Problem 30

After some preliminary negotiations over the telephone, the purchasing agent of the Galsworthy Oil Company sent off the usual company purchase order to the Forsyte Shipbuilding firm for the purchase of a $100,000 tugboat, the price quoted in the phone conversation. On receiving this, the sales agent of Forsyte Shipbuilding sent off the usual company sales acknowledgment slip, which included the following clause: "Seller does not warrant its goods in any way, and specifically disclaims any warranty of MERCHANTABILITY or of fitness." No further discussion was had by the parties. The seller shipped the tugboat, and the buyer used it for two days before it broke apart and sank due to a manufacturing defect. Is the seller's disclaimer of warranty liability (generally permitted by the UCC if the seller uses the above language) effective here? No, I don't think that the seller is liable

No UCC 2-207

The common law would have resolved this Problem by saying that the seller's form was a counteroffer, accepted by the buyer's silence. Thus the seller would escape warranty liability. The problem with this result is that it is at odds with reality. The parties really only cared about the dickered terms (the price of the boat, for example), and the disclaimer, however highlighted, is boilerplate language in the seller's form that the buyer likely never read at all.

The original version of §2-207 tackled this head on by getting rid of the common law mirror image rule. Subsection (1) of 2-207 clearly tells us that the acceptance need no longer match the offer exactly. As long as the acceptance is meant to be an acceptance, it may contain new or different terms. Then, as to what happens to these new terms, subsection (2) allows them to become part of the contract unless the original offeror objects to them or they would materially alter the original offer (in which case the new terms are stricken, and the contract is formed according to the terms of the offer).

QUESTION

Use the first two subsections of §2-207, reprinted immediately below, to resolve Problem 30 above. You should know that Official Comment 4 to this section gives a representative list of new terms that would not materially alter the original offer, while Official Comment 5 states some that do.

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 Act.

Since sellers typically (but not always) send out the second form, and since the rules of §2-207 tend to create a contract based on the first form, sellers had to have a way of protecting themselves from unwanted liability. The way to do this is to make sure that the seller's acknowledgment form is *not* an acceptance, but instead is clearly a counteroffer. Subsection (1) to §2-207 allows this in its final "unless" clause. This statutory language is referred to in the cases as the "proviso" (because it is functionally equivalent to saying "provided that if"), and the use of the proviso has a dramatic effect on the legal result. If the seller makes it clear that no acceptance is intended unless the buyer specifically agrees to the seller's terms, no contract is formed. The seller has made a counteroffer. If the buyer does specifically assent to the new terms (and mere silence is not enough), well and good: The contract now looks the way the seller desired. If the buyer says nothing (remember no one is likely to be reading these documents closely) and the goods are shipped, now what? The answer is that subsection (3) of §2-207 does create a contract. Read it carefully and the case that follows which applies it.

COMMERCE & INDUSTRY INS. CO. v. BAYER CORP.
Supreme Judicial Court of Massachusetts, 2001
433 Mass. 388, 742 N.E.2d 567, 44 UCC Rep. Serv. 2d 50

GREANEY, J. We granted the application for direct appellate review of the defendant, Bayer Corporation (Bayer), to determine the enforceability of an arbitration provision appearing in the plaintiff's, Malden Mills Industries, Inc. (Malden Mills), orders purchasing materials from Bayer. In a written decision, a judge in the Superior Court concluded that the provision was not enforceable. An order entered denying Bayer's motion to compel arbitration and to stay further litigation against it. We affirm the order.

The background of the case is as follows. Malden Mills manufactures internationally-known apparel fabrics and other textiles. On December 11, 1995, an explosion and fire destroyed several Malden Mills's buildings at its manufacturing facility. Subsequently, Malden Mills and its property insurers, the plaintiffs Commerce and Industry Insurance Company and Federal Insurance Company, commenced suit in the Superior Court against numerous defendants, including Bayer. In their complaint, the

MM = buyer Bayer = seller

plaintiffs allege, insofar as relevant here, that the cause of the fire was the ignition, by static electrical discharge, of nylon tow (also known as bulk nylon fiber), which was sold by Bayer (but manufactured by a French business entity) to Malden Mills and used by Malden Mills to manufacture "flocked fabric," a fabric used primarily for upholstery application.[3]

Malden Mills initiated purchases of nylon tow from Bayer either by sending its standard form purchase order to Bayer, or by placing a telephone order to Bayer, followed by a standard form purchase order. Each of Malden Mills's purchase orders contained, on the reverse side, as one of its "terms and conditions," an arbitration provision stating:

> Any controversy arising out of or relating to this contract shall be settled by arbitration in the City of New York or Boston as [Malden Mills] shall determine in accordance with the Rules then obtaining of the American Arbitration Association or the General Arbitration Council of the Textile Industry, as [Malden Mills] shall determine.

Another "term and condition" appearing in paragraph one on the reverse side of each purchase order provides:

> This purchase order represents the entire agreement between both parties, not withstanding any Seller's order form, whether sent before or after the sending of this purchase order, and this document cannot be modified except in writing and signed by an authorized representative of the buyer.

In response, Bayer transmitted Malden Mills's purchase orders to the manufacturer with instructions, in most instances, that the nylon tow was to be shipped directly to Malden Mills. Thereafter, Bayer prepared and sent Malden Mills an invoice. Each of the Bayer invoices contained the following language on its face, located at the bottom of the form in capital letters:

> TERMS AND CONDITIONS: NOTWITHSTANDING ANY CONTRARY OR INCONSISTENT CONDITIONS THAT MAY BE EMBODIED IN YOUR PURCHASE ORDER, YOUR ORDER IS ACCEPTED SUBJECT TO THE PRICES, TERMS AND CONDITIONS OF THE MUTUALLY EXECUTED CONTRACT BETWEEN US, OR, IF NO SUCH CONTRACT EXISTS, YOUR ORDER IS ACCEPTED SUBJECT TO OUR REGULAR SCHEDULED PRICE AND TERMS IN EFFECT AT TIME OF SHIPMENT AND SUBJECT TO THE TERMS AND CONDITIONS PRINTED ON THE REVERSE SIDE HEREOF.

The following "condition" appears in paragraph fourteen on the reverse side of each invoice:

> This document is not an Expression of Acceptance or a Confirmation document as contemplated in Section 2-207 of the Uniform Commercial Code. The acceptance of any order entered by [Malden Mills] is expressly conditioned on [Malden Mills's] assent to any additional or conflicting terms contained herein.

3. The plaintiffs' claims against Bayer allege negligence and breach of implied warranties of merchantability and of fitness for a particular purpose.

Malden Mills usually remitted payment to Bayer within thirty days of receiving an invoice.

Based on the arbitration provision in Malden Mills's purchase orders, Bayer demanded that Malden Mills arbitrate its claims against Bayer. After Malden Mills refused, Bayer moved to compel arbitration and to stay the litigation against it. The judge denied Bayer's motion, concluding, under §2-207 of the Massachusetts enactment of the Uniform Commercial Code, that the parties' conduct, as opposed to their writings, established a contract. As to whether the arbitration provision was an enforceable term of the parties' contract, the judge concluded that subsection (3) of §2-207 governed, and, pursuant thereto, the arbitration provision was not enforceable because the parties had not agreed in their writings to arbitrate. Finally, the judge rejected Bayer's argument that the plaintiffs should be equitably estopped from refusing to proceed under the arbitration provision.

1. This case presents a dispute arising from what has been styled a typical "battle of the forms" sale, in which a buyer and a seller each attempt to consummate a commercial transaction through the exchange of self-serving preprinted forms that clash, and contradict each other, on both material and minor terms. See 1 J. J. White & R. S. Summers, Uniform Commercial Code §1-3, at 6-7 (4th ed. 1995) (White & Summers). Here, Malden Mills's form, a purchase order, contains an arbitration provision, and Bayer's form, a seller's invoice, is silent on how the parties will resolve any disputes. Oddly enough, the buyer, Malden Mills, the party proposing the arbitration provision, and its insurers, now seek to avoid an arbitral forum.

Section 2-207 was enacted with the expectation of creating an orderly mechanism to resolve commercial disputes resulting from a "battle of the forms."[4] The section has been characterized as "an amphibious tank that was originally designed to fight in the swamps, but was sent to fight in the desert." White & Summers, supra at §1-3, at 8.[5] Section 2-207 sets forth rules and principles concerning contract formation and the procedures for

4. Section 2-207 was intended to restrict application of the common law "mirror image" rule to defeat the formation of a contract for the sale of goods. See JOM, Inc. v. Adell Plastics, Inc., 193 F.3d 47, 53 (1st Cir. 1999). "Under the common law, the inclusion of an additional term in an acceptance rejected the original offer and constituted a counteroffer which did not become a contract unless it was accepted by the offeror. . . . [Section 2-207] converts what would have been a counteroffer under the common law into an acceptance or confirmation even where the acceptance or confirmation includes additional terms or terms different from those offered or agreed upon." Anderson, supra at §2-207:4, at 560-561. See Moss v. Old Colony Trust Co., 246 Mass. 139, 148, 140 N.E. 803 (1923).

5. The tank metaphor was meant to convey the notion that §2-207 has not worked satisfactorily in practice. Another treatise on the Uniform Commercial Code has been more direct in criticizing §2-207. "Few provisions of the Code (or indeed of any statute) have gained the notoriety of §2-207. Scores of cases have explored its every nuance; dozens of law review articles have analyzed its minutiae. A virtual cottage industry has been created to suggest amendments, and agreement is nearly universal that it is at best a 'murky bit of prose.' Its workmanship is further honored by Grant Gilmore's characterization of the provision as 'a miserable, bungled, patched-up job . . . to which various hands . . . contributed at various points, each acting independently of the others (like the blind men and the elephant).' No similar provision exists elsewhere in the Code." (Footnotes omitted.) 1 T. D. Crandall, M. J. Herbert & L. Lawrence, Uniform Commercial Code §3.2.4, at 3:12 (1996). . . .

determining the terms of a contract. Id. at 9. As to contract formation, under §2-207, there are essentially three ways by which a contract may be formed. Id. at 19-20. See also JOM, Inc. v. Adell Plastics, Inc., 193 F.3d 47, 53 (1st Cir. 1999) (*JOM*). "First, if the parties exchange forms with divergent terms, yet the seller's invoice does not state that its acceptance is made 'expressly conditional' on the buyer's assent to any additional or different terms in the invoice, a contract is formed [under subsection (1) of §2- 207]." Id. at 53. "Second, if the seller does make its acceptance 'expressly conditional' on the buyer's assent to any additional or divergent terms in the seller's invoice, the invoice is merely a counteroffer, and a contract is formed [under subsection (1) of §2-207] only when the buyer expresses its affirmative acceptance of the seller's counteroffer." Id. Third, "where for any reason the exchange of forms does not result in contract formation (e.g., the buyer 'expressly limits acceptance to the terms of [its offer]' under §2-207(2)(a), or the buyer does not accept the seller's counteroffer under the second clause of §2-207[1]), a contract nonetheless is formed [under subsection (3) of §2-207] if their subsequent conduct—for instance, the seller ships and the buyer accepts the goods—demonstrates that the parties believed that a binding agreement had been formed." Id. at 54.

Bayer correctly concedes that its contract with Malden Mills resulted from the parties' conduct, and, thus, was formed pursuant to subsection (3) of §2-207. A contract never came into being under subsection (1) of §2-207 because (1) paragraph fourteen on the reverse side of Bayer's invoices expressly conditioned acceptance on Malden Mills's assent to "additional or different" terms,[6] and (2) Malden Mills never expressed "affirmative acceptance" of any of Bayer's invoices. See id. at 53. In addition, the exchange of forms between Malden Mills and Bayer did not result in a contract because Malden Mills, by means of language in paragraph one of its purchase orders, expressly limited Bayer's acceptance to the terms of Malden Mills's offers. . . .

Although Bayer acknowledges that its contract with Malden Mills was formed under subsection (3) of §2-207, it nonetheless argues, relying on language in both *JOM*, supra at 55, and official comment 6 to §2-207 of the Code, 1 U.L.A. 378 (Master ed.1989), that the terms of the contract are determined through an application of the principles in subsection (2) of §2-207. Under this analysis, Bayer asserts that the arbitration provision became part of the parties' contract because it was not a "material alteration," and to include the provision would cause no "surprise or hardship" to the plaintiffs. This analysis is incorrect.

Bayer ignores the significance of the method of contract formation in determining the terms of a contract. See White & Summers, supra at §1-3,

6. Bayer's invoices contain terms "additional" and "different" from those in Malden Mills's purchase orders. For example, Bayer's invoices disclaim certain warranties (implied warranties) for which Malden Mills's purchase orders provide. In addition, Bayer's invoices exclude liability for consequential damages for which Malden Mills' purchase orders provide. It cannot be said that these terms are immaterial. See Anderson, supra at §2-207:79, §2-207:88 (Code is not concerned with presence of additional term unless it is material; limitation of warranties provision and clause excluding liability for consequential damages are material new terms).

at 19-20 (discussing three routes of contract formation under §2-207, and noting "the terms of any resulting contracts will vary, depending on which route to contract formation a court adopts"). Where a contract is formed by the parties' conduct (as opposed to writings), as is the case here, the terms of the contract are determined exclusively by subsection (3) of §2-207. 2 R. A. Anderson, Uniform Commercial Code §2-207:14, at 568; §2- 207:28, at 574-575; §2-207:47, at 584; §2-207:146, at 640 (3d ed. rev. 1997) (Anderson). Official comment 7, which Bayer overlooks, expressly directs as much. See 1 U.L.A. §2-207 official comment 7, at 378 (Master ed. 1989) ("In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. In such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. . . . The only question is what terms are included in the contract, and subsection [3] furnishes the governing rule"). Under subsection (3) of §2-207, "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." G.L. c. 106, §2-207(3). In this respect, one commentator has aptly referred to subsection (3) of §2-207 as the "fall-back" rule. See 1 T. M. Quinn, Uniform Commercial Code Commentary and Law Digest par. 2-207[A][14], at 2-134 (2d ed. 1991). Under this rule, the Code accepts "common terms but rejects all the rest." Id. at 2-135. While this approach "serves to leave many matters uncovered," terms may be filled by "recourse to usages of trade or course of dealing under §1-205 or, perhaps, the gap filling provisions of §2-300s." Id. See also Anderson, supra at §2-207:78, at 602 ("'supplementary terms' authorized by UCC §2-207[3] include those that may be established by a course of dealing, course of performance, and usage of the trade").

