CHAPTER 9

Contracts and Sales of Goods Law

Although most people do not realize it, they form and execute contracts repeatedly during their daily lives. Every time you purchase gas, buy groceries, go to a movie, or visit a doctor or a dentist, you have formed a contract with the provider of the good or service you are acquiring.

Overview

In most instances, we do not even think about these informal contracts. They are typically oral, not written, transactions; they are formed and executed almost simultaneously; and, unless the goods or services purchased turn out to be defective, the transaction is complete almost immediately, with no lingering legal ramifications to worry about. Nonetheless, the law recognizes these transactions as creating legal relationships known as *contracts*.

Businesses likewise form frequent contractual relationships as they go about their normal, routine activities. Contract law issues arise at several stages in the marketing of goods and services. A manufacturer, for example, enters into purchase contracts with its suppliers and sales contracts with its distributors or retailers. The final sale to the consumer, whether the sale is made by the manufacturer itself, a retailer, or someone else in the chain of distribution, also creates a contractual relationship between the purchaser and the seller.

Businesses tend to pay more attention to their contractual relationships than do individuals. Nonetheless, many routine business transactions occur without the use of a formalized written contract or without the parties explicitly agreeing on the terms of their contract. The law provides default rules that control in the instances in which the parties have not negotiated their own contractual terms. Many of these default rules are discussed in this chapter. You should realize, however, that the law promotes freedom of contract. Explicit agreements of the parties, provided they are not illegal or against public policy, generally override the rules discussed here.

This chapter provides an overview of basic contract law principles, including both common law contracts and the special rules that apply to sales of goods. The law of contracts is considerably more detailed and complex than this necessarily brief description suggests, however, so managers should seek legal advice when confronted with these issues.

Sources of Contract Law

Contract law is a matter of state law. This raises an initial question, however, of *which* state law applies when the parties to the contract are located in two or more states. Many modern commercial transactions involve parties from different states or occur across state lines. If the parties enter into a written contract, they often include a *choice-of-law* provision that indicates which state's law is to govern the contract. Otherwise, the controlling law is the law of the state to which the substance of the contract and the parties are most closely related and the state that has the strongest governmental interest in having its law apply. There are specific *conflict-of-laws* rules that help courts make these determinations.

Two basic sources of law govern the sale of goods and services: the common law and the Uniform Commercial Code (UCC).

The Common Law of Contracts

The original source of contract law was the *common law*. As discussed in Chapter 1, common law refers to law that develops in the courts and that is primarily found in judicial decisions. Although state legislatures have passed statutes dealing with certain aspects of specific types of common law contractual relationships, such as employer-employee or landlord-tenant relationships, the common law is still the primary source of contract law. Today, the common law of contracts governs the sale of services (including employment and insurance contracts), intangible personal property (such as trade secrets), and real estate.

The American Law Institute (ALI) has compiled the *Restatement (Second) of Contracts*, which summarizes the generally accepted principles of the common law of contracts.[1] Each state has its own variations on the rules, however, so a marketer needs to be aware of the specific law that controls in the state or states in which it operates.

Uniform Commercial Code

The *Uniform Commercial Code* (UCC) is a model statute drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL)[2] and the ALI in the 1940s. It has several parts, called "Articles," which codify the law regarding certain types of commercial transactions.

Originally, commercial law varied from state to state. This imposed a very substantial burden on business, particularly as the economy grew and became national in scope and as businesses began operating across state lines. The UCC was intended to provide the states with a blueprint for commercial law that would standardize the rules across all the states and that would reflect the new legal issues raised by the growth in mass distribution of consumer goods in the early twentieth century.

Article 2 of the UCC, which was drafted in 1951 and which has been adopted in all of the states except Louisiana,[3] governs transactions involving sales of goods.[4] A *sale* is a contract by which title to goods is transferred from one party to another for a price. *Goods* are any tangible personal property. The law pertaining to the sale of goods still is not completely "uniform," as most states altered the UCC somewhat as they adopted it.

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[1]For general information on the ALI, *see* www.ali.org

[2]For general information on the NCCUSL, see www.nccusl.org. For general information on the UCC, *see* www.law.cornell.edu/topics/sales.html

[3]Louisiana follows the civil law tradition of its French heritage rather than the common law system followed in the other 49 states.

[4]Article 2A governs the lease of goods. It was proposed by the drafters of the UCC in the late 1980s in response to uncertainty about how the provisions of Article 2 applied to the burgeoning business of the leasing of goods. Article 2A is substantially similar to Article 2. Some of the major distinctions between the two are that Article 2A contains no battle of the forms provision, the Statute of Frauds provision under Article 2A requires a writing for leases of $1,000 or more, and consumers are provided certain special protections in lease relationships. For general information on Article 2A, see www.law.cornell.edu/ucc/2A/overview.html

These alterations tend to be rather minor, however, so businesses can now engage in interstate business activities with a good deal more certainty and ease.

The UCC supplements the common law of contracts with regard to the sale of goods. If the UCC does not contain an explicit provision on a particular point, common law contract rules continue to apply. A marketer of goods thus needs to be aware of both sets of legal rules.

There are some fundamental distinctions between the UCC and the common law. First, the UCC is a lot less formalistic than the common law. This means that its rules are less rigid and that the UCC is more likely to find that an enforceable contract exists than is the common law, even if the parties have failed to agree on seemingly important terms. The UCC has specific "gap-filler" provisions (discussed below) that the courts use to supply certain missing terms.

Second, the common law applies equally to all parties. Under the UCC, by contrast, "merchants" are often subject to special rules. The UCC defines a *merchant* as a person who: (1) deals in goods of the kind being sold; (2) by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction; or (3) employs an agent or broker who holds himself out as having such knowledge or skill.[5] For example, the UCC imposes an obligation of good faith upon the parties to a contract.[6] A non-merchant seller is held to a subjective standard of "honesty in fact."[7] A merchant seller, on the other hand, is held to a higher objective standard that includes not only honesty in fact, but also the "observance of reasonable commercial standards of fair dealing in the trade."[8] Examples of other special merchant rules are provided later in the chapter.

Some contracts involve the sale of both goods and services. For example, if a buyer purchases new carpeting for his home, the sales contract may well also include installation of the carpet. If a dispute arises, should it be resolved under the UCC (because the sale of goods—carpet—is involved) or the common law (because the sale of a service—carpet installation—is involved)? In *hybrid contracts* involving both goods and services, the courts generally look to see whether the predominant focus of the contract is the sale of the goods or the sale of the service (see Case Illustration 9.1).

Elements of a Contract

> A contract is a promise or set of promises for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.[9]

A contract, in short, is a promise or set of promises that the courts will enforce. All contracts involve promises, but not all promises are contracts. For a contract to exist, four elements must be present: (1) mutual assent (i.e., offer and acceptance); (2) consideration; (3) legality; and (4) capacity.

Mutual Assent

Mutual assent requires a "meeting of the minds" between the two parties and is generally shown by a valid offer and acceptance. An *offer* is a statement by the *offeror* (person making the offer) that indicates a willingness to enter into a bargain. *Acceptance* occurs

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[5] UCC § 2-104(1).

[6] UCC § 1-203.

[7] UCC § 1-201(19).

[8] UCC § 2-103(l)(b).

[9] Restatement (Second) of Contracts § 1 (1979).

when the *offeree* (person to whom the offer was made) indicates a willingness to enter into that proposed bargain. Only the intended offeror has the power to accept; third parties may not accept an offer and form a binding contract. Generally, the parties indicate their willingness through words, but conduct can also constitute an offer or acceptance. It is the objective, outward manifestation of the party's words or conduct that counts. The law will not recognize subjective or secret intentions of either party. In addition, offers usually cannot be accepted through *silence* of the offeree.

Offers are effective when received by the offeree. Under the *mailbox rule*, however, acceptances are effective when sent, even if never received by the offeror. This rule can create risks for the offeror. For example, if a properly addressed acceptance is lost in transmission, it is nonetheless effective and the offeror is bound to the contract even though it may be unaware of the acceptance. To avoid such a result, the offeror should expressly state in its offer that acceptance will be effective only upon receipt of the acceptance by the offeror.

Offers, once made, can be terminated in a number of ways. The offeree may *reject* it or issue a *counteroffer*. The offer may be explicitly *revoked* by the offeror or may expire after a *lapse of time*. The offeror may specify a time limit for acceptance in the offer; otherwise, the offer will automatically expire after a reasonable time period. Finally, the *death* or *incapacity* of either party will terminate the offer.

CASE ILLUSTRATION 9.1

THE PLANTATION SHUTTER CO. v. EZELL, 492 S.E. 2D 404 (S.C. CT. APP. 1997)

FACTS Ricky Ezell contracted to purchase specially-manufactured interior shutters for his home from The Plantation Shutter Company ("Plantation") for $5,985.75. Plantation was to manufacture and install the shutters. Ezell was not satisfied with 12 of the 37 panels after installation. Plantation agreed to remake the shutters. Ezell continued to complain about several aspects of the shutters, including their exposed hinges. Plantation agreed to specially-manufacture side strips to hide the hinges. Plantation made several attempts to schedule an appointment to install the hinges, but Ezell did not respond to its efforts. Finally, Plantation sent workers to the home to install the hinges, but Ezell refused them access. Plantation sued Ezell for breach of contract to collect the balance owing on the shutters. Ezell argued that the UCC did not apply to this contract because it was a contract for services.

DECISION The court disagreed, stating:

> *In considering whether a transaction that provides for both goods and services is a contract for the sale of goods governed by the UCC courts generally employ the predominant factor test. Under this test, if the predominant factor of the transaction is the rendition of a service with goods incidentally involved, the UCC is not applicable. If, however, the contract's predominant factor is the sale of goods with labor incidentally involved, the UCC applies. In most cases in which the contract calls for a combination of services with the sale of goods, courts have applied the UCC.*
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> *Here, the contract does not provide for installation charges. The document is entitled "Terms of Sale." By signing the contract, however, the "customer" authorized the "sales representative" to do the "work" as specified. Although the term "work" sounds more like a service contract term, looking at the contract as a whole, it is predominantly a contract for the sale of goods; therefore, we must apply the UCC.*

The court determined that Ezell was liable for breach of contract because he had accepted the shutters by failing to effectively reject them in accordance with UCC requirements.

Bilateral Versus Unilateral Contracts Contracts can be either *bilateral* or *unilateral*, depending upon whether the offeror requested a promise or an act from the offeree. Most contracts are *bilateral* contracts in which a promise is given in exchange for another promise. If a hospital sends a purchase order for bandages to a medical supply company, for example, and the medical supply company sends back an acknowledgment form, the parties have formed a bilateral contract. The hospital has promised to pay for the bandages ordered, and the medical supply company has promised to provide the bandages in return for payment.

In a *unilateral contract*, a promise is given in exchange for an act (or a refraining from acting) by the other side. Acceptance of the contract occurs when the performance of the act is complete; no promise is requested of or made by the offeree (see Case Illustration 9.2).

CASE ILLUSTRATION 9.2

CIM INSURANCE CORP. v. CASCADE AUTO GLASS, INC., 660 S.E.2D 907 (N.C. APP. 2008)

FACTS Cascade Auto Glass, Inc., is an automobile glass replacement company. Between 1999 and 2004, Cascade repaired or replaced damaged windshields in at least 2,284 vehicles insured by GMAC-affiliated insurance companies.

Before 1999, GMAC administered its own glass repair or replacement program, and typically paid the full amount billed by Cascade for work performed for its insureds. In 1999, GMAC contracted with Safelite Solutions to serve as a third-party administrator of its auto glass program. Safelite informed Cascade that GMAC would now pay lower prices for Cascade's services.

Cascade disputed the Safelite prices. However, when an insured sought services, Safelite would send Cascade a confirmation fax stating the lower price that it would pay and including a statement that "[p]erformance of services constitutes acceptance of the above price." Although Cascade then would perform the services and bill GMAC a higher rate that it deemed "fair and reasonable," GMAC, through Safelite, paid Cascade at the lower prices quoted in its faxes. Cascade accepted these payments and deposited them into its bank accounts.

After Cascade threatened to sue GMAC for the additional sums it said were owing, GMAC filed suit seeking a declaration of the rights of the parties. The trial court entered summary judgment for GMAC, and the appellate court affirmed.

DECISION The appellate court began by explaining the nature of a unilateral contract:

> *A unilateral contract is formed when one party makes a promise and expressly or impliedly invites the other party to perform some act as a condition for making the promise binding on the promisor.*

Here, GMAC, through Safelite, informed Cascade of the prices it was willing to pay for services rendered by Cascade to its insureds through several means, including letters, telephone calls, confirmation faxes when claims were made but before work was done, and payment of invoices at GMAC's stated rate.

Although Cascade protested GMAC's prices, Cascade's own protests indicated that the faxes constituted offers from GMAC: "The purpose of this letter is to address [the confirmation faxes] and to dispel any notion that we are in agreement with the *offered pricing*."

As the appellate court stated: "It is a fundamental concept of contract law that the offeror is the master of his offer. He is entitled to require acceptance in precise conformity with his offer before a contract is formed." Here, the offer stated that performance equaled acceptance. Thus, by performing the requested repairs or replacements, Cascade accepted the terms of GMAC's offers, and formed valid unilateral contracts at GMAC's stated prices.

Summary judgment for GMAC was affirmed.

