

Contracts - Sales

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CONTRACTS—SALES

*Edward J. Bennett**

Professor Bennett has selected several Illinois contracts cases which illustrate the wide-ranging development of Illinois contracts law over the past year. He analyzes cases demonstrating the courts' protectionist attitude toward the consuming public when dealing with warranty clauses, insurance contracts, contracts executed by minors, illegality, and the quasi-contract remedy, in contrast to a less protectionist attitude in exculpatory clause and Retail Installment Sales Act cases. He also reviews the many cases in which the courts strictly construe contractual terms, such as clauses attempting to foreclose the impossibility defense, covenants not to sue, and terms specifying what constitutes an offer-acceptance, thus imparting a caveat to attorneys drafting contracts.

INTRODUCTION

THE past year was extremely active for the law of contracts and sales in Illinois.¹ Thirty-five cases have been selected for comment in this survey article and they represent only one-half of all the cases dealing with significant contract and sales issues. This survey indicates that Illinois courts are resolving many cases on the basis of language interpretation and an application of a wide range of contractual remedies. Such vintage topics as the statute of frauds and the parol evidence rule are also very much alive—even the old “mail box rule” of offer and acceptance was resurrected for one case. Illinois courts revealed an inclination to favor exculpatory clauses in contracts while evidencing disfavor with arguments by insurance companies to avoid paying on policies. In the sales area, the courts demonstrated a much greater understanding of the Uniform Commercial Code (UCC) than they have in past years, and exhibited a genuine concern for consumers. The UCC and out-of-state authority were employed to relieve a used car buyer who bought the all-time “lemon” of a car; the doctrine of impossibility was invoked to

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1. “The past year” includes cases from Volumes 6-12 of the Illinois Appellate Reports (Third Series) Volumes 51-54 of the Illinois Supreme Court Reporter (Second Series) and from volumes 286-297 of the Northeastern Reports (Second Series).

enable a dance student to rescind contracts for over \$24,000 worth of dance lessons; and the concept of implied disaffirmance was used to remove a judgment against a minor car purchaser.

All but five of the cases that fall within the scope of this survey are from Illinois Appellate Courts. Of those five, four are Illinois Supreme Court decisions and one is a federal diversity case from the Seventh Circuit Court of Appeals. With six opinions, the Fifth Division of the First District is the Illinois Appellate Court represented most in the survey. The other four divisions of that District account for thirteen cases and the remaining eleven cases are from the Second through Fifth Districts (two from the Second, four from the Third, three from the Fourth and two from the Fifth). Judge Lorenz of the First District's Fifth Division is the most frequently cited opinion writer and four of his opinions were selected for the survey. Judge Burman of the First District's Fourth Division and Judge Simkins of the Fourth District each have three opinions mentioned. Only two of the thirty-five cases selected contain dissents: one by Judge Burman and the other by Supreme Court Justice Goldenhersh. Three cases indicated the appearance of legal aid attorneys and one was handled pro se.

EXCULPATORY CLAUSES ENFORCED

The exculpatory clause, a device by which a person attempts to insulate himself from future lawsuits, has come under strenuous attack in courts of other jurisdictions. The clauses have not been enforced for a variety of reasons; first, because they are usually foisted on persons who have very little bargaining power;² second, because they are not conspicuously pointed out to the persons accepting them in contracts;³ third, because they are phrased in complex language which is not usually understood by persons without legal training;⁴ and finally, because the clauses are not made a part

2. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) and *Kuzmiak v. Brookchester*, 33 N.J. Super. 575, 111 A.2d 425 (1954), and *Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

3. See, e.g., *Baker v. City of Seattle*, 79 Wash. 2d 198, 484 P.2d 405 (1971).

4. See, e.g., *Mellinkoff, How to Make Contracts Illegible*, 5 STAN. L. REV. 418 (1953).

of the contract terms.⁵ Despite these arguments, the Illinois courts have given exculpatory clauses much more favorable treatment: they have been enforced even in the face of legislative pronouncements to the contrary.⁶ During the past year, exculpatory clauses were brought to the Illinois appellate courts' attention on three separate occasions, each involving a different kind of contract. On all three occasions, the courts ruled the exculpatory clause valid. *Bruno v. Gabhauer*⁷ involved an exculpatory clause in a residential lease, one of the most common uses of such a clause. The plaintiff-lessee alleged that he fell over an iron grate and suffered injuries due to the defendant's negligence in maintaining the grate. The defendant relied solely on a clause in the lease which read: "Lessor shall not be liable to Lessee for any damage or injury . . . occasioned by the failure of Lessor to keep said premises in repair. . . ."⁸ The court acknowledged that the Illinois legislature had passed a statute in 1969 making exculpatory clauses in leases void, but also pointed out that such statute was found unconstitutional a year later because of the exclusions granted in the statute to municipal corporations and governmental units.⁹ The court admitted that the constitutional defect in the original statute was corrected in 1971 by legislative action,¹⁰ but insisted that such efforts could not operate retroactively to cover the facts in *Bruno*. The court also refused to look to other states for guidance in determining Illinois' public policy on the matter. "As applied to contracts," noted Judge English, "the constitution, statutes, and decisions of the state courts are the proper sources of Illinois public policy, and this court can-

