

Chapter 2

CONSIDERATION

SECTION 1. WHAT IS CONSIDERATION?

(Calamari & Perillo §§ 4.1–4.8, 4.14–4.15)

ADAM SMITH, THE WEALTH OF NATIONS

1776.

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

HAMER v. SIDWAY

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

Appeal from an order of the General Term of the Supreme Court in the fourth judicial department, made July 1, 1890, which reversed a judgment in favor of the plaintiff entered upon a decision of the court on trial at Special Term and granted a new trial.

This action was brought upon an alleged contract.

The plaintiff presented a claim to the executor of William E. Story, Sr., for \$5,000 and interest from the 6th day of February, 1875. She acquired it through several mesne assignments from William E. Story, 2d. The claim being rejected by the executor, this action was brought. It appears that William E. Story, Sr., was the uncle of William E. Story, 2d;

that at the celebration of the golden wedding of Samuel Story and wife, father and mother of William E. Story, Sr., on the 20th day of March, 1869, in the presence of the family and invited guests, he promised his nephew that if he would refrain from drinking, using tobacco, swearing, and playing cards or billiards for money until he became 21 years of age, he would pay him the sum of \$5,000. The nephew assented thereto, and fully performed the conditions inducing the promise. When the nephew arrived at the age of 21 years, and on the 31st day of January, 1875, he wrote to his uncle, informing him that he had performed his part of the agreement, and had thereby become entitled to the sum of \$5,000. The uncle received the letter, and a few days later, and on the 6th day of February, he wrote and mailed to his nephew the following letter:

“Buffalo, Feb. 6, 1875.

“W.E. Story, Jr.:

“Dear Nephew—Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have five thousand dollars as I promised you. I had the money in the bank the day you was twenty-one years old that I intend for you, and you shall have the money certain. * * *

“P.S.—You can consider this money on interest.”

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

PARKER, J. (after stating the facts as above.) The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator, William E. Story, became indebted to his nephew, William E. Story, 2d, on his twenty-first birthday in the sum of \$5,000. The trial court found as a fact that “on the 20th day of March, 1869, * * * William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become twenty-one years of age, then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of \$5,000 for such refraining, to which the said William E. Story, 2d, agreed,” and that he “in all things fully performed his part of said agreement.”

The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the promisee, by refraining from the use of liquor and tobacco, was not harmed, but benefited; that that which he did was best for him to do, independently of his uncle's promise,—and insists that it follows that, unless the promisor was benefited, the contract was without consideration,—a contention which, if well founded, would seem to leave open for contro-

versy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The exchequer chamber in 1875 defined "consideration" as follows: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." (Anson's Prin. of Con. 63.)

"In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." (Parsons on Contracts, 444.)

"Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." (Kent, vol 2, 465, 12th ed.)

Pollock in his work on Contracts, page 166, after citing the definition given by the exchequer chamber, already quoted, says: "The second branch of this judicial description is really the most important one. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him \$5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now, having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but, were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been, support the position we have taken.

* * *

In *Lakota v. Newton*, (an unreported case in the superior court of Worcester, Mass.) the complaint averred defendant's promise that "if you (meaning the plaintiff) will leave off drinking for a year I will give you \$100," plaintiff's assent thereto, performance of the condition by him, and demanded judgment therefor. Defendant demurred, on the

ground, among others, that the plaintiff's declaration did not allege a valid and sufficient consideration for the agreement of the defendant. The demurrer was overruled.

In *Talbott v. Stemmons*, [12 S.W.Rep. 297,] * * * the stepgrandmother of the plaintiff made with him the following agreement: "I do promise and bind myself to give my grandson Albert R. Talbott \$500 at my death if he will never take another chew of tobacco or smoke another cigar during my life, from this date up to my death; and if he breaks this pledge he is to refund double the amount to his mother." The executor of Mrs. Stemmons demurred to the complaint on the ground that the agreement was not based on a sufficient consideration. The demurrer was sustained, and an appeal taken therefrom to the court of appeals, where the decision of the court below was reversed. In the opinion of the court it is said that "the right to use and enjoy the use of tobacco was a right that belonged to the plaintiff, and not forbidden by law. The abandonment of its use may have saved him money, or contributed to his health; nevertheless, the surrender of that right caused the promise, and, having the right to contract with reference to the subject-matter, the abandonment of the use was a sufficient consideration to uphold the promise." Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in *Lindell v. Rokes*, (60 Mo. 249).

The cases cited by the defendant on this question are not in point.
* * *

The order appealed from should be reversed and the judgment of the Special Term affirmed, with costs payable out of the estate.

All concur.

KIRKSEY v. KIRKSEY

Supreme Court of Alabama, 1845.
8 Ala. 131.

Error to the Circuit Court of Talladega.

Assumpsit by the defendant, against the Plaintiff in error. The question is presented in this Court, upon a case agreed, which shows the following facts:

The plaintiff was the wife of defendant's brother, but had for some time been a widow, and had several children. In 1840, the plaintiff resided on public land, under a contract of lease, she had held over and was comfortably settled, and would have attempted to secure the land she lived on. The defendant resided in Talladega county, some sixty, or seventy miles off. On the 10th October, 1840, he wrote to her the following letter:

"Dear sister Antillico—Much to my mortification, I heard, that brother Henry was dead, and one of his children. I know that your situation is one of grief, and difficulty. You had a bad chance before, but a great deal worse now. I should like to come and see you, but cannot

with convenience at present. * * * I do not know whether you have a preference on the place you live on, or not. If you had, I would advise you to obtain your preference, and sell the land and quit the country, as I understand it is very unhealthy, and I know society is very bad. If you will come down and see me, I will let you have a place to raise your family, and I have more open land than I can tend; and on the account of your situation, and that of your family, I feel like I want you and the children to do well.”

Within a month or two after the receipt of this letter, the plaintiff abandoned her possession, without disposing of it, and removed with her family, to the residence of the defendant, who put her in comfortable houses, and gave her land to cultivate for two years, at the end of which time he notified her to remove, and put her in a house, not comfortable, in the woods, which he afterwards required her to leave.

A verdict being found for the plaintiff, for two hundred dollars, the above facts were agreed, and if they will sustain the action, the judgment is to be affirmed, otherwise it is to be reversed.

* * *

ORMOND, J. The inclination of my mind, is, that the loss and inconvenience, which the plaintiff sustained in breaking up, and moving to the defendant's, a distance of sixty miles, is a sufficient consideration to support the promise, to furnish her with a house, and land to cultivate, until she could raise her family. My brothers, however think, that the promise on the part of the defendant, was a mere gratuity, and that an action will not lie for its breach. The judgment of the Court below must therefore be reversed, pursuant to the agreement of the parties.

**PENNSY SUPPLY, INC. v. AMERICAN
ASH RECYCLING CORP.**

Superior Court of Pennsylvania, 2006.
895 A.2d 595, appeal denied 907 A.2d 1103.

OPINION BY ORIE MELVIN, J.:

¶ 1 Appellant, Pennsy Supply, Inc. (“Pennsy”), appeals from the grant of preliminary objections in the nature of a demurrer in favor of Appellee, American Ash Recycling Corp. of Pennsylvania (“American Ash”). We reverse and remand for further proceedings.

¶ 2 The trial court summarized the allegations of the complaint as follows:

The instant case arises out of a construction project for Northern York High School (Project) owned by Northern York County School District (District) in York County, Pennsylvania. The District entered into a construction contract for the Project with a general contractor, Lobar, Inc. (Lobar). Lobar, in turn, subcontracted the paving of driveways and a parking lot to [Pennsy].

The contract between Lobar and the District included Project Specifications for paving work which required Lobar, through its subcontractor Pennsy, to use certain base aggregates. The Project Specifications permitted substitution of the aggregates with an alternate material known as Treated Ash Aggregate (TAA) or AggRite.

The Project Specifications included a 'notice to bidders' of the availability of AggRite at no cost from [American Ash], a supplier of AggRite. The Project Specifications also included a letter to the Project architect from American Ash confirming the availability of a certain amount of free AggRite on a first come, first served basis.

Pennsy contacted American Ash and informed American Ash that it would require approximately 11,000 tons of AggRite for the Project. Pennsy subsequently picked up the AggRite from American Ash and used it for the paving work, in accordance with the Project Specifications.

Pennsy completed the paving work in December 2001. The pavement ultimately developed extensive cracking in February 2002. The District notified . . . Lobar . . . as to the defects and Lobar in turn directed Pennsy to remedy the defective work. Pennsy performed the remedial work during summer 2003 at no cost to the District.

The scope and cost of the remedial work included the removal and appropriate disposal of the AggRite, which is classified as a hazardous waste material by the Pennsylvania Department of Environmental Protection. Pennsy requested American Ash to arrange for the removal and disposal of the AggRite; however, American Ash did not do so. Pennsy provided notice to American Ash of its intention to recover costs.

Trial Court Opinion, 5/27/05, at 1-3 (footnote omitted). Pennsy also alleged that the remedial work cost it \$251,940.20 to perform and that it expended an additional \$133,777.48 to dispose of the AggRite it removed. Compl. ¶¶ 26, 29.

¶ 3 On November 18, 2004, Pennsy filed a five-count complaint against American Ash alleging [among other counts] breach of contract (Count I) * * * American Ash filed demurrers to all five counts. Pennsy responded and also sought leave to amend should any demurrer be sustained. The trial court sustained the demurrers by order and opinion dated May 25, 2005 and dismissed the complaint. This appeal followed.

¶ 4 Pennsy raises three questions for our review: [Discussion of two of these question is omitted. Ed.]

(1) Whether the trial court erred in not accepting as true . . . [the] Complaint allegations that (a) [American Ash] promotes the use of its AggRite material, which is classified as hazardous waste, in order to avoid the high cost of disposing [of] the material itself; and (b) [American Ash] incurred a benefit from Pennsy's use of the material

in the form of avoidance of the costs of said disposal sufficient to ground contract and warranty claims.

* * *

¶ 7 Instantly, the trial court determined that “any alleged agreement between the parties is unenforceable for lack of consideration.” Trial Court Opinion, 5/27/05, at 5. The trial court also stated “the facts as pleaded do not support an inference that disposal costs were part of any bargaining process or that American Ash offered the AggRite with an intent to avoid disposal costs.” *Id.* at 7 (emphasis added). Thus, we understand the trial court to have dismissed Count I for two reasons related to the necessary element of consideration: one, the allegations of the Complaint established that Pennsy had received a conditional gift from American Ash, *see id.* 6, 8, and, two, there were no allegations in the Complaint to show that American Ash’s avoidance of disposal costs was part of any bargaining process between the parties. *See id.* at 7.

¶ 8 It is axiomatic that consideration is “an essential element of an enforceable contract.” *Stelmack v. Glen Alden Coal Co.*, 339 Pa. 410, 414–415, 14 A.2d 127, 128 (1940). *See also Weavertown Transport Leasing, Inc. v. Moran*, 834 A.2d 1169, 1172 (Pa.Super.2003) (stating, “[a] contract is formed when the parties to it (1) reach a mutual understanding, (2) exchange consideration, and (3) delineate the terms of their bargain with sufficient clarity.”). “Consideration consists of a benefit to the promisor or a detriment to the promisee.” *Weavertown*, 834 A.2d at 1172 (citing *Stelmack*). “Consideration must actually be bargained for as the exchange for the promise.” *Stelmack*, 339 Pa. at 414, 14 A.2d at 129.

It is not enough, however, that the promisee has suffered a legal detriment at the request of the promisor. The detriment incurred must be the ‘quid pro quo’, or the ‘price’ of the promise, and the inducement for which it was made. . . . If the promisor merely intends to make a gift to the promisee upon the performance of a condition, the promise is gratuitous and the satisfaction of the condition is not consideration for a contract. The distinction between such a conditional gift and a contract is well illustrated in Williston on Contracts, Rev.Ed., Vol. 1, Section 112, where it is said: ‘If a benevolent man says to a tramp, ‘If you go around the corner to the clothing shop there, you may purchase an overcoat on my credit,’ no reasonable person would understand that the short walk was requested as the consideration for the promise, but that in the event of the tramp going to the shop the promisor would make him a gift.’

Weavertown, 834 A.2d at 1172 (quoting *Stelmack*, 339 Pa. at 414, 14 A.2d at 128–29). Whether a contract is supported by consideration presents a question of law. *Davis & Warde, Inc. v. Tripodi*, 420 Pa.Super. 450, 616 A.2d 1384 (1992).

¶ 9 The classic formula for the difficult concept of consideration was stated by Justice Oliver Wendell Holmes, Jr. as “the promise must induce the detriment and the detriment must induce the promise.” John Edward Murray, Jr., MURRAY ON CONTRACTS § 60 (3d. ed.1990), at 227 (citing *Wisconsin & Michigan Ry. v. Powers*, 191 U.S. 379, 24 S.Ct. 107, 48 L.Ed. 229 (1903)). As explained by Professor Murray:

If the promisor made the promise for the purpose of inducing the detriment, the detriment induced the promise. *If, however, the promisor made the promise with no particular interest in the detriment that the promisee had to suffer to take advantage of the promised gift or other benefit, the detriment was incidental or conditional to the promisee’s receipt of the benefit.* Even though the promisee suffered a detriment induced by the promise, the purpose of the promisor was not to have the promisee suffer the detriment because she did not seek that detriment in exchange for her promise.

Id. § 60.C, at 230 (emphasis added). This concept is also well summarized in AMERICAN JURISPRUDENCE:

As to the distinction between consideration and a condition, it is often difficult to determine whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test, in determining which construction of the promise is more reasonable is an inquiry into *whether the occurrence of the condition would benefit the promisor. If so, it is a fair inference that the occurrence was requested as consideration.* On the other hand, if the occurrence of the condition is no benefit to the promisor but is merely to enable the promisee to receive a gift, the occurrence of the event on which the promise is conditional, though brought about by the promisee in reliance on the promise, is not properly construed as consideration.

17A AM. JUR.2d § 104 (2004 & 2005 Supp.) (emphasis added). *See also* Restatement (Second) of Contracts § 71 comment c (noting “the distinction between bargain and gift may be a fine one, depending on the motives manifested by the parties”); *Carlisle v. T & R Excavating, Inc.*, 123 Ohio App.3d 277, 704 N.E.2d 39 (1997) (discussing the difference between consideration and a conditional gift and finding no consideration where promisor who promised to do excavating work for preschool being built by ex-wife would receive no benefit from wife’s reimbursement of his material costs).

¶ 10 Upon review, we disagree with the trial court that the allegations of the Complaint show only that American Ash made a conditional gift of the AggRite to Pennsy. In paragraphs 8 and 9 of the Complaint, Pennsy alleged:

American Ash actively promotes the use of AggRite as a building material to be used in base course of paved structures, and provides the material free of charge, in an effort to have others dispose of the material and thereby avoid incurring the disposal costs itself . . .

American Ash provided the AggRite to Pennsy for use on the Project, which saved American Ash thousands of dollars in disposal costs it otherwise would have incurred. Compl. ¶¶ 8, 9. Accepting these allegations as true and using the Holmesian formula for consideration, it is a fair interpretation of the Complaint that American Ash's promise to supply AggRite free of charge induced Pennsy to assume the detriment of collecting and taking title to the material, and critically, that it was this very detriment, whether assumed by Pennsy or some other successful bidder to the paving subcontract, which induced American Ash to make the promise to provide free AggRite for the project. Paragraphs 8–9 of the Complaint simply belie the notion that American Ash offered AggRite as a conditional gift to the successful bidder on the paving subcontract for which American Ash desired and expected nothing in return.

¶ 11 We turn now to whether consideration is lacking because Pennsy did not allege that American Ash's avoidance of disposal costs was part of any bargaining process between the parties. The Complaint does not allege that the parties discussed or even that Pennsy understood at the time it requested or accepted the AggRite that Pennsy's use of the AggRite would allow American Ash to avoid disposal costs. However, we do not believe such is necessary.

The bargain theory of consideration does not actually require that the parties bargain over the terms of the agreement. . . . According to Holmes, an influential advocate of the bargain theory, what is required [for consideration to exist] is that the promise and the consideration be in 'the relation of reciprocal conventional inducement, each for the other.'

E. Allen Farnsworth, *FARNSWORTH ON CONTRACTS* § 2.6 (1990) (citing O. Holmes, *THE COMMON LAW* 293–94 (1881)); *see also* Restatement (Second) of Contracts § 71 (defining "bargained for" in terms of the Holmesian formula). Here, as explained above, the Complaint alleges facts which, if proven, would show the promise induced the detriment and the detriment induced the promise. This would be consideration. Accordingly, we reverse the dismissal of Count I.

* * *

¶ 22 For all of the foregoing reasons, we reverse the trial court's order granting the demurrers and dismissing the Complaint and remand for further proceedings. Jurisdiction relinquished.

GOTTLIEB v. TROPICANA HOTEL AND CASINO

United States District Court, E.D. Pennsylvania, 2000.
109 F.Supp.2d 324.

BARTLE, DISTRICT JUDGE. * * *

Tropicana, a New Jersey corporation that operates a gambling casino in Atlantic City, offers people membership in its "Diamond Club."

In order to become a Diamond Club member, an individual must visit a promotional booth in the casino, obtain and fill out an application form, and show identification. There is no charge. The application form lists the individual's name, address, telephone number, and e-mail address, and the information provided is entered into the casino's computer database. Each member receives a Diamond Club card bearing a unique identification number. The member then presents or "swipes" the card in a machine each time he or she plays a game at the casino, and the casino obtains information about the member's gambling habits. The casino's marketing department then uses that information to tailor its promotions.

Ms. Gottlieb was, and had been for a number of years, a member of Tropicana's Diamond Club. Upon entering the casino on July 24, 1999, she immediately went to the Fun House Million Dollar Wheel Promotion ("Million Dollar Wheel") and waited in line for approximately five minutes before it was her turn to play. Diamond Club members were entitled to one free spin of the Million Dollar Wheel each day. As its name suggests, the promotion offered participants the chance to win a grand prize of \$1 million. Ms. Gottlieb had played the game several times before. In both New Jersey and Pennsylvania, Tropicana had advertised the Million Dollar Wheel in newspapers, magazines, and with direct mailings, although there is no evidence that the Gottliebs saw any of the advertisements.

Not surprisingly, the parties do not agree as to everything that happened once Ms. Gottlieb started play. However, they do agree that she presented her Diamond Club card, a casino operator swiped it through the card reader, she pressed a button to activate the wheel, and the Million Dollar Wheel began spinning. Ms. Gottlieb contends that the wheel landed on the \$1 million grand prize, but that when it did so, the casino attendant immediately swiped another card through the machine, reactivated the wheel, and then the wheel landed on a prize of two show tickets. Tropicana avers that the wheel simply landed on the lesser prize. The casino says the wheel never landed on \$1 million, and the attendant never intervened and reactivated the wheel.

I.

* * *

Under both Pennsylvania and New Jersey law, adequate consideration is necessary in order to form an enforceable contract. *See Continental Bank of Pennsylvania v. Barclay Riding Academy, Inc.*, 93 N.J. 153, 459 A.2d 1163, 1171 (1983); *Stelmack v. Glen Alden Coal Co.*, 339 Pa. 410, 413-14, 14 A.2d 127 (1940). Consideration is a bargained for exchange, and it may take the form of either a detriment to the promisee or a benefit to the promisor. *See Continental Bank*, 459 A.2d at 1172; *Stelmack*, 339 Pa. at 414, 14 A.2d at 128. In support of its contention that New Jersey law holds that no valid consideration exists when a person participates in a promotion, Tropicana cites only one case, a 1985

unpublished transcript of a ruling of the Superior Court of New Jersey. There, the Resorts International Hotel, Inc., a licensed casino operator in New Jersey, sued the New Jersey Division of Gaming Enforcement seeking a declaratory judgment that three promotions it was conducting, a gin rummy tournament and two stock market games, did not violate New Jersey law. *See Resorts Int'l Hotel, Inc. v. New Jersey Div. of Gaming Enforcement*, No. L39436-85, slip op. (N.J. Super. Ct. Law Div., Atlantic Co. Oct. 25, 1985). The question before the court was whether “something of value” passed from the player to the casino, making the promotions illegal gambling in violation of New Jersey law.³ The court did not determine whether a contract had been formed. It did observe, however, that in the past the presence of only “minute consideration” made a promotion illegal gambling under New Jersey law. *Id.* at 11. Over time, though, the scope of “something of value” had been restricted and “strictly defined.” *Id.* at 12. In other words, “something of value” requires more than the minimum consideration that would support the formation of a contract. The court concluded that nothing “of value” had passed from player to casino in the course of the three promotions. *Id.* at 13. It did not decide, as Tropicana contends, that participation in a promotion cannot constitute adequate consideration for a contract.

We find the decision of the New Jersey Supreme Court in *Lucky Calendar Co. v. Cohen*, 19 N.J. 399, 117 A.2d 487 (1955), *op. adhered to on reh'g*, 20 N.J. 451, 120 A.2d 107 (1956), to be on point. There, an advertising company brought a declaratory judgment action against the Camden County prosecutor, seeking a determination that its promotional advertisement campaign for Acme Super Markets did not violate New Jersey's Lottery Act. The centerpiece of the campaign was a calendar that had Acme coupons bordering it, which was distributed by mass mailings. *See Lucky Calendar*, 117 A.2d at 489-90. The calendar contained an explanation of the “Lucky Calendar Prize Contest.” Entrants had the opportunity to win prizes in monthly drawings. All they had to do to enter was tear the entry form off of the calendar, enter a name, address, and phone number, and have the form deposited in a box at any Acme store. There was no charge, and they were not required to be present for the drawing. *See Id.* at 490.

The question in *Lucky Calendar* was whether there had been consideration for participation in the drawings. The Supreme Court of New Jersey noted that, assuming consideration was required in order for something to qualify as an illegal lottery under the Lottery Act, it need only be the minimum consideration that is necessary to form a contract. *See Id.* at 495. It explained:

3. According to the court, New Jersey law defined “something of value” as “any money or property, any token, object or article exchangeable for money or property or any form of credit or promise directly or indirectly contemplating transfer of money

or property or of any interest therein or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.” *Id.* at 12 (citing N.J. Stat. Ann. § 2C:37-1(d)).

[T]he consideration in a lottery, as in any form of simple contract, need not be money or the promise of money. Nor need it be of intrinsic value; “a rose, a hawk or a peppercorn” will suffice, provided it is what is asked for by the promisor and is not illegal. . . . Whether a “peppercorn” or the filling in and delivering of a coupon is sufficient consideration for a promise depends only on whether it was the requested detriment to the promisee induced by the promise. That is consideration which is regarded as such by the parties.