Contrary to Bayer's contentions, subsection (2) of §2-207 is not applicable for several reasons. First, subsection (2) instructs on how to ascertain the terms of a contract when the contract is formed either by the parties' writings or by a party's written confirmation of an oral contract, situations not present here (the parties' contract was formed by their conduct). See 1 U.L.A. §2-207 official comments 1 and 2, supra at 377. See also Anderson, supra at §2-207:28, at 574-575; §2-207:30, at 576; §2-207:160, at 647. Second, the rules set forth in subsection (2), concerning how the terms of a contract between merchants are determined, apply only when the acceptance or written confirmation contains "additional or different terms," a situation also not present here (Bayer's invoice is silent concerning how to resolve disputes). See 1 U.L.A. §2-207 official comment 3, supra at 377. See also Anderson, supra at §2-207:160, at 647-648. In addition, official comment 6, read in its entirety,[7] does not support Bayer's argument because the comment expressly applies

7. Official comment 6 to §2-207, 1 U.L.A. 378 (Master ed.1989), provides:

6. If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to. Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of

to a situation where there are "conflicting" terms. Id. There are no provisions in Bayer's invoices that "conflict" with Malden Mills's arbitration provision because the invoices do not contain any provision stating how the parties intend to resolve their disputes. See White & Summers, supra at §1-3, at 15 (official comment 6 not applicable when term appears in first form, but not in second; there are no terms that "conflict").

Bayer argues that this case is governed by the language in *JOM*, supra at 54, stating that "[t]he terms of [the parties' contract formed by the parties' conduct] would then be determined under the 'default' test in §2-207(3), *which implicitly incorporates the criteria prescribed in §2-207(2)*" (emphasis supplied). We disagree. As discussed above, the criteria in subsection (2) determine what "additional or different terms" will or will not be part of a contract that is formed by the exchange of writings. Where the writings do not form a contract, subsection (3) states its own criteria—"those terms on which the writings agree" plus any terms that would be provided by other Code sections. One cannot turn to subsection (2) as another Code section that would supply a term when, by its express provisions, subsection (2) simply does not apply to the transaction.

Thus, the judge correctly concluded, under subsection (3) of §2-207, that the arbitration provision in Malden Mills's purchase orders did not become a term of the parties' contract. The arbitration provision was not common to both Malden Mills's purchase orders and Bayer's invoices. Bayer properly does not argue that any of the gap-filling provisions of G.L. c. 106, apply. Because Bayer concedes that it never previously arbitrated a dispute with Malden Mills, we reject Bayer's claim that the parties' course of dealing requires us to enforce the arbitration provision.Bayer also cites Pervel Indus., Inc. v. T M Wallcovering, Inc., 871 F.2d 7 (2d Cir. 1989), in arguing that industry custom and usage favors enforcing Malden Mills's arbitration provision. That case, however, is not helpful to Bayer. The court upheld the existence of an enforceable arbitration agreement because the manufacturer had "a well established custom of sending purchase order confirmations containing an arbitration clause," and the buyer, who had "made numerous purchases over a period of time," received "in each instance a standard confirmation form which it either signed and returned or retained without objection." Id. at 8. Although Bayer never objected to the arbitration provision in Malden Mills's purchase orders, as we have previously explained, no agreement to arbitrate ever arose due, in part, to the expressly conditional language appearing in paragraph fourteen of Bayer's invoices, and to the lack of an arbitration provision in its invoices. It is significant also that Bayer did not provide the judge with any evidence of industry custom and usage. We decline to conclude that industry custom and usage favors enforcing Malden Mills's arbitration provision.

Holding

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objection which is found in subsection (2) is satisfied and the conflicting terms do not become a part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this Act, including subsection (2). The written confirmation is also subject to Section 2-201. Under that section a failure to respond permits enforcement of a prior oral agreement; under this section a failure to respond permits additional terms to become part of the agreement.

The strong presumption of arbitrability, and the Federal and State policies favoring arbitration, see Bureau of Special Investigations v. Coalition of Pub. Safety, 430 Mass. 601, 603, 722 N.E.2d 441 (2000); Carpenter v. Pomerantz, 36 Mass. App. Ct. 627, 630, 634 N.E.2d 587 (1994); Loche v. Dean Witter Reynolds, Inc., 26 Mass. App. Ct. 296, 300, 526 N.E.2d 1296 (1988), cannot reasonably be applied here. No adequate satisfaction exists of the Federal Arbitration Act's requirements of the existence of a "written [arbitration] provision in . . . a contract," or "an agreement [to arbitrate] in writing," 9 U.S.C. §2 (1994), nor of the Massachusetts Uniform Arbitration Act's similar requirements of a "written [arbitration] agreement" or "a[n] [arbitration] provision in a written contract," G.L. c. 251, §1. The parties' forms never established a written contract; Malden Mills's arbitration provision did not integrate into the contract by reason of the parties' conduct; and they did not otherwise agree to arbitrate. See Quirk v. Data Terminal Sys., Inc., 379 Mass. 762, 768, 400 N.E.2d 858 (1980).

2. The judge correctly rejected Bayer's argument that the plaintiffs should be equitably estopped from refusing arbitration. Bayer has not shown that the plaintiffs intended to be bound to the arbitration provision in the absence of a final written contract with Bayer. Cf. Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp., 659 F.2d 836, 839 (7th Cir. 1981) (finding it inequitable "to permit [the plaintiff] to both claim that [the defendant] is liable to [it] for its failure to perform the contractual duties described in the . . . agreement and at the same time deny that [the defendant] is a party to that agreement in order to avoid arbitration of claims clearly within the ambit of the arbitration clause"). Bayer has not established any inequity in having to proceed to trial rather than to arbitration. See Cleaveland v. Malden Sav. Bank, 291 Mass. 295, 297, 197 N.E. 14 (1935).

3. Bayer may be right that the drafters of the Massachusetts version of the Code did not intend that §2-207 should provide "an avenue for a party to strike the terms of its own purchase documents." Bayer, however, cannot ignore the fact that the use of its own boilerplate invoices contributed to the result that Bayer now finds problematic. The order denying the motion to compel arbitration and to stay litigation is affirmed.

So ordered.

NOTE

The above case stands for the idea that the proviso clause acts like a railroad switch. If it is *not* used as part of the accepting form, then the purported acceptance does create a contract, and the parties are directed to subsection (2) to determine its terms. If the proviso is put into the accepting document, the exchange of forms does not create a contract, and the parties are directed to subsection (3) to see what results from their dealings. The point is this: The use or not of the proviso shunts the parties into either subsection (2) or subsection (3) *but never both*.

Problem 31

The purchasing agent of the Galsworthy Oil Company phoned the sales agent of Forsyte Shipbuilding and the two parties completely negotiated the terms of a contract for the purchase of a $100,000 tugboat, with the phone conversation ending with an agreement that they had reached a deal. The purchasing agent said that a purchase order would be forthcoming, and promptly put one in the mail. Forsyte Shipbuilding replied with an acknowledgment form that added a disclaimer of warranty and then used the exact language of the proviso to make it clear that the seller was insisting on its own terms. You are the attorney for the Galsworthy Oil Company and the company has asked you the following questions. Do the parties have a contract prior to the shipment of the boat? Is the disclaimer of warranty effective? See Air Products & Chemical, Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 206 N.W.2d 414, 12 U.C.C. Rep. Serv. 794 (1973) (once a contract has been formed by mutual agreement, a written confirmation thereof cannot use the proviso to avoid the existing contract). If you are the attorney for the seller, what can you do in all these situations to make sure that your client's disclaimer of warranties is effective?

Problem 32

The purchasing agent of the Galsworthy Oil Company sent off the usual company purchase order to the Forsyte Shipbuilding firm for the purchase of a $100,000 tugboat. It contained a clause stating "Buyer objects in advance to any changes Seller attempts to make to the terms of this purchase order." On receiving this, the sales agent of Forsyte Shipbuilding sent off the usual company sales confirmation slip, which included the following clause: "Seller does not warrant its goods in any way, and specifically disclaims any warranty of MERCHANTABILITY or of fitness. This form is not an 'acceptance' unless Buyer expressly agrees to all changes proposed by Seller." Prior to the delivery date and to the start of preparations by either party, the market changed so that Galsworthy Oil wanted to get out of the deal. You are their lawyer. Is there a contract? What are its terms? If the parties had performed without any further discussion of their differences, would the deal include a warranty? See UCC §§2-207(3) and 2-314.

Problem 33

The Galsworthy Oil Company ordered a $100,000 tugboat, and specifically demanded that all disputes be subject to binding arbitration. The acknowledgment form from Forsyte Shipbuilding agreed to all of the terms except this one, and specifically stated that "the parties agree to settle or litigate any disputes without resorting to arbitration." Neither party read

the other's form, so the tugboat was shipped, accepted, and then had major problems remaining afloat. You are the attorney for the buyer. Advise your client whether arbitration can be demanded here.

The last Problem raises the issue of how §2-207 resolves an exchange of forms containing *different* terms. While subsection (1) of the statute talks about both "additional" and "different" terms, subsection (2) mentions only "additional" ones. Official Comment 6 (reprinted below), at first glance, appears to resolve the matter, but a careful reading of it shows that it is addressed only to written confirmations of an oral contract containing different terms, which the Official Comment says cancel each other out. The courts facing the different terms scenario of Problem 33 have divided into two major camps, as the following discussion from Reilly Foam Corp. v. Rubbermaid Corp., 206 F. Supp. 2d 643 (E.D. Pa. 2002) indicates:

> The minority view permits the terms of the offer to control. Because there is no rational distinction between additional terms and different terms, both are handled under §2-207(2). For support, advocates of this position point to Official Comment 3: "Whether or not *additional or different* terms will become part of the agreement depends upon the provisions of subsection [2]" [citations omitted]. Professor Summers, the leading advocate of the minority rule, reasons that offerors have more reason to expect that the terms of their offer will be enforced than the recipient of an offer can hope that its inserted terms will be effective. See James J. White & Robert S. Summers, Uniform Commercial Code §1-3 at 35 (5th ed. 2000). The offeree at least had the opportunity to review the offer and object to its contents; if the recipient of an offer objected to a term, it should not have proceeded with the contract. . . .
>
> The final approach, held by a majority of courts, is now known as the "knockout rule." Under this approach, terms of the contract include those upon which the parties agreed and gap fillers provided by the U.C.C. provisions. This approach recognizes the fundamental tenet behind U.C.C. §2-207: to repudiate the "mirror-image" rule of the common law. One should not be able to dictate the terms of the contract merely because one sent the offer. Indeed, the knockout rule recognizes that merchants are frequently willing to proceed with a transaction even though all terms have not been assented to. It would be inequitable to lend greater force to one party's preferred terms than the other's. As one court recently explained, "An approach other than the knock-out rule for conflicting terms would result in . . . any offeror . . . always prevailing on its terms solely because it sent the first form. That is not a desirable result, particularly when the parties have not negotiated for the challenged clause." Richardson v. Union Carbide Indus. Gases, Inc., 347 N.J. Super. 524, 790 A.2d 962, 968 (N.J. Super. Ct. App. Div. 2002). Support for this view is also found in the Official U.C.C. Comments:

> Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in subsection [2] is satisfied and the conflicting terms do not become a part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this Act, including subsection [2].

U.C.C. §2-207 cmt. 6. Advocates of the knockout rule interpret Comment 6 to require the cancellation of terms in both parties' documents that conflict with one another, whether the terms are in confirmation notices or in the offer and acceptance themselves. A majority of courts now favor this approach.

KLOCEK v. GATEWAY, INC.
United States District Court, Kansas, 2000
104 F. Supp. 2d 1332, 41 U.C.C. Rep. Serv. 2d 1059

VRATIL, District Judge.

William S. Klocek brings suit against Gateway, Inc. and Hewlett-Packard, Inc. on claims arising from purchases of a Gateway computer and a Hewlett-Packard scanner. . . . For reasons stated below, the Court overrules Gateway's motion to dismiss, sustains Hewlett-Packard's motion to dismiss, and overrules the motions filed by plaintiff.

A. GATEWAY'S MOTION TO DISMISS

Plaintiff brings individual and class action claims against Gateway, alleging that it induced him and other consumers to purchase computers and special support packages by making false promises of technical support. *Complaint,* ¶¶3 and 4. Individually, plaintiff also claims breach of contract and breach of warranty, in that Gateway breached certain warranties that its computer would be compatible with standard peripherals and standard internet services. *Complaint,* ¶¶2, 5, and 6.

Gateway asserts that plaintiff must arbitrate his claims under Gateway's Standard Terms and Conditions Agreement ("Standard Terms"). Whenever it sells a computer, Gateway includes a copy of the Standard Terms in the box which contains the computer battery power cables and instruction manuals. At the top of the first page, the Standard Terms include the following notice:

> **Note to the Customer:**
>
> This document contains Gateway 2000's Standard Terms and Conditions. By keeping your Gateway 2000 computer system beyond five (5) days after the date of delivery, you accept these Terms and Conditions.

The notice is in emphasized type and is located inside a printed box which sets it apart from other provisions of the document. The Standard Terms are four pages long and contain 16 numbered paragraphs. Paragraph 10 provides the following arbitration clause:

> DISPUTE RESOLUTION. Any dispute or controversy arising out of or relating to this Agreement or its interpretation shall be settled exclusively and finally by arbitration. The arbitration shall be conducted in accordance

> with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The arbitration shall be conducted in Chicago, Illinois, U.S.A. before a sole arbitrator. Any award rendered in any such arbitration proceeding shall be final and binding on each of the parties, and judgment may be entered thereon in a court of competent jurisdiction.[8]

Gateway urges the Court to dismiss plaintiff's claims under the Federal Arbitration Act ("FAA"), 9 U.S.C. §1 et seq. The FAA ensures that written arbitration agreements in maritime transactions and transactions involving interstate commerce are "valid, irrevocable, and enforceable." 9 U.S.C. §2. Federal policy favors arbitration agreements and requires that we "rigorously enforce" them. Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 226, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987) (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158, (1985)); *Moses,* 460 U.S. at 24, 103 S. Ct. 927. "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses,* 460 U.S. at 24-25, 103 S. Ct. 927.

FAA Section 3 states:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. §3.... [T]he Court concludes that dismissal is appropriate if plaintiff's claims are arbitrable.

Gateway bears an initial summary-judgment-like burden of establishing that it is entitled to arbitration. [Citations omitted.] Thus, Gateway must present evidence sufficient to demonstrate the existence of an enforceable agreement to arbitrate. See, e.g., Oppenheimer & Co. v. Neidhardt, 56 F.3d 352, 358 (2d Cir. 1995). If Gateway makes such a showing, the burden shifts to plaintiff to submit evidence demonstrating a genuine issue for trial. Id.; see also Naddy v. Piper Jaffray, Inc., 88 Wash. App. 1033, 1997 WL 749261, *2, Case Nos. 15431-9-III, 15681-8-III (Wash. App. Dec. 4, 1997). In this case, Gateway fails to present evidence establishing the most basic facts regarding the transaction. The gaping holes in the evidentiary record preclude the Court from determining what state

8. Gateway states that after it sold plaintiff's computer, it mailed all existing customers in the United States a copy of its quarterly magazine, which contained notice of a change in the arbitration policy set forth in the Standard Terms. The new arbitration policy afforded customers the option of arbitrating before the International Chamber of Commerce ("ICC"), the American Arbitration Association ("AAA"), or the National Arbitration Forum ("NAF") in Chicago, Illinois, or any other location agreed upon by the parties. Plaintiff denies receiving notice of the amended arbitration policy. Neither party explains why—if the arbitration agreement was an enforceable contract—Gateway was entitled to unilaterally amend it by sending a magazine to computer customers.

law controls the formation of the contract in this case and, consequently, prevent the Court from agreeing that Gateway's motion is well taken.

