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HERBERT LEMELMAN

Issues of Formation and Performance

By Dean Herbert Lemelman

Special gratitude expressed to Elizabeth Gillis, a student at Suffolk University Law School who contributed greatly to the preparation and editing of this material.

The following article is a modification of a presentation made at the Suffolk University Law School Center for Continuing Professional Development. It is a discussion of specific provisions of Article 2 of the Uniform Commercial Code and their interpretation by New England courts. The discourse revolves around two major topics — General Contract Formation, which comprises Part I, and Warranties and Performance, which is covered in Part II. Due to the specificity of this exposition, the reader is encouraged to refer to the cited sections of the Uniform Commercial Code for background.

PART I:
GENERAL CONTRACT CONSIDERATIONS UNDER ARTICLE 2

I. CONTRACT FORMATION

A. Introduction

The Uniform Commercial Code departs from the classical view of contract formation which was governed by clear and formal rules of offer and acceptance, to an emphasis upon the broad definition of agreement. The Code makes it clear that a contract may be made in any manner sufficient to show agreement, including the conduct of both parties which recognizes the existence of the contract. If, under this standard, a contract has been made, it will not fail for lack of knowledge as to the exact moment of the contract, and will not fail for indefiniteness even though some of the terms are left open so long as there is an intention to make a contract and a reasonably certain basis for awarding an appropriate remedy.

This emphasis of the Code upon the general understanding of the parties is evidenced by many substantial deviations from common law formalities. Illustrative of this is Section 2-203 which purports to render seals inoperative. In like manner, Section 2-206 allows an offer to be accepted in any reasonable manner and indeed, allows an offer to enter into a bilateral contract to be accepted by the commencement of performance on the part of the offeree. Section 2-2C17 looks to the conduct of the parties to determine whether a contract was intended even though the writings might not amount to same; and allows for the parties to be contractually bound to each other with regard to items upon which agreement has been reached. Additionally, Section 2-209 clearly allows the parties to modify the terms of a contract and provides that such modification will be enforceable without consideration.

B. Constraints on the Flexibility of the Code

The foregoing should not be taken to mean that all of the common law rules have been abandoned. The flexibility concept of Article 2 is constrained by many statutory standards. For example, Section 1-102(3) which limits the parties' ability to eliminate certain standards of conduct (i.e., good faith, reasonableness, diligence and care) and stipulates that any standards of conduct that the parties set concerning performance of their obligations must be reasonable. Secondly, Section 1-105 imposes a limitation on the parties to a contract with respect to the choice of law to be applicable in the event of a dispute and litigation of the contract. Third, Section 2-201 which requires a writing in order for the sale of goods of a price of $500 or more to be enforceable (with the traditional exceptions to the statute of frauds, such as payment and acceptance, admissions, specially manufactured goods, written confirmations to which a written response is not given within 10 days). Fourth, Section 2-202 which deals with parole evidence and the admissibility of evidence which may vary the terms of a written contract as well as the ability to orally modify a contract which is intended to be the final expression of the parties. Fifth, Section 1-103, which makes it clear that rules of the Code are to be deemed supplements to any other rules of law that generally are available in the jurisdiction such as estoppel, waiver, subrogation, etc., except as specifically displaced by a provision of the Code. Sixth, Section 2-302 which generally allows a court to render unenforceable those portions of a contract that it deems to be unconscionable as the matter of law. Seventh, one should also be aware of Section 1-205 which provides the statutory basis for the introduction of the course of dealing between the parties. It allows this method of establishing what their understanding might have been with regard to the particular transaction involved and the usage of trade in which the parties are operating to determine the extent of their understanding.
It should also be kept in mind that even though the Code provides for flexibility in determining the understanding of the parties, it is clear that the fact that many items have been left open which in common understanding would have been agreed upon by the parties if they thought they were bound, it is evidence that the parties' negotiations did not reach the level of a contractual commitment and the parties may not be counsel.

C. Specific Code Variations from Common Law of Contract Formation

While it is fair to say that the Code is concerned with the substantive evaluation of whether the parties have reached an agreement by means of conduct, circumstances and express commitments, the Code does set some parameters with which the practitioner should be familiar in the drafting of contracts. There are nine quite important examples of these limitations.

To wit, Section 2-203 declares that the existence or non-existence of a seal in transactions under Article 2 is not relevant. It would seem that this provision may affect the general statute of limitations for actions based upon sealed instruments found in Massachusetts General Laws Chapter 260 Section 1. However, the question has not yet been resolved in Massachusetts.

A second example is Section 1-105 which limits the contracting parties to a choice of substantive law to be applied by a court in the event of litigation, to the law of a jurisdiction which bears a reasonable relationship to the contract. It should be kept in mind that this is a different issue than the jurisdictional problems that might arise between two contracting parties in different jurisdictions. The criteria a court should use in determining whether a reasonable relationship to the contract exists are enumerated in Seeman v. Philadelphia Warehouse.

A third example is Section 1-102(3) which, while generally noting that the provisions of the article may be varied by agreement does not allow certain standards of conduct such as good faith, diligence, reasonableness and care to be obviated by agreement. This section does allow the parties to set standards with regard to the performance of such obligations, but stipulates that these chosen standards will be enforceable only if they are not manifestly unreasonable.

Fourth, Section 1-107 provides that a waiver or renunciation of a known right may be enforceable without consideration but requires that such a waiver be evidenced by a writing signed and delivered by the aggrieved party. Therefore, if any one of the statutory tests is not met, consideration might still be necessary for the enforceability of such a non-complying waiver.

Fifth, Section 2-209 allows contract modifications to be enforceable without consideration. The section does put certain limitations upon agreements regarding later oral modifications and should be read together with the Article 2 Parole Evidence Rule as set out in Section 2-202.

The sixth example, Section 2-205, incorporates into the statute some concept of promissory estoppel and provides that a merchant who has made an offer in writing which indicates that the offer will not be revoked for a period of time is bound by that offer, even though there is no consideration, for a reasonable period up to three months. Care should be taken with regard to this provision in that it applies only against merchants, only to offers in writing and is limited to the three month period. Therefore, the general contractual rules would apply if the offeror is not a merchant, or the offer is not made in writing. Of course, if the offer is supported by consideration, then at common law it is enforceable against the offeror as a contractual commitment and would not be subject to the constraints of Section 2-205.

The seventh example, Section 2-201(2) changes the common law with regard to the Statute of Frauds in that a written memorandum which would bind the sender under this section is binding upon the recipient for the purpose of the Statute of Frauds if the recipient has reason to know the contents and fails to give written objection to same within ten days after receipt. It is important to note that this variation from the common law applies only as between merchants and would therefore have no effect on transactions in which either party is not considered to be a professional business man.

Example number eight, Section 2-207, changes the so-called "mirror image" rule at common law. Much (some say too much) has been written and said about this section which purports to deal with the resolution of the battle of inconsistent terms between merchants. At common law, such inconsistencies might have resulted in no contract at all being consummated. For example, in Roto-Lith, Ltd. v. F.P. Bartlett and Co., where the court reached the conclusion that no contract had been formed because of inconsistent provisions. The thrust of section 2-207 makes additional provisions in a sales or purchase order of the seller or buyer in a particular transaction binding upon the recipient, even though the recipient has not acquiesced thereto. For this to occur, the recipient must be a merchant and the additional terms may not materially alter the contract. If the recipient objects to such additional terms within a reasonable time of receipt, or the offer expressly limits acceptance such terms do not become part of the contract. For a Massachusetts case in which the court expressly refused to follow Roto-Lith, supra, commenting that it does not carry forward the obvious intent of this section see Furtado v. Woburn Machine, Co.

The last example concerns "Indefinite" Agreements. Prior to the Code, the law of contracts was that if the parties had not agreed on virtually all of the substantial items of the contract, it was said that the parties were not contractually bound to each other. That is, the contract was unenforceable for being too indefinite. The Code, in Section 2-204, recognizes the possibility, however, that the parties may indeed intend to be bound to a contract even though major terms have been left open. Section 2-204 makes it clear that the parties are contractually bound even though certain items are left open so long as the negotiations have reached the level of allowing a court to provide a reasonable basis for a remedy in the event of litigation. This flexibility is limited somewhat by the provisions of the Statute of Frauds which requires that the writing embody a quantity of goods to be sold.

GAP FILLERS

The following sections of the Code provide standards for important contractual considerations upon which there has been no agreement. Care should be taken in the use of these gap fillers in that if the parties have agreed, either by express agreement, custom, trade usage, or prior dealing, these sections would not apply.

Section 2-305 recognizes that the parties may intend to be bound to a contract even though the price is not settled. This section sets out the mechanism for establishing such a price, sets the standard of conduct required if one of the parties must set the price, and sets the consequences of failing to set the price.

Section 2-306 deals with output, require-
ment and exclusive dealing contracts. Prior to the Code many contracts, which may have been reasonable in light of the commercial requirements of the parties, were deemed to be unenforceable for lack of mutuality. In particular, contracts which required one party to purchase all of the output of a seller for particular items and contracts which required a seller of goods to supply the entire requirements of a buyer of such goods and exclusive contracts between parties were said to be too vague to be enforceable. In addition, difficult problems arose when there were substantial deviations between estimates or prior activities and actual requirements or output of sellers or buyers. Section 2-306 provides that in such a contract, each party is bound to accept actual productivity or demands that the other party makes in good faith, provided that it is not unreasonably disproportionate to the estimate or to any such prior comparable output or requirement. This section further provides that in the event an agreement stipulates exclusive dealing, such an agreement requires that both parties use best efforts in connection with the contract. It should be clearly understood that these rules apply only if the parties have not agreed otherwise. Therefore the use of prior dealings, custom and usage, etc., are all relevant in this inquiry. If, of course, the parties have set out minimums and maximums in connection with output and requirement contracts, the provisions of such an agreement would override the section standards. It should also be noted that the Code leaves open the question of whether an agreement with regard to exclusive dealing is otherwise lawful. Reference is also made to Code Section 2-615 which relates to the failure of presupposed conditions in contractual expectations.

A third gap filler, Section 2-307, sets out the rules when the parties have not specifically agreed whether the delivery is to be in a single lot or in installments. The starting point is that delivery is to be made in a single lot and payment is due only upon such delivery. However, where the circumstances give either party the right to make or demand delivery in lots, a portion of the price, if it can be apportioned, may be demanded for each lot.

Fourth, Section 2-308 states the general proposition that the seller has no obligation to deliver the goods to the buyer unless the parties have otherwise agreed. Again, it is important to note that custom and usage, prior conduct or express agreement are all relevant in determining whether the parties have reached an accord concerning delivery. Reference is made to Section 2-504 which deals with obligations in connection with delivery if the parties have so agreed. In a commercial setting it is not uncommon for the parties to have agreed to some form of delivery to a particular place, and therefore the rule that the seller is not required to deliver goods to the buyer, or at least arrange for shipment, applies primarily to noncommercial sales.

Fifth, Section 2-309 indicates that where the parties have not agreed to a specific time for action under a contract, the time shall be a reasonable time. Important in this analysis is the requirement that the parties act in good faith and if the parties are merchants they must act in accordance with a higher standard of conduct. The section also allows for a termination of a contract which is indefinite as to time by reasonable notification of the party intending to terminate the contract. An agreement to eliminate the need for such notification would be unenforceable as unconscionable as provided in Section 2-302.

A sixth gap filler, Section 2-310, deals with payment where the parties have not agreed on that point. The section provides that payment is due at the time and place where the buyer is to physically receive the goods. That is, no credit is extended unless the parties have so agreed. The section also covers the conflict between the buyer's ability to inspect the goods under Sections 2-512 and 2-513 and the requirement that the seller be paid before the buyer has received such goods by the use of documents. In this connection reference is also made to Section 2-511 concerning a seller who demands legal tender as payment and the effect of accepting a check in lieu of cash. Also mentioned is Section 2-507 which deals with a cash transaction in which the check has been dishonored, and Section 2-403 which concerns itself with the intervening rights of third parties in cash transactions.

Seventh, Section 2-311 deals with other specifications in a contract left to be set by one of the parties and its effect upon the contractual obligations of the parties. The section makes it clear that if a contract of sale is otherwise sufficiently definite under the standards of Section 2-204, merely that certain particulars in the contract are left to be specified by one of the parties will not render the contract invalid. The standard of conduct on the part of that party obliged to set the specifications is one of good faith and within limits of commercial reasonableness. The section goes on to further particularize which party has the specification obligations with regard to particular kinds of things (assortments, shipments, etc.) where the parties have not otherwise agreed.

II. PERFORMANCE OBLIGATIONS OF THE PARTIES

A. General Considerations.

The general obligation of the seller is to "Transfer and deliver" and of the buyer is
to “accept and pay” for the goods in accordance with the contract. This opening standard is provided in Section 2-301. Where the parties have not specified such things as time for performance, duration, quantity, quality, price, method of delivery, etc., the so-called “gap filler” provisions of Article 2 as provided in Part 3 are used.

B. Assignment and Delegation.

Particular reference should be made to the assignability of contracts for the purchase and sale of goods under Article 2. Section 2-210 asserts that unless there is a good reason to prevent assignments it is commercially desirable to allow free assignability of contracts for the purchase and sale of goods. Indeed, this section together with Section 9-311 of the Code fosters the concept of free assignability of contract rights for certain purposes even though the contract may prohibit such assignment.

A distinction should be made between assignment and delegation of duty. Under Section 2-210, a contract is freely assignable with limited exceptions as discussed hereinafter. Normally a party ought to be able to perform a sales contract through another; however, a party ought not to be able to unilaterally relieve himself of performance or obligations under the contract. Section 2-210 prevents assignment of rights where such an assignment would materially change the duty of the other party, where an assignment would increase materially the burden or risk imposed by the contract or where the assignment would impair materially a party’s chance of obtaining return performance. In this connection reference is also made to the provisions dealing with adequate assurance as provided in code Section 2-609. With regard to delegation of duties, Section 2-210 has liberalized the common law notion of “personal confidence” as set out in New England Cabinet Works v. Morris. Under the code a party can perform through a delegate unless there is an agreement to the contrary or the other party has a substantial interest in having the original party perform the contract.

It should be emphasized that in no event can the person assigning or delegating his rights or obligations under the contract be relieved from responsibility under the contractual provisions unless there has been a novation. It should be kept in mind that this alienability as espoused by the Code allows creditors of such an assignor to reach his interest in the contract.

C. Obligation of Good Faith.

The provision in Section I-203 is sometimes overlooked in performance of contractual obligations. This section provides that every contract or duty within the Code imposes an obligation of good faith in its performance. The basic definition of good faith as provided in Section 1-201(9) is honesty in fact concerning the conduct of the parties involved in the transaction. This subjective test is strengthened by Section 2-103(1)(b) which supplies an objective standard of good faith when one is a merchant. In that case, the standard of good faith becomes the reasonable commercial standard of fair dealing in the trade. This is one of the provisions that is said to require a higher standard of conduct on the part of merchants as professional business people. The function of good faith in performance is two-fold. First, the obligation sets a standard where the Code or the contract allows performance to be determined by one party or the other in its discretion, and second, the standards generally support the notion that the parties to a contract under the Code must conduct themselves in such a manner so as to satisfy minimum standards of honesty and commercial reasonableness.

D. Seller’s Obligation of Delivery.

As noted above, Section 2-301 requires that the seller “transfer and deliver” in accordance with the contract. This section raises several questions concerning the extent of the seller’s obligation, primarily, does the seller have to deliver all of the quantity under the contract or can a part of the total quantity be delivered; second, where is the place for tender and delivery; and third, what is the required tender of delivery. Generally, Section 2-307 requires that all goods called for by a contract of sale must be tendered in a single delivery. When the circumstances are such that the goods should be delivered in installments, Section 2-307 allows for such fractionalizing of the contract and Section 2-612 deals with the requirements of acceptance of each installment by the buyer. The quantity of goods is not one of those things that can be supplied by one of the sections of the Code (except for provisions of Section 2-306 dealing with output and requirements contracts) because of the provisions in Section 2-201 which require that the quantity be established in the writing in order to satisfy the Statute of Frauds.