5. See, e.g., *Klar v. H. & M. Parcel Room, Inc.*, 270 App. Div. 538, 61 N.Y.S.2d 285 (1946).

6. In 1959 the Illinois legislature passed a statute making exculpatory clauses in certain types of leases void as against public policy. See ILL. REV. STAT. ch. 80, § 15a (1959). Yet ten years later, the Illinois Supreme Court found a way to enforce an exculpatory clause covered by the statute. See *Sweeney Gasoline & Oil Co. v. Toledo, P. & W. R. Co.*, 42 Ill. 2d 265, 247 N.E.2d 603 (1969). The legislature attempted to cure the defects in the original statute and in 1971 put into effect another statute against exculpatory clauses in leases. ILL. REV. STAT. ch. 80, § 91 (1971).

7. 9 Ill. App. 3d 345, 292 N.E.2d 238 (1972).

8. *Id.* at 346, 292 N.E.2d at 240.

9. See *Sweeney Gasoline & Oil Co. v. Toledo, P. & W.R. Co.*, 42 Ill. 2d 265, 247 N.E.2d 603 (1969).

10. See note 6, *supra*.

not look elsewhere in determining its existence and applicability to the question before us."¹¹

*Morrow v. Auto Championship Racing Assn*¹² involved exculpatory language appearing in the license application and sign-in sheets signed by the plaintiff, a race car driver, prior to his participation in races sanctioned by the defendant racing association. The language read, in part:

In consideration of the acceptance by A.C.R.A., Inc. of my license application and issuance of license, . . . I do hereby release, remise and forever discharge A.C.R.A., Inc. . . . from all liability, claims, actions and possible cause of action, whatsoever that may accrue to me or to my heirs, . . . from every and any loss, damage and injury (including death) that may be sustained by my person and property while in, about, en route into and out of premises, where A.C.R.A., Inc. sanctioned races or other events are presented.¹³

Although the trial court disregarded the exculpatory clause and rendered a judgment of \$55,000 in the plaintiff's favor,¹⁴ the First District, Third Division Appellate Court found the clause valid and reversed in the defendant's favor. Judge McGloon, speaking for the court, passed over the fact that the plaintiff had never before participated in professional racing and thus had never before been asked to agree to such a release.¹⁵ He also ignored the testimony from the plaintiff and two other drivers that the exculpatory language on the sign-in sheets at the track had been folded under and attached to a clipboard so that it could not be easily seen.¹⁶ "The question of whether exculpatory agreements are against public policy calls into conflict two tenets of the law," wrote Judge McGloon.¹⁷ "First, a party should be liable for the negligent breach of a duty which he lawfully owes to another; and second, a party should be able to freely contract about his affairs."¹⁸ After noting

11. 9 Ill. App. 3d at 347, 292 N.E.2d at 240.

12. 8 Ill. App. 3d 682, 291 N.E.2d 30 (1972).

13. *Id.* at 683, 291 N.E.2d at 31.

14. *Id.* at 682, 291 N.E.2d at 31.

15. 8 Ill. App. 3d at 683, 291 N.E.2d at 31. Such a fact has been determinative in decisions of other courts. Compare *Baker v. City of Seattle*, 79 Wash. 2d 198, 484 P.2d 405 (1971) with *Garretson v. United States*, 456 F.2d 1017 (9th Cir. 1972).

16. 8 Ill. App. 3d at 683, 291 N.E.2d at 31.

17. *Id.* at 684-85, 291 N.E.2d at 32.

18. *Id.*

that Illinois favors the former tenet only for certain types of contractual relationships—such as that of a carrier-passenger, employer-employee and innkeeper-guest—the judge concluded that there is nothing about the relationship between a race promoter and a driver that would warrant making it another special category.