Before granting a stay or dismissing a case pending arbitration, the Court must determine that the parties have a written agreement to arbitrate. See 9 U.S.C. §§3 and 4; Avedon Engineering, Inc. v. Seatex, 126 F.3d 1279, 1283 (10th Cir. 1997). When deciding whether the parties have agreed to arbitrate, the Court applies ordinary state law principles that govern the formation of contracts. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). The existence of an arbitration agreement "is simply a matter of contract between the parties; [arbitration] is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *Avedon,* 126 F.3d at 1283 (quoting *Kaplan,* 514 U.S. at 943-945, 115 S. Ct. 1920). If the parties dispute making an arbitration agreement, a jury trial on the existence of an agreement is warranted if the record reveals genuine issues of material fact regarding the parties' agreement. See *Avedon,* 126 F.3d at 1283. . . .

The Uniform Commercial Code ("UCC") governs the parties' transaction under both Kansas and Missouri law. See K.S.A. §84-2-102; V.A.M.S. §400.2-102 (UCC applies to "transactions in goods."); Kansas Comment 1 (main thrust of Article 2 is limited to sales); K.S.A. §84-2-105(1) V.A.M.S. §400.2-105(1) (" 'Goods' means all things . . . which are movable at the time of identification to the contract for sale. . . ."). Regardless whether plaintiff purchased the computer in person or placed an order and received shipment of the computer, the parties agree that plaintiff paid for and received a computer from Gateway. This conduct clearly demonstrates a contract for the sale of a computer. See, e.g., Step-Saver Data Sys., Inc. v. Wyse Techn., 939 F.2d 91, 98 (3d Cir. 1991). Thus the issue is whether the contract of sale includes the Standard Terms as part of the agreement.

State courts in Kansas and Missouri apparently have not decided whether terms received with a product become part of the parties' agreement. Authority from other courts is split. Compare *Step-Saver,* 939 F. 2d 91 (printed terms on computer software package not part of agreement); Arizona Retail Sys., Inc. v. Software Link, Inc., 831 F. Supp. 759 (D. Ariz. 1993) (license agreement shipped with computer software not part of agreement); and U.S. Surgical Corp. v. Orris, Inc., 5 F. Supp. 2d 1201 (D. Kan. 1998) (single use restriction on product package not binding agreement); with Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir.), cert. denied, 522 U.S. 808, 118 S. Ct. 47, 139 L. Ed. 2d 13 (1997) (arbitration provision shipped with computer binding on buyer); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (shrinkwrap license binding on buyer)[9]; and M.A. Mortenson Co., Inc. v. Timberline Software Corp., 140 Wash. 2d 568, 998 P.2d 305 (2000) (following *Hill* and *ProCD* on license agreement supplied with software).[10] It appears that at least in part, the

9. The term "shrinkwrap license" gets its name from retail software packages that are covered in plastic or cellophane "shrinkwrap" and contain licenses that purport to become effective as soon as the customer tears the wrapping from the package. See *ProCD,* 86 F.3d at 1449.

10. The *Mortenson* court also found support for its holding in the proposed Uniform Computer Information Transactions Act ("UCITA") (formerly known as proposed UCC

cases turn on whether the court finds that the parties formed their contract *before* or *after* the vendor communicated its terms to the purchaser. Compare *Step-Saver,* 939 F.2d at 98 (parties' conduct in shipping, receiving and paying for product demonstrates existence of contract; box top license constitutes proposal for additional terms under §2-207 which requires express agreement by purchaser); *Arizona Retail,* 831 F. Supp. at 765 (vendor entered into contract by agreeing to ship goods, or at latest by shipping goods to buyer; license agreement constitutes proposal to modify agreement under §2-209 which requires express assent by buyer); and *Orris,* 5 F. Supp. 2d at 1206 (sales contract concluded when vendor received consumer orders; single-use language on product's label was proposed modification under §2-209 which requires express assent by purchaser); with *ProCD,* 86 F.3d at 1452 (under §2-204 vendor, as master of offer, may propose limitations on kind of conduct that constitutes acceptance; §2-207 does not apply in case with only one form); *Hill,* 105 F.3d at 1148-49 (same); and *Mortenson,* 998 P.2d at 311-314 (where vendor and purchaser utilized license agreement in prior course of dealing, shrinkwrap license agreement constituted issue of contract formation under §2-204, not contract alteration under §2-207).

Gateway urges the Court to follow the Seventh Circuit decision in *Hill.* That case involved the shipment of a Gateway computer with terms similar to the Standard Terms in this case, except that Gateway gave the customer 30 days — instead of 5 days — to return the computer. In enforcing the arbitration clause, the Seventh Circuit relied on its decision in *ProCD,* where it enforced a software license which was contained inside a product box. See *Hill,* 105 F.3d at 1148-50. In *ProCD,* the Seventh Circuit noted that the exchange of money frequently precedes the communication of detailed terms in a commercial transaction. See *ProCD,* 86 F.3d at 1451. Citing UCC §2-204, the court reasoned that by including the license with the software, the vendor proposed a contract that the buyer could accept by using the software after having an opportunity to read the license.[11] *ProCD,* 86 F.3d at 1452. Specifically, the court stated:

> A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance.

Article 2B) (text located at www.law.upenn.edu/library/ulc/ucita/UCITA_99.htm), which the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment by the states in July 1999. See *Mortenson,* 998 P.2d at 310 n.6, 313 n.10. The proposed UCITA, however, would not apply to the Court's analysis in this case. The UCITA applies to computer information transactions, which are defined as agreements "to create, modify, transfer, or license computer information or informational rights in computer information." UCITA, §§102(11) and 103. In transactions involving the sale of computers, such as our case, the UCITA applies only to the computer programs and copies, not to the sale of the computer itself. See UCITA §103(c)(2).

11. Section 2-204 provides: "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such contract." K.S.A. §84-2-204; V.A.M.S. §400.2-204.

ProCD, 86 F.3d at 1452. The *Hill* court followed the *ProCD* analysis, noting that "[p]ractical considerations support allowing vendors to enclose the full legal terms with their products." *Hill,* 105 F.3d at 1149.[12]

The Court is not persuaded that Kansas or Missouri courts would follow the Seventh Circuit reasoning in *Hill* and *ProCD.* In each case the Seventh Circuit concluded without support that UCC §2-207 was irrelevant because the cases involved only one written form. See *ProCD,* 86 F.3d at 1452 (citing no authority); *Hill,* 105 F.3d at 1150 (citing *ProCD*). This conclusion is not supported by the statute or by Kansas or Missouri law. Disputes under §2-207 often arise in the context of a "battle of forms," see, e.g., Diatom, Inc. v. Pennwalt Corp., 741 F.2d 1569, 1574 (10th Cir. 1984), but nothing in its language precludes application in a case which involves only one form. The statute provides:

> Additional terms in acceptance or confirmation.
>
> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract [if the contract is not between merchants]. . . .

K.S.A. §84-2-207; V.A.M.S. §400.2-207. By its terms, §2-207 applies to an acceptance or written confirmation. It states nothing which requires another form before the provision becomes effective. In fact, the official comment to the section specifically provides that §2-207(1) and (2) apply "where an agreement has been reached orally . . . and is followed by one or both of the parties sending formal memoranda embodying the terms so far agreed and

12. Legal commentators have criticized the reasoning of the Seventh Circuit in this regard. *See, e.g.,* Jean R. Sternlight, Gateway Widens Doorway to Imposing Unfair Binding Arbitration on Consumers, Fla. Bar J., Nov. 1997, at 8, 10-12 (outcome in *Gateway* is questionable on federal statutory, common law and constitutional grounds and as a matter of contract law and is unwise as a matter of policy because it unreasonably shifts to consumers search cost of ascertaining existence of arbitration clause and return cost to avoid such clause); Thomas J. McCarthy et al., Survey: Uniform Commercial Code, 53 Bus. Law. 1461, 1465-66 (Seventh Circuit finding that UCC §2-207 did not apply is inconsistent with official comment); Batya Goodman, Honey, I Shrink-Wrapped the Consumer: the Shrinkwrap Agreement as an Adhesion Contract, 21 Cardozo L. Rev. 319, 344-352 (Seventh Circuit failed to consider principles of adhesion contracts); Jeremy Senderowicz, Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumers' Informed Consent to Arbitration Clauses in Form Contracts, 32 Colum. J.L. & Soc. Probs. 275, 296-299 (judiciary (in multiple decisions, including *Hill*) has ignored issue of consumer consent to an arbitration clause). Nonetheless, several courts have followed the Seventh Circuit decisions in *Hill* and *ProCD.* See, e.g., M.A. Mortenson Co., Inc. v. Timberline Software Corp., 140 Wash. 2d 568, 998 P.2d 305 (license agreement supplied with software); Rinaldi v. Iomega Corp., 1999 WL 1442014, Case No. 98C-09-064-RRC (Del. Super. Sept. 3, 1999) (warranty disclaimer included inside computer Zip drive packaging); Westendorf v. Gateway 2000, Inc., 2000 WL 307369, Case No. 16913 (Del. Ch. March 16, 2000) (arbitration provision shipped with computer); Brower v. Gateway 2000, Inc., 246 A.D.2d 246, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998) (same); Levy v. Gateway 2000, Inc., 1997 WL 823611, 33 UCC Rep. Serv. 2d 1060 (N.Y. Sup. Oct. 31, 1997) (same).

adding terms not discussed." Official Comment 1 of UCC §2-207. Kansas and Missouri courts have followed this analysis. See Southwest Engineering Co. v. Martin Tractor Co., 205 Kan. 684, 695, 473 P.2d 18, 26 (1970) (stating in dicta that §2-207 applies where open offer is accepted by expression of acceptance in writing or where oral agreement is later confirmed in writing); Central Bag Co. v. W. Scott & Co., 647 S.W.2d 828, 830 (Mo. App. 1983) (§2-207(1) and (2) govern cases where one or both parties send written confirmation after oral contract). Thus, the Court concludes that Kansas and Missouri courts would apply §2-207 to the facts in this case. Accord *Avedon*, 126 F.3d at 1283 (parties agree that §2-207 controls whether arbitration clause in sales confirmation is part of contract).

In addition, the Seventh Circuit provided no explanation for its conclusion that "the vendor is the master of the offer." See *ProCD*, 86 F.3d at 1452 (citing nothing in support of proposition); *Hill*, 105 F.3d at 1149 (citing *ProCD*). In typical consumer transactions, the purchaser is the offeror, and the vendor is the offeree. See Brown Mach., Div. of John Brown, Inc. v. Hercules, Inc., 770 S.W.2d 416, 419 (Mo. App. 1989) (as general rule orders are considered offers to purchase); Rich Prods. Corp. v. Kemutec Inc., 66 F. Supp. 2d 937, 956 (E.D. Wis. 1999) (generally price quotation is invitation to make offer and purchase order is offer). While it is possible for the vendor to be the offeror, see *Brown Machine*, 770 S.W.2d at 419 (price quote can amount to offer if it reasonably appears from quote that assent to quote is all that is needed to ripen offer into contract), Gateway provides no factual evidence which would support such a finding in this case. The Court therefore assumes for purposes of the motion to dismiss that plaintiff offered to purchase the computer (either in person or through catalog order) and that Gateway accepted plaintiff's offer (either by completing the sales transaction in person or by agreeing to ship and/or shipping the computer to plaintiff).[13] Accord *Arizona Retail*, 831 F. Supp. at 765 (vendor entered into contract by agreeing to ship goods, or at latest, by shipping goods).

Under §2-207, the Standard Terms constitute either an expression of acceptance or written confirmation. As an expression of acceptance, the Standard Terms would constitute a counter-offer only if Gateway expressly made its acceptance conditional on plaintiff's assent to the additional or different terms. K.S.A. §84-2-207(1); V.A.M.S. §400.2-207(1). "[T]he conditional nature of the acceptance must be clearly expressed in a manner sufficient to notify the offeror that the offeree is unwilling to proceed with the transaction unless the additional or different terms are included in the contract." *Brown Machine*, 770 S.W.2d at 420. Gateway provides no evidence that at the time of the sales transaction, it informed plaintiff that the transaction was conditioned on plaintiff's acceptance of the Standard Terms. Moreover, the mere fact that Gateway shipped the goods with the terms

13. UCC §2-206(b) provides that "an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment. . . ." The official comment states that "[e]ither shipment or a prompt promise to ship is made a proper means of acceptance of an offer looking to current shipment." UCC §2-206, Official Comment 2.

attached did not communicate to plaintiff any unwillingness to proceed without plaintiff's agreement to the Standard Terms. See, e.g., *Arizona Retail,* 831 F. Supp. at 765 (conditional acceptance analysis rarely appropriate where contract formed by performance but goods arrive with conditions attached); Leighton Indus., Inc. v. Callier Steel Pipe & Tube, Inc., 1991 WL 18413, *6, Case No. 89-C-8235 (N.D. Ill. Feb. 6, 1991) (applying Missouri law) (preprinted forms insufficient to notify offeror of conditional nature of acceptance, particularly where form arrives after delivery of goods).

Because plaintiff is not a merchant, additional or different terms contained in the Standard Terms did not become part of the parties' agreement unless plaintiff expressly agreed to them. See K.S.A. §84-2-207, Kansas Comment 2 (if either party is not a merchant, additional terms are proposals for addition to the contract that do not become part of the contract unless the original offeror expressly agrees). Gateway argues that plaintiff demonstrated acceptance of the arbitration provision by keeping the computer more than five days after the date of delivery. Although the Standard Terms purport to work that result, Gateway has not presented evidence that plaintiff expressly agreed to those Standard Terms. Gateway states only that it enclosed the Standard Terms inside the computer box for plaintiff to read afterwards. It provides no evidence that it informed plaintiff of the five-day review-and-return period as a condition of the sales transaction, or that the parties contemplated additional terms to the agreement.[14] See *Step-Saver,* 939 F.2d at 99 (during negotiations leading to purchase, vendor never mentioned box-top license or obtained buyer's express assent thereto). The Court finds that the act of keeping the computer past five days was not sufficient to demonstrate that plaintiff expressly agreed to the Standard Terms. Accord *Brown Machine,* 770 S.W.2d at 421 (express assent cannot be presumed by silence or mere failure to object). Thus, because Gateway has not provided evidence sufficient to support a finding under Kansas or Missouri law that plaintiff agreed to the arbitration provision contained in Gateway's Standard Terms, the Court overrules Gateway's motion to dismiss. . . .