Generally, businesses prefer to use bilateral contracts. In unilateral contracts, the offeror cannot be certain when or whether the offeree will perform the requested act and form the contract. For example, if the hospital fails to specify its intent regarding acceptance when it places its purchase order for bandages, the medical supply company may accept either by sending back an acknowledgment form promising to ship the bandages or by in fact shipping the requested bandages.[10] In the latter instance, the hospital will not know if the medical supply company has accepted the offer until the bandages actually arrive. For this reason, businesses often prefer to avoid issuing offers that result in unilateral contracts.

Where the language of the offer is ambiguous as to whether a unilateral or bilateral contract is proposed, both the UCC and the Restatement provide that the offeree may accept either by performance or by a promise.

Advertisements as Offers Marketers often advertise the goods or services they have for sale. Does every such advertisement constitute an offer to every reader of the advertisement to enter into a contract?

Generally, no. Advertisements usually indicate that the marketer has goods or services for sale, describe those goods or services, and indicate prices. They operate as an invitation to the public to make an offer to purchase (which the seller may then accept or reject), but they generally do not rise to the level of an offer to sell. In addition, the courts generally view other sales materials, such as catalogs and price lists, as merely invitations to make an offer as well.

Advertisements that contain definite or specific language that clearly indicates a willingness on the part of the advertiser to be bound to a specific transaction may constitute an offer. For example, a court might interpret as an offer an advertisement to sell "13 SuperLite CoffeeMakers, Model 112B, for $39.95, First come, First served" because the advertiser has specified a definite number and definite type of coffeemaker to be sold.

See Discussion Case 9.1.

Option Contracts and Firm Offers As already stated, offers automatically expire after a reasonable time if they are not accepted. What is reasonable depends upon the circumstances of the offer and practices within the industry. In addition, offers may be revoked by the offeror at any time prior to acceptance. This is true even if the offer states that it will remain open for a certain time period.

However, the offeror can ensure that an offer will remain open if the offeree pays consideration (i.e., provides something of value), thus creating an *option contract*. This is a separate agreement that requires the offeree to provide consideration to the offeror in exchange for the offeror leaving the offer open for a specified time period. Option contracts are commonly used in the sale of real estate or businesses. Consideration is discussed further below.

The UCC provides a special rule for merchants called the *firm offer rule*. Under the UCC's firm offer rule,[11] an offer is not revocable if it is (1) made by a merchant (2) in a signed writing and (3) states that it will remain open for a certain time period. Firm offers do not require the payment of consideration. However, a firm offer cannot be made irrevocable for a period of time longer than three months unless consideration is paid.

Counteroffers and the Battle of the Forms An offeree, of course, is under no obligation to accept an offer made to it. The offeree may *reject* the offer (which instantly

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[10]UCC § 2-206(l)(b).

[11]UCC § 2-205.

terminates the offer) or may choose simply not to respond (which causes the offer to expire automatically after a reasonable time period).

What if the offeree is interested in the transaction presented to it but is not completely satisfied with the terms of the offer? The offeree may respond with a *counter-offer*. This has the legal effect of rejecting the original offer and putting a new offer on the table instead. Suppose that Amalgamated, Inc., contacts HR Consulting Co. and states that it is interested in having HR prepare new personnel manuals for its operations. Amalgamated has not made an offer at this point but is inviting HR to make an offer to it. HR (the offeror) then sends back a proposal, detailing the work product that it proposes to provide and stating a price of $50,000. Amalgamated (the offeree) believes that the price is too high and responds that it is willing to pay only $45,000 for HR's services.

Because Amalgamated has changed the terms of the offer sent to it, its response is a counteroffer (and Amalgamated is now the offeror). HR is the offeree and may decide whether to accept or reject the counteroffer that Amalgamated has put forth. No contract is formed between the parties unless and until HR agrees to the new terms proposed by Amalgamated.

Suppose HR rejects Amalgamated's counteroffer. May Amalgamated now go back and attempt to accept HR's original offer of $50,000? No. Amalgamated's counteroffer killed the original offer made by HR. At this point, all Amalgamated can do is issue a new offer for $50,000, which HR may choose to accept or reject.

Under the common law, the *mirror image rule* states that no contract is formed unless the offer and acceptance are identical in every respect. Suppose, for example, that Amalgamated, Inc., faxed a letter to Vendors Corp. offering to buy 100 widgets from Vendors, with delivery to occur on Tuesday, May 14. Vendors faxed back an acceptance, but the acceptance indicated that delivery was to occur on Monday, May 13. Under the common law mirror image rule, no contract has been formed and Vendors' purported acceptance is really just a counteroffer.

The common law's rigid mirror image rule does not mesh with the realities of modern-day business practice, where companies tend to use preprinted forms with boilerplate language. The buyer, for example, typically sends its purchase order form to the seller. The form contains preprinted provisions (that generally favor the buyer), with blanks where the buyer fills in terms such as price, quantity, and delivery requirements for the goods being ordered. The seller then sends back its preprinted acknowledgment form, which most likely has at least some differing preprinted terms (that generally favor the seller). Neither side typically reads the entire document sent by the other side but, rather, focuses on the terms critical to the immediate transaction, such as price, quantity, and delivery terms. Although the parties may not have reached agreement on all of the remaining terms, they clearly intend that a contract be formed. The mirror image rule frustrates this intention.

The UCC abandons the mirror image rule and focuses instead on the intent (or likely intent) of the parties to the transaction. UCC Section 2-207, known as the *Battle of the Forms* provision, tells the parties: (1) whether a contract has been created when the forms contain differing terms and, if so, (2) what terms control. The rules vary under this section depending upon whether both of the parties are merchants.

Under UCC Section 2-207, under most circumstances, a contract is formed even if the offer and acceptance contain differing terms. However, if the second document changes a *fundamental term* (for example, alters the quantity term), there is no acceptance and no contract is formed. In addition, if the second document *expressly states* that no contract will be formed unless the offeror agrees to the new or altered terms, no contract is formed. In both of these instances, the second document operates as a counteroffer.

If there is an acceptance and a contract has been formed, the second question is what terms will control? Different rules apply depending upon whether the second document contains *new* terms or *different* terms.

Whether *new* terms become part of the contract depends upon whether both parties are *merchants*. If *either* the buyer or the seller is *not* a merchant, a contract has been formed under the terms of the first document sent and any new terms in the second document are merely proposals for additions to that contract, which the other side may accept or reject.

If *both* the seller and the buyer *are* merchants, the new terms contained in the second document automatically become part of the contract unless: (1) the new terms materially alter the contract; (2) the other side objects within a reasonable time; or (3) the original offer stated that no new terms would be allowed. Material alterations include things such as disclaimers of warranties or clauses requiring arbitration in the event of a dispute. As a policy matter, the UCC takes the position that material alterations must be negotiated directly with the other side and may not be hidden in boilerplate language.

The UCC's position on *different* terms is much less clear. For example, suppose that the buyer's purchase order provides for one delivery date, but the seller's acknowledgment form states a different date. Some courts treat the different term in the same manner that they would treat a new term. Other courts find that the contract is formed but that the UCC's gap-filler provisions must be used to fill in the term on which the parties disagree. The outcome thus depends upon the state whose law controls the contract.

See Discussion Case 9.2.

Consideration

The second required element for a contract is *consideration*—that is, a *bargained-for exchange*. Promises made without consideration are considered to be gratuitous or gift promises and are generally not legally enforceable as contracts.

Consideration consists of anything of value exchanged by the parties, such as money, property, services, a promise to do something the person is not otherwise legally required to do, or a promise to refrain from doing something the person is otherwise legally entitled to do. Courts do not inquire into the adequacy of consideration; thus, the exchange of anything of value, no matter how small, suffices, provided that the amount is not nominal or the transaction is not a sham (i.e., the agreement recites the payment of consideration, but no consideration in fact was paid). If a party fails to provide anything of value, however, its promise is *illusory* and no contract is formed (see Case Illustration 9.3).

Suppose the parties enter into a valid contract for 50 hours of bookkeeping services. One month later, the parties agree that the contract shall now be for 60 hours of such services, not 50. Must this *modification* of the original contract be supported by consideration? Under the common law, the answer is yes—modifications of contracts must be supported by consideration. The UCC, on the other hand, provides that while consideration is necessary for the initial contract, it is not necessary for a modification.[12] Thus, if the contract had been for goods rather than services, consideration would not have been required.

[12]UCC § 2-209(1).

CASE ILLUSTRATION 9.3

HARRIS v. BLOCKBUSTER, INC., 622 F. SUPP. 2D 396 (N.D. TEX. APR. 15, 2009)

FACTS Blockbuster Online is a service that allows customers to rent movies through the Internet. Blockbuster entered into a contract with Facebook that caused the movie rental choices of Blockbuster customers to be disseminated on the customers' Facebook accounts to their Facebook friends.

Harris argued that this practice violated the Video Privacy Protection Act, which provides for liquidated damages of $2,500 per violation. In response to Harris' class action lawsuit, Blockbuster tried to invoke an arbitration provision in its "Terms and Conditions" document. This provision stated, in relevant part, that: "[a]ll claims, disputes or controversies … will be referred to and determined by binding arbitration." The provision also provided that users of the service waived the right to file a class action. Before a customer could join Blockbuster Online, the customer was required to click on a box certifying that the customer had read and agreed to the Terms and Conditions.

Under Texas law, a contract must be supported by consideration. If there is no consideration, the contract is illusory and cannot be enforced. Harris argued that the arbitration clause was illusory because Blockbuster reserved the right to modify the Terms and Conditions, including the arbitration provision, "at its sole discretion" and "at any time," and provided that such modifications will be effective immediately upon being posted on the site. Under the heading "Changes to Terms and Conditions," the contract further stated:

> *You agree to review these Terms and Conditions of Use periodically and your continued use of this Site following such modifications will indicate your acceptance of these modified Terms and Conditions of Use. If you do not agree to any modification of these Terms and Conditions of Use, you must immediately stop using this Site.*

DECISION The court concluded that the Blockbuster arbitration provision was illusory because there was nothing in the Terms and Conditions that prevented Blockbuster from unilaterally changing any part of the contract other than providing that such changes would not take effect until posted on the website. In particular, the court noted, "there is nothing to suggest that once published the amendment would be inapplicable to disputes arising, or arising out of events occurring, *before* such publication." Thus, because Blockbuster had in no way limited its ability to unilaterally modify all rules regarding dispute resolution, the arbitration clause was illusory and unenforceable.

Legality/Unenforceability on Public Policy Grounds

Although contract law generally favors freedom of bargaining between the parties, the courts do not enforce certain types of bargains or agreements for public policy reasons. In those cases, they typically "leave the parties where they find them," which can be very harsh on a party who has fully performed its side of the bargain but has not yet received performance from the other side. There are two rationales behind this rule: (1) to discourage the illegal conduct in the future and (2) to avoid the inappropriate and unseemly sight of having the courts become involved in enforcing a socially undesirable activity.

Some agreements are unenforceable because they are statutory violations. For example, a person engaged in a trade or business required by law to be licensed may not be properly licensed or an individual or firm may be in violation of statutes prohibiting gambling or usury. In such an instance, the statute may well provide that any agreement entered into by such a person or firm is illegal and thus unenforceable. Other types of unenforceable agreements are not statutory violations but are nonetheless found to violate public policy. These would include contracts that attempt to improperly limit one party's liability for its own tortious conduct (*exculpatory clauses* are discussed more below) or contracts that unreasonably restrain trade.

Courts may also decline to enforce contracts they regard as *unconscionable* (i.e., unfair), including *contracts of adhesion*. Contracts of adhesion typically involve standardized documents drafted by a party with grossly disproportionate bargaining power in the relationship, who then presents the document to the other party on a "take it or leave it" basis.

Courts are reluctant to allow businesses to argue that a contract was unconscionable, although they readily use this doctrine to protect consumers.

Capacity

To form a contract, both parties must have *contractual capacity*. Most persons have full capacity to enter into a contract, but certain parties have only limited capacity. *Minors* (persons under the age of 18), for example, may enter into contracts. However, those contracts are often *voidable* at the option of the minor but not at the option of the other party to the contract. Thus, businesses need to use caution when contracting with minors, particularly as minors increasingly purchase expensive consumer items, such as electronics and automobiles. Businesses often require the minor's parent or another adult to co-sign the contract. Even if the minor is able to void the contract, the adult cosigner will remain bound.

Persons who have been placed under guardianship by a court as a result of incompetency have no capacity to enter into contracts. Persons who are mentally ill or mentally incompetent but who are not under guardianship and intoxicated persons may enter into contracts, but those contracts may be voidable at their option (but not by the other party to the contract).

Corporations make contracts through the acts of their officers, agents, and/or employees. Whether a particular individual has the authority to bind the corporation to a contract is determined by principles of agency or corporate law. The president generally has authority to enter into all contracts relating to business operations. If an individual other than the president is entering into the contract on behalf of the corporation, the other party to the contract would be wise to verify that that individual has the authority to do so.

