower than it really was. James did not understand how interest accrued, and she did not understand what would happen upon default.

[¶104] James underestimated her likelihood of repaying the Disputed Loan quickly. She thought she could pay it off in two payments, but she failed to do so. She similarly mis-remembered her success in repaying previous loans. She thought she paid off each of her previous loans in one or two payments, but for the previous loans from National (the only loans in the record), James took longer. For the loan immediately preceding the Disputed Loan, there were seven attempted payments, four of which were declined.

[¶105] James is also underprivileged. In 2013, she took home approximately $1,100 per month, and her annualized income of approximately $13,200 represented 115% of the federal poverty line for a single-person household. She lived paycheck to paycheck and had no savings to fall back on. She did not have access to alternative sources of credit. By 2013, when James took out the Disputed Loan, she had been using high-interest, unsecured loans for four to five years, perhaps longer. She did not use the loans in response to unforeseen emergencies. She used them on a relatively regular basis for essential needs. She obtained the Disputed Loan because she needed money for groceries and rent. James' frequent use of high-cost loans was a detriment and should have been a red flag to National.

[¶106] At trial, National tried to turn James' weakness into a strength, arguing that she was an experienced consumer who was competent to use high-interest financial products. Zywicki stressed this point, contending that James' prior use of similar loans "suggest[ed] that she was familiar with the material terms of the loan, understood the risks, and the like." Tr. 509 (Zywicki); see *id.* at 523-24, 549-50. In contrast to National's arguments at trial, both defenders and critics of payday loans generally agree that frequent use is problematic.

[¶107] Given the relative attributes of National and James, the Disputed Loan involved both "inequality of bargaining or economic power" and the "exploitation of the underprivileged, unsophisticated, [and] uneducated." *Fritz*, 1990 WL 186448, at *5. These factors favor a finding of unconscionability.

b. A Take-It-Or-Leave-It, One-Sided Form Agreement

[¶108] The next *Fritz* factor asks directly whether there was actual bargaining involved. As framed in *Fritz,* the court should consider "[t]he use of printed form or boilerplate contracts drawn skillfully by the party in the strongest economic position, which establish industry wide standards offered on a take it or leave it basis to the party in a weaker economic position." *Id.* at *4. The type of standardized contract that this factor describes is also called a contract of adhesion. * * * *

[¶109] "[A] contract of adhesion is not unconscionable per se, and . . . all unconscionable contracts are not contracts of adhesion." Restatement (Second) of Contracts § 208, Reporter's Note, cmt a. Contracts of adhesion provide many benefits:

> Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions. Legal rules which would apply in the absence of agreement can be shaped to fit the particular type of transaction, and extra copies of the form can be used for purposes such as record-keeping, coordination and supervision. . . . Operations are simplified and costs reduced, to the advantage of all concerned.

Id. § 211, cmt. a.

[¶110] But standardized agreements also carry a heightened risk of unfair terms:

> Standardized agreements are commonly prepared by one party. The customer assents to a few terms, typically inserted in blanks on the printed form, and gives blanket assent to the type of transaction embodied in the standard form. He is commonly not represented in the drafting, and the draftsman may be tempted to overdraw in the interest of his employer.

Id., § 211, cmt. c. This dynamic creates an "obvious danger of overreaching." *Id.* "The weaker party, in need of the good or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses." 8 Williston on Contracts § 18:13 (quoting Weaver v. Am. Oil Co., 276 N.E.2d 144, 147 (Ind. 1971)).

[¶111] All else equal, the fact that an agreement is a contract of adhesion makes it relatively more likely that the agreement will be found unconscionable. Like the other *Fritz* factors, the fact that an agreement is a contract of adhesion is not sufficient, standing alone, to render an agreement unconscionable.

[¶112] The Loan Agreement is a contract of adhesion. It was form agreement, drafted by National, and provided to James on a take-it-or-leave-it basis. James had no ability to negotiate the terms of the Loan Agreement. Other than to rely on the truism that a standard form agreement is not inherently unconscionable, National does not dispute this factor. National's position is correct, but this factor nevertheless favors a finding of unconscionability.

c. The Bargaining Environment

[¶113] The final *Fritz* factor considers the "[t]he circumstances surrounding the execution of the contract." 1990 WL 186448, at *4. One pertinent attribute is the commercial setting. *Id.* Another is whether a party confronts "an absence of meaningful choice." *Ketler v. PFPA, LLC*, ___ A.3d ___, 2016 WL 192599, at *2 (Del.

Jan. 15, 2016) (quotation marks omitted). A third is the "purpose and actual effect" of the agreement. *Fritz*, 1990 WL 186448, at *4; * * * . For the Disputed Loan, that necessarily takes into account its relationship to the Payday Loan Law.

i. The Commercial Setting

[¶114] James obtained the Disputed Loan from a small, store-front office. She was given the documents and told where to sign. Reilly's main role was to try to induce her to take out twice the loan amount she wanted ($400 instead of $200). Those were not ideal conditions, but they were not inherently oppressive. They are consistent with a standardized financial transaction accomplished through a contract of adhesion.

[¶115] A more problematic issue is that National's employees denigrate the importance of the APR while describing the interest rate in simplistic ways that are designed to mislead customers. For example, National takes the position that the APR "has nothing to do with the loan." Tr. 335 (Carter). National's employees suggest to borrowers that that the APR is "irrelevant" unless the loan remains outstanding for an entire year. Tr. 337 (Carter). If a customer only plans to keep the loan outstanding for a few weeks, then National's employees discount the APR as "meaning[less]." Tr. 337-38 (Carter).

[¶116] Instead of focusing on the APR, National's employees describe the interest rate in terms that make the cost of the loan seem much lower. At trial, for example, James' counsel and Vazquez had the following exchange:

> Q: Typically, if someone comes in to borrow $100 at Loan Till Payday, what is the interest rate that they pay?
>
> A: 30 percent
>
> Q: Your understanding is they pay 30 percent? Is that right?
>
> A: It's a 30 percent block rate.

Tr. 246 (Vazquez). Vazquez did not know how a 30% block rate compared to an APR. Tr. 254 (Vazquez).

[¶117] These statements are highly problematic. By "describ[ing] the loan cost in terms of a misleading" bi-weekly rate, National understated the total cost of the Disputed Loan. Because National framed the price as "$30 on $100," James thought she would pay $60 for the $200 when she actually agreed to pay $1,620 in finance charges. James understood the simple block rate, but she did not understand the more complex financing arrangement captured by the Loan Agreement.

ii. Lack Of Meaningful Choice

[¶118] A more significant aspect of the circumstances surrounding the Loan Agreement was James' lack of a meaningful choice. When affirming a finding that a contract of adhesion for membership in a fitness club was not unconscionable, the Delaware Supreme Court observed that "[t]here is no deprivation of meaningful choice if a party can walk away from the contract." *Ketler*, ___ A.3d ___, 2016 WL 192599, at *2.

[¶119] Unlike the choice to spend discretionary income on a fitness contract, James needed money for food and to pay her rent. She lived paycheck to paycheck, had no savings to fall back on, and did not have access to alternative sources of credit. She had reached a point where she was using high-interest, unsecured loans on a regular basis to make ends meet. As a practical matter, James' precarious financial situation meant she did not have meaningful options other than a high-interest loan like the Disputed Loan.

iii. The Purpose And Effect Of The Loan Agreement

[¶120] Perhaps the most critical aspect of the bargaining environment was the purpose and effect of the Loan Agreement, which was to evade the Payday Loan Law. To reiterate, a traditional payday loan was a short-term loan designed to be repaid in a single balloon payment on the borrower's next payday, usually within two weeks or, if the borrower was paid monthly, within one month. See Consumer Credit, *supra*, at 356 ("A payday loan is a small, short-term, single-payment consumer loan."). Many borrowers, however, did not repay their loans when the balloon payments were due. When that happened, the payday loan company rolled the outstanding balance into a new payday loan for the total amount of unpaid principal and interest, plus fees. The short-term loan effectively became a longer term loan at the same high interest rate. Consumer advocates regarded the rollover as "[p]erhaps the most dangerous feature of the payday-loan product."

[¶121] To address the interest-only rollover problem in Delaware, the General Assembly adopted the Payday Loan Law. The synopsis of the bill stated:

> This bill limits to five the number of short-term consumer loans (sometimes called payday loans) that any one borrower may obtain in a twelve month period. * * * *

Del. H.B. 289 syn., 146th Gen. Assem. (2012). * * * *

[¶122] Importantly, the Payday Loan Law only applied to short-term consumer loans, which the statute defined as "a loan of $1,000 or less made to an individual borrower that charges interest and/or fees for which the stated repayment period is less than 60 days and is not secured by title to a motor vehicle." *Id.* § 2227(7). * * * *

[¶123] The Payday Loan Law was enacted before McFeeters acquired National. Under its prior owner, National responded to the Payday Loan Law by capping the number of times a customer could rollover a payday loan. * * * *

[¶124] Once McFeeters acquired National, he caused National to stop making payday loans and switch to installment loans. The new structure built the rollover problem into the design of the loan.

[¶125] In its initial manifestation, National's installment loan product was a seven-month term loan called the Flex Pay Loan. Its economic substance mirrored a one-month payday loan that was rolled over seven times (or a two-week payday loan that was rolled over fourteen times). * * * *

[¶126] From an economic standpoint, however, the Flex Pay Loan product and the Quick Payday Loan product were functionally equivalent. * * * *

[¶127] National later developed the Flex Loan product that it sold to James. The main difference was that the Flex Loan product contemplated twelve months of bi-weekly, interest-only payments before the final balloon payment.

[¶128] Put simply, National designed its installment loan products to evade the Five Loan Limit. From National's standpoint, the shift was actually beneficial, because the new products built the concept of interest-only rollovers into the loans themselves.

[¶129] The Anti-Evasion Provision [of the Payday Loan Law] recognized the risk that a lender might disguise "a short-term consumer loan as a revolving line of credit." 5 Del. C. § 2235A(f)(2). National took the opposite approach. It disguised a short-term consumer loan as an interest-only, non-amortizing installment loan. National's shift to interest-only installment loans as a means of evading the Five Loan Limit followed a strategy employed by payday lenders in other jurisdictions.

3. Balancing The Factors

[¶130] All of the *Fritz* factors point in favor of a finding of unconscionability, albeit to varying degrees. The most telling factors include (i) the economic terms of the Disputed Loan, which support a prima facie case of substantive unconscionability, (ii) the purpose and effect of the installment loan structure in circumventing the Payday Loan Law and the Five Loan Limit, and (iii) the exploitation of an underprivileged, undereducated, and financially vulnerable person. Secondary factors include (a) the use of a contract of adhesion, (b) the overall imbalance of rights and obligations, and (c) National's practices when describing the block rate finance charge versus the APR, which present a misleading picture of the cost of credit.

[¶131] On balance, the Loan Agreement is unconscionable. No one would borrow rationally on the terms it contemplated unless that person was delusional, mistaken about its terms or a material fact, or under economic duress.

4. The Remedy For The Unconscionable Agreement

[¶132] Because the Loan Agreement is unconscionable, it is voidable. The proper remedy is to declare it invalid. See Restatement (Second) of Contracts § 208, cmt. g.

[¶133] Declaring the Loan Agreement invalid is likewise appropriate because National sought to use an interest-only, non-amortizing, installment loan to evade the Payday Loan Law. “Equity always attempts to . . . ascertain, uphold, and enforce rights and duties which spring from the real relations of parties.” 2 John Norton Pomeroy, Equity Jurisprudence § 378, at 41 (Spencer W. Symons ed., 5th ed. 1941). “[E]quity regards substance rather than form.” Monroe Park v. Metro. Life Ins. Co., 457 A.2d 734, 737 (Del. 1983). Equity also “regards that as done which in good conscience ought to be done.” *Id*. In substance, the Disputed Loan was a payday loan designed to roll over twenty-six times, which contravened the Five Loan Limit.

[¶134] National loaned James $200. James has repaid National $197. As a consequence of rescinding the Loan Agreement, James owes National another $3. James may satisfy this obligation by setting it off against amounts that this decision orders National to pay. * * * *

III. CONCLUSION

[¶135] The Disputed Loan is invalid. Judgment is entered in favor of James in the amount of $3,237. Pre- and post-judgment interest on this amount will accrue at the legal rate, compounded quarterly, beginning on May 7, 2013. James is awarded her attorneys' fees and costs. * * * *

Questions:

1. Did the court require the plaintiff to show that the market for consumer loans in Wilmington was monopolistic, or that National's profits were supra-normal? Does the unconscionability test require that?

2. Do you think that the interest rate on James's loan was set by market forces, meaning by competition (i.e., that National offered the terms it did because it was afraid James would take her loan business elsewhere)?

3. Are you persuaded by Zywicki's argument in ¶71 that the loan is economically equivalent to a payday loan because the borrower has the right to pre-pay?

4. What if a party did not read a document? Does that make it unconscionable? You should be able to answer that question from *James*, but consider the following:

> Plaintiff argues repeatedly that he could not and did not read the forum selection clause, but this argument is a nonstarter: "[f]ailure to read a contract, particularly in a commercial contract setting, is not an excuse that relieves a person from the obligations of the contract." Pietroske, 2004 WI App 142, ¶ 11. "[I]n their dealings with each other, [parties] cannot close their eyes to the means of knowledge equally accessible to themselves and those with whom they deal, and then ask courts to relieve them from the consequences of their lack of vigilance." *Carney-Rutter Agency, Inc. v. Central Office Buildings, Inc.*, 263 Wis. 244, 253, 57 N.W.2d 348, 352 (1953); *see also Paper Express, Ltd v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992) ("[A] blind or illiterate party (or simply one unfamiliar with the contract language) who signs the contract without learning of its contents would be bound. Mere ignorance will not relieve a party of her obligations and she will be bound by the terms of the agreement ... [sic] [A] party who agrees to terms in writing without understanding or investigating those terms does so at his own peril.").
>
> Equally unpersuasive is plaintiff's argument that the forum selection clause was written in a foreign language. *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino*, 144 F.3d 1384, 1387 n.9 (11th Cir. 1998):
>
>> CC makes much of the fact that the written order form is entirely in Italian and that Monzon, who signed the contract on MCC's behalf directly below this provision incorporating the terms on the reverse of the form, neither spoke nor read Italian. This fact is of no assistance to MCC's position. We find it nothing short of astounding that an individual, purportedly experienced in commercial matters, would sign a contract in a foreign language and expect not to be bound simply because he could not comprehend its terms. We find nothing in the CISG that might counsel this type of reckless behavior and nothing that signals any retreat from the proposition that parties who sign contracts will be bound by them regardless of whether they have read them or understood them.
>
> "Rights under a contract are not forfeited by the other party's failure to read it." *United States v. Stump Home Specialties Manufacturing, Inc.*, 905 F.2d 1117, 1120 (7th Cir. 1990).

Israeli v. Dott.Gallina S.R.L., 632 F. Supp.2d 866, 870-71 (W.D. Wis. 2009).

5. Some courts (about half the states in the U.S.) have admitted they are willing to grant relief in unconscionability for substantive unconscionability alone. *See, e.g.*, *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, (Sup. Ct. App. 1998) ("[T]he substantive element alone may be sufficient to render the terms of the provision at issue unenforceable."). Is this a good idea?

6. Cases rescinding a contract for unconscionability as does *James* are a fairly recent phenomenon in common law history—only about sixty years old. More squarely in the unconscionability tradition is a case such as *Wollums v. Horsley*,

20 S.W. 781 (Ky. App. 1892), our Problem 28. The court in this case refused the requested equitable remedy of specific performance, so the parties were already squarely in equity's jurisdiction.

PROBLEM 28. Wollums was 60 years old, a farmer, living on a mountain farm of 200 acres in Kentucky, in a very rural area. Wollums was uneducated, afflicted with a disabling disease, and owned no other land and little personal property. He knew little of what was going on in the world around him. Horsley was an experienced real estate speculator buying mineral rights. Through his agent, Horsley entered into a contract with Wollums to buy the mineral rights on Wollums's land for $0.40 per acre. The agent assured Wollums that he would never be bothered by the contract during his life, even though much mineral development was occurring locally and a railroad was being built through the area. Horsley paid the agent $80 for making this deal, the same amount Wollums would get in exchange for his mineral rights. Later, Horsley demanded a deed for the mineral rights, but Wollums refused to give one, so Horsley sued. At trial, Wollums proved that his land was worth about $15 per acre, or $3,000. The value came almost entirely from the mineral rights. Should Wollums have to give a deed? Try to apply the complete procedural and substantive unconscionability analyses from *James*. That is probably what a court would do now.

7. James eventually was awarded attorneys' fees and costs of $331.024.50. Vice Chancellor Laster said, "Many similarly qualified Chancery practitioners would have charged at least double that amount. National should be commending James' counsel for their efficiency, particularly in light of National's bad-faith efforts to obstruct this litigation." No. 8931-VCL, 2016 WL 3226434 at *4 (Del. Ch. June 3, 2016). One ground for the fee and cost award was National's bad faith: "This pattern of behavior established that National and its counsel sought to deceive this court and opposing counsel and to strong-arm James by unnecessarily prolonging litigation over what National regarded as a small-dollar loan. " *Id.* At one point, McFeeters showed up at James's home and "allegedly threatened her. National contested the factual allegations but stipulated to a temporary restraining order that required McFeeters to remain at least 2,000 feet from James and to refrain from contacting her except through counsel." *Id.* at *2.

8. Consider UCC § 2-302.

Uniform Commercial Code § 2-302. Unconscionable Contract or Clause, and cmts. 1, 2, and 3.

Prior to the enactment of the UCC, unconscionability was considered to be largely a doctrine of equity to which defendants could turn to argue that a plaintiff's remedy at law should be mitigated. Section 2-302 enlarged that scope. Consider the first sentence of comment 1. The UCC drafters were not kidding when they said the section was intended to make unconscionability as we know it possible. This was a bold move, but one that has caught on across the law of contracts as courts have adopted the Article 2 position outside of the sale of goods context. Courts now agree generally that unconscionability is available as a defense in any contract, regardless of subject matter. To some extent, UCC § 2-302 was the genesis of this movement. How does the statute define *unconscionability*? How do the comments? What does *oppression* mean? *Unfair surprise*? *Disturbance of allocation of risks because of unequal bargaining power*? Does *James* help you understand this language?

Does not § 2-302 mandate that unconscionability be available on a showing of substantive unconscionability alone? What language suggests this? If the UCC makes unconscionability doctrine potentially applicable to a supply contract between Exxon and Baker Hughes, should the doctrine also be part of the law of contract that applies to contracts such as between James and National? In other words, should the last sentence of ¶ 48 be true everywhere?

9. When we say "free market," what do we mean the market is free of? What is the relationship between law and a "free market"?

10. You might consider whether the *James* case is justified as a matter of autonomy, welfare, or morality. Which? More than one?

Federal Trade Commission Regulation—Door to Door Sales, especially §§ 429.1 and 429.2

Question: This section mandates that the seller include in the written contract language granting a right to cancel. If the seller fails to include that language, does the consumer have a right to cancel?

Chapter 5. The Push Toward Assent

A. A Seal or Writing

PILLANS v. VAN MIEROP (1765)
King's Bench
3 Burr. 1663

[¶1] [In this case, White, a merchant in Ireland, wished to draw 800l. upon the credit of Pillans, a Dutch merchant and financier, to pacify White's creditor, Clifford. To induce Pillans to trust White's credit and make the advance, White proposed to obtain for Pillans the right to collect the money from a London financier should White default. White proposed Van Mierop as the London financier, whereupon Pillans honored White's draft and paid 800l. to Clifford. Both Pillans and White then wrote to Van Mierop to learn "whether [Van Mierop and his associates] would accept such bills as they, the plaintiffs, should in about a month's time draw upon the said Van Mierop's * * * * house here in London, for 8001. upon the credit of White." Van Mierop wrote a letter back agreeing to stand behind White, essentially as guarantor. Soon thereafter, White became insolvent, so when Pillans tried to draw upon his credit with Van Mierop, Van Mierop refused to pay. After a trial resulted in a verdict for Van Mierop, plaintiff's counsel moved for a new trial. Van Mierop's counsel opposed a new trial on the ground that his promise was without consideration because Pillans granted credit to White before Van Mierop promised.]

[¶2] Lord Mansfield asked, if "any case could be found, where the undertaking holden to be a nudum pactum was in writing." * * * *

[¶3] [Mansfield continued:] This is a matter of great consequence to trade and commerce, in every light.

[¶4] If there was any kind of fraud in this transaction, the collusion and mala fides would have vacated the contract. But from these letters, it seems to me clear, that there was none. The first proposal from White, was "I to reimburse the plaintiffs by a remittance, or by credit on the house of Van Mierop": this was the alternative he proposed. The plaintiffs chose the latter. Both the plaintiffs and White wrote to Van Mierop and Company. They answered "that they would honour the plaintiffs' draughts" so that the defendants assent to the proposal made by White, and ratify it. And it does, not seem at all that the plaintiffs then doubted of White's sufficiency, or meant to conceal any thing from the defendants.

[¶5] If there be no fraud, it is a mere question of law. The law of merchants, and the law of the land, is the same * * * * . We must consider it as a point of law. A nudum pactum does not exist, in the usage and law of merchants.

[¶6] I take it, that the ancient notion about the want of consideration was for the sake of evidence only: for when it is reduced into writing, as in covenants, specialties, bonds, &c. there was no objection to the want of consideration. And the Statute of Frauds proceeded upon the same principle.

[¶7] In commercial cases amongst merchants, the want of consideration is not an objection. * * * * I think the point of law is with the plaintiffs.

[¶8] Mr. Justice Wilmot- * * * * I can find none of those cases that go upon its being nudum pactum, that are in writing; they are all, upon parol.

[¶9] I have traced this matter of the nudum pactum; and it is very curious.

[¶10] He then explained the principle of an agreement being looked upon as a nudum pactum: and how the notion of a nudum pactum first came into our law. He said, it was echoed from the civil law: -" Ex nudo pacto non oritur actio." * * * * There was no radical defect in the contract, for want of consideration. But it was made requisite, in order to put people upon attention and reflection, and to prevent obscurity and uncertainty * * * *.

[¶11] Therefore it was intended as a guard against rash inconsiderate declarations: but if an undertaking was entered into upon deliberation and reflection, it had activity; and such promises were binding. Both Grotius and Puffendorff, hold them obligatory by the law of nations. Grot lib. 2, c. 11, De Promissis. Puffend lib. 3, c. 5. They are morally good; and only require ascertainment. Therefore there is no reason to extend the principle, or carry it further.

[¶12] * * * * Our own lawyers have adopted exactly the same idea as the Roman law. Plowden, 308 b. in the case of [*Sharington v. Strotton*] * * * * mentions it: and no one contradicted it. He lays down the distinction between contracts or agreements in words (which are more base,) and contracts or agreements in writing, (which are more high,) and puts the distinction upon the want of deliberation in the former case, and the still exercise of it in the latter. His words are the marrow of what the Roman lawyers had said. "Words pass from men lightly:" but where the agreement is made by deed, there is more stay: &c. &c. For, first, there is &c. &c. And, thirdly, he delivers the writing as his deed. "The delivery of the deed is a ceremony in law, signifying fully his good will that the thing in the deed should pass from him who made the deed, to the other. And therefore a deed, which must necessarily be made upon great thought and deliberation, shall bind without regard to the consideration." * * * *

[¶13] Therefore, if it stood only upon the naked promise, its being, in this case, reduced into writing, is a sufficient guard against surprize; and therefore the rule of nudum pactum does not apply in the present case.

[¶14] I cannot find, that a nudum pactum evidenced by writing has been ever holden bad: and I should think it good; though, where it is merely verbal, it is bad; yet I give no opinion for its being good, always, when in writing. * * * *

The holding of *Pillans v. Van Mierop* that a promise in writing needs no consideration was overruled by the House of Lords in *Rann v. Hughes*, 7 T.R. 350 n.a,, 101 ER 1014 n.a. (House of Lords 1778), in which Chief Justice Skynner said, "All contracts are, by the laws of England, distinguished into agreements by specialty [meaning a sealed writing], and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved."

Questions:

1. Is there a bargain here?

2. Lord Mansfield, Chief Justice of the King's Bench, was first trained in Scotland, where the civil law was employed, a derivation of Roman law and more akin to law used widely on the European continent. The linchpin of contract in civil law has for many centuries been assent, in line with what we studied earlier about Pufendorf and Pothier. How important does Mansfield think the consideration requirement is in this context? What does Mansfield say is the purpose for consideration?

3. How important does Justice Wilmot think consideration is? What does he think is the purpose of the consideration requirement? Does he think consideration exists here?

4. Is *Pillans* still the law?

Note: *Pillans* is a guarantee case in which the guarantor promises to the creditor. In our previous guaranty case, *Edmonds Case*, the guarantor promised to the debtor, who reciprocally promised to pay the guarantor back. In a typical guarantee case, the debtor suggests a guarantor, but the guarantor promises to the creditor-guarantee that the guarantor will pay the debtor's debts if the debtor does not. What is consideration for the guarantor's promise? Typically, courts hold that the creditor's loan to the debtor, given in exchange for the guaranty, is consideration for the guarantor's promise. Handing the loan funds over to the debtor is a bargained-for detriment to the promisee-creditor. But of course *Pillans* is different from that paradigmatic case.

Seals and Statutes

Tex. Code Ann. § 121.015. Private Seal or Scroll Not Required

> A private seal or scroll may not be required on a written instrument other than an instrument made by a corporation.

The traditional effect of a seal has declined since medieval times. In America, courts after the Revolution expanded greatly the kinds of marks on a paper that would count as a seal, until the seal itself lost much of its significance. In response, legislatures passed statutes such as the one above, and the Iowa statute below, which is less ambiguous. The Texas statute was construed in the following two cases, which explain its meaning:

WRIGHT v. ROBERT & ST. JOHN MOTOR CO. (1933)
Commission of Appeals of Texas, Section A
58 S.W.2d 67, 69

* * * * [U]nder the common law, simple contracts in writing, under seal, implied a consideration. Since the necessity for a seal has been done away with, as applied to simple written contracts, all such contracts now imply a consideration. * * * *

John W. TAYLOR v. FRED CLARK FELT COMPANY (1978)
Court of Civil Appeals of Texas, Houston (14th Dist.)
567 S.W.2d 863

J. CURTISS BROWN, Chief Justice.

[¶1] This is an appeal from a summary judgment granted the appellee in its suit on a promissory note.

[¶2] John W. Taylor (appellant), individually and doing business as John Taylor Co., is the maker of a promissory note for $22,862.19 payable to the order of Fred Clark Felt Company (appellee). The appellee filed suit on the note on June 17, 1977. The appellant's first amended answer contained a general denial and allegations of payment and fraud in the inducement. The appellee subsequently filed a motion for summary judgment, which was granted on September 27, 1977. * * * *

[¶3] There is a rebuttable statutory presumption that a written instrument imports consideration. *Thigpen v. Thigpen*, 563 S.W.2d 868 (Tex. Civ. App.-San Antonio 1978, no writ history); *Maykus v. Texas Bank & Trust Co. of Dallas*, 550 S.W.2d 396 (Tex.Civ.App.-Dallas 1977, no writ); see Tex.Rev.Civ.Stat.Ann. art. 27 (1969). The two opposing affidavits filed by the appellant contain statements that John Taylor Co. had no record of ever receiving the goods for which the promissory note was issued and that it was the customary practice of that company to keep records of the receipt of such goods. That summary judgment evidence counters the presumption of consideration and raises the inference that the goods were never delivered. See Tex. Rev.Civ.Stat.Ann. art. 3737e, § 3 (Supp. 1978). The appellant having raised a fact issue concerning the affirmative defense of failure of consideration, the trail court erred in granting summary judgment. *Hudnall v. Tyler Bank and Trust Company*, 458 S.W.2d 183 (Tex.Sup.1970).

[¶4] The judgment of the trial court is hereby reversed, and the case is remanded for a trial on the merits.

[¶5] Reversed and remanded.

The *Taylor v. Fred Clark Felt Co*. case holds that the statute creates an "evidentiary presumption" in certain circumstances. An evidentiary presumption operates to show a fact or element of a law even though no evidence regarding that fact or element is submitted to the court. Thus, relying on an evidentiary presumption, a litigant can show a fact or element by either proving the fact itself or proving the facts which cause the evidentiary presumption to exist. When a party relies on an evidentiary presumption, the opposing party may, if the presumption is rebuttable, rebut the presumption by submitting evidence which disproves the fact or element of law that was presumed. If the opposing party submits no evidence, then the unrebutted presumption becomes established as a matter of law. *Taylor* says that according to the statute certain facts establish a certain presumption. Which facts? What presumption? Is the presumption rebuttable?

Iowa Code § 537A.1. Seals abolished

> The use of private seals in written contracts, or other instruments in writing, by individuals, firms, or corporations that have not adopted a corporate seal, is hereby abolished; but the addition of a seal to any such instrument shall not affect its character or validity in any respect.

Iowa Code § 537A.2. Consideration implied

> All contracts in writing, signed by the party to be bound or by the party's authorized agent or attorney, shall import a consideration.

Iowa Code § 537A.3. Failure of consideration

> The want or failure, in whole or in part, of the consideration of a written contract may be shown as a defense, total or partial * * * *.

Question: How is the effect of the Iowa statute different from that of the Texas statute?

SKF USA, INC. v. WORKERS' COMPENSATION APPEAL BOARD (SMALLS) (1998)
Commonwealth Court of Pennsylvania
714 A.2d 496

MIRARCHI, Jr., Senior Judge.

[¶1] [SKF employed Thomas Smalls. Smalls was injured in a work-related accident in which two of his fingers were amputated. Smalls received total and partial disability workers' compensation benefits for some time. Soon after his accident, Smalls sued Norton Industries, the manufacturer of the machine which caused Smalls's injuries. Smalls and Norton later settled, Norton agreeing to pay Smalls a lump sum of $430,000 and Mrs. Smalls $20,000 and certain other later periodic payments.

[¶2] When an employee is injured and recovers compensation from a person at fault other than his employer, the employer who has paid workers' compensation money in the meantime may then recover from the employee a portion of the money the employee receives from the third party, up to the amount of workers' compensation the employee received. This is called the employer's right of subrogation. Because SKF had paid Smalls workers' compensation benefits in compensation for injury caused by the fault of Norton, SKF had subrogation rights to a portion of the money Smalls received from Norton.

[¶3] After Smalls and Norton settled, SKF's lawyer wrote a letter to Smalls's lawyer claiming subrogation rights. The two lawyers soon settled on a sum. SKF's lawyer suggested also that Smalls forego any further workers' compensation benefits. On January 31, 1986, SKF executed a general release, providing in relevant part:

> [T]he undersigned on behalf of SKF INDUSTRIES, INC. for and in consideration of $63,343.21, receipt of which is hereby acknowledged[,] do hereby remise, release, and forever discharge THOMAS SMALLS, ... of and from any and all manners of actions and causes of action, suits ... claims and demands whatsoever in law or equity, especially any and all past, present or future claims which SKF INDUSTRIES, INC. may have against THOMAS SMALLS pursuant to Section 319 of the Pennsylvania

> Workers' Compensation Act for Workers' Compensation benefits paid or to be paid to THOMAS SMALLS due to Mr. SMALLS' accident of April 22, 1980.

After SKF signed the release, Smalls again experience periods of total and partial disability and became entitled to workers' compensation as a result. On March 12, 1987, SKF filed a petition seeking subrogation credit for benefits payable to Smalls subsequent to January 1, 1986. SKF alleged that the release was void because it lacked consideration. The Workers Compensation Board held that the release was supported by consideration.

[¶4] After deciding that the release was valid under workers' compensation laws and that the release was actually supported by consideration, the Court stated:]

[¶5] * * * * [T]he Release contained the language, "we have here unto set our hands and corporate seal," and the word "seal" was preprinted next to the signature of Allen Belenson, Employer's Secretary and General Counsel. In *Graybill v. Juniata County School District*, 21 Pa. Cmwlth. 630, 347 A.2d 524, 526 (1975), the contracts contained the similar language, "the parties above named hereunto set their hands and seal," along with the word "seal" or "L.S." affixed next to or under the signatures. Although no formal raised corporate seal was affixed, as in this matter, this Court held that the presence of these markings provided ample evidence that the contracts were executed under seal.

[¶6] As to the common law effect of a seal in a written document, the Supreme Court stated:

> [O]nce plaintiff has proved the signature, consideration … may be presumed from the fact that the instrument is under seal …. In other words, a plaintiff who relies upon a sealed instrument is not obliged to prove consideration to take the case to the jury. The seal imports consideration.

Selden v. Jackson, 425 Pa. 618, 619, 230 A.2d 197, 197-98 (1967). Thus, where, as here, a contract is executed under seal, a party may not raise, as a defense, want of consideration, distinguished from failure of consideration. *Barnhart v. Barnhart*, 376 Pa. 44, 101 A.2d 904 (1954). Hence, Employer in this matter may not raise lack or want of consideration to avoid the terms of the Release.

[¶7] Moreover, regardless of lack of consideration, the Release is also valid and enforceable under the Act of May, 13, 1927, P.L. 985, 33 P.S. § 6, commonly known as the Uniform Written Obligations Act, which provides:

> A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.

In the Release executed under seal, Employer unequivocally agreed to release and discharge Claimant from "any and all past, present or future claims" arising under

Section 319 of the Act. The Release did not contain any condition or disclaimer which would refute Employer's intent to be legally bound by the terms therein. * * * *

[¶8] In conclusion, the Release is valid and enforceable. * * * *

ORDER

[¶9] AND NOW, this 23rd day of June, 1998, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

Questions:

1. Does a seal raise a presumption of consideration in Pennsylvania? Is the presumption rebuttable?

2. Would the release be enforceable without the seal?

3. What language shows that SKF intended to be bound?

B. Nominal and Recited Consideration Generally, and in Option Contracts

SCHNELL v. NELL (1861)
Supreme Court of Indiana
17 Ind. 29

[¶1] PERKINS, J.—Action by J. B. Nell against Zacharias Schnell, upon the following instrument:

> "This agreement, entered into this 13th day of February, 1856, between Zach. Schnell, of Indianapolis, Marion county, State of Indiana, as party of the first part, and J. B. Nell, of the same place, Wendelin Lorenz, of Stilesville, Hendricks county, State of Indiana, and Donata Lorenz, of Frickinger, Grand Duchy of Baden, Germany, as parties of the second part, witnesseth: The said Zacharias Schnell agrees as follows: whereas his wife, Theresa Schnell, now deceased, has made a last will and testament, in which, among other provisions, it was ordained that every one of the above named second parties, should receive the sum of $200; and whereas the said provisions of the will must remain a nullity, for the reason that no property, real or personal, was in the possession of the said Theresa Schnell, deceased, in her own name, at the time of her death, and all property held by Zacharias and Theresa Schnell jointly, therefore reverts to her husband; and whereas the said Theresa Schnell has also been a dutiful and loving wife to the said Zach. Schnell, and has materially aided him in the acquisition of all property, real and personal, now possessed by him; for,

and in consideration of all this, and the love and respect he bears to his wife; and, furthermore, in consideration of one cent, received by him of the second parties, he, the said Zach. Schnell, agrees to pay the above named sums of money to the parties of the second part, to wit: $200 to the said J. B. Nell; $200 to the said Wendelin Lorenz; and $200 to the said Donata Lorenz, in the following installments, viz., $200 in one year from the date of these presents; $200 in two years, and $200 in three years; to be divided between the parties in equal portions of $66⅔ each year, or as they may agree, till each one has received his full sum of $200.

"And the said parties of the second part, for, and in consideration of this, agree to pay the above named sum of money [one cent], and to deliver up to said Schnell, and abstain from collecting any real or supposed claims upon him or his estate, arising from the said last will and testament of the said Theresa Schnell, deceased.

"In witness whereof, the said parties have, on this 13th day of February, 1856, set hereunto their hands and seals.

"ZACHARIAS SCHNELL, [SEAL.]

"J. B. NELL, [SEAL.]

"WEN. LORENZ." [SEAL.]

[¶2] The complaint contained no averment of a consideration for the instrument, outside of those expressed in it; and did not aver that the one cent agreed to be paid, had been paid or tendered.

[¶3] A demurrer to the complaint was overruled.

[¶4] The defendant answered, that the instrument sued on was given for no consideration whatever.

[¶5] He further answered, that it was given for no consideration, because his said wife, Theresa, at the time she made the will mentioned, and at the time of her death, owned, neither separately, nor jointly with her husband, or any one else (except so far as the law gave her an interest in her husband's property), any property, real or personal, &c. * * * *

[¶6] The Court sustained a demurrer to these answers, evidently on the ground that they were regarded as contradicting the instrument sued on, which particularly set out the considerations upon which it was executed. But the instrument is latently ambiguous on this point. See Ind. Dig., p. 110.

[¶7] The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against Zacharias Schnell. It specifies three distinct considerations for his promise to pay $600:

> 1. A promise, on the part of the plaintiffs, to pay him one cent.
> 2. The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of property.
> 3. The fact that she had expressed her desire, in the form of an inoperative will, that the persons named therein should have the sums of money specified.

[¶8] The consideration of one cent will not support the promise of Schnell. It is true, that as a general proposition, inadequacy of consideration will not vitiate an agreement. *Baker v. Roberts*, 14 Ind. 552. But this doctrine does not apply to a mere exchange of sums of money, of coin, whose value is exactly fixed, but to the exchange of something of, in, itself, indeterminate value, for money, or, perhaps, for some other thing of indeterminate value. In this case, had the one cent mentioned, been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void, at first blush, upon its face, if it be regarded as an earnest one. *Hardesty v. Smith*, 3 Ind. 39. The consideration of one cent is, plainly, in this case, merely nominal, and intended to be so. As the will and testament of Schnell's wife imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him, on that ground. A moral consideration, only, will not support a promise. Ind. Dig., p. 13. And for the same reason, a valid consideration for his promise can not be found in the fact of a compromise of a disputed claim; for where such claim is legally groundless, a promise upon a compromise of it, or of a suit upon it, is not legally binding. *Spahr v. Hollingshead*, 8 Blackf. 415. There was no mistake of law or fact in this case, as the agreement admits the will inoperative and void. The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal considerations for Schnell's promise, on two grounds: 1. They are past considerations. Ind. Dig., p. 13. 2. The fact that Schnell loved his wife, and that she had been industrious, constituted no consideration for his promise to pay J. B. Nell, and the Lorenzes, a sum of money. Whether, if his wife, in her lifetime, had made a bargain with Schnell, that, in consideration of his promising to pay, after her death, to the persons named, a sum of money, she would be industrious, and worthy of his affection, such a promise would have been valid and consistent with public policy, we need not decide. Nor is the fact that Schnell now venerates the memory of his deceased wife, a legal consideration for a promise to pay any third person money.

[¶9] The instrument sued on, interpreted in the light of the facts alleged in the second paragraph of the answer, will not support an action. The demurrer to the answer should have been overruled. See *Stevenson v. Druley*, 4 Ind. 519.

[¶10] Per Curiam. — The judgment is reversed, with costs. Cause remanded &c.

Questions:

1. What possible consideration can you argue here?

2. What does *nominal* mean?

3. Do you think that consideration exists here under the *Kim v. Son* case? Under *Dyer*?

LEWIS v. FLETCHER (1980)
Supreme Court of Idaho
617 P.2d 834

BAKES, Justice.

[¶1] Plaintiffs Gerald and Patricia Lewis commenced this action for specific performance of an option contract on forty acres of land owned by defendants Claude and Stella Fletcher. The matter was tried to the district court sitting without a jury. The Lewises appeal from a judgment in favor of the Fletchers.

[¶2] In March of 1971, the Fletchers listed their 440 acre farm for sale with a realtor. The Lewises were interested in buying it. After some negotiations, the Fletchers agreed to sell and the Lewises agreed to buy 360 acres of the farm. They executed a "Receipt and Agreement to Purchase" for the 360 acre tract. This tract included the entire farm with the exception of the home forty and another forty acres adjoining it. The parties also executed an option on this adjoining forty acre parcel. By its terms, the option could be exercised in May of 1976, or earlier if the parties agreed.

[¶3] The relationship between the contract for sale of the larger tract and the option on the smaller tract is disputed. The buyers, the Lewises, contend that the sale of the 360 acre tract and the option on the forty acre tract were inseparable. They claim that both agreements were executed at the same time and on the same day, March 22, 1971. The Fletchers assert, and the trial court found, that the "Receipt and Agreement to Purchase" for the 360 acres was executed by the parties on March 18, 1971, and the option contract on March 22, 1971. The Fletchers contend, and again the trial court agreed, that the two contracts were separate. The "Receipt and Agreement to Purchase" is dated March 17, 1971, on the top of the form, and March 18, 1971, next to the Fletchers' signatures. The option is dated March 22, 1971.

[¶4] The option contract recites a consideration of $20.00. The trial court found, and the evidence supports the finding, that the $20.00 payment had never been made.

[¶5] In April of 1976, the Lewises gave notice of intention to exercise the option, the Fletchers resisted, and this controversy ensued. After a trial, the court denied the Lewises' complaint for specific performance of the option contract, citing three alternative bases for its decision. The court found, among other things, that the contract failed for want of consideration since the sum of $20.00 had not been paid to the Fletchers. Because we affirm the district court's finding that the option contract was unsupported by consideration, we need not address the alternative bases for the decision below.

[¶6] * * * * Since the option contract is separate [from the contract for the purchase of the 360 acres], it must stand on its own. The written option contract recites a consideration of $20.00 "receipt of which ... is acknowledged" by the Fletchers. The trial court found that the $20.00 was never paid, and that finding is supported by substantial and competent evidence. The legal issue presented is whether a written and signed option contract, which contains a false recital of payment of consideration and acknowledgment of its receipt, is valid and enforceable. We conclude it is not.

[¶7] In Idaho, a written instrument is presumptive evidence of consideration, I.C. § 29-103. That presumption is rebuttable and not conclusive. A party seeking to avoid or invalidate the contract may introduce evidence of a lack of consideration. I.C. § 29-104; *Rosenberry v. Clark*, 85 Idaho 317, 379 P.2d 638 (1963); *Merritt v. Sims*, 78 Idaho 292, 301 P.2d 1108 (1956); G. Bell, Handbook of Evidence for the Idaho Lawyer 199 (1972).

[¶8] The majority of jurisdictions hold that where the recited consideration has not been paid and no other consideration has been given, the contract fails for want of consideration. *Bard v. Kent*, 19 Cal.3d 449, 122 P.2d 8 (1942); *Berryman v. Kmoch*, 221 Kan. 304, 559 P.2d 790 (1977); *American Handkerchief Corp. v. Frannat Realty Co.*, 17 N.J. 12, 109 A.2d 793 (1954); *Echols v. Bloom*, 485 S.W.2d 798 (Tex.Civ.App. 1972, writ ref'd n.r.e.); *Kay v. Spencer*, 29 Wyo. 382, 213 P. 571 (1923). See J. Calamari & J. Perillo, Contracts § 4-5 (2d ed. 1977); 1A Corbin on Contracts, § 263 at 501 (1963); 1 Williston on Contracts §§ 61 & 115B (3d ed. 1957); 17 Am.Jur.2d Contracts § 91 (1964); Annot., 27 A.L.R. 1127 (1923). A minority of jurisdictions have held otherwise, either on the theory that the parties are estopped from contradicting their written recital and acknowledgement, *Real Estate Co. of Pittsburgh v. Rudolph*, 301 Pa. 502, 153 A. 438 (1930), or on the theory that the recital of the consideration gives rise to an implied promise to pay it, *Smith v. Wheeler*, 210 S.E.2d 702 (Ga. 1974). The Restatement of Contracts takes the minority position that an option in writing and signed by the offeror which recites consideration is binding notwithstanding the fact that no such consideration was given or expected. Restatement (Second) of Contracts, § 89B(1), comment c (Tent. Draft 1973). Cf. I.C. § 28-2-205 (firm offer of merchant irrevocable notwithstanding lack of consideration). However, we choose to adhere to the majority position. * * * *

[¶9] We therefore affirm the trial court's conclusion that the option on the forty acre tract is unsupported by consideration. An option contract not supported by consideration is merely a revocable offer to sell. E.g., *Berryman v. Kmoch*, 221 Kan. 304, 559 P.2d 790 (1977). Both Fletcher and Lewis testified that Fletcher had informed Lewis several years earlier that he did not intend to go through with the option, which would constitute a revocation. Nowhere in the record or briefs do the Lewises argue that they accepted the offer prior to the Fletchers' revocation. There being no acceptance prior to revocation, plaintiffs do not have an enforceable contract to purchase the forty acres.

[¶10] The judgment of the district court is hereby affirmed.

[¶11] Costs to respondents. No attorney fees allowed.
DONALDSON, C.J., SHEPARD, J., and KRAMER, J. Pro Tem., concur.
McFADDEN, J., dissents without opinion.

Questions:

1. In an option contract, such as the one in this case, the optionor makes two promises. One is to sell the item on which the option is granted. What is the other promise?

2. Would the court have enforced the contract if the $20 had been paid?

3. Does the court adopt the position of the Restatement (Second) of Contracts?

4. Why isn't $20 for an option on 40 acres nominal?

REAL ESTATE CO. OF PITTSBURGH v. RUDOLPH (1930)
Supreme Court of Pennsylvania
153 A. 438

SIMPSON, J.

[¶1] Defendant executed and delivered to the legal plaintiff an option as follows:

"April 18th, 1928.

> "Real Estate Company of Pittsburgh,
>
> "Wood and Fourth,
>
> "Pittsburgh, Pennsylvania.
>
> "Gentlemen:
>
> "In consideration of One ($1.00) Dollar in hand paid, I hereby give you the option to purchase my property situate 1628 Penn Ave., at the price of $15000.00. This option to expire at 12 o'clock noon, April 21th, 1928.
>
> "If this option is accepted by you and transaction closed, I agree to pay you a commission of 3% on the sale price. It is understood that the property is free and clear of encumbrances excepting a mortgage in the amount of $6,000.00.
>
> "Very truly yours, J. A. Rudolph."

The next day, and before he was formally notified of the acceptance of the option, defendant informed plaintiffs that he would not sell the property because his wife would not join in the conveyance. They were willing, however, to accept a title without the joinder of the wife, as, of course, they had the right to do (*Corson v. Mulvany*, 49 Pa. 88, 88 Am. Dec. 485; *Medoff v. Vandersaal*, 271 Pa. 169, 116 A. 525); but he persisted in his revocation, and refused even to discuss the matter with them, whereupon they filed the present bill in equity for specific performance. The learned president judge of the court below, who sat as chancellor, found all the disputed facts in favor of plaintiffs, and reported a decree nisi awarding specific performance, the deed to be executed by defendant alone, without the joinder of his wife. On exceptions filed, the court in banc decreed a dismissal of the bill, solely because the one dollar, specified in the option as having been paid, had not in fact been paid, and hence the optioner was well within his right in revoking it before acceptance. This raises the only point to be considered by us on plaintiffs' appeal from the decree. It must be admitted that the authorities elsewhere are not harmonious, but in our judgment the final decree is wrong.

[¶2] It is of course true that, if an option has no actual or legal consideration to support it, it may be revoked by the optioner at any time prior to acceptance. Defendant's answer does not aver a lack of consideration, however, and hence neither the fact nor effect of a want of it should have been considered by the court below. Moreover, this option has a legal consideration to support it. In *Lawrence v. McCalmont*, 2 How. (43 U. S.) 426, 452, 11 L. Ed. 326, it is said in an opinion by Mr. Justice Story:

> "The second [defense] is, that the payment of the one dollar is merely nominal and not sufficient to sustain the guarantee, if it had been received; and it is urged that it was not received. As to this last point, we feel no difficulty. The guarantor acknowledged the receipt of the one dollar, and is now estopped to deny it. If she has not received it, she would now be entitled to recover it. A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guarantee as to other contracts. A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger

> sum stipulated for or paid. * * * * But, independently of all authority, we should arrive at the same conclusion. The receipt of the one dollar is acknowledged; no fraud is pretended or shown; and the consideration, if standing alone in a bona fide transaction would sustain the present suit."

[¶3] That case is apposite here, since the traditional statement in the option of the "$1 in hand paid" can only mean that appellant acknowledges the receipt of that sum.

[¶4] If this is so as concerns a guarantor, in whose favor the law leans, it must be so in cases like the present, and so it, has been held in *Watkins v. Robertson*, 105 Va. 269, 284, 285, 54 S. E. 33, 5 L. R, A. (N. S.) 1194, 115 Am. St. Rep. 880; *Hagen v. Lehmann*, 317 Ill. 227, 230, 148 N. E. 57; *Horbach v. Coyle* (C. C. A.) 2 F.(2d) 702; and in the cases cited in those authorities. * * * *

[¶5] We need not elaborate upon these authorities, however, since the point, is so ruled, in an opinion by the retiring Chief Justice, in *Piper v. Queeney*, 282 Pa. 135, 142, 127 A. 474, 477. We there said:

> "When, in point of fact, a valuable consideration is relied on to support a deed or contract, under seal or otherwise, it may be inquired into by parol, although the result of the admission of such evidence is to show that the consideration set forth in the writing is not the real or exclusive one (*Nichols v. Nichols*, 133 Pa. 438, 454, 455, 19 A. 422), so long as nothing is permitted to be proved that is 'directly inconsistent' with the consideration named [in the instrument itself] (*Buckley's Appeal*, 48 Pa. 491, 496, 88 Am. Dec. 468; *Lewis v. Brewster*, 57 Pa. 410, 414; *McGary v. McDermott*, 207 Pa. 620, 623, 57 A. 46), or which directly changes the character of the writing or its covenants *(Henry v. Zurflieh*, 203 Pa. 440, 450, 53 A. 243)."

[¶6] * * * * It is elementary that the consideration imported from the use of a seal on such a paper may not be contradicted by proof. *Storm v. United States*, 94 U. S. 76, 83, 84, 24 L. Ed. 42. In the light of this, it, would be neither logical nor consistent to hold that the intentional insertion of an actual consideration may be overthrown whenever one of the parties desires to escape liability. * * * *

[¶7] Moreover, it is quite possible, when taken in conjunction with a finding of the chancellor that defendant knew the agreement was sought because of a hoped-for resale to a third party, that its true interpretation is that defendant gave to the legal plaintiff an option until "12 o'clock noon April 24th, 1928," to find a purchaser for the property at $15,000, and said to him, "if this option is accepted by you and transaction closed, I agree to give you a commission of three per cent on the sale price." No other construction satisfactorily explains why the vendor agreed to pay the vendee for buying the property, instead of merely stating that the sales price is to be $14,550. If that construction is correct, then the agreement contemplated services to be rendered by plaintiff to defendant forthwith which the former impliedly agrees to render, and hence an additional valuable consideration appears.

[¶8] The decree of the court below is reversed, at the cost of appellee, and the record is remitted that the decree nisi may be entered as the decree of the court.

Questions:

1. Is *Rudolph* consistent with *Lewis v. Fletcher*?

2. Isn't $1 nominal, even if Rudolph is estopped to deny it?

3. Did the plaintiff in *Rudolph* rely on the statement of consideration in the option? Was that reliance reasonable? What detriment resulted?

4. Why allow a mere recital of consideration to make an option contract enforceable? Are option contracts different from other contracts in such a way that makes this holding appropriate? (The answer is not in the case, but this is the relevant policy question. If you think about what an option is worth, it's not difficult to figure out why courts allow $20 paid for an option on 40 acres in *Lewis* and a $1 recital in *Rudolph* to be binding even though they are very small amounts.)

C. Implied Inducement

The following is a typically Delphic Cardozo opinion. It won't be the last you see in law school. The key to this one is to see that there is no consideration here, technically. Why not? You may wish to review the pre-existing duty rule, which we studied in *Borelli v. Brusseau*. Notwithstanding this, Cardozo enforces the agreement as if it had consideration. Why? What is here that counts as a bargain even though no bargain exists? Is there a reason to uphold this promise even if it is not part of a bargain?

DE CICCO v. SCHWEIZER et al. (1917)
Court of Appeals of New York
117 N.E. 807

CARDOZO, J.

[¶1] On January 16, 1902, 'articles of agreement' were executed by the defendant Joseph Schweizer, his wife, Ernestine, and Count Oberto Gulinelli. The agreement is in Italian. We quote from a translation the part essential to the decision of this controversy:

> ‘Whereas, Miss Blanche Josephine Schweizer, daughter of said Mr. Joseph Schweizer and of said Mrs. Ernestine Teresa Schweizer, is now affianced to and is to be married to the above said Count Oberto Giacomo Giovanni Francesco Maria Gulinelli: Now in consideration of all that is herein set forth the said Mr. Joseph Schweizer promises and expressly agrees by the present contract to pay annually to his said daughter Blanche, during his own life and to send her, during her lifetime, the sum of two thousand five hundred dollars, or the equivalent of said sum in francs, the first payment of said amount to be made on the 20th day of January, 1902.’

[¶2] Later articles provided that ‘for the same reason heretofore set forth,’ Mr. Schweizer will not change the provision made in his will for the benefit of his daughter and her issue, if any. The yearly payments in the event of his death are to be continued by his wife.

[¶3] On January 20, 1902, the marriage occurred. On the same day, the defendant made the first payment to his daughter. He continued the payments annually till 1912. This action is brought to recover the installment of that year. The plaintiff holds an assignment executed by the daughter, in which her husband joined. The question is whether there is any consideration for the promised annuity. That marriage may be a sufficient consideration is not disputed. The argument for the defendant is, however, that Count Gulinelli was already affianced to Miss Schweizer, and that the marriage was merely the fulfillment of an existing legal duty. For this reason, it is insisted, consideration was lacking. * * * *

[¶4] The defendant’s contract, if it be one, is not bilateral. It is unilateral. *Miller v. McKenzie*, 95 N.Y. 575, 47 Am. Rep. 85. The consideration exacted is not a promise, but an act. The count did not promise anything. In effect the defendant said to him: If you and my daughter marry, I will pay her an annuity for life. Until marriage occurred, the defendant was not bound. It would not have been enough that the count remained willing to marry. The plain import of the contract is that his bride also should be willing, and that marriage should follow. The promise was intended to affect the conduct, not of one only, but of both. This becomes the more evident when we recall that though the promise ran to the count, it was intended for the benefit of the daughter. [Citations omitted.] * * * * If the contract had been bilateral, her position might have been different. Since, however, it was unilateral, the consideration being performance (*Miller v. McKenzie*, *supra*), action on the faith of it put her in the same position as if she had been in form the promisee. That she learned of the promise before the marriage is a legitimate inference from the relation of the parties and from other attendant circumstances. The writing was signed by her parents; it was delivered to her intended husband; it was made four days before the marriage; it called for a payment on the day of the marriage; and on that day payment was made, and made to her. From all these circumstances, we may infer that at the time of the marriage the promise was known to the bride as well as the husband, and that both acted upon the faith of it.

[¶5] The situation, therefore, is the same in substance as if the promise had run to husband and wife alike, and had been intended to induce performance by both. They were free by common consent to terminate their engagement or to postpone the marriage. If they forebore from exercising that right and assumed the responsibilities of marriage in reliance on the defendant's promise, he may not now retract it. * * * *

[¶6] The defendant knew that a man and a woman were assuming the responsibilities of wedlock in the belief that adequate provision had been made for the woman and for future offspring. He offered this inducement to both while they were free to retract or to delay. That they neither retracted nor delayed is certain. It is not to be expected that they should lay bare all the motives and promptings, some avowed and conscious, others perhaps half-conscious and inarticulate, which swayed their conduct. It is enough that the natural consequence of the defendant's promise was to induce them to put the thought of rescission or delay aside. From that moment, there was no longer a real alternative. There was no longer what philosophers call a 'living' option. This in itself permits the inference of detriment. *Smith v. Chadwick*, 9 App. Cas. 187, 196; *Smith v. Land & House Corp.*, 28 Ch.D. 7, 16; *Voorhis v. Olmstead*, 66 N.Y. 113, 118; *Fottler v. Moseley*, 179 Mass. 295, 60 N.E. 788. 'If it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into the contract, it is a fair inference of fact that he was induced to do so by the statement.' Blackburn, L.J., in *Smith v. Chadwick*, *supra*. The same inference follows, not so inevitably, but still legitimately, where the statement is made to induce the preservation of a contract. It will not do to divert the minds of others from a given line of conduct, and then to urge that because of the diversion the opportunity has gone by to say how their minds would otherwise have acted. If the tendency of the promise is to induce them to persevere, reliance and detriment may be inferred from the mere fact of performance. The springs of conduct are subtle and varied. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others.

[¶7] One other line of argument must be considered. The suggestion is made that the defendant's promise was not made animo contrahendi. It was not designed, we are told, to sway the conduct of any one; it was merely the offer of a gift which found its motive in the engagement of the daughter to the count. Undoubtedly, the prospective marriage is not to be deemed a consideration for the promise 'unless the parties have dealt with it on that footing.' Holmes, Common Law, p. 292; *Fire Ins. Ass'n v. Wickham*, 141 U.S. 564, 579, 12 Sup.Ct. 84 (35 L. Ed. 860). 'Nothing is consideration that is not regarded as such by both parties.' *Philpot v. Gruninger*, 14 Wall. 570, 577 (20 L.Ed. 743); *Fire Ins. Ass'n v. Wickham*, *supra*. But here the very formality of the agreement suggests a purpose to effect the legal relations of the signers. One does not commonly pledge one's self to generosity in the language of a covenant. That the parties believed there was a consideration is certain. The document recites the engagement and the coming marriage. It states that these are the 'consideration' for the promise. The failure to marry would have made the promise ineffective. In these circumstances we cannot say that the promise was not intended to control the conduct of those whom it was designed to benefit. Certainly we cannot draw that inference as one of law. Both sides moved for the direction of a verdict, and the trial judge became by consent the trier of the facts. If conflicting inferences were possible, he chose those favorable to the plaintiff.

[¶8] The conclusion to which we are thus led is reinforced by those considerations of public policy which cluster about contracts that touch the marriage relation. The law favors marriage settlements, and seeks to uphold them. It puts them for many purposes in a class by themselves. *Phalen v. U.S. Trust Co.*, 186 N.Y.178, 181, 78 N.E.943, 7 L.R.A. (N.S.) 734, 9 Ann.Cas.595. It has enforced them at times where consideration, if present at all, has been dependent upon doubtful inference. *McNutt v. McNutt*, 116 Ind. 545, 19 N.E.115, 2 L.R.A 372; *Appleby v. Appleby*, 100 Minn.408, 111 N.W.305, 10 L.R.A. (N.S.) 590, 117 Am.St.Rep.709, 10 Ann.Cas.563. It strains, if need be, to the uttermost the interpretation of equivocal words and conduct in the effort to hold men to the honorable fulfillment of engagements designed to influence in their deepest relations the lives of others.

[¶9] The judgment should be affirmed with costs.

CRANE, J. (concurring). [Crane's concurrence is omitted.]

HISCOCK, C. J., and CUDDEBACK, POUND, and ANDREWS, JJ., concur with CARDOZO, J., and CRANE, J., concurs in opinion. COLLIN, J., not voting. Judgment affirmed.

Questions:

1. *DiCicco* is a rather difficult case. What is the issue in this court?

2. Does this case involve a unilateral or a bilateral contract?

3. Why is it necessary to show that Blanche was a party to the contract? (In thinking about this question, consider that the Count and Blanche are engaged.)

4. What facts indicate that Blanche was more or less a promisee?

5. What facts does Cardozo cite showing that the Count and Blanche married in order to get the money Blanche's father promised them?

6. Why is this promise not a gift promise? Or is it?

7. Is Cardozo's move with respect to consideration here similar to the judges' move in *Riches v. Bridges*?

8. Could the *De Cicco* opinion have helped Mona in Problem 1?

Note: Cardozo was a brilliant rhetorician, and in this case he is at his best (or worst).

D. The Statute of Frauds

One immediate result of making parol promises based upon a consideration generally enforceable in assumpsit was that courts began enforcing promises on very little evidence. Particularly because of the mutual promise rule, no longer did a seal or a transaction of property evidence every actionable promise. As evidence of promises, consideration was not as good as a sealed writing. One reaction to the ease of proof brought on by the growth of assumpsit was the passage of a statute by Parliament in 1677 which has become known as the Statute of Frauds. The Statute of Frauds has been enacted in more or less similar form by all fifty states. The following version is from Texas, but it is very much the same as other statutes enacted in the other 49 states:

> (a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is
>
> > (1) in writing; and
> >
> > (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.
>
> (b) Subsection (a) of this section applies to:
>
> > (1) a promise by an executor or administrator to answer out of his own estate for any debt or damage due from his testator or intestate;
> >
> > (2) a promise by one person to answer for the debt, default, or miscarriage of another person;
> >
> > (3) an agreement made on consideration of marriage * * * *;
> >
> > (4) a contract for the sale of real estate;
> >
> > (5) a lease of real estate for a term longer than one year;
> >
> > (6) an agreement which is not to be performed within one year from the date of making the agreement * * * *.

Questions:

1. Is a promise of guaranty required to be in writing? If so, under what section?

2. Does the statute require a promise to sell a house to be in writing?

3. Why do you suppose that Parliament in 1677 picked these categories of things to be in writing? Keep in mind that Parliament was composed of male landowners who were mostly heads of families, had inherited their wealth, and were for the most part trying to amass an estate they could pass on to heirs.

The Texas statute includes other categories of promises for which a memorandum is required but which were not found in the original Statute of Frauds and may or may not be included in other states' statutes:

> ... (3) ... or on consideration of nonmarital conjugal cohabitation; ...
>
> (7) a promise or agreement to pay a commission for the sale or purchase of:
>
> > (A) an oil or gas mining lease;
> >
> > (B) an oil or gas royalty;
> >
> > (C) minerals; or
> >
> > (D) a mineral interest; and
>
> (8) an agreement, promise, contract, or warranty of cure relating to medical care or results thereof made by a physician or health care provider as defined in Section 74.001, Civil Practice and Remedies Code. This section shall not apply to pharmacists.

Please do not consider these provisions to be included in "The Statute of Frauds" as that term is generically used, but only when the Texas statute of frauds is itself specifically discussed.

Texas also has other "statutes of frauds" on the books. These are typical. They are referred to as "statutes of frauds" but not as "The Statute of Frauds," which refers only to the statute listed in the text above supplemented by the rest of subsection (3) and by subsections (7) and (8). One of these other statutes of frauds applies to loan agreements over a certain amount, *see* Tex. Bus. & Com. Code Ann. § 26.02 (2013), and one to premarital agreements, Tex. Fam. Code Ann. § 4.002 (2013) ("A premarital agreement must be in writing and signed by both parties."). Another is found in the Texas version of the Uniform Commercial Code. We will study the UCC statute of frauds later in this section.

If a writing is now required for some kinds of agreements, does that mean a consideration is no longer required for those agreements? See the following case.

RANN v. HUGHES (1778)
House of Lords
7 T.R. 350 n.a.

* * * * All contracts are, by the laws of England, distinguished into agreements by specialty, and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. But it is said that the Statute of Frauds has taken away the necessity of any con-

sideration in this case; the Statute of Frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable. His Lordship here read those sections of that statute which relate to the present subject. He observed that the words were merely negative and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition, that when in writing the party must be at all events liable. He here observed upon the case of *Pillans v. Van Mierov in Burr* and the case of *Losh v Williamson*, Mich. 16 G. 3- in B. R.: and so far as these cases went on the doctrine of nudum pactum, he seemed to intimate that they were erroneous. He said that all his brothers concurred with him that in this case there was not a sufficient consideration to support this demand as a personal demand against the defendant, and that its being now supposed to have been in writing, makes no difference. * * * *

BENJAMIN FULTON et al. v. MARY E. ROBINSON et al. (1881)
Supreme Court of Texas
55 Tex. 401

APPEAL from Tarrant. Tried below before the Hon. H. Barksdale.

[¶1] July 2, 1874, Mary E. Robinson and Sarah J. Choat (joined with their husbands), as heirs of Israel Earles, brought suit in "trespass to try title" for three hundred and twenty acres of land against Benjamin Fulton and Charles Harold.

[¶2] July 13, 1874, defendants demurred and pleaded not guilty.

[¶3] July 13, 1875, amending, defendants alleged that on 23d of March, 1859, one James Henderson bought of the said Israel Earles the land sued for $1,120, of which $300 was paid at the date of the purchase, and the balance, $820, February 11, 1860, to Russell, administrator of Earles, which purchase was evidenced by a receipt in writing, being a receipt which will be found set forth in the opinion.

[¶4] That on February 11, 1860, Russell, administrator of Israel Earles, under an order of the probate court, made at its January term, 1860, requiring him to do so, executed to Henderson a deed for the land; that the money by him paid to Russell ($820) was duly accounted for by Russell as administrator, and that the plaintiffs received full benefit of the same in the distribution of the estate; that Henderson, at the date of the purchase, took actual possession of the land, which possession was surrendered to him by Israel Earles, and that Henderson and those under him had erected thereon valuable improvements. Defendant further pleaded limitation of three and five years.

[¶5] The statement of facts shows, on the part of plaintiffs, a patent for the land sued for, and proof of heirship.

[¶6] Defendants proved the proceedings in the probate court, consisting of Henderson's petition to the probate court for title, upon the receipt, offering to pay the remainder of the purchase money. The administrator, Russell, accepted service of citation, and the court by decree ordered the administrator to execute a bond for title on payment, and at a subsequent term an order for title and administrator's deed was shown for the land to Henderson.

[¶7] Russell testified that Earles told witness, when in his last illness, and a short time before his death, that he had sold the land to Henderson, and had turned over the tenant to him; had not made a deed; this seemed to trouble him; that Henderson had paid part of the money. Witness himself collected $820 as administrator of Earles, of Henderson; the money was paid in coin, and the coin was paid by witness over to the guardians of the children of Earles, including the plaintiffs.

Terrell & Walker, for appellants.

Smith & Jarvis, for appellees.

[¶8] I. The receipt relied upon by appellants to establish a contract of sale by Earles to Henderson is fatally defective, in this: it contains no formal promise to convey, nor does it sufficiently state the terms of a contract to take it out of the statute of frauds, or to imply a promise to convey. It does not fix the price of the land, nor does it refer to any other writing fixing the price. Henderson, after Earles' death, fixed the deferred payment, by oral testimony, at $820. This could not be legally done. *See Ellis v. Deadman*, 4 Bibb, 466, a case exactly in point; *Parkhurst v. Van Cortland*, 1 Johns. Ch., 278; 6 Blackf., 21; 1 McCord, 425; *Peters v. Phillips*, 19 Tex., 74. In the case cited by appellants from 10 Tex., 444, possession was taken under the contract, and all the purchase money had been paid in the life-time of Vaughn.

[¶9] II. There being no contract in writing for the sale of the land, and no promise in writing to convey, the probate court had no jurisdiction, and its proceeding, including Henderson's petition and the decree rendered thereon, was and is null and void. There being no jurisdiction, the court could not lawfully render any decree that would in any way affect the rights of appellees, or of their father's estate.

[¶10] III. The payment of the $820 to the guardians of appellees, if indeed such payments were ever made, could not stop the appellees without the further proof that they, with knowledge of the facts, had received the money, or other thing of value in lieu thereof, from their guardians after obtaining their majority. Rorer on Judicial Sales, secs. 452, 455.

BONNER, ASSOCIATE JUSTICE

[¶11] If the receipt given by Israel Earles, deceased, to James Henderson, was such written agreement of the sale of the land therein mentioned as gave to the county court of Tarrant county jurisdiction to make the order directing S. B. Russell, as the administrator of Earles, to make the deed to Henderson, under the statute then in force (Pasch. Dig., 1313), then the deed made by the administrator, Russell, to Henderson constituted such legal title as would defeat the claim of plaintiffs as the heirs of Earles.

[¶12] This receipt is as follows:

> "Received of James Henderson three hundred dollars, in part payment of a certain tract of land, being my own head right, lying on Rush creek, in the cross timbers, this 23d March, 1859.
>
> *ISRAEL EARLES.*"

[¶13] The mere fact that it was in the form of a receipt would not of itself defeat it as a memorandum of contract for the sale of land, if sufficient in other respects. *Dial v. Crain*, 10 Tex., 553; authorities cited in *Peters v. Phillips*, 19 Tex., 74.

[¶14] Under the decision in the case of *Peters v. Phillips*, the memorandum would be sufficient under the above statute, if it was such as required by the statute of frauds. Pasch. Dig., art. 3875.

[¶15] The general rule has often been announced in other courts as well as our own, that the memorandum under the statute of frauds should be so reasonably definite and certain within itself, or other writing referred to, as to parties, consideration and subject-matter, that specific performance can be enforced without a resort to parol testimony.

[¶16] The cases in our own reports must be construed with reference to the question then under consideration, and the settled construction given to the statute by this court.

[¶17] Following the line of our decisions, it is said in *Thomas v. Hammond*, that, in this state, the rule is settled that it is not necessary that the consideration of a contract for the sale of lands should be expressed in writing. 47 Tex., 55; *Ellett v. Brittain*, 10 Tex., 208; *Atkins v. Watson*, 12 Tex., 199.

[¶18] In the elaborate opinion by Chief Justice Hemphill, in the above case of *Ellett v. Brittain*, the authorities upon a kindred question to the one now before the court were reviewed, and the construction given to the statute in *Packard v. Richardson*, 17 Mass., 124, that the consideration need not be expressed in the writing, but might be proved by parol, was adopted; and it was said that the weight of American authority did not coincide with the rule to the contrary in *Warn v. Walters*, 5 East; and that latterly the force of this last named case had been much weakened in England.

[¶19] The receipt being sufficiently certain in other respects, as to the parties and subject-matter, and as under the above authorities the consideration could be proven by parol, it constituted such memorandum as was sufficient, under the statute, to give jurisdiction to the county court. In deciding otherwise there was error in the judgment of the court below, for which it must be reversed and the cause remanded.

[¶20] REVERSED AND REMANDED.

Questions:

1. How does one know that a memorandum is sufficient under the Statute of Frauds?

2. Does the form of the memorandum matter? Can the memorandum be a mere receipt? A telegram? A letter? A record book? A check? A suicide note?

3. Need the memorandum be signed by both parties to be sufficient?

4. The Uniform Electronic Transactions Act (UETA), passed in all but three states (WA, IL, NY—these states have similar laws, though), helps electronic records and signatures count under the Statute of Frauds. The Act tries to equate writings in electronic form to writings on paper. A key section of the act provides,

> (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
>
> (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
>
> (c) If a law requires a record to be in writing, an electronic record satisfies the law.
>
> (d) If a law requires a signature, an electronic signature satisfies the law.

UETA § 7. An "electronic signature" "means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." UETA § 2(8). A "record" includes "information . . . that is stored in an electronic or other medium and is retrievable in perceivable form." UETA § 2(13). The Act is limited in scope: it "applies only to transactions between parties each of which has agreed to conduct transactions by electronic means." UETA § 5(b). If James Henderson and Israel Earles' transaction had occurred last year, the two had bargained for the sale of this property by email, and Earles' receipt had been sent as an email, would a court bound by UETA reach the same result?

A federal law attempts to reach a similar result by providing that, "with respect to any transaction in or affecting interstate . . . commerce—(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation." Electronic Signature in Global and National Commerce Act ("E-SIGN") § 101 (2000). The NCCUSL proposed another uniform law that would have governed software and other computer information transactions, called the Uniform Computer Information Transactions Act (UCITA). UCITA contains provisions that might impact electronic signatures, but it is controversial for other reasons and is law only in Virginia and Maryland.

Mikio NAKAMURA v. Masaki FUJII (1998)
N.Y. Supreme Court, Appellate Division, First Department
677 N.Y.S.2d 113

MEMORANDUM DECISION

[¶1] Order, Supreme Court, New York County (Carol Huff, J.), entered March 17, 1997, which, to the extent appealed from, granted defendants' cross motion to dismiss the complaint as barred by the Statute of Frauds, and denied defendants' request for sanctions, unanimously modified, on the law, defendants' motion to dismiss is denied except as to the fourth cause of action on an indemnity theory, the balance of the complaint reinstated, and otherwise affirmed, without costs.

[¶2] Plaintiff alleges that in August 1992, defendants Masaki and Isako Fujii informed him that they could not afford to pay the tuition of their daughter, Aki, who was enrolled at the University of Southern California (USC). Defendants requested that plaintiff pay "certain tuition invoices" for Aki. Plaintiff orally agreed to pay the tuition in exchange for defendants' express promise to repay the amounts on demand. Thereafter, plaintiff had his corporation, Calinax, issue checks to USC on five occasions between August 1992 and December 1993, totalling $40,339.33. In August 1993, defendants made a similar request for their younger daughter, Sawako, and plaintiff orally agreed to make the tuition payments subject to the same repayment terms. Plaintiff had Calinax issue six checks to USC for Sawako's tuition between August 1993 and January 1996, totaling $60,964.20.

[¶3] According to plaintiff, defendants confirmed their repayment obligations in several meetings with plaintiff in New York. However, when plaintiff demanded repayment, defendants refused. By summons and complaint dated June 20, 1996, plaintiff commenced the instant action alleging, inter alia, a breach of the oral agreement to repay the tuition advances, * * * and that defendants' promise to repay the tuition advances constituted an indemnity. In their answer, defendants denied that they asked plaintiff to make any payments to USC or that they promised to repay him, and further denied having knowledge or information as to whether such payments were made by Calinax. Defendants also asserted six affirmative defenses, including * * * the Statute of Frauds. Defendants further asserted counterclaims for defamation, negligent and intentional infliction of emotional distress and tortious interference with contractual relations. The counterclaims were based on defendants' allegations that plaintiff sexually harassed Sawako, an employee of plaintiff, made disparaging comments about defendants and their daughter and threatened to damage Masaki Fujii's reputation with his employer.

[¶4] In October 1996, plaintiff moved to dismiss defendants' affirmative defenses and counterclaims as baseless and conclusory. Defendants cross-moved for dismissal of the complaint pursuant to CPLR 3211(a)(3), (5) and (7), and for sanctions pursuant to 22 NYCRR § 130-1.1. In their dismissal motion, defendants argued * * * that plaintiff's claims were barred by the Statute of Frauds because the promises alleged were to answer for the debt of another, and could not be performed within one year from their making.

[¶5] The IAS court denied plaintiff's motion to dismiss the affirmative defenses and counterclaims, and severed the latter. Additionally, although rejecting defendants' argument concerning [another matter], it granted defendants' motion to dismiss the complaint on the ground that it was barred by the Statute of Frauds. The court found that the oral agreement to repay the tuition advances during the daughters' enrollment at USC was unenforceable since it was not, by its terms, to be performed within one year (General Obligations Law [GOL] § 5-701[a][1]), and because it constituted a promise to answer for the debt of another (GOL § 5-701[a][2]). The remainder of the motion and cross-motion was denied without discussion.