Code Section 2-308 makes it clear that the seller has no obligation to deliver the goods unless the contract otherwise provides and that the place of delivery is the seller’s place of business or, if he has none, his residence. Since Section 2-301 requires the seller to transfer and deliver the goods in accordance with the contract, it is critical to determine whether or not there is any contractual responsibility on the part of the seller to deliver the goods, and, if so, under what circumstances. Code Section 2-503 sets out standards for the seller with regard to tender of delivery. It requires that the seller “put and hold” conforming goods at the buyer’s disposition and give the buyer an opportunity to receive the goods.

If the contract requires that the goods are to be shipped from the seller to the buyer, then the more narrow question is whether the contract is classified under the Code as a shipment contract or a destination contract. If the contract fairly read requires that the seller ship the goods to a particular destination or to the buyer, tender is made only when the goods have reached such destination. Where, however, the contract merely requires that the seller start the shipping process, this is referred to as a shipment contract (such as in FOB Seller). Then the only obligation on the part of the seller is to make a reasonable contract for the shipment and tender is accomplished upon the delivery of the goods to the carrier.

In the event the transaction is to be accomplished by the delivery of documents, that is, where the goods are warehoused or otherwise evidenced by a document of title, the tender takes place upon the delivery of documents in proper form so as to enable the buyer to obtain possession of the goods from the bailee.

E. Risk of Loss During Shipment.

It should be kept in mind that the code provisions dealing with risk of loss concern themselves with which party shall bear the risk when neither party is at fault. The Code has avoided having this issue turn on title, unlike the pre-code emphasis. Indeed, one or both parties may have an insurable interest in the goods under the provisions of Section 2-501 without regard to which party shall bear the ultimate risk of loss. It should be noted that the provisions with regard to risk of loss in the Code are subject to contrary agreement of the parties and allocation is appropriate under the provisions of Section 2-303 under which the parties can allocate the risk of loss be-
tween them in any manner not unconscionable.

The issue of which party should bear the risk of loss turns on practical considerations relative to the possession and control of goods at the time of the casualty and/or which party would be in the best position to bear the risk and protect it through insurance. Code Sections 2-509 and 2-510 also distinguish between situations in which the loss occurs before there has been a breach of contract and situations in which the loss occurs after there has been a breach.

1. Risk of Loss with no Breach. Where the goods are to be shipped by a common carrier, the risk of loss passes to the buyer in a shipment contract upon delivery of the goods to the carrier. If the contract requires the seller to deliver the goods to the buyer or to a particular destination by common carrier, the risk of loss passes to the buyer when the goods are so tendered at that place as to enable the buyer to take delivery. However, one must look to Section 2-503 to determine the method of the seller’s tender of delivery. Among other requirements, Section 2-503 mandates that the seller notify the buyer at a reasonable hour, furnish facilities reasonably suited to the receipt of the goods, etc.

If the goods are to be delivered without being moved because they are in the hands of a bailee, the risk of loss passes when the buyer or the bailee has acknowledged that the buyer has a right to possession of goods.

In the case of delivery by tender of nonnegotiable documents, Section 2-503(4)(b), which concerns itself with the method of the seller’s tender, specifically indicates that the risk of loss in such a situation will stay on the seller until the buyer has had a reasonable time to present the documents.

Where the buyer is a merchant and the goods are not to be delivered by a common carrier, Section 2-509(3) states that the risk of loss passes to the buyer upon physical receipt of the goods. If the seller is not a merchant, then the risk passes to the buyer upon tender of delivery. The concept supporting this provision is that it covers most transactions in which the seller ships by his own carrier and most likely such a seller will have insurance to cover any casualty.

If the goods are on a “sale of approval,” that is a consignment in which the consignee has a right to send the goods back to a buyer without any obligation to pay under Section 2-326, the Code specifically provides that the risk of loss remains on the consignor until the goods have been accepted by the consignee. The return is also at the risk of the consignor so long as the consignee has duly notified the consignor of an election to return the goods. This is to be contrasted with a situation in which the consignment is classified as a “sale or return” under Section 2-326 in that the goods are ultimately intended for resale by the consignee. In that situation the risk of loss seems to be on the consignee until the goods are returned to the consignor.

2. Effect of Breach on the Risk of Loss. Section 2-510 sets out rules with regard to risk of loss when there has been a breach by a seller or by the buyer. It is interesting to note that Section 2-510 does not allow for variation of these rules by agreement of the parties. Section 2-510 thus conflicts with Section 2-303 which allows the parties to set their own allocation of risks in the event of a casualty or that the goods are non-conforming under Section 2-601, if the goods or the tender of delivery fail to conform in any respect to the contract.

The buyer has the right to reject the whole, accept the whole or to accept any commercial units and reject the rest.

If the goods are so non-conforming so as to give the buyer a right of rejection under Section 2-601, the risk of loss remains on the buyer. Reference is made to the following discussion (under Buyer’s options) dealing with the justification for a buyer to reject under Section 2-601.

In some situations, the buyer may have the right to partially or completely revoke his acceptance of non-conforming goods. For example, 2-618(1)(A) gives the buyer the right to revoke his acceptance if he accepted it on the reasonable assumption that the nonconformity would be cured, and the cure did not take place.

If the buyer has a right to revoke acceptance under Section 2-608, the risk of loss, to the extent of any deficiency in insurance coverage on the part of the buyer, shall be treated as having rested on the seller from the beginning.

Where the seller has identified conforming goods to the contract and the buyer breaches or repudiates the contract, the risk of loss may be on such breaching or repudiating buyer to the extent the seller does not have enough effective insurance. This is to enable the buyer to obtain insurance on the goods for some period of time after the breach. It is assumed thereafter the seller will revert to being the owner of the goods and the normal rules of seller’s insurance would prevail.

Under Section 2-613 if the casualty to the goods occurs before the risk of loss passes to the buyer and the loss is total, the contract is avoided. If the loss is less than total, the buyer has the option to accept the goods as they then exist with due allowance from the contract price but without further right against the seller. These rules will not apply if the casualty has occurred after the risk of loss has passed to the buyer.

Although the Code provisions with regard
to risk of loss are generally designed to follow the ability of either party to insure against such risk, the Code does distinguish the insurable interest concept from risk of loss. Code Section 2-501 indicates that both parties may have an insurable interest in goods once the goods have been identified to the contract. However, problems arise when there is double insurance or more insurance than the loss. The ability of the insurance carrier to subrogate to the rights of the insured are beyond the scope of this material.

F. Anticipatory Repudiation.

The Code adopts the concept that if there has been a repudiation by either party to a contract, the aggrieved party has a series of options available to it including any remedies available for breach. Section 2-610 allows the aggrieved party to wait a commercially reasonable time for performance by the repudiating party; suspend his own performance or proceed with finishing the goods under the constraints of Section 2-704; or cancel the contract and sue for breach. This is a substantial change from the common law in Massachusetts and should be examined with care.

III. BUYER'S OPTIONS

A. Rejection of Goods.

Under the provisions of Section 2-301 a buyer must accept and pay for conforming goods tendered by the Seller. Section 2-601 purports to give the buyer the right to reject the goods if they fail in any respect to conform to the contract. This is the so-called "perfect tender" rule. It is suggested, however, that the rule is not quite what it purports to be, in that the ability of a seller to cure any non-conformities under the provisions of Section 2-508; the requirement of the buyer to be in good faith under Section 2-404; the inclusion of trade usage and custom in determining what the agreement of the parties might have been with regard to minor or insubstantial variations from the contract under Section 2-208 all work against the ability of the buyer to refuse to accept goods because of any non-conformity.

In addition, a buyer is deemed to have accepted the goods where he has failed to make an effective rejection. Part of the rejection process requires notification of such rejection within a reasonable time after delivery or tender under Section 2-602. Therefore, assuming the ability to reject under Section 2-601, failure to give the required notice under Section 2-602 will result in an acceptance under Section 2-606 and therefore the right to reject is gone. In the event of an effective rejection, a merchant buyer must comply with the reasonable directions of the seller with regard to disposition of goods under Section 2-603. Failing said instructions the buyer has a right to store the goods, reship them or resell them in accordance with the provisions of Section 2-604. It should also be noted that a buyer in possession of rejected goods has a security interest in the goods under Section 2-711 as well as the right to sell such goods upon certain notification and other commercially reasonable procedures as set out in Section 2-706. An unanswered question is the ability of such a buyer to scrap the goods.

B. Right of Inspection.

As a general proposition, the buyer has a right to inspect the goods before payment or acceptance under Section 2-513, unless the parties have otherwise agreed. The inspection may be held at any reasonable place and time and in any reasonable manner and all the costs thereof are borne by the buyer. If the goods do not conform and are rejected, the buyer may recover expenses for inspection from the seller. However, the Code does allow for situations in which payment is to be made before inspection can take place. In most situations, Section 2-512 indicates that payment is required without regard to the right of inspection. It is also clear that a payment under such circumstances does not constitute acceptance of goods or impair the buyer's right of inspection or any other remedies. Therefore, even though the buyer has paid for the goods, if the inspection results in discovery of non-conformity of the goods, the buyer has a right to reject them under the provisions of Section 2-601 and has a security interest in such goods under provisions of Section 2-711 for any such payment made. Reference is also made to Section 2-605 of the Code which deals with the effect of the buyer's failure to particularize the reasons for the rejection. In general, the failure to particularize will not prejudice the buyer unless the seller could have cured under Section 2-508 or both parties are merchants and the seller has requested in writing a full statement of all defects.

C. Right to Revoke Acceptance.

At the outset of this discussion it should be noted that acceptance as defined in Section 2-606 is a technical matter. Acceptance occurs when the buyer, after a reasonable opportunity to inspect (whether or not the right of inspection has been used) signifies to the seller by use or otherwise, that the goods are conforming or the buyer will take them anyway. Acceptance also occurs when the buyer fails to make an effective rejection or the buyer does any act inconsistent with the seller's ownership. Where the buyer effectively rejects the goods he must then ask the seller what to do with them. After a reasonable time has gone by or the seller fails to give any direction, a problem arises if the buyer scraps the goods. Has the buyer in that situation exercised control over the goods inconsistent with rights of the seller so as to constitute an acceptance?

Once the buyer has accepted the goods under any of the provisions of Section 2-606, the buyer's right of rejection is no longer available unless the acceptance was made with knowledge of a non-conformity under the assurance that it was going to be cured and the cure is not forthcoming. If the acceptance was made without discovery of a non-conformity and the acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurance, then the buyer may revoke his acceptance only when such non-conformity substantially impacts the value to the buyer. It should be noted that this standard is higher than that imposed by Section 2-601 giving the buyer the right to reject. It also should be noted that the revocation must occur within a reasonable time after the buyer discovers the ground for its action and the buyer must notify the seller of the revocation of acceptance. An open question is whether a buyer can revoke acceptance of the goods as against a remote seller. The statute merely talks in terms of notification to the seller. However, the sense is that the right of revocation of acceptance should only be available against the immediate seller, but there is authority for a contrary position. As to what constitutes proper notice under Section 2-607 see City Welding and Mfg. Co. v. Gidley - Eschenheimer, Corp. Reference is also made to the Massachusetts version of Section 2-316(A) which indicates that failure to give notice in a breach of warranty case will not be fatal as against a defendant unless the defendant can show that the failure to give notice prejudiced the rights of such defendant.

Section 2-607 also provides a mechanism whereby an intermediate seller who has been notified of a revocation of acceptance
D. Defects in Accepted Goods.

Section 2-607 contemplates that there may be a breach of warranty or any other breach of contract in connection with goods that have been accepted by the buyer. This can occur in situations in which the breach could not have been discovered by inspection and the buyer has intentionally or otherwise accepted the goods under Section 2-606 yet the breach is not substantial enough to allow a revocation of acceptance under Section 2-608.

The breach of warranty cases which do not rise to the level of substantial impairment of value fall in this category and require reasonable notice (it need not be written) to the seller of such breach. Again, reference is made to Section 2-316A which eliminates the defense of no notice in situations falling under that section in which the failure to give the notice did not prejudice the rights of the defendant. It should also be kept in mind that the burden is on the buyer to establish any breach with regard to goods that have already been accepted under the provisions of Section 2-606 and 2-607.

E. Right to Adequate Assurance.

The Code also adopts the concept that situations may arise which are not technologically a breach or repudiation of the contract by either party but reasonably make one of the contracting parties insecure with regard to the ability of the other party to perform the contract. Section 2-609 allows either party to a contract to demand assurance when reasonable grounds for insecurity arise. The Code does not determine what reasonable grounds might be, but comments indicate such things as late payments and other contract breaches, other arrangements, rumors, etc. In the event of reasonable grounds, such party can then in writing demand adequate assurance of performance and suspend any activity on his part until the assurance is forthcoming. Between merchants, the reasonableness of the grounds and the adequacies of the assurance is determined by reasonable commercial standards. Failure to provide adequate assurance within a reasonable time not exceeding thirty days amounts to a repudiation of contract and triggers the other party's rights under Section 2-703 or 2-711. It should be noted that the parties could in the original contract set a time shorter than thirty days if the setting of such time is reasonable.

IV. SELLER'S OPTIONS.

A. Right to Cure.

Under the provisions of Section 2-508 the Code introduces a concept which is designed to allow a seller to cure a non-conformity so that the buyer will indeed obtain that for which he contracted. Section 2-508 allows the seller to attempt to cure any default because of non-conformance of the goods if there is still time left under the contract and the seller reasonably notifies the buyer of his intention to cure. This is also tied to the ability of the buyer to revoke acceptance which was conditioned upon the seller's assurance of cure.

To prevent unfair surprise, a seller also has a right to cure even though the time for performance has gone by where a seller has reasonable grounds to believe that the tender would be acceptable with or without prior allowance. If the seller reasonably notifies the buyer, then the seller has a further reasonable time to substitute a conforming tender under Section 2-508.

B. Ability to Demand Cash Payment.

Even though the contract provides for the extension of credit by the seller to the buyer, under certain circumstances the seller has a right to demand cash payment for tender under Section 2-702 and has a limited right to stop the goods that are in transit under Section 2-705. Both of these rights are dependent upon the buyer becoming insolvent and are available without regard to whether the buyer is already in breach.

Indeed, where a cash transaction is contemplated, the seller might insist that the buyer pay cash as opposed to a check under the provisions of Section 2-512. In that case, the seller must afford the buyer a reasonable opportunity to obtain the cash. In these situations the effect of taking a check and its subsequent dishonor are governed by Section 2-507 and 2-511. Where there is a credit transaction and the buyer becomes insolvent, the ability of the seller to reclaim the goods is governed by Section 2-702 and provisions of the Bankruptcy Reform Act.

C. Right of Resale.

In the event of the buyer’s breach, seller has a right to resell the goods held by it but owned by the buyer under the provisions of Section 2-706. The sale is extra judicial but must be made in good faith and in a commercially reasonable manner. The specific procedure set out in the statute is designed to allow flexibility on the part of such a seller, yet has in mind that the deficiency resulting from any sale is the ultimate responsibility of the buyer and therefore the buyer's interest should be protected to some extent. However, it is clear under Section 2-706 that the seller is not accountable to the buyer for any profit made on any resale.
PART II:
COMMERCIAL WARRANTIES
UNDER THE UNIFORM
COMMERCIAL CODE

I. WARRANTY OF TITLE

A. Introduction

Unless otherwise agreed, each present sale or contract to sell at a future time carries a warranty by the seller that the title conveyed shall be good. This warranty is only of "good" title and not "merchantable" title.

The warranty of title of Section 2-312 probably does not extend to subpurchasers, but runs only to the immediate buyer.

B. Warranty of Freedom from Encumbrances

Unless otherwise agreed or excluded by particular circumstances, there is in each sale or contract of sale a warranty that the goods shall be free from any security interest or other lien or encumbrance of which the buyer at the time has no actual knowledge.

Notice that under Code Section 2-312(b) there is no warranty against security interests or other liens or encumbrances of which buyer has knowledge whereas under Section 2-312(l), the notice of buyer as to conflicting claims of ownership is immaterial. This distinction is affected by Subsection two of Section 2-312 which deals with exclusions of warranty in certain situations, which is discussed below.

Freedom from encumbrances is an aspect of the warranty of title. Since a seller may have title which is encumbered, there may exist instances where only the encumbered nature of the title is sought to be disclaimed.

C. Warranty of Rightful Transfer

Unless otherwise agreed or excluded by particular circumstances, there is in each sale or contract a warranty not only that "the title conveyed shall be good" but also that the transfer be "rightful." Also, since the warranty of title is neither express nor implied, it cannot be disclosed by use of the usual clause that "there are no express or implied warranties in connection with this sale."40

The warranties under Section 2-312(l) apply to all sellers, both merchants and non-merchants.