Promissory Estoppel

There are instances in which a promise does not meet the required elements of a contract but a court nonetheless enforces it under the doctrine of *promissory estoppel*. The *Restatement (Second) of Contracts* defines this doctrine as follows: "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."[13]

Generally, the doctrine of promissory estoppel requires four elements to be present: (1) a clear and unambiguous promise must have been made; (2) the party to whom the promise was made must have relied upon it; (3) that reliance must have been reasonable and foreseeable; and (4) the party relying on the promise must have been injured by that reliance. Under the Restatement (Second), however, reasonable reliance is not a required element. Rather, the promisee must show: (1) a promise; (2) that the promisor should have reasonably expected to induce action or forbearance; (3) that does induce such action or forbearance; and (4) that injustice can be avoided only through enforcement of the promise. The rationale behind the doctrine of promissory estoppel is to avoid the substantial hardship or injustice that would result if such a promise were not enforced.

See Discussion Case 9.3.

[13]Restatement (Second) of Contracts § 90(a).

The Statute of Frauds

The law recognizes and enforces oral contracts in most instances. All states have adopted some form of a *Statute of Frauds*, however, that requires that certain types of contracts be in writing in order to be enforceable in court in the event of a dispute. These contracts include: (1) contracts that cannot be performed in one year; (2) contracts for the transfer of an interest in real property; and (3) contracts in which one person agrees to assume another's debts.

Under the UCC's Statute of Frauds provision,[14] contracts for $500 or more usually must be in writing in order to be enforceable in court. If a contract is initially for less than $500 (and thus not required to be in writing) but is modified to bring it over $500, the modification must be in writing.

Neither the common law nor the UCC requires that the writing be a formal document—even a handwritten note on a scrap of paper or the back of an envelope will suffice. Under the common law, the document must: (1) reasonably identify the subject matter of the contract; (2) indicate that a contract (as opposed to a lease or some other type of transaction) has been made between the parties; (3) state with reasonable certainty the essential terms of the contract; and (4) be signed by the party against whom enforcement is sought.

Returning to our example of Amalgamated, Inc., and HR Consulting, let us suppose that the parties negotiated and agreed on the terms orally. Amalgamated then sent a signed letter to HR, indicating that a contract had been formed and setting forth the terms of the agreement. The letter would be a sufficient writing to allow HR to enforce the contract against Amalgamated. Amalgamated would be unable to enforce the contract against HR, however, if HR failed to perform, because Amalgamated does not have a writing signed by HR.

The lesson for managers, of course, is to never sign a document unless the other side signs as well. Where the document is being exchanged through the mail, and one side necessarily has to sign before the other, the first signatory may be protected by inclusion of a clause to the effect: "This contract shall not be formed or take effect until signed by both parties."

Under the UCC, a writing satisfies the Statute of Frauds if it: (1) evidences a contract for the sale of goods; (2) is signed by the party against whom enforcement is sought; and (3) states the quantity.[15] In addition, the UCC has a special Statute of Frauds rule for merchants. Under the *reply doctrine*, if both parties are merchants, a written confirmation that: (1) indicates that a contract has been made; (2) has been signed by the sender; and (3) states the quantity is enforceable against the recipient as well as the sender unless the recipient objects in writing within 10 days after receipt.[16]

See Discussion Case 9.1.

Parol Evidence Rule and Contract Interpretation

The *parol evidence rule* provides that evidence of oral agreements and discussion prior to the signing of a writing that is intended to be the final expression of the parties' agreement may not be introduced to contradict that writing. The rule does not bar consideration of

[14]UCC § 2-201.

[15]UCC § 2-201(1).

[16]UCC § 2-201(2).

oral modifications of a contract made after the signing of the writing, however, unless the writing states that oral modifications are not allowed.

Most modern courts will allow parties to introduce extrinsic evidence to aid in the *interpretation* of an agreement. Thus, the parties can introduce evidence of what they thought the term in the writing meant. Three sources are particularly important to this interpretation role, particularly in UCC contracts. *Course of performance* refers to the manner in which the parties have conducted themselves with regard to the specific contract at issue.[17] *Course of dealing* refers to the manner in which the parties have acted with respect to past contracts.[18] *Usage of trade* refers to "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question."[19] Although these sources cannot be used to contradict express terms in a written agreement, they can be used to interpret those terms. Where more than one source applies, the specific controls over the general. That is, an express contractual provision controls over a course of performance, which controls over a course of dealing, which controls over a usage of trade.[20]

Special UCC Rules

The UCC has a number of provisions relating to the sale of goods that differ significantly from the common law of contracts. Some of these special UCC rules are discussed here.

Definiteness and the UCC's "Gap-Filler" Provisions

Traditionally, the common law required a contract to be very definite in its terms, spelling out all of the material terms of the contract, such as the parties, the subject matter of the contract, the quantity, and the price, in order to be enforceable. Most modern courts have relaxed this requirement and will now supply a missing term where they can find a "reasonable" value for that term.

The UCC has codified this more liberal approach to definiteness of a contract. The UCC does not demand absolute certainty in an agreement in order for a contract to exist. Rather, the UCC requires only three elements to be present: (1) some sort of indication that an agreement exists; (2) the signature of the party against whom enforcement is sought; and (3) a statement of the quantity of goods being sold. The UCC has *gap-filler* rules that will fill in any terms left open or not addressed by the parties, such as price, performance, delivery or payment terms, or remedies.

The UCC will not fill in missing quantity terms—largely because there is no way to tell what the parties intended in terms of quantity if they failed to specify this themselves. The UCC will allow *output* contracts, however, where the buyer agrees to buy all that the seller produces, or *requirements* contracts, where the seller agrees to supply all that the buyer needs. In each case, however, the seller's production or the buyer's requirement is governed by norms of fair dealing and industry custom.

Performance of the Contract

Under the UCC, the basic obligation of the seller is to tender conforming goods to the buyer. The basic obligation of the buyer is to accept and pay for those goods in accordance with the contract terms.

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[17]UCC § 2-208.

[18]UCC § 1-205(1).

[19]UCC § 1-205(2).

[20]UCC § 2-208(2).

Performance by the Seller *Tender of delivery* requires the seller to: (1) put and hold conforming goods at the buyer's disposition and (2) give the buyer reasonable notification to allow the buyer to take delivery.[21] Tender of conforming goods by the seller entitles the seller to acceptance of them by the buyer and to payment of the contract price.[22]

The *perfect tender rule* requires the seller's tender to conform exactly to the terms of the contract. If the tender deviates in any way—say, the quantity delivered is insufficient, or the widgets are blue instead of green as called for under the contract—the buyer may: (1) reject the whole lot; (2) accept the whole lot; or (3) accept any commercial unit or units and reject the rest.[23] The parties can, of course, always contract around the perfect tender rule. For example, they can agree in the contract that the seller has the right to repair or replace any defective goods.

The UCC also creates a number of exceptions to the perfect tender rule. The most important of these is the seller's right to *cure*. The seller can cure—i.e., make a second delivery or substitute a different tender—in two circumstances: (1) when the time for performance under the contract has not yet expired or (2) if the seller reasonably believed that the tender would be acceptable to the buyer with or without a money allowance. If the buyer rejects the goods in this latter instance, the seller has a reasonable time period in which to cure provided the seller notifies the buyer of its intent to do so.[24]

Performance by the Buyer The buyer's obligation under the UCC is to accept conforming goods and to pay for them. As previously noted, if the tender is nonconforming, the buyer may: (1) reject all of the goods; (2) accept all of the goods; or (3) accept any commercial unit or units and reject the rest. The buyer must pay at the contract rate for any units accepted but can recover damages for any nonconformity if the buyer notifies the seller of the breach.

Once the goods have been tendered, the buyer has a number of rights, including:

Inspection: Unless the parties agreed otherwise, the buyer has a right to inspect the goods before payment or acceptance. The buyer loses its right to reject the goods or to revoke its acceptance if it fails to inspect the goods within a reasonable time period. The buyer must pay the expenses of inspection but can recover those expenses from the seller if the goods are rightfully rejected as nonconforming.[25]

Acceptance: Acceptance occurs when the buyer, after a reasonable time to inspect: (1) signifies to the seller that the goods conform; (2) signifies to the seller that the buyer will take or retain the goods despite their nonconformity; or (3) fails to make an effective rejection of the goods.[26] Once the buyer has accepted the goods, the buyer may not reject them.

Revocation of acceptance: The buyer can revoke the acceptance of nonconforming goods if the nonconformity substantially impairs the value of the goods to the buyer, provided that the acceptance: (1) was premised on the reasonable assumption that the nonconformity would be cured by the seller, and it was not cured; or (2) was made without discovery of the nonconformity, and the acceptance was reasonably induced by the difficulty of discovery of the nonconformity before acceptance or by assurances of the seller.[27]

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[21] UCC § 2-503(1).

[22] UCC § 2-507(1).

[23] UCC § 2-601.

[24] UCC § 2-508.

[25] UCC § 2-513.

[26] UCC § 2-606.

[27] UCC § 2-608(1).

Revocation is not effective until the buyer gives notification of it to the seller. The revocation must be made within a reasonable time after the buyer discovers or should have discovered the grounds for the revocation and before the goods have undergone any substantial change not caused by their defect.[28]

Rejection: Rejection must be made within a reasonable time after the goods are tendered or delivered. It does not take effect unless the buyer seasonably notifies the seller.[29] Rejection can be rightful or wrongful, depending upon whether the goods conform to the contract. The buyer has the right to reject nonconforming goods under the perfect tender rule, of course. The buyer may also reject conforming goods, although the buyer is then in breach of contract and is liable to the seller for damages as described below. Once the buyer has rejected the goods, the buyer cannot exercise any ownership interest in them but must hold the goods for a reasonable time to allow the seller to remove them.

Transfer of Title and Risk of Loss

Historically, under the common law, *title* (i.e., legal ownership) governed most aspects of the rights and duties of the buyer and seller arising out of a sales contract, including determining which party bore the risk of loss. Under the UCC, however, transfer of title and passage of risk of loss are considered separate issues. Two key questions thus arise: (1) When does *title* pass from the seller to the buyer? and (2) If the goods are damaged or destroyed before the buyer has accepted them, does the buyer or the seller bear the *risk of loss*?

Transfer of Title Transfer of title is important for a variety of reasons. In addition to telling us who owns the goods, it tells us which party's creditors can reach the goods and which party is liable in the event that someone is injured by the goods.

Often, the parties specify in their contract at what moment title transfers from the seller to the buyer. For example, the parties may state: "Title and risk of loss in all goods sold hereunder shall pass to the buyer upon seller's delivery to carrier at shipping point." Under the UCC, the agreement of the parties controls.

If the parties fail to specify in their contract when transfer of title occurs, the UCC provides default rules that will control. These rules fall into two categories: (1) where the goods are to be physically delivered to the buyer and (2) where the goods are not to be moved.

Where the Goods Are to Be Physically Delivered If the goods are to be physically delivered from the seller to the buyer, the parties may use one of two types of contracts: (1) a shipment contract or (2) a destination contract.

A *shipment contract* requires the seller to turn the goods over to a carrier but does not require the seller to deliver them to a particular destination. Title passes to the buyer when the seller delivers the goods to the carrier for shipment to the buyer. Unless the parties state otherwise, or where the terms are ambiguous, sales contracts involving the transport of goods are presumed to be shipment contracts.

A *destination contract* requires the seller to deliver the goods to a particular destination (often, the buyer's place of business). Title passes to the buyer when the seller tenders the goods at the specified destination.

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[28]UCC § 2-608(2).

[29]UCC § 2-602.

Where the Goods Are Not to Be Physically Moved If the contract provides that the seller is to transfer a *document of title* to the buyer, such as a warehouse receipt, bill of lading, or dock receipt, title transfers when the required document is delivered, even though the goods have not been physically moved.

In some instances, the parties may not intend either the goods or a document of title to be handed over. In such an instance, the title passes at the time of contracting, provided that the goods are identified to the contract; otherwise, title passes at the time of identification. *Identification* occurs when specific goods have been designated as the subject matter of the contract.

Passage of Risk of Loss *Risk of loss* determines which party, buyer or seller, will bear the financial impact of the goods being damaged, lost, or destroyed before the buyer has accepted them. (It does not address the issue of whether the party bearing the loss might have a cause of action against a third party, such as a carrier or bailee, who caused the damage to the goods.) The parties to the contract can always agree on how risk of loss should pass. If they fail to do so, the risk of loss passes according to the UCC's default rules. Risk of loss passes differently depending upon whether neither party is in breach of contract or whether one party is in breach (see Case Illustration 9.4).

CASE ILLUSTRATION 9.4

SEMA CONSTRUCTION, INC. v. DIVERSIFIED PROD. INDUSTRIES, 2007 CAL. APP. UNPUB. LEXIS 8189 (CAL. APP. OCT. 10, 2007)

FACTS SEMA Construction, Inc., contracted to purchase steel beams from Diversified Product Industries, Inc. (DPI), a steel broker. Both parties understood that SEMA had not yet obtained necessary access to the construction site on which the steel would be used to stockpile the large beams. DPI recognized that SEMA did not want to take delivery of the steel at one site and then pay to transport it to the construction site later. Thus, on the purchase order prepared by SEMA and the invoice prepared by DPI, both parties included the words "will advise" inside the "ship to" box. SEMA paid in full for the steel within a week of the purchase order.

When, a month later, SEMA still did not have access to its construction site, it advised DPI to deliver the steel to an alternative storage site. An inventory of the steel after delivery revealed that 18 beams were missing (presumably stolen by an unknown party).

DPI informed SEMA that it would credit SEMA for the missing steel. SEMA responded in writing that because it had already paid DPI for the steel, SEMA expected immediate payment for the missing steel.

