contracts the new §2-719 has only one measuring factor: whether the liquidated amount is reasonable in light of the anticipated or actual harm caused by the breach.

Problem 75

Dr. Watson signed a contract to purchase land in Florida, agreeing to pay a set amount each month to the sellers. A liquidated damages clause provided that if he missed a payment the sellers could foreclose their purchase money mortgage and reclaim the land, plus keep all payments made to date as liquidated damages. Is the clause valid? See Hutchinson v. Tompkins, 259 So. 2d 129 (Fla. 1972). What about a clause that provides for a liquidated damage of 15 percent of the contract price? Should the result be affected by the fact that before trial the seller sold the land for a price greater than the original sale price? Compare Leeber v. Deltona Corp., 546 A.2d 452 (Me. 1988) (a "fortuitous resale" should not affect the result), with Lind Bldg. Corp. v. Pacific Bellevue Dev., 55 Wash. App. 70, 776 P.2d 977 (1989) (no liquidated damage should be allowed where the seller in fact suffered no damages).

Problem 76

The construction contract contained a liquidated damages clause stating that the contractor must complete the bridge by August 10 or pay $500 a day for each day thereafter that the bridge remained uncompleted. On August 10 the bridge was still uncompleted, but the road on the other side of the river to which it was to be connected was not completed by other contractors until September 8, by which time the bridge was done. Must the bridge contractor pay the liquidated amount? What was the purpose of the clause at the time it was drafted? Compare Massman Construction Co. v. City Council, 147 F.2d 925 (5th Cir. 1945), with Southwest Engineer Co. v. United States, 341 F.2d 998 (8th Cir.), cert. denied, 382 U.S. 819 (1965).

Problem 77

When student Portia Moot tried to rent an apartment near the law school, she was required to sign a lease and put down a deposit of $600. The lease provided that this amount would be kept by the lessor as liquidated damages if Portia did any of the following things: damage the apartment in any way, cause a disturbance, bother the other tenants, keep a pet, put holes in the wall, move out without giving 30 days' notice, or fail to pay the usual $600 rent each month. The clause also provided that Portia would have to pay such other actual damages as the lessor might be able to prove. Is this clause valid? See J. Calamari and J. Perrillo, Contracts §14-32.

What about the validity of a clause that provides that if the tenant does not fulfill the entire term of the one-year lease that there is a penalty equal to all of the remaining rent? Two months' rent? See Paragon Group, Inc. v. Ampleman, 878 S.W.2d 878 (Mo. Ct. App. 1994).

Problem 78

Portia Moot next decided to sign up with a health spa to improve her physical fitness, which was suffering from the law school regimen. The spa manager talked her into a three-year contract under which she obligated herself for a total of $3,500 in lessons and training. She went once and then the strain of her studies forced her to discontinue the program. The spa sued her for $3,450 (she had put down a $50 deposit). Is it entitled to this amount? See Vogue Models, Inc. v. Reina, 6 Ill. App. 3d 211, 285 N.E.2d 256 (1972); Westmount Country Club v. Kameny, 82 N.J. Super. 200, 197 A.2d 379 (1964); Nu Dimensions Figure Salon v. Becerra, 73 Misc. 2d 917, 340 N.Y.S.2d 268 (Civ. Ct. 1973).

NOTE

In reading the following case, depending on the order in which your instructor assigns these materials, you may get your first introduction to warranties for the quality of goods. A breach of warranty under UCC Article 2's §§2-313, 2-314, or 2-315 may give rise to the right of damages under §§2-714 and 2-715. At this point, do not concern yourself with either how warranties arise or the typical measure of damages for a breach of warranty. Instead, concentrate on what the court has to say about agreements limiting damages and their effectiveness under §2-719.

SCHURTZ v. BMW OF NORTH AMERICA
Utah Supreme Court, 1991
814 P.2d 1108, 15 U.C.C. Rep. Serv. 2d 878

ZIMMERMAN, J. . . .

In February 1982, Hugh Schurtz purchased a 1982 BMW 320i from BMW of Murray. The car carried a written warranty limiting BMW's responsibility to the repair or replacement of defective parts within three years or 38,000 miles. The limited warranty specified that the decision to repair or replace was within the sole discretion of BMW. Of central concern for the purposes of the appeal were additional warranty provisions stating that "BMW of North America, Inc., makes no other express warranty on this product" and the "BMW of North America, Inc., hereby excludes incidental and consequential damages . . . for any breach of any express or implied warranty."[1]

1. The full text of the limited warranty reads as follows:

BMW of North America, Inc., warrants this vehicle to be free of defects in materials or workmanship for a period of 3 years or 38,000 miles, whichever occurs first,

After allegedly encountering numerous problems with the car, Schurtz filed the present action. He claimed that immediately after purchase, he experienced difficulties with the car. He further asserted that BMW breached the limited warranty because it was either unable or unwilling to repair or replace the car. Schurtz claimed (i) breach of written and implied warranties in contravention of the Magnuson Moss Act, 15 U.S.C. §§2301(6) and 2310(d)(1) (1974); (ii) negligent misrepresentation; (iii) breach of the Utah Consumer Sales Practices Act, Utah Code Ann. §§13-11-1 to -23 (1990); and (iv) breach of express and implied warranties made actionable by code §§70A-2-715 and -719 (1990). Schurtz sought damages including the purchase price of the automobile, incidental and consequential damages, attorney fees, costs, and punitive damages.

BMW filed a motion for summary judgment, seeking dismissal of all Schurtz's warranty claims. Pertinent to this appeal is the alternative motion for partial summary judgment in which BMW sought to have Schurtz's claims for incidental and consequential damages dismissed, arguing that these claims were barred by the express provisions of the limited warranty.

In response to this alternative motion, Schurtz argued that the limited warranty's provision excluding incidental and consequential damages and limiting the remedy for breach to repair or replacement was invalid under §2-719(2) of the Utah U.C.C. He reasoned that a provision excluding incidental and consequential damages is invalid under §2-719(2) if the warranty to repair or replace "fails of its essential purpose" and that the limited BMW warranty failed of its essential purpose because BMW was either unable or unwilling to repair his car.

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commencing with the date the vehicle is first licensed or placed in service as a "demonstrator" or "company car." To obtain service under this warranty, the vehicle must be brought, upon discovery of the defect, to the workshop of any authorized BMW dealer. This dealer will, without charge for parts or labor either repair or replace the defective part(s). The decision to repair or replace said part(s) being wholly the responsibility of BMW of North America, Inc. Parts for which replacements are made become the property of BMW of North American, Inc.

BMW of North America, Inc., makes no other express warranty on this product except the warranty as to the emission control system or the Limited Warranty-Rust Perforation. THE DURATION OF ANY IMPLIED WARRANTIES, INCLUDING THE IMPLIED WARRANTY OF MERCHANTABILITY, IS LIMITED TO THE DURATION OF THE EXPRESS WARRANTY HEREIN. BMW OF NORTH AMERICA, INC., HEREBY EXCLUDES INCIDENTAL AND CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF TIME, INCONVENIENCE, OR LOSS OF USE OF THE VEHICLE, FOR ANY BREACH OF ANY EXPRESS OR IMPLIED WARRANTY, INCLUDING THE IMPLIED WARRANTY OF MERCHANTABILITY, APPLICABLE TO THIS PRODUCT. Some states do not allow limitations on how long an implied warranty lasts, or the exclusion of incidental or consequential damages, so the above limitations and exclusions may not apply to you.

This warranty gives you specific legal rights, and you may also have other rights which vary from state to state. Any legal claim or action arising from any express or implied warranty contained herein must be brought within 12 months of the date it arises.

BMW responded to this argument by contending that under the U.C.C. the limited warranty provision excluding incidental and consequential damages remains valid even if the warranty of repair or replacement fails of its essential purpose. BMW argued that §2-719(3) governs incidental and consequential damage provisions and specifically allows a provision to exclude incidental and consequential damages unless it is "unconscionable." BMW argued that "unconscionability" under subpart (2) does not arise merely because a limited warranty to repair or replace fails of its "essential purpose."

The issue thus joined is the critical issue of this appeal. Specifically, are subparts (2) and (3) of §2-719 of the Utah U.C.C. to be read dependently, as Schurtz argues, or independently, as BMW claims and the trial court found? A dependent reading would mean that any limitation on incidental and consequential damages under subpart (3) would be ineffective in the event that the contingency in subpart (2), a failure of the essential purpose of the limited warranty, occurred. An independent reading would mean that the occurrence of the condition specified in subpart (2) would not mean the automatic invalidity of a limitation on incidental and consequential damages. Because the disposition of this issue turns on §2-719 of the Utah U.C.C., we set it forth here:

> (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,
>
> a) the agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and
>
> b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
>
> (2) Where circumstances cause an exclusive remedy or limited remedy to fail of its essential purpose, remedy may be had as provided in this act.
>
> (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

The motion for partial summary judgment was heard on July 22, 1988, and taken under advisement by the court. The matter came for trial on August 1, 1988. On the first day of trial, a jury was impaneled, counsel made their opening statements, and Schurtz was called as the first witness. On the second day of trial, before any further evidence was taken, the court ruled on the summary judgment motion filed previously by BMW. The court denied BMW's motion to dismiss all Schurtz's warranty claims, but it granted BMW's motion with respect to Schurtz's claim for incidental and consequential damages. The court agreed with BMW and concluded that subparts 2-719(2) and (3) operate independently. When a warranty limits the remedies available to the buyer to repair or replacement and also provides that the buyer may not recover incidental and consequential

damages, if the repair or replacement provisions fails of its essential purpose, the incidental and consequential damages limitaton in the warranty remains valid.

Following this decision, an agreement was reached between the parties under which BMW, although not conceding the issues of breach of warranty and breach of contract, would refund the car's purchase price of $14,500 to Schurtz upon return of the car, minus a credit to BMW for actual use by Schurtz in the amount of 16 cents per mile for 22,516 miles, for a total credit of $3,602.56. It was further agreed that Schurtz would be deemed the prevailing party for the purpose of obtaining attorney fees as provided for by the Magnuson-Moss Act, 15 U.S.C. §2310(d)(2). Under that provision, the prevailing party is entitled to such fees as the court determines were "reasonably incurred" in prosecuting the action.

Following entry of the parties' agreement, the court held a hearing to determine the reasonable attorney fees due Schurtz. Schurtz requested fees of $44,069.15, the amount which he claimed he had incurred in prosecuting the claim. BMW contended that he was not entitled to any attorney fees or, in the alternative, entitled only to an award sufficient to compensate him to the point where he filed his complaint and received an offer for settlement based on rescission on the theory that the lawsuit was unnecessary and the fees were unreasonable. The court awarded Schurtz only $10,000 on the ground that the matter "could have been and probably should have been settled very early in the proceedings, for an amount roughly equal to the ultimate outcome." The court, in awarding a discounted sum of fees to Schurtz, operated on the assumption that Schurtz should have known that he was not entitled to incidental and consequential damages and therefore spent more money prosecuting the action than was justified. Schurtz appeals from the grant of summary judgment and from the award of fees. . . .

The fundamental question before us is whether the trial court correctly held that the failure of essential purpose of a repair or replace provision in a limited warranty does not affect the validity of a companion provision in the warranty precluding incidental and consequential damages or, in other words, that subparts (2) and (3) should operate independently. To determine the answer, we must determine the proper interpretation of subparts 2-719(2) and (3) of the Utah U.C.C. In so doing, we review the language of the statute, the legislative history, and the relevant policy considerations. . . .

Section 2-719 states the contractual limitations or modifications that may be made in the remedies provided for in the earlier sections of part 7. Subpart (1) of §2-719 states that, consistent with subparts (2) and (3) of that section, the parties may limit the remedies provided in chapter two of the agreement between the buyer and seller to, for example, "repair and replacement of non-conforming goods or parts." Subpart 2-719(2) then provides that a limitation of remedies may become ineffective: "[W]here circumstances cause an exclusive remedy or limited remedy to fail of its essential purpose, [then] remedy may be had as provided in this act." As we recognized in Devore v. Bostrom, 632 P.2d 832, 835 (Utah 1981), where a limited remedy fails of its essential purpose, the buyer may pursue all

remedies provided in that part of the U.C.C., including the recovery of incidental and consequential damages under §2-715.

Subpart 2-719(3) deals separately with provisions expressly limiting damages otherwise available under §2-715. That section provides, "[C]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable."

From the statute's language, it appears that subparts (2) and (3) are to operate independently. A scheme is established under which express agreements disclaiming incidental and consequential damages are to be governed by subpart (3), and the validity of these exclusions is tested by "unconscionability," while agreements disclaiming all the other contractual remedies provided in chapter two are governed by subparts (1) and (2) and their validity is tested by "failure of essential purpose as well as the general unconscionability requirements of the Code."

This independent reading of the two provisions also conforms to the general rule that we should construe statutory provisions so as to give full effect to all their terms, where possible. Madsen v. Borthick, 769 P.2d 245, 252 n.11 (Utah 1988). If we were to read subparts (2) and (3) as dependent, we would effectively read out the unconscionability test of subpart (3) for determining the validity of a provision limiting incidental and consequential damages and substitute "failure of essential purpose" from subpart (2) as the operative text. Such a reading seems to fly in the face of the plain language of the statute.

The statute's terms lead us to conclude that subparts (2) and (3) should be read independently. We recognize that courts across the country are split on the question, suggesting that a number of courts find the statute's language less than clear. Our position is in accord with the Third Circuit's statement in [Chatlos Systems v. National Cash Register Corp., 635 F.2d 1081 (3d Cir. 1980)]:

> It appears to us that the better reasoned approach is to treat the consequential damages disclaimer as an independent provision, valid unless unconscionable [subpart (3)]. . . . The limited remedy of repair [subpart (2)] and a consequential damages exclusion are two discrete ways of attempting to limit recovery for breach of warranty. . . . The code, moreover, treats each by a different standard. The former survives unless it fails of its essential purpose, while the latter is valid unless it is unconscionable. We therefore see no reason to hold, as a general proposition, that the failure of the limited remedy provided in the contract, without more, invalidates a wholly distrinct term in the agreement excluding consequential damages. The two are not mutually exclusive.

Chatlos Systems, 635 F.2d at 1086 (bracketed material added).

Our independent reading of the two subparts is consistent with the only thing that could be described as legislative history on the issue, the comments of the drafters of the Uniform Commercial Code. The comment to §2-719 does not expressly state whether the remedies provided for by §2-719(2) should include incidental and consequential damages when a limited warranty specifically excludes them. See U.C.C. §2-719 comment (1990). However, the general terms of the comment, when viewed in light

of the other provisions of part 7, are furthered by an independent reading of §2-719(2) and §2-719(3). The comment explains that §2-719 permits contractual limitations on remedies to be overthrown in certain circumstances, and consequently, parties who conclude a contract for sale, even one with limitations of remedies, "must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract." Such a "fair quantum of remedy for breach" is available when subparts (2) and (3) are given an independent reading.

Our independent reading of subparts (2) and (3) is also supported by sound policy considerations. And with some careful tuning, our independent reading of the two subparts can accommodate the values that appear to have driven a number of courts to read these two provisions as dependent.

As noted above, there is a split among the courts across the country, with some courts reading (2) and (3) independently and others reading them dependently. These positions may appear irreconcilable. However, when the facts of the cases are taken into account, the policy considerations that seem to underlie the decisions holding the two subparts dependent appear reconcilable with the considerations underlying those holding them independent, and the split of authority on the question of a dependent or independent construction seems largely a result of the context in which the question was presented to the courts.