[¶6] In *Cron v. Hargro Fabrics*, 91 N.Y.2d 362, 366-367, 670 N.Y.S.2d 973, 694 N.E.2d 56, the Court of Appeals recently reiterated the contours of GOL § 5-701(a)(1):

> New York law provides that an agreement will not be recognized or enforceable if it is not in writing and "subscribed by the party to be charged therewith" when the agreement "by its terms is not to be performed within one year from the making thereof ..." [GOL § 5-701(a) (1)]. We have long interpreted this provision of the Statute of Frauds to encompass only those contracts which, by their terms, "have absolutely no possibility in fact and law of full performance within one year" (*D & N Boening v. Kirsch Beverages*, 63 N.Y.2d 449, 454, 483 N.Y.S.2d 164, 472 N.E.2d 992). As long as the agreement may be "fairly and reasonably interpreted" such that it

> may be performed within a year, the Statute of Frauds will not act as a bar however unexpected, unlikely, or even improbable that such performance will occur during that time frame (*Warren Chem. & Mfg. Co. v. Holbrook*, 118 N.Y. 586, 593, 23 N.E. 908 [citations omitted]).

[¶7] Nothing in the oral agreement at issue sets the duration of plaintiff's obligation to pay the tuition. It certainly does not specifically require plaintiff to pay all four years of tuition for each daughter. By its terms, it merely requires plaintiff to pay "certain tuition invoices," without stating when those invoices must be paid, or even how many. Further, the agreement requires defendants to repay the sums not at some future time, but "on demand." Given the absence of any terms mandating payments by plaintiff, or repayments by defendants, at specific times, it cannot be said that the agreement could not be performed within one year, notwithstanding its duration in fact (see, *Mann v. Helmsley-Spear*, 177 A.D.2d 147, 149-150, 581 N.Y.S.2d 16).

[¶8] Additionally, there was no guarantee that defendants' daughters would remain at USC for the full four years, or even for one year (*see*, *Zimmerman v. Zimmerman*, 86 A.D.2d 525, 526, 447 N.Y.S.2d 675, appeal dismissed 56 N.Y.2d 806; but see, *Sud v. Sud*, 211 A.D.2d 423, 424, 621 N.Y.S.2d 37; *In re Galvin's Estate*, 148 Misc. 546, 547, 266 N.Y.S. 113). "The statute of frauds is not applicable to an agreement the performance of which depends on a contingency which may or may not happen within one year" (61 N.Y.Jur.2d Frauds, Statute of, § 28, p 65; see also, *North Shore Bottling Co. v. C. Schmidt & Sons*, 22 N.Y.2d 171, 176, 292 N.Y.S.2d 86, 239 N.E.2d 189). In this case, defendants' daughters could have left USC "for any of the reasons that commonly lead many college students either to drop out of school or to change schools" (see, *Zimmerman v. Zimmerman*, *supra*, at 526, 447 N.Y.S.2d 675). Where a third party to an oral contract has the right to terminate the agreement within one year, the contract is not within the Statute of Frauds (see, 61 N.Y.Jur.2d Frauds, Statute of, § 25, p 59; *Sawyer v. Sickinger*, 47 A.D.2d 291, 295, 366 N.Y.S.2d 435; *Metro-Goldwyn-Mayer v. Scheider*, 43 A.D.2d 922, 923, 352 N.Y.S.2d 205).

[¶9] Nor is GOL § 5-701(a)(2) a bar to the enforcement of this agreement. Contrary to defendants' argument, the complaint does not allege that defendants provided a guaranty to repay the debt of their daughter. Rather, it alleges an independent promise by defendants to repay monies advanced by plaintiff, at their express request, to pay their children's tuition. Defendants' daughters owed no debt to plaintiff, and therefore GOL § 5-701(a)(2) is inapplicable. * * * *

[¶10] We have examined the parties' remaining contentions for affirmative relief and find them to be without merit.

The COLEMAN COMPANY, INC. v. CARGIL INTERNATIONAL CORP. (1998)
District Court of Appeal of Florida, Third District
731 So.2d 2

NESBITT, J.

[¶1] In the proceedings below, the jury found that camping supplies manufacturer Coleman breached an oral distributorship agreement with Cargil International, Coleman's distributor in Venezuela. Because the oral distributorship contract was for a period of more than one year, its enforcement is barred by the statute of frauds. Therefore, we reverse.

[¶2] The record reveals that the oral agreement at issue here was made in November 1993, and that the agreement anticipated performance for the entire calendar year 1994. Significantly, Cargil never disputed that the contract was made in November 1993. Nor could it: because the contract was to commence on January 1 of the calendar year 1994, and continue through December 31 of the same year; the contact, discussions, negotiations and agreement were necessarily reached sometime earlier. Thus, the entire term of the contract was for over one year. Such an oral contract is unenforceable pursuant to the statute of frauds. See §§ 672.201(1), 725.01, Fla. Stat. (1995). *See also Yates v. Ball*, 132 Fla. 132, 181 So. 341, 344 (Fla.1937) ("to make a parol contract void, it must be apparent that it was the understanding of the parties that it was not to be performed within one year from the time it was made"); *Khawly v. Reboul*, 488 So.2d 856 (Fla. 3d DCA 1986). * * * *

[¶3] In conclusion, the trial court should have entered a directed verdict for Coleman on the underlying action and on the counterclaim for account stated.

[¶4] The judgment appealed from is reversed with directions to enter a judgment consistent with this opinion. * * * *

Questions: Does anyone doubt that Coleman made the promise at issue in *The Coleman Co., Inc.* case? If you are Coleman's attorney and the Coleman sales rep says he actually made this promise, should you raise the Statute of Frauds?

Cargil's new contract was real,
But oral, without sign or seal.
'Cause it lasted too long,
The form was all wrong,
And the Statute of Frauds killed the deal.

—Jim Woodward, STCL Class of 2003

PROBLEMS 29-33. Consider the following hypotheticals. Are any of them unenforceable under the statute of frauds as agreements "not to be performed within one year" if not in writing?

29. A promise by a five-person corporation to build an ocean liner.

30. A promise made on February 9, 2020, to appear live on a TV show on February 10, 2021.

31. A promise made on February 9, 2020, to cut down and deliver certain timber on or before February 10, 2021.

32. A promise to build a house within fifteen months.

33. A promise by a railroad to maintain a switch so long as the other railroad needs it.

HOOKS v. BRIDGEWATER (1921)
Supreme Court of Texas
229 S.W. 1114

PHILLIPS, C. J.

[¶1] The plaintiff, Bob Bridgewater, brought the suit against the administrator of the estate of John W. Davis, deceased, and the heirs at law of Davis, to recover Davis' estate. The suit was in fact one to enforce a verbal agreement claimed to have been entered into by the plaintiff's father—at that time his only surviving parent, when the plaintiff was a child of nine years of age—and Davis, whereby the father contracted to surrender plaintiff's custody and control to Davis, and Davis—a single man who never married—agreed upon that consideration to rear the plaintiff, giving him the care and rights of a son, make him his heir and leave to him at his death all of his property.

[¶2] The trial court found that the evidence established the making of the parol agreement; that Davis took charge of the plaintiff under the agreement when he was thus a child, and plaintiff's father never thereafter exercised any control over him; that the plaintiff lived with Davis thereafter, giving him the affection and obedience of a son, and performing chores and services around his home as needed, for which he received no wages or money consideration. Davis failed to bequeath any of his property to plaintiff, dying intestate, leaving an estate of both real and personal property. Before his death he had not placed the plaintiff in possession of any of it.

[¶3] Judgment for the defendants was rendered in the trial court. On the appeal, this was reversed by the honorable Court of Civil Appeals for the First District and judgment rendered for the plaintiff.

[¶4] As it affected the land belonging to Davis, the contract was plainly condemned by the statute of frauds. It was merely a parol agreement whereby in consideration of the father's surrender of the custody of the plaintiff and the latter's living with Davis as a son, Davis' lands owned at his death should become the plaintiff's property. It was in effect but a parol sale of Davis' lands to be performed by him in the future, and has no higher dignity than such a sale. The question presented by this feature of the case is whether the performance of the contract by the plaintiff relieves it from the operation of the statute of frauds, or, as more accurately stated, renders the contract enforceable in equity notwithstanding the statute.

[¶5] The Court of Civil Appeals has held that it does, despite the fact that there was never any possession of the lands by the plaintiff in Davis' lifetime.

[¶6] To sustain this holding, there must be created by judicial authority another exception to the operation of the statute of frauds, one unsanctioned by any previous decision of this court, and of larger consequence than any heretofore recognized by it. This is evident. For if it be the law that a contract of this kind may, under the circumstances here present, be enforced against a decedent's estate, the entire inheritances of families are, for the benefit of strangers to the blood, put at the mercy of parol evidence.

[¶7] From an early time it has been the rule of this court, steadily adhered to, that to relieve a parol sale of land from the operation of the statute of frauds, three things were necessary: 1. Payment of the consideration, whether it be in money or services. 2. Possession by the vendee. And, 3. The making by the vendee of valuable and permanent improvements upon the land with the consent of the vendor; or, without such improvements, the presence of such facts as would make the transaction a fraud upon the purchaser if it were not enforced. Payment of the consideration, though it be a payment in full, is not sufficient. This has been the law since *Garner v. Stubblefield*, 5 Tex. 552. Nor is possession of the premises by the vendee. *Ann Berta Lodge v. Leverton*, 42 Tex. 18. Each of these three elements is indispensable, and they must all exist.

[¶8] Regardless of the disposition of other courts to engraft other exceptions upon a plain and salutary statute which had its origin in the prolific frauds and perjuries with which parol contracts concerning lands abounded, this court has always refused to further relax the statute. We think the wisdom of its course has been justified.

[¶9] Equity has no concern in such cases except to prevent the perpetration of a fraud. That is the only ground that can justify its interference. Otherwise, the exercise of its jurisdiction for the practical annulment of the statute would be but bare usurpation. It is not to remedy a possible loss to the purchaser that it may intervene. It is the operation of a plain and valid statute that is to be relieved against. For this reason eminent judges have doubted whether under any circumstances courts of equity had originally the power to enforce such parol agreements in open disregard of the statute, and have questioned the wisdom of departing from its certain rule however plausible the pretext. The statute is valid; it is imperative; it is emphatic. Its simple requirement that contracts for the transfer of lands be in writing, imposes no hardship. The effect of its relaxation in what seemed to the courts hard cases has produced abuses almost as great as would have its rigorous enforcement, in the substitution of a doubtful state of the law for a rule that was plain and certain and easily capable of observance. In a noted early English case the chancellor made the following observation of this trend of judicial decisions:

> "The statute was made for the purpose of preventing frauds and perjuries, and nothing can be more manifest to any person who has been in the habit of practicing in the courts of equity than that the relaxation of the statute has been the ground of much perjury and much fraud. If the statute had been rigorously observed, the result would probably have been that few instances of parol agreements would have occurred. Agreements would, from the necessity of the case, have been reduced to writing; whereas it is manifest that the decisions on the subject have opened a new door to fraud, and that under the pretense of part execution, if possession is had in any way whatever, means are frequently found to put a court of equity in such a situation that, without departing from its rule, it feels obliged to break through the statute."

Whatever may be the diversity of views upon the general subject, it is clear that to warrant equity's 'breaking through the statute' to enforce such a parol contract, the case must be such that the nonenforcement of the contract—or the enforcement of the statute—would, itself, plainly amount to a fraud. This is the basis, and the only basis, for the jurisdiction which courts of equity have assumed in their creation of exceptions to the statute. When it is considered that the exercise of that jurisdiction results in any case in practically setting the statute aside, certainly there should exist some positive rule which will insure its exercise for only the prevention of an actual fraud as distinguished from a mere wrong, and by which the question of whether a failure to enforce the contract would result in such a fraud may be determined so surely as to leave the statute itself, through the exactness of the exception, with some definiteness of operation. The merit of the rule announced by this court in every decision where it has dealt with the subject is that it does this. By its requirement of payment of the consideration, adverse possession by the purchaser, and his making of valuable and permanent improvements in order for the contract to be exempt from the statute, it insures the application of the exemption only for the avoidance of actual fraud, and secures, as it should, the full operation of the statute in all other cases. Its purpose is both to prevent the perpetration of fraud and to safeguard the titles of lands. It is a rule founded in sound reason and common experience, and is fair and just.

[¶10] There is no fraud in refusing to enforce the contract where only the consideration is paid. The value of the consideration may in a law action be recovered. Nor where only possession of the premises is given. In such case there is no performance by the purchaser of any obligation. Nor even where there is both payment of the consideration and possession; without valuable and permanent improvements made on the faith of contract, or their equivalent. Merely the transfer of the possession by the vendor could create no estoppel against him. A transfer of the possession of the soil affords no presumption of a sale of the fee. As said by Judge Moore in *Ann Berta Lodge v. Leverton*, 42 Tex. 18, to permit a person who can show no other act done beyond the transfer of the possession of the soil from the owner to himself, to enforce an oral agreement for the sale of the fee, would practically repeal the statute of frauds and let in all the mischiefs it was intended to guard against. But where there is payment of the consideration, the surrender of possession and the making of valuable and permanent improvements on the faith of the purchase with the owner's knowledge or consent, there is created an estoppel against him and it may fairly be said that a fraud upon the purchaser would result if the owner were permitted to repudiate the contract.

[¶11] Not only can there be no fraud upon a purchaser in refusing to enforce a parol contract for the sale of land where there has been no performance beyond the payment of the consideration, but a further strong reason for the requirement of possession is that without it the existence of the contract rests altogether in parol evidence, which common experience has shown to be too unstable and uncertain to be permitted to work a divestiture of title to real property. If, however, the purchaser be let into possession, there is furnished by an affirmative act of the owner himself at least a corroborative fact that the contract was actually made.

[¶12] At all events it is a positive requirement under the holding of this court. It is a part of the settled law, and is not now to be dispensed with. * * * *

[¶13] The parol contract here has no basis for its enforcement, other than the plaintiff's performance by his assuming with Davis the relation and rendering him the service of a son. That was the consideration for Davis' agreement to make him the owner of his estate. The case, therefore, is simply one where the consideration for a parol agreement to transfer the title to land has been paid, with no possession of the land surrendered and no valuable and permanent improvements made by the purchaser on the faith of the agreement. In no other character of case resting only upon the payment of the consideration could such a contract be enforced in this State. If the consideration for Davis' agreement had been an amount of money, however large, and had been fully paid, without possession of the land and valuable and permanent improvements the contract would be held incapable of enforcement. If the payment of the consideration is to be held insufficient in one case, it should be so held in all cases. The test is not the character of the consideration or the value of the bargain. Why should the nature of the consideration or its exceptional value alone determine the question, instead of the rule itself which, in addition to the payment of the consideration, whatever its character and value, requires possession of the land and valuable and permanent improvements? And why should there be allowed the enforcement of a parol contract for the sale of land, the consideration being of the nature paid in this case, and deny its enforcement where the consideration has been fully paid in money? No satisfactory answer can be given to these questions.

[¶14] The holding of the Court of Civil Appeals is that a distinction should be made in this case because the value of the plaintiff's services in his assumed relation as Davis' son could not be measured in money. The plaintiff's father in the making of the contract and as its basis, as well as Davis, measured them in property.

[¶15] The father calculated the money value of the plaintiff's filial relation to himself, what it would be worth to surrender that relation to Davis and the value it would be to Davis, placed it all at the value of Davis' estate, and closed the bargain accordingly. The suit assumes that Davis was able to estimate the value of the relationship and services to himself, for it charges that he agreed to pay for them by the transfer of his estate. The entire case is one where the custody, the relationship and the services of the plaintiff were dealt with as property; where it was agreed that they should be exchanged for property, showing that the parties estimated their value in property; and where, now, it is sought, as in any other pecuniary bargain, to compel payment of them in property. If the parties to the agreement were able to estimate their value in property, a court should be competent to value them in money. The value of a child's services to his parents, and of a husband's or wife's relation and affection are every day the matter of assessment by courts. They are not held uncertain as a matter of judicial investigation. There would equally be no difficulty, we apprehend, in a similar determination of the value of the plaintiff's services and relationship to Davis.

[¶16] Aside from the invalidity of the contract as to the land of the estate under the statute of frauds and its being incapable of enforcement because there was no possession by the plaintiff of the land, it is a character of contract which should be held void as a matter of public policy. A parent has no property interest in his child and should not be permitted to deal with his child as property. The law should not encourage the relinquishment by parents of their children and the renunciation of a sacred relation imposed by nature merely for the children's enrichment by placing the seal of validity upon a contract in which a parent in effect barters his child away for a property return. It is more concerned in fostering and maintaining that relation and guarding its valuable and wholesome influences than in promoting the child's financial prosperity. Let it be once held that a parent's contract of this kind is valid and may be enforced, and every parent will be free to transfer his children to anyone willing to pay them well for the bargain. We are unwilling to subscribe to such a doctrine. It tends to the destruction of one of the finest relations of human life, to the subversion of the family tie, and to the reversal of an ordering of nature which is essential to human happiness and the security of society. It reduces parental duty and the child's welfare to the sordid level of financial profit, and would license the easy surrender of that duty for merely the child's financial advantage. The custody of a child is not a subject matter of contract and therefore can constitute no consideration for a contract. The attempted agreement here was therefore not a contract. *Legate v. Legate*. Davis could not have enforced it because based upon a void consideration. If Davis could not have enforced it against the plaintiff, it is not enforceable in the plaintiff's favor.

[¶17] True, contracts between two persons upon a valuable consideration, that one will leave his property to the other, are enforceable where no statute is contravened. Such is the recognized law and was the holding in *Jordan v. Abney*, 97 Tex. 296, 78 S. W. 486. There, in addition to the contract made between the plaintiff's father and Mr. and Mrs. Ogle, there was a contract between the plaintiff herself and Mrs. Ogle, made after Ogle's death, confirming the previous contract and by which Mrs. Ogle agreed to leave the plaintiff her property. Here, there was no contract between the plaintiff and Davis for the former's service. The contract was between the plaintiff's father and Davis by which his custody and filial relation were attempted to be bargained away as though properly the subject matter of contract. They could not form the basis of a contract under the express holding in *Legate v. Legate*.

[¶18] The judgment of the honorable Court of Civil Appeals is reversed and the judgment of the District Court is affirmed.

Questions:

1. Is the oral contract valid under the Statute of Frauds?

2. On what section of the Statute does the court ground its ruling?

3. Of what legal relevance is the fact that Bob Bridgewater performed?

4. What is the policy of the Statute of Frauds?

5. Do you think that Bob Bridgewater was fabricating Davis's promise? Does it bother you that he could be sold as a child and then disinherited because his so-called adoptive father never promised in writing?

6. What is the alternate ground of this decision?

W. L. TANENBAUM v. BISCAYNE OSTEOPATHIC HOSPITAL, INC. (1966)
Supreme Court of Florida
190 So.2d 777

THOMAS, Justice.

[¶1] The facts in this case are simple. W. L. Tanenbaum, the petitioner, is an osteopathic physician specializing in radiography. In September 1961 he removed from Allentown, Pennsylvania, to North Miami Beach where he became osteopathic radiologist at respondent's North Miami Beach hospital. The parties entered into an oral contract providing for his services for a period of five years terminable only after the expiration of that period and even then only upon 90 days written notice by either party. There was evidence that petitioner importuned respondent to execute a written agreement but this was never accomplished.

[¶2] In April 1962 the respondent notified the petitioner that his services would be discontinued the first of the following July and in the next month petitioner filed his complaint for damages resulting from the respondent's action. Principal defense of the respondent, then defendant, was the Statute of Frauds, the relevant part of which provides, Sec. 725.01, that '(n)o action shall be brought * * * upon any agreement that is not be performed within the space of one year from the making thereof, unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by him thereunto lawfully authorized.'

[¶3] So, as might have been expected, the respondent moved, at the end of plaintiff's case for a directed verdict in its favor. This was denied. The motion was repeated at the close of all testimony and evidence, and ruling upon it was reserved by the court. Then the jury returned a verdict for the plaintiff in the amount of $40 thousand. Later the respondent presented a motion for a judgment in accordance with the motion for directed verdict and the court granted it.

[¶4] The trial judge found that the Statute of Frauds had been properly pleaded and that the contract was 'within' the statute. He observed that the plaintiff, petitioner, had opposed the motion on the ground that the respondent was estopped from resorting to the statute. The judge rejected this view and entered judgment for the defendant, respondent, accordingly.

[¶5] The controversy then went to the District Court of Appeal, Third District, where the appellant presented the lone question whether or not the Circuit Court had ruled properly that his claim was, as a matter of law, barred by the Statute of Frauds. That Court commented that the sole reason urged for the non-applicability of the Statute was the doctrine of 'promissory estoppel' which the Court said did not appear in any of the Florida decisions. Such being the case the Court was of the opinion that great caution should be exercised 'in the consideration of the advisability of ingrafting onto the law of this State a provision which may have the effect of nullifying the legislative will of the State as expressed by the inactment (sic) of the Statute of Frauds * * *.'

[¶6] The District Court of Appeal referred to three decisions in which the doctrine of promissory estoppel had been recognized, *Alaska Airlines, Inc. v. Stephenson*, 15 Alaska 272, 217 F.2d 295; *Fibreboard Products, Inc. v. Townsend*, 9 Cir., 202 F.2d 180, and *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88, and commented that no decision had been found indicating that the principle of promissory estoppel as related to the Statute of Frauds had been 'favorably considered by any Florida court in a law action * * *.' We are unable to elaborate on this statement except to say that there have been brought to our attention two cases in which the doctrine had been mentioned, *South Investment Corporation, et al. v. Norton, et al*., Fla., 57 So.2d 1, and *Southeastern Sales & Service Co. v. T. T. Watson, Inc.*, Fla.App., 172 So.2d 239. But in neither was the doctrine of promissory estoppel embraced.

[¶7] The principle was also recognized in the Restatement of Contracts, s 90:

> 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'

The language of the Statute of Frauds we have already quoted is quite clear and its origin and purpose were plainly stated in *Yates v. Ball*, 132 Fla. 132, 181 So. 341, as follows:

> 'The statute of frauds grew out of a purpose to intercept the frequency and success of actions based on nothing more than loose verbal statements or mere innuendos. To accomplish this, the statute requires that all actions based on agreements for longer than one year must depend on a written statement or memorandum, signed by the party to be charged. The statute should be strictly construed to prevent the fraud it was designed to correct, and so long as it can be made to effectuate this purpose, Courts should be reluctant to take cases from its protection.' (Italics supplied.)

Doubtless because this is a matter of first impression and therefore involves the introduction into the law of this State a relatively novel concept, the case was sent here on a certificate under Sec. 4(2), Article V of the Constitution, F.S.A. The question that emerges for resolution by us is whether or not we will adopt by judicial action the doctrine of promissory estoppel as a sort of counteraction to the legislatively created Statute of Frauds. This we decline to do.

[¶8] We agree with the conclusions of the Circuit Court and District Court of Appeal in rejecting the so-called doctrine of promissory estoppel and especially with the observation of the latter with reference to embracing it in view of the legislative prerogative of dealing with matters of this nature.

[¶9] The petitioner had but to follow the provisions of the Statute of Frauds to secure his rights under the arrangement with the respondent instead of taking the position, rather tardily that they did not apply to him. Thirty-three years have passed since the Restatement we have quoted was adopted and there have been about 15 intervening sessions of the legislature at which the contents of Sec. 90 of the Restatement could have been incorporated into the act yet we know of no such effort or accomplishment.

[¶10] Having undertaken to answer the question certified, the writ of certiorari which brought it here is discharged.

THORNAL, C.J., and DREW and CALDWELL, JJ., concur.

ERVIN, J., dissents with opinion.
O'CONNELL, J., dissents and concurs with ERVIN, J.

Questions:

1. Does the one-year rule apply in this case?

2. Why cannot a showing of promissory estoppel overcome the Statute of Frauds in Florida?

3. Compare the reasoning of *Tannenbaum* with the following excerpt from *Janke Construction Co., Inc. v. Vulcan Materials Co.*, 386 F. Supp. 687 (D. Wis. 1974):

[¶1] One question remains. Can the statute of frauds, raised by defendant as a defense in the context of plaintiffs contractual claim, be raised as a defense to a claim for damages based on the theory of promissory estoppel? The issue has not been raised in the Wisconsin courts and there is a split of opinion in other jurisdictions where this question has been considered.

[¶2] Some states, such as New York, have held that promissory estoppel has no application where the oral contract comes within the statute of frauds except in cases involving charitable subscriptions. *Kahn v. Cecelia Co.*, 40 F. Supp. 878 (S.D.N.Y.1941). Other jurisdictions have held that the defense of the statute is precluded either when there has been (1) a misrepresentation that the statute's requirements have been complied with, (2) a promise to make a memorandum which was also relied on by the promisee, or (3) a subsidiary promise not to raise the statute as a defense. *Tiffany Incorporated v. W.M.K. Transit Mix, Inc.*, 16 Ariz.App. 415, 493 P.2d 1220 (1972); *21 Turtle Creek Sq., Ltd. v. New York St. Teach. Retire Sys.*, 432 F.2d 64 (5th Cir. 1970) (Construing Texas Law); *Alaska Airlines v. Stephenson*, 15 Alaska 272, 217 F.2d 295 (9th Cir. 1954); *Easton v. Wycoff*, 4 Utah 2d 386, 295 P.2d 332 (1956); *Wolfe v. Wallingford Bank & Trust Co.*, 124 Conn. 507, 1 A.2d 146 (1938).[*]

[¶3] Some jurisdictions, recognizing that the doctrine of promissory estoppel is based essentially on the principles of equitable estoppel and fraud, are loath to deny relief where the statute of frauds is raised as a defense and will enforce an oral promise otherwise coming within the statute. *McIntosh v. Murphy*, 52 Haw. 29, 469 P.2d 177 (1970); *N. Litterio & Company v. Glassman Construction Com-*

[*] Many of these cases cite Comment f to § 178, Restatement of the Law of Contracts, as a basis for their rulings. Comment f, which deals with the statute of frauds, states: 'Though there has been no satisfaction of the Statute, an estoppel may preclude objection on that ground in the same way that objection to the non-existence of other facts essential for the establishment of a right or a defense may be precluded. A misrepresentation that there has been such satisfaction if substantial action is taken in reliance on the representation, precludes proof by the party who made the representation that it was false; and a promise to make a memorandum, if similarly relied on, may give rise to an effective promissory estoppel if the Statute would otherwise operate to defraud.'

pany, *supra*; *Miller v. Lawlor*, 245 Iowa 1144, 66 N.W.2d 267 (1954); *Sessions v. Southern California Edison Co*., 47 Cal.App.2d 611, 118 P.2d 935 (1941).

[¶4] In *McIntosh* the Supreme Court of Hawaii held that an oral contract of employment was enforceable and that money damages would be granted notwithstanding that the contract allegedly violated the statute of frauds. It stated, 469 P.2d at 180:

> ‘It is appropriate for modern courts to cast aside the raiments of conceptualism which cloak the true policies underlying the reasoning behind the many decisions enforcing contracts that violate the Statute of Frauds. There is certainly no need to resort to legal rubrics or meticulous legal formulas when better explanations are available. The policy behind enforcing an oral agreement which violated the Statute of Frauds, as a policy of avoiding unconscionable injury, was well set out by the California Supreme Court. In *Monarco v. Lo Greco*, 35 Cal.2d 621, 623, 220 P.2d 737, 739 (1950), a case which involved an action to enforce an oral contract for the conveyance of land on the grounds of 20 years performance by the promisee, the court said:
>
> > ‘The doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract * * *.”
>
> In *Litterio* the District of Columbia Circuit employed a different rationale for precluding application of the statute of frauds in a construction bidding case. It held that a subcontractor would be held liable on his bid, not on the basis of a contractual obligation inasmuch as no contract existed, but under the doctrine of promissory estoppel if all the elements of the doctrine were shown to be present. Thereupon the Court commented in a footnote, 319 F.2d at 740:
>
> > ‘The issue as to the applicability of the Statute of Frauds is no longer germane in light of our holding that no contract was created.’

[¶5] I agree with the statement in *Litterio* as to the inapplicability of the statute. The statute of frauds relates to the enforceability of contracts; promissory estoppel relates to promises which have no contractual basis and are enforced only when necessary to avoid injustice. The Wisconsin Supreme Court clearly stated in Hoffman that a promise which could not meet the requirements of an offer that would ripen into a contract if accepted by the promisee is nonetheless enforceable to avoid injustice if the other elements of promissory estoppel are present. * * * * Accordingly, I find the statute is not applicable in an action based on promissory estoppel.

4. Consider Restatement (Second) of Contracts § 139:

Restatement (Second) of Contracts § 139. Enforcement by Virtue of Action in Reliance.

Is this section consistent with *Tannenbaum*?

Uniform Commercial Code § 2-102. Scope; Certain Security and Other Transactions Excluded From This Article.

Uniform Commercial Code § 2-201. Formal Requirements; Statute of Frauds, and cmt. 1.

PROBLEMS 34-45. Please resolve each of the following hypothetical questions prior to class, using only UCC §§ 2-102 & 2-201 and comments.

34. John and Alice agree orally that Alice will sell to John Lot 102 of the River Ridge subdivision. Is this an enforceable contract under UCC § 2-201?
35. Suppose Professor agrees orally to sell the class a ballpoint pen for $50. Does Article 2 of the UCC apply to this transaction?
36. John and Alice orally agree that John will sell Alice his 1972 Nova for $200. Is a writing required?
37. John and Alice orally agree that John will sell Alice his 1972 Nova for $500. Is a writing required?
38. John and Alice orally agree that John will allow Alice to use his $45,000 Lexus throughout the entire next calendar year. Is a writing required?
39. John and Alice orally agree that John will install $10,000 worth of carpet in Alice's house. Alice plans to purchase the carpet from someone other than John and have it ready for John to install next Thursday. Is a writing required? Any difference if Alice is also buying the carpet from John?
40. John and Alice orally agree that John will sell his 1972 Nova to Alice for $500. Alice writes on a slip of paper, "$500 for John's Nova," and signs it. Can Alice enforce the contract? Can John enforce the contract?
41. John and Alice orally agree that John will sell his 1972 Nova for $500. Alice writes on a slip of paper, "I will pay $500 to John." Alice signs the paper. Can John enforce the contract?
42. John and Alice orally agree that John will sell his 1972 Nova for $500. Alice writes on a slip of paper, "I will buy John's Nova." Alice signs the paper. Can John enforce the contract?
43. John and Alice, auto merchants, orally agree that John will sell his 1972 Nova for $500. Alice writes on a slip of paper, "John and I agree I will pay $500 for John's Nova." Alice signs and dates the paper. The next day, Alice sends a copy of

the slip of paper to John. Alice has placed a line under her name and printed under the line “John,” as if to signify that John’s signature should be placed there. Can Alice enforce the contract?

44. John is a used car wholesaler and Alice is a used car dealer, and they orally agree that John will sell Alice his Nova for $500. Alice writes on a slip of paper, “John and I agree John will sell me a 1972 Nova.” She signs and dates the paper and sends it to John via certified mail. John receives the writing two days later and his secretary opens it and date-stamps it the day it is received. John does not respond within ten days. Can Alice enforce the contract against John?

45. Alice and John agree orally for the sale of the $500 Nova. No writing is involved, but when Alice sues John he admits in his deposition that he and Alice made a deal for the Nova. Is John’s promise enforceable?

E. The Final Push: When Does a Contract Form?

Eventually, the law adopted assent also as a paradigm. How it came to this result is fascinating. The three cases in this section were the mechanism for the adoption. Oddly, two are a response to a surrogate for the bargain rule that we have already read, in *Nicholas v. Raynbred*. Go back and read the timing rule in that case, if you will. Can you recall the purpose of that rule? Eventually, the timing rule became untenable.

COOKE v. OXLEY (1790)
King’s Bench
3 Term Rep. 653

[¶1] This was an action [in assumpsit]; and the ... count in the declaration ... stated that on [a certain date] a discourse was had ... concerning the buying of 266 hogsheads of tobacco; and [in] that discourse [Oxley] proposed to [Cooke] that [Oxley] should sell and deliver to [Cooke] the said 266 hogsheads [at a certain price]; whereupon [Cooke] desired [Oxley] to give [Cooke] time to agree to or dissent from the proposal till the hour of four in the afternoon of that day, to which [Oxley] agreed; ... ; [Cooke also] averred that he did agree to purchase the same upon the terms aforesaid, and did give notice thereof to [Oxley] before the hour of four in the afternoon of that day; he also averred that he requested [Oxley] to deliver to him the said hogsheads, and offered to pay to [Oxley] the said price for the same, yet that [Oxley] did not, &c.

[¶2] [The question then arose whether there was consideration for Oxley’s promise.]

[¶3] Erskine and Wood [argued for Cooke that consideration existed]: This was a bargain and sale on condition; and though the plaintiff might have rescinded the contract before four o’clock, yet not having done so, the condition was complied with, and both parties were bound by the agreement. The declaration considered this as a complete bargain and sale; for the breach of the agreement is for not delivering the tobacco, and not for not selling it.

[¶4] Lord Kenyon, Ch.J. ...: Nothing can be clearer than that at the time of entering into this contract the engagement was all on one side; the other party was not bound; it was therefore nudum pactum.

[¶5] Buller, J.-It is impossible to support this declaration in any point of view. In order to sustain a promise, there must be either a damage to the plaintiff, or an advantage to the defendant: but here was neither when the contract was first made. Then as to the subsequent time, the promise can only be supported on the ground of a new contract made at four o'clock; but there is no pretence [sic] for that. It has been argued that this must be taken to be a complete sale from the time when the condition was complied with; but it was not complied with, for it is not stated that the defendant did agree at four o'clock to the terms of the sale; or even that the goods were kept till that time.

[¶6] Grose, J.-The agreement was not binding on the plaintiff before four o'clock; and it is not stated that the parties came to any subsequent agreement; there is therefore no consideration for the promise. ....

Questions:

1. How is this case different from *Nicholas v. Raynbred*?

2. What is the issue in *Cooke*? What was its resolution? What rule did the court follow?

Note: *Cooke* is one of the most misunderstood common law decisions of all time. Commentators and later courts argued over its meaning for fifty years after it was decided. The difficulty was in squaring *Cooke* with *Adams v. Lindsell*, which you will read shortly. *Cooke* has never been overruled, but, in fact, *Cooke* is no longer the law in American jurisdictions. However, *Cooke* provided the impetus for the introduction and development of the explicit assent requirement in Anglo-American contract law. Only by understanding *Cooke* can one see how the consideration doctrine caused the courts to approach assent in the way that they have.

PAYNE v. CAVE (1789)
King's Bench
3 Term Reports 148

[¶1] This was an action tried at the sittings after last term at Guildhall before Lord Kenyon, wherein the declaration stated, that the plaintiff, on 22d September 1788 was possessed of a certain worm-tub, and a pewter worm in the same, which were then and there about to be sold by public auction by one S. M. the agent of the plaintiff in that behalf; the conditions of which sale were to be the usual conditions of sale of goods sold by auction, &c. * * * *. And the plaintiff avers that the conditions of sale * * * are usual conditions of sale of goods sold by auction, to wit, that the highest bidder should be the purchaser, and should deposit five shillings in the pound, and that if the lot purchased were not paid for and taken away in two days time, it should be put up again and resold, &c. * * * *. It then stated, that the defendant became the purchaser of the lot in question for 40l. and was requested to pay the usual deposit, which he refused, &c. At the trial, the plaintiff's counsel opened the case thus: - The goods were put up in one lot at an auction; there were several bidders, of whom the defendant was the last, who bid 40l; the auctioneer dwelt on the bidding, on which the defendant said, "Why do you dwell? you will not get more." The auctioneer said that he was informed the worm weighed at least 1300 cwt. and was worth more than 40l; the defendant then asked him whether he would warrant it to weigh so much, and receiving an answer in the negative, he then declared that he would not take it, and refused to pay for it. It was resold on a subsequent day's sale for 30l. to the defendant, against whom the action was brought for the difference. Lord Kenyon being of opinion, on this statement of the case, that the defendant was at liberty to withdraw his bidding any time before the hammer was knocked down, nonsuited the plaintiff.

[¶2] Walton now moved to set aside the nonsuit, on the ground that the bidder was bound * * * * to abide by his bidding, and could not retract. By the act of bidding, he acceded to those conditions, one of which was, that the highest bidder should be the buyer. The hammer is suspended, not for the benefit of the bidder, or to give him an opportunity of repenting, but for the benefit of the seller: in the meantime the person who bid last is a conditional purchaser, if nobody bids more. Otherwise it is in the power of any person to injure the vendor, because all the former biddings are discharged by the last; and, as it happened in this very instance, the goods may thereby ultimately be sold for less than the person who was last out-bid would have given for them. * * * *

[¶3] The Court thought the nonsuit very proper. The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called locus pœnitentiae. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed.

Rule refused.

Questions:

1. Was Cave's bid revocable?

2. What policy does the court cite in support of this decision? What authority have you seen for that policy in the case law we have studied?

3. What happens to prior bids when a bidder makes a higher bid?

4. Now examine UCC § 2-328:

Uniform Commercial Code § 2-328. Sale by Auction.

Is subsection (2) consistent with *Payne v. Cave*? Is the rule the same when, under (3), the auction is without reserve? When the sale is without reserve, who is the offeror and what problems does naming an offeror cause?

ADAMS v. LINDSELL (1818)
1 Barnewall and Alderson 681

[¶1] Action for non-delivery of wool according to agreement. At the trial at the last Lent Assizes for the county of Worcester, before Burrough J. it appeared that the defendants, who were dealers in wool, at St. Ives, in the county of Huntingdon, had, on Tuesday the 2d. of September 1817, written the following letter to the plaintiffs, who were woollen manufacturers residing in Bromsgrove, Worcestershire. "We now offer you eight hundred tods of wether fleeces, of a good fair quality of our country wool, at 35s. 6d. per tod, to be delivered at Leicester, and to be paid for by two months bill in two months, and to be weighed up by your agent within fourteen days, receiving your answer in course of post."

[¶2] This letter was misdirected by the defendants, to Bromsgrove, Leicestershire, in consequence of which it was not received by the plaintiffs in Worcestershire till 7 p.m. on Friday, September 5th. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. The course of the post between St. Ives and Bromsgrove is through London, and consequently this answer was not received by the defendants till Tuesday, September 9th. On the Monday September 8th, the defendants not having, as they expected, received an answer on Sunday September 7th, (which in case their letter had not been misdirected, would have been in the usual course of the post,) sold the wool in question to another person. Under these circumstances, the learned Judge held, that the delay having been occasioned by the neglect of the defendants, the jury must take it, that the answer did come back in due course of post; and that then the defendants were liable for the loss that had been sustained: and the plaintiffs accordingly recovered a verdict.

[¶3] Jervis having in Easter term obtained a rule nisi for a new trial, on the ground that there was no binding contract between the parties,

[¶4] Dauncey, Puller, and Richardson, shewed cause. They contended, that at the moment of the acceptance of the offer of the defendants by the plaintiffs, the former became bound. And that was on the Friday evening, when there had been no change of circumstances. They were then stopped by the Court, who called upon

[¶5] Jervis and Campbell in support of the rule. They relied on Payne v Cave, and more particularly on Cooke v Oxley. In that case, Oxley, who had proposed to sell goods to Cooke, and given him a certain time at his request, to determine whether he would buy them or not, was held not liable to the performance of the contract, even though Cooke, within the specified time, had determined to buy them, and given Oxley notice to that effect. So here the defendants who have proposed by letter to sell this wool, are not to be held liable, even though it be now admitted that the answer did come back in due course of post. Till the plaintiffs answer was actually received, there could be no binding contract between the parties; and before then, the defendants had retracted their offer, by selling the wool to other persons. But

[¶6] The Court said, that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them, that the plaintiffs answer was received in course of post.

Rule discharged.

Questions:

1. Okay, here it is! The moment we've all be waiting for: The BIRTH OF ASSENT! Congratulations for making it this far! Did a contract form in this case?

2. Why didn't *Cooke v. Oxley* control?

3. Do we have concerns that one promise may not have caused the other?

Historical Note on Assent v. Consideration

The need to form contracts by post was not the only reason to shift to an assent-focused doctrinal structure. Civil law in continental Europe always focused on assent rather than consideration and remedy. From the early 1700s forward, common law judges (most enthusiastically Lord Mansfield, CJKB 1756-88) began adopting vocabulary from the civil law and importing civil law positions into the common law. Mansfield also began importing merchants' customs into the common law. Merchants to a great extent favored assent as a juridical concept. Mansfield was also Chief Justice while the Americans revolted in favor of government by consent and the French planned their revolution. Consent seemed to be the buzzword for this time period. The popularity of French law also contributed to this change. As noted, Pothier became the contract law treatise of choice for common lawyers around this time. American lawyers who acted as French popularizers, James Kent (Chief Judge, NY Supreme Court, and Chancellor) and Joseph Story (U.S. Supreme Court Justice and Harvard law professor), wrote treatises adopting Pothier's positions into various aspects of contract law. In England, a commentator wrote that Pothier was "law at Westminster as well as Orleans." Sir W. Jones, ESSAY OF THE LAW OF BAILMENTS 29 (2d ed. 1804).

What happened to consideration in all of this? It ceased to be a criterion for recovery of damages and became instead just one element of the test to see whether a contract formed. The law didn't have to be put together that way. Consideration as a concept entirely subsumes assent. Courts alternately could have grounded recovery in agreement and then limited damages based on the consideration existing, for example. But that's not what happened.

Note and Questions on the Mailbox Rule

The rule of *Adams v. Lindsell* became known as the mailbox rule. The mailbox rule applies whenever acceptance is attempted by post in a case in which posting would be an acceptable method of acceptance. The mailbox rule has been applied to the following circumstances:

1. Attempted Withdrawal: Cases in which an offeror attempts to withdraw the offer but the withdrawal reaches the offeree only after the offeree has dropped the acceptance in the post office box. Under American law, a withdrawal of an offer is effective only upon receipt of the withdrawal by the offeree. The acceptance is effective when it is dropped in the mail. Should a contract form in this instance? Why not use receipt of acceptance as the time for acceptance?

2. Repudiation of an Acceptance: Cases in which the offeree drops an acceptance in the post and then repudiates the acceptance before it is received by the offeror. In some cases, the offeree has phoned or wired the offeror to repudiate before the offeror receives the acceptance but after the offeree has dropped the acceptance in

the post. In other cases, the offeree has retrieved the letter of acceptance before it has arrived. If the mailbox rule applies, a contract forms when the acceptance is dropped in the post. Because a contract has formed, the repudiation has no effect. Why should that be true? Can you think of a policy supporting that view? (Actually, the decisions in these cases are not uniform. The U.S. Court of Claims has held that the repudiation of an acceptance is effective if the repudiation is received by the offeror before the acceptance. *See Rhode Island Tool Co. v. United States*, 128 F. Supp. 417, 130 Ct. Cl. 698 (1955); *Dick v. United States*, 82 F. Supp. 362, 113 Ct. Cl. 94 (1949). Only the Court of Claims so holds; so, unless you are suing the United States in the Court of Claims, the mailbox rule governs.)

3. Loss of Acceptance: Cases in which the offeree drops the acceptance in the post but the post office loses the acceptance and it never arrives. A contract forms when the acceptance is dropped in the post, even if the letter is later lost. If the offeror acted as if there was no contract, she must bear that loss. Thus, the rule places liability for the loss on the offeror in most cases. Who really should be liable?

4. Time Required for Acceptance: Cases in which the offeror specified that the offer was to be "accepted" within X period of time. If the offeror said "within 10 days," then dropping the acceptance in the post on the 10th day should suffice. What reason can you give for this rule?

Please note that if the offeror wishes to change the mailbox rule by specifying in the offer that the acceptance must be received, the offeror is free so to specify and the courts will respect that specification.

Should the mailbox rule apply to option contracts? Courts have said yes and no. *See, e.g., Palo Alto Town and Country Village, Inc. v. BBTC Co.*, 11 Cal.3d 494 (1974) (yes); *Livesey v. COPPS Corp.*, 90 Wis.2d 577 (App. 1979) (no). Many (perhaps most) options contain language like the following: "Purchaser may exercise its right to purchase the Premises at any time during the Option Term by giving written notice thereof to Seller." What about that language seems to require more than mere mailing? Can it be construed to require something less than actual receipt?

The United Nations Convention on Contracts for the International Sale of Goods (1980), or CISG, is a treaty comprising contract law governing transactions between persons in different countries where both countries are covered by the treaty, for instance, between a person in the US and one in Zambia. You can find it in your statutory supplement.

Look at the following articles 16, 18, and 22:

CISG Article 16

CISG Article 18

CISG Article 22

How does the CISG answer cases 1-3 above?

F. What is Assent, Really, in Contract Law?

W. O. LUCY and J. C. Lucy v. A. H. ZEHMER and Ida S. Zehmer (1954)
Supreme Court of Appeals of Virginia
84 S.E.2d 516

BUCHANAN, J., delivered the opinion of the court.

[¶1] This suit was instituted by W. O. Lucy and J. C. Lucy, complainants, against A. H. Zehmer and Ida S. Zehmer, his wife, defendants, to have specific performance of a contract by which it was alleged the Zehmers had sold to W. O. Lucy a tract of land owned by A. H. Zehmer in Dinwiddie county containing 471.6 acres, more or less, known as the Ferguson farm, for $50,000. J. C. Lucy, the other complainant, is a brother of W. O. Lucy, to whom W. O. Lucy transferred a half interest in his alleged purchase.

[¶2] The instrument sought to be enforced was written by A. H. Zehmer on December 20, 1952, in these words: 'We hereby agree to sell to W. O. Lucy the Ferguson Farm complete for $50,000.00, title satisfactory to buyer,' and signed by the defendants, A. H. Zehmer and Ida S. Zehmer.

[¶3] The answer of A. H. Zehmer admitted that at the time mentioned W. O. Lucy offered him $50,000 cash for the farm, but that he, Zehmer, considered that the offer was made in jest; that so thinking, and both he and Lucy having had several drinks, he wrote out 'the memorandum' quoted above and induced his wife to sign it; that he did not deliver the memorandum to Lucy, but that Lucy picked it up, read it, put it in his pocket, attempted to offer Zehmer $5 to bind the bargain, which Zehmer refused to accept, and realizing for the first time that Lucy was serious, Zehmer assured him that he had no intention of selling the farm and that the whole matter was a joke. Lucy left the premises insisting that he had purchased the farm.

[¶4] Depositions were taken and the decree appealed from was entered holding that the complainants had failed to establish their right to specific performance, and dismissing their bill. The assignment of error is to this action of the court.

[¶5] W. O. Lucy, a lumberman and farmer, thus testified in substance: He had known Zehmer for fifteen or twenty years and had been familiar with the Ferguson farm for ten years. Seven or eight years ago he had offered Zehmer $20,000 for the farm which Zehmer had accepted, but the agreement was verbal and Zehmer backed out. On the night of December 20, 1952, around eight o'clock, he took an employee to McKenney, where Zehmer lived and operated a restaurant, filling station and motor court. While there he decided to see Zehmer and again try to buy the Ferguson farm. He entered the restaurant and talked to Mrs. Zehmer until Zehmer came in. He asked Zehmer if he had sold the Ferguson farm. Zehmer replied that he had not. Lucy said, 'I bet you wouldn't take $50,000.00 for that place.' Zehmer replied, 'Yes, I would too; you wouldn't give fifty.' Lucy said he would and told Zehmer to write up an agreement to that effect. Zehmer took a restaurant check and wrote on the back of it, 'I do hereby agree to sell to W. O. Lucy the Ferguson Farm for $50,000 complete.' Lucy told him he had better change it to 'We' because Mrs. Zehmer would have to sign it too. Zehmer then tore up what he had written, wrote the agreement quoted above and asked Mrs. Zehmer, who was at the other end of the counter ten or twelve feet away, to sign it. Mrs. Zehmer said she would for $50,000 and signed it. Zehmer brought it back and gave it to Lucy, who offered him $5 which Zehmer refused, saying, 'You don't need to give me any money, you got the agreement there signed by both of us.'

[¶6] The discussion leading to the signing of the agreement, said Lucy, lasted thirty or forty minutes, during which Zehmer seemed to doubt that Lucy could raise $50,000. Lucy suggested the provision for having the title examined and Zehmer made the suggestion that he would sell it 'complete, everything there,' and stated that all he had on the farm was three heifers.

[¶7] Lucy took a partly filled bottle of whiskey into the restaurant with him for the purpose of giving Zehmer a drink if he wanted it. Zehmer did, and he and Lucy had one or two drinks together. Lucy said that while he felt the drinks he took he was not intoxicated, and from the way Zehmer handled the transaction he did not think he was either.

[¶8] December 20 was on Saturday. Next day Lucy telephoned to J. C. Lucy and arranged with the latter to take a half interest in the purchase and pay half of the consideration. On Monday he engaged an attorney to examine the title. The attorney reported favorably on December 31 and on January 2 Lucy wrote Zehmer stating that the title was satisfactory, that he was ready to pay the purchase price in cash and asking when Zehmer would be ready to close the deal. Zehmer replied by letter, mailed on January 13, asserting that he had never agreed or intended to sell.

[¶9] Mr. and Mrs. Zehmer were called by the complainants as adverse witnesses. Zehmer testified in substance as follows:

[¶10] He bought this farm more than ten years ago for $11,000. He had had twenty-five offers, more or less, to buy it, including several from Lucy, who had never offered any specific sum of money. He had given them all the same answer, that he was not interested in selling it. On this Saturday night before Christmas it looked like everybody and his brother came by there to have a drink. He took a good many drinks during the afternoon and had a pint of his own. When he entered the restaurant around eight-thirty Lucy was there and he could see that he was 'pretty high.' He said to Lucy, 'Boy, you got some good liquor, drinking, ain't you?' Lucy then offered him a drink. 'I was already high as a Georgia pine, and didn't have any more better sense than to pour another great big slug out and gulp it down, and he took one too.'

[¶11] After they had talked a while Lucy asked whether he still had the Ferguson farm. He replied that he had not sold it and Lucy said, 'I bet you wouldn't take $50,000.00 for it.' Zehmer asked him if he would give $50,000 and Lucy said yes. Zehmer replied, 'You haven't got $50,000 in cash.' Lucy said he did and Zehmer replied that he did not believe it. They argued 'pro and con for a long time,' mainly about 'whether he had $50,000 in cash that he could put up right then and buy that farm.'

[¶12] Finally, said Zehmer, Lucy told him if he didn't believe he had $50,000, 'you sign that piece of paper here and say you will take $50,000.00 for the farm.' He, Zehmer, 'just grabbed the back off of a guest check there' and wrote on the back of it. At that point in his testimony Zehmer asked to see what he had written to 'see if I recognize my own handwriting.' He examined the paper and exclaimed, 'Great balls of fire, I got 'Firgerson' for Ferguson. I have got satisfactory spelled wrong. I don't recognize that writing if I would see it, wouldn't know it was mine.'

[¶13] After Zehmer had, as he described it, 'scribbled this thing off,' Lucy said, 'Get your wife to sign it.' Zehmer walked over to where she was and she at first refused to sign but did so after he told her that he 'was just needling him [Lucy], and didn't mean a thing in the world, that I was not selling the farm.' Zehmer then 'took it back over there * * * * and I was still looking at the dern thing. I had the drink right there by my hand, and I reached over to get a drink, and he said, 'Let me see it.' He reached and picked it up, and when I looked back again he had it in his pocket and he dropped a five dollar bill over there, and he said, 'Here is five dollars payment on it.' * * * * I said, 'Hell no, that is beer and liquor talking. I am not going to sell you the farm. I have told you that too many times before.''

[¶14] Mrs. Zehmer testified that when Lucy came into the restaurant he looked as if he had had a drink. When Zehmer came in he took a drink out of a bottle that Lucy handed him. She went back to help the waitress who was getting things ready for next day. Lucy and Zehmer were talking but she did not pay too much attention to what they were saying. She heard Lucy ask Zehmer if he had sold the Ferguson farm, and Zehmer replied that he had not and did not want to sell it. Lucy said, 'I bet you wouldn't take $50,000 cash for that farm,' and Zehmer replied, 'You haven't got $50,000 cash.' Lucy said, 'I can get it.' Zehmer said he might form a company and get it, 'but you haven't got $50,000.00 cash to pay me tonight.' Lucy asked him if he would put it in writing that he would sell him this farm. Zehmer then wrote on the back of a pad, 'I agree to sell the Ferguson Place to W. O. Lucy for $50,000.00 cash.' Lucy said, 'All right, get your wife to sign it.' Zehmer came back to where she was standing and said, 'You want to put your name to this?' She said 'No,' but he said in an undertone, 'It is nothing but a joke,' and she signed it.

[¶15] She said that only one paper was written and it said: 'I hereby agree to sell,' but the 'I' had been changed to 'We'. However, she said she read what she signed and was then asked, 'When you read 'We hereby agree to sell to W. O. Lucy,' what did you interpret that to mean, that particular phrase?' She said she thought that was a cash sale that night; but she also said that when she read that part about 'title satisfactory to buyer' she understood that if the title was good Lucy would pay $50,000 but if the title was bad he would have a right to reject it, and that that was her understanding at the time she signed her name.

[¶16] On examination by her own counsel she said that her husband laid this piece of paper down after it was signed; that Lucy said to let him see it, took it, folded it and put it in his wallet, then said to Zehmer, 'Let me give you $5.00,' but Zehmer said, 'No, this is liquor talking. I don't want to sell the farm, I have told you that I want my son to have it. This is all a joke.' Lucy then said at least twice, 'Zehmer, you have sold your farm,' wheeled around and started for the door. He paused at the door and said, 'I will bring you $50,000.00 tomorrow. * * * * No, tomorrow is Sunday. I will bring it to you Monday.' She said you could tell definitely that he was drinking and she said to her husband, 'You should have taken him home,' but he said, 'Well, I am just about as bad off as he is.'

[¶17] The waitress referred to by Mrs. Zehmer testified that when Lucy first came in 'he was mouthy.' When Zehmer came in they were laughing and joking and she thought they took a drink or two. She was sweeping and cleaning up for next day. She said she heard Lucy tell Zehmer, 'I will give you so much for the farm,' and Zehmer said, 'You haven't got that much.' Lucy answered, 'Oh, yes, I will give you that much.' Then 'they jotted down something on paper * * * * and Mr. Lucy reached over and took it, said let me see it.' He looked at it, put it in his pocket and in about a minute he left. She was asked whether she saw Lucy offer Zehmer any money and replied, 'He had five dollars laying up there, they didn't take it.' She said Zehmer told Lucy he didn't want his money 'because he didn't have enough money to pay for his property, and wasn't going to sell his farm.' Both of them appeared to be drinking right much, she said.

[¶18] She repeated on cross-examination that she was busy and paying no attention to what was going on. She was some distance away and did not see either of them sign the paper. She was asked whether she saw Zehmer put the agreement down on the table in front of Lucy, and her answer was this: 'Time he got through writing whatever it was on the paper, Mr. Lucy reached over and said, 'Let's see it.' He took it and put it in his pocket,' before showing it to Mrs. Zehmer. Her version was that Lucy kept raising his offer until it got to $50,000.

[¶19] The defendants insist that the evidence was ample to support their contention that the writing sought to be enforced was prepared as a bluff or dare to force Lucy to admit that he did not have $50,000; that the whole matter was a joke; that the writing was not delivered to Lucy and no binding contract was ever made between the parties.

[¶20] It is an unusual, if not bizarre, defense. When made to the writing admittedly prepared by one of the defendants and signed by both, clear evidence is required to sustain it.

[¶21] In his testimony Zehmer claimed that he 'was high as a Georgia pine, ' and that the transaction 'was just a bunch of two doggoned drunks bluffing to see who could talk the biggest and say the most.' That claim is inconsistent with his attempt to testify in great detail as to what was said and what was done. It is contradicted by other evidence as to the condition of both parties, and rendered of no weight by the testimony of his wife that when Lucy left the restaurant she suggested that Zehmer drive him home. The record is convincing that Zehmer was not intoxicated to the extent of being unable to comprehend the nature and consequences of the instrument he executed, and hence that instrument is not to be invalidated on that ground. 17 C.J.S., Contracts, § 133 b., p. 483; *Taliaferro v. Emery*, 124 Va. 674, 98 S.E. 627. It was in fact conceded by defendants' counsel in oral argument that under the evidence Zehmer was not too drunk to make a valid contract.

[¶22] The evidence is convincing also that Zehmer wrote two agreements, the first one beginning 'I hereby agree to sell.' Zehmer first said he could not remember about that, then that 'I don't think I wrote but one out.' Mrs. Zehmer said that what he wrote was 'I hereby agree,' but that the 'I' was changed to 'We' after that night. The agreement that was written and signed is in the record and indicates no such change. Neither are the mistakes in spelling that Zehmer sought to point out readily apparent.

[¶23] The appearance of the contract, the fact that it was under discussion for forty minutes or more before it was signed; Lucy's objection to the first draft because it was written in the singular, and he wanted Mrs. Zehmer to sign it also; the rewriting to meet that objection and the signing by Mrs. Zehmer; the discussion of what was to be included in the sale, the provision for the examination of the title, the completeness of the instrument that was executed, the taking possession of it by Lucy with no request or suggestion by either of the defendants that he give it back, are facts which furnish persuasive evidence that the execution of the contract was a serious business transaction rather than a casual, jesting matter as defendants now contend.

[¶24] On Sunday, the day after the instrument was signed on Saturday night, there was a social gathering in a home in the town of McKenney at which there were general comments that the sale had been made. Mrs. Zehmer testified that on that occasion as she passed by a group of people, including Lucy, who were talking about the transaction, $50,000 was mentioned, whereupon she stepped up and said, 'Well, with the high-price whiskey you were drinking last night you should have paid more. That was cheap.' Lucy testified that at that time Zehmer told him that he did not want to 'stick' him or hold him to the agreement because he, Lucy, was too tight and didn't know what he was doing, to which Lucy replied that he was not too tight; that he had been stuck before and was going through with it. Zehmer's version was that he said to Lucy: 'I am not trying to claim it wasn't a deal on account of the fact the price was too low. If I had wanted to sell $50,000.00 would be a good price, in fact I think you would get stuck at $50,000.00.' A disinterested witness testified that what Zehmer said to Lucy was that 'he was going to let him up off the deal, because he thought he was too tight, didn't know what he was doing. Lucy said something to the effect that 'I have been stuck before and I will go through with it.''

[¶25] If it be assumed, contrary to what we think the evidence shows, that Zehmer was jesting about selling his farm to Lucy and that the transaction was intended by him to be a joke, nevertheless the evidence shows that Lucy did not so understand it but considered it to be a serious business transaction and the contract to be binding on the Zehmers as well as on himself. The very next day he arranged with his brother to put up half the money and take a half interest in the land. The day after that he employed an attorney to examine the title. The next night, Tuesday, he was back at Zehmer's place and there Zehmer told him for the first time, Lucy said, that he wasn't going to sell and he told Zehmer, 'You know you sold that place fair and square.' After receiving the report from his attorney that the title was good he wrote to Zehmer that he was ready to close the deal.

[¶26] Not only did Lucy actually believe, but the evidence shows he was warranted in believing, that the contract represented a serious business transaction and a good faith sale and purchase of the farm.

[¶27] In the field of contracts, as generally elsewhere, 'We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. 'The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.'' *First Nat. Bank v. Roanoke Oil Co.*, 169 Va. 99, 114, 192 S.E. 764, 770.

[¶28] At no time prior to the execution of the contract had Zehmer indicated to Lucy by word or act that he was not in earnest about selling the farm. They had argued about it and discussed its terms, as Zehmer admitted, for a long time. Lucy testified that if there was any jesting it was about paying $50,000 that night. The contract and the evidence show that he was not expected to pay the money that night. Zehmer said that after the writing was signed he laid it down on the counter in front of Lucy. Lucy said Zehmer handed it to him. In any event there had been what appeared to be a good faith offer and a good faith acceptance, followed by the execution and apparent delivery of a written contract. Both said that Lucy put the writing in his pocket and then offered Zehmer $5 to seal the bargain. Not until then, even under the defendants' evidence, was anything said or done to indicate that the matter was a joke. Both of the Zehmers testified that when Zehmer asked his wife to sign he whispered that it was a joke so Lucy wouldn't hear and that it was not intended that he should hear.

[¶29] The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party. Restatement of the Law of Contracts, Vol. I, § 71, p. 74.

[¶30] '* * * * The law, therefore, judges of an agreement between two persons exclusively from those expressions of their intentions which are communicated between them. * * * *.' Clark on Contracts, 4 ed., § 3, p. 4.

[¶31] An agreement or mutual assent is of course essential to a valid contract but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind. 17 C.J.S., Contracts, § 32, p. 361; 12 Am. Jur., Contracts, § 19, p. 515.

[¶32] So a person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement, 17 C.J.S., Contracts, § 47, p. 390; Clark on Contracts, 4 ed., § 27, at p. 54.

[¶33] Whether the writing signed by the defendants and now sought to be enforced by the complainants was the result of a serious offer by Lucy and a serious acceptance by the defendants, or was a serious offer by Lucy and an acceptance in secret jest by the defendants, in either event it constituted a binding contract of sale between the parties.

[¶34] Defendants contend further, however, that even though a contract was made, equity should decline to enforce it under the circumstances. These circumstances have been set forth in detail above. They disclose some drinking by the two parties but not to an extent that they were unable to understand fully what they were doing. There was no fraud, no misrepresentation, no sharp practice and no dealing between unequal parties. The farm had been bought for $11,000 and was assessed for taxation at $6,300. The purchase price was $50,000. Zehmer admitted that it was a good price. There is in fact present in this case none of the grounds usually urged against specific performance.

[¶35] Specific performance, it is true, is not a matter of absolute or arbitrary right, but is addressed to the reasonable and sound discretion of the court. *First Nat. Bank v. Roanoke Oil Co., supra*, 169 Va. at p. 116, 192 S.E. at p. 771. But it is likewise true that the discretion which may be exercised is not an arbitrary or capricious one, but one which is controlled by the established doctrines and settled principles of equity; and, generally, where a contract is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree a specific performance of it as it is for a court of law to give damages for a breach of it. *Bond v. Crawford*, 193 Va. 437, 444, 69 S.E.2d 470, 475.

[¶36] The complainants are entitled to have specific performance of the contracts sued on. The decree appealed from is therefore reversed and the cause is remanded for the entry of a proper decree requiring the defendants to perform the contract in accordance with the prayer of the bill.
Reversed and remanded.

Questions:

1. What reasonable person is at issue—a person in the position of offeree or a third person who might have been watching?

2. Does this decision respect Zehmer's autonomy? What countervailing policy is at issue? (The answer to this question is not in the case. Please speculate what policy might support it.)

3. When does drunkenness amount to lack of capacity? Apparently being drunk does not stop one from forming a contract. But what if one was *really* intoxicated? *Dewitt v. Bowers*, 1138 S.W. 1147, 1149 (Tex. Civ. App. 1911), gave the following recitation of the rule:

> It is the rule of law that a person cannot escape liability on a contract on the mere ground that he was intoxicated at the time of its execution, unless it is proved that he was so intoxicated that he was unable to understand the nature of the contract and the consequences of its execution. He may be intoxicated to such a degree as to be excited, or so as to prevent him from acting with that degree of care that he would use were he sober, still he would not be released from his contractual liability. His contract cannot be avoided, in other words, unless his drunkenness was of such a character that he did not know its true intent or meaning, which is an amelioration of the early common-law rule that asserted that a contract entered into by an intoxicated person was binding upon him. As said by this court, through Justice Neill, in *Wells v. Houston*, 23 Tex.Civ.App. 629, 57 S.W. 584: "To avoid a contract on this ground, the obligor must have been so drunk as to

> have dethroned reason, memory, and judgment, and impaired his mental faculties to an extent that would render him non compos mentis for the time being, especially where there is no pretense that any person connected with the transaction aided in or procured the drunkenness." It has been held that a less degree of intoxication than that required to absolutely invalidate a contract may serve as a basis for avoiding the same if the drunkenness was caused by the other party, or if he takes unfair advantage of it. This would involve questions of fraud and undue influence, however, and not those of capacity to execute the contract.

Jacob F. KELLER v. Jacob HOLDERMAN (1863)
Supreme Court of Michigan
11 Mich. 248

Error to Berrien Circuit.

[¶1] Action by Holderman against Keller upon a check for $300, drawn by Keller upon a banker at Niles, and not honored. The case was tried without a jury, and the circuit judge found as facts, that the check was given for an old silver watch, worth about $15, which Keller took and kept until the day of trial, when he offered to return it to the plaintiff, who refused to receive it. The whole transaction was a frolic and a banter—the plaintiff not expecting to sell, nor the defendant intending to buy the watch at the sum for which the check was drawn. The defendant, when he drew the check had no money in the banker's hands, and he had intended to insert a condition in the check that would prevent his being liable on it; but as he failed to do so, and had retained the watch, the judge held him liable, and judgement was rendered against him for the amount of the check. * * * *

Martin, Ch. J.: Per Curiam

[¶2] When the court below found that as a fact that "the whole transaction between the parties was a frolic and a banter, the plaintiff not expecting to sell, nor the defendant intending to buy the watch for the sum for which the check was drawn," the conclusion should have been that no contract was ever made by the parties, and the finding should have been that no cause of action existed upon the check to the plaintiff.

[¶3] The judgment below is reversed, with cost of this court and the court below.

Question: Suppose Lucy had told his brother the next day, "I think Zehmer was trying to bluff me last night, as a joke, but he signed the document, and now I have got him." Would that change the result in *Lucy v. Zehmer*?

RAFFLES v. WICHELHAUS (1864)
Court of the Exchequer
2 Hurl. & C. 906

[¶1] Declaration. For that it was agreed between the plaintiff and the defendants, to wit, at Liverpool, that the plaintiff should sell to the defendants, and the defendants buy of the plaintiff, certain goods, to wit, 125 bales of Surat cotton, guaranteed middling fair merchant's Dhollorah, to arrive ex "Peerless" from Bombay; and that the cotton should be taken from the quay, and that the defendants would pay the plaintiff for the same at a certain rate, to wit, at the rate of 17½d. per pound, within a certain time then agreed upon after the arrival of the said goods in England. Averments: that the said goods did arrive by the said ship from Bombay in England, to wit, at Liverpool, and the plaintiff was then and there ready, and willing and offered to deliver the said goods to the defendants, &c. Breach: that the defendants refused to accept the said goods or pay the plaintiff for them.

[¶2] Plea. That the said ship mentioned in the said agreement was meant and intended by the defendants to be the ship called the "Peerless," which sailed from Bombay, to wit, in October; and that the plaintiff was not ready and willing and did not offer to deliver to the defendants any bales of cotton which arrived by the last mentioned ship, but instead thereof was only ready and willing and offered to deliver to the defendants 125 bales of Surat cotton which arrived by another and different ship, which was also called the "Peerless," and which sailed from Bombay, to wit, in December.

[¶3] Demurrer, and joinder therein.

[¶4] Milward, in support of the demurrer. The contract was for the sale of a number of bales of cotton of a particular description, which the plaintiff was ready to deliver. It is immaterial by what ship the cotton was to arrive, so that it was a ship called the Peerless. The words "to arrive ex 'Peerless,'" only mean that if the vessel is lost on the voyage, the contract is to be at an end. [Pollock C.B. It would be a question for the jury whether both parties meant the same ship called the Peerless.] That would be so if the contract was for the sale of a ship called the Peerless; but it is for the sale of cotton on board a ship of that name. [Pollock C.B. The defendant only bought that cotton which was to arrive by a particular ship. It may as well be said, that if there is a contract for the purchase of certain goods in warehouse A., that is satisfied by the delivery of goods of the same description in warehouse B.] In that case there would be goods in both warehouses; here it does not appear that the plaintiff had any goods on board the other "Peerless." [Martin, B. It is imposing on the defendant a contract different from that which he entered into. Pollock C.B. It is like a contract for the purchase of wine coming from a particular estate in France or Spain, where there are two estates of that name.] The defendant has no right to contradict by parol evidence a written contract good upon the face of it. He does not impute misrepresentation or fraud, but only says that he fancied the ship was a different one. Intention is of no avail, unless stated at the time of the contract. [Pollock C.B. One vessel sailed in October and the other in December.] The time of sailing is no part of the contract.

[¶5] Mellish (Cohen with him), in support of the plea. There is nothing on the face of the contract to shew that any particular ship called the "Peerless" was meant; but the moment it appears that two ships called the "Peerless" were about to sail from Bombay there is a latent ambiguity, and parol evidence may be given for the purpose of shewing that the defendant meant one "Peerless," and the plaintiff another. That being so, there was no consensus ad idem, and therefore no binding contract. He was then stopped by the Court.

[¶6] Per Curiam. Judgment for the defendants.

Questions:

1. *Raffles* is another notoriously difficult case. Milward, Mellish, and Cohen are all lawyers for the parties. Pollock and Martin are judges-barons of the Exchequer. Do the judges say in this report why they give judgment for the defendants?

2. Why does it matter which ship it was?

3. Would you ground this decision on lack of subjective intent?

4. Oliver Wendell Holmes said that the two parties never agreed because their objective manifestations of intent were different: "[T]here is no contract because the parties used different words." What could Holmes have meant by that?

5. Did the parties exchange promise for consideration? Is there any evidence the judges were thinking of it that way?

6. Please look at Restatement (Second) of Contracts § 20:

Restatement (Second) of Contracts § 20. Effect of Misunderstanding

Section 20 is the Restatement's answer to the cases in this part of the casebook. How would *Lucy*, *Keller*, and *Raffles* come out under § 20?

Chapter 6. Offers

A. What Is an Offer?

John D.R. LEONARD v. PEPSICO, INC. (August 5, 1999)
United States District Court, S.D. New York
1999 WL 587918 (S.D.N.Y.)

OPINION & ORDER

WOOD, J.

[¶1] Plaintiff brought this action seeking, among other things, specific performance of an alleged offer of a Harrier Jet, featured in a television advertisement for defendant's "Pepsi Stuff" promotion. Defendant has moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons stated below, defendant's motion is granted.

I. Background

[¶2] This case arises out of a promotional campaign conducted by defendant, the producer and distributor of the soft drinks Pepsi and Diet Pepsi. (See PepsiCo Inc.'s Rule 56.1 Statement [of Uncontested Facts] ("Def. Stat .") ¶ 2.) The promotion, entitled "Pepsi Stuff," encouraged consumers to collect "Pepsi Points" from specially marked packages of Pepsi or Diet Pepsi and redeem these points for merchandise featuring the Pepsi logo. (*See id*. ¶¶ 4, 8.) Before introducing the promotion nationally, defendant conducted a test of the promotion in the Pacific Northwest from October 1995 to March 1996. (*See id*. ¶¶ 5-6.) A Pepsi Stuff catalog was distributed to consumers in the test market, including Washington State. (*See id*. ¶ 7.) Plaintiff is a resident of Seattle, Washington. (*See id*. ¶ 3.) While living in Seattle, plaintiff saw the Pepsi Stuff commercial (*see id*. ¶ 22) that he contends constituted an offer of a Harrier Jet.

A. The Alleged Offer

[¶3] Because whether the television commercial constituted an offer is the central question in this case, the Court will describe the commercial in detail. The commercial opens upon an idyllic, suburban morning, where the chirping of birds in sun-dappled trees welcomes a paperboy on his morning route. As the newspaper hits the stoop of a conventional two-story house, the tattoo of a military drum introduces the subtitle, "MONDAY 7:58 AM." The stirring strains of a martial air mark the appearance of a well-coiffed teenager preparing to leave for school, dressed in a shirt emblazoned with the Pepsi logo, a red-white-and-blue ball. While the teenager confidently preens, the military drumroll again sounds as the subtitle "T-SHIRT 75 PEPSI POINTS" scrolls across the screen. Bursting from his room, the teenager strides down the hallway wearing a leather jacket. The drumroll sounds again, as the subtitle "LEATHER JACKET 1450 PEPSI POINTS" appears. The teenager opens the door of his house and, unfazed by the glare of the early morning sunshine, puts on a pair of sunglasses. The drumroll then accompanies the subtitle "SHADES 175 PEPSI POINTS." A voiceover then intones, "Introducing the new Pepsi Stuff catalog," as the camera focuses on the cover of the catalog. (See Defendant's Local Rule 56.1 Stat., Exh. A (the "Catalog").)[*]

[¶4] The scene then shifts to three young boys sitting in front of a high school building. The boy in the middle is intent on his Pepsi Stuff Catalog, while the boys on either side are each drinking Pepsi. The three boys gaze in awe at an object rushing overhead, as the military march builds to a crescendo. The Harrier Jet is not yet visible, but the observer senses the presence of a mighty plane as the extreme winds generated by its flight create a paper maelstrom in a classroom devoted to an otherwise dull physics lesson. Finally, the Harrier Jet swings into view and lands by the side of the school building, next to a bicycle rack. Several students run for cover, and the velocity of the wind strips one hapless faculty member down to his underwear. While the faculty member is being deprived of his dignity, the voiceover announces: "Now the more Pepsi you drink, the more great stuff you're gonna get."

[¶5] The teenager opens the cockpit of the fighter and can be seen, helmetless, holding a Pepsi. "[L]ooking very pleased with himself," (Pl. Mem. at 3,) the teenager exclaims, "Sure beats the bus," and chortles. The military drumroll sounds a final time, as the following words appear: "HARRIER FIGHTER 7,000,000 PEPSI POINTS ." A few seconds later, the following appears in more stylized script: "Drink Pepsi—Get Stuff." With that message, the music and the commercial end with a triumphant flourish.

[¶6] Inspired by this commercial, plaintiff set out to obtain a Harrier Jet. Plaintiff explains that he is "typical of the 'Pepsi Generation' ... he is young, has an adventurous spirit, and the notion of obtaining a Harrier Jet appealed to him enormously." (Pl. Mem. at 3.) Plaintiff consulted the Pepsi Stuff Catalog. The Catalog features youths dressed in Pepsi Stuff regalia or enjoying Pepsi Stuff accessories, such as "Blue Shades" ("As if you need another reason to look forward to sunny days."), "Pepsi Tees" ("Live in 'em. Laugh in 'em. Get in 'em."), "Bag of Balls" ("Three balls. One bag. No rules."), and "Pepsi Phone Card" ("Call your mom!"). The Catalog specifies the number of Pepsi Points required to obtain promotional

[*] At this point, the following message appears at the bottom of the screen: "Offer not available in all areas. See details on specially marked packages."

merchandise. (See Catalog, at rear foldout pages.) The Catalog includes an Order Form which lists, on one side, fifty-three items of Pepsi Stuff merchandise redeemable for Pepsi Points (*see id*. (the "Order Form")). Conspicuously absent from the Order Form is any entry or description of a Harrier Jet. (*See id*.) The amount of Pepsi Points required to obtain the listed merchandise ranges from 15 (for a "Jacket Tattoo" ("Sew 'em on your jacket, not your arm.")) to 3300 (for a "Fila Mountain Bike" ("Rugged. All-terrain. Exclusively for Pepsi.")). It should be noted that plaintiff objects to the implication that because an item was not shown in the Catalog, it was unavailable. (*See* Pl. Stat. ¶¶ 23-26, 29.)

