

CASE NO. 38610-1-II

Court of Appeals
of the State of Washington
Division II

LAUREN L. ELLIS and JOHN DOE ELLIS, husband and wife;
LAUREN L. ELLIS d/b/a ELLIS CONSULTING d/b/a
AMERICAN HOME APPRAISAL,

Appellants,

v.

KITSAP CREDIT UNION, a Washington State Nonprofit Credit Union
d/b/a KITSAP COMMUNITY FEDERAL CREDIT UNION

Respondent.

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STATE OF WASHINGTON
BY [Signature] DEPUTY CLERK
COURT OF APPEALS
DIVISION II

Appellant's Opening Brief

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I. ASSIGNMENT OF ERROR:

Whether the trial court erred in granting third party defendant, Kitsap Credit Union's (hereinafter "KCU") Motion for Summary Judgment?

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

ISSUE A: WHETHER KCU IS BOUND BY THE LIMITATIONS CONTAINED IN ELLIS'S APPRAISAL?

ISSUE B: WHETHER THE PARTIES' AGREEMENT, HAVING BEEN FULLY PERFORMED, IS SUBJECT TO THE STATUTE OF FRAUDS?

III. STATEMENT OF CASE

A. Background:

Third party plaintiff Lauren Ellis¹ has been an appraiser since 1985. He is an associate member of the Appraisal Institute and certified by the State of Washington. CP 43.

KCU asked Ellis to prepare an appraisal of a development project located in Kitsap County. *Id.* Ellis did so and submitted his completed appraisal to KCU on or about January 26, 2003. *Id.*

¹ d/b/a Ellis Consulting, d/b/a American Home Appraisal, hereinafter, collectively, "Ellis".

On page five of the appraisal, it states:

Purpose and Intended Use/User of the Appraisal

The intended use of this report is for *internal* decision making regarding construction financing. The intended user is the Client and/or assigns.

All other uses are expressly prohibited. Reliance on this report by anyone other than the client or other user specifically approved by ELLIS CONSULTING for a purpose not described in this section is prohibited. The authors' responsibility is limited to the client.

This appraisal report is prepared for the sole and exclusive use of Kitsap Community Federal Credit Union to assist with the mortgage lending decision. It is not to be relied upon by any third parties for any purpose whatsoever.

CP 60; Appendix A, page 5, emphasis added (*see also* Appendix A, p. 8).

The “Appraisal Summary” also states.

If this report is placed in the hands of anyone other than the client, the client shall make such party aware of all limiting conditions...

CP 65; Appendix A, p. 10.

Page 12 of the “Appraisal Summary”² states:

The client agrees to indemnify and hold harmless Ellis Consulting, its officers, and employees for any and *all claims for loss and liabilities of any nature whatsoever* arising out of or related to this contract, the appraisal report, or the inclusion of the

² The “Appraisal Summary”, attached as Appendix A, is the very first section of text in this appraisal; it begins on page 5, and concludes on page 12. Appendix A.

appraisal report as an exhibit to a registration statement and prospectus used as part of a real estate securities offering.

CP 67; Appendix A, p. 12, emphasis added.

The above-stated terms and conditions (all of which appear in the first seven pages of the text of the appraisal) are standard inclusions in professionally prepared appraisals. CP 43. Despite admitting it is common and routine to receive and use such appraisals in its business (CP 88-89), KCU has never denied that indemnification is a standard term.

Without objection to any term contained therein, KCU accepted this appraisal, paid Ellis for preparing it, and made the contemplated construction loan. CP 45.

Until the commencement of this litigation, neither Ellis, nor anyone authorized to act on his behalf approved or was aware of the use of the Appraisal Report by anyone other than KCU, in its “internal decision making” regarding the contemplated construction loan. CP 60; Appendix A, on page 5.

Nevertheless, this appraisal was given to one or more third parties, including the defendant borrower. Plaintiffs in this action allege that defendant Heins (an agent of KCU’s borrower) used Ellis’s appraisal to solicit investors in a fraudulent and unlawful securities offering.

There is no evidence that KCU even attempted to make the borrower aware of all (or any) “limiting conditions” (Appendix A, p. 10) in its use of the appraisal.

B. Procedural Posture:

Initially this lawsuit alleged that Ellis acted with other defendants in causing plaintiffs’ injuries. Ellis moved for summary judgment against plaintiffs and also moved to join KCU as a third party defendant pursuant to the appraisal’s indemnity clause. Both motions were granted. CP 4-7 and CP 24-27; CP 1-3 (Appendices B and C).

KCU subsequently moved for summary judgment seeking to avoid indemnifying Ellis for the expenses he incurred in defending himself herein. The trial court granted that motion, and this appeal followed.

IV. STANDARD ON REVIEW

The appellate court reviews summary judgment motions *de novo*, engaging in the same inquiries as the trial court. *Puget Sound Financial, LLC v. Unisearch, Inc.*, 146 Wn.2d 428, 433, 47 P.3d 940 (2002), citations omitted. Like the trial court, the appellate court takes the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Holst v. Fireside Realty, Inc.*, 89 Wn. App. 253, 948 P.2d 858 (1997), citations omitted.

On factual issues, we reverse if reasonable people could reach different conclusions, but affirm if reasonable people could reach but one conclusion.

Id., at 253-54, citations omitted.

Of particular importance in regard to the case here presented, mutual assent is a question of fact. *Sea-Van Investments Associates v. Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994).

Similarly significant, intent, and specifically whether KCU intended to be bound to indemnify, is a question of fact precluding summary judgment. *Scott Galvinizing, Inc. v. Northwest Enviroservices, Inc.*, 120 Wn.2d 573, 584 (1993); *see also: Washington Hydroculture, Inc. v. Payne*, 96 Wn.2d 322, 329, 635 P.2d 138 (1981).

Pursuant to RCW 62A. 1-205(2), trade usage also presents a factual question³. Under RCW 62A.1-205(3) parties are bound by a trade usage of which they knew or should have known. (*See: Appendix D*).

[W]hat a person knew or should have known at a given time is a question of fact.

Gillespie v. Seattle-First National Bank, 70 Wn. App. 150, 170, 855 P.2d 680 (1993).

³ The UCC can be applied by analogy to common law contracts. *Puget Sound Financial, supra*, at p. 440, fn. 14, citations omitted.

V. ARGUMENT

ISSUE A: WHETHER KCU IS BOUND BY THE LIMITATIONS CONTAINED IN ELLIS'S APPRAISAL?

1. RCW 62A Applies to the Parties' Transaction:

RCW 62A. applies to transactions in goods. RCW 62A.2-105 defines goods as

all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale.

Appendix E.

KCU does not deny it contracted with Ellis for an appraisal. There can be no doubt the appraisal KCU purchased from Ellis was movable and “specifically manufactured.”

Therefore, regardless of when this contract may have been fully formed⁴, RCW 62A. applies to the appraisal transaction, a transaction in goods.

2. Pursuant To RCW 62A. 2-204, the Parties Formed a Layered Contract Incorporating the Terms Contained in Ellis's Appraisal:

⁴ That is, regardless of whether the contract was fully formed when Ellis submitted the appraisal, or when KCU accepted it, paid for it, and used it .

In analyzing similar sorts of limiting terms first delivered to a buyer along with delivery of the product requested, the court in *M.A. Mortenson Company, Inc. v. Timberline Software Corporation*, concluded:

[T]his is a case about contract formation, not contract alteration. As such, RCW 62A.2-204, and not RCW 62A.2-207, provides the proper framework for our analysis.

Id., 140 Wn.2d 568, 582, 998 P.2d 305 (2000).⁵

RCW 62A. 2-204 provides in pertinent part:

- (1) A contract for sale of goods may be made in any manner sufficient to show agreement, *including conduct by both parties which recognizes the existence of such a contract.*
- (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

Id., Appendix F, emphasis added.

Applying 2-204, the *Mortenson* court concluded,

[B]ecause RCW 62A.2-204 allows a contract to be formed “in any manner sufficient to show agreement... even though the moment of its making is undetermined,” it allows the formation of “layered contracts”...

Mortenson, supra, at 584

⁵ KCU raised the UCC (specifically RCW 62A. 2-207) in its Reply brief on summary judgment. CP 81. RCW 62A. 2-204 was not addressed before the trial court. Nevertheless, RAP 9.12 (pursuant to which an appellate court will consider only “evidence and issues” called to the attention of the trial court), does not bar the appellate court from applying statutory authority that was not cited to the trial court. *Ellis v. Seattle*, 142 Wn.2d 450, 459 (fn. 3), 13 P.3d 1065 (2000). This makes simple sense: A statute isn’t “evidence or an issue,” it is the law.

The *Mortenson* case held that licensing terms, sent to the buyer along with a software order,

were part of the contract between Mortenson and Timberline, and Mortenson's use of the software constituted its assent to the agreement, including the license terms.

Id., at 584.

In rejecting the buyer's contention that it never saw the terms in question, the *Mortenson* court stated,

[I]t was not necessary for Mortenson to actually read the agreement in order to be bound by it.

Id., citations omitted.⁶

Likewise, the mere absence of negotiation or bargaining is not determinative of the enforceability of a clause limiting liability. *Puget Sound Financial, LLC, supra*, at 440, citations omitted.⁷

⁶ Among the cases cited with approval in *Mortenson* is that of *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997), which, along with *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), both of which were persuasive to the Washington State Court of Appeals (93 Wn. App 819, at 829-831) and the Supreme Court (*supra*, at 583-84). These cases are attached as Appendix G.

⁷ In *Puget Sound Financial, LLC, supra*, the court noted the applicability by analogy of UCC layered contract analysis to a clause limiting liability in the common law context. *Id.*, at 440, fn. 14. See also: *Tacoma Fixture Co., Inc. v. Rudd Co.*, 142 Wn.App. 547, 551, 174 P.3d 721 (2008).

In the present case there is no evidence that KCU was in any way prevented from reading and understanding the specific nature of the terms and conditions contained in Ellis's appraisal.

The indemnity term to which KCU objects is on page twelve⁸ of the very first section of the appraisal, entitled "Appraisal Summary." CP 44; Appendix A, p. 12. The balance of the appraisal consists of the details of the technical analysis and documentation supporting Ellis's valuation of the specific project.

Even assuming, solely for the sake of argument, that no one at KCU read the "Appraisal Summary"⁹, the failure to do so does not excuse it from the terms of its agreement. "[P]oor business judgment" is not a mental incapacity to contract. *Page v. Prudential Life Ins.*, 12 Wn.2d 101, 110, 120 P.2d 527 (1942).

A contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome.

Hill, supra, at 1148 (Appendix G)¹⁰

⁸ The seventh page of text.

⁹ And there is no competent admissible evidence that this is so. See: Motions to Strike. CP 39-41; CP 93-96. Mr. Huck's Declarations establish that no negotiations regarding indemnity appear in the file he reviewed, a far different matter than proof that no one read the appraisal or that no negotiations took place.

¹⁰ The *Hill* case also notes that the "layered contract" analysis is not limited to software, but is applicable to a wide variety of commercial contexts. Appendix G., at 1149.

So long as KCU was *capable* of understanding the “nature of and terms of the contract,” (*Page, supra*, at 109) it is bound by that contract and those terms.

It is especially significant that KCU never revoked:

Revocation of acceptance must occur within a reasonable time after the buyer discovers *or should have discovered* the ground for it and before any substantial change in condition of the goods...

RCW 62A. 2-608(2), emphasis added (Appendix H).

There can be no question that KCU was able to understand its obligations, had it simply read the appraisal it accepted without demure. In fact, because KCU commonly received and routinely used such appraisals (CP 88-89), and because it never denied that such appraisals usually include indemnification terms, one is almost forced to conclude that KCU *knew or should have known* of its indemnity obligation.

Whether KCU discovered, or when it should have discovered, the indemnity clause is (if it’s any question at all) a question of material fact. *Gillespie, supra*, at 170; *and see*: RCW 62A. 1-205 (Appendix D).

That KCU now denies knowledge¹¹ at very most creates an issue of material fact precluding summary judgment.

¹¹ And again, note that there is only Huck’s conclusory statement, made without personal knowledge, to this effect. CP 39-41; Cp 93-96.

The *Mortenson* court further noted that RCW 62A. 1-201(3) (Appendix I) provides in pertinent part that parties' bargains may be found in the language used, "*or by implication from other circumstances including course of dealing or usage of trade or course of performance...*" *Mortenson, supra*, at 584-85.