Therefore, we hold that an agreement between a participant in and a promoter of a stock car race, whereby the former assumes the risk of participating and releases the latter from claims due to the latter's negligence, is not void as against the public policy of this state.¹⁹

The third case involving an exculpatory clause was *Bers v. Chicago Health Clubs, Inc.*,²⁰ where a health club customer sued for injuries sustained on the club's premises and the defendant health club relied solely upon the exculpatory language contained in the contract the customer had signed. The lower court rendered a judgment on the pleadings for defendant, and the Second Division of the First District Appellate Court affirmed, holding that such a clause which released the health club from all liability for injuries suffered on its premises was not void as against public policy.²¹ The decision may be explained by the deficiency in plaintiff's presentation of the case as well as by the court's special fondness for exculpatory clauses. The court suggested that a disparity of bargaining power may have existed at the time the contract was signed, but that such information could not have been considered on appeal since it was not included in the pleadings.²²

SALES: CONSUMERS CASES

When the Illinois Retail Installment Sales Act was passed in 1965,²³ it appeared to give consumers a significant weapon against overzealous sellers. It required sellers to give clear and conspicuous

19. *Id.* at 686, 291 N.E.2d at 33. Other cases reaching the same conclusion about race drivers and promoters are: *Hine v. Dayton Speedway Corp.*, 20 Ohio App. 2d 185, 252 N.E.2d 648 (1969); *French v. Special Services, Inc.*, 107 Ohio App. 435, 159 N.E.2d 785 (1958); and *Corpus Christi Speedway v. Morton*, 279 S.W.2d 903 (Tex. Civ. App. 1955).

20. — Ill. App. 3d —, 297 N.E.2d 360 (1973).

21. *Id.* at —, 297 N.E.2d at 360.

22. *Id.*

23. ILL. REV. STAT., ch. 121½, §§ 223 *et seq.*, (1965), *as amended*, ILL. REV. STAT., ch. 121½, §§ 501 *et seq.* (1967).

notice of buyers' rights and obligations,²⁴ as well as a breakdown of the sales price, finance charges and other costs inherent in an installment purchase.²⁵ It also compelled the use of certain form language on all installment sales contracts.²⁶ One shortcoming of the Act was its limited statement of buyers' remedies for a seller's breach of his statutory duties. Though it gave buyers the right to avoid paying finance charges if the Act were violated by sellers,²⁷ it did not indicate whether such recourse was to be the buyers' exclusive civil remedy.

In 1971, an attorney for Chicago's Legal Aid Bureau argued in the First District Appellate Court that an aggrieved buyer had the right to cancel his contract since the seller's violation of the statute made the contract illegal.²⁸ The plaintiff, Joseph Spencer, had entered into a retail installment contract with the defendant, Anco Investment Corporation, using a document which did not contain the seller's signature nor the words "retail installment contract," the requisite "notice to buyer" or other information required by statute. The appellate court agreed that the contract did not comply with the Retail Installment Sales Act, but restricted the buyer's remedy to a recovery of finance charges. This year, the case was brought to the Illinois Supreme Court, where the decision was affirmed for the seller.²⁹ Justice Kluczynski wrote:

It is clear from the language of the . . . act . . . that the buyer's remedy is exclusive. To hold otherwise and render the contract void for non-compliance would negate the effect of section 17 because there would be no contract upon which this provision could be enforced.³⁰

24. See ILL. REV. STAT. ch. 121½, §§ 224, 227 (1965), as amended, ch. 121½, § 504 (1967).

25. See ILL. REV. STAT., ch. 121½, § 225 (1965), as amended, ILL. REV. STAT., ch. 121½, § 505 (1967).

26. See ILL. REV. STAT. ch. 121½, § 224 (1965), as amended, ILL. REV. STAT. ch. 121½, § 503 (1967).

27. See ILL. REV. STAT. ch. 121½, § 240 (1965), as amended, ILL. REV. STAT. ch. 121½ § 531(b) (1967).

28. See *Anco Investment Corp. v. Spencer*, 1 Ill. App. 3d 445, 275 N.E.2d 263 (1971). For a discussion of the case, see also Benett, *Contracts—Sales, Survey of Illinois Law 1971-72*, 22 DEPAUL L. REV. 156, 170 (1972).

29. *Anco Investment Corp. v. Spencer*, 53 Ill. 2d 396, 292 N.E.2d 726 (1973).

30. *Id.* at 398, 292 N.E.2d at 727. The section 17 to which the court refers to ILL. REV. STAT. ch. 121½, § 240 (1965), as amended, ILL. REV. STAT. ch. 121½, § 531(b) (1967).

The practical effect of the decision is that sellers hardly need to worry any longer over violations of the Retail Installment Sales Act since the civil repercussions are mild, if indeed they are ever sought by the victimized buyers. The criminal penalties provided in the Act³¹ are also not a strong deterrent because the State's Attorney and Attorney General's offices very seldom enforce them.