In cases where the buyer is a consumer, there is a disparity in bargaining power, and the contractual limitations on remedies, including incidental and consequential damages, are contained in a preprinted document rather than one that has been negotiated between the parties, the courts have held uniformly that if the limited warranty fails of its essential purpose, the consumer should be permitted to seek incidental and consequential damages. The courts usually reach this result by reading the two subparts dependently. See, e.g., Clark v. International Harvester, 99 Idaho 326, 581 P.2d 784 (1978). On the other hand, in cases where the parties are operating in a commercial setting, there is no disparity in bargaining power, and the contract and its limitations on remedies are negotiated, most courts have concluded that if a limited warranty fails of its essential purpose, any contractual limitation on incidental and consequential damages is not automatically void. The subparts are read independently and the surviving limitation on incidentals and consequentials remains valid absent a showing of unconscionability. E.g., V-M Corp. v. Bernard Distrib. Co., 447 F.2d 864, 869 (7th Cir. 1971); *American Elec. Power Co.*, 418 F. Supp. at 457-59.

In our view, both the consumer and the nonconsumer situation can be dealt with in a manner that reconciles the apparent split of authority in the cases by giving an independent reading to subparts (2) and (3). When trial courts are addressing the subpart (3) issue of unconscionability in any specific case, they should take an approach that frankly recognizes the differences that inhere in consumer, as opposed to commercial, settings and affect the determination of unconscionability. This distinction is recognized in other areas of the U.C.C. See, e.g., J. White & R. Summers, U.C.C. §§4-2 to 4-9 (difference in unconscionability determination in consumer

and commercial setting); 12-1 to 12-5 (difference in warranties to consumers and merchants); 14-8 to 14-9 (consumer/merchant distinction in rights of holders in due course) (2d ed. 1980). We think the results in the cases we have canvassed amount to a recognition of this distinction in §2-719 cases. Under such an approach, the trial court confronted with an issue of unconscionability takes into account any disparities in bargaining power between the parties, the negotiation process, if any, and the type of contract entered into by the parties, specifically addressing whether the contract was one of adhesion. As noted above, in practice after these factors are examined and weighed, a trial court will generally find that provisions limiting incidental and consequential damages are unconscionable in consumer settings and conscionable in commercial settings. We acknowledge that the outcome in any particular case may diverge from this pattern because of the facts; but that is only a recognition of the difficulty of neatly categorizing transactions as commercial or consumer.

An analysis that takes a case-by-case approach to the question of unconscionability accommodates the results in virtually all the cases dealing with the relationship between subparts (2) and (3). It also provides the courts with a flexible tool for determining the validity of limitations on incidental and consequential damages that serves well the different policies appropriate to consumer and commercial settings. For example, where such a limitation is freely negotiated between sophisticated parties, which will most likely occur in a commercial setting, it seems unlikely that a court will find a provision limiting incidental and consequential damages unconscionable and free the buyer from that provision simply because some other limited warranty provision has failed of its essential purpose. On the other hand, where a limitation of incidentals and consequentials is nonnegotiable and preprinted on a standard form limited warranty that is sealed in a package with consumer goods or stuffed in a glovebox, where it will never be seen until after the goods are sold, as may often occur in consumer transactions, then it seems more likely that a court will find that the freedom to contract for limitations on remedies described in subparts 2-719(1) and (3) has not really been meaningfully exercised by both parties and the limitation will be held unconscionable. See Resource Management Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028 (Utah 1985); Bekins Bar V Ranch v. Huth, 664 P.2d 455 (Utah 1983); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

In light of the foregoing, we conclude that the trial court erred in ruling on the motion for partial summary judgment that, as a matter of law, Schurtz was not entitled to incidental and consequential damages. Although the trial court correctly held that subparts (2) and (3) of §2-719 are to be read independently, it erred by not then determining whether the facts of this case warrant a finding that the limitation of incidental and consequential damages is unconscionable under subpart 2-719(3). And if it had so found, it should have made findings of fact to support the result.

We vacate the summary judgment and remand for further proceedings on the warranty question in accordance with this opinion.

Schurtz also claims that it was error for the court to award a discounted sum of attorney fees because it was based on the legal assumption that

Schurtz could not recover incidental and consequential damages and should have known that fact. Because that assumption was incorrect, the trial court must readdress the attorney fees question after deciding the warranty issues.

HALL, C.J., and DURHAM, J., concur.

HOWE, Associate C.J. (concurring and dissenting). [Omitted.]

STEWART, J. (concurring and dissenting). I agree with the majority opinion that Utah's U.C.C. §2-719(2) does not mandate that consequential damages be allowed every time a limited warranty fails of its essential purpose. However, there may be circumstances in which the failure of a limited warranty will also result in the failure of a clause limiting consequential damages. The question is primarily one of contract interpretation, in my view, rather than one of statutory construction, as both the majority and Justice Howe in his opinion seem to suggest.

Section §2-719(1) authorizes a limited or exclusive remedy. Section 2-719(2) provides that if "circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act." The phrase "as provided in this act" does not invalidate an otherwise valid contractual provision. The true question is whether, based on an interpretation of the contract, the failure of an exclusive or limited remedy also causes the failure of a consequential damages limitation. The answer to this question depends on the contract rather than the U.C.C. In other words, if the contract is interpreted in such a way that the consequential damages limitation must fail with the limited remedy, then incidental and consequential damages may be recovered as provided in the U.C.C. On the other hand, if the failure of the limited remedy does not cause the failure of the consequential damages limitation, then that limitation must be evaluated under the unconscionability standard of §2-719(3).

Sustaining an otherwise valid consequential damages limitation, even though a limited remedy has failed of its essential purpose, is entirely consistent with the terms and framework of the U.C.C. Under the U.C.C., a seller may limit consequential damages without otherwise limiting a buyer's remedies. See, e.g., Adams Laboratories, Inc. v. Jacobs Eng'g Co., 486 F. Supp. 383, 388 (N.D. Ill. 1980). There is no reason to hold that a seller and a buyer may not enter into a contract which provides for the limitation of consequential damages, so long as it is not unconscionable, in the event that a limited remedy fails of its essential purpose. The U.C.C. certainly does not mandate such a conclusion. Although generally the failure of the essential purpose of a limited remedy will also invalidate a consequential damages limitation, there are cases when it will not. . . .

Case law from other jurisdictions, including that cited in the majority opinion, if not expressly following this reasoning, at least does so implicitly. Those cases allowing consequential damages in spite of an express limitation have done so either because the seller repudiated the warranty and therefore could not rely on the warranty's limitation of consequential damages or because the two limitations were so interrelated that the failure of one necessarily caused the failure of the other. See, e.g., Jones & McKnight Corp. v. Birdsboro Corp., 320 F. Supp. 39, 43 (N.D. Ill. 1970)

(court "would be in an untenable position if it allowed the defendant to shelter itself behind one segment of the warranty when it has allegedly repudiated and ignored its very limited obligations under another segment of the same warranty"); Clark v. International Harvester Co., 99 Idaho 326, 343, 581 P.2d 784, 801 (1978) (both limitations were "integral parts of the provision, reciprocal to one another, and together they represented the agreed allocation of risk between the parties"); Adams v. J.I. Case Co., 125 Ill. App. 2d 388, 402, 261 N.E.2d 1, 7 (1970) ("[L]imitations of remedy and of liability are not separable from the obligations of the warranty. Repudiation of the obligations of the warranty destroy its benefits."); Kelynack v. Yamaha Motor Corp., USA, 152 Mich. App. 105, 115, 394 N.W.2d 17, 21 (1986) ("repair and replace remedy and the exclusion of consequential damages are integral and interdependent parts of the warranty"; seller cannot "repudiate its limited obligation under the warranty while shielding itself behind another provision of the very warranty it has repudiated"); Ehlers v. Chrysler Motor Corp., 88 S.D. 612, 620, 226 N.W.2d 157, 161 (1975) (seller cannot "repudiate its obligation under the warranty" and at the same time attempt "to shield itself behind the beneficial limitation clause" of the same warranty).

On the other hand, many courts are willing to enforce a completely separate and otherwise valid consequential damages limitation provision. See, e.g., Chatlos Sys., Inc. v. National Cash Register Corp., 635 F.2d 1081, 1086 (3d Cir. 1980) ("limited remedy of repair and a consequential damages exclusion are two discrete ways of attempting to limit recovery"; the consequential damages limitation is "valid unless it is unconscionable"); AES Technology Sys., Inc. v. Coherent Radiation, 583 F.2d 933, 941 (7th Cir. 1978) (court rejected "the contention that failure of the essential purpose of the limited remedy automatically means that a damage award will include consequential damages"; "purpose of the courts in contractual disputes is not to rewrite contracts by ignoring parties' intent; rather it is to interpret the existing contract as fairly as possible when all events did not occur as planned"); V-M Corp. v. Bernard Distrib. Co., 447 F.2d 864, 869 (7th Cir. 1971) (court "not persuaded that Section 2-719(2) . . . requires the negation of the specific limitations of the contract"); American Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435, 458 (S.D.N.Y. 1976) ("totally separate provision" limiting consequential damages does not fail with limited remedy; limited remedy which "fails of its essential purpose . . . may be ignored, and other clauses in the contract which limit remedies for breach may be left to stand or fall independently of the stricken clause. Section 2-719 was intended to encourage and facilitate consensual allocations of risks"); Stutts v. Green Ford, Inc., 47 N.C. App. 503, 516, 267 S.E.2d 919, 926 (1980) (failure of limited remedy does not invalidate a "contractual limitation on the recovery of consequential damages").

Although, as a practical matter, the various courts deciding these cases might not agree on how to interpret a particular set of facts, the principle derived from the cases is well-reasoned. In sum, if a consequential damages limitation is not so integrally related to a limited remedy that the failure of the essential purpose of that remedy, or its repudiation by the

seller, necessarily invalidates the damages limitation, the consequential damages limitation should be upheld if not unconscionable. . . .

NOTES AND QUESTIONS

1. Unconscionability, a doctrine we will discuss in some detail in Chapter 6, means that the contractual provision is so unfair that the court will not enforce it. See Uniform Commercial Code §2-302.

2. What does "failure of its essential purpose" mean? When would a remedy limitation do this? Read Official Comment 1 to §2-719.

3. Where the seller limited the buyer's remedy to repair and also disclaimed any consequential damages (such as loss of the use of the car while it was in the shop), the parties probably understood that the repair would be done in an efficient manner, and during this period buyer would have to bear the consequential damages himself. But where the seller is not able to repair the goods after numerous attempts, is it still fair to uphold the denial of consequential damages?

4. When this case is returned to the lower court for retrial, what will the parties now argue concerning §2-719?

5. Note that a consequential damages limitation for personal injury in the sale of consumer goods is prima facie unconscionable under §2-719(3)'s last sentence. Thus in Collins v. Uniroyal, 64 N.J. 260, 315 A.2d 16, 14 U.C.C. Rep. Serv. 294 (1974), where a family was killed when the tire on their automobile blew out, the New Jersey Supreme Court tossed out a limitation in the warranty attempting to avoid liability for damages due to wrongful death.

5. Punitive Damages

See the following excerpt from the Restatement (Second) of Contracts:

§355. Punitive Damages

Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.

HIBSCHMAN PONTIAC, INC. v. BATCHELOR
Supreme Court of Indiana, 1977
266 Ind. 310, 362 N.E.2d 845

GIVAN, C.J. Batchelor brought an action for breach of contract and oppressive conduct by Hibschman Pontiac, Inc. and General Motors Corporation. A trial before a jury resulted in a verdict for Batchelor and against Hibschman Pontiac and General Motors Corporation in the

amount of $1,500.00. Further, the jury assessed punitive damages against Hibschman Pontiac, Inc. in the amount of $15,000.00.

The Court of Appeals, Third District, reversed the grant of punitive damages. See 340 N.E.2d 377. Batchelor now petitions for transfer.

The record reveals the following evidence: Prior to buying the Pontiac GTO automobile involved in this case, Batchelor inquired of the salesman, the service manager and the vice president as to the quality of Hibschman Pontiac's service department, as it was important that any deficiencies in the car be corrected. The salesman and the service manager responded that the service department at Hibschman Pontiac was above average. Jim Hibschman, the vice president, assured him that he would personally see that any difficulties would be corrected. Batchelor stated that he relied on the statements of the three men and ordered a 1969 GTO Pontiac automobile.

When Batchelor picked up his new car he discovered several problems with it. As requested by the service manager of Hibschman Pon-tiac, Batchelor made a list of his complaints and brought the car in for repair a few days later. The service manager attached the list to a work order but did not list the deficiencies on the work order. Later the manager called Batchelor and said that the car was ready. When he picked up the car Batchelor noticed that several items on the list had not been touched. Batchelor testified that there were many occasions when he took the car to Hibschman Pontiac for repairs and the service manager told him that the defects had been fixed when in fact they were not fixed. Batchelor testified that the service manager knew the defects were not corrected, but represented to him that the defects were corrected. Batchelor stated that he relied on the service manager's statements and took the car on several trips, only to have it break down. Some of the deficiencies resulted in abnormal wear of the car and breakdowns after the warranty period had expired.

Batchelor testified that he had taken the car in for repairs five times before he had owned it a month but that the defects had not been corrected. Batchelor had taken the car in 12 times during the warranty period for overnight repair and at least 20 times in all during the period. During the warranty period Batchelor lost use of the car approximately 45 days while it was at Hibschman Pontiac.

Batchelor had appealed to Jim Hibschman on several occasions to take care of his car. Hibschman replied that he realized the repairs were not effected properly but that Hibschman Pontiac would "do everything to get you happy." On another occasion Jim Hibschman responded they had done all they could with the car but that Batchelor was just a particular, habitual complainer whom they could not satisfy and "I would rather you would just leave and not come back. We are going to have to write you off as a bad customer."

On several occasions Batchelor attempted to see Dan Shaules, an area service representative from Pontiac Division, about the car but was kept waiting so long that he had to leave without seeing him. Batchelor did see Shaules in Buchanan, Michigan, when he took the car to an authorized Pontiac dealer there after the warranty had expired. Shaules inspected the car and told Batchelor to return the car to Hibschman Pontiac for repairs.

Hugh Haverstock, the owner of the garage where several of the deficiencies were corrected after the expiration of the warranty, testified that Batchelor was a good customer and paid his bills. He stated that an average transmission man could have corrected the problem with the transmission and that a problem with the timing chain was discovered and corrected when a tune up lasted only 800 miles. Haverstock stated that the difference in value of the car without defects and with the defects it had was approximately $1,500.00. Haverstock testified that when a person complains about problems with cars that have not been fixed by dealerships, word gets out and others do not want to work on the cars.

Arnold Miexel, the service manager for Hibschman Pontiac during the time in question, testified that his representation to Batchelor regarding Hibschman Pontiac service department was based on the fact that the mechanics were factory trained and that he had received no complaints regarding their work. He further stated that he could not check the work of the mechanics. Miexel testified that if their work was unsatisfactory it was done over but no work order was written for it. He stated that it was possible Batchelor made complaints about the car, but the defects were not corrected. The warranty expired and, as a consequence, later work was not considered under warranty.