Id. (citing *Williston on Contracts* (rev. ed.1936), §§ 100 n. 8 and 115).⁴

The court determined that consideration was present “both in the form of a detriment or inconvenience to the promisee at the request of the promisor and of a benefit to the promisor.” *Id.* “Completing the coupon and arranging for the deposit of it in the box” at the store was the detriment to the promisee, and the “increase in volume of business” was the benefit to the promisor and its customer, the owner of the Acme stores. *Id.* at 496. As the court pointed out, “The motives of the plaintiff and its customer [in offering the Lucky Calendar Prize Contest] . . . are in nowise altruistic.” *Id.*

In *Cobaugh v. Klick-Lewis, Inc.*, 385 Pa.Super. 587, 561 A.2d 1248, (1989), the Superior Court of Pennsylvania decided that there was adequate consideration to form a binding contract where a golfer, who was participating in a tournament, shot a hole-in-one after seeing a contest announcement offering a new car to anyone who could ace the particular hole. See *Cobaugh*, 561 A.2d at 1249–50. The court noted that the promisor benefitted from the publicity of the promotional advertising, and the golfer performed an act that he was under no legal obligation to perform. See *Id.* at 1250.

The laws of New Jersey and Pennsylvania similarly hold that the minimal detriment to a participant in a promotional contest is sufficient consideration for a valid contract. As there is no conflict between the laws of the two states, we need not engage in any conflict of laws analysis. It simply does not matter which law we apply.

Ms. Gottlieb had to go to the casino to participate in the promotion. She had to wait in line to spin the wheel. By presenting her Diamond Club card to the casino attendant and allowing it to be swiped into the casino’s machine, she was permitting the casino to gather information about her gambling habits. Additionally, by participating in the game, she was a part of the entertainment that casinos, by their very nature, are designed to offer to all of those present. All of these detriments to Ms. Gottlieb were “the requested detriment[s] to the promisee induced by the promise” of Tropicana to offer her a chance to win \$1 million. *Lucky Calendar*, 117 A.2d at 495. Tropicana’s motives in offering the promotion were “in nowise altruistic.” *Id.* at 496. It offered the promotion in order to generate patronage of and excitement within the

4. The legislature of New Jersey has at the time of this case. repealed the Lottery Act that was in effect

casino. In short, Ms. Gottlieb provided adequate consideration to form a contract with Tropicana.

* * *

Tropicana's motion for summary judgment against Ms. Gottlieb on Count I of the complaint will be denied.

WHITE v. McBRIDE

Supreme Court of Tennessee, 1996.
937 S.W.2d 796.

DROWOTA, JUSTICE.

This case presents the question of whether the plaintiff, attorney Frank White, may recover attorney's fees from the estate of Kasper McGrory. This broad question may, in turn, be divided into two specific subissues: (1) whether the contingency fee contract between White and McGrory is "clearly excessive" under Disciplinary Rule 2-106 of the Code of Professional Responsibility, Tenn. Sup.Ct. R. 8, and is, thus, unenforceable; and (2) if the contingency fee contract is unenforceable, whether White may, nevertheless, recover attorney's fees on a *quantum meruit* basis. For the reasons that follow, we hold that the contract is unenforceable and that White is not entitled to recover under the theory of *quantum meruit*. Because the probate court and the Court of Appeals held that White could not recover under the contract, but could recover on a *quantum meruit* basis, we reverse the latter part of the judgment.

FACTS AND PROCEDURAL HISTORY

* * * The plaintiff, Frank White, was a friend and legal representative of Kasper McGrory and his wife Ruby Leigh Anglin McGrory for several years; in the early 1970s, he drafted wills for them in which each left all his or her assets to the surviving spouse. The McGrorys' relationship, however, apparently deteriorated thereafter. In the fall of 1990, while suffering from an illness that would eventually result in her death, Leigh wrote a holographic will in which she left several specific bequests to family members and friends, but made no mention whatsoever of Kasper. This will was placed in her safe, which contained a great many of her assets, including jewelry, deeds to real property in Texas, and numerous stock certificates.

During Leigh's illness her brother, Roma Anglin, traveled to Memphis from his home in Texas and, with White's assistance, secured a durable power of attorney [from] her. * * * [D]ays before her death, Roma Anglin and Vincent Smith, one of Kasper's nephews, opened Leigh's safe and made a detailed inventory of its contents. After completing the inventory, Roma removed the contents and placed them, pursuant to his power of attorney, in a safe deposit box at a First Tennessee Bank in Memphis. At some point after the inventory was taken, Vincent Smith provided copies of that document to both Kasper McCrory and White.

Leigh died on December 22, 1990; after the funeral, Roma Anglin returned to Texas, taking the holographic will with him. [It later came to light that Roma Anglin had taken the entire contents of the safe deposit back to Texas. Ed.] Soon thereafter Kasper expressed a desire to put Leigh's estate in order, and he asked White to assist him. White agreed to help, and he apparently contacted Roma and Leigh's other relatives in Texas to find out if they would be willing to come to Shelby County and have the estate probated there. Evidently, White did not receive a positive response from these Texas relatives, and he advised Kasper to wait and see what would happen. Kasper continued, however, to insist on taking action with regard to the estate. Thus, on February 28, 1991, he and White entered into an agreement in which White was "to force the probate of Leigh McGrory's estate in Shelby County, Tennessee to ascertain assets, 1/3 of which belong to the husband, in order to recover same." For these services White was to be paid a \$2,500 retainer plus "one-third of gross recovery above and in excess of retainer."

[Under Tennessee law, a surviving spouse is allowed to elect to take 1/3 of his or her deceased spouse's estate despite the provisions of the decedent's will. Ed.]

On March 8, 1991, White filed, in the Shelby County Probate Court, a petition to open Leigh McGrory's estate and to issue letters of administration. * * *

On March 11, 1991, the probate court entered an order appointing James Allison as administrator of Leigh McGrory's estate. * * *

On March 27, 1991, Verda Hogue, Leigh's sister living in Texas, filed a petition in the probate court asking it to (1) admit the will taken from the safe to probate; (2) appoint Verda Hogue executrix of the estate; and (3) revoke the letters of administration previously issued to James Allison. * * *

[The contents of the Tennessee safe deposit box with the exception of the jewelry, were returned to the probate court.] * * * [I]n its April 25, 1991, order denying Verda Hogue's petition to be named executrix, the probate court stated that "an injunction shall issue enjoining all heirs and interested parties from disposition of, or removing from this jurisdiction any personal property belonging to the deceased."

After this initial flurry of activity, the administration of Leigh McGrory's estate languished in the probate court; when Kasper McGrory died on July 22, 1992, no assets had yet been distributed.² Kasper left a will in which he bequeathed virtually his entire estate to the Catholic Diocese of Memphis; he also named Hubert McBride as executor of the will. McBride, in turn, hired attorney James Bland to represent Kasper's estate.

2. The record reveals that relatively little was done with regard to the estate. The only meaningful pleading is White's petition on behalf of Kasper for an elective share on May 31, 1991, and this petition was never

acted upon. Furthermore, several essential matters, such as taxation requirements, were not taken care of by the administrator. * * *

In the fall of 1993, James Kleiser, the chief financial officer of the Memphis Diocese, expressed concern about the fact that the administration of Leigh McGrory's estate was not still complete, and that Kasper's estate had received nothing therefrom. After conferring with Bland, Kleiser decided that it would be preferable to relieve White of his representation of Kasper's interest in Leigh's estate. Bland, thus, wrote White a letter on October 27, 1992, informing him of the decision. In this letter, Bland offered to pay White a reasonable fee for his prior representation of Kasper's interest in Leigh's estate.

White refused to accept this proposal, citing his February 28, 1991, contingency fee contract with Kasper. Thereafter, Kasper's estate filed a petition to substitute Bland as counsel and for approval of attorney's fees, which White opposed. On January 25, 1993, the probate court entered an order substituting counsel; it also set a hearing for March 2, 1993, for a determination of a reasonable fee due White.

Before the hearing was held, however, White filed a claim against Kasper's estate for \$108,291.00; this figure represented approximately one-third of \$349,000, the amount of Leigh's estate to which Kasper was entitled by law. McBride filed an exception to this claim, alleging that the claimed fee was "clearly excessive" under DR 2-106 and was, therefore, unenforceable.

After hearing evidence on these issues, including the testimony of two former probate judges and White's sworn statement as to the amount of time he had expended on the case, the probate court filed a memorandum opinion in January 1994. In this opinion, the probate court held that the fee sought to be charged by White violated DR 2-106. It reasoned as follows:

There is no proof in this record that there was ever any doubt that Mr. McGrory was Ruby Leigh McGrory's surviving spouse and an heir at law, and therefore entitled to, at a minimum, 1/3 of his wife's estate. The record reflects no will contest, no issue raised as to Mr. McGrory being the surviving spouse and no other suit or challenge of any kind in this matter undertaken or defended by Mr. White. Therefore, the only genuine contingency involved was how large a disbursement Mr. McGrory would ultimately receive by operation of law.

[White] in support of his fee request points to the fact that he had to resist the efforts of Mrs. McGrory's relatives to take her assets to Texas. Mr. Allison testified that Mr. White was instrumental in helping him get those assets returned to Memphis. Although Mr. White did help get those assets back, there was never any doubt that these assets belonged to Mrs. McGrory's estate and it was in the power of this court to order them to be returned. . . .

[White also] defends his contingent fee contract by claiming that Mr. McGrory was fully advised of the situation when he entered into the subject contract. The fact that an attorney fully informs his client of the contingent fee contract and its implications does not validate it.

The court in *Florida Bar v. Moriber*, 314 So.2d 145, 149 (Fla.1975), faced a similar defense and stated “even if we presume that the client were an educated, experienced party dealing at arm’s length with Respondent, it is our view that an attorney may still be disciplined for overreaching when fees charged are grossly disproportionate to the services rendered.” In the instant case even if Mr. White fully explained the contingent fee contract to Mr. McGrory, it does not validate the agreement in this case. It is quite possible that Mr. McGrory did not fully understand the matter and had no idea what other attorneys in the area would charge for similar services to obtain his legal share of his wife’s estate, which he would have received by operation of law. The duty must therefore be placed on the attorney to deal fairly and in good faith with his clients in setting fees.

. . . The court finds and so holds that the fee sought to be charged by [White], under said contract, was grossly disproportionate to the services he rendered. The court further finds that the fee sought by [White] under said agreement was clearly excessive and unreasonable, and the court therefore holds that the subject contingent fee contract was in violation of Disciplinary Rule 2–106(a) and said contract was unenforceable. Therefore, [White] cannot recover under it.

Although it rejected White’s claim pursuant to the fee contract, the probate court went on to note that Tennessee law permits a recovery under the theory of *quantum meruit* even if a fee contract were unenforceable. Believing that it was required to award a fee based on *quantum meruit*, the probate court multiplied White’s time on the case, approximately 114 hours, by \$150 per hour—a rate established by expert testimony as the maximum allowable for probate matters.³ After making some minor deductions, the probate court set the fee at \$12,500.

* * *

I.

The first issue for our consideration is whether the contingency fee contract itself and the subsequent attempt to enforce that contract contravened DR 2–106. That rule provides:

(A) A lawyer shall not enter into an agreement for, charge, or attempt to collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

³. Two former Shelby County probate judges, Joseph Evans and James Watson, testified that \$150 per hour was the maximum rate they would award for probate work.

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

Although these factors are to be used as guides, *Connors v. Connors*, 594 S.W.2d 672, 676 (Tenn.1980), ultimately the reasonableness of the fee must depend upon the particular circumstances of the individual case. *Hail v. Nashville Trust Co.*, 31 Tenn.App. 39, 212 S.W.2d 51 (1948).

* * *

Having rejected White's proffered justification of the fee contract, we have no doubt that the probate court was correct in holding that the fee contract violated DR 2-106. Although this estate matter was not without problems, it was, in the scheme of things, not terribly complicated or novel. Certainly it did not require any special skill or expertise, DR 2-106(B)(1), and White does not hold himself out as a probate specialist, worthy of an extraordinarily high fee. DR 2-106(B)(7). There is no indication that this matter prohibited White from undertaking other employment. DR 2-106(B)(2). Furthermore, the results obtained by White were not particularly good, DR 2-106(B)(4), as Kasper had received nothing from Leigh's estate as of the date of his death. Finally, and most dramatically, we note that if White were to be paid in accordance with the fee contract, he would have earned approximately \$950 per hour. This figure is grossly in excess of the \$150 hourly rate, which, judging from the expert testimony, we consider to be at the upper end of "the fee customarily charged in the locality for similar legal services." DR 2-106(B)(3).

Because we agree that the fee sought to be charged was clearly excessive under DR 2-106, we therefore affirm the probate court's holding on this issue.

II.

The next issue for our consideration is whether White may recover fees on a *quantum meruit* basis despite the fact that the fee contract is violative of DR 2–106 and, thus, unenforceable. White argues that settled Tennessee law provides that an attorney may recover fees on the theory of *quantum meruit* even if the fee contract itself is determined to be unenforceable. * * *

The estate, for its part, concedes that Tennessee law does sanction a recovery in *quantum meruit* even if the fee contract were deemed to be unenforceable. However, it argues that this rule is flawed and that attorneys who attempt to charge a fee that is clearly excessive under the disciplinary rules of this court should not be permitted to recover on a theory of *quantum meruit* if that fee is disallowed. To allow such a practice, the estate contends, encourages unscrupulous attorneys to try and exact unreasonable fees from their clients, confident that they will receive a reasonable amount of compensation if their unethical efforts are thwarted.

Initially, we note that the parties are correct in their assessment of Tennessee case law on this point. These decisions, however, have been almost entirely devoid of any supporting rationale for the rule. * * *

* * *

* * * We agree that attorneys should not be penalized for innocent snafus, such as an oversight in drafting that might render their fee contracts unenforceable. To do so would be unfair to the lawyer who had otherwise diligently pursued the client's interests, and it would result in a windfall to the client who had benefitted from these services. Thus, a recovery under a theory of *quantum meruit* is warranted in these situations.

We are of the opinion, however, that an attorney who enters into a fee contract, or attempts to collect a fee, that is clearly excessive under DR 2–106 should not be permitted to take advantage of the *Cummings* rule [allowing recovery despite innocent violations of the rules—ed.]. A violation of DR 2–106 is an ethical transgression of a most flagrant sort as it goes directly to the heart of the fiduciary relationship that exists between attorney and client. To permit an attorney to fall back on the theory of *quantum meruit* when he unsuccessfully fails to collect a clearly excessive fee does absolutely nothing to promote ethical behavior. On the contrary, this interpretation would encourage attorneys to enter exorbitant fee contracts, secure that the safety net of *quantum meruit* is there in case of a subsequent fall.

We do not agree with White's dire prediction that this holding will have a chilling effect on attorneys' willingness to enter contingent fee contracts. Disciplinary Rule 2–106 is not a weapon that a recalcitrant client can employ at will to nullify the fee contract and thereby escape all liability for legal services. Rather, by its very terms the rule condemns only those fees that a lawyer of ordinary prudence would definitely and firmly believe to be excessive and sets forth a list of factors to determine

when a fee is reasonable. Because of the high threshold embodied in the rule, we are confident that DR 2-106 will serve to deny recovery only to those who truly deserve it.

Having so concluded, we reverse that portion of the lower courts' judgment awarding fees on a *quantum meruit* basis. Any prior authority in conflict with this opinion is hereby expressly overruled.

ELEANOR THOMAS v. BENJAMIN THOMAS

Queen's Bench, 1842.
114 Eng.Rep. 330, 2 Q.B. 851.

[Assumpsit upon an agreement, a part of which follows:] "And whereas the said testator, shortly before his death, declared, in the presence of several witnesses, that he was desirous his said wife should have and enjoy during her life, or so long as she should continue his widow, all and singular the dwelling-house," & c., "or 100*l.* out of his personal estate," in addition to the respective legacies and bequests given her in and by his said will; "but such declaration and desire was not reduced to writing in the life-time of the said John Thomas and read over to him; but the said Samuel Thomas and Benjamin Thomas are fully convinced and satisfied that such was the desire of the said testator, and are willing and desirous that such intention should be carried into full effect: Now these presents witness, and it is hereby agreed and declared by and between the parties, that, in consideration of such desire and of the premises," the executors would convey the dwelling-house, & c., to the plaintiff and her assigns during her life, or for so long a time as she should continue a widow and unmarried: "provided nevertheless, and it is hereby further agreed and declared, that the said Eleanor Thomas or her assigns shall and will, at all times during which she shall have possession of the said dwelling-house, & c., pay to the said Samuel Thomas and Benjamin Thomas, their executors, & c., the sum of 1*l.* yearly towards the ground-rent payable in respect of the said dwelling-house and other premises thereto adjoining, and shall and will keep the said dwelling-house and premises in good and tenable repair:" with other provisions not affecting the questions in this case.

The plaintiff was left in possession of the dwelling-house and premises for some time; but the defendant, after the death of his co-executor, refused to execute a conveyance tendered to him for execution pursuant to the agreement, and shortly before the trial brought an ejectment, under which he turned the plaintiff out of possession. * * * Ultimately a verdict was found for the plaintiff on all the issues; and, in Easter term last, a rule nisi was obtained pursuant to the leave reserved.

* * *

LORD DENMAN, C.J. There is nothing in this case but a great deal of ingenuity, and a little wilful blindness to the actual terms of the instrument itself. There is nothing whatever to show that the ground-rent was payable to a superior landlord; and the stipulation for the

payment of it is not a mere proviso, but an express agreement. (His Lordship here read the proviso.) This is in terms an express agreement, and shows a sufficient legal consideration quite independent of the moral feeling which disposed the executors to enter into such a contract. Mr. Williams' definition of consideration is too large: the word *causa* in the passage referred to means one which confers what the law considers a benefit on the party. Then the obligation to repair is one which might impose charges heavier than the value of the life estate.

PATTESON, J. It would be given to *causa* too large a construction if we were to adopt the view urged for the defendant: it would be confounding consideration with motive. Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff: it may be some detriment to the plaintiff, or some benefit to the defendant; but at all events it must be moving from the plaintiff. Now that which is suggested as the consideration here—a pious respect for the wishes of the testator—does not in any way move from the plaintiff: it moves from the testator; therefore, legally speaking, it forms no part of the consideration. Then it is said that, if that be so, there is no consideration at all, it is a mere voluntary gift: but when we look at the agreement we find that this is not a mere proviso that the donee shall take the gift with the burthens; but it is an express agreement to pay what seems to be a fresh apportionment of a ground-rent, and which is made payable not to a superior landlord but to the executors. So that this rent is clearly not something incident to the assignment of the house; for in that case, instead of being payable to the executors, it would have been payable to the landlord. Then as to the repairs: these houses may very possibly be held under a lease containing covenants to repair; but we know nothing about it: for any thing that appears, the liability to repair is first created by this instrument. The proviso certainly struck me at first as Mr. Williams put it, that the rent and repairs were merely attached to the gift by the donors; and, had the instrument been executed by the donors only, there might have been some ground for that construction; but the fact is not so. Then it is suggested that this would be held to be a mere voluntary conveyance as against a subsequent purchaser for value: possibly that might be so: but suppose it would: the plaintiff contracts to take it, and does take it, whatever it is, for better or worse: perhaps a bona fide purchase for a valuable consideration might override it; but that cannot be helped.

COLERIDGE, J. The concessions made in the course of the arguments have in fact disposed of the case. It is conceded that mere motive need not be stated; and we are not obliged to look for the legal consideration in any particular part of the instrument, merely because the consideration is usually stated in some particular part: *ut res magis valeat*, we may look to any part. In this instrument, in the part where it is usual to state the consideration, nothing certainly is expressed but a wish to fulfil the intentions of the testator; but in another part we find an express agreement to pay an annual sum for a particular purpose, and also a distinct agreement to repair. If these had occurred in the first part of the

instrument, it could hardly have been argued that the declaration was not well drawn, and supported by the evidence. As to the suggestion of this being a voluntary conveyance, my impression is that this payment of 1*l.* annually is more than a good consideration: it is a valuable consideration: it is clearly a thing newly created, and not part of the old ground rent.

Rule discharged.

FIEGE v. BOEHM

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

DELAPLAINE, JUDGE.

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

Plaintiff alleged in her declaration substantially as follows: (1) that early in 1951 defendant had sexual intercourse with her although she was unmarried, and as a result thereof she became pregnant, and defendant acknowledged that he was responsible for her pregnancy; (2) that on September 29, 1951, she gave birth to a female child; that defendant is the father of the child; and that he acknowledged on many occasions that he is its father; (3) that before the child was born, defendant agreed to pay all her medical and miscellaneous expenses and to compensate her for the loss of her salary caused by the child's birth, and also to pay her ten dollars per week for its support until it reached the age of 21, upon condition that she would not institute bastardy proceedings against him as long as he made the payments in accordance with the agreement; (4) that she placed the child for adoption on July 13, 1954, and she claimed the following sums: Union Memorial Hospital, \$110; Florence Crittenton Home, \$100; Dr. George Merrill, her physician, \$50; medicines, \$70.35; miscellaneous expenses, \$20.45; loss of earnings for 26 weeks, \$1,105; support of the child, \$1,440; total, \$2,895.80; and (5) that defendant paid her only \$480, and she demanded that he pay her the further sum of \$2,415.80, the balance due under the agreement, but he failed and refused to pay the same.

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

Plaintiff then filed an amended declaration, which contained the additional allegation that, after the breach of the agreement by defendant, she filed a charge with the State's Attorney that defendant was the father of her bastard child; and that on October 8, 1953, the Criminal

Court found defendant not guilty solely on a physician's testimony that "on the basis of certain blood tests made, the defendant can be excluded as the father of the said child, which testimony is not conclusive upon a jury in a trial court."

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

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

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

Defendant further testified that in May, 1953, he went to see plaintiff's physician to make inquiry about blood tests to show the paternity of the child; and that those tests were made and they indicated that it was not possible that he could have been the child's father. He then stopped making payments. Plaintiff thereupon filed a charge of bastardy with the State's Attorney.

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

terized by different combinations of two agglutinogens in the red blood cells and two agglutinins in the serum. Dr. Sachs reported that Fiege's blood group was Type O, Miss Boehm's was Type B, and the infant's was Type A. He further testified that on the basis of these tests, Fiege could not have been the father of the child, as it is impossible for a mating of Type O and Type B to result in a child of Type A.

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

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

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

It was originally held at common law that a child born out of wedlock is *filius nullius*, and a putative father is not under any legal liability to contribute to the support of his illegitimate child, and his promise to do so is unenforceable because it is based on purely a moral obligation. * * *

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

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

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

Of course, a contract of a putative father to provide for the support of his illegitimate child must be based, like any other contract, upon sufficient consideration. * * *

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

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

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

against a certain man that he is the father of the child, but that man promises to pay her in order to prevent bastardy proceedings against him, the forbearance to institute proceedings is not sufficient consideration.

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

* * *

Another analogous case is *Thompson v. Nelson*, 28 Ind. 431. There the plaintiff sought to recover back money which he had paid to compromise a prosecution for bastardy. He claimed that the prosecuting witness was not pregnant and therefore the prosecution was fraudulent. It was held by the Supreme Court of Indiana, however, that the settlement of the prosecution was a good consideration for the payment of the money and it could not be recovered back, inasmuch as it appeared from the evidence that the prosecution was instituted in good faith, and at that time there was reason to believe that the prosecuting witness was pregnant, although it was found out afterwards that she was not pregnant.