A more encouraging case for consumers, however, is *Overland Bond and Investment Corp. v. Howard*,³² where the Appellate Court for the First District, Fifth Division rendered the most comprehensive application of the Uniform Commercial Code's warranty provisions since the UCC was adopted in this state in 1962.³³ The appellant, Howard, purchased a used car from Car Credit Corporation and signed a retail installment contract which acknowledged his acceptance of the car in good condition and included a standard "integration" clause:

This contract contains all of the agreements of the parties relative to the retail installment sale, and no representations, promises, statements or warranties, express or implied, have been made by seller unless contained herein or imposed by law.³⁴

Howard informed the dealer at the time of the purchase that he was a salesman and that he needed the daily use of a car for his job. The day after the purchase of the car, its transmission fell out onto the Eisenhower Expressway. Howard returned the car to the dealer, who repaired the transmission nine days later. Then the gas line clogged and had to be fixed. A week after that, the brakes failed on the Dan Ryan Expressway and the car was again returned to the dealer for repairs. Three weeks went by, and despite daily inquiries by Howard, no further work was done on the car. At that time, Howard informed two salesmen and the credit manager that he was cancelling the contract. The plaintiff, Overland, who was the assignee of the installment contract, resold the automobile at an auction for \$500 and sued Howard for the unpaid balance of the purchase price of the car.

31. See ILL. REV. STAT. ch. 121½, § 243 (1965), as amended, ILL. REV. STAT. ch. 121½, § 531 (a) (1973): "(a) Any person who knowingly violates this Act is guilty of a Class A misdemeanor."

32. 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972).

33. See ILL. REV. STAT. ch. 26 (1971).

34. 9 Ill. App. 3d at 355, 292 N.E.2d at 173.

The trial court, sitting without a jury, entered an order confirming judgment by confession against Howard. On appeal, the Northwest Neighborhood Legal Services office of Chicago's Legal Assistance Foundation filed an impressive brief, citing the Illinois Consumer Fraud Act,³⁵ sections of the Uniform Commercial Code,³⁶ and extensive case law from Illinois and other jurisdictions. The appellate court, in an opinion by Judge English, adopted the appellant's position in its entirety, and in so doing, made five significant conclusions. First, the court concluded that the warranty of merchantability applies as much to a used car as to a new one. The official comment to section 2-314³⁷ left doubt on this point. Relying on case law from Connecticut³⁸ and Washington,³⁹ Judge English stated

Fitness for the ordinary purpose of driving implies that the vehicle should be in a safe condition and substantially free of defects. It should be obvious that any car without an adequate transmission and proper brakes is not fit for the ordinary purpose of driving. Any other conclusion would entitle unscrupulous sellers to foist inherently dangerous and potentially worthless vehicles on unwary consumers and thereby avoid the obvious intent of the statute.⁴⁰

Second, the court found that because Howard had informed the car dealer he was a salesman who needed a car for business purposes, a second warranty, that of fitness for a particular purpose, was created.⁴¹ All four requisites for the warranty were found in the trial record: 1) the buyer's communication of his purpose to seller; 2) the seller's use of his skill and judgment in helping the buyer select a product to meet his stated purpose; 3) the buyer's reliance on the

35. See ILL. REV. STAT. ch. 121½, § 262L (1969) (this provision remains unchanged in the 1971 Code).

36. ILL. REV. STAT. ch. 26, §§ 2-314, 2-315, 2-316(2) and (3), 2-607(3)(a), and 2-608 (1971).

37. "A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description." ILL. ANN. STAT. ch. 26, § 2-314 (Smith-Hurd 1963) (UNIFORM COMMERCIAL CODE § 2-314, Comment 3).

38. *Chamberlain v. Bob Matick Chevrolet, Inc.*, 4 Conn. Cir. 685, 239 A.2d 42 (1967).

39. *Berg v. Stromme*, 79 Wash. 2d 184, 484 P.2d 380 (1971).

40. 9 Ill. App. 3d at 354, 292 N.E.2d at 172-73.

41. See ILL. REV. STAT. ch. 26, § 2-315 (1969) (this provision remains unchanged in the 1971 code).

seller's skill and judgment, and 4) the seller's knowledge of the buyer's reliance.

The court's third conclusion was that all the attempted disclaimers in the contract were ineffective because they were put in fine print in an inconspicuous location on the writing and were not phrased in language required by statute.⁴² "[T]o exclude an implied warranty of merchantability," stated the court, "the language used must mention merchantability and be conspicuous. No such language appears in the present contract even among [SIC] the fine print. . . ."⁴³ Though conceding that implied warranties might also be excluded if the contract states "buyer acknowledges delivery, examination and acceptance of said car in its *present* condition," the court found that the actual language used in the contract at issue—"buyer acknowledges delivery and acceptance of said motor vehicle in *good* condition"—was significantly different and thus, did not act as a disclaimer of warranties.