Trade usage and course of dealing are relevant to interpreting a contract and determining the contract's terms.

Puget Sound Financial, LLC, supra, at 434, citations omitted.

Extrinsic evidence is admissible to prove trade usage. *Graaf v. Bakker Brothers of Idaho, Inc.*, 84 Wn. App. 814, 818, 934 P.2d 1228 (1997), citations omitted.

In this case, the uncontradicted evidence regarding trade usage is Ellis's statement that the inclusion of an indemnity term is very nearly universal in professionally prepared appraisals. CP 43. KCU has never denied that indemnity is a standard term in the appraisals it routinely receives and uses in making secured loans. In any event,

The existence and scope of a usage of trade are to be determined as questions of fact.

Puget Sound Financial, supra, at 434, citations omitted; *and see*: RCW 62A.1-205(2), Appendix D.

Unrebutted evidence of an industry practice is persuasive of trade usage and supports “the inclusion of limiting language in the contract” between the parties. *Puget Sound Financial, supra*, at 435.

The parties’ layered contract included the indemnity provision contained in Ellis’s appraisal.

3. Pursuant to RCW 62A., When KCU Paid for, and Used the Ellis Appraisal Without Indicating Its Rejection of Any Part Thereof, It Accepted the Appraisal and the Terms Contained Therein:

The conclusion that the provisions contained in the Appraisal Summary are binding also conforms to the general scheme of the UCC. For instance, pursuant to RCW 62A. 2-602(1) (Appendix J), a buyer’s rejection of goods is ineffective unless it is communicated to the seller within a reasonable time.

A tender or delivery of goods made pursuant to a contract of sale, even though wholly non-conforming, requires affirmative action by the buyer to avoid acceptance. Under subsection (1), therefore, a buyer is given a reasonable time to notify the seller of his rejection, but without such seasonable notification his rejection is ineffective.

UCC Official Comment 1 (included within Appendix J).

The Washington comments to RCW 62A. 2-602 concur:

The buyer is “deemed to accept if “after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.”

Comment 1, citations omitted, (Appendix J).

Here, of course, the “good” in question is the appraisal itself.

KCU now seeks to repudiate the terms of the very document it paid for and used to its own purposes. However, pursuant to RCW 62A. 2-606(1) (Appendix K), acceptance of goods occurs when a buyer fails to effectively reject (under §2-602), or performs an act inconsistent with the seller’s ownership. RCW 62A. 2-606(1)(b) and (c). Here, KCU *both* failed to reject *and* used the appraisal as if it were its own.

Acceptance of a part of any commercial unit is acceptance of that *entire* unit.

RCW 62A. 2-606(2), emphasis added (Appendix K).

Ellis submitted the appraisal as a commercial unit, a whole, and it was accepted by KCU as such. When KCU paid for and used the appraisal, without notifying Ellis of its rejection of any part thereof, it accepted the appraisal with all the terms contained therein.

KCU cannot now (long after the fact) pick and chose what parts of that whole commercial unit it will accept and abide by, and what parts it

now finds convenient to reject. That is to say, it accepted “the risk that the unread terms may in retrospect prove unwelcome.” *Hill, supra*, at 1148 (Appendix G).

4. However Analyzed, KCU’s Mutual Assent and Intent to be Bound are Questions of Material Fact that Cannot be Resolved on Summary Judgment:

KCU is seeking to alter the stated terms of the appraisal it accepted, claiming it did not assent to, or intend to be bound by, the appraisal’s indemnification provision.¹²

In this, however, KCU misunderstands the nature of mutual assent under Washington law.

In the case of *Multicare Medical Center v. Dept. of Health and Human Services*, 114 Wn.2d 572, 790 P.2d 124 (1990), the court concluded that the requisite mutual intent to contract supported the unilateral contract there at issue. The court noted:

To determine the mutual intentions of contracting parties we follow the objective manifestation theory of contracts... Thus, the unexpressed subjective intention of the parties is irrelevant; the mutual assent of the parties must be gleaned from their outward manifestations.

Multicare Medical Center, supra, at 586-87, citations omitted.

¹² Again, there is no competent evidence of this alleged lack of assent. CP 39-41; 93-96.

To determine whether a party has manifested an intent to enter into a contract, we impute an intention corresponding to the reasonable meaning of a person's words and acts.

Id., at 587, citations omitted.

Therefore, though contract interpretation is controlled by the parties' intent, that intent must be outwardly manifested. Here, KCU took the appraisal, paid for it, and used it without ever objecting to the indemnity provision. Mr. Huck's testimony (to the extent this testimony is admissible at all) that KCU did not intend to be bound by the terms of the appraisal is nothing more than exactly the sort of "unexpressed subjective intention" that is "irrelevant" to interpretation of this, or any other, contract. *Id.*

It is the duty of the court to declare the meaning of what is written, and not what was intended to be written.

Berg v. Hudesman, 115 Wn.2d 657, 669, 801 P.2d 222 (1990), citations omitted.¹³

Regardless of *all* else, mutual assent, is a question of fact¹⁴, as is an intent to include an indemnity clause. *Scott Galvinizing, supra*, at 584.

¹³ Here, what is written is an obligation to indemnify Ellis (CP 44, Appendix A, p. 12), not Mr. Huck's speculation as to the state of mind of an absent witness.

¹⁴ *Sea-Van-Investments, supra*, at 126, citations omitted; *Multicare Medical Center, supra*, at 586, n. 24.

If KCU had wished not to be bound by the terms stated in the appraisal, it could have attempted to further negotiate this issue with Ellis. Alternatively, under RCW 62A. 2-602 (Appendix J), KCU could have rejected the Ellis appraisal and shopped around for an appraisal that did not include these terms.¹⁵

Pursuant to the terms of RCW 62A. 2-606(1) (Appendix K) when, without objection to its terms, KCU paid for and used Ellis's appraisal it accepted the appraisal and assented to the conditions and limitations stated therein.

CONCLUSION A: KCU IS BOUND BY THE LIMITATIONS CONTAINED IN ELLIS'S APPRAISAL.

ISSUE B: WHETHER THE PARTIES' AGREEMENT, HAVING BEEN FULLY PERFORMED, IS SUBJECT TO THE STATUTE OF FRAUDS?

Full performance by one party removes the case from the operation of the statute (of frauds)...

Becker v. Lagerquist Bros., Inc., 55 Wn.2d 425, 436, 348 P.2d 423 (1960), citations omitted; *See also Rutkosky v. Tracy*, 89 Wn.2d 606, 611, 574 P.2d 382 (1978).

Here *both* Ellis and KCU fully performed: Ellis submitted the appraisal; KCU accepted it, paid for it, and used it. A unilateral contract,

¹⁵ Their success in this regard is problematic, given that it is undisputed that indemnity provisions are standard in appraisal agreements. CP 44-45 (paragraphs 8-9)

when fully performed, is “totally outside the ambit of the statute of frauds.” *Brem-Rock, Inc. v. Warnack*, 28 Wn. App. 483, 493, 624 P.2d 220 (1981).¹⁶

Even if only Ellis had performed, “the other party is estopped to assert the statute.” *Becker, supra*, at 434.

Under the UCC, a contract which does not satisfy the RCW 62A. 2-201 statute of frauds, “but which is valid in other respects is enforceable”:

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (RCW 62A. 2-606).

RCW 62A. 2-201(3)(c) (Appendix L).¹⁷

When KCU accepted and paid Ellis for the appraisal containing the indemnity provision at issue, the contract was “executed” (*Multicare Medical Center, supra*, at 587.

¹⁶ In *French v. Sabey*, 134 Wn.2d 547, 951 P.2d 260 (1998), the court reaffirmed this general rule, but carved out an exception for a contract of fixed five year duration, even if it could have been performed in less than one year. *Id.*, 553-54.

¹⁷ Though the UCC statute of frauds does not specifically address indemnification, in applying RCW 62A, 2-201, the court in *Smith v. Skone & Connors Produce, Inc.*, 107 Wn. App. 199, 26 P.3d 981 (2001), noted the UCC provides guidance for a common law analysis. *Id.*, 205-206, citations omitted.

It is elementary that contracts that are unenforceable become enforceable in so far as they become executed contracts.

Christofersen v. Radovich, 23 Wn.2d 846, 850, 162 P.2d 830 (1945), citations omitted.

A consideration becomes executed in case the promisee does or forbears to do some lawful act which concludes his part of the contract...

Lasswell v. Anderson, 127 Wn. 591, 593, 221 P. 300 (1923), citations omitted.

When Ellis submitted the appraisal and KCU accepted and paid for it, this contract was executed and therefore, enforceable.

After KCU's acceptance, Ellis reasonably concluded that KCU had agreed to be bound to the terms, limitations, and conditions contained in the appraisal. Had he believed otherwise, he would have withdrawn his offer of this appraisal: The potential for liability to third parties is simply too great if the use of such appraisals is not limited, or indemnity is refused. CP 44-45 (paragraphs 8-9).

KCU wants to have it both ways: It wants to accept Ellis's appraisal, without objecting to its terms (because to object would run the risk that Ellis might withdraw the document), *and also* wants to retain the right to revoke express terms of that appraisal, if and when it becomes convenient to do so.

If KCU can at any time, repudiate indemnity without notice, Ellis is left dangling: holding the bag for the cost of defending himself against plaintiffs' lawsuit, though that lawsuit itself resulted, not from Ellis's actions, but from those of KCU, who gave the appraisal to the borrower without imposing any restrictions on its use as set forth therein. CP 65, Appendix A, p. 10.

Where a man has been silent, when in conscience he should have spoken, he shall be debarred from speaking when conscience requires him to be silent.

De Boe v. Prentice Packing & Storage Co., 172 Wn. 514, 521, 20 P.2d 1107 (1933); *and see: Mall Tool Co. v. Far West Equipment*, 45 Wn.2d 158, 169, 273 P.2d 652 (1954).

Here it is undisputed that indemnity was a standard term in professionally prepared appraisals. CP 44. As one would expect, KCU commonly receives and routinely uses such appraisals (CP 88), but now claims lack of assent to indemnity (only) and seeks shelter behind the state of frauds. However,

[T]he purpose of the statute of frauds is to prevent fraud, not to perpetrate one...

Powers v. Hastings, 20 Wn. App. 837, 842, 582 P.2d 897 (1978).

KCU cannot employ the statute of frauds to avoid the obligation it knew, or should have known, it was accepting when it paid for and used Ellis's appraisal without any indication it was rejecting the terms stated therein.

The parties' full performance removes their agreement from the operation of the Statute of Frauds, and KCU is estopped from claiming otherwise.

CONCLUSION B: THE PARTIES' AGREEMENT, HAVING BEEN FULLY PERFORMED, IS NOT SUBJECT TO THE STATUTE OF FRAUDS.

VI. CONCLUSION

The trial court's grant of KCU's Motion for Summary Judgment should be reversed and the case remanded for trial on the merits.

DATED this 8th day of April 2009.

Respectfully Submitted,

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PRELIMINARY APPRAISAL INFORMATION

Report Organization

This report is designed to inform the reader of all factors influencing the property's value in a clear and concise manner. The Appraisal Summary sections provide an overview of the property and general information. The description section starts with general regional issues and proceeds to more specific issues directly related to the property. The Highest and Best Use section establishes the premise upon which the property is valued.

The valuation section describes one or more appraisal methods and includes comparable information, application of market information to the subject, and valuation analysis. The approaches utilized are reconciled into final value conclusions as applicable. Supporting information is attached in the Addenda.

Purpose and Intended Use/User of the Appraisal

The purpose of this appraisal is to estimate the defined values under the applicable scenarios, as described in this report. The intended use of this report is for internal decision making regarding construction financing. The intended user is the Client and/or assigns.

All other uses are expressly prohibited. Reliance on this report by anyone other than the client or other user specifically approved by ELLIS CONSULTING for a purpose not described in this section is prohibited. The authors' responsibility is limited to the client.

This appraisal report is prepared for the sole and exclusive use of *Kitsap Community Federal Credit Union* to assist with the mortgage lending decision. It is not to be relied upon by any third parties for any purpose whatsoever.

Value Definitions

Market Value—the Appraisal Standards Board of The Appraisal Foundation and the Appraisal Institute has adopted the following definition.

