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PROFESSOR BUDNITZ

SUPPLEMENTARY MATERIALS

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THE PREDOMINANT PURPOSE TEST

Is the predominant purpose test satisfactory?

I. Consider the following transaction: The buyer and seller enter into a contract in which the seller agrees to repair the transmission in a used bulldozer. (See the *Cudmore* case on page 16, footnote 3.) In applying the predominant purpose test to that transaction, consider the following standards:

- II Is the test easy to apply?
- II Can we predict the outcome with confidence?
- II Does the test clarify how the law applies to specific transactions?
- II Does the test promote uniformity?
- II Does the test result in simplification?

II. The hypos below provide information about the cost of repairing the transmission in the used bulldozer. Does having this information make it easier to apply the predominant purpose test?

Hypo 1

The repairs take 10 hours of labor to complete, requiring $750 for replacement parts.

Hypo 2

Repairs take 10 hours of labor, labor is $40 / hour, parts $750.

Hypo 3

Labor $725, parts $750.

Hypo 4

Labor $750, parts $750.

III. Some courts find looking solely at dollar amounts for costs of labor and parts inadequate. They consider all of the following factors in trying to determine whether goods or services predominate. Does consideration of all of these factors help you to apply the predominant purpose test?

- 1) Economic reality.
- II Expectations of parties.
- II Nature of Seller's business.

THE SCOPE OF UCC ARTICLE 2

PROPOSAL OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, AUGUST 2002

INTRODUCTION

The text which appears below is the proposal that was presented to NCCUSL at its August 2002 Meeting in Tucson. After discussion at the meeting, amendments to Article 2 were approved, but important changes were made to the proposed amendments in the form of removal of several items which had been in the proposal. The entire proposed amended section 2-102 on scope was removed, leaving that section unchanged from what it is at present. In addition, several proposed provisions in section 2-103, defining terms, were removed. The text below indicates what was removed at the August meeting. The version approved at the August meeting did not include any comments.

Produced below is the proposal rather than the version approved at the August meeting, as well as the comments to the proposal, because they help to illustrate the issues which are being considered by the drafters.

Because the UCC is a joint project of the NCCUSL and the American Law Institute, the next step apparently will be consideration by the ALI.

SECTION 2-102. SCOPE -----ENTIRE SECTION REMOVED FROM VERSION APPROVED BY NCCUSL IN AUGUST

(1) Unless the context otherwise requires, and subject to Section 2-108, this article applies to transactions in goods. This Article does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction.

(2) Except as provided in subsection (4), in the case of a transaction involving both goods and non-goods, a court may resolve a dispute by the application of this article to the entire transaction, by the application of other law to the entire transaction, or by the application of this article to part of the transaction and other law to part of the transaction. In making the determination as to the law applicable to the transaction, the court shall take into consideration the nature of the transaction and of the dispute.

(3) This article does not apply to transactions that do not involve goods.

(4) A transaction in a product consisting of computer information and goods that are solely the medium containing the computer information is not a transaction in goods, but a court is not precluded from applying provisions in this article to a dispute concerning whether the goods conform to the contract.

(5) Nothing in this article alters, creates, or diminishes rights in intellectual property.

Proposed Comments

1. This Article applies to transactions in goods. The term "goods" is defined in Section 2-103(1)(m).

2. A great many transactions involve both goods and non-goods. Some transactions involve goods and services. Others involve goods and property other than goods, such as realty, intellectual property, or other intangible personal property. As subsection (2) makes clear, there is no hard and fast rule that determines whether, and the extent to which, this Article applies to disputes arising out of such transactions. There is a large body of case law concerning transactions involving goods and services, and somewhat less precedent concerning other such transactions. The variety of combinations of goods and non-goods that may comprise a transaction, and the types of disputes that a court may be called upon to resolve, make it inadvisable to enact firm principles to determine the applicable body of law. Subsection (2) recognizes that principles that work well in some contexts may not work well in others. Accordingly, it directs courts, in determining whether this Article or other law governs a particular matter before it, to take into consideration the nature of the transaction and of the dispute. Courts should not apply this Article or other law without careful consideration of these matters. In a particular transaction, the non-goods aspect or the goods aspect may predominate. Even though one aspect predominates, however, the core of the dispute may relate to the aspect that does not predominate. Moreover, there may be times when the provisions in this Article, which are designed for goods, simply are not appropriate for application to other aspects of the transaction, and the same may at times be true regarding application of other law to the goods aspect. Finally, in a transaction that is not easily severable into goods and non-goods aspects, a court might decide that it is appropriate to apply one body of law to the entire transaction.

As the nature of transactions evolves over time, the character of those transactions is impossible to predict. Accordingly, this section neither endorses nor rejects any particular approach for determining the applicability of Article 2 to disputes arising from any particular transaction. *[At this point, the comment will provide seven examples (assuming that we can find them) of approaches that courts have used in some cases (with neither indorsement nor condemnation). The seven examples, taken as a whole, are completely neutral inasmuch as the first six consist of mirror-image pairs, while the seventh involves breaking the transaction into goods and non-goods components. The seven examples are: (i) Article 2 applied because goods predominate, (ii) other law applied because non-goods predominate, (iii) Article 2 applied because goods are gravamen, even though goods do not predominate (or without regard to whether they do), (iv) other law applied, because non-goods are gravamen, even though goods predominate (or without regard to whether they do), (v) Article 2 applied to an integrated product, even though it contains information, (vi) other law applied to an integrated product, even thought it contains goods, (vii) transaction broken down into its elements, with Article 2 applying only to the goods.]*

3. Subsection (3) states explicitly what has always been true - this Article does not apply to transactions that do not involve goods. Thus, for example, this Article does not govern a contract solely for services or solely for information. When a dispute in such a transaction is before a court, unless a different statute controls, the court is left to do what common-law courts

traditionally have done - determine the best rule for the situation before it.

4. Subsection (4) recognizes that transactions in which the only goods involved are a medium containing computer information are essentially information transactions and, thus, should not be categorized as transactions in goods. In such a case, however, there may be a dispute about whether the medium itself (the goods) is defective, and the court is not precluded from applying relevant provisions of this Article.

5. Subsection (5) makes it clear that application of this Article to the informational aspect of a transaction does not alter, create, or diminish rights in intellectual property. To the extent that such rights are governed by other state law, nothing in this Article changes that state law. To the extent that such rights are governed by federal law, under the Supremacy Clause of the Constitution of the United States, nothing in this Article can determine those rights. The fact that a court under subsection (2) applies this Article to a transaction in which goods containing copyrighted information are transferred does not mean that the information itself has been sold for purposes of state law (*see* next paragraph) and does not determine whether the transfer constitutes a "first sale" for purposes of federal copyright law.

In transactions that involve information, the agreement between the parties sometimes contains restrictions on certain uses or future transfers of the information. As is true with analogous restrictions with respect to goods, this Article does not address the enforceability of these restrictions. If the restrictions are effective under other law, this Article does not invalidate them; if they are ineffective under other law, nothing in this Article validates them. *See* Section 1-103.

SECTION 2-103. DEFINITIONS AND INDEX OF DEFINITIONS. (Excerpts)

(1) In this article unless the context otherwise requires

(b) "Computer information" means information in electronic form which is obtained from or through the use of a computer or which is in a form capable of being processed by a computer. **THIS DEFINITION WAS REMOVED BY NCCUSL**

Proposed Comment

Information is not computer information unless it is in electronic form. Thus, information printed on paper is not computer information.

(c) "Conspicuous", with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. A term in an electronic record intended to evoke a response by an electronic agent is conspicuous if it is presented in a form that would enable a reasonably configured electronic agent to take it into account or react to it without review of the record by an individual. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following:

(i) for a person:

(A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size;

(B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language; and

(ii) for a person or an electronic agent, a term that is so placed in a record or display that the person or electronic agent cannot proceed without taking action with respect to the particular term.

Proposed Comment

The definition of "conspicuous" may be moved to revised Article 1. The first sentence is based on original Section 1-201(10) but the concept is expanded to include terms in electronic records. The general standard is, that to be conspicuous, a term ought to be noticed by a reasonable person. The second sentence states a special rule for situations where the sender of an electronic record intends to evoke a response from an electronic agent; the presentation of the term must be capable of evoking a response from a reasonably configured electronic agent. Whether a term is conspicuous is an issue for the court.

Paragraphs (i) and (ii) set out several methods for making a term conspicuous. The requirement that a term be conspicuous functions both as notice (the term ought to be noticed) and as a basis for planning (giving guidance to the party that relies on the term about how that result can be achieved).

Paragraph (i), which relates to the general standard for conspicuousness, is based on original Section 1-201(10) but is intended to give more guidance. Paragraph (ii) is new and relates to the special standard for electronic records intended to evoke a response from an electronic agent. Although these paragraphs indicate some of the methods for making a term attention-calling, the test is whether attention can reasonably be expected to be called to it. The statutory language should not be construed to permit a result that is inconsistent with that test.

(g) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

Proposed Comment

The definition of "electronic" may be moved to revised Article 1. The electronic contracting provisions, including the definitions of "electronic," "electronic agent," "record," "electronic record," "information processing system," and certain the electronic aspects of "receive" are based on the provisions of the Uniform Electronic Transactions Act and are consistent with the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. SECTION 7001 *et seq.*).

(h) "Electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in

whole or in part, without review or action by an individual.

Proposed Comment

The definition of "electronic agent" may be moved to revised Article 1.

(i) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

Proposed Comment

The definition of "electronic record" may be moved to revised Article 1.

(k) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.

Legislative Note: This definition should not be adopted if the jurisdiction has enacted revised Article 1.

(l) "Goods" means all things that are movable at the time of identification to a contract for sale. The term includes future goods, specially manufactured goods, the unborn young of animals, growing crops, and other identified things attached to realty as described in Section 2-107. The term does not include information, the money in which the price is to be paid, investment securities under Article 8, the subject matter of foreign exchange transactions, and choses in action.

Proposed Comment

The definition of "goods" has been amended to exclude information. *See* Section 2-103(1)(m). [Portions discussing foreign exchange transactions omitted.]

(m) "Information" means data, text, images, sounds, mask works, computer programs, software, databases, or the like, including collections and compilations. The term includes computer information.

THIS DEFINITION WAS REMOVED BY NCCUSL

(o) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

Legislative Note: This definition should not be adopted if the jurisdiction has enacted revised Article 1.

(r) "Sign" means, with present intent to authenticate or adopt a record,

(i) to execute or adopt a tangible symbol; or

(ii) to attach to or logically associate with the record an electronic sound, symbol, or process.

Proposed Comment

The definition is broad enough to cover any record that is signed within the meaning of present Article 1 (Section 1-201(39)) or that contains an electronic signature within the meaning of the

Uniform Electronic Transactions Act (Section 2(8)). It is consistent with the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. SECTION 7001 *et seq.*).

SOFTMAN PRODUCTS CO. v. ADOBE SYSTEMS, INC.
2001 Westlaw 1343955 (C.D. Cal. 2001)

[1] This matter comes before the Court on the counter-claimant Adobe's application for a preliminary injunction. After reviewing and considering the materials submitted by the parties, and hearing oral argument, the Court adopts the following order.

I. Background

[2] The counter-claimant Adobe Systems Inc. ("Adobe") is a leading software development and publishing company. The counter-defendant SoftMan Products Company ("SoftMan") is a Los Angeles-based company that distributes computer software products primarily through its website,*1080 www.buycheapsoftware.com. Adobe alleges that since at least November 1997, SoftMan has distributed unauthorized Adobe software, including Adobe Educational software [FN1] and unbundled Adobe "Collections." [FN2] By distributing the individual pieces of Adobe Collections, Adobe contends that SoftMan is infringing Adobe's copyright in these products and violating the terms of Adobe's licenses. While SoftMan agrees that it is breaking apart various Adobe Collections and distributing the individual pieces of them as single products, SoftMan claims that it is entitled to distribute Adobe software in this manner. There is no direct contractual relationship between Adobe and SoftMan.

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FN1. SoftMan agrees that, at one point, it sold Adobe Educational software, but disputes that it has done so within the past year. (SoftMan Opp. at 6.)

FN2. "Collections" are sets of individual Adobe products, such as Adobe Photoshop or Illustrator on separate CD's, that are sold together in a larger Adobe Retail Box. These Collections are offered by Adobe at a discount from the individual retail products comprising the Collection. (Adobe Mot. at 3.) "An example of an Adobe Collection is the Adobe Publishing Collection, comprised of Adobe PageMaker, Acrobat, Photoshop and Illustrator, for $999. Separately, these products retails as follows: Pagemaker--$499, Acrobat--$249, Photoshop--$609 and Illustrator--$399." (*Id.*)

[3] Adobe distributes its products through "licensing" agreements with distributors. [FN3] Each piece of Adobe software is also accompanied by an End User License Agreement ("EULA"), which sets forth the terms of the license between Adobe and the end user for that specific Adobe product. The EULA is electronically recorded on the computer disk and customers are asked to agree to its terms when they attempt to install the software. (SoftMan Opp. at 4.)

FN3. Specific agreements include the Adobe Authorized Reseller Agreement (for distribution of full Retail versions of Adobe software), the Adobe Off-Campus Educational Reseller Agreement ("OCRA") for distribution of Educational software, and the Original Equipment Manufacturer Agreements ("OEM") (for distribution of Adobe software coupled to hardware such as a scanner). (Snyder Decl. ¶ 7, Ex. 2; Williams Decl. ¶ 3, Ex. 1.)

[4] Adobe alleges, among other things, that SoftMan has infringed on Adobe's trademark by distributing incomplete versions of Adobe software. The central difference between these allegedly incomplete products and the genuine Adobe software is that when SoftMan unbundles a Collection and resells its component parts, such individual pieces of software may not be accompanied by the registration information which would entitle the bearer access to Adobe's customer support and technical services. Adobe alleges that customers may be confused about the connection between authentic Adobe software and the unauthorized versions distributed by SoftMan because a consumer may acquire a product from SoftMan as a "Retail" version when, in fact, it is a piece of an unbundled Adobe Collection.
On August 27, 2001, this Court granted a temporary restraining order and seizure order against SoftMan. On September 10, 2001, the Court entered a preliminary injunction, to be in effect for the duration of the Court's review of the supplemental briefing submitted by the parties following oral argument.

[Portions omitted.]

(2) *Sale v. License*

1. (a) *Historical Background*

[5] Historically, the purpose of "licensing" computer program copy use was to employ contract terms to augment trade secret protection in order to protect against unauthorized copying at a time when, first, the existence of a copyright in computer programs was doubtful, and, later, when the extent to which copyright provided protection was uncertain. (*See* Rice Decl. ¶ 6.) Computer program copy use "licensing" continued after federal courts interpreted the Copyright Act to provide substantial protection for computer programs as literary works. (*Id.* at ¶ 7.) In *Step-Saver Data Systems, Inc. v. Wyse Technology, the Third Circuit examined the historical development of the use of licensing in the software industry and concluded that subsequent changes to the Copyright Act had rendered the need to characterize the transaction as a license "largely anachronistic." 939 F.2d 91, 96 n. 7 (3d Cir.1991). [FN10]*

FN10. The court in Step-Saver explained: "When these form licenses were first developed for software, it was, in large part, to avoid the federal copyright law first sale doctrine.... Under this doctrine, one could purchase a copy of a computer program, and then lease it

or lend it to another without infringing the copyright on the program.... Consumers,

instead of purchasing their own copy of the program, would simply rent a copy of the program, and duplicate it.... [S]oftware producers wanted to sue the companies that were renting the copies of the program to individual consumers, rather than the individual consumers. The first sale doctrine, though, stood as a substantial barrier to successful suit against these software rental companies, even under a theory of contributory infringement. By characterizing the original transaction between the software producer and the software rental company as a license, rather than a sale, and by making the license personal and non-transferable, software producers hoped to avoid the reach of the first sale doctrine and to establish a basis in state contract law for suing the software rental companies directly. Questions remained, however, as to whether the use of state contract law to avoid the first sale doctrine would be preempted either by the federal copyright statute (statutory preemption) or by the exclusive constitutional grant of authority over copyright issues to the federal government (constitutional preemption). [Citations.] Congress recognized the problem, and, in 1990, amended the first sale doctrine as it applies to computer programs and phonorecords. [Citations.] As amended, the first sale doctrine permits only non-profit libraries and educational institutions to lend or lease copies of software and phonorecords. [citations.] (Under the amended statute, a purchaser of a copy of a

copyrighted computer program may still sell his copy to another without the consent of the copyright holder.)." 939 F.2d at 96, n. 7.

**1084 (b) Adobe Sells its Software*

[6] A number of courts have held that the sale of software is the sale of a good within the meaning of Uniform Commercial Code. *Advent Sys. Ltd. v. Unisys Corp.,* 925 F.2d 670, 676 (3d Cir.1991); *Step-Saver,* 939 F.2d at 99-100; *Downriver Internists v. Harris Corp.,* 929 F.2d 1147, 1150 (6th Cir.1991). It is well-settled that in determining whether a transaction is a sale, a lease, or a license, courts look to the economic realities of the exchange. *Microsoft Corp. v. DAK Indus.,* 66 F.3d 1091 (9th Cir.1995); *United States v. Wise,* 550 F.2d 1180 (9th Cir.1977). In *DAK,* Microsoft and DAK entered into a license agreement granting DAK certain nonexclusive license rights to Microsoft's computer software. The agreement provided that DAK would pay a royalty rate per copy of computer software that it distributed. Subsequently, DAK filed a petition for bankruptcy, and failed to pay the final two out of a total of five installments. Microsoft filed a motion for the payment of an administrative expense, claiming that it should be compensated for DAK's post-bankruptcy petition use of the license agreement. On appeal, the Ninth Circuit held that the economic realities of the agreement indicated that it was a sale, not a license to use. Thus, Microsoft simply held an unsecured claim and not an administrative expense. The court

found that the agreement was best characterized as a lump sum sale of software units to DAK, rather than a grant of permission to use an intellectual property. The court in *DAK* noted: **4 Because we look to the economic realities of the agreement, the fact that the agreement labels itself a "license" and calls the payments "royalties," both terms that arguably imply periodic payment for the use rather than sale of technology, does not control our analysis. *DAK,* 66 F.3d at 1095, n. 2. Other courts have reached the same conclusion: software is sold and not licensed. *See, e.g., RRX Indus., Inc. v. Lab-Con, Inc.,* 772 F.2d 543, 546 (9th Cir.1985); *Applied Info. Mgmt., Inc. v. Icart,* 976 F.Supp. 149, 155 (E.D.N.Y.1997) (finding that whether a transaction denominated a "license" was in fact a sale conveying ownership was a disputed question of fact); *Novell, Inc. v. CPU Distrib., Inc.,* 2000 U.S. Dist. Lexis 9975 (S.D.Tex.2000). In *Novell,* a software manufacturer was pursuing a discount retailer for copyright infringement. Like Adobe, CPU argued that it purchased the software from an authorized source and was entitled to resell it under the first sale doctrine. Novell claimed that it did not sell software but merely licensed it to distribution partners. The court held that these transactions constituted sales and not a license, and therefore that the first sale doctrine applied. 2000 U.S. Dist. Lexis 9975 at *18. Adobe frames the issue as a dispute about the ownership of intellectual property. In fact, it is a dispute about the ownership of individual pieces of Adobe software. Section 202 of the Copyright Act recognizes a distinction between tangible *1085 property rights in copies of the work and intangible property rights in the creation itself. [FN11] In this case, no claim is made that transfer of the copy involves transfer of the ownership of the intellectual property within. (*See* SoftMan's Suppl. Brief at 9-10) ("Adobe has ownership rights in the copyright of [its] software."). What is at stake here is the right of the purchaser to dispose of that purchaser's particular copy of the software.