D. Warranty Against Infringement

Unless otherwise agreed, a seller who is a merchant regularly dealing in goods of that kind warrants that they shall be free from any rightful claim of any third person by way of infringement or otherwise. Therefore, a seller who does not wish to warrant against patent, trademark, copyright and similar infringement claims should disclaim them expressly. A buyer who furnishes specifications to a seller must hold the seller harmless against any claim by "infringement or the like" arising out of compliance with specifications.

Many purchase orders contain detailed specifications of goods to be manufactured and assembled for the buyer. It is not uncommon for the buyer to "furnish" specifications to the seller in the sense that the buyer has the last word and made the final adjustments. In the absence of circumstances indicating a contrary intent, such a buyer may be warranting against infringement.

Reference is made to the limitation on this warranty against the United States under the Massachusetts version of the Code.41

E. Exclusion of Warranty

It is said that the warranties under Section 2-312 are sui generis and are not express or implied for the purpose of disclaimers under Code Section 2-316.

The warranty of title, right to convey, and no encumbrances is excluded only by specific language or by circumstances which give the buyer reason to know that the seller does not claim title in himself, or that he is purporting to sell only such right or title as he or a third person may have.42

It would seem prudent to negate all three prongs of the warranty. The language "no warranty of title" can lead to litigation. There is only one warranty (in form) under Code Section 2-312(l), hence if one negates one warranty, it is arguable one has negated all. This probably accords with the intention of the drafter; but the language is construed against the drafter.

In view of the fact that the title warranties are not implied or express warranties, it would seem that the phrase "No implied or express warranties" would not negate title warranties. It is also doubtful that the phrase "no warranties" does this in view of the requirements of Section 2-312(2) of "specific language" to negate.

Also a general disclaimer such as "of all warranties, express or implied" would be insufficient to negate the warranty of title. Neither would the following form be sufficient: "There are no warranties beyond those stated in this agreement, and this agreement contains all the terms between the parties, and no others shall apply."

There have been in the past fraudulent and covert disclaimers of the warranty of title on the part of some sellers. The drafters of the Code require a disclaimer of the warranty of title to be specific or brought to the attention of the buyer so that the latter would know that he was taking the sole risk of title if such was to be the case.

F. Sales Without Warranty

Apart from an exclusion clause, no warranty of title arises when the seller is selling under a power or by virtue of his office, as a pledgee, mortgagee, personal representative, auctioneer, or sheriff. When the circumstances give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have, no warranty arises unless one is expressly assumed.43

Typical of the case where the circumstances make it clear that no warranty of title is included are sales by bankruptcy trustees, other representatives or creditors and like officers at forced sales, sales by administrators and guardians.

Article 9 of the Code concerning sales of collateral by secured parties on default should be consulted in connection with such sales.44

Nevertheless, in cases of contracts for sale other than by legal representatives, auctioneers, bankruptcy trustees, and like the, the seller makes an implied warranty of title though not so classified in the Code. The warranty can be excluded or modified, but only by "specific language or by circumstances which give the buyer reason to know that the person selling...is purporting to sell only such right or title as he or a third person may have."45

G. Sales by Foreclosing Lienors

Under Code Section 2-312(2), Official Comment 5, the title warranties are not normally given at sales by foreclosing lienors because they are out of the flow of normal commerce and supposedly their peculiar character is apparent to the buyer who is aware that an unknown or limited interest is being sold.

If the lienor, however, also is a person who deals in goods of the kind against
which the lien is being foreclosed, Section 2-312(2) will not apply unless the buyer has reason to know that the person selling does not claim title in himself, or is purporting to sell such right or title as he may have. The merchant seller, in addition, may be making infringement warranties under Section 2-312(3). Consequently, to foreclose the possibility that the above may result, there should be first an express exclusion of the warranty of title, and second, an express exclusion that the seller is a merchant as to the goods to be sold or preferably an exclusion of infringement warranties under Section 2-312(3).

If lienor is solely a financial institution, it would not seem necessary to negate warranties under Section 2-312, although it may be better practice to do so.

A foreclosing lienor-merchant should also give consideration to implied warranties under Code Sections 2-314 and 2-315. In evaluating rights and liabilities of foreclosing lienor and a purchaser therefrom, check also Section 9-504. A good faith purchaser is protected against all rights of the debtor under the security agreement, but no claims of third parties. The lienor-secured party would still remain liable to his debtor for improper sale.

II. EXPRESS WARRANTY

A. Express Warranty-Defined.

An express warranty is found in any statement or affirmation of fact made by seller to buyer which relates to the goods and becomes a basis of the bargain. No formal words are necessary to create such a warranty, nor does the seller have to have any intention to make a warranty by his statement. This is so because the bargain may be made before the seller can thrust his disclaimer on the buyer.48

B. Affirmation of Fact v. Opinion.

Subsection (2) Section 2-313 preserves a long line of case law, usually involving “puffing of goods” to the effect that mere statements of opinion with respect to the value of other properties of the goods do not constitute warranties.47

Nearly every item of goods is expected by the parties to possess some certain qualities. Most draftsmen who prepare special warranties are aware that the language to be employed should be considered carefully and of the fact that any ambiguity will probably be construed against the party who prepared it. The real thrust of Code Section 2-313 is felt by the merchant who, in attempting to advertise his product, or otherwise stimulate buyer interest, inadvertently (or unwisely) makes an affirmation of fact or some promise which relates to the goods without being aware that he is making an express warranty. It is not necessary that a seller have any "specific intention to make a warranty."48

C. Express Warranty of Conformity.

An express warranty of conformity may be found in any description of the goods which is made a basis of the bargain. The Uniform Commercial Code Comment to Code Section 2-313 indicates clearly that description consists of much more than merely technical terms and specifications or blueprints and drawings.

Quite often the written plans and specifications are not those of the buyer, but rather of someone else with whom he has a contract. In a situation such as this, the buyer becomes, in essence, a subcontractor, and the buyer wants performance according to a third party's specifications, even though the buyer is inspecting the sample for general appearance. In these situations, the seller or subcontractor is very often a specialist in the field and the buyer or general contractor is not. If the seller does not wish to run the chance of the sample being nonconforming, he or buyer should obtain confirmation from the other contracting party who is to receive ultimate performance.

If the specifications are the buyer's own, it may be unconscionable for him to reserve the right to refuse performance on grounds of nonconformity where he has had an opportunity and has approved the sample.49

Under Section 2-313(c) any sample which is made a part of the basis of the bargain creates an express warranty that the goods shall conform to the sample or model.50 Quite often, samples and models are not prepared with the precision of finished goods or even by the same process. In such cases, it is desirable to spell out that they are not part of the basis of the bargain and that no warranty is intended.

The use of a sample to describe the goods being sold to measure the quality...
and quantity of the seller's obligation to deliver "conforming goods" is an extremely useful device. Also, the use of a description by reference to a sample is especially useful in describing new products and new inventions for which no generally accepted terms or descriptions have achieved recognition in the trade. It is, however, not necessary that any written reference be made to any sample to effect the warranty that the goods shall conform to the sample.

It is not necessary that there be an agreement, in explicit terms, that the sample is a part of the bargain. If a customer sees a product on display in the seller's place of business and orders it, the basis of the bargain is formed at the time the order is placed and the future disclaimer of warranty by the seller may be meaningless unless some sort of estoppel can be erected to force the buyer to rely on the special "warranty" delivered with the goods instead of the warranties provided in the Code which become effective when the parties entered into the contract.

The warranty of Code Section 2-313 is an "express" warranty and not an "implied" warranty and is not disclaimed by a general disclaimer of "implied" warranties.

Since the use of express warranties may result in absolute liability without fault, particular attention should be given to liability and remedies that may be available by legislation in addition to the Uniform Commercial Code, especially in the area of consumer goods.

III. IMPLIED WARRANTIES

The Warranty of Merchantability and the Warranty of Fitness for Particular Purpose are standards of conduct imposed upon sellers of goods. They are said to be implied warranties in that they will be raised unless the parties otherwise agree. Much of the law in this area is based upon public policy and care should be taken to have an understanding of problems of disclaimers, standing to sue and limitation of remedies.

It should be noted that the implied warranties discussed in this comment and set out in these sections are examples of minimum standards of conduct on the part of sellers of things and can be augmented by a seller making express warranties under Code Section 2-313. Also, particular attention should be given to liability and remedies that may be available by legislation in addition to the Uniform Commercial Code, especially in the area of consumer goods.

It is sometimes said the cumulative effect of M.G.L.A. c. 106 §§ 2-314, 2-315, 2-316, 2-316A and 2-318 is the equivalent of the theory of strict liability in tort when there is a sale of goods. It is suggested that this may not be the case since the sections of the Code dealing with sale, merchant, notice, statute of limitations, etc. would have to be met in a warranty claim but not in a tort claim.

Reference is also made to Cohen v. McDonnell Douglas Corp., where the Court refused to extend Section 2-318 to include purely the emotional distress of a son learning of his mother's death as "affected by the goods" within that statute.

The following observations about these implied warranties may be helpful.

A. Merchantability

The seller must be a "merchant" and there must be a "sale" of "goods". Although the Massachusetts version of the Code specifically includes the serving of food or drink in the concept of sale and excludes the sale of blood, whether the transaction is one of services or sale continues to be troublesome. There is also authority for the warranty liability to attach to leases or other bailments of personal property especially when the substance of the transaction is a transfer of effective ownership in the item. The buyer does not have to be the user of the goods. The warranty can run in favor of a person who has resold or holds the goods for resale.

Generally speaking the warranty of merchantability is that at the minimum the goods in question would pass muster in the trade. Any variations should be explicit in the agreement. Matters of required packaging and representations on the packaging are included in this warranty.

B. Fitness for Particular Purpose

Code Section 2-315 provides an implied warranty of fitness for a particular purpose which arises when the seller, at the time of contracting, has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill and judgment to select or furnish suitable goods. The seller need not be a merchant and the buyer need not be the end user.

Under the Code, it is enough that the seller "has reason to know any particular purpose for which the goods are required" and that the buyer is "relying on his skill or judgment to select or furnish suitable goods."

Knowledge of the buyer's reliance upon the seller's skill and judgment may be inferred from the circumstances surrounding the transaction. The parole evidence rule may not be sufficient to exclude evidence of such circumstances. It is also not necessary that the seller be a merchant for the implied warranty of fitness for particular purpose to be applicable to the transaction.

The warranty of fitness for particular purpose is directed to the situation where the goods are put to an unusual use. If the goods purchased are put to an ordinary use, the implied warranty of merchantability applies. If, however, the buyer plans to use the goods for another purpose, a warranty of fitness for that particular purpose might also arise if the circumstances fit those set forth in Code Section 2-315.

IV. DISCLAIMER OF WARRANTIES

Any discussion of disclaimers of warranties must be prefaced by references to legislative enactments that might make any attempt at disclaimer unenforceable. Also, one should distinguish between disclaimers, which if effective, would mean that no breach occurred, and limitations of remedies. Finally, the impact of M.G.L.A. c. 106 § 2-316A cannot be overstated.

A. Exclusion of Warranty of Merchantability

Words or conduct tending to negate an express warranty are inoperative to the extent that negation is an unreasonable construction. To exclude the implied warranty of merchantability, or any part of it, the language must mention "merchantability" unless the case can be brought within the scope of Section 2-316(3). There is no requirement that the disclaimer be in writing but if it is in writing, it must be "conspicuous." That section also states that the decision as to whether a term or clause is "conspicuous" is one for the court and not for the jury to determine.

Code Section 2-316(3)(b) provides that when the buyer has, before entering into the contract, examined the goods or the sample or model or has refused to examine the goods there is no implied warranty with respect to the defects which an examination ought to, under the circumstances, have revealed to him. This does not negate the implied warranties entirely, but only negates those as to things which a reasonable examination ought to

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have disclosed. The nature and extent of
the examination required of a buyer is un-
doubtedly dictated by the circumstances.

Code Section 2-316(2) provides that a
disclaimer of the warranty of merchant-
ability may be oral, but even though it is
oral, it must be couched in terms so that
the expression "merchantability" is used.
However, subsection 3(a) is apparently in
some conflict because it provides "not-
withstanding subsection 2...all implied
warranties are excluded by expressions like
"as is", "with all faults", etc. It would,
therefore, be much safer to put a dis-
claimer of warranty of merchantability in
writing and include the word "merchanta-
bility" even in an "as is" context.

B. Inconsistent Warranty Provisions

It has often happened that a buyer signs
an agreement which contains an unbargain-
gained disclaimer attempting to exclude the
warranties provided by law, while the seller
has made express warranties in inducing a
sale. When any such express warranties
and negation or limitation in the agreement
cannot reasonably be construed as consist-
tent, the negation or limitation is in-
operative. This protection of the buyer's
rights cannot be stretched too far, of
course, because of the rule that parol
evidence cannot alter, vary or repeal the
terms of an integrated written instrument.
The problem of inconsistent forms is
discussed elsewhere, in these materials.

C. Exclusion of Warranty of Fitness for
Particular Purpose

Code Section 2-316(2) indicates that the
disclaimer for the warranty of fitness for a
particular purpose must be in writing and
conspicuous. However, it also gives a
statutory prescription for a valid disclaimer
of this warranty, to wit:

There are no warranties which extend
beyond the description on the face
hereof.

An integrated writing could, effectively,
bar the impact of statements made by a
seller, or seller's agent which could go
beyond a mere salesman's puffing to the ef-
flect of what a certain article or merchan-
dise can or will do. A clause such as the
following is suggested: "This writing is in-
tended by the Seller and the Buyer as a
final and exclusive expression of their
agreement (and no course of dealing or
usage of trade or course of performance
shall be relevant to explain or supplement
any term used in this agreement)."

Code Section 2-316(3)(c) calls attention
to the fact that custom and usage and prior
dealing can affect warranties.

M.G.L.A. c. 106 § 2-316A is not part of the
Uniform Commercial Code and was
enacted specially in 1970 and amended to
its present language in 1973. Although the
section basically deals with limitations on
disclaimers of warranties in the consumer
area, some further comments on this sec-
tion may be helpful. The section applies
not only to consumer goods but also to
consumer services, even though it is found
in the Code Article dealing with sale of
goods. It flatly prohibits disclaimers of im-
plied warranties (merchantability and
fitness for a particular purpose) but allows
disclaimers of express warranties of a
manufacturer in consumer goods under
certain circumstances.

It also is important to be aware of
M.G.L.A. c. 106 § 2-318 as amended in 1971
which extends liability to users and
other parties who may not have been
buyers and therefore are not in privity of
contract with the seller or manufacturer.

A comment should also be made on the
interesting language of M.G.L.A. c. 106 §
2-316A. It includes within its provisions
"sales of consumer goods, services or
both." Article 2 generally deals with sales
of goods and one of the threshold ques-
tions has always been whether the transac-
tion is a sale of goods or for services. If it
is a mixed bag the cases seem to look at
which part dominates. However, this sec-
tion seems to apply to transactions which
are solely "services" and it could be argued
that this is beyond the scope of Article 2.
This argument should not be persuasive
since it is a valid exercise of legislative
function and its label or where it is placed
in the Massachusetts General Laws should
not be determinative of its effectiveness.

V. RULES OF CONSTRUCTION IN
CONTRACT PROVISIONS
DEALING WITH WARRANTIES

In some contracts, it may be difficult to
distinguish between technical specifications
and general language of description, and,
since the former takes precedence over the
latter in determining the existence of war-
ranties, it may be advisable to specify the
intent of the parties.

A. Samples or Models v. Exact Or
Technical Language

Warranties, express or implied, are con-
strued as consistent and cumulative unless
such construction would be unreasonable.
If such construction would be unreasonable,
the intention of the parties controls as to
which warranty is dominant. In ascer-
taining intention, it is presumed that exact
or technical language controls over an in-
consistent sample or model or general
language of description.77

Nothing in Section 2-317 precludes a
finding that the seller is stopped and
therefore this section is not applicable. The
official Code Comments indicate that these
rules are intended to deal with a seller
who, in good faith, has made inconsistent
statements.