[¶7] The rear foldout pages of the Catalog contain directions for redeeming Pepsi Points for merchandise. (See Catalog, at rear foldout pages.) These directions note that merchandise may be ordered "only" with the original Order Form. (*See id*.) The Catalog notes that in the event that a consumer lacks enough Pepsi Points to obtain a desired item, additional Pepsi Points may be purchased for ten cents each; however, at least fifteen original Pepsi Points must accompany each order. (*See id*.)

[¶8] Although plaintiff initially set out to collect 7,000,000 Pepsi Points by consuming Pepsi products, it soon became clear to him that he "would not be able to buy (let alone drink) enough Pepsi to collect the necessary Pepsi Points fast enough." (Affidavit of John D.R. Leonard, Mar. 30, 1999 ("Leonard Aff."), ¶ 5.) Reevaluating his strategy, plaintiff "focused for the first time on the packaging materials in the Pepsi Stuff promotion," (id.,) and realized that buying Pepsi Points would be a more promising option. (*See id*.) Through acquaintances, plaintiff ultimately raised about $700,000. (*See id*. ¶ 6.)

B. Plaintiff's Efforts to Redeem the Alleged Offer

[¶9] On or about March 27, 1996, plaintiff submitted an Order Form, fifteen original Pepsi Points, and a check for $700,008.50. (*See* Def. Stat. ¶ 36.) Plaintiff appears to have been represented by counsel at the time he mailed his check; the check is drawn on an account of plaintiff's first set of attorneys. (*See* Defendant's Notice of Motion, Exh. B (first).) At the bottom of the Order Form, plaintiff wrote in "1 Harrier Jet" in the "Item" column and "7,000,000" in the "Total Points" column. (*See id*.) In a letter accompanying his submission, plaintiff stated that the check was to purchase additional Pepsi Points "expressly for obtaining a new Harrier jet as advertised in your Pepsi Stuff commercial." (*See* Declaration of David Wynn, Mar. 18, 1999 ("Wynn Dec."), Exh. A.)

[¶10] On or about May 7, 1996, defendant's fulfillment house rejected plaintiff's submission and returned the check, explaining that:

> The item that you have requested is not part of the Pepsi Stuff collection.
> It is not included in the catalogue or on the order form, and only catalogue merchandise can be redeemed under this program. The Harrier jet in the Pepsi commercial is fanciful and is simply included to create a humorous

> and entertaining ad. We apologize for any misunderstanding or confusion that you may have experienced and are enclosing some free product coupons for your use.

(Wynn Aff. Exh. B (second).) Plaintiff's previous counsel responded on or about May 14, 1996, as follows:

> Your letter of May 7, 1996 is totally unacceptable. We have reviewed the video tape of the Pepsi Stuff commercial ... and it clearly offers the new Harrier jet for 7,000,000 Pepsi Points. Our client followed your rules explicitly.... This is a formal demand that you honor your commitment and make immediate arrangements to transfer the new Harrier jet to our client. If we do not receive transfer instructions within ten (10) business days of the date of this letter you will leave us no choice but to file an appropriate action against Pepsi....

(Wynn Aff., Exh. C.) This letter was apparently sent onward to the advertising company responsible for the actual commercial, BBDO New York ("BBDO"). In a letter dated May 30, 1996, BBDO Vice President Raymond E. McGovern, Jr., explained to plaintiff that:

> I find it hard to believe that you are of the opinion that the Pepsi Stuff commercial ("Commercial") really offers a new Harrier Jet. The use of the Jet was clearly a joke that was meant to make the Commercial more humorous and entertaining. In my opinion, no reasonable person would agree with your analysis of the Commercial.

(Wynn Aff. Exh. A.) On or about June 17, 1996, plaintiff mailed a similar demand letter to defendant. (See Wynn Aff., Exh. D.)

[¶11] Litigation of this case initially involved two lawsuits, the first a declaratory judgment action brought by PepsiCo in this district (the "declaratory judgment action"), and the second an action brought by Leonard in Florida state court (the "Florida action"). PepsiCo brought suit in this Court on July 18, 1996, seeking a declaratory judgment stating that it had no obligation to furnish plaintiff with a Harrier Jet. That case was filed under docket number 96 Civ. 5320. In response to PepsiCo's suit in New York, Leonard brought suit in Florida state court on August 6, 1996, although this case had nothing to do with Florida. That suit was removed to the Southern District of Florida in September 1996. In an Order dated November 6, 1996, United States District Judge James Lawrence King found that, "Obviously this case has been filed in a forum that has no meaningful relationship to the controversy and warrants a transfer pursuant to 28 U.S.C. § 1404(a)." *Leonard v. PepsiCo*, 96-2555 Civ.-King, at 1 (S.D.Fla. Nov. 6, 1996). The Florida suit was transferred to this Court on December 2, 1996, and assigned the docket number 96 Civ. 9069.

[¶12] Once the Florida action had been transferred, Leonard moved to dismiss the declaratory judgment action for lack of personal jurisdiction. In an Order dated November 24, 1997, the Court granted the motion to dismiss for lack of personal jurisdiction in case 96 Civ. 5320, from which PepsiCo appealed. Leonard also moved to voluntarily dismiss the Florida action. While the Court indicated that the motion was proper, it noted that PepsiCo was entitled to some compensation for the costs of litigating this case in Florida, a forum that had no meaningful relationship to the case. (See Transcript of Proceedings Before Hon. Kimba M. Wood, Dec. 9, 1997, at 3.) In an Order dated December 15, 1997, the Court granted Leonard's motion to voluntarily dismiss this case without prejudice, but did so on condition that Leonard pay certain attorneys' fees.

[¶13] In an Order dated October 1, 1998, the Court ordered Leonard to pay $88,162 in attorneys' fees within thirty days. Leonard failed to do so, yet sought nonetheless to appeal from his voluntary dismissal and the imposition of fees. In an Order dated January 5, 1999, the Court noted that Leonard's strategy was " 'clearly an end-run around the final judgment rule." ' (Order at 2 (quoting *Palmieri v. DeFaria*, 88 F.3d 136 (2d Cir. 1996)).) Accordingly, the Court ordered Leonard either to pay the amount due or withdraw his voluntary dismissal, as well as his appeals therefrom, and continue litigation before this Court. (See Order at 3.) Rather than pay the attorneys' fees, Leonard elected to proceed with litigation, and shortly thereafter retained present counsel.

[¶14] On February 22, 1999, the Second Circuit endorsed the parties' stipulations to the dismissal of any appeals taken thus far in this case. Those stipulations noted that Leonard had consented to the jurisdiction of this Court and that PepsiCo agreed not to seek enforcement of the attorneys' fees award. With these issues having been waived, PepsiCo moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. The present motion thus follows three years of jurisdictional and procedural wrangling.

II. Discussion

A. The Legal Framework

1. Standard for Summary Judgment

[¶15] On a motion for summary judgment, a court "cannot try issues of fact; it can only determine whether there are issues to be tried." *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 58 (2d Cir. 1987) (citations and internal quotation marks omitted). * * * *

2. Choice of Law

[¶16] * * * * The Court agrees with both parties that resolution of this issue requires consideration of principles of contract law that are not limited to the law of any one state. Most of the cases cited by the parties are not from New York courts. As plaintiff suggests, the questions presented by this case implicate questions of contract law "deeply ingrained in the common law of England and the States of the Union." (Pl. Mem. at 8.)

B. Defendant's Advertisement Was Not An Offer

1. Advertisements as Offers

[¶17] The general rule is that an advertisement does not constitute an offer. The Restatement (Second) of Contracts explains that:

> Advertisements of goods by display, sign, handbill, newspaper, radio or television are not ordinarily intended or understood as offers to sell. The same is true of catalogues, price lists and circulars, even though the terms of suggested bargains may be stated in some detail. It is of course possible to make an offer by an advertisement directed to the general public (see § 29), but there must ordinarily be some language of commitment or some invitation to take action without further communication.

Restatement (Second) of Contracts § 26 cmt. b (1979). Similarly, a leading treatise notes that:

> It is quite possible to make a definite and operative offer to buy or sell goods by advertisement, in a newspaper, by a handbill, a catalog or circular or on a placard in a store window. It is not customary to do this, however; and the presumption is the other way. ... Such advertisements are understood to be mere requests to consider and examine and negotiate; and no one can reasonably regard them as otherwise unless the circumstances are exceptional and the words used are very plain and clear.

1 Arthur Linton Corbin & Joseph M. Perillo, Corbin on Contracts § 2.4, at 116- 17 (rev. ed.1993) (emphasis added); see also 1 E. Allan Farnsworth, Farnsworth on Contracts § 3.10, at 239 (2d ed.1998); 1 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 4:7, at 286-87 (4th ed.1990). New York courts adhere to this general principle. *See Lovett v. Frederick Loeser & Co*., 124 Misc. 81, 207 N.Y.S. 753, 755 (Mun. Ct. N.Y. City 1924) (noting that an "advertisement is nothing but an invitation to enter into negotiations, and is not an offer which may be turned into a contract by a person who signifies his intention to purchase some of the articles mentioned in the advertisement"); *see also Geismar v. Abraham & Strauss*, 109 Misc.2d 495, 439 N.Y.S.2d 1005, 1006 (Dist. Ct. Suffolk Cty. 1981) (reiterating *Lovett* rule); *People v. Gimbel Bros. Inc.*, 202 Misc. 229, 115 N.Y.S.2d 857, 858 (Ct. Spec. Sess. 1952) (because an "[a]dvertisement does not constitute an offer of sale but is solely an invitation to customers to make an offer to purchase," defendant not guilty of selling property on Sunday).

[¶18] An advertisement is not transformed into an enforceable offer merely by a potential offeree's expression of willingness to accept the offer through, among other means, completion of an order form. In *Mesaros v. United States*, 845 F.2d 1576 (Fed. Cir. 1988), for example, the plaintiffs sued the United States Mint for failure to deliver a number of Statue of Liberty commemorative coins that they had ordered. When demand for the coins proved unexpectedly robust, a number of individuals who had sent in their orders in a timely fashion were left empty-handed. *See id*. at 1578-80. The court began by noting the "well-established" rule that advertisements and order forms are "mere notices and solicitations for offers which create no power of acceptance in the recipient." *Id*. at 1580; *see also Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 538-39 (9th Cir. 1983) ("The weight of authority is that purchase orders such as those at issue here are not enforceable contracts until they are accepted by the seller."); Restatement (Second) of Contracts § 26 ("A manifestation of willingness to enter a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent."). The spurned coin collectors could not maintain a breach of contract action because no contract would be formed until the advertiser accepted the order form and processed payment. *See id*. at 1581; see also *Alligood v. Procter & Gamble*, 594 N.E.2d 668 (Ohio Ct. App. 1991) (finding that no offer was made in promotional campaign for baby diapers, in which consumers were to redeem teddy bear proof-of-purchase symbols for catalog merchandise); *Chang v. First Colonial Savings Bank*, 410 S.E.2d 928 (Va. 1991) (newspaper advertisement for bank settled the terms of the offer once bank accepted plaintiffs' deposit, notwithstanding bank's subsequent effort to amend the terms of the offer). Under these principles, plaintiff's letter of March 27, 1996, with the Order Form and the appropriate number of Pepsi Points, constituted the offer. There would be no enforceable contract until defendant accepted the Order Form and cashed the check.

[¶19] The exception to the rule that advertisements do not create any power of acceptance in potential offerees is where the advertisement is "clear, definite, and explicit, and leaves nothing open for negotiation," in that circumstance, "it constitutes an offer, acceptance of which will complete the contract." *Lefkowitz v. Great Minneapolis Surplus Store*, 86 N.W.2d 689, 691 (Minn. 1957). In Lefkowitz, defendant had published a newspaper announcement stating: "Saturday 9 AM Sharp, 3 Brand New Fur Coats, Worth to $100 .00, First Come First Served $1 Each." *Id*. at 690. Mr. Morris Lefkowitz arrived at the store, dollar in hand, but was informed that under defendant's "house rules," the offer was open to ladies, but not gentlemen. *See id*. The court ruled that because plaintiff had fulfilled all of the terms of the advertisement and the advertisement was specific and left nothing open for negotiation, a contract had been formed. *See id*.; *see also Johnson v. Capital City Ford Co*., 85 So.2d 75, 79 (La. Ct. App. 1955) (finding that newspaper advertisement was sufficiently certain and definite to constitute an offer).

[¶20] The present case is distinguishable from *Lefkowitz*. First, the commercial cannot be regarded in itself as sufficiently definite, because it specifically reserved the details of the offer to a separate writing, the Catalog.[*] The commercial itself made no mention of the steps a potential offeree would be required to take to accept the alleged offer of a Harrier Jet. The advertisement in *Lefkowitz*, in contrast, "identified the person who could accept." Corbin, *supra*, § 2.4, at 119. *See*

[*] It also communicated additional words of reservation: "Offer not available in all areas. See details on specially marked packages."

generally United States v. Braunstein, 75 F. Supp. 137, 139 (S.D.N.Y. 1947) ("Greater precision of expression may be required, and less help from the court given, when the parties are merely at the threshold of a contract."); Farnsworth, *supra*, at 239 ("The fact that a proposal is very detailed suggests that it is an offer, while omission of many terms suggests that it is not.").[*] Second, even if the Catalog had included a Harrier Jet among the items that could be obtained by redemption of Pepsi Points, the advertisement of a Harrier Jet by both television commercial and catalog would still not constitute an offer. As the *Mesaros* court explained, the absence of any words of limitation such as "first come, first served," renders the alleged offer sufficiently indefinite that no contract could be formed. *See Mesaros*, 845 F.2d at 1581. "A customer would not usually have reason to believe that the shopkeeper intended exposure to the risk of a multitude of acceptances resulting in a number of contracts exceeding the shopkeeper's inventory." Farnsworth, *supra*, at 242. There was no such danger in Lefkowitz, owing to the limitation "first come, first served."

[¶21] The Court finds, in sum, that the Harrier Jet commercial was merely an advertisement. The Court now turns to the line of cases upon which plaintiff rests much of his argument.

2. Rewards as Offers

[¶22] In opposing the present motion, plaintiff largely relies on a different species of unilateral offer, involving public offers of a reward for performance of a specified act. Because these cases generally involve public declarations regarding the efficacy or trustworthiness of specific products, one court has aptly characterized these authorities as "prove me wrong" cases. *See Rosenthal v. Al Packer Ford*, 374 A.2d 377, 380 (Md. Ct. Spec. App. 1977). The most venerable of these precedents is the case of *Carlill v. Carbolic Smoke Ball Co*., 1 Q.B. 256 (Court of Appeal, 1892), a quote from which heads plaintiff's memorandum of law: "[I]f a person chooses to make extravagant promises ... he probably does so because it pays him to make them, and, if he has made them, the extravagance of the promises is no reason in law why he should not be bound by them." Carbolic Smoke Ball, 1 Q.B. at 268 (Bowen, L.J.).

[¶23] Long a staple of law school curricula, Carbolic Smoke Ball owes its fame not merely to "the comic and slightly mysterious object involved," A.W. Brian Simpson, Quackery and Contract Law: *Carlill v. Carbolic Smoke Ball Company* (1893), in Leading Cases in the Common Law 259, 281 (1995), but also to its role

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[*] The reservation of the details of the offer in this case distinguishes it from Payne v. Lautz Bros. & Co., 166 N.Y.S. 844 (City Ct. Buffalo 1916). In Payne, a stamp and coupon broker purchased massive quantities of coupons produced by defendant, a soap company, and tried to redeem them for 4,000 round-trip tickets to a local beach. The court ruled for plaintiff, noting that the advertisements were "absolutely unrestricted. It contained no reference whatever to any of its previous advertising of any form." Id. at 848. In the present case, by contrast, the commercial explicitly reserved the details of the offer to the Catalog.

in developing the law of unilateral offers. The case arose during the London influenza epidemic of the 1890s. Among other advertisements of the time, for Clarke's World Famous Blood Mixture, Towle's Pennyroyal and Steel Pills for Females, Sequah's Prairie Flower, and Epp's Glycerine Jube-Jubes, *see Simpson*, *supra*, at 267, appeared solicitations for the Carbolic Smoke Ball. The specific advertisement that Mrs. Carlill saw, and relied upon, read as follows:

> 100£ reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any diseases caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. 1000£ is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter.
>
> During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

Carbolic Smoke Ball, 1 Q.B. at 256-57. "On the faith of this advertisement," *id.* at 257, Mrs. Carlill purchased the smoke ball and used it as directed, but contracted influenza nevertheless.[*] The lower court held that she was entitled to recover the promised reward.

[¶24] Affirming the lower court's decision, Lord Justice Lindley began by noting that the advertisement was an express promise to pay £100 in the event that a consumer of the Carbolic Smoke Ball was stricken with influenza. *See id*. at 261. The advertisement was construed as offering a reward because it sought to induce performance, unlike an invitation to negotiate, which seeks a reciprocal promise. As Lord Justice Lindley explained, "advertisements offering rewards ... are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer." *Id.* at 262; *see also id.* at 268 (Bowen, L.J.).[†] Because Mrs. Carlill had complied with the terms of the offer, yet contracted influenza, she was entitled to £100.

[¶25] Like *Carbolic Smoke Ball*, the decisions relied upon by plaintiff involve offers of reward. In *Barnes v. Treece*, 549 P.2d 1152 (Wash.Ct.App.1976), for example, the vice-president of a punchboard distributor, in the course of hearings

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[*] Although the Court of Appeals's opinion is silent as to exactly what a carbolic smoke ball was, the historical record reveals it to have been a compressible hollow ball, about the size of an apple or orange, with a small opening covered by some porous material such as silk or gauze. The ball was partially filled with carbolic acid in powder form. When the ball was squeezed, the powder would be forced through the opening as a small cloud of smoke. See Simpson, *supra*, at 262-63. At the time, carbolic acid was considered fatal if consumed in more than small amounts. See id. at 264.

[†] Carbolic Smoke Ball includes a classic formulation of this principle: "If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write a note saying that they have accepted my proposal?" Carbolic Smoke Ball, 1 Q.B. at 270 (Bowen, L.J.).

before the Washington State Gambling Commission, asserted that, " 'I'll put a hundred thousand dollars to anyone to find a crooked board. If they find it, I'll pay it." ' *Id*. at 1154. Plaintiff, a former bartender, heard of the offer and located two crooked punchboards. Defendant, after reiterating that the offer was serious, providing plaintiff with a receipt for the punchboard on company stationery, and assuring plaintiff that the reward was being held in escrow, nevertheless repudiated the offer. *See id*. at 1154. The court ruled that the offer was valid and that plaintiff was entitled to his reward. *See id*. at 1155. The plaintiff in this case also cites cases involving prizes for skill (or luck) in the game of golf. *See Las Vegas Hacienda v. Gibson*, 359 P.2d 85 (Nev.1961) (awarding $5,000 to plaintiff, who successfully shot a hole-in-one); *see also Grove v. Charbonneau Buick- Pontiac, Inc.*, 240 N.W.2d 853 (N.D.1976) (awarding automobile to plaintiff, who successfully shot a hole-in-one).

[¶26] Other "reward" cases underscore the distinction between typical advertisements, in which the alleged offer is merely an invitation to negotiate for purchase of commercial goods, and promises of reward, in which the alleged offer is intended to induce a potential offeree to perform a specific action, often for noncommercial reasons. In *Newman v. Schiff*, 778 F.2d 460 (5th Cir. 1985), for example, the Fifth Circuit held that a tax protestor's assertion that, "If anybody calls this show ... and cites any section of the code that says an individual is required to file a tax return, I'll pay them $100,000," would have been an enforceable offer had the plaintiff called the television show to claim the reward while the tax protestor was appearing. *See id*. at 466-67. The court noted that, like Carbolic Smoke Ball, the case "concerns a special type of offer: an offer for a reward." *Id*. at 465. *James v. Turilli*, 473 S.W.2d 757 (Mo. Ct. App. 1971), arose from a boast by defendant that the "notorious Missouri desperado" Jesse James had not been killed in 1882, as portrayed in song and legend, but had lived under the alias "J. Frank Dalton" at the "Jesse James Museum" operated by none other than defendant. Defendant offered $10,000 "to anyone who could prove me wrong." *See id*. at 758-59. The widow of the outlaw's son demonstrated, at trial, that the outlaw had in fact been killed in 1882. On appeal, the court held that defendant should be liable to pay the amount offered. *See id*. at 762; *see also Mears v. Nationwide Mutual Ins. Co.*, 91 F.3d 1118, 1122-23 (8th Cir. 1996) (plaintiff entitled to cost of two Mercedes as reward for coining slogan for insurance company).

[¶27] In the present case, the Harrier Jet commercial did not direct that anyone who appeared at Pepsi headquarters with 7,000,000 Pepsi Points on the Fourth of July would receive a Harrier Jet. Instead, the commercial urged consumers to accumulate Pepsi Points and to refer to the Catalog to determine how they could redeem their Pepsi Points. The commercial sought a reciprocal promise, expressed through acceptance of, and compliance with, the terms of the Order Form. As noted previously, the Catalog contains no mention of the Harrier Jet. Plaintiff states that he "noted that the Harrier Jet was not among the items described in the catalog, but this did not affect [his] understanding of the offer." (Pl. Mem. at 4.) It should have.*

[¶28] Carbolic Smoke Ball itself draws a distinction between the offer of reward in that case, and typical advertisements, which are merely offers to negotiate. As Lord Justice Bowen explains:

> It is an offer to become liable to any one who, before it is retracted, performs the condition.... It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate—offers to receive offers—offers to chaffer, as, I think, some learned judge in one of the cases has said.

Carbolic Smoke Ball, 1 Q.B. at 268; see also Lovett, 207 N.Y.S. at 756 (distinguishing advertisements, as invitation to offer, from offers of reward made in advertisements, such as Carbolic Smoke Ball). Because the alleged offer in this case was, at most, an advertisement to receive offers rather than an offer of reward, plaintiff cannot show that there was an offer made in the circumstances of this case.

C. An Objective, Reasonable Person Would Not Have Considered the Commercial an Offer

[¶29] Plaintiff's understanding of the commercial as an offer must also be rejected because the Court finds that no objective person could reasonably have concluded that the commercial actually offered consumers a Harrier Jet.

1. Objective Reasonable Person Standard

[¶30] In evaluating the commercial, the Court must not consider defendant's subjective intent in making the commercial, or plaintiff's subjective view of what the commercial offered, but what an objective, reasonable person would have understood the commercial to convey. *See Kay-R Elec. Corp. v. Stone & Weber Constr. Co.*, 23 F.3d 55, 57 (2d Cir. 1994) ("[W]e are not concerned with what was going through the heads of the parties at the time [of the alleged contract]. Rather, we are talking about the objective principles of contract law."); *Mesaros*, 845 F.2d at 1581 ("A basic rule of contracts holds that whether an offer has been made depends on the objective reasonableness of the alleged offeree's belief that the advertisement or solicitation was intended as an offer."); Farnsworth, *supra*, § 3.10, at 237; Williston, *supra*, § 4:7 at 296- 97.

* In his affidavit, plaintiff places great emphasis on a press release written by defendant, which characterizes the Harrier Jet as "the ultimate Pepsi Stuff award." (See Leonard Aff. ¶ 13.) Plaintiff simply ignores the remainder of the release, which makes no mention of the Harrier Jet even as it sets forth in detail the number of points needed to redeem other merchandise.

[¶31] If it is clear that an offer was not serious, then no offer has been made:

> What kind of act creates a power of acceptance and is therefore an offer? It must be an expression of will or intention. It must be an act that leads the offeree reasonably to conclude that a power to create a contract is conferred. This applies to the content of the power as well as to the fact of its existence. It is on this ground that we must exclude invitations to deal or acts of mere preliminary negotiation, and acts evidently done in jest or without intent to create legal relations.

Corbin on Contracts, § 1.11 at 30 (emphasis added). An obvious joke, of course, would not give rise to a contract. *See,* e.g., *Graves v. Northern N.Y. Pub. Co.,* 260 A.D. 900, 22 N.Y.S.2d 537 (App. Div. 4th Dept. 1940) (dismissing claim to offer of $1000, which appeared in the "joke column" of the newspaper, to any person who could provide a commonly available phone number). On the other hand, if there is no indication that the offer is "evidently in jest," and that an objective, reasonable person would find that the offer was serious, then there may be a valid offer. See Barnes, 549 P.2d at 1155 ("[I]f the jest is not apparent and a reasonable hearer would believe that an offer was being made, then the speaker risks the formation of a contract which was not intended ."); see also *Lucy v. Zehmer,* 84 S.E.2d 516, 518, 520 (Va. 1954) (ordering specific performance of a contract to purchase a farm despite defendant's protestation that the transaction was done in jest as " 'just a bunch of two doggoned drunks bluffing" ').

2. Necessity of a Jury Determination

[¶32] Plaintiff also contends that summary judgment is improper because the question of whether the commercial conveyed a sincere offer can be answered only by a jury. Relying on dictum from *Gallagher v. Delaney*, 139 F.3d 338 (2d Cir. 1998), plaintiff argues that a federal judge comes from a "narrow segment of the enormously broad American socio-economic spectrum," *id*. at 342, and, thus, that the question whether the commercial constituted a serious offer must be decided by a jury composed of, inter alia, members of the "Pepsi Generation," who are, as plaintiff puts it, "young, open to adventure, willing to do the unconventional." (See Leonard Aff. ¶ 2.) Plaintiff essentially argues that a federal judge would view his claim differently than fellow members of the "Pepsi Generation."

[¶33] Plaintiff's argument that his claim must be put to a jury is without merit. *Gallagher* involved a claim of sexual harassment in which the defendant allegedly invited plaintiff to sit on his lap, gave her inappropriate Valentine's Day gifts, told her that "she brought out feelings that he had not had since he was sixteen," and "invited her to help him feed the ducks in the pond, since he was 'a bachelor for the evening." ' *Gallagher*, 139 F.3d at 344. The court concluded that a jury determination was particularly appropriate because a federal judge lacked "the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications." *Id*. at 342. This case, in contrast, presents a question of whether there was an offer to enter into a contract, requiring the Court to determine how a reasonable, objective person would have understood defendant's commercial. Such an inquiry is commonly performed by courts on a motion for summary judgment. See Krumme, 143 F.3d at 83; Bourque, 42 F.3d at 708; Wards Co., 761 F.2d at 120.

3. Whether the Commercial Was "Evidently Done In Jest"

[¶34] Plaintiff's insistence that the commercial appears to be a serious offer requires the Court to explain why the commercial is funny. Explaining why a joke is funny is a daunting task; as the essayist E.B. White has remarked, "Humor can be dissected, as a frog can, but the thing dies in the process...."[*] The commercial is the embodiment of what defendant appropriately characterizes as "zany humor." (Def. Mem. at 18.)

[¶35] First, the commercial suggests, as commercials often do, that use of the advertised product will transform what, for most youth, can be a fairly routine and ordinary experience. The military tattoo and stirring martial music, as well as the use of subtitles in a Courier font that scroll terse messages across the screen, such as "MONDAY 7:58 AM," evoke military and espionage thrillers. The implication of the commercial is that Pepsi Stuff merchandise will inject drama and moment into hitherto unexceptional lives. The commercial in this case thus makes the exaggerated claims similar to those of many television advertisements: that by consuming the featured clothing, car, beer, or potato chips, one will become attractive, stylish, desirable, and admired by all. A reasonable viewer would understand such advertisements as mere puffery, not as statements of fact, *see*, e.g., *Hubbard v. General Motors Corp*., 95 Civ. 4362(AGS), 1996 WL 274018, at *6 (S.D.N.Y. May 22, 1996) (advertisement describing automobile as "Like a Rock," was mere puffery, not a warranty of quality); *Lovett*, 207 N.Y.S. at 756; and refrain from interpreting the promises of the commercial as being literally true.

[¶36] Second, the callow youth featured in the commercial is a highly improbable pilot, one who could barely be trusted with the keys to his parents' car, much less the prize aircraft of the United States Marine Corps. Rather than checking the fuel gauges on his aircraft, the teenager spends his precious preflight minutes preening. The youth's concern for his coiffure appears to extend to his flying without a helmet. Finally, the teenager's comment that flying a Harrier Jet to school "sure beats the bus" evinces an improbably insouciant attitude toward the relative difficulty and danger of piloting a fighter plane in a residential area, as opposed to taking public transportation.[†]

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[*] Quoted in Gerald R. Ford, Humor and the Presidency 23 (1987).

[†] In this respect, the teenager of the advertisement contrasts with the distinguished figures who testified to the effectiveness of the Carbolic Smoke Ball, including the Duchess of Sutherland; the Earls of Wharncliffe, Westmoreland, Cadogan, and Leitrim; the Countesses Dudley, Pembroke, and Aberdeen; the Marchionesses of Bath and Conyngham; Sir Henry Acland, the physician to the Prince of Wales; and Sir James Paget, sergeant surgeon to Queen Victoria. See Simpson, *supra*, at 265.

[¶37] Third, the notion of traveling to school in a Harrier Jet is an exaggerated adolescent fantasy. In this commercial, the fantasy is underscored by how the teenager's schoolmates gape in admiration, ignoring their physics lesson. The force of the wind generated by the Harrier Jet blows off one teacher's clothes, literally defrocking an authority figure. As if to emphasize the fantastic quality of having a Harrier Jet arrive at school, the Jet lands next to a plebeian bike rack. This fantasy is, of course, extremely unrealistic. No school would provide landing space for a student's fighter jet, or condone the disruption the jet's use would cause.

[¶38] Fourth, the primary mission of a Harrier Jet, according to the United States Marine Corps, is to "attack and destroy surface targets under day and night visual conditions." United States Marine Corps, Factfile: AV-8B Harrier II (last modified Dec. 5, 1995) <http://www.hqmc.usmc.mil/factfile.nsf>. Manufactured by McDonnell Douglas, the Harrier Jet played a significant role in the air offensive of Operation Desert Storm in 1991. *See id.* The jet is designed to carry a considerable armament load, including Sidewinder and Maverick missiles. *See id.* As one news report has noted, "Fully loaded, the Harrier can float like a butterfly and sting like a bee—albeit a roaring 14-ton butterfly and a bee with 9,200 pounds of bombs and missiles." Jerry Allegood, Marines Rely on Harrier Jet, Despite Critics, News & Observer (Raleigh), Nov. 4, 1990, at C1. In light of the Harrier Jet's well-documented function in attacking and destroying surface and air targets, armed reconnaissance and air interdiction, and offensive and defensive anti-aircraft warfare, depiction of such a jet as a way to get to school in the morning is clearly not serious even if, as plaintiff contends, the jet is capable of being acquired "in a form that eliminates [its] potential for military use." (See Leonard Aff. ¶ 20.)

[¶39] Fifth, the number of Pepsi Points the commercial mentions as required to "purchase" the jet is 7,000,000. To amass that number of points, one would have to drink 7,000,000 Pepsis (or roughly 190 Pepsis a day for the next hundred years—an unlikely possibility), or one would have to purchase approximately $700,000 worth of Pepsi Points. The cost of a Harrier Jet is roughly $23 million dollars, a fact of which plaintiff was aware when he set out to gather the amount he believed necessary to accept the alleged offer. (See Affidavit of Michael E. McCabe, 96 Civ. 5320, Aug. 14, 1997, Exh. 6 (Leonard Business Plan).) Even if an objective, reasonable person were not aware of this fact, he would conclude that purchasing a fighter plane for $700,000 is a deal too good to be true.[*]

[*] In contrast, the advertisers of the Carbolic Smoke Ball emphasized their earnestness, stating in the advertisement that " £1,000 is deposited with the Alliance Bank, shewing our sincerity in the matter." Carbolic Smoke Ball, 1 Q.B. at 257. Similarly, in Barnes, the defendant's "subsequent statements, conduct, and the circumstances show an intent to lead any hearer to believe the statements were made seriously." Barnes, 549 P.2d at 1155. The offer in Barnes, moreover, was made in the serious forum of hearings before a state commission; not, as defendant states, at a "gambling convention." Compare Barnes, 549 P.2d at 1154, with Def. Reply Mem. at 6.

[¶40] Plaintiff argues that a reasonable, objective person would have understood the commercial to make a serious offer of a Harrier Jet because there was "absolutely no distinction in the manner" (Pl. Mem. at 13,) in which the items in the commercial were presented. Plaintiff also relies upon a press release highlighting the promotional campaign, issued by defendant, in which "[n]o mention is made by [defendant] of humor, or anything of the sort." (Id. at 5.) These arguments suggest merely that the humor of the promotional campaign was tongue in cheek. Humor is not limited to what Justice Cardozo called "[t]he rough and boisterous joke ... [that] evokes its own guffaws." *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 483, 166 N.E. 173, 174 (1929). In light of the obvious absurdity of the commercial, the Court rejects plaintiff's argument that the commercial was not clearly in jest. * * * *

D. The Alleged Contract Does Not Satisfy the Statute of Frauds

[¶41] The absence of any writing setting forth the alleged contract in this case provides an entirely separate reason for granting summary judgment. Under the New York Statute of Frauds,

> a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

N.Y.U.C.C. § 2-201(1); *see also*, e.g., *AFP Imaging Corp. v. Philips Medizin System*, 92 Civ. 6211(LMM), 1994 WL 652510, at *4 (S.D.N.Y. Nov. 17, 1994)). Without such a writing, plaintiff's claim must fail as a matter of law. *See Hilord Chem. Corp. v. Ricoh Elecs., Inc.*, 875 F.2d 32, 36-37 (2d Cir. 1989) ("The adequacy of a writing for Statute of Frauds purposes 'must be determined from the documents themselves, as a matter of law."') (quoting *Bazak Int'l. Corp. v. Mast Indus., Inc.*, 73 N.Y.2d 113, 118, 538 N.Y.S.2d 503 (1989)).

[¶42] There is simply no writing between the parties that evidences any transaction. Plaintiff argues that the commercial, plaintiff's completed Order Form, and perhaps other agreements signed by defendant which plaintiff has not yet seen, should suffice for Statute of Frauds purposes, either singly or taken together. (See Pl. Mem. at 18-19.) For the latter claim, plaintiff relies on *Crabtree v. Elizabeth Arden Sales Corp.*, 305 N.Y. 48, 110 N.E .2d 551 (N.Y. 1953). *Crabtree* held that a combination of signed and unsigned writings would satisfy the Statute of Frauds, "provided that they clearly refer to the same subject matter or transaction." *Id.* at 55. Yet the Second Circuit emphasized in *Horn & Hardart Co. v. Pillsbury Co.*, 888 F.2d 8 (2d Cir. 1989), that this rule "contains two strict threshold requirements." *Id.* at 11. First, the signed writing relied upon must by itself establish " 'a contractual relationship between the parties." ' *Id.* (quoting *Crabtree*, 305 N.Y. at 56); *see also O'Keeffe v. Bry*, 456 F. Supp. 822, 829 (S.D.N.Y. 1978) ("To the extent that Crabtree permits the use of a 'confluence of memoranda,' the minimum condition for such use is the existence of one [signed] document establishing the basic, underlying contractual commitment.”). The second threshold requirement is that the unsigned writing must “‘on its face refer to the same transaction as that set forth in the one that was signed.’’ *Horn & Hardart*, 888 F.2d at 11 (quoting *Crabtree*, 305 N.Y. at 56); *see also Bruce Realty Co. of Florida v. Berger*, 327 F. Supp. 507, 510 (S.D.N.Y. 1971).

[¶43] None of the material relied upon by plaintiff meets either threshold requirement. The commercial is not a writing; plaintiff’s completed order form does not bear the signature of defendant, or an agent thereof; and to the extent that plaintiff seeks discovery of any contracts between defendant and its advertisers, such discovery would be unavailing: plaintiff is not a party to, or a beneficiary of, any such contracts. Because the alleged contract does not meet the requirements of the Statute of Frauds, plaintiff has no claim for breach of contract or specific performance. * * * *

III. Conclusion

[¶44] In sum, there are three reasons why plaintiff’s demand cannot prevail as a matter of law. First, the commercial was merely an advertisement, not a unilateral offer. Second, the tongue-in-cheek attitude of the commercial would not cause a reasonable person to conclude that a soft drink company would be giving away fighter planes as part of a promotion. Third, there is no writing between the parties sufficient to satisfy the Statute of Frauds.

[¶45] For the reasons stated above, the Court grants defendant’s motion for summary judgment. The Clerk of Court is instructed to close these cases. Any pending motions are moot.

Questions:

1. Was the advertisement an offer?

2. Why is this case not like the rewards cases, such as the *Carbolic Smoke Ball* case, or *Barnes v. Treece*?

3. Who is the objective, reasonable person? Do you agree?

4. The plaintiff here is from Seattle. Who wants to litigate in Florida? Why? Who wants to litigate in New York? Name at least two reasons to litigate in New York?

5. What facts if added to those of *Leonard* would make Leonard's belief reasonable?

6. In *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 86 N.W.2d 689 (Minn. 1957), the Store placed the following ad in a Minneapolis newspaper:

'Saturday 9 A.M. Sharp 3 Brand New Fur Coats Worth to $100.00
First Come First Served $1 Each'

One week later, the Store published the following ad:

'Saturday 9 A.M. 2 Brand New Pastel Mink 3-Skin Scarfs
Selling for $89.50
Out they go Saturday. Each ... $1.00
1 Black Lapin Stole Beautiful, worth $139.50 ... $1.00
First Come First Served'

On each of the Saturdays named in the ads, Lefkowitz was the first to present himself at the store and demand the items offered. Each time he indicated his willingness to pay $1. The Store refused to sell to him. The first time, the Store said it had a "house rule" that the offer was intended only for women. On the second visit, the Store told Lefkowitz that he knew the house rules. Has the Store made an offer? Should the house rule affect the analysis? In the course of its analysis, the Store argued, citing numerous precedents, that

> where an advertiser publishes in a newspaper that he has a certain quantity or quality of goods which he wants to dispose of at certain prices and on certain terms, such advertisements are not offers which become contracts as soon as any person to whose notice they may come signifies his acceptance by notifying the other that he will take a certain quantity of them. Such advertisements have been construed as an invitation for an offer of sale on the terms stated, which offer, when received, may be accepted or rejected and which therefore does not become a contract of sale until accepted by the seller; and until a contract has been so made, the seller may modify or revoke such prices or terms.

Why might you hold that a Walmart ad was not an offer but was an "invitation for an offer"?

7. In *Owen v. Tunison*, 158 A. 926 (Me. 1932), Owen wrote to Tunison:

> "Dear Mr. Tunison:
>
> Will you sell me your store property which is located on Main St. in Bucksport, Me. running from Montgomery's Drug Store on one corner to a Grocery Store on the other, for the sum of $6,000.00?"

About six weeks later, Owen received the following reply, written four weeks earlier and mailed from France:

> In reply to your letter of Oct. 23rd which has been forwarded to me in which you inquire about the Bradley Block, Bucksport Me.
>
> Because of improvements which have been added and an expenditure of several thousand dollars it would not be possible for me to sell it unless I was to receive $16,000.00 cash.
>
> The upper floors have been converted into apartments with baths and the b'l'dg put into first class condition.
>
> Very truly yours,
>
> [Signed] R. G. Tunison."

Owen then wrote back:

> Accept your offer for Bradley block Bucksport Terms sixteen thousand cash send deed to Eastern Trust and Banking Co Bangor Maine Please acknowledge.

Four days later Tunison notified Owen that he did not wish to sell, so Owen sued. What should the court hold?

8. Norreasha Gill was listening to "DJ Slick" on WLTO-FM (Hot 102) on May 25, 2005. Slick announced that he would, as part of an on-air contest give a "hundred grand" to the 10th caller. Ms. Gill heard the description of the context and listened to the radio for two hours the next morning, hoping to win. She believed she would receive $100,000 if she were the 10th caller and, indeed, she was the 10th caller! Ms. Gill was told by DJ Slick on the air that she had won a "hundred grand" and was given instructions as to how to receive her prize. He said she would be a "hundred grand richer." That night, she told her children that they would buy a minivan and a home with a backyard. Pursuant to DJ Slick's instructions, she arrived at the Central Bank building the next day, where she was informed that she would not be receiving the money and that the contest was a joke. Assuming DJ Slick was its agent, did WLTO make an offer? [I (Ricks) spoke with Lee Van Horn, counsel for Ms. Gill, on July 20, 2007. He said the station removed the case to federal court in the Eastern District of Kentucky, but then it was mediated and settled. The amount of the settlement is to be kept confidential, according to its terms. Mr. Van Horn did say that his client was happy with the result but not as happy later when she did her taxes.]

In November 2000, Ben Stromberg (known as "Ben Stone" on the radio) told his listeners on KORB in Davenport, Iowa, that "anyone who would have the station's logo permanently tattooed across his or her forehead" would be paid $30,000 per year for five years. Two listeners called the station to make sure the offer was legitimate and were assured that it was. The two then went to a tattoo parlor with a person who claimed to be a radio station employee. The person paid for the tattoos and snapped a photo of the two with the logo. But the station did not pay. Branded, ABA Journal, September 2002, 20. Should it have to?

9. Courts in a number of cases have held that

> A merchant who utilizes the self service shopping method thereby makes an open invitation to the public to enter his store and to inspect and take possession of any item so displayed. The merchant's act of stocking these self-service displays with goods thereby makes an offer to the shopper to enter a contract for their sale.

Barker v. Allied Supermarket, 596 P.2d 870, 871-72 (Okla. 1979) (case in which a bottle of soda exploded in the shopper's cart on her way to the checkout counter). Likewise, the shopper's "act of taking physical possession of the goods with the intent to purchase them manifested an intent to accept the offer and a promise to take them to the check-out counter and to there pay for them." *Fender v. Colonial Stores, Inc.*, 225 S.E.2d 691, 693-94 (Ga. Ct. App. 1976) (another exploding bottle case). Courts stick with this position even though stores universally allow the customer to put items back before paying for them. See *Barker*, 596 P.2d at 872;

Fender, 225 S.E. at 694. Doesn't that mean that while the items are in the cart the store is bound but the customer is not? Does that square with *Payne v. Cave*? Why would a court do this?

10. See if you can find on the internet a military jet for sale. Look, for instance here—

http://gizmodo.com/5755832/7-year-old-kid-buys-harrier-jet-fighter

—and here—

http://www.wired.com/2014/07/harrier-silverstone-auction/.

You may find the Pepsi commercials (Pepsi made three different commercials, listed in order) at the following links:

#1: https://www.youtube.com/watch?v=ZdackF2H7Qc
#2: https://www.youtube.com/watch?v=Ln0VSA9UJ-w
#3: https://www.youtube.com/watch?v=Z4TQmazYyCU

Leonard thought up a wondrous plan
To buy wings with points from a can
But "The jet's not offered,"
The district court proffered,
"You are no reasonable man."

—Amy Hebert Craft, STCL Class of 2004

Fool sees commercial
Pepsi points for an airplane
Are you kidding me?

—Amy Hebert Craft, STCL Class of 2004

Uniform Commercial Code § 2-204. Formation in General.

Question: Is the standard named in § 2-204 different from the one in *Leonard v. Pepsico*?

We are about to study other rules that apply to offers, but in a real dispute, no offer ever stands alone. There is a response. What does the court's rule for responses, given in the next case, teach us about the nature of offers?

FOSTER v. OHIO STATE UNIVERSITY (1987)
Court of Appeals of Ohio, Tenth District, Franklin County
534 N.E.2d 1220

STRAUSBAUGH, Presiding Judge.

[¶1] This is an appeal by plaintiff from a summary judgment in the Court of Claims in favor of defendant and against plaintiff.

[¶2] The record indicates that defendant, the Ohio State University, through Andrew Broekema, Dean of the Ohio State College of Arts, by letter dated May 3, 1983, offered plaintiff, Philip E. Foster, an eleven-month appointment as Chairperson and Associate Professor of the Department of History of Art at the Ohio State University beginning July 1, 1983. The letter concluded: "If the terms and conditions of this letter are acceptable to you, please sign the enclosed copy and return it to my office." Subsequently, Dean Broekema notified plaintiff by express mail dated May 25, 1983: "Unless an answer to letter of offer, dated May 3, 1983, is received in my office by Thursday, June 2, 1983, offer for position of Chairperson and Associate Professor, Department of History of Art at The Ohio State University, is withdrawn." The record further indicates that, on June 2, 1983, plaintiff telephoned Dean Broekema collect and left a message with his secretary that plaintiff accepted the position effective July 15, 1983. On June 7, 1983, defendant notified plaintiff that, since he had failed to accept in writing by June 2, the offer was revoked. On June 11, plaintiff signed the May 3 letter notifying defendant of his acceptance.

[¶3] The Court of Claims thereafter granted defendant's motion for summary judgment finding that plaintiff's failure to accept in writing the terms of defendant's offer by June 2 barred his later acceptance on June 11. It is from this finding and judgment that plaintiff appeals setting forth the following single assignment of error:

> "The lower court erred in failing to find that appellant's telephone acceptance of appellee's letter/offer of May 3, 1983, followed by a confirmatory writing delivered in a reasonable time, met all elements of appellee's offer and created an employment contract between the parties."

In support of his assignment of error, plaintiff argues first that there is no evidence to support a finding that plaintiff had to answer by June 2 or that the answer had to be in writing and, therefore, plaintiff had a reasonable time in which to respond. Second, even if the May 25 letter required a definite answer by June 2, there is no indication that the acceptance had to be in writing alone. Third, the question of whether the acceptance had sufficiently met an offer is a question of fact and as such the evidence shows that plaintiff accepted the offer as tendered. Fourth, to the extent that the Court of Claims relied upon time being the essence of the contract, there is no indication that defendant ever believed a timely answer was critical to the appointment of the position.

[¶4] The terms of defendant's offer to plaintiff were set forth in the May 3, 1983 letter and established the precise manner and place of acceptance—that a copy of the letter be signed and the copy be returned to Dean Broekema's office. Subsequently, Dean Broekema imposed an additional requirement as to time, prescribing that plaintiff's acceptance be received by June 2, 1983. The time requirement did not modify or alter any previous specifications but merely put a time limit on the duration of the offer. An offer which is unsupported by consideration is subject to revocation at any time. 1 Williston on Contracts (3 Ed.1957) 176-179, Section 55; *Franck v. Seavey Mfg. Co*. (1926), 21 Ohio App. 369, 4 Ohio Law Abs. 299, 153 N.E. 209. The offeror can wholly terminate or limit the power and mode of acceptance. 1 Corbin on Contracts (1963) 157- 166, Sections 38 and 39. When an acceptance to a contract for employment does not meet and correspond with the offer in every respect, no contract is usually formed. 1 Restatement of the Law 2d, Contracts (1981) 144, Section 58; *Schiff v. Schiff* (App.1942), 36 Ohio Law Abs. 626, 632, 45 N.E.2d 132, 136; *see, also, Karas v. Brogan* (1978), 55 Ohio St.2d 128, 129, 9 O.O.3d 107, 107-108, 378 N.E.2d 470, 471.

[¶5] Defendant's offer to plaintiff dated May 3, 1983 states that the position was to begin July 1, 1983. When plaintiff left his purported message of acceptance on June 2, 1983, he indicated July 15, 1983 as the desired date of commencement. A reply to an offer which purports to accept but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counteroffer. 1 Restatement of the Law 2d, Contracts (1981) 145, Section 59. Plaintiff's telephonic purported acceptance of June 2, 1983 was therefore a counteroffer and not an unconditional acceptance which was rejected by Dean Broekema in his letter of June 7, 1983 and, therefore, no contract was created. The undisputed facts indicate that plaintiff simply failed to accept the terms of the offer and therefore no contract exists. Plaintiff's single assignment of error is overruled, and the judgment of the Court of Claims is affirmed.

[¶6] JUDGMENT AFFIRMED.
WHITESIDE and BOWMAN, JJ., concur.

WHITESIDE, Justice, concurring.

Although I concur in the judgment, I do solely for the reason that the June 2, 1983 telephone "acceptance" by plaintiff constituted a counteroffer which was rejected by the June 7, 1983 response letter, the effect of which was to rescind the original offer making the subsequent attempted "acceptance" by plaintiff's signing the original letter offer on June 11, 1983, ineffectual since there was no outstanding offer to accept at that time.

Questions:

1. Did a contract form here?

2. The Foster court states, "A reply to an offer which purports to accept but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counteroffer." This is generally called the "mirror image" rule. Unless the acceptance is a mirror image of the offer (so the rhetoric behind the name goes), the acceptance is merely a counteroffer, and no contract forms.

PROBLEM 46. Suppose large company 1 sends a purchase order to large company 2. Company 1's purchase order contains terms A-K. In response, 2 ships the goods and includes an invoice for the goods. Company 2's invoice specifically negates terms C and D on Company 1's form and contains terms L-Q. Is 2's invoice an acceptance? If not, what is it?

1	2
A	
B	
C	-C
D	-D
..	
K	
	L-Q

B. Termination of the Power of Acceptance

This section of your casebook (Chapter 6.B) is fairly simple, really. Recall from *Adams v. Lindsell* that the court held that an offer fictionally continued, as if in the ether, until it was accepted. The *Adams* fiction raised the specter of offers continuing indefinitely, in which case the sheer number of outstanding offers would soon, speaking tongue-in-cheek, fill the ether itself and crowd the metaphysical world with offers, bouncing this way and that, to the consternation of other metaphysical entities who must also share the space (if it is proper to speak of it as space). On a more practical note, offers that continued forever could be accepted forever, and that would disrupt the certainty in future planning that contract law is supposed to allow. So, metaphysically and practically, there must be a way to get rid of outstanding offers—ways for the viability of offers to end. The cases in this section outline those ways. See how many you can find and define.

DICKINSON v. DODDS (1876)
Court of Appeal, Chancery Division
2 Ch. Div. 463

[¶1] On Wednesday, the 10th of June, 1874, the Defendant John Dodds signed and delivered to the Plaintiff, George Dickinson, a memorandum, of which the material part was as follows:—

> I hereby agree to sell to Mr. George Dickinson the whole of the dwelling-houses, garden ground, stabling, and outbuildings thereto belonging, situate at Croft, belonging to me, for the sum of £800. As witness my hand this tenth day of June, 1874.
>
> £800. (Signed) *John Dodds*.
>
> P.S.—This offer to be left over until Friday, 9 o'clock, a.m. *J.D.* (the twelfth), 12th June, 1874.
> (Signed) *J. Dodds*.

[¶2] The bill alleged that Dodds understood and intended that the Plaintiff should have until Friday 9 A.M. within which to determine whether he would or would not purchase, and that he should absolutely have until that time the refusal of the property at the price of £800, and that the Plaintiff in fact determined to accept the offer on the morning of Thursday, the 11th of June, but did not at once signify his acceptance to Dodds, believing that he had the power to accept it until 9 A.M. on the Friday.

[¶3] In the afternoon of the Thursday the Plaintiff was informed by a Mr. Berry that Dodds had been offering or agreeing to sell the property to Thomas Allan, the other Defendant. Thereupon the Plaintiff, at about half-past seven in the evening, went to the house of Mrs. Burgess, the mother-in-law of Dodds, where he was then staying, and left with her a formal acceptance in writing of the offer to sell the property. According to the evidence of Mrs. Burgess this document never in fact reached Dodds, she having forgotten to give it to him.

[¶4] On the following (Friday) morning, at about seven o'clock, Berry, who was acting as agent for Dickinson, found Dodds at the Darlington railway station, and handed to him a duplicate of the acceptance by Dickinson, and explained to Dodds its purport. He replied that it was too late, as he had sold the property. A few minutes later Dickinson himself found Dodds entering a railway carriage, and handed him another duplicate of the notice of acceptance, but Dodds declined to receive it, saying, "You are too late. I have sold the property."

[¶5] It appeared that on the day before, Thursday, the 11th of June, Dodds had signed a formal contract for the sale of the property to the Defendant Allan for £800, and had received from him a deposit of £40.

[¶6] The bill in this suit prayed that the Defendant Dodds might be decreed specifically to perform the contract of the 10th of June, 1874; that he might be restrained from conveying the property to Allan; that Allan might be restrained from taking any such conveyance; that, if any such conveyance had been or should be made, Allan might be declared a trustee of the property for, and might be directed to convey the property to, the Plaintiff; and for damages. * * * *

James, L.J., after referring to the document of the 10th of June, 1874, continued:-

[¶7] The document, though beginning, "I hereby agree to sell," was nothing but an offer, and was only intended to be an offer, for the Plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed there was no concluded agreement then made; it was in effect and substance only an offer to sell. * * * * There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o'clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere nudum pactum, was not binding, and that at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. Well, that being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, "Now I withdraw my offer." It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retractation. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the Plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, "I withdraw the offer." This is evidence from the Plaintiff's own statements in the bill.

[¶8] The Plaintiff says in effect that, having heard and knowing that Dodds was no longer minded to sell to him, and that he was selling or had sold to some one else, thinking that he could not in point of law withdraw his offer, meaning to fix him to it, and endeavoring to bind him, "I went to the house where he was lodging, and saw his mother-in-law, and left with her an acceptance of the offer, knowing all the while that he had entirely changed his mind. I got an agent to watch for him at 7 o'clock the next morning, and I went to the train just before 9 o'clock, in order that I might catch him and give him my notice of acceptance just before 9 o'clock, and when that occurred he told my agent, and he told me, you are too late, and he then threw back the paper." It is to my mind quite clear that before there was any attempt at acceptance by the Plaintiff, he was perfectly well aware that Dodds had changed his mind, and that he had in fact agreed to sell the property to Allan. It is impossible, therefore, to say that there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement. I am of opinion, therefore, that the Plaintiff has failed to prove that there was any binding contract between Dodds and himself.

[¶9] Mellish, L.J.:-I am of the same opinion. * * * *

[¶10] Baggallay, J.A.-I entirely concur in the judgments which have been pronounced.

[¶11] James, L.J.:-The bill will be dismissed * * * *. * * * *

Questions:

1. Was Dodds' promise to hold his offer open until Friday morning binding?

2. Suppose Berry did not tell Dickinson about the revoking facts and otherwise the facts of the case are the same. What result? (The answer to this question is not in the case, but you should be able to figure it out from the materials we have studied.)

3. Why does the court go out on a limb to let Dodds off after he was so sneaky? (The answer to this question is not in the case but if you think about policies underlying enforcement of promises, some answers should occur to you.)

Note: Restatement (Second) of Contracts § 43 is an acceptable recapitulation of *Dickinson v. Dodds*.

Restatement (Second) of Contracts § 43. Indirect Communication of Revocation.

Charles William AKERS v. J. B. SEDBERRY, Inc., et al.
William Gambill WHITSITT v. J. B. SEDBERRY, Inc., et al. (1956)
Court of Appeals of Tennessee, Middle Section, at Nashville
286 S.W.2d 617

FELTS, Judge.

[¶1] These two consolidated causes are before us upon a writ of error sued out by J. B. Sedberry, Inc., and Mrs. M. B. Sedberry, defendants below, to review a decree of the Chancery Court, awarding a recovery against them in favor of each of the complainants, Charles William Akers and William Gambill Whitsitt, for damages for breach of a contract of employment.

[¶2] The principal question presented is whether complainants resigned their employment, or were wrongfully discharged by defendants; and if there was a breach of contract for which complainants are entitled to recover, there are some further questions as to the measure or extent of the recovery.

[¶3] J. B. Sedberry, Inc., was a Tennessee corporation with its principal place of business at Franklin, Tennessee. Mrs. M. B. Sedberry owned practically all of its stock and was its president and in active charge of its affairs. It was engaged in the business of distributing 'Jay Bee' hammer mills, which were manufactured for it under contract by Jay Bee Manufacturing Company, a Texas corporation, whose plant was in Tyler, Texas, and whose capital stock was owned principally by L. M. Glasgow and B. G. Byars.

[¶4] On July 1, 1947, J. B. Sedberry, Inc., by written contract, employed complainant Akers as Chief Engineer for a term of five years at a salary of $12,000 per year, payable $1,000 per month, plus 1% of its net profits for the first year, 2% the second, 3% the third, 4% the fourth, and 5% the fifth year. His duties were to carry on research for his employer, and to see that the Jay Bee Manufacturing Company, Tyler, Texas, manufactured the mills and parts according to proper specifications. Mrs. M. B. Sedberry guaranteed the employer's performance of this contract.

[¶5] On August 1, 1947, J. B. Sedberry, Inc., by written contract, employed complainant Whitsitt as Assistant Chief Engineer for a term of five years at a salary of $7,200 per year, payable $600 per month, plus 1% of the corporation's net profits for the first year, 2% for the second, 3% for the third, 4% for the fourth, and 5% for the fifth year. His duties were to assist in the work done by the Chief Engineer. Mrs. M. B. Sedberry guaranteed the employer's performance of this contract.

[¶6] Under Mrs. Sedberry's instructions, Akers and Whitsitt moved to Tyler, Texas, began performing their contract duties in the plant of the Jay Bee Manufacturing Company, continued working there, and were paid under the contracts until October 1, 1950, when they ceased work, under circumstances hereafter stated.

[¶7] In 1947, when these employment contracts were made, Mrs. Sedberry owned no stock in the Jay Bee Manufacturing Company. In 1948 she purchased the shares of stock in this company which were owned by the Glasgow interests, and in 1949 she purchased the 750 shares owned by her brother, B. G. Byars, and gave him her note therefor in the sum of $157,333.93, pledging the 750 shares with him as collateral to her note.

[¶8] Glasgow had been general manager of the Jay Bee Manufacturing Company, but when he sold his stock, he was succeeded by A. M. Sorenson as manager. There soon developed considerable friction between Sorenson and complainants Akers and Whitsitt. The Jay Bee Manufacturing Company owed large sums to the Tyler State Bank & Trust Co.; and the bank's officers, fearing the company might fail under Sorenson's management, began talking to Akers and Whitsitt about the company's financial difficulties.

[¶9] One of the bank's vice-presidents, J. Harold Stringer, made a trip to Franklin to see Mrs. Sedberry about the company's indebtedness to the bank. He told her that they could not get along with Sorenson and did not agree with the way he was managing the company's affairs. Mrs. Sedberry asked Stringer as soon as he got back to Tyler to see Akers and Whitsitt and discuss with them plans for the refinancing and the operation of the company; and thereafter the bank's officers had a number of conferences with Akers and Whitsitt about these matters.

[¶10] While these matters were pending, Akers and Whitsitt flew to Nashville and went to Franklin to talk with Mrs. Sedberry about them. They had a conference with her at her office on Friday, September 29, 1950, lasting from 9:30 a. m. until 4:30 p. m. As they had come unannounced, and unknown to Sorenson, they felt Mrs. Sedberry might mistrust them; and at the outset, to show their good faith, they offered to resign, but she did not accept their offer. Instead, she proceeded with them in discussing the operation and refinancing of the business.

[¶11] Testifying about this conference, Akers said that, at the very beginning, to show their good faith, he told Mrs. Sedberry that they would offer their resignations on a ninety-day notice, provided they were paid according to the contract for that period; that she pushed the offers aside—'would not accept them', but went into a full discussion of the business; that nothing was thereafter said about the offers to resign; and that they spent the whole day discussing the business, Akers making notes of things she instructed him to do when he got back to Texas.

[¶12] Whitsitt testified that at the beginning of the meeting Akers stated the position for both of them, and told Mrs. Sedberry, as evidence of their good faith, 'we would resign with ninety-days notice if she paid us the monies that she owed us to that date, and on the other hand, if she did not accept that resignation, we would carry forth the rest of our business.' He said that she did not accept the offer, but proceeded with the business, and nothing further was said about resigning.

[¶13] Mrs. Sedberry testified that Akers and Whitsitt came in and 'offered their resignations'; that they said they could not work with Sorenson and did not believe the bank would go along with him; and that 'they said if it would be of any help to the organization they would be glad to tender their resignation and pay them what was due them.' She further said that she 'did not accept the resignation', that she 'felt it necessary to contact Mr. Sorenson and give consideration to the resignation offer.’ But she said nothing to complainants about taking the offer under consideration.

[¶14] On cross-examination she said that in the offer to resign ‘no mention was made of any ninety-day notice’. Asked what response she made to the offer she said, ‘I treated it rather casually because I had to give it some thought and had to contact Mr. Sorenson.’ She further said she excused herself from the conference with complainants, went to another room, tried to telephone Sorenson in Tyler, Texas, but was unable to locate him.

[¶15] She then resumed the conference, nothing further was said about the offers to resign, nothing was said by her to indicate that she thought the offers were left open or held under consideration by her. But the discussion proceeded as if the offers had not been made. She discussed with complainants future plans for refinancing and operating the business, giving them instructions, and Akers making notes of them.

[¶16] Following the conference, complainants, upon Mrs. Sedberry’s request, flew back to Texas to proceed to carry out her instructions. On the way back, and while in Nashville, Friday evening, Akers telephoned her in Franklin to tell her that he had just learned that the bank had sued both the companies and process had been served that day. On the next morning, September 30, Akers had a conference with the bank officials about the refinancing of the company, the results of which he reported to Mrs. Sedberry by long-distance telephone conversation that day.

[¶17] On Monday, October 2, 1950, Mrs. Sedberry sent to complainants similar telegrams, signed by ‘J. B. Sedberry, Inc., by M. B. Sedberry, President’, stating that their resignations were accepted, effective immediately. We quote the telegram to Akers, omitting the formal parts:

> ‘Account present unsettled conditions which you so fully are aware we accept your kind offer of resignation effective immediately. Please discontinue as of today with everyone employed in Sedberry, Inc., Engineering Department, discontinuing all expenses in this department writing.’

While this said she was ‘writing’, she did not write. Akers wrote her, but held up sending his letter, at the request of her brother, Mr. Byars, who was one of the officers of the bank in Tyler, Texas. Akers later rewrote practically the same letter and mailed it to her on October 16, 1950. Whitsitt also sent her a similar letter on the same day.

[¶18] In his letter, Akers said that he was amazed to get her telegram, and called her attention to the fact that no offer to resign by him was open or outstanding when she sent the telegram; that while he had made a conditional offer to resign at their conference on September 29, she had immediately rejected the offer, and had discussed plans for the business and had instructed him and Whitsitt as to things she wanted them to do in the business on their return to Tyler.

[¶19] This letter further stated that Akers was expecting to be paid according to the terms of his contract until he could find other employment that would pay him as much income as that provided in his contract, and that if he had to accept a position with less income, he would expect to be paid the difference, or whatever losses he suffered by her breach of the contract. Whitsitt's letter contained a similar statement of his position.

[¶20] On November 10, 1950, Mrs. Sedberry wrote a letter addressed to both Akers and Whitsitt in which she said that 'no one deplored the action taken more than the writer', but she did not recede from her position as expressed in the telegram. She stated her contention that the offers to resign had been without condition; and though she also said she would like to make an amicable settlement, no settlement was made.

[¶21] As it takes two to make a contract, it takes two to unmake it. It cannot be changed or ended by one alone, but only by mutual assent of both parties. A contract of employment for a fixed period may be terminated by the employee's offer to resign, provided such offer is duly accepted by the employer. *Gentry Co. v. Margolius*, 110 Tenn. 669, 674, 75 S.W. 959; *Balderacchi v. Ruth*, 36 Tenn. App. 421, 424, 256 S.W.2d 390, 391.

[¶22] An employee's tender of his resignation, being a mere offer is, of course, not binding until it has been accepted by the employer. Such offer must be accepted according to its terms and within the time fixed. The matter is governed by the same rules as govern the formation of contracts. *Nesbit v. Giblin*, 96 Neb. 369, 148 N.W. 138, L.R.A.1915D, 477, Ann.Cas.1916A, 1008; 1 Labatt's Master & Servant (2d ed.) section 181; Note, Ann.Cas.1916A, 1011, 1012.

[¶23] An offer may be terminated in a number of ways, as, for example, where it is rejected by the offeree, or where it is not accepted by him within the time fixed, or, if no time is fixed, within a reasonable time. An offer terminated in either of these ways ceases to exist and cannot thereafter be accepted. 1 Williston on Contracts (1936), secs. 50A, 51, 53, 54; 1 Corbin on Contracts (1950), secs. 35, 36; 1 Rest., Contracts, secs. 35, 40.

[¶24] The question what is a reasonable time, where no time is fixed, is a question of fact, depending on the nature of the contract proposed, the usages of business and other circumstances of the case. Ordinarily, an offer made by one to another in a face to face conversation is deemed to continue only to the close of their conversation, and cannot be accepted thereafter.

[¶25] The rule is illustrated by Restatement of Contracts, section 40, Illustration 2, as follows:

> ‘2. While A and B are engaged in conversation, A makes B an offer to which B then makes no reply, but a few hours later meeting A again, B states that he accepts the offer. There is no contract unless the offer or the surrounding circumstances indicate that the offer is intended to continue beyond the immediate conversation.’

[¶26] In *Mactier’s Adm’rs v. Frith*, 1830, 6 Wend.N.Y., 103, 114, 21 Am.Dec. 262, 268, the rule was stated as follows:

> ‘Although the will of the party making the offer may precede that of the party accepting, yet it must continue down to the time of the acceptance. Where parties are together chaffering about an article of merchandise and one expresses a present willingness to accept of certain terms, that willingness is supposed to continue, unless it is revoked, to the close of their interview and negotiation on the same subject, and if during this time the other party says he will take the article on the terms proposed, the bargain is thereby closed. Pothier Traite du Contract de Vente, p. 1, sec. 2, art. 3, no. 31.’ * * * *

Professor Corbin says:

> ‘When two negotiating parties are in each other’s presence, and one makes an offer to the other without indicating any time for acceptance, the inference that will ordinarily be drawn by the other party is that an answer is expected at once. * * * * If, when the first reply is not an acceptance, the offeror turns away in silence, the proper inference is that the offer is no longer open to acceptance.’ 1 Corbin on Contracts (1950), section 36, p. 111.

[¶27] The only offer by Akers and Whitsitt to resign was the offer made by them in their conversation with Mrs. Sedberry. They made that offer at the outset, and on the evidence it seems clear that they expected an answer at once. Certainly, there is nothing in the evidence to show that they intended the offer to continue beyond that conversation; and on the above authorities, we think the offer did not continue beyond that meeting.

[¶28] Indeed, it did not last that long, in our opinion, but was terminated by Mrs. Sedberry’s rejection of it very early in that meeting. While she did not expressly reject it, and while she may have intended, as she says, to take the offer under consideration, she did not disclose such an intent to complainants; but, by her conduct, led them to believe she rejected the offer, brushed it aside, and proceeded with the discussion as if it had not been made.

[¶29] ‘An offer is rejected when the offeror is justified in inferring from the words or conduct of the offeree that the offeree intends not to accept the offer or to take it under further advisement (Rest. Contracts sec. 36).’ 1 Williston on Contracts, section 51.

[¶30] So, we agree with the Trial Judge that when defendants sent the telegrams, undertaking to accept offers of complainants to resign, there was no such offer in existence; and that this attempt of defendants to terminate their contract was unlawful and constituted a breach for which they are liable to complainants.
* * * *

[¶31] Finally, defendants contend that if complainants are entitled to any recovery at all, such recovery should have been limited to the ninety-day period from and after October 2, 1950, because complainants themselves admitted that they had offered to resign upon ninety days notice with pay for that period.

[¶32] The answer to this contention is that their offer to resign on ninety days notice was not accepted, but had terminated, and there was no offer in existence when Mrs. Sedberry undertook to accept their offers of resignation. Such attempt by defendants to terminate their contract was unlawful and was a breach for which they become liable for the measure of recovery as above stated. * * * *

[¶33] All of the assignments of error are overruled and the decree of the Chancellor is affirmed. Decrees will be entered here for complainants for the amount of the decrees below with interest. * * * * The causes are remanded to the Chancery Court for further proceedings not inconsistent with this opinion.

HICKERSON and SHRIVER, JJ., concur.

Questions:

1. What two ways for a power of acceptance to terminate are outlined in this case?

2. What did Mrs. Sedberry do to reject the offers?

3. How is this case the same as *Foster v. Ohio State University*?

In Re the Estate of Helen SEVERTSON, Deceased.
Kathy Thorson, et al., v. Inez BREITER, personal representative (1998)
Court of Appeals of Minnesota
1998 WL 88253 (Minn. App.)

WILLIS, Judge

[¶1] Appellant contends the district court erred in concluding that the document signed by decedent and respondents relating to decedent's real estate is an offer to sell that survived her death. We reverse.

FACTS

[¶2] Respondents Kathy and Mark Thorson and the decedent, Helen Severtson, were neighbors for approximately 14 years, during which time they became good friends. After Severtson's husband died in 1993, the Thorsons spent substantial time with Severtson. Kathy Thorson visited with her almost daily when she took Severtson her mail. Mark Thorson did odd jobs for Severtson when needed.

[¶3] The Thorsons had told both Severtson and her husband on several occasions that they would be interested in purchasing the Severtsons' property if they ever wanted to sell it. On February 16, 1996, Severtson and the Thorsons signed a typed document that provides:

> I, Helen Severtson, give Mark and Kathy Thorson first option to purchase my farmsite, all buildings, including the quonset home, rock quarry, including any leased quarry rights, and adjoining farm land. * * * *
>
> Purchase price agreed upon is $100,000, to be paid to Helen Severtson if living or to the Estate of Helen Severtson if she is deceased or incapacitated to deal with sale of above listed property. Any persons occupying the quonset home will vacate and leave property in good repair before or upon closure date on above property.

There is a hand-written addendum, initialed by the parties, that provides:

> In the event that Helen Severtson should die suddenly, persons in the quonset home will be given three months to vacate all premises and to leave them in good repair, otherwise under any other conditions the above will apply.

[¶4] Myron Danielson, another of Severtson's neighbors, testified that he drafted the typewritten portion of the document but was not actually present when the Thorsons or Severtson signed it. Danielson also testified that he drafted the document for Severtson so "[t]hat there would be some legal document that her wishes would be carried out" and so there would not be litigation over the matter.

[¶5] Severtson died on August 4, 1996. The Thorsons recorded the document with the Dodge County Recorder in September 1996 as an option contract. On October 17, 1996, the Thorsons notified Inez Breiter, the personal representative of Helen Severtson's estate, of their intent to purchase Severtson's property. When the estate's representative disallowed their claim, the Thorsons petitioned the district court for relief.

[¶6] After a hearing, the district court rejected the Thorsons' argument that the document signed by Severtson and the Thorsons is an option to purchase property, concluding that there was no consideration separate and distinct from a promise to pay the purchase price. But the court found that a bilateral contract for the purchase of land was created because (1) Severtson offered to sell her property; (2) the offer to sell survived her death; and (3) the Thorsons accepted the offer by notifying the estate's representative of their intent to purchase. The Thorsons and the estate's representative both moved the court for amended findings, and the court issued its amended findings of fact, conclusions of law, order, and judgment on June 30, 1997. The court concluded that "the Thorsons were entitled to possession [of the property] within 90 days of [Severtson's] death or their acceptance of the offer." Because both of those dates had already passed, the court ordered that Thorsons were entitled to possession of the property within 90 days after the date of its order. This appeal followed.

DECISION

[¶7] "The construction and effect of a contract are questions of law for the court * * * *." *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979). "The court's role in interpreting a contract is to ascertain and give effect to the intention of the parties." *Metropolitan Sports Facilities Comm'n v. General Mills, Inc.*, 470 N.W.2d 118, 122-23 (Minn.1991). But the court may only give effect to the parties' intent if that can be done consistently with established legal principles. *Republic Nat'l Life Ins. Co. v. Lorraine Realty Corp*., 279 N.W.2d 349, 354 (Minn. 1979).

[¶8] The estate's representative argues that the district court erred in concluding that Severtson offered to sell her property to the Thorsons, based on the fact that the document they signed gives the Thorsons a "first option to purchase" the Severtson property. An offer is conduct that empowers an offeree to create a contract by his or her acceptance. *League General Ins. Co. v. Tvedt*, 317 N.W.2d 40, 43 (Minn. 1982). Where we can ascertain the parties' intent from the written contract, we do not "remake the contract" by construing it differently. *Art Goebel, Inc. v. North Suburban Agencies, Inc.*, 567 N.W.2d 511, 516 (Minn. 1997). The document signed by Severtson and the Thorsons recites no conditions precedent to the exercise of the Thorsons' "first option to purchase"; it unambiguously manifests Severtson's intent to sell her property to the Thorsons. The district court, therefore, did not err in concluding that Severtson offered to sell her property to the Thorsons.

[¶9] The estate's representative argues that if Severtson did offer to sell her property, the district court erred in finding that the offer did not terminate on Severtson's death. The district court relied on the Restatement (Second) of Contracts § 36 (1981), which provides that

> (1) An offeree's power of acceptance may be terminated by
> * * *
> (d) death or incapacity of the offeror or offeree.

See also *Cooke v. Belzer*, 413 N.W.2d 623, 627 (Minn. App. 1987) (citing section 36 of the restatement). Noting that section 36 states that an offeror's death may terminate an offeree's power to accept, the district court concluded that an offeror's death does not automatically terminate an offer. The court found that the offer did not terminate here because Severtson intended her offer to remain open even if she died before it was accepted. But section 36 of the restatement simply lists alternative methods by which an offeree's power to accept is terminated, while sections 36-49 discuss the specific circumstances under which each method applies. Restatement (Second) of Contracts § 36 cmt. a. Section 48 provides that

> [a]n offeree's power of acceptance is terminated when the offeree or offeror dies or is deprived of legal capacity to enter into the proposed contract.

Restatement (Second) of Contracts § 48 (1981); *see also Heideman v. Northwestern Nat'l Life Ins. Co*., 546 N.W.2d 760, 764 (Minn. App. 1996) (adopting section 48 of the restatement), review denied (Minn. June 7, 1996).

[¶10] The basis for the rule is described by Professor Williston in his treatise on contracts:

> Assuming that the formation of a contract require[s] mutual mental assent of the parties, and offer and acceptance [are] merely evidence of such assent, it would be obviously impossible that a contract should be formed where either party to the transaction died before this assent was obtained. That such assent was formerly thought necessary seems probable, and as to death, this theory is still maintained. Accordingly, it is generally held that the death of the offeror terminates the offer.

1 Samuel Williston, A Treatise on the Law of Contracts § 62 (3d ed. 1957). Although Severtson may have intended for her offer to survive her death, we cannot harmonize that intent with the established legal principle that an offer terminates on the death of the offeror.

[¶11] The Thorsons cite, as did the district court, *Frederick v. Peoples State Bank of Madison Lake*, 385 N.W.2d 11 (Minn. App. 1986), review denied (Minn. May 29, 1986). The court in *Frederick*, in turn, cites the New Jersey Superior Court for the proposition that

> where the owner of real property enters into a contract of sale and then dies before executing a deed * * *, the other party may enforce the contract against the owner's estate, the theory being that equitable title to the property vests in the vendee as soon as the contract was executed, subject, however, to a lien in favor of the vendor for the unpaid purchase price. * * * * Such contracts, therefore, are enforceable, even though one of the parties thereto may die before performance is had.

Id. at 15 (quoting *In re Beier*, 48 N.J. Super. 450, 137 A.2d 617, 618 (N.J. Super. 1958)) (second ellipsis in original). But because the Thorsons did not accept Severtson's offer before she died, there was no contract for sale at the time of Severtson's death. The issue is not whether a contract for sale survives Severtson's death, but whether her offer to enter into a contract for sale survives her death. Because the document signed by Severtson and the Thorsons is properly characterized as an offer to sell, the Thorsons' power to accept the offer terminated when Severtson died.