* * *

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

* * *

Judgment affirmed, with costs.

Problems

1. F had prepared a will by the terms of which he divided his estate equally among his three children. One of them, P, told F that she was pregnant but did not intend to marry. Thereupon, F revoked his will and executed a new one in which he eliminated P as a co-equal beneficiary. He promised P that he would execute another will according to his original plan if she would have an abortion. P had an abortion and notified her father. However, he died without changing his will. P sues the estate. What result?

2. A promises B that A will sell and deliver a set of books to B if B's father, C, pays \$150 for the set. C pays, but A fails to deliver the books. May B enforce A's promise?

3. A and B entered into a contract under which A would do specified work and B would pay \$10,000 when the work was done. After the work was completed, B said to A, "You have done such a good job that I'll pay you \$5,000 extra." B paid A \$15,000. May B recover \$5,000?

4. H and W were living in a house owned by H's father (F). H made valuable improvements upon the property. Upon H's death F wrote to W and stated: "In view of the fact that my son has made improvements upon the property for which I feel that you should receive adequate compensation, I give you the privilege of purchasing said property for the sum of \$230,000 at my death." F signed and mailed the letter which was received by W. F is now deceased and W wishes to purchase the property. Does she have an enforceable right to purchase it for \$230,000?

5. D promised P that, if P continued to deliver specified kinds of merchandise to D's brother, D would pay for the items already delivered and for the items to be delivered. P duly performed. Does P have a cause of action against D?

6. Defendant put a notice in a trade magazine stating that it needed a reporter with stated qualifications for a "permanent position." The plaintiff replied and was eventually hired. The plaintiff left a job as a baker in which he was receiving the sum of \$50 per week and took the job with the defendant at \$40 per week. After 3 years the plaintiff was fired. Does he have a cause of action for breach of contract?

7. P gave a lease to J.S. for life. J.S. transferred the lease to D. P demanded rent from D. D replied that his understanding was that J.S. had fully paid for the lease and no rent was due. D also stated that, if P would show him a deed proving that rent was due, he would pay it. P showed him such a deed. May P recover on D's promise?

8. D, father, conveyed property to his daughter, P, and stated that it was a Christmas present. As part of the same transaction D agreed to continue to pay off two mortgages that encumbered the property. At the same time one of P's brothers gave P a dollar which in turn she gave to her father. Is there consideration to support D's promise?

9. R Corp. owns a restaurant. S is a supplier of restaurant equipment. D is R Corp.'s principal shareholder. D gave S the following guaranty signed by D: "For and in consideration of \$1 paid by S (receipt of which is hereby acknowledged) I hereby guaranty to S any indebtedness of R Corp. to the extent of \$10,000." The \$1 mentioned was not in fact paid.

At the time D gave S the guaranty, R Corp. was not indebted to S but did become indebted to S in the amount of \$5,000 for restaurant equipment delivered on credit. Is the guaranty enforceable? What result if the \$5,000 debt had been incurred before the guarantee was given?

SECTION 2. PRE-EXISTING DUTY RULE

(*Calamari & Perillo* §§ 4.9—4.11)

SCHWARTZREICH v. BAUMAN-BASCH, INC.

New York Court of Appeals, 1921.
231 N.Y. 196, 131 N.E. 887.

CRANE, J. On the 31st day of August, 1917, the plaintiff entered into the following employment agreement with the defendant:

“BAUMAN-BASCH, INC.,
“Coats & Wraps
“31-33 East 32nd Street
“New York

“Agreement entered into this 31st day of August, 1917, by and between Bauman-Basch, Inc., a domestic corporation, party of the first part, and Louis Schwartzreich, of the Borough of Bronx, City of New York, party of the second part, *Witnesseth*:

“The party of the first part does hereby employ the party of the second part, and the party of the second part agrees to enter the services of the party of the first part as a designer of coats and wraps.

“The employment herein shall commence on the 22nd day of November, 1917, and shall continue for twelve months thereafter. The party of the second part shall receive a salary of Ninety (\$90.00) per week, payable weekly.

“The party of the second part shall devote his entire time and attention to the business of the party of the first part, and shall use his best energies and endeavors in the furtherance of its business.

“*In witness whereof*, the party of the first part has caused its seal to be affixed hereto and these presents to be signed, and the party of the second part has hereunto set his hand and seal the day and year first above written.

BAUMAN-BASCH, INC.

“S. Bauman

“LOUIS SCHWARTZREICH

“In the presence of:”

In October the plaintiff was offered more money by another concern. Mr. Bauman, an officer of the Bauman-Basch, Inc., says that in that month he heard that the plaintiff was going to leave and thereupon had with him the following conversation.

“A. I called him in the office, and I asked him, ‘Is that true that you want to leave us?’ and he said ‘Yes,’ and I said, ‘Mr. Schwartzreich, how can you do that; you are under contract with us?’ He said, ‘Somebody offered me more money.’ * * * I said, ‘How much do they offer you?’ He said, ‘They offered him \$115 a week.’ * * * I said, ‘I cannot get a designer now, and, in view of the fact that I have to send my sample line

out on the road, I will give you a hundred dollars a week rather than to let you go.' He said, 'If you will give me \$100, I will stay.'"

Thereupon Mr. Bauman dictated to his stenographer a new contract, dated October 17, 1917, in the exact words of the first contract and running for the same period, the salary being \$100 a week, which contract was duly executed by the parties and witnessed. Duplicate originals were kept by the plaintiff and defendant.

Simultaneously with the signing of this new contract, the plaintiff's copy of the old contract was either given to or left with Mr. Bauman. He testifies that the plaintiff gave him the paper but that he did not take it from him. The signatures to the old contract plaintiff tore off at the time according to Mr. Bauman.

The plaintiff's version as to the execution of the new contract is as follows:

"A. I told Mr. Bauman that I have an offer from Scheer & Mayer of \$110 a week, and I said to him, 'Do you advise me as a friendly matter—will you advise me as a friendly matter what to do; you see I have a contract with you, and I should not accept the offer of \$110 a week, and I ask you, as a matter of friendship, do you advise me to take it or not.' At the minute he did not say anything, but the day afterwards he came to me in and he said, 'I will give you \$100 a week, and I want you to stay with me.' I said, 'All right, I will accept it; it is very nice of you that you do that, and I appreciate it very much.'"

The plaintiff says that on the 17th of October when the new contract was signed, he gave his copy of the old contract back to Mr. Bauman, who said: "You do not want this contract any more because the new one takes its place."

The plaintiff remained in the defendant's employ until the following December when he was discharged. He brought this action under the contract of October 17th for his damages.

The defense, insisted upon through all the courts, is that there was no consideration for the new contract as the plaintiff was already bound under his agreement of August 31, 1917, to do the same work for the same period at \$90 a week.

The trial justice submitted to the jury the question whether there was a cancellation of the old contract and charged as follows:

"If you find that the \$90 contract was prior to or at the time of the execution of the \$100 contract cancelled and revoked by the parties by their mutual consent, then it is your duty to find that there was a consideration for the making of the contract in suit, viz., the \$100 contract and, in that event, the plaintiff would be entitled to your verdict for such damages as you may find resulted proximately, naturally and necessarily in consequence of the plaintiff's discharge prior to the termination of the contract period of which I shall speak later on."

Defendant's counsel thereupon excepted to that portion of the charge in which the court permitted the jury to find that the prior contract may have been canceled simultaneously with the execution of the other agreement. Again the court said:

“The test question is whether by word or by act, either prior to or at the time of the signing of the \$100 contract, these parties mutually agreed that the old contract from that instant should be null and void.”

The jury having rendered a verdict for the plaintiff the trial justice set it aside and dismissed the complaint on the ground that there was not sufficient evidence that the first contract was canceled to warrant the jury’s findings.

The above quotations from the record show that a question of fact was presented and that the evidence most favorable for the plaintiff would sustain a finding that the first contract was destroyed, canceled or abrogated by the consent of both parties.

The Appellate Term was right in reversing this ruling. Instead of granting a new trial, however, it reinstated the verdict of the jury and the judgment for the plaintiff. The question remains, therefore, whether the charge of the court as above given, was a correct statement of the law or whether on all the evidence in the plaintiff’s favor a cause of action was made out.

Can a contract of employment be set aside or terminated by the parties to it and a new one made or substituted in its place? If so, is it competent to end the one and make the other at the same time?

It has been repeatedly held that a promise made to induce a party to do that which he is already bound by contract to perform is without consideration. But the cases in this state, while enforcing this rule, also recognize that a contract may be canceled by mutual consent and a new one made. Thus *Vanderbilt v. Schreyer* (91 N.Y. 392, 402) held that it was no consideration for a guaranty that a party promise to do only that which he was before legally bound to perform. This court stated, however:

“It would doubtless be competent for parties to cancel an existing contract and make a new one to complete the same work at a different rate of compensation, but it seems that it would be essential to its validity that there should be a valid cancellation of the original contract. Such was the case of *Lattimore v. Harsen* (14 Johns. 330).”

In *Cosgray v. New England Piano Co.* (10 App.Div. 351, 353) it was decided that where the plaintiff had bound himself to work for a year at \$30 a week, there was no consideration for a promise thereafter made by the defendant that he should notwithstanding receive \$1,800 a year. Here it will be noticed there was no termination of the first agreement which gave occasion for BARTLETT, J., to say in the opinion:

“The case might be different if the parties had, by word of mouth, agreed wholly to abrogate and do away with a pre-existing written contract in regard to service and compensation, and had substituted for it another agreement.”

Any change in an existing contract, such as a modification of the rate of compensation, or a supplemental agreement, must have a new consideration to support it. In such a case the contract is continued, not ended. Where, however, an existing contract is terminated by consent of

both parties and a new one executed in its place and stead, we have a different situation and the mutual promises are again a consideration. Very little difference may appear in a mere change of compensation in an existing and continuing contract and a termination of one contract and the making of a new one for the same time and work, but at an increased compensation. There is, however, a marked difference in principle. Where the new contract gives any new privilege or advantage to the promisor, a consideration has been recognized, though in the main it is the same contract. (*Triangle Waist Co., Inc. v. Todd*, 223 N.Y. 27.)

If this which we are now holding were not the rule, parties having once made a contract would be prevented from changing it no matter how willing and desirous they might be to do so, unless the terms conferred an additional benefit to the promisor.

All concede that an agreement may be rescinded by mutual consent and a new agreement made thereafter on any terms to which the parties may assent. Prof. Williston in his work on Contracts says (Vol. I, § 130a): "A rescission followed shortly afterwards by a new agreement in regard to the same subject-matter would create the legal obligations provided in the subsequent agreement."

The same effect follows in our judgment from a new contract entered into at the same time the old one is destroyed and rescinded by mutual consent. The determining factor is the rescission by consent. Provided this is the expressed and acted upon intention, the time of the rescission, whether a moment before or at the same time as the making of the new contract, is unimportant.

The decisions are numerous and divergent where one of the parties to a contract refuses to perform unless paid an additional amount. Some states hold the new promise to pay the demand binding though there be no rescission. It is said that the new promise is given to secure performance in place of an action for damages for not performing (*Parrot v. Mexican Central Railway Co.*, 207 Mass. 184), or that the new contract is evidence of the rescission of the old one and it is the same as if no previous contract had been made (*Coyner v. Lynde*, 10 Ind. 282; *Connelly v. Devoe*, 37 Conn. 570; *Goebel v. Linn*, 47 Mich. 489), or that unforeseen difficulties and hardships modify the rule (*King v. Duluth, M. & N. Ry. Co.*, 61 Minn. 482), or that the new contract is an attempt to mitigate the damages which may flow from the breach of the first. (*Endriss v. Belle Isle Ice Co.*, 49 Mich. 279.) (See Anson's Law of Contract [Huffcut's Amer.Ed.], p. 114, sec. 138.) * * *

The contrary has been held in such cases as *Carpenter v. Taylor* (164 N.Y. 171); *Price v. Press Publishing Co.* (117 App.Div. 854); *Davis & Company v. Morgan* (117 Ga. 504); *Alaska Packers' Association v. Domenico* (117 Fed.Rep. 99); *Conover v. Stillwell* (34 N.J.L. 54, 57); *Erny v. Sauer* (234 Penn.St. 330). In none of these cases, however, was there a full and complete rescission of the old contract and it is this with which we are dealing in this case. Rescission is not presumed; it is expressed; the old contract is not continued with modifications; it is ended and a new one made.

The efforts of the courts to give a legal reason for holding good a promise to pay an additional compensation for the fulfillment of a pre-existing contract is commented upon in note upon *Abbott v. Doane* (163 Mass. 433) in 34 L.R.A. 33, 39, and the result reached is stated as follows: "The almost universal rule is that without any express rescission of the old contract, the promise is made simply for additional compensation, making the new promise a mere *nudum pactum*." As before stated, in this case we have an express rescission and a new contract.

There is no reason that we can see why the parties to a contract may not come together and agree to cancel and rescind an existing contract, making a new one in its place. We are also of the opinion that reason and authority support the conclusion that both transactions can take place at the same time.

For the reasons here stated, the charge of the trial court was correct, and the judgments of the Appellate Division and the Appellate Term should be affirmed, with costs.

Judgments affirmed.

ANGEL v. MURRAY

Supreme Court of Rhode Island, 1974.
113 R.I. 482, 322 A.2d 630.

ROBERTS, CHIEF JUSTICE.

This is a civil action brought by Alfred L. Angel and others against John E. Murray, Jr., Director of Finance of the City of Newport, the city of Newport, and James L. Maher, alleging that Maher had illegally been paid the sum of \$20,000 by the Director of Finance and praying that the defendant Maher be ordered to repay the city such sum. The case was heard by a justice of the Superior Court, sitting without a jury, who entered a judgment ordering Maher to repay the sum of \$20,000 to the city of Newport. Maher is now before this court prosecuting an appeal.

The record discloses that Maher has provided the city of Newport with a refuse-collection service under a series of five-year contracts beginning in 1946. On March 12, 1964, Maher and the city entered into another such contract for a period of five years commencing on July 1, 1964, and terminating on June 30, 1969. The contract provided, among other things, that Maher would receive \$137,000 per year in return for collecting and removing all combustible and noncombustible waste materials generated within the city.

In June of 1967 Maher requested an additional \$10,000 per year from the city council because there had been a substantial increase in the cost of collection due to an unexpected and unanticipated increase of 400 new dwelling units. Maher's testimony, which is uncontradicted, indicates the 1964 contract had been predicated on the fact that since 1946 there had been an average increase of 20 to 25 new dwelling units per year. After a public meeting of the city council where Maher explained in detail the reasons for his request and was questioned by

members of the city council, the city council agreed to pay him an additional \$10,000 for the year ending on June 30, 1968. Maher made a similar request again in June of 1968 for the same reasons, and the city council again agreed to pay an additional \$10,000 for the year ending on June 30, 1969.

The trial justice found that each such \$10,000 payment was made in violation of law. His decision, as we understand it, is premised on two independent grounds. * * * Second, he found that Maher was not entitled to extra compensation because the original contract already required him to collect all refuse generated within the city and, therefore, included the 400 additional units. The trial justice further found that these 400 additional units were within the contemplation of the parties when they entered into the contract. It appears that he based this portion of the decision upon the rule that Maher had a preexisting duty to collect the refuse generated by the 400 additional units, and thus there was no consideration for the two additional payments.

[The court points out that it is illegal for a municipality to pay out money as a gift; if there is no consideration the payments were illegal gifts. Ed.]

* * *

It is generally held that a modification of a contract is itself a contract, which is unenforceable unless supported by consideration. *See* Simpson, [Contracts] § 93 [(2d ed. 1965)]. In *Rose v. Daniels*, 8 R.I. 381 (1866), this court held that an agreement by a debtor with a creditor to discharge a debt for a sum of money less than the amount due is unenforceable because it was not supported by consideration.

Rose is a perfect example of the preexisting duty rule. Under this rule an agreement modifying a contract is not supported by consideration if one of the parties to the agreement does or promises to do something that he is legally obligated to do or refrains or promises to refrain from doing something he is not legally privileged to do. *See* Calamari & Perillo, Contracts § 60 (1970); 1A Corbin, Contracts §§ 171-72 (1963); 1 Williston, [Contracts] § 130 [(Jaeger 3d ed. 1957)]; Annot., 12 A.L.R.2d 78 (1950). In *Rose* there was no consideration for the new agreement because the debtor was already legally obligated to repay the full amount of the debt.

Although the preexisting duty rule is followed by most jurisdictions, a small minority of jurisdictions, Massachusetts, for example, find that there is consideration for a promise to perform what one is already legally obligated to do because the new promise is given in place of an action for damages to secure performance. *See* *Swartz v. Lieberman*, 323 Mass. 109, 80 N.E.2d 5 (1948); *Munroe v. Perkins*, 26 Mass. (9 Pick.) 298 (1830). *Swartz* is premised on the theory that a promisor's forbearance of the power to breach his original agreement and be sued in an action for damages is consideration for a subsequent agreement by the promisee to pay extra compensation. This rule, however, has been widely

criticized as an anomaly. See Calamari & Perillo, *supra*, § 61; Annot., 12 A.L.R.2d 78, 85-90 (1950).

The primary purpose of the preexisting duty rule is to prevent what has been referred to as the "hold-up game." See 1A Corbin, *supra*, § 171. A classic example of the "hold-up game" is found in *Alaska Packers' Ass'n v. Domenico*, 117 F. 99 (9th Cir.1902). There 21 seamen entered into a written contract with Domenico to sail from San Francisco to Pyramid Harbor, Alaska. They were to work as sailors and fishermen out of Pyramid Harbor during the fishing season of 1900. The contract specified that each man would be paid \$50 plus two cents for each red salmon he caught. Subsequent to their arrival at Pyramid Harbor, the men stopped work and demanded an additional \$50. They threatened to return to San Francisco if Domenico did not agree to their demand. Since it was impossible for Domenico to find other men, he agreed to pay the men an additional \$50. After they returned to San Francisco, Domenico refused to pay the men an additional \$50. The court found that the subsequent agreement to pay the men an additional \$50 was not supported by consideration because the men had a preexisting duty to work on the ship under the original contract, and thus the subsequent agreement was unenforceable.

Another example of the "hold-up game" is found in the area of construction contracts. Frequently, a contractor will refuse to complete work under an unprofitable contract unless he is awarded additional compensation. The courts have generally held that a subsequent agreement to award additional compensation is unenforceable if the contractor is only performing work which would have been required of him under the original contract. * * *

These examples clearly illustrate that the courts will not enforce an agreement that has been procured by coercion or duress and will hold the parties to their original contract regardless of whether it is profitable or unprofitable. However, the courts have been reluctant to apply the preexisting duty rule when a party to a contract encounters unanticipated difficulties and the other party, not influenced by coercion or duress, voluntarily agrees to pay additional compensation for work already required to be performed under the contract. For example, the courts have found that the original contract was rescinded, *Linz v. Schuck*, 106 Md. 220, 67 A. 286 (1907); abandoned, *Connelly v. Devoe*, 37 Conn. 570 (1871), or waived, *Michaud v. McGregor*, 61 Minn. 198, 63 N.W. 479 (1895).

Although the preexisting duty rule has served a useful purpose insofar as it deters parties from using coercion and duress to obtain additional compensation, it has been widely criticized as a general rule of law. With regard to the preexisting duty rule, one legal scholar has stated: "There has been a growing doubt as to the soundness of this doctrine as a matter of social policy. * * * In certain classes of cases, this doubt has influenced courts to refuse to apply the rule, or to ignore it, in their actual decisions. Like other legal rules, this rule is in process of growth and change, the process being more active here than in most

instances. The result of this is that a court should no longer accept this rule as fully established. It should never use it as the major premise of a decision, at least without giving careful thought to the circumstances of the particular case, to the moral deserts of the parties, and to the social feelings and interests that are involved. It is certain that the rule, stated in general and all-inclusive terms, is no longer so well-settled that a court must apply it though the heavens fall." 1A Corbin, *supra*, § 171; *see also* Calamari & Perillo, *supra*, § 61.

The modern trend appears to recognize the necessity that courts should enforce agreements modifying contracts when unexpected or unanticipated difficulties arise during the course of the performance of a contract, even though there is no consideration for the modification, as long as the parties agree voluntarily.

Under the Uniform Commercial Code, § 2-209(1), which has been adopted by 49 states, "[a]n agreement modifying a contract [for the sale of goods] needs no consideration to be binding." See G.L.1956 (1969 Reenactment) § 6A-2-209(1). Although at first blush this section appears to validate modifications obtained by coercion and duress, the comments to this section indicate that a modification under this section must meet the test of good faith imposed by the Code, and a modification obtained by extortion without a legitimate commercial reason is unenforceable.

The modern trend away from a rigid application of the preexisting duty rule is reflected by § 89D(a) [now 89(a), ed.] of the American Law Institute's Restatement Second of the Law of Contracts, which provides: "A promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made * * *."

We believe that § 89D(a) is the proper rule of law and find it applicable to the facts of this case. It not only prohibits modifications obtained by coercion, duress, or extortion but also fulfills society's expectation that agreements entered into voluntarily will be enforced by the courts. *See generally* Horwitz, *The Historical Foundations of Modern Contract Law*, 87 Harv.L.Rev. 917 (1974). Section 89D(a), of course, does not compel a modification of an unprofitable or unfair contract; it only enforces a modification if the parties voluntarily agree and if (1) the promise modifying the original contract was made before the contract was fully performed on either side, (2) the underlying circumstances which prompted the modification were unanticipated by the parties, and (3) the modification is fair and equitable.

The evidence, which is uncontradicted, reveals that in June of 1968 Maher requested the city council to pay him an additional \$10,000 for the year beginning on July 1, 1968, and ending on June 30, 1969. This request was made at a public meeting of the city council, where Maher explained in detail his reasons for making the request. Thereafter, the city council voted to authorize the Mayor to sign an amendment to the 1964 contract which provided that Maher would receive an additional

\$10,000 per year for the duration of the contract. Under such circumstances we have no doubt that the city voluntarily agreed to modify the 1964 contract.

Having determined the voluntariness of this agreement, we turn our attention to the three criteria delineated above. First, the modification was made in June of 1968 at a time when the five-year contract which was made in 1964 had not been fully performed by either party. Second, although the 1964 contract provided that Maher collect all refuse generated within the city, it appears this contract was premised on Maher's past experience that the number of refuse-generating units would increase at a rate of 20 to 25 per year. Furthermore, the evidence is uncontradicted that the 1967-1968 increase of 400 units "went beyond any previous expectation." Clearly, the circumstances which prompted the city council to modify the 1964 contract were unanticipated. Third, although the evidence does not indicate what proportion of the total this increase comprised, the evidence does indicate that it was a "substantial" increase. In light of this, we cannot say that the council's agreement to pay Maher the \$10,000 increase was not fair and equitable in the circumstances.

The judgment appealed from is reversed, and the cause is remanded to the Superior Court for entry of judgment for the defendants.

CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

Article 29 (1).

A contract may be modified or terminated by the mere agreement of the parties.