The term, "present condition," we agree, is like "as is" and "with all faults," since those terms make no direct assertion that the vehicle is qualitatively either good or bad, but, instead, imply a warning to the buyer that he may be purchasing a car in its present condition with whatever faults it may possess. On the other hand, to state that a vehicle is in "good condition" at the time of delivery does not, in our opinion, call the buyer's attention to the exclusion of any warranties, but simply seeks to reassure the buyer that the car he is purchasing is a "good" one.⁴⁴

Fourth, the court found that no particular words or method were required to make an adequate notice of a warranty breach under

42. See ILL. REV. STAT. ch. 26, § 2-316(2) and (3)(a) (1969) (this provision remains unchanged in the 1971 code).

43. 9 Ill. App. 3d at 356, 292 N.E.2d at 174. The court is referring to UNIFORM COMMERCIAL CODE § 2-316(2):

Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

44. 9 Ill. App. 3d at 356, 292 N.E.2d at 174, referring to UNIFORM COMMERCIAL CODE § 2-316(3)(a):

unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. . . .

section 2-607(3)(a).⁴⁵ Having the car towed to the dealer's place of business and informing the dealer's employees that the car was in need of repair constituted sufficient notice to the dealer that the implied warranties had been breached. While buyers in the past have found themselves unable to assert breaches of warranties because of their failure to comply with the Code's notice requirement, *Howard* may remove this barrier with its lessening of formality in giving notice.

Finally, the court found that Howard had retained the right to revoke his acceptance of the car and get his money back several weeks after the date of purchase.⁴⁶ Attempts to utilize section 2-608 have often failed in the past because buyers were unable to prove that a non-conformity in the goods *substantially* impaired the value of the goods or because buyers could not show that they gave the sellers an opportunity to cure the non-conformity.

From the facts of this case, there can be little doubt that defendants' car, after having had the transmission fall out, and then experiencing a complete failure of the brakes (both dangerous occurrences while defendant was travelling on an expressway), was so hazardous to drive that the value of defendants' contract for the car was substantially impaired. A consideration of the different defects and their substantial effect on defendants' car leads us to conclude that the revocation was entirely proper and justified since the buyers received unfulfilled assurances that the defects would be cured and also because of the practical impossibility of initial discovery of the defects by the buyers.⁴⁷

Consumer-oriented attorneys who might regard *Howard* as the start of a trend toward consumerism in Illinois courts should temper

45. UNIFORM COMMERCIAL CODE § 2-607(3)(a) reads: "Where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from *any* remedy . . ." [emphasis added].

46. UNIFORM COMMERCIAL CODE § 2-608 entitled "Revocation of Acceptance," reads:

(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.

47. 9 Ill. App. 3d at 360, 292 N.E.2d at 177.

their enthusiasm with the realization that the equities of the case were glaringly in favor of the buyer and the fact that appellee, Overland, failed to file a brief or even put in an appearance in the appellate court.⁴⁸ Nevertheless, it is still encouraging to see that a well-researched and well-written brief, as was presented by attorneys for Howard, is still an effective way to make law in Illinois.

SALES: NON-CONSUMER CASES

The facts in *Oloffson v. Coomer*,⁴⁹ decided this year by the Third District Court of Appeals, provide an excellent illustration of the application of the UCC's sections on anticipatory repudiation and computation of damages. The plaintiff, Oloffson, was a grain dealer and the defendant, Coomer, was a farmer.⁵⁰ In April, 1970, they entered into a contract for 40,000 bushels of corn, 20,000 to be delivered by Coomer by October 30 and 20,000 to be delivered by December 15, 1970. On June 3 of that year, Coomer informed Oloffson that he was not going to plant corn because the season had been too wet, and that Oloffson would have to buy his corn elsewhere. Oloffson refused to take Coomer's suggestion, and for several months thereafter attempted to get Coomer to deliver the corn as promised. Finally, he gave up and decided to purchase the corn elsewhere at a price much higher than either the contract price or the June 3 market price. The price of corn stated in the April contract was \$1.12 a bushel while the market price on June

48. The appellants moved for a default judgement against the appellee for the latter's failure to appear in the appellate court, but rather than granting a pro forma reversal, the court chose to consider the merits of the appeal. Its authority for doing so was *Daley v. Jack's Tivoli Liquor Lounge, Inc.*, 118 Ill. App. 2d 264, 254 N.E.2d 814 (1969).

49. 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973).

50. An important issue in the case was whether the defendant, Coomer, a farmer, could be considered a "merchant" under the UCC definition for that word. UNIFORM COMMERCIAL CODE § 2-104(1) states:

"Merchant" means a person who deals in goods of the kind, or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

The court concluded that Coomer was *not* a "merchant" within this definition because he "was simply in the business of growing rather than merchandising grain." 11 Ill. App. 3d at 920, 296 N.E.2d at 873.

3, when Coomer said he would not deliver, was \$1.16. The average price actually paid by Oloffson was \$1.42 a bushel.