[¶12] The Thorsons argue that the document should be treated as an option to purchase. But the district court found that it is not an option, and because the

Thorsons did not raise this issue in a notice of review, it is not properly before this court. See Minn. R. Civ. App. P. 106 (explaining respondent's right to obtain review); see also *Arndt v. American Family Ins. Co*., 394 N.W.2d 791, 793 (Minn. 1986). Nevertheless, we note that the record supports the district court's determination that there was no legal consideration here separate and distinct from the promise to pay the purchase price. And the district court correctly concluded that without such consideration, the document is not an option to purchase. *See Country Club Oil Co. v. Lee*, 239 Minn. 148, 152, 58 N.W.2d 247, 250 (1953). * * * *

[¶13] Because the document at issue was an offer to sell that terminated on Severtson's death, the district court erred in finding that a bilateral contract for the purchase of real estate was created when the Thorsons gave the personal representative of Severtson's estate notice of their intent to purchase the Severtson property.

[¶14] Reversed.

Questions:

1. Was the so-called option a binding option contract?

2. Was the option an offer?

3. Did the offer survive Severtson's death? Under the rule the court adopts, is it necessary for the offeree to know of the offeror's death?

4. What effect did Severtson's intent that her offer survive her death have?

5. Can you think of a good reason to have this rule in this case (in which the offeror clearly intended her offer to survive her)?

6. Suppose Severtson had not intended that her offer survive her death but had merely left an outstanding offer which the Thorsons tried to accept. Can you think of a good reason to have the rule of *In re Severtson* apply to this case?

Questions from *Foster v. Ohio State University* and *Payne v. Cave*:

1. What is the effect of a counteroffer on the original offer?

2. What is the effect of a subsequent bid on a prior bid at an auction?

Restatement (Second) of Contracts § 45. Option Contract Created by Part Performance or Tender & cmt. e.

Questions:

1. In a unilateral contract, a promise is made in exchange for a performance. Though either party might be the offeror, generally the promisor makes an offer: "If you mow my lawn, I'll pay you $30." A few law professors once argued that in such a case a contract would not form until the performance was complete because only then was consideration given as requested. But that meant that the promisor/offeror was not bound during the promisee's performance and could withdraw the offer until the last blade of grass was cut. The most famous example, suggested by a Professor Wormser, involves an offer by A to pay $100 to B if B will walk across the Brooklyn Bridge. Wormser argued that if A overtook B when B was halfway across and withdrew his offer, B would have no rights against A even though B had partially performed. Wormser, *The True Conception of Unilateral Contracts*, 26 Yale L.J. 136 (1916). That result seems harsh because the promisee has justifiably relied on the promise. How would section 45 handle the Brooklyn Bridge case?

2. Suppose Wormser had been correct and section 45 never written. When A stops B from performing further, doesn't B have a claim against A? The lawn mowing deal is a better example, perhaps: When the lawn service mows half my lawn because I have told them if they mow the whole lawn I will pay them, don't they have a claim against me even after I stop them from completing the job?

3. An option contract involves two promises by the optionor: one (offering) to perform and one to hold the offer open during a period of time. In an option contract created under section 45, who is the optionor—the promisor or the promisee? How long has the optionor promised to keep the offer open? (You might draw some argument from *Akins v. J.B. Sedberry, Inc*. in answer to this question.)

4. In a unilateral contract, one party makes no promise, so that party is not bound to perform. B could legally stop walking halfway across and A would have no valid claim against him. But doesn't that mean that while B is walking, A is bound but B is not? Is that a problem? (You might look at the comments to section 45 with respect to this question.)

5. Why would a promisor offer a unilateral rather than a bilateral contract?

Louis W. and Sylvia V. RAGOSTA v. Allen S. WILDER, Jr. (1991)
Supreme Court of Vermont
592 A.2d 367

PECK, Justice.

[¶1] Defendant appeals from a judgment ordering him to convey to plaintiffs a piece of real property known as "The Fork Shop." Defendant argues that the court improperly found that a binding contract existed and that it misapplied the doctrine of equitable estoppel. He also contends that the ruling cannot be upheld under promissory estoppel principles since the court failed to examine the extent to which enforcement of defendant's promise to sell was required to prevent injustice. Because the trial court's ruling cannot stand on contract or equitable estoppel grounds and because the court's analysis of promissory estoppel is inextricably bound in its contractual analysis, we reverse and remand the cause for further proceedings consistent with the principles expressed herein.

[¶2] In 1985, plaintiffs became interested in purchasing "The Fork Shop" from defendant, but preliminary negotiations between the parties were fruitless. In 1987, plaintiffs learned that defendant was again considering selling the "The Fork Shop," mailed him a letter offering to purchase the property along with a check for $2,000 and began arrangements to obtain the necessary financing. By letter dated September 28, 1987, defendant returned the $2,000 check explaining that he had two properties "up for sale" and that he would not sign an acceptance to plaintiffs' offer because "that would tie up both these properties until [there was] a closing." In the letter, he also made the following counter-offer:

> I will sell you The Fork Shop and its property as listed in book 35, at page 135 of the Brookfield Land Records on 17 April 1972, for $88,000.00- (Eighty- eight thousand dollars), at anytime up until the 1st of November 1987 that you appear with me at the Randolph National Bank with said sum. At which time they will give you a certified deed to this property or to your agent as directed, providing said property has not been sold.

[¶3] On October 1st, the date plaintiffs received the letter, they called defendant. The court found that during the conversation plaintiffs told defendant that "the terms and conditions of his offer were acceptable and that they would in fact prepare to accept the offer." Defendant assured plaintiffs that there was no one else currently interested in purchasing "The Fork Shop."

[¶4] On October 6th, plaintiffs informed defendant that they would not close the sale on October 8th as discussed previously but that they would come to Vermont on October 10th. On October 8th, defendant called plaintiffs and informed them that he was no longer willing to sell "The Fork Shop." The trial court found that, at that time, defendant was aware plaintiffs "had processed their loan application and were prepared to close." Plaintiffs informed defendant that they would be at the Randolph National Bank at 10:00 a.m. on October 15th with the $88,000 purchase price and in fact appeared. Defendant did not. Plaintiffs claim they incurred $7,499.23 in loan closing costs.

[¶5] Plaintiffs sued for specific performance arguing that defendant had contracted to sell the property to them. They alleged moreover that defendant knew they would have to incur costs to obtain financing for the purchase but assured them that the sale would go through and that they relied on his assurances.

[¶6] The trial court concluded that defendant "made an offer in writing which could only be accepted by performance prior to the deadline." It concluded further that defendant could not revoke his offer on October 8th because plaintiffs, relying on the offer, had already begun performance and that defendant should be estopped from revoking the offer on a theory of equitable estoppel. It ordered defendant to convey to plaintiffs "The Fork Shop" for $88,000. This appeal followed.

I.

[¶7] Plaintiffs claim that defendant's letter of September 28, 1987 created a contract to sell "The Fork Shop" to them unless the property was sold to another buyer. Rather, defendant's letter contains an offer to sell the property for $88,000, which the trial court found could only be accepted "by performance prior to the deadline," and a promise to keep the offer open unless the property were sold to another buyer. Defendant received no consideration for either promise. In fact, defendant returned plaintiffs' check for $2,000 which would have constituted consideration for the promise to keep the offer open, presumably because he did not wish to make a firm offer. Thus, the promise to keep the offer to sell open was not enforceable and, absent the operation of equitable estoppel, defendant could revoke the offer to sell the property at any time before plaintiffs accepted it. *See Buchannon v. Billings*, 127 Vt. 69, 75, 238 A.2d 638, 642 (1968) ("An option is a continuing offer, and if supported by a consideration, it cannot be withdrawn before the time limit.") (emphasis added).

[¶8] Plaintiffs argue that the actions they undertook to obtain financing, which were detrimental to them, could constitute consideration for the promise to keep the offer to sell open. Their argument is unconvincing. Although plaintiffs are correct in stating that a detriment may constitute consideration, they ignore the rule that "[t]o constitute consideration, a performance or a return promise must be bargained for." Restatement (Second) of Contracts § 71(1) (1981). "A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." *Id*. at § 71(2). Plaintiffs began to seek financing even before defendant made a definite offer to sell the property. Whatever detriment they suffered was not in exchange for defendant's promise to keep the offer to sell open.

[¶9] The trial court ruled that the offer to sell "The Fork Shop" could only be accepted by performance but concluded that in obtaining financing plaintiffs began performance and that therefore defendant could not revoke the offer to sell once plaintiffs incurred the cost of obtaining financing. Section 45 of the Restatement (Second) of Contracts provides that "[w]here an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it." However, "[w]hat is begun or tendered must be part of the actual performance invited in order to preclude revocation under this Section." *Id.* at comment f.

[¶10] Here, plaintiffs were merely engaged in preparation for performance. The court itself found only that "plaintiffs had changed their position in order to tender performance." At most, they obtained financing and assured defendant that they would pay; plaintiffs never tendered to defendant or even began to tender the $88,000 purchase price. Thus, they never accepted defendant's offer and no contract was ever created. *See Multicare Medical Center v. State Social & Health Services,* 114 Wash.2d 572, 584, 790 P.2d 124, 131 (1990) ("under a unilateral contract, an offer cannot be accepted by promising to perform; rather, the offeree must accept, if at all, by performance, and the contract then becomes executed").[*]
* * * *

[¶11] On remand the court shall consider the case under promissory estoppel only and determine what remedy, if any, is necessary to prevent injustice. In making this determination the court should consider the fact that plaintiffs incurred the expense of obtaining financing although they could not be certain that the property would be sold to them. * * * *

[¶12] Reversed and the cause remanded for further proceedings consistent with the principles expressed herein.

Questions:

1. Could Wilder's offer be revoked without breaching a contract?

2. Was Wilder's promise made with consideration at the time it was made? Why?

3. Did Ragosta's promise to perform render Wilder's promise binding? Why?

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[*] Because defendant specified that the manner of acceptance would be performance, plaintiffs' argument that they accepted defendant's offer over the telephone must fail. In fact, plaintiffs admitted in their depositions that they were very worried that the property would be sold to someone else prior to closing. Thus, they should have understood that they had no enforceable contract until closing.

4. Did Ragosta's beginning to obtain financing bind Wilder? Why?

5. At what point in time would Wilder have been bound, had he not retracted?

6. Should promissory estoppel principles apply to Wilder's promise?

William A. DRENNAN v. STAR PAVING COMPANY (a Corporation) (1958)
Supreme Court of California, In Bank
333 P.2d 757

TRAYNOR, Justice.

[¶1] Defendant appeals from a judgment for plaintiff in an action to recover damages caused by defendant's refusal to perform certain paving work according to a bid it submitted to plaintiff.

[¶2] On July 28, 1955, plaintiff, a licensed general contractor, was preparing a bid on the 'Monte Vista School Job' in the Lancaster school district. Bids had to be submitted before 8:00 p. m. Plaintiff testified that it was customary in that area for general contractors to receive the bids of subcontractors by telephone on the day set for bidding and to rely on them in computing their own bids. Thus on that day plaintiff's secretary, Mrs. Johnson, received by telephone between fifty and seventy-five subcontractors' bids for various parts of the school job. As each bid came in, she wrote it on a special form, which she brought into plaintiff's office. He then posted it on a master cost sheet setting forth the names and bids of all subcontractors. His own bid had to include the names of subcontractors who were to perform one-half of one per cent or more of the construction work, and he had also to provide a bidder's bond of ten per cent of his total bid of $317,385 as a guarantee that he would enter the contract if awarded the work.

[¶3] Late in the afternoon, Mrs. Johnson had a telephone conversation with Kenneth R. Hoon, an estimator for defendant. He gave his name and telephone number and stated that he was bidding for defendant for the paving work at the Monte Vista School according to plans and specifications and that his bid was $7,131.60. At Mrs. Johnson's request he repeated his bid. Plaintiff listened to the bid over an extension telephone in his office and posted it on the master sheet after receiving the bid form from Mrs. Johnson. Defendant's was the lowest bid for the paving. Plaintiff computed his own bid accordingly and submitted it with the name of defendant as the subcontractor for the paving. When the bids were opened on July 28th, plaintiff's proved to be the lowest, and he was awarded the contract.

[¶4] On his way to Los Angeles the next morning plaintiff stopped at defendant's office. The first person he met was defendant's construction engineer, Mr.

Oppenheimer. Plaintiff testified: 'I introduced myself and he immediately told me that they had made a mistake in their bid to me the night before, they couldn't do it for the price they had bid, and I told him I would expect him to carry through with their original bid because I had used it in compiling my bid and the job was being awarded them. And I would have to go and do the job according to my bid and I would expect them to do the same.'

[¶5] Defendant refused to do the paving work for less than $15,000. Plaintiff testified that he 'got figures from other people' and after trying for several months to get as low a bid as possible engaged L & H Paving Company, a firm in Lancaster, to do the work for $10,948.60.

[¶6] The trial court found on substantial evidence that defendant made a definite offer to do the paving on the Monte Vista job according to the plans and specifications for $7,131.60, and that plaintiff relied on defendant's bid in computing his own bid for the school job and naming defendant therein as the subcontractor for the paving work. Accordingly, it entered judgment for plaintiff in the amount of $3,817.00 (the difference between defendant's bid and the cost of the paving to plaintiff) plus costs.

[¶7] Defendant contends that there was no enforceable contract between the parties on the ground that it made a revocable offer and revoked it before plaintiff communicated his acceptance to defendant.

[¶8] There is no evidence that defendant offered to make its bid irrevocable in exchange for plaintiff's use of its figures in computing his bid. Nor is there evidence that would warrant interpreting plaintiff's use of defendant's bid as the acceptance thereof, binding plaintiff, on condition he received the main contract, to award the subcontract to defendant. In sum, there was neither an option supported by consideration nor a bilateral contract binding on both parties.

[¶9] Plaintiff contends, however, that he relied to his detriment on defendant's offer and that defendant must therefore answer in damages for its refusal to perform. Thus the question is squarely presented: Did plaintiff's reliance make defendant's offer irrevocable?

[¶10] Section 90 of the Restatement of Contracts states: 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.' This rule applies in this state. * * * *

[¶11] Defendant's offer constituted a promise to perform on such conditions as were stated expressly or by implication therein or annexed thereto by operation of law. (See 1 Williston, Contracts (3rd. ed.), s 24A, p. 56, s 61, p. 196.) Defendant had reason to expect that if its bid proved the lowest it would be used by plaintiff. It induced 'action * * * * of a definite and substantial character on the part of the promisee.'

[¶12] Had defendant's bid expressly stated or clearly implied that it was revocable at any time before acceptance we would treat it accordingly. It was silent on revocation, however, and we must therefore determine whether there are conditions to the right of revocation imposed by law or reasonably inferable in fact. In the analogous problem of an offer for a unilateral contract, the theory is now obsolete that the offer is revocable at any time before complete performance. Thus section 45 of the Restatement of Contracts provides: 'If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.' In explanation, comment b states that the 'main offer includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer, and that if tender is made it will be accepted. Part performance or tender may thus furnish consideration for the subsidiary promise. Moreover, merely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for making a promise binding (see s 90).'

[¶13] Whether implied in fact or law, the subsidiary promise serves to preclude the injustice that would result if the offer could be revoked after the offeree had acted in detrimental reliance thereon. Reasonable reliance resulting in a foreseeable prejudicial change in position affords a compelling basis also for implying a subsidiary promise not to revoke an offer for a bilateral contract.

[¶14] The absence of consideration is not fatal to the enforcement of such a promise. It is true that in the case of unilateral contracts the Restatement finds consideration for the implied subsidiary promise in the part performance of the bargained-for exchange, but its reference to section 90 makes clear that consideration for such a promise is not always necessary. The very purpose of section 90 is to make a promise binding even though there was no consideration 'in the sense of something that is bargained for and given in exchange.' (See 1 Corbin, Contracts 634 et seq.) Reasonable reliance serves to hold the offeror in lieu of the consideration ordinarily required to make the offer binding. In a case involving similar facts the Supreme Court of South Dakota stated that 'we believe that reason and justice demand that the doctrine (of section 90) be applied to the present facts. We cannot believe that by accepting this doctrine as controlling in the state of facts before us we will abolish the requirement of a consideration in contract cases, in any different sense than an ordinary estoppel abolishes some legal requirement in its application. We are of the opinion, therefore, that the defendants in executing the agreement (which was not supported by consideration) made a promise which they should have reasonably expected would induce the plaintiff to submit a bid based thereon to the Government, that such promise did induce this action, and that injustice can be avoided only by enforcement of the promise.' *Northwestern Engineering Co. v. Ellerman*, 69 S.D. 397, 408, 10 N.W.2d 879, 884; *see also*, *Robert Gordon, Inc., v. Ingersoll-Rand Co.*, 7 Cir., 117 F.2d 654, 661; *cf. James Baird Co. v. Gimbel Bros.*, 2 Cir., 64 F.2d 344.

[¶15] When plaintiff used defendant's offer in computing his own bid, he bound himself to perform in reliance on defendant's terms. Though defendant did not bargain for this use of its bid neither did defendant make it idly, indifferent to whether it would be used or not. On the contrary it is reasonable to suppose that defendant submitted its bid to obtain the subcontract. It was bound to realize the substantial possibility that its bid would be the lowest, and that it would be included by plaintiff in his bid. It was to its own interest that the contractor be awarded the general contract; the lower the subcontract bid, the lower the general contractor's bid was likely to be and the greater its chance of acceptance and hence the greater defendant's chance of getting the paving subcontract. Defendant had reason not only to expect plaintiff to rely on its bid but to want him to. Clearly defendant had a stake in plaintiff's reliance on its bid. Given this interest and the fact that plaintiff is bound by his own bid, it is only fair that plaintiff should have at least an opportunity to accept defendant's bid after the general contract has been awarded to him.

[¶16] It bears noting that a general contractor is not free to delay acceptance after he has been awarded the general contract in the hope of getting a better price. Nor can he reopen bargaining with the subcontractor and at the same time claim a continuing right to accept the original offer. *See*, *R. J. Daum Const. Co. v. Child*, Utah, 247 P.2d 817, 823. In the present case plaintiff promptly informed defendant that plaintiff was being awarded the job and that the subcontract was being awarded to defendant.

[¶17] Defendant contends, however, that its bid was the result of mistake and that it was therefore entitled to revoke it. It relies on the rescission cases of *M. F. Kemper Const. Co. v. City of Los Angeles*, 37 Cal.2d 696, 235 P.2d 7, and *Brunzell Const. Co. v. G. J. Weisbrod, Inc.*, 134 Cal.App.2d 278, 285 P.2d 989. *See also*, *Lemoge Electric v. San Mateo County*, 46 Cal.2d 659, 662, 297 P.2d 638. In those cases, however, the bidder's mistake was known or should have been known to the offeree, and the offeree could be placed in status quo. Of course, if plaintiff had reason to believe that defendant's bid was in error, he could not justifiably rely on it, and section 90 would afford no basis for enforcing it. *Robert Gordon, Inc., v. Ingersoll-Rand, Inc.*, 7 Cir., 117 F.2d 654, 660. Plaintiff, however, had no reason to know that defendant had made a mistake in submitting its bid, since there was usually a variance of 160 per cent between the highest and lowest bids for paving in the desert around Lancaster. He committed himself to performing the main contract in reliance on defendant's figures. Under these circumstances defendant's mistake, far from relieving it of its obligation constitutes an additional reason for enforcing it, for it misled plaintiff as to the cost of doing the paving.

Even had it been clearly understood that defendant's offer was revocable until accepted, it would not necessarily follow that defendant had no duty to exercise reasonable care in preparing its bid. It presented its bid with knowledge of the substantial possibility that it would be used by plaintiff; it could foresee the harm that would ensue from an erroneous underestimate of the cost. Moreover, it was motivated by its own business interest. Whether or not these considerations alone would justify recovery for negligence had the case been tried on that theory (*see Biakanja v. Irving*, 49 Cal.2d 647, 650, 320 P.2d 16), they are persuasive that defendant's mistake should not defeat recovery under the rule of section 90 of the Restatement of Contracts. As between the subcontractor who made the bid and the general contractor who reasonably relied on it, the loss resulting from the mistake should fall on the party who caused it. * * * *

[¶18] There is no merit in defendant's contention that plaintiff failed to state a cause of action, on the ground that the complaint failed to allege that plaintiff attempted to mitigate the damages or that they could not have been mitigated. Plaintiff alleged that after defendant's default, 'plaintiff had to procure the services of the L & H Co. to perform said asphaltic paving for the sum of $10,948.60.' Plaintiff's uncontradicted evidence showed that he spent several months trying to get bids from other subcontractors and that he took the lowest bid. Clearly he acted reasonably to mitigate damages. In any event any uncertainty in plaintiff's allegation as to damages could have been raised by special demurrer. Code Civ.Proc. s 430, subd. 9. It was not so raised and was therefore waived. Code Civ.Proc. s 434.

[¶19] The judgment is affirmed.
GIBSON C. J., and SHENK, SCHAUER, SPENCE and McCOMB, JJ., concur.

Questions:

1. Is Star Paving's bid enforceable? Why?

2. Was Star Paving's bid supported by consideration?

3. Did Drennan accept Star Paving's bid?

4. Was there a consensual contract in this case?

5. Should the general contractor be bound if the subcontractor might be? Consider the following from *Holman Erection Co. v. Orville E. Madsen & Sons, Inc.,* 330 N.W.2d 693 (Minn. 1983) and prepare to report what reasons support your answer to that question:

> [¶1] While commentators have urged that a general contractor be bound to a listed subcontractor upon the mere listing or use of the subcontractor's bid in the general bid on several theories, we do not adopt the reasoning.

See, e.g., Note, Another Look at Construction Bidding and Contracts at Formation, 53 Va. L. Rev. 1720 (1967); Note, Once Around the Flag Pole: Construction Bidding and Contracts at Formation, 39 N.Y.U.L.Rev. 816 (1964); see also Closen & Weiland, *supra* at 605 (urging legislative action to regulate the public bidding process). * * * *

[¶2] The broad policy justifications advanced for binding the general to the subcontractor upon utilization or listing of the subcontractor in the general bid include:

> 1) limiting bargaining to the pre-award stage to put the general and the sub on equal footing as to any subsequent negotiation or modification of the initial agreement;
>
> 2) providing certainty in the industry;
>
> 3) avoiding bid-shopping;
>
> 4) providing formality and allowing the commercial context to supply the necessary fact basis; and
>
> 5) allowing for necessary negotiation on open terms, the only binding terms being the price and the nature of the work bid on.

[¶3] Underlying all of the above justifications is a superficial equity notion. In Minnesota, as well as most other jurisdictions, the subcontractor may be obligated to perform by application of promissory estoppel. The general, however, remains free to avoid the listed subcontractor and negotiate with other subcontractors. This one-sided arrangement seems, on its face, unfair. Why should one party be bound and other not? A close examination of the construction business and the nature of the bidding process, however, reveals several justifications for the unequal treatment of generals and subcontractors.

[¶4] First, the reason a subcontractor is bound by its bid is the existence of justifiable reliance by the general on the subcontractor's price for specified work. The general makes his bid after gathering and evaluating a number of subcontract bids. Once the general wins the prime contract from the awarding authority, he is bound to his own bid. For the subcontractor to be able to refuse to perform would subject the general to a financial detriment. *See Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc.*, 291 Minn. 113, 120, 190 N.W.2d 71, 75-76 (1971).

[¶5] In contrast, the subcontractor does not rely on the general and suffers no detriment. A subcontractor submits bids to all or most of the general contractors that it knows are bidding on a project. The subcontractor receives invitations to bid from some generals and submits bids to others without invitation. The time and expense involved in preparing the bid is not segregated to any particular general. The total cost is part of the overhead of doing business. The same bid is submitted to each general. Thus, whether or not any particular general wins the contract is of little or no concern to the subcontractor. The subcontractor engages in the same work and expense in preparing its bid regardless of who wins the general contract and whether the subcontractor wins the contract on which it bid. No further expense is incurred until a formal agreement is reached with the general and actual work commences. Clearly, the promissory estoppel concept is not applicable in this situation. Bostrom bound the subcontractor to his bid not on the basis of a contract, but on the basis of estoppel. With no detrimental reliance, there can be no estoppel claim. Ample justification exists for binding the subcontractor and not binding the general. The two situations are very different.

[¶6] Second, the nature of the bidding process compels allowing the general sufficient leeway to maintain its flexibility in executing subcontracts and selecting the subcontractors it will hire for a project. Typically, subcontractors submit their bids only a few hours before the general bid must be submitted to the awarding authority. The general's representatives take the bids over the telephone and hurriedly compile their own bid. This period of time is hectic and complex. The bids received consist of the contract price and a listing of work included. Specifics are left for future negotiation and clarification.

[¶7] The last-minute procedure is designed to prevent bid-shopping. This court has recognized the undesirable nature of bid-shopping, *Bostrom*, 291 Minn. at 121, 190 N.W.2d at 76, and the last-minute bidding process seems well entrenched in the construction industry. *See Hoel-Steffen Construction Co. v. United States*, 684 F.2d 843, 849 (Ct. Cl. 1982).

[¶8] The bidding process puts the subcontractor and the general in very different positions as to the content of the subcontract. The subcontractors have the luxury of preparing their bids on their own timetable, subject only to the deadline for submitting their bids to the general contractors. The same bid goes to all the general contractors and covers the same work. The generals, on the other hand, are dealing with all the various construction aspects of the project and with numerous potential subcontractors. They compile their bids, as the various subcontractor bids are received, within a few hours of the deadline for submission of the prime bid. Specifics are necessarily given less than thorough consideration and are left for future negotiations. Finally, the lowest dollar amount bidder is not always the one chosen to do the work or the one listed as the potential subcontractor. Reliability, quality of work, and capability to handle the job are all considerations weighed by the general in choosing subcontractors. MBE regulations requiring an effort to use a percentage of minority contractors are another potential consideration.

[¶9] Binding general contractors to subcontractors because a particular bid was listed in the general bid or was utilized in making the bid would remove a considerable degree of needed flexibility. The present case illustrates the consequences quite well. Because the project involved was a public project, MBE regulations required that an effort be made to use minority contractors. When Madsen began to put the specifics of the project together, it was forced to juggle the subcontracts in order to comply with the MBE regulations. Van Knight, the subcontractor chosen instead of Holman, qualified as a minority business and offered to supply materials and supplies not included in Holman's bid. Despite a slightly higher cost, Madsen selected Van Knight as the steel erection subcontractor.

[¶10] If Madsen was bound to the bids listed in its prime bid, there is a possibility that the contract would have been lost due to failure to comply with MBE regulations. The next highest qualifying bidder would then have been selected, to the awarding authority's greater expense and to Madsen's detriment. Such a result imposes a greater cost on the project and a loss to the general contractor. The result under the prevailing law in most jurisdictions, and which we adopt here, would not impose any additional expenses on the rejected subcontractor.

[¶11] A decision in favor of the subcontractor on this issue would place Minnesota in a minority position as perhaps the sole state to hold that a contract is formed by the mere listing of a subcontractor in a general contractor's bid to the awarding authority. Although supplying some certainty and symmetry to the construction industry, such a decision would also impose a rigidity on the process and result in greater cost to awarding authorities and potential detriment to general contractors. If such a change is to take place, it is one properly brought before the legislature.

More Questions:

6. Did a contract form when Madsen listed Holman on the bid and Madsen won the bid?

7. What is bid-shopping? Should the general be able to bind the sub if the general shops the sub's bid?

Uniform Commercial Code § 2-205. Firm Offers, and cmts. 1 and 2.

Questions:

1. Can the holder of a garage sale give a firm offer?

2. Can a law college give a firm offer to provide a legal education at a stated tuition rate?

3. Can a used car salesman give a firm offer that will remain open for six months to sell a certain car?

4. Can the used car salesman give an oral firm offer?

Note on Terms of Art

I suggest you write out a list of elements for a firm offer. Typically, students think the phrase *firm offer* means an offer which states unambiguous terms or is final in some way. That is how business-people sometimes use the phrase. But we are lawyers, and so for us some words are "terms of art," which have technical meanings not necessarily related to the common meanings of the words. *Firm offer* is one such legal term of art. So is *offer*. If we look at *firm offer* as a term of art, the business-person's usage is nonsense. All offers contain ambiguous terms, and the level of definiteness in an offer is but one element in what makes an offer an offer at all. Moreover, all offers are final, because they invite acceptance. Otherwise, they would not be offers. So the phrase *firm offer* as business-people use the term is merely redundant. Of course, in this law class and generally in law school and in practice (except when you speak to your business clients), the term of art is the primarily relevant usage. Therefore, when you see the phrase *firm offer* from now on in contract law, you should consider whether it means an offer that complies with UCC § 2-205.

Chapter 7. Acceptances

A. Acceptances: What Are They?

Please review *Foster v. Ohio State University* (1987), the last case in Chapter 6.A. What Is an Offer?

B. Choice of Promise or Performance

Charles L. GLEESON v. Chris F. FRAHM and Olga K. Frahm (1982)
Supreme Court of Nebraska
320 N.W.2d 95

EMPSON, District Judge.

[¶1] This is an action for specific performance. On July 31, 1978, the defendants, Chris F. Frahm and Olga K. Frahm, executed for consideration an option, which is in pertinent part as follows:

> "KNOW ALL MEN BY THESE PRESENTS: That ... [Frahms] hereinafter referred to as First Party ... in consideration of the sum of One Dollar and other good and valuable consideration ... paid ... by ... second party ... hereby agree to hold, until the 1st day of January, 1980, 12:00 o'clock A.M., ... subject exclusively to the order of the said second party or his, her or their assigns, the following described property to wit: [property described] or to transfer and convey the said property by warranty deed ... at any time within the time above prescribed, to the said second party or to such person or persons as he ... may direct, at and for the price of One Thousand Two Hundred and Fifty (1,250) Dollars per acre payable on the following terms: 25% down payment, balance payable in ten (10) annual installments bearing interest at the rate of 8% per annum ....
>
> ....
>
> "... if there should be any delay on the part of the first party in perfecting the title to the above property for more than thirty (30) days, after notice shall have been given of the election of the holder of this option to purchase the aforesaid property, then, and in that event, the holder of this option shall have the right to cancel this option, and upon the exercise of such right of cancellation, shall receive back the consideration paid for this option ...."

The option was assigned to the plaintiff, Charles L. Gleeson.

[¶2] On December 28, 1979, Gleeson mailed to the Frahms a document entitled "Acceptance of Option to Purchase," which is in pertinent part as follows:

> "I, Charles L. Gleeson, as Assignee ... do under a certain option agreement made by you on the 31st day of July, 1978, for the purchase of the property described as follows: [property described] hereby elect to exercise such option to purchase, upon the terms as contained in said option agreement and do direct that you transfer and convey said property by Warranty Deed ... to myself, Charles L. Gleeson and Richard J. Gleeson, as tenants in common.
>
> "Please deliver abstract of title to the real estate certified to date, to my attorney ...."

[¶3] The document, received by the Frahms on December 29, 1979, neither contained nor was accompanied by any payment or specific offer of payment of any kind. Gleeson has never offered the Frahms any payment and the Frahms have never taken any steps to convey the property.

[¶4] No further action was taken by either party until about the middle of January 1980, when Gleeson stopped by the Frahms' home to ask about fencing the property. Chris Frahm told him to go see their attorney, who told Gleeson the sale would not be made. This lawsuit resulted.

[¶5] The Frahms' answer to Gleeson's petition alleged that the option was not exercised by Gleeson because the "downpayment" required was not tendered or paid before the option expired. They have defended throughout on that basis, and the trial court, upon that same theory, sustained the Frahms' motion to dismiss at the close of Gleeson's case.

[¶6] The nature of an option has been stated by this court as follows: " ' "An option to purchase real estate is a unilateral contract by which the owner of the property agrees with the holder of the option that he has the right to buy the property according to the terms and conditions of the contract. By such agreement the owner does not sell the land, nor does he at the time contract to sell. He does, however, agree that the person to whom the option is given shall have the right at his election or option to demand the conveyance in the manner specified." ' " *Commuter Developments & Investments, Inc. v. Gramlich*, 203 Neb. 569, 573, 279 N.W.2d 394, 396 (1979); *Phillips Petroleum Co. v. City of Omaha*, 171 Neb. 457, 106 N.W.2d 727 (1960). This definition gives rise to and is implicit in such cases as *Master Laboratories, Inc. v. Chestnut*, 154 Neb. 749, 49 N.W.2d 693 (1951), and *State Securities Co. v. Daringer*, 206 Neb. 427, 293 N.W.2d 102 (1980), which hold that the exercise of an option to buy or sell real estate must be unconditional and in accordance with the offer made. Those holdings, in turn, spring from long-standing principles of contract law that the acceptance of any offer, to result in a contract, must be absolute, unconditional, and unqualified. *See Roberts v. Cox*, 91 Neb. 553, 136 N.W. 831 (1912).

[¶7] The parties may contract to the effect that full or partial performance by the holder of the option is required to exercise the option. If they do so, the contract remains a unilateral one after the option is exercised, that is, the holder having performed, only the owner remains bound to perform. If they do not so contract, the holder may exercise by promising to perform, in which case the contract becomes bilateral—both parties are bound by their promises to perform the contract. Where the contract specifies the required manner of acceptance, the holder must conform. Where the manner of acceptance is not specified, the holder may exercise by promising to perform what the option requires of him. Restatement (Second) of Contracts § 32 (1981). The option contract in this case does not specify any particular manner of exercise or acceptance.

[¶8] It is significant that the contract gives the Frahms 30 days to perfect title after notice of election of Gleeson to purchase. It is more significant that upon the Frahms' failure to perfect title, Gleeson shall "receive back" not the downpayment but the "consideration paid for this option," i.e., "One Dollar and other good and valuable consideration." The Frahms' contention that proper exercise of the option required a downpayment before the Frahms had displayed good title is untenable. Gleeson's letter of acceptance, couched in the words of the option contract itself, is a clear exercise of the option, by which Gleeson became bound to pay the price upon the Frahms' showing of good title and their offer of a warranty deed.

[¶9] The judgment is reversed and the cause is remanded to the District Court for further proceedings.

[¶10] REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, Justice, dissenting.

[¶1] I dissent. The terms of the option require a downpayment of 25 percent at the time the option is exercised. Since no downpayment was received by January 1, 1980, the option expired. I would have sustained the District Court's order dismissing the plaintiff's petition.

[¶2] I am authorized to state that BROWER, D. J., joins in this dissent.

Question: Does it matter in this case whether consideration was paid for the option?

C. Issues of Intent

SIMMONS v. UNITED STATES (1962)
United States Court of Appeals Fourth Circuit
308 F.2d 160

SOBELOFF, Chief Judge.

[¶1] Diamond Jim III, a rock fish, was one of millions of his species swimming in the Chesapeake Bay, but he was a very special fish, and he occasions some nice legal questions. Wearing a valuable identification tag, he was placed on June 19, 1958, in the waters of the Bay by employees of the American Brewery, Inc., with the cooperation of Maryland state game officials. According to the well-publicized rules governing the brewery-sponsored Third Annual American Beer Fishing Derby, anybody who caught Diamond Jim III and presented him to the company, together with the identification tag and an affidavit that he had been caught on hook and line, would be entitled to a cash prize of $25,000.00. The company also placed other tagged fish in the Chesapeake, carrying lesser prizes.

[¶2] Fishing on the morning of August 6, 1958, William Simmons caught Diamond Jim III. At first, he took little notice of the tag, but upon re-examining it a half hour later, he realized that he had caught the $25,000.00 prize fish. After Simmons and his fishing companions appropriately marked the happy event, he hastened to comply with the conditions of the contest. Soon thereafter, in the course of a television appearance arranged by the brewery, he received the cash prize. The record shows that Simmons knew about the contest, but, as an experienced fisherman, he also knew that his chances of landing that fish were minuscule, and he did not have Diamond Jim III in mind when he set out that morning.

[¶3] Thereupon, an alert District Director of the Internal Revenue Service came forward with the assertion that the cash prize was includable in Simmons' gross income under section 61(a) and section 74(a) of the Internal Revenue Code, 26 U.S.C.A. §§ 61(a), 74(a) and assessed a tax deficiency of $5,230.00. Promptly Simmons paid and filed a claim for refund. A small sum was refunded on the basis of very generous deductions allowed by the Internal Revenue Service. Not satisfied, however, Simmons brought an action in the District Court on the theory that no part of the cash prize can be included in gross income under sections 61(a) and 74(a) of the Internal Revenue Code * * *. * * * * On motion for summary judgment, the District Court held for the Government, and Simmons prosecutes this appeal. * * * *

II.

[¶4] The taxpayer's next point is that he was at least entitled to have a jury decide whether the $25,000.00 payment to him was a gift, excluded from gross income by section 102. The Supreme Court's exposition of this branch of the law in *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 80 S. Ct. 1190 (1960), is of course controlling, and this court expressed its understanding of that decision in *Poyner v. Commissioner*, 301 F.2d 287 (4th Cir. 1962). Here it suffices to repeat that it is the function of the trier of fact to determine the basic facts and from these to infer the motivations of the donor. This does not mean, however, that in an appropriate case a district judge may not make a decision on summary judgment. Where, from the facts stipulated and submitted on affidavit, when viewed in the light most favorable to the taxpayer, it plainly appears that a jury could not reasonably infer that the payments were motivated 'out of affection, respect, admiration, charity or like impulses,' or from a 'detached or disinterested generosity,' or from similar sentiments, summary judgment for the Government is the correct disposition. Such is the present case.

[¶5] The established fact is that there was no personal relationship between Simmons and the brewery to prompt it to render him financial assistance. Nor was it impelled by charitable impulses toward the community at large, for the prize was to be paid to whoever caught Diamond Jim III, regardless of need or affluence. Rather, the taxpayer has apparently rendered the company a valuable service, for, by catching the fish and receiving the award amid fanfare, he brought to the company the publicity the Fishing Derby was designed to generate.

[¶6] Moreover, under accepted principles of contract law on which we may rely in the absence of pertinent Maryland cases, the company was legally obligated to award the prize once Simmons had caught the fish and complied with the remaining conditions precedent. The offer of a prize or reward for doing a specified act, like catching a criminal, is an offer for a unilateral contract. For the offer to be accepted and the contract to become binding, the desired act must be performed with knowledge of the offer. The evidence is clear that Simmons knew about the Fishing Derby the morning he caught Diamond Jim III. It is not fatal to his claim for refund that he did not go fishing for the express purpose of catching one of the prize fish. So long as the outstanding offer was known to him, a person may accept an offer for a unilateral contract by rendering performance, even if he does so primarily for reasons unrelated to the offer. Consequently, since Simmons could require the company to pay him the prize, the case is governed by *Robertson v. United States*, 343 U.S. 711, 713-714, 72 S. Ct. 994, 96 L.Ed. 1237 (1952). There, the Supreme Court held that, since the sponsor of a contest for the best symphonies submitted was legally obligated to award prizes in accordance with his offer, the payment made was not a gift to the recipient. * ** *

[¶7] Affirmed.

Questions:

1. Would Simmons have won the prize if he had not known about the offer when he caught the fish?

2. Blanche and Albert are happily engaged to be married. Blanche's father Joe, who is rich, wants to make sure Albert, who is kind of a loser, provides for his daughter, but he doesn't want Blanche to know that he thinks Albert is a loser. Two days before the marriage, he pulls Albert aside and gives him a note, which says,

> If you marry my daughter, I will pay you $10,000 per year for each year you are married, while I am alive, beginning on the night of the wedding. Signed, Joe

Two days later, Blanche and Albert marry. Two years later, Albert is heavily in debt and needs quick cash. He finds someone, Luigi, willing to give him cash for the amount of all the payments required by Joe's note, taking into account Joe's life expectancy and discounting to present value. So Albert sells the note to Luigi in exchange for this wad of cash. Albert pays off most of his debts with the cash, and Luigi gives notice of the assignment to Joe, who refuses to pay Luigi anything. In the suit Luigi v. Joe, does the court hold that Albert accepted Joe's offer?

3. What is consideration for the brewery's promise to pay $25,000 to the person who catches Diamond Jim III? Does a bargain exist in this case?

One day Mr. Simmons went fishin'
To catch Jim III wasn't his mission:
"This is no prize I took,
Just a gift on a hook."
But the feds said that he was just wishin'.

—Anon., 2001 (altered slightly)

D. Notice

CARLILL v. CARBOLIC SMOKE BALL CO. (1893)
Court of Appeal
1 Q.B. 256

[¶1] Appeal from a decision of Hawkins, J.

[¶2] The defendants, who were the proprietors and vendors of a medical preparation called "The Carbolic Smoke Ball," inserted in the Pall Mall Gazette of November 13, 1891, and in other newspapers, the following advertisement:

> "100l. reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. 1000l. is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter.
>
> "During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventatives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.
>
> "One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10s., post free. The ball can be refilled at a cost of 5s. Address, Carbolic Smoke Ball Company, 27 Princes Street, Hanover Square, London."

[¶3] The plaintiff, a lady, on the faith of this advertisement, bought one of the balls at a chemist's, and used it as directed, three times a day, from November 20, 1891, to January 17, 1892, when she was attacked by influenza. Hawkins, J., held that she was entitled to recover the 100l. The defendants appealed.

LINDLEY, L.J. [The Lord Justice stated the facts, and proceeded:-] * * * *
* * * *

[¶4] But then it is said, "Supposing that the performance of the conditions is an acceptance of the offer, that acceptance ought to have been notified." Unquestionably, as a general proposition, when an offer is made, it is necessary in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified. But is that so in cases of this kind? I apprehend that they are an exception to that rule, or, if not an exception, they are open to the observation that the notification of the acceptance need not precede the performance. This offer is a continuing offer. It was never revoked, and if notice of acceptance is required * * *, the person who makes the offer gets the notice of acceptance contemporaneously with his notice of the performance of the condition. If he gets notice of the acceptance before his offer is revoked, that in principle is all you want. I, however, think that the true view, in a case of this kind, is that the person who makes the offer shows by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance.
* * * *

[The concurring opinions of Bowen and Smith, L.J., are omitted.]

Questions:

1. If I promise my young neighbor, "I'll pay you $20 if you promise to mow my lawn," then, if my neighbor accepts, how will I receive notice of that acceptance?

2. If I promise my young neighbor, "I'll pay you $20 if you mow my lawn," must my neighbor give notice of acceptance at the time of my promise or before mowing in order to collect later?

3. A Carbolic Smoke Ball is a rubber ball with a short, pipe-like, hollow extension. The extension is covered with a cloth. The ball is filled with carbolic acid in powder form. The user holds the extension under her nose and taps on the ball, which makes the powder arise through the cloth. When the user breaths in the carbolic acid, it induces sneezing. Considering what the smoke ball is and how it was used, you will appreciate the humor in a part of Justice Lindley's opinion I have cut. The first issue Lindley addressed in the actual opinion was: Is this advertisement an offer? He phrased it differently, however. He said, "We must first consider whether this was intended to be a promise at all, or whether it was a mere puff which meant nothing. Was it a mere puff?" A "mere puff"! What a lark! Was the advertisement an offer?

4. What is consideration for the smoke ball company's promise?

ELECTRIC STORAGE BATTERY CO. v. BLACK (1965)
Supreme Court of Wisconsin
27 Wis. 2d 366 (1965)

GORDON, J.

* * * * Notice of Acceptance.

[¶1] All courts agree that if the contract of guaranty affirmatively calls for notice, it is a condition which must be met in order to bind the guarantor on his promise. Mr. Milo Black's letter of guaranty, dated July 30, 1960, does not expressly cover the question whether he expected to be notified by the creditor that the latter accepted the guaranty and intended to make deliveries of merchandise in reliance thereon. Courts have not been uniform in their decisions on the issue whether notice of intention to accept such a guaranty is necessary in order to hold the guarantor liable.

[¶2] Some courts have held that if there is any fair reason for the guarantor to be uncertain that the creditor will accept the proposed guaranty, a notice of the intention to accept is a constructive condition to the liability of the guarantor. * * * *

[¶3] In Restatement, 1 Contracts, p. 64, sec. 56, appears the following illustration:

> "1. A writes to B: 'Let C have $100 and I guarantee its repayment.' Immediately on receiving this communication, B lets C have $100 but fails to

> notify A of the fact, although he knows that A is not otherwise likely to learn of it. B cannot enforce the guaranty if C fails to pay the debt."

[¶4] The decisions of the state of Wisconsin demonstrate that notice of acceptance to the guarantor is ordinarily required. In *A. B. Kuhlman Co. v. Cave* (1908), 135 Wis. 279, 115 N. W. 793, the guarantor wrote a letter to the creditor which contained the following:

> "I request that should Mr. Leon H. Cave . . . order goods from you at any time after date of this letter of credit until further notice, that you ship same to order of said agent, and I hereby guarantee payment for the same within twenty days after the arrival of the goods at destination."

The trial court rendered judgment in favor of the creditor against the guarantor, and the supreme court reversed, with the following holding, at page 280:

> "It is plain that this judgment was erroneous. The writing sued on was simply a letter of credit and constituted an offer merely on the part of the defendant, which would not become a contract until accepted and notice of acceptance given to the guarantor. This has been so recently held by this court that no extended discussion of the principle is either desirable or necessary. *Miami Co. Nat. Bank v. Goldberg*, 133 Wis. 175, 113 N. W. 391. See, also, *New Home S. M. Co. v. Simon*, 104 Wis. 120, 80 N. W. 71. No acceptance or notice of acceptance was found by the court; hence no completed contract of guaranty was made and no liability incurred."

[¶5] * * * * At page 180 of the *Miami County Nat. Bank* Case, the court cited *Acme Mfg. Co. v. Reed* (1900), 197 Pa. St. 359, 47 Atl. 205, for the policy behind this rule:

> "A guarantor of future credit or advancing is entitled to notice from the party giving the credit of his acceptance of the guaranty, inasmuch as such notice enables the guarantor to know the nature and extent of his liability, to exercise due diligence in guarding himself against losses which might otherwise be unknown to him, and to avail himself of the appropriate means in law and equity to compel the other parties to discharge him from future responsibility. . . . The corporation accepted and filled the order, but gave no notice of the acceptance to the guarantor. Held, that the guarantor was not liable." * * * *

[¶6] This rule followed in Wisconsin and in a number of other states has been questioned and circumscribed. When the guaranty contract is executed contemporaneously with the signing of the primary contract, it would be unsound to require formal notice. In addition, the guarantor may, by his conduct, waive the necessity of notice of acceptance.

[¶7] The plaintiff has referred the court to several cases which hold that notice of acceptance is not necessary when the guaranties are continuing in nature, as they are considered to be offers which become effective as soon as they are relied on by the creditor. *Klatte v. Franklin State Bank* (1933), 211 Wis. 613, 248 N. W.

158, 249 N. W. 72; *Chicago Lock Co. v. Kirchner* (1929), 199 Wis. 30, 225 N. W. 185; *International Textbook Co. v. Mabbott* (1915), 159 Wis. 423, 150 N. W. 429. However, in each of the foregoing cases (unlike the case at bar) the giving of the guaranty was contemporaneous with the execution of the primary contract; under such circumstances, notice of acceptance would indeed be a formality.

[¶8] Also, these cases can be distinguished on other grounds. In the *International Textbook Co*. Case, *supra*, the court points out, at page 427, that the guarantor expressly waived any notice of acceptance of the guaranty. In the *Chicago Lock Co.* Case, *supra*, the guarantor claimed he never received a formal notice of acceptance, but the court observed that the guarantor had actual knowledge of it from another source. In the *Klatte* Case, *supra*, the issue now being considered was not before the court. The main issue there involved the legal effect of a notice by a surety that he intended to terminate his future liability on the contract. * * * *

[¶9] Restatement, Security (1941), p. 248, sec. 86, asserts the following rule:

> "Where the surety offers to guarantee an extension of credit to the principal and the credit is extended as the sole consideration for the surety's promise, the contract is complete upon the extension of credit, but if the surety does not know of the extension of credit and has no adequate means of ascertaining with reasonable promptness and certainty that the credit has been extended and the creditor should know this, the contract of the surety is discharged unless within a reasonable time after the extension of credit the creditor exercises reasonable diligence to notify the surety thereof."

[¶10] The effect of the Restatement rule is to obviate the need of notice to the surety except in those cases wherein he is either unaware of the extension of credit or does not have adequate means to learn of it; under the Kuhlman Case and other decisions of this state, the emphasis is somewhat different: The guarantor is entitled to notice of acceptance unless there exists some special circumstance excusing it. There may even be contracts of guaranty which, by their special terms or particular circumstances, will require not only an original notice of acceptance but additional notices of acceptance as to subsequent sales or shipments.

[¶11] The instant case was submitted upon stipulated facts. There is nothing in such facts or in the documentary exhibits that were received in evidence which would relieve the creditor of its responsibility to give notice of acceptance of Mr. Milo Black's offer to guarantee payment for material purchased by his son. The plaintiff urges that when Mr. Milo Black responded (in Exhibit 5) to the creditor's letter of May 7, 1962, he acknowledged, in effect, that he had never expected to receive notice of acceptance at the time he wrote the original letter. We are unable to derive such meaning from Exhibit 5. Therein Mr. Milo Black wrote:

> "I guaranteed his first shipment but that was nearly two years ago.
>
> "I would suggest your reducing your account to your cost and giving him a long term settlement. His intentions are good if given a chance."

In our opinion, the foregoing language neither demands nor waives acceptance in any degree greater than the original letter of July 30, 1960. Under the authority *of A. B. Kuhlman Co. v. Cave, supra*, we conclude that Mr. Milo Black was entitled to notice of acceptance, and, in the absence of such notice, he cannot be held liable on the contract. * * * *

We conclude that Mr. Milo Black was entitled to receive from the plaintiff notice of acceptance of his guaranty contract and, since such notice was not given, the guarantor cannot be held liable.

By the Court. Judgment affirmed.

Questions:

1. What did Black offer?

2. What was consideration for Black's offer?

3. Did the battery company accept Black's offer?

4. Would you have known that you were to give Black notice of acceptance, given such cases as *Carlill*?

5. When must such notice be given?

Okay, you now know quite a bit about consideration and assent. This rather recent opinion employs those terms but in some odd ways. Which statements by the court contradict what we have read in prior cases? Which statements that the court makes are factually or legally impossible or so unlikely as to make them unbelievable?

Craig ASMUS et al. v. PACIFIC BELL et al. (2000)
Supreme Court of California
96 Cal.Rptr.2d 179

CHIN, J.

[¶1] We granted the request of the Ninth Circuit Court of Appeals for an answer to the following certified question of law under rule 29.5 of the California Rules of * * *Court: "Once an employer's unilaterally adopted policy—which requires employees to be retained so long as a specified condition does not occur—has become a part of the employment contract, may the employer thereafter unilaterally [terminate] the policy, even though the specified condition has not occurred?" We conclude the answer to the certified question is yes. An employer may unilaterally terminate a policy that contains a specified condition, if the condition is one of indefinite duration, and the employer effects the change after a reasonable time, on reasonable notice, and without interfering with the employees' vested benefits.

I. BACKGROUND

* * * *

B. Facts

[¶2] In 1986, Pacific Bell issued the following "Management Employment Security Policy" (MESP): "It will be Pacific Bell's policy to offer all management employees who continue to meet our changing business expectations employment security through reassignment to and retraining for other management positions, even if their present jobs are eliminated. * * * * This policy will be maintained so long as there is no change that will materially affect Pacific Bell's business plan achievement."

[¶3] In January 1990, Pacific Bell notified its managers that industry conditions could force it to discontinue its MESP. In a letter to managers, the company's chief executive officer wrote: "[W]e intend to do everything possible to preserve our Management Employment Security policy. However, given the reality of the marketplace, changing demographics of the workforce and the continued need for cost reduction, the prospects for continuing this policy are diminishing—perhaps, even unlikely. We will monitor the situation continuously; if we determine that business conditions no longer allow us to keep this commitment, we will inform you immediately."

[¶4] Nearly two years later, in October 1991, Pacific Bell announced it would terminate its MESP on April 1, 1992, so that it could achieve more flexibility in conducting its business and compete more successfully in the marketplace. That same day, Pacific Bell announced it was adopting a new layoff policy (the Management Force Adjustment Program) that replaced the MESP but provided a generous severance program designed to decrease management through job reassignments and voluntary and involuntary terminations. Employees who chose to continue working for Pacific Bell would receive enhanced pension benefits. Those employees who opted to retire in December 1991 would receive additional enhanced pension benefits, including increases in monthly pension and annuity options. Employees who chose to resign in November 1991 would receive these additional enhanced pension benefits as well as outplacement services, medical and life insurance for one year, and severance pay equaling the employee's salary and bonus multiplied by a percentage of the employee's years of service.

[¶5] Plaintiffs are 60 former Pacific Bell management employees who were affected by the MESP cancellation. They chose to remain with the company for several years after the policy termination and received increased pension benefits for their continued employment while working under the new Management Force Adjustment Program. All but eight of them signed releases waiving their right to assert claims arising from their employment under the MESP or its termination.

[¶6] Plaintiffs filed an action in federal district court against Pacific Bell and its parent company, Pacific Telesis Group, seeking declaratory and injunctive relief, as well as damages for breach of contract, breach of fiduciary duty, fraud, and violations of the Employee Retirement Income Security Act (ERISA) (29 U.S.C. § 1000 et seq.). The parties filed countermotions for partial summary judgment before conducting discovery. The district court granted summary judgment in Pacific Bell's favor against the 52 plaintiffs who signed releases. In an unpublished opinion, the Ninth Circuit affirmed the district court's judgment in this respect.

[¶7] The district court granted summary judgment on the breach of contract claim in favor of the eight plaintiffs who did not sign releases. It held that even if an employer had the right unilaterally to terminate a personnel policy creating a contractual obligation, that right would not apply in cases where the original employment policy incorporated a term for duration or conditions for rescission, absent stronger evidence of the employees' assent to the policy modification than their continued employment. The court concluded that Pacific Bell could not terminate its MESP unless it first demonstrated (paraphrasing the words of the MESP) "a change that will materially alter Pacific Bell's business plan achievement."

[¶8] Thereafter, the parties entered into a stipulation providing in part that Pacific Bell "elected not to present any further evidence in this action with respect to the question of whether there has been 'a change that will materially alter Pacific Bell's business plan achievement' ... and agreed that summary judgment may be entered in favor of the eight remaining Plaintiffs on the issue of liability for their claims of breach of contract by breach of the MES policy...." On May 5, 1997, the district court entered an order approving the stipulation and entered judgment in plaintiffs' favor on the issue.

[¶9] Pursuant to the parties' agreement, the court certified for interlocutory appeal the issue whether Pacific Bell breached the MESP, and the Ninth Circuit accepted the interlocutory appeal. In a published opinion, the Ninth Circuit stated its certification request and noted that our answer to the certified question would determine the remaining portion of the case pending before it. (*Asmus v. Pacific Bell* (9th Cir. 1998) 159 F.3d 422, 423-425.) The court agreed to abide by our answer. (*Id*. at p. 425.)

II. DISCUSSION

A. California Employment Law

[¶10] We held in *Foley v. Interactive Data Corp*. (1988) 47 Cal.3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (Foley), that an implied-in-fact contract term not to terminate an employee without good cause will rebut the statutory presumption of Labor Code section 2922 that employment for an indefinite period is terminable at will. (Id. at p. 677, 254 Cal.Rptr. 211, 765 P.2d 373.) The Foley court observed that the trier of fact can infer an agreement to limit grounds for an employee's termination based on the employee's reasonable reliance on company policy manuals. (Id. at pp. 681- 682, 254 Cal.Rptr. 211, 765 P.2d 373.) In Scott, we stated that, in light of Foley, we could find "no rational reason why an employer's policy that its employees will not be demoted except for good cause, like a policy restricting termination or providing for severance pay, cannot become an implied term of an employment contract. In each of these instances, an employer promises to confer a significant benefit on the employee, and it is a question of fact whether that promise was reasonably understood by the employee to create a contractual obligation." (Scott, *supra*, 11 Cal.4th at p. 464, 46 Cal.Rptr.2d 427, 904 P.2d 834.) Both Scott and Foley emphasized that employment policies, manuals, and offers were not exempt from the rules governing contract interpretation. (Scott, *supra*, 11 Cal.4th at p. 469, 46 Cal.Rptr.2d 427, 904 P.2d 834; Foley, *supra*, 47 Cal.3d at p. 681, 254 Cal.Rptr. 211, 765 P.2d 373.)

[¶11] In some cases, an employer adopts a no-layoff policy or provides employees with an employment security policy in order to earn the employees' loyalty in exchange for granting them job security. This exchange is fair and it may, depending on the facts, provide the basis for an enforceable unilateral contract, i.e., one in which the promisor does not receive a promise in return as consideration. (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 213, pp. 221-222; see Befort, Employee Handbooks and the Legal Effect of Disclaimers (1991/1992) 13 Indus. Rel. L.J. 326, 342.)

[¶12] In a unilateral contract, there is only one promisor, who is under an enforceable legal duty. (1 Corbin on Contracts (1993) § 1.23, p. 87.) The promise is given in consideration of the promisee's act or forbearance. As to the promisee, in general, any act or forbearance, including continuing to work in response to the unilateral promise, may constitute consideration for the promise. (1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 213, p. 221; 2 Corbin on Contracts (1995) § 5.9, pp. 40-46; Rest.2d Contracts, §§ 71, 72; Civ.Code, § 1584.)[*]

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[*] An employment contract in which the employer promises to pay an employee a wage in return for the employee's work is typically described as a unilateral contract. Scholars observe, however, that it is not always easy to determine whether an offer creates a unilateral or bilateral contract. (1 Corbin on Contracts, *supra*, § 1.23, pp. 93- 94.) Indeed, the distinction between the contract types often exaggerates the importance of the particular bargain compelling performance without commitment. "In response to these concerns, the Restatement (Second) of Contracts has abandoned the terms 'unilateral' and 'bilateral,' without, however, abandoning the concepts behind them." (Id. at § 1.23, p. 94.) In the Restatement Second of Contracts, the unilateral contract is preserved in the phrase, "Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance...." (Rest.2d Contracts, § 45(1).) Most legal scholars, however, prefer to rely on the traditional terminology to distinguish between the two types of offers and promises

[¶13] As a Court of Appeal observed, "Of late years the attitude of the courts (as well as of employers in general) is to consider [employment security agreements] which offer additional advantages to employees as being in effect offers of a unilateral contract which offer is accepted if the employee continues in the employment, and not as being mere offers of gifts. They make the employees more content and happier in their jobs, cause the employees to forego their rights to seek other employment, assist in avoiding labor turnover, and are considered of advantage to both the employer and the employees." (*Chinn v. China Nat. Aviation Corp*. (1955) 138 Cal.App.2d 98, 99-100, 291 P.2d 91 (*Chinn* (Cite as: 23 Cal.4th 1, 11, 999 P.2d 71, 76, 96 Cal.Rptr.2d 179, 184)) [employer's agreement to pay severance benefits becomes enforceable unilateral contract if employee accepts benefit offer by continuing employment]; *see also Lang v. Burlington Northern R. Co.* (D. Minn. 1993) 835 F. Supp. 1104, 1106 [continued employment constitutes acceptance of arbitration policy added to employment manual after employment commenced]; *Hunter v. Sparling* (1948) 87 Cal.App.2d 711, 723, 197 P.2d 807 [continuing services of employee is adequate consideration for employer's promise to pay future pension].)

[¶14] The parties agree that California law permits employers to implement policies that may become unilateral implied-in-fact contracts when employees accept them by continuing their employment. We do not further explore the issue in the context here, although we noted that whether employment policies create unilateral contracts will be a factual question in each case. (Chinn, *supra*, 138 Cal.App.2d at pp. 99-100, 291 P.2d 91.) The parties here disagree on how employers may terminate or modify a unilateral contract that has been accepted by the employees' performance. Plaintiffs assert that Pacific Bell was not entitled to terminate its MESP until it could demonstrate a change materially affecting its business plan, i.e., until the time referred to in a clause in the contract. Pacific Bell asserts that because it formed the contract unilaterally, it could terminate or modify that contract as long as it did so after a reasonable time, gave affected employees reasonable notice, and did not interfere with the employees' vested benefits (e.g., pension and other retirement benefits). Even if we were to require additional consideration, Pacific Bell contends it gave that consideration by offering enhanced pension benefits to those employees who chose to remain with the company after the modification took effect. Both parties rely on cases from other jurisdictions to support their respective positions.

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because the use of unilateral contract analysis has been growing in recent years, particularly in employment cases. (1 Corbin on Contracts, *supra*, § 1.23, p. 95.) As one scholar observed, "Sometimes innovation does not take the form of a new substantive rule but rather of a new perspective on the problem, reflected in the substitution of a new terminology or analysis for a traditional one. For example, the Restatement (Second) abandons the terms 'unilateral' and 'bilateral' as descriptions of contracts.... There is no way to assess the extent to which such innovations in terminology and analysis portend innovations of substance." (Farnsworth, Ingredients in the Redaction of the Restatement (Second) of Contracts (1981) 81 Colum. L. Rev. 1, 5-6, fns. omitted.) In this case, we retain the distinction between unilateral and bilateral contracts.

B. Other Jurisdictions

[¶15] Because there is no case in point on the present question in this state, the parties each rely on the rule as stated in other jurisdictions to support their particular views.

[¶16] Pacific Bell points to the rule in the majority of jurisdictions that have addressed the question whether and how an employer may terminate or modify an employment security policy that has become an implied-in-fact unilateral contract. Regardless of the legal theory employed, the majority of other jurisdictions that have addressed the question conclude that an employer may terminate or modify a contract with no fixed duration period after a reasonable time period, if it provides employees with reasonable notice, and the modification does not interfere with vested employee benefits. (*See*, e.g., *Elliott v. Board of Trustees* (1995) 104 Md.App. 93, 655 A.2d 46, 51 (*Elliott*); *In re Certified Question* (1989) 432 Mich. 438, 443 N.W.2d 112, 120, 121, fn. 17 (*Bankey*); *Sadler v. Basin Elec. Power Coop*. (N.D. 1988) 431 N.W.2d 296, 300; *Fleming v. Borden, Inc*. (1994) 316 S.C. 452, 450 S.E.2d 589, 595 (*Fleming*); *Ryan v. Dan's Food Stores, Inc.* (Utah 1998) 972 P.2d 395, 401; *Progress Printing Co., Inc. v. Nichols* (1992) 244 Va. 337, 421 S.E.2d 428, 431 (*Progress Printing*); *Gaglidari v. Denny's Restaurants, Inc.* (1991) 117 Wash.2d 426, 815 P.2d 1362, 1367 (*Gaglidari*); *Leathem v. Research Found. of City Univ*. (S.D.N.Y. 1987) 658 F. Supp. 651, 655.)

[¶17] Most of these courts refer to general contract law in deciding whether an employer may terminate or modify an employment contract. They reason that because the employer created the policy's terms unilaterally, the employer may terminate or modify them unilaterally with reasonable notice. (See, e.g., Elliott, *supra*, 655 A.2d at p. 51; Fleming, *supra*, 450 S.E.2d at p. 595; Progress Printing, *supra*, 421 S.E.2d at p. 431; Gaglidari, *supra*, 815 P.2d at p. 1367; but see Bankey, *supra*, 443 N.W.2d at pp. 119-120 [relying on public policy grounds, not contract theory, to allow employer to terminate discharge-for-cause policy with reasonable notice].)

[¶18] Fleming indicated that of the three possible approaches to the termination question, it favored the majority approach as the one most consistent with unilateral contract principles. (*Fleming*, *supra*, 450 S.E.2d at pp. 594-595.) The first approach—to allow termination without notice at any time before completion of the contract—struck the Fleming court as too harsh. (Ibid.) That approach is now considered obsolete in California. (*Drennan v. Star Paving Co*. (1958) 51 Cal.2d 409, 414, 333 P.2d 757.) *Fleming* also rejected an alternative minority model that would impose bilateral concepts on a unilateral contract to require mutual assent and additional consideration to support the termination. (*Fleming*, *supra*, 450 S.E.2d at p. 595.) The court settled on the majority approach after recognizing that the employer-employee relationship is not static. *Fleming* stated that "[e]mployers must have a mechanism which allows them to alter the employee handbook to meet the changing needs of both business and employees." (Ibid.)

[¶19] As plaintiffs observe, a minority of jurisdictions today hold that an employer cannot terminate or modify a unilateral employment contract without the employees' express knowledge and consent. (*See Torosyan v. Boehringer Ingelheim Pharm.* (1995) 234 Conn. 1, 662 A.2d 89, 99; *Brodie v. General Chemical Corp.* (Wyo. 1997) 934 P.2d 1263, 1268; *Robinson v. Ada S. McKinley Community Services* (7th Cir. 1994) 19 F.3d 359, 364.) Like the dissent, they reason that any termination or modification of a unilateral employment contract requires additional consideration and acceptance by the affected employees, because their only choices in light of a pending termination would be to resign or to continue working. (*See*, e.g., *Demasse v. ITT Corp*. (1999) 194 Ariz. 500, 984 P.2d 1138, 1145 (*Demasse*).)

[¶20] Most recently, in *Demasse,* the Ninth Circuit certified a question to the Arizona Supreme Court whether a layoff seniority provision (stating that the company will lay off junior employees ahead of senior employees) may be unilaterally modified to permit the employer to lay off employees without regard to seniority status. (*Demasse*, *supra*, 984 P.2d at p. 1140.) The employee handbook reserved the employer's right to amend, modify, or cancel it. When the employees received the handbook, they signed an acknowledgement that they understood and would comply with its provisions. (*Id*. at p. 1141.) Four years later, the employer modified the layoff policy to base it not on seniority status, but on employee " 'abilities and documentation of performance.' " (Ibid.) The plaintiffs were employees whom the company laid off 10 days after the new policy took effect. They sued in federal district court, alleging they were laid off in breach of an implied-in-fact contract. (Ibid.)

[¶21] After the district court found the employer unilaterally could alter its handbook, the Ninth Circuit certified the question to the Arizona Supreme Court. That court concluded that, although most handbook terms are merely descriptions of the employer's present policies, some could create implied-in- fact contracts, depending on the parties' intent. (*Demasse*, *supra*, 984 P.2d at p. 1143.) The court adopted the minority rule, holding that once a handbook policy becomes an implied-in-fact contract, the employer cannot unilaterally modify it. (*Id*. at p. 1144.) Any change requires mutual assent, with continued employment inadequate consideration for the change. (*Id*. at p. 1145.) The court was concerned the employer could alter the contract terms and, on the same day, fire the employee, rendering the original contract illusory. (*Id*. at p. 1147.) It rejected Arizona precedent holding that the employer provided consideration for the change by continuing to provide jobs, and the employees manifested their assent by continuing to work. (Ibid.)

[¶22] Vice Chief Justice Jones's dissent aptly rejected the notion that in order to free itself of future obligations, the company would be required to provide employees with a wage increase or other bonus amounting to new consideration. To do so, the dissent reasoned, would incorrectly impose a bilateral principle on the unilateral relationship, leaving the employer unable to manage its business, impairing essential managerial flexibility, and causing undue deterioration of traditional employment principles. (*Demasse*, *supra*, 984 P.2d at p. 1156 (dis. opn. of Jones, V.C.J.); *see also Fleming*, *supra*, 450 S.E.2d at p. 595.)

[¶23] In preferring the more reasonable majority rule, the dissent also found unsatisfactory the *Demasse* majority's reasoning that employers not wanting to be bound by a handbook's terms are simply free never to issue one in the first place. As the dissent observed, "employers may be unilaterally forced by economic circumstance to curtail or shut down an operation, something employers have the absolute right to do. When the employer chooses in good faith, in pursuit of legitimate business objectives, to eliminate an employee policy as an alternative to curtailment or total shutdown, there has been forbearance by the employer. Such forbearance constitutes a benefit to the employee in the form of an offer of continuing employment. The employer who provides continuing employment, albeit under newly modified contract terms, also provides consideration to support the amended policy manual." (*Demasse*, *supra*, 984 P.2d at p. 1155 (dis. opn. Of Jones, V.C.J.).) We agree with the *Demasse* dissent's thoughtful analysis and find its application of contract principles to the question before it reflected in our own state's developing case law and scholarly treatises. (*See*, e.g., *Scott*, *supra*, 11 Cal.4th at p. 472, 46 Cal.Rptr.2d 427, 904 P.2d 834; 1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 233, p. 241.)

[¶24] We turn now to plaintiffs' several arguments that would restrict Pacific Bell's right to terminate or modify its MESP.

C. Application of Legal Principles

1. Consideration

[¶25] Plaintiffs contend that Pacific Bell gave no valid consideration to bind the proposed MESP termination and subsequent modification. According to plaintiffs, when Pacific Bell unilaterally terminated the contract to create a new contract with different terms, it left its employees with no opportunity to bargain for additional benefits or other consideration. The parties' obligations were unequal, and hence, there was no mutuality of obligation for the change.

[¶26] We disagree. The general rule governing the proper termination of unilateral contracts is that once the promisor determines after a reasonable time that it will terminate or modify the contract, and provides employees with reasonable notice of the change, additional consideration is not required. (1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 228, p. 236.) The mutuality of obligation principle requiring new consideration for contract termination applies to bilateral contracts only. (Ibid.) In the unilateral contract context, there is no mutuality of obligation. (Ibid.) For an effective modification, there is consideration in the form of continued employee services. (Ibid.) The majority rule correctly recognizes and applies this principle. (*See* ante, 96 Cal.Rptr.2d at pp. 185-187, 999 P.2d at pp. 76-

78.) Here, Pacific Bell replaced its MESP with a subsequent layoff policy. Plaintiffs' continued employment constituted acceptance of the offer of the modified unilateral contract. As we have observed, a rule requiring separate consideration in addition to continued employment as a limitation on the ability to terminate or modify an employee security agreement would contradict the general principle that the law will not concern itself with the adequacy of consideration. (*Foley*, *supra*, 47 Cal.3d at p. 679, 254 Cal.Rptr. 211, 765 P.2d 373.)

[¶27] The corollary is also true. Just as employers must accept the employees' continued employment as consideration for the original contract terms, employees must be bound by amendments to those terms, with the availability of continuing employment serving as adequate consideration from the employer. When Pacific Bell terminated its original MESP and then offered continuing employment to employees who received notice and signed an acknowledgement to that effect, the employees accepted the new terms, and the subsequent modified contract, by continuing to work. Continuing to work after the policy termination and subsequent modification constituted acceptance of the new employment terms. (*See Pine River State Bank v. Mettille* (Minn. 1983) 333 N.W.2d 622, 626-627 [continued employment is sufficient consideration for employment contract modification].)

2. Illusoriness

[¶28] Plaintiffs alternatively claim that Pacific Bell's MESP would be an illusory contract if Pacific Bell could unilaterally modify it. Plaintiffs rely on the rule that when a party to a contract retains the unfettered right to terminate or modify the agreement, the contract is deemed to be illusory. (See 1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 234, p. 241.)

[¶29] Plaintiffs are only partly correct. Scholars define illusory contracts by what they are not. As Corbin observes, "if a promise is expressly made conditional on something that the parties know cannot occur, no real promise has been made. Similarly, one who states 'I promise to render a future performance, if I want to when the time arrives,' has made no promise at all. It has been thought, also, that promissory words are illusory if they are conditional on some fact or event that is wholly under the promisor's control and bringing it about is left wholly to the promisor's own will and discretion. This is not true, however, if the words used do not leave an unlimited option to the one using them. It is true only if the words used do not in fact purport to limit future action in any way." (2 Corbin on Contracts, *supra*, § 5.32, pp. 175-176, fns. omitted.) Thus, an unqualified right to modify or terminate the contract is not enforceable. But the fact that one party reserves the implied power to terminate or modify a unilateral contract is not fatal to its enforcement, if the exercise of the power is subject to limitations, such as fairness and reasonable notice. (*See id*. at p. 177; 1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 233, p. 241.)

[¶30] As Pacific Bell observes, the MESP was not illusory because plaintiffs obtained the benefits of the policy while it was operable. In other words, Pacific Bell was obligated to follow it as long as the MESP remained in effect. Although a permanent nolayoff policy would be highly prized in the modern workforce, it does not follow that anything less is without significant value to the employee or is an illusory promise. (*See Bankey*, *supra*, 443 N.W.2d at pp. 119-120.) As long as the MESP remained in force, Pacific Bell could not treat the contract as illusory by refusing to adhere to its terms; the promise was not optional with the employer and was fully enforceable until terminated or modified. (2 Corbin on Contracts, *supra*, § 5.32, p. 177.)

3. Vested Benefits

[¶31] Plaintiffs next allege that the MESP conferred a vested benefit on employees, like an accrued bonus or a pension. But as Pacific Bell observes, no court has treated an employment security policy as a vested interest for private sector employees. (*See Bankey*, *supra*, 443 N.W.2d at p. 121, fn. 17 [vested rights concept cannot be stretched to include obligations created by employer's written policy statements applicable to general workforce].) In addition, plaintiffs do not allege that Pacific Bell terminated its MESP in bad faith. Although we agree with plaintiffs that an employer may not generally interfere with an employee's vested benefits, we do not find that the MESP gave rise to, or created any, vested benefits in plaintiffs' favor.

4. Condition as Definite Duration Clause

[¶32] Plaintiffs alternatively contend that a contract specifying termination on the occurrence (or nonoccurrence) of a future happening, in lieu of a specific date, is one of definite duration that cannot be terminated or modified until the event occurs. (*See Wittmann v. Whittingham* (1927) 85 Cal.App. 140, 145, 259 P. 63 [contract to deliver shares of stock when stock dividends or profits had paid note is contract of definite duration]; *La Jolla Casa deManana v. Hopkins* (1950) 98 Cal.App.2d 339, 348, 219 P.2d 871 [contracts specified to last until " 'termination of the present war' " and until plaintiff " 'can reasonably build a home for herself' " are contracts for definite duration].) Because Pacific Bell declared that it would maintain its MESP "so long as" its business conditions did not substantially change, plaintiffs, like the dissent, assert that the specified condition is automatically one for a definite duration that Pacific Bell is obliged to honor until the condition occurs.

[¶33] Contrary to plaintiffs and the dissent, a "specified condition" may be one for either definite or indefinite duration. Indeed, both plaintiffs and the dissent fail to recognize that courts have interpreted a contract that conditions termination on the happening of a future event as one for a definite duration or time period only when "there is an ascertainable event which necessarily implies termination." (*Lura v. Multaplex, Inc*. (1982) 129 Cal.App.3d 410, 414-415, 179 Cal.Rptr. 847;

see also Bradner v. Vasquez (1951) 102 Cal.App.2d 338, 344, 227 P.2d 559.) As Pacific Bell observes, even though its MESP contained language specifying that the company would continue the policy "so long as" it did not undergo changes materially affecting its business plan achievement, the condition did not state an ascertainable event that could be measured in any reasonable manner. As Pacific Bell explains, when it created its MESP, the document referred to changes that would have a significant negative effect on the company's rate of return, earnings and, "ultimately the viability of [its] business." The company noted that if the change were to occur, it would result from forces beyond Pacific Bell's control, and would include "major changes in the economy or the public policy arena." These changes would have nothing to do with a fixed or ascertainable event that would govern plaintiffs' or Pacific Bell's obligations to each other under the policy. Therefore, the condition in the MESP did not restrict Pacific Bell's ability to terminate or modify it, as long as the company made the change after a reasonable time, on reasonable notice, and in a manner that did not interfere with employees' vested benefits. (*See*, e.g., *Consolidated Theatres, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal.2d 713, 731, 73 Cal.Rptr. 213, 447 P.2d 325 [contract for indefinite duration terminable after a reasonable time on reasonable notice].)