DPI replied in writing that payment would "be made in due course" and pointed out that when it received SEMA's purchase order, DPI had advised SEMA that the steel had to ship immediately because it had come off another job site where the contractor had no space or time to store the steel. DPI stated that it tried several times unsuccessfully to obtain delivery instructions from SEMA, and the loss of the steel was caused by SEMA's delay. DPI stated it was "not in the storage business" and it was "inappropriate for [SEMA] to insist that DPI take on the responsibility of guarding over steel reserved for SEMA in some other company's facility." It closed the letter by stating DPI would "take responsibility for the missing steel" but that "[t]his unfortunate circumstance … should serve as a valuable lesson learned for us both."

SEMA bought replacement steel from another company for $ 0.065 per pound more than it contracted to pay DPI. When SEMA failed to receive a refund from DPI, SEMA filed a breach of contract claim against DPI. DPI countered that SEMA had breached the contract by failing to immediately provide a delivery date.

SEMA won $38,985.32 and DPI appealed.

(Continued)

DECISION The appellate court found that SEMA's delay in designating a time and place of delivery was consistent with the terms of the contract the parties had entered into. Under UCC 2-311, "An agreement for sale which is otherwise sufficiently definite … to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness." This contract contemplated that the delivery date would be specified at a later date by SEMA. SEMA did in fact request delivery within 30 days, which was a commercially reasonable time under the circumstances.

DPI was also incorrect in arguing that SEMA bore the risk of loss either after the date it paid for the steel or after DPI informed SEMA the beams were ready for delivery.

UCC 2-509 addresses risk of loss when there has been no breach of contract (as here). With a destination contract, the seller bears the risk of loss until the goods arrive at their specified destination. With a shipment contract, the risk of loss passes to the buyer when the goods are delivered to a carrier for shipment.

The court did not have to decide whether this was a destination or shipment contract. If it was a destination contract, the risk of loss was on DPI until the goods arrived at their destination. If it was a shipment contract, the risk of loss was on DPI until the goods were delivered to a carrier. Here, the evidence showed that the steel was missing "before any carrier had an opportunity to load it and deliver it." Thus, the risk of loss remained on DPI. The judgment of the trial court was affirmed.

In the Absence of a Breach In the *shipment* and *destination* contracts contexts already discussed, title and risk of loss pass at the same time, provided that neither party is in breach of contract.

In all other cases, title and risk of loss pass separately. Thus, if the seller sells goods to the buyer that are in the possession of a bailee (such as a warehouse), and they are not to be moved, the UCC sets forth three possibilities for transfer of risk of loss:

1. If the buyer receives a negotiable document of title covering the goods, the risk of loss passes at that time.
2. If the bailee acknowledges the buyer's right to take possession of the goods (for example, by sending a notice to the buyer that the goods are available), the buyer assumes the risk of loss upon receipt of the acknowledgment.
3. If the seller gives the buyer a nonnegotiable document of title or a written direction to the bailee to deliver the goods and the buyer has had a reasonable time to present the document or direction, the risk of loss passes to the buyer.[30]

The remaining cases usually involve a buyer who is to take delivery from the seller's premises. In such cases, we would expect that a merchant seller would keep insurance on goods under its control. A buyer, on the other hand, is unlikely to insure goods that are not in its possession. Thus, if the seller *is* a merchant, the risk of loss passes to the buyer only when the buyer receives the goods. If the seller is *not a* merchant, the risk of loss passes to the buyer only when the seller tenders delivery.

In the Event of a Breach If the seller tenders or delivers goods that do not conform to the contract, the risk of loss is on the seller until either the seller cures the breach or the buyer agrees to take the goods despite their nonconformity. Similarly, if the buyer wrongfully refuses to take the goods, the risk of loss rests on the buyer for a reasonable time period until the seller can fully insure the goods.[31]

[30]UCC § 2-509(2).

[31]UCC § 2-510.

Insurable Interest Transfer of title and risk of loss are important issues because they help determine which party (or parties) has an *insurable interest* in the goods; i.e., which party (or parties) has the legal right to purchase insurance to protect the goods. The seller has an insurable interest as long as it retains title to or a security interest in the goods. The buyer has an insurable interest when goods are identified to the contract. In addition, any party who has the risk of loss with respect to the goods has an insurable interest in them.[32]

Breach of Contract and Contract Remedies

Actual and Anticipatory Breach

Breach of contract occurs when one party fails to perform its contractual obligations at the time performance is due. *Anticipatory breach*, also known as *anticipatory repudiation*, occurs when one party, through its conduct or words, indicates prior to the time when its performance is due under the contract that it intends to breach.

Under the common law, the nonrepudiating party may treat an anticipatory repudiation as a breach of contract and immediately sue for damages. Alternatively, that party may await the time of performance to see if the repudiating party will withdraw the repudiation and go forward with its performance. Under the UCC, however, the nonrepudiating party may await performance only for a commercially reasonable amount of time and then must undertake mitigation measures.[33] The repudiating party may retract its repudiation unless the nonrepudiating party has: (1) canceled; (2) materially altered its position; or (3) otherwise indicated that the repudiation is final.

Remedies Generally

Suppose that Buyer and Seller have entered into a contract, and Seller *breaches* (i.e., fails to perform its contractual duties). The law can respond to this in one of two ways: (1) it can permit Seller to breach and simply order Seller to pay Buyer for any damages Buyer may have suffered; or (2) it can treat a breach of contract as being such wrongful behavior that Seller should be punished for its actions.

Generally, contract law wants to promote economic efficiency and wants to put factors of production to their highest and best use. Thus, contract law will permit a breach of contract in most instances if it is more efficient (i.e., cheaper) for the breaching party to breach the contract and pay damages than to go through with performance. As a result, punitive damages are rarely awarded in breach of contract cases (although if the breach of contract also constitutes a tort, such as fraud, punitive damages may be available).

The objective of contract remedies, therefore, is to make the nonbreaching party "whole"—i.e., to put the nonbreaching party in as good a position economically as if the defendant had fully performed. In addition, remedies under contract law are generally *cumulative*, which means that the nonbreaching party can mix and match remedies until it has fully recovered for all of its losses.

Remedies for breach of contract may be *equitable* or *legal. Equitable remedies* are generally available only where monetary damages are inadequate to protect the nonbreaching party. Equitable remedies in contract cases usually involve either *specific performance* or issuance of an *injunction*. A decree for specific performance orders the promisor to render the promised performance. An injunction usually orders a party to refrain from a particular act. Specific performance is most commonly given for breach of a contract to

[32] UCC § 2-501.

[33] UCC § 2-610.

convey a piece of land and is never given for personal services contracts. The court cannot order an individual to work for a particular employer, although it may issue an injunction prohibiting the individual from working for a competitor. Specific performance is also granted when the goods involved in the contract are unique or where it would be difficult to fairly calculate monetary damages.

A court of equity can also order *rescission* (cancellation) of a contract where enforcing the contract would be unfair. When the courts order rescission, they generally order the parties to make *restitution* to each other as well; i.e., they order the parties to return any goods, property, or money that they have exchanged.

Legal remedies typically consist of monetary damages. The common law imposes a *duty to mitigate* upon the plaintiff. This means that if the plaintiff could have avoided a particular item of damage by reasonable effort but fails to do so, he will not be able to collect for that item of damage. The UCC also imposes a duty to mitigate upon plaintiffs who are buyers (but not upon seller-plaintiffs). If the seller fails to deliver or delivers nonconforming goods that the buyer rejects, the buyer must "cover" (i.e., obtain substitute goods in the marketplace) if she can reasonably do so, or she will be unable to recover for those damages that could have been prevented by cover.

Under the common law, if the injured party has fulfilled its duty to mitigate, it is entitled to receive *compensatory damages*, which are intended to put that party in as good a position economically as he would have occupied had the defendant not breached. The injured party generally can recover *consequential damages* as well, which are indirect damages that foreseeably flow from the breach.

Often, the parties to a contract place a *liquidated damages clause* in their written agreement. This is a provision that specifies what will occur and/or what remedies will be available in the event of a breach. Courts generally enforce such provisions provided they are satisfied that the clause is an attempt to estimate actual damages and not to penalize the party for breach of contract. Thus, courts generally require that to be enforceable, the liquidated damages clause must (1) be a reasonable estimate of the anticipated or actual loss in the event of breach and (2) address harm that is uncertain or difficult to calculate, even after the fact.

Some contracts also contain an *exculpatory clause*, which is a provision that attempts to excuse one party from liability for its own tortious conduct. Courts generally will not enforce exculpatory clauses that attempt to relieve a party of liability for intentional torts or for willful conduct, fraud, recklessness, or gross negligence but may enforce clauses that address liability for ordinary negligence or contractual breach, provided the clause is conspicuous and clear. Where the party attempting to benefit from the clause has substantially more bargaining power than the other party, the courts may find that the clause is unconscionable and so unenforceable. If the parties have equal bargaining power, however, the courts generally will allow them to allocate risk between themselves via an exculpatory clause.

Remedies in Sales Contracts

The UCC provides special remedies rules that differ from the common law rules. The remedies given will vary depending upon whether the buyer or the seller is the injured party and depending upon whether the goods have been accepted.

Where the Goods Have Not Been Accepted

Buyer's Remedies If the seller has breached the contract, the buyer has a variety of remedies from which to choose.[34] The more common remedies are discussed here.

[34] UCC §§ 2-711 to 2-717.

First, the buyer can *reject* the goods and *cancel* the contract. (This will be the preferred choice of a buyer who has entered into a losing bargain.) Second, the buyer can *cover*, i.e., buy commercially reasonable substitute goods from another seller in good faith and without delay and recover *the difference between the contract price and the cover price, less expenses saved*, from the breaching seller. Third, if the buyer is unable to cover or does not choose to do so, the buyer can recover the *difference between the contract price and the market price at the time the buyer learned of the breach, less expenses saved*.

The buyer may also recover *consequential damages* (e.g., injury to person or property resulting from a breach of warranty) and *incidental damages* (e.g., costs such as inspection, transportation, or storage expenses directly associated with the breach and the buyer's attempt to cover). If the buyer fails to cover, it cannot recover any consequential damages that were preventable by reasonable cover attempts.

Seller's Remedies Where the buyer has breached, the seller also has a choice of remedies.[35] If the buyer has not accepted the goods, the seller has three options. First, if the seller resells the goods to a third party in good faith and in a "commercially reasonable" manner, the seller may recover the difference between the resale and the contract price, plus incidental damages. Second, the seller may recover the difference between the market price at the time and place for delivery and the unpaid contract price, plus incidental damages. Third, if either of these formulas will not make the seller whole, the seller may instead recover lost profits, plus incidental damages. This remedy is particularly important to a lost volume seller, i.e., a seller who had an adequate supply to have satisfied both the original contract and the resale, who probably would have made both sales in the absence of the breach, and who would have made a profit on both sales (see Case Illustration 9.5).

CASE ILLUSTRATION 9.5

VANDERWERFF IMPLEMENT, INC. v. McCANCE, 561 N.W.2D 24 (S.D. 1997)

FACTS Blaine McCance purchased a used farming disc from Vanderwerff Implement, Inc. for $2,575. After using the disc for one day, McCance found that the disc was leaving a six- to eight-inch ridge on one side. Within a day after purchase, McAfee telephoned Vanderwerff and informed the company of the problem. McCance stopped payment on his check and returned the disc two weeks later. Vanderwerff checked the disc but found no defect.

The trial court found that Vanderwerff had made an express warranty to McCance that the disc was "field ready," that this warranty had not been breached, and that McCance was in violation of an enforceable contract. The court also found that Vanderwerff was a lost volume seller and awarded damages to Vanderwerff in the amount of $2,575 plus interest.

McCance appealed the trial court's decision.

DECISION The appellate court stated that the normal measure of a seller's damages in the event of a breach is the difference between the market price and the contract price. A "lost volume seller," however, may seek damages for lost profits on the sales contract:

> *To be a "lost volume seller," one must prove that "even though [it] resold the contract goods, that sale to the third party would have been made regardless of the buyer's breach," using the inventory on hand at the time. Furthermore, "the lost volume seller must establish that had the breaching buyer performed, the seller would have realized profits from two sales." The main inquiry is whether the seller had the ability to sell the product to both the buyer who breached and the resale buyer.*

(Continued)

[35] UCC §§ 2-702 to 2-710.

The appellate court agreed with the trial court that Vanderwerff was a lost volume seller. Vanderwerff sold approximately 15 new and 15 used discs each year and typically carried about 10-12 discs in inventory. The "most compelling" evidence that Vanderwerff was a lost volume seller was that Vanderwerff actually resold the disc at issue.

The appellate court found that the trial court had awarded the wrong measure of damages, however. A lost volume seller is entitled to the profit that the seller would have made had the buyer fully performed, plus interest. The trial court, however, awarded Vanderwerff the full contract price, including the profit, plus interest. The appellate court thus remanded the case for a correct determination of damages.

Finally, the seller may sue for the *contract price, plus incidental damages*, in a few specific situations (i.e., where the buyer has accepted the goods, where the risk of loss has passed to the buyer and the goods are lost in transit, or if the seller is unable to resell the goods because they are perishable or custom-made). Note that the seller can always recover incidental damages but cannot recover consequential damages (see Case Illustration 9.6).