3. The Battle of the Forms under the 2003 Revision of Article 2

Recognizing the mess that the original version of §2-207 had produced, the drafters of the 2003 revision of Article 2 worked to simplify things. Gone is any discussion of the proviso as well as the rules of old subsection (2). Instead §2-206(3) now contains the statement that avoids the common law mirror image rule:

> (3) A definite and seasonable expression of acceptance in a record operates as an acceptance even if it contains terms additional to or different from the offer.

14. The Court is mindful of the practical considerations which are involved in commercial transactions. But it is not unreasonable for a vendor to clearly communicate to a buyer — at the time of sale — either the complete terms of the sale or the fact that the vendor will propose additional terms as a condition of sale, if that be the case.

To which the Official Comment adds that "any responsive record must still be reasonably understood as an 'acceptance' and not as a proposal for a different transaction."

New §2-207 now consists only of a modified version of old subsection (3):

> Subject to Section 2-202, if (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract, are:
>
> (a) terms that appear in the records of both parties;
> (b) terms, whether in a record or not, to which both parties agree; and
> (c) terms supplied or incorporated under any provision of this Act.

The new Official Comment explains that:

> this section gives no preference to either the first or the last form; the same test is applied to the terms in each. Terms in a record that insist on all of that record's terms and no other terms as a condition of contract formation have no effect on the operation of this section. When one party insists in that party's record that its own terms are a condition to contract formation, if that party does not subsequently perform or otherwise acknowledge the existence of a contract, if the other party does not agree to those terms, the record's insistence on its own terms will keep a contract from being formed under Sections 2-204 or 2-206, and this section is not applicable.

Problem 34

The purchasing agent of the Galsworthy Oil Company ordered a $100,000 tugboat, and Forsyte Shipbuilding sent back an acknowledgment form which included a binding arbitration clause and the following language: "This is not an acceptance; it is a counteroffer. Buyer's payment for the item shipped shall constitute an acceptance of all of the terms of this counteroffer." Galsworthy Oil Company sent payment to the seller, and the boat was shipped and accepted. When the boat proved to have warranty problems, the seller insisted on arbitration (which was not common in this particular industry). How does new §2-207 resolve the issue?

V. INDEFINITENESS

As a general rule, no mutual assent exists and thus no contract is formed unless the agreement of the parties is sufficiently certain. Certain as to what? All terms? What degree of certainty must be shown? Must certainty be established only by the terms of the offer? Are terms in the acceptance

relevant? Is evidence other than the language of the offer and acceptance relevant?

CORBIN ON CONTRACTS §29

We must not jump too readily to the conclusion that a contract has not been made from the fact of apparent incompleteness. People do business in a very informal fashion, using abbreviated and elliptical language. A transaction is complete when the parties mean it to be complete. It is a mere matter of interpretation of their expressions to each other, a question of fact. An expression is no less effective that it is found by the method of implication. The parties may not give verbal expression to such vitally important matters as price, place and time of delivery, time of payment, amount of goods, and yet they may actually have agreed upon them. This may be shown by their antecedent expression, their past action and custom, and other circumstances.

The UCC requires the courts to look to the following matters as aids for construction of the contract: *usage of trade,* meaning the custom within any given industry; *course of dealing,* meaning the parties' conduct in past contacts with one another; and *course of performance,* meaning what the parties do while performing this *one* contract (what the common law called *practical construction*). Read §§1-205 and 2-208 of the UCC.[3] The UCC has a number of provisions designed to fill in the blanks left in the contract. Read §§2-305 (Open Price Term), 2-306 (Output, Requirements and Exclusive Dealings), 2-307 (Delivery in Single or Several Lots), 2-308 (Absence of Specified Place for Delivery), and 2-309 (Absence of Specific Time Provisions).

WALKER v. KEITH
Court of Appeals of Kentucky, 1964
382 S.W.2d 198

CLAY, Commissioner. . . .

In July 1951 appellants, the lessors, leased a small lot to appellee, the lessee, for a 10-year term at a rent of $100 per month. The lessee was given an option to extend the lease for an additional 10-year term, under the same terms and conditions except as to rental. The renewal option provided:

> rental will be fixed in such amount as shall actually be agreed upon by the lessors and the lessee with the monthly rental fixed on the comparative basis

3 There is a new version of Article 1 of the Uniform Commercial Code that has been slow in gaining acceptance. In that version, these sections are combined into the new §1-303.

of rental values as of the date of the renewal with rental values at this time reflected by the comparative business conditions of the two periods.

The lessee gave the proper notice to renew but the parties were unable to agree upon the rent. Preliminary court proceedings finally culminated in this lawsuit. Based upon the verdict of an advisory jury, the Chancellor fixed the new rent at $125 per month.

The question before us is whether the quoted provision is so indefinite and uncertain that the parties cannot be held to have agreed upon this essential rental term of the lease. There have been many cases from other jurisdictions passing on somewhat similar lease provisions and the decisions are in hopeless conflict. We have no authoritative Kentucky decision.

At the outset two observations may be made. One is that rental in the ordinary lease is a very uncomplicated item. It involves the number of dollars the lessee will pay. It, or a method of ascertaining it, can be so easily fixed with certainty. From the standpoint of stability in business transactions, it should be so fixed.

Secondly, as an original proposition, uncomplicated by subtle rules of law, the provision we have quoted, on its face, is ambiguous and indefinite. The language used is equivocal. It neither fixes the rent nor furnishes a positive key to its establishment. The terminology is not only confusing but inherently unworkable as a formula.

The above observations should resolve the issue. Unfortunately it is not that simple. Many courts have become intrigued with the possible import of similar language and have interpolated into it a binding obligation. The lease renewal option has been treated as something different from an ordinary contract. The law has become woefully complicated. For this reason we consider it necessary and proper to examine this question in depth.

The following basic principles of law are generally accepted:

> It is a necessary requirement in the nature of things that an agreement in order to be binding must be sufficiently definite to enable a court to give it an exact meaning. Williston on Contracts (3d ed.) Vol. 1, section 37 (page 107).
>
> Like other contracts or agreements for a lease, the provision for a renewal must be certain in order to render it binding and enforceable. Indefiniteness, vagueness, and uncertainty in the terms of such a provision will render it void unless the parties, by their subsequent conduct or acts supplement the covenant and thus remove an alleged uncertainty. The certainty that is required is such as will enable a court to determine what has been agreed upon. 32 Am. Jur., Landlord and Tenant, section 958 (page 806).
>
> The terms of an extension or renewal, under an option therefor in a lease, may be left for future determination by a prescribed method, as by future arbitration or appraisal; but merely leaving the terms for future ascertainment, without providing a method for their determination, renders the agreement unenforceable for uncertainty. 51 C.J.S. Landlord and Tenant 56b(2), page 597.
>
> A renewal covenant in a lease which leaves the renewal rental to be fixed by future agreement between the parties has generally been held unenforceable and void for uncertainty and indefiniteness. Also, as a general rule, provisions for renewal rental dependent upon future valuation of premises without indicating when or how such valuation should be made have been

held void for uncertainty and indefiniteness. 32 Am. Jur., Landlord and Tenant, section 965 (page 810).

Many decisions supporting these principles may be found in 30 A.L.R. 572; 68 A.L.R. 157; 166 A.L.R. 1237.

The degree of certainty is the controlling consideration. An example of an appropriate method by which a non-fixed rental could be determined appears in Jackson v. Pepper Gasoline Co., 280 Ky. 226, 113 S.W.2d 91, 126 A.L.R. 1370. The lessee, who operated an automobile service station, agreed to pay "an amount equal to one cent per gallon of gasoline delivered to said station." Observing that the parties had created *a definite objective standard* by which the rent could with certainty be *computed,* the court upheld the lease as against the contention that it was lacking in mutuality. (The Chancellor cited this case as authoritative on the issue before us, but we do not believe it is. Appellee apparently agrees because he does not even cite the case in his brief.)

On the face of the rent provision, the parties had not agreed upon a rent figure. They left the amount to future determination. If they had agreed upon a specific method of making the determination, such as by computation, the application of a formula, or the decision of an arbitrator, they could be said to have agreed upon whatever rent figure emerged from utilization of the method. This was not done.

It will be observed the rent provision expresses two ideas. The first is that the parties agree to agree. The second is that the future agreement will be based on a comparative adjustment in the light of "business conditions." We will examine separately these two concepts and then consider them as a whole.

The lease purports to fix the rent at such an amount as shall "actually be agreed upon." It should be obvious that an agreement to agree cannot constitute a binding contract. Williston on Contracts (3d ed.) Vol. 1, section 45 (page 149); Johnson v. Lowery, Ky., 270 S.W.2d 943; National Bank of Kentucky v. Louisville Trust Co., 6 Cir., 67 F.2d 97.

Slade v. City of Lexington, 141 Ky. 214, 132 S.W. 404, 32 L.R.A., N.S., 201, has been cited as adopting a contrary view. Certain language in that opinion would seem to justify such contention. However, that case involved very unusual features and some of the broad language used was unnecessary to the decision. The parties (being a legislatively created public service corporation and a municipality) had agreed to renew a contract "upon terms as mutually agreed upon." When the time came for renewal, *both parties agreed upon new terms.* Thus the contract in this respect was *executed.* Since the parties had actually complied with all of its provisions, it was properly held valid and binding as of its inception. No question was raised with respect to the enforceability of the contract as between the parties thereto, which is the issue before us. If this case may be construed to hold that an agreement to agree, standing alone, constitutes a binding contract, we believe it unsound.

As said in Williston on Contracts (3d ed.) Vol. 1, section 45 (page 149):

> Although a promise may be sufficiently definite when it contains an option given to the promisor, yet if an essential element is reserved for the

> future agreement of both parties, the promise gives rise to no legal obligation until such future agreement. Since either party, by the very terms of the agreement, may refuse to agree to anything the other party will agree to, it is impossible for the law to fix any obligation to such a promise.

We accept this because it is both sensible and basic to the enforcement of a written contract. We applied it in Johnson v. Lowery, Ky., 270 S.W.2d 943, page 946, wherein we said:

> To be enforceable and valid, a contract to enter into a future covenant must specify all material and essential terms and leave nothing to be agreed upon as a result of future negotiations.

This proposition is not universally accepted as it pertains to renewal options in a lease. Hall v. Weatherford, 32 Ariz. 370, 259 P. 282, 56 A.L.R. 903; Rainwater v. Hobeika, 208 S.C. 433, 38 S.E.2d 495, 166 A.L.R. 1228. We have examined the reasons set forth in those opinions and do not find them convincing. The view is taken that the renewal option is for the benefit of the lessee; that the parties intended something; and that the lessee should not be deprived of his right to enforce his contract. This reasoning seems to overlook the fact that a party must have an enforceable contract before he has a right to enforce it. We wonder if these courts would enforce an *original* lease in which the rent was not fixed, but agreed to be agreed upon.

Surely there are some limits to what equity can or should undertake to compel parties in their private affairs to do what the court thinks they should have done. See Slayter v. Pasley, Or., 199 Or. 616, 264 P.2d 444, 449; and dissenting opinion of Judge Weygandt in Moss v. Olson, 148 Ohio 625, 76 N.E.2d 875. In any event, we are not persuaded that renewal options in leases are of such an exceptional character as to justify emasculation of one of the basic rules of contract law. An agreement to agree simply does not fix an enforceable obligation.

As noted, however, the language of the renewal option incorporated a secondary stipulation. Reference was made to "comparative business conditions" which were to play some part in adjusting the new rental. It is contended this provides the necessary certainty, and we will examine a leading case which lends support to the argument.

In Edwards v. Tobin, 132 Or. 38, 284 P. 562, 68 A.L.R. 152, the court upheld and enforced a lease agreement which provided that the rent should be "determined" at the time of renewal, "said rental to be *a reasonable rental* under the then existing conditions." (Our emphasis.) Significance was attached to the last quoted language, the court reasoning that since the parties had agreed upon a reasonable rent, the court would hold the parties to the agreement by fixing it.

All rents tend to be reasonable. When parties are trying to reach an agreement, however, their ideas or claims of reasonableness may widely differ. In addition, they have a right to bargain. They cannot be said to be in *agreement* about what is a reasonable rent until they specify a figure or an exact method of determining it. The term "reasonable rent" is itself indefinite and uncertain. Would an original lease for a "reasonable rent"

be enforceable by either party? The very purpose of a rental stipulation is to remove this item from an abstract area.

It is true courts often must *imply* such terms in a contract as "reasonable time" or "reasonable price." This is done when the parties fail to deal with such matters in an otherwise enforceable contract. Here the parties were undertaking to fix the terms rather than leave them to implication. Our problem is not what the law would imply if the contract did not purport to cover the subject matter, but whether the parties, in removing this material term from the field of implication, have fixed their mutual obligations.

We are seeking what the agreement actually was. When dealing with such a specific item as rent, to be payable in dollars, the area of possible agreement is quite limited. If the parties did not agree upon such an unequivocal item or upon a definite method of ascertaining it, then there is a clear case of nonagreement. The court, in fixing an obligation under a nonagreement, is not enforcing the contract but is binding the parties to something they were patently unable to agree to when writing the contract.

The opinion in the *Tobin* case, which purportedly was justifying the enforcement of a contractual obligation between the lessor and the lessee, shows on its face the court was doing something entirely different. This question was posed in the opinion: "What logical reason is there for equity to refuse to act when the parties themselves *fail to agree* on the rental?" (Our emphasis.) The obvious logical answer is that even equity cannot enforce as a contract a nonagreement. No distortion of words can hide the fact that when the court admits the parties "fail to agree," then the contract it enforces is one it makes for the parties.

It has been suggested that rent is not a material term of a lease. It is said in the *Tobin* case: "The method of determining the rent pertains more to form than to substance. It was not the essence of the contract, but was merely incidental and ancillary thereto." This seems rather startling. Nothing could be more vital in a lease than the amount of rent. It is the price the lessee agrees to pay and the lessor agrees to accept for the use of the premises. Would a contract to buy a building at a "reasonable price" be enforceable? Would the method of determining the price be a matter of "form" and "incidental and ancillary" to the transaction? In truth it lies at the heart of it. This seems to us as no more than a grammatical means of sweeping the problem under the rug. It will not do to say that the establishment of the rent agreed upon is not of the essence of a lease contract.