B. Privity of Contract Requirement in
Warranties

The problem of the need for privity of
contract in recovery against the manufac-
turer of goods in claims by the ultimate in-
jured party, whether the party was the im-
mediate or ultimate purchaser or not, has
been the subject of substantial legislative
and judicial action. Traditionally in Massa-
chusetts, lack of privity was a defense to
actions in breach of warranty. As a result
of the decision in the latter case upholding
the defense of lack of privity as to warranty
actions, Section 2-318 was amended to read
as follows:

Lack of privity between the plaintiff
and defendant shall be no defense in
any action brought against the manufac-
turer, seller, lessor or supplier of goods
to recover damages for breach of war-
ranty, express or implied, or for
negligence, although the plaintiff did
not purchase the goods from the defen-
dant, if the plaintiff was a person
whom the manufacturer, seller, lessor
or supplier might reasonably have ex-
pected to use, consume or be affected
by the goods. The manufacturer, seller,
lessee or supplier may not exclude or
limit the operation of this section.

The section as above stated results from
Notice that it includes the liability of
lessors within its ambit.

Although it has been said that this new
section eliminates the defense of lack of
privity in Massachusetts, it should be
noted that the requirements of the section must be met. Such factors as existence of sale, lack of notice, foreseeability by the defendants and the type of damage must be investigated. Although the section seems only to apply to "persons" the definition under Code Section 1-201(3) is broad enough to include organizations.

Notice also that the statute as amended includes actions of negligence even though lack of privity was not a technical defense in a tort action. This section does not eliminate the other elements necessary in a negligence action. Distinguish the concept of strict liability in tort actions as embodied in Restatement of Torts, Second 402A, which has not yet been adopted in Massachusetts either judicially or legislatively. 80

Also it should be noted that even though the section states that the prospective defendant may not exclude or limit the operation of this section, this presumes an effective warranty, express or implied, and limitations and/or disclaimers may be available. 81

It should be noted that the New Hampshire and Rhode Island versions of 2-318 vary in some degree from the Massachusetts statute set out above. 82 These statutes are as follows:

New Hampshire
382-A:2-318 ACTIONS OR WARRANTIES AGAINST MANUFACTURERS, SELLERS, OR SUPPLIERS OF GOODS. Lack of privity shall not be a defense in any action brought against the manufacturer, seller or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, even though the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods. A manufacturer, seller, or supplier may not exclude or limit the operation of this section.

Rhode Island
6A-2-318. THIRD PARTY BENEFICIARIES OF WARRANTIES EXPRESS OR IMPLIED. A seller's or a manufacturer's or a packer's warranty whether express or implied including but not limited to a warranty of merchantability provided for in 6A-2-314, extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller or a manufacturer or a packer may not exclude or limit the operation of this section.

C. General Measure of Damages
Code Section 2-714 sets out the measure of damages for the buyer in goods that have been accepted. This section should be read with Section 1-106 and generally deals with the recovery of foreseeable damages that will put the buyer in the same position he would have been in had the seller performed the contract. Particular reference is made to Section 2-714(2) and (3) which deal with tort type damages in breach of warranty cases.

D. Incidental Damages
A buyer's incidental damages include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses of commissions in connection with effecting cover and any other reasonable expenses incident to the delay or other breach. 84

E. Consequential Damages
Consequential damages recoverable by an aggrieved buyer include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; as well as injury to person or property proximately resulting from any breach of warranty. 85

If the buyer has particular requirements, it may be better to inform the seller of this and have seller acknowledge his own knowledge of such facts. This can be done either by inclusion in the contract or by a separate writing. The statute does not require that seller sign such acknowledgement, but for obvious reasons, this is preferable.

F. Limitations of Incidental and Consequential Damages
While certain disclaimers of warranties must be made conspicuously to be effective, 86 the Code makes no requirement that limitations on damages or modifications of remedies be "conspicuous." 87 Consequential damages may be limited or excluded unless
the limitation or exclusion is "unconscionable" and 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.88

G. Buyer's Right of Setoff

A buyer, on notifying the seller of his intention to do so, may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.89

The notice should be given promptly and this section does not supersede Code Section 2-607(3)(a, b) requiring the buyer to notify the seller within a reasonable time after he discovers or should have discovered any breach. Failure of the buyer to give the notice required by the last cited section precludes the buyer from any remedy (emphasis added), including the "remedy" of deducting damages from the price.90

H. Liquidated Damages

The parties may, by contract, agree upon an amount of damages as liquidated damages, but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.91 The Code does not deal with the problem of unreasonably small liquidated damages, although the Official Comments to Section 2-718 suggest that such might be unconscionable under Section 2-302.

I. Limitation of Remedies

Code Section 2-719 allows under certain conditions, the parties to agree as to additional remedies and limitation of remedies. There are certain guidelines set out in the section with regard to the parties' ability to agree. Namely, they provide that the agreement is subject to the limitation set out in Section 2-718 on liquidated damages; and secondly, that if the agreement provides for a sole and exclusive remedy and the agreed upon remedy does not work (such as constant repair to no avail), such a provision will not be enforceable under Section 2-719(2).92 Additionally, consequential damages may be limited so long as not unconscionable93 and finally, consequential damages for injury to the person in consumer goods is prima facie unconscionable.

There must be clear language in the case of an attempt to have an exclusive limited remedy. This is especially true in light of Code Section 1-105 which provides for liberal construction of remedies.

It also should be kept in mind that a disclaimer of warranty is conceptually different from limitation of remedies. Should the disclaimer be effective in a particular case, there is no breach and therefore no remedy.94 Should the disclaimer be ineffective and there is otherwise a breach, the remedy provisions of this section become important.

FOOTNOTES

1. Sections 2-204 and 2-207.
4. See Section 2-104 for definition of merchant.
5. 297 Fed. 2d 497 (1st Cir. 1962).
7. 19 UCC Reporter 760 (Massachusetts Superior Court, 1976).
8. Section 2-201.
10. Section 1-105(2).
11. Section 2-105.
12. Section 2-102(1)(c).
16. Section 2-504.
17. Section 2-503.
18. (with the help of the shorthand terms such as FOB, CIF, etc. found in Sections 2-319 through Section 2-324).
20. (See Article 7 of the Code).
21. (See Sections 2-503, 2-504, 2-308).
22. Section 2-509(1)(a).
23. Section 2-509(1)(b).
24. Section 2-509(2).
27. Section 2-512.
28. (this includes the notice requirement under Section 2-602).
29. (Section 2-508).
36. See Section 1-103.
38. 11 U.S.C. Section 546(C).
39. Section 2-312.
40. Code Section 2-312.
42. Code Section 2-312(2).
43. Code Section 2-312(2).
44. See Code Section 9-504.
45. Code Section 2-312(2).
48. Section 2-313(2).
49. Code Section 2-302.
51. (See e.g., M.G.L.A. c. 93A (Unfair Trade Practices)); M.G.L.A. c. 255B (Retail Motor Vehicles Installment Sales Act); M.G.L.A. c. 255D (Retail Installation Sales Act); M.G.L.A. c. 231 § 85J (Deceitful Sales); M.G.L.A. c. 90 § 7N1/2 (Lemon Law); 15 U.S.C.A. § 2301 et seq. (Magnuson-Moss Warranty Act).
52. (Code Section 2-314).
53. (Section 2-315).
57. For discussion of the New Hampshire and Rhode Island versions of 2-318 and the privity problem, see Part 2, V(B) of these materials.
59. (Section 2-310).
60. (Section 2-310(1)).
61. (M.G.L.A. c. 106 [para] 2-314(1)).
64. (Code Sections 2-314(2)(e) and (8)).
67. E.g. M.G.L.A. §§ 255B, 255D, c. 231 § 85J e. 90 & 7N1/2 (all primarily in the consumer protection area).
68. (Code Sections 2-718 and §2-719).
69. See Part II: V(B), infra.
70. Section 2-316(1).
71. See Code Section 1-201(1).
72. For a good discussion of the area in a commercial sale (in the form of a lease) see Xerox Corp. v. Hawkes, 475 A.2d 7 (N.H. 1984).
73. Code Section 2-317.
76. Code Section 2-202 and Section 2-209.
77. Code Section 2-317.
83. (See Code Section 2-712).
84. Code Section 2-715(1).
85. Code Section 2-715(2).
86. Code Section 2-316(2).
88. Code Section 2-719(c).
89. Code Section 2-717.
90. Cf. M.G.L.A. c. 106, § 2-316A.
91. Code Section 2-718(1).
93. (Code Section 2-302).
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Remedies Under Article 2 of the Uniform Commercial Code: A Prescription That Goes Beyond “Take Two Aspirins And Call The Court In The Morning”

By Professor Richard M. Perlmutter

Introduction

The Uniform Commercial Code provides sellers and buyers of goods with a wide range of responses to breach or unexcused nonperformance by their contractual partners. Not surprisingly in light of the Code's avowed intention to create a businesslike environment within which commercial affairs may be transacted, those responses include, (and indeed, emphasize), wholly non-judicial approaches to breach as well as combinations of self-help and judicial remedies along with the more traditional breach of contract damage remedies. Mindful of the cost in dollars and lost time involved in commercial litigation, the drafters of the Uniform Commercial Code clearly attempted to impose limits on unnecessary judicial intervention in commercial affairs by providing both sellers and buyers with self-help tools with which to react to breach and by creating appropriate inducements to encourage aggrieved parties to attempt to utilize those weapons before resorting to litigation.

This article will explore the self-help, non-judicial responses to breach of contract provided by the Code to both sellers and buyers who are faced with the problem. It is not intended to be either an exhaustive review of a comprehensive survey of the Code's remedial mosaic or texture. (Thus, sections 2-708, “Seller's Damages for Non-Acceptance or Repudiation”, 2-709, “Action for the Price”; 2-710, “Buyer's Damages for Breach in Regard to Accepted Good”, 2-715, “Buyer's Incidental and Consequential Damages”; 2-716, “Buyer's Right to Specific Performance or Replevin”, 2-718, “Liquidation or Limitation of Damages”, 2-719, “Contractual Modification or Limitation of Remedy” and 2-721, “Remedies for Fraud” are for the most part ignored in this article, notwithstanding their obvious importance in the Code’s overall remedial scheme.) Rather, this article will emphasize certain sections of the seller's and buyer's remedies provisions of the Uniform Commercial Code that appear to foster the attitude of independence from litigation that characterizes the Code. For many merchants to whom the thought of litigation with its attendant tangible and intangible costs is a commercial nightmare and who are, therefore, anxious to pursue practical and realistic solutions in order to salvage a bad situation and get on with their business, those provisions may, in fact, be the most useful and the most significant.

Several general observations may be helpful at the outset. Among the “do good and avoid evil” admonitions of Article 1 of the Code is §1-106(1): “The remedies provided . . . shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . . “, no doubt a praiseworthy but hardly a revolutionary sentiment. Comments 1 and 4 to §2-703 clearly indicate that the Code policy articulated in §1-106(1) is intended to govern the judicial application of seller's remedies under the Code. Thus, the principle of compensation, rather than punishment, is reflected in the Code's approach to seller's remedies, in order to achieve the time-honored objective of putting the non-breaching party in as good a position as performance would have. To the same end, the Code rejects the doctrine of election of remedies with respect to non-breaching sellers and, in Comment 1 to §2-703, makes it clear that the remedies provided are “essentially cumulative in nature: and, therefore, that the choice of one does not necessarily disqualify seller from seeking or obtaining other relief. Thus, for example, a seller may elect to exercise self-help by cancelling the contract and still seek damages for breach under §2-708. Finally, under §1-203 the Code imposes a good faith requirement on all of its sections, to which is added the specific demand for “commercially reasonable” behavior under many of the seller's remedies sections. Indeed, it is fair to say that the sellers' remedies sections of the Code provide additional example of the Code's attempt to mandate business-like, non-wasteful and commercially prudent behavior by parties, even when they are confronting the disappointment of their contract expectations.

Those general comments relative to seller's remedies as they illuminate the underlying policy of the Code's approach to remediation for breach are equally applicable in the context of buyer's remedies. For example, buyer's election of remedies predication is also alleviated under §§ 2-711(1), which protects buyer's restitutionary interests, and 2-601(c), which allows partial acceptance/rejection. Once
again it seems clear that the drafters of the Code sought to implement the direction of §1-106(1) that "...the aggrieved party...be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages...be had except as specifically provided...". In other words, the overriding goal is clearly to compensate the disappointed buyer, not to punish the defaulting seller.

II. Seller's Non-Judicial Responses to Breach

Section 2-703 of the Code provides an index to seller's remedies and a definition of the types of buyer's defaults that set seller's remedial alternatives in motion. The Code scheme encourages the seller to respond swiftly and prudently to one of the events of breach described in §2-703 in order to prevent unnecessary damages resulting from buyer's breach. Section 2-703(a) specifically authorizes the aggrieved seller to withhold delivery of the goods and §2-703(f) allows seller to cancel the contract with respect to any goods directly affected and undelivered if buyer's breach is "of the whole contract", as that term is defined in §2-612. Combined with the Code sections dealing with the extent to which buyer's payment is a condition precedent to seller's duty to deliver, (see §2-511(1)), and the general contract law of concurrent conditions of performance, it is clear that seller's withholding of delivery in the face of a §2-703 event is not a breach of contract by seller. Similarly, it should be noted in passing that §2-702 allows a seller who discovers the buyer to be insolvent to refuse to deliver other than on a cash basis, (including receipt of payment for any goods previously delivered), and to stop delivery of any goods in transit under §2-705, to be discussed below. While issues relating to buyer's insolvency are beyond the scope of this article, it is worth pointing out that seller's rights under §2-702, combined with the right to request adequate assurances of performance under §2-609, provide a seller with an additional and meaningful basis for maintaining control over goods and for preventing a more dangerous situation from developing on his own, without the need to resort to judicial alternatives.

Section 2-705 of the Code allows the seller to stop delivery of goods in the possession of a carrier or other bailee either when he discovers the buyer to be insolvent or if "buyer repudiates or fails to make a payment due before delivery or for any other reason the seller has a right to withhold or reclaim the goods." Seller's rights under §2-705 terminate when buyer has actual or constructive possession of the goods and are dependent upon seller having notified the bailee of the stop order in a reasonably timely manner. Comment 2 to §2-705 also states that seller's right to stop delivery of goods in the possession of a bailee or carrier terminates when a designated representative of the buyer takes actual or constructive possession of the goods. Such a "designated representative" may include a sub-purchaser or an agent. These termination of rights provisions are intended to protect the bailee, as is the requirement of subsection (3)(b) that "seller is liable to bailee for any ensuing charges or damages. Matsushita Elec. Corp. of America v. Sonus Corp., 362 Mass., 246, 284 N.E.2d 880 (1972) further holds that a seller's fear of insecurity does not justify a delivery stoppage in a credit sales situation. See also, Carter, Rights of Buyers and Sellers, to Goods Under UCC, 6 Boston Coll.L. Rev. 169 (1965).

Section 2-704 requires the seller to make a crucial decision in the face of buyer's default or breach by anticipatory repudiation which occurs during the time that seller is in the process of manufacturing the goods. The section permits the aggrieved seller to elect to identify to the contract conforming goods and to either (i) complete the manufacture, (and thereby "wholly identify the goods to the contract"); (ii) "cease manufacture and resell for scrap or salvage value"; or finally (iii) "proceed in any other reasonable manner". If the seller elects under §2-704(1) to identify to the contract conforming goods that are in his possession or control, he may proceed to recover damages under §2-708, and in appropriate cases to recover the lost profits he has been deprived of as a result of buyer's premature repudiation under §2-708(2). Thus, in Cesco Mfg. Corp. v. Norcross, Inc., 391 N.E.2d 270, 27 U.C.C.Rep. Serv. 126 (Mass. App. 1979) a manufacturer of greeting card racks and other trade fixtures was allowed a §2-708(2) recovery in spite of its decision to discontinue the assembly of the unfinished goods upon buyer's repudiation. The calculation of profit will be determined in accordance with §2-708(2), and will allow seller to recover any expenditures made prior to the time he learned of the buyer's breach, but will be subject to a reduction for seller's variable contract fulfillment expenses saved as a result of buyer's breach. In this way, seller will be able to obtain the protection of his reasonable contract expectation.