At the trial Oloffson was awarded damages based on the difference between the contract price and the June 3 market price. On appeal, Oloffson contended that the proper measure of damages was the difference between the contract price and the market prices for corn on the dates Coomer was supposed to make his deliveries. The difference of opinion between the trial court and Oloffson amounted to about \$20,000. Judge Alloy of the appellate court made the primary finding that Coomer's June 3 statement was an anticipatory repudiation of the contract pursuant to section 2-610 of the UCC.⁵¹ This conclusion meant that Oloffson, as the "aggrieved party," had two alternatives. He could either await performance by the repudiating party for a commercially reasonable time or he could resort to any remedy for breach provided for in another section of the Code.⁵² However, the court gave such a restrictive construction to "commercially reasonable time" that it effectively eliminated the first alternative. The "'commercially reasonable time,'" stated the court, "expired on June 3, 1970"—the same day Coomer made his repudiation.⁵³ Thus, Oloffson's options were limited to the remedies delineated in section 2-711 of the Code.⁵⁴ That section again provided him with two alternatives: either he could "cover" under section 2-712,⁵⁵ *i.e.*, arrange to buy the corn elsewhere on June 3 and

51. See ILL. REV. STAT. ch. 26, § 2-610 (1961) (this provision remains unchanged in the 1971 code).

52. A list of buyer's remedies is contained in § 2-711, and according to § 2-610, a buyer confronted with an anticipatory breach has all of the options of § 2-711 open to him.

53. 11 Ill. App. 3d at 921, 296 N.E.2d at 874. The court explained:

Since Coomer's statement to Oloffson on June 3, 1970, was unequivocal and since "cover" easily and immediately was available to Oloffson in the well-organized and easily accessible market for purchases of grain to be delivered in the future, it would be unreasonable for Oloffson on June 3, 1970, to have awaited Coomer's performance rather than to have proceeded under Section 2-610(b) and, thereunder, to elect then to treat the repudiation as a breach. Therefore, if Oloffson were relying on his right to effect cover under section 2-711(1)(a), June 3, 1970, might for the foregoing reason alone have been the day on which he acquired cover.

11 Ill. App. 3d at 922, 296 N.E.2d at 874.

54. UNIFORM COMMERCIAL CODE § 2-610(b) on anticipatory repudiation refers to two other sections—2-703 and 2-711—but 2-711 is the only one applying in this case because the buyer is the aggrieved party. Section 2-703 deals with the seller's remedies when the buyer has repudiated.

55. UNIFORM COMMERCIAL CODE § 2-712 states, in part:

then recover the difference between the cost of purchase and the contract price, or he could sue Coomer under section 2-713⁵⁶ for the difference between the market price for corn on June 3 and the contract price. Under either of these alternatives, damages would add up to the same figure—the same sum which the lower court actually awarded to Oloffson.⁵⁷ Oloffson's mistake, then, was waiting several months after the June 3 repudiation to arrange for a substitute corn purchase; he should have acted immediately on June 3.⁵⁸ Although the case does not produce any novel results, it is useful in showing the workings and inter-relationship of various UCC sections and provides an object lesson for those who wish to keep all their options open in anticipatory breach situations in sales contracts.

In *Weiss v. Rockwell Manufacturing Co.*,⁵⁹ Judge Egan of the First District, First Division Appellate Court, described the necessary ingredients for an express warranty under section 2-313 of the Code⁶⁰ and then went on to give three reasons why no such warranties were made. The plaintiff, Weiss, contended that a statement made by one of the defendants, Ness, about the operation of an electrical wood shaping machine was a warranty, the breach of which caused him to injure his hand severely. The court's first rea-

(1) After a breach . . . the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller. (2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages . . ., but less expenses saved in consequence of the seller's breach.

56. UNIFORM COMMERCIAL CODE § 2-713 states in part:

(1) . . . the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages . . ., but less expenses saved in consequence of the seller's breach.

57. The appellate court concluded that the \$1,500 judgment in Coomer's favor was all that he was entitled to. 11 Ill. App. 3d at 923, 296 N.E.2d at 875.

58. The court also indicated that Oloffson was in bad faith on June 3, 1970 when he failed to point out to Coomer the usage of trade permitting his customers to cancel grain contracts and pay the difference between the contract price and market price on the day of cancellation. 11 Ill. App. 3d at 922-23, 296 N.E.2d at 874-75.

59. 9 Ill. App. 3d 906, 293 N.E.2d 375 (1973).