We have examined the *Tobin* case at length because it exemplifies lines of reasoning adopted by some courts to dredge certainty from uncertainty. Other courts balk at the process. The majority of cases, passing upon the question of whether a renewal option providing that the future rent shall be dependent upon or proportionate to *the valuation of the property* at the time of renewal, hold that such provision is not sufficiently certain to constitute an enforceable agreement. See cases cited in 30 A.L.R. 579 and 68 A.L.R. 159. The valuation of property and the ascertainment of "comparative business conditions," which we have under consideration, involve similar uncertainties.

A case construing language closely approximating that in the lease before us is Beal v. Dill, 173 Kan. 879, 252 P.2d 931. The option to extend

the lease provided: "said rental shall be subject to reasonable adjustment, up or down, depending upon general business conditions then existing." The Kansas Supreme Court, purporting to follow what it deemed the "majority rule" (and citing numerous authorities), held this language was too indefinite to be enforceable.

The opposite conclusion on similar language was reached in Greene v. Leeper, 193 Tenn. 153, 245 S.W.2d 181. The option provided for: "a rental to be agreed on according to business conditions at that time." The court, declaring that "rental can be determined with reasonable certainty by disinterested parties," adjudged this was an enforceable provision. The court indicated in the opinion that real estate experts would have no difficulty in fixing the rental agreed upon. The trouble is the parties did not agree to leave the matter to disinterested parties or real estate experts, and it is a false assumption that there will be no differences of opinion.

A similar renewal option was enforced in Fuller v. Michigan National Bank, 342 Mich. 92, 68 N.W.2d 771. In that case the language was "at a rent to be agreed upon, dependent on then existing conditions. . . ." The court treated the problem as one involving an *ambiguity.* Synonyms for the word "ambiguous" are: indeterminate, indefinite, unsettled. This dubiosity is of course what makes it clear the parties had failed to reach an *agreement.*

We do not think our problem can be solved by determining which is the "majority" rule and which is the "minority" rule. We are inclined, however, to adhere to a sound basic principle of contract law unless there are impelling reasons to depart from it, particularly so when the practical problems involved in such departure are so manifest. Let us briefly examine those practical problems.

What the law requires is an adequate key to a mutual agreement. If "comparative business conditions" afforded sufficient certainty, we might possibly surmount the obstacle of the unenforceable agreement to agree. This term, however, is very broad indeed. Did the parties have in mind local conditions, national conditions, or conditions affecting the lessee's particular business?

That a controversy, rather than a mutual agreement, exists on this very question is established in this case. One of the substantial issues on appeal is whether the Chancellor properly admitted in evidence the consumer price index of the United States Labor Department. At the trial the lessor was attempting to prove the change in local conditions and the lessee sought to prove changes in national conditions. Their minds to this day have never met on a criterion to determine the rent. It is pure fiction to say the court, in deciding upon some figure, is enforcing something the parties agreed to.

One aspect of this problem seems to have been overlooked by courts which have extended themselves to fix the rent and enforce the contract. This is the Statute of Frauds. The purpose of requiring a writing to evidence an agreement is to assure certainty of the essential terms thereof and to avoid controversy and litigation. See 49 Am. Jur., Statute of Frauds, section 313 (page 629); section 353 (page 663); section 354 (page 664). This very case is living proof of the difficulties encountered when a court undertakes to supply a missing essential term of a contract.

In the first place, when the parties failed to enter into a new agreement as the renewal option provided, their rights were no longer *fixed* by the contract. The determination of what they were was automatically shifted to the courtroom. There the court must determine the scope of relevant evidence to establish that certainty which obviously cannot be culled from the contract. Thereupon extensive proof must be taken concerning business conditions, valuations of property, and reasonable rentals. Serious controversies develop concerning the admissibility of evidence on the issue of whether "business conditions" referred to in the lease are those on the local or national level, or are those particularly affecting the lessee's business. An advisory jury is impanelled to express its opinion as to the proper rental figure. The judge then must decide whether the jury verdict conforms to the proof and to his concept of equity. On appeal the appellate court must examine alleged errors in the trial. Assuming some error in the trial (which appears likely on this record), the case may be reversed and the whole process begun anew. All of this time we are piously clinging to a concept that the contract itself fixed the rent with some degree of certainty.

We realize that litigation is oft times inevitable and courts should not shrink from the solution of difficult problems. On the other hand, courts should not expend their powers to establish contract rights which the parties, with an opportunity to do so, have failed to define. As said in Morrison v. Rossingnol, 5 Cal. 64, quoted in 30 A.L.R. at page 579:

> A court of equity is always chary of its power to decree specific performance, and will withhold the exercise of its jurisdiction in that respect, unless there is such a degree of certainty in the terms of the contract as will enable it at one view to do complete equity.

That cannot be done in this case.

Stipulations such as the one before us have been the source of interminable litigation. Courts are called upon not to enforce an agreement or to determine what the agreement was, but to write their own concept of what would constitute a proper one. Why this paternalistic task should be undertaken is difficult to understand when the parties could so easily provide any number of workable methods by which rents could be adjusted. As a practical matter, courts sometimes must assert their right not to be imposed upon. This thought was thus summed up in Slayter v. Pasley, Or., 264 P.2d 444, page 449:

> We should be hesitant about completing an apparently legally incomplete agreement made between persons sui juris enjoying freedom of contract and dealing at arms' length by arbitrarily interpolating into it our concept of the parties' intent merely to validate what would otherwise be an invalid instrument, lest we inadvertently commit them to an ostensible agreement which, in fact, is contrary to the deliberate design of all of them. It is a dangerous doctrine when examined in the light of reason. Judicial paternalism of this character should be as obnoxious to courts as is legislation by judicial fiat. Both import a quality of jural ego and superiority not consonant with long-accepted ideas of legistic propriety under a democratic form of government. If, however, we follow the urgings of the lessee in the

instant matter, we will thereby establish a precedent which will open the door to repeated opportunities to do that which, in principle, courts should not do and, in any event, are not adequately equipped to do.

We think the basic principle of contract law that requires substantial certainty as to the material terms upon which the minds of the parties have met is a sound one and should be adhered to. A renewal option stands on the same footing as any other contract right. Rent is a material term of a lease. If the parties do not fix it with reasonable certainty, it is not the business of courts to do so.

The renewal provision before us was fatally defective in failing to specify either an agreed rental or an agreed method by which it could be fixed with certainty. Because of the lack of agreement, the lessee's option right was illusory. The Chancellor erred in undertaking to enforce it.

The judgment is reversed.

NOTES AND QUESTIONS

1. Compare Miller v. Bloomberg, 26 Ill. App. 3d 18, 324 N.E.2d 207 (Ill. App. 1975), in which the court was willing to uphold a contract allowing a tenant to purchase at the "then prevailing price." For an annotation on point, see 2 A.L.R.3d 701.

2. Would the UCC's statutory provisions listed prior to the case have solved the problem here? See UCC §§2-102 and 2-105(1).

REGO v. DECKER
Supreme Court of Alaska, 1971
482 P.2d 834

RABINOWITZ, J. Appellant Joseph Rego and his wife leased land with a three bay service station on it to appellee Robert Decker for one year, 1966. The rent was to be $65 per month, plus 2 cents per gallon on all gasoline sold in excess of 4,000 gallons per month and "a sum equal to the net profit realized from the sale of diesel fuel." The Regos agreed in part to pave the grounds with asphalt before July 31, 1966. Under the lease Decker was given an option to renew for four years on the same terms except that the minimum rent was to be increased to $125 per month during 1969 and 1970. The lease also included an option to purchase provision which provided:

> The lessors shall grant the lessee the firm option to purchase the leased premises, upon the giving of thirty days written notice of the exercise of the option by certified mail, at any time during the term of this lease or the renewed term thereof. Upon the lessee's exercise of his option to purchase, the terms of the transaction shall be as follows:

A. The purchase price of the premises shall be Eighty-One Thousand ($81,000.00) Dollars.

B. If lessee exercises his option to purchase within the term of this lease, the amount of all rents paid to the lessors shall be deducted from the purchase price. If the lessee exercises his option to purchase within the first two years of the renewed lease term seventy-five (75%) percent of all rents paid to the lessors shall be deducted from the purchase price. If the lessee exercises his option to purchase within the last two years of the renewed lease term, fifty (50%) percent of all rents paid to the lessors shall be deducted from the purchase price. The terms for payment of the remaining balance due on the purchase price in the event the lessee exercises his option to so purchase shall be identical to the terms hereinbefore set forth as rent herein.

C. The lessors shall furnish the lessee with a Warranty Deed to the property. The lessors shall also furnish the lessee with a title insurance policy for the amount of the purchase price subject to no exceptions other than deed restrictions, easements and patent reservations of record.

D. The parties shall have the right to terminate this lease, or any renewal thereof, at any time upon the giving of thirty (30) days written notice by certified mail. Provided, however, any options in existence on the effective date of such termination may be exercised in the manner herein provided for a period of ninety (90) days following said effective termination date.

The Regos never paved the grounds of the service station. Prior to the expiration of the initial one-year period of the lease, Decker renewed the same for a four-year period. In February of 1967, Decker notified the Regos that he was exercising his option to purchase the property, and demanded a warranty deed and title insurance policy within 30 days. The Regos did not comply with Decker's demand, and conveyed the property instead to others, who took with notice of Decker's interest. Decker sued the Regos and their grantees for specific performance by the Regos of their obligations under the option to purchase provisions of the lease, damages flowing from the Regos' failure to pave the premises and other relief. After trial to the superior court without a jury, judgment was entered ordering the Regos to execute and deliver a warranty deed to Decker, declaring that Decker would, in the event the Regos refused to convey to Decker, have title to the property not subject to any interest of the Regos or their grantees, and ordering the Regos to deliver to Decker an $81,000 title insurance policy on the property. The Regos were also ordered to pave the premises with an asphalt covering by July 15, 1969, or Decker was to have judgment for $15,000. From this judgment the Regos appeal. They argue that specific performance should have been denied because the terms of the option provisions of the lease were uncertain and too harsh, or in the alternative, that if granted, the specific performance provisions of the decree should have been conditioned upon various provisions protecting their interests. The Regos also contend that the court erred in providing for a $15,000 money judgment against them if they failed to pave the premises of the service station.

Uncertainty of the Terms of the Contract

In this appeal the Regos argue that specific performance should have been denied because the terms of the purchase option were uncertain.

In their view the uncertainty of the option is reflected in the provisions pertaining to the amount of monthly payments, the lack of definition concerning the phrase "net profit" on diesel fuel sales, the omission of any provision for interest and stipulated time for its payment, and the further omission of any security for Decker's performance. Decker argues that monthly payments under the purchase option clearly were to continue at $125 plus 2 cents per gallon on gasoline sold in excess of 4,000 gallons and net profit on diesel fuel; "net profits" on diesel fuel need not be certain because no diesel fuel has been or is likely to be sold; extrinsic evidence indicated that the parties intended no interest payments or security agreement.

To be specifically enforceable, a contract "must be reasonably definite and certain as to its terms."[2] In Alaska Creamery Products, Inc. v. Wells,[3] a contract for sale of goods was held too uncertain because the amount of the down payment and the terms of future payments were left for future determination by the parties. The inadequate contract in *Alaska Creamery* was an oral attempt to enter into an executory accord. Lewis v. Lockhart[4] reiterates the *Alaska Creamery* rule,[5] but finds adequate certainty for specific performance of a promise to sell land on the strength of a lessee's option to purchase on terms to be agreed on at the time of exercise, plus an "earnest money receipt" acknowledging part payment of the purchase price and reciting that the balance was to be obtained "from an FHA secured loan." *Lewis* said that the earnest money receipt cured the uncertainty of the option as drafted in the lease because the trial court could reasonably provide for payment within four months on the basis of the common knowledge that FHA loans generally were processed within that period.

Regarding the rule requiring reasonable certainty and its application to particular factual situations, *Alaska Creamery* and *Lewis* demonstrate that:

> The dream of a mechanical justice is recognized for what it is — only a dream and not even a rosy or desirable one.[6]

In general it has been said that the primary underlying purpose of the law of contracts is the attempted "realization of reasonable expectations that have been induced by the making of a promise."[7] In light of this underlying purpose, two general considerations become relevant to solution of reasonable certainty-specific performance problems. On the one hand, courts should fill gaps in contracts to ensure fairness where the reasonable expectations of the parties are fairly clear. The parties to a contract often cannot negotiate and draft solutions to all the problems which may arise. Except in transactions involving very large amounts of money or adhesion contracts to be imposed on many parties, contracts tend to be skeletal, because the amount of time and money needed to produce a more complete contract would be disproportionate to the value of the transaction to the parties.

2. Alaska Creamery Products, Inc. v. Wells, 373 P.2d 505, 510 (Alaska 1962).
3. Id.
4. 379 P.2d 618 (Alaska 1963).
5. Id. at 622.
6. 5A A. Corbin, Contracts §1136, at 94 (1964).
7. 1 A. Corbin, Contracts §1, at 2 (1963).

Courts would impose too great a burden on the business community if the standards of certainty were set too high. On the other hand, the courts should not impose on a party any performance to which he did not and probably would not have agreed. Where the character of a gap in an agreement manifests failure to reach an agreement rather than a sketchy agreement, or where gaps cannot be filled with confidence that the reasonable expectations of the parties are being fulfilled, then specific enforcement should be denied for lack of reasonable certainty.

Several other considerations affect the standard of certainty. A greater degree of certainty is required for specific performance than for damages, because of the difficulty of framing a decree specifying the performance required, as compared with the relative facility with which a breach may be perceived for purposes of awarding damages. Less certainty is required where the party seeking specific performance has substantially shifted his position in reliance on the supposed contract, than where the contract is wholly unperformed on both sides. While option contracts for the sale of land such as the one at issue are not technically within the scope of the Uniform Commercial Code, we consider relevant here the recent legislative decision to provide in contracts for sale of goods that

> [e]ven though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.[13]

We turn now to consideration of the Regos' specific claims of uncertainty. Appellants' first three claims of uncertainty are that the monthly minimum payment after 1970 was not clearly established, that the meaning of "net profit" on diesel fuel sales was unclear, and that the option did not clearly establish whether interest was to be due on the unpaid balance. Appellants further argue that the agreement was fatally uncertain because it failed to say what sort of security, if any, was required while appellee was paying for the gas station. Our disposition on the issue of security obviates the necessity for passing on appellants' first three contentions.