Dan Shaules testified that Miexel was an average service manager. He testified that not all of the deficiencies in the car were corrected properly. He further stated that if any defects in the car were brought to their attention within the warranty period, items would be corrected if necessary after the warranty had expired.

Appellant first argues that there was insufficient evidence to permit the issue of punitive damages to go to the jury and that the court should have rendered a directed verdict on the issue of punitive damages on behalf of Hibschman Pontiac. This Court has recently dealt with the question of punitive damages in a contract action. In Vernon Fire & Casualty Ins. Co. v. Sharp (1976), Ind., 349 N.E.2d 173, the majority restated the general provision that punitive damages are not recoverable in contract actions and went on to state exceptions to this rule. Where the conduct of a party in breaching his contract, independently establishes the elements of a common law tort, punitive damages may be awarded for the tort.

Punitive damages may be awarded in addition to compensatory damages "whenever the elements of fraud, malice, gross negligence or oppression *mingle* in the controversy." (Emphasis supplied.) Vernon Fire & Casualty Ins. Co. v. Sharp, supra, Ind., 349 N.E.2d 178, 180, quoting Taber v. Hutson (1854), 5 Ind. 322.

Further, where a separate tort accompanies the breach or the elements of tort mingle with the breach, it must appear that the public interest will be served by the deterrent effect of the punitive damages. Vernon Fire & Casualty Ins. Co. v. Sharp, supra.

Appellant urges that the evidence presented does not indicate tortious conduct of any sort on its part. While a reasonable inference could be made from the evidence that appellant merely attempted to fulfill its contract and to do no more than that contract required, it is also reasonable to infer that

Hibschman Pontiac acted tortiously and in willful disregard of the right of Batchelor. This Court has often stated the maxim that it will not reweigh the evidence nor determine the credibility of witnesses, but will sustain a verdict if there is any evidence of probative value to support it. Moore v. Waitt (1973), Ind. App., 298 N.E.2d 456; Smart and Perry Ford Sales, Inc. v. Weaver (1971), 149 Ind. App. 693, 274 N.E.2d 718.

A corporation can act only through its agents, and their acts, when done within the scope of their authority, are attributable to the corporation. Soft Water Utilities, Inc. v. Lefevre (1974), Ind. App., 308 N.E.2d 395.

Here, the jury could reasonably have found elements of fraud, malice, gross negligence or oppression mingled into the breach of warranty. The evidence showed that requested repairs were not satisfactorily completed although covered by the warranty and capable of correction. Some of these defects were clearly breaches of warranty. Paint was bubbled, the radio never worked properly, the hood and bumper were twisted and misaligned, the universal joints failed, the transmission linkage was improperly adjusted, the timing chain was defective causing improper tune-ups and the carburetor was defective, among other things. Batchelor took the car to the defendant with a list of defects on numerous occasions and picked up the car when told it was "all ready to go." It was reasonable to infer that the defendant's service manager represented repairs to have been made when he knew that the work had not been done and that in reliance on his representations, Batchelor drove the car on trips and had breakdowns. Before purchasing the car Batchelor was given special representations on the excellence of Hibschman's service department, and the jury could find that Batchelor relied on these in buying the car from the defendant. After having brought the car in on numerous occasions, Batchelor was told by Jim Hibschman, "I would rather you would just leave and not come back. We are going to have to write you off as a bad customer." And he was told by one of Hibschman's mechanics that, "If you don't get on them and get this fixed, they will screw you around and you will never get it done." From these statements the jury could infer that the defendant was attempting to avoid making certain repairs by concealing them during the period of the warranty. Batchelor gave the defendant numerous opportunities to repair the car and the defendant did not do so; instead he tried to convince Batchelor that the problems were not with the car, but rather with Batchelor. We are of the opinion that in this case the jury could have found there was cogent proof to establish malice, fraud, gross negligence and oppressive conduct.

Although fraudulent conduct was not alleged in the complaint, evidence on the subject was admitted. Any inconsistency between the pleadings and proof will be resolved in favor of the proof at trial. Ayr-Way Stores, Inc. v. Chitwood (1973), 261 Ind. 86, 300 N.E.2d 335; Vernon Fire & Casualty Ins. Co. v. Sharp, supra. Thus there was probative evidence supporting the claim for punitive damages. The trial court did not err in denying a directed verdict as to that issue. See Jordanich v. Gerstbauer (1972), 153 Ind. App. 416, 287 N.E.2d 784.

Appellant next presents a collective argument for three issues: whether there was sufficient evidence to support an award for punitive damages in the amount of $15,000; whether the award of $15,000 punitive damages

bears a reasonable relationship to the actual damages; and whether punitive damages of $15,000 is excessive in this case.

Appellant here urges that there was no evidence presented concerning its worth or ability to pay. In Physicians Mutual Ins. Co. v. Savage (1973), 156 Ind. App. 283, 296 N.E.2d 165, the Court of Appeals held that the assessment of punitive damages in the amount of $50,000 "was not excessive when considered in relation to the evidence available to the trial court." The opinion noted that included in the evidence was a statement of net worth of the defendant. In Manning v. Lynn Immke Buick, Inc. (1971), 28 Ohio App. 2d 203, 276 N.E.2d 253, the court held that where punitive damages are to be assessed, the wealth of the defendant may be shown so that the jury will assess damages that will punish him. Such a rule is based on the theory that it will take a greater amount of penalty to dissuade a rich person than a poor person from oppressive conduct. However there appears to be no requirement that evidence of worth be submitted in cases of punitive damages.

Indiana has followed a rule that punitive damages in a proper case may be assessed by the jury within their sound discretion guided by proper instructions given by the court. Murphy Auto Sales v. Coomer (1953), 123 Ind. App. 709, 112 N.E.2d 589. There is no rule that the amount of punitive damages must be within a certain ratio to compensatory damages, although in the case of Bangert v. Hubbard (1955), 127 Ind. App. 579, 126 N.E.2d 778, a malicious prosecution suit, the court held that punitive damages of $10,500, being 105 times the compensatory damages, was so excessive as to indicate that the verdict was given under the influence of passion and prejudice. In Lou Leventhal Auto Co. v. Munns (1975), Ind. App., 328 N.E.2d 734, the Court of Appeals held that punitive damages in the amount of $1,500 was not excessive, although it was 50 times greater than the compensatory damages proven. That case involved an action to replevin an automobile wrongfully repossessed by a dealer. As noted by Judge Lowdermilk, the high ratio of punitive damages to compensatory damages "alone is not conclusive of an improper award. The amount here awarded is not so large as to appear the result of passion or prejudice, and is therefore not excessive." 328 N.E.2d at 742.

In the case at bar, although it was within the province of the jury to assess punitive damages, the amount in this case is so high as to violate the "first blush" rule as set out in City of Indianapolis v. Stokes (1914), 182 Ind. 31, 105 N.E. 477:

> Damages are not [to be] considered excessive unless at first blush they appear to be outrageous and excessive or it is apparent that some improper element was taken into account by the jury in determining the amount.

For the above reasons transfer is granted and the cause is remanded to the trial court with instruction to order remittitur of $7,500 of the punitive damages. In the event the remittitur is not made, the trial court shall order a new trial. The trial court is in all other matters affirmed.

DeBruler, J., concurring in result. I agree that the punitive damage award of $15,000.00 was excessive, and that remittitur of $7,500.00 is

reasonable. However, I doubt the efficacy of the standard enunciated by the majority for the review of punitive damages awards, the "first blush" rule. This rule is vague and contains no objective standards for the evaluation of such awards in view of their purpose, the deterrence of tortious conduct, and the danger to be guarded against, awards motivated by vindictiveness and prejudice. I believe that we should undertake to define a standard of review of punitive damages which imposes objective limitations upon such damages.

NOTES AND QUESTIONS

1. How does the Indiana rule vary from that expressed in the Restatement provision preceding the case?

2. In Travelers Indemnity Co. v. Armstrong, 442 N.E.2d 349 (Ind. 1982), the Indiana Supreme Court adopted a "clear and convincing" standard; that is, that any element of fraud, malice, gross negligence, or oppression that provides the basis for a claim for punitive damages must be established by clear and convincing evidence. The court added:

> [P]unitive damages should not be allowable upon evidence that is merely consistent with the hypothesis of malice, fraud, gross negligence or oppressiveness. Rather some evidence should be required that is inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other such iniquitous human failing.

3. Under the Indiana standard should punitive damages be awarded if the defendant purposefully breaches a contract because it can get a better deal from a third party despite the cost of compensatory damages? Judge Posner of the Seventh Circuit Court of Appeals says no because society would suffer a net social gain. Can you explain what he means? Judge Posner would hold the breaching party liable for punitives under the Indiana rule when the breach is

> opportunistic; the promisor wants the benefit of the bargain without bearing the agreed-upon cost, and exploits the inadequacies of purely compensatory remedies (the major inadequacies being that pre- and post-judgment interest rates are frequently below market levels when the risk of nonpayment is taken into account and that the winning party cannot recover his attorney's fees). This seems the common element in most of the Indiana cases that have allowed punitive damages to be awarded in breach of contract cases.

Patton v. Mid-Continent Systems, 841 F.2d 742 at 751 (7th Cir. 1988).

4. In *Hibschman*, other than failing to repair the car, what, if anything, did the defendant do to deserve punishment?

5. Factors that may affect the amount of punitive damages include the plaintiff's costs of litigation, the financial condition of the defendant, and the grossness of the conduct of the defendant.

6. See generally Clarkson, Miller, and Muris, Liquidated Damages v. Penalties: Sense or Nonsense?, 1978 Wis. L. Rev. 351; Goetz and Scott, Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach, 77 Colum. L. Rev. 554 (1977); Sullivan, Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change, 61 Minn. L. Rev. 207 (1977); Note, 8 Ind. L. Rev. 668 (1975).

7. When punitive damages are sought, courts have often allowed as part of discovery an investigation of the financial records of the defendant to determine what amount is necessary to make the award pinch but not too much. Annot., 54 A.L.R. 4th 998.

E. Damages Under the Uniform Commercial Code

1. Buyer's Damages

If the seller fails to tender delivery in the manner promised or the quantity or the quality of the goods does not conform to the contract, the buyer generally has the right to *reject* the goods. UCC §2-601. (There are some limitations to this right; for example, the seller may have the right to cure the defect under UCC §2-508.) The right to reject is an important remedy because upon rejection the seller is in control of the goods and ultimately responsible for any decline in value that may occur after rejection. If the buyer holds on to nonconforming goods for too long or uses them without regard to the seller's rights, the right to reject the goods disappears — *acceptance* has occurred. UCC §2-606. Even after acceptance, the buyer may still be entitled to *revoke* acceptance of the goods depending upon the nature of the defect and exactly when the buyer attempts to revoke acceptance. UCC §2-608. The issues involved in rejection/acceptance/revocation are further discussed in Chapter 7. At this stage it is important to know that the proper exercise of the right of rejection or revocation will affect the measure of damages for breach.

If the buyer has rightfully rejected or revoked acceptance or the seller never delivered the goods at all, the buyer's actual damages are determined by either UCC §2-712 or 2-713. The following problems address those two sections. The buyer may also be entitled to incidental and consequential damages under §2-715. (Further, the amount of damages may be limited by provisions in the sales contract that set a maximum amount for damages. §§2-718, 2-719.)

Problem 79

Roget agreed to purchase 40 new computer workstations with state of the art speakers from Sleazic Computers located in Quartz, California. The workstations were to be delivered by the seller to Roget's place of business in Lewiston, Indiana, on March 1, 2007. The cost of each was $3,000.

When delivered, Roget discovered that the built-in speakers were barely audible and totally worthless. Roget properly revoked acceptance of the products on March 25, 2007, pursuant to UCC §2-608. On April 1, Roget purchased another brand at the cost of $4,000 each. The new workstations had excellent speakers and were essentially identical to those purchased from Sleazic except that the substitute workstations had a keyboard with a built-in mouse, a feature worth $200. This feature was of no importance to Roget, who had purchased the substitute workstations because they were readily available (a must).

What are Roget's damages under §2-712 if you presume that Roget suffered no consequential or incidental damages?

$ 3,800 x 40

Problem 80

Assume the same facts as in the last Problem, except also assume that the market price of processors like that purchased by Roget was $5,000 in Lewiston and $3,000 in Quartz. Roget has sued Sleazic for damages under UCC §2-713. If you assume Roget is entitled to sue under that section, what would be the amount of damages assuming no incidental or consequential damages? Is Roget entitled to sue under that section or should Roget be limited to damages as measured by §2-712? See Official Comment 3 to §2-712, and Official Comment 5 to §2-713. If Roget had consequential damages that could have been avoided by cover, are those damages recoverable in an action under §2-713? See UCC §2-715(2)(a), and Official Comment 3 to §2-712.

If a buyer finally accepts goods, the buyer's damages are determined by §§2-714 and 2-715. The basic remedy of §2-714 is the difference between the value of the goods in the condition as sold and the value of the goods as promised. Section 2-715 allows consequential and incidental damages.

2. Seller's Damages

If the buyer breaches before acceptance or wrongfully revokes the acceptance, the seller's right to damages is determined by UCC §§2-706, 2-708(1), or 2-708(2). The seller's right to damages under §2-706 are similar to the buyer's right to cover damages. Under §2-706, the seller is entitled to resell the goods under the procedure set out in that section. The measure of damages under the section is then the difference between the resale price and the contract price. The seller may add any incidental damages under §2-710 but must deduct any expenses saved.

Problem 81

H. Majesty sold 3,000 plates to Corner Surprises in the City of Devane. Majesty was to deliver at Corner's back door on May 3. The plates celebrated the 100th anniversary of the Order of the Weasel, which was holding its 100th anniversary in Devane. The plates were delivered when promised. Both the manner of delivery and the plates' quality were also as promised. No matter, Corner sent the plates back. The plates had been sold to Corner for $20 each. Upon Corner's breach, Majesty resold the plates to another dealer at $18 each. No notice was given to Corner. The plates had a market value in Devane of $14 on May 3. H. Majesty has sued Corner for breach and asked for damages as measured by §2-708(1). Corner argues that damages must be measured by §2-706 because the resale occurred. Majesty rebuts that the section is not applicable because it failed to follow its limitations.

(a) Did Majesty fail to follow the procedures of §2-706?

(b) If Majesty did fail to follow the restrictions of the section, can Majesty opt for recovery under §2-708(1)? See Official Comment 2 to §2-708(1); §1-106; Official Comment 1 to §2-703; White and Summers, Uniform Commercial Code §7-7 (5th ed. 2000).

TERADYNE, INC. v. TELEDYNE INDUSTRIES
United States Court of Appeals, First Circuit, 1982
676 F.2d 865

WYZANSKI, Senior District Judge. In this diversity action, Teradyne, Inc. sued Teledyne Industries, Inc. and its subsidiary for damages pursuant to §2-708(2) of the UCC, Mass. Gen. Laws c.106 §2-708(2) (hereafter "§2-708(2)"). Teledyne does not dispute the facts that it is bound as a buyer under a sales contract with Teradyne, that it broke the contract, and that Teradyne's right to damages is governed by §2-708(2). The principal dispute concerns the calculation of damages.

The district court referred the case to a master whose report the district court approved and made the basis of the judgment here on appeal.

The following facts, derived from the master's report, are undisputed.