The seller may, however, conclude that it is prudent and preferable to complete the manufacture of the goods even after buyer's repudiation. Seller may believe that buyer will ultimately accept the goods or that the seller's general duty to mitigate damages requires the completion of manufacture. Seller may also opt to complete manufacture in order to prevent the manufacturing capacity of his factory from lying idle or to avoid laying off production workers. Difficult questions arise when seller's decision to complete the manufacture of goods after buyer's repudiation does not ultimately turn out to reduce the damages that seller later seeks to recover from the
Section 2-704 seeks to ameliorate the harsh results reached under §64(4) of the Uniform Sales Act, which limited seller's damages to an amount "no greater... than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the repudiation or countermand." The Uniform Sales Act approach, combined with seller's duty to mitigate, created a real possibility of unfair hardship in situations in which seller's honest efforts to predict market fluctuations were unsuccessful. Section 2-704(2) is clearly intended to provide some relief to the aggrieved seller by allowing him to exercise "reasonable commercial judgment for the purpose of avoiding loss and of effective realization" in deciding whether to either complete manufacture or to resell for scrap or salvage. Comment 2 to §2-704 makes it clear that "[t]he burden is on the buyer to show the commercially unreasonable nature of the seller's action in completing manufacture."

Thus, the seller who elects to complete manufacture may identify goods to the contract, resell and recover damages under §2-706 or, in a case in which the resale of such goods turns out to be unfeasible, recover the full price under §2-709. If the seller elects to cease manufacture, recovery may be sought under §2-708, and, under the proper circumstances, lost profits may be recovered under §2-708(2). Finally, it is important to note that Comment 2 to §2-704 measures the seller's reasonable commercial judgment by "the facts as they appear at the time he learns of the breach", a rejection of hindsight that is evocative of the well-known language of Comment 2 to §2-712 relative to buyer's right to cover, discussed in Section III below.

III. Buyer's Non-Judicial Responses to Breach

As has been previously noted, it is the general approach of the Code to equip non-breaching parties with the tools needed to avoid the occurrence of unnecessary business loss resulting from breach without the necessity of litigation if at all possible. Thus, the Code authorizes non-breaching buyers to take certain private actions in response to a seller's event of default, thereby enhancing the likelihood that buyer will protect himself from the effects of breach without the need of resorting to one of the judicially imposed remedies provided by other sections of the Code. Section 2-711(1) at the outset makes clear the buyer's right to cancel the contract upon occurrence of the defined events of the seller's default set forth in the section. Since the Code does not specify formal requirements of notice for buyer's cancellation, it can be assumed that the major significance of the cancellation provision is to protect the buyer who elects to cancel from any subsequent claim by the seller that buyer has breached the contract. The conclusion is further substantiated by the fact that the Code makes it clear that cancellation by the buyer is not a necessary prerequisite to recovery of the down payment or to the buyer's seeking of a remedy under §§ 2-712 or 2-713.

The Code also protects the non-breaching buyer from the untoward consequences of the common law election of remedies doctrine. Buyer is not required to rescind the contract in order to obtain a recovery of any down-payment under the Code. Furthermore, not only may buyer seek a recovery of any down payment without cancellation, but the buyer who has cancelled and recovered a down-payment may also seek damages for seller's breach under §§ 2-712 or 2-713. See. Lanners v. Whitney, 247 Ore. 223, 428 P.2d 398 (1967). The Code, therefore, clearly protects buyer's restitutionary interests without causing a buyer to risk the loss of a subsequent judicial remedy that will protect his expectation interest under the contract as well. The Code's total rejection of the common law election of remedies doctrine is further underscored by the buyer's right to reject or to revoke acceptance of commercial units, rather than all of the contract goods, under §2-601(c). The buyer can respond to seller's breach by electing to accept some but not all of the tendered goods, cancelling the remainder of the contract, seeking a recovery of any down-payment previously made by him and obtaining damages for seller's breach under subsequent sections. Although a buyer who elects to accept only part of the delivered goods and who seeks to recover the price which he paid for the rejected goods may run into problems in allocating the proper portion of a lump sum purchase price, the Code's intention to liberalize protection of buyer's price recovery is clear.

Section 2-717 of the Code allows the buyer upon notification to the seller to "deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract." Comment 2 to section 2-717 states that the notice to seller may be an informal one, but that the notice is essential if buyer "wishes to avoid a default within the meaning of the section on insecurity and right to assurances." Section 691(1)(a) of the Uniform Sales Act allowed the buyer to recoup in a breach of warranty situation. Section 2-717, Comment 1 expands those rights by allowing the deduction from the price for "any breach by the seller." The breach involved, however, must relate to the same contract under which the price in question is involved. Thus, under §2-717 the buyer who has retained the goods but has not paid the full purchase price is provided with security for his subsequent damage claim against seller for "all or any part of the resulting damages." This provision puts a buyer whose payment obligation is still in part executory in a much stronger position. Massachusetts cases discussing §2-717 include C.R. Bard, Inc. v. Medical Electronics Corp., 529 F.Supp. 1382 (D.C.Mass. 1982) and Butane Products Corp. v. Empire Advertising Services, Inc., 39 Mass.App.Dec. 92 (1967).

Additional security for buyer's claims for breach is provided by §2-711(3), which states that after an event of seller's default "...a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in a like manner as an aggrieved seller...[under §2-706]." Under this provision, a buyer who has made a down-payment or partial payment on non-conforming goods or on a non-conforming tender need not return the goods and sue seller subsequently for restitution of the partial payment and expenses. Rather, buyer has the option to hold the goods as security for those expenses and to resell them in accordance with the requirements of section 2-706. Comments 1 and 3 to §9-113 state that neither an executed security agreement or a filing by buyer is necessary for the perfection of the §2-711 security interest. Comment 2 to §2-711 states that a buyer who exercises his right to resell rejected goods "may not keep any profit resulting from the resale and is limited to retaining only the amount of the price paid and the cost that is involved in the inspection and handling of the goods." The same Comment goes on to state that "the buyer is not permitted to retain such funds as he might believe adequate for his damages" from the resale proceeds. Thus the buyer's security interest under §2-711(3) is considerably more narrow.
than that under §2-717, under which any part of the buyer's damages may be deducted from the unpaid price. For example, difference money damages under §2-713 and consequential damages under §2-715 are not covered under §2-711(3) but are under the broader language of §2-717. This distinction may have a significant effect on buyer's election to reject the goods and rely on them as security under §2-711(3) or simply to rely on the unpaid contract price under section 2-717 as security. In Bevel-Fold, Inc. v. Bose Corp., 9 Mass.App. 579, 402 N.E.2d 1104 (1980) a buyer's public resale of the goods under §§ 2-711(3) and 2-706 was held to be commercially reasonable, especially in view of the fact that the seller failed to take steps to protect its interest in the goods by examining them for defects before the sale. Buyer further was allowed to deduct transportation and storage costs under §2-715(a) from the resale proceeds.

IV. Seller's Self-Help/Judicial Remedy: Resale
Comment 1 to §2-704 labels as "seller's primary remedy" the resale rights set forth in §2-706. This section permits the seller, after the occurrence of a §2-703 event, to resell the goods and to obtain as damages the difference between the contract price and the resale price. In theory, it will often be possible for a seller who elects to proceed with resale under §2-706 to avoid the necessity of litigation entirely if there has not been a drastic fall in the market price of the good since the time of contract formation. It is, therefore, comparable to buyer's cover remedy under §2-712 and another modern application of the so-called "affirmative version" of the avoidable consequences rule. (See D. Dobbs, Remedies (1973) §3.7 at 187.) Seller's resale rights are intended by the Code to be flexible and to encourage seller to take prompt and effective steps in response to a buyer's breach. Therefore, the only meaningful limits imposed by the Code to the exercise of those resale rights are the exercise of good faith and commercially reasonable conduct.

The remedy of vastly expanded seller's resale rights is a Code innovation which is intended to allow the seller to utilize superior market access, sales forces and other resources to minimize the loss resulting from buyer's breach. The underlying assumption is that the seller, motivated by a desire to obtain ready cash for his goods without prolonged delay occasioned by litigation will resell the goods at the highest price possible, thereby probably obviating the need for a judicial remedy. In essence, the Code seeks both to equip seller with the tools necessary and to encourage sellers to take effective steps to mitigate damages and to prevent the occurrence of unnecessary ("avoidable") consequences of buyer's breach.

Goods subject to resale rights under §2-706 must be reasonably identified to the breached contract, (as that concept is defined in §2-501 and elaborated upon in §2-704, discussed above). As indicated above, those goods need not have been either in existence or identified to the contract prior to the breach of contract. They must, however, conform to the contract in order to fix the amount of seller's damages. (See Comment 7 to §2-706: "If the goods so identified conform to the contract, their resale will fix the seller's damages quite as satisfactorily as if they had been identified before the breach.")

Resale under §2-706 may be either private or public. The only requirement for private resale is advance notification to the buyer of seller's intention to resell. Failure to provide such notification will deprive seller of a remedy under §2-706. (See, Foxco Industries, Ltd. v. Fabric World, Inc., 595 F.2d 976, 26 U.C.C.Rep.Serv. 694 (5th Cir. 1979). In Wood v. Downing, 243 Ark. 120, 418 S.W.2d 800, 4 U.C.C.Rep.Serv. 733 (1967) it was held under such circumstances that buyer was entitled to recover full down payment for the goods.) Comment 4 to §2-706 indicates that the section has attempted to "free the remedy of resale from legalistic restrictions" and states that private sale may be effected through direct solicitation, negotiation or a broker. The same comment invites selection of public resale based upon the character of the goods and "relevant trade practices and usages..." and defines public resale as sale by auction. Section 2-706 imposes more numerous requirements for public resale. Only identified goods may be sold unless there exists a recognized market for future goods of the kind in question, according to Comment 9 of §2-706, and the sale must be held at a usual place for such public sales if reasonably possible. Furthermore, in the case of a public resale, the defaulting buyer must be given reasonable notice of the time and place of the sale and of the
amount of immediate cash available through the self-help resale remedy would protect the breaching buyer from dishonesty or unnecessarily inflated damage claims. A final substantial encouragement to the seller who elects to avail himself of the §2-706 resale remedy is contained in §2-706(6), which allows the seller to retain any profit made on resale. (It should be noted that under §2-707 a “person in the position of a seller” is not allowed to keep such profits. For an example of a “person in the position of a seller”, see §5-115(1).) Damages under §2-706 are measured by the difference between the resale price and the contract price, together with any incidental damages allowed under ...[§ 2-70], but less expenses saved in consequence of the buyer’s breach.” As has been pointed out by at least one authority, only the insertion of the notion of “unpaid” contract price as the benchmark from which damages are measured in §2-706(1) will prevent the Code from overcompensating the aggrieved seller. See R. Nordstrom, Law of Sales (1970) §174 at 526, hereinafter “Nordstrom”; Nordstrom, Seller’s Damages Following Resale Under Article Two of the Uniform Commercial Code, 65 Mich.L.Rev. 1299 (1967). That it is the policy of the Code to avoid such over-compensation is manifestly clear from introductory sections, (such as §1-106, referred to above), and from the “less expenses saved in consequence of the buyer’s breach” language of §2-706. Whether a seller who is able to effect a resale under §2-706 in excess of the contract price and who is entitled to retain the profit under §2-706(6) is also able to recover incidental damages under §2-706(1) is unclear. Professor Nordstrom, however, has argued that such recovery is unnecessary and will provide an unjustifiable windfall to the seller. Nordstrom §174 at 528. (Amtoy Trading Corp. v. Miehle Printing Press & Mfg. Co., 206 F.2d 103 (2d Cir. 1953) is interesting pre-CODE support for Professor Nordstrom’s position.) He argues that the word “profit” in §2-706(6) should be read to mean net rather than gross profit. Such a reading would appear to be consistent with the pre-CODE law and with the Code’s effort to compensate the non-breaching party rather than to punish the party in breach.

Final brief note should be made of the fact that under §2-703, Comment 1, resale is optional, rather than compulsory. In this regard, the resale remedy of seller once again reflects the cover remedy of buyer. (See §2-712, Comment 3, discussed in greater detail in Section V, which states that “cover is not a mandatory remedy for the buyer, the buyer is always free to choose between cover and damages for non-delivery under ... §2-713.”) However, as in the case with a buyer’s choice not to pursue the cover remedy, a seller’s decision to refrain from resale may influence a court’s subsequent judgment of commercial reasonableness and its after-the-fact evaluation of seller’s mitigation of damages efforts. Nevertheless, Equilase Corp. v. D’Amrolfo, 6 Mass.App. 919, 379 N.E.2d 1130 (1978) suggests a less rigorous attitude about seller’s duty to mitigate.

V. Buyer’s Self-Help/Judicial Remedy:
Cover

Prior to the adoption of the Code, under the common law doctrine of avoidable consequences or “mitigation of damages”, the non-breaching buyer of goods was often inconsistent and unpredictable. Under the so-called negative version of the avoidable consequences of mitigation doctrine, a non-breaching party could not recover those damages which could reasonably have been prevented. While the affirmative version of the avoidable consequences rule provided some basis for the aggrieved party’s recovery of any expenses reasonably incurred in an attempt to mitigate his losses, the so-called duty to mitigate often created a dilemma which compromised the position of the aggrieved buyer. Frequently the non-breaching buyer was confronted with the unhappy choice of either knowingly failing in his duty of mitigation, thus relinquishing recovery of all consequential damages which might have been prevented, or, alternatively, attempting to mitigate through the purchase of substitute goods, with the possible result that through misjudgment of the market, his purchase price would subsequently be deemed unreasonable and hence recovery would be denied.

The drafters of Article 2 of the Code attempted to alleviate the aggrieved buyer’s dilemma both by improving and clarifying the alternatives available in seller default cases. Application of pre-CODE rules produced unacceptable results in four major situations in which courts frequently denied recovery to non-defaulting buyers: (1) when the purchase price of the substitute goods was viewed as unreasonable; (2) when the buyer had failed to consult an appropriate number of alternative sources; (3) when the buyer was deemed to have delayed unreasonably in obtaining cover;
and (4) when there was insufficient proof that an attempt to cover had been made with reasonable diligence. Whether the Code's attempt to provide aggrieved buyers with attractive self-help alternatives to immediate litigation and judicial intervention has been entirely successful is a highly debatable proposition.

Among the best known illustrations of the problems encountered by pre-Code buyers are Missouri Furnace v. Cochran, 8 F. 463 (W.D.Pa. 1881) and Sauer v. McClintic-Marshall Construction Co., 179 Mich. 618 146 N.W. 422 (1914). In Missouri Furnace v. Cochran seller repudiated his obligation to deliver a specified quantity of coke to buyer every working day for one year at a price of $1.20 per ton. Buyer promptly entered into a similar forward contract at $4.00 per ton, somewhat below the market price for such contracts prevailing at the time of the seller's repudiation. That market price had risen to unprecedented levels because of a threatened miners' strike, but it plummeted when the strike was averted. The court rejected buyer's claim for damages based on the $4.00 per ton cost of cover, awarding instead damages measured by the difference between the market price prevailing on each day of the remainder of the year and the $1.20 contract price: "The good faith of the plaintiff in entering into the new contract cannot be questioned, but it proved a most unfortunate venture." In Sauer v. McClintic-Marshall Construction Co. seller repudiated a contract to fabricate and supply structural steel for a building that buyer was erecting at a time when buyer faced substantial losses for further delays under a liquidated damages clause in its contract with the building owner. Buyer promptly purchased steel for immediate delivery at a price more than $1,000 in excess of the contract price. The court, without even bothering to consider the consequential losses avoided by buyer in purchasing the substitute steel, refused to award the cost of cover on the grounds that buyer had failed to make every reasonable effort to mitigate its losses by searching the market for the lowest cost substitute.

Several observations can be made about these and other pre-Code cases. First, that these buyers were denied recovery may not be the result of flaws in the common law. Rather, the results may stem from the objective unreasonableness of their respective purchases. Second, it may be argued that the buyers should have been awarded the damages they sought under prevailing common law doctrine, based on the cover-contract price differential formula. Since the buyers would probably have been limited to such a measure of damages had the market price exceeded the cost of readily available cover, (based on the principal that a non-breaching party ought not to be allowed to profit as a result of breach), then, barring bad faith dealings, the buyers should have been allowed to collect accordingly in a case where the cost of cover purchases exceeded the market price. Such an approach would appear to produce the most fair results over time since it would not require aggrieved buyers to forecast the direction of the market value at their sole risk. In spite of the foregoing pitfalls, however, in the great majority of pre-Code cases the buyer who effectively covered was allowed to recover the cost of doing so.