'**Market Value**' means the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

- a. buyer and seller are typically motivated;
- b. both parties are well informed or well advised, and acting in what they consider their best interests;
- c. a reasonable time is allowed for exposure in the open market;

LE 1160

- d. payment is made in terms of cash in United States dollars or in terms of financial arrangements comparable thereto; and
- e. the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

Value Scenarios Defined

“As-Is” Market Value refers to the scenario under which a property is evaluated in the condition observed upon inspection as then existing under legal allowed uses without hypothetical conditions, assumptions or qualifications as of the relevant date. “As Vacant” refers to the value as vacant land.

Stabilized Value refers to a scenario of stabilized operation, as of the expected date of occurrence. For a proposed property, this situation may represent a prospective scenario when all improvements have been constructed and the property occupied at a sustainable operation.

Specified Financing

Cash to seller, with or without financing; considered to be cash equivalent.

Property Rights Appraised

The property rights appraised is the fee simple interest.

History/Ownership Activity

Ownership—The subject had and offer an acceptance on December 30, 1999. The seller was Hansen Trust Corp., the buyer was Ericksen Group and/or assigns. The Ericksen Group subsequently assigned all of the purchaser’s rights to the Malibu Corp. the purchase price was \$600,000.

3-Year History—No other transactions were reported during the past three years.

Marketing Activity—The subject (as a site) is not being marketed for sale. Construction financing is being secured for the construction of residential units and the commercial space as proposed for the site. The residential units and the commercial space are being actively marketed.

Scope of the Assignment/Report Presentation

This assignment is a complete appraisal reported in a self-contained format. The assignment included inspection of the subject property and comparable’s, plus an analysis of the factors affecting the marketability and value of the subject property .

LE 1161

Scope of the Appraisal

Initially, I collected and analyzed regional economic information pertaining to the Kitsap County and Bainbridge Island area. Sources for information analyzed included data obtained from the Regional Council of Governments, as well as the 2000 U.S. Census, the Bainbridge Island Planning Department. Pertinent conclusions from this research is reflected in the *Regional/County Overview* and the *Highest and Best Use Analysis*.

In addition to the aforementioned macro-analysis, I completed primary research of the subject neighborhood and competitive neighborhoods, for the purpose of identifying development trends and the "health" of specific markets. These areas were also investigated for the purpose of identifying comparable sites to the subject. Data obtained from the Kitsap County Assessor's office, Malibu Corporation, as well as from several real estate professionals active in this market, aided in the process of identifying comparable sites.

Specific subject property data was obtained both from the client, and the Kitsap County Assessor's office. This data has been verified when possible through the on-site inspections. The analyses and conclusions obtained within this report are dependent upon the specific assumptions outlined in these pages. The data analyzed during the course of this assignment is sufficient for developing a supportable market value estimate for the subject.

In the process of preparing this appraisal, we:

- Inspected the subject property.
- Reviewed financial information on the subject property.
- Conducted market research of occupancies, rents, concessions, and operating expenses at competing facilities, which involved interviews with onsite managers and review of our own database from previous appraisal files.
- Prepared an estimate of stabilized income and expenses for capitalization purposes.
- Conducted market inquiries into recent sales of similar buildings to ascertain sales price per square foot, effective gross income multipliers, and capitalization rates. This process involved telephone interviews with sellers, buyers, and/or participating brokers.
- Prepared a Cost, Sales Comparison, and Income Capitalization Approaches to value.

Unavailability of Information

During the course of this assignment, data pertaining to the comparable properties was successfully obtained from the owners or agents of the property. Attempts were made to locate comparable commercial property in the Bainbridge Island area. Contact with real estate specialists indicated there were sales of comparable properties and sufficient information was obtained to appropriately develop reliable measures of unit costs, from which the sales analysis was reliably developed. Other data sources used were Metroscan, Comps, Inc. and CIBA.

State Certification

I, Lauren L. Ellis, am a Washington State Certified General Real Estate Appraiser, with Certificate No. 270-11 EL LI SL L627C2

Competency Provision

I, Lauren L. Ellis, have the knowledge and experience necessary to complete this assignment in accordance with the Competency Provision within the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation. The profile of professional experience found in the *Addenda* sets forth general information regarding my education, experience, and qualifications.

Disclosure of Client and Intended User(s).

The term client is defined in *Uniform Standard of Professional Appraisal Standards*, 2000 edition as:

"The party or parties who engage an appraiser (by employment or contract) in a specific assignment."

The term Intended User(s) is defined in *Uniform Standards of Professional Appraisal Standards*, 2002 edition as:

"The client and any other party as identified, by name or type, as users of the appraisal, appraisal review, or consulting report, by the appraiser based on communication with the client at the time of the assignment."

This report is intended for use only by ***Kitsap Community Federal Credit Union*** (the client), and any other users as authorized by the client. Use of this report by others is not intended by the appraisers.

Disclosure of Client's Intended Use

The term **Intended Use** is defined in *Uniform Standards of Professional Appraisal Practice*, 2002 edition as:

"The use or uses of an appraiser's reported appraisal, appraisal review, or consulting assignment opinions and conclusions, as identified by the appraiser based on communication with the client at the time of the assignment."

The intended use of this appraisal is to assist Kitsap Community Federal Credit Union in establishing the market value of the subject real property.

Departure

This report does not depart from the Uniform Standards of Appraisal Practice or the Code of Professional Ethics of the Appraisal Institute.

LE 1163

Market Exposure Period

Market exposure refers to the anticipated time necessary for a property's exposure on the market to realize a price equivalent to the values concluded in this report. The exposure period precedes the effective date of valuation.

Exposure time is defined within the *USPAP*, Statement 6, as:

“The estimated length of time the property interest being appraised would have been offered on the market prior to the hypothetical consummation of a sale at market value on the effective date of the appraisal; a retrospective estimate based upon an analysis of past events assuming a competitive and open market.”

Based on the subject's location and design, an exposure period of 6 to 12 months would be anticipated, assuming stabilization.

Marketing period is very similar to exposure time, but reflects a projected time period to sell the property, rather than a retrospective estimate. As such, similar time periods as discussed for exposure time are applicable for marketing time.

Personal Property, Fixtures, and Intangible Items

None included in this valuation.

FIRREA AND USPAP CONFORMITY

Every attempt has been made to conform to the uniform standards of professional appraisal practice promulgated by the Appraisal Standards Board and the Appraisal Foundation. In addition, the appraisal is intended to conform to the appraisal standards required by Title XI of FIRREA (Federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989). Also, the attempt was made to totally conform to those appraisal requirements of potential lenders on the proposed project.

Extraordinary Assumptions

As reported by the developer-the 5,300 square foot building on the corner of Ericksen and Knechtel has three dentists and only seven on-site parking spaces. This building is significantly underparked to the point of being unmarketable. The Building owner Dr. Maloof, intends to purchase or lease some of the additional parking from the subject when it is available. It is an assumption of this report, that seven stalls will be sold or lease to Dr. Maloof. If this does not occur, the value conclusions may need to be revised.

Hypothetical Assumptions

None.

LE 1164

Assumptions and Limiting Conditions

The liability of Ellis Consulting and employees is limited to the client only and only up to the amount of the fee actually received for the assignment. Further, there is no accountability, obligation, or liability to any third party. If this report is placed in the hands of anyone other than the client, the client shall make such party aware of all limiting conditions and assumptions of the assignment and related discussions. The appraisers are in no way responsible for any costs incurred to discover or correct any deficiency in the property.

The appraiser is not qualified to detect the presence of toxic or hazardous substances or materials, which may influence or be associated with the property or any adjacent properties, has made no investigation or analysis as to the presence of such materials, and expressly disclaims any duty to note the degree of fault. Ellis Consulting and its owners, agents, employees, shall not be liable for any costs, expenses, assessments, or penalties, or diminution in value, property damage, or personal injury (including death) resulting from or otherwise attributable to toxic or hazardous substances or materials, including, without limitation, hazardous waste, asbestos material, formaldehyde, or any smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids, solids or gasses, waste materials or other irritants, contaminants or pollution.

This appraisal is made subject to certain assumptions and limiting conditions pertaining to the subject property and market information deemed by the appraiser appropriate to making such appraisal.

1. We were provided an original copy of the building plans for the subject property as proposed on the site for our reference.
2. The valuation stated herein assumes that the property will be put to its highest and best use.
3. Income and expense information on the subject property provided by the owner, his representative, or third parties, is assumed to be current and accurate.
4. No opinion as to the title of the subject property is rendered. Data related to the legal description was obtained from the Kitsap County Tax Assessor and the Kitsap County Records Office. The title is assumed to be marketable and free and clear of all liens, encumbrances, easements and restrictions except those specifically discussed in the report.
5. No engineering survey has been made by the appraiser. Except as specifically stated, data relative to size and area were taken from sources considered reliable and no encroachment of real property improvements is considered to exist.

LE 1165

Other Limiting Conditions

Other limiting conditions governing this appraisal are listed below.

- ◆ The American with Disabilities Act (ADA) became effective January 26, 1992. I have not made a specific compliance survey and analysis of this property to determine whether or not it is in conformity with the various detailed requirements of the ADA. It is possible that a compliance survey of the property together with a detailed analysis of the requirements of the ADA could reveal that the property is not in compliance with one or more of the requirements of the act. If so, this fact could have a negative effect upon the value of the property. Since I have no direct evidence relating to this issue, possible noncompliance with the requirements of ADA was not considered in estimating the value of the property.
- ◆ Unless otherwise stated in this report, I have not identified the existence of hazardous materials on the property. I have no knowledge of the existence of such materials on the property, although I am not qualified to detect such substances. The presence of substances such as asbestos, urea-formaldehyde foam insulation, or other potentially hazardous materials may affect the value of the property. The value estimate is predicated on the assumption there is no such material on or in the property that would cause a loss in value. No responsibility is assumed for any such conditions, or for any expertise or engineering knowledge required to discover them. The client is urged to retain an expert in this field, if desired.
- ◆ The subject is considered as if free and clear from encumbrances. Site measurements and building details were obtained from property inspections, information provided by the client, or public records. I did not complete an engineering survey. Pertinent data may have been obtained from county and city records, title insurance companies, real estate brokers, local property managers, as well as owners and developers of similar and/or competitive properties. All data received from these sources is assumed to be correct.
- ◆ Where the value of the improvements is shown separately, the value of each is segregated only as an aid to better estimate the value of the whole. The data and conclusions embodied in this appraisal are a part of the whole valuation. No part of this appraisal is to be used out of context and, by itself alone, no part of this appraisal is necessarily correct, as being only part of the evidence upon which final judgment as to value is based.
- ◆ Appraisal reports that contain a valuation relating to an estimate in land that is less than the whole fee simple estate are subject to the following: *"the value reported for such estate relates to a fractional interest only in the real estate involved and the value of the fractional interest plus the value of all other fractional interests may or may not equal the value of the entire fee simple estate considered as a whole."*

LE 1166

- ◆ Appraised values that relate to geographical portions of a large parcel or tract of real estate are subject to the following: *"the value reported for such geographical portion relates to such portion only and should not be construed as applying with equal validity to other portions of the larger parcel or tract. The value reported for such geographical portions plus the value of all other geographical portions may or may not equal the value of the entire parcel or tract considered as an entity."*
- ◆ Maps, plats, and exhibits included herein are for illustration only, as an aid on visualizing matters discussed within the report. They should not be considered as surveys or relied upon for any other purpose.
- ◆ No opinion is expressed as to the value of subsurface oil, gas, or mineral rights and it is assumed the property is not subject to surface entry for the exploration or removal of such materials except as is expressly stated.
- ◆ The projections included in this report are utilized to assist in the valuation process and are based on current market conditions, anticipated short-term supply and demand factors, and a continued stable economy. Therefore, these projections, as well as the additional opinions expressed in this report are subject to changes recognizing future conditions cannot be accurately predicted.
- ◆ The client agrees to indemnify and hold harmless Ellis Consulting., its officers, and employees from any and all claims for loss and liabilities of any nature whatsoever arising out of or related to this contract, the appraisal report, or the inclusion of the appraisal report as an exhibit to a registration statement and prospectus used as part of a real estate securities offering.
- ◆ Employment to make this appraisal does not require testimony in court, unless mutually satisfactory arrangements are made in advance. No opinion is intended to be expressed for legal matters that would require specialized investigation or knowledge beyond that ordinarily employed by real estate appraisers, although such matters may be discussed in this report.
- ◆ The By-Laws and Regulations of USPAP govern disclosure of the contents of this report. Neither all nor any part of the contents of this report (especially any conclusions as to value, the identity of the appraiser or the firm with which he is connected, shall be disseminated to the public through advertising media or any other public means of communication, without the prior written consent and approval of the author.