FN11. "Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied." 17 U.S.C. § 202.

[7] The Court finds that the circumstances surrounding the transaction strongly suggests that the transaction is in fact a sale rather than a license. For example, the purchaser commonly obtains a single copy of the software, with documentation, for a single price, which the purchaser pays at the time of the transaction, and which constitutes the entire payment for the "license." The license runs for an indefinite term without provisions for renewal. In light of these indicia, many courts and commentators conclude that a "shrinkwrap license" transaction is a sale of goods rather than a license. [FN12]

FN12. The term "shrinkwrap license" refers to the fact that the license begins when the purchaser reads its terms and tears open the transparent plastic wrapping, or "shrinkwrap," that encloses the software product. "Although early shrinkwrap licenses often were visible prior to purchase, and could be read before the purchaser tore open the software's wrapping, more recent variants place the license within the software's

packaging or on the disk itself." Stephen P. Tarolli, *The Future of Information Commerce under Contemporary Contract and Copyright Principles*, 46 Am. U.L.Rev. 1639, 1647-48 (1997) (footnote omitted); *see also ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir.1996) ("The 'shrinkwrap license' gets its name from the fact that retail software packages are covered in plastic or cellophane 'shrinkwrap' ... vendors ... have written licenses that become effective as soon as the customer tears the wrapping from the package. Vendors prefer 'end user license' ...").

[8] The reality of the business environment also suggests that Adobe sells its software to distributors. Adobe transfers large amounts of merchandise to distributors. The distributors pay full value for the merchandise and accept the risk that the software may be damaged or lost. [FN13] The distributors also accept the risk that they will be unable to resell the product. [FN14] The distributors then resell the product to other distributors in the secondary market. The secondary market and the ultimate consumer also pay full value for the product, and accept the risk that the product may be lost or damaged. This evidence suggests a transfer of title in the good. The transfer of a product for consideration with a transfer of title and risk of loss generally constitutes a sale. *1086 *VWP of Am., Inc. v. United States*, 175 F.3d 1327, 1338- 39 (Fed.Cir.1999). Professor Raymond Nimmer writes:

FN13. "In purchasing Adobe software from authorized distributors, I always understood that SoftMan was obtaining title to the particular copies it purchased.... SoftMan paid fair value for the product and assumes the risk of loss or damage upon receipt. SoftMan also assumed the risk of loss if it was unable to resell the software." (Dracup Decl. ¶ 8.)

FN14. SoftMan points to the language of Adobe's distribution agreements, which includes sale terms and states that the distributor assumes the risk of loss or damage of the product. (Soriano Decl., Ex. 1 at 5.7-5.14.) Therefore, SoftMan argues, Adobe transfers title in the

software to its distributors subject to a license restricting the distributor's rights and the manner in which the distributor may sell the software. In addition, SoftMan argues that even if title does not pass to the distributors, the distributors may still transfer title in individual copies subject to the terms of the EULA. A consumer may obtain good title from a distributor who has not perfected title. Unif. Comm.Code § 2- 403(2).

**5 Ownership of a copy should be determined based on the actual character, rather than the label, of the transaction by which the user obtained possession. Merely labeling a transaction as a

lease or license does not control. If a transaction involves a single payment giving the buyer an unlimited period in which it has a right to possession, the transaction is a sale. In this situation, the buyer owns the copy regardless of the label the parties use for the contract. Course of dealing and trade usage may be relevant, since they establish the expectations and intent of the parties. The pertinent issue is whether, as in a lease, the user may be required to return the copy to the vendor after the expiration of a particular period. If not, the transaction conveyed not only possession, but also transferred ownership of the copy.
Raymond Nimmer, *The Law of Computer Technology* § 1.18[1] p. 1-103 (1992). The Court agrees that a single payment for a perpetual transfer of possession is, in reality, a sale of personal property and therefore transfers ownership of that property, the copy of the software.

[9] Other commentators have urged courts to look at the substance rather than the form of licensing agreements. *See, e.g.*, David A. Rice, *Licensing the Use of Computer Program Copies and the Copyright Act First Sale Doctrine,* 30 Jurimetrics J. 157 (1990). In particular, the following factors require a finding that distributing software under licenses transfers individual copy ownership: temporally unlimited possession, absence of time limits on copy possession, pricing and payment schemes that are unitary not serial, licenses under which subsequent transfer is neither prohibited nor conditioned on obtaining the licensor's prior approval (only subject to a prohibition against rental and a requirement that any transfer be of the entity), and licenses under which the use restrictions principal purpose is to protect intangible copyrightable subject matter, and not to preserve property interests in individual program copies. *Id.* at 172.

[10] Adobe relies primarily on two cases to support its proposition that software is licensed and not sold. In *Microsoft Corp. v. Harmony Computers & Elecs., Inc.*, 846 F.Supp. 208, 212 (E.D.N.Y.1994), the court assumed without analysis that the transaction was a license rather than a sale and held that distribution outside the scope of a license agreement constituted copyright infringement. The Court finds *Harmony* 's facts to be distinguishable. In that case, the defendants were selling *counterfeit* Microsoft products. Here, Adobe does not allege that SoftMan sells counterfeit Adobe software.

[11] Adobe also relies on *Adobe Sys. Inc. v. One Stop Micro, Inc.*, 84 F.Supp.2d 1086, 1093 (N.D.Cal.2000). The court held that One Stop's distribution of Educational versions of Adobe software to non-educational end users was outside the scope of Adobe's license and in violation of Adobe's exclusive right to distribute under § 106(3). In *One Stop,* an unlicensed reseller admitted to adulterating the packaging for Adobe Educational software and transferring it as retail Adobe products for prices below the street price of the retail product. *Id.* The court further held that One Stop could not claim to have title for first sale purposes while the end user only obtained a license. The Court finds the facts of *One Stop* to be distinguishable from the instant case. In *One Stop,* the issue was peeling off and destroying the "Education version" stickers on software, as well as destroying bar code and serial numbers on the software, and then reselling it as commercial software. *Id.* at 1088. To the extent that the court in *One Stop* found that the transaction at issue was in fact a license, and not a *1087 sale, this Court simply declines to adopt that analysis. In *One Stop,* the court placed great weight on the declarations of Adobe's experts that licensing is the preferred method of distributing software. The Court understands

fully why licensing has many advantages for software publishers. However, this preference does not alter the Court's analysis that the substance of the transaction at issue here is a sale and not a license.

(c) *EULA Terms*

[12] Adobe argues that the EULA requires construction of the transaction as a license rather than a sale. The Court finds that SoftMan is not bound by the EULA because there was no assent to its terms.

i) *Assent*

[13] Adobe contends that the EULA limits the consumer's ability to transfer the software after buying it. According to SoftMan, a hard copy of the EULA agreement is not enclosed with the individual Adobe software disk. Instead, consumers are asked to agree to its terms as part of the installation process. (Dracup Decl. ¶ 7.)

[14] Courts have required that assent to the formation of a contract be manifested in some way, by words or other conduct, if the contract is to be effective. E. Allan Farnsworth, *Farnsworth on Contracts* § 3.1 (2d ed.2000). As the court noted in *Specht v. Netscape Communications Corp.*, 150 F.Supp.2d 585 (S.D.N.Y.2001): "The case law on software licensing has not eroded the importance of assent in contract formation. Mutual assent is the bedrock of any agreement to which the law will give force. Defendants' position, if accepted, would so expand the definition of assent as to render it meaningless." *Id.* at 596.

[15] In the instant case, the Court finds that there is only assent on the part of the consumer, if at all, when the consumer loads the Adobe program and begins the installation process. It is undisputed that SoftMan has never attempted to load the software that it sells. Consequently, the Court finds that SoftMan is not subject to the Adobe EULA.

[16] Adobe fails to offer a compelling rationale for how SoftMan becomes subject to Adobe's licenses if SoftMan never loads the software onto computers. Adobe claims that the EULA is enforceable against SoftMan because the boxes containing Adobe software (including Collections) clearly indicate that use is subject to the consumer's agreement to the terms contained in EULA inside. *See, e.g., ProCD,* 86 F.3d at 1451. Like the CD boxes in *ProCD,* Adobe's EULAs state that the product can be returned if the terms are not agreed to by the end user. The Adobe Collections boxes state: "NOTICE TO USERS: This product is offered subject to the license agreement included with the media." (Navarro Decl. at p. 2.) However, the existence of this notice on the box cannot bind SoftMan. Reading a notice on a box is not equivalent to the degree of assent that occurs when the software is loaded onto the computer and the consumer is asked to agree to the terms of the license.

[17] Adobe further asserts that whether SoftMan is characterized as a distributor or reseller, SoftMan would be bound by the terms of these license agreements, which state that Adobe

retains ownership of its software products, as well as the media upon which these software products are distributed. It is undisputed that SoftMan is not a signatory to any licensing agreements. Yet Adobe claims that although SoftMan has never signed an agreement with Adobe, the terms of Adobe's distribution agreements all apply to SoftMan.
[18] **7 In *One Stop,* the court stated that although One Stop was not a signatory to an *1088 Adobe licensing agreement, it was nevertheless subject to the restrictions of those agreements. 84 F.Supp.2d at 1092. The court found that by obtaining Adobe software from a party to an Adobe licensing agreement, One Stop was bound by any restrictions imposed by that agreement. *Id.* at 1093. In *Harmony,* the court found that "to the extent that defendants bought their Microsoft Products from authorized Microsoft licensees, they were subject to the same licensing restrictions under which those licensees operated." *Harmony,* 846 F.Supp. at 213. The Court declines to adopt the analysis of these cases.

[19] The Court finds that Adobe's EULA cannot be valid without assent. Therefore, SoftMan is not bound by the EULA because it has never loaded the software, and therefore never assented to its terms of use.

UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT (UCITA)

SCOPE

Apply UCITA section 103(b)(1) and (3) to the following hypotheticals. Also read the Official Comment to section 103, especially Comment 4. UCITA is included in Selected Commercial Statutes (2001 edition)

HYPOTHETICALS

Which law applies to the following transactions: Art. 2, UCITA, or other law?

1) Sale of computer.

2) Sale of computer & sale of software containing computer information from same seller. The buyer downloads the software from seller's Web site.

3) Sale of computer & sale of software as in #2, except instead of being downloaded, software is contained in a diskette.

4) Sale of automobile containing a computer which has embedded in it a computer program which operates the brakes.

5) Sale of digital camera which has embedded in it a computer program that enables the camera to link to a computer.

6) Apply UCITA to the Advent case (sale of computer information and services).

ProCD, INC v. ZEIDENBERG

86 F.3d 1447 (7th Cir. 1996)

[Amicus curiae briefs were filed on behalf of the Business Software Alliance, the Software Publisher's Ass'n, and the Am. Committee for Interoperable Systems.]

Before COFFEY, FLAUM, and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

Must buyers of computer software obey the terms of shrinkwrap licenses? The *1449 district court held not, for two reasons: first, they are not contracts because the licenses are inside the box rather than printed on the outside; second, federal law forbids enforcement even if the licenses are contracts. 908 F.Supp. 640 (W.D.Wis.1996). The parties and numerous amici curiae have briefed many other issues, but these are the only two that matter--and we disagree with the district judge's conclusion on each. Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable). Because no one argues that the terms of the license at issue here are troublesome, we remand with instructions to enter judgment for the plaintiff.

I

ProCD, the plaintiff, has compiled information from more than 3,000 telephone directories into a computer database. We may assume that this database cannot be copyrighted, although it is more complex, contains more information (nine- digit zip codes and census industrial codes), is organized differently, and therefore is more original than the single alphabetical directory at issue in Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991). See Paul J. Heald, The Vices of Originality, 1991 Sup.Ct. Rev. 143, 160-68. ProCD sells a version of the database, called SelectPhone (trademark), on CD-ROM discs. (CD-ROM means "compact disc--read only memory." The "shrinkwrap license" gets its name from the fact that retail software packages are covered in plastic or cellophane "shrinkwrap," and some vendors, though not ProCD, have written licenses that become effective as soon as the customer tears the wrapping from the package. Vendors prefer "end user license," but we use the more common term.) A proprietary method of compressing the data serves as effective encryption too. Customers decrypt and use the data with the aid of an application program that ProCD has written. This program, which is copyrighted, searches the database in response to users' criteria (such as "find all people named Tatum in Tennessee, plus all firms with 'Door Systems' in the corporate name"). The resulting

lists (or, as ProCD prefers, "listings") can be read and manipulated by other software, such as word processing programs.

The database in SelectPhone (trademark) cost more than $10 million to compile and is expensive to keep current. It is much more valuable to some users than to others. The combination of names, addresses, and SIC codes enables manufacturers to compile lists of potential customers. Manufacturers and retailers pay high prices to specialized information intermediaries for such mailing lists; ProCD offers a potentially cheaper alternative. People with nothing to sell could use the database as a substitute for calling long distance information, or as a way to look up old friends who have moved to unknown towns, or just as an electronic substitute for the local phone book. ProCD decided to engage in price discrimination, selling its database to the general public for personal use at a low price (approximately $150 for the set of five discs) while selling information to the trade for a higher price. It has adopted some intermediate strategies too: access to the SelectPhone (trademark) database is available via the America Online service for the price America Online charges to its clients (approximately $3 per hour), but this service has been tailored to be useful only to the general public.

If ProCD had to recover all of its costs and make a profit by charging a single price--that is, if it could not charge more to commercial users than to the general public--it would have to raise the price substantially over $150. The ensuing reduction in sales would harm consumers who value the information at, say, $200. They get consumer surplus of $50 under the current arrangement but would cease to buy if the price rose substantially. If because of high elasticity of demand in the consumer segment of the market the only way to make a profit turned out to be a price attractive to commercial users alone, then all consumers would lose out--and so would the commercial clients, who would have to pay more for the listings because ProCD could not obtain any contribution toward costs from the consumer market.

*1450 To make price discrimination work, however, the seller must be able to control arbitrage. An air carrier sells tickets for less to vacationers than to business travelers, using advance purchase and Saturday-night-stay requirements to distinguish the categories. A producer of movies segments the market by time, releasing first to theaters, then to pay-per-view services, next to the videotape and laserdisc market, and finally to cable and commercial tv. Vendors of computer software have a harder task. Anyone can walk into a retail store and buy a box. Customers do not wear tags saying "commercial user" or "consumer user." Anyway, even a commercial-user-detector at the door would not work, because a consumer could buy the software and resell to a commercial user. That arbitrage would break down the price discrimination and drive up the minimum price at which ProCD would sell to anyone. Instead of tinkering with the product and letting users sort themselves--for example, furnishing current data at a high price that would be attractive only to commercial customers, and two-year-old data at a low price--ProCD turned to the institution of contract. Every box containing its consumer product declares that the software comes with restrictions stated in an enclosed license. This license, which is encoded on the CD-ROM disks as well as printed in the manual,

and which appears on a user's screen every time the software runs, limits use of the application program and listings to non-commercial purposes.

Matthew Zeidenberg bought a consumer package of SelectPhone (trademark) in 1994 from a retail outlet in Madison, Wisconsin, but decided to ignore the license. He formed Silken Mountain Web Services, Inc., to resell the information in the SelectPhone (trademark) database. The corporation makes the database available on the Internet to anyone willing to pay its price--which, needless to say, is less than ProCD charges its commercial customers. Zeidenberg has purchased two additional SelectPhone (trademark) packages, each with an updated version of the database, and made the latest information available over the World Wide Web, for a price, through his corporation. ProCD filed this suit seeking an injunction against further dissemination that exceeds the rights specified in the licenses (identical in each of the three packages Zeidenberg purchased). The district court held the licenses ineffectual because their terms do not appear on the outside of the packages. The court added that the second and third licenses stand no different from the first, even though they are identical, because they might have been different, and a purchaser does not agree to--and cannot be bound by--terms that were secret at the time of purchase. 908 F.Supp. at 654.