IN RE MORTON ALLAN SEGALL, ATTORNEY

Supreme Court of Illinois, 1987.
117 Ill.2d 1, 509 N.E.2d 988, 109 Ill.Dec. 149.

* * *

JUSTICE THOMAS J. MORAN delivered the opinion of the court:

The Administrator of the Attorney Registration and Disciplinary Commission filed a three-count complaint charging respondent, Morton Allan Segall, with professional misconduct. Count I of the complaint charged that respondent's attempts to settle a lawsuit brought against him by the Carte Blanche Corporation violated Rules 1-102(a)(4), 1-102(a)(5) and 7-104(a)(1) of the Code of Professional Responsibility (87 Ill.2d Rules 1-102(a)(4), 1-102(a)(5), 7-104(a)(1)). Count II charged the same violations with regard to respondent's attempts to settle a lawsuit brought against him by the Amoco Oil Company. Count III charged that respondent's repeated refusal to allow Amoco to take his deposition violated Rule 1-102(a)(5) (87 Ill.2d R. 1-102(a)(5)). The Hearing Board found no ethical violation with regard to count III, but found against

respondent on counts I and II. The Hearing Board recommended that he be censured. The Review Board agreed with the Hearing Board's findings but recommended that a two-year suspension be imposed. Respondent filed exceptions in this court pursuant to Rule 753(e)(5) (103 Ill.2d R. 753(e)(5)).

The issue before this court is what, if any, sanctions should be imposed.

The complaint in the Carte Blanche suit alleged that respondent incurred numerous credit card charges, beginning on May 18, 1979. As of the date of the complaint, November 24, 1981, the unpaid balance on the account was alleged to be \$12,837.42. On February 8, 1982, a default judgment was entered in favor of Carte Blanche for \$12,837.42, plus costs.

Respondent moved to vacate the default judgment, claiming lack of notice. On October 4, 1982, while this motion was pending, respondent, who was in Florida at the time, directed his secretary to send a check for \$95.60 directly to Carte Blanche. He knew at the time that Carte Blanche was represented by counsel, but he nonetheless bypassed that counsel. Typed on the reverse of the check was an attempted limitation, stating that "acceptance, negotiation or endorsement of this draft shall constitute a full and final release in settlement of all claims and causes of action for Acct. No. 944-148-645-4 in the name of Mort A. Segall." Allegedly accompanying the check was a letter which referenced the pending lawsuit, and read as follows:

"Gentlemen:

In order to settle all pending claims and disputes in connection with the above entitled litigation for the above account, and to avoid the expense and effort of further litigation, I am enclosing herewith and tendering my check in the sum of \$95.60 in full settlement and payment of any and all claims, causes of action and matters in dispute as referenced above and now pending so that all claims between your company and the undersigned can be resolved amicably and finally.

If you agree with this offer of settlement to resolve all pending disputes and all claims with reference to the above, then your acceptance, negotiation or endorsement of the enclosed check shall constitute a full and final release, settlement and satisfaction of all claims and disputed actions with reference to all pending disputes, claims and accounts as referenced above, and you need not acknowledge this letter as the cancelled check will be sufficient for my records to show that you have agreed to accept the enclosed payment in full satisfaction and settlement and release of all pending matters and claims and accounts disputed as referenced above."

On November 22, 1982, respondent's first motion to vacate the judgment was denied. On December 10, 1982, respondent filed another motion to vacate the judgment. Attached to the motion were copies of the above letter and the negotiated check. In support of the motion

respondent claimed that the negotiated check evidenced a settlement of Carte Blanche's claims. The trial court, however, found that there had been no accord and satisfaction, and dismissed the motion.

Respondent appealed, but the appellate court affirmed the trial court's judgment in an unpublished order (*Carte Blanche Corp. v. Segall* (1983), 115 Ill.App.3d 1158, 78 Ill.Dec. 253, 461 N.E.2d 1087). * * * On May 24, 1984, more than 10 months after the appellate court order was issued, respondent paid the judgment in full.

The facts in the Amoco case were very similar. Amoco's amended complaint alleged that respondent, as of August 26, 1980, owed a balance of \$11,238.16 for credit purchases between January 1, 1979, and June 1, 1980. On October 4, 1982, the same date as his letter and check to Carte Blanche, respondent directed his secretary to send Amoco a letter and a check for \$48.76. Except for the account number and the lawsuit referenced, the letter and the endorsement restriction on the check were identical to those in the Carte Blanche case. As in the Carte Blanche case, respondent knowingly bypassed Amoco's lawyers, sending the check directly to Amoco.

On November 10, 1982, respondent filed a motion to dismiss Amoco's suit, claiming that the negotiated check evidenced a settlement. Respondent also filed a motion to "quash" his own deposition, for which he had failed to appear despite two court orders specifically requiring him to do so. On December 16, 1982, respondent's motions were denied, and a judgment for \$11,238.16, plus costs, was entered against him as a sanction for his repeated refusal to be deposed. This judgment was upheld by the appellate court. (For further details, see *Amoco Oil Co. v. Segall* (1983), 118 Ill.App.3d 1002, 74 Ill.Dec. 447, 455 N.E.2d 876.) Approximately three months later respondent paid the judgment in full.

Disciplinary Rule 7-104 states, in part:

"(a) During the course of his representation of a client a lawyer shall not

(1) communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." (87 Ill.2d R. 7-104(a)(1).)

Respondent admits that in each of the lawsuits he knowingly contacted a party represented by counsel without obtaining counsel's consent. He argues, however, that these contacts were made on his own behalf as a litigant and thus were not "[d]uring the course of his representation of a client." We disagree. An attorney who is himself a party to the litigation represents himself when he contacts an opposing party. Rule 7-104(a)(1) is designed to protect litigants represented by counsel from direct contacts by opposing counsel. A party, having employed counsel to act as an intermediary between himself and opposing counsel, does not lose the protection of the rule merely because opposing counsel is also a party to the litigation. Consequently, an attorney who is

himself a litigant may be disciplined under Rule 7-104(a)(1) when, as in the case at bar, he directly contacts an opposing party without permission from that party's counsel.

The Administrator also alleges that respondent's conduct violated Disciplinary Rules 1-102(a)(4) and (5). Rule 1-102 reads in pertinent part:

“(a) A lawyer shall not

* * *

(4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; or

(5) engage in conduct that is prejudicial to the administration of justice.” 87 Ill.2d R. 1-102.

The Administrator argues that respondent's conduct was deceptive and was an attempt to defraud Carte Blanche and Amoco, in violation of Rule 1-102(a)(4). The Administrator also argues that, by representing to the court in each case that the suit had been settled, respondent attempted a fraud on the court, in violation of Rule 1-102(a)(5).

In both circuit court cases the court found that the plaintiff's negotiation of respondent's check did not establish an accord and satisfaction because respondent did not sufficiently prove that the letter explaining the conditional settlement was actually sent along with the checks. In the Amoco case, for example, the appellate court pointed out that respondent claimed that his secretary, Barbara Butts, sent the letter at his direction while he was in Florida. However, Butts neither testified nor supplied an affidavit, so there was no evidence as to when and where the letter was sent, or if it was sent at all. (*Amoco Oil Co. v. Segall* (1983), 118 Ill.App.3d 1002, 1012, 74 Ill.Dec. 447, 455 N.E.2d 876.) If the Administrator had been able to prove that respondent knew that the letters had never been sent, then it would have been obvious that respondent had committed fraud. The Administrator, however, specifically alleged that respondent *did* send the letters to Amoco and Carte Blanche. Since this allegation was admitted by respondent we must assume that the letters were in fact sent. The Administrator nonetheless argues that the letters, together with the circumstances under which they were sent, amounted to an attempted fraud.

This court has applied a broad definition of fraud, finding fraud whenever there is conduct “calculated to deceive.” (*In re Armentrout* (1983), 99 Ill.2d 242, 251, 75 Ill.Dec. 703, 457 N.E.2d 1262; accord, *People ex rel. Chicago Bar Association v. Gilmore* (1931), 345 Ill. 28, 46, 177 N.E. 710.) We agree with the Hearing Board and the Review Board that respondent's conduct, taken as a whole, was calculated to deceive Carte Blanche and Amoco by obtaining settlements of large claims for *de minimis* amounts. Respondent bypassed each plaintiff's attorney in these cases and sent each plaintiff a letter which was designed to make the plaintiffs' agents believe that the minimal amount tendered was the amount actually due. The letters did not state the actual amount due,

and, in the Carte Blanche case, did not even mention that the dispute had been reduced to a judgment. We agree with the Review Board that there is “no rational basis upon which we can believe that Respondent thought that he could actually settle claims of \$12,837.42 and \$11,238.16 for \$95.60 and \$48.76, respectively.” We therefore agree that his conduct violated Rule 1–102(a)(4).

Also, by filing motions to dismiss the suits due to the purported settlements, respondent attempted to involve the courts in his fraudulent scheme. Involving the courts in such a scheme must be considered “prejudicial to the administration of justice,” and thus respondent’s conduct also violated Rule 1–102(a)(5).

While respondent’s attempted fraud was not successful, an attempted deception is as serious an ethical violation as a successful one. Together with the violation of Rule 7–104(a)(1) we feel that respondent’s attempted fraud was serious enough to warrant a substantial suspension. We therefore order that respondent be suspended from the practice of law for a period of two years from the date of this opinion.

Respondent suspended.

[CLARK, C.J., dissented and filed opinion in which SIMON, J., joined.]

KIBLER v. FRANK L. GARRETT & SONS, INC.

Supreme Court of Washington, En Banc, 1968.
73 Wash.2d 523, 439 P.2d 416.

ROSELLINI, JUDGE. This action on a contract was dismissed at the close of the plaintiff’s evidence, the trial court finding, although it had not been pleaded, that there had been an accord and satisfaction. The plaintiff has appealed.

The facts are these: The plaintiff was hired by the defendant to harvest his wheat crop. There was no agreement on the price to be paid. According to the plaintiff’s evidence, he told the defendant that, if the wheat crop proved to be more than 50 bushels per acre, the price would be 18 cents per bushel and perhaps more, depending on the circumstances. He testified that the crop was in excess of 50 bushels per acre and there were harvesting difficulties which had not been anticipated due to the presence of guy wires, roads, and risers. He sent the defendant a bill based upon a charge of 25 cents per bushel, but later sent a corrected bill for \$876.20 based on 20 cents per bushel. The response which he eventually received to this billing was the following letter and a check for \$444:

This check is for \$10.00 an acre, and 37 acres is \$370.00. This is what you offered to harvest our wheat for. Seeing that the wheat was fairly heavy, we are paying you \$2.00 an acre more, which makes a total of \$444.00. Your total pay is 50% more than we paid last year for harvesting the same acres, and 20% more than you agreed to do it for. Billing on this acreage for approximately \$30.00 an acre is ridiculous.

Upon receipt of these items, the plaintiff called his attorney and asked if he could safely deposit the check. The attorney asked him to read the notations on it. He read the typewritten notation: "Harvesting Wheat Washington Ranch" and the printed words "Frank L. Garrett & Sons, Inc.", but he did not see a line of fine print on the check which read: "By endorsement this check when paid is accepted in full payment of the following account." The attorney told him he could deposit the check. He did not communicate further with the defendant but proceeded to bring this action.

As we have said, accord and satisfaction was not pleaded as a defense. However, the trial court, observing the fine print on the check and drawing it to the attention of the parties, concluded that, taken in conjunction with the letter, this notation established as a matter of law that there had been an accord and satisfaction.

The rules governing the question of accord and satisfaction are set forth in the leading case of *Graham v. New York Life Ins. Co.*, 182 Wash. 612, 47 P.2d 1029 (1935). They are as follows:

(1) Whether there has been an accord and satisfaction in any given case is generally a mixed question of law and fact.

(2) But where the facts are not in controversy, it is purely a question of law for the court.

(3) To create an accord and satisfaction in law, there must be a meeting of minds of the parties upon the subject and an intention on the part of both to make such an agreement.

(4) An accord and satisfaction is founded on contract, and a consideration therefor is as necessary as for any other contract.

(5) Where the debtor pays what in law he is bound to pay and what he admits that he owes, such payment by the debtor and its acceptance by the creditor, even though tendered as payment in full of a larger indebtedness, do not operate as an accord and satisfaction of the entire indebtedness, because there is no consideration therefor.

(6) Generally speaking, when a debtor sends to his creditor a check in an amount that the debtor is willing to pay, and at the same time informs the creditor that the debtor intends the check to be considered as full payment, then, by accepting and cashing the check, the creditor agrees to the settlement and cannot thereafter seek additional compensation.

(7) But the rule just stated does not apply where there is an agreement that a certain sum shall be paid on account and not in full settlement, and the sending of a check stating that it is in full settlement does not, as a matter of law, under such circumstances, effect an accord and satisfaction.

(8) Nor does that rule apply where the debt or amount is liquidated or certain and due, unless there is a new consideration.

(9) Where the amount of a debt or obligation is unliquidated or in dispute, then the tender by the debtor of a certain sum in full payment of the debt, followed by acceptance and retention of the amount ten-

dered, establishes an accord and satisfaction; but if the amount be liquidated or undisputed, then such tender and acceptance do not establish an accord and satisfaction.

The facts are not in dispute in this case, therefore the question is one of law. Did the letter and the check and the cashing of the latter constitute an accord and satisfaction? The claim was unliquidated; therefore, if the check was intended as full payment and that fact was communicated to the plaintiff, his cashing of the check completed the accord.

The important question to determine is whether there was a meeting of the minds. In order for this to have occurred, the defendant must have made his intention clear to the plaintiff. The trial court was of the opinion that the letter, when read in conjunction with the fine print on the check, manifested that intention.

The letter itself does not state that the check is sent in full payment. Such an intent might be gleaned from the language that he considers it all that is reasonably owing to the plaintiff. Yet the last sentence equivocates. The amount asked by the plaintiff is ridiculous, the defendant says, but he does not say, "I will pay no more than the amount enclosed." We think the letter leaves the question of the amount owed open to further negotiation. The fact that the plaintiff did not attempt further negotiation does not alter the import of the language of the letter.

* * *

Since there were no conditions attached to the acceptance of the check in this case, the letter was not an offer of an accord.

Was the condition sufficiently expressed on the check itself? It is unquestioned that the plaintiff did not see the fine print, and his attorney did not see it. The defendant's attorney did not notice it, apparently, until it was called to his attention at the trial. This was a form check, presumably used in the payment of all of the defendant's accounts, whether the payments made were payments in full or partial payments. There was nothing on the check to indicate that the language was particularly applicable to the plaintiff's claim. The trial court felt that the tone of the letter cast upon the plaintiff the duty to examine the check minutely or cash it at his peril. We do not agree. The burden is upon the party alleging an accord and satisfaction to show that there was indeed a meeting of the minds. See *Brear v. Klinker Sand & Gravel Co.*, 60 Wash.2d 443, 374 P.2d 370 (1962). If the language contained in the fine print on the check was of significance in forming an accord, it must appear that the fact of its significance was brought to the plaintiff's attention. The evidence is to the contrary.

* * *

We hold that the proof in this case did not show an accord and satisfaction, since while the claim was disputed, there was no showing that the defendant manifested to the plaintiff his intention to pay no

more than the amount which he remitted. To sustain the trial court would necessitate a holding that payment of an amount less than that claimed by the creditor operates as an accord and satisfaction if the amount paid is all that the debtor admits that he owes. This is contrary to the rule we have quoted from *Ingram v. Sauset*, supra, and would place a creditor at a disadvantage in accepting partial payments from a reluctant debtor, since by doing so he would be jeopardizing his right to receive the balance, even though in law that balance was in fact due him. It is true that the courts look with favor on compromise, but this means genuine compromise, arrived at through mutual agreement, and not compromise fallen into inadvertently.

The plaintiff's witnesses testified that the reasonable value of his services was close to the amount which he claimed was due him. The defendant did not present evidence on this question, since the court dismissed the action at the close of the plaintiff's case. As the record now stands, there is no evidence of overreaching on the part of the plaintiff.

The judgment is reversed and the cause remanded for a new trial.

* * *

HALE, J. (dissenting). The facts of this case, in my judgment, present a classic example of accord and satisfaction, and I would, therefore, affirm the trial court. After all, the question of whether the parties have resolved their differences by an accord and satisfaction is largely a question of fact to be determined by the jury, or, as in this case, by the court as trier of the fact. 1 Am.Jur.2d, *Accord & Satisfaction* § 11.

I agree that the printed notation on the check was insufficient to engender an accord and satisfaction, but the events leading up to the delivery of the check and the circumstance of its cashing provided more than adequate evidence, in my view, to support the trial court's factual finding that Mr. Kibler knowingly cashed the check in full payment and satisfaction of the debt for which it had been tendered. Here are the circumstances as I see them which led inexorably to an accord and satisfaction.

* * *

The instant case began with an unliquidated claim, an agreement to harvest the wheat for an unspecified sum running from \$10 per acre to a greater amount, depending vaguely on unspecified contingencies. Then the creditor sent a bill demanding 25 cents per bushel for a total demand of \$1,095.25. A few days later he sent his debtor a corrected or new billing at 20 cents per bushel in the total sum of \$876.20, thus conclusively establishing the unliquidated and uncertain nature of the obligation. The debt at the outset was unliquidated and for an uncertain amount; it remained so through the first erroneous billing for \$1,095.25 and the second billing at \$876.20.

It was still unliquidated and uncertain when defendant sent plaintiff a check for \$444 on November 3, 1965, and stated specifically that the check was for the agreed price of \$10 per acre, with an added \$2 per acre

because the wheat was very heavy. The assertions in the letter of transmittal that the enclosed check was 50 per cent more than plaintiff agreed to do the work for, and that the billing sent by plaintiff at nearly \$30 an acre was ridiculous, all unmistakably convey the notion that the check was tendered in full payment. Under these circumstances, it should have been clear to a person of ordinary understanding that cashing the check constituted an acceptance of the \$444 in full payment and discharge of plaintiff's claim for harvesting defendant's 37 acres.

I would, therefore, affirm.

* * *

Problems

Analyze these problems from a common law perspective. Ignore any statutory changes and the doctrine of duress.

10. A bank in Kentucky was robbed. A bankers' association offered a reward of \$5,000 to anyone who apprehended the robber. Within a week, P, who was a police officer in the jurisdiction in which the bank was located, apprehended the robber who was convicted. P sues the association. What result?

11. Angela applied to the Village of Homewood to become a firefighter. Under State law, the Village was required to process her application; the processing included a physical agility test. Prior to administering the test, the Village required Angela to sign a release of liability for all injuries she might suffer as a result of the test. During the test, she fell and was injured. She claims that the injuries were the result of the Village's negligence. The Village raises the release as a defense. Will the defense succeed?

12. Plaintiffs were sailors on defendant's vessel and agreed to work for a certain sum for a particular voyage. Midway through the voyage the plaintiffs demanded an increase in wages and defendant promised to pay \$X more. Plaintiffs completed the voyage. Was the defendant's promise enforceable?

13. Plaintiff and defendant entered into a contract for the sale and delivery (in installments) of 4,000 wooden display stands at a price of 65 cents each. After 2,000 stands had been delivered and paid for, the plaintiff told defendant that due to increased costs he would have to charge 75 cents for each stand and defendant agreed to pay the higher rate. Plaintiff delivered the stands. At what rate is plaintiff entitled to be paid?

14. P was employed by D under a contract for the year. D got into financial difficulties and during the contract year, P agreed with other key personnel that they all would accept a lesser salary for the balance of the year. Is there consideration for P's promise to take less?

15. D bought a tractor-trailer and financed the purchase through C, a bank. D missed a number of payments. C declared D in default on the loan agreement and threatened to exercise its right of repossession. D and C reached an agreement whereby D promised to have the broker, for whom D worked, subtract the money D owed C from D's paycheck and give it directly

to C in exchange for C's promise not to exercise its right of repossession. The next day the tractor-trailer was repossessed on C's order. D sued C. Was there a binding agreement?

16. A, a subcontractor, contracts with B, a general contractor, to install heating units in houses being built by B for C. A discontinues work without justification. C promises to pay A an additional amount if A completes the installation in accordance with A's contract with B. A performs. Is there consideration for C's promise?

17. Plaintiff, as landlord, entered into a lease with defendant as tenant. The lease was for a five-year period at the agreed rental of \$500 per month. Two years later, the parties entered into an oral agreement whereby rentals were reduced to \$450. The reduced rent was paid and plaintiff now seeks to recover the \$50 per month that was not paid.

18. Tenant terminated its lease as it was empowered to do by a clause in the lease providing that Tenant could terminate the lease by paying a termination fee of \$380,000. It delivered a check in that amount clearly marked that it was tendered in full satisfaction of all claims Landlord had against Tenant. Landlord protested the language on the check but deposited it into its account. Landlord now sues Tenant, claiming damages for Tenant's breach of an obligation to restore the premises to their pre-rental condition. Tenant pleads the affirmative defense of accord and satisfaction. How can Landlord meet this defense?

19. The plaintiff sold and delivered to defendant at various times bricks for which defendant was billed for the total of \$820. On May 12th plaintiff sent bricks which would have been worth \$448 if they had conformed to the contract. The defendant rejected them as non-conforming and asked plaintiff what to do with the bricks. On August 3 the defendant wrote the plaintiff as follows:

"Enclosed find check for \$820 which pays our account up to July 1st. We have deducted the \$448 for non-conforming bricks.

Please advise us what disposition we shall make of these bricks for you."

Plaintiff received and cashed the check and now sues for the \$448, alleging that the bricks are conforming. (a) If you were representing the defendant what would you set forth in your answer? (b) What issues will arise as to the validity of this defense?

20. Bridget bought a new Honda from a dealer, Honda of Rapid City, Inc. To pay for it, she applied for and received partial financing from First National Bank. The bank issued a check in the amount of \$11,000 payable to the dealer. On the back of the check the bank had rubber-stamped this legend: "On accepting this check the dealer will cause to be recorded in the appropriate record offices and on the title to the vehicle a notice of a lien on the vehicle in favor of the First National Bank." Bridget delivered the check to the sales representative at the dealer's premises. The sales representative delivered the check to the bookkeeper who rubber-stamped it "Honda of Rapid City, Inc." and deposited it. No notice of lien was recorded. The car was delivered to Bridget who soon thereafter lost her job and sold the Honda for cash to a *bona fide* purchaser who had no notice of any lien. First National Bank sues Honda of Rapid City, Inc. What result?

SECTION 3. DURESS AND STATUTORY CHANGES

(*Calamari & Perillo* §§ 5.12—5.17 and 9.6)

U.C.C. § 1-102. Purposes; Rules of Construction; Variation by Agreement

* * *

(3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

U.C.C. § 1-203. Obligation of Good Faith

Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

U.C.C. § 1-201. General Definitions

Subject to additional definitions contained in the subsequent Articles of this Act which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Act:

* * *

(19) “Good faith” means honesty in fact in the conduct or transaction concerned.

U.C.C. § 2-103. Definitions and Index of Definitions

(1) In this Article unless the context otherwise requires

* * *

(b) “Good faith” in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

ROTH STEEL PRODUCTS v. SHARON STEEL CORP.