LE 1167

RECEIVED AND FILED
KITSAP COUNTY CLERK

MAY 21 2008

DAVID W. PETERSON

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

ROSEMARY and DAVID SUTTON, husband)
and wife; BELA SZABO, an individual;)
JERRY and BECKY DEETER, husband and)
wife; FOTH FAMILY TRUST, a Family)
Trust; JOHN LARSEN, an individual;)
PAMELA MCPEEK and WILLIAM)
HALLIGAN, husband and wife; START)
NOW CORPORATION, a nonprofit)
corporation; SARA BLAKE, an individual;)
LAVONNE and WILLIAM MUELLER,)
husband and wife; GENE and JOANNE)
BREITBACH, husband and wife; THE)
EDWARD L. SENNER AND EUNICE I.)
SENNER REVOCABLE LIVING TRUST, a)
living trust; MARK and KIMBERLEY)
SENNER, husband and wife,)

Plaintiff,

vs.

MALIBU DEVELOPMENT)
CORPORATION, a Washington Corporation;)
THE MERIDIAN ON BAINBRIDGE)
ISLAND, LLC, a Washington limited liability)
company; JOHN ERICKSON and JANE DOE)
ERICKSON, husband and wife; BRUCE A.)
MCCURDY and CONNIE M. MCCURDY,)
husband and wife; LAUREN L. ELLIS and)
JOHN DOE ELLIS, husband and wife;)
LAUREN L. ELLIS d/b/a ELLIS)

Case No.: 06-2-02385-6

ORDER GRANTING DEFENDANT
ELLIS' MOTION FOR SUMMARY
JUDGMENT DISMISSING ALL OF
PLAINTIFFS' CLAIMS AGAINST
ELLIS

ORDER GRANTING MOTION FOR SUMMARY
JUDGMENT AGAINST PLAINTIFFS
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Judgment (Plaintiffs).doc

EX-PARTE by mail

The Lanz Firm, P.S.
Suite 809, AGC Building
1200 Westlake Avenue North
Seattle, WA 98109

206-382-1827 FAX 206-682-5288

ORIGINAL

1 CONSULTING d/b/a AMERICAN HOME)
2 APPRAISAL; CHRISTOPHER M. HEINS)
3 and CYNTHIA HEINS, husband and wife;)
4 PREFERRED BENEFIT SERVICES, INC., a)
5 Washington Corporation,)

6 Defendants)

7 LAUREN L. ELLIS and JOHN DOE ELLIS,)
8 husband and wife; LAUREN L. ELLIS d/b/a)
9 ELLIS CONSULTING d/b/a AMERICAN)
10 HOME APPRAISAL,)

11 Third Party Plaintiffs,)

12 vs.)

13 KITSAP CREDIT UNION, a Washington)
14 State Nonprofit Credit Union d/b/a KITSAP)
15 COMMUNITY FEDERAL CREDIT UNION)

16 Third Party Defendant.)

17 This matter having come on regularly before the undersigned judge of the above-entitled
18 Court on Defendant Ellis' Motion for Summary Judgment dismissing plaintiffs' claims against
19 him, the Court having heard argument of counsel, reviewed the pleadings and records herein and
20 specifically the following documents submitted on this motion:

- 21 1. Defendant Ellis's Motion for Summary Judgment Against Plaintiffs;
- 22 2. Declaration of Bernard G. Lanz in Support of Motion for Summary Judgment;
- 23 3. Declaration of Lauren Ellis in Support of Motion for Summary Judgment;
- 24 4. Plaintiff's Response to Motion for Summary Judgment;
5. Declaration of Philip Havers in Opposition to Motion for Summary Judgment;
6. Declaration of Bela Szabo in Opposition to Motion for Summary Judgment;
7. Declaration of Jerry Deeter in Opposition to Motion for Summary Judgment;
8. Declaration of Eric Foth in Opposition to Motion for Summary Judgment;
9. Declaration of Jean Schanen in Opposition to Motion for Summary Judgment;

25 ORDER GRANTING MOTION FOR SUMMARY
JUDGMENT AGAINST PLAINTIFFS
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Judgment (Plaintiffs).doc

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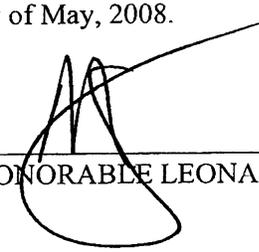
- 1 10. Declaration of Pamela McPeck in Opposition to Motion for Summary Judgment;
- 2 11. Declaration of Sara Blake in Opposition to Motion for Summary Judgment;
- 3 12. Declaration of William Mueller in Opposition to Motion for Summary Judgment;
- 4 13. Declaration of Gene Breitbach in Opposition to Motion for Summary Judgment;
- 5 14. Declaration of John Larsen in Opposition to Motion for Summary Judgment; and
- 6 15. Defendants Ellis' Reply in Support of Motion for Summary Judgment.

7 The court finds that there are no genuine material factual issues and, as a matter of law,
8 defendant Ellis is entitled to summary judgment as requested. NOW THEREFORE, IT IS
9 HEREBY

10 **ORDERED, ADJUDGED AND DECREED**

11 Defendant Ellis' Motion for Summary Judgment dismissing plaintiffs' claims against him
12 is hereby granted. Plaintiffs' claims for fraud, negligent misrepresentation, and violations of the
13 Washington State Consumer Protection and Securities Acts (RCW 19.86 and 21.20) are
14 dismissed with prejudice and without an award of attorney's fees or costs incurred.

15 DONE IN OPEN COURT this 21 day of May, 2008.

16 
17 THE HONORABLE LEONARD W. COSTELLO

18 Presented by:

19 THE LANZ FIRM, P.S.

20 By 

21 BERNARD G. LANZ WSBA #11097
22 Attorney for Defendants Ellis

23 ORDER GRANTING MOTION FOR SUMMARY
24 JUDGMENT AGAINST PLAINTIFFS
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Judgment (Plaintiffs).doc

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1200 Westlake Avenue North
Seattle, WA 98109
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1 Agreed as to form; Notice of
2 presentation waived:

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PHILIP J. HAVERS, WSBA #33877
Of BUSKIRK HAVERS LINDSAY OLSEN PLLC
Attorneys for Plaintiffs

25 ORDER GRANTING MOTION FOR SUMMARY
JUDGMENT AGAINST PLAINTIFFS
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RECEIVED FOR FILING
KITSAP COUNTY CLERK

AUG - 7 2008

DAVID W. PETERSON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

ROSEMARY and DAVID SUTTON, husband)
and wife; BELA SZABO, an individual;)
JERRY and BECKY DEETER, husband and)
wife; FOTH FAMILY TRUST, a Family)
Trust; JOHN LARSEN, an individual;)
PAMELA MCPEEK and WILLIAM)
HALLIGAN, husband and wife; START)
NOW CORPORATION, a nonprofit)
corporation; SARA BLAKE, an individual;)
LAVONNE and WILLIAM MUELLER,)
husband and wife; GENE and JOANNE)
BREITBACH, husband and wife; THE)
EDWARD L. SENNER AND EUNICE I.)
SENNER REVOCABLE LIVING TRUST, a)
living trust; MARK and KIMBERLEY)
SENNER, husband and wife,)

Plaintiff,

vs.

MALIBU DEVELOPMENT)
CORPORATION, a Washington Corporation;)
THE MERIDIAN ON BAINBRIDGE)
ISLAND, LLC, a Washington limited liability)
company; JOHN ERICKSON and JANE DOE)
ERICKSON, husband and wife; BRUCE A.)
MCCURDY and CONNIE M. MCCURDY,)
husband and wife; LAUREN L. ELLIS and)
JOHN DOE ELLIS, husband and wife;)
LAUREN L. ELLIS d/b/a ELLIS)

Case No.: 06-2-02385-6

AMENDED ORDER GRANTING
DEFENDANT ELLIS' MOTION FOR
SUMMARY JUDGMENT DISMISSING
ALL OF PLAINTIFFS' CLAIMS
AGAINST ELLIS

AMENDED ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT AGAINST PLAINTIFFS
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Summary Judgment (Plaintiffs).doc

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1 CONSULTING d/b/a AMERICAN HOME)
2 APPRAISAL; CHRISTOPHER M. HEINS)
3 and CYNTHIA HEINS, husband and wife;)
4 PREFERRED BENEFIT SERVICES, INC., a)
5 Washington Corporation,)

6 Defendants)

7 LAUREN L. ELLIS and JOHN DOE ELLIS,)
8 husband and wife; LAUREN L. ELLIS d/b/a)
9 ELLIS CONSULTING d/b/a AMERICAN)
10 HOME APPRAISAL,)

11 Third Party Plaintiffs,)

12 vs.)

13 KITSAP CREDIT UNION, a Washington)
14 State Nonprofit Credit Union d/b/a KITSAP)
15 COMMUNITY FEDERAL CREDIT UNION)

16 Third Party Defendant.)

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18 Court on Defendant Ellis' Motion for Summary Judgment dismissing plaintiffs' claims against
19 him, the Court having heard argument of counsel, reviewed the pleadings and records herein and
20 specifically the following documents submitted on this motion:

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- 22 2. Declaration of Bernard G. Lanz in Support of Motion for Summary Judgment;
- 23 3. Declaration of Lauren Ellis in Support of Motion for Summary Judgment;
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7 The court finds that there are no genuine material factual issues and, as a matter of law,
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9 HEREBY

10 **ORDERED, ADJUDGED AND DECREED**

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12 is hereby granted. Plaintiffs' claims for fraud, negligent misrepresentation, violations of the
13 Washington State Consumer Protection and Securities Acts (RCW 19.86 and 21.20) and piercing
14 the corporate veil are dismissed with prejudice and without an award of attorney's fees or costs
15 incurred.

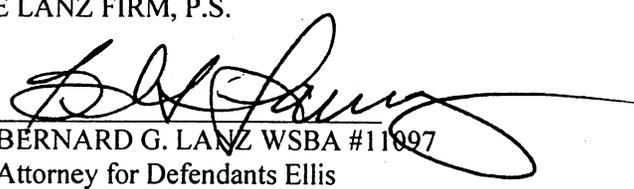
16 DONE IN OPEN COURT this 7 day of August, 2008.

17 **LEONARD W. COSTELLO**

18 THE HONORABLE LEONARD W. COSTELLO

19 Presented by:

20 THE LANZ FIRM, P.S.

21 By: 

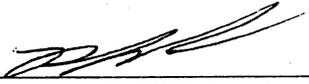
22 BERNARD G. LANZ WSBA #11897
23 Attorney for Defendants Ellis

24
25 AMENDED ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT AGAINST PLAINTIFFS
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Agreed as to form; Notice of presentation waived:



PHILIP J. HAVERS, WSBA #33877
Of HAVERS LAW OFFICES, INC. PS
Attorneys for Plaintiffs

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

ROSEMARY and DAVID SUTTON, husband and wife; BELA SZABO, an individual; JERRY and BECKY DEETER, husband and wife; FOTH FAMILY TRUST, a Family Trust; JOHN LARSEN, an individual; PAMELA MCPEEK and WILLIAM HALLIGAN, husband and wife; START NOW CORPORATION, a nonprofit corporation; SARA BLAKE, an individual; LAVONNE and WILLIAM MUELLER, husband and wife; GENE and JOANNE BREITBACH, husband and wife; THE EDWARD L. SENNER AND EUNICE I. SENNER REVOCABLE LIVING TRUST, a living trust; MARK and KIMBERLEY SENNER, husband and wife,

Plaintiff,

vs.

MALIBU DEVELOPMENT CORPORATION, a Washington Corporation; THE MERIDIAN ON BAINBRIDGE ISLAND, LLC, a Washington limited liability company; JOHN ERICKSON and JANE DOE ERICKSON, husband and wife; BRUCE A. MCCURDY and CONNIE M. MCCURDY, husband and wife; LAUREN L. ELLIS and JOHN DOE ELLIS, husband and wife; LAUREN L. ELLIS d/b/a ELLIS CONSULTING d/b/a AMERICAN HOME APPRAISAL; CHRISTOPHER M. HEINS and CYNTHIA HEINS, husband and wife; PREFERRED BENEFIT SERVICES, INC., a Washington Corporation,

Defendants.