II

Following the district court, we treat the licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code. Whether there are legal differences between "contracts" and "licenses" (which may matter under the copyright doctrine of first sale) is a subject for another day. See Microsoft Corp. v. Harmony Computers & Electronics, Inc., 846 F.Supp. 208 (E.D.N.Y.1994). Zeidenberg does not argue that Silken Mountain Web Services is free of any restrictions that apply to Zeidenberg himself, because any effort to treat the two parties as distinct would put Silken Mountain behind the eight ball on ProCD's argument that copying the application program onto its hard disk violates the copyright laws. Zeidenberg does argue, and the district court held, that placing the package of software on the shelf is an "offer," which the customer "accepts" by paying the asking price and leaving the store with the goods. Peeters v. State, 154 Wis. 111, 142 N.W. 181 (1913). In Wisconsin, as elsewhere, a contract includes only the terms on which the parties have agreed. One cannot agree to hidden terms, the judge concluded. So far, so good--but one of the terms to which Zeidenberg agreed by purchasing the software is that the transaction was subject to a license. Zeidenberg's position therefore must be that the printed terms on the outside of a box are the parties' contract--except for printed terms that refer to or incorporate other terms. But why would Wisconsin fetter the parties' choice in this *1451 way? Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works), or both. The "Read Me" file included with most software, describing system requirements and potential incompatibilities, may be equivalent to ten pages of type; warranties and license restrictions take still more space. Notice on the

outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike. See E. Allan Farnsworth, 1 Farnsworth on Contracts s 4.26 (1990); Restatement (2d) of Contracts s 211 comment a (1981) ("Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than the details of individual transactions."). Doubtless a state could forbid the use of standard contracts in the software business, but we do not think that Wisconsin has done so.

Transactions in which the exchange of money precedes the communication of detailed terms are common. Consider the purchase of insurance. The buyer goes to an agent, who explains the essentials (amount of coverage, number of years) and remits the premium to the home office, which sends back a policy. On the district judge's understanding, the terms of the policy are irrelevant because the insured paid before receiving them. Yet the device of payment, often with a "binder" (so that the insurance takes effect immediately even though the home office reserves the right to withdraw coverage later), in advance of the policy, serves buyers' interests by accelerating effectiveness and reducing transactions costs. Or consider the purchase of an airline ticket. The traveler calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order. The ticket contains elaborate terms, which the traveler can reject by canceling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous. See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991); see also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, --- U.S. ----, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995) (bills of lading). Just so with a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theater that detects a violation will confiscate the tape and escort the violator to the exit. One could arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.

Consumer goods work the same way. Someone who wants to buy a radio set visits a store, pays, and walks out with a box. Inside the box is a leaflet containing some terms, the most important of which usually is the warranty, read for the first time in the comfort of home. By Zeidenberg's lights, the warranty in the box is irrelevant; every consumer gets the standard warranty implied by the UCC in the event the contract is silent; yet so far as we are aware no state disregards warranties furnished with consumer products. Drugs come with a list of ingredients on the outside and an elaborate package insert on the inside. The package insert describes drug interactions, contraindications, and other vital information--but, if Zeidenberg is right, the purchaser need not read the package insert, because it is not part of the contract.

Next consider the software industry itself. Only a minority of sales take place over the

counter, where there are boxes to peruse. A customer may place an order by phone in response to a line item in a catalog or a review in a magazine. Much software is ordered over the Internet by purchasers who have never seen a box. Increasingly software arrives by wire. There is no box; there is only a stream of electrons, a collection of information that includes data, an application program, instructions, many limitations ("MegaPixel 3.14159 cannot be used with BytePusher 2.718"), and the terms of *1452 sale. The user purchases a serial number, which activates the software's features. On Zeidenberg's arguments, these unboxed sales are unfettered by terms--so the seller has made a broad warranty and must pay consequential damages for any shortfalls in performance, two "promises" that if taken seriously would drive prices through the ceiling or return transactions to the horse-and-buggy age.

According to the district court, the UCC does not countenance the sequence of money now, terms later. (Wisconsin's version of the UCC does not differ from the Official Version in any material respect, so we use the regular numbering system. Wis. Stat. s 402.201 corresponds to UCC s 2-201, and other citations are easy to derive.) One of the court's reasons--that by proposing as part of the draft Article 2B a new UCC s 2-2203 that would explicitly validate standard-form user licenses, the American Law Institute and the National Conference of Commissioners on Uniform Laws have conceded the invalidity of shrinkwrap licenses under current law, see 908 F.Supp. at 655- 56--depends on a faulty inference. To propose a change in a law's text is not necessarily to propose a change in the law's effect. New words may be designed to fortify the current rule with a more precise text that curtails uncertainty. To judge by the flux of law review articles discussing shrinkwrap licenses, uncertainty is much in need of reduction--although businesses seem to feel less uncertainty than do scholars, for only three cases (other than ours) touch on the subject, and none directly addresses it. See Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir.1991); Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 268-70 (5th Cir.1988); Arizona Retail Systems, Inc. v. Software Link, Inc., 831 F.Supp. 759 (D.Ariz.1993). As their titles suggest, these are not consumer transactions. Step-Saver is a battle-of-the-forms case, in which the parties exchange incompatible forms and a court must decide which prevails. See Northrop Corp. v. Litronic Industries, 29 F.3d 1173 (7th Cir.1994) (Illinois law); Douglas G. Baird & Robert Weisberg, Rules, Standards, and the Battle of the Forms: A Reassessment of s 2-207, 68 Va. L.Rev. 1217, 1227-31 (1982). Our case has only one form; UCC s 2-207 is irrelevant. Vault holds that Louisiana's special shrinkwrap-license statute is preempted by federal law, a question to which we return. And Arizona Retail Systems did not reach the question, because the court found that the buyer knew the terms of the license before purchasing the software.

What then does the current version of the UCC have to say? We think that the place to start is s 2-204(1): "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by using the software after having an

opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance. So although the district judge was right to say that a contract can be, and often is, formed simply by paying the price and walking out of the store, the UCC permits contracts to be formed in other ways. ProCD proposed such a different way, and without protest Zeidenberg agreed. Ours is not a case in which a consumer opens a package to find an insert saying "you owe us an extra $10,000" and the seller files suit to collect. Any buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price. Nothing in the UCC requires a seller to maximize the buyer's net gains. Section 2-606, which defines "acceptance of goods", reinforces this understanding. A buyer accepts goods under s 2-606(1)(b) when, after an opportunity to inspect, he fails to make an effective rejection under s 2- 602(1). ProCD extended an opportunity to reject if a buyer should find the license terms *1453 unsatisfactory; Zeidenberg inspected the package, tried out the software, learned of the license, and did not reject the goods. We refer to s 2-606 only to show that the opportunity to return goods can be important; acceptance of an offer differs from acceptance of goods after delivery, see Gillen v. Atalanta Systems, Inc., 997 F.2d 280, 284 n. 1 (7th Cir.1993); but the UCC consistently permits the parties to structure their relations so that the buyer has a chance to make a final decision after a detailed review.

Some portions of the UCC impose additional requirements on the way parties agree on terms. A disclaimer of the implied warranty of merchantability must be "conspicuous." UCC s 2-316(2), incorporating UCC s 1-201(10). Promises to make firm offers, or to negate oral modifications, must be "separately signed." UCC ss 2-205, 2-209(2). These special provisos reinforce the impression that, so far as the UCC is concerned, other terms may be as inconspicuous as the forum-selection clause on the back of the cruise ship ticket in Carnival Lines. Zeidenberg has not located any Wisconsin case-- for that matter, any case in any state--holding that under the UCC the ordinary terms found in shrinkwrap licenses require any special prominence, or otherwise are to be undercut rather than enforced. In the end, the terms of the license are conceptually identical to the contents of the package. Just as no court would dream of saying that SelectPhone (trademark) must contain 3,100 phone books rather than 3,000, or must have data no more than 30 days old, or must sell for $100 rather than $150--although any of these changes would be welcomed by the customer, if all other things were held constant--so, we believe, Wisconsin would not let the buyer pick and choose among terms. Terms of use are no less a part of "the product" than are the size of the database and the speed with which the software compiles listings. Competition among vendors, not judicial revision of a package's contents, is how consumers are protected in a market economy. Digital Equipment Corp. v. Uniq Digital Technologies, Inc., 73 F.3d 756 (7th Cir.1996). ProCD has rivals, which may elect to compete by offering superior software, monthly updates, improved terms of use, lower price, or a better compromise among these elements. As we stressed above, adjusting terms in buyers' favor might help Matthew Zeidenberg today (he already has the software) but would lead to a response, such as a higher price, that might make consumers as a whole worse off.

[The court's discussion of the Copyright Act is omitted. Some courts do not agree with ProCD. See e.g., Arizona Retail Sys. v. The Software Link, Inc., 831 F. Supp. 759, 765 (D. Ariz. 1993) (Seller entered into a contract when it shipped the goods; any subsequent terms and conditions constituted a proposal to modify the contract to which the buyer must specifically assent). See also Step-Saver Data Sys. v. Wyse Technology, 939 F. 2d 91 (3d Cir. 1991).]

HILL v. GATEWAY 2000, INC.

105 F.3d 1147 (7th Cir. 1997), cert. denied,

522 U.S. 808 (1997)

Before CUMMINGS, WOOD, Jr., and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

A customer picks up the phone, orders a computer, and gives a credit card number. Presently a box arrives, containing the computer and a list of terms, said to govern unless the customer returns the computer within 30 days. Are these terms effective as the parties' contract, or is the contract term- free because the order-taker did not read any terms over the phone and elicit the customer's assent?

One of the terms in the box containing a Gateway 2000 system was an arbitration clause. Rich and Enza Hill, the customers, kept the computer more than 30 days before complaining about its components and performance. They filed suit in federal court arguing, among other things, that the product's shortcomings make Gateway a racketeer (mail and wire fraud are said to be the predicate offenses), leading to treble damages under RICO for the Hills and a class of all other purchasers. Gateway asked the district court to enforce the arbitration clause; the judge refused, writing that "[t]he present record is insufficient to support a finding of a valid arbitration agreement between the parties or that the plaintiffs were given adequate notice of the arbitration clause." Gateway took an immediate appeal, as is its right. 9 U.S.C. s 16(a)(1)(A).

The Hills say that the arbitration clause did not stand out: they concede noticing the statement of terms but deny reading it closely enough to discover the agreement to arbitrate, and they ask us to conclude that they therefore may go to court. Yet an agreement to arbitrate must be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. s 2. Doctor's Associates, Inc. v. Casarotto, --- U.S. ----, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996), holds that this provision of the Federal Arbitration Act is inconsistent with any requirement that an arbitration clause be prominent. A contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome. Carr v. CIGNA Securities, Inc., 95 F.3d 544, 547 (7th Cir.1996); Chicago Pacific Corp. v. Canada Life Assurance Co., 850 F.2d 334 (7th Cir.1988). Terms inside Gateway's box stand or fall together. If they constitute the parties' contract because the Hills had an opportunity to return the computer after reading them, then all must be enforced.

ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir.1996), holds that terms inside a box of software bind consumers who use the software after an opportunity to read the terms and to reject them by returning the product. Likewise, Carnival Cruise Lines, Inc. v. Shute, 499 U.S.

585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991), enforces a forum-selection clause that was included among three pages of terms attached to a cruise ship ticket. ProCD and Carnival Cruise Lines exemplify the many commercial transactions in which people pay for products with terms to follow; ProCD discusses others. 86 F.3d at 1451-52. The district court concluded in ProCD that the contract is formed when the consumer pays for the software; as a result, the court held, only terms known to the consumer at that moment are part of the contract, and provisos inside the box do not count. Although this is one way a contract *1149 could be formed, it is not the only way: "A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance." Id. at 1452. Gateway shipped computers with the same sort of accept-or- return offer ProCD made to users of its software. ProCD relied on the Uniform Commercial Code rather than any peculiarities of Wisconsin law; both Illinois and South Dakota, the two states whose law might govern relations between Gateway and the Hills, have adopted the UCC; neither side has pointed us to any atypical doctrines in those states that

might be pertinent; ProCD therefore applies to this dispute.

Plaintiffs ask us to limit ProCD to software, but where's the sense in that? ProCD is about the law of contract, not the law of software. Payment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors. Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread. For what little it is worth, we add that the box from Gateway was crammed with software. The computer came with an operating system, without which it was useful only as a boat anchor. See Digital Equipment Corp. v. Uniq Digital Technologies, Inc., 73 F.3d 756, 761 (7th Cir.1996). Gateway also included many application programs. So the Hills' effort to limit ProCD to software would not avail them factually, even if it were sound legally--which it is not.

For their second sally, the Hills contend that ProCD should be limited to executory contracts (to licenses in particular), and therefore does not apply because both parties' performance of this contract was complete when the box arrived at their home. This is legally and factually wrong: legally because the question at hand concerns the formation of the contract rather than its performance, and factually because both contracts were incompletely performed. ProCD did not depend on the fact that the seller characterized the transaction as a license rather

than as a contract; we treated it as a contract for the sale of goods and reserved the question whether for other purposes a "license" characterization might be preferable. 86 F.3d at 1450. All debates about characterization to one side, the transaction in ProCD was no more executory than the one here: Zeidenberg paid for the software and walked out of the store with a box under his arm, so if arrival of the box with the product ends the time for revelation of contractual terms, then the time ended in ProCD before Zeidenberg opened the box. But of course ProCD had not completed performance with delivery of the box, and neither had Gateway. One element of the transaction was the warranty, which obliges sellers to fix defects in their products. The Hills have invoked Gateway's warranty and are not satisfied with its response, so they are not well positioned to say that Gateway's obligations were fulfilled when the motor carrier unloaded the box. What is more, both ProCD and Gateway promised to help customers to use their products. Long-term service and information obligations are common in the computer business, on both hardware and software sides. Gateway offers "lifetime service" and has a round-the-clock telephone hotline to fulfil this promise. Some vendors spend more money helping customers use their products than on developing and manufacturing them. The document in Gateway's box includes promises of *1150 future performance that some consumers value highly; these promises bind Gateway just as the arbitration clause binds the Hills.

Next the Hills insist that ProCD is irrelevant because Zeidenberg was a "merchant" and they are not. Section 2-207(2) of the UCC, the infamous battle-of-the-forms section, states that "additional terms [following acceptance of an offer] are to be construed as proposals for addition to a contract. Between merchants such terms become part of the contract unless ...". Plaintiffs tell us that ProCD came out as it did only because Zeidenberg was a "merchant" and the terms inside ProCD's box were not excluded by the "unless" clause. This argument pays scant attention to the opinion in ProCD, which concluded that, when there is only one form, "sec. 2-207 is irrelevant." 86 F.3d at 1452. The question in ProCD was not whether terms were added to a contract after its formation, but how and when the contract was formed--in particular, whether a vendor may propose that a contract of sale be formed, not in the store (or over the phone) with the payment of money or a general "send me the product," but after the customer has had a chance to inspect both the item and the terms. ProCD answers "yes," for merchants and consumers alike. Yet again, for what little it is worth we observe that the Hills misunderstand the setting of ProCD. A "merchant" under the UCC "means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction", s 2-104(1). Zeidenberg bought the product at a retail store, an uncommon place for merchants to acquire inventory. His corporation put ProCD's database on the Internet for anyone to browse, which led to the litigation but did not make Zeidenberg a software merchant.

At oral argument the Hills propounded still another distinction: the box containing ProCD's software displayed a notice that additional terms were within, while the box containing Gateway's computer did not. The difference is functional, not legal. Consumers browsing the aisles of a store can look at the box, and if they are unwilling to deal with the prospect of

additional terms can leave the box alone, avoiding the transactions costs of returning the package after reviewing its contents. Gateway's box, by contrast, is just a shipping carton; it is not on display anywhere. Its function is to protect the product during transit, and the information on its sides is for the use of handlers rather than would-be purchasers.

Perhaps the Hills would have had a better argument if they were first alerted to the bundling of hardware and legal-ware after opening the box and wanted to return the computer in order to avoid disagreeable terms, but were dissuaded by the expense of shipping. What the remedy would be in such a case--could it exceed the shipping charges?--is an interesting question, but one that need not detain us because the Hills knew before they ordered the computer that the carton would include some important terms, and they did not seek to discover these in advance. Gateway's ads state that their products come with limited warranties and lifetime support. How limited was the warranty--30 days, with service contingent on shipping the computer back, or five years, with free onsite service? What sort of support was offered? Shoppers have three principal ways to discover these things. First, they can ask the vendor to send a copy before deciding whether to buy. The Magnuson-Moss Warranty Act requires firms to distribute their warranty terms on request, 15 U.S.C. s 2302(b)(1)(A); the Hills do not contend that Gateway would have refused to enclose the remaining terms too. Concealment would be bad for business, scaring some customers away and leading to excess returns from others. Second, shoppers can consult public sources (computer magazines, the Web sites of vendors) that may contain this information. Third, they may inspect the documents after the product's delivery. Like Zeidenberg, the Hills took the third option. By keeping the computer beyond 30 days, the Hills accepted Gateway's offer, including the arbitration clause.

The Hills' remaining arguments, including a contention that the arbitration *1151 clause is unenforceable as part of a scheme to defraud, do not require more than a citation to Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). Whatever may be said pro and con about the cost and efficacy of arbitration (which the Hills disparage) is for Congress and the contracting parties to consider. Claims based on RICO are no less arbitrable than those founded on the contract or the law of torts. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 238-42, 107 S.Ct. 2332, 2343-46, 96 L.Ed.2d 185 (1987). The decision of the district court is vacated, and this case is remanded with instructions to compel the Hills to submit their dispute to arbitration.

Specht v. Netscape Communications Corp. & America Online

150 F.Supp.2d 585 (S.D.N.Y. 2001)

MEMORANDUM AND ORDER DENYING MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS

HELLERSTEIN, D.J.

***1** Promises become binding when there is a meeting of the minds and consideration is exchanged. So it was at King's Bench in common law England; so it was under the common law in the American colonies; so it was through more than two centuries of jurisprudence in this country; and so it is today. Assent may be registered by a signature, a handshake, or a click of a computer mouse transmitted across the invisible ether of the Internet. Formality is not a requisite; any sign, symbol or action, or even willful inaction, as long as it is unequivocally referable to the promise, may create a contract.

The three related cases before me all involve this timeless issue of assent, but in the context of free software offered on the Internet. If an offeree downloads free software, and the offeror seeks a contractual understanding limiting its uses and applications, under what circumstances does the act of downloading create a contract? On the facts presented here, is there the requisite assent and consideration? My decision focuses on these issues.

In these putative class actions, Plaintiffs allege that usage of the software transmits to Defendants private information about the user's file transfer activity on the Internet, thereby effecting an electronic surveillance of the user's activity in violation of two federal statutes, the Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et seq.*, and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. Defendants move to compel arbitration and stay the proceedings, arguing that the disputes reflected in the Complaint, like all others relating to use of the software, are subject to a binding arbitration clause in the End User License Agreement ("License Agreement"), the contract allegedly made by the offeror of the software and the party effecting the download. Thus, I am asked to decide if an offer of a license agreement, made independently of freely offered software and not expressly accepted by a user of that software, nevertheless binds the user to an arbitration clause contained in the license.