[¶34] The facts show that those conditions were met here. Pacific Bell implemented the MESP in 1986, and it remained in effect until 1992, when the company determined that maintaining the policy was incompatible with its need for flexibility in the marketplace. The company then implemented a new Management Force Adjustment Program in which employees whose positions were eliminated would be given 60 days to either find another job within the company, leave the company with severance benefits after signing a release of any claims, or leave the company without severance benefits. The employees were provided with a booklet entitled Voluntary Force Management Programs detailing the new benefits the company provided following the MESP cancellation.

[¶35] Thus, the MESP was in place for a reasonable time and was effectively terminated after Pacific Bell determined that it was no longer a sound policy for the company. Contrary to the dissent, Pacific Bell did not engage in behavior that one could characterize as "manipulative or oppressive." (Dis. opn., post, 96 Cal.Rptr.2d at p. 191, 999 P.2d at p. 82.) Employees were provided ample advance notice of the termination, and the present plaintiffs even enjoyed at least two more years of employment and corresponding benefits under a modified policy before they were eventually laid off. In sum, Pacific Bell maintained the MESP for a reasonable time, it provided more than reasonable notice to the affected employees that it was terminating the policy, and it did not interfere with employees' vested benefits. The law requires nothing more.

III. CONCLUSION

[¶36] As discussed, our employment cases support application of contract principles in the decision whether an employer may unilaterally terminate an employment security policy that has become an implied- in-fact unilateral contract. (*See*, e.g., *Foley*, *supra*, 47 Cal.3d at pp. 678- 679, 254 Cal.Rptr. 211, 765 P.2d 373.) Under contract theory, an employer may terminate a unilateral contract of indefinite duration, as long as its action occurs after a reasonable time, and is subject to prescribed or implied limitations, including reasonable notice and preservation of vested benefits. (1 Witkin, Summary of Cal. Law, *supra*, Contracts, §§ 233-234, pp. 240-241.) The facts clearly show that employees enjoyed the benefits of the MESP for a reasonable time period, and that Pacific Bell gave its employees reasonable and ample notice of its intent to terminate the MESP. The company also did not at any time interfere with employees' vested benefits in effecting the MESP termination. In addition, the employees accepted the company's modified policy by continuing to work in light of the modification. Therefore, in response to the Ninth Circuit's certification request, we conclude that we should answer as follows: An employer may terminate a written employment security policy that contains a specified condition, if the condition is one of indefinite duration and the employer makes the change after a reasonable time, on reasonable notice, and without interfering with the employees' vested benefits.

BAXTER, J., BROWN, J., and HALLER, J., concur.

Questions:

1. This opinion is full of doctrinal and analytical errors, almost as if the court needs to retake first-semester Contracts. How many errors can you find?

2. Did the court hold that there was a "change that will materially affect Pacific Bell's business plan achievement" or that Pacific Bell had the right to modify the MESP?

3. What would you do as an employee when Pacific Bell announced the MESP and you wanted to continue working at Pacific Bell but reject the MESP? How can you be sure when the employee is going back to work that she means to accept the MESP? Is this circumstance different from *Simmons v. United States*? *DiCicco v. Schweizer*?

4. What would you do as an employee when Pacific Bell announced the discontinuance of the MESP if you wanted to continue to work at Pacific Bell but wanted to reject the discontinuance and continue instead to accept the MESP? How can you be sure when the employee is going back to work that she means to accept the discontinuance of the MESP?

5. Is consideration required for the discontinuance?

6. How many positions have courts taken with respect to the enforceability of a modification of an employee policy that arguably takes away rights from employees?

7. *Asmus* is an analytical disaster. Much better reasoned is the opinion from Michigan dealing with the same issue, *In re Certified Question (Bankey v. Storer Broadcasting Co.)*, 443 N.W.2d 112 (Mich. 1989), which follows. How is it different from *Asmus*?

> [¶1] Without rejecting the applicability of unilateral contract theory in other situations, we find it inadequate as a basis for our answer to the question as worded and certified by the United States Court of Appeals. We look, instead, to the analysis employed in *Toussaint* which focused upon the benefit that accrues to an employer when it establishes desirable personnel policies. Under *Toussaint*, written personnel policies are not enforceable because they have been "offered and accepted" as a unilateral contract; rather, their enforceability arises from the benefit the employer derives by establishing such policies.
>
>> While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices *or that the employer may change them unilaterally*. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official *at any given time*, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with an obligation." *Toussaint*, *supra*, 408 Mich. P. 613 * * * (emphasis added).
>
> [¶2] Under the *Toussaint* analysis, an employer who chooses to establish desirable personnel policies, such as a discharge-for-cause employment policy, is not seeking to induce each individual employee to show up for work day after day, but rather is seeking to promote an environment conducive to collective productivity. The benefit to the employer of promoting such an environment, rather than the traditional contract-forming mechanisms of mutual assent or individual detrimental reliance, gives rise

to a situation "instinct with an obligation." When, as in the question before us, the employer changes its discharge-for-cause policy to one of employment at will, the employer's benefit is correspondingly extinguished, as is the rationale for Court's enforcement of the discharge-for-cause policy.

[¶3] Even though a discharge-for-cause policy may be modified or revoked, while such a policy remains in effect "the employer may not treat its promise as illusory" by refusing to adhere to the policy's terms. *Toussaint*, p. 619. It has been suggested that if such a policy is revocable, it is of no value and thus is the equivalent of an illusory promise. Of course, a permanent job commitment would be highly prized in the modern work force. However, it does not follow that anything less than a permanent job commitment is without meaning or value. Indeed, the prevalence of job security provisions in collective bargaining agreements that typically expire after only a few years attests to the fact that such commitments need not be permanent to have value.

[¶4] Furthermore, it is important to recognize that even though an employment policy is revocable, the *Toussaint* approach to employer obligation promotes stability in employment relations in two significant ways: by holding employers accountable for personnel policies that "are established and official at any given time," and by requiring that such policies be "applied consistently and uniformly to each employee." *Toussaint* holds that an employee may "legitimately expect" that his employer will uniformly apply personnel policies "in force at any given time." *Id.*

[¶5] It is one thing to expect that a discharge-for-cause policy will be uniformly applied while it is in effect; it is quite a different proposition to expect that such a personnel policy, having no fixed duration, will be immutable unless the right to revoke the policy was expressly reserved. The very definition of "policy" negates a legitimate expectation of permanence. "Policy" is defined as "a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in the light of given conditions to guide and usu[ally] determine present and future decisions; . . . a projected program consisting of desired objectives and the means to achieve them . . . ." Webster's Third New International Dictionary Unabridged Edition (1964). In other words, a "policy" is commonly understood to be a flexible framework for operational guidance, not a perpetually binding contractual obligation. In the modern economic climate, the operating policies of a business enterprise must be adaptable and responsive to change.

[¶6] Were we to answer the certified question by holding that once an employer adopted a policy of discharge-for-cause, such a policy could never be changed short of successful renegotiation with each employee who worked while the policy was in effect, the uniformity stressed in

> *Toussaint*, *supra* pp. 613, 619, 624, would be sacrificed. If an employer had amended its handbook from time to time, as often is the case, the employer could find itself obligated in a variety of different ways to any number of different employees, depending on the modifications which had been adopted and the extent of the work force turnover. Furthermore, were we to answer the certified question as plaintiff Bankey requests, many employers would be tied to anachronistic policies in perpetuity merely because they did not have the foresight to anticipate Court's *Toussaint* decision by expressly reserving at the outset the right to make policy changes.

E. Silence

Gary F. KASKISTO v. NORTH AM. EQUITABLE LIFE ASSURANCE CO.
(1981)
District Court of Appeal of Florida, Third District
405 So.2d 248

BASKIN, Judge.

[¶1] Because we find no evidence of appellant's acceptance of the changed contract terms submitted by appellee, we reverse the final judgment entered by the trial court. The court's announcement that its decision resulted from appellant's failure to object to the altered mortgage interest rate conflicts with the principle of law that silence does not constitute an acceptance of an offer unless a duty to speak has arisen from a past relationship of the parties, their previous dealings, or other circumstances. 17 C.J.S., Contracts, s 41(e) (1963). Appellant neither initialed the changes in the contract nor performed any act which might operate as an estoppel. *See Mayer v. First National Co. of Sarasota*, 99 Fla. 173, 125 So.2d 909 (Fla. 1930). The requirement that acceptance of an offer to sell realty must be absolute and unconditional, *Koplin v. Bennett*, 155 So.2d 568 (Fla. 1st DCA 1963), was not met.

[¶2] Reversed and remanded for further proceedings consistent with this opinion.

Question: Under unjust enrichment doctrine, a person who embarks on a contract performance before the other party has assented or given the performing party some reasonable expectation of compensation is called a what?

Note: *Kaskisto* states the general rule clearly. The question for the succeeding cases in this section is "when does a duty to speak arise?"

James R. LEE v. SHELLER GLOBE CORP.
v. STAUFFER CHEMICAL COMPANY and Brent Chemical Corporation (1986)
United States District Court, S.D. Mississippi,
Hattiesburg Division
661 F. Supp. 6

MEMORANDUM OPINION
GEX, District Judge.

[¶1] This matter is before the Court on the cross motions for summary judgment filed by Third Party Plaintiff Sheller Globe Corporation ("Sheller") and Third Party Defendant Stauffer Chemical Company ("Stauffer"). * * * *

[¶2] Plaintiff James Lee, while employed as a sales representative for Stauffer, was injured July 7, 1979, on the premises of Sheller's automotive plant then located in Kosciusko, Mississippi. Plaintiff was present in the plant in connection with the sale of certain chemicals from Stauffer to Sheller as evidenced by Sheller's purchase order numbered K 06099 issued June 20, 1979. Lee filed this action against Sheller to recover damages for personal injuries allegedly sustained in the accident upon which his complaint is based. Sheller filed a third party complaint seeking contractual indemnity from Stauffer based upon the pertinent terms of the purchase order. The reverse side of the purchase order contained the following provision:

> INDEMNIFICATION In the event that Seller is required to enter the premises owned, leased, occupied by, or under the control of Buyer during the performance of services hereunder or during delivery of articles herein contemplated, Seller agrees to indemnify and save harmless Buyer, officers, employees and agents from all costs, loss, expense, damages, claims, suits or liability resulting from injury, including death, to person or property damage arising from or in any manner growing out of the act or omission of Seller, its subcontractors, agents, or their respective employees, and Seller agrees to indemnify Buyer with respect to any claim or demand for damage for personal injury or death of, or property damage sustained by, Seller, its subcontractors, agents or their respective employees, which arise from any cause, including negligence of Buyer, its agents, subcontractors or, their respective employees.

Sheller's urging of its motion is premised upon a finding that the subject chemical sale constituted a contract for the sale of goods pursuant to the provisions of the Mississippi Uniform Commercial Code. * * * *

[¶3] The Court has considered the briefs and authorities submitted by the parties and is of the opinion that Sheller's premise is well founded. A contract was established by virtue of Sheller's purchase order (the offer) and Stauffer's shipment of the ordered goods (the acceptance). Miss.Code Ann. Sections 75-2-204, 75-2-206 (1972). Accordingly, the terms of the purchase order created the parties' respective obligations.

Questions:

1. Is this decision consistent with UCC § 2-204?

2. How would you define the circumstances under which this duty arose?

JOSEPHINE AND ANTHONY CORP. et al. v. Norman P. HORWITZ (1977)
Supreme Court, Appellate Division, Second Department
396 N.Y.S.2d 53

MEMORANDUM BY THE COURT

[¶1] In an action inter alia to declare (1) that a certain stipulation is of no force and effect and (2) the amount due plaintiffs from defendant, plaintiffs appeal from a judgment of the Supreme Court, Kings County, dated March 16, 1976, which after a trial, is in favor of plaintiff Josephine Presti and against defendant, upon the court's declaration that the stipulation was in full force and effect and fixation of the amount due from defendant.

[¶2] Judgment affirmed, with costs.

[¶3] During the period from October, 1964 to March, 1965 the defendant borrowed from the plaintiff corporation. Part payment was made, resulting, as of May 18, 1971, in a balance due of $8,950. On that date the defendant offered plaintiffs a "stipulation", with terms, although no action was pending. The plaintiffs did not sign the stipulation as tendered, but instead modified it. By his attorney's letter, the defendant rejected the agreement as modified and renewed the original offer. A check for $75, the first payment, was enclosed with that letter. The plaintiffs never replied, but did cash that check and the subsequent 18 checks tendered pursuant to the renewed offer.

[¶4] Defendant ceased paying on May 3, 1973. Plaintiffs commenced this action, contending that no agreement had ever been entered into and seeking the remaining principal due, with interest from October, 1964. It is our opinion that the parties entered into a binding agreement, and, therefore, that interest should be computed from the date of default on that agreement.

[¶5] Plaintiffs' return of the modified agreement constituted a counteroffer. The defendant's attorney's letter rejected the counteroffer. However, that same letter also contained a renewal of the original offer. While silence, of itself, is not an acceptance absent a duty to speak, "(a) duty to speak is imperative as a matter of law where conduct, accompanied by silence, would be deceptive and beguiling" (*Brennan v. National Equit. Inv. Co.*, 247 N.Y. 486, 490, 160 N.E. 924, 925). When the plaintiffs cashed the checks, an acceptance of the renewed offer was indicated by their conduct.

Questions: How would you define this circumstance in which a duty to speak arose? Is this case different from *Lee v. Sheller Globe Corp*.?

DEN NORSKE STATS OLJESELSKAP, A.S. v. HYDROCARBON PROCESSING, INC. (1998)
United States District Court, S.D. Texas, Houston Division
992 F. Supp. 913

Opinion on Summary Judgment
HUGHES, District Judge.

1. Introduction.

[¶1] Two companies entered into contracts for the sale of propane. A broker arranged the contracts and confirmed them by telephone calls and facsimile transmissions to both companies. When the price of propane dropped, one of the companies repudiated the contracts. The other sued seeking damages. Because contracts were formed, confirmed, and breached, the damaged company will recover its loss.

2. Facts.

[¶2] On September 24, 1996, Hydrocarbon Processing, Inc. (Hydro) agreed to sell Den norske stats oljeselskap, a.s. (Statoil), 10,000 barrels of propane at $0.4200 per gallon for delivery in February 1997. Gasteam USA, Inc., brokered the agreement, called both parties to confirm that the sale had closed, and confirmed the agreement by sending facsimiles to both parties.

[¶3] On December 20, 1996, Statoil and Hydro agreed to trade February propane deliveries. Statoil agreed to sell Hydro 25,000 barrels of propane at $0.5725 per gallon; Hydro agreed to sell Statoil 25,000 barrels at a price to be calculated based on the average current month quotation in an independent report. Again, Gasteam brokered the transaction, called both parties to confirm that the sale had closed, and sent confirming faxes to them.

[¶4] The faxes specified the seller, buyer, product, quality, quantity, delivery, price, payment, title, risk, distribution, confidentiality, and commission. They began by saying, "Further to recent conversations, we are pleased to confirm the following transaction ...." They did not require a response from the parties. Hydro never requested additional documents nor objected to the faxes. In none of seventy-two transactions brokered by Gasteam for Hydro and not involving Statoil in 1995-1996 did Hydro tell Gasteam that it required additional documents to close a deal.

[¶5] In mid-February—sixty days after the second deal and, coincidentally, at the time for performance of both deals—Hydro sent letters to Statoil repudiating both contracts, contending that the faxes were mere offers. Propane had by then dropped to $0.38793 per gallon. Statoil covered the first contract. It made a profit of $6,300.00 on the first deal but lost $193,798.50 on the second. Statoil seeks its net loss of $187,498.50, Gasteam's brokerage fee of $1,050.00, attorneys' fees of $14,473.33, and pre- and post-judgment interest.

3. Contract Formation

[¶6] Texas law allows a contract to "be made in any manner sufficient to show agreement." Tex. Bus. & Com. Code § 2.204(a) (1994). The confirming memoranda from the middle party reliably evinces agreement.

[¶7] The only reasonable interpretation of the facts is that contracts were formed. Gasteam conveyed Statoil's offers to Hydro and Hydro's acceptance to Statoil. It then confirmed the transactions by telephone and fax. That is simple contract formation—offer and acceptance—occurring through a broker and documented in faxes.

[¶8] In a similar situation, a contract between two grain dealers was formed through a broker who sent confirmation by wire and mail to the parties. The purchasing grain dealer made no complaints on receipt of the confirmation. *Producers Grain Corp. v. Rust*, 291 S.W.2d 477, 480 (Tex.Civ.App.—Amarillo 1956, no writ). *See also Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816, 817 n.4 (5th Cir. 1990) (noting, without comment, that parties had "contracted" for sale of jet fuel by buyer's contacting broker who transmitted confirmation telexes to seller). Under Texas law, therefore, Hydro and Statoil formed contracts. Hydro's argument that there is a genuine issue of material fact on propane industry standards for contract formation does not matter: a contract was formed under Texas law.

[¶9] At a minimum, Hydro acquiesced to the contracts. Even if, as Hydro contends, the faxes were mere offers, Hydro's silence in the face of "confirming telefaxes" is acceptance.

> It is true that, generally speaking, an offeree has a right to make no reply to offers, and hence that his silence is not to be construed as an acceptance. But, where the relation between the parties is such that the offeror is justified in expecting a reply, or the offeree is under a duty to reply, the latter's silence will be regarded as acceptance. Under such circumstances, "one who keeps silent, knowing that his silence will be misinterpreted, should

> not be allowed to deny the natural interpretation of his conduct," etc. Williston on Contracts, §§ 91, 91a.

Laredo Nat'l Bank v. Gordon, 61 F.2d 906, 907 (5th Cir. 1932). Hydro had to object openly and promptly if it did not intend to perform. Because it remained silent, Hydro at least acquiesced to the contract.

4. Affirmative Defenses.

[¶10] Hydro has asserted the affirmative defenses of failure of consideration, estoppel, fraud, and contributory negligence. Two of these defenses are legally impossible: one cannot negligently commit fraud. None of the defenses is convincing: no fact shows lack of consideration, estoppel, fraud, or contributory negligence.

[¶11] In its response to Statoil's motion for summary judgment, Hydro raises the statute of frauds as an affirmative defense, which it had not asserted in its original answer and which it did not seek leave to add until seven months after filing its original answer. The claim is, therefore, procedurally deficient. It is also substantively defective. Gasteam's confirming faxes satisfy the statute:

> [A] contract for the sale of goods for the price of $500 or more is not enforceable ... unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

Tex. Bus. & Com. Code § 2.201(a) (1994). Gasteam was the broker for both parties and acted with the authority of both parties. Statoil asked Gasteam to arrange the transactions. Gasteam arranged them with Hydro. Hydro conveyed its acceptance to Gasteam. Gasteam prepared, signed, and delivered the faxes to both parties. Each fax constitutes "a writing ... signed by ... [an] authorized agent or broker." Although Gasteam's president stated in his affidavit that Gasteam acted independently rather than as the agent for either of the parties, Gasteam was, nevertheless, authorized by both parties to broker the transactions. At the very least, Gasteam had the authority to convey information between the parties. Gasteam sent signed, confirming faxes to the parties. The statute of frauds requires nothing more.

[¶12] Even if the statute of frauds was not already satisfied, the faxes would fall within its "merchant's exception":

> Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of [this law] against such party unless written notice of objection to its contents is given within ten days after it is received.

Tex. Bus. & Com. Code § 2.201(b) (1994). Hydro and Statoil are merchants. The faxes are good against Statoil since Gasteam functioned as Statoil's broker. Tex. Bus. & Com. Code § 2.201(a) (1994). They were plainly letters of confirmation ("[W]e are pleased to confirm the following transaction ...."); because they did not require further action by either party to form the contracts, they were not mere offers. *See Adams v. Petrade Int'l, Inc.*, 754 S.W.2d 696, 706 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (holding that a writing was a mere offer rather than a confirmation of an oral contract because recipient was required to sign and return copy of letter). Hydro received the faxes and knew their contents. It did not object. The faxes satisfy the statute of frauds under its requirements for merchants. * * * *

6. Conclusion

[¶13] The parties formed a contract; Hydro breached it. Statoil will recover its loss.

Question: Is this case different from the last two: *Lee v. Sheller Globe Corp*. and *Josephine* and *Anthony Corp. v. Horwitz*?

LOUISVILLE TIN & STOVE CO. v. LAY (1933)
Court of Appeals of Kentucky
65 S.W.2d 1002

[¶1] Appeal from Circuit Court, Knox County.

[¶2] Action by the Louisville Tin & Stove Company against Mrs. May Lay. Judgment in favor of the defendant, and the plaintiff filed a motion for an appeal.

[¶3] Motion sustained, appeal granted, and judgment reversed in accordance with opinion.

RICHARDSON, Justice.

[¶4] The Louisville Tin & Stove Company, a corporation, with its chief office at Louisville, Ky., without the knowledge or consent of Mrs. May Lay, who was engaged in business at Corbin, Ky., under the firm name and style of Lay's Variety Store, shipped to her, in her firm name, a lot of heaters, gas ranges, and circulators of the value of $701.06, via the Louisville & Nashville Railroad Company. At that time D. W. Lay, the husband of May Lay, was engaged at Corbin, Ky., in an independent business under the firm name of Lay's Electric Shop. He was insolvent and without credit. Mrs. Lay was solvent with good credit which induced jobbers and wholesalers to ship goods to her when ordered in her firm name. The merchandise was shipped in good faith and billed to Lay's Variety Store, Corbin, Ky., by the Louisville Tin & Stove Company, and received by the railroad company at Corbin, Ky., on September 16, 1930. B. Wax was a drayman at Corbin, and during the month of September nine shipments of merchandise arrived at Corbin consigned to Lay's Variety Store and each of them was delivered by the railroad company to Wax, the drayman for Mrs. Lay. Wax claims that he was authorized by her to receive shipments of merchandise consigned to Lay's Variety Store, whenever they arrived at the freight depot at Corbin, and that on the morning of September 18th he noticed in the freight station a number of gas stoves, ranges, etc., consigned to Lay's Variety Store. Knowing that Mrs. Lay was not selling that kind of merchandise, he did not take the same out of the depot until he talked with her. On the forenoon of September 18th he imparted to her the information of the number of ranges, stoves, etc., at the depot, billed to her, and asked her what she wanted done with them. She became angry and announced, "that was some of Mr. Lay's doings, and that she knew nothing about the shipments at all and had nothing to do with them, but that she would find out about them." He claims he went back that afternoon to her place of business, again asked her about the shipment, when she told him to deliver the ranges, stoves, etc., to Lay's Electric Shop, and that he did so. D. W. Lay "gave him a check for the freight and drayage." Mrs. Lay's version of the transaction is that she knew nothing about the shipment; that she did not order the merchandise or authorize the ordering of same, directly or indirectly; that when Wax told her about the shipment being at the freight depot she became very angry and objected to it and refused to accept same; that Wax first told her about the shipment one morning; that she talked to her husband, D. W. Lay, owner of the Lay's Electric Shop, and that later, some time that afternoon, the drayman, Wax, mentioned the matter to her again, and that she told him to see Mr. Lay and Mr. Bohmer about the matter; that "if she told Wax to deliver the merchandise to Lay's Electric Shop, she did not remember it; that she and W. D. Lay were man and wife, having two children and reside in the same house."

[¶5] Of the entire shipment of merchandise, $349.39 worth were returned to the Louisville Tin & Stove Company, the balance retained by Lay's Electric Shop of the value of $359.67. This action was brought to recover this balance. The case was tried before a jury, resulting in a verdict in favor of Mrs. Lay.

[¶6] The testimony not only of Wax, the drayman, but that of Mrs. Lay, shows that although the merchandise was billed and shipped to Lay's Variety Store without the knowledge or consent of Mrs. Lay, she, after its arrival, assumed control of its disposition, knowing full well that it had been so billed and shipped by the Louisville Tin & Stove Company. It was entirely optional with her to reject it unqualifiedly, or to accept it or direct it to be delivered to her husband. Without considering the testimony of the drayman, bearing on this topic, her own testimony shows that she directed the drayman to see her husband, thus conferring upon him the authority and right to determine the disposition of the shipment. After so doing, on his failure to pay the balance due thereon, she cannot escape her liability therefor to the consignor, the Louisville Tin & Stove Company. It was at her direction and by her authority that the merchandise reached the possession of her husband at his place of business.

[¶7] It is a reasonable and a sound principle that where merchandise is consigned to one in his name, in the absence of an express contract or order or when one person sends or delivers goods to another, under circumstances which indicate that a sale is intended and the one to whom the goods are sent or delivered with knowledge of the facts does not object or offer to return them within a reasonable time, but retains and uses them as his own or directs another to do so, a contract of sale and purchase will be implied. *Caldwell & Drake v. Cunningham*, 162 Ky. 272, 172 S. W. 498, 500; *Caskey v. Williams Bros*., 227 Ky. 73, 11 S.W.2d 991.

[¶8] In *Caldwell & Drake v. Cunningham*, we quoted with approval from *Estey Organ Co. v. Lehman*, 132 Wis. 144, 111 N. W. 1097, 11 L. R. A. (N. S.) 254, 122 Am. St. Rep. 951, the prevailing rule in such cases: "The defendants having received and retained the property with knowledge of the price plaintiff expected to receive, and without any agreement, express or implied, for a different price, they cannot escape payment of the price stated in the invoice. * * * The minds of the parties not having met upon the price prior to the time the property was received by defendants at Houghton, Mich., it was their duty, when they received it with knowledge of the price, to refuse to accept it, unless they were willing to pay the price stated in the invoice. Having taken the property and converted it to their own use, they became liable to pay such price, which the evidence establishes was the regular selling price and a reasonable price." * * * *

[¶9] Mrs. Lay, however, failed to exercise her right to repudiate the shipment, but exercised the authority of authorizing the drayman to see her husband for directions over it. Her acts constitute an acceptance of the shipment and bring the case squarely within the principle we have reiterated.

[¶10] The trial court erred in refusing to direct a verdict for the Louisville Tin & Stove Company. The motion for an appeal is sustained, the appeal granted, and judgment reversed for proceedings consistent herewith.

Questions:

1. How would you define the circumstances creating the duty to speak in this case?

2. Was Mrs. Lay unjustly enriched?

AUSTIN v. BURGE (1911)
Kansas City Court of Appeals, Missouri
137 S.W. 618

ELLISON, J.

[¶1] This action was brought on an account for the subscription price of a newspaper. The judgment in the trial court was for the defendant. It appears that plaintiff was publisher of a newspaper in Butler, Mo., and that defendant's father-in-law subscribed for the paper, to be sent to defendant for two years, and that the father-in-law paid for it for that time. It was then continued to be sent to defendant, through the mail, for several years more. On two occasions defendant paid a bill presented for the subscription price, but each time directed it to be stopped. Plaintiff denies the order to stop, but for the purpose of the case we shall assume that defendant is correct. He testified that, notwithstanding the order to stop it, it was continued to be sent to him, and he continued to receive and read it, until finally he removed to another state.

[¶2] We have not been cited to a case in this state involving the liability of a person who, though not having subscribed for a newspaper, continues to accept it by receiving it through the mail. There are, however, certain well-understood principles in the law of contracts that ought to solve the question. It is certain that one cannot be forced into contractual relations with another and that therefore he cannot, against his will, be made the debtor of a newspaper publisher. But it is equally certain that he may cause contractual relations to arise by necessary implication from his conduct. The law in respect to contractual indebtedness for a newspaper is not different from that relating to other things which have not been made the subject of an express agreement. Thus one may not have ordered supplies for his table, or other household necessities, yet if he continue to receive and use them, under circumstances where he had no right to suppose they were a gratuity, he will be held to have agreed, by implication, to pay their value. In this case defendant admits that, notwithstanding he ordered the paper discontinued at the time when he paid a bill for it, yet plaintiff continued to send it, and he continued to take it from the post office to his home. This was an acceptance and use of the property, and, there being no pretense that a gratuity was intended, an obligation arose to pay for it.

[¶3] A case quite applicable to the facts here involved arose in *Fogg v. Atheneum*, 44 N. H. 115, 82 Am. Dec. 191. There the Independent Democrat newspaper was forwarded weekly by mail to the defendant from May 1, 1847, to May 1, 1849, when a bill was presented, which defendant objected to paying on the ground of not having subscribed. Payment was, however, finally made, and directions given to discontinue. The paper changed ownership, and the order to stop it was not known to the new proprietors for a year; but, after being notified of the order, they nevertheless continued to send it to defendant until 1860, a period of 11 years, and defendant continued to receive it through the post office. Payment was several times demanded during this time, but refused on the ground that there was no subscription. The court said that: "During this period of time the defendants were occasionally requested, by the plaintiff's agent, to pay their bill. The answer was, by the defendants, 'We are not subscribers to your newspaper.' But the evidence is the defendants used or kept the plaintiff's * * * newspapers, and never offered to return a number, as they reasonably might have done, if they would have avoided the liability to pay for them. Nor did they ever decline to take the newspapers from the post office." The defendant was held to have accepted the papers, and to have become liable for the subscription price by implication of law.

[¶4] In *Ward v. Powell*, 3 Har. (Del.) 379, it was decided that an implied agreement to pay for a newspaper or periodical arose by the continued taking and accepting the paper from the post office, and that “if a party, without subscribing to a paper, declines taking it out of the post office, he cannot become liable to pay for it; and a subscriber may cease to be such at the end of the year, by refusing to take the papers from the post office, and returning them to the editor as notice of such determination.” In *Goodland v. Le Clair*, 78 Wis. 176, 47 N.W. 268, it was held that if a person receives a paper from the post office for a year, without refusing or returning it, he was liable for the year’s subscription. And a like obligation was held to arise in the case of *Weatherby v. Bonham*, 5 C. & P. 228.

[¶5] The preparation and publication of a newspaper involves much mental and physical labor, as well as an outlay of money. One who accepts the paper, by continuously taking it from the post office, receives a benefit and pleasure arising from such labor and expenditure as fully as if he had appropriated any other product of another’s labor, and by such act he must be held liable for the subscription price. On the defendant’s own evidence, plaintiff should have recovered.

[¶6] The judgment will therefore be reversed, and the cause remanded.
All concur.

Questions:

1. Is this case different from *Louisville Tin & Stone Co. v. Lay*?

2. Is Burge unjustly enriched?

39 U.S.C. § 3009

Questions: Would this section, if applied to the facts of *Austin v. Burge*, reverse it? How about *Louisville Tin & Stove Co. v. Lay*?

Negative Option Plans

Section 425.1 of 16 C.F.R. defines a negative option plan as "a contractual plan or arrangement under which a seller periodically sends to subscribers an announcement which identifies merchandise (other than annual supplements to previously acquired merchandise) it proposes to send to subscribers to such plan, and the subscribers thereafter receive and are billed for the merchandise identified in each such announcement, unless by a date or within a time specified by the seller with respect to each such announcement the subscribers, in conformity with the provisions of such plan, instruct the seller not to send the identified merchandise." Does the negative option plan sound familiar? The regulation does not prohibit negative option plans but requires that sellers clearly disclose plan terms and that certain standards of fairness be met:

> (b) In connection with the sale or distribution of goods and merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, it shall constitute an unfair or deceptive act or practice for a seller in connection with the use of any negative option plan to:
>
> > (1) Refuse to credit, for the full invoiced amount thereof, the return of any selection sent to a subscriber, and to guarantee to the Postal Service or the subscriber postage adequate to return such selection to the seller, when:
> >
> > > (i) The selection is sent to a subscriber whose form indicating that he does not want to receive the selection was received by the seller by the return date or was mailed by the subscriber by the mailing date;
> > >
> > > (ii) Such form is received by the seller after the return date, but has been mailed by the subscriber and postmarked at least 3 days prior to the return date;
> > >
> > > (iii) Prior to the date of shipment of such selection, the seller has received from a contract-complete subscriber, a written notice of cancellation of membership adequately identifying the subscriber; however, this provision is applicable only to the first selection sent to a canceling contract-complete subscriber after the seller has received written notice of cancellation. After the first selection shipment, all selection shipments thereafter are deemed to be unordered merchandise pursuant to Section 3009 of the Postal Reorganization Act of 1970, as adopted by the Federal Trade Commission in its public notice, dated September 11, 1970; or
> > >
> > > (iv) The announcement and form are not received by the subscriber in time to afford him at least ten (10) days in which to mail his form.

Question: A company called BMG used to sell compact discs with music on them using a negative option plan, but it no longer does so. Consider instead another business: Boxy Charm Inc. The website www.boxycharm.com's subscription program works as follows, according to https://www.boxycharm.com/how-it-works (6/27/19):

> 1. Join Now. In each box, you will receive 4 to 5 full-size beauty items. Ranging from makeup and skincare, to beauty tools and color cosmetics, each box has a minimum value of $100.

> 2. Explore Your Beauty. Find new and creative ways to use the products in your BOXYCHARM by watching tutorials and looks shared by our Charmer community on social media.
> 3. Be Charmed. Enjoy exclusive, members-only offers from the best brands in beauty. Win free products through BOXY-Giveaways and receive reward points redeemable in our exclusive Charm Shop!

At the bottom of the page is a button labeled "SUBSCRIBE."

Subscriptions start at $21 per month (an amazing deal for products with a minimum value of $100, don't you think?). Here's how the subscription works, according to the legal terms:

> By subscribing to the monthly Box Service, you are considered a Subscriber of the Service, and you agree to the recurring monthly payment of a Twenty-One Dollars USD ($21.00) monthly subscription fee, whether monthly or in pre-paid intervals offered by the Website. Once you subscribe (or once a User is off the Waitlist), the Company will process your Twenty One Dollars USD ($21.00) monthly subscription fee for the first month, or your pre-payment for a Three (3), Six (6) or Twelve (12) month term, as described below, and every month, or term thereafter, until your subscription is cancelled, without further notice to you or authorization from you. * * * *
>
> Active Subscriber subscriptions will be automatically extended for successive renewal periods of the same duration as the initial subscription term unless the Active Subscriber expressly cancels the subscription at any time by logging in to the Account Page and selecting 'Subscriptions' under 'Account preferences', or by emailing BOXYCHARM at info@boxycharm.com with the subject line “UNSUBSCRIBE” from the email you used to create your User account on the Website. If a Subscriber on the waitlist wishes to cancel their Subscription, that Subscriber must contact BOXYCHARM by emailing info@boxycharm.com, with the email subject line "UNSUBSCRIBE".

If you want to cancel, you can, by going to your Account on the website. The cancellation instructions include the following: "Please Note: You must cancel your account before the 1st of the month to prevent being billed for that month's box."

If you get a box you do not want, can you send it back? Nope: "Once you have been billed for a new subscription activation or a subscription renewed we are not able to offer a refund, return, or exchange."

Is the Boxycharm subscription a negative option plan? When does the sale of the items in the box occur?

Incidentally, the Boxycharm website terms also include this:

> By accessing the Website and agreeing to these Terms and Conditions, you expressly waive the right to request a chargeback from your credit card company, and acknowledge that your sole recourse for any disputes is through the dispute resolution procedures noted herein.

F. The Battle of the Forms

Uniform Commercial Code § 2-207. Add'l Terms in Acceptance or Confirmation, and all cmts.

UCC § 2-207 is one of those disasters of law that happen occasionally when a statute is drafted to handle a complex legal problem for the first time. Commentators Duesenberg & King said it "is one of the most important, subtle, and difficult in the entire Code, and well it may be said that the product as it finally reads is not altogether satisfactory." 3 Richard W. Duesenberg & Lawrence P. King, Sales & Bulk Transfers Under The Uniform Commercial Code § 3.02 (1992). They understate the difficulties considerably. The statute was drafted to address the problem of forms sent between companies ordering and shipping goods. The forms might or might (probably will) not reflect what the buyer and seller consciously agreed. Typically, an ordering company will send a purchase order and the shipping company will respond by shipping the goods and sending an invoice. In virtually all such situations, the terms listed on the purchase order (usually on the back) do not agree with the terms listed on the invoice (again, usually on the back of the invoice).

Here are two problems to walk you through the statute:

PROBLEM 47. Tom Manufacturing Company sends a purchase order for tools to Jerry Tools Company. Tom's purchase order contains terms A-J and a clause stating that "shipment of goods ordered herein shall constitute acceptance of the terms and conditions of this purchase order." Jerry promptly ships the tools in response to Tom's purchase order and with the tools sends an invoice which contains terms -B, -D, -J (meaning the terms provide exactly the opposite of the corresponding terms in Tom's purchase order, i.e., if B requires arbitration, -B requires a court trial and explicitly says no arbitration will take place). Jerry's invoice also contains terms K-Q. Jerry's form has a clause stating that "acceptance of the goods shipped herein constitutes acceptance of the terms of this invoice, which shall supersede the terms of any purchase order received prior to shipment." But both the purchase order and invoice on their front sides describe the same ordered tools. Tom accepts the tools and promptly pays for them. The reverse sides of the forms Tom and Jerry sent look something like this:

Tom			Jerry	
A	F		-B	M
B	G		-D	N
C	H		-J	O
D	I		K	P
E	J		L	Q

Questions:

A. Common Law

1. Under the common law rule set forth in *Foster v. Ohio State University*, did Jerry accept Tom's order?

2. Under the common law rule set forth in *Lee v. Sheller Globe Corp*., did Jerry accept Tom's order?

3. Under common law rules, did Tom accept Jerry's invoice?

B. UCC § 2-207(1)

1. Was Jerry's invoice a definite and seasonable expression of acceptance?

2. Was Jerry's response to the purchase order expressly made conditional on Tom's assent to its terms?

3. Did a contract form when Jerry sent the invoice? (You might consider comments 1 & 2 in regard to this question. The answer to this question is "Yes," but I want you to be able to read the statute and tell me why.)

C. UCC § 2-207(2) (comments 3-6 to section 2-207 are helpful here)

1. Term K negates standard warranties of merchantability and fitness for a particular purpose. Does it become part of the contract?

2. Clause L requires Tom as purchaser to pay 15% interest on overdue invoices, but Jerry's invoice does not restrict Tom's credit or vary from ordinary trade practices in the industry. Is L part of the contract?

3. What does section (2) say about whether -J is part of the contract? (Careful! The drafters of section 2-207 made this a trick question! Section (1) talks about additional and different terms. What does (2) say about different terms?)

4. What does comment 3 say about whether -J becomes part of the contract?

5. What does comment 6 say about whether -J becomes part of the contract?

PROBLEM 48. Bugs Production Co. sends a purchase order for supplies to Elmer Supply Co. Bugs's purchase order orders from Elmer 2000 model XJ4aZ keyboards. Bugs's purchase order also contains terms A-J and a clause stating that "shipment of goods ordered herein shall constitute acceptance of the terms and conditions of this purchase order." Elmer promptly ships the keyboards in response to Bugs's purchase order. Elmer sends an invoice with the keyboards which contains terms -B, -D, -J (purporting to negate corresponding terms in Bugs's purchase order) and also terms K-Q. Elmer's form also describes the products shipped differently, however. It says that Bugs ordered 3000 model XJ7bX keyboards, which are another model entirely and much more expensive. In fact, Elmer shipped with the invoice 2000 model XJ4aZ keyboards, so Elmer's product and invoice do not match. Elmer's form also contains a clause stating that "this invoice as an acceptance of any purchase order is expressly made conditional on the purchaser's assent to any additional or different terms contained herein." Bugs accepted the keyboards, which are defective. Bugs wants Elmer to take them back, but Elmer claims that term -D on its invoice disclaimed all warranties (as opposed to term D in the purchase order, which provided for warranties), so Elmer refuses to take the keyboards back.

A. UCC § 2-207(1)

1. Was Elmer's invoice a definite and seasonable expression of acceptance? The answer to this question is "No," but the answer is not in the statute. Consider the following from *Alliance Wall Corp. v. Ampat Midwest Corp.*, 477 N.E.2d 1206 (Ohio Ct. App. 1984):

> [¶1] At issue, of course, was not the date of delivery, but the date of shipment. The goods were to be shipped F.O.B. seller's plant. This was a shipment contract. R.C. 1302.32(A).* The seller was required only to place the goods in the possession of a carrier, make a reasonable contract for shipment, tender documents of title, and notify the buyer of the shipment. R.C. 1302.48.†

* "Unless otherwise agreed the term F.O.B. (which means 'free on board') at a named place, even though used only in connection with the stated price, is a delivery term under which: "(1) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in section 1302.48 of the Revised Code and bear the expense and risk of putting them into the possession of the carrier * * *." R.C. 1302.32(A)(1).

† "Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must:

[¶2] The parties did not agree in their correspondence to a shipment date, nor is there persuasive evidence that the parties orally agreed upon a definite shipment date. Seller's vice-president at trial admitted that seller was aware of buyer's urgent need for prompt shipment. This fact, in conjunction with buyer's statement in its letter of September 1, 1981, that shipment should "certainly" occur within seven weeks, is persuasive evidence that the parties had agreed that "time was of the essence." It was a crucial term of the contract. Nevertheless, the seller did not expressly agree to the shipment date of seven weeks, but instead proposed a "tentative shipping date" of November 6, 1981.

[¶3] Seller's agent explained that in contracts of this type, it could not guarantee a shipping date because it depended for raw materials upon a Minnesota supplier. It could not fabricate the aluminum panels without those materials.

[¶4] In the case at bar there was testimony that toward the end of September, the seller learned that its supplier would deliver the aluminum two weeks behind schedule. The seller promptly notified the buyer that this would delay shipment from November 6 to November 20, 1981. There was also testimony that after the exchange of letters on October 14 and October 22, 1981, the buyer orally agreed to the new delivery date, and promised not to hold seller liable for damages resulting from this delay. The buyer offered no evidence to rebut this testimony.

[¶5] The parties did not agree, in their confirmatory memoranda, to a shipment date. The shipment date was a "material term"; in fact, it appears to have been more important to the buyer than was the exact price, because of its need to promptly complete the work. The seller appeared to be just as adamant not to be bound to any particular date.

[¶6] The parties' failure to reach an agreement on the matter of the shipment date and price prevented the formation of a binding contract. The buyer had proposed a date of seven weeks from September 1, 1981; to-wit, October 19, 1981. The seller had "tentatively" offered to ship on Novem-

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"(A) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and

"(B) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

"(C) promptly notify the buyer of the shipment.

"Failure to notify the buyer under division (C) of this section or to make a proper contract under division (A) of this section is a ground for rejection only if material delay or loss ensures." R.C. 1302.48.

> ber 6, 1981. In short, the seller did not agree to be bound by any particular date of shipment.
>
> [¶7] In the usual case, the seller's written confirmation "operates as an acceptance even though it states terms additional or different from those offered * * *." R.C. 1302.10(A). .... This rule, however, does not apply where the parties disagree as to "dickered for" terms. In such a case, contract formation does not occur until both sides have at least partially performed ....

2. Was Elmer's response to the purchase order expressly made conditional on Bugs's assent to its terms?

B. UCC § 2-207(3)

1. Did a contract form under (3)?

2. Are the keyboards subject to warranties? (See UCC §§ 2-314 & 2-315, *infra* in Chapter 10.)

3. In *Alliance Wall Corp*., what should the shipment date be if the parties performed but failed to agree? (See UCC §§ 2-309.)

Do you see the relationship between § 2-207(1) and (3)? Consider the following from *Gardner Zemke Co. v. Dunham Bush, Inc.*, 850 P.2d 319 (N.M. 1993):

> The one proposition on which most courts and commentators agree at this point in the construction of the statute is that Section 2-207(3) applies only if a contract is not found under Section 2-207(1). Dorton, 453 F.2d at 1166; Duesenberg & King, § 3.03[1] at 3-40; 2 Hawkland, § 2-207:04 at 178-79; White & Summers, § 1-3 at 35. However, there are courts that disagree even with this proposition. *See Westinghouse Elec. Corp. v. Nielsons, Inc.*, 647 F. Supp. 896 (D.Colo. 1986) (dealing with different terms, finding a contract under 2-207(1) and proceeding to apply 2-207(2) and 2-207(3)).

If you have worked through these problems to find the answers, you are ready to read the cases which follow in the last part of this chapter.

The GARDNER ZEMKE COMPANY v. DUNHAM BUSH, INC. (1993)
Supreme Court of New Mexico
850 P.2d 319

OPINION
FRANCHINI, Justice.

[¶1] This case involves a contract for the sale of goods and accordingly the governing law is the Uniform Commercial Code—Sales, as adopted in New Mexico. NMSA 1978, §§ 55-2-101 to -2-725 (Orig.Pamp. & Cum.Supp.1992) (Article 2). In the course of our discussion, we will also refer to pertinent general definitions and principles of construction found in NMSA 1978, Sections 55-1-101 to -1-209 (Orig.Pamp. & Cum.Supp.1992). Section 55-2-103(4). The case presents us with our first opportunity to consider a classic "battle of the forms" scenario arising under Section 55- 2-207. Appellant Gardner Zemke challenges the trial court's judgment that a Customer's Acknowledgment (Acknowledgment) sent by appellee manufacturer Dunham Bush, in response to a Gardner Zemke Purchase Order (Order), operated as a counteroffer, thereby providing controlling warranty terms under the contract formed by the parties. We find merit in appellants' argument and remand for the trial court's reconsideration.

I.

[¶2] Acting as the general contractor on a Department of Energy (DOE) project, Gardner Zemke issued its Order to Dunham Bush for air-conditioning equipment, known as chillers, to be used in connection with the project. The Order contained a one-year manufacturer's warranty provision and the requirement that the chillers comply with specifications attached to the Order. Dunham Bush responded with its preprinted Acknowledgment containing extensive warranty disclaimers, a statement that the terms of the Acknowledgment controlled the parties' agreement, and a provision deeming silence to be acquiescence to the terms of the Acknowledgment.

[¶3] The parties did not address the discrepancies in the forms exchanged and proceeded with the transaction. Dunham Bush delivered the chillers, and Gardner Zemke paid for them. Gardner Zemke alleges that the chillers provided did not comply with their specifications and that they incurred additional costs to install the nonconforming goods. Approximately five or six months after start up of the chillers, a DOE representative notified Gardner Zemke of problems with two of the chillers. In a series of letters, Gardner Zemke requested on-site warranty repairs. Through its manufacturer's representative, Dunham Bush offered to send its mechanic to the job site to inspect the chillers and absorb the cost of the service call only if problems discovered were within any component parts it provided. Further, Dunham Bush required that prior to the service call a purchase order be issued from the DOE, to be executed by Dunham Bush for payment for their services in the event their mechanic discovered problems not caused by manufacturing defects. Gardner Zemke rejected the proposal on the basis that the DOE had a warranty still in effect for the goods and would not issue a separate purchase order for warranty repairs.

[¶4] Ultimately, the DOE hired an independent contractor to repair the two chillers. The DOE paid $24,245.00 for the repairs and withheld $20,000.00 from its contract with Gardner Zemke.* This breach of contract action then ensued, with Gardner Zemke alleging failure by Dunham Bush to provide equipment in accordance with the project plans and specifications and failure to provide warranty service.

II.

[¶5] On cross-motions for summary judgment, the trial court granted partial summary judgment in favor of Dunham Bush, ruling that its Acknowledgment was a counteroffer to the Gardner Zemke Order and that the Acknowledgment's warranty limitations and disclaimers were controlling. Gardner Zemke filed an application for interlocutory appeal from the partial summary judgment in this Court, which was denied. A bench trial was held in December 1991, and the trial court again ruled the Acknowledgment was a counteroffer which Gardner Zemke accepted by silence and that under the warranty provisions of the Acknowledgment, Gardner Zemke was not entitled to damages.

[¶6] On appeal, Gardner Zemke raises two issues: (1) the trial court erred as a matter of law in ruling that the Acknowledgment was a counteroffer; and (2) Gardner Zemke proved breach of contract and contract warranty, breach of code warranties, and damages.

III.

[¶7] Karl N. Llewellyn, the principal draftsman of Article 2, described it as "[t]he heart of the Code." Karl N. Llewellyn, Why We Need the Uniform Commercial Code, 10 U.Fla.L.Rev. 367, 378 (1957). Section 2-207 is characterized by commentators as a "crucial section of Article 2" and an "iconoclastic Code section." Bender's Uniform Commercial Code Service (Vol. 3, Richard W. Duesenberg & Lawrence P. King, Sales & Bulk Transfers Under The Uniform Commercial Code) § 3.01 at 3-2 (1992). Recognizing its innovative purpose and complex structure Duesenberg and King further observe Section 2- 207 "is one of the most important, subtle, and difficult in the entire Code, and well it may be said that the product as it finally reads is not altogether satisfactory." *Id.* § 3.02 at 3-13.

[¶8] Section 55-2-207 provides:

* The government has the right to set off the remaining $4,245.00 from any other Gardner Zemke government contract. See Project Map, Inc. v. United States, 203 Ct.Cl. 52, 486 F.2d 1375 (1973) (per curiam).

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
>> (a) the offer expressly limits acceptance to the terms of the offer;
>>
>> (b) they materially alter it; or
>>
>> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act [this chapter].

Relying on Section 2-207(1), Gardner Zemke argues that the trial court erred in concluding that the Dunham Bush Acknowledgment was a counteroffer rather than an acceptance. Gardner Zemke asserts that even though the Acknowledgment contained terms different from or in addition to the terms of their Order, it did not make acceptance expressly conditional on assent to the different or additional terms and therefore should operate as an acceptance rather than a counteroffer.

[¶9] At common law, the "mirror image" rule applied to the formation of contracts, and the terms of the acceptance had to exactly imitate or "mirror" the terms of the offer. *Idaho Power Co. v. Westinghouse Elec. Corp*., 596 F.2d 924, 926 (9th Cir. 1979). If the accepting terms were different from or additional to those in the offer, the result was a counteroffer, not an acceptance. *Id.*; *see also Silva v. Noble*, 85 N.M. 677, 678-79, 515 P.2d 1281, 1282-83 (1973). Thus, from a common law perspective, the trial court's conclusion that the Dunham Bush Acknowledgment was a counteroffer was correct.

[¶10] However, the drafters of the Code "intended to change the common law in an attempt to conform contract law to modern day business transactions." *Leonard Pevar Co. v. Evans Prods. Co.*, 524 F. Supp. 546, 551 (D. Del.1981). As Professors White and Summers explain:

> The rigidity of the common law rule ignored the modern realities of commerce. Where preprinted forms are used to structure deals, they rarely mirror each other, yet the parties usually assume they have a binding contract and act accordingly. Section 2-207 rejects the common law mirror image rule and converts many common law counteroffers into acceptances under 2-207(1).

James J. White & Robert S. Summers, Handbook of the Law Under the Uniform Commercial Code § 1-3 at 29-30 (3d ed. 1988) (footnotes omitted).

[¶11] On its face, Section 2-207(1) provides that a document responding to an offer and purporting to be an acceptance will be an acceptance, despite the presence of additional and different terms. Where merchants exchange preprinted forms and the essential contract terms agree, a contract is formed under Section 2-207(1). Duesenberg & King, § 3.04 at 3-47 to -49. A responding document will fall outside of the provisions of Section 2-207(1) and convey a counteroffer, only when its terms differ radically from the offer, or when "acceptance is expressly made conditional on assent to the additional or different terms"—whether a contract is formed under Section 2-207(1) here turns on the meaning given this phrase.

[¶12] Dunham Bush argues that the language in its Acknowledgment makes acceptance expressly conditional on assent to the additional or different terms set forth in the Acknowledgment. The face of the Acknowledgment states:

> IT IS UNDERSTOOD THAT OUR ACCEPTANCE OF THIS ORDER IS SUBJECT TO THE TERMS AND CONDITIONS ENUMERATED ON THE REVERSE SIDE HEREOF, IT BEING STRICTLY UNDERSTOOD THAT THESE TERMS AND CONDITIONS BECOME A PART OF THIS ORDER AND THE ACKNOWLEDGMENT THEREOF.

The following was among the terms and conditions on the reverse side of the Acknowledgment.

> Failure of the Buyer to object in writing within five (5) days of receipt thereof to Terms of Sale contained in the Seller's acceptance and/or acknowledgment, or other communications, shall be deemed an acceptance of such Terms of Sale by Buyer.

In support of its contention that the above language falls within the "expressly conditional" provision of Section 2-207, Dunham Bush urges that we adopt the view taken by the First Circuit in *Roto-Lith, Ltd. v. F.P. Bartlett & Co*., 297 F.2d 497 (1st Cir. 1962). There, Roto-Lith sent an order for goods to Bartlett, which responded with an acknowledgment containing warranty disclaimers, a statement that the acknowledgment reflected the terms of the sale, and a provision that if the terms were unacceptable Roto-Lith should notify Bartlett at once. *Id*. at 498-99. Roto-Lith did not protest the terms of the acknowledgment and accepted and paid for the goods. The court held the Bartlett acknowledgment was a counteroffer that became binding on Roto-Lith with its acceptance of the goods, reasoning that "a response which states a condition materially altering the obligation solely to the disadvantage of the offeror" falls within the "expressly conditional" language of 2-207(1). *Id*. at 500.

[¶13] Dunham Bush suggests that this Court has demonstrated alliance with the principles of *Roto-Lith* in *Fratello v. Socorro Electric Cooperative, Inc*., 107 N.M. 378, 758 P.2d 792 (1988). *Fratello* involved the terms of a settlement agreement in which one party sent the other party a proposed stipulated order containing an additional term. In the context of the common law, we cited *Roto-Lith* in support of the proposition that the additional term made the proposed stipulation a counteroffer. *Fratello*, 107 N.M. at 381, 758 P.2d at 795.

[¶14] We have never adopted *Roto-Lith* in the context of the Code and decline to do so now. While ostensibly interpreting Section 2-207(1), the First Circuit's analysis imposes the common law doctrine of offer and acceptance on language designed to avoid the common law result. *Roto-Lith* has been almost uniformly criticized by the courts and commentators as an aberration in Article 2 jurisprudence. *Leonard Pevar Co*., 524 F. Supp. at 551 (and cases cited therein); Duesenberg & King, § 3.05[1] at 3-61 to -62; White & Summers, § 1-3 at 36-37.

[¶15] Mindful of the purpose of Section 2-207 and the spirit of Article 2, we find the better approach suggested in *Dorton v. Collins & Aikman Corp*., 453 F.2d 1161 (6th Cir. 1972). In *Dorton*, the Sixth Circuit considered terms in acknowledgment forms sent by Collins & Aikman similar to the terms in the Dunham Bush Acknowledgment. The Collins & Aikman acknowledgments provided that acceptance of orders was subject to the terms and conditions of their form, together with at least seven methods in which a buyer might acquiesce to their terms, including receipt and retention of their form for ten days without objection. *Id*. at 1167-68.

[¶16] Concentrating its analysis on the concept of the offeror's "assent," the Court reasoned that it was not enough to make acceptance expressly conditional on additional or different terms; instead, the expressly conditional nature of the acceptance must be predicated on the offeror's "assent" to those terms. *Id*. at 1168. The Court concluded that the "expressly conditional" provision of Section 2-207(1) "was intended to apply only to an acceptance which clearly reveals that the offeree is unwilling to proceed with the transaction unless he is assured of the offeror's assent to the additional or different terms therein." *Id*. This approach has been widely accepted. *Diatom, Inc. v. Pennwalt Corp*., 741 F.2d 1569, 1576-77 (10th Cir. 1984); *Reaction Molding Technologies, Inc. v. General Elec. Co*., 588 F. Supp. 1280, 1288 (E.D. Pa. 1984); *Idaho Power Co*., 596 F.2d at 926-27.

[¶17] We agree with the court in *Dorton* that the inquiry focuses on whether the offeree clearly and unequivocally communicated to the offeror that its willingness to enter into a bargain was conditioned on the offeror's "assent" to additional or different terms. An exchange of forms containing identical dickered terms, such as the identity, price, and quantity of goods, and conflicting undickered boilerplate provisions, such as warranty terms and a provision making the bargain subject to the terms and conditions of the offeree's document, however worded, will not propel the transaction into the "expressly conditional" language of Section 2-207(1) and confer the status of counteroffer on the responsive document.

[¶18] While *Dorton* articulates a laudable rule, it fails to provide a means for the determination of when a responsive document becomes a counteroffer. We adopt the rule in *Dorton* and add that whether an acceptance is made expressly conditional on assent to different or additional terms is dependent on the commercial context of the transaction. Official Comment 2 to Section 55-2-207 suggests that "[u]nder this article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract."* While the comment applies broadly and envisions recognition of contracts formed under a variety of circumstances, it guides us to application of the concept of "commercial understanding" to the question of formation. *See* 2 William D. Hawkland, Uniform Commercial Code Series § 2- 207:02 at 160 (1992) ("The basic question is whether, in commercial understanding, the proposed deal has been closed.").

[¶19] Discerning whether "commercial understanding" dictates the existence of a contract requires consideration of the objective manifestations of the parties' understanding of the bargain. It requires consideration of the parties' activities and interaction during the making of the bargain; and when available, relevant evidence of course of performance, Section 55-2-208; and course of dealing and usage of the trade, Section 55-1-205. The question guiding the inquiry should be whether the offeror could reasonably believe that in the context of the commercial setting in which the parties were acting, a contract had been formed. This determination requires a very fact specific inquiry. See John E. Murray, Jr., Section 2-207 Of The Uniform Commercial Code: Another Word About Incipient Unconscionability, 39 U.Pitt.L.Rev. 597, 632-34 (1978) (discussing *Dorton* and identifying the commercial understanding of the reasonable buyer as the "critical inquiry").

[¶20] Our analysis does not yield an iron clad rule conducive to perfunctory application. However, it does remain true to the spirit of Article 2, as it calls the trial court to consider the commercial setting of each transaction and the reasonable expectations and beliefs of the parties acting in that setting. *Id*. at 600; § 55-1-102(2)(b) (stating one purpose of the act is "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties").

[¶21] The trial court's treatment of this issue did not encompass the scope of the inquiry we envision. We will not attempt to make the factual determination necessary to characterize this transaction on the record before us. Not satisfied that the trial court adequately considered all of the relevant factors in determining that the

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* While we recognize that the Official Comments do not carry the force of law, they are a part of the official text of the Code adopted by our legislature and we do look to them for guidance. Reardon v. Alsup (In Re Anthony), 114 N.M. 95, 98 n.1, 835 P.2d 811, 814 n.1 (1992). As Professor Llewellyn explained, the Comments were:

> prepared, as was the Code itself, under the joint auspices of the Conference of Commissioners on Uniform State Laws and the American Law Institute. These comments are very useful in presenting something of the background and purposes of the sections, and of the way in which the details and policies build into a whole. In these aspects they greatly aid understanding and construction.

Karl N. Llewellyn, Why We Need the Uniform Commercial Code, 10 U.Fla.L.Rev. 367, 375 (1957).

Dunham Bush Acknowledgment functioned as a counteroffer, we remand for reconsideration of the question.

[¶22] In the event the trial court concludes that the Dunham Bush Acknowledgment constituted an acceptance, it will face the question of which terms will control in the exchange of forms. In the interest of judicial economy, and because this determination is a question of law, we proceed with our analysis.

IV.

[¶23] The Gardner Zemke Order provides that the "[m]anufacturer shall replace or repair all parts found to be defective during initial year of use at no additional cost." Because the Order does not include any warranty terms, Article 2 express and implied warranties arise by operation of law. Section 55-2-313 (express warranties), § 55-2-314 (implied warranty of merchantability), § 55-2-315 (implied warranty of fitness for a particular purpose). The Dunham Bush Acknowledgment contains the following warranty terms.

> WARRANTY: We agree that the apparatus manufactured by the Seller will be free from defects in material and workmanship for a period of one year under normal use and service and when properly installed: and our obligation under this agreement is limited solely to repair or replacement at our option, at our factories, of any part or parts thereof which shall within one year from date of original installation or 18 months from date of shipment from factory to the original purchaser, whichever date may first occur be returned to us with transportation charges prepaid which our examination shall disclose to our satisfaction to have been defective. THIS AGREEMENT TO REPAIR OR REPLACE DEFECTIVE PARTS IS EXPRESSLY IN LIEU OF AND IS HEREBY DISCLAIMER OF ALL OTHER EXPRESS WARRANTIES, AND IS IN LIEU OF AND IN DISCLAIMER AND EXCLUSION OF ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, AS WELL AS ALL OTHER IMPLIED WARRANTIES, IN LAW OR EQUITY, AND OF ALL OTHER OBLIGATIONS OR LIABILITIES ON OUR PART. THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE DESCRIPTION HEREOF.... Our obligation to repair or replace shall not apply to any apparatus which shall have been repaired or altered outside our factory in any way....

[¶24] The one proposition on which most courts and commentators agree at this point in the construction of the statute is that Section 2-207(3) applies only if a contract is not found under Section 2-207(1). *Dorton*, 453 F.2d at 1166; Duesenberg & King, § 3.03[1] at 3-40; 2 Hawkland, § 2-207:04 at 178-79; White & Summers, § 1-3 at 35. However, there are courts that disagree even with this proposition. *See Westinghouse Elec. Corp. v. Nielsons, Inc.*, 647 F. Supp. 896 (D.Colo. 1986) (dealing with different terms, finding a contract under 2-207(1) and proceeding to apply 2-207(2) and 2-207(3)).

[¶25] The language of the statute makes it clear that "additional" terms are subject to the provisions of Section 2-207(2). However, a continuing controversy rages among courts and commentators concerning the treatment of "different" terms in a Section 2-207 analysis. While Section 2-207(1) refers to both "additional or different" terms, Section 2- 207(2) refers only to "additional" terms. The omission of the word "different" from Section 55-2-207(2) gives rise to the questions of whether "different" terms are to be dealt with under the provisions of Section 2-207(2), and if not, how they are to be treated. That the terms in the Acknowledgment are "different" rather than "additional" guides the remainder of our inquiry and requires that we join the fray. Initially, we briefly survey the critical and judicial approaches to the problem posed by "different" terms.

[¶26] One view is that, in spite of the omission, "different" terms are to be analyzed under Section 2-207(2). 2 Hawkland, § 2-207:03 at 168. The foundation for this position is found in Comment 3, which provides "[w]hether or not additional or different terms will become part of the agreement depends upon the provisions of Subsection (2)." Armed with this statement in Comment 3, proponents point to the ambiguity in the distinction between "different" and "additional" terms and argue that the distinction serves no clear purpose. *Steiner v. Mobile Oil Corp*., 20 Cal.3d 90, 141 Cal.Rptr. 157, 165- 66 n.5, 569 P.2d 751, 759-60 n.5 (1977); *Boese-Hilburn Co. v. Dean Machinery Co*., 616 S.W.2d 520, 527 (Mo. Ct. App. 1981). Following this rationale in this case, and relying on the observation in Comment 4 that a clause negating implied warranties would "materially alter" the contract, the Dunham Bush warranty terms would not become a part of the contract, and the Gardner Zemke warranty provision, together with the Article 2 warranties would control. § 55-2-207(2)(b).

[¶27] Another approach is suggested by Duesenberg and King who comment that the ambiguity found in the treatment of "different" and "additional" terms is more judicially created than statutorily supported. While conceding that Comment 3 "contributes to the confusion," they also admonish that "the Official Comments do not happen to be the statute." Duesenberg & King, § 3.05 at 3-52. Observing that "the drafters knew what they were doing, and that they did not sloppily fail to include the term 'different' when drafting subsection (2)," Duesenberg and King postulate that a "different" term in a responsive document operating as an acceptance can never become a part of the parties' contract under the plain language of the statute. *Id*. § 3.03[1] at 3-38.

[¶28] The reasoning supporting this position is that once an offeror addresses a subject it implicitly objects to variance of that subject by the offeree, thereby preventing the "different" term from becoming a part of the contract by prior objection and obviating the need to refer to "different" terms in Section 55-2-207(2). *Id*. § 3.05[1] at 3-77; *Air Prods. & Chems. Inc. v. Fairbanks Morse, Inc.*, 58 Wis.2d 193, 206 N.W.2d 414, 423- 25 (1973). Professor Summers lends support to this position. White & Summers, § 1-3 at 34. Although indulging a different analysis, following this view in the case before us creates a result identical to that flowing from application of the provisions of Section 2- 207(2) as discussed above—the Dunham Bush warranty provisions fall out, and the stated Gardner Zemke and Article 2 warranty provisions apply.

[¶29] Yet a third analysis arises from Comment 6, which in pertinent part states:

> Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in Subsection (2) is satisfied and the conflicting terms do not become a part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this act, including Subsection (2).

The import of Comment 6 is that "different" terms cancel each other out and that existing applicable code provisions stand in their place. The obvious flaws in Comment 6 are the use of the words "confirming forms," suggesting the Comment applies only to variant confirmation forms and not variant offer and acceptance forms, and the reference to Subsection 55-2-207(2)—arguably dealing only with "additional" terms—in the context of "different" terms. Of course, Duesenberg and King remind us that Comment 6 "is only a comment, and a poorly drawn one at that." Duesenberg & King, § 3.05[1] at 3-79.

[¶30] The analysis arising from Comment 6, however, has found acceptance in numerous jurisdictions including the Tenth Circuit. *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1578-79 (10th Cir. 1984). Following a discussion similar to the one we have just indulged, the court found this the preferable approach. *Id*. at 1579; accord *Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc.*, 98 Idaho 495, 503-04, 567 P.2d 1246, 1254-55 (1977), appeal dismissed and cert. denied, 434 U.S. 1056, 98 S. Ct. 1225, 55 L.Ed.2d 757 (1978). Professor White also finds merit in this analysis. White & Summers, § 1-3 at 33-35. Application of this approach here cancels out the parties' conflicting warranty terms and allows the warranty provisions of Article 2 to control.

[¶31] We are unable to find comfort or refuge in concluding that any one of the three paths drawn through the contours of Section 2-207 is more consistent with or true to the language of the statute. We do find that the analysis relying on Comment 6 is the most consistent with the purpose and spirit of the Code in general and Article 2 in particular. We are mindful that the overriding goal of Article 2 is to discern the bargain struck by the contracting parties. However, there are times where the conduct of the parties makes realizing that goal impossible. In such cases, we find guidance in the Code's commitment to fairness, Section 55-1-102(3); good faith, Sections 55-1-203 & -2-103(1)(b); and conscionable conduct, Section 55-2-302.

[¶32] While Section 2-207 was designed to avoid the common law result that gave the advantage to the party sending the last form, we cannot conclude that the statute was intended to shift that advantage to the party sending the first form. Such a result will generally follow from the first two analyses discussed. We adopt the third analysis as the most even-handed resolution of a difficult problem. We are also aware that under this analysis even though the conflicting terms cancel out, the Code may provide a term similar to one rejected. We agree with Professor White that "[a]t least a term so supplied has the merit of being a term that the draftsmen considered fair." White & Summers, § 1- 3 at 35.

[¶33] Due to our disposition of this case, we do not address the second issue raised by Gardner Zemke. On remand, should the trial court conclude a contract was formed under Section 2-207(1), the conflicting warranty provisions in the parties' forms will cancel out, and the warranty provisions of Article 2 will control.

[¶34] IT IS SO ORDERED.
BACA, J., and PATRICIO M. SERNA, District Judge (sitting by designation).

Note: More Battles About Battle of the Forms

Back in the early 1990s, Rich and Enza Hill called Gateway 2000, Inc.'s phone order line, ordered a computer, and gave a credit card number. Gateway shipped a computer to them. In the box with the computer was a small booklet of terms that included an arbitration clause. A notice with the booklet stated that the terms would govern the relationship between Gateway and its customer unless the customer returned the computer within 30 days. The Hills kept the computer, but the computer had issues. The Hills later filed suit for a class of Gateway customers, claiming breach of contract and other things.

In *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), the court per Judge Frank Easterbrook decided that the Hills were bound by the terms in the box, including the arbitration clause. Is that what you'd expect from our studies of UCC § 2-207?

Hill claimed to be following the *ProCD* decision. In *ProCD*, Zeidenberg bought a box of software from a retail store. The box was closed, but on the outside of it "in small print at the bottom of the package" was a disclosure "stating that [the buyer was] subject to the terms and conditions of the enclosed license agreement." *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 654 (W.D. Wisc. 1996). Even without the disclosure on the box, though, it's hard to imagine that Zeidenberg, a Ph.D student in computer science, was not aware that the seller of the software considered it subject to a license. Of course, Zeidenberg could not know the exact terms of the license until he bought the software, opened the box, and opened the software, but the court of appeals held him bound to the license terms nonetheless. Is Zeidenberg's case similar to the Hills'?

Here are some excerpts from the *Hill* opinion. Most people hesitate to defend these statements as applicable to the Hills. What do you suppose is the basis for criticizing each of these? The first is a rhetorical question.

> 1. Are these terms [in the booklet] effective as the parties' contract, or is the contract term-free because the order-taker did not read any terms over the phone and elicit the customer's assent?
>
> 2. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), holds that terms inside a box of software bind consumers who use the software after an opportunity to read the terms and to reject them by returning the product. Likewise, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S. Ct. 1522, 113 L.Ed.2d 622 (1991), enforces a forum selection clause that was included among three pages of terms attached to a cruise ship ticket. *ProCD* and *Carnival Cruise Lines* exemplify the many commercial transactions in which people pay for products with terms to follow; *ProCD* discusses others. 86 F.3d at 1451-52. The district court concluded in *ProCD* that the contract is formed when the consumer pays for the software; as a result, the court held, only terms known to the consumer at that moment are part of the contract, and provisos inside the box do not count. Although this is one way a contract could be formed, it is not the only way: "A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance." *Id*. at 1452. Gateway shipped computers with the same sort of accept-or-return offer ProCD made to users of its software.
>
> 3. Payment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors. Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread.

> 4. Section 2-207(2) of the UCC, the infamous battle-of-the-forms section, states that "additional terms [following acceptance of an offer] are to be construed as proposals for addition to a contract. Between merchants such terms become part of the contract unless ...". Plaintiffs tell us that *ProCD* came out as it did only because Zeidenberg was a "merchant" and the terms inside ProCD's box were not excluded by the "unless" clause. This argument pays scant attention to the opinion in *ProCD,* which concluded that, when there is only one form, "sec. 2-207 is irrelevant." 86 F.3d at 1452.
>
> 5. [T]he Hills knew before they ordered the computer that the carton would include some important terms, and they did not seek to discover these in advance. Gateway's ads state that their products come with limited warranties and lifetime support. How limited was the warranty—30 days, with service contingent on shipping the computer back, or five years, with free onsite service? What sort of support was offered? Shoppers have three principal ways to discover these things. First, they can ask the vendor to send a copy before deciding whether to buy. Concealment would be bad for business, scaring some customers away and leading to excess returns from others. Second, shoppers can consult public sources (computer magazines, the Web sites of vendors) that may contain this information. Third, they may inspect the documents after the product's delivery. Like Zeidenberg, the Hills took the third option. By keeping the computer beyond 30 days, the Hills accepted Gateway's offer, including the arbitration clause.

Though *Hill* was widely followed for a time, it was also strongly criticized. Also, some courts directly rejected *Hill*. The following case, *Klocek v. Gateway, Inc*., 104 F. Supp. 2d 1332 (D. Kan. 2000), applied § 2-207 to "the *Gateway* facts," a pattern that came up in several cases in the late 1990s.

Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569 (Sup. Ct. App. 1998), is a good example. In this fact pattern, plaintiffs bought computers and software from Gateway 2000, Inc. They ordered the products by mail or telephone, and the products were shipped to them. Gateway promised "service when you need it," including 24/7 technical support. As of July 3, 1995, Gateway included with the products shipped to consumers a "Standard Terms and Conditions Agreement." The document provided, "This document contains Gateway 2000's Standard Terms and Conditions. By keeping your Gateway 2000 computer system beyond thirty (30) days after the date of delivery, you accept these Terms and Conditions." Paragraph 10, titled "DISPUTE RESOLUTION," said,

> Any dispute or controversy arising out of or relating to this Agreement or its interpretation shall be settled exclusively and finally by arbitration. The arbitration shall be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The arbitration shall be conducted in Chicago, Illinois, U.S.A. before a sole arbitrator. Any award rendered in any such arbitration proceeding shall be final and

> binding on each of the parties, and judgment may be entered thereon in a court of competent jurisdiction.

Plaintiffs sued as a class, alleging that Gateway did not provide any real technical support. Gateway moved for arbitration. Plaintiffs responded that the International Chamber of Commerce (ICC) was headquartered in France and was particularly difficult to contact. Further, under ICC arbitration rules, a claim of less than $50,000 required a $4,000 fee, including a non-refundable $2,000 registration fee. Because the ICC followed England's "loser pays" rule, a consumer would pay Gateway's legal fees if Gateway won the arbitration. Consumers would also incur travel fees to Chicago. But all correspondence had to be sent to France. Of course, even some really smart, capable, wealthy people bought Gateway computers. Plaintiffs contended the arbitration clause was unconscionable. The court in *Brower* held the arbitration term unconscionable. Can you see why?

The same arbitration term was at issue in *Klocek*, but the court did not reach the question of unconscionability. Instead, the court asked whether, under § 2-207, the clause ever became part of an enforceable contract:

> [¶1] Gateway urges the Court to follow the Seventh Circuit decision in *Hill*. That case involved the shipment of a Gateway computer with terms similar to the Standard Terms in this case, except that Gateway gave the customer 30 days—instead of 5 days—to return the computer. In enforcing the arbitration clause, the Seventh Circuit relied on its decision in *ProCD*, where it enforced a software license which was contained inside a product box. *See Hill*, 105 F.3d at 1148-50. In *ProCD*, the Seventh Circuit noted that the exchange of money frequently precedes the communication of detailed terms in a commercial transaction. *See ProCD*, 86 F.3d at 1451. Citing UCC § 2-204, the court reasoned that by including the license with the software, the vendor proposed a contract that the buyer could accept by using the software after having an opportunity to read the license.[*] *ProCD*, 86 F.3d at 1452. Specifically, the court stated:
>
>> A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance.
>
> *ProCD*, 86 F.3d at 1452. The *Hill* court followed the *ProCD* analysis, noting that "[p]ractical considerations support allowing vendors to enclose the full legal terms with their products." *Hill*, 105 F.3d at 1149.[†]

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[*] Section 2-204 provides: "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such contract." K.S.A. § 84- 2-204; V.A.M.S. § 400.2-204.