Under the Code, the self-help cover option remedy provided by §2-712 appears to be the preferred course of action for an aggrieved buyer, since in most cases the buyer should be able to purchase substitute goods in the marketplace and, as the cost of doing so is transferred to the defaulting seller, the buyer will theoretically be left in the same position he would have been had he received the contracted-for performance. Furthermore, the cover remedy is consistent with the Code's philosophy of avoiding unnecessary waste by encouraging the non-breaching buyer to take prompt and effective steps to mitigate the damages flowing from seller's breach.

Comment 2 to §2-712 makes it clear that an exact duplicate of the goods contracted for need not be purchased in order to constitute proper cover and that it is not necessary that the delivery or credit terms be the same. Comment 2 further states that: "The test of proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner, and it is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective." It is, of course, imperative that this direction be followed if the cover remedy of §2-712 is to fulfill the goal of alleviating the dilemma of the non-breaching buyer. Only by placing itself in the position the buyer was in when he had to make his cover decision can a court fairly judge the effectiveness of cover so as to allow the buyer to "...obtain the goods he needs thus meeting his essential need", (Comment 1 to §2-712). Section 2-712(1) requires the buyer who opts to cover to do so "without unreasonable delay". Unfortunately neither §1-204(2), which states that "[w]hat is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action"; nor Comment 2 to §2-712, which declares that the requirement "...is not intended to limit the time necessary for him to look around and decide as to how he may best effect cover", provides much guidance to the buyer with respect to the time limit for cover. Productora E. Importadora De Papel v. Fleming, 376 Mass. 826, 383 N.E.2d 1129 (1978) suggests that buyers may still face a problem of "second guessing" when they decide to cover. In Productora the Court suggests that evidence that buyer "made few or no inquiries to suppliers of substitute...[goods] would tend to show it acted unreasonably." Little consideration was given by the Court to the urgency of buyer's need for the goods. A definition of the word "reasonable" as used in §2-712, Comment 2 with reference to cover purchases which are "...commercially usable as reasonable substitutes...", is also conspicuously lacking, as is any indication of how many alternative sources a buyer should consult before making a cover purchase.

The damage calculation formula under §2-712(2) appears to be a straightforward one: "the difference between the cost of cover and the contract price together with any incidental or consequential damages...[under §2-715], but less expenses saved in consequence of the seller's breach." Productora E. Importadora De Papel v. Fleming, 376 Mass. 826, 383 N.E.2d 1129 (1978) contains a careful computation of such costs and expenses that shows that the simplicity of the formula is, at best, deceptive.

A final and vitally important aspect of the code's cover remedy approach is the appearance of a discretionary or optional element to buyer's selection of the remedy. Section 2-712(1) says that the "...buyer may cover..." [emphasis added] and §2-712(3) states that "[f]ailure of a buyer to effect cover within this section does not bar him from any other remedy." The juxtaposition of these clauses with §2-713, which provides buyer with the alternative of conventional market price less contract price damages, provides added support to the notion of cover as an optional response to breach by buyer. However, one should not accept the optional aspect of §2-712(2) at face value. If a buyer actually does cover before the market price goes up, he should not be entitled to §2-713 damages instead of his cost of cover under §2-712. It is a basic tenet of remedial law that the remedy...
should not put the non-breaching party in a better position than performance would have. Such a buyer has successfully mitigated the losses. Indeed, Comment 5 to §2-713 acknowledges that market value damages are appropriate "only when and to the extent that the buyer has not covered." Furthermore, in spite of the words of §2-713(3), it is clear that most buyers, especially merchant manufacturers or middlemen, must cover or confront the avoidable consequences or failure to mitigate damages rule, incorporated into the Code in §2-715. Failure by such buyers to promptly find substitute goods if they are available will in most instances result in substantial losses which may not be recoverable from seller, both because they could have been avoided through cover and because often they will later be determined to have been speculative and unforeseeable consequences of the breach. In fact one scholar considers the theory that expectation losses should be protected only through cover, which should be mandatory unless the non-breaching party is willing to forego all damages other than restitution. (Nordstrom §484 at 445 n. 88.) Although Professor Nordstrom concludes that the Code has rejected compulsory cover, there are surely grounds for speculating about just how optional the cover route is to most merchant buyers. The problem seems to be further compounded by Comment 3 to §2-712, which provides that "...cover is not a mandatory remedy...The buyer is always free to choose between cover and damages for non-delivery...". In cases involving fungible goods it may be impossible to establish whether a given purchase was made as a cover for non-delivered goods, especially if buyer claims to have an elastic demand for the goods in question in hopes of collecting under §2-713, See, e.g., Wander Limited v. Krouse & Company, 368 So.2d 235 (Miss. 1979), dealing with a volume buyer of pecan nuts for commercial confectionary purposes. See also, Productora E. Importadora De Pape! v. Fleming, 376 Mass. 826, 383 N.E.2d 1129 (1978).

Notwithstanding the success of buyers claiming §2-712 cover damages in many cases, that the buyer's pre-Code dilemma can still be a problem for an unwary buyer is demonstrated by the well-known case of Oloffson v. Coomer, II Ill.App.3d 918, 296 N.E.2d 871 (1973). In Oloffson the court held that a grain buyer's failure to cover on the very day he learned of an unequivocal repudiation by a farmer-seller, (and who was also found to have acted in bad faith by failing to disclose to seller an important trade usage that would have allowed seller to cancel on payment of cancellation fee), was not entitled to recover under §2-712 based on the price of a subsequent cover purchase. The court concluded that any purchase made after the date of repudiation was unreasonably delayed under the circumstances.

The §2-172 "cover option" of the Code may not have effected a significant difference from similar pre-Code cases. Aggrieved buyers remain under a positive duty to mitigate if they hope to collect for consequential losses, while there remains a degree of risk for a buyer attempting to secure cover in accordance with the relevant Code provisions. Several Massachusetts cases deal with the connection between buyer's opportunity to cover and claims for consequential losses under §2-715. In re G.S.F. v. Sandell, 6 B.R. 894, 31 U.C.C.Rep.Serv. 919 (1980) the court stated that the "crux" of the issue was whether buyer's losses might have been reasonably prevented by cover. With respect to the relevant portion of buyer's claim the court concluded that there was no evidence to indicate that such cover would involve undue risk, expense for humiliation", and therefore buyer's failure to cover extinguished its rights to consequential damages. In Matsushita Electric Corp. v. Sonus Corp., 362 Mass. 246, 284 N.E.2d 880 (1972) buyer's claim for loss of prospective profits under §2-715 was expressly made conditional on the fact that such losses could not have been reasonably prevented by cover. In United California Bank v. Eastern Mountain Sports #1, 546 F.Supp. 949 (D.Mass. 1982), affirmed 705 F.2d 439 (1982), the federal district court concluded that a buyer of down-filled ski parkas which were defective could not have avoided a loss of profits by cover, since by the time the goods were delivered it was too late to find substitutes in time for winter selling season. By inference, the court indicated that if such cover might have avoided the loss of profits, buyer's claim for those lost profits would fail if the cover option had not been pursued. Thus, it appears that the "optional" characteristic of cover is very limited under Massachusetts cases.

VI. Conclusion

Professor Karl Llewellyn, commonly acknowledged to be the principal architect of the Uniform Commercial Code and one of the great and influential figures of twentieth century American law, must have concluded that the path out of the thicket of judicially created and imposed contract remedies in the sale of goods context was simply to avoid them whenever possible. It seems clear, therefore, that the Code consciously pursues a self-help, avoidance of unnecessary litigation policy that is both practical and business-like. That is not to say that the Code has abandoned the traditional approach of judicial remediation. In the sellers and buyers context, respectively, §§ 2-708(1) and 2-713 provide for orthodox general or direct contract damages predicated on market price comparison measurements, §§ 2-708(2) and 2-715 provide for consequential or special damages, and §§ 2-709 and 2-716 carry forward those common law remedies aimed at securing the precise contract rights for which the parties bargained — seller's action for the price under §2-709 and buyer's action for specific performance under §2-716. Nevertheless, it is manifest throughout the Code's remedies sections and the Official Comments to those sections that the drafters hoped in most cases to encourage a response to the unperformed sale of goods contract that might lead the parties down a path that will take them away from the courtroom and "put [them] in as good a position as if the other party had fully performed" through self-help and without litigation.
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Losing Its Balance:
Superrationalism and
The Supreme Court in the 1984 Term

By Professors Stephen J. Callahan and Gerard Clark

Attorney General Edwin Meese has recently criticized Supreme Court decisions as inconsistent with the original intent of the framers of the Constitution. Some of the justices have responded publicly by describing the Constitution as a document flexible enough to adapt to changing conditions. Of course, the original intent of the framers has never been the sole or even primary referent of constitutional decision-making, but the debate over decisional methodology is of critical importance in evaluating the content and legitimacy of the Court's performance.

If one were to attempt to characterize Supreme Court jurisprudence in constitutional cases based upon the 1984 term, perhaps the term "superrationalism" is most descriptive. These cases present claims that governmental responses to perceived policy needs transgress the limits established by the Constitution. The Court, using superrationalism, carefully examines the governmental action and the problem it was designed to address and asks whether the governmental response was "rational". Superrationalism seems to import concepts of social causality inquiring into whether the response is tailored to fit the problem. The place of the individual claim is usually downplayed, but at other times it is balanced against the government's interest with the Court choosing a winner based upon a conclusory determination of which interest deserves to prevail. Whether there has been a denial of a constitutional right turns not so much upon the influence of precedent or the extension of principle, but more often upon the majority's determination of whether the public decisionmaker has acted reasonably. Thus, the 1984 term was marked by a general loosening of doctrinal restraints on judicial discretion and the appearance of result-oriented analysis.

In procedural due process and fourth amendment cases the Court used familiar balancing formulas, but it did so by using techniques that tend to distort the balance and by weighing the governmental and individual interests in an ad hoc manner. In equal protection, while purporting to rely upon the minimum rationality standard of review, the Court struck down the government's action in almost every case as irrational or illegitimate. In the First Amendment area, the Court seemed more willing to balance speech according to the majority's notion of its relative value.

Equal Protection

In the long-accepted two-tiered analysis of equal protection, rational basis scrutiny has almost automatically resulted in the upholding of the governmental action. The hallmark of rationality review has been extreme deference to the public decisionmaker, and this has been especially true in cases of economic legislation. In the 1984 term, the Court purported to use rational basis scrutiny but in reality its analysis was much less deferential.

The two-tier approach has been criticized as mechanistic, but its absence seems to leave the Court at sea with no moorings, reciting and balancing the interests ad hoc. In Metropolitan Insurance Co. v. Ward, 105 S. Ct. 1676; the Court invalidated an ad hoc statute that granted a perennial property tax exemption to Vietnam era veterans who were residents of New Mexico prior to May 8, 1976. The Court held that the classification between older and newer resident veterans was not rationally related to the asserted purpose of compensating New Mexico's Vietnam veterans, the distinction between established residents and more recent arrivals was not legitimate.

In two other equal protection cases, local favoritism was invalidated as irrational. Hooper v. Bernalillo City Assessor, 105 S. Ct. 2862, involved a New Mexico statute that granted a personnel property tax exemption to Vietnam era veterans who were residents of New Mexico prior to May 8, 1976. The Court held that the classification between older and newer resident veterans was not rationally related to the asserted purpose of encouraging Vietnam veterans to settle in the state. As to the asserted purpose of compensating New Mexico's Vietnam veterans, the distinction between established residents and more recent arrivals was not legitimate.

In Williams v. Vermont, 105 S. Ct. 2465, the state's sales and use tax scheme for automobiles was struck down because it worked a discrimination against recent Vermont residents who had purchased their automobiles elsewhere and paid a state sales tax before moving to Vermont. Such persons were required to pay the state's use tax prior to registering their cars. Vermont residents however were granted credits in such circumstances. The Court held the
classification burdening new residents was arbitrary because it bore no rational relationship to the state's purpose of paying for maintenance and improvement of Vermont's roads.

In *City of Cleburne v. Cleburne Living Centers*, 105 S. Ct. 3248, the Court declared unconstitutional the denial by the Cleburne city council of a special zoning permit for the operation of a group home for the mentally retarded. The Court refused to extend heightened scrutiny to a classification based upon retardation. Nevertheless, the Court invalidated the denial of the permit because city council concerns about the appropriateness of the site were "vague and unsubstantiated."

The kind of rationality review used by the Court in these cases appears to involve no overriding presumption of constitutionality. In fact, the tone of these opinions suggests that the public decisionmaker must convince the Court of the rationality of its decisions.

**Procedural Due Process**

Defining what is 'due process' in the procedural context has always involved a balancing of individual and governmental interests. Recently the Court has weighed the three factors set forth in *Matthews v. Eldridge*: the private interest affected by the official action; the risk of erroneous deprivation through the procedures used and the probable value of additional procedural safeguards; and finally, the burdens on the government that the additional or substitute procedural requirement would entail. In *Cleveland Board of Education v. Loudermill*, 105 S. Ct. 1487, the Court held that, where state law grants to a public employee the right not to be terminated except for cause, he is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. Justice Rehnquist excoriated the majority not for the result or for the use of the Matthews balancing formula, but for their *ad hoc* manner of applying the test, favoring the individual interest and denigrating the government's interest while reaching a result inconsistent with precedent.

In *Walters v. National Association of Radiation Survivors*, 105 S. Ct. 3180, however, it seems that Justice Rehnquist, writing for the majority, was engaged in a similar *ad hoc* application of Matthews. In Walters, the Court refused to strike down the statutory limit of ten dollars that a veteran can pay to his attorney for representation in disability proceedings before the Veterans Administration. In applying Matthews, the majority determined that the government's interest in maintaining informality in the V.A. disability claim system outweighed the individual interest in hiring an attorney to ensure the continued receipt of disability payments. The government's interests were enhanced by two factors, the deference owed to a 120 year-old decision of a co-equal branch of government and the Court's unwillingness to examine a particular class of cases, such as those involving exposure to radiation, Agent Orange, or post-traumatic stress syndrome, in light of the general interest of the V.A. in adjudicating some 800,000 cases each year. The Court downplayed the potential value of the services of an attorney, favoring instead the V.A.'s interest in brevity and informality.

In *Ake v. Oklahoma*, 105 S. Ct. 1087, the Court held that due process required the appointment of a psychiatrist to assist a criminal defendant who makes a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial. After emphasizing the compelling nature of the individual's interest in meaningful access to justice and the accuracy of a criminal proceeding, the Court disagreed with the state's assertion that the requirement would be a "staggering burden" by pointing out that several states and the federal government have already provided such psychiatric assistance without financial disaster.

Finally, in two cases involving procedural rights of prisoners in disciplinary proceedings, the Court continued to restrict the individual rights of those "who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." In *Superintendent, M.C.I. at Walpole v. Hill*, 105 S. Ct. 2768, the Court held that due process requires that there be "some evidence" in the record before authorities can revoke a prisoner's good-time credits. The Court found, however, that evidence that three inmates were seen jogging away from an assaulted inmate was sufficient to meet the standard. Similarly, in *Ponte v. Real*, 105 S. Ct. 2192, the Court held that due process does not require a statement of reasons for refusal to call witnesses requested by an inmate to appear in the record of the administrative proceeding. In dissent, Justice Marshall criticized the decision as ignoring precedent and clearly established due process principles merely because the majority felt that to do so was consistent with "sound penological practice."

**Fourth Amendment**

In several cases during the 1984 term, the Court focused upon the constitutionally permissible extent of intrusions by government officials based upon something less than probable cause. In each case, the analysis was guided by the general notion of "reasonableness under the circumstances" and results were reached by a balancing of interests with the weight of the balance most often in favor of the government.

In *New Jersey v. T.L.O.*, 105 S. Ct. 733, the Court held that the Fourth Amendment applies to searches conducted by public school officials, but that neither warrant nor probable cause is necessary to justify the search. The standard announced by the majority is whether there were "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." 105 S. Ct. at 744. Consequently, the Court found that a teacher was justified in searching the handbag of a student suspected of having smoked a cigarette in the girls' room and in continuing the search once cigarettes were found (and thereby discovering marijuana). The court found that the search was "reasonable at its inception" and that it was "reasonably related in scope to the circumstances which justified the interference in the first place." 105 S. Ct. at 744; see *Terry v. Ohio*, 392 U.S. 1 (1968). For Justice Brennan, dissenting, the majority not only failed to give due weight in the balance to the serious privacy interests at stake but also unfairly loaded the scales on the government side. It did this by broadly characterizing the school's interest as "the need for effective methods to deal with breaches of public order" rather than the costs of applying a standard less than probable cause. 105 S. Ct. at 755. Brennan further characterized the Court's proclivity for balancing to reach a pre-determined result as nothing more than "doctrinally destructive nihilism," less a balance using a neutral utilitarian calculus than "an unanalyzed exercise of judicial will." 105 S. Ct. at 758.