I. Factual and Procedural Background

Defendant Netscape, a provider of computer software programs that enable and facilitate the use of the Internet, offers its "SmartDownload" software free of charge on its web site to all those who visit the site and indicate, by clicking their mouse in a designated box, that they wish to obtain it. SmartDownload is a program that makes it easier for its users to download files from the Internet without losing their interim progress when they pause to engage in some other task, or if their Internet connection is severed. [Part of opinion omitted.]

***2** Visitors wishing to obtain SmartDownload from Netscape's web site arrive at a page pertaining to the download of the software. On this page, there appears a tinted box, or button, labeled "Download." By clicking on the box, a visitor initiates the download. The sole reference on this page to the License Agreement appears in text that is visible only if a visitor scrolls down through the page to the next screen. If a visitor does so, he or she sees the following invitation to review the License Agreement:

Please review and agree to the terms of the *Netscape SmartDownload software license agreement* before downloading and using the software.

Visitors are not required affirmatively to indicate their assent to the License Agreement, or even to view the license agreement, before proceeding with a download of the software. But if a visitor chooses to click on the underlined text in the invitation, a hypertext link takes the visitor to a web page entitled "License & Support Agreements." The first paragraph on this page reads in pertinent part:

The use of each Netscape software product is governed by a license agreement. You must read and agree to the license agreement terms BEFORE acquiring a product. Please click on the appropriate link below to review the current license agreement for the product of interest to you before acquisition. For products available for download, you must read and agree to the license agreement terms BEFORE you install the software. If you do not agree to the license terms, do not download, install or use the software.

Below the paragraph appears a list of license agreements, the first of which is "*License Agreement for Netscape Navigator and Netscape Communicator Product Family* (Netscape Navigator, Netscape Communicator and Netscape SmartDownload)." If the visitor then clicks on that text, he or she is brought to another web page, this one containing the full text of the License Agreement.

The License Agreement, which has been unchanged throughout the period that Netscape has made SmartDownload available to the public, grants the user a license to use and reproduce SmartDownload, and otherwise contains few restrictions on the use of the software. The first paragraph of the License Agreement describes, in upper case print, the purported manner in which a user accepts or rejects its terms.

BY CLICKING THE ACCEPTANCE BUTTON OR INSTALLING OR USING NETSCAPE COMMUNICATOR, NETSCAPE NAVIGATOR, OR NETSCAPE SMARTDOWNLOAD SOFTWARE (THE "PRODUCT"), THE INDIVIDUAL OR ENTITY LICENSING THE PRODUCT ("LICENSEE") IS CONSENTING TO BE BOUND BY AND IS BECOMING A PARTY TO THIS AGREEMENT. IF LICENSEE DOES NOT AGREE TO ALL OF THE TERMS OF THIS AGREEMENT, THE BUTTON INDICATING NON-ACCEPTANCE MUST BE SELECTED, AND LICENSEE MUST NOT INSTALL OR USE THE SOFTWARE.

The License Agreement also contains a term requiring that virtually all disputes be submitted to arbitration in Santa Clara County, California.

***3** Unless otherwise agreed in writing, all disputes relating to this Agreement (excepting any dispute relating to intellectual property rights) shall be subject to final and binding arbitration in Santa Clara County, California, under the auspices of JAMS/EndDispute, with the losing party paying all costs of arbitration.

II. Applicable Law

[Discussion of the Federal Arbitration Act and choice of law is omitted. The court held that California law applied.]

***4** By its terms, Article 2 of the Uniform Commercial Code "applies to transactions in goods." *See* Cal. Com.Code § 2102. The parties' relationship essentially is that of a seller and a purchaser of goods. Although in this case the product was provided free of charge, [FN8] the roles are essentially the same as when an individual uses the Internet to purchase software from a company: here, the Plaintiff requested Defendant's product by clicking on an icon marked "Download," and Defendant then tendered the product. Therefore, in determining whether the parties entered into a contract, I look to California law as it relates to the sale of goods, including the Uniform Commercial Code in effect in California.

III. Did Plaintiffs Consent to Arbitration?

Unless the Plaintiffs agreed to the License Agreement, they cannot be bound by the arbitration clause contained therein. My inquiry, therefore, focuses on whether the Plaintiffs, through their acts or failures to act, manifested their assent to the terms of the License Agreement proposed by Defendant Netscape. More specifically, I must consider whether the web site gave Plaintiffs sufficient notice of the existence and terms of the License Agreement, and whether the act of downloading the software sufficiently manifested Plaintiffs' assent to be bound by the License Agreement. I will address separately the factually distinct circumstances of Plaintiffs Michael Fagan and Christopher Specht.

In order for a contract to become binding, both parties must assent to be bound. "[C]ourts have required that assent to the formation of a contract be manifested in some way, by words or other conduct, if it is to be effective." E. Allan Farnsworth, *Farnsworth on Contracts* § 3.1 (2d ed.2000). "To form a contract, a manifestation of mutual assent is necessary. Mutual assent may be manifested by written or spoken words, or by conduct." Binder v. Aetna Life Ins. Co., 75 Cal.App.4th 832, 850, 89 Cal.Rptr.2d 540, 551 (Cal.Ct.App.1999) (citations omitted). "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Cal. Com.Code § 2204.

These principles enjoy continuing vitality in the realm of software licensing. The sale of software, in stores, by mail, and over the Internet, has resulted in several specialized forms of license agreements. For example, software commonly is packaged in a container or wrapper that advises the purchaser that the use of the software is subject to the terms of a license agreement contained inside the package. The license agreement generally explains that, if the purchaser does not wish to enter into a contract, he or she must return the product for a refund, and that failure to return it within a certain period will constitute assent to the license terms. These so-called "shrink-wrap licenses" have been the subject of considerable litigation.

[Portions of the opinion discussing shrink-warp licenses as treated in *ProCD, Inc. v. Zeidenberg* and *Hill v. Gateway 2000* is omitted.]

Although not mentioned in the decision, the customer, by seeking to take advantage of the warranty provisions contained in the license agreement, thus could be fairly charged with the arbitration clause as well. It bears noting that unlike the plaintiffs in *Hill* and *Brower,* who grounded their claims on express warranties contained in the contracts, the Plaintiffs in this case base their claims on alleged privacy rights independent of the License Agreement for SmartDownload.

***6** Not all courts to confront the issue have enforced shrink-wrap license agreements. In *Klocek v. Gateway, Inc.,* the court considered a standard shrink- wrap license agreement that was included in the box containing the computer ordered by the plaintiff. 104 F.Supp.2d 1332 (D.Kan.2000). The court held that Kansas and Missouri courts probably would not follow *Hill* or *ProCD, supra* . The court held that the computer purchaser was the offeror, and that the vendor accepted the purchaser's offer by shipping the computer in response to the offer. Under Section 2-207 of the Uniform Commercial Code, [FN11] the court held, the vendor's enclosure of the license agreement in the computer box constituted "[a] definite and seasonable expression of acceptance ... operat [ing] as an acceptance even though it state[d] terms additional to or different from those offered or agreed upon, unless acceptance [was] expressly made conditional on assent to the additional or different terms." *Id.* (quoting K.S.A. § 84-2-207). The court found that the vendor had not made acceptance of the license agreement a condition of the purchaser's acceptance of the computer, and that "the mere fact that Gateway shipped the goods with the terms attached did not communicate to plaintiff any unwillingness to proceed without plaintiff's agreement to the [license terms.]" Id. at 1340. Therefore, the court held, the plaintiff did not agree to the license terms and could not be compelled

to arbitrate. Id. at 1341.

For most of the products it makes available over the Internet (but not SmartDownload), Netscape uses another common type of software license, one usually identified as "click-wrap" licensing. A click-wrap license presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. [FN12] The product cannot be obtained or used unless and until the icon is clicked. For example, when a user attempts to obtain Netscape's Communicator or Navigator, a web page appears containing the full text of the Communicator / Navigator license agreement. Plainly visible on the screen is the query, "Do you accept all the terms of the preceding license agreement? If so, click on the Yes button. If you select No, Setup will close." Below this text are three button or icons: one labeled "Back" and used to return to an earlier step of the download preparation; one labeled "No," which if clicked, terminates the download; and one labeled "Yes," which if clicked, allows the download to proceed. Unless the user clicks "Yes," indicating his or her assent to the license agreement, the user cannot obtain the software. The few courts that have had occasion to consider click-wrap contracts have held them to be valid and enforceable. *See, e.g.*, In re RealNetworks, Inc. Privacy Litigation, No. 00C1366, 2000 WL 631341 (N.D.Ill. May 8, 2000); *Hotmail Corp. v. Van$ Money Pie, Inc.*, No. C 98-20064, 1998 WL 388389 (N.D.Cal. April 16, 1998).

***7** A third type of software license, "browse-wrap," was considered by a California federal court in Pollstar v. Gigmania Ltd., No. CIV-F-00-5671, 2000 WL 33266437 (E.D.Cal. Oct.17, 2000). In *Pollstar*, the plaintiff's web page offered allegedly proprietary information. Notice of a license agreement appears on the plaintiff's web site. Clicking on the notice links the user to a separate web page containing the full text of the license agreement, which allegedly binds any user of the information on the site. However, the user is not required to click on an icon expressing assent to the license, or even view its terms, before proceeding to use the information on the site. The court referred to this arrangement as a "browse-wrap" license. The defendant allegedly copied proprietary information from the site. The plaintiff sued for breach of the license agreement, and the defendant moved to dismiss for lack of mutual assent sufficient to form a contract. The court, although denying the defendant's motion to dismiss, expressed concern about the enforceability of the browse-wrap license:

Viewing the web site, the court agrees with the defendant that many visitors to the site may not be aware of the license agreement. Notice of the license agreement is provided by small gray text on a gray background.... No reported cases have ruled on the enforceability of a browse wrap license.... While the court agrees with [the defendant] that the user is not immediately confronted with the notice of the license agreement, this does not dispose of [the plaintiff's] breach of contract claim. The court hesitates to declare the invalidity and unenforceability of the browse wrap license agreement at this time.

Id. at *5-6. [FN13]

The SmartDownload License Agreement in the case before me differs fundamentally from both click-wrap and shrink-wrap licensing, and resembles more the browse-wrap license of *Pollstar*.

Where click-wrap license agreements and the shrink-wrap agreement at issue in *ProCD* require users to perform an affirmative action unambiguously expressing assent *before* they may use the software, that affirmative action is equivalent to an express declaration stating, "I assent to the terms and conditions of the license agreement" or something similar. For example, Netscape's Navigator will not function without a prior clicking of a box constituting assent. Netscape's SmartDownload, in contrast, allows a user to download and use the software without taking any action that plainly manifests assent to the terms of the associated license or indicates an understanding that a contract is being formed.

California courts carefully limit the circumstances under which a party may be bound to a contract. "[A]n offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious.... This principle of knowing consent applies with particular force to provisions for arbitration." Windsor Mills, Inc. v. Collins & Aikman Corp., 25 Cal.App.3d 987, 993, 101 Cal.Rptr. 347 (Cal.Ct.App.1972). *Accord* Lawrence v. Walzer & Gabrielson, 207 Cal.App.3d 1501, 1507, 256 Cal.Rptr. 6 (Cal.Ct.App.1989); Cory v. Golden State Bank, 95 Cal.App.3d 360, 366, 157 Cal.Rptr. 538 (Cal.Ct.App.1979).

***8** Netscape argues that the mere act of downloading indicates assent. However, downloading is hardly an unambiguous indication of assent. The primary purpose of downloading is to obtain a product, not to assent to an agreement. In contrast, clicking on an icon stating "I assent" has no meaning or purpose other than to indicate such assent. Netscape's failure to require users of SmartDownload to indicate assent to its license as a precondition to downloading and using its software is fatal to its argument that a contract has been formed.

Furthermore, unlike the user of Netscape Navigator or other click-wrap or shrink-wrap licensees, the individual obtaining SmartDownload is not made aware that he is entering into a contract. SmartDownload is available from Netscape's web site free of charge. Before downloading the software, the user need not view any license agreement terms or even any reference to a license agreement, and need not do anything to manifest assent to such a license agreement other than actually taking possession of the product. From the user's vantage point, SmartDownload could be analogized to a free neighborhood newspaper, readily obtained from a sidewalkbox or supermarket counter without any exchange with a seller or vender. It is there for the taking.

The only hint that a contract is being formed is one small box of text referring to the license agreement, text that appears below the screen used for downloading and that a user need not even see before obtaining the product:

Please review and agree to the terms of the *Netscape SmartDownload software license agreement* before downloading and using the software.

Couched in the mild request, "Please review," this language reads as a mere invitation, not as a condition. The language does not indicate that a user *must* agree to the license terms before

downloading and using the software. While clearer language appears in the License Agreement itself, the language of the invitation does not require the reading of those terms [FN14] or provide adequate notice either that a contract is being created or that the terms of the License Agreement will bind the user.

The case law on software licensing has not eroded the importance of assent in contract formation. Mutual assent is the bedrock of any agreement to which the law will give force. Defendants' position, if accepted, would so expand the definition of assent as to render it meaningless. Because the user Plaintiffs did not assent to the license agreement, they are not subject to the arbitration clause contained therein and cannot be compelled to arbitrate their claims against the Defendants.

[The remainder of the opinion is omitted.]

FN8. In order to form a contract, parties must exchange some consideration. "Among the limitations on the enforcement of promises, the most fundamental is the requirement of consideration." E. Allan Farnsworth, *Farnsworth on Contracts* § 2.2 (2d ed.2000). In general, "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." Restatement (Second) of Contracts, § 17. The apparent failure of consideration on Plaintiff's side--put simply, Plaintiff's obtaining SmartDownload without giving anything in return--might support a finding that no contract exists. However, because I rely on other grounds to find that the parties did not enter into a contract, *see infra*, I need not decide this issue.

FN9. In a breach-of-warranty suit involving software, the Supreme Court of Washington, *en banc*, enforced a license agreement that, like the agreement at issue in *ProCD,* was presented on the user's computer screen each time the software was used, and also was located on the outside of each diskette pouch and on the inside cover of the instruction manuals. *See* M.A. Mortenson Co., Inc. v. Timberline Software Corp., 140 Wash.2d 568, 998 P.2d 305 (Wash.2000).

FN11. Although Section 2-207 of the Uniform Commercial Code, codified by Kansas at K.S.A. § 84-2-207, generally is invoked in a "battle of the forms," the *Klocek* court held that "nothing in [the] language [of Section 2-207] precludes application in a case which involves only one form." *Id.* at 1339.

FN12. In this respect, click-wrap licensing is similar to the shrink- wrap license at issue in *ProCD, supra*, which appeared on the user's computer screen when the software was used and could not be bypassed until the user indicated acceptance of its terms. *See* ProCD, 86 F.3d at 1452.

FN13. Judge Barbara Jones of this Court considered a similar license arrangement in Register.com

v. Verio, Inc., 126 F.Supp.2d 238 (S.D.N.Y.2000) (Jones, J.). The plaintiff posted license terms on its web site, alongside a statement that "[b]y submitting this query [to the plaintiff's database], you agree to abide by these terms." Id. at 248. The court held that, "in light of this sentence at the end of Register.com' s terms of use, there can be no question that by proceeding to submit a [ ] query, Verio manifested its assent to be bound by Register.com's terms of use, and a contract was formed and subsequently breached." *Id.* Judge Jones was applying New York law. *Id.* at 241. Here, I am applying California law. But, whether under California or New York law, the promissee's assent to be bound is a required condition, and I find no such assent on the facts presented in this case.

FN14. Defendants argue that this case resembles the situation where a party has failed to read a contract and is nevertheless bound by that contract. *See, e.g.,* Powers v. Dickson, Carlson & Campillo, 54 Cal.App.4th 1102, 1109, 63 Cal.Rptr.2d 261 (Cal.Ct.App.1997); Rowland v. PaineWebber Inc., 4 Cal.App.4th 279, 287, 6 Cal.Rptr.2d 20 (Cal.Ct.App.1992). This argument misses the point. The question before me is whether the parties have first bound themselves to the contract. If they have unequivocally agreed to be bound, the contract is enforceable whether or not they have read its terms.

ELECTRONIC COMMERCE:
ELECTRONIC DATA INTERCHANGE (EDI) & INTERNET TRANSACTIONS

I. INTRODUCTION

Increasingly, businesses and government are doing their buying and selling via electronic media. This basically involves the buyer's and seller's computers talking to each other. For several years, these transactions have been two party communications between the buyer and seller. Recently, government and commercial parties also have been using the Internet where the seller or buyer establishes a cyberspace "shopping mall." For example, the Government Services Administration (GSA) acts as the purchasing agent which buys vast quantities of office supplies for federal government agencies. The GSA has an Internet web site enabling thousands of potential sellers to view the GSA's needs and submit offers.[1] Consumer transactions on the Internet also are growing. An estimated $250 billion worth of products were sold via EDI in 1998.[2] An estimated $17 billion worth of goods and services were sold via the Internet in 1998. Although EDI is by far the larger market, the volume of sales on the Internet is growing rapidly.

II. EDI

A. Introduction and Desription

Major corporations have implemented EDI. These include Eastman Kodak, General Motors and Wal-Mart.[3] Large companies benefit from the elimination of paper as well as standardized and streamlined procedures.[4] Standardized formats are used for purchase orders, invoices, etc. There is a reduction in paper handling and in administrative and processing

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[1] Lisa Carbon, "Electronic Commerce Strategies," Government Executive 42 (Dec. 1996), available in LEXIS, News library.

[2] Andy Reinhardt, “Extranets: Log on, link up, save big,” Bus. Week (June 22, 1998) at 134.

[3] Id.

[4] "CHHA Expands Edibanx to Attract Small Firms," Corporate EFT Rep. (Nov. 27, 1996), available in LEXIS, News library.