[†] Legal commentators have criticized the reasoning of the Seventh Circuit in this regard. See, e.g., Jean R. Sternlight, Gateway Widens Doorway to Imposing Unfair Binding Arbitration on Consumers, Fla. Bar J., Nov. 1997, at 8, 10-12 (outcome in Gateway is questionable on federal statutory, common law and constitutional grounds and as a matter of contract law and is unwise as a matter of policy because it unreasonably shifts to consumers search cost of ascertaining existence of arbitration clause and return cost to avoid such clause); Thomas J. McCarthy et al., Survey: Uniform Commercial Code, 53 Bus. Law. 1461, 1465-66 (Seventh Circuit finding that UCC § 2-207

[¶2] The Court is not persuaded that Kansas or Missouri courts would follow the Seventh Circuit reasoning in *Hill* and *ProCD*. In each case the Seventh Circuit concluded without support that UCC § 2-207 was irrelevant because the cases involved only one written form. *See ProCD*, 86 F.3d at 1452 (citing no authority); *Hill*, 105 F.3d at 1150 (citing *ProCD*). This conclusion is not supported by the statute or by Kansas or Missouri law. Disputes under § 2-207 often arise in the context of a "battle of forms," *see*, e.g., *Diatom, Inc. v. Pennwalt Corp*., 741 F.2d 1569, 1574 (10th Cir. 1984), but nothing in its language precludes application in a case which involves only one form. The statute provides:

> Additional terms in acceptance or confirmation.
>
> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract [if the contract is not between merchants]....

K.S.A. § 84-2-207; V.A.M.S. § 400.2-207. By its terms, § 2-207 applies to an acceptance or written confirmation. It states nothing which requires another form before the provision becomes effective. In fact, the official comment to the section specifically provides that §§ 2-207(1) and (2) apply "where an agreement has been reached orally ... and is followed by one or both of the parties sending formal memoranda embodying the terms so far agreed and adding terms not discussed." Official Comment 1 of UCC § 2- 207. Kansas and Missouri courts have followed this analysis. * * * * Thus, the Court concludes that Kansas and Missouri courts would apply § 2-207 to the facts in this case. * * * *

[¶3] In addition, the Seventh Circuit provided no explanation for its conclusion that "the vendor is the master of the offer." *See ProCD*, 86 F.3d at 1452 (citing nothing in support of proposition); *Hill*, 105 F.3d at 1149

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did not apply is inconsistent with official comment); Batya Goodman, Honey, I Shrink-Wrapped the Consumer: the Shrinkwrap Agreement as an Adhesion Contract, 21 Cardozo L. Rev. 319, 344-352 (Seventh Circuit failed to consider principles of adhesion contracts); Jeremy Senderowicz, Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumers' Informed Consent to Arbitration Clauses in Form Contracts, 32 Colum. J.L. & Soc. Probs. 275, 296-299 (judiciary (in multiple decisions, including Hill) has ignored issue of consumer consent to an arbitration clause). Nonetheless, several courts have followed the Seventh Circuit decisions in Hill and ProCD. See, e.g., M.A. Mortenson Co., Inc. v. Timberline Software Corp., 140 Wash.2d 568, 998 P.2d 305 (license agreement supplied with software); Rinaldi v. Iomega Corp., 1999 WL 1442014, Case No. 98C-09- 064-RRC (Del. Super. Sept. 3, 1999) (warranty disclaimer included inside computer Zip drive packaging); Westendorf v. Gateway 2000, Inc., 2000 WL 307369, Case No. 16913 (Del. Ch. March 16, 2000) (arbitration provision shipped with computer); Brower v. Gateway 2000, Inc. , 246 A.D.2d 246, 676 N.Y.S.2d 569 (N.Y.App.Div.1998) (same); Levy v. Gateway 2000, Inc., 1997 WL 823611, 33 UCC Rep. Serv.2d 1060 (N.Y.Sup. Oct. 31, 1997) (same).

(citing *ProCD*). In typical consumer transactions, the purchaser is the offeror, and the vendor is the offeree. * * * * While it is possible for the vendor to be the offeror, see *Brown Machine*, 770 S.W.2d at 419 (price quote can amount to offer if it reasonably appears from quote that assent to quote is all that is needed to ripen offer into contract), Gateway provides no factual evidence which would support such a finding in this case. The Court therefore assumes for purposes of the motion to dismiss that plaintiff offered to purchase the computer (either in person or through catalog order) and that Gateway accepted plaintiff's offer (either by completing the sales transaction in person or by agreeing to ship and/or shipping the computer to plaintiff).[*] *Accord Arizona Retail*, 831 F. Supp. at 765 (vendor entered into contract by agreeing to ship goods, or at latest, by shipping goods).

[¶4] Under § 2-207, the Standard Terms constitute either an expression of acceptance or written confirmation. As an expression of acceptance, the Standard Terms would constitute a counter-offer only if Gateway expressly made its acceptance conditional on plaintiff's assent to the additional or different terms. K.S.A. § 84-2-207(1); V.A.M.S. § 400.2- 207(1). "[T]he conditional nature of the acceptance must be clearly expressed in a manner sufficient to notify the offeror that the offeree is unwilling to proceed with the transaction unless the additional or different terms are included in the contract." *Brown Machine*, 770 S.W.2d at 420. Gateway provides no evidence that at the time of the sales transaction, it informed plaintiff that the transaction was conditioned on plaintiff's acceptance of the Standard Terms. Moreover, the mere fact that Gateway shipped the goods with the terms attached did not communicate to plaintiff any unwillingness to proceed without plaintiff's agreement to the Standard Terms. * * * *

[¶5] Because plaintiff is not a merchant, additional or different terms contained in the Standard Terms did not become part of the parties' agreement unless plaintiff expressly agreed to them. See K.S.A. § 84-2-207, Kansas Comment 2 (if either party is not a merchant, additional terms are proposals for addition to the contract that do not become part of the contract unless the original offeror expressly agrees).[†] Gateway argues that plaintiff demonstrated acceptance of the arbitration provision by keeping the computer more than five days after the date of delivery. Although the Standard Terms purport to work that result, Gateway has not presented evidence that plaintiff expressly agreed to those Standard Terms. Gateway

[*] UCC § 2-206(b) provides that "an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment ..." The official comment states that "[e]ither shipment or a prompt promise to ship is made a proper means of acceptance of an offer looking to current shipment." UCC § 2-206, Official Comment 2.

[†] The Court's decision would be the same if it considered the Standard Terms as a proposed modification under UCC § 2-209. See, e.g., Orris, 5 F. Supp.2d at 1206 (express assent analysis is same under §§ 2- 207 and 2-209).

> states only that it enclosed the Standard Terms inside the computer box for plaintiff to read afterwards. It provides no evidence that it informed plaintiff of the five-day review-and-return period as a condition of the sales transaction, or that the parties contemplated additional terms to the agreement.* *See Step-Saver*, 939 F.2d at 99 (during negotiations leading to purchase, vendor never mentioned box-top license or obtained buyer's express assent thereto). The Court finds that the act of keeping the computer past five days was not sufficient to demonstrate that plaintiff expressly agreed to the Standard Terms. *Accord Brown Machine*, 770 S.W.2d at 421 (express assent cannot be presumed by silence or mere failure to object). Thus, because Gateway has not provided evidence sufficient to support a finding under Kansas or Missouri law that plaintiff agreed to the arbitration provision contained in Gateway's Standard Terms, the Court overrules Gateway's motion to dismiss. * * * *

Question: Which decision has the better analysis, *Hill* or *Klocek*?

G. Web Contracts

CONTRACTING ONLINE: THE *UBER* CASES

"Uber provides a ride-sharing service . . . for a fee. Uber licenses the Uber mobile application (the "Uber App") to the public so that users may request transportation services from independent third party providers in the users' local area." To use the app, Uber "users must first register with Uber by creating an account" through the app itself or through Uber's website.

Uber's online registration process as a contract-formation event was at issue in three recent, important cases. In two cases, the users downloaded the app and created an account through the app. In the latest case, the user registered on the website.

The users all had different disputes with Uber. In *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017), the plaintiff on behalf of a class of users sued Uber's CEO Travis Kalanick for price-fixing. The trial court granted Kalanick's motion to bring Uber into the litigation as a necessary party.

In *Cullinane v. Uber Technologies, Inc.*, 893 F.3d 53 (1st Cir. 2018), the plaintiffs on behalf of a class of users sued Uber for charging unnecessary fees. The facts in the first paragraph above were quoted and paraphrased from *Cullinane*.

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* The Court is mindful of the practical considerations which are involved in commercial transactions, but it is not unreasonable for a vendor to clearly communicate to a buyer—at the time of sale—either the complete terms of the sale or the fact that the vendor will propose additional terms as a condition of sale, if that be the case.

In *Theodore v. Uber Technologies, Inc.*, 442 F. Supp.3d 433 (D. Mass. 2020), the wheel-chair-bound plaintiff sued for injunctive relief because Uber failed "to provide wheelchair accessible vehicles in the suburb where Mr. Theodore resides."

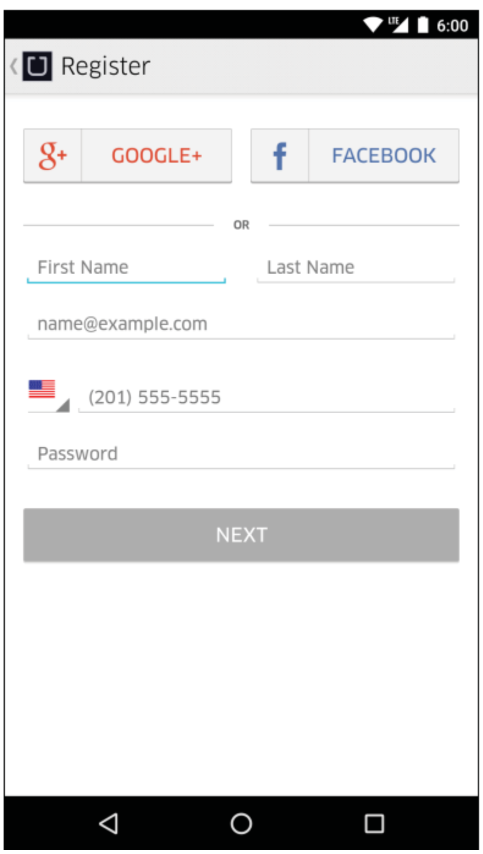
In each case, Uber moved to compel arbitration, and the court had to decide whether the plaintiffs were bound by the arbitration clause in Uber's terms of service.

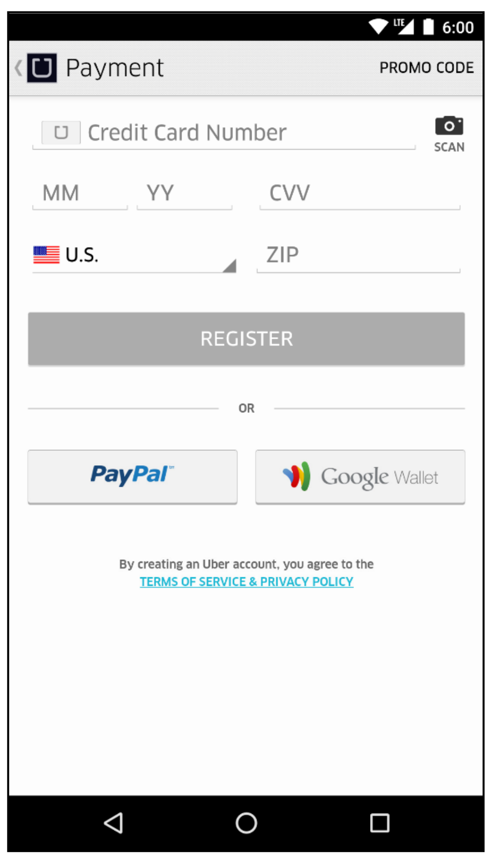
Uber's sign-up process was quite similar for all of these plaintiffs.

1. *Meyer*

Here is the way the *Meyer* court described it:

> [1] The first screen, at which the user arrives after downloading the application and clicking a button marked "Register," is labeled "Register" and includes fields for the user to enter his or her name, email address, phone number, and a password (the "Registration Screen"). The Registration Screen also offers the user the option to register via a Google+ or Facebook account. According to Uber's records, Meyer did not sign up using either Google+ or Facebook and would have had to enter manually his personal information. [Meyer's phone screen was 5.1 inches, measured diagonally, and no images here are rendered at actual size.]





[¶2] After completing the information on the Registration Screen and clicking "Next," the user advances to a second screen labeled "Payment" (the "Payment Screen"), on which the user can enter credit card details or elect to make payments using PayPal or Google Wallet, third-party payment services. According to Uber's records, Meyer entered his credit card information to pay for rides. To complete the process, the prospective user must click the button marked "REGISTER" in the middle of the Payment Screen.

[¶3] Below the input fields and buttons on the Payment Screen is black text advising users that "[b]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY." * * * * The capitalized phrase, which is bright blue and underlined, was a hyperlink that, when clicked, took the user to a third screen containing a button that, in turn, when clicked, would then display the current version of both Uber's Terms of Service and Privacy Policy. Meyer recalls entering his contact information and credit card details before registering, but does not recall seeing or following the hyperlink to the Terms and Conditions. He declares that he did not read the Terms and Conditions, including the arbitration provision.

[¶4] When Meyer registered for an account, the Terms of Service contained the following mandatory arbitration clause [and *Cullinane* and *Theodore* appear to have had equivalents]:

> **Dispute Resolution**
>
> You and Company agree that any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof or the use of the Service or Application (collectively, **"Disputes"**) will be settled by binding arbitration, except that each party retains the right to bring an individual action in small claims court and the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents or other intellectual property rights. **You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding.**
>
> Further, unless both you and Company otherwise agree in writing, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of any class or representative proceeding. If this specific paragraph is held unenforcea-

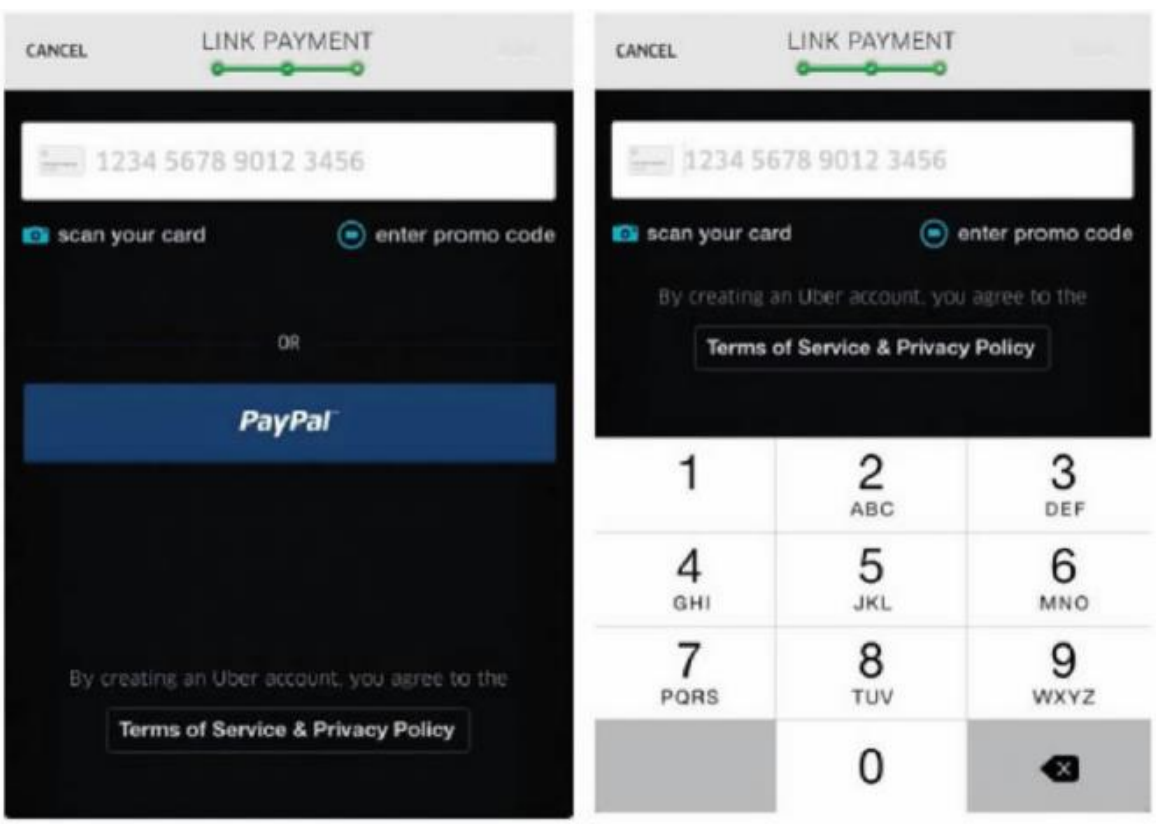
ble, then the entirety of this "Dispute Resolution" section will be deemed void. Except as provided in the preceding sentence, this "Dispute Resolution" section will survive any termination of this Agreement.

Appellants' App. at 111-12. The Terms of Service further provided that the American Arbitration Association ("AAA") would hear any dispute, and that the AAA Commercial Arbitration Rules would govern any arbitration proceeding.

2. *Cullinane*

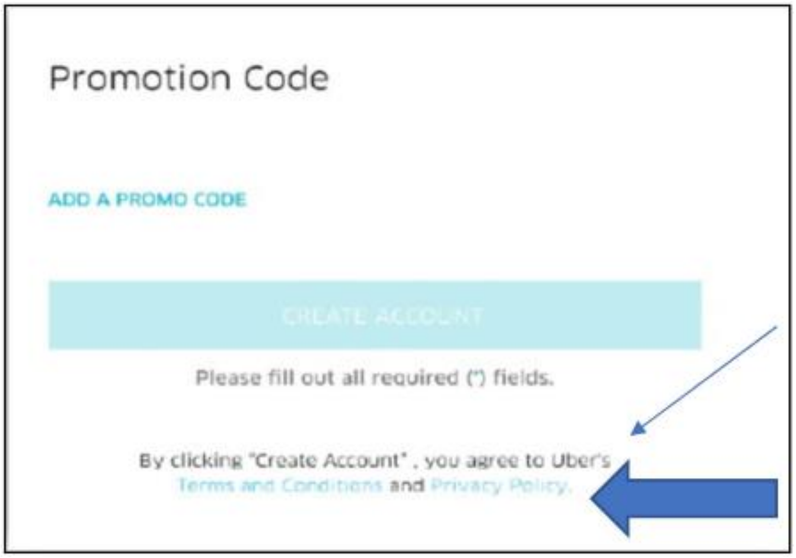
The *Cullinane* process was slightly different. The first screen was entitled "Create an Account" and required an email address, mobile phone number, and password. A second screen entitled "Create a Profile" required first and last name and a picture. The third screen said either "Link Card" or "Link Payment" and, like the second screen in *Meyer*, asked the user to enter payment information.

The third screen looked like one of the following. Earlier users only saw something like the right screen, but after Uber added a PayPal option, users were taken to the left screen first; if they chose credit card, then they saw something like the right screen. Uber claimed that the rectangular box around its Terms of Service & Privacy Policy was a clickable link. After payment information was entered, a "Done" button in the upper right corner became visible and operable.



3. *Theodore*

Mr. Theodore's case is a little different because he never registered through the app. In 2016, he "created an account on Uber's website." The website's screen (below) looked similar to that from *Meyer* and *Cullinane* with regard to the terms and conditions; other information on those pages in the app was, on the website, entered on prior screens, however.



After registering, Mr. Theodore could not find wheelchair accessible vehicles through the app and never used Uber's service.

4. The Dispute

In none of these cases was the user required to click on the Terms of Service link in order to complete the registration process. Each could (and did) register without clicking on the link. The question the court addressed was whether the plaintiffs—users—had agreed to the arbitration agreements.

This issue is probably (technically) about Uber's offer. It's safe to say that no human on Uber's side exercised any thought about whether to accept a user's registration after the user was finished registering. Thus, if a contract formed, the offer was probably Uber's. Surely what Uber proposed was an exchange to which it had already assented, on condition of a valid payment method. But we place the issue here at the end of the chapter on acceptance because the cases addressed both offer and acceptance, as you will see.

5. The Law

All three courts used substantially the same law, and all cite ultimately to *Specht v. Netscape Communications Corp*. 306 F.3d 17 (2d Cir. 2002), an opinion by then-Judge Sotomayor that has become the foundational precedent in the area. *Cullinane* and *Theodore* cite also to *Meyer*, and *Theodore* cites also to *Cullinane*. The cases follow in line.

Here is the recitation of law from ***Cullinane*** with most citations and other extraneous verbiage removed:

> [A] It is well settled that "arbitration is a matter of contract." "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."
>
> [B] [I]n *Ajemian v. Yahoo!, Inc*., 83 Mass.App.Ct. 565, 987 N.E.2d 604, 611-15 (2013), the Massachusetts Appeals Court addressed the enforceability of forum selection and limitation clauses within an online contract and that court's decision is "trustworthy data for ascertaining state law." While the clauses at issue in *Ajemian* did not include an arbitration clause, "the essential question presented was the same: what level of notice and assent is required in order for a court to enforce an online adhesion contract?" Consequently, we apply the principles stated in *Ajemian*.
>
> [C] In *Ajemian*, the Appeals Court determined that there was "no reason to apply different legal principles [of contract enforcement] simply because a forum selection clause . . . is contained in an online contract." Therefore, "such clauses will be enforced provided they have been reasonably communicated and accepted." The Appeals Court explained that "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility." *Id*. at 612 ([ultimately] quoting *Specht v. Netscape Commc'ns Corp*., 306 F.3d 17, 35 (2d Cir. 2002)). With this in mind, the Appeals Court set forth a two-step inquiry for the enforceability of forum selection clauses in online agreements. The first inquiry is whether the contract terms were "reasonably communicated to the plaintiffs." The second is whether the record shows that those terms were "accepted and, if so, the manner of acceptance." The court further clarified that the burden to show that the terms were reasonably communicated and accepted lies on the party seeking to enforce the forum selection clause.

Compare those statements with ***Meyer*'s**:

[A] Where there is no evidence that the offeree had actual notice of the terms of the agreement, the offeree will still be bound by the agreement if a reasonably prudent user would be on inquiry notice of the terms.

[B] Whether a reasonably prudent user would be on inquiry notice turns on the "[c]larity and conspicuousness of arbitration terms," *Specht*, 306 F.3d at 30; in the context of web-based contracts, as discussed further below, clarity and conspicuousness are a function of the design and content of the relevant interface.

[C] Thus, only if the undisputed facts establish that there is "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms" will we find that a contract has been formed. See *Specht*, 306 F.3d at 35. * * * *

[D] "Courts around the country have recognized that [an] electronic 'click' can suffice to signify the acceptance of a contract," and that "[t]here is nothing automatically offensive about such agreements, as long as the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement."

[E] With these principles in mind, one way in which we have previously distinguished web-based contracts is the manner in which the user manifests assent—namely, "clickwrap" (or "click-through") agreements, which require users to click an "I agree" box after being presented with a list of terms and conditions of use, or "browsewrap" agreements, which generally post terms and conditions on a website via a hyperlink at the bottom of the screen. Courts routinely uphold clickwrap agreements for the principal reason that the user has affirmatively assented to the terms of agreement by clicking "I agree." Browsewrap agreements, on the other hand, do not require the user to expressly assent. "Because no affirmative action is required by the website user to agree to the terms of a contract other than his or her use of the website, the determination of the validity of the browsewrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions."

[F] Of course, there are infinite ways to design a website or smartphone application, and not all interfaces fit neatly into the clickwrap or browsewrap categories. Some online agreements require the user to scroll through the terms before the user can indicate his or her assent by clicking "I agree." [Scrollthrough or scrollwrap?] Other agreements notify the user of the existence of the website's terms of use and, instead of providing an "I agree" button, advise the user that he or she is agreeing to the terms of service when registering or signing up. * * * *

> [G] Classification of web-based contracts alone, however, does not resolve the notice inquiry. Insofar as it turns on the reasonableness of notice, the enforceability of a web-based agreement is clearly a fact-intensive inquiry. Nonetheless, on a motion to compel arbitration, we may determine that an agreement to arbitrate exists where the notice of the arbitration provision was reasonably conspicuous and manifestation of assent unambiguous as a matter of law. See *Specht*, 306 F.3d at 28.

These rules from *Meyer* might have a slightly different focus, but is it hard to predict what difference will occur in actual application merely by reading the rules from the two cases?

6. The Application

Nevertheless, the courts differed in application of the test. The *Meyer* court held that the plaintiff "was on inquiry notice of the arbitration provision by virtue of the hyperlink . . . and, thus, manifested his assent to the agreement by clicking 'Register.'" It reasoned that (i) normal people know how to use a smartphone and can recognize a link, (ii) this hyperlink was in blue like any normal hyperlink would be, and (iii) the sign-up page was uncluttered and clear enough. The notice was "spatially and temporally coupled" with the button designated for assent. The court also stressed the "transactional context": "Meyer located and downloaded the Uber App, signed up for an account, and entered his credit card information with the intention of entering into a forward-looking relationship with Uber[,] . . . one that would require some terms and conditions."

Cullinane, on the other hand, found "that the Plaintiffs were not reasonably notified of the terms of the Agreement." The highlights include these:

> [D] We note at the outset that Uber chose not to use a common method of conspicuously informing users of the existence and location of terms and conditions: requiring users to click a box stating that they agree to a set of terms, often provided by hyperlink, before continuing to the next screen. Instead, Uber chose to rely on simply displaying a notice of deemed acquiescence and a link to the terms.
>
> [E] Uber's "Terms of Service & Privacy Policy" hyperlink did not have the common appearance of a hyperlink. While not all hyperlinks need to have the same characteristics, they are "commonly blue and underlined." [The court cited *Meyer* after this sentence.]
>
> [F] Along with the "Terms of Service & Privacy Policy" hyperlink, the "Link Card" and "Link Payment" screens contained other terms displayed with similar features. For example, the terms "scan your card" and "enter promo code" were also written in bold and with a similarly sized font as

> the hyperlink. Both versions of the third screen also included the words "CANCEL" and "DONE,"—the latter being barely visible until the user had entered the required payment information—in all capital letters and dark colored font. Meanwhile, the top of the screens featured the terms "Link Card" or "Link Payment" in large capital letters and dark colored font. These had the largest-sized font in both versions of the third screen.
>
> [G] Uber's "Terms of Service & Privacy Policy" hyperlink was even less conspicuous on the "Link Payment" screen. The inclusion of the additional payment option and the placement of a large blue PayPal button in the middle of the screen were more attention-grabbing and displaced the hyperlink to the bottom of the screen.

This is just a small portion of the analyses from *Cullinane* and *Meyer*, but you can get what the courts are doing: parsing through the website design to argue whether the terms and conditions link was conspicuous—reasonably communicated.

Ah, but ***Theodore*** included the terms and conditions link in blue on a white background, just as we saw in *Meyer*! The *Theodore* court noted the similarity to *Meyer* but also reasoned that

> some of the other terms on the page were still in the same color as the hyperlink, including "enter promo code," and the links to the "Terms and Conditions" and "Privacy Policy" were still not the largest text on the screen. The hyperlinks also continued to appear without any underlining. Finally, as before, the Terms and Conditions were linked at the bottom of the screen and did not require an affirmative acknowledgment from the prospective user that he or she was agreeing to be bound by the Terms and Conditions or the Privacy Policy by creating an Uber account.

The court also noted that it was bound by *Cullinane* (D. Mass is within the 1st Cir.). One could also almost hear the court whisper "and not bound by *Meyer*." At any rate, the *Theodore* court refused to order arbitration, on grounds that no agreement to arbitrate existed.

Here is your **ASSIGNMENT FOR CLASS**:

1) Taking the facts of *Meyer*, choose what result you think a court should reach—agreement or not, then construct your legal argument (a) using the best standards used by these courts, to the extent you can discern them, and (b) naming at least five facts, from most persuasive to least persuasive, in favor of your result. I may ask you for your legal argument, and I intend to poll the class to see what facts each of you chose.

2) Given the state of the law, how would you recommend that clients design their websites? Please name the key design feature/s and give reasons.

Questions:

1. The *Meyer* court held that Meyer also had to arbitrate against Kalanick:

> Although Kalanick is not a party to the Terms and Conditions between Uber and Meyer, he is nonetheless protected by them. "Courts in this and other circuits consistently have held that employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement."

Op. at 39 n.11. The law reasons that these claims, too, are within the language of the arbitration clause. What do you think? The courts have also cited in support the federal policy in favor of arbitration. Whether Kalanick himself, a non-party, can claim the right to arbitrate is the question, though. *Roby v. Corp. of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993), reasoned that employees and agents are intended beneficiaries of the arbitration clauses. (The doctrine of third-party beneficiaries is a topic addressed in Volume II of this casebook.) How hard would it be to escape arbitration with an entity if you could force into court all the people who acted on the entity's behalf?

2. Binding Meyer to the arbitration agreement in this case is most like which other case we have studied? *ProCD*? *Hill*? *Austin v. Burge*? *Den Norske Stats Oljeselscap*? *Lee v. Sheller Globe*? *Lucy v. Zehmer*?

Chapter 8. Definiteness

A. The General Principle

ACADEMY CHICAGO PUBLISHERS v. Mary W. CHEEVER (1991)
Supreme Court of Illinois
578 N.E.2d 981

Justice HEIPLE delivered the opinion of the court:

[¶1] This is a suit for declaratory judgment. It arose out of an agreement between the widow of the widely published author, John Cheever, and Academy Chicago Publishers. Contact between the parties began in 1987 when the publisher approached Mrs. Cheever about the possibility of publishing a collection of Mr. Cheever's short stories which, though previously published, had never been collected into a single anthology. In August of that year, a publishing agreement was signed which provided, in pertinent part:

> "Agreement made this 15th day of August 1987, between Academy Chicago Publishers or any affiliated entity or imprint (hereinafter referred to as the Publisher) and Mary W. Cheever and Franklin H. Dennis of the USA (hereinafter referred to as Author).
>
> Whereas the parties are desirous of publishing and having published a certain work or works, tentatively titled The Uncollected Stories of John Cheever (hereinafter referred to as the Work):
>
> * * * *
>
> 2. The Author will deliver to the Publisher on a mutually agreeable date one copy of the manuscript of the Work as finally arranged by the editor and satisfactory to the Publisher in form and content.
>
> * * * *
>
> 5. Within a reasonable time and a mutually agreeable date after delivery of the final revised manuscript, the Publisher will publish the Work at its own expense, in such style and manner and at such price as it deems best, and will keep the Work in print as long as it deems it expedient; but it will not be responsible for delays caused by circumstances beyond its control."

[¶2] Academy and its editor, Franklin Dennis, assumed the task of locating and procuring the uncollected stories and delivering them to Mrs. Cheever. Mrs. Cheever and Mr. Dennis received partial advances for manuscript preparation. By the end of 1987, Academy had located and delivered more than 60 uncollected stories to Mrs. Cheever. Shortly thereafter, Mrs. Cheever informed Academy in writing that she objected to the publication of the book and attempted to return her advance.

[¶3] Academy filed suit in the circuit court of Cook County in February 1988, seeking a declaratory judgment: (1) granting Academy the exclusive right to publish the tentatively titled, “The Uncollected Stories of John Cheever”; (2) designating Franklin Dennis as the book’s editor; and (3) obligating Mrs. Cheever to deliver the manuscript from which the work was to be published. The trial court entered an order declaring, inter alia: (1) that the publishing agreement executed by the parties was valid and enforceable; (2) that Mrs. Cheever was entitled to select the short stories to be included in the manuscript for publication; (3) that Mrs. Cheever would comply with her obligations of good faith and fair dealing if she delivered a manuscript including at least 10 to 15 stories totaling at least 140 pages; (4) Academy controlled the design and format of the work to be published, but control must be exercised in cooperation with Mrs. Cheever.

[¶4] Academy appealed the trial court’s order, challenging particularly the declaration regarding the minimum story and page numbers for Mrs. Cheever’s compliance with the publishing agreement, and the declaration that Academy must consult with defendant on all matters of publication of the manuscript.

[¶5] The appellate court affirmed the decision of the trial court with respect to the validity and enforceability of the publishing agreement and the minimum story and page number requirements for Mrs. Cheever’s compliance with same. The appellate court reversed the trial court’s declaration regarding control of publication, stating that the trial court erred in considering extrinsic evidence to interpret the agreement regarding control of the publication, given the explicit language of the agreement granting exclusive control to Academy. (200 Ill.App.3d 677, 146 Ill. Dec. 386, 558 N.E.2d 349.) Appeal is taken in this court pursuant to Supreme Court Rule 315(a) (134 Ill.2d R. 315(a)).

[¶6] The parties raise several issues on appeal; this matter, however, is one of contract and we confine our discussion to the issue of the validity and enforceability of the publishing agreement.

[¶7] While the trial court and the appellate court agreed that the publishing agreement constitutes a valid and enforceable contract, we cannot concur. The principles of contract state that in order for a valid contract to be formed, an “offer must be so definite as to its material terms or require such definite terms in the acceptance that the promises and performances to be rendered by each party are reasonably certain.” (1 Williston, Contracts §§ 38 through 48 (3d ed. 1957); 1 Corbin, Contracts §§ 95 through 100 (1963).) Although the parties may have had and manifested the intent to make a contract, if the content of their agreement is unduly uncertain and indefinite no contract is formed. 1 Williston § 37; 1 Corbin § 95.

[¶8] The pertinent language of this agreement lacks the definite and certain essential terms required for the formation of an enforceable contract. (*Midland Hotel Corp. v. Reuben H. Donnelley Corp*. (1987), 118 Ill.2d 306, 113 Ill. Dec. 252, 515 N.E.2d 61.) A contract "is sufficiently definite and certain to be enforceable if the court is enabled from the terms and provisions thereof, under proper rules of construction and applicable principles of equity, to ascertain what the parties have agreed to do." (*Morey v. Hoffman* (1957), 12 Ill.2d 125, 145 N.E.2d 644.) The provisions of the subject publishing agreement do not provide the court with a means of determining the intent of the parties.

[¶9] Trial testimony reveals that a major source of controversy between the parties is the length and content of the proposed book. The agreement sheds no light on the minimum or maximum number of stories or pages necessary for publication of the collection, nor is there any implicit language from which we can glean the intentions of the parties with respect to this essential contract term. The publishing agreement is similarly silent with respect to who will decide which stories will be included in the collection. Other omissions, ambiguities, unresolved essential terms and illusory terms are: No date certain for delivery of the manuscript. No definition of the criteria which would render the manuscript satisfactory to the publisher either as to form or content. No date certain as to when publication will occur. No certainty as to style or manner in which the book will be published nor is there any indication as to the price at which such book will be sold, or the length of time publication shall continue, all of which terms are left to the sole discretion of the publisher.

[¶10] A contract may be enforced even though some contract terms may be missing or left to be agreed upon, but if the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract. (*Champaign National Bank v. Landers Seed Co*. (1988), 165 Ill.App.3d 1090, 116 Ill. Dec. 742, 519 N.E.2d 957, Restatement (Second) of Contracts § 33 (1981).) Without setting forth adequate terms for compliance, the publishing agreement provides no basis for determining when breach has occurred, and, therefore, is not a valid and enforceable contract.

[¶11] An enforceable contract must include a meeting of the minds or mutual assent as to the terms of the contract. (*Midland Hotel*, 118 Ill.2d at 313, 113 Ill. Dec. 252, 515 N.E.2d 61.) It is not compelling that the parties share a subjective understanding as to the terms of the contract; the parties' conduct may indicate an agreement to the terms of same. (*Steinberg v. Chicago Medical School* (1977), 69 Ill.2d 320, 13 Ill. Dec. 699, 371 N.E.2d 634.) In the instant case, however, no mutual assent has been illustrated. The parties did not and do not share a common understanding of the essential terms of the publishing agreement.

[¶12] In rendering its judgment, the trial court supplied minimum terms for Mrs. Cheever's compliance, including story and page numbers. It is not uncommon for a court to supply a missing material term, as the reasonable conclusion often is that the parties intended that the term be supplied by implication. However, where the subject matter of the contract has not been decided upon and there is no standard available for reasonable implication, courts ordinarily refuse to supply the missing term. (1 Williston § 42; 1 Corbin § 100.) No suitable standard was available for the trial court to apply. It is our opinion that the trial court incorrectly supplied minimum compliance terms to the publishing agreement, as the agreement did not constitute a valid and enforceable contract to begin with. As noted above, the publishing agreement contains major unresolved uncertainties. It is not the role of the court to rewrite the contract and spell out essential elements not included therein.

[¶13] In light of our decision that there was no valid and enforceable contract between the parties, we need not address other issues raised on appeal. For the foregoing reasons, the decisions of the trial and appellate courts in this declaratory judgment action are reversed.

Reversed.

Justices CLARK and FREEMAN took no part in the consideration or decision of this opinion.

Questions:

1. Did a contract form here?

2. Why doesn't the court simply imply a reasonable term?

3. Why don't parties fill out terms? (The answer to this is not in the case, but please speculate as to what reasons might be.)

Note: The Amazon review of the book, Anita Miller, UNCOLLECTING CHEEVER: THE FAMILY OF JOHN CHEEVER VS. ACADEMY CHICAGO PUBLISHERS (2001), details the history of this litigation. Miller was part owner of the publishing house and wrote the book in order to grind her ax (she has an ax to grind). In the end, Academy did publish a small collection of 13 stories in 1994, which left 55 still uncollected. Why did the Cheevers (more than Mrs. Cheever were involved) back out? One Cheever child said, "I'm a greedy pig. All my life I've wanted to be rich. Haven't you?" Of course, that's not what they argued in court.

JOSEPH MARTIN, JR., DELICATESSEN, INC. v. Henry D. SCHUMACHER (1981)
Court of Appeals of New York
436 N.Y.S.2d 247

FUCHSBERG, Judge.

[¶1] This case raises an issue fundamental to the law of contracts. It calls upon us to review a decision of the Appellate Division, 70 A.D.2d 1, 419 N.Y.S.2d 558 which held that a realty lease's provision that the rent for a renewal period was "to be agreed upon" may be enforceable.

[¶2] The pertinent factual and procedural contexts in which the case reaches this court are uncomplicated. In 1973, the appellant, as landlord, leased a retail store to the respondent for a five-year term at a rent graduated upwards from $500 per month for the first year to $650 for the fifth. The renewal clause stated that "(t)he Tenant may renew this lease for an additional period of five years at annual rentals to be agreed upon; Tenant shall give Landlord thirty (30) days written notice, to be mailed certified mail, return receipt requested, of the intention to exercise such right." It is not disputed that the tenant gave timely notice of its desire to renew or that, once the landlord made it clear that he would do so only at a rental starting at $900 a month, the tenant engaged an appraiser who opined that a fair market rental value would be $545.41.

[¶3] The tenant thereupon commenced an action for specific performance in Supreme Court, Suffolk County, to compel the landlord to extend the lease for the additional term at the appraiser's figure or such other sum as the court would decide was reasonable. For his part, the landlord in due course brought a holdover proceeding in the local District Court to evict the tenant. On the landlord's motion for summary judgment, the Supreme Court, holding that a bald agreement to agree on a future rental was unenforceable for uncertainty as a matter of law, dismissed the tenant's complaint. Concordantly, it denied as moot the tenant's motion to remove the District Court case to the Supreme Court and to consolidate the two suits.

[¶4] It was on appeal by the tenant from these orders that the Appellate Division, expressly overruling an established line of cases in the process, reinstated the tenant's complaint and granted consolidation. In so doing, it reasoned that "a renewal clause in a lease providing for future agreement on the rent to be paid during the renewal term is enforceable if it is established that the parties' intent was not to terminate in the event of a failure to agree". It went on to provide that, if the tenant met that burden, the trial court could proceed to set a "reasonable rent". One of the Justices, concurring, would have eliminated the first step and required the trial court to proceed directly to the fixation of the rent. Each party now appeals by leave of the Appellate Division pursuant to CPLR 5602 (subd. (b), par. 1). The tenant seeks only a modification adopting the concurrer's position.

The question formally certified to us by the Appellate Division is simply whether its order was properly made. Since we conclude that the disposition at the Supreme Court was the correct one, our answer must be in the negative.

[¶5] We begin our analysis with the basic observation that, unless otherwise mandated by law (e. g., residential emergency rent control statutes), a contract is a private "ordering" in which a party binds himself to do, or not to do, a particular thing (*Fletcher v. Peck*, 6 Cranch (10 U.S.) 87, 136; 3 L.Ed. 162. Hart and Sachs, Legal Process, 147- 148 (1958)). This liberty is no right at all if it is not accompanied by freedom not to contract. The corollary is that, before one may secure redress in our courts because another has failed to honor a promise, it must appear that the promisee assented to the obligation in question.

[¶6] It also follows that, before the power of law can be invoked to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained. Otherwise, a court, in intervening, would be imposing its own conception of what the parties should or might have undertaken, rather than confining itself to the implementation of a bargain to which they have mutually committed themselves. Thus, definiteness as to material matters is of the very essence in contract law. Impenetrable vagueness and uncertainty will not do (1 Corbin, Contracts, s 95, p. 394; 6 Encyclopedia of New York Law, Contracts, s 301; Restatement, Contracts 2d, s 32, Comment a).

[¶7] Dictated by these principles, it is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable (*Willmott v. Giarraputo*, 5 N.Y.2d 250, 253, 184 N.Y.S.2d 97, 157 N.E.2d 282; *Sourwine v. Truscott*, 17 Hun. 432, 434). [Editor Notes: Citations to other state court decisions in accord are omitted.] This is especially true of the amount to be paid for the sale or lease of real property (*see Forma v. Moran*, 273 App.Div. 818, 76 N.Y.S.2d 232; *Huber v. Ruby*, 187 Misc. 967, 969, 65 N.Y.S.2d 462, app. dsmd 271 App.Div. 927, 67 N.Y.S.2d 710, *see, generally*, 58 A.L.R. 3d 500, Validity and Enforceability of Provision for Renewal of Lease at Rental to be Fixed by Subsequent Agreement of the Parties). The rule applies all the more, and not the less, when, as here, the extraordinary remedy of specific performance is sought (11 Williston, Contracts (Jaeger 3d ed.), s 1424; Pomeroy, Equity Jurisprudence, s 1405).

[¶8] This is not to say that the requirement for definiteness in the case before us now could only have been met by explicit expression of the rent to be paid. The concern is with substance, not form. It certainly would have sufficed, for instance, if a methodology for determining the rent was to be found within the four corners of the lease, for a rent so arrived at would have been the end product of agreement between the parties themselves. Nor would the agreement have failed for indefiniteness because it invited recourse to an objective extrinsic event, condition or standard on which the amount was made to depend. All of these, inter alia, would have come within the embrace of the maxim that what can be made certain is certain (9 Coke, 47a). (*Cf. Backer Mgt. Corp. v. Acme Quilting Co*., 46 N.Y.2d 211, 219, 413 N.Y.S.2d 135, 385 N.E.2d 1062 (escalation of rent keyed to building employees' future wage increases); *City of Hope v. Fisk Bldg. Assoc*., 63 A.D.2d 946, 406 N.Y.S.2d 472 (rental increase to be adjusted for upward movement in US Consumer Price Index); *see, generally*, 87 A.L.R. 3d 986; Lease Provisions Providing for Rent Adjustment Based on Event or Formula Outside Control of Parties.)

[¶9] But the renewal clause here in fact contains no such ingredients. Its unrevealing, unamplified language speaks to no more than "annual rentals to be agreed upon". Its simple words leave no room for legal construction or resolution of ambiguity. Neither tenant nor landlord is bound to any formula. There is not so much as a hint at a commitment to be bound by the "fair market rental value" which the tenant's expert reported or the "reasonable rent" the Appellate Division would impose, much less any definition of either. Nowhere is there an inkling that either of the parties directly or indirectly assented, upon accepting the clause, to subordinate the figure on which it ultimately would insist, to one fixed judicially, as the Appellate Division decreed be done, or, for that matter, by an arbitrator or other third party. * * * *

[¶10] For all these reasons, the order of the Appellate Division should be reversed, with costs, and the orders of the Supreme Court, Suffolk County, reinstated. The certified question, therefore, should be answered in the negative. As to the plaintiff's appeal, since that party was not aggrieved by the order of the Appellate Division, the appeal should be dismissed (CPLR 5511), without costs. * * * *

JASEN, Judge (dissenting in part).

While I recognize that the traditional rule is that a provision for renewal of a lease must be "certain" in order to render it binding and enforceable, in my view the better rule would be that if the tenant can establish its entitlement to renewal under the lease, the mere presence of a provision calling for renewal at "rentals to be agreed upon" should not prevent judicial intervention to fix rent at a reasonable rate in order to avoid a forfeiture. Therefore, I would affirm the order of the Appellate Division for the reasons stated in the opinion of Justice LEON D. LAZER at the Appellate Division.

COOKE, C. J., and GABRIELLI, JONES and WACHTLER, JJ., concur with FUCHSBERG, J.
MEYER, J., concurs in a memorandum.
JASEN, J., dissents in part and on defendant's appeal votes to affirm in a memorandum.
On defendant's appeal: Order reversed, with costs, the orders of Supreme Court, Suffolk County, reinstated and the question certified answered in the negative.
On plaintiff's appeal: Appeal dismissed, without costs.

Questions:

1. Why wasn't the landlord held to have violated a duty to negotiate in good faith?

2. Why doesn't the court impose a reasonable rental rate under UCC § 2-305?

3. Suppose the parties had specified that rent on renewal will be current rent plus a percentage of current rent equal to the percentage by which the consumer price index has increased from time of lease formation to the time of renewal. Would this be enforceable?

4. Suppose the parties had specified that an arbitrator would set a rate. Would this be enforceable?

John CASSINARI v. Charles W. MAPES and Gloria Mapes Walker (1975)
Supreme Court of Nevada
542 P.2d 1069

OPINION
THOMPSON, Justice:

[¶1] This action was commenced by John Cassinari as lessee in response to notices to quit served upon him by Charles W. Mapes and Gloria Mapes Walker, lessors. He sought a court declaration regarding the status of his lease, an injunction against the lessors' interference therewith, and damages for breach of the covenant of quiet enjoyment. The lessors counterclaimed for restitution of the premises.

[¶2] The written lease, effective September 1, 1966, through August 31, 1971, at a monthly rent of $450, granted lessee 'the exclusive right to secure a new lease upon the property covered hereby for an additional period of Five (5) years from and after the expiration of the term hereof upon the same terms and conditions as herein set forth, at a monthly rental to be determined at that time.'

[¶3] Since the rent was not specified, nor a method provided for determining rent in case of disagreement, the district court ruled that the option to extend the term of the lease was too vague to be enforced. The court also declined to apply the doctrine of part performance to the circumstances before it. Consequently, injunctive relief was denied the lessee, and restitution of the premises to the lessors was ordered. By reason of its holding, the court was not obliged to decide other issues in the case. The lessee has appealed.

[¶4] As already noted, the original five-year term was to expire August 31, 1971. In March, and again in April, 1971 the lessee notified the lessors in writing of his intention to extend the lease for an additional five years, and in the latter notification, requested that a time and place be scheduled to determine the rent to be charged. Attorneys for lessee and lessors discussed the matter before August 31, 1971, but did not resolve it. The lessee and lessors did not themselves communicate with each other regarding the rent to be charged for the extended term.

[¶5] On August 17, 1971, before expiration of the original term, the President of the United States issued executive order No. 11615 which prohibited the raising of rents after its issue. This order was effective for six months.

[¶6] From September 1, 1971, until May 1974, the lessee continued paying $450 a month rent and the lessors accepted those monthly payments without protest. In May 1974, the lessors served two notices to quit upon the lessee, each demanding that he surrender the premises by June 1, 1974. The first of said notices asserted that the lessee was selling wine in violation of the lease, and the second notice advised that the lessors had elected to terminate the lease because the premises had become uninhabitable. This litigation followed.

[¶7] 1. A covenant to extend a lease upon such terms as may be agreed upon is a nullity and unenforceable since all the terms of the extension are left for future agreement. *City of Reno v. Silver State Flying Serv*., 84 Nev. 170, 175, 438 P.2d 257 (1968). In the case before us, however, all terms and conditions of the renewal were settled, leaving only the rental to later be determined. There is a division of authority as to enforceability in this circumstance. We are persuaded that the better view is to enforce such a provision for extension. * * * *

[¶8] It is appropriate to enforce such a provision since the clause for renewal constitutes part of the consideration for the original lease, and was without question intended by the parties to have meaning and to be effective. Surely we may not presume that one of the signatories agreed to the provision only in the secret belief that it would prove unenforceable. It is proper, then, to imply that the parties intended a reasonable rent for the extended period. If unable to agree, a court should be allowed to fix the rental since economic conditions are ascertainable with sufficient certainty to make the clause capable of enforcement. This view, we think, carries out the true intention of the parties, and does not constitute a making of a lease by the court in opposition to the desire of lessor and lessee.

[¶9] Consequently, we reverse the determination below that the provision for extending the term of the lease is too vague to be enforceable.

[¶10] 2. The lessee surrendered possession of the leased premises to the lessors in compliance with the decision below and did not endeavor to secure a stay pending appeal. The building, a portion of which was the subject of the lease in issue, has been demolished by the lessors and the land on which it was located is now being used as a parking lot. The lessee presently is conducting his restaurant business at another location. Of these facts we take judicial notice. NRS 47.130(2).

[¶11] Thus, it is apparent that the injunctive relief sought by the lessee in the first instance, and his request that the renewal covenant be specifically enforced, no longer tenders a viable issue.

[¶12] The lessee, however, also sought to recover damages * * * *. That issue was not fully litigated since the hearing centered upon the effectiveness of the renewal provision of the lease. In view of our disagreement with the trial court on that central issue, a remand is in order to consider the question of damages, if any, sustained by the lessee.

Reversed and remanded.

GUNDERSON, C.J., and BATJER, ZENOFF and MOWBRAY, JJ., concur.

Question: Is *Cassinari* consistent with *Schumacher*?

Uniform Commercial Code § 2-305. Open Price Term.

Uniform Commercial Code § 2-307. Delivery in Single Lot of Several Lots.

Uniform Commercial Code § 2-308. Absence of Specified Place for Delivery.

Uniform Commercial Code § 2-309. Absence of Specific Time Provisions; Notice of Termination.

Uniform Commercial Code § 2-310. Open Time for Payment or Running of Credit; Authority to Ship Under Reservation.

Uniform Commercial Code § 2-311. Options and Cooperation Respecting Performance.

PROBLEM 49. Alice and Cheshire agree that Alice will buy Cheshire's car. They sign the following paper:

Cheshire will sell his car to Alice, who will buy. Signed, *Alice Cheshire*

1. What is the price of Cheshire's car? Who decides?
2. When must Cheshire deliver?
3. Where must Cheshire deliver?
4. When must Alice pay?
5. Does a contract exist despite the lack of specification?

B. The Preliminary Agreement

The DACOURT GROUP, INC. v. BABCOCK INDUSTRIES, INC.,
FKI Babcock PLC, Dennis F. Flint, Jeffrey L. Currier, Peter W. Krehbiel,
and Robert M. Miller (1990)
United States District Court, D. Connecticut
747 F. Supp. 157

RULING ON MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

EGINTON, District Judge.

[¶1] Plaintiff, The Dacourt Group, Inc. ("Dacourt"), brought this action against defendants Babcock Industries, Inc. ("Babcock"), FKI Babcock PLC ("FKI"), the corporate parent of Babcock, and certain named officers of Babcock. This action arises out of a proposed $80 million sale-leaseback transaction involving commercial properties owned by Babcock. Dacourt, as the prospective purchaser and lessor, alleges that it suffered damages when, due to the actions of the various defendants, the sale and leaseback were not consummated. Jurisdiction in this action is based on diversity of citizenship, pursuant to 28 U.S.C. § 1332.

FACTS

[¶2] In 1988, Babcock and Dacourt entered into negotiations for the sale and leaseback of sixteen commercial properties owned by Babcock. The initial marketing package for the transaction circulated to potential investors by Babcock's broker made the representation that FKI would provide a "keep-well" letter to assure an institutional investor/lessor interested in the properties that its subsidiary, Babcock, would maintain a certain, unspecified, minimum net worth. This representation allegedly had the express approval of Babcock and FKI.

[¶3] On November 3, 1988 the representatives for the parties met to negotiate the terms of the sale-leaseback transaction. At the conclusion of the meeting, two documents were drafted to memorialize the negotiations. A "revised Offer to Purchase and Leaseback the [Babcock] Properties" (the "Revised Offer") was drafted and executed by the President of Dacourt. The Revised Offer was never subscribed to by Babcock or any authorized agent. Next, the attorney for Babcock drafted a letter (the "November 3 Letter") on Babcock's behalf which stated that "[w]e have come to a tentative agreement on basic terms." The letter was signed by Babcock's broker, David J. Daddario, who was retained for the transaction. Daddario had no express authority to execute documents or to enter into contractual agreements on behalf of Babcock. The specific terms of the FKI "keep-well" remained unresolved.

[¶4] Substantial negotiations did not resume until April 11, 1989. At this meeting Dacourt demanded from FKI, in addition to the "keep-well" guaranty, a complete indemnification for all environmental liabilities on the sixteen properties. FKI refused to satisfy either of Dacourt's demands and the transaction was placed on "hold."

[¶5] Dacourt alleges that the individual defendants contacted FKI and attempted to discourage it from completing the Dacourt financing by impressing upon FKI that a contemplated management buy-out of Babcock would be less likely if Babcock had closed the sale-leaseback transaction with Dacourt. Dacourt maintains that as a result of these communications FKI notified the parties that it would not be willing to provide a "keep-well" agreement or any other form of guaranty. In May, 1989, Dacourt was informed that Babcock would not proceed with the sale-leaseback because FKI was auctioning Babcock.

[¶6] In its eleven count complaint, Dacourt asserts that Babcock is liable for breach of contract, breaches of obligations to negotiate in good faith, negligent misrepresentation and on promissory estoppel grounds. Dacourt claims that FKI is liable to it under promissory estoppel because Dacourt relied to its detriment on FKI's representation that it would provide a "keep-well" guaranty as part of the sale-leaseback transaction. Dacourt also asserts claims for tortious interference against the individual defendants arising from the named officers' alleged attempts to influence FKI to abandon the sale-leaseback transaction. Defendants have moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(2) for lack of jurisdiction over FKI, pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted, or for summary judgment.

I. Motion to Dismiss on Jurisdictional Grounds
[Ricks-The court's discussion of the defendants' 12(b)(2) motion is omitted.]

II. Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted or for Summary Judgment
* * * *

A. Breach of Contract Claim

[¶7] The threshold issue to be addressed is whether the parties ever entered into a binding agreement for the sale-leaseback transaction. Plaintiff argues that the Revised Offer and the November 3 Letter evidence the existence of an agreement between the parties. The Court does not find that the parties, as of November 3, 1988, had come to an agreement as to the terms of the transaction.

[¶8] A binding agreement can arise, if the parties so intend, prior to the signing of a formal contract. *Arcadian Phosphates, Inc. v. Arcadian Corp*., 884 F.2d 69 (2d Cir. 1989); *Teachers Ins. and Annuity Assoc. v. Tribune Co*., 670 F. Supp. 491 (S.D.N.Y. 1987). The Court does not find Babcock ever evidenced the requisite intent to be bound by the documentation prepared on November 3. It is clear from the documents and the affidavits that the Revised Offer reflected the status of negotiations as of that date, but that material terms remained open for negotiation. The Revised Offer expressly called for the preparation of formal contractual documentation, and escrow deposit and financial and environmental covenants remained material open terms. “There is a strong presumption against finding binding obligation in agreements which include open terms, call for future approvals and expressly anticipate future preparation and execution of documents.” Teachers Ins. and Annuity Assoc., 670 F. Supp. at 499. The absence of an expression of intent by an officer of Babcock to be bound by the terms of the Revised Offer and the fact that material terms remained unresolved as of November 3, 1988, lead the Court to conclude that as a matter of law a binding agreement for the sale-leaseback transaction did not exist between Dacourt and Babcock. Summary judgment is therefore granted in favor of the defendants on Count I of the complaint.

B. Claims for Breach of the Duty of Good Faith

[¶9] Counts II, V and IX of the complaint assert claims that Babcock breached its duty to negotiate in good faith. Absent an agreement between the parties, no duty of good faith can be implied. *Reprosystem B.V. v. SCM Corp*., 727 F.2d 257, 264 (2d Cir.), *cert. denied*, 469 U.S. 828, 105 S. Ct. 110, 83 L.Ed.2d 54 (1984). In opposing the motion for summary judgment, the plaintiff asserts that the November 3 Letter “created a binding preliminary agreement” sufficient to support the finding of an implied duty of good faith. *Teachers Ins. and Annuity Assoc. v. Tribune*, 670 F. Supp. at 498. Based upon the evidence presented, the Court does not find that, as of November 3, 1988, a binding preliminary agreement sufficient to support an implied duty of good faith existed. The parties negotiating this transaction were experienced professionals and there is insufficient evidence to conclude that there was a bilateral intention to be bound by the November 3 documentation prior to the execution of a formal contract or prior to the resolution, through further negotiation, of the numerous open terms. Given the absence of an enforceable obligation, no duty of good faith can be implied. * * * *

D. Claims for Promissory Estoppel

[¶10] Counts VI and VII assert claims against Babcock and FKI for promissory estoppel arising from representations or promises which were allegedly made by the defendants during the negotiations. In light of the Court's ruling, *supra*, that the court lacks jurisdiction over FKI, these claims will only be analyzed with respect to Babcock.

[¶11] A claim for promissory estoppel requires "[1] a clear and unambiguous promise; [2] a reasonable and foreseeable reliance by the party to whom the promise is made; and [3] an injury sustained by ... reason of his reliance." *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 78 (2d Cir. 1984). Dacourt bases its promissory estoppel claims on Babcock's alleged representations to third parties that "Babcock had agreed to the Dacourt financing," and Babcock's alleged representations to Dacourt that it would "proceed diligently to negotiate all relevant documents" and that "FKI would provide a keep-well agreement." The Court finds that while these representations may have been made they do not constitute "clear and unambiguous promises" sufficient to support a claim for damages on promissory estoppel grounds. Each of these representations were made in the course of negotiations and are too vague to satisfy the requirement of a "clear and unambiguous promise" on the part of the promisee. *Id.*; *D'Ulisse-Cupo v. Board of Directors*, 202 Conn. 206, 213, 520 A.2d 217, 221 (1987). At the time these alleged promises were made, material terms remained unresolved regarding each of the representations. Given the context in which the alleged representations were made, the Court concludes that no "clear and unambiguous promises" were made by Babcock and the defendant is entitled to summary judgment on Counts VI and VII of the complaint.

E. Claims for Negligent Misrepresentation

[¶12] In Count VIII of the complaint, Dacourt alleges that Babcock's representation in the marketing package circulated for the transaction and in the November 3 documentation that a "keep-well" guaranty would be provided constitutes a negligent misrepresentation. Plaintiff has failed to submit any credible evidence which would lead the Court to conclude that at the time the representations were made Babcock knew or had reason to know they were false. Absent evidence to support plaintiff's claims that Babcock knew or should have known that FKI's willingness to provide a "keep-well" guaranty was not certain, the Court finds such claims unpersuasive. Rather, it appears the "keep-well" guaranty was withdrawn as a result of the flow of the negotiations. The withdrawal of guaranties or indemnifications being a result not uncommon in the negotiation of sophisticated corporate transactions. Finding no genuine issue of material fact as to the negligent misrepresentation claim, the defendants are entitled to summary judgment on Count VIII of the complaint.

CONCLUSION

[¶13] For the foregoing reasons, FKI's motion to dismiss is GRANTED and the only claims which remain to be litigated are Counts X and XI of the complaint. Summary judgment is GRANTED on all other counts in accordance with this ruling.
SO ORDERED.

Questions:

1. Why didn't the court hold that Babcock breached a duty of good faith?

2. Why did the promissory estoppel claim fail?

3. What difference do you spot between promissory estoppel as formulated in this case and in R2K § 90?

CHANNEL HOME CENTERS v. Frank GROSSMAN,
Tri Star Associates, Baker Investments Corporation,
Cedarbrook Associates, a Pennsylvania Limited Partnership (1986)
United States Court of Appeals, Third Circuit
795 F.2d 291

OPINION OF THE COURT
BECKER, Circuit Judge.

[¶1] This diversity case presents the question whether, under Pennsylvania law, a property owner's promise to a prospective tenant, pursuant to a detailed letter of intent, to negotiate in good faith with the prospective tenant and to withdraw the lease premises from the marketplace during the negotiation, can bind the owner for a reasonable period of time where the prospective tenant has expended significant sums of money in connection with the lease negotiations and preparation and where there was evidence that the letter of intent was of significant value to the property owner. We hold that it may. We therefore vacate and reverse the district court's determination that there was no enforceable agreement, and remand the case for trial.

I.

[¶2] Appellant Channel Home Centers ("Channel"), a division of Grace Retail Corporation, operates retail home improvement stores throughout the Northeastern United States, including Philadelphia and its suburbs. Appellee Frank Grossman, a real estate broker and developer, with his sons Bruce and Jeffrey Grossman, either owns or has a controlling interest in appellees Tri-Star Associates

("Tri-Star"), Baker Investment Corporation ("Baker"), and Cedarbrook Associates, a Pennsylvania Limited Partnership ("Cedarbrook").*

[¶3] Between November, 1984 and February, 1985, the Grossmans, through Baker, were in the process of acquiring ownership of Cedarbrook Mall ("the mall") located in Cheltenham Township, Pennsylvania, a northern suburb of Philadelphia. During these months, Baker was the equitable owner of the mall, Tri-Star was acting as the mall's leasing agent, and legal title was in Equitable Life Assurance Society. It was anticipated that, upon closing in February, 1985, Baker would become both legal and equitable owner of the mall. App. at 218a- 219a, 496a. The Grossmans intended to revitalize the mall, which had fallen on hard times prior to their acquisition, through an aggressive rehabilitation and leasing program.

[¶4] In the third week of November, 1984, Tri-Star wrote to Richard Perkowski, Director of Real Estate for Channel, informing him of the availability of a store location in Cedarbrook Mall which Tri-Star believed Channel would be interested in leasing. Perkowski expressed some interest, and met the Grossmans on November 28, 1984. After Perkowski was given a tour of the premises, the terms of a lease were discussed. App. at 457a, 496a. Frank Grossman testified that "we discussed various terms, and these terms were, some were loose, some were more or less terms." App. at 364a, 496a- 497a.

[¶5] In a memorandum dated December 7, 1984, to S. Charles Tabak, Channel's senior vice-president for general administration, Perkowski outlined the salient lease terms that he had negotiated with the Grossmans. App. at 97a. On or about the same date, Tabak and Leon Burger, President of Channel, visited the mall site with the Grossmans. They indicated that Channel desired to lease the site. App. at 413a-415a. Frank Grossman then requested that Channel execute a letter of intent that, as Grossman put it, could be shown to "other people, banks or whatever." App. at 366a-367a. Tabak testified that the Grossmans wanted to get Channel into the site because it would give the mall four "anchor" stores. App. at 414a. Apparently, Frank Grossman was anxious to get Channel's signature on a letter of intent so that it could be used to help Grossman secure financing for his purchase of the mall. App. at 366a-367a, 497a.

[¶6] On December 11, 1984, in response to Grossman's request, Channel prepared, executed, and submitted a detailed letter of intent setting forth a plethora of lease terms which provided, inter alia, that

> [t]o induce the Tenant [Channel] to proceed with the leasing of the Store, you [Grossman] will withdraw the Store from the rental market, and only negotiate the above described leasing transaction to completion.

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* Tri-Star Associates is a fictitious name under which Frank Grossman trades; Baker Investment Corporation is a corporation whose sole shareholders are Frank Grossman and his sons Bruce and Jeffrey; Cedarbrook Associates is a Pennsylvania limited partnership whose general partner is Baker and whose limited partners are Frank, Bruce, and Jeffrey Grossman. App. at 208(a)-212(a).

> Please acknowledge your intent to proceed with the leasing of the store under the above terms, conditions and understanding by signing the enclosed copy of the letter and returning it to the undersigned within ten (10) days from the date hereof.

App. at 31a.*

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* The full December 11, 1984 letter, on Channel stationery, reads as follows:

> Dear Mr. Grossman:
>
> The Channel Home Centers Division of Grace Retail Corporation has approved the leasing of a store at the above described location subject to the terms and conditions of this letter. The purpose of this letter is to express the understanding under which an Agreement of Lease, prepared by Tenant, but in a mutually satisfactory form, is to be executed by the owner of the Shopping Center, as Landlord and Grace Retail Corporation, as Tenant. The Landlord will lease to the Tenant the following described Store located in the captioned Shopping Center, all as shown and described on the copy of your leasing brochure attached to this letter and on the following terms:
>
> 1. Store: Existing 70,400 sq. ft. area designated in the attached leasing brochure as space "1" on lower level of mall beneath Jamesway Department Store, together with use of outdoor area for storage and sales. Such area located in portion of parking lot adjacent to space "1".
>
> 2. Term & Rent: Term of twenty-five (25) years commencing the date Tenant opens for business during which Tenant will pay Annual Rent in the amounts set forth below plus Percentage Rent of two (2) percent of Gross Sales during each lease year in excess of the Gross Sales Break
> Point set forth below:

Lease Year	Annual Rent	Gross Sales Break Point
1-5	$112,500	$10.0 MM
6-10	137,500	11.0 MM
11-15	162,500	12.1 MM
16-20	187,500	13.3 MM
20-25	212,500	14.6 MM

> 3. Option Periods: Tenant's right to extend for four (4) option periods of five (5) years each, on the same terms as during the initial term, except that during each exercised option period, the Annual Rent shall be increased once by $25,000 per year, and the Gross Sales Break Point shall be increased by 10% over the sums in effect for the prior 5-year period (i.e. during Lease Years 26-30 of first option period, Annual Rent shall be $237,500 per year and Gross Sales Break Point shall be $16.06 million);
>
> 4. Real Estate Taxes: Landlord's obligation, Tenant does not make contributions;
>
> 5. Common Area Maintenance: Landlord's obligation to maintain and repair existing 850 car parking lot in northeast portion of Shopping Center, which will be the Tenant's primary parking area, and other common areas of the Shopping Center; Tenant does not make contributions;
>
> 6. Landlord's Pre-term Responsibilities: Landlord will deliver Store empty and broom clean including the removal of all partitions, and with HVAC system in working order. The Landlord will submeter and locate the major electric service to the area of the Store, as Channel designates. Landlord will remove the existing escalator and provide escape stairs as per fire code, and will insure that the building is free of any asbestos hazard. The service elevator and two receiving bays on the lower level, will be boxed-out from the Tenant's Store, to serve the upper levels of the Shopping Center.
>
> 7. Maintenance & Repairs: Landlord will maintain repair and replace if necessary the HVAC system, roof and structural and exterior portions of the building. Tenant

[¶7] Frank Grossman promptly signed the letter of intent and returned it to Channel. App. At 499a. Grossman contends that Perkowski and Tabak also agreed orally that a draft lease be submitted within thirty (30) days. App. at 331a-332a, 365-366a. Perkowski and Tabak denied telling Grossman that a lease would be forthcoming within 30 days or any finite period of time. App. at 445a, 473a.

[¶8] Thereafter, both parties initiated procedures directed toward satisfaction of lease contingencies. The letter of intent specified that execution of the lease was expressly subject to each of the following: (1) approval by Channel's parent corporation, W.R. Grace & Company ("Grace"), of the essential business terms of the lease; (2) approval by Channel of the status of title for the site; and (3) Channel's obtaining, with Frank Grossman's cooperation, all necessary permits and zoning variances for the erection of Channel's identification signs. App. at 30a; see *supra* note 2.

[¶9] On December 14, 1984, Channel directed the Grace legal department to prepare a lease for the premises. Channel's real estate committee approved the lease site on December 20, 1984. App. at 472a. Channel planning representatives

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responsible for building interior and store front and will pay its prorate share of HVAC usage. Execution of the Agreement of Lease by Landlord and Tenant is specifically subject to each of the following:

a. Tenant's authority: Approval by Tenant's parent corporation, W.R. Grace & Co., and its Retail Group, of the essential business terms of the Agreement of Lease;

b. Legal Title: Approval by the Tenant of the status of title for the site, including any access easements.

c. Sign Contingency: The Tenants obtaining all necessary permits with the Landlords cooperation (including obtaining any sign variances) for the erection of Tenant's identification signs, on two (2) pylons located on Cheltenham Ave. and Easton Ave., respectively, and two building signs on the front of the mall and the front of the Store.

The Tenant has and will not incur any brokerage fees in connection with this proposed lease. Any expenditure by the Landlord or Tenant prior to execution of the Agreement of Lease shall be at the party's own risk. A store opening date during the first half of 1985 is planned. Lease preparation, obtaining the sign permits and approvals described above and delivery of possession of the Store to Tenant would commence immediately and proceed to achieve that estimated opening date. To induce the Tenant to proceed with the leasing of this Store, you will withdraw the Store from the rental market, and only negotiate the above described leasing transaction to completion. Please acknowledge your intent to proceed with the leasing of the captioned store under the above terms, conditions and understanding by signing the enclosed copy of this letter and returning it to the undersigned within ten (10) days from the date hereof.

Very truly yours,

/s/

S.C. Tabak

Senior Vice President

Channel Home Center Division

App. at 29a-31a.

visited the premises on December 21, 1984, to obtain measurements for architectural alterations, renovations and related construction. App. at 379a. Detailed marketing plans were developed, building plans drafted, delivery schedules were prepared and materials and equipment deemed necessary for the store were purchased. App. at 91a-96a, 99a-135a, 422a-423a, 517a- 547a. The Grossmans applied to the Cheltenham Township building and zoning committee for permission to erect commercial signs for Channel and other tenants of the mall. App. at 15a.

[¶10] On January 11, 1985, Frank Shea, Esquire, of the Grace legal department sent to Frank Grossman two copies of a forty-one (41) page draft lease and, in a cover letter, requested copies of several documents to be used as exhibits to the lease. App. at 43a- 44a. On January 16, 1985, Frank Shea received the following letter from Bruce Grossman:

> Dear Mr. Shea:
>
> As you requested, enclosed please find the following documents:
>
> 1) A copy of a recent title report for the Cedarbrook Mall (the "Mall"),
>
> 2) A legal description of the Mall,
>
> 3) A site plan of the Mall, and
>
> 4) A description of the Landlord's construction.
>
> As we discussed, we have commenced work on the Channel location at the Mall and would, therefore, appreciate your assistance in expediting the execution of the Channel lease.
>
> I look forward to hearing from you soon.
>
> Very truly yours,
>
> BAKER INVESTMENT CORPORATION
>
> /s/
>
> Bruce S. Grossman,
>
> Executive Vice President

App. at 16a. On January 21, 1985, Frank Shea received a copy of a letter from Frank Grossman to Richard Perkowski dated January 17, 1985. It provided:

> At Frank Shea's request, enclosed is a site plan for the Cedarbrook Mall and also a copy of the proposed pylon sign design. We look forward to executing the lease agreement in the very near future. If you have any questions, please feel free to call me.

App. at 46a.

[¶11] Bruce Grossman called Shea on January 23, 1985 to discuss the lease. The only item Grossman could recall discussing pertained to the "use" clause in the lease, specifically whether Channel could use the site for warehouse facilities at some future point. App. at 286a-287a, 502a. Apparently, Grossman then related other areas of concern and Shea suggested that a telephone conference be arranged with all parties the following week. App. at 382a, 502a. Grossman agreed. According to Grossman, Shea was supposed to initiate the conference call; however, when the call was not forthcoming, Grossman did not attempt to reach Shea or anyone else at Channel. App. at 389a-390a. Shea understood that the Grossmans were going to discuss the lease among themselves and get back to him. App. at 448a.

[¶12] On or about January 22, 1985, Stephen Erlbaum, Chairman of the Board of Mr. Good Buys of Pennsylvania, Inc. ("Mr. Good Buys"), contacted Frank Grossman. Like Channel, Mr. Good Buys is a corporation engaged in the business of operating retail home improvement centers; it is a major competitor of Channel in the Philadelphia area. App. at 20a-21a. Erlbaum advised Grossman that Mr. Good Buys would be interested in leasing space at Cedarbrook Mall, and sent Grossman printed information about Mr. Good Buys. App. at 202a.

[¶13] On January 24, 1985, construction representatives from Channel met at the mall site to go over building alterations and designs. App. at 287a-288a, 503a. The next day, January 25, 1985, Erlbaum and other representatives from Mr. Good Buys met with the Grossmans and toured Channel's proposed lease location. App. at 503a. When Erlbaum expressed an interest in leasing this site, lease terms were discussed. *Id.*

[¶14] On February 6, 1985, Frank Grossman notified Channel that "negotiations terminated as of this date" due to Channel's failure to submit a signed and mutually acceptable lease for the mall site within thirty days of the December 11, 1984 letter of intent. App. at 42a. (This was the first and only written evidence of the purported thirty day time limit. The letter of intent contained no such term. See discussion *supra* at 8.) On February 7, 1985, Mr. Good Buys and Frank Grossman executed a lease for the Cedarbrook Mall. App. at 147a-196a. Mr. Good Buys agreed to make base-level annual rental payments which were substantially greater than those agreed to by Channel in the December 11, 1984 letter of intent. App. at 147a.* Channel's corporate parent, Grace, approved the terms of Channel's proposed lease on February 13, 1985. App. at 443a-444a.

II.

[¶15] Channel commenced this diversity action, 28 U.S.C. § 1332(a), in the district court for the Eastern District of Pennsylvania on February 15, 1985. Count I of Channel's complaint alleged that appellees' conduct violated the December 11, 1984 letter of intent and constituted a breach of contract; Count II was in the form of a motion for a temporary restraining order ("TRO") and preliminary injunction

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* Channel had agreed to rental payments of $112,500 for years 1-5; $137,500 for years 6-10; $162,500 for years 11-15; $187,500 for years 16- 20, and $212,500 for years 20-25. Additionally, Channel agreed to pay percentage rent of two (2) percent of gross sales above the following gross sales break points: $10,000,000 for years 1-5; $11,000,000 for years 6- 10; $12,100,000 for years 11-15; $13,300,000 for years 16-20, and $14,600,000 for years 20-25. See *supra* note 3. Mr. Good Buys agreed to rental payments of $249,750 for years 1-5; $360,750 for years 6-10; $388,500 for years 11-15; $416,250 for years 6-20; and $444,000 for years 21-25. App. at 147a. Mr. Good Buys did not have to pay additional percentage rent based on gross sales, however. Id.

to restrain appellees from violating the letter of intent by entering into a lease agreement with Mr. Good Buys for the Cedarbrook Mall premises. App. at 4a-8a. In a supporting affidavit, S. Charles Tabak averred that Channel had substantially completed all tasks necessary to meet the opening date contemplated in the letter of intent and that it had made out- of-pocket expenditures to this end in the sum of $25,000. App. at 9a-14a.

[¶16] On February 15, 1985 the district court granted a TRO restraining and enjoining appellees from surrendering or tendering possession of the premises described in the letter of intent to anyone other than Channel pending a determination of Channel's motion for preliminary injunction. App.at 2a. A preliminary injunction hearing was held on February 25, 1985. App.at 2a. At the hearing, which lasted approximately ten minutes, the district court requested that live testimony be limited to matters not covered in depositions. The testimony taken was not fully transcribed. See Brief of Appellant at 3.