60. ILL. REV. STAT. ch. 26, § 2-313 (1961) (this provision remains unchanged in the 1971 code).

son for rejecting Weiss' argument was that the defendant's language was not an affirmation of fact or a promise, as required by section 2-313, but rather a personal opinion.⁶¹

To determine whether or not there is a warranty, the decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment on a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case there is a warranty and in the latter there is not.⁶²

Further, the court found that the defendant Ness did not assert a fact of which Weiss was ignorant. Both parties could readily see the danger of the device in operation and Ness merely had said there would be no worry of getting hurt if the machine was used properly.⁶³ Finally, Weiss failed to prove that Ness' statement was false. The language about there being no worry of injury was conditioned on the board being "tight against the fence," but at the time of injury, the board was not tight against the fence. The most surprising aspect of the case, however, is the fact that the court even considered the *possibility* of an express warranty under section 2-313 since the facts show that Weiss was not a person entitled to such warranty protection in Illinois. Illinois code section 2-318⁶⁴ extends warranty protection only to buyers, family or household members of the buyer, and house guests of the buyer—not to employees of buyers. The wood shaper was purchased by Weiss' employer, not by Weiss, but the court failed to mention this point. *Weiss*, however, can still be helpful to show the overlapping of warranties in sales law with products liability in tort law. Two other counts in Weiss' com-

61. 9 Ill. App. 3d at 915, 293 N.E.2d at 381.

62. *Id.* The court quoted from *Keller v. Flynn*, 346 Ill. App. 499, 508, 105 N.E.2d 532, 536 (1952).

63. Moreover, the vendor here certainly did not assert a fact of which the buyer was ignorant. Ness was not possessed of any special knowledge. The same observations made with reference to the duty to warn are appropriate here. The vendor and vendee could both see the danger of the device in operation that the blades cut from the underside, and that pressure was required to hold the board down and against the cutter.
9 Ill. App. 3d at 915, 293 N.E.2d at 381.

64. ILL. REV. STAT. ch. 26, § 2-318 (1970):

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. . . .

plaint were based on a products liability theory, but they were rejected by the court as well.

Another case reflecting an overlap of the UCC and tort law was *Best Bearings, Inc. v. Challenger Parts Rebuilders, Inc.*,⁶⁵ a case heard this year by the Second District Appellate Court. The buyer of ball bearings and other automotive equipment initially brought an action against the seller based on breach of the express and implied warranties of title.⁶⁶ The trial court dismissed the complaint on the grounds that the plaintiff failed to bring the action within four years of the date of the alleged breach, as required by section 2-725 of the Code.⁶⁷ The plaintiff then sought to file an amended complaint in which he alleged the same facts, but as part of an action of fraud rather than breach of warranty. The appellate court permitted the action to proceed in tort because it was now within the five year statute of limitations for fraud.⁶⁸

IMPOSSIBILITY AND FRAUD IN DANCE CONTRACTS

Three years ago, a dance student tried to rescind a contract with Arthur Murray's dance studio because an alleged physical disability made it impossible for him to continue his lessons.⁶⁹ The First District, First Division Appellate Court thwarted his efforts because the trial record did not sufficiently evince the alleged disability. The court, however, left the door open for future litigants in the student's position by endorsing two sections of the *Restatement of Contracts* on the doctrine of impossibility.⁷⁰ Seizing on that court's dictum,

65. 10 Ill. App. 3d 404, 294 N.E.2d 118 (1973).

66. See ILL. REV. STAT. ch. 26, § 2-312 (1969) (this provision remains unchanged in the 1971 code).

67. ILL. REV. STAT. ch. 26, § 2-725(1)(2) (1969) (this provision remains unchanged in the 1971 code).

68. ILL. REV. STAT. ch. 83, § 23 (1969).

69. See *Davies v. Arthur Murray, Inc.*, 124 Ill. App. 2d 141, 260 N.E.2d 240 (1970).

70. RESTATEMENT OF CONTRACTS § 459 (1932):

A duty that requires for its performance action that can be rendered only by the promisor or some other particular person is discharged by his death or such illness as makes the necessary action by him impossible or seriously injurious to his health, unless the contract indicates a contrary intention or there is contributing fault on the part of the person subject to the duty.

RESTATEMENT OF CONTRACTS § 460 (1932):

(1) Where the existence of a specific thing or person is, either by the

another dance student of Arthur Murray, Inc. this year put forth the same impossibility argument in an effort to rescind a series of five contracts obligating him for \$24,812.80.⁷¹ This time, the plaintiff presented the court with ample evidence from both lay and expert witnesses as to his disability which resulted from an auto accident. The defendant studio this time pointed to clauses which had been added to its contracts since the time of the previous case. These clauses, printed in bold face capital lettering, read: "NON-CANCELLEABLE NEGOTIABLE CONTRACT" and "I UNDERSTAND THAT NO REFUNDS WILL BE MADE UNDER THE TERMS OF THIS CONTRACT." The defendant studio contended the clauses manifested a mutual intent by the parties to foreclose any possible application of the doctrine of impossibility.