Normal business practice, appellants contend, would require a real estate contract, deed of trust, or mortgage, but here the purchase option agreement is too uncertain to determine what security provisions should be put into a decree. Appellee Decker argues that the parties intended that there should be no security agreement, so the contract is not uncertain. The trial court did not make a finding of fact on the question of whether security was intended. If the parties intended not to provide for security, then the silence of the contract does not amount to uncertainty. A finding by the trial court that the parties intended to have a security agreement but failed to specify its character would have amounted to uncertainty in the contract in question. Such uncertainty, however, should not result in unconditional denial of specific performance, at least where the vendee has entered into possession in part in reliance on the option to purchase agreement. But as we hold below, in the circumstances of this case, specific performance on

13. [Uniform Commercial Code §2-204(3).]

the Regos' part should not have been required without conditioning such performance on the giving of security by Decker for his performance. In granting specific performance, the decree can be fashioned to provide that the plaintiff furnish adequate security for his agreed performance. In so doing, the courts are fulfilling their function of achieving justice between the parties without requiring additional or unnecessary litigation. . . .

Thus, although we believe the trial court was correct in granting Decker specific performance of the purchase option agreement, we further hold that the court's decree should have been made conditional upon Decker's either paying the purchase price in full or furnishing adequate security embodying such terms as the court considered appropriate. We therefore affirm the decree insofar as it awards Decker specific performance and the case is remanded for such further proceedings as are deemed necessary to condition the grant of specific performance upon the giving of appropriate security.

QUESTION

The court here is applying the old Latin maxim *ut res magis valeat quam pereat* ("let it be saved rather than destroyed"). Can this case be reconciled with the Kentucky case (Walker v. Keith) immediately preceding it?

Problem 35

Race Manhattan Bank agreed to purchase 100,000 loan forms from Mykos Printing. All terms were set but the price. Because of a recent amendment to New York statutes, Race and Mykos were not certain of the language that would ultimately be required in the forms. Therefore, rather than specifying a price for the forms, it was agreed that the parties would later meet and set a price. When that time came, the parties could not agree on a price for the forms. Is there a contract? See UCC §2-305. What if the missing term were the place for delivery? See UCC §2-308.

Problem 36

Ms. Lovett owned a company that sold meat pies. In early May one year she contracted with a Mr. Todd to deliver 1,000 pies to his establishment on December 1. She regularly sold two different types of meat pies: Juicy (costing $2.89 each) and Extra Juicy ($3.89). Todd told her in May that he wasn't yet sure how much he wanted of each type, but he was certain he would want a total of 1,000. He agreed to phone her in November and specify the types desired. November arrived and she became worried when she did not hear from him. He told her that he had converted to vegetarianism and he refused to discuss the matter further. Read UCC §2-311 and decide if she had a contract. If so, advise her how to settle the specificity issue.

CHAPTER

2

CONSIDERATION

I. THE BASIC CONCEPT

A. Definition

ADAM SMITH, THE WEALTH OF NATIONS
(1776)

In almost every other race of animals each individual, when it is grown up to maturity, is entirely independent, and in its natural state has occasion for the assistance of no other living creature. But man has almost constant occasion for the help of his brethren, and it is in vain for him to expect it from their benevolence only. He will be more likely to prevail if he can interest their self-love in his favour, and show them that it is for their own advantage to do for him what he requires of them. Whoever offers to another a bargain of any kind, proposes to do this. Give me that which I want, and you shall have this which you want, is the meaning of every such offer; and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of. It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.

Civilization itself has arisen in no small part because of the exclusively human trait of swapping things. Much of what we know of early civilization derives from still extant commercial records. Certainly commercial law is very old law. By 3000 B.C. Egypt and what is now Iraq had reached a thriving commerce, and from there we have progressed to a system that is so complicated that no one understands it. Certain fundamentals, though, still obtain. The very essence of such a commerce, then and now, is the necessity of exchange.

Problem 37

Should the following promises, without more, be enforced?

(a) I promise to give you $500.

(b) I promise to give you $500 if you go to Chicago.

(c) I promise to give you $500 if you do not go to Chicago next Friday.

CORBIN ON CONTRACTS §110

The mere fact that one man promises something to another creates no legal duty and makes no legal remedy available in case of nonperformance. To be enforceable, the promise must be accompanied by some other factor. This seems to be true of all systems of law. The question now to be discussed is what is this other factor. What fact or facts must accompany a promise to make it enforceable at law?

A contract is defined as a promise that the law will enforce. See Corbin §3. This means that a true contract will always contain at least one promise, and in a typical commercial setting that promise will be exchanged for something else, a *quid pro quo.* That "something else" is what the law calls *consideration.*

RESTATEMENT (SECOND) OF CONTRACTS

§71. Requirement of Exchange; Types of Exchange

(1) To constitute consideration, a performance or a return promise must be bargained for.

(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

(3) The performance may consist of

(a) an act other than a promise, or

(b) a forbearance, or

(c) the creation, modification, or destruction of a legal relation.

(4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

HAMER v. SIDWAY
Court of Appeals of New York, 1891
124 N.Y. 538, 27 N.E. 256

Appeal from an order of the general term of the supreme court in the fourth judicial department, reversing a judgment entered on the decision of the court at special term in the county clerk's office of Chemung county on the 1st day of October, 1889. The plaintiff presented a claim to the executor of William E. Story, Sr., for $5,000 and interest from the 6th day of February, 1875. She acquired it through several mesne assignments from William E. Story, 2d. The claim being rejected by the executor, this action was brought. It appears that William E. Story, Sr., was the uncle of William E. Story, 2d; that at the celebration of the golden wedding of Samuel Story and wife, father and mother of William E. Story, Sr., on the 20th day of March, 1869, in the presence of the family and invited guests, he promised his nephew that if he would refrain from drinking, using tobacco, swearing, and playing cards or billiards for money until he became 21 years of age, he would pay him the sum of $5,000. The nephew assented thereto, and fully performed the conditions inducing the promise. When the nephew arrived at the age of 21 years, and on the 31st day of January, 1875, he wrote to his uncle, informing him that he had performed his part of the agreement, and had thereby become entitled to the sum of $5,000. The uncle received the letter, and a few days later, and on the 6th day of February, he wrote and mailed to his nephew the following letter:

Buffalo, Feb. 6, 1875
W. E. Story, Jr.

Dear Nephew:

Your letter of the 31st ultimately came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have five thousand dollars, as I promised you. I had the money in the bank the day you was twenty-one years old that I intend for you, and you shall have the money certain. Now, Willie, I do not intend to interfere with this money in any way till I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. The first five thousand dollars that I got together cost me a heap of hard work. You would hardly believe me when I tell you that to obtain this I shoved a jack-plane many a day, butchered three or four years, then came to this city, and, after three months' perserverance, I obtained a situation in a grocery store. I opened this store early, closed late, slept in the fourth story of the building in a room 30 by 40 feet, and not a human being in the building but myself. All this I done to live as cheap as I could to save something. I don't want you to take up with this kind of fare. I was here in the cholera season of '49 and '52, and the deaths averaged 80 to 125 daily, and plenty of small-pox. I wanted to go home, but Mr. Fisk, the gentleman I was working for, told me, if I left them, after it got healthy he probably

would not want me. I stayed. All the money I have saved I know just how I got it. It did not come to me in any mysterious way, and the reason I speak of this is that money got in this way stops longer with a fellow that gets it with hard knocks than it does when he finds it. Willie, you are twenty-one, and you have many a thing to learn yet. This money you have earned much easier than I did, besides acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it. I was ten long years getting this together after I was your age. Now, hoping this will be satisfactory, I stop. . . .

Willie, I have said much more than I expected to. Hope you can make out what I have written. To-day is the seventeenth day that I have not been out of my room, and have had the doctor as many days. Am a little better today. Think I will get out next week. You need not mention to father, as he always worries about small matters.

Truly yours,
W. E. Story

P.S. You can consider this money on interest.

The nephew received the letter, and thereafter consented that the money should remain with his uncle in accordance with the terms and conditions of the letter. The uncle died on the 29th day of January, 1887, without having paid over to his nephew any portion of the said $5,000 and interest. . . .

PARKER, J. (after stating the facts as above). The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator, William E. Story, became indebted to his nephew, William E. Story, 2d, on his twenty-first birthday in the sum of $5,000. The trial court found as a fact that "on the 20th day of March, 1869, . . . William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become twenty-one years of age, then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of $5,000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement." The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the promisee, by refraining from the use of liquor and tobacco, was not harmed, but benefited; that that which he did was best for him to do, independently of his uncle's promise, — and insists that it follows that, unless the promisor was benefited, the contract was without consideration, — a contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The exchequer chamber in 1875 defined "consideration" as follows: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in

fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." Anson, Cont. 63. "In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." Pars. Cont. 444. "Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." 2 Kent, Comm. (12th ed.) 465. Pollock in his work on Contracts (page 166), after citing the definition given by the exchequer chamber, already quoted, says: "The second branch of this judicial description is really the most important one. 'Consideration' means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first." Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now, having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but, were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been, support the position we have taken. In Shadwell v. Shadwell, 9 C.B. (N.S.) 159, an uncle wrote to his nephew as follows:

> My dear Lancey:
>
> I am so glad to hear of your intended marriage with Ellen Nicholl, and, as I promised to assist you at starting, I am happy to tell you that I will pay you 150 pounds yearly during my life and until your annual income derived from your profession of a chancery barrister shall amount to 600 guineas, of which your own admission will be the only evidence that I shall receive or require.
>
> Your affectionate uncle,
> Charles Shadwell

It was held that the promise was binding, and made upon good consideration. In Lakota v. Newton, (an unreported case in the superior court of Worcester, Mass.,) the complaint averred defendant's promise that "if you [meaning the plaintiff] will leave off drinking for a year I will give you $100." Plaintiff's assent thereto, performance of the condition by him, and demanded judgment therefor. Defendant demurred, on the ground, among others, that the plaintiff's declaration did not allege a valid and sufficient consideration for the agreement of the defendant. The demurrer was overruled. In Talbott v. Stemmons, 12 S.W. Rep. 297, (a Kentucky case, not yet officially reported,) the step-grandmother of the plaintiff made

with him the following agreement: "I do promise and bind myself to give my grandson Albert R. Talbott $500 at my death if he will never take another chew of tobacco or smoke another cigar during my life, from this date up to my death; and if he breaks this pledge he is to refund double the amount to his mother." The executor of Mrs. Stemmons demurred to the complaint on the ground that the agreement was not based on a sufficient consideration. The demurrer was sustained, and an appeal taken therefrom to the court of appeals, where the decision of the court below was reversed. In the opinion of the court it is said that "the right to use and enjoy the use of tobacco was a right that belonged to the plaintiff, and not forbidden by law. The abandonment of its use may have saved him money, or contributed to his health; nevertheless, the surrender of that right caused the promise, and, having the right to contract with reference to the subject matter, the abandonment of the use was a sufficient consideration to uphold the promise. . . ."

The order appealed from should be reversed, and the judgment of the special term affirmed, with costs payable out of the estate. All concur.

QUESTIONS

1. Analyze the above case under the Restatement provision that precedes the case. What exactly was the consideration?

2. After quoting the classic definition of "valuable" consideration as being something of benefit to the promisor or of detriment to the promisee, the court states that the latter alone is enough but that if both were required there was benefit to the uncle here. What does the court mean? What benefit did the uncle receive from the nephew's asceticism?

Problem 38

Meriwether Lewis needed money for a trip he was planning, and he applied for a loan from the Jefferson National Bank. The bank agreed to lend him the money only if he and a solvent third party, a *surety,* signed a promissory note payable to the bank. Lewis's best friend, Mr. Clark, agreed to be his surety, and together they signed the promissory note, after which the bank gave Lewis the money. Lewis took his trip, but never returned. May Clark avoid payment under the theory that he never received any consideration? See UCC §3-419(b)'s last sentence, and that section's Official Comment 2.

B. Sufficiency

Traditionally the common law rule was that the courts would inquire into the *sufficiency* of the consideration, but not the *adequacy* of the consideration. *Sufficiency* means that the offered consideration must be

something that has value in the eyes of the law; *adequacy* refers to the quantity of the amounts exchanged. The Restatement (Second) of Contracts no longer refers to the issue of sufficiency, but this does not necessarily mean that the issue has disappeared.

Problem 39

Should the following promises be enforced?

(a) When Claudius adopted his nephew Hamlet, he was disturbed by the lack of affection the boy showed toward him. He tried everything to get the boy to like him, but nothing seemed to work. Finally, he signed an agreement with Hamlet, promising to pay his nephew $5,000 a year if his nephew would agree to like him. If Hamlet develops a genuine affection for his uncle, but Claudius refuses to pay the money, does Hamlet have a contract claim? That is, is the consideration that he promised *sufficient* in the eyes of the law?

(b) On his deathbed, John Roberts tried everything to keep alive. Finally a local fortune teller, Mrs. McGruder, did some "conjuring" over him in return for his promissory note for $250. Her conjuring and incantations did not work, and he died, but she sued his estate on the note anyway. Has she given consideration for his $250 promise? See Cooper v. Livingston, 19 Fla. 684 (1883).

(c) Jack Point contacted the Yeoman Corporation and offered to sell it a marketing idea that would increase the corporation's profits from the sale of its product. If they adopted the idea, Jack wanted one-half of the increased profits. Figuring that it couldn't lose from this deal, the corporation signed such an agreement. Jack then disclosed his idea: raise the wholesale price slightly. Shortly thereafter the Yeoman Corporation did so, and increased profits resulted. Must Jack be paid half of these profits? See Soule v. Bon Ami, 201 A.D. 794, 195 N.Y.S. 574 (1922), aff'd without opinion, 235 N.Y. 609, 139 N.E. 754, modified, 236 N.Y. 555, 142 N.E. 281 (1923).

(d) Mr. Meyer mailed an advertising scheme to the makers of Chesterfield cigarettes suggesting billboards showing two well-dressed men in conversation, one extending to the other a package of cigarettes saying, "Have one of these," and the other replying, "No thanks; I smoke Chesterfields." The company did not reply, but two years later adopted an advertising campaign showing two men and a caddy with golf clubs, one man having an open cigarette case, and the other a package of Chesterfields, and the slogan "I'll stick to Chesterfields." Should the company have to pay for this? See Liggett & Meyer Tobacco Co. v. Meyer, 101 Ind. App. 420, 194 N.E. 206 (1935) ("a property right subject to sale ... must be something novel and new; in other words, one cannot claim any right in the multiplication table").

(e) Girard had never had any education, but nonetheless had managed to make a lot of money. Late in life he decided to remedy his ignorance, and hired Descartes to teach him the multiplication table. Has Descartes furnished consideration for Girard's promise of payment?

C. *Adequacy of Consideration*

BATSAKIS v. DEMOTSIS
Court of Civil Appeals of Texas, El Paso, 1949
226 S.W.2d 673

McGILL, J. This is an appeal from a judgment of the 57th judicial District Court of Bexar County. Appellant was plaintiff and appellee was defendant in the trial court. The parties will be so designated.