> On July 30, 1976 Teradyne, Inc. ("the seller"), a Massachusetts corporation, entered into a Quantity Purchase Contract ("the contract") which, though made with a subsidiary, binds Teledyne Industries, Inc., a California corporation ("the buyer"). That contract governed an earlier contract resulting from the seller's acceptance of the buyer's July 23, 1976 purchase order to buy at the list price of $98,400 (which was also its fair market value) a T-347A transistor test system ("the T-347A"). One consequence of such governance was that the buyer was entitled to a $984 discount from the $98,400 price.

The buyer canceled its order for the T-347A when it was packed ready for shipment scheduled to occur two days later. The seller refused to accept the cancellation.

The buyer offered to purchase instead of the T-347A a $65,000 Field Effects Transistor System ("the FET") which would also have been governed by "the contract." The seller refused the offer.

After dismantling, testing, and reassembling at an estimated cost of $614 the T-347A, the seller, pursuant to an order that was on hand prior to the cancellation, sold it for $98,400 to another purchaser (hereafter "resale purchaser").

Teradyne would have made the sale to the resale purchaser even if Teledyne had not broken its contract. Thus if there had been no breach, Teradyne would have made two sales and earned two profits rather than one.

The seller was a volume seller of the equipment covered by the July 23, 1976 purchase order. The equipment represented standard products of the seller and the seller had the means and capacity to duplicate the equipment for a second sale had the buyer honored its purchase order.

Teradyne being of the view that the measure of damages under §2-708(2) was the contract price less ascertainable costs saved as a result of the breach — see Jericho Sash and Door Company, Inc. v. Building Erectors, Inc., 362 Mass. 871, 872, 286 N.E.2d 343, (1972) (hereafter "*Jericho*") — offered as evidence of its cost prices its Inventory Standards Catalog ("the Catalog") — a document which was prepared for tax purposes not claimed to have been illegitimate, but which admittedly disclosed "low inventory valuations." Relying on that Catalog, Teradyne's Controller, McCabe, testified that the *only* costs which the seller saved as a result of the breach were:

direct labor costs associated with production	$ 3,301
material charges	17,045
sales commission on one T-347A	492
expense	1,800
TOTAL	$22,638

McCabe admitted that he had not included as costs saved the labor costs of employees associated with testing, shipping, installing, servicing, or fulfilling 10-year warranties on the T-347A (although he acknowledged that in forms of accounting for purposes other than damage suits the costs of those employees would not be regarded as "overhead"). His reason was that those costs would not have been affected by the production of one machine more or less. McCabe also admitted that he had not included fringe benefits which amounted to 12% in the case of both included and excluded labor costs.

During McCabe's direct examination, he referred to the 10-K report which Teradyne had filed with the SEC. On cross-examination McCabe admitted that the 10-K form showed that on average the seller's revenues were distributed as follows:

profit	9%
"selling and administrative" expense	26%
interest	1%

"cost of sales and engineering" (including substantial research and developmental costs incidental to a high technology business) 64%

He also admitted that the average figures applied to the T-347A.

Teledyne contended that the 10-K report was a better index of lost profits than was the Catalog. The master disagreed and concluded that the more appropriate formula for calculating Teradyne's damages under §2-708(2) was the one approved in *Jericho,* supra — " 'gross profit' including fixed costs but not costs saved as a result of the breach." He then stated:

> In accordance with the statutory mandate that the remedy "be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed," M.G.L. c.106 §1-106(1), I find that the plaintiff has met its burden of proof of damages, and has established the accuracy of its direct costs and the ascertainability of its variable costs with reasonable certainty and "whatever definiteness and accuracy the facts permit." Comment l to §1-106(1) of the UCC.

In effect, this was a finding that Teradyne had saved only $22,638 as a result of the breach. Subtracting that amount and also the $984 quantity discount from the original contract price of $98,400, the master found that the lost "profit (including reasonable overhead)" was $74,778. To that amount the master added $614 for "incidental damages" which Teradyne incurred in preparing the T-347A for its new customer. Thus he found that Teradyne's total §2-708(2) damages amounted to $75,392.

The master declined to make a deduction from the $75,392 on account of the refusal of the seller to accept the buyer's offer to purchase an FET tester in partial substitution for the repudiated T-347A.

At the time of the reference to the master, the court, without securing the agreement of the parties, had ordered that the master's costs should be paid by them in equal parts.

Teradyne filed a motion praying that the district court (1) should adopt the master's report allowing it to recover $75,392, and (2) should require Teledyne to pay all the master's costs. The district court, without opinion, entered a judgment which grants the first prayer and denies the second. Teledyne appealed from the first part of the judgment; Teradyne appealed from the second part.

1. The parties are agreed that §2-708(2) applies to the case at bar. Inasmuch as this conclusion is not plain from the text, we explain the reasons why we concur in that agreement.

Section 2-708(2) applies only if the damages provided by §2-708(1) are inadequate to put the seller in as good a position as performance would have done. Under §2-708(1) the measure of damages is the difference between unpaid contract price and market price. Here the unpaid contract price was $97,416 and the market price was $98,400. Hence no damages would be recoverable under §2-708(1). On the other hand, if the buyer had performed, the seller (1) would have had the proceeds of two contracts, one with the buyer Teledyne and the other with the "resale purchaser" and (2) *it seems* would have had in 1976-7 one more T-347A sale.

A literal reading of the last sentence of §2-708(2) — providing for "due credit for payments or proceeds of resale" — would indicate that Teradyne recovers nothing because the proceeds of the resale exceeded the price set in the Teledyne-Teradyne contract. However, in light of the statutory history of the subsection, it is universally agreed that in a case where after the buyer's default a seller resells the goods, the proceeds of the resale are not to be credited to the buyer if the seller is a lost volume seller[2] — that is, one who had there been no breach by the buyer, could and would have had the benefit of both the original contract and the resale contract.

Thus, despite the resale of the T-347A, Teradyne is entitled to recover from Teledyne what §2-708(2) calls its expected "profit (including reasonable overhead)" on the broken Teledyne contract.[4]

2. The term "lost volume seller" was apparently coined by Professor Robert J. Harris in his article A Radical Restatement of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared, 18 Stan. L. Rev. 66 (1965). The terminology has been widely adopted. See Famous Knitwear Corp. v. Drug Fair Inc., 493 F.2d 251, 254 n.5 (4th Cir. 1974); Snyder v. Herbert Greenbaum & Assoc. Inc., 38 Md. App. 144, 157, 380 A.2d 618, 624 (1977); Publicker Industries, Inc. v. Roman Ceramics Corp., 652 F.2d 340, 346 (3d Cir. 1981). See Restatement (Second) Contracts §347 Comment f; J. White and R. Summers, Uniform Commercial Code, 2d ed. (1980) (hereafter "White and Summers") §7-9, particularly p.276 first full paragraph.

4. Ibid. White and Summers at pp. 284-285 give the following suppositious case which parallels the instant case. Boeing is able to make and sell in one year 100 airplanes. TWA contracts to buy the third plane off the assembly line, but it breaks the contract and Boeing resells the plane to Pan Am which had already agreed to buy the fourth plane. Because of the breach Boeing sells only 99 aircraft during the year. White and Summers say that the right result, despite the words of §2-708(2), is that Boeing recovers from TWA both the net profit and the overhead components of the TWA contract price, no credit being given for any part of the proceeds Boeing received from its sale to Pan Am.

We do not agree with the third sentence in the following Comment f to Restatement (Second) Contract §347 insofar as it indicates that a volume seller like Teradyne may recover from a defaulting buyer only the lost *net* profit on the original contract.

> f. Lost volume. Whether a subsequent transaction is a substitute for the broken contract sometimes raises difficult questions of fact. If the injured party could and would have entered into the subsequent contract, even if the contract had not been broken, and could have had the benefit of both, he can be said to have "lost volume" and the subsequent transaction is not a substitute for the broken contract. The injured party's damages are then based on the *net* profit that he has lost as a result of the broken contract. Since entrepreneurs try to operate at optimum capacity, however, it is possible that an additional transaction would not have been profitable and that the injured party would not have chosen to expand his business by undertaking it had there been no breach. It is sometime assumed that he would have done so, but the question is one of fact to be resolved according to the circumstances of each case. See illustration 16. See also Uniform Commercial Code §2-708(2). [Emphasis added.]

Limiting the volume seller's recovery to lost net profit does not permit the recovery of reasonable overhead for which provision is specifically made in the text of §2-708(2). The reason for the allowance of overhead is set forth in Vitex Mfg. Corp. v. Caribtex Corp., 377 F.2d 795, 799 (3d Cir. 1967) (hereafter "Vitex"):

> as the number of transaction[s] over which overhead can be spread becomes smaller, each transaction must bear a greater portion or allocate share of the fixed overhead cost. Suppose a company has fixed overhead of $10,000 and engages in five similar transactions; then the receipts of each transaction would bear $2000 of overhead expense. If the company is now forced to spread this $10,000 over only four

2. Teledyne not only "does not dispute that damages are to be calculated pursuant to §2-708(2)" but concedes that the formula used in Jericho Sash & Door Co. v. Building Erectors Inc., 362 Mass. 871, 286 N.E.2d 343 (1972), for determining lost profit including overhead — that is, the formula under which direct costs of producing and selling manufactured goods are deducted from the contract price in order to arrive at "profit (including reasonable overhead)" as that term is used in §2-708(2) — "is permissible provided any variable expenses are identified."

What Teledyne contends is that all variable costs were not identified because the cost figures came from a catalog, prepared for tax purposes, which did not fully reflect all direct costs. The master found that the statement of costs based on the catalog was reliable and that Teledyne's method of calculating costs based on the 10-K statements was not more accurate. Those findings are not clearly erroneous and therefore we may not reverse the judgment on the ground that allegedly the items of cost which were deducted are unreliable. . . .

Teledyne's more significant objection to Teradyne's and the master's application of the *Jericho* formula in the case at bar is that neither of them made deductions on account of the wages paid to testers, shippers, installers, and other Teradyne employees who directly handled the T-347A, or on account of the fringe benefits amounting in the case of those and other employees to 12 percent of wages. Teradyne gave as the reason for the omission of the wages of the testers, etc. that those wages would not have been affected if each of the testers, etc. handled one product more or less. However, the work of those employees entered as directly into production and supplying the T-347A as did the work of a fabricator of a T-347A. Surely no one would regard as "reasonable overhead" within §2-708(2) the wages of a fabricator of a T-347A even if his wages were the same whether he made one product more or less. We conclude that the wages of the testers, etc. likewise are not part of overhead and as a "direct cost" should have been deducted from the contract price. A fortiori fringe benefits amounting to 12 percent of wages should also have been deducted as direct costs. Taken together we cannot view these omitted items as what *Jericho* called "relatively insignificant items." We, therefore, must vacate the district court's judgment. In accordance with the procedure followed in Publicker Industries, Inc. v. Roman Ceramics Corp., 603 F.2d 1065, 1072-1073 (3d Cir. 1979) and Famous Knitwear Corp. v. Drug Fair, Inc., 493 F.2d 251, 255-256 (4th Cir. 1974), we remand this case so that with respect to the omitted direct labor costs specified above the parties may offer further evidence and the court may make findings "with whatever definiteness and accuracy the facts permit, but no more." *Jericho,* p.872, 286 N.E.2d 343.

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transactions, then the overhead expense per transaction will rise to $2500, significantly reducing the profitability of the four remaining transactions. Thus, where the contract is between businessmen familiar with commercial practices, as here, the breaching party should reasonably foresee that his breach will not only cause a loss of "clear" profit, but also a loss in that the profitability of other transactions will be reduced. Resolute Ins. Co. v. Percy Jones, Inc., 198 F.2d 309 (C.A. 10, 1952). Cf. In re Kellett Aircraft Corp., 191 F.2d 231 (C.A. 3, 1951). . . .

There are two other matters which may properly be dealt with before the case is remanded to the district court.

3. Teledyne contends that Teradyne was required to mitigate damages by acceptance of Teledyne's offer to purchase instead of the T-347A the FET system.

That point is without merit.

The meaning of Teledyne's offer was that if Teradyne would forego its profit-loss claim arising out of Teledyne's breach of the T-347A contract, Teledyne would purchase another type of machine which it was under no obligation to buy. The seller's failure to accept such an offer does not preclude it from recovering the full damages to which it would otherwise be entitled. As Restatement (Second) Contracts, §350 Comment c indicates, there is no right to so-called mitigation of damages where the offer of a substitute contract "is conditioned on surrender by the injured party of his claim for breach." "One is not required to mitigate his losses by accepting an arrangement with the repudiator if that is made conditional on his surrender of his rights under the repudiated contract." 5 Corbin, Contracts 2nd (1964) §1043 at 274. . . .

Generally it is an abuse of discretion for a district court without cause to charge the prevailing party the costs of the reference to a master. See Popeil Brothers, Inc. v. Schick Electric, Inc., 516 F.2d 772, 774 (7th Cir. 1975); Chemical Bank & Trust Co. v. Prudence-Bonds Corp., 207 F.2d 67, 77-78 (2d Cir. 1953).

As the matter stood when the district judge denied Teradyne's motion to require Teledyne to pay all the master's costs, while Teradyne had not prevailed on all the issues presented in its complaint which sought a recovery of $98,400, it had recovered $75,392 by prevailing on all the issues finally submitted to the master. However, as a result of the present opinion that $75,392 recovery will be reduced by an unpredictable amount. Under these circumstances, we deem it appropriate to vacate the part of the judgment denying Teradyne's motion, and we remand the case to allow the district court after it has decided how much to deduct from the $75,392 recovery to determine afresh how the master's costs should be allocated. In making its determination the district court may exercise a reasonable discretion. It is not required to impose all the master's costs on Teledyne on the theory that since Teradyne recovered a substantial part of what it sought, it was the prevailing party. If it so chooses, the district court may adopt some other approach — for example, an allocation of the master's costs by reference to the ratio of the amount which Teradyne finally recovers to the amount it originally sought in the complaint or to the amount it sought when the case was submitted to the master.

The district court's judgment is vacated and the case is remanded to the district court to proceed in accordance with this opinion.

QUESTIONS AND NOTE

1. Are all sellers of goods "lost volume sellers"? If you agree to sell your car to your neighbor and he later changes his mind, are you entitled to lost volume profits?

"Lost volume sellers" may be found outside of the coverage of the UCC and a recovery similar to that under §2-708(2) is typically available in such cases. For an intersting case applying the term to a volume lessor of rental laundry equipment, see Jetz Service Co., Inc. v. Salina Properties, 19 Kan. App.2d 144, 865 P.2d 1051 (1993). The court allowed the plaintiff to recover the lost profit without accounting for any amounts received on other leases under the common law equivalent of §2-708(2): Comment f of Restatement (Second) of Contracts, §347. The plaintiff there had sufficient customers and rental equipment so that leasing the equipment defendant leased to another lessee did not make the plaintiff whole.

2. Why does the court draw a distinction between overhead costs and variable expenses (which the court calls "direct costs")? Which was which here? For an interesting case demonstrating the importance of going to court well armed with supporting evidence of costs and profit, see Sure-Trip, Inc. v. Westinghouse Engineering, 47 F.3d 526 (2d Cir. 1995). There the court agreed that taxable income from sale of products on tax return would not necessarily reflect profit under UCC §2-708(2). Can you see why?