United States Court of Appeals, Sixth Circuit, 1983.
705 F.2d 134.

CELEBREZZE, SENIOR CIRCUIT JUDGE.

This diversity action for breach of contract involves issues which require us to explore some relatively uncharted areas of Article Two of the Uniform Commercial Code, Ohio Rev.Code Sec. 1302.01 *et seq.* We vacate the district court’s judgment, however, to the extent that it concludes that adequate notice of breach was given in 1974 and remand this question for more comprehensive findings of fact.

I.

The plaintiffs-appellees (cross-appellants), Roth Steel Products Company and Toledo Steel Tube Company, are subsidiaries of Roth Industries, Inc. Roth Steel produces welded straight tubing for a variety of uses; Toledo Steel Tube produces fabricated steel tubing for use in automobile exhaust systems. Mr. Howard Guerin, vice-president for purchasing, Roth Industries, served as the purchasing agent for both corporations until April, 1973, when he was replaced by Mr. Richard Mecaskey.

Sharon Steel Corporation, defendant-appellant (cross-appellee), is a subsidiary of NVF Corporation. In 1973, Sharon was an integrated steel producer which accounted for approximately one percent of the steel produced in this country. It produced hot rolled and cold rolled sheet steel in carbon and alloy grades, as well as pickled and oiled sheet steel. The plaintiffs used sheet steel to produce tubing. Mr. Frank Metzger, Sharon's Northern Ohio Sales Manager, was responsible for all sales to the plaintiffs.

A. In 1972, the steel industry operated at approximately 70% of its capacity. Steel prices were highly competitive and discounts from published prices were given customers in an effort to increase the productive use of steel making capacity. On November 14, 1972, Metzger, Sharon's representative, met with Guerin and offered to sell the plaintiffs specific quantities of hot rolled, cold rolled and pickled steel at prices substantially lower than Sharon's "book price". Testimony indicated that these prices and quantities were to be effective from January 1 until December 31, 1973.

On November 17, 1972, Metzger forwarded a communication in the form of a letter to Guerin confirming the discussions of November 14. The letter indicated that Sharon would sell the plaintiffs 200 tons of hot rolled pickled steel each month for \$148.00 per ton and that it would sell plaintiffs hot rolled black steel on an open schedule basis for \$140.00 per ton. The letter also discussed "the probability" that Sharon could sell 500 tons of cold rolled to both Roth Steel and Toledo at varying prices depending on the type of cold rolled steel ordered. Metzger testified that a few days after the letter was sent, the plaintiffs agreed to purchase 1,000 tons of cold rolled steel (500 tons each) at the prices indicated in the letter.

On February 15, 1973, Metzger and Guerin met to discuss the tonnages of hot rolled steel mentioned in the November 17 letter. During the meeting, Metzger and Guerin agreed to increase the monthly tonnage of hot rolled pickled steel that Sharon would sell to the plaintiffs from 200 tons to 300 tons each month. Metzger also agreed, on behalf of Sharon, to sell the plaintiffs 300 tons of hot rolled black steel until May, 1973, when the monthly tonnage would be increased to 400 tons per month for the remainder of 1973. To confirm the agreement, Metzger noted these increased tonnages on Guerin's copy of the November 17 letter.

In early 1973, several factors influenced the market for steel. Federal price controls discouraged foreign producers from importing steel; conversely, domestic producers exported a substantial portion of the steel produced domestically, in an effort to avoid federal price controls. Thus, the domestic steel supply was sharply reduced. In addition, the industry experienced substantial increases in demand as well as increases in labor, raw material, and energy costs. These increased labor, raw material, and energy costs compelled steel producers to increase prices. The increased demand and the attractive export market caused the entire industry to operate at full capacity in 1973 and 1974. Consequently, nearly every domestic producer experienced substantial delays in delivery.

As a result of the changed market conditions, Sharon decided to withdraw all price concessions, including those it had given the plaintiffs. The plaintiffs were notified of this decision on March 23, 1973 and they immediately protested, asserting that the price increase was a breach of the November, 1972 agreement, as modified in February. As a result of this protest, discussions ensued and Sharon agreed to continue to sell steel to the plaintiffs at the discount prices of November, 1972 until June 30, 1973. For the remainder of 1973, Sharon proposed to sell rolled steel to plaintiffs at modified prices; these prices were higher than the prices set forth in the November 17 letter, but were lower than the published prices which Sharon charged its other customers. Sharon clearly indicated to plaintiffs that Sharon would sell no steel to plaintiffs after June 30, 1973 except at modified prices. Although plaintiffs initially were reluctant to accept Sharon's compromise, they finally agreed to Sharon's compromise proposal primarily because they were unable to purchase sufficient steel elsewhere to meet their production requirements.

In the second half of 1973, Sharon also experienced difficulties in filling orders in a timely fashion. In most of 1973 and 1974, Sharon's mill was operating at full capacity; because it could not produce any more steel, Sharon implemented a "blanking" policy in an effort to reduce the backlog of orders. Pursuant to the blanking policy, Sharon would refuse to accept purchase orders that requested delivery for a particular "blanked" month and all the steel produced that month was used to fill overdue orders. Because of this policy Sharon refused several purchase orders issued by plaintiffs: it refused to book Roth's orders of 300 tons of hot rolled pickled steel and 400 tons of hot rolled black steel for delivery in October, 1973 and Toledo's order of 425 tons of cold rolled steel for delivery in December, 1973. Both October and December were "blanked" months.

B. Sharon and the plaintiffs conducted business differently in 1974. In 1974, contracts were formed separately on an order-by-order basis. Normally, the plaintiffs issued a purchase order which indicated the type and amount of steel sought, and the requested delivery date; the purchase orders were offers to purchase steel and were not effective until accepted by Sharon. Sharon accepted an offer by issuing an acknowledg-

ment form; in this form, Sharon agreed to ship a quantity of steel by a specific date, usually the date requested by the purchaser. The acknowledgment form indicated that the price for the shipment would be the “[s]eller’s prices prevailing at the time of shipment.”

In 1974, the steel market became even less predictable than in 1973: overall demand increased, deliveries of steel became more erratic, and acknowledged delivery dates were rarely observed. Sharon’s actual delivery dates were three to five months after the promised delivery dates. Throughout 1974, the price of steel steadily rose; as a consequence, Sharon’s late deliveries had the effect of increasing the price of the goods.

Although Sharon’s shipments to the plaintiffs were consistently delinquent throughout 1974, the plaintiffs continued to accept the late shipments and to place new orders with Sharon. The plaintiffs apparently acquiesced in this pattern of late shipments and higher prices for two reasons: they had no practical alternative source of steel and they believed Sharon’s assurances that the late deliveries resulted from the general shortage of raw materials and the need to equitably allocate its limited production among all of its customers.

In May, 1974, the plaintiffs discovered facts that caused them to believe that the delays in shipment were not entirely the result of raw material shortages and Sharon’s allocation system. Specifically, the plaintiffs learned on May 9, 1974, that Sharon was selling substantial amounts of rolled steel to its subsidiary Ohio Metal Processing Company. Ohio Metal Processing was operating as a warehouse and selling steel at premium prices. By selling through its warehouse-subsidiary, Sharon was able to obtain higher prices than federal price controls otherwise permitted. In 1974, approximately fifteen percent (20,000 tons per month) of Sharon’s monthly steel production was sold to Ohio Metal Processing. Thus, the plaintiffs assert that they first learned that Sharon’s late deliveries were not entirely the result of raw material shortages and an allocation system when they learned that steel was being sold to Ohio Metal Processing.

The plaintiffs did not immediately act upon this information. Instead, they allowed the remaining unfilled orders to pend during the summer. In September, 1974, Roth’s orders were placed on “hold” due to [a] labor dispute. Most of plaintiffs’ orders were cancelled [in] October, 1974. One final delivery was made by Sharon on October 31, 1974; although this order had been inadvertently overlooked by the plaintiffs and thus not cancelled, the plaintiffs rejected this shipment because delivery had been made nearly one year after the agreed delivery date.

C. The plaintiffs commenced this action in April, 1975, alleging breach of contract and seeking to recover their expenses in “covering”. In March, 1976, the plaintiffs sought leave to file an amended complaint. The complaint, as amended, asserted 41 counts; plaintiffs sought damages based on the difference between the contract price and the market price for the goods at the time breach was discovered. The amended complaint sought total damages of \$896,174.60. Sharon’s answer denied

the existence of a contract for the calendar year 1973 and raised several defenses: the statute of frauds, modification of the oral contract, commercial impracticability and failure to give notice of breach. It also counterclaimed for damages based upon the steel shipment which was rejected by Toledo Steel in October, 1974.

Following discovery, the district court granted plaintiffs' motion for partial summary judgment, concluding that the statute of frauds did not bar the enforcement of the November, 1972 oral agreement. Following a five day trial, the district court issued a lengthy and exhaustive memorandum of opinion. In the opinion, the district court concluded that an oral contract was formed in November, 1972; that Sharon's attempt, in June, 1973, to modify the contract was ineffective; and that Sharon had breached the contract by charging prices higher than agreed upon in the November, 1972 contract, by refusing to sell steel in October and December, 1973, and by failing to make timely delivery of some orders issued pursuant to the 1972 agreement. With regard to the 1974 transactions, the district court concluded that Sharon had breached several contracts for delivery of steel by failing to make a timely delivery or by failing to make delivery at all. It also concluded that the plaintiffs had given adequate notice of breach with regard to those late shipments which they accepted. It granted the plaintiffs damages of \$555,968.46, but denied their motion for prejudgment interest. Finally, it dismissed Sharon's counterclaim, because it concluded that Toledo properly rejected the late shipment.

Sharon has appealed from the district court's order granting the plaintiffs' claim for damages and the order dismissing its counterclaim. The plaintiffs have cross-appealed from the district court's order denying prejudgment interest.

II.

* * *

C. In March, 1973, Sharon notified its customers that it intended to charge the maximum permissible price for all of its products; accordingly, all price concessions, including those made to the plaintiffs, were to be rescinded effective April 1, 1973. On March 23, 1973, Guerin indicated to Metzger that the plaintiffs considered the proposed price increase to be a breach of the November, 1972 contract. In an effort to resolve the dispute, Guerin met with representatives of Sharon on March 28, 1973 and asked Sharon to postpone any price increases until June or July, 1973. Several days later, Richard Mecaskey, Guerin's replacement, sent a letter to Sharon which indicated that the plaintiffs believed that the November, 1972 agreement was enforceable and that the plaintiffs were willing to negotiate a price modification if Sharon's cost increases warranted such an action. As a result of this letter, another meeting was held between Sharon and the plaintiffs. At this meeting, Walter Gregg, Sharon's vice-president and chairman of the board, agreed to continue charging the November, 1972 prices until June 30, 1973 and offered, for

the remainder of 1973, to charge prices that were lower than Sharon's published prices but higher than the 1972 prices. Although the plaintiffs initially rejected the terms offered by Sharon for the second half of 1973, Mecaskey reluctantly agreed to Sharon's terms on June 29, 1973.

Before the district court, Sharon asserted that it properly increased prices because the parties had modified the November, 1973 contract to reflect changed market conditions. The district court, however, made several findings which, it believed, indicated that Sharon did not seek a modification to avoid a loss on the contract. The district court also found that the plaintiffs' inventories of rolled steel were "alarmingly deficient" at the time modification was sought and that Sharon had threatened to cease selling steel to the plaintiffs in the second-half of 1973 unless the plaintiffs agreed to the modification. Because Sharon had used its position as the plaintiffs' chief supplier to extract the price modification, the district court concluded that Sharon had acted in bad faith by seeking to modify the contract. In the alternative, the court concluded that the modification agreement was voidable because it was extracted by means of economic duress; the tight steel market prevented the plaintiffs from obtaining steel elsewhere at an affordable price and, consequently, the plaintiffs were forced to agree to the modification in order to assure a continued supply of steel. *See e.g. Oskey Gasoline & Oil Co. v. Continental Oil Co.*, 534 F.2d 1281 (8th Cir.1976). Sharon challenges these conclusions on appeal.

The ability of a party to modify a contract which is subject to Article Two of the Uniform Commercial Code is broader than common law, primarily because the modification needs no consideration to be binding. O.R.C. Sec. 1302.12 (U.C.C. Sec. 2-209(1)). A party's ability to modify an agreement is limited only by Article Two's general obligation of good faith. * * * In determining whether a particular modification was obtained in good faith, a court must make two distinct inquiries: whether the party's conduct is consistent with "reasonable commercial standards of fair dealing in the trade," *U.S. for Use and Benefit of Crane Co. v. Progressive Enterprises*, 418 F.Supp. 662, 664 n. 1 (E.D.Va.1976), and whether the parties were in fact motivated to seek modification by an honest desire to compensate for commercial exigencies. *See Ralston Purina Co. v. McNabb*, 381 F.Supp. at 183 (subjective purpose [to maximize damages] of extending time of performance under contract indicates bad faith and renders modification invalid); O.R.C. Sec. 1302.01(A)(2) (U.C.C. Sec. 2-103). The first inquiry is relatively straightforward; the party asserting the modification must demonstrate that his decision to seek modification was the result of a factor, such as increased costs, which would cause an ordinary merchant to seek a modification of the contract. *See Official Comment 2*, O.R.C. Sec. 1302.12 (U.C.C. Sec. 2-209) (reasonable commercial standards may require objective reason); J. White & R. Summers, *Handbook of Law under the U.C.C.* at 41. The second inquiry, regarding the subjective honesty of the parties, is less clearly defined. Essentially, this inquiry requires the party asserting the modification to demonstrate that he was, in fact, motivated by a legiti-

mate commercial reason and that such a reason is not offered merely as a pretext. *Ralston Purina Co. v. McNabb*, 381 F.Supp. at 183–84. Moreover, the trier of fact must determine whether the means used to obtain the modification are an impermissible attempt to obtain a modification by extortion or overreaching. * * *

Sharon argues that its decision to seek a modification was consistent with reasonable commercial standards of fair dealing because market exigencies made further performance entail a substantial loss. The district court, however, made three findings which caused it to conclude that economic circumstances were not the reason that Sharon sought a modification: it found that Sharon was partially insulated from raw material price increases, that Sharon bargained for a contract with a slim profit margin and thus implicitly assumed the risk that performance might come to involve a loss, and that Sharon's overall profit in 1973 and its profit on the contract in the first quarter of 1973 were inconsistent with Sharon's position that the modification was sought to avoid a loss. Although all of these findings are marginally related to the question whether Sharon's conduct was consistent with reasonable commercial standards of fair dealing, we do not believe that they are sufficient to support a finding that Sharon did not observe reasonable commercial standards by seeking a modification. In our view, these findings do not support a conclusion that a reasonable merchant, in light of the circumstances, would not have sought a modification in order to avoid a loss. For example, the district court's finding that Sharon's steel slab contract²⁶ insulated it from industry wide cost increases is correct, so far as it goes. Although Sharon was able to purchase steel slabs at pre-1973 prices, the district court's findings also indicate that it was not able to purchase, at those prices, a sufficient tonnage of steel slabs to meet its production requirements. The district court also found that Sharon experienced substantial cost increases for other raw materials, ranging from 4% to nearly 20%. In light of these facts, the finding regarding the fixed-price contract for slab steel, without more, cannot support an inference that Sharon was unaffected by the market shifts that occurred in 1973. Similarly, the district court's finding that Sharon entered a contract in November, 1972 which would yield only a slim profit does not support a conclusion that Sharon was willing to risk a loss on the contract. Absent a finding that the market shifts and the raw material price increases were foreseeable at the time the contract was formed—a finding which was not made—Sharon's willingness to absorb a loss cannot be inferred from the fact that it contracted for a smaller profit than usual. Finally, the findings regarding Sharon's profits are not

26. Sharon was a party to a contract with United States Steel which allowed it to make monthly purchases of slab steel ranging from a minimum of 25,000 tons per month to a maximum of 45,000 tons per month. It was also a party to a contract with Wierton [sic] Steel which allowed it to purchase slab steel in amounts varying between 10,000 to 20,000 tons per month.

Both of these contracts were entered prior to 1973, at a very attractive price. When the market strengthened in 1973, however, Sharon was unable to obtain the maximum monthly tonnages permitted under these contracts: U.S. Steel delivered only 30,000 tons per month and Wierton 10,000 tons per month.

sufficient, by themselves, to warrant a conclusion that Sharon was not justified in seeking a modification. Clearly, Sharon's initial profit on the contract is an important consideration; the district court's findings indicate, however, that at the time modification was sought substantial future losses were foreseeable. A party who has not actually suffered a loss on the contract may still seek a modification if a future loss on the agreement was reasonably foreseeable. Similarly, the overall profit earned by the party seeking modification is an important factor; this finding, however, does not support a conclusion that the decision to seek a modification was unwarranted. The more relevant inquiry is into the profit obtained through sales of the product line in question. This conclusion is reinforced by the fact that only a few product lines may be affected by market exigencies; the opportunity to seek modification of a contract for the sale of goods of a product line should not be limited solely because some other product line produced a substantial profit.

In the final analysis, the single most important consideration in determining whether the decision to seek a modification is justified in this context is whether, because of changes in the market or other unforeseeable conditions, performance of the contract has come to involve a loss. In this case, the district court found that Sharon suffered substantial losses by performing the contract as *modified*. * * * We are convinced that unforeseen economic exigencies existed which would prompt an ordinary merchant to seek a modification to avoid a loss on the contract; thus, we believe that the district court's findings to the contrary are clearly erroneous. * * *

The second part of the analysis, honesty in fact, is pivotal. The district court found that Sharon "threatened not to sell Roth and Toledo any steel if they refused to pay increased prices after July 1, 1973" and, consequently, that Sharon acted wrongfully. Sharon does not dispute the finding that it threatened to stop selling steel to the plaintiffs. Instead, it asserts that such a finding is merely evidence of bad faith and that it has rebutted any inference of bad faith based on that finding. We agree with this analysis; although coercive conduct is evidence that a modification of a contract is sought in bad faith, that *prima facie* showing may be effectively rebutted by the party seeking to enforce the modification. *E.g., Business Incentives Co., Inc. v. Sony Corp. of America*, 397 F.Supp. 63, 69 (S.D.N.Y.1975) (in context of economic duress, coercive conduct permissible in light of contractual right to terminate). *See Jamestown Farmers Elevator, Inc. v. General Mills*, 552 F.2d 1285, 1290 (8th Cir.1977) ("good faith insistence upon a legal right [with coercive effect] which one believes he has usually is not duress, even if it turns out that that party is mistaken and, in fact, has no such right"); *White & Summers, supra*, at 41 (good faith exists if a party believes that contract permits party seeking modification to refuse to perform if modification not effected). Although we agree with Sharon's statement of principles, we do not agree that Sharon has rebutted the inference of bad faith that rises from its coercive conduct. Sharon asserts that its decision to unilaterally raise prices was based on language in the November 17,

1972 letter which allowed it to raise prices to the extent of any general industry-wide price increase. Because prices in the steel industry had increased, Sharon concludes that it was justified in raising its prices. Because it was justified in raising the contract price, the plaintiffs were bound by the terms of the contract to pay the increased prices. Consequently, any refusal by the plaintiffs to pay the price increase sought by Sharon must be viewed as a material breach of the November, 1972 contract which would excuse Sharon from any further performance. Thus, Sharon reasons that its refusal to perform absent a price increase was justified under the contract and consistent with good faith.

This argument fails in two respects. First, the contractual language on which Sharon relies only permits, at most, a price increase for cold rolled steel; thus, even if Sharon's position were supported by the evidence, Sharon would not have been justified in refusing to sell the plaintiffs hot rolled steel because of the plaintiffs' refusal to pay higher prices for the product. More importantly, however, the evidence does not indicate that Sharon ever offered this theory as a justification until this matter was tried. Sharon's representatives, in their testimony, did not attempt to justify Sharon's refusal to ship steel at 1972 prices in this fashion. Furthermore, none of the contemporaneous communications contain this justification for Sharon's action. In short, we can find no evidence in the record which indicates that Sharon offered this theory as a justification at the time the modification was sought. Consequently, we believe that the district court's conclusion that Sharon acted in bad faith by using coercive conduct to extract the price modification is not clearly erroneous. Therefore, we hold that Sharon's attempt to modify the November, 1972 contract, in order to compensate for increased costs which made performance come to involve a loss, is ineffective because Sharon did not act in a manner consistent with Article Two's requirement of honesty in fact when it refused to perform its remaining obligations under the contract at 1972 prices.³¹

* * *

We have exhaustively reviewed the record, and have considered nearly every facet of the district court's decision. We believe, for the most part, that the district court has correctly resolved the factual and legal questions which the parties have so bitterly contested for the past eight years. Regrettably, however, we cannot bring this long and costly

31. The district court also found, as an alternative ground, that the modification was voidable because the plaintiffs agreed to the modification due to economic duress. *See, e.g., Oskey Gasoline & Oil Co. v. Continental Oil*, 534 F.2d 1281 (8th Cir.1976). Because we conclude that the modification was ineffective as a result of Sharon's bad faith, we do not reach the issue whether the contract modification was also voidable because of economic duress. We note, howev-

er, that proof that coercive means were used is necessary to establish that a contract is voidable because of economic duress. *Id.* at 1286. Normally, it cannot be used to void a contract modification which has been sought in good faith; if a contract modification has been found to be in good faith, then presumably no wrongful coercive means have been used to extract the modification.

litigation to an end; we must remand this case for factual findings regarding the timeliness of plaintiffs' notice of breach in 1974.

Accordingly, we affirm in part, vacate in part, and remand for further proceedings not inconsistent with this opinion.

MERRITT, CIRCUIT JUDGE, concurring in part and dissenting in part. [Opinion omitted. Ed.]

AUSTIN INSTRUMENT, INC. v. LORAL CORP.

Court of Appeals of New York, 1971.
29 N.Y.2d 124, 324 N.Y.S.2d 22, 272 N.E.2d 533.

FULD, CHIEF JUDGE. The defendant, Loral Corporation, seeks to recover payment for goods delivered under a contract which it had with the plaintiff Austin Instrument, Inc., on the ground that the evidence establishes, as a matter of law, that it was forced to agree to an increase in price on the items in question under circumstances amounting to economic duress.

In July of 1965, Loral was awarded a \$6,000,000 contract by the Navy for the production of radar sets. The contract contained a schedule of deliveries, a liquidated damages clause applying to late deliveries and a cancellation clause in case of default by Loral. The latter thereupon solicited bids for some 40 precision gear components needed to produce the radar sets, and awarded Austin a subcontract to supply 23 such parts. That party commenced delivery in early 1966.