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expenses.[5] Buyers can maintain inventory at lower levels because EDI enables them to more accurately predict demand and immediately order whatever additional inventory is needed. The shorter purchasing processing time results in quicker delivery, so the buyer does not have to carry excess inventory "just in case" it is needed. Small and medium sized companies, however, complain that they have additional costs such as the need to purchase new computers, consulting and set-up fees, and network user fees.

Service providers are developing new enhancements to EDI. One example is "financial electronic data interchange" (FEDI) in which the buyer pays for the goods by having its bank electronically transfer the funds for the purchase from its bank account to the seller's bank account.[6] Another feature is offered by an Atlanta company to common carriers which deliver goods. As part of its EDI service, truckers can provide instant proof of delivery, notify parties of damage to their goods, and quickly respond to a seller's request for an immediate pickup.[7]

Mastercard International and Actra Business Systems have formed a consortium that is developing an EDI Internet system which illustrates the multimedia capabilities of selling electronically. Vendors selling their goods can use video, audio, and three dimensional product images.[8] In addition, they can easily change catalog listings.

The federal government may provide the essential thrust to get the EDI rocket soaring. Federal government involvement in EDI has been growing through individual agency pilot projects for several years. It was given a tremendous boost by the 1994 Federal Acquisition Streamlining Act which called for the federal government to establish a Federal Acquisition Network (FACNET), a network using EDI technology. President Clinton set January 1997 as the date by which he wanted government agencies to use electronic commerce for all routine procurements.[9]

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[5] Electronic Messaging Services Task Force, "The Commercial Use of Electronic Data Interchange-A Report," 45 Business Lawyer 1645 (1990).

[6] "CHHA Expands...," supra note 4.

[7] "Tracker Rolled Out," EDI News (Nov. 25, 1996), available in LEXIS, News library.

[8] Diane Trommer, "Group to Pilot Net-Based Order Management System," Electronic Buyers' News 62 (Dec. 2, 1996).

[9] Carbon, supra note 1.

State agencies have also begun using EDI.[10] A program in South Carolina is using EDI to promote economic development and social goals. It tries to match government agencies with minority and women-owned small businesses. In addition, in non-governmental commercial commerce, the EDI program enables majority-owned businesses to keep track of the extent to which they are meeting their goals of contracting with minority-owned businesses.

Some agencies already using EDI have had remarkable success. For example, the Defense Department orders vast quantities of goods for its mess halls, commissaries, and hospitals. Purchasing through EDI requires fewer staff persons, the process of offer and acceptance occurs as quickly as the computers can communicate with one another, and results in delivery within 72 hours instead of an average 60 days under the paper system. Because the transaction and delivery process is so fast, the government needs to maintain far less inventory. As a result Walter Reed Army Hospital closed six warehouses which it used to store goods, saving more than $6 million each year. As in non-governmental commercial EDI, the purchase and sale via EDI often is accompanied by financial electronic data interchange in which the payment also is made via EDI. For example, the Veterans Affairs Department pays electronically with the government's credit card when it purchases goods through EDI. This results in vendors rebating $6.50 for every $1,000 purchased because the vendor saves money by selling through EDI. The VA expected to save $28 million in 1996 through these rebates.

There are problems with using the government's EDI FACNET system, however. As in non-governmental commercial commerce, smaller businesses in particular resist paying the start-up costs for the hardware and software, paying fees for the network and building infrastructures.[11] They are discouraged by the fact that, at least in these beginning stages, there may not be adequate business opportunities for them to justify these costs. Therefore, many are turning to the Internet.

B. Transmitting EDI Messages via the Internet

Instead of the traditional one-on-one EDI system, some government agencies and businesses are using the Internet to transmit EDI messages.[12] For example, the Air Force and the GSA have EDI Internet web sites for buying goods. Smaller businesses favor these because they can sell goods to the government without incurring the costs of using FACNET. Users of the Internet to purchase

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[10] John P. McDermott, "Company a Gateway for Business Deals," Post & Courier (Charleston, S.C.), Nov. 25, 1996, at D2, available in LEXIS, News library.

[11] Carbon, supra note 1.

[12] Id.

goods are concerned about authentication, reliability,[13] security and privacy of the Internet,[14] however. Government and businesses are exploring ways of calming these concerns through standardized procedures and data encryption and digital signatures. Companies have established task forces to develop uniform requirements and standards to ensure interoperability.[15]

C. Internet Transactions

Many companies have "intranets." These are internal networks using the same software standards as the Internet. Companies distribute messages and data among offices via intranets. Increasingly companies also are developing "extranets," in which certain selected firms such as suppliers can connect with the company's network over the Internet or through private networks.[16] Mobil, BankAmerica, Hewlett-Packard, Proctor and Gamble, and Prudential HealthCare use extranets.

An example of how electronic commerce over the Internet could work follows:[17] Louie's Luggage is a national retailer. It uses its intranet, a secure link on the Internet, to send information to its hundreds of retail outlets, collect sales figures from them, etc. Employees can use the Intranet to send expense reports, apply for the company's health plan, obtain travel authorizations, and so forth. Louie's has an extranet to which certain manufacturers and other suppliers have access. The extranet provides the sellers of goods and services a cheaper and more flexible manner of dealing with Louie's than EDI offers. Louie's uses the Internet to do its banking. It receives payments from some of its business partners in this fashion. Payments are faster and paperwork is eliminated. However, some businesses from whom Louie's buys goods and services also use the Internet for payment, meaning Louie's loses the float he used to enjoy with the paper-based payment system. Louie's also has a Web site from which consumers can purchase its luggage. This reduces Louie's need for expensive retail outlets and enables Louie's to reach consumers all over the world. In addition, Louie's places "cookies" in the computer of every consumer who visits its site. Cookies are markers which track the consumer's activity on the Web, enabling the firm to collect sales data on the shopping patterns of its customers.

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[13] Rik Drummond, "Safe and secure Electronic Commerce," Network Computing 116 (Dec. 1, 1996), available in LEXIS, News Library.

[14] Carbon, supra note 1.

[15] Drummond, supra note 13.

[16] Reinhardt, supra note 2.

[17] This example is a modification of one developed by Reinhardt, supra note 2.

III. OFFER AND ACCEPTANCE OVER THE INTERNET IN CONSUMER TRANSACTIONS

A. Introduction

There is currently a major controversy among those involved in drafting uniform state laws over what conduct by consumers should constitute their acceptance of the terms and conditions of agreements relating to sales over the Internet. Some object to a rule which would bind the consumer when the only conduct of the consumer is "point and click."

It is important for sellers and consumer buyers to know if and when a contract is formed, because prior to that time neither party is bound and either can refuse to complete the transaction. This is a significant consumer right. The online consumer may want to get out of the transaction even though she has selected some items for purchase and clicked on various buttons with vague labels. For example, at a late stage in the checkout cycle she may for the first time learn of exorbitant shipping charges or of a no return policy. She may be told that if she decides to return the goods she must ship them to Oregon in their original containers rather than returning them to the seller's brick and mortar store located close to where the consumer lives or works. Perhaps she gets worried about the absence on the site of the seller's address or a customer service phone number. While online waiting for pages to download she may check her daily newspaper and find a better deal advertised by another seller. For all of these reasons and more, the consumer needs to know at what point she is bound and can no longer back out of the transaction.[18]

Even if the consumer agrees to be bound to the contract, many sites put the contract's terms and conditions in places where they are difficult to find. Is a consumer bound by a term which can be located only if the consumer clicks on several successive links, the first one or more of which do not clearly indicate they will eventually lead to the term or condition in question?

At the present time, most Web purchases by consumers are not for substantial sums. However, as more consumers purchase expensive goods such as computers online, both consumers and sellers have significant stakes in the issues surrounding contract formation.

B. Formation of contracts: Applicable Law

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[18] As discussed below (e.g., Walmart II, MagazineCity), the seller may structure the transaction so that even after a contract has been formed, the consumer may be able to get out of the transaction (e.g., by returning the goods pursuant to a 'satisfaction guaranteed' policy), and the seller may be able to cancel (e.g., if the seller does not receive the consumer's check within the required time period).

Restatement: "Manifestation of mutual assent" is required to form a contract. It is present when each party either makes a promise or begins performance; a contract may be in writing or formed by oral statements, acts, or failure to act. "The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act."[19] If a party's conduct manifests assent but he did not in fact assent, the contract is avoidable because of his mistake.[20]

Uniform Commercial Code (UCC): Sale of goods. "A contract...may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."[21] A court may find that a contract was formed even though it cannot determine the moment when it was formed.[22] A contract is formed even though it is indefinite because some terms are left out, as long as the court has enough information to order an appropriate remedy.[23] Unless language or circumstances unambiguously indicate otherwise, an offer to make a contract invites "acceptance in any manner and by any medium reasonable in the circumstances."[24]

Uniform Computer Information Transactions Act (UCITA): "A person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it...intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term."[25]

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[19] Restatement (Second) Contracts, § 19(1) (1981).

[20] Restatement (Second) Contracts, §§ 17-19 (1981).

[21] UCC § 2-204(1).

[22] UCC § 2-204(2).

[23] UCC § 2-204(3).

[24] UCC § 2-206(1)(b).

[25] UCITA § 112. UCITA applies only to computer information transactions, which are defined as agreements to create, modify, transfer, or license computer information. Computer information is information in electronic form which is obtained from or through the use of a computer or which can be processed by a computer. § 102. Whether or not UCITA applies to a given transaction, it provides a useful model for analyzing Web sales and will likely influence judges where applicable law is not explicit on an issue in controversy.

C. Offer & Acceptance: Scenarios From Web Sites[26]

Consider the following descriptions of popular Web sites and **visit the sites yourself.** The descriptions are based on a survey conducted the week of December 13, 1999. Some pages may have been changed since then.

1. Walmart I

Consumer shops; at checkout reviews selected items, clicks on "Complete" button, has an opportunity to verify or change delivery address and select payment method, clicks on "Proceed" button which transmits order. Walmart sends e-mail "confirming transmission and receipt of your order."

When a consumer shops at a physical store, cases hold that the seller makes an offer when he places goods on the shelf. The consumer accepts when he takes the goods off the shelf with the intention of paying for them. *Fender v. Colonial Stores*, 138 Ga. App. 31, 225 S.E.2d 691 (1976)(contract to sell goods at a future time; follows analysis of *Giant Food*); *Giant Food v. Washington Coca Cola Bottling Co.*, 332 A.2d 1 (Ct. App. Md. 1975)(fact that consumer has option of changing her mind before paying indicates only that the agreement of the parties permits the consumer to end the contract irrespective of the seller's breach; it does not indicate that a contract has not been formed). *Accord, Barker v. Allied Supermarket*, 596 P.2d 870 (Okla. 1979); *Seigel v. Giant Food*, 20 Md. App. 611, 318 A.2d 874 (1974). *See Porter v. Pfizer Hosp. Products Group*, 783 F. Supp. 1466 (D. Me. 1992)(formation of contract even though buyer was never billed for the goods).

When a consumer shops at a Web site, does the seller make an offer by displaying goods for sale on the site? Is that display the equivalent of placing goods on the shelf? If that is a correct analysis, then does the Walmart shopper accept the offer when she clicks on the "Complete" button? Does clicking on "Complete" mean the consumer has finished with her part of forming the contract and consequently has accepted? Alternatively, perhaps the consumer has not accepted until she clicks on the "Proceed" button because until then the order is not transmitted.

2. Walmart II www.walmart.com

In January, 2000, Walmart redesigned its Web site. Now, instead of clicking on "Proceed,"

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[26] The description of Web sites reflects their content and format as of the dates in December, 1999 when they were visited. These sites change substantially over time. Auction sites were not included in the survey and pose their own set of contract formation issues.

the consumer clicks on a button labeled "Send Order to Wal-Mart." Under "Frequently Asked Questions," the consumer is told: "Due to the timeliness of transmitting orders, once an order has been placed, it cannot be canceled. However, orders can be returned to any of our stores." (With certain exceptions, goods can be returned within certain time limits, if the consumer is "dissatisfied.") Although the consumer cannot cancel her order after clicking on the "Send Order" button, the seller can cancel if the consumer chose to pay by check or money order and payment is not received within 14 days of placing the order. (UCC § 2-703(f) provides the seller with the remedy of cancellation when the buyer fails to pay when due or before delivery.)

Labeling the button "Send Order to Wal-Mart" certainly is more descriptive, and therefore more informative, than "Complete" or "Proceed." But does this mean that sites using non-descriptive terms such as "Proceed" and "Complete" are vulnerable to the consumer's claim that clicking on that button should not constitute acceptance by the consumer because it is too vague to manifest an intention to be bound?

Does use of the term "order" in Walmart II instead of the term "complete" it used in Walmart I change the analysis? Is it reasonable for a consumer to believe that "order" means an offer? Under this analysis, the seller displaying goods on the site is merely inviting the consumer to make an offer. Clicking on "Send Order to Wal-Mart" is the consumer's offer. The seller accepts by sending an e-mail confirmation or by performance (delivery of the goods).

Apparently Walmart intends that clicking on the "Send Order" button constitutes consumer acceptance and not the consumer's offer, because the consumer has no right to cancel after that click. If clicking on that button constituted the consumer's offer, the consumer would be able to cancel at any time until the seller accepted.

The consumer, however, has the right to return the goods even though the seller has not committed any breach. Is this analogous to the "change of mind" example in the *Giant Food* case noted in the discussion of Walmart I? That is, the right to return irrespective of fault does not negate the formation of a contract which occurred when the consumer accepted by clicking on the button.

3. Lands' End www.landsend.com

Consumer shops; at checkout clicks on "Send it in" button. A page on the site explains: "When you're all through, click on the 'Send it in' button and the order will be submitted to us...[Y]ou can reconsider your selections-right up to the point when you've made a final decision and clicked on the 'Send it in' button."

By using the term "final decision" the seller seems to be informing the consumer that when she clicks on the "Send it in" button, the consumer is accepting the seller's offer. "Final decision"

seems to imply that clicking on the button results in the consumer being bound.

4. Macys www.macys.com

Consumer shops; at checkout clicks on "Complete Order On-Line" button which causes a screen to display her order. Shopper is instructed to click on "Charge It" button to "complete your transaction."

If we follow the *Giant Food* analysis, it appears the consumer accepts the seller's offer by clicking on "Complete Order On-Line." According to that decision and others, a contract is formed as long as the buyer has selected the goods and intended to pay, even if no payment was made. Before the consumer clicks on "Charge It," the consumer is already bound and is merely indicating a payment method.

Alternatively, the consumer accepts only when she clicks on "Charge It." While the first button must be clicked to complete the consumer's "order," the second button must be clicked to complete the "transaction." That difference in language could be interpreted to mean the second click is what completes the transaction in the sense of completing the formation of a contract and binding the consumer.

5. Amazon www.amazon.com

At checkout, shopper is told: "Your order is not complete until you click here." Shopper is directed by an arrow to click on the "Place Your Order" button. After that button is clicked, Amazon sends an e-mail confirmation.

Does the consumer accept by clicking on the "Place Your Order" button? Or is the seller the one accepting when it sends the confirmation? If the latter is true, the consumer can cancel at any time before she receives the confirmation.

6. eToys www.etoys.com (now merged with www.kbkids.com)

At checkout, consumer clicks on "Submit Order" button. Site displays a page "confirming your order and giving you an order number...We will also confirm your order via e-mail within 24 hours." eToys' terms and conditions include the following:

The receipt of an e-mail order confirmation does not constitute the acceptance of an order

or a confirmation of an offer to sell. Etoys reserves the right, without prior notification, to limit the order quantity on any item and/or refuse service to any customer. Verification of information may be required prior to the acceptance of any order.

By stating that the consumer's receipt of a confirmation does not constitute the acceptance of an order, the seller seems to be saying that its sending of the confirmation does not constitute the seller's acceptance of the consumer's order. By talking in terms of the seller's acceptance of an order, it appears the consumer's order is regarded as the consumer's offer. The terms and conditions also state that the e-mail is not "a confirmation of an offer to sell." Does this mean it is not a confirmation by the seller of the consumer's offer to sell, or does it mean it is not a confirmation of the seller's offer to sell? Finally, the seller reserves the right to refuse service to any consumer. Perhaps the effect of all of this is that the consumer's order is the consumer's offer, and the seller does not accept until the seller actually ships the goods. If that is the correct analysis, the consumer has the right to withdraw her offer at any time up until shipment.

7. MagazineCity www.magazinecity.net

At checkout, shopper has choice of clicking on either "Yes: Place Order," or "No. Do Not Order." If the consumer clicks on the Yes button, the seller sends e-mail which states: "We will prepay your order to the publishers within 24 hours, after which time the order will not be subject to cancellation."

The seller provides the consumer with 24 hours in which to cancel. This might mean that the seller makes the offer and the consumer accepts if she does not cancel before expiration of the 24 hour cancellation period. (Under the Restatement, failure to act can result in formation of a contract.) Alternatively, under a *Giant Food* analysis, perhaps the seller made the offer and the consumer accepted by placing her order. Under *Giant Food*, the consumer's opportunity to cancel for up to 24 hours for any reason does not negate the prior formation of a contract. A third alternative: The e-mail sent to the consumer states, "This e-mail is to confirm and thank you for your recent order." Arguably, the consumer's order was the offer and the seller accepted by sending the e-mail confirmation.

IV. WHAT TERMS BIND THE CONSUMER?

Where the consumer and the seller have formed a contract, both parties are bound to that contract. However, there may be a question as to what the terms of the contract are. This problem arises in the context of Web sales because of the manner in which sellers disclose the terms and conditions which apply to the transaction. Sellers disclose terms and conditions on Web sites by providing links from the home page and other pages to additional pages that contain the disclosures,

or to pages that in turn contain links to pages that contain the disclosures. For example, the eToys home page does not contain any link to terms and conditions. If the consumer clicks on the "help" link, however, she will find links to 36 pages. Under the category "additional topics" is a link called "Terms of Use."

The UCC requires that written disclaimers of implied warranties be conspicuous.[27] Is a disclaimer conspicuous if the consumer must click on three links to get to the disclaimer? Is a disclaimer conspicuous if it is displayed in large upper case letters on the screen, but is barely visible when printed onto paper?