Plaintiff sued defendant to recover $2,000 with interest at the rate of 8 percent per annum from April 2, 1942, alleged to be due on the following instrument, being a translation from the original, which is written in the Greek language:

Peiraneus
April 2, 1942

Mr. George Batsakis:
Konstantinou Diadohou #7
Peiraeus

Mr. Batsakis:

I state by my present (letter) that I received today from you the amount of two thousand dollars ($2,000.00) of United States of America money, which I borrowed from you for the support of my family during these difficult days and because it is impossible for me to transfer dollars of my own from America.

> The above amount I accept with the expressed promise that I will return to you again in American dollars either at the end of the present war or even before in the event that you might be able to find a way to collect them (dollars) from my representative in America to whom I shall write and give him an order relative to this. You understand until the final execution (payment) to the above amount an eight percent interest will be added and paid together with the principal.
>
> I thank you and I remain yours with respects.

(Signed) *Eugenia The. Demotsis*

Trial to the court without the intervention of a jury resulted in a judgment in favor of plaintiff for $750.00 principal, and interest at the rate of 8 percent per annum from April 2, 1942 to the date of judgment, totaling $1,163.83, with interest thereon at the rate of 8 percent per annum until paid. Plaintiff has perfected his appeal.

The court sustained certain special exceptions of plaintiff to defendant's first amended original answer on which the case was tried, and struck therefrom paragraphs II, III and V. Defendant excepted to such action of the court, but has not crossassigned error here. The answer,

stripped of such paragraphs, consisted of a general denial contained in paragraph I thereof, and of paragraph IV, which is as follows:

> IV. That under the circumstances alleged in Paragraph II of this answer, the consideration upon which said written instrument sued upon by plaintiff herein is founded, is wanting and has failed to the extent of $1,975.00, and defendant pleads specially under the verification hereinafter made the want and failure of consideration stated, and now tenders, as defendant has heretofore tendered to plaintiff, $25.00 as the value of the loan of money received by defendant from plaintiff, together with interest thereon.
>
> Further, in connection with this plea of want and failure of consideration defendant alleges that she at no time received from plaintiff himself or from anyone for plaintiff any money or thing of value other than, as hereinbefore alleged, the original loan of 500,000 drachmae. That at the time of the loan by plaintiff to defendant of said 500,000 drachmae the value of 500,000 drachmae in the Kingdom of Greece in dollars of money of the United States of America, was $25.00, and also at said time the value of 500,000 drachmae of Greek money in the United States of America in dollars was $25.00 of money of the United States of America. The plea of want and failure of consideration is verified by defendant as follows.

The allegations in paragraph II which were stricken, referred to in paragraph IV, were that the instrument sued on was signed and delivered in the Kingdom of Greece on or about April 2, 1942, at which time both plaintiff and defendant were residents of and residing in the Kingdom of Greece, and

> Plaintiff . . . avers that on or about April 2, 1942 she owned money and property and had credit in the United States of America, but was then and there in the Kingdom of Greece in straitened financial circumstances due to the conditions produced by World War II and could not make use of her money and property and credit existing in the United States of America. That in the circumstances the plaintiff agreed to and did lend to defendant the sum of 500,000 drachmae, which at that time, on or about April 2, 1942, had the value of $25.00 in money of the United States of America. That the said plaintiff, knowing defendant's financial distress and desire to return to the United States of America, exacted of her the written instrument plaintiff sues upon, which was a promise by her to pay to him the sum of $2,000.00 of United States of America money.

Plaintiff specially excepted to paragraph IV because the allegations thereof were insufficient to allege either want of consideration or failure of consideration, in that it affirmatively appears therefrom that defendant received what was agreed to be delivered to her, and that plaintiff breached no agreement. The court overruled this exception, and such action is assigned as error. Error is also assigned because of the court's failure to enter judgment for the whole unpaid balance of the principal of the instrument with interest as therein provided.

Defendant testified that she did receive 500,000 drachmas from plaintiff. It is not clear whether she received all the 500,000 drachmas or only a portion of them before she signed the instrument in question. Her testimony clearly shows that the understanding of the parties was that plaintiff would give her the 500,000 drachmas if she would sign the instrument.

She testified:

> *Q.* ... who suggested the figure of $2,000.00?
> *A.* That was how he asked me from the beginning. He said he will give me five hundred thousand drachmas provided I signed that I would pay him $2,000.00 American money.

The transaction amounted to a sale by plaintiff of the 500,000 drachmas in consideration of the execution of the instrument sued on, by defendant. It is not contended that the drachmas had no value. Indeed, the judgment indicates that the trial court placed a value of $750.00 on them or on the other consideration which plaintiff gave defendant for the instrument if he believed plaintiff's testimony. Therefore the plea of want of consideration was unavailing. A plea of want of consideration amounts to a contention that the instrument never became a valid obligation in the first place. National Bank of Commerce v. Williams, 125 Tex. 619, 84 S.W.2d 691.

Mere inadequacy of consideration will not void a contract. 10 Tex. Jur., Contracts, Sec. 89, p.150; Chastain v. Texas Christian Missionary Society, Tex. Civ. App., 78 S.W.2d 728, loc. cit. 731(3), Wr. Ref.

Nor was the plea of failure of consideration availing. Defendant got exactly what she contracted for according to her own testimony. The court should have rendered judgment in favor of plaintiff against defendant for the principal sum of $2,000.00 evidenced by the instrument sued on, with interest as therein provided. We construe the provision relating to interest as providing for interest at the rate of 8 percent per annum. The judgment is reformed so as to award appellant a recovery against appellee of $2,000.00 with interest thereon at the rate of 8 percent per annum from April 2, 1942. Such judgment will bear interest at the rate of 8 percent per annum until paid on $2,000.00 thereof and on the balance interest at the rate of 6 percent per annum. As so reformed, the judgment is affirmed.

Reformed and affirmed.

QUESTIONS

Does this case seem right to you? What policy is behind the idea that the law will not inquire into the adequacy of the consideration? Go back to Problem 39. In the situations described there, were we looking at the *adequacy* of the consideration?

SCHNELL v. NELL
Supreme Court of Indiana, 1861
17 Ind. 29

PERKINS, J. Action by J. B. Nell against Zacharias Schnell, upon the following instrument:

This agreement, entered into this 13th day of February, 1856, between Zach. Schnell, of Indianapolis, Marion county, State of Indiana, as party of the first part, and J. B. Nell, of the same place, Wendelin Lorenz, of Stilesville, Hendricks county, State of Indiana, and Donata Lorenz, of Frickinger, Grand Duchy of Baden, Germany, as parties of the second part, witnesseth: The said Zacharias Schnell agrees as follows: whereas his wife, Theresa Schnell, now deceased, has made a last will and testament, in which, among other provisions, it was ordained that every one of the above named second parties, should receive the sum of $200; and whereas the said provisions of the will must remain a nullity, for the reason that no property, real or personal, was in the possession of the said Theresa Schnell, deceased, in her own name, at the time of her death, and all property held by Zacharias and Theresa Schnell jointly, therefore reverts to her husband; and whereas the said Theresa Schnell has also been a dutiful and loving wife to the said Zach. Schnell, and has materially aided him in the acquisition of all property, real and personal, now possessed by him; for, and in consideration of all this, and the love and respect he bears to his wife; and, furthermore, in consideration of one cent, received by him of the second parties, he the said Zach. Schnell, agrees to pay the above named sums of money to the parties of the second part, to wit: $200 to the said J. B. Nell; $200 to the said Wendelin Lorenz; and $200 to the said Donata Lorenz, in the following installment, viz., $200 in one year from the date of these presents; $200 in two years, and $200 in three years; to be divided between the parties in equal portions $66⅔ each year, or as they may agree, till each one has received his full sum of $200.

And the said parties of the second part, for, and in consideration of this, agree to pay the above named sum of money [one cent], and to deliver up to said Schnell, and abstain from collecting any real or supposed claims upon him or his estate, arising from the said last will and testament of the said Theresa Schnell, deceased.

In witness whereof, the said parties on this 13th day of February, 1856, set hereunto their hands and seals

Zacharias Schnell, [SEAL.]
J. B. Nell, [SEAL.]
Wen. Lorenz, [SEAL.]

The complaint contained no averment of a consideration for the instrument, outside of those expressed in it; and did not aver that the one cent agreed to be paid, had been paid or tendered.

A demurrer to the complaint was overruled.

The defendant answered, that the instrument sued on was given for no consideration whatever.

He further answered, that it was given for no consideration, because his said wife, Theresa, at the time she made the will mentioned, and at the time of her death, owned, neither separately, nor jointly with her husband, or any one else (except so far as the law gave her an interest in her husband's property), any property, real or personal, etc.

The will is copied into the record, but need not be into this opinion.

The Court sustained a demurrer to these answers, evidently on the ground that they were regarded as contradicting the instrument sued on, which particularly set out the considerations upon which it was

executed. But the instrument is latently ambiguous on this point. See Ind. Dig., p.110.

The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against Zacharias Schnell. It specifies three distinct considerations for his promise to pay $600:

(1) A promise, on the part of the plaintiffs, to pay him one cent.
(2) The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of property.
(3) The fact that she had expressed her desire, in the form of an inoperative will, that the persons named therein should have the sums of money specified.

The consideration of one cent will not support the promise of Schnell. It is true, that as a general proposition, inadequacy of consideration will not vitiate an agreement. Baker v. Roberts, 14 Ind. 552. But this doctrine does not apply to a mere exchange of sums of money, of coin, whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value, for money, or, perhaps, for some other thing of indeterminate value. In this case, had the one cent mentioned, been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void, at first blush, upon its face, if it be regarded as an earnest one. Hardesty v. Smith, 3 Ind. 39. The consideration of one cent is, plainly, in this case, merely nominal, and intended to be so. As the will and testament of Schnell's wife imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him, on that ground. A moral consideration, only, will not support a promise. Ind. Dig., p.13. And for the same reason, a valid consideration for his promise can not be found in the fact of a compromise of a disputed claim; for where such claim is legally groundless, a promise upon a compromise of it, or of a suit upon it, is not legally binding. Spahr v. Hollingshead, 8 Blackf. 415. There was no mistake of law or fact in this case, as the agreement admits the will inoperative and void. The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal considerations for Schnell's promise, on two grounds: 1. They are past considerations. Ind. Dig., p.13. 2. The fact that Schnell loved his wife, and that she had been industrious, constituted no consideration for his promise to pay J. B. Nell, and the Lorenzes, a sum of money. Whether, if his wife, in her lifetime, had made a bargain with Schnell, that, in consideration of his promising to pay, after her death, to the persons named, a sum of money, she would be industrious, and worthy of his affection, such a promise would have been valid and consistent with public policy, we need not decide. Nor is the fact that Schnell now venerates the memory of

his deceased wife, a legal consideration for a promise to pay any third person money.

The instrument sued on, interpreted in the light of the facts alleged in the second paragraph of the answer, will not support an action. The demurrer to the answer should have been overruled. See Stevenson v. Druley, 4 Ind. 519.

PER CURIAM. The judgment is reversed, with costs. Cause remanded, etc.

QUESTION

Does this case conflict with the last one?

Problem 40

Is there consideration in the following hypotheticals if the promise or act requested is given?

(a) I promise to deliver 800 bushels of wheat to you in return for your promise to deliver 500 bushels of wheat to me.

(b) I promise to give you $10,000 in return for your promise to sell me the silver dollar that George Washington threw across the Potomac.

(c) I promise to give you one dollar if you will give me two quarters so that I can operate this vending machine.

(d) I promise to sell you Blackacre in return for your promise to pay $1.00. (Blackacre is worth around $500,000.)

(e) Would your answer to (d) change if the $1.00 were in fact paid?

(f) The contract recited that "In return for $1.00, in hand received, I hereby give you an option to buy Blackacre for the sum of $500,000; this option must be exercised prior to December 1, 2007." Is the dollar adequate consideration here? Does it matter that the recital is a sham because the dollar was never paid? Compare the Restatement section quoted below with Hermes v. Wm. F. Meyer Co., 65 Ill. App. 3d 745, 382 N.E.2d 841 (1978), and Board of Control v. Burgess, 45 Mich. App. 183, 206 N.W.2d 256 (1973).

RESTATEMENT (SECOND) OF CONTRACTS

§87. OPTION CONTRACT

(1) An offer is binding as an option contract if it

(a) is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or

(b) is made irrevocable by statute.

(2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

COMMENT C. FALSE RECITAL OF NOMINAL CONSIDERATION

A recital in a written agreement that a stated consideration has been given is evidence of that fact as against a party to the agreement, but such a recital may ordinarily be contradicted by evidence that no such consideration was given or expected. See §218. In cases within Subsection (1)(a), however, the giving and recital of nominal consideration performs a formal function only. The signed writing has vital significance as a formality, while the ceremonial manual delivery of a dollar or a peppercorn is an inconsequential formality. In view of the dangers of permitting a solemn written agreement to be invalidated by oral testimony which is easily fabricated, therefore, the option agreement is not invalidated by proof that the recited consideration was not in fact given. A fictitious rationalization has sometimes been used for this rule: acceptance of delivery of the written instrument conclusively imports a promise to make good the recital, it is said, and that promise furnishes consideration. Compare §218. But the sound basis for the rule is that stated above.

II. FORBEARANCE AS CONSIDERATION

FIEGE v. BOEHM
Court of Appeals of Maryland, 1956
210 Md. 352, 123 A.2d 316

DELAPLAINE, J. This suit was brought in the Superior Court of Baltimore City by Hilda Louise Boehm against Louis Gail Fiege to recover for breach of a contract to pay the expenses incident to the birth of his bastard child and to provide for its support upon condition that she would refrain from prosecuting him for bastardy.

Plaintiff alleged in her declaration substantially as follows: (1) that early in 1951 defendant had sexual intercourse with her although she was unmarried, and as a result thereof she became pregnant, and defendant acknowledged that he was responsible for her pregnancy; (2) that on September 29, 1951, she gave birth to a female child; that defendant is the father of the child; and that he acknowledged on many occasions that he is the father; (3) that before the child was born, defendant agreed to pay all her medical and miscellaneous expenses and to compensate her for the loss of her salary

caused by the child's birth, and also to pay her ten dollars per week for its support until it reached the age of 21, upon condition that she would not institute bastardy proceedings against him as long as he made the payments in accordance with the agreement; (4) that she placed the child for adoption on July 13, 1954, and she claimed the following sums: Union Memorial Hospital, $110; Florence Crittenton Home, $100; Dr. George Merrill, her physician, $50; medicines $70.35; miscellaneous expenses, $20.45; loss of earnings for 26 weeks, $1,105; support of the child $1,440; total, $2,895.80; and (5) that defendant paid her only $480, and she demanded that he pay her the further sum of $2,415.80, the balance due under the agreement, but he failed and refused to pay the same.