3. If the buyer of goods does not reject them and tries to recover their price, but instead accepts them in spite of their nonconformities, the buyer may wish to sue for breach of warranty damages. Under the UCC such damages are measured the same way that the common law measured them (see Hawkins v. McGee at the beginning of this chapter): the difference between the value of the goods as warranted and the value of the goods delivered, plus incidental and consequential damages. See UCC §§2-714(2) and (3) and 2-715. Where the goods are in disrepair, that amount will typically equal the cost of repair. As we shall see in Chapter 7, the buyer also may be able to reject the goods or revoke acceptance of the goods in an appropriate case.

II. RESTITUTION

A true contract is based on the intention of the parties to have a contract, and this intention is found in the express or implied terms of the agreement. Most contracts need not comply with any particular formalities (though some must be reflected by a writing, see Chapter 4). Where the past dealings of the parties so indicate, a contract can be said to be *implied in fact,* meaning that a contract is intended by the parties even though none of its terms are expressly agreed upon. If, for example, the parties originally sign a sales agreement, but through the years deviate from its terms as the circumstances change, their agreement becomes a contract implied in fact, see UCC §2-208 (Course of Performance),[1] though, again, its meaning depends on the intention of the parties, which is gathered from their conduct.

With this sort of true contract, contrast a contract *implied in law,* sometimes called a *quasi-contract.* Such a contract is imposed upon the

1. Changed to §1-303 in the revised version of Article 1.

parties irrespective of their actual intent. This arises in the situation where one party has the benefit of money, property, or services of another, and it would be unjust to allow that party to keep the benefit without paying for it. Where this unjust enrichment would occur, the law conclusively presumes a promise of restitution. For this reason, such an action is also known as an action in *restitution*. The concept includes a number of actions that have as a common goal the prevention of the defendant's unjust enrichment. Examples of such actions include the constructive trust and equitable accounting utilized when a fiduciary relationship has been violated by an agent or trustee. We do not have the space to develop the subject of restitution completely in these materials. However, we will explore the doctrine to the extent it is recognized by the drafters of the Restatement (Second) of Contracts as particularly relevant in the contractual setting.[2] There the concept of restitution is often used:

(1) as an independent theory of recovery when there is no enforceable contract because of lack of mutual assent or some other formation defect — "quasi-contract" actions;
(2) as an alternative method to measure damages, or as an independent remedy, for a party not in breach of an enforceable contract;
(3) as an independent remedy for a party who has breached an enforceable contract;
(4) as an independent theory of recovery when a contract is unenforceable because of some defect such as a lack of a requisite writing (a Statute of Frauds problem), impossibility, mistake, or incapacity.

The following materials consider the use of restitution in the first three instances. The fourth use of restitution will be discussed as the statute of frauds, impossibility, and other bars to enforceability are covered in later chapters.

A. *Restitution When There Is No Contract: Quasi-Contract*

Quasi-contract actions developed from the common law action of general assumpsit, which was used to provide relief for *both* contracts implied in fact (based on the intention of the parties) and contracts implied in law (imposed regardless of the parties' intent). The latter are also called quasi-contracts because a true contract is primarily based on the intention of the parties to be bound.

The writ of general assumpsit was divided into different parts called the *common counts,* three of which are still much in use today. These theories of action are

(1) *Quantum meruit:* the value of services rendered to another.
(2) *Quantum valebant:* the value of property delivered to another.

2. There is also a Restatement of Restitution.

(3) *Money had and received:* money held by one person but belonging to another.

In a quasi-contractual action one person will have received services, property, or money under circumstances where that person would be unjustly enriched if allowed to keep same, so the law allows an action in restitution to recover the benefits conferred.

MAGLICA v. MAGLICA
California Court of Appeals, 1998
66 Cal. App. 4th 442, 78 Cal. Rptr. 2d 101

total confuse case

SILLS, P.J.

I. INTRODUCTION

This case forces us to confront the legal doctrine known as "quantum meruit" in the context of a case about an unmarried couple who lived together and worked in a business solely owned by one of them. Quantum meruit is a Latin phrase, meaning "as much as he deserves,"[6] and is based on the idea that someone should get paid for beneficial goods or services which he or she bestows on another.[7]

which kind?

The trial judge instructed the jury that the reasonable value of the plaintiff's services was either the value of what it would have cost the defendant to obtain those services from someone else or the "value by which" he had "benefitted as a result" of those services. The instruction allowed the jury to reach a whopping number in favor of the plaintiff — $84 million — because of the tremendous growth in the *value* of the business over the years.

As we explain later, the finding that the couple had no contract in the first place is itself somewhat suspect because certain jury instructions did not accurately convey the law concerning implied-in-fact contracts. However, assuming that there was indeed no contract, the quantum meruit award cannot stand. The legal test for recovery in quantum meruit is not the value of the benefit, but value of the services (assuming, of course, that the services were beneficial to the recipient in the first place). In this case the failure to appreciate that fine distinction meant a big difference. People who work for businesses for a period of years and then walk away with $84 million do so because they have acquired some *equity* in the business, not because $84 million is the going rate for the services of even the most workaholic manager. In substance, the court was allowing

6. See Black's Law Dictionary (5th ed. 1979) page 1119, column 1.

7. See, e.g., Earhart v. William Low Co. (1979) 25 Cal. 3d 503, 518 [158 Cal. Rptr. 887, 600 P.2d 1344] ("Where one person renders services at the request of another and the latter obtains benefits from the services, the law ordinarily implies a promise to pay for the services."); Palmer v. Gregg (1967) 65 Cal. 2d 657, 660 [56 Cal. Rptr. 97, 422 P.2d 985] ("The measure of recovery in *quantum meruit* is the reasonable value of the services rendered, provided they were of direct benefit to the defendant."); Hedging Concepts, Inc. v. First Alliance Mortgage Co. (1996) 41 Cal. App. 4th 1410, 1419 [49 Cal. Rptr. 2d 191] ("A quantum meruit or quasi-contractual recovery rests upon the equitable theory that a contract to pay for services rendered is implied by law for reasons of justice. . . .").

the jury to value the plaintiff's services as if she had made a sweetheart stock option deal-yet such a deal was precisely what the jury found she did not make. So the $84 million judgment cannot stand.

On the other hand, plaintiff was hindered in her ability to prove the existence of an implied-in-fact contract by a series of jury instructions which may have misled the jury about certain of the factors which bear on such contracts. The instructions were insufficiently qualified. They told the jury flat out that such facts as a couple's living together or holding themselves out as husband and wife or sharing a common surname did not mean that they had any agreement to share assets. That is not *exactly* correct. Such factors can, indeed, when taken together with other facts and in context, show the existence of an implied-in-fact contract. At most the jury instructions should have said that such factors do not *by themselves necessarily* show an implied-in-fact contract. Accordingly, when the case is retried, the plaintiff will have another chance to prove that she indeed had a deal for a share of equity in the defendant's business.

II. Facts

The important facts in this case may be briefly stated. Anthony Maglica, a Croatian immigrant, founded his own machine shop business, Mag Instrument, in 1955. He got divorced in 1971 and kept the business. That year he met Claire Halasz, an interior designer. They got on famously, and lived together, holding themselves out as man and wife — hence Claire began using the name Claire Maglica — but never actually got married. And, while they worked side by side building the business, Anthony never agreed — or at least the jury found Anthony never agreed — to give Claire a share of the business. When the business was incorporated in 1974 all shares went into Anthony's name. Anthony was the president and Claire was the secretary. They were paid equal salaries from the business after incorporation. In 1978 the business began manufacturing flashlights, and, thanks in part to some great ideas and hard work on Claire's part (e.g., coming out with a purse-sized flashlight in colors), the business boomed. Mag Instrument, Inc., is now worth hundreds of millions of dollars.

In 1992 Claire discovered that Anthony was trying to transfer stock to his children but not her, and the couple split up in October. In June 1993 Claire sued Anthony for, among other things, breach of contract, breach of partnership agreement, fraud, breach of fiduciary duty and quantum meruit. The case came to trial in the spring of 1994. The jury awarded $84 million for the breach of fiduciary duty and quantum meruit causes of action, finding that $84 million was the reasonable value of Claire's services.

III. Discussion

[The court first found that there was no fiduciary duties between the parties.]

B. QUANTUM MERUIT ALLOWS RECOVERY FOR THE VALUE OF BENEFICIAL SERVICES, NOT THE VALUE BY WHICH SOMEONE BENEFITS FROM THOSE SERVICES

The absence of a contract between Claire and Anthony, however, would not preclude her recovery in quantum meruit: As every first year law student knows or should know, recovery in quantum meruit does not require a contract. (See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §112, p. 137; see, e.g., B.C. Richter Contracting Co. v. Continental Cas. Co. (1964) 230 Cal. App. 2d 491, 499-500 [41 Cal. Rptr. 98].)[8]

The classic formulation concerning the measure of recovery in quantum meruit is found in Palmer v. Gregg, supra, 65 Cal. 2d 657. Justice Mosk, writing for the court, said: "The measure of recovery in *quantum meruit* is the reasonable value of the services rendered *provided* they were of direct benefit to the defendant." (Id. at p. 660, italics added; see also Producers Cotton Oil Co. v. Amstar Corp. (1988) 197 Cal. App. 3d 638, 659 [242 Cal. Rptr. 914].)

The underlying idea behind quantum meruit is the law's distaste for unjust enrichment. If one has received a benefit which one may not justly retain, one should "restore the aggrieved party to his [or her] former position by return of the *thing* or its *equivalent* in money." (1 Witkin, Summary of Cal. Law, supra, Contracts, §91, p. 122.)

The idea that one must be *benefited* by the goods and services bestowed is thus integral to recovery in quantum meruit; hence courts have always required that the plaintiff have bestowed some benefit on the defendant as a prerequisite to recovery. (See Earhart v. William Low Co., supra, 25 Cal. 3d 503, 510 [explaining origins of quantum meruit recovery in actions for recovery of money tortiously retained; law implied an obligation to restore " 'benefit,' unfairly retained by the defendant"].)

But the threshold requirement that there be a benefit from the services can lead to confusion, as it did in the case before us. It is one thing to require that the defendant be benefited by services, it is quite another to *measure* the reasonable value of those *services* by the value by which the defendant was "benefited" as a *result* of them. Contract price and the reasonable value of services rendered are two separate things; sometimes the reasonable value of services exceeds a contract price. (See B. C. Richter Contracting Co. v. Continental Cas. Co., supra, 230 Cal. App. 2d at p. 500.) And sometimes it does not.

At root, allowing quantum meruit recovery based on "resulting benefit" of services rather than the reasonable value of beneficial services affords the plaintiff the best of both contractual and quasi-contractual recovery. Resulting benefit is an open-ended standard, which, as we have mentioned earlier, can result in the plaintiff obtaining recovery amounting to de facto ownership in a business all out of reasonable relation to the value of services rendered. After all, a particular service timely rendered

8. The doctrine can become trickier when an actual contract is involved. (See Hedging Concepts, Inc. v. First Alliance Mortgage Co., supra, 41 Cal. App. 4th 1410, 1419-1420 [quantum meruit recovery cannot conflict with terms of actual contract between parties, lest the court in effect impose its own ideas of a fair deal on the parties].)

can have, as Androcles was once pleasantly surprised to discover in the case of a particular lion, disproportionate value to what it would cost on the open market.

The facts in this court's decision in Passante v. McWilliam (1997) 53 Cal. App. 4th 1240 [62 Cal. Rptr. 2d 298] illustrate the point nicely. In *Passante*, the attorney for a fledgling baseball card company gratuitously arranged a needed loan for $100,000 at a crucial point in the company's history; because the loan was made the company survived and a grateful board promised the attorney a 3 percent equity interest in the company. The company eventually became worth more than a quarter of a billion dollars, resulting in the attorney claiming *$33 million* for his efforts in arranging but a single loan. This court would later conclude, because of the attorney's duty to the company as an attorney, that the promise was unenforceable. (See id. at pp. 1247-1248.) Interestingly enough, however, the one cause of action the plaintiff in *Passante* did not sue on was quantum meruit; while this court opined that the attorney should certainly get paid "something" for his efforts, a *$33 million* recovery in quantum meruit would have been too much. Had the services been bargained for, the going price would likely have been simply a reasonable finder's fee. (See id. at p. 1248.)

The jury instruction given here allows the value of services to depend on their *impact* on a defendant's business rather than their reasonable value. True, the services must be of benefit if there is to be any recovery at all; even so, the benefit is not necessarily related to the reasonable value of a particular set of services. Sometimes luck, sometimes the impact of others makes the difference. Some enterprises are successful; others less so. Allowing recovery based on resulting benefit would mean the law imposes an exchange of equity for services, and that can result in a windfall — as in the present case — or a serious shortfall in others. Equity-for-service compensation packages are extraordinary in the labor market, and always the result of specific bargaining. To impose such a measure of recovery would make a deal for the parties that they did not make themselves. If courts cannot use quantum meruit to change the terms of a contract which the parties did make (see Hedging Concepts, Inc. v. First Alliance Mortgage Co., supra, 41 Cal. App. 4th at p. 1420), it follows that neither can they use quantum meruit to impose a highly generous and extraordinary contract that the parties did not make. . . .

Telling the jury that it could measure the value of Claire's services by "[t]he value by which Defendant has benefited as a result of [her] services" was error. It allowed the jury to value Claire's services as having bought her a de facto ownership interest in a business whose owner never agreed to give her an interest. On remand, that part of the jury instruction must be dropped. . . .

D. CERTAIN JURY INSTRUCTIONS MAY HAVE MISLED THE JURY INTO FINDING THERE WAS NO IMPLIED CONTRACT WHEN IN FACT THERE WAS ONE

As we have shown, the quantum meruit damage award cannot stand in the wake of the jury's finding that Claire and Anthony had no agreement to share the equity in Anthony's business. But the validity of that very

finding itself is challenged in Claire's protective cross-appeal, where she attacks a series of five jury instructions, specially drafted and proferred by Anthony. These instructions are set out in the margin.[9] We agree with Claire that it was error for the trial court to give three of these five instructions. The three instructions are so infelicitously worded that they might have misled the jury into concluding that evidence which can indeed support a finding of an implied contract could not.

The problem with the three instructions is this: They isolate three uncontested facts about the case: (1) living together, (2) holding themselves out to others as husband and wife, (3) providing services "such as" being a constant companion and confidant — and, seriatim, tell the jury that these facts definitely do not mean there was an implied contract. True, none of these facts *by themselves and alone* necessarily *compels* the conclusion that there was an implied contract. But that does not mean that these facts cannot, in conjunction with all the facts and circumstances of the case, establish an implied contract. In point of fact, they can.

Unlike the "quasi-contractual" quantum meruit theory which operates *without* an actual agreement of the parties, an implied-in-fact contract entails an actual contract, but one manifested in conduct rather than expressed in words. (See Silva v. Providence Hospital of Oakland (1939) 14 Cal. 2d 762, 773 [97 P.2d 798] ["The true implied contract, then, consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words."]; McGough v. University of San Francisco (1989) 214 Cal. App. 3d 1577, 1584 [263 Cal. Rptr. 404] ["An implied-in-fact contract is one whose existence and terms are manifested by conduct."]; 1 Witkin, Summary of Cal. Law, supra, Contracts, §11, p. 46 ["The distinction between *express* and *implied in fact* contracts relates only to the *manifestation of assent*; both types are based upon the expressed or apparent intention of the parties."].)[10]

9. Here are the five:

1. No Contract Results From Parties Holding Themselves out as Husband and Wife. You cannot find an agreement to share property or form a partnership from the fact that the parties held themselves out as husband and wife. The fact that unmarried persons live together as husband and wife and share a surname does not mean that they have any agreement to share earnings or assets.