[¶17] Thereafter, on March 26, 1985, the district court filed a Memorandum Opinion and Order that consolidated Channel's motion for a preliminary injunction with the trial on the merits. App. at 495a-508a. Fed. R. Civ. P. 65(a)(2). The court's Order denied Channel's motion for preliminary injunction and entered judgment in favor of appellees. Additionally, the Order denied as moot Mr. Good Buy's motion for leave to intervene as a party plaintiff.

[¶18] In its opinion, the district court rejected Channel's arguments that the letter of intent constituted either a valid unilateral or a valid bilateral agreement. The court concluded that the letter of intent (1) did not bind the parties to any obligation; (2) was unenforceable for lack of consideration; and, (3) was insufficient to satisfy the Pennsylvania Statute of Frauds for leases, inasmuch as it contemplated a future negotiation, Pa.Stat.Ann. tit. 68 § 250.202-203 (Purdon's 1965 & Supp.1986).

[¶19] On April 5, 1985, Channel filed a motion for reconsideration, arguing that the district court erred by consolidating its denial of the preliminary injunction with an adjudication on the merits without prior notice to the parties. Channel argued that, because the preliminary injunction hearing had been held only ten days after Channel had filed its complaint, there had been insufficient time to complete discovery. Full evidentiary development, Channel contended, required substantially more discovery by way of interrogatories, document requests, and depositions from other persons and entities including but not limited to Jeffrey Grossman (a principal of appellee's Baker Investment Corp. and Cedarbrook Associates); Toys-R-Us and Jamesway (other anchor stores at Cedarbrook Mall); and Equitable Life Assurance Society (the former legal owner of Cedarbrook Mall which, Channel argued, had committed to permanent financing of the project on the strength of Channel's letter of intent commitment).

[¶20] Upon reconsideration, the district court entered an order on May 7, 1985, affirming its March 26, 1985 judgment, with the proviso that Channel would be permitted to present additional evidence at another hearing if it made a request to do so within fifteen days of the date of the order. App. at 510a- 515a. The district court stated that, despite the lack of notice and Channel's averments to the contrary, "it was of the understanding that the parties had agreed to the consolidation." App. at 514a.* Channel did not request another evidentiary hearing. This appeal followed. * * * *

IV.

[¶21] Channel's second contention on appeal is that the district court erred in holding that the letter of intent was unenforceable and did not bind the parties to any obligation. Channel argues that the letter, coupled with the surrounding circumstances, constitutes a binding agreement to negotiate in good faith. Appellees rejoin that a promise to negotiate in good faith or to use best efforts to reduce to formal writing an agreement between the parties is enforceable only if the parties have in fact reached agreement on the underlying transaction. Because it is conceded that the letter of intent did not constitute a final agreement between the parties, appellees contend that it is merely evidence of preliminary negotiations and, as such, is unenforceable at law. Appellees further argue that even if the agreement were an otherwise enforceable contract, the letter of intent and any promises contained therein are unenforceable by virtue of Channel's lack of consideration. The parties agree that Pennsylvania law applies to the case.

[¶22] It is hornbook law that evidence of preliminary negotiations or an agreement to enter into a binding contract in the future does not alone constitute a contract. *See Goldman v. McShain*, 432 Pa. 61, 68, 247 A.2d 455, 458 (1968); *Lombardo v. Gasparini Excavating Co.*, 385 Pa. 388, 392, 123 A.2d 663, 666 (1956); *Kazanjian v. New England Petroleum Corp.*, 332 Pa. Super. 1, 7, 480 A.2d 1153, 1157 (1984); see Restatement (Second) of Contracts § 26 (1979). Appellees believe that this doctrine settles this case, but, in so arguing, appellees misconstrue Channel's contract claim. Channel does not contend that the letter of intent is binding as a lease or an agreement to enter into a lease. Rather, it is Channel's position that this document is enforceable as a mutually binding obligation to negotiate in good faith.† By unilaterally terminating negotiations with Channel and precipitously entering into a lease agreement with Mr. Good Buys, Channel ar-

* The district court also rejected Channel's additional contention that the letter of intent should be enforced under the doctrine of promissory estoppel. In light of our disposition on appeal, we need not reach the propriety of the district court's determinations that neither a unilateral contract analysis nor the doctrine of promissory estoppel is applicable to the instant case.

† Because Channel does not argue that the letter of intent is enforceable as a lease between the parties, appellees' reliance upon the district court's conclusion that the letter of intent is insufficient to satisfy the Pennsylvania Statute of Frauds for Leases, Pa.Stat.Ann. tit. 68, §§ 250.202-203 (Purdon 1965 & Supp.1986), is misplaced. The district court therefore erred in holding that the letter of intent was insufficient to satisfy the Statute of Frauds for leases.

gues, Grossman acted in bad faith and breached his promise to "withdraw the Store from the rental market and only negotiate the above-described leasing transaction to completion." See *supra* note 2.

[¶23] Under Pennsylvania law, the test for enforceability of an agreement is whether both parties have manifested an intention to be bound by its terms and whether the terms are sufficiently definite to be specifically enforced. * * * * Consideration "confers a benefit upon the promisor or causes a detriment to the promisee and must be an act, forbearance or return promise bargained for and given in exchange for the original promise." *Curry v. Estate of Thompson*, 332 Pa. Super. 364, 371, 481 A.2d 658, 661 (1984).

[¶24] Although no Pennsylvania court has considered whether an agreement to negotiate in good faith may meet these conditions, the jurisdictions that have considered the issue have held that such an agreement, if otherwise meeting the requisites of a contract, is an enforceable contract. *See*, e.g., *Thompson v. Liquichimica of America, Inc.*, 481 F. Supp. 365, 366 (E.D.N.Y. 1979); ("Unlike an agreement to agree, which does not constitute a closed proposition, an agreement to use best efforts [or to negotiate in good faith] is a closed proposition, discrete and actionable."); *accord Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 264 (2d Cir. 1984); *Chase v. Consolidated Foods Corp.*, 744 F.2d 566, 571 (7th Cir. 1984); *Arnold Palmer Golf Co. v. Fuqua Industries Inc.*, 541 F.2d 584 (6th Cir. 1976); *Itek Corp. v. Chicago Aerial Industries, Inc.*, 248 A.2d 625 (Del. 1968); Restatement (Second) of Contracts § 205 comment (c) (1979) ("Good faith in negotiation"); *see generally* Kessler and Fine, Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract; a Comparative Study, 77 Harv. L. Rev. 401 (1964).[*] We are satisfied that Pennsylvania would follow this rule. Applying Pennsylvania law, then, we must ask (1) whether both parties manifested an intention to be bound by the agreement; (2) whether the terms of the agreement are sufficiently definite to be enforced; and (3) whether there was consideration.

[¶25] In determining the parties' intentions concerning the letter of intent, we must examine the entire document and the relevant circumstances surrounding its adoption. *United Refining Co. v. Jenkins*, 410 Pa. 126, 137, 189 A.2d 574, 580 (1963); *Hillbrook Apartments, Inc. v. Nyce Crete Co.*, 237 Pa. Super. 565, 572, 352 A.2d 148, 151 (1975). The letter of intent, signed by both parties, provides that "[t]o induce the Tenant [Channel] to proceed with the leasing of the Store, you [Grossman] will withdraw the Store from the rental market, and only negotiate the above described leasing transaction to completion." See *supra* note 2. The agreement thus contains an unequivocal promise by Grossman to withdraw the store from the rental market and to negotiate the proposed leasing transaction with Channel to completion.

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[*] Good faith in the bargaining or formation stages of the contracting process is distinguishable from the common law duty to perform in good faith. [Citations omitted.]

[¶26] Evidence of record supports the proposition that the parties intended this promise to be binding. After the letter of intent was executed, both Channel and the Grossmans initiated procedures directed toward satisfaction of lease contingencies. Channel directed its parent corporation to prepare a draft lease; Channel planning representatives visited the lease premises to obtain measurements for architectural alterations, renovations, and related construction. Channel developed extensive marketing plans; delivery schedules were prepared and material and equipment deemed necessary for the store were purchased. The Grossmans applied to the township zoning committee for permission to erect Channel signs at various locations on the mall property. Channel submitted a draft lease on January 11, 1985, and the parties, through correspondence and telephone conversations and on-site visits, exhibited an intent to move toward a lease as late as January 23, 1985. See discussion *supra* at 294-96. Accordingly, the letter of intent and the circumstances surrounding its adoption both support a finding that the parties intended to be bound by an agreement to negotiate in good faith.

[¶27] We also believe that Grossman's promise to "withdraw the Store from the rental market and only negotiate the above described leasing transaction to completion," viewed in the context of the detailed letter of intent (which covers most significant lease terms, see *supra* n.2), is sufficiently definite to be specifically enforced, provided that Channel submitted sufficient legal consideration in return.

[¶28] Appellees argue that "[n]o money or thing of value was paid, either at the time of the letter or at any other time that would convert an agreement to negotiate into some enforceable type of contract." Brief of Appellees at 16. We disagree. It seems clear that the execution and tender of the letter of intent by Channel was of substantial value to Frank Grossman. At the time the letter of intent was executed, Grossman was in the process of obtaining financing for his purchase of the mall. When it became apparent to Grossman that Channel—a major corporate tenant—was seriously interested in leasing the mall site, he requested that Channel sign a letter of intent which, as Grossman put it, could be shown to "other people, banks or whatever with a view to getting permanent financing." App. at 366a-367a. Fully aware of Grossman's desire to obtain financing, Channel sought to solidify its bargaining position by requesting that Grossman also sign the letter of intent and promise to "withdraw the store from the rental market and only negotiate the above- described leasing transaction to completion." There being evidence that value passed from each party to the other, we conclude that the record would support a finding that Channel's execution and tender of the letter of intent conferred a bargained for benefit on Grossman which was valid consideration for Grossman's return promise to negotiate in good faith.

V.

[¶29] In sum, we agree with Channel that the record contains evidence that supports a finding that the parties intended to enter into a binding agreement to negotiate in good faith. We further hold that the agreement had sufficient specificity to make it an enforceable contract if the parties so intended, and that consideration passed between the parties. We will therefore remand this case to the district court for trial.

[¶30] At least two significant issues must be resolved at trial. First, although our review of the record reveals that there is sufficient evidence to support a finding that the parties intended to be bound by the letter of intent, we do not hold that the evidence requires this conclusion. At trial, evidence will presumably be brought to light that will aid the trier of fact in deciding this issue.

[¶31] As noted above, there is also some dispute over whether there was a time limit on the negotiations that was not specified in the letter of intent. Because the district court erroneously concluded that the letter of intent was unenforceable as a matter of law, it made no factual findings with regard to this critical term. If, as appellees suggest, Channel orally agreed to forward a draft lease within 30 days of the date on which the letter of intent was executed, Channel's failure to do so could have terminated the agreement. Alternatively, if, as Channel argues, the parties did not fix a definite time for the duration of negotiations, then a reasonable time would be applicable. *See Darlington v. General Electric Corp.*, 350 Pa. Super. 183, 192-93, 504 A.2d 306, 310-11 (1986), and a determination must be made as to what constitutes a reasonable time under all the circumstances.

[¶32] The judgment of the district court will therefore be reversed, and the case remanded for further proceedings consistent with this opinion.

Chapter 9. Limits on the Reach of Contract Law

A. Public Policy

Hazel Virginia REHAK v. Archie S. MATHIS (1977)
Supreme Court of Georgia
238 S.E.2d 81

BOWLES, Justice.

[¶1] This is an appeal from an order of the Superior Court of Floyd County granting appellee's motion for summary judgment.

[¶2] The appellant, Hazel Rehak, filed an action in equity against the appellee, Archie Mathis, and in her complaint alleged that the parties, in 1957, had jointly purchased a home in Floyd County, Georgia. For the first two years, 1957 and 1958, she paid all installment payments upon the home. From 1959 through February of 1975, the appellant and appellee each made one-half of the monthly installment payments on the house. The complaint further alleged that both parties lived and cohabited together in the house for 18 years, during which time, appellant alleged she "cooked for, cleaned for, and in general cared for the comforts, needs, and pleasures of the (appellee) . . . while they cohabited together." The appellant alleged that on numerous occasions the appellee told her that the house belonged to them jointly and that for the rest of her life he would support and take care of her and her financial needs.

[¶3] In December of 1975, the appellee moved out of the house and told the appellant to vacate the home. The appellee refused to pay her anything for her purchase money interest in the house or for the services rendered to the appellee over the 18-year period during which they cohabited.

[¶4] The appellant, in January of 1976, filed a verified petition for divorce against appellee in the Superior Court of Floyd County, wherein the appellant admitted that she cohabited with the appellee for 18 years. Following repeated hearings and negotiations between the parties, the appellant filed a motion to dismiss the divorce action with prejudice. The court entered an order dismissing the complaint, said dismissal to affect the question of marriage only and in no way to affect any future civil suit of equitable action by either party against the other.

[¶5] Following the dismissal, the appellant brought the present equitable action seeking an award of $100.00 a month for the 18 years that she lived with and took care of the needs of the appellee and additionally sought exclusive title and possession to the house in Floyd County.

[¶6] Subsequent to the filing of the complaint a motion for summary judgment was made by the appellee, which motion was supported by a brief. The appellant filed no response to appellee's motion. The court entered an order granting the appellee's motion for summary judgment for reason that there was no genuine issue as to any material fact and, therefore, appellee was entitled to judgment as a matter of law. The appellant appeals that order.

[¶7] Summary judgment will be granted only where there is no issue as to any material fact, and as a matter of law the moving party is entitled to a judgment. Code Ann. s 81A-156(c). * * * *

[¶8] In the instant case, the appellee moved for a summary judgment contending "the pleadings in this case conclusively show that all property and monetary claims asserted thereon are based upon a meretricious relationship, which claims are not recoverable because contrary to the public policy of this State."

[¶9] It is well settled that neither a court of law nor a court of equity will lend its aid to either party to a contract founded upon an illegal or immoral consideration. Code Ann. s 20-501; *Wellmaker v. Roberts*, 213 Ga. 740, 101 S.E.2d 712 (1958); *Watkins v. Nugen*, 118 Ga. 372, 45 S.E. 262 (1903).

[¶10] The appellee's motion for summary judgment was supported by the verified pleadings in the former complaint for divorce between the parties, and the pleadings in the present case. The parties being unmarried and the appellant having admitted the fact of cohabitation in both verified pleadings, this would constitute immoral consideration under Code Ann. s 20-501, and it was appellant's duty to come forward and introduce evidence which would rebut that conclusion. Appellant having failed to introduce any rebuttal evidence sufficient to show to the court that there was a genuine issue of fact to be decided, it was not error for the court to grant summary judgment in favor of the appellee.

[¶11] Judgment affirmed.

All the Justices concur, except HALL and HILL, JJ., who dissent.

HILL, Justice, dissenting.

[¶1] Courts normally do not deny judicial relief to sinners. If that were the rule, the caseload in all courts would be drastically reduced. Courts normally do not deny judicial relief where both plaintiff and defendant have been immoral. If that were the rule, the divorce rate would be reduced.

[¶2] What courts invariably do is refuse to enforce a contract where, as the majority says, the contract is "founded upon" an illegal or immoral consideration; i.e., where the consideration for the contract is the agreement by one or both parties to perform an illegal or immoral act. Thus, where a man and woman have contracted with each other to cohabit together illegally, a court will not require the woman to perform her promise nor will it require the man to pay for her services. However, where a man hires a maid to clean house for him, his obligation to pay wages is enforceable in court even though he seduces her. The difference is that in the former case the illegal conduct is part of the consideration for the contract whereas in the latter case the illegal conduct is not part of the consideration but is incidental to the contract. I do not find evidence that the female in this case agreed to make house payments in consideration of the male's promise to seduce her or to cohabit with her illegally.

[¶3] In the case before us, the movant has not carried the burden on a movant for summary judgment of showing that sex was any part of the consideration of this alleged contract. This court has simply presumed that sex was agreed to. We will not guess at the terms of contracts in other cases but here we knowingly imagine what the terms of this agreement were. In my opinion we should not use conjecture to imagine what the parties agreed to do.

[¶4] Let the defendant state under oath what he says was agreed to and what he says was done and if the contract be illegal let the district attorney represent the state. This court should not deny relief to the plaintiff based on our inference as to what constituted the consideration for the alleged agreement sued on here. I therefore dissent.

[¶5] I am authorized to say, that Justice HALL joins in this dissent.

Questions:

1. What rule of law resolves the case?

2. What does the court say is immoral consideration here?

3. What is the dissent's primary point of contention?

4. How does the majority know that sex was what induced the promise to pay?

5. Why does the dissent say at the end, "Let the defendant state under oath what he says was agreed to and what he says was done and if the contract be illegal let the district attorney represent the state"?

6. Is this case really about illegal consideration?

7. Does religion influence this decision?

8. What should Rehak have alleged?

Campaign Promises

Are campaign promises enforceable? Consider the following from *May v. Kennard Indep. Sch. Dist.*, Memorandum Order Adopting the Magistrate Judge's Report and Recommendation, 1996 WL 768039Y, (E.D. Texas 1996):

* * * * Breach of Contract Claim

[¶1] Plaintiff claims breach of contract against former Texas Governor Ann Richards. He claims that a legally enforceable contract was formed between former governor Richards and the citizens of the state based upon certain campaign promises made during her gubernatorial campaign. Plaintiff asserts Richards breached this contract by failing to segregate proceeds from the state lottery in a separate fund to be used solely for education-related expenses. He complains that the filtering of lottery proceeds into a general fund "is a flagrant breach of contract and faith with the Texas state taxpayers." Plaintiff's Amended Complaint at 2.

[¶2] A political campaign promise is legally insufficient to create a binding contract unless it is so intended by the promisor and promisee. *Russell v. District of Columbia,* 747 F. Supp. 72, 80 (D.D.C.1990), aff'd, 984 F.2d 1255 (D.C.Cir. 1993). Plaintiff neither presents evidence nor claims of any personal representations by Richards that he would not have to pay his property taxes. Thus, the Court must determine whether Richards' campaign speeches created an oral contract with plaintiff.

[¶3] The statements upon which plaintiff's claim are based were not made specifically to plaintiff by then gubernatorial candidate Richards. It may be reasonably concluded that she made them for the general benefit of the citizens of the state of Texas. It would be wholly unreasonable for any listener to interpret a campaign promise, by its inherent nature, to serve as an offer to enter into a legally binding contract. Thus, it would be unreasonable for plaintiff to believe that Richards had made a legally enforceable promise. Plaintiff also had reason to know that the candidate did not intend for her statements to be legally binding. Because plaintiff had reason to know that Richards would not intend for her statements to create a binding contract, there could be no mutual assent and no contract.[*]

[¶4] Plaintiff's attempted breach of contract claim should be dismissed as frivolous. * * * *

Questions: Should the plaintiff have alleged promissory estoppel? Unjust enrichment?

B. Plea Bargains

BROOKS v. UNITED STATES of America (1983)
United States Court of Appeals, Seventh Circuit
708 F.2d 1280

POSNER, Circuit Judge.

[¶1] The appellant, Brooks, pleaded guilty to a drug charge, pursuant to a plea agreement with the government that stated, "The government would recommend neither for nor against an executed sentence in this cause." The government made no recommendation for sentence at the sentencing hearing, and Brooks was sentenced to 4 years in prison and fined $5,000. He later moved under Rule 35(b) of the Federal Rules of Criminal Procedure for a reduction of sentence. The government responded that Brooks' motion "fails to recite any change in circumstances or any matter in mitigation that was not brought to the attention of the Court, or that could [not] have been brought to the attention of the Court at the defendant's disposition hearings. Defendant has made no showing which would justify any further leniency by the Court.... The defendant has already received consideration and mercy having been sentenced to serve four (4) years upon conviction of charges that carried a maximum sentence of five (5) years." The district court denied Brooks' Rule 35(b) motion, and he then filed a motion under 28 U.S.C. § 2255 to set aside his conviction on the ground that the government had broken its plea agreement by opposing the Rule 35(b) motion. He appeals from the district court's denial of his section 2255 motion.

[¶2] A plea bargain is, in law, just another contract, *United States v. Mooney*, 654 F.2d 482, 486 (7th Cir. 1981), so if by opposing Brooks' motion for reduction of sentence the government broke its promise not to recommend for or against an executed sentence he is entitled to appropriate relief. Whether that relief would be

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[*] Further, May does not present any evidence that he performed any action that constitutes acceptance or consideration for the candidate's promise even if, assuming arguendo, there had been an offer.

to be resentenced by the same or by a different judge or to be allowed to withdraw his plea of guilty we need not decide, for we do not think the government broke its promise. All the government promised was not to make a sentence recommendation; it does not appear that the word "executed" qualifies "sentence" in any way relevant to this case or that the words "in this cause" have some special significance. The government fulfilled its promise and Brooks was then duly sentenced. The government did not make a further promise that after Brooks was sentenced it would stand mute in the face of any efforts he might make to get the sentence reduced. It is stretching the language of the agreement to interpret the government's opposition to Brooks' Rule 35(b) motion as a recommendation for the four-year sentence that the judge had imposed. And we do not see why the language should be stretched. The government gives up a lot when it gives up its right to oppose the defense counsel's arguments for leniency at the sentencing hearing; it would be giving up much more if it gave counsel another free shot at the judge in the form of a Rule 35(b) motion.

[¶3] Therefore, "In the absence of any indication that the parties expected the Government not to oppose a Rule 35 motion, we would hesitate to imply such a condition. The prosecutor honored his commitment to make the agreed sentence recommendation at the sentencing hearing. The short motion in opposition to the defendant's Rule 35(b) motion essentially recounted the details of the sentencing proceeding. The defendant complains that the prosecutor's position was not neutral ..., particularly because of the Government's inclusion of the statement that 'Mooney's sentence is lawful, appropriate, not excessive, justified, and as such, his motion should be denied.' We are not prepared, however, to say that this plea agreement necessarily required the Government to remain wholly neutral." *United States v. Mooney*, *supra*, 654 F.2d at 486. Yet Mooney had a better case than Brooks. The government had agreed to recommend 10 years but the judge had sentenced him to 25. Although one might have thought that the government's agreement to recommend a 10-year sentence carried with it an obligation to support or at least not impede the defendant's effort to get a longer sentence reduced to the recommended length, this court was unwilling to interpret the plea agreement even that broadly.

[¶4] In *Bergman v. Lefkowitz*, 569 F.2d 705, 707 n.3 (2d Cir. 1977), a state prosecutor, as part of a plea agreement, promised that he would "recommend to the Judge of the New York State Supreme Court who will sentence Bernard Bergman on his plea of guilty ... that ... no sentence additional to that imposed by the United States District Court Judge on the federal indictment be imposed here." The prosecutor made the recommendation but later opposed Bergman's motion for a reduction of the sentence imposed by the state judge, who had disregarded the prosecutor's recommendation. *Id.* at 713. The Second Circuit held that the plea agreement had not been violated by the prosecutor's opposition to the motion for reduction of sentence. "Before accepting the agreement the judge had placed everyone on notice that he might decide not to follow that recommendation and the agreement did not require the Special Prosecutor to join in any appeal or post-conviction proceeding with respect to any additional sentence so imposed." *Id.* at 716. The only difference between Bergman and this case is that the agreement here was to make no sentence recommendation, rather than to recommend no additional sentence; and we cannot see how this difference can help Brooks.

[¶5] His best cases are *United States v. Ewing*, 480 F.2d 1141 (5th Cir. 1973) (*per curiam*), and *United States v. Arnett*, 628 F.2d 1162 (9th Cir. 1979). In *Ewing*, the prosecutor promised not to oppose probation for the defendant but the court sentenced the defendant to prison anyway, and when he moved under Rule 35 to have the prison sentence converted to probation the government opposed his motion. The Fifth Circuit held that the government's opposition was a breach of the plea agreement. *Ewing* is like *Mooney*: an agreement not to oppose probation could be interpreted to mean that the government would not oppose a post-sentence motion designed just to obtain what the government had said it would not oppose. *Ewing* cannot have much vitality in this circuit after *Mooney*; and while it is true that *Mooney* purports to distinguish rather than to reject *Ewing*, the difference between distinguishing and rejecting is in this instance one of judicial decorum rather than of substance. As noted in *Mooney*, *Ewing* has been interpreted narrowly, even in the Fifth Circuit. *See* 654 F.2d at 485, citing *United States v. Johnson*, 582 F.2d 335, 337 (5th Cir. 1978) (*per curiam*). One of the cases that construes *Ewing* narrowly is *Arnett*, *see* 628 F.2d at 1164, 1165 n.4, which rejected on facts virtually identical to those in the present case the proposition "that a plea bargain committing the government 'to take no position as to the appropriate sentence' binds the government, as a matter of law, to remain silent at the time of a motion for reduction of sentence," *id.* at 1164-65. The only thing in *Arnett* that is helpful to Brooks is the statement that "resolution of the good-faith disputes over the terms of an agreement should be made by the district court, to whom the plea was originally submitted, 'on the basis of adequate evidence,' " *id.* at 1164, which led the court to remand the case for a factual hearing to determine whether the agreement had been violated. There is no indication in the present case that a factual hearing would clarify the plea agreement. Brooks' argument is not that the agreement is ambiguous and therefore that extrinsic facts are necessary to bring its intended meaning to light but that the agreement on its face requires the government not to oppose any Rule 35(b) motion that he might make. As we cannot accept this argument we conclude that the judgment denying Brooks' motion for relief under 28 U.S.C. § 2255 must be AFFIRMED.

Questions:

1. What did the government agree to do or not to do?

2. Who wrote the plea bargain, do you suppose?

3. Can't the prosecutor and the judge collusively agree (even tacitly) that the prosecutor will withhold comment on the sentence until the Rule 35 motion, at

which time the judge will really find out what the state thinks?

4. If the agreement was ambiguous, who should take responsibility for the ambiguity, as between the government and the defendant?

5. Why should the law enforce plea agreements?

WATKINS v. COMMONWEALTH of Virginia (1997)
Court of Appeals of Virginia
491 S.E.2d 755

ANNUNZIATA, Judge.

[¶1] Appellant, John Edward Watkins, s/k/a John Edward Watkins, Sr., appeals his conviction for feloniously operating a motor vehicle after having been adjudicated an habitual offender. He contends that the trial court erred in refusing to compel the Commonwealth to uphold its agreement to reduce the charge to a misdemeanor offense. We agree and reverse his conviction.

I.

[¶2] On July 10, 1995, appellant appeared in general district court for a preliminary hearing on the felony charge of driving after having been declared an habitual offender and for trial on a misdemeanor charge of driving while intoxicated. Before the cases were called, the Assistant Commonwealth's attorney informed appellant's counsel that she did not have a copy of the order adjudicating appellant an habitual offender and that she would like a continuance. Plea negotiations ensued, and the resulting agreement followed: appellant promised not to oppose the Commonwealth's request for a continuance, and the Commonwealth promised to reduce the habitual offender charge from a felony to a misdemeanor, to which appellant would then plead guilty. Appellant also agreed to plead guilty to driving while intoxicated.

[¶3] Appellant stood silent, as the Commonwealth requested, and the trial court granted a continuance. When the hearing reconvened on August 2, 1995, appellant was prepared to plead guilty to the misdemeanor habitual offender charge and to driving while intoxicated. The Commonwealth, however, represented by a different attorney, refused to reduce the habitual offender charge and announced its intent to prosecute the felony offense.

[¶4] The trial court rejected appellant's motion to compel the Commonwealth to reduce the charge in accord with the prior agreement, finding that

> until the Defendant is substantially prejudiced, … there is no agreement enforceable by the Defendant with the Commonwealth. And, in fact, the Commonwealth can withdraw its agreement at any time up until that point.

Appellant pled not guilty, was tried by the court, and was convicted.

II.

[¶5] Under the terms of the parties' agreement, the Commonwealth promised to reduce the charge against appellant from a felony to a misdemeanor in exchange for appellant's promise not to oppose the Commonwealth's request for a continuance and to plead guilty to two misdemeanor offenses. Appellant performed all that was required of him by the agreement prior to the Commonwealth's obligation to perform. The Commonwealth failed to perform. The issue on appeal is whether the trial court erred in refusing to compel the Commonwealth's performance. Under the facts of this case, we hold that the trial court erred, and we reverse appellant's conviction.

[¶6] The principles which guide our decision are "an amalgam of constitutional, supervisory, and private [contract] law concerns," which comprise a body of law unique to plea bargaining. *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986). While plea bargains are analogous to commercial contracts, they do not demand strict application of the common law principles of contract. *See*, e.g., *id*.; *United States v. Mozer*, 828 F. Supp. 208, 215 (S.D.N.Y. 1993); *State v. Brockman*, 277 Md. 687, 357 A.2d 376, 383 (1976); *see generally*, William M. Ejzak, Plea Bargains and Nonprosecution Agreements: What Interests Should Be Protected When Prosecutors Renege?, 1991 U. Ill. L. Rev. 107 (1991); Lawrence K. Rynning, Note, Constitutional Recognition for Defendant's Plea Bargaining Expectations in the Absence of Detrimental Reliance, 58 N.C.L. Rev. 599 (1980). "The rigid application of contract law to plea negotiations would be incongruous since, for example, the trial court is not ordinarily bound by the compact and [the government] cannot obtain 'specific performance' of a defendant's promise to plead guilty." *Brockman*, 357 A.2d at 383. Furthermore, rigid application of contract principles is tempered by the fact that "the defendant's underlying 'contract' right is constitutionally based and, therefore, reflects concerns that differ fundamentally from and run wider than those of commercial contract law." *Harvey*, 791 F.2d at 300. Moreover, underlying any criminal prosecution are concerns for the " 'honor of the government, public confidence in the fair administration of justice, and the effective administration of justice.'" *Id*. (quoting *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972), *cert. denied*, 417 U.S. 933, 94 S. Ct. 2646, 41 L.Ed.2d 237 (1974)).

[¶7] "The prevailing doctrine is that 'the State may withdraw from a plea agreement at any time prior to, but not after, the actual entry of the guilty plea by the defendant or other action by him constituting detrimental reliance upon the agreement.'" * * * * The decision to compel enforcement of the agreement, in other words, is determined according to the action taken by the defendant, if any, in reliance on the agreement.

[¶8] When a defendant enters a plea of guilty in reliance on an agreement with the government, enforcement of the agreement will be compelled. *Santobello v. New York*, 404 U.S. 257, 264, 92 S. Ct. 495, 500, 30 L.Ed.2d 427 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."); * * * *.[*]

[¶9] When a defendant has taken no action in reliance on the agreement, however, the contrary result obtains. An offer by the government alone, even if accepted by the defendant under common law contract principles, does not require specific enforcement of the agreement. *See Mabry v. Johnson*, 467 U.S. 504, 507-08, 104 S. Ct. 2543, 2546-47, 81 L.Ed.2d 437 (1984) ("A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution."); *People v. Heiler*, 79 Mich. App. 714, 262 N.W.2d 890, 895 (1977) ("To hold the prosecutor bound by the agreement under [such circumstances] would … actually inhibit the dispositional use of plea bargaining by placing the prosecutor at an absolute disadvantage."). Enforcement is not compelled absent some performance by the defendant because, under such circumstances, the defendant's right to trial by jury remains a sufficient remedy to the government's withdrawal of the agreement. Indeed,

> [the] fundamental right [to trial by jury] would be belittled if [it were] held [ ] to be an insufficient "remedy" or result for a defendant who has not been induced to rely on the plea to his detriment. The prosecutor is under no duty to plea bargain if no offer is made, and the defendant is entitled to trial. There is no rational basis for holding, in essence, that a trial is sufficient for the defendant who has not been offered a plea and insufficient for the one who has.

Government of the Virgin Islands v. Scotland, 614 F.2d 360, 365 (3rd Cir. 1980).

[¶10] A middle ground exists when the defendant, although not having pled guilty, has taken some "other action" pursuant to a plea agreement. In such a case, the full panoply of constitutional protections attending a plea of guilty does not attain, yet, the agreement cannot be dismissed as executory when the defendant has acted in accordance with the terms of the agreement. The issue is what "other action" taken by the defendant, short of pleading guilty, compels enforcement of the agreement.

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[*] Indeed, a defendant's "detrimental reliance" is manifest when he or she enters a plea of guilty pursuant to an agreement with the government because "the entry of a guilty plea is a waiver of certain constitutional rights … [including] the Fifth Amendment right against compulsory self-incrimination, the Sixth Amendment right to trial by jury, and the Sixth Amendment right of confrontation." See, e.g., Gardner v. Warden, 222 Va. 491, 493-94, 281 S.E.2d 876, 877 (1981).

[¶11] Some courts hold that enforcement of the agreement should be compelled only where the defendant's performance implicates his or her constitutional rights. *See,* e.g., *People v. Navarroli*, 121 Ill.2d 516, 118 Ill. Dec. 414, 418, 521 N.E.2d 891, 895 (1988) (agreement not enforced because defendant's cooperation in informing police with respect to ongoing drug transactions did not implicate constitutional right). We disagree with that position because, as stated above, a defendant's constitutional rights are not always, necessarily, the basis for compelling enforcement of plea agreements.* Rather, the decision to compel enforcement is guided by "an amalgam of constitutional, supervisory, and private [contract] law concerns." *Harvey*, 791 F.2d at 300. *See also Navarroli*, 118 Ill. Dec. at 422, 521 N.E.2d at 899 (Clark, J., dissenting) (criticizing majority for failing to look beyond constitutional implications of defendant's performance to enforce agreement on other grounds); *Workman v. Commonwealth*, 580 S.W.2d 206, 207 (Ky.1979), overruled on other grounds, 817 S.W.2d 218 (Ky.1991) ("If the government breaks its word, it breeds contempt for integrity and good faith. It destroys the confidence of citizens in the operation of their government and invites them to disregard their obligations. That way lies anarchy. We deal here with a 'pledge of public faith-a promise made by state officials-and one that should not be lightly disregarded.' "); *see generally Rynning*, *supra*, at 606-07 (Examples of detrimental reliance requiring enforcement of an agreement have included: "[p]roviding information to government authorities, testifying for the government, confessing guilt, returning stolen property, making monetary restitution, failing to file a motion to have charges presented to a grand jury, submitting to a lie detector test and waiving certain procedural guarantees.") (citations omitted).

[¶12] Guided by such principles, we hold that where a plea agreement calls for performance by the defendant and the defendant has performed pursuant to the terms of the agreement, the agreement will be enforced. We find no authority to support a qualitative analysis of a defendant's performance and find, instead, that

* We recognize that the procedural posture of a case may demand that enforcement be determined in strict adherence to constitutional principles. See Mabry, 467 U.S. at 507, 104 S. Ct. at 2546 (where defendant could "obtain … relief only if his custody is in violation of the Federal Constitution"). Our decision here, however, is not constrained by such principles.

In addition, we note that the performance necessary to implicate the constitution as a vehicle for enforcing a plea agreement has received varying interpretation. Some courts have held that the constitution requires enforcement only where a defendant enters an involuntary plea in reliance on the agreement. See United States v. Coon, 805 F.2d 822, 825 (8th Cir. 1986). Under that theory, even cooperation with the government that leads to incriminating statements does not implicate the constitution, because incriminating statements can simply be suppressed at trial. See id. Other courts have held that the constitution requires enforcement only when a defendant waives a constitutional right in reliance on the agreement. See Navarroli, 118 Ill. Dec. 414, 521 N.E.2d at 895 (agreement not enforced because defendant's cooperation in informing police with respect to ongoing drug transactions did not implicate constitutional right). Yet other courts hold that enforcement on constitutional grounds does not require a defendant's reliance on the agreement to implicate constitutional rights. See People v. Macrander, 756 P.2d 356, 360-61 (Colo.1988) (waiver of preliminary hearing in reliance on agreement sufficient to require enforcement of agreement).

the terms of the parties' agreement best define their respective performance obligations.

[¶13] In the present case, appellant did not enter a guilty plea in reliance on the plea agreement; thus, his reliance on *Santobello*, *Johnson*, *Jordan*, and *Jones* is misplaced. This is not a case, however, where the government sought to withdraw an agreement that consisted solely of an exchange of executory promises upon which the defendant had not acted. *Cf. Mabry*, 467 U.S. at 507-08, 104 S. Ct. at 2546-47; *Heiler*, 262 N.W.2d at 892. Rather, this case presents the middle ground. Here, because appellant had fully performed his obligation under the terms of the agreement, he was entitled to have the agreement enforced.

[¶14] Accordingly, we reverse appellant's conviction on the habitual offender charge 5 and remand for further proceedings consistent with this opinion.

[¶15] Reversed and remanded.

Questions:

1. Is the plea agreement enforceable even though Watkins did not enter a guilty plea in accord with it?

2. What rationales does the court give for enforcement of plea agreements? (Please list them.)

3. The prior cases cited by the court rest on a waiver of a constitutional right (to a jury trial) in reliance on a plea agreement. Does this case?

4. Why not give effect to assent?

C. Employment at Will

In the following case, I am not as concerned that you know the law established in this case as I am that you understand the courts' methodology for discerning and proving public policy.

BANAITIS v. MITSUBISHI BANK, LTD. (1994)
Oregon Supreme Court
879 P.2d 1288 (1994)

LANDAU, Judge.

[¶1] Defendants appeal from a judgment awarding plaintiff compensatory damages on his claim for wrongful discharge against defendant The Bank of California, N.A. (BanCal), and on his claim for interference with a contractual relationship against defendant Mitsubishi Bank, Ltd. (MBL). Plaintiff cross-appeals a judgment notwithstanding the verdict that deprived him of a jury award of punitive damages against both defendants. We affirm on the appeal and reverse on the cross-appeal.

[¶2] We state the facts in the light most favorable to plaintiff. Plaintiff, a former vice president of BanCal, began working for the bank in 1980. MBL is a financial institution in the "Mitsubishi Group," a collection of related companies in Japan. In 1984, MBL acquired directly 13 percent of the stock in BanCal. It then acquired a holding company that held the balance of BanCal's stock. MBL transferred a number of its officers from Tokyo to manage the bank. One of those officers, Tanaka, remained an MBL employee, but was given a title at BanCal. Tanaka was plaintiff's supervisor from late 1986 until plaintiff's termination.

[¶3] BanCal had a policy of keeping its customers' financial information confidential. It stated that policy in its employee policy manual, and each year employees were required to certify that they understood the policy. An employee who breached the confidentiality policy was subject to immediate dismissal.

[¶4] When MBL acquired BanCal, a number of BanCal's customers expressed concern that MBL would acquire information from BanCal that would be used by other members of the Mitsubishi Group for competitive advantage. Some customers stopped doing business with BanCal. Others demanded written confidentiality agreements that would insure that their financial information would not be disclosed to MBL.

[¶5] In the fall of 1986, an employee of MBL telephoned plaintiff and asked him to supply a "comparison chart on [BanCal's] grain company customers." The comparison chart that MBL requested contains information that shows the relative financial positions of five large grain shippers, including each company's cash on hand, accounts receivable, inventory of grain, accounts and notes payable, long-term indebtedness, net worth, cost of goods, operating expenses, profit and inventory turnover. Knowledge of that information would give a competitor an advantage in the marketplace. Plaintiff refused the MBL employee's request for the chart, explaining that disclosure of the information was against bank policy, against the law and unethical. When the MBL employee explained that he sought the information for MBL's internal use only, plaintiff responded that he would not release the information without written authorization from the bank's president.

[¶6] In September, 1986, the manager of MBL's Portland office made a similar request of plaintiff, this time asking for confidential financial information about a particular customer, Schnitzer Steel Industries, Inc. (Schnitzer). Schnitzer was one of the BanCal customers that had demanded express promises from BanCal that confidential information would not be disclosed to MBL or any member of the Mitsubishi Group. Plaintiff again refused MBL's request.

[¶7] Soon after that, in February, 1987, Tanaka wrote a performance evaluation that falsely accused plaintiff of not meeting his 1986 budget. In June, 1987, Tanaka falsely accused plaintiff of going to New York on business without approval. Tanaka also accused plaintiff of being dishonest and questioned his integrity. In August, 1987, BanCal put plaintiff on probation for 90 days, based on another evaluation that reiterated the earlier falsehoods and added new false charges.

[¶8] Plaintiff's probation was over in mid-November, but BanCal did not dismiss him. Meanwhile, plaintiff informed BanCal's Human Resources Department that he could not stay at the bank and offered to negotiate a smooth departure. On December 16, while negotiations continued, plaintiff told his staff at a breakfast meeting that he would be leaving the bank soon. He had anticipated that he would continue to work at least through December 31, 1987, so that he would receive the full value of the bank's contributions to his pension fund for 1987. However, Tanaka and BanCal's Human Resources Department accelerated his departure date to December 30, 1987, thus depriving him of those pension benefits. Plaintiff received notice of that decision in a letter hand-delivered by Tanaka. Plaintiff then was instructed that he had 30 minutes to "clean out his desk.” He protested that he could not possibly complete the task that quickly, so he was allowed to remove his things the next day after working hours. Other employees were instructed to watch him while he packed.

[¶9] Plaintiff commenced this action on December 12, 1989. He alleged a claim against BanCal for wrongful discharge and a claim against MBL for interference with a contractual relationship. The complaint included demands for punitive damages against both defendants.

[¶10] At the close of the evidence at trial, defendants moved for directed verdicts on both claims. The trial court denied the motions, and the jury returned a verdict for plaintiff, awarding plaintiff compensatory and punitive damages against both defendants. Defendants then moved for a judgment notwithstanding the verdict or, in the alternative, for a new trial. The trial court denied that motion with respect to the verdict for compensatory damages. It granted the motion with respect to punitive damages on both claims, and it denied the alternative motion for a new trial.

[¶11] In the first assignment of error, BanCal contends that the trial court erred in denying its motion for directed verdict, because plaintiff failed to produce evidence of a prima facie case for wrongful termination. BanCal concedes, for the purpose of the motion, that it deliberately made plaintiff's working environment so unpleasant that he had to leave, and that it did so in retaliation for his withholding BanCal's confidential customer information from MBL. According to BanCal, that does not constitute wrongful termination, because plaintiff was an at-will employee, and the reason for his discharge does not fall within any exception to the general rule that at-will employees may be discharged at any time, for any reason.

[¶12] In reviewing the denial of the motion for directed verdict, we consider the evidence, including the inferences, in the light most favorable to the nonmoving party, and the verdict cannot be set aside "unless we can affirmatively say that there is no evidence from which the jury could have found the facts necessary" to support the verdict. * * * *

[¶13] In general, an employer may discharge an employee at any time, for any reason, unless doing so violates a contractual, statutory or constitutional requirement. *Patton v. J.C. Penney Co*., 301 Or. 117, 120, 719 P.2d 854 (1986). There are exceptions to the general rule. A cause of action will lie against an employer who discharges an employee for performing a public duty, or fulfilling a societal obligation such as serving on a jury, *Nees v. Hocks*, 272 Or. 210, 219, 536 P.2d 512 (1975), or refusing to commit a potentially tortious act of defamation. *Delaney v. Taco Time Int'l*., 297 Or. 10, 17, 681 P.2d 114 (1984). An employer also may be held liable for discharging an employee for pursuing private statutory rights that are directly related to the employment, such as resisting sexual harassment by a supervisor, *Holien v. Sears, Roebuck and Co*., 298 Or. 76, 90-97, 689 P.2d 1292 (1984), or filing a claim for workers' compensation benefits. *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978).

[¶14] In this case, plaintiff contends that his termination for refusing to disclose confidential information falls within the "societal obligation" or "public duty" exception to the at-will rule. According to plaintiff, there is a public duty to avoid disclosing valuable, confidential customer financial information held by a bank. That public duty, he argues, is evidenced by a host of state and federal statutes that generally protect business information from discovery by or disclosure to the public or to government agencies. In particular, plaintiff relies on federal and state public records statutes, rules of civil procedure and various criminal statutes, all of which protect against disclosure of confidential financial information.

[¶15] BanCal argues that plaintiff's refusal to divulge the requested information implicates no societal obligation or public duty. It argues that none of the statutes on which plaintiff relies specifically applies to the disclosure of customer financial information held by a bank. Without such statutes, "carefully tethered" to the specific conduct at issue, BanCal contends, there can be no societal obligation or public duty.

[¶16] We first address the parties' arguments concerning the standard that we must apply in determining whether a societal obligation or public duty is implicated. In deciding the question whether an employer could be held liable for discharging an employee for serving on a jury, the Supreme Court in *Nees v. Hocks*, *supra*, looked to the provisions in the Oregon Constitution preserving the right of jury trials, to various statutes describing exemptions from jury service and consequences for neglecting to show up for jury service, and to caselaw from other jurisdictions concerning the importance of jury duty. The court concluded:

> "These actions by the people, the legislature and the courts clearly indicate that the jury system and jury duty are regarded as high on the scale of American institutions and citizen obligations. * * * * For these reasons we hold that the defendants are liable for discharging plaintiff because she served on the jury." 272 Or. at 218, 536 P.2d 512.

The constitutional provisions on which the court relied, as well as the statutes and the caselaw, do not impose an obligation of jury service. Nevertheless, the court drew on them as indicia of the public policy that it found to be the basis for liability.

[¶17] Likewise, in *Delaney v. Taco Time Int'l.*, *supra*, in which the Supreme Court considered whether an employer could be found liable for discharging an employee who refused to sign a false performance evaluation, the court relied on two provisions of the Oregon Constitution, Article I, sections 8 and 10. Neither of those provisions prohibits a person from defaming another. Nevertheless, the court concluded that "[t]hese two sections indicate that a member of society has an obligation not to defame others." 297 Or. at 17, 681 P.2d 114; *see also Holien v. Sears, Roebuck and Co.*, *supra*, 298 Or. at 83, 689 P.2d 1292.

[¶18] In short, there is no requirement, as BanCal contends, that a specific statute has been violated before we may conclude that a societal obligation or a public duty has been implicated. We must review all the relevant "evidence" of a particular public policy, whether that be expressed in constitutional and statutory provisions or in the caselaw of this or other jurisdictions. We turn, then, to the issue of whether discharging an employee for refusing to disclose a customer's confidential financial information falls within the societal obligation exception to the at-will rule. We conclude that it does.

[¶19] Numerous statutes reflect a legislative recognition of the important public policy of protecting from disclosure confidential commercial and financial information. The Federal Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 et seq., prohibits, with certain exceptions, the disclosure of a customer's records by a financial institution to a government authority without the customer's consent. The Federal Freedom of Information Act, 5 U.S.C. § 552, similarly exempts from disclosure by public agencies any "commercial or financial information" that is privileged or confidential. 5 U.S.C. § 552(b)(4). The Oregon Public Records Act, ORS 192.501(2), likewise exempts from disclosure any

> "compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it."

In a related vein, ORCP 36 C(7) authorizes courts to issue protective orders to avoid disclosure of "a trade secret or other confidential * * * * commercial information." See also FRCP 26(c)(7).

[¶20] Various criminal statutes reflect a public interest in protecting the confidentiality of commercial financial records. ORS 165.095(1) provides that a person who "misapplies" property entrusted to a financial institution commits a crime. Removal or disclosure of a bank's files or other property is a Class C felony. ORS 708.715.*

[¶21] At common law, the courts in a number of jurisdictions have recognized a bank's duty not to divulge to a third party, without the customer's consent, any information relating to the customer acquired through the keeping of the customer's account. As the Idaho Supreme Court said in *Peterson v. Idaho First National Bank*, 83 Idaho 578, 367 P.2d 284 (1961):

> "It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors' accounts. Inviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors." 83 Idaho at 588, 367 P.2d 284.

See also Burrows v. Superior Court, 13 Cal.3d 238, 243, 118 Cal.Rptr. 166, 529 P.2d 590 (1974); *Barnett Bank of West Florida v. Hooper*, 498 So.2d 923, 925 (Fla. 1986); *Indiana Nat. Bank v. Chapman*, 482 N.E.2d 474, 480 (Ind. App. 1985); *Suburban Trust Co. v. Waller*, 44 Md.App. 335, 340, 408 A.2d 758 (1979); *Pigg v. Robertson*, 549 S.W.2d 597, 600 (Mo. App. 1977); *Djowharzadeh v. City Nat. Bank & Trust Co.*, 646 P.2d 616, 619-20 (Okla. Ct. App. 1982). Consistent with that rule, BanCal's own internal policy prohibits the disclosure of confidential customer financial information.

[¶22] Those statutory provisions, rules and common law principles reflect a common concern for the protection of valuable commercial financial information, particularly when that information has been entrusted to a bank. Permitting a bank to discharge with impunity its employee for refusing to disclose confidential customer financial information would violate that public policy and compromise the protections that the statutes, rules and common law duties were designed to afford.

[¶23] BanCal acknowledges the foregoing authorities. It also concedes that they concern the type of confidential customer financial information that is involved in this case. It nevertheless maintains that most of the statutory provisions only establish limitations on the authority of governmental agencies—not banks—to disclose that confidential customer financial information. It also insists that the authorities that do concern the disclosure of information entrusted to banks only

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* Plaintiff argues that other statutes reflect a public policy of protecting confidential customer financial information. In particular, plaintiff relies on the Oregon Trade Secrets Act, ORS 646.461(4), and the Federal Antitrust Improvements Act, 18 U.S.C. § 1905, which governs disclosure of confidential information by officials of the United States government. BanCal argues that those statues are irrelevant, because the information involved in this case does not constitute a "trade secret" within the meaning of those statutes. Because we find ample evidence in other statutes of a public policy to protect confidential customer financial information, we do not address whether the trade secrets statutes apply.

give rise to private remedies and, therefore, cannot be evidence of important public policies.

[¶24] BanCal's arguments rest on an incorrect characterization of the standard we apply in discerning the existence of a societal obligation or public duty. As we have said, it is not necessary that a statute specifically regulate the conduct that precipitated the discharge. We review statutes and other authorities for evidence of a substantial public policy that would, as the Supreme Court said in *Nees v. Hocks*, *supra*, be "thwarted" if an employer were allowed to discharge its employee without liability. 272 Or. at 219, 536 P.2d 512.

[¶25] Moreover, BanCal's argument rests on an incorrect characterization of the statutes. Several do more than merely create private remedies. ORS 165.095(1), for example, makes it a crime for any person to misapply property entrusted to a financial institution.* And ORS 708.715 establishes criminal penalties for removal of files or other property from a bank. The legislature's decision to attach a criminal penalty to that conduct is a strong indication that it views the protection of property entrusted to a bank to be a matter of public importance. *Nees v. Hocks*, *supra*, 272 Or. at 219, 536 P.2d 512; *McQuary v. Bel Air Convalescent Home, Inc.*, 69 Or. App. 107, 110, 684 P.2d 21, *rev. den.*, 298 Or. 37, 688 P.2d 845 (1984).

[¶26] The trial court did not err in denying BanCal's motion for a directed verdict. * * * *

[¶27] In the next two assignments of error, BanCal contends that the trial court gave improper jury instructions on the wrongful discharge claim. We review the trial court's rulings on requests for instructions to determine whether the instructions probably created in the minds of the jurors an erroneous impression of the law that affected the outcome of the case. * * * *

[¶28] The court delivered the following two instructions:

> "To recover under this claim, plaintiff must show by a preponderance of the evidence either, one, the Bank of California terminated plaintiff's employment for refusing to violate public policy, or two, constructively discharged plaintiff's employment or plaintiff for refusing to violate public policy and three, that plaintiff was damaged as a result.
>
> "The public policy of this state protects financial and other business information having independent economic value which is entrusted to a fi-

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* BanCal asserts that ORS 165.095(1) "is aimed at the likes of embezzlement and diversion of funds or property, not at information sharing." That argument is contradicted by the Supreme Court's decision in State v. Hitz, 307 Or. 183, 766 P.2d 373 (1988), in which the court held that

> "[t]he section was designed by the Criminal Law Revision Commission to define an offense distinct from existing crimes of embezzlement and fraudulent misapplication of entrusted property by not requiring an intent to deceive, injure, or defraud anyone." 307 Or. at 185, 766 P.2d 373. (Emphasis supplied.)

> nancial institution on a confidential basis from intentional disclosure by the financial institution unless the disclosure is authorized by the entity to which it pertains or by law."

According to BanCal, the instructions should have used the term "societal obligation," instead of the phrase, "public policy." The term "public policy," it contends, was repudiated by the Supreme Court in *Harrell v. Travelers Indemnity Company*, 279 Or. 199, 567 P.2d 1013 (1977). BanCal argues that the second instruction compounded that error by describing the so-called "public policy" in terms that find no support in constitutional or statutory provisions that are directly applicable to this case.

[¶29] Although it may be true that the phrase "public policy" is, in some ways, less precise than the words "societal obligation," we cannot say that that rendered the trial court's instructions incorrect. The Supreme Court, in fact, frequently has described the exception to the at-will rule using the terms "public duty," "societal obligation" and "public policy," with no apparent intention to draw distinctions among those terms. *See*, e.g., *Holien v. Sears, Roebuck and Co*., *supra*, 298 Or. at 83, 689 P.2d 1292; *Delaney v. Taco Time Int'l*., *supra*, 297 Or. at 15-16, 681 P.2d 114. BanCal's reliance on *Harrell v. Travelers Indemnity Company*, *supra*, for its argument to the contrary is misplaced. That case was not a wrongful discharge case and did not discuss any exception to the at-will rule. At issue was whether "public policy" provided a basis for invalidating a provision in an insurance policy. In that context, the court commented that

> "for a court to undertake to invalidate private contracts upon the ground of `public policy' is to mount `a very unruly horse, and when you once get astride it you never know where it will carry you.'" 279 Or. at 206, 567 P.2d 1013 (quoting 14 Williston on Contracts 7-8, § 1629 (3d ed 1972)).

The court nevertheless articulated a rule that, in certain circumstances, a contract may be held invalid as contrary to public policy.

[¶30] In any event, BanCal has not asserted, much less demonstrated, any prejudicial effect of using the term "public policy" in the jury instructions. Apart from the use of those two words, the instructions the court delivered did not substantially depart from the instructions BanCal itself requested. Particularly when the court instructed the jury on the specific public policy that applied in this case, we cannot say that the instructions, taken as a whole, caused the jury to decide the case one way or the other. * * * *

[¶31] BanCal insists that the court's description of the relevant public policy—the protection of financial and other business information that has been entrusted to a bank—was incorrect, because it finds no basis in any specific constitutional or statutory provision. That, however, is the same argument that BanCal asserts in urging reversal of the trial court's denial of the motion for a directed verdict on the wrongful discharge claim. For the same reasons we rejected the argument in that context, we reject it again here. The trial court did not err in delivering its instructions on the wrongful discharge claim. * * * *

Questions:

1. How does one prove a public policy in an Oregon employment-at-will public policy exception case?

2. What must a plaintiff prove to win a wrongful discharge case in Oregon?

3. What public policies does Banaitis suggest in this case?

4. What business justifications does the defendant offer?

5. Has the court created a new category of wrongful discharge in the state?

6. How confident are you that you can predict what other exceptions to at-will employment will succeed under Oregon law?

D. Covenants Not to Compete

Stephen FREIBURGER v. J-U-B ENGINEERS, INC. (2005)
Supreme Court of Idaho
111 P.3d 100

TROUT, Justice.

[¶1] Stephen Freiburger brought this declaratory judgment action against J-U-B Engineers, Inc. (J-U-B), seeking a judicial declaration that J-U-B's non-compete clause in his employment contract was invalid and unenforceable under Idaho law. The district court granted summary judgment to Freiburger, from which J-U-B now appeals. Because we agree with the trial court that the clause is unreasonable and greater than necessary to protect J-U-B's legitimate business interests, we affirm.

I.
FACTUAL AND PROCEDURAL BACKGROUND

[¶2] In December 1991, J-U-B hired Stephen Freiburger and, as part of his employment application, he signed an Applicant's Certification and Agreement (Agreement). The Agreement included a restrictive covenant (Covenant), which is at the center of this controversy. That Covenant reads, in part:

> Should I become an employee of JUB, it is anticipated that my responsibilities may increase with time and that I may be an official representative to many clients served by JUB. Therefore, *I agree that for a period of two years following any date of termination of my employment with JUB, I*

> *would not attempt to take, take or join with anyone to take, (without the written consent of JUB) any of past or present clients or projects or any pending clients or projects, for which JUB has or would be providing professional services.* (emphasis added).

J-U-B Engineering is one of the largest privately owned engineering firms in the State of Idaho with offices in Boise, Twin Falls, Pocatello, Coeur d'Alene and Nampa, and employs approximately 250 people. It does business throughout the Northwest and has been in business for more than 30 years.

[¶3] Freiburger became a professional engineer in 1991, just as he joined J-U-B. When he was hired, he had prior experience in consulting engineering and technical expertise in both transportation and solid waste engineering. Freiburger served as J-U-B's project manager in Twin Falls, moving to the Boise office and then to Nampa. While with J-U-B, Freiburger participated in all aspects of client development and knew how J-U-B engaged in client development and client service. He attended manager meetings and was privy to proprietary information concerning existing clients and projects.

[¶4] According to J-U-B, Freiburger participated in its "inner circle" and in planning efforts to "capture more of the transportation engineering work" available in J-U-B's area of practice. Also, it appears that because of his prominence in the transportation group, he built a relationship base with the Idaho Department of Transportation (IDOT), becoming one of J-U-B's primary liaisons with IDOT, and embodying J-U-B's goodwill effort with IDOT to secure IDOT projects and contracts.

[¶5] On April 25, 2001, Freiburger resigned from J-U-B. About six months later, Freiburger joined Riedesel Engineering, LLC (Riedesel). Soon after Freiburger began his new employment, Riedesel wanted to propose on an IDOT project and tout Freiburger's qualifications in order to secure IDOT projects. At that time, Freiburger wanted to make sure he was not in conflict with the Covenant and, therefore, made several attempts, both directly and through his attorney, to obtain from J-U-B a list of clients that J-U-B considered to be covered under the terms of the Covenant. When J-U-B refused to provide any list of those clients, and simply instructed Freiburger that he should run any potential clients by them first, Freiburger initiated this declaratory judgment action on September 12, 2002, asking the court to declare the Covenant overbroad, unreasonable, void and unenforceable as a matter of law. * * * *

[¶6] Freiburger then filed a motion for summary judgment, seeking to have the Covenant declared unenforceable as a matter of law. After oral argument on the matter, the trial court issued its memorandum decision, granting summary judgment to Freiburger. The court found the Covenant unreasonable and fatally overbroad and declined to strike the offending language in the Covenant to make it reasonable, finding that the court would essentially have to rewrite the entire Covenant to make it reasonable. Freiburger then requested costs and attorney fees pursuant to I.C. § 12-120(3). The court granted Freiburger's request, awarding him $117.00 in costs and $9,360.00 in fees. J-U-B timely filed this appeal. * * * *

III.
ANALYSIS
A. The Covenant Not to Compete

[¶7] J-U-B's primary contention on appeal is that the district court erred in granting Freiburger summary judgment because it has a legitimate interest in protecting its business from former employees who may endeavor to take J-U-B clients and the Covenant contained in the Agreement reasonably protects that interest. Restrictive covenants not to compete in an employment contract, though enforceable, are disfavored and will be strictly construed against the employer. *See Stipp v. Wallace Plating, Inc.*, 96 Idaho 5, 6, 523 P.2d 822, 823 (1974); *Shakey's Inc. v. Martin,* 91 Idaho 758, 762, 430 P.2d 504, 508 (1967). In order to be enforceable, a covenant not to compete must be ancillary to a lawful contract supported by adequate consideration, and consistent with public policy. *McCandless v. Carpenter,* 123 Idaho 386, 390, 848 P.2d 444, 447 (Ct.App.1993).

[¶8] In addition, a covenant not to compete contained in an employment contract must be reasonable as applied to the employer, the employee, and the public. *See Stipp,* 96 Idaho at 6, 523 P.2d at 823; *Insurance Ctr., Inc. v. Taylor,* 94 Idaho 896, 899, 499 P.2d 1252, 1255 (1972); *Marshall*, 81 Idaho at 203, 339 P.2d at 508; *McCandless*, 123 Idaho at 390, 848 P.2d at 447. In other words, a covenant not to compete is reasonable only if the covenant: (1) is not greater than is necessary to protect the employer in some legitimate business interest; (2) is not unduly harsh and oppressive to the employee; and (3) is not injurious to the public. *See* Restatement (Second) Of Contracts § 188 (1981).

[¶9] We note that some jurisdictions have applied different standards of reasonableness, depending on the type of restrictive covenant involved and what it is seeking to accomplish. For instance, some courts have held that covenants not to compete ought to be analyzed differently than anti-piracy covenants. *See, e.g., Merrill Lynch, Pierce, Fenner Smith Inc. v. Ran,* 67 F. Supp.2d 764 (E.D.Mich.1999). Under this view, covenants not to compete preclude employees from working in the same business as the employers' for certain periods of time and thus, are strictly construed against employers. *See Hilb, Rogal and Hamilton Co. of Arizona, Inc. v. McKinney,* 190 Ariz. 213, 946 P.2d 464, 467 (Ct.App.1997). On the other hand, anti-piracy agreements restrict the terminated employee from soliciting customers of his former employer or making use of confidential information from his previous employment. *Id.* These agreements have been held to a less stringent test of reasonableness than blanket prohibitions of competition, as they are not considered nearly as oppressive and unreasonable as noncompete agreements. *See Corroon Black of Ill., Inc. v. Magner,* 145 Ill.App.3d 151, 98 Ill. Dec. 663, 494 N.E.2d 785 (1986); *Olliver/Pilcher Ins., Inc. v. Daniels*, 148 Ariz. 530, 715 P.2d 1218 (1986).

[¶10] However, we think the more reasoned approach is to simply determine whether or not the clause is no more restrictive than necessary to protect the employer's legitimate business interests. This test can aptly be applied regardless of whether the clause itself seeks to limit the employee's work in the field entirely, or seeks only to limit the employee in approaching former clients. Indeed, we have in the past upheld the application of a restrictive covenant, no matter what it is termed, only after a determination that it was no broader than necessary to protect an employer's legitimate business interest. *See Magic Lantern Prod., Inc. v. Dolsot,* 126 Idaho 805, 892 P.2d 480 (1995); *Insurance Center, Inc. v. Taylor,* 94 Idaho 896, 499 P.2d 1252 (1972).

1. *J-U-B's Legitimate Business Interest*

[¶11] The first issue the Court must consider is whether J-U-B has a legitimate business interest worthy of protection. The burden is on the employer to prove the extent of its protectable interest. *McCandless*, 123 Idaho at 391, 848 P.2d at 449. The general rule is that an employer is not entitled to protection against ordinary competition. *See Pinnacle Performance, Inc. v. Hessing,* 135 Idaho 364, 367, 17 P.3d 308, 311 (Ct.App.2001) (citing 54A Am.Jur.2d Monopolies § 916 (1996)). However, employers are entitled to protect their businesses from the detrimental impact of competition by employees who, but for their employment, would not have had the ability to gain a special influence over clients or customers. *See Amex Distrib. Co., Inc. v. Mascari*, 150 Ariz. 510, 724 P.2d 596, 605 (Ct.App.1986); *American Software USA, Inc. v. Moore*, 264 Ga. 480, 448 S.E.2d 206, 208 (1994); *Holloway v. Faw, Casson Co.,* 319 Md. 324, 572 A.2d 510, 515 (1990); *Prof'l Bus. Services Co. v. Rosno,* 256 Neb. 217, 589 N.W.2d 826, 831 (1999). Thus, "the employer has a protectable interest in the customer relationships its former employee established and/or nurtured while employed by the employer, and is entitled to protect itself from the risk that a former employee might appropriate customers by taking unfair advantage of the contacts developed while working for the employer." *W.R. Grace Co. v. Mouyal*, 262 Ga. 464, 422 S.E.2d 529, 531 (1992); *See also* 54a Am.Jur.2d Monopolies § 919 (1996).

[¶12] Freiburger entered into an employment relationship with J-U-B that clearly both placed him in direct contact with J-U-B clients, as well as placed him in the forefront in developing J-U-B's goodwill effort with several clients. Therefore, we conclude that J-UB has a legitimate business interest worthy of protection in the client relationships Freiburger helped to develop while in J-U-B's employ.

2. *The Covenant as a Reasonable Means of Protecting the Interest*

[¶13] The second step in analyzing the Covenant is to determine whether it is a reasonable means of protecting J-U-B's legitimate business interest. The core provision in the Covenant provides:

> ... I agree that for a period of two years following any date of termination of my employment with J-U-B, I would not attempt to take, take or join with anyone to take, (without the written consent of J-U-B) any of past or present clients or projects or any pending clients or projects, for which JU-B has or would be providing professional services....

[¶14] The district court found that the Covenant was an overbroad means of protecting J-U-B's interest in the goodwill developed by Freiburger because the Covenant unreasonably prohibited Freiburger from providing any services to J-U-B's clients, current, past and potential, without regard to whether Freiburger had any contact with these clients. This conclusion is similar to an Idaho Court of Appeals decision that analyzed a restrictive covenant similar to the one at issue here. *See Pinnacle Performance, Inc. v. Hessing,* 135 Idaho 364, 17 P.3d 308 (Ct.App.2001).

[¶15] In *Pinnacle,* the employer entered into a written employment agreement with Hessing, as an independent contractor, to develop a prototype card shuffler for the employer's client, Casinovations. The agreement contained a non-competition clause that read: "Contractor agrees to not offer, sell, or trade his services directly to Company clients, both current and past, for a period of two (2) years from completion of Contractor's work for the Company ...." *Pinnacle,* 135 Idaho at 366, 17 P.3d at 310. After developing the prototype, Hessing signed an employment agreement with Casinovations, and the employer filed a complaint against Hessing alleging that he had breached the covenant not to compete.

[¶16] The Court of Appeals noted that if a court finds that an employer has a legitimate business interest, such a business interest is reasonably protected by prohibiting the employee from providing services to those clients with whom the employee developed customer goodwill. *Id.* at 368, 17 P.3d at 312. "However, a prohibition against doing business with an employer's clients, without regard to whether a relationship existed between the client and the employee, is an overbroad means of protecting the employer's interest in the goodwill developed by the employee." *Id.* (citing *American Software,* 448 S.E.2d at 209). Thus, the court found that since the covenant not to compete failed to reasonably limit the scope of the prohibited activity to those clients with whom Hessing had contact, the prohibitive impact of the covenant was greater than necessary to protect the employer's legitimate business interest.

[¶17] The decision also noted that a covenant not to compete which prohibits an employee from working in any capacity or which fails to specify with particularity the activities the employee is prohibited from performing is too overbroad and indefinite to be considered reasonable. *Id.* at 368-69, 448 S.E.2d 206, 17 P.3d at 312-13; *See also National Teen-Ager Co. v. Scarborough,* 254 Ga. 467, 330 S.E.2d 711, 713 (Georgia 1985); *American Family Life Assurance Co. v. Tazelaar,* 135 Ill.App.3d 1069, 90 Ill. Dec. 789, 482 N.E.2d 1072, 1075 (1985). The court found that the term "services" was not expressly defined in the covenant and, therefore, it failed to limit the scope of activities Hessing was prohibited from performing. The covenant was too overbroad and indefinite to be considered reasonable.

[¶18] The Covenant at issue here is clearly an overbroad means of protecting J-U-B's legitimate business interest. First, J-U-B has actively operated throughout the Northwest region for nearly thirty years and clearly has a large client base both past and present, yet the Covenant prohibits Freiburger from taking any of this large group of clients regardless of whether Freiburger helped to develop J-U-B's goodwill effort toward that client. Instead of the reference point of the Covenant being goodwill created through the efforts of Freiburger, the Covenant prohibits contact with any past, present or potential client of J-U-B at the time Freiburger left J-U-B's employ. It is possible, under the plain language of the Covenant, that if J-U-B had a client or project twenty years ago and had not had contact with that client since, Freiburger would still be prohibited from taking that client for a period of two years after he left J-U-B. Since the Covenant includes past clients or projects, without any meaningful limitation, it is an overbroad means of protecting the employer's interest in the goodwill Freiburger helped to develop.

[¶19] Secondly, just as in *Pinnacle,* the Covenant at issue unreasonably prohibits Freiburger from providing any services to J-U-B's clients, current, past, or pending. We note that nothing in the Covenant limits the scope of activities Freiburger is prohibited from offering. The prohibitive impact of this limitation is especially harsh and oppressive to Freiburger considering the nature of the clients involved in this area of business. The Covenant would likely prevent Freiburger from performing any services to a number of state and local governmental agencies throughout the Northwest.

[¶20] Third, the portion of the Covenant that refers to taking any "pending" clients or projects for whom J-U-B "would be providing professional services" is also unreasonable and overbroad. J-U-B contends that "pending" can reasonably be defined as "imminent," and should be interpreted to mean identified clients in whom J-U-B has invested goodwill and to whom J-U-B has sufficiently recruited and engaged such that the client will hire J-U-B. However, this ignores the fact that the term is not defined in the Agreement and can reasonably be given more than one possible interpretation, making it an overbroad description of the clients Freiburger is prohibited from "taking." There is no "goodwill" limitation to be found, nor is there language that limits the interpretation of "pending" clients or projects. Instead, the clause appears to require Freiburger to know to which "pending" clients or projects J-U-B "would be" providing professional services in the future. Therefore, it is clear that the Covenant is overbroad and an unreasonable means of protecting J-U-B's legitimate business interest.

3. *Judicial Modification of the Covenant*

[¶21] J-U-B finally argues that even if the Covenant is determined to be too overbroad to be enforced, Idaho case law suggests that a non-compete covenant can be altered by the court to render it reasonable and enforceable. In fact, J-U-B argues this Court should do so unless it determines the Covenant was not drafted in good faith. *See Data Management, Inc. v. Greene.*, 757 P.2d 62 (Alaska 1988). This Court has approved of the modification of otherwise unreasonable covenants not to compete. *See Insurance Ctr., Inc., v. Taylor,* 94 Idaho 896, 899, 499 P.2d 1252, 1255 (1972). In doing so the Court explained:

> It is the conclusion of this Court that the cases which authorize a modification of restrictive covenants ancillary to employment agreements are more consistent with the inherent concerns of a court of equity—fairness and reasonableness. Adoption of the modification principle allows a court to escape the rule of arbitrary refusal to enforce a covenant which, while unreasonable or indefinite in some of its terms, nevertheless serves to protect a legitimate interest of the parties or the public as the case may be .... [T]his Court seeks to provide flexibility to determining remedies available to the parties and the public. Consequently, enforcement is variable upon the circumstances of each case. Rather than choosing between absolute enforcement or unenforcement, there will be a wide range of alternatives available to meet the particular facts of the case being tried.

Id. at 900-901, 499 P.2d at 1255-56. Nevertheless, "a covenant not to compete may not be modified to make it reasonable if the covenant is 'so lacking in the essential terms which would protect the employee' such that the trial court is no longer modifying but rewriting the covenant." *Pinnacle Performance,* 135 Idaho at 369, 17 P.3d at 313 (*quoting Insurance Ctr.,* 94 Idaho at 900, 499 P.2d at 1256).

[¶22] Here, it would be necessary not only to strike some of the words of the Covenant, but in addition, to add clauses relating to good will and relationships between Freiburger and the clients and defining the parameters of what services Freiburger would be prohibited from providing to J-U-B clients. This is far more than a "blue pencil" approach to an unreasonable word or two and would have the district court or this Court re-writing the parties' contract. The district court correctly concluded that merely striking a few words from the Covenant could not achieve the goals of making it reasonable and enforceable and we agree that the only alternative was to declare the entire clause void and unenforceable as a matter of law. * * * *

IV.
CONCLUSION

[¶23] The Covenant at issue is unenforceable as a matter of law because it is unreasonable and much broader than necessary to protect J-U-B's legitimate business interest in the client goodwill developed by Freiburger while in J-U-B's employ. The Court cannot simply strike a few words from the Covenant to make it reasonable and enforceable and would be forced to rewrite the contract, adding essential limiting language in order to bring the Covenant into compliance with applicable law. * * * *

Chief Justice SCHROEDER and Justices EISMANN, BURDICK and JONES concur.

Questions:

1. What does ancillary mean? In what ways could a covenant not to compete be ancillary to the sale of a business? An employment agreement? When would a covenant not to compete not be ancillary?

2. Courts often draw a distinction between sales of business and employment agreements when judging whether an ancillary covenant not to compete should be enforceable. Why might a court be less likely to enforce a covenant not to compete in an employment agreement, or to enforce it less rigidly?

3. The "blue pencil" approach that the court names allows a court to cut back to a reasonable limit the scope, time, or geographic reach of a non-compete clause. Some courts have rejected the use of the blue pencil rule in employment cases, instead striking the clause at issue down.

Chapter 10. Warranties

Uniform Commercial Code § 2-312. Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement.

Uniform Commercial Code § 2-313. Express Warranties by Affirmation, Promise, Description, Sample, and cmts. 1, 3, 4, and 8.

Uniform Commercial Code § 2-314. Implied Warranty: Merchantability; Usage of Trade.

Uniform Commercial Code § 2-315. Implied Warranty: Fitness for Particular Purpose.

Uniform Commercial Code § 2-316. Exclusion or Modification of Warranties.

Uniform Commercial Code § 2-317. Cumulation and Conflict of Warranties Express or Implied.

Uniform Commercial Code § 2-318. Third Party Beneficiaries of Warranties Express or Implied, Alternatives A, B, and C.

Uniform Commercial Code § 2-719. Contractual Modification or Limitation of Remedy.

Questions:

1. In a sale of goods, does the seller normally promise that the buyer will actually own the goods?

2. Can a buyer of goods normally rest assured that the seller promises that no bank has taken a collateral interest in the goods that would allow the bank to take the goods back after the sale?

3. A Horizon Organic Milk carton says that the milk is fat free. Is that a warranty? What makes you think it was the basis of the bargain? (See § 2-313 cmts. 3 & 8.) Must reliance on the warranty be shown in order to prove that it is the basis of the bargain?

4. The Horizon carton also says that Horizon Organic milk "is always the very highest quality milk." Is that a warranty?

5. A farmer says that his bull is "the greatest living dairy bull." Is that a warranty?

6. What if the used car dealer says of a certain car, "This car is in great shape"? Is that a warranty?

7. Must Horizon milk purchased from Kroger (a grocery store chain) be merchantable?

8. If I buy the Horizon milk and my neighbor who is dining with us drinks it and as a result becomes ill, can he sue?

9. Do garage sale items come with a warranty of merchantability?

10. Might garage sale items come with a warranty of fitness for a particular purpose?

Karen BENTLEY v. Charles SLAVIK and Rosemary Slavik (1987)
United States District Court, S.D. Illinois
663 F. Supp. 736

MEMORANDUM AND ORDER

STIEHL, District Judge:

[¶1] This cause was tried before the Court, without a jury, on May 26 and 27, 1987. Having heard and considered the evidence and arguments of all parties, the Court makes the following findings of fact and conclusions of law as required by Rule 52(a) of the Fed.R.Civ.P.

FINDINGS OF FACT

* * * *

[¶2] During January, 1984, plaintiff observed, on a bulletin board located at Indiana University, a notice which the defendant, Charles Slavik, asked to be placed there. In the notice, Slavik represented that he had for sale an Auguste Sebastien Philippe Bernardel violin made in 1835 with an appraised value ranging from $15,000 to $20,000.