In two other cases, the Court expanded the scope of *Terry v. Ohio*, supra, which held that police officers may stop and briefly detain a suspect when they have reasonable suspicion that he is engaged in
imminent or ongoing criminal activity. In *United States v. Hensley*, 105 S. Ct. 675, the Court upheld the legality of a stop which was based solely upon a 'wanted flyer' indicating that the suspect had been involved in a completed felony. Even though the Court acknowledged that the weight of the public interest is not as great when a crime is completed as it is when a crime is imminent or ongoing, it found the interest in solving crime to be sufficient to outweigh the interest of the individual in freedom from such stops.

In *United States v. Sharpe*, 105 S.Ct. 1568, the Court refused to impose a brevity requirement for a stop based on reasonable suspicion, as long as the officers "diligently pursue those means of investigation likely to confirm or dispel the suspicions." In *Sharpe*, the officers detained the driver of a pick-up truck, which was overloaded and was riding in tandem with another truck appearing to evade the officers, for a period of twenty minutes before the officers' suspicions ripened into probable cause. Justice Brennan criticized the majority for evading the requirement set out in *Florida v. Royer*, 460 U.S. 491 (1983), that the officers must use the least intrusive means to verify or dispel their suspicion and for its distortion of the balance by exaggerating the government's interest and minimizing that of the individual.

In *United States v. Montoya de Hernandez*, 105 S. Ct. 3304, the Court found a detention of more than sixteen hours was reasonable where the defendant was reasonably suspected of entering the United States with drugs hidden in her alimentary canal. Ultimately she underwent a court-ordered rectal examination that disclosed the presence of balloons filled with cocaine. The majority emphasized the necessity of the detention in view of the suspect's refusal to submit to an x-ray, but it also noted that the long period of detention resulted from "the method by which she chose to smuggle illicit drugs into this country." 105 S. Ct. at 331. Justice Brennan once again criticized the majority for its "post hoc rationalizations" and for its "effort to employ the Terry decision as a means of converting the Fourth Amendment into a general 'reasonableness' balancing process-a process in which the judicial thumb apparently will be planted firmly on the law enforcement side of the scales." 105 S. Ct. at 3320.

The balance does not always come down in favor of the government. In *Winton v. Lee*, 105 S. Ct. 1611, the Court affirmed the decision of a lower federal court enjoining a state trial court from requiring a robbery defendant to undergo a surgical operation to remove a bullet imbedded one inch deep in his chest. Analyzing the factors set out in *Schmerber v. California*, 384 U.S. 757 (1966), and balancing the individual and governmental interests, the Court found the operation too intrusive in view of the "substantial additional evidence" the prosecution already had to show the defendant's guilt. Thus the government's interest was more narrowly defined in the context of the individual case and the balance came down in the defendant's favor.

In *Tennessee v. Garner*, 105 S. Ct. 1694, the Court declared unconstitutional a Tennessee statute allowing police officers to use any means to effectuate the arrest of a fleeing felon, under circumstances where there was no probable cause to believe that the suspect posed a serious threat to the officers or others. The plaintiff in this wrongful death action was the father of a teenage boy killed by a Memphis police officer while climbing a fence after a burglary. The majority balanced the government's interest in apprehension of criminals and deterrence of escape attempts by suspects against the individual interest in being free from the application of deadly force. What was perhaps most decisive in *Garner* was evidence of a long-term trend away from the common-law rule and especially the fact that 86.8% of police departments explicitly reject the use of deadly force against non-dangerous felons. 105 S. Ct. at 1705.

First Amendment

The first amendment precedent most often balanced the respective interests of government and the individual with a thumb on the speech side of the scale. The 1984 term saw a general lifting of the thumb. For example, the Court showed a greater willingness, once abjured, to consider the relative value of the speech in applying the balance. In access cases, instead of balancing to determine if the proposed use of public property was compatible with the purposes of the forum, the Court focused the inquiry upon the government's intent, thereby allowing the government to narrowly define what is and what is not a public forum.

In *Dun & Bradstreet v. Greenmoss Bldrs., Inc.*, 105 S. Ct. 2939, the Court held that the plaintiff in a defamation suit need not prove actual malice to recover presumed and punitive damages where the defamatory speech concerned purely private matters. In applying the balancing test, the Court found that a false report that the plaintiff company had declared bankruptcy was a matter of private concern not entitled to the same level of constitutional protection as speech about issues of public concern. Because credit reporting is more like commercial speech and not essential to the underlying first amendment value of informed self-government, it is outweighed by the state's interest in protecting the individual's reputation.

The Court's willingness to evaluate the content of speech was evident as well in *F.E.C. v. N.C.P.A.C.*, 105 S. Ct. 1459, where political action committees challenged federal limits on expenditures on behalf of presidential candidates. Because it involved the core area of political speech, the government's interest had to be "compelling" and the means "narrowly tailored to effectuate the interest." The spending limits were struck down as not sufficiently tailored to the government's interest in preventing corruption. The Court focused upon the fact that expenditures on behalf of a candidate are qualitatively different than contributions directly given to a candidate in that the former are less likely to represent the *quid pro quo* of political corruption.

The fact that speech is political is not always determinative of the balance, especially where the speaker is asserting a right of access to public property. In such cases, if the government does not intend to open the property to a particular class of speaker, the denial of access is constitutionally permissible if it is 'reasonable' and not viewpoint-based.

In *Cornelius v. N.A.A.C.P. Legal Defense Fund*, 105 S. Ct. 3439, the Court upheld the exclusion of legal defense and political advocacy organizations from participation in the Combined Federal Campaign, a charity drive aimed at federal employees. The Court held that the campaign was a non-public forum and that the regulation need only be "reasonable under all the circumstances." The majority had little trouble deciding that "the President could reasonably conclude that a dollar directly spent on food and shelter to the needy is more beneficial than a dollar spent on litigation that might or might not result in aid to the needy." 105 S. Ct. at 3453. Justice Blackmun, in a strongly-worded dissent, stated that defining the forum according to the intent of the government
rather than the character and weight of its interests greatly narrows the definition of the public forum and allows far greater restriction of access to public property.

Even where the government's property is opened to the public for purposes of expression, it may not constitute a public forum if the intent of the government was to omit a particular speaker or class of speakers. In United States v. Albertini, 105 S. Ct. 2907, the Court upheld the conviction of a defendant who had entered Hickam Air Force Base during an advertised 'open house' to make a political protest nine years after he had been barred from the base for defacing classified documents. Because the base commander had not intended to open the forum to those who had previously been barred, the defendant had no right of access to the base. The Court applied the test of United States v. O'Brien, 391 U.S. 367 (1968): a statute which is content-neutral and serves a significant governmental interest unrelated to the suppression of speech will be upheld where the incidental restriction of speech is "no greater than necessary to further the government's interest." The Court read "necessary" to mean necessary in terms of general usage, not "essential" in the sense of the least restrictive alternative.

The O'Brien test was also applied in Wayte v. United States, 105 S. Ct. 1524, in which the federal government's passive enforcement policy of prosecuting only those who reported to Selective Service their unwillingness to register for the draft or those who were reported by others was attacked as a content-based regulation of speech. The Court found that "a nation's need to insure its own security" was compelling and that the passive enforcement policy was the only effective interim solution available to carry out that interest.

In Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, the Court considered whether newspaper advertisements by an attorney soliciting clients who had suffered injury from the use of the Dalkon Shield intra-uterine contraceptive device warranted a public reprimand. The Court applied a balancing test requiring that the regulation of non-deceptive commercial speech "directly advance a substantial governmental interest." The state attempted to justify its ban on self-recommendation and unsolicited advice as a prophylactic rule to ensure that attorneys "don't use false or deceptive advertising to stir up meritless litigation." The Court found that such a rule was not "narrowly crafted to serve the State's purposes."

Privileges, Immunities, and Property Deprivations

Even where the plaintiff claims that the government has undermined a property interest, the methodology is a rational balancing. In Railroad Corp. v. Atchinson, Topeka Co., 105 S. Ct. 1441, the Court reviewed legislation which unilaterally changed the contract between Amtrak and its member railroads charging members a reimbursement fee for the cost of rail privileges to rail employees. The member railroads challenged the legislation as an impairment of the obligation of contract and as a deprivation of property without the due process clause. The Court stated that the standard under both required the plaintiff to establish that Congress "acted in an arbitrary and irrational way." 105 S. Ct. at 1455. The Court then examined a government accounting office study which showed that a number of cost-spreading schemes were considered and that the one chosen by Congress was by no means irrational.

In United States v. Locke, the Court approved a provision of the Federal Land Policy and Management Act which required persons making claims to federal land to file before December 31 in any particular year where the claimant had filed one day late. The Court characterized the question as whether the "constraint or duty posed as a reasonable restriction designed to further legitimate legislative objectives." 105 S. Ct. at 1797-98. The Court found that imposition of a timely filing requirement as a condition for continued property interest met the standard of reasonableness, even if it posed a trap for the unwary which could easily cause forfeiture of valuable rights.

Likewise, under the privileges and immunities clause wherein the Court examines hostile state legislation, the test again seemed to be one of super rationalization. In Supreme Court of New Hampshire v. Piper, the Court invalidated a residency requirement as a condition for admission to the bar in New Hampshire as violating the privileges and immunities clause. The Court asked if there was "a substantial reason for the difference in treatment" and if the reason bore a "substantial relationship to the state's objective." 105 S. Ct. at 1275. The Court went on to review the New Hampshire arguments including familiarity with local rules and procedures, ethical behavior, and availability for court proceedings and pro-bono work as insufficiently related to the use of a residency requirement.

Establishment Clause

The past term's establishment clause cases represent an exception to the loosening of standards and general balancing of interests that characterized the analysis in other cases. The Court applied the test of Lemon v. Kurtzman, 403 U.S. 602 (1971), more strictly than in recent terms to strike down several statutes whose purpose or effect was to advance religion or which fostered excessive government entanglement with religion.

In Wallace v. Jaffree, 105 S. Ct. 2479, the Court struck down an Alabama statute authorizing public school teachers to announce a one-minute moment of silence for meditation or voluntary prayer at the beginning of the school day. After quickly dispensing with the argument that the establishment clause constrains only the federal government, the Court found that the purpose of the statute was to endorse religion and that, in fact, "the statute had no secular purpose." 105 S. Ct. at 2490. Thus the first prong of the Lemon test—that the statute must have a secular legislative purpose—required the invalidation of the statute. Justice Rehnquist attacked the "wall of separation" metaphor and its descendant, the Lemon test, as representing a "mistaken understanding of constitutional history," 105 S. Ct. at 2509.

In two cases involving state aid to private schools, the Court applied the Lemon test and found the statutes impermissible. A local Michigan school district had adopted two programs which used public funds to provide secular instruction to students in private religious schools. Grand Rapids School District v. Ball, 105 S. Ct. 3216. The Court found that the programs had the effect of promoting religion in that they created a risk of state-sponsored religious indoctrination, represented a symbolic union of government and religion, and subsidized the religious function of the schools by taking over a percentage of the schools' secular function.

A similar program in New York City in which federal funds were used to provide instructional services to educationally deprived parochial students assertedly avoided the problem of religious effect by its strict monitoring system. In Aguila v. Felton, 105 S. Ct. 3232, however, the Court held that the program violated the third prong of the Lemon test because it fostered excessive entanglement of church and state.

Finally, in Estate of Thornton v. Caldor, 105 S. Ct. 2914, the Court struck down a Connecticut statute that granted employees...
a right to refuse to work on their Sabbath. The absolute right to observe the Sabbath without consideration of the employer's interests was found to have the primary effect of advancing religion.

Commerce Clause/Congressional Power

In *Garcia v. San Antonio Metro. Transit Authority*, 105 S. Ct. 1005, the Court overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), and abandoned its search for standards to define those traditional and fundamental functions of state government which are immune from federal regulation under the commerce clause. In deciding that San Antonio's mass transit system was subject to the Fair Labor Standards Act, the majority admitted that a judicial inquiry into what is a traditional function was "unsound in principle and unworkable in practice." 105 S. Ct. at 1016. Such an inquiry is unprincipled, for the majority, because it "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." 105 S. Ct. at 1015. The Court concluded that the states' constitutional role in the federal political process is sufficient to protect state sovereignty.

CRITIQUE

In the 1984 term, the Supreme Court continued a trend toward greater reliance on a rationalistic decisional methodology. In its most common manifestation it borrows from utilitarian social analysis. The method requires identification of the individual's constitutional claim and the quantification of its importance, an identification of the government's interest in denying the claim, and a quantification of society's potential loss if the claim is granted. These antagonistic interests are evaluated by a balancing process in which the Court chooses the interest which reason informs it to be of paramount importance. Of course, the balancing methodology has long been a familiar tool of constitutional adjudication, but when the balancing is done on a level of higher generality, the process takes on the mantle of legislative policymaking rather than judicial decisionmaking. During the past term this abstract balancing was evident in two ways. First, the competing interests are defined at a higher level of abstraction than is necessary for the individual case. For example, in cases involving claims against the military, the government's interest in "national security" will tend to override claims of constitutional right regardless of the facts of the particular case. Secondly, the Court often disregards the factual record and relies on a more global fact inquiry that tends to strain the fact-finding capabilities of lower courts.

Global Fact Inquiry

*Walters* demonstrates the methodology well. The narrow question is whether a ten dollar limit on attorney's fees violates procedural due process. Flexibility and attention to the particularized needs of each case have always been hallmarks of due process analysis, requiring an examination of the record below to assure that fairness was observed in the particular case. Since *Matthews*, however, the Court has virtually ignored the record and looked instead to the much more global question of whether the procedural rules as written and applied in the vast generality of cases appear to operate fairly. *Walters* stated that the focus of the inquiry was the "generality of cases, not the rare exceptions." 105 S. Ct. at 3189. The actual case before the Court merely presents a vehicle for inquiring into the larger question of the overall fairness of the agency's procedures.

A global inquiry into the adequacy of an administrative process strains the fact-finding abilities of any court. It obviously does not have proofs with respect to the some 800,000 cases per year that the V.A. administers. Any kind of conclusion about the level of justice that occurs in these proceedings must involve inquiries that are impressionistic and general in nature. For instance, in *Walters*, the Court found success rates not to vary greatly based upon representation by, for instance, the American Legion, the Veterans of Foreign Wars, no representation, and representation by an attorney/agent. Whether such statistics substantiate the proposition that attorneys are not needed is a question best left to sociological methodology. Suffice it to say that the conclusion is far from certain. In addition, the Court makes unfounded statements about the contributions that attorneys can make. The plaintiff claimed that showing causality between radiation injury and presence at the explosion of atomic bombs was a complicated factual inquiry requiring lawyers. The
The traditional balance between individual and governmental interest is stated in highly generalized terms. In *Walters*, for instance, instead of examining the fairness and efficiency of benefit distribution by the V.A. in those terms, the Court looked to the question of whether the statute served the purpose of “paternalistic protector of claimant's supposed best interest,” and not whether that paternalism served the plaintiffs in the particular case.

The same generalized inquiry occurred elsewhere. In the prison cases, for instance, the court relies upon the goal of the “penological need to provide swift discipline.” Of course, such an inquiry will almost always serve to defeat claims against the military. For instance, in *Wayte* the fact that “few interests can be more compelling than a nation’s need to ensure its own security” and that “freedom as we know it has been suppressed in many countries” serve to defeat the plaintiff’s claim that the passive enforcement policy of the Selective Service system violates the First Amendment. Likewise, in *Albertini*, the need “to preserve security” justifies the exclusion of the plaintiff from a military base during an open house because of his threatened demonstration against military policies.