Case No.: 06-2-02385-6

ORDER GRANTING LEAVE TO AMEND ANSWER, ADD ADDITIONAL AFFIRMATIVE DEFENSES AND ADD A THIRD PARTY DEFENDANT FOR INDEMNIFICATION

RECEIVED FOR FILING
KITSAP COUNTY CLERK
MAR - 7 2008
DAVID W. PETERSON

1 This court having received and reviewed the Ellis defendants' Motion for Leave to
2 Amend their Answer, Add Additional Affirmative Defenses and add a Third Party Claim for
3 Indemnification against Kitsap Credit Union d/b/a Kitsap Community Federal Credit Union,
4 having received and reviewed the responses in opposition to this motion (if any), having heard
5 argument of counsel, having also reviewed the files and pleadings herein, and being otherwise
6 fully advised on the merits, hereby:

7 **ORDERS, ADJUDGES & DECREES**

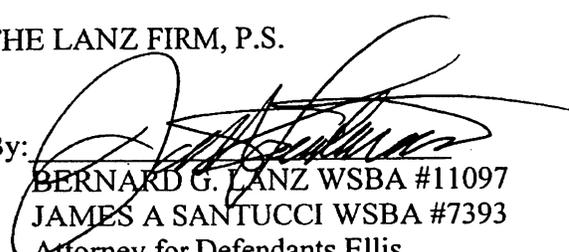
- 8
- 9 1. The Ellis defendants' Motion for Leave to Amend is granted; and
 - 10 2. The Ellis defendants may file their First Amended Answer and Third Party
11 Complaint for as set forth in Appendix A to Defendants Motion for Leave to Amend and serve
12 the summons and First Amended Answer and Third Party Complaint on Kitsap Credit Union
13 d/b/a Kitsap Community Federal Credit Union.

14 DONE IN OPEN COURT this 7th day of March, 2008 **LEONARD W. COSTELLO**

15
16
17 THE HONORABLE LEONARD W. COSTELLO

18 Presented by:

19 THE LANZ FIRM, P.S.

20
21 By: 

22 BERNARD G. LANZ WSBA #11097
23 JAMES A SANTUCCI WSBA #7393
24 Attorney for Defendants Ellis
25

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MAR - 7 2008

DAVID W. PETERSON

ORDER GRANTING LEAVE TO AMEND ANSWER AND
ADD THIRD PARTY DEFENDANT
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Amend.doc

The Lanz Firm, P.S.
Suite 809, AGC Building
1200 Westlake Avenue North
Seattle, WA 98109
206-382-1827 FAX 206-682-5288

APPENDIX C
PAGE 2

1 Agreed as to form; Notice of
2 presentation waived:

3

4 _____
5 PHILIP J. HAVERS, WSBA #33877
6 Of BUSKIRK HAVERS LINDSAY OLSEN PLLC
7 Attorneys for Plaintiffs

8 _____
9 SUSAN FOX, WSBA #15278
10 OF RYAN SWANSON & CLEVELAND PLLC
11 Attorneys for Defendants Heins & Preferred
12 Benefit Services, Inc.

13 _____
14 JOHN R. SPENCER, WSBA # 32188
15 Attorney for Defendants Malibu
16 Development Corp. and McCurdy

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West's Revised Code of Washington Annotated Currentness
Title 62A. Uniform Commercial Code (Refs & Annos)
 ↗ Article 1. General Provisions
 ↗ Part 2. General Definitions and Principles of Interpretation
 → **62A.1-205. Course of dealing and usage of trade**

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

CREDIT(S)

[1965 ex.s. c 157 § 1-205. Cf. former RCW sections: (i) RCW 63.04.100(1); 1925 ex.s. c 142 § 9; RRS § 5836-9. (ii) RCW 63.04.160(5); 1925 ex.s. c 142 § 15; RRS § 5836-15. (iii) RCW 63.04.190(2); 1925 ex.s. c 142 § 18; RRS § 5836-18. (iv) RCW 63.04.720; 1925 ex.s. c 142 § 71; RRS § 5836-71.]

Current through Chapter 2 of the 2009 Regular Session

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C

West's Revised Code of Washington Annotated Currentness

Title 62A. Uniform Commercial Code (Refs & Annos)

▣ Article 2. Sales (Refs & Annos)

▣ Part 1. Short Title, General Construction and Subject Matter

→ **62A.2-105. Definitions: Transferability; “goods”; “future” goods; “lot”; “commercial unit”**

(1) “Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (RCW 62A.2-107).

(2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are “future” goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

(3) There may be a sale of a part interest in existing identified goods.

(4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

(5) “Lot” means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

(6) “Commercial unit” means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

CREDIT(S)

[1965 ex.s. c 157 § 2-105. Subds. (1), (2), (3), (4), cf. former RCW sections: (i) RCW 63.04.060; 1925 ex.s. c 142 § 5; RRS § 5836-5. (ii) RCW 63.04.070; 1925 ex.s. c 142 § 6; RRS § 5836-6. (iii) RCW 63.04.755; 1925 ex.s. c 142 § 76; RRS § 5836-76; formerly RCW 63.04.010.]

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West's Revised Code of Washington Annotated Currentness

Title 62A. Uniform Commercial Code (Refs & Annos)

▣ Article 2. Sales (Refs & Annos)

▣ Part 2. Form, Formation and Readjustment of Contract

→ **62A.2-204. Formation in general**

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

CREDIT(S)

[1965 ex.s. c 157 § 2-204. Cf. former RCW sections: (i) RCW 63.04.020; 1925 ex.s. c 142 § 1; RRS § 5836-1. (ii) RCW 63.04.040; 1925 ex.s. c 142 § 3; RRS § 5836-3.]

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APPENDIX F



United States Court of Appeals,
Seventh Circuit.
ProCD, INCORPORATED, Plaintiff-Appellant,
v.
Matthew ZEIDENBERG and Silken Mountain Web
Services, Inc., Defendants-Appellees.
No. 96-1139.

Argued May 23, 1996.
Decided June 20, 1996.

Producer of computer software brought action against users, alleging claims under Copyright Act, Wisconsin Computer Crimes Act, and Wisconsin contract and tort law after users downloaded telephone listings stored on software and made listings available on Internet. The United States District Court for the Western District of Wisconsin, Barbara B. Crabb, Chief Judge, entered judgment in favor of users, 908 F.Supp. 640, and producer appealed. The Court of Appeals, Easterbrook, Circuit Judge, held that: (1) shrinkwrap license included with software was binding on buyer under Uniform Commercial Code, and (2) enforcement of shrinkwrap license under state law did not create rights equivalent to exclusive rights within general scope of copyright, and was not preempted by Copyright Act.

Reversed and remanded.

West Headnotes

[1] Copyrights and Intellectual Property 99 ↪ 107

99 Copyrights and Intellectual Property
99II Intellectual Property
99k107 k. Contracts. Most Cited Cases
Computer software shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general.

[2] Contracts 95 ↪ 15

95 Contracts
95I Requisites and Validity
95I(B) Parties, Proposals, and Acceptance
95k15 k. Necessity of Assent. Most Cited Cases
In Wisconsin, contract includes only terms on which parties have agreed.

[3] Statutes 361 ↪ 230

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k230 k. Amendatory and Amended Acts. Most Cited Cases
To propose change in law's text is not necessarily to propose change in law's effect; new words may be designed to fortify current rule with more precise text that curtails uncertainty.

[4] Sales 343 ↪ 22(.5)

343 Sales
343I Requisites and Validity of Contract
343k22 Offer to Sell
343k22(.5) k. In General. Most Cited Cases

Sales 343 ↪ 22(3)

343 Sales
343I Requisites and Validity of Contract
343k22 Offer to Sell
343k22(3) k. Acceptance of Offer to Sell. Most Cited Cases
Vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on kind of conduct that constitutes acceptance; buyer may accept by performing acts vendor proposes to treat as acceptance. U.C.C. § 2-204(1).

[5] Sales 343 ↪ 69

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(Cite as: 86 F.3d 1447)

343 Sales

343II Construction of Contract

343k67 Subject-Matter

343k69 k. Specific Articles or Goods.

Most Cited Cases

Shrinkwrap license included with computer software was binding on buyer under Uniform Commercial Code; seller proposed contract that buyer could accept by using software after having opportunity to read license at his leisure, and buyer could have prevented formation of contract by returning software. U.C.C. § 2-204(1).

[6] Copyrights and Intellectual Property 99 ↪
107

99 Copyrights and Intellectual Property

99II Intellectual Property

99k107 k. Contracts. Most Cited Cases

States 360 ↪18.87

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.83 Trade Regulation; Monopolies

360k18.87 k. Copyrights and Patents.

Most Cited Cases

Enforcement of shrinkwrap license included with computer software under state law did not create rights equivalent to exclusive rights within general scope of copyright, and was thus not preempted by Copyright Act. 17 U.S.C.A. § 301(a).

[7] Copyrights and Intellectual Property 99 ↪
107

99 Copyrights and Intellectual Property

99II Intellectual Property

99k107 k. Contracts. Most Cited Cases

States 360 ↪18.87

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.83 Trade Regulation; Monopolies

360k18.87 k. Copyrights and Patents.

Most Cited Cases

Provision of Copyright Act preempting any rights under state law that are equivalent to any of exclusive rights within general scope of copyright does not interfere with private transactions in intellectual property, and does not prevent states from respecting those transactions. 17 U.S.C.A. § 301(a).

*1448 Michael J. Lawton, Kenneth B. Axe, Lathrop & Clark, Madison, WI, Thomas N. O'Connor (argued), John T. Gutkoski, Lauren C. Panora, Hale & Dorr, Boston, MA, for ProCD, Inc.

Keith Napolitano, Madison, WI, David A. Austin (argued), Madison, WI, for Matthew Zeidenberg and Silken Mountain Web Services, Inc.

June M. Besek, Morton D. Goldberg, Jesse M. Feder, Schwab, Goldberg, Price & Dannay, New York City, for Information Industry Ass'n, amicus curiae, American Medical Ass'n, amicus curiae and Association of American Publishers, amicus curiae.

Christopher A. Meyer, Michael R. Klipper, Meyer & Klipper, Washington, DC, for Business Software Alliance, amicus curiae.

Barry D. Weiss, Stuart Smith, Ronald Julian Palenski, Gordon & Glickson, Chicago, IL, Kenneth A. Wasch, Mark Nebergall, Software Publishers Ass'n, Inc., Washington, DC, for Software Publishers Ass'n, amicus curiae.

Mark Alan Lemley, University of Texas School of Law, Austin, TX, Peter M.C. Choy, American Committee for Interoperable Systems, Mountain View, CA, for American Committee for Interoperable Systems, amicus curiae.

Before COFFEY, FLAUM, and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

[1] Must buyers of computer software obey the

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

I

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

This program, which is copyrighted, searches the database in response to users' criteria (such as "find all people named Tatum in Tennessee, plus all firms with 'Door Systems' in the corporate name"). The resulting lists (or, as ProCD prefers, "listings") can be read and manipulated by other software, such as word processing programs.

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

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

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then all consumers would lose out-and so would the commercial clients, who would have to pay more for the listings because ProCD could not obtain any contribution toward costs from the consumer market.

***1450** To make price discrimination work, however, the seller must be able to control arbitrage. An air carrier sells tickets for less to vacationers than to business travelers, using advance purchase and Saturday-night-stay requirements to distinguish the categories. A producer of movies segments the market by time, releasing first to theaters, then to pay-per-view services, next to the videotape and laserdisc market, and finally to cable and commercial tv. Vendors of computer software have a harder task. Anyone can walk into a retail store and buy a box. Customers do not wear tags saying "commercial user" or "consumer user." Anyway, even a commercial-user-detector at the door would not work, because a consumer could buy the software and resell to a commercial user. That arbitrage would break down the price discrimination and drive up the minimum price at which ProCD would sell to anyone.

Instead of tinkering with the product and letting users sort themselves-for example, furnishing current data at a high price that would be attractive only to commercial customers, and two-year-old data at a low price-ProCD turned to the institution of contract. Every box containing its consumer product declares that the software comes with restrictions stated in an enclosed license. This license, which is encoded on the CD-ROM disks as well as printed in the manual, and which appears on a user's screen every time the software runs, limits use of the application program and listings to non-commercial purposes.