In May, 1966, Loral was awarded a second Navy contract for the production of more radar sets and again went about soliciting bids. Austin bid on all 40 gear components but, on July 15, a representative from Loral informed Austin's president, Mr. Krauss, that his company would be awarded the subcontract only for those items on which it was low bidder. The Austin officer refused to accept an order for less than all 40 of the gear parts and on the next day he told Loral that Austin would cease deliveries of the parts due under the existing subcontract unless Loral consented to substantial increases in the prices provided for by that agreement—both retroactively for parts already delivered and prospectively on those not yet shipped—and placed with Austin the order for all 40 parts needed under Loral's second Navy contract. Shortly thereafter, Austin did, indeed, stop delivery. After contacting 10 manufacturers of precision gears and finding none who could produce the parts in time to meet its commitments to the Navy,¹ Loral acceded to Austin's demands; in a letter dated July 22, Loral wrote to Austin that "We have feverishly surveyed other sources of supply and find that because of the prevailing military exigencies, were they to start from scratch as would have to be the case, they could not even remotely begin to deliver on time to meet the delivery requirements established by the

1. The best reply Loral received was from a vendor who stated he could com-
mence deliveries sometime in October.

Government. * * * Accordingly, we are left with no choice or alternative but to meet your conditions.”

Loral thereupon consented to the price increases insisted upon by Austin under the first subcontract and the latter was awarded a second subcontract making it the supplier of all 40 gear parts for Loral’s second contract with the Navy.² Although Austin was granted until September to resume deliveries, Loral did, in fact, receive parts in August and was able to produce the radar sets in time to meet its commitments to the Navy on both contracts. After Austin’s last delivery under the second subcontract in July, 1967, Loral notified it of its intention to seek recovery of the price increases.

On September 15, 1967, Austin instituted this action against Loral to recover an amount in excess of \$17,750 which was still due on the second subcontract. On the same day, Loral commenced an action against Austin claiming damages of some \$22,250—the aggregate of the price increases under the first subcontract—on the ground of economic duress. The two actions were consolidated and, following a trial, Austin was awarded the sum it requested and Loral’s complaint against Austin was dismissed on the ground that it was not shown that “it could not have obtained the items in question from other sources in time to meet its commitment to the Navy under the first contract.” A closely divided Appellate Division affirmed (35 A.D.2d 387, 316 N.Y.S.2d 528, 532). There was no material disagreement concerning the facts; as Justice Steuer stated in the course of his dissent below, “[t]he facts are virtually undisputed, nor is there any serious question of law. The difficulty lies in the application of the law to these facts.” (35 A.D.2d 392, 316 N.Y.S.2d 534.)

The applicable law is clear and, indeed, is not disputed by the parties. A contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will. (See *Allstate Med. Labs., Inc. v. Blaivas*, 20 N.Y.2d 654, 282 N.Y.S.2d 268, 229 N.E.2d 50; *Kazaras v. Manufacturers Trust Co.*, 4 N.Y.2d 930, 175 N.Y.S.2d 172, 151 N.E.2d 356; *Adams v. Irving Nat. Bank*, 116 N.Y. 606, 611, 23 N.E. 7, 9; see, also, 13 Williston, *Contracts* [3d ed., 1970], § 1603, p. 658.) The existence of economic duress or business compulsion is demonstrated by proof that “immediate possession of needful goods is threatened” (*Mercury Mach. Importing Corp. v. City of New York*, 3 N.Y.2d 418, 425, 165 N.Y.S.2d 517, 520, 144 N.E.2d 400) or, more particularly, in cases such as the one before us, by proof that one party to a contract has threatened to breach the agreement by withholding goods unless the other party agrees to some further demand. * * * However, a mere threat by one party to breach the contract by not delivering the required items, though wrongful, does not in itself constitute economic duress. It must also appear that the threatened party could not obtain the goods from another source of supply and that the

2. Loral makes no claim in this action on the second subcontract.

ordinary remedy of an action for breach of contract would not be adequate.

We find without any support in the record the conclusion reached by the courts below that Loral failed to establish that it was the victim of economic duress. On the contrary, the evidence makes out a classic case, as a matter of law, of such duress.

It is manifest that Austin's threat—to stop deliveries unless the prices were increased—deprived Loral of its free will. As bearing on this, Loral's relationship with the Government is most significant. As mentioned above, its contract called for staggered monthly deliveries of the radar sets, with clauses calling for liquidated damages and possible cancellation on default. Because of its production schedule, Loral was, in July, 1966, concerned with meeting its delivery requirements in September, October and November, and it was for the sets to be delivered in those months that the withheld gears were needed. Loral had to plan ahead, and the substantial liquidated damages for which it would be liable, plus the threat of default, were genuine possibilities. Moreover, Loral did a substantial portion of its business with the Government, and it feared that a failure to deliver as agreed upon would jeopardize its chances for future contracts. These genuine concerns do not merit the label “‘self-imposed, undisclosed and subjective’” which the Appellate Division majority placed upon them. It was perfectly reasonable for Loral, or any other party similarly placed, to consider itself in an emergency, duress situation.

Austin, however, claims that the fact that Loral extended its time to resume deliveries until September negates its alleged dire need for the parts. A Loral official testified on this point that Austin's president told him he could deliver some parts in August and that the extension of deliveries was a formality. In any event, the parts necessary for production of the radar sets to be delivered in September were delivered to Loral on September 1, and the parts needed for the October schedule were delivered in late August and early September. Even so, Loral had to “work * * * around the clock” to meet its commitments. Considering that the best offer Loral received from the other vendors it contacted was commencement of delivery sometime in October, which, as the record shows, would have made it late in its deliveries to the Navy in both September and October, Loral's claim that it had no choice but to accede to Austin's demands is conclusively demonstrated.

We find unconvincing Austin's contention that Loral, in order to meet its burden, should have contacted the Government and asked for an extension of its delivery dates so as to enable it to purchase the parts from another vendor. Aside from the consideration that Loral was anxious to perform well in the Government's eyes, it could not be sure when it would obtain enough parts from a substitute vendor to meet its commitments. The only promise which it received from the companies it contacted was for *commencement* of deliveries, not full supply, and, with vendor delay common in this field, it would have been nearly impossible to know the length of the extension it should request. It must be

remembered that Loral was producing a needed item of military hardware. Moreover, there is authority for Loral's position that nonperformance by a subcontractor is not an excuse for default in the main contract. (See, e.g., McBride & Wachtel, *Government Contracts*, § 35.10, [11].) In light of all this, Loral's claim should not be held insufficiently supported because it did not request an extension from the Government.

Loral, as indicated above, also had the burden of demonstrating that it could not obtain the parts elsewhere within a reasonable time, and there can be no doubt that it met this burden. The 10 manufacturers whom Loral contacted comprised its entire list of "approved vendors" for precision gears, and none was able to commence delivery soon enough. As Loral was producing a highly sophisticated item of military machinery requiring parts made to the strictest engineering standards, it would be unreasonable to hold that Loral should have gone to other vendors, with whom it was either unfamiliar or dissatisfied, to procure the needed parts. As Justice Steuer noted in his dissent, Loral "contacted all the manufacturers whom it believed capable of making these parts" (35 A.D.2d at p. 393, 316 N.Y.S.2d at p. 534), and this was all the law requires.

It is hardly necessary to add that Loral's normal legal remedy of accepting Austin's breach of the contract and then suing for damages would have been inadequate under the circumstances, as Loral would still have had to obtain the gears elsewhere with all the concomitant consequences mentioned above. In other words, Loral actually had no choice, when the prices were raised by Austin, except to take the gears at the "coerced" prices and then sue to get the excess back.

Austin's final argument is that Loral, even if it did enter into the contract under duress, lost any rights it had to a refund of money by waiting until July, 1967, long after the termination date of the contract, to disaffirm it. It is true that one who would recover moneys allegedly paid under duress must act promptly to make his claim known. (See *Oregon Pacific R.R. Co. v. Forrest*, 128 N.Y. 83, 93, 28 N.E. 137, 139; *Port Chester Elec. Constr. Corp. v. Hastings Terraces*, 284 App.Div. 966, 967, 134 N.Y.S.2d 656, 658.) In this case, Loral delayed making its demand for a refund until three days after Austin's last delivery on the second subcontract. Loral's reason—for waiting until that time—is that it feared another stoppage of deliveries which would again put it in an untenable situation. Considering Austin's conduct in the past, this was perfectly reasonable, as the possibility of an application by Austin of further business compulsion still existed until all of the parts were delivered.

In sum, the record before us demonstrates that Loral agreed to the price increases in consequence of the economic duress employed by Austin. Accordingly, the matter should be remanded to the trial court for a computation of its damages.

The order appealed from should be modified, with costs, by reversing so much thereof as affirms the dismissal of defendant Loral Corporation's claim and, except as so modified, affirmed.

BERGAN, JUDGE (dissenting). Whether acts charged as constituting economic duress produce or do not produce the damaging effect attributed to them is normally a routine type of factual issue.

Here the fact question was resolved against Loral both by the Special Term and by the affirmance at the Appellate Division. It should not be open for different resolution here.

In summarizing the Special Term's decision and its own, the Appellate Division decided that "the conclusion that Loral acted deliberately and voluntarily, without being under immediate pressure of incurring severe business reverses, precludes a recovery on the theory of economic duress" (35 A.D.2d 387, 391, 316 N.Y.S.2d 528, 532).

When the testimony of the witnesses who actually took part in the negotiations for the two disputing parties is examined, sharp conflicts of fact emerge. Under Austin's version the request for a renegotiation of the existing contract was based on Austin's contention that Loral had failed to carry out an understanding as to the items to be furnished under that contract and this was the source of dissatisfaction which led both to a revision of the existing agreement and to entering into a new one.

This is not necessarily and as a matter of law to be held economic duress. On this appeal it is needful to look at the facts resolved in favor of Austin most favorably to that party. Austin's version of events was that a threat was not made but rather a request to accommodate the closing of its plant for a customary vacation period in accordance with the general understanding of the parties.

Moreover, critical to the issue of economic duress was the availability of alternative suppliers to the purchaser Loral. The demonstration is replete in the direct testimony of Austin's witnesses and on cross-examination of Loral's principal and purchasing agent that the availability of practical alternatives was a highly controverted issue of fact. On that issue of fact the explicit findings made by the Special Referee were affirmed by the Appellate Division. Nor is the issue of fact made the less so by assertion that the facts are undisputed and that only the application of equally undisputed rules of law is involved.

Austin asserted and Loral admitted on cross-examination that there were many suppliers listed in a trade registry but that Loral chose to rely only on those who had in the past come to them for orders and with whom they were familiar. It was, therefore, at least a fair issue of fact whether under the circumstances such conduct was reasonable and made what might otherwise have been a commercially understandable renegotiation an exercise of duress.

The order should be affirmed.

* * *

Problems

21. Assume you have purchased an appliance directly from the manufacturer and have opened the box to find a limited warranty document that promises some protection but disclaims the implied warranties of the UCC. You also found a postcard asking for some information about your purchase. You filled out the card and mailed it. Your appliance develops problems not covered by the limited warranty but which would be covered by the implied warranties of the UCC. You bring action against the seller for breach of the UCC warranty. What will be the result?

22. Assume you bought a used truck. The bill of sale says “AS IS, WITHOUT WARRANTY.” Soon after you had inspected the truck and accepted delivery, defects showed up. The seller, a dealer, agrees to repair the truck at no cost to you. The dealer makes major engine repairs and bills you \$19,000. Is the dealer bound by the promise to repair without charging anything?

23. Seller agreed to manufacture and deliver an automated production line for eyeglass lenses. The agreed-upon delivery date was October 30, 2004. The contract contained a clause forbidding non-written modifications. Various delays ensued and delivery was not made in October. Buyer thereafter cooperated with Seller in trying to get a finished product, and agreed to pay for cost overruns and urged completion, but complained about the delay. This combination of cooperation and complaints continued during the Spring of 2005. Near the end of May 2005, Seller tendered delivery; Buyer rejected the goods on the grounds that “it was too late” and sued for breach. Seller claims that the delivery date was waived; Buyer relies on the clause forbidding non-written modifications. Both parties rely on UCC § 2-209. Resolve the dispute.

SECTION 4. CONSIDERATION IN BILATERAL CONTRACTS AND MUTUALITY OF OBLIGATION

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(Calamari & Perillo §§ 4.12—4.16)

RIDGE RUNNER FORESTRY v. ANN M. VENEMAN, SECRETARY OF AGRICULTURE

United States Court of Appeals, Federal Circuit, 2002.
287 F.3d 1058.

MAYER, CHIEF JUDGE. Ridge Runner Forestry appeals from the decision of the Department of Agriculture Board of Contract Appeals dismissing its cause of action for lack of jurisdiction pursuant to 41 U.S.C. §§ 601-613. In re Ridge Runner Forestry, AGBCA No. 2000-161-1, 2001 WL 170915 (Feb. 13, 2001). Because no contract had been formed, we affirm the board’s decision.

BACKGROUND

Ridge Runner Forestry is a fire protection company located in the Pacific Northwest. In response to a request for quotations (“RFQ”) issued by the Forestry Service, Ridge Runner submitted a proposal and ultimately signed a document entitled Pacific Northwest Interagency Engine Tender Agreement (“Tender Agreement”). The Tender Agreement incorporated the RFQ in its entirety, including the following two provisions in bold faced lettering: (1) “Award of an Interagency Equipment Rental Agreement based on response to this Request for Quotations (RFQ) does not preclude the Government from using any agency or cooperator or local EERA resources”; and (2) “Award of an Interagency Equipment Rental Agreement does not guarantee there will be a need for the equipment offered nor does it guarantee orders will be placed against the awarded agreements.” *Request for Quotation*, No. R6-99-117 (March 29, 1999). Additionally, because the government could not foresee its actual equipment needs, the RFQ contained language that allowed the contractor to decline the government’s request for equipment for any reason: “Because the equipment needs of the government and availability of contractor’s equipment during an emergency cannot be determined in advance, it is mutually agreed that, upon request of the government, the contractor shall furnish the equipment offered herein *to the extent the contractor is willing and able at the time of order.*” *Id.* (emphasis added). The RFQ also included a clause informing bidders that they would not be reimbursed for any costs incurred in submitting a quotation. Ridge Runner signed Tender Agreements in 1996, 1997, 1998, and 1999. In 1999, it presented a claim for \$180,000 to the contracting officer alleging that the Forestry Service had violated an “implied duty of good faith and fair dealing” because Ridge Runner had been “systematically excluded for the past several years from providing services to the Government.” In response, the contracting officer told Ridge Runner that she lacked the proper authority to decide the claim. Ridge Runner timely appealed the decision to the Department of Agriculture Board of Contract Appeals. The board granted the government’s motion to dismiss concluding that because no contract had been entered into, it lacked jurisdiction under the Contract Disputes Act (“CDA”), 41 U.S.C. §§ 601-613.

DISCUSSION

We have jurisdiction over an appeal from a decision of an agency board of contract appeals by virtue of 28 U.S.C. § 1295(a)(10). The board’s jurisdiction under the CDA requires, at a minimum, a contract between an agency and another party. 41 U.S.C. § 607(d) (1994, amended in 2000). Therefore, the threshold matter is whether the Tender Agreements constituted contracts between the parties, which is a question of law that we review de novo. See *Oman-Fischbach Int’l v. Pirie*, 276 F.3d 1380, 1383 (Fed.Cir.2002).

“To be valid and enforceable, a contract must have both consideration to ensure mutuality of obligation . . . and sufficient definiteness so

as to ‘provide a basis for determining the existence of a breach and for giving an appropriate remedy.’” *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329, 1332 (Fed.Cir.2000) (internal citations omitted). “To constitute consideration, a performance or a return promise must be bargained for.” Restatement (Second) of Contracts § 71(1) (1979). And the “promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances. . . .” *Id.* § 77.

Ridge Runner argues that the Tender Agreement was a binding contract that placed specific obligations upon the government; namely, the government was obligated to call upon Ridge Runner, and the other winning vendors, for its fire fighting needs, and in return, the vendors were to remain ready with acceptable equipment and trained staff to answer the government’s call. This, Ridge Runner argues, places the alleged contract squarely within our holding in *Ace-Federal*, 226 F.3d 1329.

Ace-Federal involved a requirements contract whereby the government was obligated to use, with limited exceptions, enumerated suppliers. Following a request for proposals, Ace Federal, as well as other vendors, contracted with the government to provide court reporting and transcription services for various federal agencies. Included in each of the contracts was the standard requirements clause found in Federal Acquisition Regulation § 52.216–21(c) which provides “[e]xcept as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.” 48 C.F.R. § 52.216–21(c) (1988). Each contract also included a termination for convenience clause that limited government liability should the General Services Administration (“GSA”) choose to cancel any contract. During the relevant term, some of the covered agencies contracted for transcription services from non-contract sources without obtaining the necessary waiver. We held that “each time an agency that did not obtain a GSA waiver arranged for services covered under the contract from a non-contract source, the government did not act within the limited exception and breached the contract.” *Ace-Federal*, 226 F.3d at 1332–33.

The contract in *Ace-Federal* is quite distinct from the Tender Agreements at issue in this case. That contract obligated the government to fulfill all of its requirements for transcription services from enumerated vendors or obtain a waiver. The Tender Agreements here are nothing but illusory promises. By the phrase illusory promise is meant words in promissory form that promise nothing; they do not purport to put any limitation on the freedom of the alleged promisor, but leave his future action subject to his own future will, just as it would have been had he said no words at all. *Torncello v. United States*, 231 Ct.Cl. 20, 681 F.2d 756, 769 (1982) (quoting 1 *Corbin on Contracts* § 145 (1963)). The government had the option of attempting to obtain firefighting services from Ridge Runner or any other source, regardless of whether that

source had signed a tender agreement. The Agreements contained no clause limiting the government's options for firefighting services; the government merely "promised" to consider using Ridge Runner for firefighting services. Also, the Tender Agreement placed no obligation upon Ridge Runner. If the government came calling, Ridge Runner "promised" to provide the requested equipment only if it was "willing and able." It is axiomatic that a valid contract cannot be based upon the illusory promise of one party, much less illusory promises of both parties. See Restatement (Second) of Contracts § 71(1).

CONCLUSION

Accordingly, the decision of the Department of Agriculture Board of Contract Appeals is affirmed.

WOOD v. LUCY, LADY DUFF-GORDON

New York Court of Appeals, 1917.
222 N.Y. 88, 118 N.E. 214.

CARDOZO, J. The defendant styles herself "a creator of fashions." Her favor helps a sale. Manufacturers of dresses, millinery and like articles are glad to pay for a certificate of her approval. The things which she designs, fabrics, parasols and what not, have a new value in the public mind when issued in her name. She employed the plaintiff to help her to turn this vogue into money. He was to have the exclusive right, subject always to her approval, to place her indorsements on the designs of others. He was also to have the exclusive right to place her own designs on sale, or to license others to market them. In return, she was to have one-half of "all profits and revenues" derived from any contracts he might make. The exclusive right was to last at least one year from April 1, 1915, and thereafter from year to year unless terminated by notice of ninety days. The plaintiff says that he kept the contract on his part, and that the defendant broke it. She placed her indorsement on fabrics, dresses and millinery without his knowledge, and withheld the profits. He sues her for the damages, and the case comes here on demurrer.

The agreement of employment is signed by both parties. It has a wealth of recitals. The defendant insists, however, that it lacks the elements of a contract. She says that the plaintiff does not bind himself to anything. It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day. A promise may be lacking, and yet the whole writing may be "instinct with an obligation," imperfectly expressed (SCOTT, J., in *McCall Co. v. Wright*, 133 App.Div. 62; *Moran v. Standard Oil Co.*, 211 N.Y. 187, 198). If that is so, there is a contract.

The implication of a promise here finds support in many circumstances. The defendant gave an exclusive privilege. She was to have no

right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff. The acceptance of the exclusive agency was an assumption of its duties (*Phoenix Hermetic Co. v. Filtrine Mfg. Co.*, 164 App.Div. 424; *W.G. Taylor Co. v. Bannerman*, 120 Wis. 189; *Mueller v. Bethesda Mineral Spring Co.*, 88 Mich. 390). We are not to suppose that one party was to be placed at the mercy of the other (*Hearn v. Stevens & Bro.*, 111 App.Div. 101, 106; *Russell v. Allerton*, 108 N.Y. 288). Many other terms of the agreement point the same way. We are told at the outset by way of recital that “the said Otis F. Wood possesses a business organization adapted to the placing of such indorsements as the said Lucy, Lady Duff-Gordon has approved.” The implication is that the plaintiff’s business organization will be used for the purpose for which it is adapted. But the terms of the defendant’s compensation are even more significant. Her sole compensation for the grant of an exclusive agency is to be one-half of all the profits resulting from the plaintiff’s efforts. Unless he gave his efforts, she could never get anything. Without an implied promise, the transaction cannot have such business “efficacy as both parties must have intended that at all events it should have” (BOWEN, L.J., in *The Moorcock*, 14 P.D. 64, 68). But the contract does not stop there. The plaintiff goes on to promise that he will account monthly for all moneys received by him, and that he will take out all such patents and copyrights and trademarks as may in his judgment be necessary to protect the rights and articles affected by the agreement. It is true, of course, as the Appellate Division has said, that if he was under no duty to try to market designs or to place certificates of indorsement, his promise to account for profits or take out copyrights would be valueless. But in determining the intention of the parties, the promise *has* a value. It helps to enforce the conclusion that the plaintiff *had* some duties. His promise to pay the defendant one-half of the profits and revenues resulting from the exclusive agency and to render accounts monthly, was a promise to use reasonable efforts to bring profits and revenues into existence. For this conclusion, the authorities are ample. . . .

The judgment of the Appellate Division should be reversed, and the order of the Special Term affirmed, with costs in the Appellate Division and in this court.

* * *

MEZZANOTTE v. FREELAND

Court of Appeals of North Carolina, 1973.
20 N.C.App. 11, 200 S.E.2d 410.

This is an action seeking specific performance of a contract of sale and damages for breach of contract.

On 2 May 1972 plaintiffs and defendants executed a contract under the terms of which plaintiffs agreed to buy and defendants agreed to sell a tract of land in Orange County, together with improvements and

facilities, known as the Daniel Boone Complex. The contract set out the sales price and terms of payment which included a good faith deposit by plaintiffs of \$5,000.00. * * *

* * *

Among the other provisions of the 2 May 1972 agreement were the following:

“2. This agreement is contingent upon parties of the second part [plaintiffs] being able to secure a second mortgage from North Carolina National Bank on such terms and conditions as are satisfactory to them in order to finance the closing and to secure additional working capital * * *

* * *

BALEY, J. * * *

The second contention of the defendants that the contract on May 2 was not supported by valid consideration is dependent upon the interpretation to be placed upon the promise of plaintiffs to purchase the properties in accordance with the terms of the contract. Defendants assert that since the agreement was contingent upon the plaintiffs' obtaining “satisfactory” financing from North Carolina National Bank the promise to buy was illusory and cannot constitute consideration.