2. No Implied Contract From Living Together. You cannot find an implied contract to share property or form a partnership simply from the fact that the parties lived together[.]

3. Creation of an Implied Contract. . . . The fact the parties are living together does not change any of the requirements for finding an express or implied contract between the parties.

4. Companionship Does Not Constitute Consideration. Providing services such as a constant companion and confidant does not constitute the consideration required by law to support a contract to share property, does not support any right of recovery and such services are not otherwise compensable.

5. Obligations Imposed by Legal Marriage. In California, there are various obligations imposed upon parties who become legally and formally married. These obligations do not arise under the law merely by living together without a formal and legal marriage.

10. Because an implied-in-fact contract can be found where there is no expression of agreement in *words*, the line between an implied-in-fact contract and recovery in quantum

In Alderson v. Alderson (1986) 180 Cal. App. 3d 450, 461 [225 Cal. Rptr. 610], the court observed that a number of factors, *including*

- direct testimony of an agreement;
- holding themselves out socially as husband and wife;
- the woman and her children's taking the man's surname;
- pooling of finances to purchase a number of joint rental properties;
- joint decisionmaking in rental property purchases;
- rendering bookkeeping services for, paying the bills on, and collecting the rents of, those joint rental properties; and
- the nature of title taken in those rental properties

could all support a finding there was an implied agreement to share the rental property acquisitions equally.

We certainly do not say that living together, holding themselves out as husband and wife, and being companions and confidants, even taken together, are *sufficient in and of themselves* to show an implied agreement to divide the equity in a business owned by one of the couple. However, *Alderson* clearly shows that such facts, together with others bearing more directly on the business and the way the parties treated the equity and proceeds of the business, *can* be part of a series of facts which do show such an agreement. The vice of the three instructions here is that they affirmatively suggested that living together, holding themselves out, and companionship could not, as a matter of law, even be *part* of the support for a finding of an implied agreement. That meant the jury could have completely omitted these facts when considering the other factors which might also have borne on whether there was an implied contract.

On remand, the three instructions should not be given. The jury should be told, rather, that while the facts that a couple live together, hold themselves out as married, and act as companions and confidants toward each other do not, by themselves, show an implied agreement to share property, those facts, when taken together and in conjunction with other facts bearing more directly on the alleged arrangement to share property, can show an implied agreement to share property.

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meruit — where there may be no actual agreement at all — is fuzzy indeed. We will not attempt, in dicta, to clear up that fuzziness here. Suffice to say that because quantum meruit is a theory which implies a promise to pay for services as a *matter of law for reasons of justice* (Hedging Concepts, Inc. v. First Alliance Mortgage Co., supra, 41 Cal. App. 4th at p. 1419), while implied-in-fact contracts are predicated on actual agreements, albeit not ones expressed in words (Silva v. Providence Hospital of Oakland, supra, 14 Cal. 2d at p. 773; McGough v. University of San Francisco, supra, 214 Cal. App. 3d at p. 1584), recovery in quantum meruit is necessarily a different theory than recovery on an implied-in-fact contract. (Cf. 1 Witkin, Summary of Cal. Law, supra, Contracts, §112, pp. 137-138 [noting uncertainty created by decisions which were not clear about whether quantum meruit was based on implied-in-law or implied-in-fact contracts].)

Neither do we address the quantum of proof necessary to support recovery on a quantum meruit theory or attempt to divine the dividing line between services which may be so gratuitously volunteered under circumstances in which there can be no reasonable expectation of payment and services which do qualify for recovery in quantum meruit. These matters have not been briefed and may be left for another day.

Disposition

The judgment is reversed. The case is remanded for a new trial. At the new trial the jury instructions identified in this opinion as erroneous shall not be given. In the interest of justice both sides will bear their own costs on appeal.

Problem 82

When Elsie Maynard passed out in the department store, she was rushed to Tower Hospital for emergency medical care. After two weeks in a coma, she died. May the hospital recover its expenses from her estate? See In re Crisan Estate, 362 Mich. 569, 107 N.W.2d 907 (1961). Would it make a difference if she had tried to commit suicide? If she were a well-known Christian Scientist?

Problem 83

All the neighbors on the block, except Ruth McCarty, signed contracts with Quick Construction, Inc., to have curbing installed. Ruth decided that the price was too high and she told Quick's manager that she did not want the curbing. Deciding that the block would look odd if her lot were left uncurbed, Quick put curbing along McCarty's property at the same time it installed the rest. Quick then sent her a bill for her share of the project. The curbing is beautiful, is worth $500 (and the bill is only for $350), and has improved the value of her house by $1,000. What must she pay?

Ø Poorly think so

FEINGOLD v. PUCELLO
Pennsylvania Superior Court, 1995
439 Pa. Super. 509, 654 A.2d 1093

Olszewski, Judge:

On February 2, 1979, Barry Pucello was involved in a motor vehicle accident. One of Pucello's co-workers knew Allen Feingold, a personal injury attorney, and asked if he could give Feingold Pucello's name. Pucello agreed.

Feingold called Pucello that very evening. Pucello explained that he wasn't feeling well, having just been in an accident, and would call back tomorrow. Feingold recommended a doctor he knew, and set up an appointment for Pucello. The next day, the two discussed the possibility of Feingold's representing Pucello. Pucello gave Feingold some basic information, but did not discuss fee arrangements.

Feingold then went to work on the case. He inspected the accident site, took pictures, obtained the police report, and secured an admission of liability from the other driver. He had still never met with Pucello in

person. Towards the end of February, Feingold mailed a formal contingency fee agreement to Pucello, which called for a 50/50 split of the recovery, after costs. Pucello balked at the high fee, and found other counsel. Pucello told Feingold he could keep any pictures, reports, and admissions; Feingold never forwarded the file.

About a year later, Feingold sued Pucello in quantum meruit. A board of arbitrators unanimously found for Pucello. Feingold appealed to the Philadelphia Court of Common Pleas. After much procedural delay, the parties had a de novo bench trial.[1] The trial court found that while Feingold might have had a quantum meruit claim if Pucello retained him and then fired him midway through the case, here the parties never even entered into an attorney-client relationship. The trial court thus found for Pucello, and Feingold appeals.

Feingold argues that Pucello orally agreed to have Feingold represent him, so he is entitled to be paid for the work he did even though Pucello never signed a written fee agreement. The trial court found that by working on the case without the agreement, Feingold proceeded at his own risk. Since there was never a meeting of the minds regarding representation, there was no contract and no obligation to reimburse for his work on the case. Feingold acknowledges the absence of an express contract, but argues that the circumstances imply a contract to support quantum meruit recovery. He contends that Pucello enjoyed the benefits of his efforts despite rejecting his work product: Feingold got Pucello a doctor's appointment, and once the tortfeasor admitted liability, he was unlikely to deny it later.

Quantum meruit is an equitable remedy. Dept. of Environmental Resources v. Winn, 142 Pa. Cmwlth. 375, 597 A.2d 281, 284 n. 3 (1991), alloc. denied 529 Pa. 654, 602 A.2d 863 (1992). We therefore begin our analysis by noting that Feingold comes to this court with hands smudged by the ink which should have been used to sign his fee agreement. Pa. R.C.P. 202, now rescinded, was in effect in the late 1970's. This rule required attorneys to put contingency fee agreements in writing. Pa. R.C.P. 202, 42 Pa. C.S.A. The rule was rescinded because it duplicated Rule 1.5(b) of the Rules of Professional Conduct, which requires attorneys to state their contingency fee in writing "before, or within a reasonable time after commencing representation." As the trial court aptly noted, the whole point of these rules is to avoid precisely the sort of situation Feingold brings to the court. Opinion 3/29/94 at 8.

Secondly, Feingold's proposed contingency fee of 50% of the recovery, after costs, is breathtakingly high. It struck the trial court as unethical. N.T. 7/13/88 at 21. By pricing his services at the top end of the spectrum, Feingold should expect some prospective clients to balk. This makes stating the fee agreement up front all the more important. Contingency fee practice used to be badly abused by practitioners who would assure their injured clients not to worry — he case was in good hands. When the relationship had passed the point of no return and the client's reliance was entrenched, then the attorney mentioned what his hefty percentage of the take would

1. Pucello had since moved to California, but was represented by counsel at the trial.

be. The only way to counter this abuse was to require that attorneys state contingency fees up front and in writing. This is also why the requirement evolved from a procedural rule into an ethical rule. We think Feingold's abject failure to comply with this rule precludes any equitable recovery.

Even without these equitable considerations, Feingold's claim still fails on its merits. In rejecting the proposed fee agreement, Pucello told Feingold to keep his work-product. Thus Feingold did not confer any tangible benefit on Pucello. Feingold argues that having admitted liability to Feingold, the tortfeasor was constrained from altering his story, which facilitated settlement. If so, then Feingold's claim would more properly lie against Pucello's attorney, who testified that he still could have won the case without Feingold's preliminary work. Id. at 32.[2] Thus, Pucello would have gotten his recovery either way; it is only Pucello's attorney whose job might have been facilitated by Feingold's services. See Johnson v. Stein, 254 Pa. Super. 41, 385 A.2d 514 (1978).

Feingold likens himself to the surgeon who may render emergency medical treatment first, and then ask for payment later. Appellant's reply brief at 1. Pucello's claim had a two-year statute of limitation, and was for the sole purpose of obtaining money, not saving his life. Feingold could have held off working on the case long enough to properly commence the relationship by stating his contingency fee up front, and should have under our procedural and ethical rules.[3] When Pucello learned of Feingold's exorbitant rates, he understandably balked and told Feingold to keep his file. Feingold's unclean hands and Pucello's rejection of his services clearly preclude any quantum meruit recovery.

Order affirmed.

DEL SOLE, J., concurs in the result.

BECK, J., files a concurring opinion.

BECK, Judge, concurring.

I concur in the result reached by my colleague. I do so, however, on the narrow basis that appellant has failed to make out a claim in quasi-contract that would entitle him to restitution from appellees.

Appellant has conceded that the facts in this case do not support a finding that a contract for legal services was reached between him and appellee Pucello. His only claim on appeal is that the trial court erred in denying his quantum meruit claim on the basis that there had been no meeting of the minds between the parties. In this appellant is correct, for "[u]nlike true contracts, quasi-contracts are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice." Schott v. Westinghouse Electric Corporation, 436 Pa. 279, 290, 259 A.2d 443, 449 (1969), quoting Restatement (Second) of Contracts, §5, comment b. at 24. "Quasi contracts may be found in the absence of any expression of assent by the party to be charged and may indeed be found

2. Pucello's attorney also offered to reimburse Feingold for his out-of-pocket expenses, though not for his time. Id.

3. In fact, both old Pa. R.C.P. 202 and ethics rule 1.5(b) are mandatory, not aspirational.

in spite of the party's contrary intention." Schott v. Westinghouse Electric Corporation, supra at 290-91, 259 A.2d at 449. Martin v. Little, Brown and Co., 304 Pa. Super. 424, 430-431, 450 A.2d 984, 988 (1981). However, this error by the trial court does not warrant reversal of its judgment because it is clear that the facts of this case cannot, as a matter of law, support a quantum meruit recovery by appellant.

A cause of action in quasi-contract for quantum meruit, a form of restitution, is made out where one person has been unjustly enriched at the expense of another. Martin v. Little, Brown and Co., supra (citing DeGasperi v. Valicenti, 198 Pa. Super. 455, 457, 181 A.2d 862, 864 (1962)). The elements of unjust enrichment are "benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value." Wolf v. Wolf, 527 Pa. 218, 590 A.2d 4 (1991); . . . The most significant element of the doctrine is whether the enrichment of the defendant is unjust. Id. Thus to sustain a claim of unjust enrichment, it must be shown "that a person wrongly secured or passively received a benefit that it would be unconscionable to retain" without making payment. Martin v. Little, Brown and Co., supra (citing Brereton's Estate, 388 Pa. 206, 212, 130 A.2d 453, 457 (1957); . . .

The facts of this case simply cannot support a finding that Pucello was unjustly enriched by appellant Feingold's services. By refusing to accept Feingold's files containing his work product, Pucello affirmatively rejected any direct benefit from Feingold's services. Thus it is clear that acceptance and retention of the benefits of Feingold's services, a necessary element of the claim of unjust enrichment, has not been established.

Appellant argues that despite Pucello's refusal to accept his work product, Pucello nevertheless passively received benefits from Feingold's services. He points to two specific benefits which he contends were received by Pucello. First, he asserts that Pucello's ability to obtain an appointment with a conveniently located physician on short notice was a result of Feingold's established relationships with the physician. Second, Feingold asserts that settlement of Pucello's case was facilitated because Feingold obtained a written admission of liability from the driver of the car which struck Pucello, and the driver was constrained from denying liability when he was later interviewed by Pucello's counsel. I cannot agree that either of these alleged "benefits," even if received by Pucello, was sufficient to establish that Pucello was unjustly enriched.

Feingold's assistance in arranging an appointment with a physician is not the type of service for which one would normally expect to pay, nor is it a professional legal service which has a value because of the professional expertise required to render it. Accordingly, these services did not confer upon Pucello a benefit which it would be unconscionable to retain without making restitution. Similarly, Feingold's claim that settlement of Pucello's case was facilitated by the admissions made by the alleged tortfeasor to Feingold is entirely speculative. Because Feingold introduced no competent evidence to support his assertion that his work on the case had the effect he alleges, the record cannot support his claim that his services conferred a benefit upon Pucello.

Appellant's claim for quantum meruit cannot be sustained in the absence of a finding of unjust enrichment which, in equity, requires restitution. Because the record in this matter will not support such a finding, his quantum meruit claim was properly denied. I would therefore affirm the trial court's order.

B. *Restitution for Breach of Contract*

UNITED STATES v. ALGERNON BLAIR, INC.
United States Court of Appeals, Fourth Circuit, 1973
479 F.2d 638

CRAVEN, Circuit Judge. May a subcontractor, who justifiably ceases work under a contract because of the prime contractor's breach, recover in quantum meruit the value of labor and equipment already furnished pursuant to the contract irrespective of whether he would have been entitled to recover in a suit on the contract? We think so, and, for reasons to be stated, the decision of the district court will be reversed.

The subcontractor, Coastal Steel Erectors, Inc., brought this action under the provisions of the Miller Act, 40 U.S.C.A. §270a et seq., in the name of the United States against Algernon Blair, Inc., and its surety, United States Fidelity and Guaranty Company. Blair had entered a contract with the United States for the construction of a naval hospital in Charleston County, South Carolina. Blair had then contracted with Coastal to perform certain steel erection and supply certain equipment in conjunction with Blair's contract with the United States. Coastal commenced performance of its obligations, supplying its own cranes for handling and placing steel. Blair refused to pay for crane rental, maintaining that it was not obligated to do so under the subcontract. Because of Blair's failure to make payments for crane rental, and after completion of approximately 28 percent of the subcontract, Coastal terminated its performance. Blair then proceeded to complete the job with a new subcontractor. Coastal brought this action to recover for labor and equipment furnished.