In the Fourth Amendment cases rationalism resulted in a further breakdown of standards. In *Hensley*, the Court stated that the test “is grounded in the standard of reasonableness” and “balances the nature and quality of the intrusion of personal security against the importance of the governmental interests alleged to justify the intrusion.” 105 S. Ct. at 680. Citing the state interest in “effective crime prevention and detection and the interests in “solving crimes and bringing offenders to justice … particularly in the context of felonies or crime involving a threat to public safety,” the Court concluded that “the law enforcement interests at stake in these circumstances outweigh the individual interest to be free of a stop and detention that is no more extensive than permissible in the investigation of imminent or ongoing crimes.” 105 S. Ct. at 681. In *Sharpe* and *Montoya*, the permissible duration of the stop was expanded to what is reasonable under all the circumstances and courts were cautioned “not [to] indulge in unrealistic second-guessing” of the exercise of judgment by police officers. Similarly, in *New Jersey v. T.L.O.*, great deference was accorded teachers and school administrators to determine whether the search of a student is reasonable and the lower court was chided for its “somewhat crabbed notion of reasonableness.” When an undefined standard of reasonableness is arrived at by a balancing formula that states the government's interest in such broad terms as “the need for effective crime prevention and detection” or “the need for effective methods to deal with breaches of public order,” the result seems pre-determined.

Certainly the goals of friendly adjudication, penological success, military preparedness, and the apprehension and prosecution of criminals are worthy goals. But the Court never delineates how they are underwritten by the plaintiff's claim of right. Further the individual’s interest in the balance often pales in significance because the rules he invokes are prophylactic in nature, and thus the benefits to be gained from them are never immediately recognizable. Finally, if the Court views executive branch actors as benevolent, there is no need for prophylactic rules. This approach ignores the judiciary’s traditional role as the dispenser of particularized justice, especially in the context of a bureaucratic state. Clearly the legislature, in determining whether a statute should be enacted, may look to the generality of cases and make policy judgments about efficiency. Courts, however, have traditionally served the role of hearing claimants who say that a legislative scheme has somehow operated unfairly as to them. A high-level policy review is antithetical to individualized claims of constitutional violation. In truth, the approaches used for review of executive and legislative actions have collapsed into one unified standard of review.

The equal protection decisions seem to represent the same kind of balancing to determine reasonableness that occurs in the fourth amendment and procedural due process cases. The decisionmaker will be accorded some deference, but appears to have the burden of showing that its purposes are legitimate and its means reasonably related to its goals. In *Metropolitan Life*, for example, purposes that are legitimate under commerce clause scrutiny are unconstitutional under equal protection. In *Cleburne Living Centers*, the permit denial was found to be irrational because the fears of the community were vague and unsubstantiated. Here, as in other areas, there is a lack of standards anchored in clearly-stated constitutional principle. The decision is not what is constitutional, but what is reasonable to the majority.

The balancing approach to first amendment cases has also become more amorphous because the Court now suggests that different types of speech will be accorded more or less weight according to their relative value. Perhaps there are principled criteria by which the Court could determine the relative value of various classes of speech, but the disagreement between the majority and dissent in *Dun & Bradstreet* over the values underlying the First Amendment suggests that the inquiry into value is a question of policy rather than principle.

**CONCLUSION**

The use of a balancing methodology is, of course, nothing new to the Supreme Court. While the Court abandoned this methodology in substantive due process, it survived under the old equal protection, the commerce clause, and elsewhere. This term, however, demonstrates a substitution of this methodology for virtually everything else: rights are no longer "vested", classifications are no longer suspect, speech protections are subject to government definitions of when and where. Ultimately the term evidences an attack on doctrine, principle, and precedent. In their place we find a judicial investigation into governmental choice of policy and the majority’s evaluation of the success of the choices in achieving the perceived goals. In truth specialized protection for interests in such things as property, speech, or the vote appears to have disappeared in favor of a generalized judicial review of means.
and ends. The result is a diminution of the concept of right itself.

Further, the methodology undermines certainty in the law. One need not agree with Holmes' adage that law is merely a prediction of what the courts will do to understand that ultimately constitutional law must be knowable and predictable. The answer to a future question, for instance, of whether proof of hearing officer bias constitutes a violation of due process, may require the answer to take into consideration the overall fairness of hundreds of thousands of cases that are heard under the same statute. This would require consideration of the comparative individual and collective interests of claims like that of the plaintiff and the likelihood of improved fact finding throughout the system as a result of imposing stricter standards. Certainly one could not expect the individual practitioner to be able to make an intelligent judgment about the question.

Indeed one wonders whom the Court is writing for. Its style is academic, but if it is writing for academia it need not quote the text of the Fourth Amendment nor footnote every proposition as in a law review article. Is it trying to convince the public of the correctness of its decisions? Or is the individual policeman and hearing officer supposed to superrationalize as the Court does?

In addition, the Court's methodology downplays analogous reasoning from decided cases. Since the factors which are to be balanced are peculiar to each decisional body, analogy is frequently inapplicable. This further undermines prediction. It was this concern about prediction that led to the result in Garcia. Because it could not find a principled basis on which to decide the limits of local governmental immunity, the Court decided to leave the question to the policymaking branches.

The religion cases are the only clear exception to the rule of superrationalism. For instance, in Jaffree, striking down the moment of silence, the Court looked to legislative intent as required by Lemon to conclude that it was an establishment of religion. Ultimately, if one believes that the legitimacy of judicial review must be judged in the context of the Court's jurisprudential approach to its work, the legitimacy of superrationalism is less defensible than a jurisprudence relying upon such theories as text, intent, or precedent.

Finally, the generalized balance is result oriented in that, if one states the governmental interest with the sufficient amount of generality, it will almost prevail against an individual interest. One of the classic complaints about classical utilitarian theories was that general overall good always prevailed against individual interest. This appears to be the Court's direction in the interpretation of the document that was designed to achieve the opposite.
Faculty Publications
New Publications Since April, 1985

Please send information on your new publications to the
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56 Temple Street, Boston, MA 02114

Books:
Family Law Guidebook, by Honorable Edward M. Ginsburg (Adjunct Professor of Law), Butterworth's (1984).

Education Manual for Child Care Providers, by Professor Thomas R. Finn, published by the State of Rhode Island, (12/1/85).

Faculty Handbook (For Continuing Education Faculty), by Professor Charles P. Kindregan, published by Center for Continuing Professional Development (1985).

Articles:


Can the Medium Be the Message? The Growing Controversy Over the Advertising Medium Used by Lawyers, by Professor Charles Kindregan, 6 Rptr.L.Prof. 51 (1985).

Recovery Against Tobacco Companies, by Professor Alvan Brody, 21 Trial (No. II) 48 (Nov. 1985).


Guilty But Mentally Ill: The Real Verdict is Guilty, by Professor Linda C. Fentiman XXVI Boston College L.Rev. 601 (1985).


Ethics, by Barry Brown, published in the Annual Survey of Massachusetts Law.


The Non-Contractual Nature of the Student-University Contractual Relationship, by Professor Victoria Dodd, 33 Univ. of Kansas L. Rev. 701 (1985).


The International Court of Justice and the Nicaraguan Case: An Interview with Professor Leo Gross, by Professor Valerie Epps, 29 Boston Bar J. 14 (1985).

Landlord and Tenant, "Tom on Torts, Et Alia by Professor Thomas Lambert, 28 A. T. L. A. 50 (March 1985).

SUFFOLK’S NORTHEAST REGIONAL CHAMPIONSHIP TEAM

Suffolk University Law School’s National Moot Court Team won the Northeast regional championship. The team was (from left) Daniel Jay Goldberg of Burlington, VT, third year day student; Kimberlee A. Worth of Rockport, MA, a third year evening student; and Gordon M. Jones of Arlington, MA, a fourth year evening student. They’re shown with their adviser, Law Professor Marc D. Greenbaum (left) and Dean David J. Sargent (right). On their way to the regional championship, the Suffolk team defeated teams from Bridgeport, Maine, Cornell and Syracuse and Boston College Law Schools.
Case Comments:


Supplements:


Massachusetts Pleading and Practice, by Professor Charles Kindregan (co-author), 1985 supplements, published by Matthew Bender Co. (August 1985).

Book Chapters:

Use of Checklists in the Initial Stage of a Products Liability Claim, Ch. 21 in Proof of Product Defect, publ. by Lawyer's Corporation Publishing Co. (1985), by Professor Charles Kindregan.


Citations:

The following publications of Professor Timothy Wilton's have been cited in the named publications:

Functional Interest Advocacy in Modern Complex Litigation, 60 Washington University Law Quarterly 27 (1982), was cited in:

Fiss & Rendleman, Injunctions (2d ed) (Foundation Press, 1984) at p. 802

Rhode, Class Conflicts in Class Actions, 34 Stanford L. Rev. 1183, 1184 (1982)

The Class Action in Social Reform Litigation: In Whose Interest?, 63 Boston University Law Review 597 (1983), was cited in:


Wright, Miller & Kane, Federal Practice & Procedure: Civil, (1985 Supp.) 1775, n. 34 at p. 34

Professor Marc Greenbaum's article on employment discrimination, which will be published in Vol. 58 of the Temple Law Review, has already been cited at 133 U. Pennl. L. Rev. 227, 261, n. 188 (1984).

A program on Public Sector Labor Law at Suffolk featured as its faculty (left to right) Prof. Nancy Dowd, Attorney John Canavan of Nutter, McClennen and Fish, Attorney Alan McDonald of McDonald and Noonan, Mediator/Arbitrator Joan Dolan, Attorney Robert Holland of Holland, Crowe & Drachman, Attorney Diane Zaar, Chief Counsel John Cochran of the Mass. Labor Relations Commission, Prof. Charles Kindregan, Prof. Marc Greenbaum.
Nick Buoniconti (J.D. 1968) has been named President and Chief Operating Officer of U.S. Tobacco Company. Buoniconti was a linebacker for the N.E. Patriots football team for seven years and has been associated with U.S. Tobacco since the early 1970's. In 1983, Mr. Buoniconti was named senior vice-president of corporate relations and within a few months was promoted to executive vice president of the company. U.S. Tobacco produces smokeless chewing tobacco under brand names such as Skol and Copenhagen and had sales last year of about $443 million and net income of about $83 million.

Kevin M. Herlihy (J.D. 1971) was nominated by Governor Michael Dukakis for associate justice of Lawrence District Court. He has been in private practice in Haverhill, Mass. since 1974 and, also, served as an attorney in the public sector. In 1974, he was assigned to the Essex County district attorney's office as a special assistant attorney general. From 1975 to 1977, he was an assistant district attorney in that county. Prior to taking those two positions, he was an associate for the law firm of Kline and Gardner in Gloucester.

Richard A. Voke (J.D. 1975) is the new Chairman of the Massachusetts House Ways and Means Committee.

Leonard Kirk O'Donnell (J.D. 1975) has been appointed head of the Center for National Policy in Washington, D.C. The appointment was announced by former Secretary of State Edmund S. Muskie. O'Donnell will be leaving his position as Counsel to the Speaker of the U.S. House of Representatives.

Lisa Nicole Singer (J.D. 1978) is now associated with the firm of Melrod, Redman and Gartlan in Washington, D.C.

John A. Hollister (J.D. 1978), a partner in the firm of Anderson and Adams, New Orleans, Louisiana, has co-authored an article on the effects of Bankruptcy on Louisiana security devices in 31 Loyola Law Review 1 (1985).

Robert A. George (J.D. 1980) is presently an associate partner in the law firm of Balliro, Mondano and Balliro, Boston. He is former assistant district attorney of Norfolk County and was a staff attorney for the law office of J. Albert Johnson, F. Lee Bailey of counsel, prior to his present position. He and his wife, Deborah, are now the proud parents of Meghan George born in April of 1985.

Anthony Antico (J.D. 1981), Charles Barrett (J.D. 1981) and James Burke (J.D. 1981) have recently moved the office of their firm Antico, Barrett and Burke to 1 Essex Green Drive located at the North Shore Shopping Center in Peabody.

Carol Simeon (J.D. 1981) is the Assistant Prosecuting Attorney in the Criminal Division of the Ingham Company Prosecutors Office in Lansing, Michigan. Attorney Simeon was also elected Secretary of the Mid-Michigan Region of the Womens' Lawyer Association.

Maura Sweeney Doyle (J.D. 1981) has become an associate of the law firm of Richard Maloney and Daniel Hourihan located at 133 Federal Street, Suite 600, in Boston.
In Memoriam

Margaret Blizard (J.D. 1963) passed away in May of 1985. She was a leader in Massachusetts and National Democratic politics, state politics, and mental health and in women’s professional activities. At the time of her death, she was a member of the governing council of the American Public Health Association, which in 1984, honored her for her leadership and 40 years of public service. She was an administrator and legal assistant to the Commissioner of public health from 1965 to 1983.

John Doherty (J.D. 1930) passed away in May of 1985. He was 83 years old. He was a partner in the Lynn law firm of Donahue, Doherty and Dolan from 1970 until his retirement in 1973. He was formerly President of the Suffolk Law School Alumni Association.

Clarence Elam (J.D. 1967) passed away in April of 1985, at the age of sixty-one. He was a former Chairman of the Boston Licensing Board and one-time secretary to the late governor, Christian A. Herter and the Governor’s Council. In 1955, he was elected one of Greater Boston’s 10 outstanding young men. At his death, he was operating a private law practice at Center Plaza and had been on the staff as a teacher and ombudsman at Roxbury Community College.

William McDonough (J.D.) passed away in November of 1985. A South Boston native, he graduated from Suffolk University Law School and practiced law in Medford for 50 years. He was also chairman of the Medford March of Dimes, director of the Medford Cooperative Bank, and participated in several charitable organizations.
Faculty Publication Summaries

“The Con-Contractual Nature of the Student-University Contractual Relationship”

33 Kansas L. Rev. 701 (1985)
by Professor Victoria J. Dodd
Suffolk University Law School

It is increasingly commonplace for students dismissed from colleges and universities for academic or disciplinary reasons to sue their alma mater. As the student-university relationship has been characterized as being primarily contractual in nature, contractual arguments are frequently raised by these student litigants. Particularly in light of the restriction on substantive due process relief recently set forth in Regents of the University of Michigan v. Ewing, 54 U.S. L.W. 4055, an analysis of contractual theories in the educational setting raises issues that are more than merely “academic.”

This article dissects the student-university contractual relationship and concludes that such a characterization is legally unsound. Piecing together the history of the doctrine in English and American law over the last one hundred years, the article contends that the contractual aspect of the student-university connection has been erroneously over-generalized to cover all facets of the educational relationship. Analytically, the absence of a business, bargain relationship between student and school should draw one away from a contractual framework.

The article criticizes on a number of different levels the use of the contractual focus in the higher education setting. Describing how courts appear to use contract law selectively, in an overly results-oriented approach, the article discusses the areas of implied contractual terms, changing the terms of the contract, and interpreting the terms of the student-university contract. In a concluding section, the article suggests that a torts approach to the student-university context would be more appropriate, as the law of torts centers around harm to relationships, which is the analytical nub of the student-university connection.

Federalism Issues in “No Airbag” Tort Claims: Preemption and Reciprocal Comity

by Professor Timothy Wilton
Suffolk University Law School

Within the last few years, product liability tort claims against manufacturers for failure to equip cars with airbags have become increasingly common. Such a claim, if allowed, would require individual juries to assess the merits of airbags and potentially to award substantial damages. The federal agency regulating automotive design, however, has itself assessed the merits of airbags and consistently refused to require their installation. In its most recent ruling, the agency established a policy that mandatory seatbelt use laws rather than airbags were the preferred means of occupant protection in collisions. The courts will be called upon in the next several years to determine what effect the federal regulation should have on this tort claim.

Two aspects of federalism are implicated by this shift in the airbag battleground from federal agency to state tort law. This article analyzes the application of doctrines of preemption and comity to the “no airbag” tort claim and concludes first, that insofar as the effects of the claim conflict with the purposes of the federal regulation, the claim would be preempted, and second, that principles of comity dictate that the state should conform its tort standard for liability to the standard set by the federal regulation.
A number of noted labor law and medical law experts participated in the recent conference on AIDS, including, left to right (first row): Attorney Paul F. Kelly of Segal, Roitman and Coleman, Attorney Joseph O'Leary of Choate, Hall and Stewart, and Attorney Sarah Gibson of Cambridge, (second row) Attorney Lynn Goldsmith of the Massachusetts Department of Public Health, Professor Arthur S. Leonard of New York Law School, George Grady, M.D., Massachusetts State Epidemiologist and Professor Charles Kindregan of Suffolk University Law School (program moderator).