It seems clear that the parties in signing the contract of sale intended to be mutually bound to comply with its terms. They understood that plaintiffs would make an honest good faith effort to acquire financing satisfactory to themselves from NCNB. The contract implies that plaintiffs would in good faith seek proper financing from NCNB and that such financing in keeping with reasonable business standards could not be rejected at the personal whim of plaintiffs but only for a satisfactory cause. Where a contract confers on one party a discretionary power affecting the rights of the other, this discretion must be exercised in a reasonable manner based upon good faith and fair play. The record here indicates that the parties so understood their obligation and that plaintiffs applied for a loan from NCNB and obtained a verbal commitment but were not able to secure the loan and arranged other financing in order to meet their obligations under the contract. A promise conditioned upon an event within the promisor's control is not illusory if the promisor also “impliedly promises to make reasonable effort to bring the event about or to use good faith and honest judgment in determining whether or not it has in fact occurred.” 1 Corbin on Contracts, § 149, at 659. The implied promise is enforceable by the promisee, and it constitutes a legal detriment to the promisor; therefore it furnishes sufficient consideration to support a return promise. In *Helicopter Corp. v. Realty Co.*, 263 N.C. 139, 147, 139 S.E.2d 362, 368, our court approved this language concerning consideration:

“It has been held that ‘there is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do,

whether there is any actual loss or detriment to him or actual benefit to the promisor or not.’ ”

Although there are no North Carolina cases specifically in point, courts in other jurisdictions have recognized that a conditional promise may be accompanied by an implied promise of good faith and reasonable effort, and that it need not be illusory.

For example, in *Jay Dreher Corp. v. Delco Appliance Corp.*, 93 F.2d 275 (2d Cir.1937), defendant granted plaintiff a franchise to sell its products in a certain territory. Plaintiff agreed to sell these products and build up defendant’s business in the specified territory. Defendant reserved the right to reject any order sent in by plaintiff, and plaintiff contended that this made defendant’s promise illusory. In an opinion by Judge Learned Hand, the court held that the contract was supported by consideration, finding an implied promise “that the defendant will use an honest judgment in passing upon orders submitted.” *Id.* at 277.

In *Commercial Credit Co. v. Insular Motor Corp.*, 17 F.2d 896 (1st Cir.1927), defendant, an automobile dealer, agreed to sell plaintiff all the time sales obligations of its customers for two years, and plaintiff agreed to purchase these obligations. The contract provided that plaintiff would purchase only “acceptable” time sales obligations. The court rejected defendant’s contention that the contract lacked consideration. It held that the contract did not allow plaintiff to refuse arbitrarily to purchase defendant’s obligations. “Acceptable does not mean acceptable by whim; it means acceptable within the usual business meaning of the word as applied to this kind of business dealings.” *Id.* at 899–900.

In *Richard Bruce & Co. v. J. Simpson & Co.*, 40 Misc.2d 501, 243 N.Y.S.2d 503 (Sup.Ct.1963), plaintiff agreed to underwrite a public offering of defendant’s stock, and defendant agreed to pay plaintiff a commission. Defendant violated the agreement, and plaintiff sued for breach of contract. Defendant asserted that the contract was void for lack of consideration, pointing to a provision allowing plaintiff to terminate the contract if it “in its absolute discretion, shall determine that market conditions or the prospects of the public offering are such as to make it undesirable or inadvisable.” The court held the contract enforceable, stating that plaintiff’s discretion was only “a discretion based upon fair dealing and good faith—a reasonable discretion.” *Id.* at 504, 243 N.Y.S.2d at 506.

Several cases have upheld the validity of contracts quite similar to the one involved in the present case. In *Mattei v. Hopper*, 51 Cal.2d 119, 330 P.2d 625 (1958), plaintiff agreed to buy a tract of land from defendant. The contract provided that it was “[s]ubject to Coldwell Banker & Company obtaining leases satisfactory to the purchaser.” The court held that plaintiff was bound by an implied promise to use good faith in determining whether Coldwell Banker’s leases were “satisfactory.” Therefore, his promise was not illusory and the contract was enforceable.

In *Kays v. Brack*, 350 F.Supp. 1243 (D.Idaho 1972), plaintiffs agreed to lease a tract of land and buy some corporate stock from defendants. The contract provided: "The buyer's agreement to purchase is contingent upon the buyer being able to secure financing acceptable to the buyer, and if the buyer is unable, despite his best efforts, to obtain such financing within 10 days after all sellers have signed this agreement, the buyer shall notify the sellers and either party shall have the right to cancel this transaction." The court held that plaintiffs' promise was not illusory, since they were required to use their best efforts to obtain financing. A similar case is *White & Bollard, Inc. v. Goodenow*, 58 Wash.2d 180, 361 P.2d 571 (1961).

Most closely in point is *Sheldon Simms Co. v. Wilder*, 108 Ga.App. 4, 131 S.E.2d 854 (1963). Here plaintiff entered into a contract to purchase real property from defendant. The contract provided: "This contract is contingent upon the purchaser's ability to obtain a loan on said property of \$24,000.00 with maximum interest of 6¼ percent per annum, for a maximum period of twenty years." The court held that the contract was valid and supported by consideration. Plaintiff was required to make "a diligent effort" to obtain a loan. *Id.* at 5, 131 S.E.2d at 855. He could not frustrate the contract by deciding at whim not to get a loan.

All of these cases tend to indicate that the agreement signed on 2 May 1972 by the Mezzanottes and the Freelandts was a valid and enforceable contract, supported by consideration. The contract included an implied promise by the Mezzanottes to use reasonable effort to procure a loan and to exercise good faith in deciding whether the terms of the loan were satisfactory.

* * *

Affirmed.

**MIAMI COCA-COLA BOTTLING CO.
v. ORANGE CRUSH CO.**

Circuit Court of Appeals, Fifth Circuit, 1924.
296 F. 693.

BRYAN, CIRCUIT JUDGE. This is an appeal from an order dismissing appellant's bill, which seeks to enjoin the cancellation by the appellee of a contract and to compel its specific performance. The contract is in the form of a license, whereby the appellee grants to the appellant the exclusive right, within a designated territory, to manufacture a certain drink called "orange crush," and to bottle and distribute it in bottles under appellee's trade-mark. The appellee agreed, among other things, to supply its concentrate to be used in the manufacture of orange crush at stated prices, and to do certain advertising. The appellant agreed to purchase a specified quantity of the concentrate, to maintain a bottling plant, to solicit orders, and generally to undertake to promote the sale of orange crush, and to develop an increase in the volume of sales. The license granted was perpetual, but contained a proviso to the effect that the appellant might at any time cancel the contract.

The bill avers that the appellant bought a quantity of the concentrate, manufactured orange crush, and was engaged in the performance of its obligations, when, about a year after the contract was entered into, the appellee gave written notice that it would no longer be bound.

We agree with the District Judge that the contract was void for lack of mutuality. It may be conceded that the appellee is liable to the appellant for damages for the period during which the contract was performed; but for such damages the appellant has an adequate remedy at law. So far, however, as the contract remains executory, it is not binding, since it can be terminated at the will of one of the parties to it. The consideration was a promise for a promise. But the appellant did not promise to do anything, and could at any time cancel the contract. According to the great weight of authority such a contract is unenforceable. *Marble Co. v. Ripley*, 10 Wall. 339, 359, 19 L.Ed. 955; *Willard Sutherland & Co. v. United States*, 262 U.S. 489, 43 Sup.Ct. 592, 67 L.Ed. 1086; *Velie Motor Car Co. v. Kopmeier Motor Car Co.*, 194 Fed. 324, 114 C.C.A. 284; *McCaffrey v. Knight* (D.C.) 282 Fed. 334; *Fowler Utilities Co. v. Gray*, 168 Ind. 1, 79 N.E. 897, 7 L.R.A. (N.S.) 726, 120 Am.St.Rep. 344; 6 R.C.L. 691; 1 Williston, pp. 219, 222. The contract cannot be upheld upon the theory that the appellant had a continuing option, because an option to be valid must be supported by a consideration. 6 R.C.L. 687.

* * *

The decree is affirmed.

Interview, N.Y. Times, Jan. 16, 2005

Interview by Deborah Solomon of Craig Ferguson

Q. Did you sign a contract with CBS?

A. Yes, I did, for six years. They can fire me any day they want.

Q. Then what is the point of the contract?

A. I have no idea. They insisted on it.

TEXAS GAS UTILITIES COMPANY v. S.A. BARRETT

Supreme Court of Texas, 1970.
460 S.W.2d 409.

STEAKLEY, JUSTICE. This is a suit for minimum payments under a contract for natural gas service. It was instituted by petitioner, Texas Gas Utilities Company, sometimes called the gas company, against respondents S.A. Barrett, John Barrett and James Beavers. After trial to a jury, the trial court ruled in response to respondents' motion for judgment that they were entitled to judgment on the jury verdict and as a matter of law. A take nothing judgment was accordingly rendered against petitioner. The court of civil appeals affirmed upon the holding

that the contract is unenforceable for lack of mutuality of obligation. 452 S.W.2d 508. Our views are otherwise which, in turn, calls for consideration of points not discussed by the intermediate court.

The contract upon which suit was brought was dated April 21, 1964 and was for a term of five years with an option to renew for an additional five years. The signatories were Associated Oil and Gas Company, petitioner's predecessor-assignor (the assignment being dated January 1, 1965) and respondents. The purpose of the contract was the supplying of natural gas for use by respondents in fueling irrigation water well pumps on farm properties which they held under a five year agricultural lease dated January 17, 1964. The contract required an annual minimum payment during the life of the contract of \$7.50 per 1400 h.p. for each engine installed.¹ A five mile pipe line to the properties was constructed by petitioner's predecessor in March, 1964, at an expense in excess of \$100,000 and deliveries of natural gas were commenced on April 6, 1964. Subsequent to the execution of the contract, and prior to its assignment to petitioner on January 1, 1965, respondents were evicted from the leased properties by their lessors. The contract is silent concerning the obligations of the parties in such event. It does not appear to be disputed that natural gas was available at all times; that the gas company furnished gas as ordered by respondents; and that the gas company delivered gas to the successors of respondents, billed them therefor, and will credit respondents with the sums paid by such successors.

The basic obligation assumed by Associated Oil and Gas Company, and by petitioner as assignee of the contract in question, was the delivery of natural gas to respondents as set forth in Article I:

"Subject to the terms and conditions herein stated Company will from April 21, 1964 to April 21st, 1969 until the expiration or other termination of this agreement (unless prevented by one or more of the causes mentioned in Article VI hereof) deliver to Customer at a meter installed by Company on the service line owned by Customer downstream of Billing Meter, set at various water well locations on a 4100.33 Acre Farm, * * * natural gas for use by Customer for the following purposes only: Fuel for irrigation purposes for approximately twenty (20) water wells."

The obligation to furnish gas was subject, however, to these provisions in Article VI of the contract:

1. Article II provided that "Customer shall be billed monthly and will on or before the tenth day from date of billing pay company for gas delivered or made available hereunder between the last two meter readings (called 'Billing Period') at the following rates and amounts.

1. 55 cents per each 1,000 cubic feet of gas.
2. An annual minimum payable in equal monthly installments, whether

used or not, of \$7.50 per horsepower for each engine installed, the original engines installed hereunder having 1400 horsepower. In event the original engines be abandoned or replaced by ones of lesser horsepower, the original engine horsepower rate shall apply; if replaced by one of greater horsepower the new shall apply."

“Company will make reasonable provision to insure a continuous supply of natural gas but does not guarantee a continuous supply of natural gas, and shall not be liable for damages occasioned by interruptions to service or failure to commence delivery, caused by conditions beyond its reasonable control, by an Act of God or the public enemy, inevitable accident, floods, fire, explosions, strikes, riots, war, delay in receiving shipments of required material, order of court or judge granted in any bonafide adverse legal proceedings or actions, or any order of any commission or tribunal having jurisdiction in the premises or without limitation by the preceding enumeration any other act or thing reasonably beyond its control or interruptions necessary for repairs or changes in Company’s distributing system. No payment, however, shall be required from Customer for service which Company herein agrees but fails to furnish.

“It is further and distinctly understood and agreed that the Company assumes no obligation whatever regarding the quantity or quality of gas delivered hereunder, or the continuity of service, and shall not be liable therefor, but Company will endeavor to supply the requirements of Customer for the above class of service to the extent of the amount of gas available for such service and to the extent permitted under any agreement between Company and any producer of gas available to Company for the supply of natural gas to Company, and subject to such limitations in the sale of gas for this class of service as in Company’s opinion may be necessary for the continued maintenance of the supply of gas for domestic use, it being recognized that Company is dependent for gas to be supplied hereunder upon gas produced by [sic] Company by other producers.” (Italics are added.)

It was the view of the court of civil appeals that under Article VI, particularly the italicized portion, the gas company was not obligated to furnish gas and for this reason the contract was unenforceable as lacking in mutuality of obligation. This, in respondents’ words, is their “first and foremost” position in asserting non-liability for the minimum payments which petitioner seeks to recover.

As has been noted by recognized legal scholars, a commonly repeated statement by the courts is that mutuality of obligation is a requisite in the formation of a contract, and that both parties to a contract must be bound or neither is bound. See 1 Williston on Contracts § 105A, at 420 (1957); 1A Corbin on Contracts § 152, at 2 (1963); 1 Page on Contracts § 565, at 949 (1920). The Williston treatise suggests that however limited, this is but a way of stating that there must be valid consideration. Professor Corbin urges the view that mutuality of obligations should be used solely to express the idea that each party is under a legal duty to the other; each has made a promise and each is an obligor. This is said to be the meaning with which the term is commonly used and that it is more correct to say that it is consideration that is necessary, not mutuality of obligation. But it has also been concluded “that logic is as powerless to disprove the existence of the mutuality rule as it has been shown to be powerless to establish its existence * * * that

no logic is able to connect the supposed mutuality rule with any formulation of the doctrine of consideration and no other logical justification for it has ever been suggested." Oliphant, *Mutuality of Obligation in Bilateral Contracts at Law*, 25 *Colum.L.Rev.* 705 (1925); 28 *Colum.L.Rev.* 997 (1928).

Be all of this as it may, this Court in *Texas Farm Bureau Cotton Ass'n v. Stovall*, 113 *Tex.* 273, 253 *S.W.* 1101 (1923) spoke quite succinctly of the rule of mutuality of obligation when it said:

"Reduced to its last analysis, the rule is simply that a contract must be based upon a valid consideration, and that a contract in which there is no consideration moving from one party, or no obligation upon him, lacks mutuality, is unilateral, and unenforceable. * * * It is quite elementary that the promise of one party is a valid consideration for the promise of the other party."

In speaking of mutual reciprocal obligations as consideration, the rule was stated in *Clement v. Producers' Refining Co.*, 277 *S.W.* 634 (*Tex.Comm.App.*1925) that "where no other consideration is shown, mutual obligations by the parties to the agreement will furnish a sufficient consideration to constitute a binding contract." See also *Johnson v. Breckenridge-Stephens Title Co.*, 257 *S.W.* 223, (*Tex.Comm.App.* 1924) and *Roberts v. Anthony*, 185 *S.W.* 423, (*Tex.Civ.App.—Amarillo* 1916, no writ.) It is presumed that when parties make an agreement they intend it to be effectual, not nugatory. *Portland Gasoline Co. v. Superior Marketing Co., Inc.*, 150 *Tex.* 533, 243 *S.W.2d* 823 (1951). A contract will be construed in favor of mutuality, *Carpenter Paper Co. v. Calcasieu Paper Co., Inc.*, 164 *F.2d* 653 (5th Cir.1947). The modern decisional tendency is against lending the aid of courts to defeat contracts on technical grounds of want of mutuality. *Armstrong v. Southern Production Co., Inc.*, 182 *F.2d* 238 (5th Cir.1950).

It is clear to us that the agreement here in question is a binding and enforceable contract. The writing embodies an exchange of obligations of value to each contracting party, reciprocally or mutually induced. The gas company was bound to deliver natural gas to the various water well delivery points specified in the contract; to make reasonable provisions to insure a continuous supply of natural gas; to endeavor to supply the requirements of respondents; and to install the necessary metering equipment at its own expense. Respondents were in turn bound to pay for the gas delivered to their wells upon their order and to pay the minimum charges provided in the contract. These mutually imposed obligations are not negated by the language used. See *Portland Gasoline Co. v. Superior Marketing Co., Inc.*, *supra*. The gas company explicitly bound itself in Article I to deliver natural gas to respondents "unless prevented by one or more of the causes mentioned in Article VI hereof." The exculpatory clause in Article VI did not relieve the gas company of this obligation. It would have been subject to liability for breach of contract if it had failed upon order to furnish gas to respondents for causes other than those specified in Article VI. The extent of the exculpatory clause is that the gas company assumed no obligation—made

no guarantee—either that gas would always be available or that gas of a particular quality would always be available. It was bound, however, to supply *available* natural gas to respondents within the restrictions of Article 6057, R.C.S. of Texas, 1925.² Cf. *Standard Oil Company of Texas v. Lopeno Gas Company*, 240 F.2d 504 (5th Cir.1957).

We accordingly hold that the contract upon which petitioner sued is enforceable against respondents. * * *

* * *

The judgments below will therefore be reversed and the cause remanded to the trial court for entry of judgment consistent with this opinion.

It is so ordered.

TIGG v. DOW CORNING CORP.

United States Court of Appeals, Third Circuit, 1992.

962 F.2d 1119, cert. dismissed 506 U.S. 1042, 113 S.Ct. 834, 122 L.Ed.2d 111.

ALITO, Circuit Judge: This is a breach of contract case. Following a jury verdict, the district court entered judgment for the plaintiff, Tigg Corporation, and against the defendant, Dow Corning Corporation, for more than \$17.5 million, plus interest. Dow Corning appealed, and Tigg cross-appealed, alleging error in the determination of interest. We will affirm on all issues related to liability, but we will reverse and remand for a new trial on the question of damages.

I.

The contracts in question concerned a new product developed to remove polychlorinated biphenyls (“PCBs”) from electrical transformers. PCBs are toxic, and in 1982 the Environmental Protection Agency issued final regulations restricting the use, servicing, and disposal of transformers containing PCBs. At that time, thousands of existing transformers contained askarel fluid, a coolant rich in PCBs. The EPA regulations created an incentive for owners to remove the PCBs from existing transformers rather than replacing them. In order to accomplish this task, it was necessary, not only to replace the fluid with a substitute, but to remove the PCBs that had been absorbed over the years by the wood and paper products in a transformer’s core.

To satisfy the anticipated demand for a product capable of removing these PCBs, Tigg and Dow Corning entered into a joint development agreement for a new product known as “RetroSil.” This product, which

2. “No such pipe line public utility shall discriminate in favor of or against any person, place or corporation, either in apportioning the supply of natural gas or in its charges therefor; nor shall any such utility directly or indirectly charge, demand, collect or receive from any one a greater or less compensation for any service rendered

than from another for a like and contemporaneous service; provided this shall not limit the right of the Commission to prescribe different rates and regulations for the use of natural gas for manufacturing and similar purposes, or to prescribe rates and regulations for service from or to other or different places, as it may determine.”

consisted of a pumping unit (called a control station) and a filter component (called the adsorber unit), was intended to work as follows. After the askarel fluid was drained from a transformer and replaced with a different coolant, Dow Corning 561 Silicone Transformer Fluid, the PCBs in the core would leach into the new fluid. The new fluid would be pumped through the adsorber unit, and the PCBs would be removed.

In June 1982, Tigg and Dow Corning entered into two agreements under which Tigg was to supply Dow Corning with its requirements of control stations and adsorbers. For the years 1982, 1983, and 1984, the agreements specified Dow Corning's "minimum" and "expected" purchases of control stations and adsorbers. The agreements did not specify figures for 1985 and 1986, but stated that these were to be provided by July 1, 1984. Under the agreements, [Tigg was required to sell exclusively to Dow Corning, ed.] [I]f Dow Corning did not purchase the minimum adsorber units during a particular year, Tigg could sell these units to other customers.

Dow Corning bought the stated minimum for 1982. The minimums for 1983 were reduced by agreement of the parties, but Dow Corning's purchases still fell short. Dow Corning purchased 102 control stations (instead of the reduced minimum of 480) and 500 adsorbers (instead of the reduced minimum of 1750).

* * * For the entire year of 1984, Dow Corning bought no control stations and only 105 adsorbers; the minimums in the contract were 825 control stations and 2500 adsorbers. Dow Corning made no purchases for 1985 and 1986.

Tigg sued Dow Corning for breach of contract in the United States District Court for the Western District of Pennsylvania based on diversity of citizenship. Count One of the amended complaint alleged that the contracts required Dow Corning to purchase the stated minimums in 1983 and 1984 but that Dow Corning had failed to do so. * * * Count Three alleged that Dow Corning had acted in bad faith in setting its requirements (at nothing) for the years 1985 and 1986. Dow Corning contended that the minimums were not binding and that it had acted in good faith in setting its requirements.

The district court originally granted partial summary judgment for Tigg, holding that the contracts unambiguously required Dow Corning to purchase the minimums set out in their provisions. The district court certified this question for interlocutory review, and we reversed, holding that there was a genuine issue of material fact concerning the intended meaning of the term "minimum." *Tigg Corp. v. Dow Corning Corp.*, 822 F.2d 358 (3d Cir.1987).

The case was then tried before a jury. Dow Corning contended that the minimums were not binding and that RetroSil was a flawed product that was rejected by the market.* * *

Tigg, on the other hand, argued that RetroSil was technologically sound. Tigg blamed any problems on other causes, such as the failure to change filters frequently enough and the use of Fluid 561 rather than

allegedly better fluids. * * * The jury returned verdicts for Tigg. The court . . . entered a judgment for Tigg in the amount of approximately * * * [\$17.5 million].

II.

Dow Corning argues that the judgment should be reversed based on several alleged errors in the jury instructions. We review jury instructions to determine whether, if taken as a whole, they properly apprised the jury of the issues and the applicable law. * * *

A. *Instructions Concerning the Burden of Persuasion With Respect to Dow Corning's Alleged Bad Faith in Count Three.*

* * * As previously noted, Count Three claimed that Dow Corning acted in bad faith by not purchasing any control stations and adsorbors during 1985 and 1986, years for which no numerical minimums were specified in the contracts. In a requirements contract for the sale of goods, the Michigan Commercial Code imposes an obligation on the buyer to exercise good faith in setting its requirements. Mich.Comp.Laws Ann. [hereinafter Mich.] § 440.2306(1) (corresponding to U.C.C. § 2-306(1)). . . .

Dow Corning contends, and Tigg does not dispute, that the burden of proving Dow's bad faith should have been placed on Tigg. We agree. * * * We now consider whether the charge adequately instructed the jury regarding the placement of this burden.

1. Dow Corning argues that the jury was misled because the district court refused to give an instruction explicitly stating that Tigg had the burden of proving bad faith. The court, however, did give a general instruction assigning to Tigg the burden of persuasion on all elements of its claims . . . [and] a short time later . . . stated, "plaintiff claims that defendant did not act in good faith when it failed to buy its requirements for the years 1985 and 1986." Taken together, these two portions of the instructions meant that Tigg had the burden of proving bad faith; thus these two portions of the instructions conveyed the same message as the specific instruction that Dow Corning sought. * * * [A] trial judge has broad discretion concerning the particular language used in a jury instruction.

* * *

2. Dow Corning maintains that the district court erroneously recast the burden of proof when it instructed the jury as follows:

[Good faith] imposes upon the defendant an obligation to use its *best efforts* to promote the sale of the equipment covered by the contracts.