CASE ILLUSTRATION 9.6

DETROIT RADIANT PRODS. CO. v. BSH HOME APPLIANCES CORP., 473 F.3D 623 (6TH CIR. 2007)

FACTS Detroit Radiant manufactures gas-fired infrared heaters for commercial and industrial applications. BSH Home Appliances Corporation manufactures home appliances under several well-known brand names.

BSH supplied Detroit Radiant with detailed specifications for a burner, known as the Pro 27 burner, and requested a price quote based on an annual estimated order of 30,000 units.

Once the parties had satisfactorily resolved their price negotiations, BSH sent first a purchase order for 15,000 units, followed by a purchase order for 16,000 units. Detroit Radiant began to make and ship the burners under "release schedules" provided by BSH.

Detroit Radiant shipped almost 13,000 burners to BSH over an eight-month span, which BSH accepted and paid for at the contract price. BSH then contracted with a different company, Solaronics, to be its supplier of Pro 27 burners (at a lower price), and stopped ordering from Detroit Radiant. BSH did not accept the remainder of the burners from Detroit Radiant. However, because BSH considered the Pro 27 burners in the hands of Detroit Radiant to contain proprietary technology, BSH did not want Detroit Radiant to sell the burners to competitors.

Detroit Radiant sued for breach of contract and claimed damages for the 18,114 units that BSH had not purchased. Detroit Radiant claimed $312,104 in lost profits, plus $52,011 in unused inventory because the Pro 27 burners had been specially manufactured for BSH and could not be sold elsewhere.

The trial court awarded $418,216 to Detroit Radiant, and BSH appealed.

DECISION The appellate court affirmed the lower court decision. The court noted that the UCC provides alternative measures of damages when the buyer breaches, as here. The "default" measure of damages is "the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages."

An alternative measure of damages, "lost profits," is most commonly available to a lost volume seller (which all parties agreed Detroit Radiant was not). However, lost profits damages are also available to a plaintiff who cannot adequately recoup under the default measure: "If the measure of damages provided in [UCC 2-708(1)] is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages."

Here, the Pro 27 were "specially manufactured" by Detroit Radiant to BSH's specifications. Moreover, because BSH prevented Detroit Radiant from selling the burners to any other party, there was no reasonably ascertainable or accessible market for the burners. The court concluded:

> *Detroit Radiant was left with a warehouse of burners and component parts that it could not unload, due both to the uniqueness of the Pro 27 burner and to the fact that BSH itself did not want Detroit Radiant to share any secrets as to that burner. And Detroit Radiant was further left without its anticipated profits—i.e., the benefit of the bargain that it had entered into with BSH. Michigan contract law, not to mention common sense, dictates that BSH should pay up, and thus we AFFIRM the judgment of the district court.*

Where the Goods Have Been Accepted Where the buyer has accepted the goods but refuses to pay for them, the seller may sue for the *contract price, plus incidental damages*. If the accepted goods are nonconforming, however, the buyer may sue for *breach of warranty*. Warranties are discussed further in Chapter 10.

Contract Law and E-Commerce

On October 1, 2000, the Electronic Signatures in Global and National Commerce Act (E-SIGN Act)[36] took effect. This federal act provides that any transaction in or affecting interstate or foreign commerce will not be denied legal effect, validity, or enforceability solely because an electronic signature was used. Thus, this Act makes e-signatures as legally binding as handwritten signatures and removes legal barriers to the growth of electronic commerce. The Act does not address other issues relating to electronic contracting, however, such as how the holder of an electronic document can establish its authenticity.

The E-SIGN Act applies to a wide variety of legal transactions, including those arising under Article 2 of the UCC.[37] Thus, a buyer and seller may contract for a sale of goods over a website and be assured that the contract will not fail merely because it was signed electronically rather than formalized in a traditional paper-and-ink contract.

The E-SIGN Act preempts state laws that conflict with its provisions. The E-SIGN Act does not preempt state laws based on the Uniform Electronic Transactions Act (UETA), however. Almost all of the states have adopted UETA.[38] The UETA provides that: (1) a record or signature shall not be denied legal effect or enforceability just because it is in electronic form; (2) a contract shall not be denied legal effect or enforceability just because an electronic record was used in its formation; and (3) an electronic signature satisfies any legal requirement calling for a signature.

Many other countries have also passed electronic signature acts, including Germany in 1997[39] and Japan[40] and the United Kingdom in 2000.[41] The European Union enacted a Directive regarding the legal effect of electronic signatures in 1999.[42]

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[36]15 U.S.C. §§ 7001-7006, 7021, and 7031.

[37]The E-SIGN Act applies to Article 2A as well.

[38]Information about the UETA, including a listing of the states that have adopted it, can be found on the NCCUSL's website at www.nccusl.org

[39]The Digital Signature Act can be viewed at www.ied.ox.ac.uk/gla/statutes/SIG.htm

[40]The Law Concerning Electronic Signatures and Certification Services can be viewed at/www.meti.go.jp/english/special/E-Commerce/index.html

[41]The Electronic Communications Act 2000 can be viewed at www.opsi.gov.uk

[42]Directive 1999/93/EC of the European Parliament and of the Council of 13 Dec. 1999 on a Community framework for electronic signatures, available at http://eur-lex.europa.eu

Contracts in the International Environment

When the contracting parties are from different countries, a number of special legal issues arise. A U.S. contracting party cannot automatically assume that U.S. law will apply to the transaction, nor can it automatically assume that the contract law of other countries will resemble the U.S. law with which it is familiar. In some countries, for example, title to goods may pass at the time of delivery; in others, it may pass as soon as an agreement is reached, preventing the seller from reclaiming the goods if the buyer fails to pay. Obviously, such distinctions can have profound effects upon the manner in which contractual relationships are formed and handled.

As of February, 2009, 73 countries (including the United States) had adopted the *United Nations Convention on the International Sale of Goods* (CISG).[43] The CISG applies to contracts for the sale of goods between parties whose places of business are in different countries but does not apply to sales of personal or consumer goods. Authentic texts of the CISG exist in six languages.[44] The CISG is roughly analogous to the American UCC. It represents, however, a compromise between the common law and civil law traditions of the various member countries.

The CISG automatically applies to relevant contracts between parties whose places of business are in different Contracting States unless the parties select otherwise. Thus, if the parties do not want the CISG to cover their international sales contract, they need to specifically so state and should select an alternative forum. In addition, parties whose contracts are not otherwise subject to the CISG may nonetheless elect to have the CISG apply to their contract.

Articles 1 through 6 of the CISG address its scope of application and general provisions. Articles 7 through 13 address the interpretation of contracts. Article 11 states that a sales contract does not have to be in writing, although several countries that have adopted the CISG have expressly excluded this provision. Articles 14 through 24 address contract formation, including offer and acceptance. Article 25 addresses enforcement issues.

There are some substantial differences between the UCC and the CISG. The UCC, for example, adopts the "mailbox" rule discussed earlier. The CISG, on the other hand, adopts the European principle that an acceptance is not effective until the offeror receives it. The CISG is also not as lenient as the UCC in finding the existence of a contract in battle of the forms situations; rather, most nonconforming acceptances under the CISG operate merely as counteroffers, not acceptances. The UCC supplies a price if necessary, as already discussed. The CISG, on the other hand, does not allow a contract to be formed unless the price term or a provision for determining the price is supplied in the agreement. The UCC requires a writing to satisfy the Statute of Frauds for contracts over $500, while the CISG does not require a writing to make a sales contract valid. The CISG also rejects the UCC's perfect tender rule, providing instead that the buyer may reject goods only where the nonconformity amounts to a fundamental breach of contract. This distinction reflects the longer shipping times and greater distances, costs, and complexities of international sales contracts.

See Discussion Case 9.4.

Parties entering into international contracts should not rely solely upon the default rules that may apply under the CISG or other applicable laws but, rather, should have

[43]Information on the CISG, including its text, member countries, and cases decided under it may be found at www.cisg.law.pace.edu. The United States became a signatory effective January 1, 1988.

[44]Arabic, Chinese, English, French, Russian, and Spanish.

an express written agreement that addresses the special issues raised by international contractual relationships. The parties should consider including clauses such as a *forum clause* specifying the location and the court in which disputes are to be litigated; a *governing law clause* specifying which country's or state's law is to apply to the transaction; a *currency of payment clause* specifying the unit of currency that is to be the medium of exchange between the parties; a *force majeure clause* specifying what happens in the event of a war, natural disaster, strike, or extreme shortage; a *language clause* specifying the language in which agreements may be formed, notices sent, or enforcement pursued; and a *notice clause* specifying the manner in which notices are to be sent, taking into account delays caused by long distances, differing holidays, and other factors unique to the international setting. It is also often very important to have a *title passage clause*. The CISG does not address this aspect of international sales. Exporters often prefer to have title transfer outside the United States, so as to avoid adverse U.S. tax consequences.

Parties who enter into commercial contracts often consider including a provision requiring alternative dispute resolution in the event of a problem. Where the contracting parties are from different countries and neither wants to submit to the courts of the other's home country, arbitration clauses are particularly common. To be truly effective, arbitration clauses must be carefully drafted and must provide for a fair and efficient procedure. The clause should identity the arbitrators and the manner in which they are to be selected, the procedural rules that will govern the arbitration, the place of the arbitration, and the language in which it will be conducted.

DISCUSSION CASES

9.1 Advertisements as Offers, Statute of Frauds

Leonard v. PepsiCo., Inc., 88 F. Supp. 2d 116 (S.D. N.Y. 1999), *aff'd per curiam*, 210 F.3d 88 (2d Cir. 2000)

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 .... [D]efendant's motion is granted.

I. Background

This case arises out of a promotional campaign conducted by defendant, the producer and distributor of the soft drinks Pepsi and Diet Pepsi. 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. * * *

A. *The Alleged Offer*

* * * 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.

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."

The teenager opens the cockpit of the fighter and can be seen, helmetless, holding a Pepsi. Looking very pleased with himself, 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.

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." 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 merchandise. The Catalog includes an Order Form which lists, on one side, fifty-three items of Pepsi Stuff merchandise redeemable for Pepsi Points …. Conspicuously absent from the Order Form is any entry or description of a Harrier Jet. * * *

The rear foldout pages of the Catalog contain directions for redeeming Pepsi Points for merchandise. These directions note that merchandise may be ordered "only" with the original Order Form. 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.

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." Reevaluating his strategy, plaintiff "focused for the first time on the packaging materials in the Pepsi Stuff promotion," and realized that buying Pepsi Points would be a more promising option. Through acquaintances, plaintiff ultimately raised about $700,000.

B. *Plaintiff's Efforts to Redeem the Alleged Offer*

On or about March 27, 1996, plaintiff submitted an Order Form, fifteen original Pepsi Points, and a check for $700,008.50. 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. 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. 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."

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.

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.

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.

On or about June 17, 1996, plaintiff mailed a similar demand letter to defendant.

* * *

II. Discussion

* * *

B. *Defendant's Advertisement Was Not An Offer*

1. Advertisements as Offers

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, 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). * * *

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. * * * 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.

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." 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. 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.

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." 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. [T]he absence of any words of limitation such as "first come, first served," renders the alleged offer sufficiently indefinite that no contract could be formed. "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." There was no such danger in *Lefkowitz*, owing to the limitation "first come, first served."

The Court finds, in sum, that the Harrier Jet commercial was merely an advertisement. * * *

* * *

C. *An Objective, Reasonable Person Would Not Have Considered the Commercial an Offer*

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

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.

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. An obvious joke, of course, would not give rise to a contract. 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.

* * *

3. Whether the Commercial Was "Evidently Done In Jest"

Plaintiff's insistence that the commercial appears to be a serious offer requires the Court to explain why the commercial is funny.* * * The commercial is the embodiment of what defendant appropriately characterizes as "zany humor."

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 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, and refrain from interpreting the promises of the commercial as being literally true.

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.

Third, the notion of traveling to school in a Harrier Jet is an exaggerated adolescent fantasy. * * * 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.

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 vis'-ual conditions." * * * 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."

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. 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.

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" 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 "no mention is made by [defendant] of humor, or anything of the sort." These arguments suggest merely that the humor of the promotional campaign was tongue in cheek. * * * 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*

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). Without such a writing, plaintiff's claim must fail as a matter of law.

There is simply no writing between the parties that evidences any transaction. * * *

* * * 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

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.

For the reasons stated above, the Court grants defendant's motion for summary judgment. * * *

QUESTIONS FOR DISCUSSION FOR CASE 9.1

1. Under what circumstances do advertisements constitute offers? Why did this advertisement not constitute an offer?
2. The court finds that an "objective, reasonable person" would interpret this advertisement merely as humor and not as a legitimate offer. Do you think that the line between jest and offer may be harder to draw in other advertisements? Can you think of any advertisements you have seen where the distinction was less clear than it was in this case?
3. The court also finds that PepsiCo was entitled to summary judgment under the Statute of Frauds. Why? Under what circumstances would a contract arising from an advertisement satisfy the Statute of Frauds?

9.2 UCC Battle of the Forms

Oakley Fertilizer, Inc. v. Continental Ins. Co., 276 S.W.3d 342 (Mo. App. 2009)

Introduction

Oakley Fertilizer, Inc. ("Seller") appeals from the judgment of the Circuit Court of St. Louis County granting summary judgment in favor of Continental Insurance Company. * * * We reverse and remand.