Matthew Zeidenberg bought a consumer package of SelectPhone (trademark) in 1994 from a retail outlet in Madison, Wisconsin, but decided to ignore the license. He formed Silken Mountain Web Services, Inc., to resell the information in the SelectPhone (trademark) database. The corporation makes

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

II

[2] Following the district court, we treat the licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code. Whether there are legal differences between "contracts" and "licenses" (which may matter under the copyright doctrine of first sale) is a subject for another day. See *Microsoft Corp. v. Harmony Computers & Electronics, Inc.*, 846 F.Supp. 208 (E.D.N.Y.1994). Zeidenberg does not argue that Silken Mountain Web Services is free of any restrictions that apply to Zeidenberg himself, because any effort to treat the two parties as distinct would put Silken Mountain behind the eight ball on ProCD's argument that copying the application program onto its hard disk violates the copyright laws. Zeidenberg does argue, and the district court held, that placing the package of software on the shelf is an "offer," which the customer "accepts" by paying the asking price and leaving the store with the goods. *Peeters v. State*, 154 Wis. 111, 142 N.W. 181 (1913). In Wisconsin, as elsewhere, a contract

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includes only the terms on which the parties have agreed. One cannot agree to hidden terms, the judge concluded. So far, so good-but one of the terms to which Zeidenberg agreed by purchasing the software is that the transaction was subject to a license. Zeidenberg's position therefore must be that the printed terms on the outside of a box are the parties' contract-except for printed terms that refer to or incorporate other terms. But why would Wisconsin fetter the parties' choice in this *1451 way? Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works), or both. The "Read Me" file included with most software, describing system requirements and potential incompatibilities, may be equivalent to ten pages of type; warranties and license restrictions take still more space. Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike. See E. Allan Farnsworth, 1 *Farnsworth on Contracts* § 4.26 (1990); *Restatement (2d) of Contracts* § 211 comment a (1981) ("Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than the details of individual transactions."). Doubtless a state could forbid the use of standard contracts in the software business, but we do not think that Wisconsin has done so.

Transactions in which the exchange of money precedes the communication of detailed terms are common. Consider the purchase of insurance. The buyer goes to an agent, who explains the essentials (amount of coverage, number of years) and remits the premium to the home office, which sends back a policy. On the district judge's understanding, the terms of the policy are irrelevant because the insured paid before receiving them. Yet the device of

payment, often with a "binder" (so that the insurance takes effect immediately even though the home office reserves the right to withdraw coverage later), in advance of the policy, serves buyers' interests by accelerating effectiveness and reducing transactions costs. Or consider the purchase of an airline ticket. The traveler calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order. The ticket contains elaborate terms, which the traveler can reject by canceling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991); see also *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995) (bills of lading). Just so with a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theater that detects a violation will confiscate the tape and escort the violator to the exit. One *could* arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.

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

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

[3] According to the district court, the UCC does not countenance the sequence of money now, terms later. (Wisconsin's version of the UCC does not differ from the Official Version in any material respect, so we use the regular numbering system. Wis. Stat. § 402.201 corresponds to UCC § 2-201, and other citations are easy to derive.) One of the court's reasons-that by proposing as part of the draft Article 2B a new UCC § 2-2203 that would explicitly validate standard-form user licenses, the American Law Institute and the National Conference of Commissioners on Uniform Laws have conceded the invalidity of shrinkwrap licenses under current law, see 908 F.Supp. at 655-56-depends on a faulty inference. To propose a change in a law's *text* is not necessarily to propose a change in the law's *effect*. New words may be designed to fortify the current rule with a more precise text that curtails uncertainty. To judge by the flux of law review articles discussing shrinkwrap licenses, uncertainty is much in need of reduction-although businesses seem to feel less uncertainty than do scholars, for only three cases (other than ours) touch on the subject, and none directly addresses it. See *Step-Saver*

Data Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir.1991); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 268-70 (5th Cir.1988); *Arizona Retail Systems, Inc. v. Software Link, Inc.*, 831 F.Supp. 759 (D.Ariz.1993). As their titles suggest, these are not consumer transactions. Step-Saver is a battle-of-the-forms case, in which the parties exchange incompatible forms and a court must decide which prevails. See *Northrop Corp. v. Litronic Industries*, 29 F.3d 1173 (7th Cir.1994) (Illinois law); Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 Va. L.Rev. 1217, 1227-31 (1982). Our case has only one form; UCC § 2-207 is irrelevant. *Vault* holds that Louisiana's special shrinkwrap-license statute is preempted by federal law, a question to which we return. And *Arizona Retail Systems* did not reach the question, because the court found that the buyer knew the terms of the license before purchasing the software.

[4][5] What then does the current version of the UCC have to say? We think that the place to start is § 2-204(1): “A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.” A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by *using* the software after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance. So although the district judge was right to say that a contract can be, and often is, formed simply by paying the price and walking out of the store, the UCC permits contracts to be formed in other ways. ProCD proposed such a different way, and without protest Zeidenberg agreed. Ours is not a case in which a consumer opens a package to find an insert saying “you owe

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us an extra \$10,000” and the seller files suit to collect. Any buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price. Nothing in the UCC requires a seller to maximize the buyer's net gains.

Section 2-606, which defines “acceptance of goods”, reinforces this understanding. A buyer accepts goods under § 2-606(1)(b) when, after an opportunity to inspect, he fails to make an effective rejection under § 2-602(1). ProCD extended an opportunity to reject if a buyer should find the license terms *1453 unsatisfactory; Zeidenberg inspected the package, tried out the software, learned of the license, and did not reject the goods. We refer to § 2-606 only to show that the opportunity to return goods can be important; acceptance of an offer differs from acceptance of goods after delivery, see *Gillen v. Atalanta Systems, Inc.*, 997 F.2d 280, 284 n. 1 (7th Cir.1993); but the UCC consistently permits the parties to structure their relations so that the buyer has a chance to make a final decision after a detailed review.

Some portions of the UCC impose additional requirements on the way parties agree on terms. A disclaimer of the implied warranty of merchantability must be “conspicuous.” UCC § 2-316(2), incorporating UCC § 1-201(10). Promises to make firm offers, or to negate oral modifications, must be “separately signed.” UCC §§ 2-205, 2-209(2). These special provisos reinforce the impression that, so far as the UCC is concerned, other terms may be as inconspicuous as the forum-selection clause on the back of the cruise ship ticket in *Carnival Lines*. Zeidenberg has not located any Wisconsin case-for that matter, any case in any state-holding that under the UCC the ordinary terms found in shrinkwrap licenses require any special prominence, or otherwise are to be undercut rather than enforced. In the end, the terms of the license are conceptually identical to the contents of the package. Just as no court would dream of saying

that SelectPhone (trademark) must contain 3,100 phone books rather than 3,000, or must have data no more than 30 days old, or must sell for \$100 rather than \$150-although any of these changes would be welcomed by the customer, if all other things were held constant-so, we believe, Wisconsin would not let the buyer pick and choose among terms. Terms of use are no less a part of “the product” than are the size of the database and the speed with which the software compiles listings. Competition among vendors, not judicial revision of a package's contents, is how consumers are protected in a market economy. *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756 (7th Cir.1996). ProCD has rivals, which may elect to compete by offering superior software, monthly updates, improved terms of use, lower price, or a better compromise among these elements. As we stressed above, adjusting terms in buyers' favor might help Matthew Zeidenberg today (he already has the software) but would lead to a response, such as a higher price, that might make consumers as a whole worse off.

III

[6] The district court held that, even if Wisconsin treats shrinkwrap licenses as contracts, § 301(a) of the Copyright Act, 17 U.S.C. § 301(a), prevents their enforcement. 908 F.Supp. at 656-59. The relevant part of § 301(a) preempts any “legal or equitable rights [under state law] that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103”. ProCD's software and data are “fixed in a tangible medium of expression”, and the district judge held that they are “within the subject matter of copyright”. The latter conclusion is plainly right for the copyrighted application program, and the judge thought that the data likewise are “within the subject matter of copyright” even if, after Feist, they are not sufficiently original to be copyrighted. 908

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F.Supp. at 656-57. *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 676 (7th Cir.1986), supports that conclusion, with which commentators agree. E.g., Paul Goldstein, III *Copyright* § 15.2.3 (2d ed.1996); Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 101[B] (1995); William F. Patry, II *Copyright Law and Practice* 1108-09 (1994). One function of § 301(a) is to prevent states from giving special protection to works of authorship that Congress has decided should be in the public domain, which it can accomplish only if “subject matter of copyright” includes all works of a *type* covered by sections 102 and 103, even if federal law does not afford protection to them. Cf. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989) (same principle under patent laws).

***1454** But are rights created by contract “equivalent to any of the exclusive rights within the general scope of copyright”? Three courts of appeals have answered “no.” *National Car Rental System, Inc. v. Computer Associates International, Inc.*, 991 F.2d 426, 433 (8th Cir.1993); *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488, 1501 (5th Cir.1990); *Acorn Structures, Inc. v. Swantz*, 846 F.2d 923, 926 (4th Cir.1988). The district court disagreed with these decisions, 908 F.Supp. at 658, but we think them sound. Rights “equivalent to any of the exclusive rights within the general scope of copyright” are rights established *bylaw*-rights that restrict the options of persons who are strangers to the author. Copyright law forbids duplication, public performance, and so on, unless the person wishing to copy or perform the work gets permission; silence means a ban on copying. A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create “exclusive rights.” Someone who found a copy of SelectPhone (trademark) on the street would not be affected by the shrinkwrap license-though the federal copyright laws of their own force would limit the finder's ability to copy or transmit the application program.

Think for a moment about trade secrets. One common trade secret is a customer list. After *Feist*, a simple alphabetical list of a firm's customers, with address and telephone numbers, could not be protected by copyright. Yet *Kewanee Oil Co. v. Bicorn Corp.*, 416 U.S. 470, 94 S.Ct. 1879, 40 L.Ed.2d 315 (1974), holds that contracts about trade secrets may be enforced-precisely because they do not affect strangers' ability to discover and use the information independently. If the amendment of § 301(a) in 1976 overruled *Kewanee* and abolished consensual protection of those trade secrets that cannot be copyrighted, no one has noticed-though abolition is a logical consequence of the district court's approach. Think, too, about everyday transactions in intellectual property. A customer visits a video store and rents a copy of *Night of the Lepus*. The customer's contract with the store limits use of the tape to home viewing and requires its return in two days. May the customer keep the tape, on the ground that § 301(a) makes the promise unenforceable?

A law student uses the LEXIS database, containing public-domain documents, under a contract limiting the results to educational endeavors; may the student resell his access to this database to a law firm from which LEXIS seeks to collect a much higher hourly rate? Suppose ProCD hires a firm to scour the nation for telephone directories, promising to pay \$100 for each that ProCD does not already have. The firm locates 100 new directories, which it sends to ProCD with an invoice for \$10,000. ProCD incorporates the directories into its database; does it have to pay the bill? Surely yes; *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 99 S.Ct. 1096, 59 L.Ed.2d 296 (1979), holds that promises to pay for intellectual property may be enforced even though federal law (in *Aronson*, the patent law) offers no protection against third-party uses of that property. See also *Kennedy v. Wright*, 851 F.2d 963 (7th Cir.1988). But these illustrations are what our case is about. ProCD offers software and data for two prices: one for personal use, a higher price for commercial use. Zeidenberg wants to use the data

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without paying the seller's price; if the law student and Quick Point Pencil Co. could not do that, neither can Zeidenberg.