UCITA provides that there is manifestation of assent to terms only if there is an opportunity for review.[28] UCITA contains a Comment which provides a standard for whether terms and conditions on a Web site are available for review. "If access to [the terms] is so time-consuming or cumbersome as to effectively preclude review," there is no manifestation of assent to those terms.[29]

The author's survey of Web sites revealed that some required extensive searching to discover the terms and conditions. Moreover, sometimes there were inconsistencies in the stated terms from one page to another. In addition, some pages were designed so that it was not possible to print legible paper copies of the terms.

See Christina Kunz, Maureen F. Del Duca, Heather Thayer, Jennifer Debrow, *Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent*, 57 Bus. Lawyer 401 (2001). This article describes 15 strategies for avoiding disputes. It is a product of an American Bar Association Working Group.

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[27] UCC § 2-316(2).

[28] UCITA § 112. *See* supra note 8.

[29] UCITA § 112, Comment 8.

STATUTE OF FRAUDS UNDER §2-201

I. Scope

Sale of goods, $500 or more

II. Requirements

1) writing indicates contract made OR oral evidence rests on a real transaction

section v. comment

definition of writing 1-201(46)

2) Signed by party against whom enforcement is sought

definition of 'signed' 1-201(39)

3) Indicates quantity

section v. comment

III. Promissory estoppel

IV. Admissions

A. Voluntary-involuntary

B. In court admission

V. Partial payment and Acceptance

divisible v. indivisible contracts

VI. Specially Manufactured Goods

VII. Between Merchants---confirmation not followed by written 10 day objection

VIII. Noncompliance---makes contract voidable

Comment 4

IX. Waiver of Statute of Frauds

§ 2-201 does not contain phrase "Unless otherwise agreed..." But see § 1-102(4)

§ 1-102, Comment 2, 2d paragraph suggests oral waiver would not be valid.

Implication for written waiver?

§ 1-205, Comment 4---statute of frauds is a "mandatory rule."

See casebook, pp. 124-126, note 6.

DEPT. of TRANSPORTATION v. NORRIS

222 Ga. App. 361, 474 S.E.2d 216 (1996)

[Known derisively by cyberspace lawyers throughout the country as the “beeps and chirps” case.]

McMURRAY, Presiding Judge.

Plaintiff Steven Earl Norris, individually, and as administrator of the estate of Ann Lois Norris, deceased, brought this action for wrongful death and other damages against defendants Reeves Construction Company and the Georgia Department of Transportation ("DOT"). DOT moved to dismiss plaintiff's action for several reasons including an alleged failure to timely file an ante litem notice of claim.

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The case sub judice presents a further issue in that plaintiff attempted to provide the required notice of the claim by a facsimile transmission which was sent and received within the requisite period of time.

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It may also be added that a facsimile transmission does not satisfy the statutory requirement that notice be "given in writing." Such a transmission is an audio signal via a telephone line containing information from which a writing may be accurately duplicated, but the transmission of beeps and chirps along a telephone line is not a writing, as that term is customarily used. Indeed, the facsimile transmission may be created, transmitted, received, stored and read without a writing, in the conventional sense, or hard copy in the technical vernacular, having ever been created. The superior court erred in denying DOT's motion to dismiss.

Judgment reversed.

JOHNSON and RUFFIN, JJ., concur in the judgment only.

The case was reversed on other grounds, the court specifically stating, "...we do not decide whether the facsimile notice was sufficient under the circumstances." *Norris v. Georgia Dept. of Transportation*, 268 Ga. 192, 193, 486 S.E.2d 826,827 (Ga. 1997). One judge dissented, believing that the facsimile transmission did not satisfy the writing requirements for notification under the Georgia statute.

THE E-SIGN ACT

Introduction

The Electronic Signatures in Global and National Commerce Act[1] (E-Sign Act) provides that an electronic signature has the same legal effect as any other type of legally valid signature. In addition, a contract or other record relating to a transaction in or affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because it is in electronic form rather than in writing. A contract may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation. Finally, where other law requires record retention, companies are permitted to retain documents in electronic form. There are special rules for consumer transactions. Most provisions took effect on October 1, 2000. The effective date for the record retention provisions was March 1, 2001.

Generally the E-Sign Act preempts state law. **The Act applies to UCC Article 2 transactions**. However, there are many important exceptions to coverage.

Scope

The Act covers transactions in or affecting interstate or foreign commerce, and the electronic signatures, contracts, and electronic records which may be involved in such transactions.[2] The following types of conduct are included within the meaning of transactions: "[T]he **sale**, lease, exchange, **licensing** or other disposition of (i) **personal property, including goods** and intangibles, (ii) **services, [and] (iii) any combination**" of (i) and (ii). In addition, transaction includes "the sale, lease, exchange, or other disposition of any interest in real property, or any combination thereof." [Emphasis supplied.]

"Record" is defined as "information which is inscribed on a tangible medium or that is stored in an electronic form or other medium and is retrievable in perceivable form."[3]

An electronic record is defined as "a contract or other record created, generated, sent,

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[1] Pub. Law 106-229 (2000).

[2] "Transaction" is defined as "an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons...." § 106(13).

[3] § 106(9).

communicated, received, or stored by electronic means."[4]

"Electronic signature...means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record."[5] The definitions in the E-Sign act are modeled after those in the Uniform Electronic Transactions Act (UETA). Comment 7 to UETA section 2 explains that "the essential attribute of a signature involves applying the sound, symbol or process with an intent to do a legally significant act....This definition [of electronic signature] includes as an electronic signature the standard webpage click through process. " The comment also discusses "the necessity that the electronic signature be linked or logically associated with the record."

Exceptions

The Act does not apply[6] to "a contract or other record to the extent it is governed by" the following;

1) laws governing wills and testamentary trusts

2) law governing adoption, divorce or other matters of family law;

3) much of the Uniform Commercial Code. **But the Act does govern Article 2**. Other portions of the UCC which are governed by the Act are Article 2A (leases) and sections 1-107 and 1-206.

4) court orders or notices, or official court documents required to be executed in connection with court proceedings. Briefs, pleadings and "other writings" are specifically listed as among the items regarded as included within this rubric.

5) specified notices related to consumer protection and safety including any notice of the cancellation or termination of utility services and of health insurance or benefits or life insurance.

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[4] § 106(5). An oral communication or a recording of an oral communication is not within the definition of an electronic record for purposes of consumer disclosure requirements. § 101(c)(6). The E-Sign Act's definition of electronic record is modeled after that in the Uniform Electronic Transactions Act (UETA) which is included in your *Selected Commercial Statutes*. A comment in UETA lists the following as coming within the definition: information processing systems, computer equipment and programs such as information stored on a hard drive or floppy disk, electronic data interchange, electronic mail, voice mail, telephone answering machine messages, audio and video tape recordings, facsimile, telecopying, and scanning. UETA, § 2, Comment 7.

[5] § 106(5).

[6] § 103.

Also excepted are notices of "default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual." Finally, notices of the "recall of a product, or material failure of a product, that risks endangering health or safety" are not covered, nor is "any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials."

Preemption

In general, the Act preempts state law. However, the Act does not preempt a state statute, regulation, or other rule of law which limits, modifies, or supercedes the Act in two instances.[7]

The Act does not preempt state law which "constitutes an enactment or adoption of the Uniform Electronic Transactions Act [UETA)] as approved and recommended for enactment in all states by the National Conference of Commissioners on Uniform State Laws in 1999."[8] Some states which enacted UETA adopted versions which differed in some respects from that adopted by the Commissioners in 1999. Therefore, the Act also provides that "any exception to the scope of [the UETA] enacted by a State...shall be preempted to the extent such exception is inconsistent with this title...."

Georgia has not adopted UETA so it cannot take advantage of this exception. But it has adopted its own electronic records and signature law O.C.G.A. §§ 10-12-1 et seq. The extent to which the Act preempts this state law is not clear, however, because of another provision.

In addition to the UETA exception, the Act also does not preempt state law which "specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if"

1) the alternative procedures or requirements are consistent with the E-Sign Act, and

2) the alternative procedures or requirements do not require or accord greater legal status to the implementation of any specific technology for creating, storing, communicating, or authenticating electronic records or signatures. In other words, the state law must be technology

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[7] § 102.

[8] States which have enacted either the official version of UETA or a variation of it include: Alabama, Arizona, Arkansas, California, Delaware, District of Columbia, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming.

neutral.

A key issue may be the extent to which Georgia's law is "consistent" with the E-Sign Act. Georgia has passed a law providing: "The General Assembly intends that the provisions of this chapter [the Georgia electronic records and signature statute] shall not be preempted by [the E-Sign Act]." O.C.G.A. § 10-12-2(b). Query: Can a state legislature prevent a federal law from preempting a state law by declaring that the state law is not preempted.

Consumer Consent

The Act contains provisions which apply only to consumer transactions. Many state and federal statutes and regulations require that a company provide information and disclosures in writing to consumers. For example, the Truth in Lending Act requires creditors to disclose certain information, such as the finance charge, to the consumer. UCC § 2-316 has special rules the seller must follow in order to exclude or modify implied warranties. For example, in order to exclude the implied warranty of fitness for a particular purpose, the exclusion must be in writing and conspicuous. The Act permits a company to provide that information electronically, but only if the consumer consents.[9] Affirmative consent is required; implied consent does not suffice. The Act includes detailed requirements for obtaining consumer consent. For example, the consumer must be provided a statement of rights, including the right to withdraw consent and how to obtain a paper copy of an electronic record after consent is given. The company also must provide a statement, prior to obtaining consent, informing the consumer of the hardware and software he or she will need in order to access and retain the electronic records the company will send. The consumer must consent electronically, or must confirm his or her consent electronically. For example, a consumer might send an e-mail or go to the company's web site and indicate consent by clicking on appropriately labeled descriptive buttons. This must be done in a manner which shows that the consumer has access to equipment capable of receiving and retaining the company's electronic records. If the company changes its hardware or software requirements after the consumer gives consent, the company must inform the consumer of the new specifications and remind the consumer of the right to withdraw consent.

Georgia's law does not contain requirements comparable to these consumer consent provisions. Therefore, presumably even if E-Sign does not preempt the Georgia law in regard to its general rules on the validity of electronic records and signatures, the consumer consent requirements of E-Sign apply to transactions involving consumers.

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[9] § 101(c). "Consumer" is defined as "an individual who obtains, through a transaction, products or services which are used primarily for personal, family, or household purposes...."

Even if the consumer consents to having disclosures communicated electronically, thus triggering the applicable provisions of the Act related to electronic records, nothing in the Act "affects the content or timing of any disclosure or other record" which any other law requires a company to make available to a consumer.[10]

Validity of Electronic Contracts

The Act is intended and designed to ensure that a party to a contract cannot attack the validity of the contract solely because it is in the form of an electronic record or is signed electronically. However, state contract law, including the UCC, continues to apply in full force to every other issue relating to the validity of a contract.

[10] § 101(c)(2).

STATUTE OF FRAUDS AND E-SIGN ACT HYPOS

HYPO 1

Sarah goes to the Dresses4U Web site and selects a dress costing $700 and puts it into her virtual shopping cart. She clicks on a button which says: "Proceed to payment options" where she is given the choice of paying by Visa or Mastercard credit cards. At that point Sarah changes her mind and decides she does not want to buy the dresses because she carries only American Express.

The seller delivers the dress anyway and demands payment, claiming Sarah obligated herself by signing when she clicked on the "Proceed" button.

Can Sarah use UCC 2-201 and/or the E-Sign Act in her defense?

HYPO 2

Sarah goes to the Dresses4U Web site. She buys a $700 dress. The site contains a document titled "Agreement" which includes a disclaimer of implied warranties including the implied warranty of merchantability. UCC 2-316(2) provides that, if a disclaimer of the implied warranty of merchantability is in writing, in order for the seller to be able to rely on that disclaimer, it must be conspicuous. (A disclaimer of an implied warranty means, in effect, that the buyer has waived any right to enforce that warranty.) The disclaimer on the Web site is in tiny 6 point type. (^{This is what 6 point type looks like.})

The dress is delivered. Sarah cleans it, precisely following the cleaning instructions on the tag in the dress. The dress shrinks to ½ its original size. This constitutes a breach of the implied warranty.

The seller claims it has an enforceable valid disclaimer of the warranty.

Does an agreement on a Web site meet the requirements of 2-201? Does the agreement come within the UCC's definition of "written?" UCC 1-201(46).

What is the effect of the E-Sign Act? Disregard the issue of whether the seller obtained the consumer's consent pursuant to the consent requirements of the Act.

What is the effect of the E-Sign Act on the "conspicuous" requirement of the UCC?

STATUTE OF FRAUDS AND PROMISSORY ESTOPPEL

Courts have struggled over the question of whether an agreement based on an oral promise can be enforceable under a theory of promissory estoppel even though it does not comply with the requirements of the statute of frauds in the UCC. The Restatement (Second) of Contracts definition of promissory estoppel is reproduced in the Note on page 57 of the casebook. Under certain limited circumstances, the Restatement permits enforcement of an oral promise. Moreover, the Restatement permits this "notwithstanding the Statute of Frauds...."

The majority of courts apply the doctrine of promissory estoppel. These courts justify their position as follows. Despite the long history of the promissory estoppel doctrine, UCC §2-201 does not preclude application of the doctrine. Moreover, §1-103 permits a court to supplement the provisions of the UCC with "principles of law and equity" unless "displaced by the particular provisions" of the UCC. Estoppel is among those principles specifically listed. In light of the Restatement's clear intention to preserve promissory estoppel "notwithstanding" the presence of the statute of frauds, the UCC would have expressly excluded application of that doctrine if it had so intended.

A minority of the courts disagree and refuse to apply promissory estoppel. Some justify this by claiming that precluding promissory estoppel promotes the UCC's goal of uniformity. Section 2-201 deals with the issue of oral promises. Allowing application of non-UCC concepts in an area with which the UCC has already dealt undermines uniformity. That is an unconvincing argument for a court to make today, given the fact that most courts have already forsaken uniformity by deciding to apply promissory estoppel. Second, some courts contend the drafters demonstrated their intention for §2-201 to be the exclusive law on this issue by providing limited exceptions in §2-201(3). This shows they considered the extent to which the requirements could be modified, and made a conscious choice to limit it to three and no more. Finally, the minority which reject the doctrine fear applying the doctrine will so undermine the statute of frauds that it will be a nullity. In response, the majority can point out that promissory estoppel applies only in a narrowly drawn set of situations.

The text of the UCC is unclear. Consequently, courts have the opportunity to demonstrate how deeply they believe in the efficacy of the statute of frauds in sale of goods transactions. The fact that the majority has decided to apply promissory estoppel may reflect their lack of faith in the efficacy of the statute of frauds as much as their objective construction of the statute.

BATTLE OF THE FORMS UNDER §2-207

I. Acceptance: definite & seasonable expression of acceptance

or

written confirmation unless expressly conditional

II. Additional Terms

A. General Rule-proposals

B. Between merchants, part of contract unless

1. material alteration

surprise

hardship

if it is a material alteration, additional term is a proposal

2. offer limits acceptance

3. notification of objection

III. Different Terms

knockout rule by analogy to 2-207(3)

gap fillers

trend: CUC

IV. Conduct

agreed upon terms in writings

plus

knockout rule

gap fillers

trend: CUC

UNCONSCIONABILITY OUTLINE

I. Definition---§2-302

one-sided, oppression, surprise

II. Factors

A. Procedural Unconscionability

1) Oppression
   a) manner & process
   b) unequal bargaining power, resulting in no meaningful choice

2) Surprise
   a) ignorance
   b) fine print, gobbledegook

B. Substantive Unconscionability

1) limitation of remedies

2) one-sided transactions

3) harsh terms---price, warranty modification

III. Remedies

IV. Burden

V. Time period

VI. Hearing---§2-302(2)

contract formation & bargaining power

VII. Preemption----2-316 & 2-719

VIII. Scope---consumer cases contrasted with commercial cases, importance of bargaining power in commercial cases

IX. Matter of Law

NEC TECHNOLOGIES, INC. v. NELSON

267 Ga. 390, 478 S.E.2d 769 (1996)

HUNSTEIN, Justice.

Arthur and Kathy Nelson brought suit against Curtis Mathes Corporation, C.M. City, Inc. d/b/a Curtis Mathes Home Entertainment Center, and NEC Technologies, Inc. ("NEC"), seeking to recover property damages they sustained in a fire allegedly caused by a defect in the Curtis Mathes television set they had purchased. The Nelsons asserted causes of action sounding in strict liability, negligence, and breach of warranty. Based on language in the express warranty on the television set which provided that the warranty "Excludes All Incidental and Consequential Damages," Curtis Mathes and C.M. City moved for partial summary judgment on the Nelsons' claim for consequential property damages under the breach of warranty claim. Holding as a matter of law that the exclusion was not unconscionable at the time of the sale to the Nelsons, the trial court granted the motion. In regard to the Nelsons' claim that NEC was liable to them as the manufacturer of the television set's electronic components, the trial court granted summary judgment to the corporation, finding that it did not manufacture the electronic components but instead was the exclusive importer, marketer and distributer of the components; the manufacturer of the components was NEC Home Electronics (USA), Ltd. (hereinafter "NEC Ltd."). The trial court further found that NEC was not the alter ego of NEC Ltd. The Court of Appeals reversed the trial court on both issues. **771 Nelson v. C.M. City, Inc., 218 Ga.App. 850(4), (6), 463 S.E.2d 902 (1995). We granted certiorari to consider that court's rulings on both of these issues. We reverse.

1. Georgia law expressly allows manufacturers of products to limit or exclude consequential damages. OCGA s 11-2-719(3). However, manufacturers may not limit or exclude such damages where the result would be unconscionable. Id. The Legislature recognized both the distinction between consumer and commercial purchasers of products and the distinction between personal injury and property damages, in that OCGA s 11-2-719(3) expressly states that a limitation on consequential damages for personal injury in the case of consumer goods is prima facie unconscionable. The Legislature could *391 have provided that a limitation on consequential property damages in the case of consumer goods is prima facie unconscionable, as it did with consequential damages for personal injuries, but it chose not to do so. Warranty limitations on the recovery of consequential damages to property in consumer cases have been upheld. E.g., McCrimmon v. Tandy Corp., 202 Ga.App. 233(3) , 414 S.E.2d 15 (1991); Sharpe v. General Motors Corp., 198 Ga.App. 313(5), 401 S.E.2d 328 (1991). It follows from a review of OCGA s 11-2-719(3) and case law that only those limitations/exclusions on consequential property damages in consumer cases that are "unconscionable" are barred under Georgia law.