Background

In mid-2005, Continental issued an insurance policy to Seller. The policy covered shipments of goods made in the course of Seller's business. Specifically, the policy provided:

> To cover all shipments for the Assureds [sic] own account or for the account of Owners of the cargo transported by the Assured which the Assured agrees to insure, such agreement to be made prior to any known or reported loss, or prior to or simultaneous with the sailing of the vessel.

The Continental policy also stated that coverage did not extend to shipments insured by other parties and required Seller to notify Continental of each shipment covered by the policy.

In July 2005, Seller entered into negotiations with Ameropa North America ("Buyer") for the sale of approximately 3000 short tons of fertilizer ("the cargo") to be shipped to Buyer in Caruthersville, Missouri from New Orleans on barges operated by a third party carrier ("Carrier"). Subsequently, Seller sent a "sales contract" to Buyer, which Buyer received but did not sign or return. The sales contract memorialized the terms discussed during the parties' negotiations. The contract also included a term providing that the cargo's title and risk of loss would transfer from Seller to Buyer after Seller received "good funds" from Buyer and that "Buyer assumes responsibility of product insurance at [that] point."

In response to Seller's sales contract, Buyer emailed an electronically signed agreement to purchase the cargo ("purchase agreement") to Seller. The purchase agreement did not mention the sales contract and included the term, "$200.00/ ST FOB BARGE EX NEW ORLEANS, LA".

Between August 23 and 24, 2005, the cargo was loaded onto the barges in New Orleans. On August 29, Hurricane Katrina and/or its related storms damaged the barges. Initially, Seller advised Buyer that the cargo was not damaged. Relying on this advice, Buyer tendered full payment to Seller on September 8, 2005. However, when, shortly thereafter, the cargo arrived at its destination, Buyer rejected it due to "crusty wet product." Seller later sold the damaged cargo at salvage value and issued a credit to Buyer for a partial amount of the purchase price and provided substitute fertilizer in lieu of a refund on the remaining purchase price.

After reimbursing Buyer, Seller demanded coverage under the Continental policy for the loss to the cargo. Continental denied coverage on the grounds that the cargo's title and risk of loss transferred from Seller to Buyer at the time the cargo was loaded in New Orleans, prior to the damage, and, therefore, Buyer, not Seller, was responsible for the loss.

Following the denial of coverage, Seller brought suit against Continental alleging breach of its insurance contract. Both parties filed motions for summary judgment. The trial court granted Continental's motion ….

Seller appeals.

* * *

Discussion

A. Did the Trial Court Correctly Apply Section 2-207 of the Uniform Commercial Code

In its sole point, Seller contends that the trial court erred in granting summary judgment for Continental because genuine issues of material fact precluded the finding that Buyer, and not Seller, held the risk of loss when the cargo was damaged. Continental maintains that title and risk of loss passed to Buyer at the time the barges were loaded, and, therefore, the insurance policy does not cover the loss at issue. Simply stated, Continental's entitlement to summary judgment turns on whether the trial court correctly applied the Uniform Commercial Code when it held that: (1) there was no agreement between the parties as to transfer of title and risk of loss, and therefore (2) the title and risk of loss transferred from Seller to Buyer when the barges were loaded.

Both parties agree that Seller's sales contract and Buyer's purchase agreement are the only two documents evidencing the terms of Buyer and Seller's agreement. The two contractual documents, however, contain different terms concerning the transfer of title and risk of loss. Seller's sales contract expressly provided that Seller retained title and risk of loss until Seller received payment from Buyer. The "F.O.B. New Orleans" term in Buyer's purchase agreement denoted that risk of loss transferred to Buyer when the cargo was loaded aboard the barges at the place of shipment in New Orleans.[2] The cargo sustained storm damage

[2]The designation "F.O.B" means "free on board" and is a term of art defined by the Uniform Commercial Code. In relevant part, the Code provides that "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 this article … and bear the expense and risk of putting them into the possession of the carrier[.]" Section 2-319(1)(a). Both Seller and Continental agree that the F.O.B. shipment term used in Buyer's purchase agreement is consistent with the Code's definition to the extent that it would operate to transfer the risk of loss at the time the cargo was loaded onto barges in New Orleans.

after the barges were loaded, but before Seller received payment from Buyer. As such, title and risk of loss transferred to Buyer *after* the loss under the sales contract's term, and *before* the loss under the purchase agreement's term.

To determine which term controlled Buyer and Seller's contract, we apply Section 2-207 of the Uniform Commercial Code, which governs transactions for the sale of goods and "provides the workable rule of law addressing the problem of the discrepancies in the independently drafted documents exchanged between the two parties."

Section 2-207 provides:

(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 chapter.

When applying this provision, this Court has noted that Section 2-207 is "one of the most important, subtle and difficult in the entire Code" and that to correctly apply it, "the facts presented must be reconciled, step-by-step, with various provisions of U.C.C. s. 2-207." Accordingly, we assess Seller and Buyer's sales agreement under each subsection of Section 2-207 to determine when the cargo's title and risk of loss transferred from the Seller to the Buyer.

First, we determine whether Buyer and Seller formed a valid contract under Section 2-207(1). Continental impliedly argues, and the trial court apparently agreed, that there was no valid written contract or agreement within the meaning of Section 2-207(1), thus triggering application of Section 2-207(3). We disagree. Applicable case law supports a finding that Seller's sales contract and Buyer's purchase agreement formed a valid sales contract through written offer and acceptance, thus triggering application of Section 2-207(2).

Seller's sales contract constituted an offer. Because the Code does not define the term "offer," the common law definition applies. "An offer is made when the offer leads the offeree to reasonably believe that an offer has been made." Seller's sales contract, which described, among other things, the goods to be shipped, the quantity, the price, and the shipment date, was sufficient to apprise Buyer of Seller's offer to contract.

Buyer's purchase agreement constituted a valid acceptance of Seller's offer. Section 2-207(1) provides that "[a] definite and seasonable expression of acceptance … 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." Buyer's unconditional purchase agreement, which agreed to the same essential terms stated in Buyer's sales contract was a "seasonable expression of acceptance" forming a binding contract. The fact that the purchase agreement contained a risk of loss term different from that of the offer does not preclude the purchase agreement from constituting a valid acceptance.

Having identified the sales contract and purchase agreement as the parties' respective offer and acceptance, we proceed to Section 2-207(2). Under Section 2-207(2), additional or different terms in an acceptance "are to be construed as proposals for addition to the contract." U.C.C. § 2-207(2). Between merchants, such additional or different terms become part of a 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 this is received." The record reveals that Seller's sales contract did not limit acceptance to its terms and Seller did not object to the different risk of loss term in Buyer's purchase agreement. As such, the risk of loss term in Buyer's purchase agreement became part of the contract unless the term "materially altered" the contract.

Under … Section 2-207(2), an acceptance's different or additional term will "materially alter" the contract when it "result[s] in surprise or hardship if incorporated without express awareness by the other party." The burden of proving that a term is a "material alteration" falls on the party opposing the inclusion of the additional or different term.

Though no Missouri court has expressly addressed the issue, a majority of courts have held that the question of materiality, under Section 2-207(2), is generally a question of fact determined by the expectations of the parties and the particular facts of the case.[7] In holding that materiality is a fact question, these courts have also recognized that the question of materiality is not suitable for summary judgment.

Applying the approach advanced by the majority of courts, we agree that the question of materiality under U.C.C. § 2-207(2) is generally a question of fact and is not appropriate for summary judgment. Thus, at this stage in the litigation, we do not determine whether Buyer's different risk of loss term "materially altered" the parties' contract, and are therefore unable to conclude, as a matter of law, whether Seller held the cargo's title and risk of loss at the time the cargo was damaged. Accordingly, the trial court erred when concluding that "[p]ursuant to applicable U.C.C. Rules and evidence presented, the title and risk of loss transferred at the time of loading [Carrier's] barges and before the loss herein occurred[,]" and summary judgment in favor of Continental cannot be affirmed on this basis.

As noted above, Continental argues for the application of Section 2-207(3), which provides that terms to which the parties do not agree will be supplemented by the default provisions of the Code. Section 2-207(3) reads:

> 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 chapter.

U.C.C. § 2-207(3) (emphasis added).

[7]Some courts have recognized that certain contract terms—e.g., warranty, arbitration, and indemnity clauses—result in such "surprise or hardship" that they "materially alter" a contract as a matter of law. However, we have found no cases which held that the type of title and risk of loss term in this case materially altered a contract within the meaning of Section 2-207(2) as a matter of law.

Section 2-207(3) expressly provides that its application is limited to instances where the writings of the parties do not establish a valid contract and the parties nevertheless act as if a contract exists. In such cases, courts will apply Section 2-207(3) to enforce the sales contract and use the supplementary provisions of the Code to supply the terms not agreed upon by the parties. In this case, however, Section 2-207(3) is inapplicable because, as discussed above, Seller's sales contract and Buyer's purchase agreement established a valid written contract under Section 2-207(1). Accordingly, Continental's reliance on—and the trial court's apparent application of—Section 2-207(3) is misplaced and does not support summary judgment in favor of Continental.[8]

* * *

Conclusion

Because summary judgment in favor of Continental cannot be sustained on the grounds articulated by the trial court …, we reverse the trial court's judgment and remand for proceedings consistent with this opinion.

QUESTIONS FOR DISCUSSION FOR CASE 9.2

1. Why was it necessary for the court to apply UCC Section 2-207 here? On what term or terms did the parties' documents disagree?
2. Did the court determine that the parties had a contract? If so, did the court determine what the terms of that contract were?
3. Was UCC Section 2-207(3) relevant to this dispute? Why or why not?
4. Does this decision fully resolve the dispute between the parties? Procedurally, what happens next in this case?

[8]We note that Continental, in addition to arguing for the application of Section 2-207(3), also argues at length about the Code's presumption for "F.O.B. shipment" contracts, which, like the terms in the purchase agreement, would shift the risk of loss to Buyer at the time the cargo was loaded upon the barges in New Orleans. Specifically, Continental claims that because the Buyer and Seller's contractual documents do not agree as to when risk of loss transferred, the Code's presumption for "F.O.B. shipment" contracts is applicable. Continental's argument, however, reflects a misunderstanding of the Code's presumption for "F.O.B. shipment" contracts. A contract will be construed as a F.O.B. shipment contract unless the parties "expressly specify" otherwise. In other words, the F.O.B. presumption is only applicable in instances where the terms of the contract fail to expressly address the transfer of risk of loss. Under the instant facts, both Seller's sales contract and Buyer's purchase agreement "expressly specified" when the risk of loss transferred, and consequently, those express terms will not be superseded by the Code's presumption for F.O.B. shipment contracts.

9.3 Promissory Estoppel, Contract Remedies

Tour Costa Rica v. Country Walkers, Inc., 758 A.2d 795 (Vt. 2000)

Defendants Country Walkers, Inc. (CW) and Robert Maynard (Maynard) appeal from the superior court's denial of their … motion for judgment as a matter of law, following a jury verdict for plaintiff, Tour Costa Rica (TCR), on its promissory estoppel claim. The jury awarded plaintiff, a company that runs tours in Costa Rica, damages after finding that defendant had breached a promise of a two-year commitment to use TCR to develop, organize and operate Costa Rican walking tours for defendant during that period. We affirm.

* * *

CW is a Vermont business, owned by Maynard and his wife, that sells guided tours at locations around the world. In 1994, Leigh Monahan, owner of TCR, contacted Maynard and offered to design, arrange and lead walking tours in Costa Rica for defendant. During negotiations, Monahan explained to Maynard that she had just incorporated the tour company and, because the company had limited resources, she could not afford to develop specialized tours for defendant unless she had a two-year commitment from CW to run its Costa Rican tours through TCR. In the summer of 1994, the parties entered into a verbal agreement under which plaintiff was to design, arrange and lead customized walking tours in Costa Rica for CW from 1995 through 1997. * * *

In March and April 1995, plaintiff conducted two walking tours for CW.

* * * Between the end of April and June of 1995, the parties discussed the details of, and scheduled the dates for, approximately eighteen walking tours for 1996 and 1997. Due to limited resources, plaintiff could not conduct tours for anyone else while working with defendant and, therefore, stopped advertising and promoting its business, did not pursue other business opportunities and, in fact, turned down other business during this period. In August 1995, a few weeks before the next tour was to occur, defendant informed plaintiff that it would be using another company for all of its future tours in Costa Rica. When challenged by plaintiff with its promised commitment, Maynard responded: "If I did and I certainly may have promised you a two year commitment, I apologize for not honoring it."

Notwithstanding this apology, defendant went on to operate tours in Costa Rica using a rival company. * * * Due to the suddenness of the break with CW, plaintiff was left without tours to run during a prime tourist season, and without sufficient time to market any new tours of its own.

Plaintiff filed suit against defendant, alleging … promissory estoppel …. * * *

* * *

* * * The case went to the jury, and the jury found for … plaintiff on the promissory estoppel claim, and awarded expectation damages in the amount of $22,520.00. * * * This appeal followed.

I.