[7] Although Congress possesses power to preempt even the enforcement of contracts about intellectual property-or railroads, on which see *Norfolk & Western Ry. v. Train Dispatchers*, 499 U.S. 117, 111 S.Ct. 1156, 113 L.Ed.2d 95 (1991)-courts usually read preemption clauses to leave private contracts unaffected. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995), provides a nice illustration. A federal statute preempts any state "law, rule, regulation, standard, or other provision ... relating to rates, routes, or services of any air carrier." 49 U.S.C.App. § 1305(a)(1). Does such a law preempt the law of contracts-so that, for example, an air carrier need not honor a quoted price (or a contract to reduce the price by the value of frequent flyer miles)? The Court allowed that it is possible to read the statute that *1455 broadly but thought such an interpretation would make little sense. Terms and conditions offered by contract reflect private ordering, essential to the efficient functioning of markets. 513 U.S. at ---- - ----, 115 S.Ct. at 824-25. Although some principles that carry the name of contract law are designed to defeat rather than implement consensual transactions, *id.* at ---- n. 8, 115 S.Ct. at 826 n. 8, the rules that respect private choice are not preempted by a clause such as § 1305(a)(1). Section 301(a) plays a role similar to § 1301(a)(1): it prevents states from substituting their own regulatory systems for those of the national government. Just as § 301(a) does not itself interfere with private transactions in intellectual property, so it does not prevent states from respecting those transactions. Like the Supreme Court in *Wolens*, we think it prudent to refrain from adopting a rule that anything with the label "contract" is necessarily outside the preemption clause: the variations and possibilities are too numerous to foresee. *National Car Rental* likewise recognizes the possibility that some applications of the law of contract could interfere with the attainment of national ob-

jectives and therefore come within the domain of § 301(a). But general enforcement of shrinkwrap licenses of the kind before us does not create such interference.

Aronson emphasized that enforcement of the contract between Aronson and Quick Point Pencil Company would not withdraw any information from the public domain. That is equally true of the contract between ProCD and Zeidenberg. Everyone remains free to copy and disseminate all 3,000 telephone books that have been incorporated into ProCD's database. Anyone can add SIC codes and zip codes. ProCD's rivals have done so. Enforcement of the shrinkwrap license may even make information more readily available, by reducing the price ProCD charges to consumer buyers. To the extent licenses facilitate distribution of object code while concealing the source code (the point of a clause forbidding disassembly), they serve the same procompetitive functions as does the law of trade secrets. *Rockwell Graphic Systems, Inc. v. DEV Industries, Inc.*, 925 F.2d 174, 180 (7th Cir.1991). Licenses may have other benefits for consumers: many licenses permit users to make extra copies, to use the software on multiple computers, even to incorporate the software into the user's products. But whether a particular license is generous or restrictive, a simple two-party contract is not "equivalent to any of the exclusive rights within the general scope of copyright" and therefore may be enforced.

REVERSED AND REMANDED.

C.A.7 (Wis.),1996.

ProCD, Inc. v. Zeidenberg

86 F.3d 1447, 65 USLW 2014, 1996 Copr.L.Dec. P 27,529, 39 U.S.P.Q.2d 1161, 29 UCC Rep.Serv.2d 1109

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APPENDIX G



United States Court of Appeals,
Seventh Circuit.

Rich HILL and Enza Hill, on behalf of a class of
persons similarly situated, Plaintiffs-Appellees,

v.

GATEWAY 2000, INC., and David Prais, Defend-
ants-Appellants.

No. 96-3294.

Argued Dec. 10, 1996.

Decided Jan. 6, 1997.

Rehearing and Suggestion for Rehearing En Banc
Denied Feb. 3, 1997.

Buyer of computer who had purchased computer through telephone order brought action against manufacturer, in which civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim and other claims were asserted. Manufacturer sought enforcement of arbitration clause which had been included in terms sent to buyer in box in which computer was shipped, and the United States District Court for the Northern District of Illinois, Suzanne B. Conlon, J., refused to enforce agreement. Manufacturer appealed, and the Court of Appeals, Easterbrook, Circuit Judge, held that terms sent in box, which stated that they governed sale unless computer was returned within 30 days, were binding on buyer, who did not return computer.

Vacated and remanded.

West Headnotes

[1] ↪141

25T Alternative Dispute Resolution

25TII Arbitration

25TII(B) Agreements to Arbitrate

25Tk141 k. Persons Affected or Bound.

Most Cited Cases

(Formerly 33k7.3 Arbitration)

Sales 343 ↪69

343 Sales

343II Construction of Contract

343k67 Subject-Matter

343k69 k. Specific Articles or Goods.

Most Cited Cases

Contract terms, including arbitration clause, which were contained in box in which computer which had been ordered by telephone was shipped to buyer and which provided that terms governed sale unless customer returned computer within 30 days were binding on buyer who did not return computer.

[2] Contracts 95 ↪93(2)

95 Contracts

95I Requisites and Validity

95I(E) Validity of Assent

95k93 Mistake

95k93(2) k. Signing in Ignorance of

Contents in General. Most Cited Cases

Contract need not be read to be effective, and people who accept contract without having read it take risk that unread terms may in retrospect prove unwelcome.

[3] ↪121

25T Alternative Dispute Resolution

25TII Arbitration

25TII(A) Nature and Form of Proceeding

25Tk118 Matters Which May Be Subject to Arbitration Under Law

25Tk121 k. Statutory Rights and Obligations. Most Cited Cases

(Formerly 33k3.3 Arbitration)

Claims based on Racketeer Influenced and Corrupt Organizations (RICO) Act are no less arbitrable than those founded on contract or law of torts. 18 U.S.C.A. § 1961 et seq.

*1148 Daniel A. Edelman (argued), Cathleen M. Combs, James O. Latturner, Charles E. Petit, Edel-

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man & Combs, Chicago, IL, for Plaintiffs-Appellees.

Terry M. Grimm, Thomas J. Wiegand, Winston & Strawn, Robert M. Rader (argued), Winston & Strawn, Washington, DC, for Defendants-Appellants.

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

EASTERBROOK, Circuit Judge.

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

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

[1][2] The Hills say that the arbitration clause did not stand out: they concede noticing the statement of terms but deny reading it closely enough to discover the agreement to arbitrate, and they ask us to conclude that they therefore may go to court. Yet

an agreement to arbitrate must be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996), holds that this provision of the Federal Arbitration Act is inconsistent with any requirement that an arbitration clause be prominent. A contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome. *Carr v. CIGNA Securities, Inc.*, 95 F.3d 544, 547 (7th Cir.1996); *Chicago Pacific Corp. v. Canada Life Assurance Co.*, 850 F.2d 334 (7th Cir.1988). Terms inside Gateway's box stand or fall together. If they constitute the parties' contract because the Hills had an opportunity to return the computer after reading them, then all must be enforced.

ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir.1996), holds that terms inside a box of software bind consumers who use the software after an opportunity to read the terms and to reject them by returning the product. Likewise, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991), enforces a forum-selection clause that was included among three pages of terms attached to a cruise ship ticket. *ProCD* and *Carnival Cruise Lines* exemplify the many commercial transactions in which people pay for products with terms to follow; *ProCD* discusses others. 86 F.3d at 1451-52. The district court concluded in *ProCD* that the contract is formed when the consumer pays for the software; as a result, the court held, only terms known to the consumer at that moment are part of the contract, and provisos inside the box do not count. Although this is one way a contract *1149 could be formed, it is not the only way: "A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance." *Id.* at 1452. Gateway shipped computers with the same sort of accept-or-return offer *ProCD* made to users

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of its software. *ProCD* relied on the Uniform Commercial Code rather than any peculiarities of Wisconsin law; both Illinois and South Dakota, the two states whose law might govern relations between Gateway and the Hills, have adopted the UCC; neither side has pointed us to any atypical doctrines in those states that might be pertinent; *ProCD* therefore applies to this dispute.

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

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

Next the Hills insist that *ProCD* is irrelevant be-

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

(“Fragile!” “This Side Up!” ☼ ↑↑↑)

rather than would-be purchasers.

Perhaps the Hills would have had a better argument if they were first alerted to the bundling of hardware and legal-ware after opening the box and wanted to return the computer in order to avoid disagreeable terms, but were dissuaded by the expense of shipping. What the remedy would be in such a case-could it exceed the shipping charges?-is an interesting question, but one that need not detain us because the Hills knew before they ordered the computer that the carton would include *some* important terms, and they did not seek to discover these in advance. Gateway's ads state that their products come with limited warranties and lifetime support. How limited was the warranty-30 days,

practices or goods involved in the transaction”, § 2-104(1). Zeidenberg bought the product at a retail store, an uncommon place for merchants to acquire inventory. His corporation put ProCD's database on the Internet for anyone to browse, which led to the litigation but did not make Zeidenberg a software merchant.

At oral argument the Hills propounded still another distinction: the box containing ProCD's software displayed a notice that additional terms were within, while the box containing Gateway's computer did not. The difference is functional, not legal. Consumers browsing the aisles of a store can look at the box, and if they are unwilling to deal with the prospect of additional terms can leave the box alone, avoiding the transactions costs of returning the package after reviewing its contents. Gateway's box, by contrast, is just a shipping carton; it is not on display anywhere. Its function is to protect the product during transit, and the information on its sides is for the use of handlers

with service contingent on shipping the computer back, or five years, with free onsite service? What sort of support was offered? Shoppers have three principal ways to discover these things. First, they can ask the vendor to send a copy before deciding whether to buy. The Magnuson-Moss Warranty Act requires firms to distribute their warranty terms on request, 15 U.S.C. § 2302(b)(1)(A); the Hills do not contend that Gateway would have refused to enclose the remaining terms too. Concealment would be bad for business, scaring some customers away and leading to excess returns from others. Second, shoppers can consult public sources (computer magazines, the Web sites of vendors) that may contain this information. Third, they may inspect the documents after the product's delivery. Like Zeidenberg, the Hills took the third option. By

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keeping the computer beyond 30 days, the Hills accepted Gateway's offer, including the arbitration clause.

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

C.A.7 (Ill.),1997.

Hill v. Gateway 2000, Inc.

105 F.3d 1147, 65 USLW 2458, RICO
Bus.Disp.Guide 9183, 31 UCC Rep.Serv.2d 303

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C

West's Revised Code of Washington Annotated Currentness

Title 62A. Uniform Commercial Code (Refs & Annos)

▣ Article 2. Sales (Refs & Annos)

▣ Part 6. Breach, Repudiation and Excuse

→ **62A.2-608. Revocation of acceptance in whole or in part**

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured;
or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

CREDIT(S)

[1965 ex.s. c 157 § 2-608. Cf. former RCW 63.04.700 (1)(d), (3), (4), (5); 1925 ex.s. c 142 § 69; RRS § 5836-69.]

Current through Chapter 2 of the 2009 Regular Session

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APPENDIX H



West's Revised Code of Washington Annotated Currentness
Title 62A. Uniform Commercial Code (Refs & Annos)
▣ Article 1. General Provisions
▣ Part 2. General Definitions and Principles of Interpretation
→ **62A.1-201. General definitions**

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

- (1) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined.
- (2) "Aggrieved party" means a party entitled to resort to a remedy.
- (3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Title (RCW 62A.1-205, RCW 62A.2-208, and RCW 62A.2A-207). Whether an agreement has legal consequences is determined by the provisions of this Title, if applicable; otherwise by the law of contracts (RCW 62A.1-103). (Compare "Contract".)
- (4) "Bank" means any person engaged in the business of banking.
- (5) "Bearer" means the person in possession of an instrument, document of title, or certificated security payable to bearer or indorsed in blank.
- (6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.
- (7) "Branch" includes a separately incorporated foreign branch of a bank.
- (8) "Burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence.
- (9) "Buyer in ordinary course of business" means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire

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goods or documents of title under a pre-existing contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 62A.2 RCW may be a buyer in ordinary course of business. A person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt is not a buyer in ordinary course of business.

(10) "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.

(11) "Contract" means the total legal obligation which results from the parties' agreement as affected by this Title and any other applicable rules of law. (Compare "Agreement".)

(12) "Creditor" includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.

(13) "Defendant" includes a person in the position of defendant in a cross-action or counterclaim.

(14) "Delivery" with respect to instruments, documents of title, chattel paper, or certificated securities means voluntary transfer of possession.

(15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(16) "Fault" means wrongful act, omission or breach.

(17) "Fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this Title to the extent that under a particular agreement or document unlike units are treated as equivalents.

(18) "Genuine" means free of forgery or counterfeiting.

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

(20) "Holder" with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. "Holder" with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.

(21) To "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.

APPENDIX I

(22) "Insolvency proceedings" includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.

(23) A person is "insolvent" who either has ceased to pay his or her debts in the ordinary course of business or cannot pay his or her debts as they become due or is insolvent within the meaning of the federal bankruptcy law.

(24) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government and includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more nations.