[¶3] In response to the notice, plaintiff contacted Slavik by telephone to inquire about the violin. During the telephone conversation, Slavik again represented that he had an authentic 1835 Bernardel violin with an appraised value ranging from $15,000 to $20,000, and invited the plaintiff to visit the defendants at their home in Edwardsville, Illinois, to see the violin.

[¶4] On January 28, 1984, plaintiff travelled to defendants' home, saw the violin, played and inspected it for at least two hours. During the plaintiff's visit, Charles Slavik again represented to the plaintiff that the violin was an authentic 1835 Auguste Sebastien Philippe Bernardel violin, and further showed her Certificate No. 5500 from one Robert Bernard Tipple dated September 21, 1980, which certificate estimated that the violin was an authentic Auguste Sebastien Philippe Bernardel violin, which had a value of $15,000 to $20,000. Tipple, since deceased, was a violin maker, authenticator, and appraiser in Mount Vernon, Illinois.

[¶5] In reliance upon the representations of Slavik, and the certificate presented by him, plaintiff purchased the violin from defendant, Charles Slavik, for $17,500. At that time, plaintiff paid Charles Slavik $15,000 by check, and agreed to pay the balance of $2,500 by February 15, 1984. The bill of sale signed by Slavik referred to the sale of "One Bernardel A.S.P. Violin." The second payment was made by check dated February 13, 1984, mailed from Indiana. A letter which accompanied the $2,500 check expressed the plaintiff's pleasure with the violin. From the date of purchase until the end of 1985, the plaintiff played the violin for an average of eight hours a day.

[¶6] Sometime in April of 1985, plaintiff became aware that the violin might not be a genuine work of Auguste Sebastien Philippe Bernardel made in 1835. Shortly after the plaintiff became aware the violin might not be a genuine Bernardel, plaintiff made demand upon Charles Slavik to return the purchase price and offered to return the violin, but Slavik refused to do so. Despite this, the plaintiff continued to play the violin until December of 1985.

[¶7] During the plaintiff's use of the violin it required serious repair. In November of 1984, the top of the violin was removed, a procedure considered "major surgery” in the bowed-stringed-instrument community. The repair was poorly done, and the violin now has adhesive residue visible on its exterior. At this time, the violin has a crack near the fingerboard and a crack under the chin rest. The neck of the violin was recently broken in transit, although it has since been reattached. Finally, the Court finds from the testimony of Professor R. Kent Perry that the violin has a “buzz” due to either the poor repair or the poor condition of the instrument. The Court finds that the violin is in poorer condition now than it was when purchased by the plaintiff.

[¶8] Although the defendants presented this evidence of the changed condition of the violin with fervor, they presented a theme without a resolution. No evidence was introduced to establish the extent to which the damage and repairs decreased the value of the violin. By failing to complete the theme, the defendants, in effect, leave the Court to speculate as to the measure of the diminution in the value of the violin and thereby improvise the final passage. The Court must, however, decline this offer.

[¶9] On the crucial question of authenticity, the plaintiff presented the testimony of Lowell Gene Bearden, and the evidence deposition of Frank Passa, both experts in the authentication and appraisal of violins. Bearden, of St. Louis, learned his craft from his father, and has operated his own violin shop for 24 years, where he has crafted three violins. He is a member of the International Society of Violin and Bow Makers, of which there are fewer than 25 members in this country. Frank Passa, of San Francisco, has operated a violin shop for 56 years, serving mostly members of major symphony orchestras. His skill also came under the tutelage of family members. Passa is also a member of the International Society of Violin and Bow Makers, and founded the American Federation of Violin and Bow Makers. Bearden and Passa, while not members of the academic music community, make their living in part from, and have based their reputations on, their ability to correctly identify, authenticate and appraise violins made centuries ago. These men examined the violin in question, and both asserted unequivocally that the instrument is not a Bernardel. They placed its value at between $750 and $2,000.

[¶10] As counterpoint, defendants offered the testimony of R. Kent Perry, Ph.D., professor of violin and chamber music at Southern Illinois University—Edwardsville. Professor Perry supplemented his testimony by playing brief excerpts from the classics on the violin in question, thereby both educating and entertaining the Court, as had plaintiff at the conclusion of her testimony. While the evidence presented by Professor Perry was helpful to the Court, it is clear that he is not an expert in the field of authenticating violins.

[¶11] Additional evidence as to the authenticity of the violin as a Bernardel came in the form of the certificate of authenticity issued by Tipple and introduced as a joint exhibit of the parties. Tipple’s certificate was less than compelling; it merely stated that it was his “estimation” the violin was a Bernardel.

[¶12] Defendants also presented the evidence of Mr. Slavik's daughter, Suzanne von Frasunkiewicz, a concert violinist from Brazil, who testified that she had played the violin on tour, found it to be a fine instrument, and believed it to be a Bernardel. Her belief was primarily based on what she had heard over the years in her father's home, and she admitted that she had had no training or experience in authenticating or appraising violins.

[¶13] The Court finds the evidence presented by plaintiff on the determinative question of authenticity to be the more credible, and finds from a preponderance of the evidence that the violin is not the work of Auguste Sebastien Phillipe Bernardel, and that its value at the time of sale was $2,000.

[¶14] Despite this, the Court finds that Charles Slavik neither purposefully nor willfully misrepresented the maker or value of the violin, though he referred to the instrument as a Bernardel both orally and on the Bill of Sale. Slavik is neither an expert on the masters of violins, nor is he in the business, occupation or vocation of selling violins.

[¶15] The Court further finds that there has been no evidence that defendant, Rosemary Slavik, had any ownership interest in the violin, nor that she played any role in the sale of the violin to plaintiff. In other words, the sale of this violin was not a duet by the defendants, but rather a solo by Charles Slavik.

CONCLUSIONS OF LAW

* * * *

[¶16] The plaintiff alleges in Count III that defendants breached the contract by not delivering a Bernardel. The defendants deny this, and assert that Charles Slavik delivered the violin bargained for and that the contract was ratified through a letter written by the plaintiff on February 13, 1984. Under the Illinois Uniform Commercial Code, Ill.Rev.Stat. ch. 26, para. 2-313(1)(b) (1983), an express warranty is created at time of sale that the goods sold by a seller will conform to any description of the goods that is a part of the basis of the bargain. The plaintiff, in effect, asserts that the certificate of authentication issued by Tipple and the sellers' reference to the violin as a Bernardel, both orally and in the bill of sale, as well as in the announcement letter posted on the bulletin board, was an express warranty by Charles Slavik to plaintiff.

[¶17] In a similar dispute arising more than 50 years ago, a California Court of Appeals found that a bill of sale reciting the sale of two violins, a "Stradivarius" and a "Guarnerius," served as a warranty from the seller to the buyer that the violins sold were, in fact, Stradivarius and Guarnerius violins. *Smith v. Zimbalist*, 2 Cal.App.2d 324, 38 P.2d 170 (1934), *hearing denied* by California Supreme Court.

[¶18] To determine whether a warranty was created under Illinois law, the Court must examine the intent of the parties as expressed in the bill of sale and in the circumstances surrounding the sale itself. *Alan Wood Steel Co. v. Capital Equipment Enterprises, Inc.*, 39 Ill.App.3d 48, 349 N.E.2d 627 (1976). This determination is generally considered a question of fact. *Redmac, Inc. v. Computerland of Peoria*, 140 Ill.App.3d 741, 95 Ill. Dec. 159, 489 N.E.2d 380 (1986). When examining ¶ 2-313(1)(b) of the Illinois Uniform Commercial Code, courts have used a "basis of the bargain" test which looks to the descriptions or affirmations forming the basic assumption of the bargain between the parties. *Alan Wood*, at 632.

[¶19] From the evidence presented to the Court, it is clear that the description of the violin as a Bernardel, the affirmation created by the seller's repeated use of the term "Bernardel," and the presentation of a certificate of authentication support the conclusion that there existed a basic assumption that the transaction concerned a 1835 Auguste Sebastien Philippe Bernardel violin. The Court finds that ¶ 2-313(1)(b) applies to this dispute, and that a warranty under the statute was created by Charles Slavik. Consistent with the findings of fact, the Court concludes that an Auguste Sebastien Philippe Bernardel violin was not delivered by Charles Slavik to Bentley, and therefore Slavik breached the contract with plaintiff. * * * *

[¶20] The plaintiff claims $20,000 in damages for the breach of contract allegation of Count III. The Court has concluded there was a breach of contract resulting from the warranty created by Slavik. Under Ill.Rev.Stat. ch. 26 ¶ 2-714(2) (1983), "the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted...." *Id.* The Court has found the violin had a value of $2,000 when sold, and that it was sold for $17,500, a value it would have had were it a Bernardel as warranted.

[¶21] In this case, the sale may be over, but the warranty lingers on. The plaintiff's measure of damages under Count III, therefore, is $15,500. * * * *

CADENZA

[¶22] This case gave the Court an insight into the relationship classical musicians develop with their instruments. The plaintiff referred to violins as "living," "breathing" and possessing "souls." Mr. Slavik spoke of his care of the violin over 33 years of ownership with pride and intensity. It is clear that this dispute concerned more than a simple commercial transaction. The defendant felt his integrity attacked; the plaintiff felt victimized.

[¶23] While sympathetic, the law is ill-equipped to soothe such emotions. The Court must examine the matter with detachment. Yet, it is this detachment that gives the law a timeless quality similar to that of the music the litigants so love. The law's disinterest gives it consistency, and its consistency, in turn, gives it endurance. It is this enduring quality that the law and great music share. Just as many classic works of music are based on a simple melody, the law of this case is based on a consistent rule: that a seller's description of an item amounts to a warranty that the object sold is as described. Returning to an earlier refrain: the sale may be over, but the warranty lingers on.

FINALE

[¶24] In summary, * * * * [t]he Court finds in favor of plaintiff, Karen Bentley, and against defendant, Charles Slavik, on Counts III and IV of plaintiff's complaint, and awards damages in favor of plaintiff, Karen Bentley, and against defendant, Charles Slavik, in the amount of $15,500. The Clerk of the Court is hereby ORDERED to enter judgment accordingly.

IT IS SO ORDERED.

Questions:

1. Karen Bentley Pollick likes older violins. "Pollick performs on a violin made by Jean Baptiste Vuillaume in Paris in 1860." http://www.kbentley.com/#/bio-and-reviews/. Is it possible that Karen Bentley actually believed completely, without a second thought, Slavik's statement that this was a Bernardel?

2. If Slavik were a twelve-year-old, would Bentley have been justified in so believing?

3. Let's just suppose that Ms. Bentley realized that the violin might not have been as "estimated." Would that matter? How would Slavik have argued that to the court?

4. What's with Dr. Perry and Ms. von Frasunkiewicz? Did their testimony have any relevance? Why were they put on the stand?

The Estate of Martha NELSON v. Carl RICE and Anne Rice (2000)
Court of Appeals of Arizona
12 P.3d 238

ESPINOSA, Chief Judge.

[¶1] Plaintiff/appellant the Estate of Martha Nelson, through its copersonal representatives Edward Franz and Kenneth Newman, appeals from a summary judgment in favor of defendants/appellees Carl and Anne Rice in the Estate's action seeking rescission or reformation of the sale of two paintings to the Rices. The

Estate argues that these remedies are required because the sale was based upon a mutual mistake. * * * *

We affirm.

Facts and Procedural History

[¶2] We view the evidence and all reasonable inferences therefrom in the light most favorable to the party opposing the summary judgment. *Hill-Shafer Partnership v. Chilson Family Trust,* 165 Ariz. 469, 799 P.2d 810 (1990). After Martha Nelson died in February 1996, Newman and Franz, the copersonal representatives of her estate, employed Judith McKenzie-Larson to appraise the Estate's personal property in preparation for an estate sale. McKenzie-Larson told them that she did not appraise fine art and that, if she saw any, they would need to hire an additional appraiser. McKenzie- Larson did not report finding any fine art, and relying on her silence and her appraisal, Newman and Franz priced and sold the Estate's personal property.

[¶3] Responding to a newspaper advertisement, Carl Rice attended the public estate sale and paid the asking price of $60 for two oil paintings. Although Carl had bought and sold some art, he was not an educated purchaser, had never made more than $55 on any single piece, and had bought many pieces that had "turned out to be frauds, forgeries or ... to have been [created] by less popular artists." He assumed the paintings were not originals given their price and the fact that the Estate was managed by professionals, but was attracted to the subject matter of one of the paintings and the frame of the other. At home, he compared the signatures on the paintings to those in a book of artists' signatures, noticing they "appeared to be similar" to that of Martin Johnson Heade. As they had done in the past, the Rices sent pictures of the paintings to Christie's in New York, hoping they might be Heade's work. Christie's authenticated the paintings, *Magnolia Blossoms on Blue Velvet and Cherokee Roses,* as paintings by Heade and offered to sell them on consignment. Christie's subsequently sold the paintings at auction for $1,072,000. After subtracting the buyer's premium and the commission, the Rices realized $911,780 from the sale.

[¶4] Newman and Franz learned about the sale in February 1997 * * * *. During 1997, the Rices paid income taxes of $337,000 on the profit from the sale of the paintings, purchased a home, created a family trust, and spent some of the funds on living expenses.

[¶5] The Estate sued the Rices in late January 1998, alleging the sale contract should be rescinded or reformed on grounds of mutual mistake and unconscionability. In its subsequent motion for summary judgment, the Estate argued the parties were not aware the transaction had involved fine art, believing instead that the items exchanged were "relatively valueless, wall decorations." In their opposition and cross-motion, the Rices argued the Estate bore the risk of mistake * * * *. The trial court concluded that, although the parties had been mistaken about the value of the paintings, the Estate bore the risk of that mistake. * * * * Accordingly, the court denied the Estate's motion for summary judgment and granted the Rices' cross-motion. The Estate's motion for new trial was denied, and this appeal followed. * * * *

Mutual Mistake

[¶6] The Estate first argues that it established a mutual mistake sufficient to permit the * * * * rescission of the sale of the paintings to the Rices. A party seeking to rescind a contract on the basis of mutual mistake must show by clear and convincing evidence that the agreement should be set aside. *Emmons v. Superior Court*, 192 Ariz. 509, 968 P.2d 582 (App.1998). A contract may be rescinded on the ground of a mutual mistake as to a " 'basic assumption on which both parties made the contract.' " *Renner v. Kehl*, 150 Ariz. 94, 97, 722 P.2d 262, 265 (1986), *quoting* Restatement (Second) of Contracts § 152 cmt. b (1979). Furthermore, the parties' mutual mistake must have had " 'such a material effect on the agreed exchange of performances as to upset the very bases of the contract.' " *Id., quoting* Restatement § 152 cmt. a. However, the mistake must not be one on which the party seeking relief bears the risk under the rules stated in § 154(b) of the Restatement. *Emmons*; Restatement § 152.

[¶7] In concluding that the Estate was not entitled to rescind the sale, the trial court found that, although a mistake had existed as to the value of the paintings, the Estate bore the risk of that mistake under § 154(b) of the Restatement, citing the example in comment a. Section 154(b) states that a party bears the risk of mistake when "he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient." In explaining that provision, the Washington Supreme Court stated, "In such a situation there is no mistake. Instead, there is an awareness of uncertainty or conscious ignorance of the future." *Bennett v. Shinoda Floral, Inc.,* 108 Wash.2d 386, 739 P.2d 648, 653-54 (1987); *see also State Farm Fire & Cas. Co. v. Pacific Rent-All, Inc.,* 90 Hawai'i 315, 978 P.2d 753 (1999).

[¶8] The Estate contends neither party bore the risk of mistake, arguing that § 154 and comment a are not applicable to these facts. * * * * [But] comment c clearly applies here and states:

> *Conscious ignorance*. Even though the mistaken party did not agree to bear the risk, he may have been aware when he made the contract that his knowledge with respect to the facts to which the mistake relates was limited. If he was not only so aware that his knowledge was limited but undertook to perform in the face of that awareness, he bears the risk of the mistake. It is sometimes said in such a situation that, in a sense, there was not mistake but "conscious ignorance."

[¶9] Through its personal representatives, the Estate hired two appraisers, McKenzie- Larson and an Indian art expert, to evaluate the Estate's collection of Indian art and artifacts. McKenzie-Larson specifically told Newman that she did not appraise fine art. In his deposition, Newman testified that he had not been concerned that McKenzie- Larson had no expertise in fine art, believing the Estate contained nothing of "significant value" except the house and the Indian art collection. Despite the knowledge that the Estate contained framed art other than the Indian art, and that McKenzie-Larson was not qualified to appraise fine art, the personal representatives relied on her to notify them of any fine art or whether a fine arts appraiser was needed. Because McKenzie-Larson did not say they needed an additional appraiser, Newman and Franz did not hire anyone qualified to appraise fine art. By relying on the opinion of someone who was admittedly unqualified to appraise fine art to determine its existence, the personal representatives consciously ignored the possibility that the Estate's assets might include fine art, thus assuming that risk. *See Klas v. Van Wagoner,* 829 P.2d 135, 141 n.8 (Utah App. 1992) (real estate buyers not entitled to rescind sale contract because they bore risk of mistake as to property's value; by hiring architects, decorators, and electricians to examine realty, but failing to have it appraised, purchasers executed sale contract knowing they "had only 'limited knowledge' with respect to the value of the home"). Accordingly, the trial court correctly found that the Estate bore the risk of mistake as to the paintings' value. * * * *

[¶10] Furthermore, under Restatement § 154(c), the court may allocate the risk of mistake to one party "on the ground that it is reasonable in the circumstances to do so." In making this determination, "the court will consider the purposes of the parties and will have recourse to its own general knowledge of human behavior in bargain transactions." Restatement § 154 cmt. d. Here, the Estate had had ample opportunity to discover what it was selling and failed to do so; instead, it ignored the possibility that the paintings were valuable and attempted to take action only after learning of their worth as a result of the efforts of the Rices. Under these circumstances, the Estate was a victim of its own folly and it was reasonable for the court to allocate to it the burden of its mistake. * * * *

[¶11] Affirmed. * * * *

Questions:

1. Why are the results different in *Bentley* and *Nelson*?

2. How would you make a *Nelson* argument within the legal framework of *Bentley*? [Remember *Nelson*. You might place it in your outline under the mutual mistake section, too.]

3. Did Slavik intend to make a warranty? Did that matter?

4. Why do we have a statute giving warranty effect to affirmations of fact made by sellers of goods?

Note: Martin Johnson Heade painted nearly twenty known replicas of magnolias on cloth. They turn up from time to time. http://www.nytimes.com/1999/06/04/arts/painting-packs-a-million-dollar-surprise.html. The one mentioned in the Times article still hangs in Houston at the Museum of Fine Arts. http://www.mfah.org/art/detail/magnolias-gold-velvet-cloth/.

Priscilla D. WEBSTER v. BLUE SHIP TEA ROOM, INC. (1964)
Supreme Judicial Court of Massachusetts
198 N.E.2d 309

REARDON, Justice.

[¶1] This is a case which by its nature evokes earnest study not only of the law but also of the culinary traditions of the Commonwealth which bear so heavily upon its outcome. It is an action to recover damages for personal injuries sustained by reason of a breach of implied warranty of food served by the defendant in its restaurant. An auditor, whose findings of fact were not to be final, found for the plaintiff. On a retrial in the Superior Court before a judge and jury, in which the plaintiff testified, the jury returned a verdict for her. The defendant is here on exceptions to the refusal of the judge (1) to strike certain portions of the auditor's report, (2) to direct a verdict for the defendant, and (3) to allow the defendant's motion for the entry of a verdict in its favor under leave reserved.

[¶2] The jury could have found the following facts: On Saturday, April 25, 1959, about 1 P. M., the plaintiff, accompanied by her sister and her aunt, entered the Blue Ship Tea Room operated by the defendant. The group was seated at a table and supplied with menus.

[¶3] This restaurant, which the plaintiff characterized as 'quaint,' was located in Boston 'on the third floor of an old building on T Wharf which overlooks the ocean.'

[¶4] The plaintiff, who had been born and brought up in New England (a fact of some consequence), ordered clam chowder and crabmeat salad. Within a few minutes she received tidings to the effect that 'there was no more clam chowder,' whereupon she ordered a cup of fish chowder. Presently, there was set before her 'a small bowl of fish chowder.' She had previously enjoyed a breakfast about 9 A. M. which had given her no difficulty. 'The fish chowder contained haddock, potatoes, milk, water and seasoning. The chowder was milky in color and not clear.

The haddock and potatoes were in chunks' (also a fact of consequence). 'She agitated it a little with the spoon and observed that it was a fairly full bowl * * *. It was hot when she got it, but she did not tip it with her spoon because it was hot * * * * but stirred it in an up and under motion. She denied that she did this because she was looking for something, but it was rather because she wanted an even distribution of fish and potatoes.' 'She started to eat it, alternating between the chowder and crackers which were on the table with * * * * [some] rolls. She ate about 3 or 4 spoonfuls then stopped. She looked at the spoonfuls as she was eating. She saw equal parts of liquid, potato and fish as she spooned it into her mouth. She did not see anything unusual about it. After 3 or 4 spoonfuls she was aware that something had lodged in her throat because she couldn't swallow and couldn't clear her throat by gulping and she could feel it.' This misadventure led to two esophagoscopies at the Massachusetts General Hospital, in the second of which, on April 27, 1959, a fish bone was found and removed. The sequence of events produced injury to the plaintiff which was not insubstantial.

[¶5] We must decide whether a fish bone lurking in a fish chowder, about the ingredients of which there is no other complaint, constitutes a breach of implied warranty under applicable provisions of the Uniform Commercial Code,[*] the annotations to which are not helpful on this point. As the judge put it in his charge, 'Was the fish chowder fit to be eaten and wholesome? * * * * [N]obody is claiming that the fish itself wasn't wholesome. * * * * But the bone of contention here—I don't mean that for a pun—but was this fish bone a foreign substance that made the fish chowder unwholesome or not fit to be eaten?'

[¶6] The plaintiff has vigorously reminded us of the high standards imposed by this court where the sale of food is involved (*see Flynn v. First Natl. Stores Inc.*, 296 Mass. 521, 523, 6 N.E.2d 814) and has made reference to cases involving stones in beans (*Friend v. Childs Dining Hall Co.*, 231 Mass. 65, 120 N.E. 407, 5 A.L.R. 1100), trichinae in pork (*Holt v. Mann*, 294 Mass. 21, 22, 200 N.E. 403), and to certain other cases, here and elsewhere, serving to bolster her contention of breach of warranty.

[¶7] The defendant asserts that here was a native New Englander eating fish chowder in a 'quaint' Boston dining place where she had been before; that '[f]ish chowder, as it is served and enjoyed by New Englanders, is a hearty dish, originally designed to satisfy the appetites of our seamen and fishermen'; that '[t]his

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[*] '(1) Unless excluded or modified by section 2-316, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. (2) Goods to be merchantable must at least be such as * * * (c) are fit for the ordinary purposes for which such goods are used * * *.' G.L. c. 106, s 2-314. '* * * (3)(b) [W]hen the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him * * *.' G.L. c. 106, s 2-316.

court knows well that we are not talking of some insipid broth as is customarily served to convalescents.' We are asked to rule in such fashion that no chef is forced 'to reduce the pieces of fish in the chowder to miniscule size in an effort to ascertain if they contained any pieces of bone.' 'In so ruling,' we are told (in the defendant's brief), 'the court will not only uphold its reputation for legal knowledge and acumen, but will, as loyal sons of Massachusetts, save our world-renowned fish chowder from degenerating into an insipid broth containing the mere essence of its former stature as a culinary masterpiece.' Notwithstanding these passionate entreaties we are bound to examine with detachment the nature of fish chowder and what might happen to it under varying interpretations of the Uniform Commercial Code.

[¶8] Chowder is an ancient dish preexisting even 'the appetites of our seamen and fishermen.' It was perhaps the common ancestor of the 'more refined cream soups, purees, and bisques.' Berolzheimer, The American Woman's Cook Book (Publisher's Guild Inc., New York, 1941) p. 176. The word 'chowder' comes from the French 'chaudiere,' meaning a 'cauldron' or 'pot.' 'In the fishing villages of Brittany * * * * 'faire la chaudiere' means to supply a cauldron in which is cooked a mess of fish and biscuit with some savoury condiments, a hodge-podge contributed by the fishermen themselves, each of whom in return receives his share of the prepared dish. The Breton fishermen probably carried the custom to Newfoundland, long famous for its chowder, whence it has spread to Nova Scotia, New Brunswick, and New England.' A New English Dictionary (MacMillan and Co., 1893) p. 386. Our literature over the years abounds in references not only to the delights of chowder but also to its manufacture. A namesake of the plaintiff, Daniel Webster, had a recipe for fish chowder which has survived into a number of modern cookbooks[*] and in which the removal of fish bones is not mentioned at all. One old time recipe recited in the New English Dictionary study defines chowder as 'A dish made of fresh fish (esp. cod) or clams, stewed with slices of pork or bacon, onions, and biscuit. 'Cider and champagne are sometimes added." Hawthorne, in The House of the Seven Gables (Allyn and Bacon, Boston, 1957) p. 8, speaks of '[a] codfish of sixty pounds, caught in the bay, [which] had been dissolved into the rich liquid of a chowder.' A chowder variant, cod 'Muddle,' was made in Plymouth in the 1890s by taking 'a three or four pound codfish, head added. Season with salt and pepper and boil in just enough water to keep from

[*] 'Take a cod of ten pounds, well cleaned, leaving on the skin. Cut into pieces one and a half pounds thick, preserving the head whole. Take one and a half pounds of clear, fat salt pork, cut in thin slices. Do the same with twelve potatoes. Take the largest pot you have. Fry out the pork first, then take out the pieces of pork, leaving in the drippings. Add to that three parts of water, a layer of fish, so as to cover the bottom of the pot; next a layer of potatoes, then two tablespoons of salt, 1 teaspoon of pepper, then the pork, another layer of fish, and the remainder of the potatoes. Fill the pot with water to cover the ingredients. Put over a good fire. Let the chowder boil twenty-five minutes. When this is done have a quart of boiling milk ready, and ten hard crackers split and dipped in cold water. Add milk and crackers. Let the whole boil five minutes. The chowder is then ready to be first-rate if you have followed the directions. An onion may be added if you like the flavor.' 'This chowder,' he adds, 'is suitable for a large fishing party.' Wolcott, The Yankee Cook Book (Coward-McCann, Inc., New York City, 1939) p. 9.

burning. When cooked, add milk and piece of butter.'[*] The recitation of these ancient formulae suffices to indicate that in the construction of chowders in these parts in other years, worries about fish bones played no role whatsoever. This broad outlook on chowders has persisted in more modern cookbooks. 'The chowder of today is much the same as the old chowder * * *.' The American Woman's Cook Book, *supra*, p. 176. The all embracing Fannie Farmer states in a portion of her recipe, fish chowder is made with a 'fish skinned, but head and tail left on. Cut off head and tail and remove fish from backbone. Cut fish in 2-inch pieces and set aside. Put head, tail, and backbone broken in pieces, in stewpan; add 2 cups cold water and bring slowly to boiling point * * *.' The liquor thus produced from the bones is added to the balance of the chowder. Farmer, The Boston Cooking School Cook Book (Little Brown Co., 1937) p. 166.

[¶9] Thus, we consider a dish which for many long years, if well made, has been made generally as outlined above. It is not too much to say that a person sitting down in New England to consume a good New England fish chowder embarks on a gustatory adventure which may entail the removal of some fish bones from his bowl as he proceeds. We are not inclined to tamper with age old recipes by any amendment reflecting the plaintiff's view of the effect of the Uniform Commercial Code upon them. We are aware of the heavy body of case law involving foreign substances in food, but we sense a strong distinction between them and those relative to unwholesomeness of the food itself, e. g., tainted mackerel (*Smith v. Gerrish*, 256 Mass. 183, 152 N.E. 318), and a fish bone in a fish chowder. Certain Massachusetts cooks might cavil at the ingredients contained in the chowder in this case in that it lacked the heartening lift of salt pork. In any event, we consider that the joys of life in New England include the ready availability of fresh fish chowder. We should be prepared to cope with the hazards of fish bones, the occasional presence of which in chowders is, it seems to us, to be anticipated, and which, in the light of a hallowed tradition, do not impair their fitness or merchantability. While we are buoyed up in this conclusion by *Shapiro v. Hotel Statler Corp*., 132 F. Supp. 891 (S.D. Cal.), in which the bone which afflicted the plaintiff appeared in 'Hot Barquette of Seafood Mornay,' we know that the United States District Court of Southern California, situated as are we upon a coast, might be expected to share our views. We are most impressed, however, by *Allen v. Grafton*, 170 Ohio St. 249, 164 N.E.2d 167, where in Ohio, the Midwest, in a case where the plaintiff was injured by a piece of oyster shell in an order of fried oysters, Mr. Justice Taft (now Chief Justice) in a majority opinion held that 'the possible presence of a piece of oyster shell in or attached to an oyster is so well known to anyone who eats oysters that we can say as a matter of law that one who eats oysters can reasonably anticipate and guard against eating such a piece of shell * * *.' (P. 259 of 170 Ohio St., p. 174 of 164 N.E.2d.)

[¶10] Thus, while we sympathize with the plaintiff who has suffered a peculiarly New England injury, the order must be

[*] Atwood, Receipts for Cooking Fish (Avery & Doten, Plymouth, 1896) p. 8.

[¶11] Exceptions sustained.

[¶12] Judgment for the defendant.

Bone of Contention

Sit down for chowder
eat fish bone, cry warranty
breach, high court says no.

Chowderhead

In quaint eatery
sit down for hearty chowder
expect bone or two.

Not for Tourists

Have shame for thinking
we must dilute our chowder
Give us chunks or death.

—George R. Kelley, STCL Class of 2002

Questions:

1. Is the Blue Ship Tea Room a merchant?

2. Is a soda bottle with a mouse in it fit for ordinary use? How about a fried chicken head found in a McDonald's chicken McNugget carton? How about a passenger's side seat belt that unbuckles when a car is hit mostly head-on but slightly from the car's left side and the passenger's weight is thrown against the buckle itself?

3. Are cigarettes fit for ordinary use? Is butter? (Consider comment 4 to § 2-313.)

4. What sort of warranty disclaimer would have removed the possibility of Webster's suit? Where would the Tea Room have had to put the disclaimer?

Images of the restaurant can be found at http://cca.li/QF and http://cca.li/QG and http://cca.li/QH.

Michael CATANIA et al. v. Charles J. BROWN (1967)
Circuit Court of Connecticut, Appellate Division
231 A.2d 668

JACOBS, Judge.

[¶1] We are justified in assuming from the finding that the defendant is engaged in the retail paint business. In June, 1964, the plaintiff Michael Catania asked the defendant to recommend a paint to cover the exterior stucco walls of the plaintiffs' house. The defendant was told that the stucco was in a 'chalky' and 'powdery' condition. He recommended and sold to Catania a product known as Pierce's shingle and shake paint. At the time of the sale, the defendant advised Catania to 'wire-brush' any loose particles which were 'flaky' or 'scaly' before applying the paint; the defendant also told Catania to mix two or three gallons of the paint in a container and to add a thinner. No other instructions or directions were given. Catania followed the instructions as given. In November, 1964, the paint on the exterior walls of the plaintiffs' house began to peel, flake and blister. The paint did not adhere to the surface because the condition of the walls was such that a thorough 'wire-brushing' and sandblasting of the entire surface were required before application of the paint.

[¶2] The trial court made two crucial findings of fact: (1) Catania relied upon the defendant's skill and judgment in the selection of suitable paint for the purpose of painting the exterior walls; and (2) the defendant was at fault in recommending the particular paint as suitable for the purpose intended.

[¶3] In *Corneliuson v. Arthur Drug Stores, Inc.*, 153 Conn. 134, 136, 214 A.2d 676, 678, our Supreme Court said: 'In *Crotty v. Shartenberg's-New Haven, Inc.*, *supra* (147 Conn. 460, 162 A.2d 513), we had occasion to consider the development of the law in the field of products liability and analyze the provisions of the Connecticut statute on implied warranties.' *See* General Statutes ss 42a-2-314, 42a-2-315. In the *Crotty* case, the court held (p. 464, 162 A.2d p. 515) that 'under our statute, there may be an implied warranty (1) that the goods shall be reasonably fit for a particular purpose, or (2) that the goods shall be of merchantable quality. The existence, nature and extent of either implied warranty depend upon the circumstances of the case.' See note, 79 A.L.R.2d 431, 469. Under the statute governing implied warranty of fitness for a particular purpose (s 42a-2-315), two requirements must be met: (a) the buyer relies on the seller's skill or judgment to select or furnish suitable goods; and (b) the seller at the time of contracting has reason to know the buyer's purpose and that the buyer is relying on the seller's skill or judgment. 'It is a question of fact in the ordinary case whether these conditions have been met and the warranty arises.' 1 Anderson, Uniform Commercial Code s 2-315:3, p. 213.

[¶4] The implied warranty of fitness is not founded on negligence; *Ireland v. Louis K. Liggett Co*., 243 Mass. 243, 137 N.E. 371; *Lundquist v. Coca Cola Bottling Co*., 42 Wash.2d 170, 254 P.2d 488; nor is it founded on fraud or lack of good faith. *Aegis Productions, Inc. v. Arriflex Corporation*, 25 A.D.2d 639, 268 N.Y.S.2d 185; 77 C.J.S. Sales s 325. 'The raising of an implied warranty of fitness depends upon whether the buyer informed the seller of the circumstances and conditions which necessitated his purchase of a certain character of article or material and left it to the seller to select the particular kind and quality of article suitable for the buyer's use. So when the buyer orders goods to be supplied and trusts to the judgment or skill of the seller to select goods or material for which they are ordered, there is an implied warranty that they shall be reasonably fit for that purpose.' *Green Mountain Mushroom Co. v. Brown*, 117 Vt. 509, 513, 95 A.2d 679, 681 (improper type of roof cement); see *Kirk v. Stineway Drug Store Co*., 38 I11.App.2d 415, 187 N.E.2d 307, 6 A.L.R.3d 1 (household stepladder purchased from defendant); *Martin v. J. C. Penney Co*., 50 Wash.2d 560, 313 P.2d 689, 80 A.L.R.2d 697 (shirt purchased from defendant burst into flames on contact with electric stove); *Frisken v. Art Strand Floor Coverings, Inc*., 47 Wash.2d 587, 288 P.2d 1087 (asphalt tile recommended by defendant); *Handy v. Holland Furnace Co.*, 11 Wis.2d 151, 105 N.W.2d 299 (reliance on seller's skill where seller recommended thermostatic fan for plaintiff's furnace); cf. *Houstone-Starr Co. v. Berea Brick & Tile Co*., D.C. 197 F. Supp. 492 (seller did not impliedly warrant that cull bricks were fit for use in exterior homes). 'Reliance can, of course, be more readily found where the retailer selects the product or recommends it.' 2 Frumer & Friedman, Products Liability s 19.03(4), p. 523.

[¶5] The finding, which may not be corrected, discloses that the buyer, being ignorant of the fitness of the article offered by the seller, justifiably relied on the superior information, skill and judgment of the seller and not on his own knowledge or judgment, and under such circumstances an implied warranty of fitness could properly be claimed by the purchaser. We cannot and do not consider contradictions or inconsistencies in the testimony.

[¶6] As we have construed s 42a-2-315, the facts of this case fall within its provisions.

[¶7] There is no error.

[¶8] In this opinion PRUYN and KINMONTH, JJ., concurred.

MOHASCO INDUSTRIES, INC. v. ANDERSON HALVERSON CORPORATION,
and United Resort Hotels, Inc., which does business as Stardust Hotel (1974)
Supreme Court of Nevada
520 P.2d 234

OPINION

THOMPSON, Chief Justice:

[¶1] Alexander Smith Carpets, a division of Mohasco Industries, Inc., brought this action to recover $18,242.50 for specially fabricated carpet which it manufactured and delivered for installation in the hotel lobby and casino showroom of the Stardust Hotel at Las Vegas, Nevada. The Stardust had refused to pay since the carpet 'shaded' excessively giving it a mottled effect and the appearance of being water stained. The trial court found that its refusal to pay was justified, and denied recovery to the plaintiff. This appeal followed.

[¶2] 1. The relevant facts are these. One Fritz Eden, an interior decorator selected and hired by Stardust, designed a pattern for the carpet to be used in the hotel lobby and casino showroom. A sample run of the chosen pattern was taken to the hotel by Eden, and was approved. Eden then specified the material and grade of carpet which the Stardust also approved. The Stardust then issued a detailed purchase order designating the type and length of yarn, weight per square yard, type of weave, color and pattern. No affirmation of fact or promise was made by any representative of Alexander Smith Carpets, the seller, to Stardust, the buyer. The carpet which was manufactured, delivered and installed was consistent with the sample (*cf. Mobile Housing, Inc. v. Stone*, 490 S.W.2d 611 (Tex. Civ. App. 1973)), and precisely conformed to the detailed purchase order. There were no manufacturing defects in the carpet. *Cf. Santor v. A. and M. Karagheusian*, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

[¶3] Upon installation, however, the carpet did shade and, apparently, to a much greater extent than the Stardust or its representative had anticipated. It is clear from the testimony that 'shading' is an inherent characteristic of all pile carpeting. When the tufts of the carpet are bent in different angles, the light reflection causes portions of the carpet to appear in different shades of the same color. The only explanation in the record for the 'excessive shading' was that Fritz Eden, the decorator for Stardust, decided not to specify the more expensive 'twist yarn.' That type yarn causes the tufts to stick straight up (or at least tends to do so) thus aiding in the elimination of excessive shading.

[¶4] The trial court found that the sale of the carpet was a sale by sample which was made a part of the basis of the bargain and created an express warranty that the carpet delivered for installation would conform to the sample. Moreover, that the express warranty was breached by the seller, thus precluding its claim for relief. The judgment entered rests squarely upon that finding.

[¶5] That finding is clearly erroneous. The installed carpet conformed precisely to the description of the goods contained in the purchase order. Moreover, it conformed precisely to the sample which the buyer approved. Whether the sale be deemed a sale by description or by sample, in either event the express warranty of conformity was met. The seller delivered the very carpet which the buyer selected and ordered.

[¶6] Although there is substantial evidence to support the trial court's finding that the installed carpet shaded excessively, that consequence may not be equated with a breach of an express warranty since the seller delivered and installed the very item which the buyer selected and ordered. Had the buyer, through its interior decorator, selected the more expensive carpet with 'twist yarn,' perhaps this controversy would not have arisen. The buyer, not the seller, must bear the consequence of that mistake.

[¶7] 2. As already noted, the judgment below rests upon an erroneous finding that the seller breached an express warranty that the whole of the carpet would conform to the sample which the buyer had approved. The buyer suggests, however, that the judgment should be sustained in any event since it is otherwise clear that the seller breached the implied warranties of merchantability and fitness. We turn to consider this contention.

[¶8] a. Unless excluded, or modified, a warranty of merchantability is implied in a contract if the seller is a merchant with respect to the goods in question. We have not, heretofore, had occasion to consider the impact, if any, of the implied warranty of merchantability upon a case where the goods are sold by sample or description and the buyer's specifications are so complete that it is reasonable to conclude that he had relied upon himself and not the seller with regard to the merchantability of the goods. In a related context, that of a building contractor who performed his work in accordance with detailed plans and specifications supplied by the owner, we have ruled that he may recover for his services even though his work may not have fully accomplished the purposes intended. *Home Furniture, Inc. v. Brunzell Construction Company*, 84 Nev. 309, 314, 440 P.2d 398 (1968).

[¶9] It is apparent that in a case where the sample or description of the goods may, for some reason, result in an undesirable product, the seller is placed in a dilemma. In Hawkland, A Transactional Guide to the Uniform Commercial Code, sec. 1.190206, at 65, the following example is given. Suppose a buyer provides his seller with minute specifications of the material, design and method of construction to be utilized in preparation of an order of shoes, and the seller delivers to the buyer shoes which exactly conform to the specifications. If the blueprints are in fact designs of defective shoes, the buyer should not be able to complain that the shoes are defective. For such an order might put the seller in the dilemma of being forced to breach either the express warranty of description or the implied warranty of merchantability.

[¶10] The matter at hand is similar to the example just given. Although the carpet was not defective, it did shade excessively and was, in the view of the buyer, an undesirable product. Yet, it was the product which the buyer specified and ordered. The manufacturer-seller was not at liberty to add 'twist yarn' and charge a higher price. The buyer relied upon its decorator, Fritz Eden, and the seller performed as directed. In these limited circumstances we conclude that the reasoning of *Home Furniture, Inc. v. Brunzell Construction Company*, *supra*, applies with equal force to this case. More precisely, we hold that the implied warranty of merchantability is limited by an express warranty of conformity to a precise description supplied by the buyer, and if the latter warranty is not breached, neither is the former.

[¶11] b. 'Where the seller at the time of contracting had reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified . . . an implied warranty that the goods shall be fit for such purpose.' NRS 104.2315.

[¶12] Buyer reliance is lacking in this case. The buyer used its own judgment, made its own selection and supplied the seller with detailed specifications which omitted twist yarn. A warranty of fitness may not be implied in these circumstances.

[¶13] 3. The judgment for United Resort Hotels, Inc., doing business as Stardust Hotel is reversed, and since there is no dispute concerning the amount of the plaintiff's claim, the cause is remanded to the district court to enter judgment for the plaintiff against the said defendant for $18,242.50, together with appropriate interest and costs. * * * *

MOWBRAY, GUNDERSON, BATJER and ZENOFF, JJ., concur.

DOW AGROSCIENCES, LLC v. Dennis BATES (2002)
United States District Court, N.D. Texas
205 F. Supp.2d 623

ORDER

CUMMINGS, District Judge.

[¶1] On this day the Court considered Plaintiff's Motion for Summary Judgment filed March 13, 2002. Defendants filed a Response to Plaintiff's Motion to Dismiss on April 2, 2002. Plaintiff filed a Reply on April 19, 2002. After considering all relevant arguments and evidence, the Court **GRANTS** Plaintiff's Motion for Summary Judgment.

I. BACKGROUND

[¶2] Plaintiff, Dow AgroSciences, manufactures pest management and biotechnology products. Plaintiff introduced Strongarm in the spring of 2000. Strongarm is used as a preemergence herbicide to control certain weeds in peanuts. Plaintiff began receiving demand letters from individual peanut growers (Defendants) contending that Strongarm was "highly toxic" and failed to control the weeds in their peanut crops. The Defendants also contended that Plaintiff misrepresented the product and that the misrepresentations constituted false, misleading, and deceptive acts and practices. In addition, Defendants alleged false advertising, breach of warranty, and statutory claims for alleged deceptive and fraudulent trade practices. Defendants' demand letters demanded payment from Plaintiff for certain damages, including consequential and incidental damages, treble damages, and attorneys' fees and expenses. On December 21, 2001, Plaintiff brought suit seeking declaratory judgment. * * * *

III. DISCUSSION

[¶3] Plaintiff filed this suit in an effort to have the Court determine the parties' rights and obligations under the applicable federal law. Plaintiff contends that the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") expressly preempts all of Defendants' claims against Plaintiff. Defendants assert that their claims are not expressly preempted by FIFRA. [The court held plaintiffs correct.] * * * *

[¶4] Additionally, Plaintiff claims that Defendants' alleged breach of implied and express warranty claims are foreclosed by Strongarm's label provisions. Strongarm's label provisions specifically disclaim any implied warranties and provide a limited express warranty.* In Texas, the UCC provides for the exclusion or modification of warranties. Tex.Bus. & Com. Code Ann. § 2.316(b) (Vernon 2000). Section 2.316(b) provides as follows:

> (b) Subject to subsection (c), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing it must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be in writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example "there are no warranties which extend beyond the description on the face hereof".

Whether a disclaimer is conspicuous or not is a question of law. Section 1.201(10) of the Texas Business and Commerce Code states that "a term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals is conspicuous." Tex. Bus. & Com. Code Ann. § 1.201(10) (Vernon Supp.2002). Strongarm's label provision excluding any express or implied warranty meets the letter of the Texas UCC and thus is enforceable. Tex.Bus. & Com. Code Ann. § 2.316(b); 2.316(b), (c) (Vernon 2000). Assuming *arguendo* that Defendants' claims for an alleged breach of express and implied warranties were not preempted by FIFRA, the claims would be foreclosed by Strongarm's label provisions. Plaintiff's Motion for Summary Judgment on Defendants' breach of implied and express warranty claims is **GRANTED.** * * * *

IV. CONCLUSION

[¶5] For the reasons previously discussed, Plaintiff's Motion for Summary Judgment is **GRANTED.** All other pending motions are DENIED as MOOT. All relief not expressly granted is **DENIED.**

[¶6] SO ORDERED.

* Strongarm's label provides as follows: "Dow AgroSciences warrants that this product conforms to the chemical description on the label and is reasonably fit for the purposes stated on the label when used in strict accordance with the directions, subject to the inherent risks set forth below". Dow AgroSciences MAKES NO OTHER EXPRESS OR IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR ANY OTHER EXPRESS OR IMPLIED WARRANTY.

John MURRAY and Alice Murray v. HOLIDAY RAMBLER, INC.,
KOA Trailer Sales, Inc. (1978)
Supreme Court of Wisconsin
265 N.W.2d 513

CONNOR T. HANSEN, Justice.

[¶1] On January 23, 1974, the plaintiffs purchased a 22-foot 1973 Avenger motorhome for a total sales price, including sales tax, license fees and trade-in allowance on another motorhome owned by the plaintiffs, of $11,007.15.

[¶2] Before taking delivery of the motorhome on January 30, 1974, Mr. Murray signed a "PRE-DELIVERY INSPECTION & ACCEPTANCE DECLARATION," acknowledging that he had inspected or had been given a demonstration of various components of the motorhome, and that these items had performed or had been explained to his satisfaction. Mr. Murray testified that he had gone through the items on this check list and had accepted the motorhome. He further testified that he had read "some" of the document and received a copy of it. The "PRE-DELIVERY INSPECTION & ACCEPTANCE DECLARATION" contained the warranty which is the basis for this litigation.

[¶3] The plaintiffs had problems with the motorhome from the day they took possession. It was returned repeatedly to KOA Trailer Sales, Inc., (hereinafter KOA) as an authorized dealer for the manufacturer, Holiday Rambler, Inc., (hereinafter Holiday Rambler), and various repairs and adjustments were performed at the expense of Holiday Rambler. Mr. Murray estimated that by July, 1974, the motorhome had been returned to KOA nine or ten times.

[¶4] In July, 1974, the plaintiffs traveled to Colorado in the motorhome. On the trip they experienced difficulty with the operation of it in a number of respects. We describe the various problems with the vehicle in greater detail in discussing the issue of whether the limited warranty remedy had failed its essential purpose.

[¶5] On returning to Wisconsin in mid-July, the Murrays took the motorhome to KOA, and were assured that it would be repaired, either by KOA or by Holiday Rambler, apparently without expense to the Murrays. There was testimony that the Murrays agreed to this.

[¶6] Arrangements were then made to have the vehicle taken to the Holiday Rambler factory in Wakarusa, Indiana, for any necessary adjustments. Holiday Rambler informed the Murrays, however, that they would be required to pick up the vehicle at the Indiana factory themselves.

[¶7] Mr. Murray decided not to have the repairs made. Instead, he picked up the motorhome at KOA, drove it home and hired a lawyer. By letter dated August

15, 1974, the Murrays informed KOA that they were revoking acceptance of the motorhome and that they demanded payment of $11,900. In September, 1974, KOA apparently offered to reimburse the Murrays for the expense of traveling to the Holiday Rambler factory, but the Murrays rejected this offer, and this action was commenced.

[¶8] The after-verdict motions of defendant, KOA, to change the jury's answers to certain questions and for judgment notwithstanding the verdict were denied, and judgment was entered in accordance with the verdict.[*]

[¶9] Holiday Rambler has appealed, and the plaintiffs have filed a notice of review with regard to the trial court's exclusion of evidence of plaintiffs' litigation expenses. KOA has been admitted as a party pursuant to sec. 817.12(6), Stats.

[¶10] The issues presented are as follows:

1. Does Holiday Rambler's limited warranty, together with its disclaimer of all other warranties, preclude revocation of acceptance of the motorhome?

2. Were the plaintiffs entitled to revoke acceptance of the motorhome? * * * *

LIMITED WARRANTY AND WARRANTY DISCLAIMER.

[¶11] Holiday Rambler and KOA contend on this appeal that the limited express warranty given by Holiday Rambler prevents the plaintiffs from revoking acceptance of the motorhome.

[¶12] Under the Uniform Commercial Code, (hereinafter UCC) a seller of goods may limit his contractual liability in two ways. He may disclaim or limit his warranties, pursuant to sec. 402.316, Stats., or he may limit the buyer's remedies for a breach of warranty, pursuant to sec. 402.719. These methods are closely related, and in many cases their effect may be substantially identical. *K-Lines, Inc. v. Roberts Motor Co.*, 273 Or. 242, 541 P.2d 1378 (1975); White and Summers, Handbook of the Law Under the Uniform Commercial Code (hornbook series, 1972) (hereinafter White and Summers), sec. 12-8, p. 375. Conceptually, however, they are distinct. A disclaimer of warranties limits the seller's liability by reducing the number of circumstances in which the seller will be in breach of the contract; it precludes the existence of a cause of action. A limitation of remedies, on the other hand, restricts the remedies available to the buyer once a breach is established. White and Summers, *supra*, sec. 12-11, pp. 383, 384.

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[*] The judgment in the amount of $14,923.03 includes $11,007.15 for the purchase price of the vehicle, $110 for inspection fees, $51.72 as reimbursement for repairs, $800 for interest and transportation costs, $2,500 for loss of use of the motorhome, and $455.78 in costs.

[¶13] In the present case we believe the "PRE-DELIVERY INSPECTION & ACCEPTANCE DECLARATION" is an attempt to both disclaim warranties and limit the remedies available to the buyer upon breach.

[¶14] Sec. 402.316, Stats. [UCC 2-316] permits a seller to limit or exclude both implied and express warranties. See: *Recreatives, Inc. v. Myers*, 67 Wis.2d 255, 264, 265, 226 N.W.2d 474 (1975). Language limiting implied warranties must be conspicuous and otherwise consistent with the provisions of sec. 402.316 and must not be unconscionable in light of the circumstances at the time the contract was made. Sec. 402.302.

[¶15] The document signed by Mr. Murray purported to exclude all warranties, express or implied, and stated in part, above his signature:

> "WARNING: THE PURCHASER IS EXPECTED TO READ THIS DOCUMENT BEFORE IT IS SIGNED.
>
> ". . . THE PURCHASER SHOULD NOT SIGN THIS STATEMENT UNTIL ALL OF THE ITEMS INDICATED ABOVE HAVE EITHER BEEN PERFORMED OR EXPLAINED TO HIS SATISFACTION. . . ."
>
> "The undersigned parties attest to the fact that the above representations are, to the best of their knowledge, true and that the purchaser has received a copy of this Pre-Delivery Inspection and Acceptance Declaration and read thoroughly the MANUFACTURER'S UNDERTAKING AVENGER CORPORATION on the reverse side."

The reverse side of this document stated:

> "MANUFACTURER'S UNDERTAKING-AVENGER CORPORATION*
>
> "THERE ARE NO WARRANTIES EXPRESSED OR IMPLIED AND PARTICULARLY THERE ARE NO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE MADE BY AVENGER CORPORATION FOR ITS PRODUCTS.
>
> "AVENGER CORPORATION, as the manufacturer, in lieu thereof undertakes and agrees that the product identified on the Pre-Delivery and Acceptance Declaration (reverse side) was free of defects in material and workmanship at the time of its delivery to the dealer and the initial user and owner; and
>
> "If the attached Pre-Delivery and Acceptance Declaration is properly filled out and returned to Avenger Corporation at Nappanee, Indiana, within five days of delivery of this trailer to the original user; and
>
> "If such Avenger product or its component parts (other than tires *) shall fail within one year from the date of delivery to the original user because the product or component part was defective when installed; and
>
> "If the owner-user will return the trailer to a service facility authorized by Avenger Corporation within fifty-two (52) weeks after initial delivery, Avenger Corporation will in the method it determines to be necessary re-

* The Avenger Corporation, now dissolved, was a wholly-owned subsidiary of Holiday Rambler.

place, or repair, at its sole option any such defective product or component at its own cost and expense.

> "THERE ARE NO OTHER WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, AND NO OTHER OBLIGATIONS, EITHER EXPRESS OR IMPLIED, INCLUDING SPECIFICALLY ANY OBLIGATION FOR INCIDENTAL EXPENSES OF ANY NATURE UNDERTAKEN BY AVENGER CORPORATION AS THE MANUFACTURER." (Emphasis added.)

[¶16] The language used in the document constitutes a warranty ". . . that the product . . . was free of defects in material and workmanship at the time of its delivery . . ."* Because this express warranty conflicts with the preceding disclaimer of all warranties, the language of express warranty must control. White and Summers, *supra*, at sec. 12-3, p. 352.

[¶17] Official Comment 1 to sec. 2-316, UCC (sec. 402.316, Stats., *supra*) states that that section:

> ". . . is designed principally to deal with those frequent clauses in sales contracts which seek to exclude 'all warranties, express or implied.' It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty . . .."

The undertaking in the instant case therefore constitutes a warranty that the motorhome was free of defects at the time of delivery, subject to whatever limitation is effected by the limitation of remedies language contained therein.†

[¶18] The damages which would otherwise be available upon a breach of contract may be altered or limited by the parties pursuant to sec. 402.719, Stats [UCC 2-719]. This section gives the parties substantial latitude to fashion their own remedies for breach of the contract. However, the UCC disfavors limitations on remedies and provides for their deletion where they would effectively deprive a party of reasonable protection against breach. *Chemetron Corporation v. McLouth Steel Corporation* (D.C. Ill. 1974), 381 F. Supp. 245, 250, affirmed 522 F.2d 469 (7th Cir. 1975).

[¶19] The drafters of the UCC recognized that:

> ". . . it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there

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* The fact that this warranty is denominated an "undertaking" is not significant. Formal words such as "warrant" or "guarantee" need not be used to create an express warranty. Sec. 402.313(2), Stats. Further, an "undertaking" is defined in part as "3. A promise or pledge; a guarantee; . . ." Webster's New International Dictionary (2d ed.).

† Holiday Rambler and KOA apparently acknowledge this point. Despite the drafter's efforts to avoid the word "warranty," both Holiday Rambler and KOA refer, in their briefs, to the "undertaking" as a "warranty."

> be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract . . .”

Official Comment 1, sec. 2-719, UCC; accord: *Conte v. Dwan Lincoln- Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976); *Wilson Trading Corporation v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 297 N.Y.S.2d 108, 244 N.E.2d 685 (1968).

[¶20] Accordingly, any clause purporting to limit remedies in an unconscionable manner will be deleted, making the ordinary UCC remedies available as though the stricken clause had never existed. Official Comment 1, sec. 2-719, UCC.

[¶21] In addition, sec. 402.719(2), Stats. provides:

> “(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this code.”

This provision dictates that:

> “. . . (W)here an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article (Chapter 402, Stats.).” Official Comment 1, sec. 2-719, UCC.

[¶22] The warranty in the present case, like most motor vehicle warranties, limited the buyer’s remedies to repair or replacement of defective parts. Specifically, the “undertaking” provides:

> “. . . Avenger Corporation will in the method it determines to be necessary replace or repair, at its sole option any such defective product or component at its own cost and expense. “THERE ARE NO OTHER WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, AND NO OTHER OBLIGATIONS, EITHER EXPRESS OR LIMITED, INCLUDING SPECIFICALLY ANY OBLIGATION FOR INCIDENTAL EXPENSES OF ANY NATURE UNDERTAKEN BY AVENGER CORPORATION AS THE MANUFACTURER.”

Such a limitation is not, on its face, unconscionable. *Cox Motor Car Company v. Castle* (Ky. 1966), 402 S.W.2d 429; *Potomac Electric Pow. Co. v. Westinghouse Elec. Corp.* (D.C. 1974), 385 F. Supp. 572. Sec. 402.719(2), Stats., specifically recognizes the possibility of such a limitation.

[¶23] However, where the limited remedy fails of its essential purpose, the limitation will be disregarded and ordinary UCC remedies will be available. Sec. 402.719(2), Stats. The purpose of an exclusive remedy of repair or replacement, from the buyer’s standpoint, is to give him goods which conform to the contract in this case, a motorhome substantially free of defects within a reasonable time[*] after a defect is discovered. *Conte v. Dwan Lincoln-Mercury, supra*; *Beal v. Gen-*

[*] What is a “reasonable time” for taking any action under the Uniform Commercial Code depends on the nature, purpose and circumstances of such action. Sec. 401.204(2), Stats.

eral Motors Corp. (D.C. Del. 1973), 354 F. Supp. 423; *Moore v. Howard Pontiac-American, Inc*. (Tenn. App. 1972), 492 S.W.2d 227.

> ". . . (E)very buyer has the right to assume his new car, with the exception of minor adjustments, will be 'mechanically new and factory furnished, operate perfectly, and be free of substantial defects' . . . "After the purchase of an automobile, the same should be put in good running condition; that is the seller does not have an unlimited time for the performance of the obligation to replace and repair parts. The buyer of an automobile is not bound to permit the seller to tinker with the article indefinitely in the hope that it may ultimately be made to comply with the warranty. 46 Am.Jur. Sales s 732; 77 C.J.S. Sales s 340. At some point in time, if major problems continue to plague the automobile, it must become obvious to all people that a particular vehicle simply cannot be repaired or parts replaced so that the same is made free of defect. . . ." *Orange Motors of Coral Gables v. Dade Co. Dairies*, 258 So.2d 319, 320, 321 (Fla. App. 1972), quoting *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J.Super. 441, 240 A.2d 195 (1968). Accord: *General Motors Corporation v. Earnest*, 279 Ala. 299, 184 So.2d 811, 814 (1966).

Although individual nonconformities may not be substantial in and of themselves, the obligation to repair or replace parts may fail of its essential purpose where the cumulative effect of all the nonconformities substantially impairs the value of the goods to the buyer. *Zoss v. Royal Chevrolet, Inc*., 11 UCC Rep. 527, 532 (Ind. Super. 1972).

[¶24] Where the seller is given reasonable opportunity to correct the defect or defects, and the vehicle nevertheless fails to operate as should a new vehicle free of defects, the limited remedy fails of its essential purpose. See: *Soo Line Railroad Co. v. Fruehauf Corp.* (8th Cir. 1977), 547 F.2d 1365; *Ehlers v. Chrysler Motor Corporation* (S.D. 1975), 226 N.W.2d 157; *Kohlenberger, Inc. v. Tyson's Foods, Inc.*, 256 Ark. 584, 510 S.W.2d 555 (1974); *Beal v. General Motors Corp., supra*; *Ford Motor Company v. Gunn*, 123 Ga. App. 550, 181 S.E.2d 694 (1971). The buyer may then invoke any of the remedies available under the UCC, including the right to revoke acceptance of the goods, under sec. 2-608 of the UCC (sec. 402.608, Stats.). *Moore v. Howard Pontiac-American, Inc*., *supra*; *Jacobs v. Metro Chrysler-Plymouth, Inc*., 125 Ga. App. 462, 188 S.E.2d 250 (1972).

[¶25] In the present case the jury determined that the plaintiffs had cause to revoke the acceptance of the motorhome. The verdict of a jury will not be disturbed by this court if, viewing the evidence in the light most favorable to the verdict, any credible evidence fairly admits of an inference supporting the verdict. *Nolden v. Mutual Benefit Life Ins. Co.*, 80 Wis.2d 353, 359, 259 N.W.2d 75 (1977). Here there was ample credible evidence to support the jury's implicit finding that the defendants had failed to provide the plaintiffs with a motorhome substantially free of material defects within a reasonable time.

[¶26] The testimony favorable to the verdict showed the following: Mr. Murray experienced problems with the lights and battery of the vehicle on the day he took possession and, although repairs were attempted, the lights continued to dim, the electrical system went dead on several occasions, and the generator did not charge the battery properly. The wiring of an outdoor light short-circuited where it passed through a sharp-edged metal wall. There were problems with the clock. There was an exposed, allegedly non-energized, 120-volt wire coming from the main electrical panel. Plaintiffs' expert witness testified that the wiring in the 12-volt electrical system was of an insufficient gauge for the type of fuses used by the manufacturer, that this wiring was not in conformity with the applicable electrical code, and that there was a danger of overheating in the electrical system.

[¶27] The original gas tank and an auxiliary gas tank, installed by KOA at the Murrays' request prior to delivery, were both apparently improperly vented. As a result, it was extremely difficult to fill the tanks; gasoline would spew out of the tanks when the caps were removed; and gasoline fumes came up into the passenger compartment. Mr. Murray testified that on one occasion, service station attendants were able to put only twenty cents' worth of gasoline into both tanks. Apparently as a result of problems with the carburetor, the vehicle would stall. Dirt and soldering flux were found in the fuel filter, which was replaced, as was the fuel pump.

[¶28] There were problems with the air suspension system. There was testimony that this resulted in uneven distribution of weight on the tandem set of wheels in the rear of the vehicle, putting insufficient weight on the front wheels and causing steering problems. Repairs were made to the suspension system, but the steering problems persisted. Mr. Murray complained that the front brakes were not operating properly, and despite adjustments, had difficulty with the front wheels.

[¶29] KOA apparently remedied various problems with the furnace and refrigerator, with an oil filter, and with a rattling engine cowling. KOA corrected the LP fuel tank gauge, which, as installed at the factory, indicated "full" when the tank was empty, and vice versa; KOA also supplied a missing handle for the tank and drained water which was inside the tank when it left the factory.

[¶30] Unusual pressure caused a water line to come uncoupled. Mr. Murray advised KOA about this problem but repaired it himself.

[¶31] There was also testimony regarding problems with folding seats, the furnace fan, the exhaust fan above the stove, a splash board which came unfastened, and the oven door, which fell off. Although there was conflicting testimony as to whether these parts were defective, the testimony of the Murrays with regard to these problems was not inherently incredible.

[¶32] It is the position of the defendants that KOA successfully repaired every defect complained of by the Murrays, and that the Murrays were satisfied with the repair service. The evidence on this point was conflicting, and the jury could reasonably have believed Mr. Murray's testimony that he had never told KOA he was satisfied with the vehicle and that, on the contrary, he had repeatedly sought to return the troublesome Avenger and to recover his purchase price and the motorhome he had traded in.

[¶33] Although the Murrays agreed that KOA had never refused to attempt a requested repair, this testimony does not affect their right to revoke acceptance. The limited remedy of repair or replacement of defective parts fails of its essential purpose whenever, despite reasonable opportunity for repair, the goods are not restored to a nondefective condition within a reasonable time, whether or not the failure to do so is willful. *Soo Line Railroad Co. v. Fruehauf Corp*., *supra*, at 1371, fn. 7; *Beal v. General Motors Corp*., *supra*, at 427.

[¶34] In July, 1974, the Murrays traveled to Colorado in the motorhome. They experienced continued problems filling the gasoline tanks. At one point they were forced to leave the vehicle to avoid gasoline fumes which filled the interior. Gasoline spewed from the tanks when the tank caps were removed, and they were asked to leave one service station after the attendant was thus doused with gasoline.

[¶35] Mr. Murray testified that the vehicle stalled while ascending one mountain and that the rear brakes malfunctioned while descending another.

[¶36] On the return trip, the electrical system malfunctioned while the Murrays were inside a South Dakota restaurant. Lights came on; smoke filled the vehicle, and wiring was burned. Defendants' expert agreed that this fire may have been caused by a short circuit where a wire passed through the sharp-edged metal wall of the vehicle.

[¶37] After this incident, the electrical system did not charge properly, and the plaintiffs were unable to use the air-conditioner. The plaintiffs opened the windows, and several screens blew out. The electrical system went out completely in Ellsworth, Wisconsin, and the plaintiffs traveled the rest of the way to their home near Menomonie, Wisconsin, by automobile.

[¶38] This evidence amply supports the conclusion that, despite reasonable opportunity for repair, the defendants had failed to provide the Murrays with goods conforming to the contract that is, with a safe and substantially non-defective motorhome within a reasonable time after purchase. The limited remedy therefore failed of its essential purpose, and the remedy of revocation became available. Also, under the warranty, Holiday Rambler was to bear the expense of repairs or replacements. Nevertheless, they initially insisted the Murrays travel to Indiana, at their own expense, to pick up the motorhome after it had been repaired. * * * *

Questions:

1. Why isn't the limitation of the warranty effective?

2. Can you think of another doctrine that might affect the enforceability of a warranty disclaimer?

3. Is the movement of this case toward contract or status?

Appendix—Answers to Problems 7-12

PROBLEM 7 ANSWER: The court in *Miami Coca-Cola Bottling Co. v. Orange Crush Co.*, 296 F. 693 (5th Cir. 1924), ruled for Crush. Here is the court's reasoning:

> We agree with the District Judge that the contract was void for lack of mutuality. It may be conceded that the appellee is liable to the appellant for damages for the period during which the contract was performed; but for such damages the appellant has an adequate remedy at law. So far, however, as the contract remains executory, it is not binding, since it can be terminated at the will of one of the parties to it. The consideration was a promise for a promise. But the appellant did not promise to do anything, and could at any time cancel the contract. According to the great weight of authority such a contract is unenforceable.

Did the court reach the correct result?

PROBLEM 8 ANSWER: The court in *Johnson Lakes Development, Incorporated v. Central Nebraska Public Power & Irrigation District*, 576 N.W.2d 806 (Neb. 1998), answered in two ways:

> [T]he 'reservation of such a power to terminate does not invalidate the contract or render the consideration for a promise insufficient, so long as the party reserving the power to terminate is irrevocably bound for any appreciable period of time or has materially changed any of his legal relations or otherwise rendered some performance capable of operating as consideration. If a period of notice is required, the contract remains in force and must continue to be performed according to its terms during the specified period after receipt of the notice of termination.
>
> * * * *
>
> Even a slight restriction on the exercise of the right of termination, such as the requirement that advanced notice be given, is sufficient to prevent a unilateral right of termination from being regarded as illusory in nature.

The court also addressed the fact that only one party of the two had a termination right:

> [W]e do not regard the reserved power to terminate in the instant case as invalid simply because it is unilateral. As observed in Williston on Contracts:
>
> > The confusion attendant upon the use of the term mutuality has arisen most frequently when one party under a contract has an option, not given to the other, of discontinuing or extending performance or of cancelling or renewing the contract, or in some manner of determining the extent of performance. If the power conferred goes so far as to render illusory the promise of the party

> having the option, there is indeed no consideration, and therefore no contract. However, the mere fact that the option prevents the mutual promises from being coextensive with one another does not prevent both promises from being binding according to their respective terms.

2 Richard A. Lord, Williston on Contracts § 7:14 at 297-300 (4th ed. 1992). Similarly, it is stated in Corbin on Contracts:

> The power to terminate that is reserved is invariably a power to terminate the whole contract, including both promises alike. Where one promise is illusory and the other is not, it looks as if the one promised performance must be rendered whether the other is performed or not. This is not so in the case of a power to terminate. If the power is exercised, both parties are freed from their promissory duties. If it is not exercised, neither is freed. It does not appear to involve an attempt to get something for nothing, and there is no such result whether the power is exercised or not.
>
> This being so, the contract should not be regarded as unfair for its supposed lack of "mutuality."

2 Joseph M. Perillo and Helen H. Bender, Corbin on Contracts, § 6.10 at 293 (rev. ed. 1995).

Did this court get it right?

PROBLEM 9 ANSWER: No. Here is the court's language from *Scott v. Moragues Lumber Co.*, 80 So. 394 (Ala. 1918):

> It is said, in the first place, that the alleged contract between the parties was conditioned upon the will of [Scott,] and was therefore void for want of consideration or mutuality of obligation. A valid contract may be conditioned upon the happening of an event, even though the event may depend upon the will of the party who afterwards seeks to avoid its obligation. * * * * [Scott] was not bound to purchase the vessel; but, when he did, the offer—or the contract, if the offer had been accepted—thereafter remained as if this condition had never been stipulated, its mutuality or other necessary incidents of obligation depending upon its other provisions and the actions of the parties thereunder.

We will deal with conditions throughout the law of contract, and this holding in *Scott* will come back to help or haunt you (depending on whether you think it is wise).

Does the language from *Scott* also resolve the real estate purchase financing condition problem?

PROBLEM 10 ANSWER: Cardozo concluded that Wood actually promised something. Because that is not immediately apparent on the facts, Cardozo spent some time discussing it:

> It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day. A promise may be lacking, and yet the whole writing may be "instinct with an obligation," imperfectly expressed * * * *. If that is so, there is a contract.
>
> The implication of a promise here finds support in many circumstances. The defendant gave an exclusive privilege. She was to have no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff. The acceptance of the exclusive agency was an assumption of its duties * * * *. We are not to suppose that one party was to be placed at the mercy of the other * * * *. Many other terms of the agreement point the same way. We are told at the outset by way of recital that "the said Otis F. Wood possesses a business organization adapted to the placing of such indorsements as the said Lucy, Lady Duff-Gordon has approved."
>
> The implication is that the plaintiff's business organization will be used for the purpose for which it is adapted. But the terms of the defendant's compensation are even more significant. Her sole compensation for the grant of an exclusive agency is to be one-half of all the profits resulting from the plaintiff's efforts. Unless he gave his efforts, she could never get anything. Without an implied promise, the transaction cannot have such business "efficacy as both parties must have intended that at all events it should have" (BOWEN, L. J., in The Moorcock, 14 P. D. 64, 68). But the contract does not stop there. The plaintiff goes on to promise that he will account monthly for all moneys received by him, and that he will take out all such patents and copyrights and trademarks as may in his judgment be necessary to protect the rights and articles affected by the agreement. It is true, of course, as the Appellate Division has said, that if he was under no duty to try to market designs or to place certificates of indorsement, his promise to account for profits or take out copyrights would be valueless. But in determining the intention of the parties, the promise has a value. It helps to enforce the conclusion that the plaintiff had some duties. His promise to pay the defendant one-half of the profits and revenues resulting from the exclusive agency and to render accounts monthly, was a promise to use reasonable efforts to bring profits and revenues into existence. For this conclusion, the authorities are ample * * * *.

Because Wood actually promised something, Cardozo concluded, Lady Lucy could be bound to her own promises. But, Cardozo's analysis raises questions:

1. Who do you suppose drafted this agreement? Why was it drafted the way it was?

2. This is a four-three decision in the NY Court of Appeals. Would the dissenters hold that no mutuality existed? Under what circumstances would that be fair to Wood?

3. If the contract is taken as is, without any implied terms, what is Lucy's remedy if Wood does nothing to promote her designs?

4. I think this case was decided on incorrect grounds and probably reached the wrong result, even though in the practical legal world the opinion is taken as unquestionable, though easily distinguishable, authority. Why wasn't this a case of unilateral contract—a bargain for some sort of action rather than a bargain for a promise in return?

Wood, that ingenious drafta
Wrote "duties" that he didn't hafta,
But the court didn't suffer
That clever old duffer
To lose, so he had the last laughta.

Of course, Lucy, Lady Duff-Gordon, is still famous as a designer, though somewhat out of fashion now. She is also famous as a Titanic survivor.

PROBLEM 11 ANSWER: Comment 2 provides quite expressly that the answer is "no." Is the Lumenera contract for requirements or output? Why? Answers to the other questions are reserved for class discussion.

PROBLEM 12 ANSWER: No. Here is the court's language, *Mattei v. Hopper*, 330 P.2d 265 (Cal. 1958):

> While contracts making the duty of performance of one of the parties conditional upon his satisfaction would seem to give him wide latitude in avoiding any obligation and thus present serious consideration problems, such "satisfaction" clauses have been given effect. They have been divided into two primary categories and have been accorded different treatment on that basis. First, in those contracts where the condition calls for satisfaction as to commercial value or quality, operative fitness, or mechanical utility, dissatisfaction cannot be claimed arbitrarily, unreasonably, or capriciously * * *, and the standard of a reasonable person is used in determining whether satisfaction has been received. * * * * Of the cited cases, two have expressly rejected the arguments that such clauses either rendered the contracts illusory (*Collins v. Vickter Manor, Inc.*, *supra*) or deprived the promises of their mutuality of obligation. (*Melton v. Story*, *su-*

pra.) The remaining cases tacitly assumed the creation of a valid contract. However, it would seem that the factors involved in determining whether a lease is satisfactory to the lessor are too numerous and varied to permit the application of a reasonable man standard as envisioned by this line of cases. Illustrative of some of the factors which would have to be considered in this case are the duration of the leases, their provisions for renewal options, if any, their covenants and restrictions, the amounts of the rentals, the financial responsibility of the lessees, and the character of the lessees' businesses.

This multiplicity of factors which must be considered in evaluating a lease shows that this case more appropriately falls within the second line of authorities dealing with "satisfaction" clauses, being those involving fancy, taste, or judgment. Where the question is one of judgment, the promisor's determination that he is not satisfied, when made in good faith, has been held to be a defense to an action on the contract. * * * * Although these decisions do not expressly discuss the issues of mutuality of obligation or illusory promises, they necessarily imply that the promisor's duty to exercise his judgment in good faith is an adequate consideration to support the contract. None of these cases voided the contracts on the ground that they were illusory or lacking in mutuality of obligation. Defendant's attempts to distinguish these cases are unavailing, since they are predicated upon the assumption that the deposit receipt was not a contract making plaintiff's performance conditional on his satisfaction. As seen above, this was the precise nature of the agreement. Even though the "satisfaction" clauses discussed in the above-cited cases dealt with performances to be received as parts of the agreed exchanges, the fact that the leases here which determined plaintiff's satisfaction were not part of the performance to be rendered is not material. The standard of evaluating plaintiff's satisfaction—good faith—applies with equal vigor to this type of condition and prevents it from nullifying the consideration otherwise present in the promises exchanged.

Moreover, the secondary authorities are in accord with the California cases on the general principles governing "satisfaction" contracts. "It has been questioned whether an agreement in which the promise of one party is conditioned on his own or the other party's satisfaction contains the elements of a contract—whether the agreement is not illusory in character because conditioned upon the whim or caprice of the party to be satisfied. Since, however, such a promise is generally considered as requiring a performance which shall be satisfactory to him in the exercise of an honest judgment, such contracts have been almost universally upheld." * * * * "A promise conditional upon the promisor's satisfaction is not illusory since it means more than that validity of the performance is to depend on the arbitrary choice of the promisor. His expression of dissatisfaction is not conclusive. That may show only that he has become dissatisfied with the con-

> tract; he must be dissatisfied with the performance, as a performance of the contract, and his dissatisfaction must be genuine." (Rest., Contracts (1932), § 265, comment a.)

Questions:

1. Is *Mattei* different from *Scott v. Moragues Lumber Co*.?

2. See if you can imagine examples of kinds of cases in which satisfaction is governed by a good faith standard, or by a reasonableness standard. Which standard is more likely to result in settlement before trial?

When Hopper spoke her bottom line,
And Mattei could finally sign,
He could be satisfied,
And she couldn't hide,
No matter how much she could whine.