Defendant first argues that plaintiff failed to make out a prima facie case of promissory estoppel. Under the doctrine of promissory estoppel: "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 action or inaction taken in reliance on the promise must be "of a definite and substantial character." In other words, the promisee must have detrimentally relied on the promise. Defendant does not seriously dispute that there was a promise or that plaintiff did take action based on the promise. Rather, defendant argues that plaintiff's reliance was not reasonable or detrimental, and that this is not a case where injustice can be avoided only by enforcement of the promise. We first address defendant's argument that plaintiff's reliance was not reasonable.

A.

In determining whether a plaintiff reasonably relied on a defendant's promise, courts examine the totality of the circumstances. Here, plaintiff presented evidence that it relied on defendant's promise of a two-year exclusive commitment by (a) ceasing to advertise and promote the business, failing to pursue other business opportunities, and turning down other business; (b) making hotel and restaurant reservations and arranging for transportation for the tours it was to operate for CW; and (c) making purchases related to the tours it was to operate for CW. Plaintiff suggests that this reliance was reasonable because, in negotiations with Maynard, plaintiff made clear that it required a two-year commitment due to its limited resources, the time it would have to devote to develop specialized tours for CW, and the ongoing communication between the parties as to future dates and requirements for tours.

Defendant argues that plaintiff's reliance was not reasonable based solely on standard industry practice that permits the cancellation of tours upon thirty to sixty days' notice.

While there was no dispute that tours could be canceled with appropriate notice, there was evidence that this industry practice did not apply to the parties' two-year commitment. Monahan testified that she and Maynard specifically agreed to the two-year time frame because she wanted a measure of security for her fledgling company. She further testified that it was her understanding, from negotiations with Maynard, that the two-year commitment was unaffected by the possibility that some scheduled tours might be canceled if, for example, too few people signed.

* * *

[W]e find that plaintiff presented sufficient evidence to enable the jury to conclude that plaintiff's reliance on defendant's promise was reasonable.

B.

Defendant next argues that plaintiff's reliance on defendant's promise was not detrimental. Defendant suggests that the only evidence of detriment offered by plaintiff was Monahan's testimony concerning expenses for a few minor equipment purchases. Plaintiff disagrees.

Plaintiff maintains that its reliance was detrimental because (1) it lost business due to the fact that (a) it stopped advertising and promoting the business, did not pursue other business opportunities, and turned down other business in reliance on the parties' agreement, and (b) after defendant breached the agreement, plaintiff had no money to advertise or conduct other tours; (2) it spent money in preparation for the tours it was to operate for defendant; and (3) its reputation in the industry suffered because it had to cancel two-years' worth of reservations it had made on behalf of defendant.

Defendant does not dispute that plaintiff stopped advertising and promoting the business, did not pursue other business opportunities and turned down other business, or that plaintiff's reputation was harmed.

Instead, defendant contends that (1) plaintiff would have had to arrange for transportation and make reservations at hotels and restaurants for any tours it arranged for CW, whether or not the tours were part of an exclusive two-year arrangement, and (2) the money plaintiff spent in preparation for the tours is not, in and of itself, sufficient to show detrimental reliance.

Defendant's first argument is flawed because, as noted above, Monahan testified that she told Maynard that plaintiff could not afford to arrange tours for CW without an exclusive two-year agreement. There was no evidence that plaintiff would have prepared tours for CW if the parties did not have an exclusive two-year agreement. Defendant's second argument is flawed because it overlooks the facts that plaintiff stopped advertising and promoting the business, did not pursue other business opportunities, and in fact turned down other business. In reliance on a two-year commitment, plaintiff stopped soliciting business from other sources and declined other bookings, a substantial change in position for a fledgling tour business. Further, plaintiff's reputation in Costa Rica's tourism industry was damaged.

The evidence shows that, as a result of defendant's breach of the parties' agreement, plaintiff suffered significant harm for each of the above-mentioned reasons. Accordingly, the jury could reasonably conclude that plaintiff's reliance on defendant's promise was detrimental.

C.

Whether injustice can be avoided only by enforcement of the promise is a question of law informed by several factors, including:

(a) the availability and adequacy of other remedies, particularly cancellation and restitution;
(b) the definite and substantial character of the action or forbearance in relation to the remedy sought;
(c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;
(d) the reasonableness of the action or forbearance; [and]
(e) the extent to which the action or forbearance was foreseeable by the promisor.

Restatement (Second) of Contracts § 139(2) (1981).

* * * Damages available in a promissory estoppel action depend upon the circumstances of the case. * * *

Expectation damages, which the jury awarded in this case, provide the plaintiff with an amount equal to the benefit of the parties' bargain.

One potential component of expectation damages is loss of future profits.

The purpose of expectation damages is to "put the nonbreaching party in the same position it would have been [in] had the contract been fully performed." Restitution damages seek to compensate the plaintiff for any benefit it conferred upon the defendant as a result of the parties' contract. The purpose of restitution damages is to return the plaintiff to the position it held before the parties' contract. Reliance damages give the plaintiff any reasonably foreseeable costs incurred in reliance on the contract. As with restitution, the purpose of reliance damages is to return the plaintiff to the position it was in prior to the parties' contract. Restitution damages are inapplicable in the instant case because there is no evidence that plaintiff conferred any benefit on defendant as a result of defendant's promise. Further, cancellation is inapplicable, as defendant had already breached its promise, and cancellation would provide no remedy for plaintiff. Reliance damages are also inappropriate because the majority of the harm plaintiff suffered was not expenditures it made in reliance on defendant's promise, but rather, lost profits from the tours it had scheduled with defendant, lost potential profits because it failed to pursue other business opportunities, and harm to its reputation.

Therefore, an award of expectation damages is the only remedy that adequately compensates plaintiff for the harm it suffered.

As to the other factors considered, plaintiff's actions and inactions were of a definite and substantial character. * * * As previously discussed, plaintiff's reliance on defendant's promise was reasonable, and plaintiff's actions and inactions were foreseeable by defendant. Defendant expected plaintiff to take specific actions on defendant's behalf and to design and conduct tours to defendant's specifications. Further, defendant was aware that plaintiff was a new company without a lot of capital, and that it was spending much of that capital preparing tours for defendant.

Taking the above factors into consideration, there was sufficient evidence to allow the jury to conclude that, in this case, injustice could be avoided only by enforcement of the promise through an award of monetary damages.

* * *

The jury's damage award was not clearly erroneous. Affirmed.

QUESTIONS FOR DISCUSSION FOR CASE 9.3

1. Why is this a promissory estoppel case and not a breach of contract case?
2. What are the elements of promissory estoppel? Which of those elements are at issue in this case?

9.4 Convention on the Sale of Goods

Zhejiang Shaoxing Yongli Printing & Dyeing Co., Ltd. v. Microflock Textile Group Corp., 66 U.C.C. Rep. Serv. 2d (Callaghan) 716 (S.D. Fla. May 19, 2008)

THIS MATTER came before the Court on the Plaintiffs' Motion for Summary Judgment …. As more fully explained below, the plaintiff is entitled to judgment as a matter of law.

Procedural Background

The plaintiff filed an action against the defendant for breach of contract for failing to make full payment for goods delivered and accepted. The plaintiff and the defendant had an on-going business relationship between 2002 and 2004, whereby, pursuant to purchase orders placed by the defendant, the plaintiff sold and shipped various polyester dyed fabric ("Goods") from China to the defendant in the United States.

The action involves eight (8) separate orders and shipments of the Goods, which had an agreed total contract price in the amount of $316,797.78. Between August 27, 2002, and March 5, 2004, the defendant made eight (8) partial payments that totaled $204,954.24. The balance remaining is $111,843.54. The plaintiff claims that it is entitled to statutory interest at the rate of six percent (6%) per year from the due date of each unpaid invoice.

* * *

Analysis

* * *

II. The United Nations Convention on Contracts for the International Sale of Goods (1980) ("CISG") Governs

The parties in this action are from the United States of America and the People's Republic of China. Both countries are signatories to the United Nations Convention on Contracts for the International Sale of Goods (1980) ("CISG"). The CISG "applies to contracts of sale of goods between parties whose places of business are in different States when the States are Contracting States." CISG, Art. 1(a). The CISG governs "the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract." CISG, Art. 4. The CISG automatically applies to international sales contracts between parties from different contracting states unless the parties agree to exclude the application of the CISG, as stated in Article 6 of the CISG. Because the parties did not agree to exclude the application of the CISG, the CISG provides the substantive law governing this contractual dispute. Domestic law, including the Uniform Commercial Code as incorporated in Fla. Stat. §§ 670.101 – 680.532, does not govern the parties' contractual relationship.

Article 12 of the CISG gives Contracting States the right to require that the parties' intention to be bound by an agreement be evidenced exclusively in writing, when a Contracting State makes an Article 96 declaration:

> Any provision … of part II of this convention that allows a contract of sale or modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contract State which has made a declaration under Article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

CISG, Art. 12. China has made such a declaration under Article 96. The plaintiff's principal place of business is in the People's Republic of China. The Chinese Declaration requires all agreements to be in writing to be enforceable.

Under the CISG, a "contract is concluded at the moment when an acceptance of an offer becomes effective." CISG, Art. 23. The defendant provided via facsimile or e-mail written orders for various goods from the plaintiff. The purchase orders constitute offers under the CISG. The plaintiff filled the orders presented by the [defendant], shipped the orders, and submitted written invoices and packing lists to the defendant. The invoices and packing lists constitute acceptance under the CISG. The eight contracts between the plaintiff and the defendant satisfy the CISG requirements for an enforceable contract under the CISG.

III. There Is No Genuine Issue of Material Fact.

A. There Are No Written Documents to Show that the Plaintiff Agreed to Modify or Waive the Defendant's Obligation to Pay the Full Amount of the Eight Invoices.

* * *

It is undisputed that at no time after delivery of the Goods did the plaintiff, in writing, change, modify, waive, or in any way agree in writing to modify the defendant's obligation to pay the outstanding balance of $111,843.54 owed pursuant to the eight invoices. There is no evidence in the record to reflect a written modification of the parties' eight contracts to permit less than full payment. Any negotiations, if they occurred or to what extent they occurred, between the parties for modified payments on the eight invoices were not made in writing, are not evidenced by a writing, and do not satisfy the requirements of the Chinese Declaration under Article 96 of the CISG. Without any evidence of a written modification, the CISG requires this Court to enforce the invoices as stated. The balance owed on the subject invoices totals $111,843.54. There being no genuine issue as to any material fact, the plaintiff is entitled to judgment as a matter of law in its favor against the defendant in the amount of $111,843.54.

* * *

C. The Plaintiff Is Not Entitled to Pre-judgment Interest.

The plaintiff also seeks pre-judgment interest under Florida law. The CISG is silent on the issue of interest. Because substantive domestic law does not apply, the plaintiff is not entitled to any interest. The plaintiff is not entitled to pre-judgment interest.

Accordingly, it is

ORDERED AND ADJUDGED that the Plaintiffs' Motion for Summary Judgment is GRANTED. A judgment in the amount of $111,843.54 will be entered in favor of the plaintiff and against the defendant.

QUESTIONS FOR DISCUSSION FOR CASE 9.4

1. Why does the CISG, and not the UCC, govern this contract?
2. Why does the court find that the parties' agreement must be in writing?
3. What constituted the offer in this contract? What constituted the acceptance?

DISCUSSION QUESTIONS

1. From 1988 to 1992, Dennis McInerney served as a sales representative for Charter Golf, Inc., a company that manufactures and sells golf apparel and supplies. McInerney's sales territory originally covered Illinois but was later expanded to include Indiana and Wisconsin. In 1989, Hickey-Freeman, which manufactures a competing line of golf apparel, offered McInerney a position as an exclusive sales representative that included an 8 percent commission. McInerney contacted Jerry Montiel, Charter Golf's president, to notify him of his intention to accept Hickey-Freeman's offer. Montiel wanted McInerney to continue to work for Charter Golf and offered McInerney a 10 percent commission on sales in Illinois and Wisconsin "for the remainder of his life" in a position where he could be discharged only for dishonesty or disability. McInerney then refused the Hickey-Freeman offer and continued working for Charter Golf. The working relationship between McInerney and Charter Golf deteriorated, and Charter Golf fired McInerney. McInerney sued for breach of contract. In response, Charter Golf argued that: (1) McInerney's promise to forgo the Hickey-Freeman job was not sufficient consideration to turn an existing employment-at-will contract into a contract for lifetime employment; and that, (2) if there was a contract, the Statute of Frauds requires that a lifetime employment contract be in writing. How should the court rule on these two claims, and why?
2. In August 1995, Carl Merritt contacted RxP Prods., Inc. ("RxP") about selling "RxP Gas Kicker," a fuel additive, as a private-label product. The parties entered into an agreement, which stated, in its entirety:

   > This agreement is made on this 28th day of September, 1995, between RxP Products, Inc., hereafter referred to as RxP, and Merritt-Campbell, Incorporated, hereinafter referred to as Merritt-Campbell.
   >
   > In consideration of the sum of ten dollars ($10.00), the receipt of which is acknowledged, RxP agrees to sell to Merritt-Campbell the product marketed as "RxP Gas Kicker" under the following terms:
   >
   > 1. RxP guarantees the following price to Merritt-Campbell for a period of five (5) years from the date of first order.
   >   a. RxP Gas Kicker bottled in 2.5 ounce quantities—$1.25 per bottle (excluding labels).
   >   b. RxP Gas Kicker in 55 gallon drum quantity —$1,280,00 (sic) per drum.
   >
   >   Said pricing may be increased only in the case of documented price increases to RxP for raw materials.
   > 2. RxP will bottle RxP Gas Kicker in either green or black bottles, as provided as samples, upon request for Merritt-Campbell.
   > 3. RxP guarantees shipment within fourteen (14) days from receipt of order from Merritt-Campbell.
   > 4. Both RxP and Merritt-Campbell agree unconditionally to maintain confidentiality regarding the relationship between the two companies. This confidentiality includes, but is not limited to, any disclosure of the source product market by RxP and Merritt-Campbell. The scope of this confidentiality includes, but is not limited to, any director, officer, employee, or agent of both RxP and Merritt-Campbell.
   > 5. It is understood by RxP that it is the intention of Merritt-Campbell to market the product heretofore referred to as "RxP Gas Kicker" under a private label.