The district court found that the subcontract required Blair to pay for crane use and that Blair's refusal to do so was such a material breach as to justify Coastal's terminating performance. This finding is not questioned on appeal. The court then found that under the contract the amount due Coastal, less what had already been paid, totaled approximately $37,000. Additionally, the court found Coastal would have lost more than $37,000 if it had completed performance. Holding that any amount due Coastal must be reduced by any loss it would have incurred by complete performance of the contract, the court denied recovery to Coastal. While the district court correctly stated the "'normal' rule of contract damages,"[1] we think Coastal is entitled to recover in quantum meruit.

1. Fuller and Perdue, The Reliance Interest in Contract Damages, 46 Yale L.J. 52 (1936); Restatement of Contracts §333 (1932).

In United States for Use of Susi Contracting Co. v. Zara Contracting Co., 146 F.2d 606 (2d Cir. 1944), a Miller Act action, the court was faced with a situation similar to that involved here — the prime contractor had unjustifiably breached a subcontract after partial performance by the subcontractor. The court stated:

> For it is an accepted principle of contract law, often applied in the case of construction contracts, that the promisee upon breach has the option to forego any suit on the contract and claim only the reasonable value of his performance.

146 F.2d at 610. The Tenth Circuit has also stated that the right to seek recovery under quantum meruit in a Miller Act case is clear. Quantum meruit recovery is not limited to an action against the prime contractor but may also be brought against the Miller Act surety, as in this case. Further, that the complaint is not clear in regard to the theory of a plaintiff's recovery does not preclude recovery under quantum meruit. Narragansett Improvement Co. v. United States, 290 F.2d 577 (1st Cir. 1961). A plaintiff may join a claim for quantum meruit with a claim for damages from breach of contract.

In the present case, Coastal has, at its own expense, provided Blair with labor and the use of equipment. Blair, who breached the subcontract, has retained these benefits without having fully paid for them. On these facts, Coastal is entitled to restitution in quantum meruit.

> The "restitution interest," involving a combination of unjust impoverishment with unjust gain, presents the strongest case for relief. If, following Aristotle, we regard the purpose of justice as the maintenance of an equilibrium of goods among members of society, the restitution interest presents twice as strong a claim to judicial intervention as the reliance interest, since if A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two.

Fuller & Perdue, The Reliance Interest in Contract Damages, 46 Yale L.J. 52, 56 (1936).[6]

The impact of quantum meruit is to allow a promisee to recover the value of services he gave to the defendant irrespective of whether he would have lost money on the contract and been unable to recover in a suit on the contract. Scaduto v. Orlando, 381 F.2d 587, 595 (2d Cir. 1967). The measure of recovery for quantum meruit is the reasonable value of the performance, Restatement of Contracts §347 (1932); and recovery is undiminished by any loss which would have been incurred by complete performance. 12 Williston on Contracts §1485, at 312 (3d ed. 1970). While the contract price may be evidence of reasonable value of the services, it does not measure the value of the performance or limit recovery.[7] Rather,

6. This case also comes within the requirements of the Restatements for recovery in quantum meruit. Restatement of Restitution §107 (1937); Restatement of Contracts §§347-357 (1932).

7. Scaduto v. Orlando, 381 F.2d 587, 595-596 (2d Cir. 1967); St. Paul-Mercury Indem. Co. v. United States ex rel. Jones, 238 F.2d 917, 924 (10th Cir. 1956); United States for Use of Susi Contracting Co. v. Zara Contracting Co., 146 F.2d 606, 610-611 (2d Cir. 1944).

the standard for measuring the reasonable value of the services rendered is the amount for which such services could have been purchased from one in the plaintiff's position at the time and place the services were rendered.

Since the district court has not yet accurately determined the reasonable value of the labor and equipment use furnished by Coastal to Blair, the case must be remanded for those findings. When the amount has been determined, judgment will be entered in favor of Coastal, less payments already made under the contract. Accordingly, for the reasons stated above, the decision of the district court is reversed and remanded with instructions.

NOTES AND QUESTIONS

1. The Miller Act is a federal statute permitting certain parties to a construction project to recover from the contractor's surety if they remain unpaid.

2. When a contract is breached and restitution is awarded to the nonbreaching party, is the court awarding a remedy for breach of contract or for an action independent of any contract — an independent action in quasi-contract? G. Palmer believes the distinction is "largely sterile," adding:

> Corbin argues that restitution of the value of the plaintiff's performance [when there is contract breach] is not quasi contract but merely a remedy for breach. Certainly it is a remedy for breach, but the aim is to recover the value of the plaintiff's performance, and the connection with quasi contract is demonstrated by the fact that there is a similar remedy for many situations in which there is no breach.

1 G. Palmer, Law of Restitution §8 at n.9.

3. The measure of damages in restitution is the benefit the plaintiff conferred on the defendant. Reliance damages are generally greater than this recovery because all reliance expenditures are reimbursed whether or not they benefit the defendant. (But, as we shall see, if the benefit to the defendant is greater than the cost to produce it, restitution damages could be more.) If expectancy damages are generally greater than reliance damages and reliance damages greater than restitution damages, why were expectancy or reliance damages not sought in *Algernon*?

4. How exactly is the court to determine the value of the benefit to the defendant when awarding restitution damages? What exactly was the measure of restitution according to the court in *Algernon*? Compare Restatement (Second) of Contracts:

> It should be noted, however, that in suits for restitution there are many cases permitting the plaintiff to recover the value of benefits conferred on the defendant, even though this value exceeds that of the return performance promised by the defendant. In these cases it is no doubt felt that the defendant's breach should work a forfeiture of his right to retain the benefits of an advantageous bargain.

Fuller and Perdue, supra at 77.

§371. Measure of Restitution Interest

If a sum of money is awarded to protect a party's restitution interest, it may as justice requires be measured by either

(a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or
(b) the extent to which the other party's property has been increased in value or his other interests advanced.

6. Some courts refuse to limit restitution damages to the contract price; an approach apparently accepted by the court in *Algernon.* See also Southern Painting Co. v. United States, 222 F.2d 431 (10th Cir. 1955); 1 G. Palmer, Law of Restitution §4.4 (1978). Authority on the other side includes Johnson v. Bovee, 40 Colo. App. 317, 574 P.2d 513 (1978); Childress and Garamella, The Law of Restitution and the Reliance Interest in Contract, 64 NW. U. L. Rev. 433, 439-441 (1969).

The Restatement drafters did not take sides on this issue. They did provide that if the plaintiff has completed performance and the defendant's breach is simply the failure to pay the agreed price, restitution is not a proper measure. Restatement (Second) of Contracts §373(2). The reason given by the Restatement drafters for this limitation is as follows:

> To give him that right would impose on the court the burden of measuring the benefit in terms of money in spite of the fact that this has already been done by the parties themselves when they made their contract.

Is this a convincing reason? What if all performance had been rendered except the attachment of the plastic plates on the electrical outlets? Would the plaintiff be able to seek restitution in an amount exceeding the contract price?

Problem 84

Weekend Construction Company agreed to build a parking garage for Municipal Airport, but it proved to be a foolish contract because the construction would cost Weekend Construction $100,000, but the Airport agreed to pay no more than $80,000, as per the contract. When the construction was halfway completed, Municipal Airport filed for a bankruptcy and repudiated this contract. Weekend Construction has incurred $50,000 in expenses so far, with the same amount yet to go. What is the amount of the claim it should file in the bankruptcy proceeding?

ROSENBERG v. LEVIN
Supreme Court of Florida, 1982
409 So. 2d 1016

OVERTON, J. This is a petition to review a decision of the Third District Court of Appeal, reported as Levin v. Rosenberg, 372 So. 2d 956 (Fla. 3d

D.C.A. 1979). The issue to be decided concerns the proper basis for compensating an attorney discharged without cause by his client after he has performed substantial legal services under a valid contract of employment. We find conflict with our decision in Goodkind v. Wolkowsky, 132 Fla. 63, 180 So. 538 (1938).

We hold that a lawyer discharged without cause is entitled to the reasonable value of his services on the basis of quantum meruit, but recovery is limited to the maximum fee set in the contract entered into for those services. We have concluded that without this limitation, the client would be penalized for the discharge and the lawyer would receive more than he bargained for in his initial contract. In the instant case, we reject the contention of the respondent lawyer that he is entitled to $55,000 as the reasonable value of his services when his contract fee was $10,000. We affirm the decision of the district court and recede from our prior decision in *Goodkind.*

The facts of this case reflect the following. Levin hired Rosenberg and Pomerantz to perform legal services pursuant to a letter agreement which provided for a $10,000 fixed fee, plus a contingent fee equal to fifty percent of all amounts recovered in excess of $600,000. Levin later discharged Rosenberg and Pomerantz without cause before the legal controversy was resolved and subsequently settled the matter for a net recovery of $500,000. Rosenberg and Pomerantz sued for fees based on a "quantum meruit" evaluation of their services. After lengthy testimony, the trial judge concluded that quantum meruit was indeed the appropriate basis for compensation and awarded Rosenberg and Pomerantz $55,000. The district court also agreed that quantum meruit was the appropriate basis for recovery but lowered the amount awarded to $10,000, stating that recovery could in no event exceed the amount which the attorneys would have received under their contract if not prematurely discharged. 372 So. 2d at 958.

The issue submitted to us for resolution is whether the terms of an attorney employment contract limit the attorney's quantum meruit recovery to the fee set out in the contract. This issue requires, however, that we answer the broader underlying question of whether in Florida quantum meruit is an appropriate basis for compensation of attorneys discharged by their clients without cause where there is a specific employment contract. The Florida cases which have previously addressed this issue have resulted in confusion and conflicting views.

In Goodkind v. Wolkowsky, this Court held that an attorney who was employed for a specific purpose and for a definite fee, but who was discharged without cause after substantial performance, was entitled to recover the fee agreed upon as damages for breach of contract. The attorney in *Goodkind* was employed to represent several clients in a tax case for a fixed fee of $4,000 and was discharged without cause prior to his completion of the matter. He sought damages for breach of contract. The trial court sustained clients' demurrer to the complaint "on the ground that plaintiff's right to recover must be restricted to a reasonable compensation for the value of the services performed prior to the discharge." 180 So. at 540. The attorney appealed and this Court, after an extensive survey of the authorities, reversed the attorney's quantum meruit recovery and

found instead that he was entitled to recover under the contract. The *Goodkind* court, while following the traditional contract rule, did recognize the right of the client to discharge his attorney at any time with or without cause. The Third District Court of Appeal later applied this contract rule to a contingent fee contract situation in Osius v. Hastings, 97 So. 2d 623 (Fla. 3d D.C.A. 1957), rev'd on other grounds, 104 So. 2d 21 (Fla. 1958).

In Milton Kelner, P.A. v. 610 Lincoln Road, Inc., 328 So. 2d 193 (Fla. 1976), we approved the enforcement of a specific attorney-client contract, but left open the issue of whether quantum meruit was the proper rule in a contingency fee case. The attorney in *Kelner* represented a client on an insurance claim under a contingency fee contract calling for "40 percent of all sums recovered." The insurer agreed to pay the face amount of the policy before trial, but the client rejected the settlement offer and discharged the attorney without cause. In effect, the maximum recovery from the insurance company had been obtained at the time of the discharge. The attorney then sought recovery under the contract in the trial court and was successful, with the jury resolving the dispute relating to fee calculation in favor of the attorney. On appeal, the district court reversed and limited the attorney's recovery to quantum meruit rather than the percentage of the insurance proceeds recovery provided by the contingency contract. The district court emphasized that recovery under the original contract might have a chilling effect on a client's exercise of the right to discharge. The district court then certified to this Court the question it had decided, whether quantum meruit should be the exclusive remedy in contingent fee cases. We chose to decide the *Kelner* case on its unique facts and held:

> Under the peculiar circumstances of this case, where the proceeds of the insurance policy were fully recovered and the real issue of how the contingency fee was to be computed was settled by a jury, we will not disturb the verdict and restrict the computation of the attorney's fee to quantum meruit. We do agree with the District Court that Goodkind v. Wolkowsky applies to a fixed fee contract and does not establish the precedent for contingent fee contracts.

We continued by stating:

> Quantum meruit may well be the proper standard when the discharge under a contingent fee contract occurs *prior* to the obtaining of the full settlement contracted for under the attorney-client agreement, with the cause of action accruing only upon the happening of the contingency to the benefit of the former client. That issue, however, is not factually before us and we do not make that determination in this cause.

328 So. 2d at 196 (citation omitted).

The First District Court of Appeal, in Sohn v. Brockington, 371 So. 2d 1089 (Fla. 1st D.C.A. 1979), cert. denied, 383 So. 2d 1202 (Fla. 1980), subsequently determined that, based on the above-quoted language in *Kelner,* quantum meruit was the appropriate remedy when discharge occurred before the happening of the contingency. In *Sohn,* the attorney was employed under a forty percent contingent fee contract and was

discharged without cause before filing the complaint. The client subsequently retained new counsel who secured a settlement of $75,000. The district court affirmed the trial court which had limited the attorney to a quantum meruit recovery and awarded him $950 as the reasonable value of his services. In so holding, the district court concluded that "the [modern] rule . . . is the more logical and should be adopted in this state." 371 So. 2d at 1092. That court also held that the attorney's cause of action accrued immediately upon discharge in accordance with the view expressed in Martin v. Camp, 219 N.Y 170, 177, 114 N.E. 46, 49 (1916).

The existing case law in this state reflects that this Court is on record as favoring the traditional contract means of recovery. We have, however, inferred in dicta in *Kelner* that quantum meruit may be the proper basis for recovery in a contingent fee contract situation. The First District Court of Appeal in *Sohn* expressly held that quantum meruit is proper in a contingency contract. In the instant case, the Third District Court of Appeal held that quantum meruit is proper where the contingency does not control and limited such quantum meruit recovery to the maximum amount of the contract fee.

There are two conflicting interests involved in the determination of the issue presented in this type of attorney-client dispute. The first is the need of the client to have confidence in the integrity and ability of his attorney and, therefore, the need for the client to have the ability to discharge his attorney when he loses that necessary confidence in the attorney. The second is the attorney's right to adequate compensation for work performed. To address these conflicting interests, we must consider three distinct rules.

Contract Rule

The traditional contract rule adopted by a number of jurisdictions holds that an attorney discharged without cause may recover damages for breach of contract under traditional contract principles. The measure of damages is usually the full contract price, although some courts deduct a fair allowance for services and expenses not expended by the discharged attorney in performing the balance of the contract. . . . Some jurisdictions following the contract rule also permit an alternative recovery based on quantum meruit so that an attorney can elect between recovery based on the contract or the reasonable value of the performed services. . . .

Support for the traditional contract theory is based on: (1) the full contract price is arguably the most rational measure of damages since it reflects the value that the parties placed on the services; (2) charging the full fee prevents the client from profiting from his own breach of contract; and (3) the contract rule is said to avoid the difficult problem of setting a value on an attorney's partially completed legal work.