(25) A person has "notice" of a fact when

(a) he or she has actual knowledge of it; or

(b) he or she has received a notice or notification of it; or

(c) from all the facts and circumstances known to him or her at the time in question he or she has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when he or she has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this Title.

(26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when

(a) it comes to his or her attention; or

(b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him or her as the place for receipt of such communications.

(27) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his or her attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his or her regular duties or unless he or she has reason to know of the transaction and that the transaction would be materially affected by the information.

(28) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(29) "Party", as distinct from "third party", means a person who has engaged in a transaction or made an agreement within this Title.

APPENDIX I

- (30) "Person" includes an individual or an organization (See RCW 62A.1-102).
- (31) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.
- (32) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, security interest, issue or re-issue, gift or any other voluntary transaction creating an interest in property.
- (33) "Purchaser" means a person who takes by purchase.
- (34) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.
- (35) "Representative" includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.
- (36) "Rights" includes remedies.
- (37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation, except for lease-purchase agreements under chapter 63.19 RCW. The term also includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9A. The special property interest of a buyer of goods on identification of such goods to a contract for sale under RCW 62A.2-401 is not a "security interest", but a buyer may also acquire a "security interest" by complying with Article 9A. Except as otherwise provided in RCW 62A.2-505, the right of a seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods is not a "security interest," but a seller or lessor may also acquire a "security interest" by complying with Article 9A. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (RCW 62A.2-401) is limited in effect to a reservation of a "security interest."

Whether a transaction creates a lease or security interest is determined by the facts of each case. However, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and:

- (a) The original term of the lease is equal to or greater than the remaining economic life of the goods;
- (b) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;
- (c) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement; or
- (d) The lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

A transaction does not create a security interest merely because it provides that:

- (a) The present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease

APPENDIX I

is entered into;

(b) The lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods;

(c) The lessee has an option to renew the lease or to become the owner of the goods;

(d) The lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed;

(e) The lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed; or

(f) The amount of rental payments may or will be increased or decreased by reference to the amount realized by the lessor upon sale or disposition of the goods.

For purposes of this subsection (37):

(a) Additional consideration is not nominal if (i) when the option to renew the lease is granted to the lessee the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed, or (ii) when the option to become the owner of the goods is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed. Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised;

(b) "Reasonably predictable" and "remaining economic life of the goods" are to be determined with reference to the facts and circumstances at the time the transaction is entered into; and

(c) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

(38) "Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.

(39) "Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing.

(40) "Surety" includes guarantor.

(41) "Telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.

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(42) "Term" means that portion of an agreement which relates to a particular matter.

(43) "Unauthorized" signature means one made without actual, implied or apparent authority and includes a forgery.

(44) "Value". Except as otherwise provided with respect to negotiable instruments and bank collections (RCW 62A.3-303, RCW 62A.4-210, and RCW 62A.4-211) a person gives "value" for rights if he or she acquires them

(a) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or

(b) as security for or in total or partial satisfaction of a preexisting claim; or

(c) by accepting delivery pursuant to a pre-existing contract for purchase; or

(d) generally, in return for any consideration sufficient to support a simple contract.

(45) "Warehouse receipt" means a receipt issued by a person engaged in the business of storing goods for hire.

(46) "Written" or "writing" includes printing, typewriting or any other intentional reduction to tangible form.

CREDIT(S)

[2001 c 32 § 9; 2000 c 250 § 9A-802; 1996 c 77 § 1. Prior: 1993 c 230 § 2A-602; 1993 c 229 § 1; 1992 c 134 § 14; 1990 c 228 § 1; 1986 c 35 § 53; 1981 c 41 § 2; 1965 ex.s. c 157 § 1-201.]

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C

West's Revised Code of Washington Annotated Currentness

Title 62A. Uniform Commercial Code (Refs & Annos)

▣ Article 2. Sales (Refs & Annos)

▣ Part 6. Breach, Repudiation and Excuse

→ **62A.2-602. Manner and effect of rightful rejection**

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two following sections on rejected goods (RCW 62A.2-603 and RCW 62A.2-604),

(a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this Article (subsection (3) of RCW 62A.2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) the buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this Article on seller's remedies in general (RCW 62A.2-703).

CREDIT(S)

[1965 ex.s. c 157 § 2-602. Cf. former RCW sections: (i) RCW 63.04.090; 1925 ex.s. c 142 § 8; RRS § 5836-8. (ii) RCW 63.04.510; 1925 ex.s. c 142 § 50; RRS § 5836-50.]

WASHINGTON COMMENTS [1965 ENACTMENT]

2003 Main Volume

(1) This subsection makes no change with respect to the time within which rejection is permitted. See USA 8 (RCW 63.04.090) (buyer deemed to accept if “after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them”); 36 WnLR 72.

The previous statute did not appear to impose any particular affirmative duty on the buyer with regard to rejec-

APPENDIX J

tion. See USA 50 (RCW 63.04.510) (buyer not bound to return goods to seller, "sufficient if he notifies the seller that he refuses to accept them"). To the contrary, this subsection requires that notice of rejection be given and subsec. (2)(b) requires that the buyer use reasonable care in holding rejected goods in his possession at the seller's disposition.

(2) Part (a) is without statutory precedent. No remedy for the "wrong" contemplated hereunder is stated. However, it has been suggested that the remedy intended is ratification of the wrongful act as acceptance under sec. 2-606(1)(c), permitting the seller to sue for the price. New York Law Revision Commission--Study of Uniform Commercial Code--Article 2--Sales 515 (1955). It seems arguable that the seller might, alternatively, refuse to ratify the act and treat the act as a conversion under sec. 2-401(4) (rejection reverts title in seller).

Part (b). See comment to subsec. (1).

Part (c). No comment.

UNIFORM COMMERCIAL CODE COMMENTS

2003 Main Volume

Prior Uniform Statutory Provision: Section 50, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To make it clear that:

1. A tender or delivery of goods made pursuant to a contract of sale, even though wholly non-conforming, requires affirmative action by the buyer to avoid acceptance. Under subsection (1), therefore, the buyer is given a reasonable time to notify the seller of his rejection, but without such seasonable notification his rejection is ineffective. The sections of this Article dealing with inspection of goods must be read in connection with the buyer's reasonable time for action under this subsection. Contract provisions limiting the time for rejection fall within the rule of the section on "Time" and are effective if the time set gives the buyer a reasonable time for discovery of defects. What constitutes a due "notifying" of rejection by the buyer to the seller is defined in Section 1-201.
2. Subsection (2) lays down the normal duties of the buyer upon rejection, which flow from the relationship of the parties. Beyond his duty to hold the goods with reasonable care for the buyer's [seller's] disposition, this section continues the policy of prior uniform legislation in generally relieving the buyer from any duties with respect to them, except when the circumstances impose the limited obligation of salvage upon him under the next section.
3. The present section applies only to rightful rejection by the buyer. If the seller has made a tender which in all respects conforms to the contract, the buyer has a positive duty to accept and his failure to do so constitutes a "wrongful rejection" which gives the seller immediate remedies for breach. Subsection (3) is included here to emphasize the sharp distinction between the rejection of an improper tender and the non-acceptance which is a breach by the buyer.
4. The provisions of this section are to be appropriately limited or modified when a negotiation is in process.

Cross References:

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Point 1: Sections 1-201, 1-204(1) and (3), 2-512(2), 2-513(1) and 2-606(1)(b).

Point 2: Section 2-603(1).

Point 3: Section 2-703.

Definitional Cross References:

“Buyer”. Section 2-103.

“Commercial unit”. Section 2-105.

“Goods”. Section 2-105.

“Merchant”. Section 2-104.

“Notifies”. Section 1-201.

“Reasonable time”. Section 1-204.

“Remedy”. Section 1-201.

“Rights”. Section 1-201.

“Seasonably”. Section 1-204.

“Security interest”. Section 1-201.

“Seller”. Section 2-103.

HISTORICAL AND STATUTORY NOTES

Uniform Law:

This section is similar to § 2-602 of the Uniform Commercial Code. See Vol. 1B Uniform Laws Annotated, Master Edition or ULA Database on Westlaw.

CROSS REFERENCES

- Definitions, see §§ 62A.1-201, 62A.2-103 et seq.
- Payment before inspection, impairment of buyer's remedies, see § 62A.2-512.
- Reasonable time, seasonably, see § 62A.1-204.

LIBRARY REFERENCES

2003 Main Volume

- Sales  177, 179(6).
- Westlaw Topic No. 343.

RESEARCH REFERENCES

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Treatises and Practice Aids

1A Wash. Prac. Series § 36.21, Passage of Title.

1A Wash. Prac. Series § 36.28, Buyer's Right to Reject Goods.

1A Wash. Prac. Series § 36.30, Acceptance of Goods.

1A Wash. Prac. Series § 36.57, Form--Notice of Rejection--Nonmerchant Buyer.

NOTES OF DECISIONS

In general 1
Buyers' duties 2

1. In general

Onion seed buyer timely and effectively rejected seed that did not comply with purchase contract's germination rate requirement; all eight germination tests were completed within some four and one-half months after buyer washed and dried seed, and, based on seller's conversation with buyer before tests were completed, seller understood that because of seed's low germination rate, buyer would not purchase seed unless it could find another buyer. *Graaff v. Bakker Bros. of Idaho, Inc.* (1997) 85 Wash.App. 814, 934 P.2d 1228. Sales ↪ 179(6)

2. Buyers' duties

If seller delivers conforming goods, which buyer rejects, seller owns goods after rejection, and buyer must hold goods with reasonable care at seller's disposition for time sufficient to permit seller to remove them, and may additionally be liable for damages for breach of contract. *Kysar v. Lambert* (1995) 76 Wash.App. 470, 887 P.2d 431, review denied 126 Wash.2d 1019, 894 P.2d 564. Sales ↪ 131

If seller delivers nonconforming goods, which buyer rejects, seller owns goods after rejection, and buyer must hold goods with reasonable care at seller's disposition for time sufficient to permit seller to remove them, and buyer may be entitled to damages for seller's breach of contract. *Kysar v. Lambert* (1995) 76 Wash.App. 470, 887 P.2d 431, review denied 126 Wash.2d 1019, 894 P.2d 564. Sales ↪ 131

West's RCWA 62A.2-602, WA ST 62A.2-602
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C

West's Revised Code of Washington Annotated Currentness

Title 62A. Uniform Commercial Code (Refs & Annos)

▣ Article 2. Sales (Refs & Annos)

▣ Part 6. Breach, Repudiation and Excuse

→ **62A.2-606. What constitutes acceptance of goods**

(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or

(b) fails to make an effective rejection (subsection (1) of RCW 62A.2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

CREDIT(S)

[1965 ex.s. c 157 § 2-606. Cf. former RCW sections: (i) RCW 63.04.480(1); 1925 ex.s. c 142 § 47; RRS § 5836-47. (ii) RCW 63.04.490; 1925 ex.s. c 142 § 48; RRS § 5836-48.]

Current through Chapter 2 of the 2009 Regular Session

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APPENDIX K

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

LAUREN L. ELLIS and JOHN DOE)
ELLIS, husband and wife; LAUREN L.)
ELLIS d/b/a ELLIS CONSULTING)
d/b/a AMERICAN HOME)
APPRAISAL,)
Appellants,)
and)
KITSAP CREDIT UNION, a)
Washington State Nonprofit Credit)
Union d/b/a KITSAP COMMUNITY)
FEDERAL CREDIT UNION)
Respondent.)

Case No.: 38610-1-II

DECLARATION OF
SERVICE

09 APR -9 PM 1:46
STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS
DIVISION II

I, KATHRYN M. NIES, declare under penalty of perjury that:

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action. My business address is Suite 809, AGC Building, 1200 Westlake Avenue North, Seattle, Washington 98109.

On April 9, 2009, I delivered via ABC Legal Messenger, Inc. a true and correct copy of the following documents:

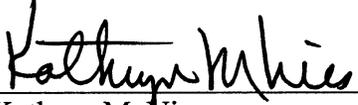
1. Appellant Opening Brief; and
2. Declaration of Service,

to the following:

Brian C. Read
Frank R. Siderius
Siderius Lonergan & Martin, LLP
500 Union Street, Suite 847
Seattle, Washington 98101

Executed on April 8th, 2009 at Seattle, Washington.

I declare under penalty of perjury under the laws of the
State of Washington that the above is true and correct.



Kathryn M. Nies