FN1. OCGA s 11-2-719(3) provides:

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 Uniform Commercial Code and the Georgia UCC, see OCGA s 11-1-101 et seq., contain no definition of "unconscionability." This Court has noted that the basic test for determining unconscionability is "whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." Comment 1 to Uniform Commercial Code s 2-302. R.L. Kimsey Cotton Co. v. Ferguson, 233 Ga. 962, 965(3), 214 S.E.2d 360 (1975). However, the process by which a court reaches the conclusion that a contract provision is unconscionable has been discussed by our appellate courts only in abbreviated and conclusory fashion. E.g., Ga. Magnetic Imaging v. Greene County Hosp. Auth., 219 Ga.App. 502(5), 466 S.E.2d 41 (1995); Fiat Auto U.S.A. v. Hollums, 185 Ga.App. 113(2), 363 S.E.2d 312 (1987). Thus, to assist this Court in resolving this appeal, we have found it helpful to conduct a review of foreign authorities.

FN2. Other definitions of an unconscionable contract include " 'such an agreement as no sane man not acting under a delusion would make and that no honest man would take advantage of,' [cit.]," R.L. Kimsey Cotton Co. v. Ferguson, supra, 233 Ga. at 966(3), 214 S.E.2d 360 and a contract that is " 'abhorrent to good morals and conscience. It is one where one of the parties takes a fraudulent advantage of another.' " F.N. Roberts Pest Control Co. v. McDonald, 132 Ga.App. 257, 260, 208 S.E.2d 13 (1974).

It has been recognized that "unconscionability" as set forth in UCC s 2-302 is "not a concept, but a determination to be made in light of a variety of factors not unifiable into a formula." (Footnote and emphasis deleted.) Vol. 1, White & Summers, Uniform Commercial Code (4th Ed.), s 4-3, p. 213. See also A & M Produce Co. v. FMC Corp., 135 Cal.App.3d 473, 186 Cal.Rptr. 114, 120 (1982) (unconscionability is "a flexible doctrine designed to allow courts to directly consider numerous *392 factors which may adulterate the contractual process"). Foreign courts have generally divided the relevant factors into procedural and substantive elements. See UCC-Unconscionability Warranty Disclaimer, 38 A.L.R.4th 25, ss 2, 3(a)(b). Procedural unconscionability addresses the process of making the contract, while substantive unconscionability looks to the contractual terms themselves. Id.; White & Summers, supra. A non-inclusive list of some factors courts have considered in determining whether a contract is procedurally**772 unconscionable includes the age, education, intelligence, business acumen and experience of the parties, their relative bargaining power, the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice. See, e.g., Fotomat Corp. of Fla. v. Chanda, 464 So.2d 626, 629 (Fla.App. 5 Dist.1985); Wille v. Southwestern Bell Telephone, 219 Kan. 755, 549 P.2d 903, 906-907 (1976) (commercial transaction); Schroeder v. Fageol Motors, 86 Wash.2d 256, 544 P.2d 20, 23 (1975). See also White & Summers, supra, s 4- 3, p. 215, fn. 15. As to the substantive element of unconscionability, courts

have focused on matters such as the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns. See, e.g., Fotomat Corp. of Fla. v. Chanda, supra, 464 So.2d at 629; A & M Produce Co. v. FMC Corp., supra, 186 Cal.Rptr. at 122 (commercial transaction). See also White & Summers, supra, ss 4-4 through 4-6. We find the procedural-substantive analysis of unconscionability helpful and apply it to the case at bar.

[Portions omitted.]

FN6. Research supports the statement made in Fotomat Corp. of Fla. v. Chanda, supra, 464 So.2d at 629, that [m]ost courts take a "balancing approach" to the unconscionability question, and to tip the scales in favor of unconscionability, most courts seem to require a certain quantum of procedural plus a certain quantum of substantive unconscionability.

[Portions omitted.]

OCGA § 11-2-302(1) directs the trial court to determine as a matter of law whether a contract or any clause thereof was unconscionable "*395 at the time it was made": the unconscionability of a contract is not to be judged based on subsequently-acquired knowledge. See White & Summer, supra, s 4-3, p. 211. There is nothing in the record to indicate **774 that at the time the Nelsons executed the sales contract for their television set, they were not aware of the normal hazards associated with the use of any electrical appliance.

[Portions omitted.]

Further, given that the unconscionability of contractual provisions is determined as a matter *396 of law, OCGA § 11-2-302(1), we reject the Court of Appeals' holding that as a matter of law a manufacturer commits fraud by selling under its own label and as its own wares a complex product such as a television set which contains components that were not in every aspect designed, formulated, fabricated, constructed, and assembled exclusively by the manufacturer. Such a holding fails to reflect the reality and complexity of today's world-wide marketplace. Because there is an absence of evidence that Curtis Mathes or C.M. City acted fraudulently in the particular manner in which this television set was sold to the Nelsons, see Lau's Corp. v. Haskins, supra, the trial court correctly held that the exclusion in issue was not unconscionable.

4. OCGA § 11-2-302 provides Georgia courts with a potent tool for shielding disadvantaged and uneducated consumers from overreaching merchants. However, Georgia law also recognizes

and protects the freedom of parties to contract. See, e.g., National Consultants v. Burt, 186 Ga.App. 27, 32, 366 S.E.2d 344 (1988). " 'People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability.' " **775 Fotomat Corp. of Fla. v. Chanda, supra, 464 So.2d at 630.

Based on a review of the evidence in light of both procedural and substantive elements of unconscionability, we cannot conclude as a matter of law that decent, fairminded persons would possess a profound sense of injustice from the enforcement of this warranty provision excluding the recovery of consequential property damages in the sale of a television set so as to render the exclusion unconscionable under OCGA s 11-2-302. Therefore, the Court of Appeals erred by reversing the trial court when it found that the warranty provision excluding the Nelsons from recovering consequential property damages was not unconscionable and that the Nelsons can recover under their breach of warranty claim only those damages allowed by the warranty. We note that this holding will not leave the Nelsons without recourse for their property damages, as they may seek to recover those losses *397 under their strict liability and negligence causes of action.

All the Justices concur

[The portion of the decision discussing lack of privity between NEC and the Nelsons and the Nelsons' theory NEC was the alter ego of NEC Ltd., the corporate manufacturer, is omitted.]

HIERARCHY OF AGREEMENT'S COMPONENTS
CASEBOOK PAGES 126-130

1. The contract between Buyer and Seller provides that Seller will deliver 10 widgets to Buyer in August. Seller delivers the 10 widgets on August 15. Buyer does not object. Later when a dispute arises, Seller claims the August 15 date became the delivery date through "course of performance." Is Seller correct? See §2-208.

2. The contract between Buyer and Seller provides that Seller will deliver 10 widgets to Buyer in August, and 10 widgets in September. Seller delivers 10 widgets on August 15 and 10 widgets on September 15. Buyer does not object. Later when a dispute arises, Seller claims the August 15 and September 15 dates became the delivery dates through "course of performance." Is Seller correct? See §2-208

3. On 24 previous occasions, every time Seller delivered the widgets Buyer ordered, Seller imposed transportation charges which were not specified in the written agreement between the parties. On each occasion, Buyer paid the additional charges without objection. In regard to the 25th occasion, however, Buyer objected and pointed out that the contract did not mention these additional charges. Seller argued that the additional charges became part of the bargain because of the parties' course of dealing. Is Seller correct? See §1-205.

4. Seller and buyer are both in the widget business. Seller proves in court that according to the usage of the trade, payment is due within 30 days of delivery. Buyer does not dispute this, but says it is not bound by the trade usage because Buyer was unaware of that usage until trial. Is Buyer bound by trade usage of which it is unaware? See §1-205.

5. For several years, Seller furnished asphalt to Buyer who is located on the island of Oahu, in Hawaii. Seller was a huge international company which sold asphalt to purchasers all over the world. Buyer was in the asphalt paving business. When a dispute arose over the price of the asphalt, Buyer relied on a trade usage unique to the asphalt paving business in Oahu. Seller claimed that it was bound only by trade usage pertaining to its business, which is the purchase and sale of asphalt, not the trade usage of the asphalt paving trade on Oahu. Buyer was unable to

prove that Seller was aware of Oahu's paving trade usage, but argued that if Seller did not intend to bound by local trade usage, Seller should have made that clear to Buyer. Who should prevail? See §1-205.

JACKSON v. MEADOWS

153 Ga.App. 1, 264 S.E.2d 503 (1980)

DEEN, Chief Judge.

The plaintiff appellant, according to undisputed evidence, went to the defendant Meadows, owner of a Chevrolet dealership, Meadows Motors, Inc. and ordered a Limited **505 Edition Corvette Indianapolis "500" Pace Car, the price of which was at the time unknown to both parties. Meadows ordered the vehicle from the manufacturer on a form showing Gary Jackson as the customer and, when it arrived, prepared an invoice to Jackson. The deal fell through because Jackson insists that the contract between the parties contained a provision that the price would be $150 over cost (later ascertained as $11,084.98) whereas Meadows swears that price was not discussed. Meadows moved for and was granted summary judgment in an action for specific performance and damages. Held :

1. Code s 109A-2-201(1) provides that contracts for the sale of goods of $500 or over are not enforceable absent a writing signed by the party against whom enforcement is sought "sufficient to indicate that a contract for sale has *2 been made between the parties." Jackson, the intended purchaser, could produce only Meadows' order form to the manufacturer and an invoice to himself. An unsigned invoice is not a writing in confirmation of the contract. Evans Implement Co. v. Thomas Indus., Inc., 117 Ga.App. 279, 160 S.E.2d 462 (1968). Neither do we find the order form sent by Meadows to the manufacturer to be a contract between Meadows and Jackson even though it designated Jackson to the manufacturer as the intended customer.

2. The contract itself, if otherwise sufficient, need not show that there has been an agreement on price. Code s 109A-2-305(1). Cf. First Nat.Bank, etc., Co. v. Olivetti Corp., 130 Ga.App. 896, 899, 204 S.E.2d 781 (1974). Professor Karl Llewellyn, prime author of the Model Act, has been quoted as saying of Code s 109A-2-201: "(Y)ou can't enforce it beyond the quantity stated. You can be inaccurate about other things, price, for example, you can leave out." White and Summers, Uniform Commercial Code (1972), p. 52.

3. However, a contract which is otherwise insufficient may still be enforceable if the party against whom enforcement is sought admits by pleading or testimony that a contract of sale was in fact made. The defendant here, for himself individually and for his corporate enterprise, states by affidavit attached to his motion for summary judgment that he has a Chevrolet dealership, that Gary Jackson told him to order the vehicle involved in this lawsuit and that he agreed to do so and to notify him when it arrived; that he did order the vehicle and did notify him on arrival in April, 1978, the date of its delivery to the dealership. He further by deposition stated that his first knowledge of the existence of this model was when Jackson

brought him the magazine article about it. The only difference of opinion between these litigants regarding the contract is that Meadows swears price was not discussed, whereas Jackson swears they agreed on a price of over $150 over manufacturer's list. The "contract for sale," as to which the admission of the party may take the place of a writing, does not refer to a contract complete in all its terms, but to a transaction sufficient to stand as proof that the parties *3 did in fact enter into a contractual relationship. Cf. Hagan v. Jockers, 138 Ga.App. 847(2), 228 S.E.2d 10 (1976). The admission that the parties agreed that Jackson would purchase a described automobile which Meadows would order for him, that Meadows did order it for him, and when it arrived, refused to close the deal, is sufficient to raise a jury issue, both as to part performance of the contract and as to agreed price. It was error to grant summary judgment to the defendant.

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SHULMAN and CARLEY, JJ., concur.

PAYMENT

I. Distinguish between "price term" and "payment term."

Price term: how much goods cost. See 2-305.

II. Payment term

A. When. Unless otherwise agreed, at time buyer receives goods. 2-310(a) & Comment 1, 2-511(1); 2-103(1)(c)(defines "receipt").

As Comment 1, 2-310 explains, this allows the buyer a right to inspect before paying even though "under the delivery term the risk of loss may have previously passed to him." After we have studied delivery, risk of loss and buyer remedies, the significance of this language will be clearer. See also Comment 2: Unless the agreement provided that the goods were sold on credit, the seller is not required to surrender possession until the buyer has paid. As noted in 2-511, Comment 1, the requirement in 2-511(1) that the seller is not required to tender and complete delivery unless the buyer tenders payment is applicable mainly to consumer transactions because the "great body of commercial contracts...carry credit terms."

B. Where. Where buyer receives goods. 2-310(a).

C. How. In any manner currently acceptable in ordinary course of business. 2-511(2).

What if buyer tenders a check and seller demands cash?

DELIVERY OUTLINE

I. General obligations of parties §2-301

Seller: transfer & deliver
Buyer: accept & pay

II. Delivery as a gap filler and the hierarchy

§§2-307, 2-308, 2-309, 2-319

III. Number of deliveries §2-307

IV. Time of delivery: reasonable time §2-309(1), 1-204(2)

V. Contracts silent on place for delivery

A. Place for delivery: seller's place of business §2-308

B. Manner of tender of delivery §2-503(1)

C. Risk of loss §2-509(3), see 2-103(1)(c)

VI. Shipment Contract

Presumption: §2-503, Comment 5
Manner of delivery §2-504, see also §2-319(1)(a)

Risk of loss in absence of breach: due delivery to carrier §2-509(1)(a)

Risk of loss where breach §2-510 (We will not cover this topic.)

VII. Destination Contract

Manner of delivery 2-503(3), see also §2-319(1)(b)

Risk of loss in absence of breach: tendered so as to enable buyer to take delivery §2-509(1)(b)

Risk of loss where breach §2-510 (We will not cover this topic.)

DELIVERY HYPOTHETICALS

1) Scarlett, whose business is located in Atlanta, has the exclusive rights to produce official GSU Panther t-shirts. She agrees to sell Rhett, whose store is located in Athens, 50,000 shirts. The contract states the delivery term as "FOB Athens" which according to the provisions of the UCC requires Scarlett to pay for the cost of transporting the goods to Athens. 2-319(1)(b).

However, it is clear from the parties' course of dealing that Rhett always pays for transportation when the contract says "FOB Athens" and Rhett has never objected to this arrangement in the past.

What controls, the UCC provision or course of dealing?

2) The agreement between Scarlett and Rhett provided no specific time for delivery, but Scarlett knew that Rhett did not need all 50,000 shirts immediately. Therefore, in order to ease her own production burden, she timely delivered 25,000 shirts.

Although Rhett did not need more than 25,000 shirts at that time, because he was short of funds, he refused to pay, claiming he was required to pay only if and when Scarlett delivered all 50,000 at one time.

Is Rhett correct? See §§2-307, 2-105(5).

3) The agreement between Rhett and Scarlett contained no provision for a delivery date. The normal amount of time between signing the contract and delivery is two months. The contract price of each shirt was $1.75. Scarlett now realizes that she can sell the shirts to another buyer for $2.25 per shirt so she wants to get out of her contract. She knows that Rhett is not in the soundest financial condition, so she rushes production and delivers the shirts in just one month. Sure enough, Rhett does not have the funds to pay for the shipment. Therefore, Scarlett refuses to let Rhett have the shirts and has them returned to her plant.

What is the time for delivery if the contract does not specify any time? See §2-309 and Comments.

Has either of the parties breached the contract?

4) Scarlett, located in Atlanta, agreed to sell 50,000 shirts to Rhett whose store is located in Athens. Nothing was agreed upon regarding delivery. Close to the time the shirts were to be ready, Scarlett called Rhett and told him the shirts were available and he should come to Atlanta to pick them up.

Is the above contract a shipment contract, a destination contract, or something else?

See §§2-308, 2-503, 2-504.

5) Same facts as in question 4, except that the contract provides: "FOB Atlanta."

Shipment contract, destination contract, or other?

6) Same facts as in question 4, except that the contract provides: "FOB Athens."

Shipment contract, destination contract, or other?

7) Scarlett, Inc. agrees to sell the shirts to Rhett. The contract is silent on delivery. When the shirts are ready, Scarlett calls Rhett, tells him they are ready. Rhett comes to Atlanta, inspects the shirts, finds them satisfactory. Scarlett says: "Take them, they're yours." Rhett responded: "I'll be back tomorrow with my truck." That night a fire destroyed the shirts.

Who bears the loss? See §2-509.

8) Same facts as in question 7, except Scarlett is an accountant selling her 30 year old Olympic t-shirt to Rhett, a professional collector of memorabilia.

Who bears the loss? See §2-509, 2-503, Comment 1.

9) Scarlett, located in Atlanta, agreed to sell the Panthers t-shirts to Rhett, located in Athens. Contract provided: "FOB Atlanta." Scarlett arranged for a common carrier to transport the goods, entered into a reasonable contract with the carrier and notified Rhett of the shipping arrangements. On the way to Athens, the truck driver stopped at the University of Georgia to watch a Bull Dog football game. While at the game, some disgruntled folks from UGA stole the t-shirts.

Who bears the loss, Scarlett or Rhett? See §2-509.

10) Same facts as in question 9 except the contract provides: "FOB Athens."

Who bears the loss, Scarlett or Rhett? See §2-509.

EXPRESS WARRANTIES

I. Definition---affirmation, contrast puffing

Factors: specificity, capable of being conclusively proven or empirically tested, seller more sophisticated than buyer

Hypo 1: Grass seed is "top quality."

Hypo 2: Seller sells grass seed in a package. Package says "Grade A seeds." Also written on package is: "Seeds conform to federal & state law on sale of seeds." Seller alleges and proves at trial that she intended only her statement about conformity with federal and state law to be a warranty. She never intended "Grade A seeds" to be a warranty. Buyer presents no evidence on seller's intent. Should the court even consider whether "Grade A seeds" constitutes an express warranty?

II. Affirmation---part of basis of bargain

Hypo 3: Seller states: "This car has a diesel engine." Buyer knows car does not have a diesel engine.