Dow Corning contends that a buyer's duty of "good faith" under a requirements contract (see Mich. § 440.2306(1) (corresponding to U.C.C. § 2-306(1))) does not include a duty to use "best efforts" to market the product purchased. Accordingly, Dow Corning argues that the instruction was improper. We disagree that the instruction was improper.

First, we do not believe that this instruction placed the burden of proving bad faith (or lack of best efforts) on Dow Corning. The instruction merely said that Dow Corning was obligated under the contract to use its best efforts to promote the sale of RetroSil. * * * [T]he instruction said nothing at all about the burden of proof.

Second, we agree with the district court that Dow Corning had a duty under the agreements to use its best efforts to promote RetroSil. The obligation to use best efforts to resell a product is imposed upon those buyers engaged in “exclusive dealing in the kind of goods concerned. . . .” Mich. § 440.2306(2) (corresponding to U.C.C. 2-306(2)). * * * This obligation is intended to protect the original seller, who in an exclusive arrangement depends solely upon the buyer to resell the goods. *See Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917).

In a non-exclusive arrangement the buyer’s efforts in reselling the product may have little effect on the original seller. If the buyer does not resell the product, the seller, without breaching the contract, may solicit orders from other potential buyers. By contrast, in an exclusive dealing arrangement the seller has only one outlet for its goods. It is obligated not to sell to anyone except the buyer. In such a situation, the seller’s interests are inextricably bound up with the success of the buyer in reselling the product. The obligation placed on the buyer to use best efforts reflects its monopoly power; the exclusivity arrangement makes the seller as subject to the decisions of the buyer as a subsidiary within the buyer’s firm. The obligation of best efforts forces the buyer/reseller to consider the best interests of the seller and itself as if they were one firm.

Dow Corning contends that the agreements in this case were requirements contracts, not exclusive dealing agreements. There is no reason, however, why a requirements contract may not also involve an exclusive dealing restriction. Such a contract would obligate the buyer to buy its requirements from the seller and obligate the seller to sell only to the buyer. That is precisely the nature of the agreements between Tigg and Dow Corning. Dow Corning was obligated to buy its requirements from Tigg; thus, Dow Corning owed a duty to set its requirements in good faith. Tigg was generally forbidden to sell to any other buyer; thus, Dow Corning owed a duty to use its best efforts to resell the product.

Dow Corning argues that the agreements did not create an exclusive dealing arrangement because Tigg could sell adsorbents to other buyers if Dow Corning did not buy the stated minimums. However, the jury found Dow Corning in breach for failing to order the stated minimums in 1983 and 1984 and found the minimums to be binding. This means that the provision allowing Tigg to sell to other buyers was operative only in the event of Dow Corning’s breach. So long as Dow Corning did not breach, Tigg was obligated to sell to Dow Corning and only Dow Corning. Accordingly, the provision on which Dow Corning relies is only, in effect, a remedies clause, and we do not believe that such a clause, by itself, destroys the exclusivity of the contract.

Dow Corning suggests that the agreements in this case were not exclusive dealing agreements because Tigg was an “equipment supplier,” rather than a manufacturer, and Dow Corning was not a “distributor.” These labels, however, are not dispositive. Nor is it dispositive, as Dow Corning suggests, that the agreements did not expressly require that Dow Corning use its best efforts. The obligation to use best efforts is implied under Mich. § 440.2306(2) (corresponding to U.C.C. § 2-306(2)) “unless otherwise agreed” whenever the parties have made a “contract to refrain from supplying any other dealer or agent...” Mich. § 440.2306 (corresponding to U.C.C. § 2-306) official comment 5. In order for an obligation to use best efforts to be implied, the contract need not involve special kinds of parties or goods; the contract need only preclude the seller from selling goods to any other buyer while the contract is in force.⁶ The contract between Tigg and Dow Corning imposed such an obligation, and therefore the district court was correct in charging on best efforts.⁷

3. Dow Corning next contends that the jury instructions erroneously suggested that its good faith requirements could not have been zero. As Dow Corning correctly observes, under the U.C.C., a requirements buyer may have a good faith reason for demanding no goods from the seller. In such a case, the buyer does not breach by ordering no goods. [Citations omitted.]

Dow Corning requested a specific instruction on this point, but the district court refused. Moreover, the court instructed the jury that Dow had to act “according to commercial standards of fair dealing in the trade so that its requirements will approximate a *reasonably obtainable figure*.” * * * (emphasis added). Dow Corning maintains that this instruction “improperly suggest[ed] that Dow Corning’s requirements

6. Dow also argues that because it insisted on the exclusivity arrangement in order to protect its interest in the technology it was to allow Tigg to use in the joint venture no best efforts obligation ought to be implied. We disagree. Mich. § 440.2306(2) (corresponding to U.C.C. § 2-306(2)) imposes this obligation when its terms are met regardless of the motivation for agreeing to those terms or the interest the parties seek to protect in agreeing to those terms. * * *

7. The district court erred in suggesting that a requirement buyer’s obligation to take requirements in “good faith” under Mich. § 440.2306(1) (corresponding to U.C.C. § 2-306(1)) includes a duty to exercise “best efforts” to promote the resale of the product. The obligation to use “best efforts” to resell the product exists under Mich. § 440.2306(2) (corresponding to U.C.C. § 2-306(2)) only in an exclusive dealing contract. Therefore, under a requirements contract lacking an exclusive dealing provision, no “best efforts” duty

would exist. In the present case, however, the contracts in question contained both “requirements” and “exclusive dealing” provisions and therefore both obligations applied.

In describing the “best efforts” obligation of a buyer under an exclusive dealing contract, some courts have written that this obligation entails a duty to act in good faith. See, e.g., *Gestetner Corp. v. Case Equip. Co.*, 815 F.2d 806 (1st Cir.1987) (Me. Com.Code); *Hoover’s Hatchery, Inc. v. Utgaard*, 447 N.W.2d 684 (Ia.App.1989); *Kubik v. J & R Foods of Or., Inc.*, 282 Or. 179, 577 P.2d 518 (1978). While we agree that an exclusive dealing buyer’s obligation to exercise “best efforts” probably subsumes an obligation to act in “good faith,” it is important to distinguish this obligation, which is a feature of exclusive dealing contracts, from a requirements buyer’s obligation to take requirements in “good faith” under Mich. § 440.2306(1) (corresponding to U.C.C. § 2-306(1)).

could not be zero and must have some reasonable relationship to the 1982–84 minimum.” * * *

Once again, however, we cannot conclude that the district court erred. The reference to “a reasonably obtainable figure” did not suggest that Dow’s requirements could not be zero. If Dow Corning reasonably concluded that RetroSil was a commercial failure, its “reasonably obtainable” requirements could be zero. Moreover, while the specific instruction Dow Corning requested might have been helpful, it was not obligatory. Dow argued to the jury that its requirements were zero, and the instructions did not foreclose or discourage the jury from choosing that number. Nor was the jury told that good faith required Dow to order goods even if it did not, in good faith, require the goods. Thus, we find no ground for reversal.

B. *Other Jury Instructions.*

1. Dow Corning next argues that the district court erred in giving the jury, as part of the instructions on Count One, a charge on the rule of contract interpretation known as *contra proferentem*. The court charged as follows:

If you, Members of the Jury, are unable to ascertain the intention of the parties from the evidence in the case, you may refer to a rule of interpretation of contracts; that a contract may be interpreted adversely to the party that drafted or wrote the contract. * * *

Dow Corning contends that the instruction was erroneous for several reasons. * * * [W]e are convinced that the instruction, even if erroneous, was harmless. In a civil case, an erroneous instruction provides a basis for reversal only if it was “inconsistent with substantial justice” (Fed.R.Civ.P. 61) or affects “a substantial right of [a] party” (Fed.R.Evid. 103(a)). [Citation omitted.] This standard is not met here.

In the first place, the instruction did not identify Dow Corning as the drafter of the agreements, and Dow Corning attempted to portray Tigg as co-drafter. * * * Thus, even if the jury relied on the instruction, it is by no means clear that the instruction benefitted Tigg.

More important, the *contra proferentem* instruction by its terms applied only if the jury was “unable to ascertain the intention of the parties from the evidence in the case.” Here, it seems most unlikely that the jury was unable to reach agreement concerning the meaning of the term “minimum[s]” based on the contract language and the other evidence. Although we previously held that the contract language alone was not sufficient to support partial summary judgment for Tigg, that language was indisputably powerful evidence in Tigg’s favor. The relevant provision of the control stations agreement read as follows:

1.2 Agreement

DOW CORNING shall purchase from TIGG, and TIGG shall sell to DOW CORNING, the Control Stations specified in Paragraph 1.3 in the quantities specified in Paragraph 1.4.

1.3 Product

RetroSil™ Control [Stations, ed.] produced exclusively for DOW CORNING in accordance with the DOW CORNING specifications attached as Exhibit 1.

DOW CORNING may revise its specifications at any time.

1.4 Quantity

DOW CORNING agrees to purchase annually the minimum quantity of RetroSil™ Control Stations to specifications set out in Exhibit 1, indicated in the table below.

Contract Year	RetroSil™ Control Stations	
	Minimum	Expected
1982		
3rd Quarter	66	165
4th Quarter	66	248
Total	132	413
1983	578	1115
1984	825	2228
1985 and 1986	To be provided by July 1, 1984.	

* * *

(The agreement on adsorbers contained a provision that was identical except for the number of units listed.)

Both the ordinary meaning of the term “minimum” and the contrast with “expected” purchases weighed heavily in favor of Tigg’s interpretation. We have reviewed the other evidence on which Dow Corning relied to show that the term “minimum” really meant a “forecast.” While this evidence was sufficient to create a jury question, the evidence in favor of Tigg’s interpretation of the term “minimum” was overwhelming, and thus the instruction in question, even if erroneous, was clearly harmless.

* * *

In sum, we have found no reversible error in any part of the jury instruction relating to liability, and we will accordingly affirm the judgment of the district court with respect to liability.

* * *

[The court, however, held that the District Court had improperly charged the jury on the measure of damages and remanded for a new trial on the issue of damages alone. Ed.]

SUMMITS 7, INC. v. KELLY

Supreme Court of Vermont, 2005.
178 Vt. 396, 886 A.2d 365.

ALLEN, C.J. (Ret.), Specially Assigned.

¶ 1. Defendant Staci Lasker¹ appeals the superior court’s order enjoining her from working for a competitor of her former employer, plaintiff

¹ Defendant’s maiden name is Staci Kelly, but by the time of trial she was using her married name, Staci Lasker.

Summits 7, Inc., based on the terms of a noncompetition agreement entered into by the parties during Lasker's at-will employment with Summits 7. The principal issue in dispute is whether there was sufficient consideration to support the agreement. The superior court ruled that either Lasker's continued employment or the promotions and increased pay she received during her employment with Summits 7 was sufficient consideration to support the agreement. We agree with the superior court that Lasker's continued employment constituted sufficient consideration. * * *

* * *

I.

* * *

¶ 15. The primary issue that Lasker raises in this case is whether the . . . noncompetition agreement she signed was supported by adequate consideration. We emphasize that Lasker has not challenged the agreement on the basis that it is unreasonable with respect to the type of restrictions imposed on her or whether those restrictions are narrowly tailored to address Summits 7's legitimate interests. Nor has Lasker contended that the agreement is unreasonable with respect to the length of time that it imposes restrictions on competition. Lasker does argue that the superior court erred by not addressing whether the geographic scope of the agreement was unreasonably broad, but . . . we need not consider this issue because Lasker plainly sought and obtained employment within a reasonably restricted geographic area, and the court may enforce the agreement to the extent that it is reasonable. Hence, if we conclude that the agreement was supported by adequate consideration, we will affirm the superior court's judgment in favor of Summits 7.

¶ 16. As noted, the trial court ruled that continued employment would be sufficient consideration to support the covenant not to compete, but that it was unnecessary to even reach that conclusion because the increased compensation and promotions that Lasker received during her employment with Summits 7 were adequate consideration to support the covenant. We disagree with the latter determination. There is no evidence that Lasker's promotions and raises were connected in any way with the noncompetition agreements she signed. * * * We can only assume that she received these promotions and raises because she performed her job well and was rewarded for that performance.

¶ 17. We also decline to give controlling weight to the fact that, by its terms, the noncompetition agreement could be enforced only if Lasker were fired for cause or left her employment voluntarily. One might argue that the agreement provided some incentive for Summits 7 not to fire Lasker without cause, but any such incentive did not constitute a tangible benefit beyond continued employment in exchange for signing the agreement. Indeed, the agreement explicitly states that it neither

creates a contract of employment nor alters in any way Lasker's status as an at-will employee.

¶ 18. Nevertheless, we agree with the superior court, the majority of other courts, and the recent Restatement [of Employment Law] draft that continued employment alone is sufficient consideration to support a covenant not to compete entered into during an at-will employment relationship. See *Mattison [v. Johnston]*, 730 P.2d [286] at 288 [1986] (although there is authority to contrary, most jurisdictions have found that continued employment is sufficient consideration to support restrictive covenant executed after at-will employment has begun); Restatement (Third) of Employment Law, Preliminary Draft No. 2, *supra*, § 6.05 cmt. d. . . . * * *

¶ 19. Moreover, because an at-will employee can be fired without cause at any time after the initial hire, the consideration is the same regardless of what point during the employment relationship the employee signs the covenant not to compete. See [*Copeco, Inc. v. Caley*], 632 N.E.2d [1299] at 1301[1992] (there is no substantive difference between promise of employment upon initial hire and promise of continued employment during employment relationship) . . . * * *

¶ 20. In either case, the employee is, in effect, agreeing not to compete for a given period following employment in exchange for either initial or continued employment. Looked at another way, in either case the consideration is the employer's forbearance from terminating the at-will employment relationship. * * * Regardless of what point during the employment relationship the parties agree to a covenant not to compete, legitimate consideration for the covenant exists as long as the employer does not act in bad faith by terminating the employee shortly after the employee signs the covenant. See *Zellner [v. Conrad]*, 589 N.Y.S.2d [903]at 907 [1992] (forbearance of right to terminate at-will employee is legal detriment that can stand as consideration for restrictive covenant; where employment relationship continues for substantial period after covenant is signed, that forbearance is real, and not illusory).* * *

II.

* * *

Affirmed.

¶ 25. JOHNSON, J., dissenting.

* * * Long after Staci Lasker began working for Summits 7, the company required her to sign an extremely broad noncompetition agreement forbidding her from directly or indirectly participating in any enterprise providing services related to those offered by Summits 7. The restriction on her employment was for one year following her termination for cause or voluntary resignation and covered all of Vermont and New Hampshire and part of New York. For signing this highly restrictive agreement, Lasker received nothing other than the right to continue the job that she already had. * * *

¶ 26. A brief examination of the facts demonstrates that Lasker's continued employment is illusory consideration for her signing the noncompetition agreement. The day before Summits 7 presented the agreement to Lasker, she was an at-will employee who could be fired at any time with or without cause, but who was free to leave her employ at any time and seek any other job. The day after she signed the agreement, she was still an at-will employee who could be fired at any time for any or no reason, but she had lost her right to seek any other job after leaving her employ.

* * *

* * *

¶ 28. The majority obscures the illusory nature of the consideration it finds here by suggesting that continued employment is sufficient consideration as long as the employer does not terminate the employment relationship in bad faith shortly after the agreement is reached. I find this reasoning illogical and unpersuasive. Whether there is adequate consideration should be judged based on the expectations of the parties at the time they enter into the agreement. Applying a retrospective analysis to determine whether there was consideration gets us away from traditional notions of consideration and instead transforms an illusory promise into enforceable consideration through performance. T. Staidl, *The Enforceability of Noncompetition Agreements when Employment is At-Will: Reformulating the Analysis*, 2 Employee Rts. & Emp. Pol'y J. 95, 106 (1998) . . . * * *

¶ 29. [H]istorically courts have closely scrutinized post-employment covenants not to compete. 1 H. Specter & M. Finkin, *Individual Employment Law and Litigation* § 8.01, at 443 (1989). Judicial scrutiny is necessary because such covenants are often the result of unequal bargaining power between the parties. *Id.* Employers may take advantage of that unequal bargaining power by imposing restrictions intended to ensure that their employees will not compete with them after they leave their employ. On the other side, employees interested in obtaining or keeping their jobs are likely to give scant attention to the hardship that they may suffer later through the loss of their livelihood as the result of the restriction on their future employment. *Id.* § 8.08, at 485. In the interests of free commerce and freedom to choose one's employment, courts have felt obligated to assure that restrictive covenants are aimed at protecting legitimate employer interests rather than restricting trade or competition.

¶ 30. Although these public policy concerns are ultimately addressed by determining whether the covenant in dispute is reasonably related to a legitimate employer interest and has reasonable geographic and temporal restrictions, the issue of whether adequate consideration exists for such covenants has become a flashpoint for those same concerns. In light of the increasing criticism of and restrictions upon at-will employment relationships, and the lack of any real bargaining between employer and employee when continued at-will employment is exchanged for restrictions on future employment, the "better view" is to require additional

consideration beyond continued employment to support a restrictive covenant entered into during the employment relationship. *Id.* § 8.02, at 450. . . . * * *

¶ 31. In this case, Staci Lasker began working for Summits 7 in 2000 as a ten-dollar-an-hour employee and gradually progressed in the company. More than a year after she commenced her employment with Summits 7, the company required her to sign a noncompetition agreement severely restricting her post-employment rights. The trial court suggested in its decision that Lasker's general development as an employee—her learning how to handle increased responsibilities concerning the business—was adequate consideration for signing the noncompetition agreement. I concur with the majority's rejection of this position. * * *

¶ 32. The trial court also rejected Lasker's argument that requiring her to sign the noncompetition agreement upon threat of dismissal amounted to coercion. * * * Lasker had argued that she did not really have a choice as to whether to sign the agreement because her marriage was breaking up at the time and she had to stay financially solvent to support her two children. Her situation illustrates the unequal bargaining power that typically exists between employer and employee, particularly when the employer requires the employee to sign a noncompetition agreement upon threat of dismissal after the employee has become established in the job. * * *

* * *

¶ 35. In sum, I believe that requiring an employee to sign a post-employment covenant not to compete upon threat of dismissal, without conferring any benefit upon the employee other than continued at-will employment, which can be terminated at any time after the agreement is reached, is coercive in nature and unsupported by any real consideration. I would strike the agreement in this case for lack of consideration.

Problems

24. On April 30, B and S signed a contract which provided that B agreed to buy and S to sell special pre-mixed barbecue sauce, at a designated price per gallon, to be used in toasted buns in B's restaurant. S also agreed to give B an exclusive right to use this sauce in the State of Oregon. The agreement was for a period of 10 years. Beginning in May, B began purchasing several gallons of sauce per month. In October, B decided it could make a similar sauce for less money. Thus, B did not place an order for sauce that month and informed S that it did not expect to buy any additional sauce. Does S have a cause of action against B?

25. D, an oil company, agreed to supply P, a public utility, and P agreed to buy, its requirements for fuel oil at one of its generators. The contract was for a five-year period at a fixed rate per barrel and contained estimates of the amounts of oil which P would require per year. These estimates were made based upon the assumption that P would primarily burn gas. At the time the agreement was signed, gas was less expensive than

oil and, in the agreement, P explicitly reserved the right to burn as much gas as it chose.

Within five months of the signing of the agreement, the market price of oil increased sharply. P revised its requirements for oil, demanding a 63 percent increase over the contract estimate. D refused to meet the increased demand but supplied P with the amount of the contract estimate plus ten percent.

The increase in P's demand was occasioned by a sixfold increase in sales of electricity by P to other utilities. In addition, P proposed to sell to a supplier of gas a large quantity of gas that it could have used to produce electricity. P sued D for failure to deliver its increased demands of oil. What result?

26. Kemp owned and operated a gasoline station. He entered into a contract with plaintiff, a petroleum company, agreeing to purchase all his supplies of gasoline from plaintiff for a period of 7 years. In the second year of performance, Kemp formed a corporation wholly owned by himself and transferred the gasoline station and all its assets to this corporation. He then informed plaintiff that he had no further requirements for gasoline. Kemp's corporation then began purchasing gasoline from one of plaintiff's competitors. Plaintiff sues. What result?

27. A enters into a bilateral contract with B in which A promises to ride B's horse in the Derby in return for B's promise to pay \$1,000. A threatens not to ride. C, a stranger, promises A an additional \$1,000 if A will promise to ride. A makes the promise and rides. Does the doctrine of forging a good unilateral contract out of a bad bilateral contract apply to this case?

28. A promises to work for B for one year in return for B's promise to pay him a fair share of the profits. A performs. Does the doctrine of forging a good unilateral contract out of a bad bilateral contract apply to this case?

29. Husband and Wife had marital problems that in large part stemmed from his off again, on again addiction to cocaine. At a time when he was free of his addiction, the parties entered into an agreement as follows: Wife agreed not to leave him as long as he refrained from using illicit drugs and Husband promised to refrain from using illicit drugs. The agreement further provided that if Husband breached, he would forfeit to her his interest in certain community property. He did not keep his promise. She sued for divorce and asked for a declaration that the community property be forfeited to her. Put aside any ideas you may have about matrimonial law; is the contract enforceable under principles of contract law?

30. P and D, who were brothers, owned adjacent parcels of land. There was a dock on D's parcel. They entered into an agreement which permitted P to use the dock for 10 years in exchange for P's promise to pay one half of the maintenance expenses each year. By the terms of the agreement, P was permitted to terminate the agreement at will. After five years D refused to allow P to continue to use the dock. P brings an action against D for breach of contract and D sets up a defense of mutuality of obligation. During the five years prior to the commencement of the suit P had paid one half of the maintenance expenses of the dock. Make one or more arguments for P.

31. S and B entered into an agreement by the terms of which S agreed to sell and B agreed to buy 12 carloads of Ko-Hi flasks at a stipulated price. There was a clause in the agreement which read as follows: "It is agreed that Buyer may have the privilege of increasing quantity by an additional 13 carloads shown herein during the period covered by this agreement." An additional 13 carloads were ordered but not delivered. What are the rights of the parties?

32. The defendant, acting under its power of eminent domain, took title to the plaintiff's building. The defendant promised plaintiff to pay plaintiff's moving expenses if the plaintiff promised (1) to depart the premises peacefully and expeditiously without requiring the defendant to resort to legal action; (2) to relocate its business elsewhere in the same community and not liquidate. Plaintiff so promised. Was defendant's promise supported by consideration?

33. Plaintiff was employed by the defendant in Wyoming at a time when the employer's personnel manual made clear promises of job security. (Review the *Sanchez* decision on page 6. It represents Wyoming law on personnel manuals.) Subsequently, the employer informed each employee that the personnel manual was withdrawn and that from that moment on all personnel were under a hiring at will. As part of a downsizing operation, plaintiff was later discharged. (a) Does plaintiff have a claim based on the original manual? (b) Would the answer or analysis be different if the manual had expressly stated that it would be subject to change by the employer?