Defendant demurred to the declaration on the ground that it failed to allege that in September, 1953, plaintiff instituted bastardy proceedings against him in the Criminal Court of Baltimore, but since it had been found from blood tests that he could not have been the father of the child, he was acquitted of bastardy. The Court sustained the demurrer with leave to amend.

Plaintiff then filed an amended declaration, which contained the additional allegation that, after the breach of the agreement by defendant, she filed a charge with the State's Attorney that defendant was the father of her bastard child; and that on October 8, 1953, the Criminal Court found defendant not guilty solely on a physician's testimony that "on the basis of certain blood tests made, the defendant can be excluded as the father of the said child, which testimony is not conclusive upon a jury in a trial court."

Defendant also demurred to the amended declaration, but the Court overruled that demurrer.

Plaintiff, a typist, now over 35 years old, who has been employed by the Government in Washington and Baltimore for over thirteen years, testified in the Court below that she had never been married, but that at about midnight on January 21, 1951, defendant, after taking her to a moving picture theater on York Road and then to a restaurant, had sexual intercourse with her in his automobile. She further testified that he agreed to pay all her medical and hospital expenses, to compensate her for loss of salary caused by the pregnancy and birth, and to pay her ten dollars per week for the support of the child upon condition that she would refrain from instituting bastardy proceedings against him. She further testified that between September 17, 1951, and May, 1953, defendant paid her a total of $480.

Defendant admitted that he had taken plaintiff to restaurants, had danced with her several times, had taken her to Washington, and had brought her home in the country; but he asserted that he had never had sexual intercourse with her. He also claimed that he did not enter into any agreement with her. He admitted, however, that he had paid her a total of $480. His father also testified that he stated "that he did not want his mother to know, and if it were just kept quiet, kept principally away from his mother and the public and the courts, that he would take care of it."

Defendant further testified that in May, 1953, he went to see plaintiff's physician to make inquiry about blood tests to show the paternity of

the child; and that those tests were made and they indicated that it was not possible that he could have been the child's father. He then stopped making payments. Plaintiff thereupon filed a charge of bastardy with the State's Attorney.

The testimony which was given in the Criminal Court by Dr. Milton Sachs, hematologist at the University Hospital, was read to the jury in the Superior Court. In recent years the blood-grouping test has been employed in criminology, in the selection of donors for blood transfusions, and as evidence in paternity cases. The Landsteiner blood-grouping test is based on the medical theory that the red corpuscles in human blood contain two affirmative agglutinating substances, and that every individual's blood falls into one of the four classes and remains the same throughout life. According to Mendel's law of inheritance, this blood individuality is an hereditary characteristic which passes from parent to child, and no agglutinating substance can appear in the blood of a child which is not present in the blood of one of its parents. The four Landsteiner blood groups, designated as AB, A, B, and O, into which human blood is divided on the basis of the compatibility of the corpuscles and serum with the corpuscles and serum of other persons, are characterized by different combinations of two agglutinogens in the red blood cells and two agglutinins in the serum. Dr. Sachs reported that Fiege's blood group was Type O, Miss Boehm's was Type B, and the infant's was Type A. He further testified that on the basis of these tests, Fiege could not have been the father of the child, as it is impossible for a mating of Type O and Type B to result in a child of Type A.

Although defendant was acquitted by the Criminal Court, the Superior Court overruled his motion for a directed verdict. In the charge to the jury the Court instructed them that defendant's acquittal in the Criminal Court was not binding upon them. The jury found a verdict in favor of plaintiff for $2,415.80, the full amount of her claim.

Defendant filed a motion for judgment n.o.v. or a new trial. The Court overruled that motion also, and entered judgment on the verdict of the jury. Defendant appealed from that judgment.

Defendant contends that, even if he did enter into the contract as alleged, it was not enforceable, because plaintiff's forbearance to prosecute was not based on a valid claim, and hence the contract was without consideration. He, therefore, asserts that the Court erred in overruling (1) his demurrer to the amended declaration, (2) his motion for a directed verdict, and (3) his motion for judgment n.o.v. or a new trial.

It was originally held at common law that a child born out of wedlock is *filius nullius,* and a putative father is not under any legal liability to contribute to the support of his illegitimate child, and his promise to do so is unenforceable because it is based on purely a moral obligation. Some of the courts in this country have held that, in the absence of any statutory obligation on the father to aid in the support of his bastard child, his promise to the child's mother to pay her for its maintenance, resting solely on his natural affection for it and his moral obligation to provide for it, is a promise which the law cannot enforce because of lack of sufficient consideration. Mercer v. Mercer's Adm'r, 87 Ky. 30, 7 S.W. 401; Wiggins v. Keizer, 6

Ind. 252; Davis v. Herrington, 53 Ark. 5, 13 S.W. 215. On the contrary, a few courts have stated that the natural affection of a father for his child and the moral obligation upon him to support it and to aid the woman he has wronged furnish sufficient consideration for his promise to the mother to pay for the support of the child to make the agreement enforceable at law. Birdsall v. Edgerton, 25 Wend., N.Y., 619; Todd v. Weber, 95 N.Y. 181, 47 Am. Rep. 20; Trayer v. Setzer, 72 Neb. 845, 101 N.W. 989.

However, where statutes are in force to compel the father of a bastard to contribute to its support, the courts have invariably held that a contract by the putative father with the mother of his bastard child to provide for the support of the child upon the agreement of the mother to refrain from invoking the bastardy statute against the father, or to abandon proceedings already commenced, is supported by sufficient consideration. Jangraw v. Perkins, 77 Vt. 375, 60 A. 385; Beach v. Voegtlen, 68 N.J.L. 472, 53 A. 695; Thayer v. Thayer, 189 N.C. 502, 127 S.E. 553, 39 A.L.R. 428.

In Maryland it is now provided by statute that whenever a person is found guilty of bastardy, the court shall issue an order directing such person (1) to pay for the maintenance and support of the child until it reaches the age of eighteen years, such sum as may be agreed upon, if consent proceedings be had, or in the absence of agreement, such sum as the court may fix, with due regard to the circumstances of the accused person; and (2) to give bond to the State of Maryland in such penalty as the court may fix, with good and sufficient securities, conditioned on making the payments required by the court's order, or any amendments thereof. Failure to give such bond shall be punished by commitment to the jail or the House of Correction until bond is given but not exceeding two years. Code Supp. 1955, art. 12, §8.

Prosecutions for bastardy are treated in Maryland as criminal proceedings, but they are actually civil in purpose. Kennard v. State, 177 Md. 549, 10 A.2d 710; Kisner v. State, Md., 122 A.2d 102. While the prime object of the Maryland Bastardy Act is to protect the public from the burden of maintaining illegitimate children, it is so distinctly in the interest of the mother that she becomes the beneficiary of it. Accordingly a contract by the putative father of an illegitimate child to provide for its support upon condition that bastardy proceedings will not be instituted is a compromise of civil injuries resulting from a criminal act, and not a contract to compound a criminal prosecution, and if it is fair and reasonable, it is in accord with the Bastardy Act and the public policy of the State.

Of course, a contract of a putative father to provide for the support of his illegitimate child must be based, like any other contract, upon sufficient consideration. The early English law made no distinction in regard to the sufficiency of a claim which the claimant promised to forbear to prosecute, as the consideration of a promise, other than the broad distinction between good claims and bad claims. No promise to forbear to prosecute an unfounded claim was sufficient consideration. In the early part of the Nineteenth Century, an advance was made from the criterion of the early authorities when it was held that forbearance to prosecute a suit which had already been instituted was sufficient consideration, without inquiring

whether the suit would have been successful or not. Longridge v. Dorville, 5 B. & Ald. 117.

In 1867 the Maryland Court of Appeals, in the opinion delivered by Judge Bartol in Hartle v. Stahl, 27 Md. 157, 172, held: (1) that forbearance to assert a claim before institution of suit, if not in fact a legal claim, is not of itself sufficient consideration to support a promise; but (2) that a compromise of a doubtful claim or a relinquishment of a pending suit is good consideration for a promise; and (3) that in order to support a compromise, it is sufficient that the parties entering into it thought at the time that there was a bona fide question between them, although it may eventually be found that there was in fact no such question.

We have thus adopted the rule that the surrender of, or forbearance to assert, an invalid claim by one who has not an honest and reasonable belief in its possible validity is not sufficient consideration for a contract. 1 Restatement, Contracts, sec. 76(b). We combine the subjective requisite that the claim be bona fide with the objective requisite that it must have a reasonable basis of support. Accordingly a promise not to prosecute a claim which is not founded in good faith does not of itself give a right of action on an agreement to pay for refraining from so acting, because a release from mere annoyance and unfounded litigation does not furnish valuable consideration.

Professor Williston was not entirely certain whether the test of reasonableness is based upon the intelligence of the claimant himself, who may be an ignorant person with no knowledge of law and little sense as to facts; but he seemed inclined to favor the view that "the claim forborne must be neither absurd in fact from the standpoint of a reasonable man in the position of the claimant, nor, obviously unfounded in law to one who has an elementary knowledge of legal principles." 1 Williston on Contracts, rev. ed., sec. 135. We agree that while stress is placed upon the honesty and good faith of the claimant, forbearance to prosecute a claim is insufficient consideration if the claim forborne is so lacking in foundation as to make its assertion incompatible with honesty and a reasonable degree of intelligence. Thus, if the mother of a bastard knows that there is no foundation, either in law or fact, for a charge against a certain man that he is the father of the child, but that man promises to pay her in order to prevent bastardy proceedings against him, the forbearance to institute proceedings is not sufficient consideration.

On the other hand, forbearance to sue for a lawful claim or demand is sufficient consideration for a promise to pay for the forbearance if the party forbearing had an honest intention to prosecute litigation which is not frivolous, vexatious, or unlawful, and which he believed to be well founded. Snyder v. Cearfoss, 187 Md. 635, 643, 51 A.2d 264; Pullman Co. v. Ray, 201 Md. 268, 94 A.2d 266. Thus the promise of a woman who is expecting an illegitimate child that she will not institute bastardy proceedings against a certain man is sufficient consideration for his promise to pay for the child's support, even though it may not be certain whether the man is the father or whether the prosecution would be successful, if she makes the charge in good faith. The fact that a man accused of bastardy is forced to enter into a contract to pay for the support of his bastard child from

fear of exposure and the shame that might be cast upon him as a result, as well as a sense of justice to render some compensation for the injury he inflicted upon the mother, does not lessen the merit of the contract, but greatly increases it. Hook v. Pratt, 78 N.Y. 371, 34 Am. Rep. 539; Hays v. McFarlan, 32 Ga. 699, 79 Am. Dec. 317. . . .

In the case at bar there was no proof of fraud or unfairness. Assuming that the hematologists were accurate in their laboratory tests and findings, nevertheless plaintiff gave testimony which indicated that she made the charge of bastardy against defendant in good faith. For these reasons the Court acted properly in overruling the demurrer to the amended declaration and the motion for a directed verdict. . . .

As we have found no reversible error in the rulings and instructions of the trial Court, we will affirm the judgment entered on the verdict of the jury.

Judgment affirmed, with costs.

Found for the P's mother

RESTATEMENT (SECOND) OF CONTRACTS

§74. Settlement of Claims

(1) Forbearance to assert or the surrender of a claim or defense which proves to be invalid is not consideration unless

(a) the claim or defense is in fact doubtful because of uncertainty as to the facts or the law, or
(b) the forbearing or surrendering party believes that the claim or defense may be fairly determined to be valid.

(2) The execution of a written instrument surrendering a claim or defense by one who is under no duty to execute it is consideration if the execution of the written instrument is bargained for even though he is not asserting the claim or defense and believes that no valid claim or defense exists.

Problem 41

Mark Queensberry was the current holder of a promissory note signed by Sebastian Melmouth. When the note matured, Queensberry came to Melmouth's house to collect. Mrs. Melmouth met him at the door and handed him a promissory note she had signed for the same amount; it was payable exactly one year later. She said to Queensberry that if he would promise her to forbear collecting on her husband's note for one year, at the end of that period she would pay her note if her husband was unable to pay his. Queensberry just grunted and walked away with her note. He did forbear collection activities for one year. Now Queensberry is trying to collect from Mrs. Melmouth. She is arguing that she had asked for a promise and did not get it, and that there is, therefore, no consideration.

Even if this was a promise would this be consideration

Is she correct? See Strong v. Sheffield, 144 N.Y. 392, 39 N.E. 330 (1895); Restatement (Second) of Contracts, §74, comment d.

Problem 42

Romeo Montague married Juliet and they lived happily for a year until he was struck by a car. The doctors told Juliet that it was unlikely he would recover and that he would probably live for a few days at best. That night, worried, Juliet searched through their family papers and discovered that her father-in-law, Vern Montague, was still named as beneficiary in Romeo's will. The next morning she obtained a change-of-beneficiary form from the insurance agent and took it to the hospital, hoping to catch Romeo in a lucid moment and have him sign it. Outside of Romeo's hospital room, Juliet ran into Vern Montague, and she told him about her plan. He was horrified, saying that bothering Romeo about death benefits at this moment would certainly hasten his end. Vern added that if she would forget changing the beneficiary, he would pay the insurance money over to her when he received it. Relieved, she agreed. Ten minutes later, Romeo died. When Vern received the insurance money, he told Juliet that he had never liked her and that he was particularly upset that she would extort a promise out of him by using the ugly threat of killing his son. He refused to give her the money and she sued. How should this come out? See Orr v. Orr, 181 Ill. App. 148 (1913).

Juliet would win

Problem 43

When she took the course in Property and learned about title searches, Portia Moot, first-year law student, decided to search the title of the home she had owned for five years. She was disturbed to learn that the house was on land once owned by an Indian tribe. More research convinced her that the Indians had been duped into signing the original treaty deeding the land to the government. When she asked her Property professor about this, she was told not to worry because the statute of limitations had long since run out on this sort of claim. Still concerned, Portia tracked down the remnants of the tribe involved and offered to pay the tribe $1,000 if its governing council would sign a contract promising to forbear to press its possible claim against her property; she also asked the tribe to sign a quit-claim deed. The council initially refused, saying that the tribe's lawyer had advised that the tribe definitely had no possible claim; the tribe said it didn't want to take her money for nothing. She persisted, and the tribe finally signed the documents. When her check bounced, Portia suddenly realized that she needed the money for other matters and told the tribe to forget the whole thing. The tribe, thoroughly annoyed by this time, sued. Portia argued that the tribe had given no consideration. How should this come out? See Mullen v. Hawkins, 141 Ind. 363, 40 N.E. 797 (1895).

Indian ~~no possible~~ forbearance based on invalid claim

She did give them consideration - so no contract

Perfectly enforceable K. but doesn't fit in subsection 1 if you get what's bargained for even nation writing, enforceable.