III. No magic words required

IV. No intent required; but intent relevant regarding meaning of terms used in warranty

V. Proximate cause

VI. Burden of proof---on party claiming existence of warranty

VII. Role of reliance

A. Reliance required

But: 1) included in USA, omitted in UCC; 2) 2-313, Comment 3; 3) scholarly criticism; 4) contrast 2-315

B. Presumption of reliance, shifts burden of proving non-reliance to seller

C. Reliance not required; exceptions: seller proves he retracted his statement; or seller

proves the parties understood goods would not conform to seller representations, as where buyer had prior knowledge or inspected goods and knew goods did not conform

Hypo 4: Advertisement: "Mazda Model Q30 has a diesel engine." Buyer never sees the ad.

EXPRESS WARRANTY HYPOTHETICALS

Determine which of the following constitute express warranties.

1) MK-Mace instantly stops assailants in their tracks.

2) The Brantly Helicopter is safe and dependable.

3) The Feline CAT scan X-ray machine is state of the art.

4) The Binar irrigation system for golf courses will provide years of trouble free service.

5) The Dalkon Shield is the modern superior contraceptive device. It provides safe, sure, sensible contraception.

6) Chesterfields are mild. L&M cigarettes have a filter to trap tar and nicotine. Virginia Slims are for the liberated woman. Smoke Parliaments with their recessed filter. True cigarettes are low in tar and nicotine.

7) Seller guarantees the goods against defects in material and workmanship, but such guarantee is limited to a period of one year following delivery.

8) Because of the experimental nature of this equipment, the seller makes no performance warranties. This conveyor is designed with a deflection tolerance of plus or minus 1/32 of an inch.

IMPLIED WARRANTY HYPOTHETICALS

1) Owner of 7-Eleven convenience store sold one of her cash registers. Can the buyer succeed in his suit for breach of implied warranty of merchantability? See UCC sections 2-314 and 2-104(1).

2) (a) Phred Pharmacist sold a prescription drug, Hair Today, to Alan Allergic. The drug is not merchantable.

Harry "Hell's Angels" Houdini sold his motorcycle to Mr. Meek. The motorcycle is not merchantable.

What is the justification for holding Pharmacist liable for a violation of the implied warranty of merchantability, but not Harry?

(b) Is Pharmacist liable for breach of 2-314 if he had no way to discover that drug was not merchantable?

(c) Does a drug violate 2-314(2)(c) if Alan develops a severe rash on his head from Hair Today? Assume Pharmacist can produce data showing no more than one in a million persons develop such a reaction.

(d) What result if same facts as in (c), but 5% of all buyers develop the reaction?

e) What result in (d) if Hair Today contains a brochure in each package that warns the purchaser that although the drug will produce hair today, it may cause a rash tomorrow?

3) Buyer purchases a new car which cannot go into reverse.

4) Buyer purchases a tree planting device. All such devices produced by this company have a tendency to shatter when the device hits a rock because of the manner in which the device is built.

5) Buyer purchases a can of deodorant which works fine. Unfortunately, it is highly inflammable and buyer starts a fire if she is smoking while using the product.

6) Farmer sells pecans to dealer. Dealer resells the pecans to retailer. Retailer rejects the pecans because they are unfit for human consumption. Dealer sues Farmer for breach of section 2-314(2)(a).

7) Buyer, a Colorado utility company, purchased an electrostatic precipitator from a seller in the business of selling this type of pollution control equipment to utilities in Colorado. The buyer claims the equipment is unmerchantable because it does not enable the utility to meet Colorado air pollution standards. Does the failure to meet the state's air pollution requirements show the equipment violates section 2-314(2)(a)?

8) Buyer purchases and smokes Camel cigarettes for twenty years. She sues the company which produces Camels for breach of section 2-314(2)(a) because she alleges the cigarettes caused her lung cancer.

9) Buyer purchases an Oldsmobile which the buyer discovers after the sale contains a Chevrolet engine. Can the buyer prevail by arguing the Oldsmobile is in violation of section 2-314(2)(c)?

10) Magic Car Wash buys brushes for its car wash equipment from Soapy Suds. The brushes knocked off the exterior accessories, such as outside mirrors, of the cars going through the car wash. Can buyer successfully sue for breach of implied warranties?

11) Phillip Fisherman purchases a boat from seller, who is also a fisherman. Phillip never says he wants the boat for fishing, but seller knows Phillip is a fisherman. The boat is merchantable for transportation in water, but is not suitable for fishing. Is there a breach of section 2-315?

12) Francesca Farmer went to her International Harvester dealer to buy certain equipment. She explained the particular job she wanted the equipment to perform. She explained she had never bought this type of device before and asked the dealer to select the appropriate model. The equipment did not satisfactorily perform the particular task Francesca had described to the dealer. Is there a breach of section 2-315?

13) Francesca Farmer went to her International Harvester dealer to buy certain equipment. She explained the particular job she wanted the equipment to perform. She explained she had never bought this type of device before. She then on her own chose the precise model she wanted and requested that the seller make certain modifications to the equipment. The equipment did not satisfactorily perform the particular task Francesca had described to the dealer. Is there a breach of section 2-315?

Buyer's Awareness of Disclaimer Where Disclaimer Is Not "Conspicuous"

Read the following in connection with Problem 1, page 268. Courts take one of the following 4 approaches:

1) Never consider buyer's awareness

Objective test

Support: nothing in 2-316 says court should consider buyer's awareness, just worded in terms of whether disclaimer is conspicuous.

If not conspicuous, disclaimer is no good, even if buyer was aware of disclaimer.

2) (a) Never consider consumer buyer's awareness.

This test assumes consumers don't understand significance of disclaimer, even though, as in our facts, the buyer actually does understand.

Presumption that if not conspicuous, consumer is not aware of disclaimer.

(b) Always consider commercial buyer's awareness

Under this test, disclaimer may be effective even though not conspicuous (no harm, no foul).

3) Consider buyer's awareness only if not clear whether it's conspicuous

If it is clear that disclaimer is conspicuous = disclaimer is effective

If clear disclaimer is not conspicuous = disclaimer is not effective

If not clear whether disclaimer is conspicuous, consider buyer's awareness of disclaimer.

If buyer aware, then this is evidence that disclaimer was conspicuous as to buyer, so disclaimer is effective.

4) Always consider buyer's awareness even tho disclaimer is not conspicuous

Subjective test.

Support: 2-316, Comment 1: protect buyer from surprise by requiring conspicuous disclaimer.

If buyer was aware, not an unexpected surprise so disclaimer is effective (no harm, no foul). Courts use this test where buyer is sophisticated and there has been substantial negotiation over the terms of the agreement.

PRIVITY AND WARRANTY (OPTIONAL)

I. Horizontal Privity

Horizontal privity in the warranty context refers to the degree to which the buyer's express or implied warranty extends to persons other than the buyer (third parties). For example, if you buy a widget and your spouse is injured because the widget is defective, does your spouse get the benefit of your warranty? Section 2-318 of the UCC provides three alternatives, each offering a different range of protection to third parties. Most states, including Georgia, have adopted Alternative A, which provides the most limited protection to third parties. Under Alternative A, the warranty "extends to any natural person who is in the family or household of [the] buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured by breach of the warranty."

II. Vertical Privity

Vertical privity refers to the chain of distribution of goods, for example, from the manufacturer, to wholesale distributor, to dealer, to ultimate buyer. The official version of the UCC does not address vertical privity. (A few states, however, have amended §2-318 to apply to vertical privity as well as horizontal privity.) The case law distinguishes between breach of express warranties and breach of implied warranties.

A. Breach of Express Warranties

The trend is to disregard vertical privity requirements, but only under certain circumstances:

1) The remote seller must have made representations which it intended the buyer to rely on, and which the remote seller made in order to induce the buyer to purchase the goods. An example is an advertisement by a car manufacturer targeted directly to the ultimate consumer buyer.

AND

2) The buyer did indeed rely on the representations or was induced by the representations.

AND

3) The buyer used the goods in the manner the seller expected or should have expected the buyer to use the goods.

Most courts apply the above rules to all types of transactions, but some courts make distinctions based on:

1) Type of purchase: some courts abolish privity requirements only in regard to purchases by consumers, not for purchases by commercial buyers.

2) Type of injury: some courts abolish privity requirements only in cases seeking a remedy for personal injury.

3) Type of goods: some courts abolish privity requirements only if the goods are household goods, not commercial goods.

B. Breach of Implied Warranties

Buyers have been most successful in cases involving the implied warranty of merchantability. It is very difficult for a buyer to show a remote seller violated the implied warranty of fitness for a particular purpose because the fitness warranty ordinarily only arises from the relationship between the direct seller from whom the buyer purchases the goods, not from the remote seller.

The trend is for courts to abolish privity requirements in cases involving personal injuries and property damage. Courts justify abolishing the requirements in these cases on the following grounds: 1) buyers cannot protect themselves adequately from defectively manufactured goods; 2) there is an implied assurance from the manufacturer that the goods are safe; and 3) the manufacturer has a superior ability to bear or spread the risk of loss.

Courts generally are reluctant to abolish privity requirements for economic loss. Economic loss includes out of pocket losses and the loss of the benefit of the bargain. Courts fear abolishing the requirements for economic loss might expose remote sellers to astronomical losses and economic losses are less foreseeable and therefore less insurable. Nevertheless, some courts have abolished privity requirements even for economic loss.

BUYER REMEDIES:
REJECTION: PROCEDURE AND DUTIES

I. Procedure

A. Reject within reasonable time §§2-602(1), 1-204(2) & Comment 2

B. No acceptance until given reasonable opportunity to inspect §2-606(1)(b)

1. Reasonable facilities

2. Reasonable time to inspect §1-204(2)

C. Reasonable time to notify seller of rejection §2-602(1)

D. Under certain circumstances, buyer must inform seller of nature of defect justifying rejection §2-605

E. Failure to follow procedure results in acceptance §2-606

II. Duties

A. Exercise of ownership prohibited §§2-602(2)(a), 2-606(1)(c), 2-711(3) mobile homes, security interests

B. Store, reship or resell §2-604

1. Consumer buyer: hold goods §2-602(b) & (c)
optional: reship or resell

2. Merchant buyer: duty to follow seller's instructions §2-603. If no instructions within reasonable time, §2-604 applies, seller can store, reship or resell.

Exception: agent or place of business at market

CURE OUTLINE

I. Buyer rejects before time of performance: §2-508(1)

A. Time of performance generally means when the goods are delivered

B. Seller must seasonably notify buyer of intention to cure

C. Seller must make a conforming delivery within the contract time

D. Seller can cure by repair or replacement

II. Buyer rejects after time of performance: §2-508(2)

A. Seller must reasonably believe goods would be acceptable

B. Cases: major/minor defect distinction

1. Majority view: seller may cure regardless of whether defect is major or minor

2. Minority view: if minor defect, seller may cure by repair or replacement

if major defect, seller has no right to cure

C. Seller must seasonably notify buyer of intent to cure

D. Seller must make conforming tender within a reasonable time

E. Conforming tender must be within agreement or contemplation of the parties (Zabriske)

BUYER REMEDIES:

REVOCATION, SPECIFIC PERFORMANCE & DAMAGES

I. Revocation of Acceptance: Substantive Requirements §2-608(1)

A. Nonconformity substantially impairs.

B. Noncomformity substantially impairs.

C. Buyer's excuse for accepting goods

Acceptance on reasonable assumption of cure

or

Acceptance reasonably induced by difficulty of discovering before acceptance or seller's assurances

D. Use of goods after revocation

II. Revocation of Acceptance: Procedural Requirements

A. Timing: within reasonable time & before substantial change in goods not caused by defect §2-608(2), Comments 4 & 6

B. Notice to seller §2-608(2), Comment 5

C. Buyer who revokes properly has same rights & duties as if buyer had rejected §2-608(3)

D. Seller's right to cure under 2-608(1)(b)

Majority: No right to cure. Gappelberg, Tex. Sup. Ct. Seems to assume buyer's faith is shaken

Minority: No right to repair. Right to replace even if serious defect unless buyer's confidence undermined. The refusal to grant a right to repair is based on fact that usually seller already has tried to repair several times. See casebook, p.388. Gappelberg, Tex. Ct. App.

III. Where buyer has no goods

A. Right to get goods from seller

§2-716: specific performance---unique or "other proper circumstances"

B. Damages

§2-713: rejection, revocation, non-delivery or repudiation---market price-contract price differential

§2-712: cover as nonmandatory alternative. Buyer's damages---cost of cover-contract price differential.

Rule: If buyer covers, buyer is entitled to consequential damages. 2-712(2)

If buyer does not cover, buyer is not entitled to consequential damages. 2-713(1)

Exception: Even if buyer did not cover, buyer nevertheless can recover consequential damages if buyer can show the loss could not have been prevented by cover or otherwise. 2- 712, Comment 3; 2-715(2)(a)

Replevin: In order to be able to replevy goods, buyer must prove inability to cover or efforts to cover would have been unavailing. 2-712, Comment 3; 2-716(3)

IV. Remedies as to goods buyer accepts

A. Burden on buyer to establish breach §2-607(4)

B. Buyer must notify seller of breach within reasonable time §2-607(3)(a)

C. Damages: §2-714(1)---"ordinary course of events...any manner...reasonable"

specific formula for breach of warranty---§2-714(2)

Many courts acting pursuant to §2-714(1) in non-warranty cases apply the breach of warranty formula contained in §2-714(2)

V. Contractual limitations on damages §2-719

Relationship of failure of essential purpose (§2-719(2)) and unconscionability §2-719(3) within context of consequential damages

BUYER'S REMEDIES: DAMAGES

Problem 1, p. 399

Facts: Goods rejected after arrival. 2-713(1) & (2).

Calculation: Difference between market price at place of arrival and the contract price, plus incidental and consequential damages, 2-713(1), 2-715, less expenses saved because of seller's breach, 2-713(1).

Market price	$16.25
Contract price	-15.00
	1.25

Transportation is an incidental expense. 2-715(1). Goods were shipped FOB Atlanta, seller was located in Atlanta. Consequently, buyer ordinarily is responsible for this expense. 2-319(1)(a). But here, if buyer has paid for transportation, buyer can recover that expense as incidental damages.

Facts: Buyer rejects before seller ships the goods.

Calculation: Under 2-713(2), market price is to be determined as of the place for tender. Where shipment contract, goods are considered tendered when they are to be given over to the carrier.

Market price at place of tender	$15
Contract price	15
	0

Problem 2, p. 400

	Wholesale	Retail
Market price	$2.45	$2.50
Contract price	1.50	1.50
	.95	1.00

2-713, Comment 2: same branch of trade.

Problem 2, p. 408

Cover: 2-712(2)

Purchase price of covered goods	650
Finance charge	+54
	704
Contract price of revoked goods	-495
Damages	209

SELLER'S REMEDIES

I. Where buyer accepts the goods

Seller has an action for the price where buyer accepts the goods §2-709(1)(a)

Seller has an action for the price even though buyer has rejected or revoked acceptance, where buyer has not followed correct procedure in doing so

II. Where buyer has not accepted the goods

Seller does not have an action for the price §2-709(3); instead, seller has an action for damages

This applies where buyer has followed the correct procedure for rejection or revocation, but has no substantive basis for rejection or revocation

(We will not consider the exceptions contained in §2-709(1)(a) and §2-709(1)(b)).

Problems

1. Sharp Knives Company entered into a contract to sell 10,000 electric knives to the Cute Cutting Co-op (CCC) at a price of $50,000. The knives were delivered to CCC on the date set in the contract. One-half hour after delivery, CCC telephoned Sharp and informed Sharp that it was rejecting the knives because they were not the proper color. In fact, the knives conformed to the contract in every respect.

May Sharp recover the price of the knives from CCC?

2. Assume as in Problem 1 that CCC had no valid reason to reject the knives, but also assume that CCC waited two weeks before notifying Sharp it was rejecting the knives.

May Sharp recover the price of the knives?

III. Action for damages

A. Resell goods and recover contract price-resale price differential §2-706

OR

B. Recover contract price-market price differential §2-708(1)

C. If §2-708(1) damages are inadequate, seller can recover lost profit §2-708(2)

Example: the lost volume seller

(Two other remedies will not be considered: Liquidated damages allowed if reasonable §2-718(1); remedy where goods are unfinished §2-704(2).)

EXAM NO._____

SAMPLE
EXAMINATION

Sales
Professor Budnitz

SAMPLE INSTRUCTIONS

This examination consists of _____ pages, excluding the page of instructions. Please check your copy to make sure it is complete.

Return the examination questions with your bluebooks. Write your exam number on this instruction sheet as well as all of your bluebooks, and place this instruction sheet and the exam questions in one of your bluebooks.

To assist you in answering the questions on the exam, you may use your copy of the Uniform Commercial Code, the casebook for this course, the photocopied Supplementary Materials, handouts, notes, and outlines you have prepared. You may not use commercial outlines, commercial study aids, nutshells, etc.

You have three hours to complete this exam, with the suggested time for each question indicated at the beginning of the question. In calculating grades, points will be allocated to each question in accordance with the suggested times.

A total of 170 minutes have been allocated to the questions. In addition, you have 10 minutes of "free time." It is suggested that you use this time to familiarize yourself with the examination as a whole, finish questions for which you ran out of time, etc.

Read each question carefully. Answer each question in the manner indicated in the question. Your answer should include specific reference to and discussion of Uniform Commercial Code sections you believe apply to the question. In addition, you should refer to and discuss applicable case law and the Official Comments to the Uniform Commercial Code.

SAMPLE QUESTION

20 Minutes

Byte Computer Company sold a $90,000 computer to GSU. The computer operated in a very unsatisfactory manner because it gave every student at least one grade of 94, regardless of the actual grades fed into it.

The sales contract provided that the computer was being sold "As Is." The term "As Is" was printed in the same type size as the rest of the contract.

GSU contends that the "As Is" disclaimer of warranties is without legal force because it is not conspicuous.

Byte admits that the "As Is" term is not conspicuous, but argues that the UCC does not require it to be conspicuous in order to be effective.

You represent GSU. Write a memorandum explaining how the UCC supports GSU's contention. The memo also should explain what UCC sections Byte will rely on to support its argument. Finally, describe the argument you will make to the judge to persuade her that your position should prevail.