Quantum Meruit Rule

To avoid restricting a client's freedom to discharge his attorney, a number of jurisdictions in recent years have held that an attorney

discharged without cause can recover only the reasonable value of services rendered prior to discharge. . . . This rule was first announced in Martin v. Camp, 219 N.Y. 170, 114 N.E. 46 (1916), where the New York Court of Appeals held that a discharged attorney could not sue his client for damages for breach of contract unless the attorney had completed performance of the contract. The New York court established quantum meruit recovery for the attorney on the theory that the client does not breach the contract by discharging the attorney. Rather, the court reasoned, there is an implied condition in every attorney-client contract that the client may discharge the attorney at any time with or without cause. With this right as part of the contract, traditional contract principles are applied to allow quantum meruit recovery on the basis of services performed to date. Under the New York rule, the attorney's cause of action accrues immediately upon his discharge by the client, under the reasoning that it is unfair to make the attorney's right to compensation dependent on the performance of a successor over whom he has no control. See Tillman v. Komar, 259 N.Y. 133, 135-136, 181 N.E. 75, 76 (1932).

The California Supreme Court, in Fracasse v. Brent, 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972), also adopted a quantum meruit rule. That court carefully analyzed those factors which distinguish the attorney-client relationship from other employment situations and concluded that a discharged attorney should be limited to a quantum meruit recovery in order to strike a proper balance between the client's right to discharge his attorney without undue restriction and the attorney's right to fair compensation for work performed. The *Fracasse* court sought both to provide clients greater freedom in substituting counsel and to promote confidence in the legal profession while protecting society's interest in the attorney-client relationship.

Contrary to the New York rule, however, the California court also held that an attorney's cause of action for quantum meruit does not accrue until the happening of the contingency, that is, the client's recovery. If no recovery is forthcoming, the attorney is denied compensation. The California court offered two reasons in support of its position. First, the result obtained and the amount involved, two important factors in determining the reasonableness of a fee, cannot be ascertained until the occurrence of the contingency. Second, the client may be of limited means and it would be unduly burdensome to force him to pay a fee if there was no recovery. The court stated that: "[S]ince the attorney agreed initially to take his chances on recovering any fee whatever, we believe that the fact that the success of the litigation is no longer under his control is insufficient to justify imposing a new and more onerous burden on the client." Id. at 792, 494 P.2d at 14, 100 Cal. Rptr. at 390.

Quantum Meruit Rule Limited by the Contract Price

The third rule is an extension of the second that limits quantum meruit recovery to the maximum fee set in the contract. This limitation is believed necessary to provide client freedom to substitute attorneys

without economic penalty. Without such a limitation, a client's right to discharge an attorney may be illusory and the client may in effect be penalized for exercising a right.

The Tennessee Court of Appeals, in Chambliss, Bahner & Crawford v. Luther, 531 S.W.2d 108 (Tenn. Ct. App. 1975), expressed the need for limitation on quantum meruit recovery, stating: "It would seem to us that the better rule is that because a client has the unqualified right to discharge his attorney, fees in such cases should be limited to the value of the services rendered or the contract price, whichever is less." 531 S.W.2d at 113. In rejecting the argument that quantum meruit should be the basis for the recovery even though it exceeds the contract fee, that court said:

> To adopt the rule advanced by Plaintiff would, in our view, encourage attorneys less keenly aware of their professional responsibilities than Attorney Chambliss, 2/3 to induce clients to lose confidence in them in cases where the reasonable value of their services has exceeded the original fee and thereby, upon being discharged, reap a greater benefit than that for which they had bargained.

531 S.W.2d at 113. Other authorities also support this position.*[1]

Conclusion

We have carefully considered all the matters presented, both on the original argument on the merits and on rehearing. It is our opinion that it is in the best interest of clients and the legal profession as a whole that we adopt the modified quantum meruit rule which limits recovery to the maximum amount of the contract fee in all premature discharge cases involving both fixed and contingency employment contracts. The attorney-client relationship is one of special trust and confidence. The client must rely entirely on the good faith efforts of the attorney in representing his interests. This reliance requires that the client have complete confidence in the integrity and ability of the attorney and that absolute fairness and candor characterize all dealings between them. These considerations dictate that clients be given greater freedom to change legal representatives than might be tolerated in other employment relationships. We approve the philosophy that there is an overriding need to allow clients

1. For example, Corbin on Contracts, in the chapter dealing with restitution, cites the quantum meruit rule with this limitation with approval. Contracts §1102 (1980 Supp.) at 207-208. Another commentator stated: "The protection afforded to the client becomes illusory if the discharged attorney's recovery on *quantum meruit* exceeds the contract price." Note, Limiting the Wrongfully Discharged Attorney's Recovery to Quantum Meruit—Fracasse v. Brent, 24 Hastings L. Rev. 771, 774 (1973). This comment also appeared in a recent article: "In New York, discharge of an attorney cancels the contract of employment. Thus an attorney can recover the full value of his services, even if it exceeds the contract price. This holding defeats the policy against penalizing the client for exercising his right to discharge an attorney, because he essentially is forced to pay damages for exercising a right." Note, Attorney's Right to Compensation When Discharged Without Cause From a Contingent Fee Contract—Covington v. Rhodes, 678 Wake Forest L. Rev. 677, 689-690 (1979).

freedom to substitute attorneys without economic penalty as a means of accomplishing the broad objective of fostering public confidence in the legal profession. Failure to limit quantum meruit recovery defeats the policy against penalizing the client for exercising his right to discharge. However, attorneys should not be penalized either and should have the opportunity to recover for services performed.

Accordingly, we hold that an attorney employed under a valid contract who is discharged without cause before the contingency has occurred or before the client's matters have concluded can recover only the reasonable value of his services rendered prior to discharge, limited by the maximum contract fee. We reject both the traditional contract rule and the quantum meruit rule that allow recovery in excess of the maximum contract price because both have a chilling effect on the client's power to discharge an attorney. Under the contract rule in a contingent fee situation, both the discharged attorney and the second attorney may receive a substantial percentage of the client's final recovery. Under the unlimited quantum meruit rule, it is possible, as the instant case illustrates, for the attorney to receive a fee greater than he bargained for under the terms of his contract. Both these results are unacceptable to us.

We further follow the California view that in contingency fee cases, the cause of action for quantum meruit arises only upon the successful occurrence of the contingency. If the client fails in his recovery, the discharged attorney will similarly fail and recover nothing. We recognize that deferring the commencement of a cause of action until the occurrence of the contingency is a view not uniformly accepted. Deferral, however, supports our goal to preserve the client's freedom to discharge, and any resulting harm to the attorney is minimal because the attorney would not have benefited earlier until the contingency's occurrence. There should, of course, be a presumption of regularity and competence in the performance of the services by a successor attorney.

In computing the reasonable value of the discharged attorney's services, the trial court can consider the totality of the circumstances surrounding the professional relationship between the attorney and client. Factors such as time, the recovery sought, the skill demanded, the results obtained, and the attorney-client contract itself will necessarily be relevant considerations.

We conclude that this approach creates the best balance between the desirable right of the client to discharge his attorney and the right of an attorney to reasonable compensation for his services. With this decision, we necessarily recede from our prior decision in Goodkind v. Wolkowsky. This decision has no effect on our *Kelner* decision concerning completed contracts, whether contingent, fixed fee, or mixed. We find the district court of appeal was correct in limiting the quantum meruit award to the contract price, and its decision is approved.

Problem 85

Attorney Amos Factory was world famous for his legal abilities in the area of antitrust law. He was employed by a client for the agreed fee of

$50,000 to handle a complex negotiation leading to a merger. When he was half done with the task, the client wrongfully discharged him. He proves to the court's satisfaction that his efforts prior to the discharge were already worth $50,000. May he recover that amount? Yes

Problem 86

Joe purchased a new Nyet from Sally's Auto. When the auto was delivered, it quickly became evident that the car was seriously defective. Joe revoked acceptance in timely fashion and sued Sally's for a return of his $5,000 downpayment and the return of his 1997 Cambo, which he had given Sally as a trade-in. Sally admits liability but contends that there is nothing that authorizes such recovery. She argues that actual damages are limited to recovery under UCC §2-712 or 2-713 and since Joe did not cover and all Nyets had the same defect (and therefore the market price was identical to what Joe paid) Joe could recover nothing. Who wins? See UCC §2-711.

C. *The Breaching Plaintiff*

BRITTON v. TURNER
Supreme Court of New Hampshire, 1834
6 N.H. 481

PARKER, J. delivered the opinion of the court.

It may be assumed, that the labor performed by the plaintiff, and for which he seeks to recover a compensation in this action, was commenced under a special contract to labor for the defendant the term of one year, for the sum of one hundred and twenty dollars, and that the plaintiff has labored but a portion of that time, and has voluntarily failed to complete the entire contract.

It is clear, then, that he is not entitled to recover upon the contract itself, because the service, which was to entitle him to the sum agreed upon, has never been performed.

But the question arises, can the plaintiff, under these circumstances, recover a reasonable sum for the service he has actually performed, under the count in *quantum meruit*.

Upon this, and questions of a similar nature, the decisions to be found in the books are not easily reconciled.

It has been held, upon contracts of this kind for labor to be performed at a specified price, that the party who voluntarily fails to fulfil the contract by performing the whole labor contracted for, is not entitled to recover any thing for the labor actually performed, however much he may have done towards the performance, and this has been considered the settled rule of law upon this subject. [Citations omitted.]

That such rule in its operation may be very unequal, not to say unjust, is apparent.

A party who contracts to perform certain specified labor, and who breaks his contract in the first instance, without any attempt to perform it, can only be made liable to pay the damages which the other party has sustained by reason of such non performance, which in many instances may be trifling — whereas a party who in good faith has entered upon the performance of his contract, and nearly completed it, and then abandoned the further performance — although the other party has had the full benefit of all that has been done, and has perhaps sustained no actual damage — is in fact subjected to a loss of all which has been performed, in the nature of damages for the non fulfilment of the remainder, upon the technical rule, that the contract must be fully performed in order to a recovery of any part of the compensation.

By the operation of this rule, then, the party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract, and the other party may receive much more, by the breach of the contract, than the injury which he has sustained by such breach, and more than he could be entitled to were he seeking to recover damages by an action.

The case before us presents an illustration. Had the plaintiff in this case never entered upon the performance of his contract, the damage could not probably have been greater than some small expense and trouble incurred in procuring another to do the labor which he had contracted to perform. But having entered upon the performance, and labored nine and a half months, the value of which labor to the defendant as found by the jury is $95, if the defendant can succeed in this defence, he in fact receives nearly five sixths of the value of a whole year's labor, by reason of the breach of contract by the plaintiff a sum not only utterly disproportionate to any probable, not to say possible damage which could have resulted from the neglect of the plaintiff to continue the remaining two and an half months, but altogether beyond any damage which could have been recovered by the defendant, had the plaintiff done nothing towards the fulfilment of his contract.

Another illustration is furnished in Lantry v. Parks, 8 Cowen, 83. There the defendant hired the plaintiff for a year, at ten dollars per month. The plaintiff worked ten and a half months, and then left saying he would work no more for him. This was on Saturday — on Monday the plaintiff returned, and offered to resume his work, but the defendant said he would employ him no longer. The court held that the refusal of the defendant on Saturday was a violation of his contract, and that he could recover nothing for the labor performed.

There are other cases, however, in which principles have been adopted leading to a different result.

It is said, that where a party contracts to perform certain work, and to furnish materials, as, for instance, to build a house, and the work is done, but with some variations from the mode prescribed by the contract, yet if the other party has the benefit of the labor and materials he should be bound to pay so much as they are reasonably worth. [Citations omitted.] . . .

The party who contracts for labor merely, for a certain period, does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day, if the other party commences the performance, and with knowledge also that the other may eventually fail of completing the entire term.

If under such circumstances he actually receives a benefit from the labor performed, over and above the damage occasioned by the failure to complete, there is as much reason why he should pay the reasonable worth of what has thus been done for his benefit, as there is when he enters and occupies the house which has been built for him, but not according to the stipulations of the contract, and which he perhaps enters, not because he is satisfied with what has been done, but because circumstances compel him to accept it such as it is, that he should pay for the value of the house. . . .

We hold then, that where a party undertakes to pay upon a special contract for the performance of labor, or the furnishing of materials, he is not to be charged upon such special agreement until the money is earned according to the terms of it, and where the parties have made an express contract the law will not imply and raise a contract different from that which the parties have entered into, except upon some farther transaction between the parties. . . .

But if, where a contract is made of such a character, a party actually receives labor, or materials, and thereby derives a benefit and advantage, over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done, and the value received, furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case, one not within the original agreement, and the party is entitled to "recover on his new case, for the work done, not as agreed, but yet accepted by the defendant." 1 Dane's Abr. 224.

If on such failure to perform the whole, the nature of the contract be such that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is entitled so to do, and in such case is not liable to be charged, unless he has before assented to and accepted of what has been done, however much the other party may have done towards the performance. He has in such case received nothing, and having contracted to receive nothing but the entire matter contracted for, he is not bound to pay, because his express promise was only to pay on receiving the whole, and having actually received nothing the law cannot and ought not to raise an implied promise to pay. But where the party receives value — takes and uses the materials, or has advantage from the labor, he is liable to pay the reasonable worth of what he has received. 1 Camp. 38, Farnsworth v. Garrard. And the rule is the same whether it was received and accepted by the assent of the party prior to the breach, under a contract by which, from its nature, he was to receive labor, from time to time until the completion of the whole contract; or whether it was received and accepted by an assent subsequent to the performance of all which was in fact done. If he received it under such circumstances as precluded him from rejecting it afterwards, that does not alter the case — it has still been received by his assent. . . .

The amount, however, for which the employer ought to be charged, where the laborer abandons his contract, is only the reasonable worth, or the amount of advantage he receives upon the whole transaction, (6 N.H. 15, Wadleigh v. Sutton) and, in estimating the value of the labor, the contract price for the service cannot be exceeded. 7 Green. 78; 4 Wendell, 285, Dubois v. Delaware & Hudson Canal Company; 7 Wend. 121, Koon v. Greenman. . . .

If in such case it be found that the damages are equal to, or greater than the amount of the labor performed, so that the employer, having a right to the full performance of the contract, has not upon the whole case received a beneficial service, the plaintiff cannot recover.

This rule, by binding the employer to pay the value of the service he actually receives, and the laborer to answer in damages where he does not complete the entire contract, will leave no temptation to the former to drive the laborer from his service, near the close of his term, by ill treatment, in order to escape from payment; nor to the latter to desert his service before the stipulated time, without a sufficient reason; and it will in most instances settle the whole controversy in one action, and prevent a multiplicity of suits and cross actions. . . .

Applying the principles thus laid down, to this case, the plaintiff is entitled to judgment on the verdict.

The defendant sets up a mere breach of the contract in defense of the action, but this cannot avail him. He does not appear to have offered evidence to show that he was damnified by such breach, or to have asked that a deduction should be made upon that account. The direction to the jury was therefore correct, that the plaintiff was entitled to recover as much as the labor performed was reasonably worth, and the jury appear to have allowed a *pro rata* compensation, for the time which the plaintiff labored in the defendant's service. . . .

Judgment on the verdict.

Problem 87

Famous movie star Howard Teeth agreed to accept a $50,000 fee to appear in a low-budget remake of Aristophanes's *The Birds.* As part of his contract, he promised to make a publicity tour to promote the film. After the film was over, he flatly refused to go on the tour. The movie was nonetheless a surprise hit and made millions for its producers. Teeth, not having been paid anything, sued for $1 million, the reasonable value of his services. What amount should he recover? Would your answer change if he had been involved in an accident and was not feeling well?

Problem 88

Montgomery sold King several marine charts for $2,000. King sent a $750 down payment. Shortly thereafter, King relinquished his merchant