   A dispute arose between the two parties. Merritt-Campbell filed suit against RxP alleging that RxP had breached a requirements contract entered into by the parties. Merritt-Campbell sought specific performance as a remedy. RxP responded that the contract did not satisfy the UCC Statute of Frauds because it failed to state a quantity term. Who is correct?

3. Gary Trimble placed a written order for advertising for his business in Ameritech's 1994–95 PAGES-PLUS Directory. Ameritech failed to publish Trimble's advertisement. The contract that Trimble had signed provided:

   > if publisher should be found liable for loss or damage due to a failure on the part of the publisher or its directory, in any respect, regardless of whether customer's claim is based on contract, tort, strict liability, or otherwise, the liability shall be limited to an amount equal to the contract price for the disputed advertisement, or that sum of money actually paid by the customer toward the disputed advertisements, whichever sum shall be less, as liquidated damages and not as a penalty, and this liability shall be exclusive. In no event shall publisher be liable for any loss of customer's business, revenues, profits, the cost to the customer of other advertisements or any other special, incidental, consequential or punitive damages of any nature, or for any claim against the customer by a third party.

   Trimble was not charged for the advertisement. He filed suit for damages arising from loss of business. The trial court granted Ameritech's request for summary judgment and Trimble appealed. Is the clause in the parties' contract limiting Ameritech's liability valid and enforceable?

4. Kathleen F. Liarikos purchased a 1984 Jaguar XJS from Pine Grove Auto Sales in 1988. She asserted that Pine Grove made various representations about the car's low mileage. In 1990, after the car had had a variety of mechanical problems, Liarikos discovered that the Jaguar's odometer had been turned back. She then sent a letter to Pine Grove that she asserted was a revocation of her acceptance of the Jaguar. Liarikos received no response from Pine Grove. Liarikos continued to use the vehicle as she needed a car in order to conduct her business. Did Liarikos negate her revocation of acceptance by continuing to use the Jaguar?

5. Bertha Jamison contracted to purchase a set of encyclopedias from Encyclopedia Britannica for $1,652.08. She made a $100 down payment and signed a document entitled "Britannica Revolving Credit Agreement—Retail Installment Contract," in which she agreed to pay $57 per month until the purchase price was fully paid. The contract specified Jamison's street address as the location to which the encyclopedias were to be shipped. Soon thereafter, Encyclopedia Britannica assigned the contract to Merchants Acceptance, Inc.

   Jamison never received the encyclopedias. A United Parcel Service (UPS) tracking slip revealed the encyclopedias were shipped to Jamison's post office box, not to her street address. Jamison refused to make any of the payments on her account. Merchants sued for payment of the outstanding balance. How should the court rule, and why?

6. Sunset Trails, Inc., provides private recreational facilities, entertainment, and catering for large corporate groups, conventions, and other private parties. On March 25, 1996, Nortex Drug Distributors, Inc., signed a contract reserving Sunset Trails' facilities and catering for a company picnic on July 7, 1996. The contract provided for a minimum of 400 persons at $17.50 per person, for a total of $7,000. The contract contained the following cancellation damages provision:

   > Due to the exclusive nature of the CIRCLE R RANCH for group bookings only, the Client will be responsible for payment of the full contract … in the event that this function is cancelled.

   On July 2, 1996, five days before the scheduled event, Nortex informed Sunset Trails that it was canceling the picnic. Because of the late notice, Sunset Trails was unable to rebook the facilities for July 7. Sunset Trails sent Nortex a bill for $7,000. Nortex refused to pay the bill and contended that the cancellation provision in the contract was an unlawful penalty provision. Sunset Trails argued that the provision was a valid liquidated damages provision. How should the court rule, and why?

7. On August 21, 1992, Miguel A. Diaz Rodriguez ("Diaz") contracted with Learjet, Inc., to purchase a model 60 aircraft. The contract called for a $250,000 deposit to be made upon execution of the contract; $750,000 to be paid on September 18; $1 million to be paid 180 days before the delivery date of July 30, 1993; and the balance to be paid on delivery. Learjet anticipated making a profit of $1.8 million on the sale to Diaz.

Diaz paid the $250,000 deposit on August 21, but made no further payments. At the end of September 1992, Diaz called Learjet, indicated he did not want the aircraft, and requested a return of his deposit. Learjet indicated that it would not return the deposit but, rather, would retain it as liquidated damages in accordance with the express terms of the contract, which provided for the retention of such payments in the event of breach.

Learjet then contracted with Circus Circus Enterprise, Inc., for sale of the aircraft. Learjet realized a $1,887,464 profit on the sale of the aircraft to Circus Circus, which was larger than the profit it would have made on the sale to Diaz. Diaz filed suit for return of the $250,000 deposit, alleging that the retention of the deposit was an unreasonable and unenforceable penalty. At the time that Diaz breached the contract, Learjet was operating at 60 percent capacity. Learjet would have been able to accelerate its production schedule to produce more model 60 planes during any given year. How should the court rule?

8. Frigidaire, which manufactures freezers, contacted McGill Manufacturing Co. about purchasing an electrical switch that McGill had advertised as "water resistant." McGill sent Frigidaire some samples of the switches and a price quotation that contained the conditions of sale on its reverse side. Among those conditions was a statement that limited McGill's warranty obligations to either repayment of the purchase price or replacement of the returned parts. The samples were not completely water resistant, so the parties agreed upon a slight redesign of the switches, with a corresponding increase in price.

   Frigidaire then sent McGill a blanket purchase order for the redesigned switches. The purchase order set forth Frigidaire's terms and conditions of purchase, which included express warranties of merchantability and fitness for a particular purpose. The purchase order also stated:

   > This Purchase Order is to be accepted in writing by Seller by signing and returning promptly to Buyer the Acknowledgment Copy, but if for any reason Seller should fail to sign and return to Buyer the Acknowledgment Copy, the commencement of any work or performance of any services hereunder by Seller shall constitute acceptance by Seller of this Purchase Order and all its terms and conditions.
   >
   > Acceptance of this Purchase Order is hereby expressly limited to the terms hereof. Any terms proposed by Seller which add to, vary from, or conflict with the terms herein shall be void and the terms hereof shall govern. If this Purchase Order has been issued by Buyer in response to an offer the terms of which are additional to or different from any of the provisions hereof, then the issuance of this Purchase Order by Buyer shall constitute an acceptance of such offer subject to the express condition that the Seller assent that this Purchase Order constitutes the entire agreement between Buyer and Seller with respect to the subject matter hereof and the subject matter of such offer.

   The purchase order stated the original price of the switches, not the increased price that reflected the agreed-upon redesign.

   The next day, McGill sent a computer-generated acknowledgment form, which set forth terms similar to the terms on the original price quotation but which included additional limitations and exclusions of warranties. Ten days later, McGill's sales representative changed the incorrect price on the purchase order form, signed it, and returned it to Frigidaire.

   Frigidaire produced several thousand freezers containing McGill's switches. The switches began to fail within a matter of months. Frigidaire filed suit, alleging breach of contract and breach of express and implied warranties and seeking in excess of $1.5 million in damages. Frigidaire argues that the terms found in its blanket purchase order should control; McGill argues that the terms found in its acknowledgment form should control. Which party is correct, and why?

9. On April 14, 1993, Saint Switch, Inc., offered to sell fuel pumps to Norca Corp., stating that its offer was firm until July 31, 1994. On August 18, 1993, Saint Switch forwarded to Norca a new offer stating different price terms for the fuel pumps. On November 4, 1993, Norca attempted to accept the original offer made on April 14, 1993. Is Norca permitted to accept that original offer? Why or why not?

10. Carol Poole began working as a travel agent for Incentives Unlimited in April 1992. Four years later, Incentives asked Poole to sign an "Employment Agreement" that contained a covenant not to compete. The covenant prohibited Poole from competing directly with Incentives within a four-county

area for one year after ceasing her employment with Incentives. Poole signed the Agreement.

Poole soon left Incentives and began working at a competing travel agency. Incentives sued to enforce the covenant not to compete. The trial court awarded summary judgment to Poole. Incentives appealed. Is the covenant not to compete enforceable? Why or why not?

11. In March 1998, McDonald's Corp. began the "1998 McDonald's Monopoly Game" to promote sales of its food items. Customers could win by collecting the entire series of official "Collect to Win" stamps or by obtaining an "Instant Win" stamp. The official rules of the promotion game were posted at all participating McDonald's locations. The official rules stated in part:

> All game materials are subject to verification at a participating McDonald's or the Redemption Center, whichever is applicable. Game materials are null and void and will be rejected if not obtained through authorized, legitimate channels, or if they are mutilated or tampered with in any way (except for the signed initials of the potential winner), or if they contain printing, typographical, mechanical, or other errors. All decisions of McDonald's and the Redemption Center are final, binding and conclusive in all matters.

The official rules also stated: "You are not a winner of any prize until your official game stamp(s) has been verified at the Redemption Center or a participating McDonald's, whichever is applicable."

On April 2, Vernicesa Barnes ordered hash browns at a McDonald's restaurant. The container had a game piece attached that stated: "$200,000 Dream Home Cash—Stamp 818—Need Stamps 818, 819, & 820 to Win—Instant Winner!" Interpreting this to mean that she had an "Instant Win" Stamp, Barnes filled out the forms to begin the redemption process and mailed the stamp and signed forms to McDonald's Redemption Center.

On May 1, Barnes received a letter from the Redemption Center notifying her that the game stamp was a miscut "Collect to Win" stamp and would not be honored. Barnes filed suit, alleging breach of contract. How should the court rule on her claim?

12. Jordan Systems, Inc., a construction subcontractor, contracted to purchase custom-made windows from Windows, Inc., a fabricator and seller of windows located in South Dakota. The purchase contract provided: "All windows to be shipped properly crated/packaged/boxed suitable for cross country motor freight transit and delivered to New York City."

Windows, Inc., constructed the windows and arranged to have them shipped to Jordan by a common carrier, Consolidated Freightways Corp. During the course of shipment, however, approximately two-thirds of the windows were damaged as a result of "load shift." The damage resulted from the windows being improperly loaded on the truck by Consolidated's employees.

Jordan sued Windows to recover incidental and consequential damages based on Windows' alleged breach of contract. How should the court rule on this claim?

13. Tacoma Fixture Company, Inc. (TFC), a cabinet manufacturer, regularly ordered paint and varnish products from Rudd over a period of several years. In a typical transaction, TFC would place its order with Rudd by telephone or fax, and Rudd would arrange shipment of the products. Neither party would issue a written confirmation order, but Rudd would mail an invoice to TFC after the goods were shipped and delivered. These invoices included several terms that TFC did not specifically agree to, such as a warranty disclaimer, a remedy limitation, a forum selection clause, and an attorney fee clause.

TFC experienced several problems with Rudd's products, which caused the cabinet finishes to crack and discolor. TCF sued for breach of express and implied warranties, but Rudd argued that the warranty disclaimers and remedy limitations contained on its invoices shielded it from liability. How should the court rule on TCF's claims?

14. Reynold Williams Jr., purchased a 2004 GMC Yukon SLT from Spitzer Autoworld Canton, L.L.C. According to the written purchase agreement, Williams was to receive a trade-in allowance of $15,500 for his 2003 Ford Explorer. The purchase agreement also had a statement indicating that this was the entire agreement between the parties. Williams subsequently sued Spitzer, stating he and Spitzer had reached a prior oral agreement that he would receive a trade-in allowance of $16,500 and that this agreement should have been incorporated in the purchase agreement. Williams stated that he had failed to notice the difference when signing the contract because he was focused on the monthly payment amount. He stated that the error only became apparent to

him when he found out that his financing had been declined and that he owed an additional $2,000 to pay off the loan secured by the Explorer. How should the court rule on Williams' claim, and why?

15. In October, 2003, Mountain Camo, Inc. entered into a contract with Wendall and Janet Mills in which Mountain Camo sold the Mills a number of items of "close-out inventory." According to the contract, payment for the goods was due on March 30, 2005. The Mills picked up the inventory personally in November, 2004, but put the goods straight into warehouse storage without inspecting them. The Mills made no payments on the goods and eventually returned them to Mountain Camo in May or early June, 2005. Mountain Camo sold the goods to another buyer for $45,000, and sued the Mills for $94,771.54, which is the difference between the $139,771.54 value of the goods and the $45,000 Montana Camo received for sale of the goods to a third party. The Mills argue that they were not in breach of contract because they had rejected the goods because of defects and odd sizing that would render the goods difficult to sell, and thus had returned them to Mountain Camo. How should the court rule, and why?

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