While recognizing the extant right to waive that doctrine,⁷² the court held that the particular language referred to by the defendant failed to accomplish this purpose. "An ambiguous contract will be construed most strongly against the party who drafted it," reasoned the court in an opinion by Judge Stamos.⁷³ "Although neither party to a contract should be relieved from performance on the ground that good business judgment was lacking, a court will not place upon language a ridiculous construction."⁷⁴ In addition to praying for and getting his money back, the plaintiff sought punitive damages against the studio based on fraud. He contended he was fraudulently induced to sign the contracts by representations that he had "exceptional potential to be a fine and accomplished dancer" and that he was a "natural born dancer." The court took into account the business relationship between the parties and the educational background of the plaintiff, who had attended college, in rejecting this part of the complaint.

terms of the bargain or in the contemplation of both parties, necessary for the performance of a promise in the bargain, a duty to perform the promise . . . is discharged if the thing or person subsequently is not in existence in time for reasonable performance, unless a contrary intention is manifested, or the contributing fault of the promisor causes the nonexistence.

71. *Parker v. Arthur Murray, Inc.*, 10 Ill. App. 3d 1000, 295 N.E.2d 487 (1973).

72. Both sections of the RESTATEMENT OF CONTRACTS to which the court referred—sections 459 and 460—contain language that permits parties to make the doctrine of impossibility inoperative if they so agree. See note 70 *supra*.

73. 10 Ill. App. 3d at 1003, 295 N.E.2d at 490. Judge Stamos was writing for the First District, Second Division of the Appellate Court.

74. *Id.*

Generally a mere expression of opinion could not support an action for fraud. [citation omitted] In addition, misrepresentations, in order to constitute actionable fraud, must pertain to present or pre-existing facts, rather than to future or contingent events, expectations or probabilities.⁷⁵

Though the case probably will remain significant for its discussion of impossibility and fraud, it will lose its importance in resolving dance contract disputes because in 1965 the Illinois legislature passed a bill regulating such contracts.⁷⁶

STATUTE OF FRAUDS AND PAROL EVIDENCE RULE

It is astounding to see that after centuries of litigation, the statute of frauds and parol evidence rule remain a vital area of litigation in contract cases. As is usually the case, the Illinois courts during the past year applied the exceptions to the two rules more than the rules themselves. In *Mercer v. Sturm*,⁷⁷ the plaintiffs tried to force the defendant to honor a verbal agreement he made allowing the construction and use of a driveway on his property. The plaintiffs had performed their part of the bargain by constructing and grading the driveway while the defendant merely stood by without objection. Only after the plaintiffs completed their performance did the defendant question the validity of the agreement, raising the statute of frauds as his defense. The court found that the plaintiffs' performance under the contract was sufficient to take the case out of the statute and to bind defendant to his oral promise. "It would be a fraud in this case," noted the court, "to permit the defendant to annul his agreement by invoking the statute of frauds."⁷⁸

In *Stein v. Malden Mills, Inc.*,⁷⁹ a salesman sued his former em-

75. 10 Ill. App. 3d at 1004, 295 N.E.2d at 490. The "opinions" the court found included statements by defendant to plaintiff that plaintiff had "exceptional potential to be a fine and accomplished dancer," that he had "exceptional potential" and that he was a "natural born dancer" and a "terrific dancer."

76. ILL. REV. STAT. ch. 29, §§ 51, 52 (1965), dealing with the regulation of contracts involving both health and dance studios. Section 52 reads: "Any contract for health or dance studio services which does not comply with the applicable provisions of this act shall be void and unenforceable as contrary to public policy." (This language remains unchanged in the 1971 code).

77. 10 Ill. App. 3d 65, 293 N.E.2d 457 (1973), decided by the Third District Appellate Court.

78. 10 Ill. App. 3d at 68, 293 N.E.2d at 460. The Illinois statute requiring contracts involving land to be in writing is ILL. REV. STAT. ch. 59, § 2 (1971).

79. 9 Ill. App. 3d 266, 292 N.E.2d 52 (1972), decided by the First District, Fifth Division of the Appellate Court.

ployer for breach of an oral contract under which he was to receive commissions on reorder sales even after termination of his employment. The defendant contended that the contract was violative of the one year provision of the Illinois statute of frauds⁸⁰ since the commissions could have been payable to the plaintiff for a period far longer than a year after the oral contract was made. In fact, commissions were paid to plaintiff long beyond the one year period. The court rejected the argument and applied the same reasoning that courts have been applying for the past half-century:

[T]he test to determine whether such agreement comes within the statute is not whether it was performed within a year, but whether, when the agreement was made, it could have been performed within a year; and if so, it does not come within the statute.⁸¹

The court noted that even though the agreement called for payment of commissions as long as the customers reordered, and that those reorders foreseeably could have come in forever, it was just as possible that reorders could have stopped before the end of one year, or that the plaintiff could have died before the end of the first year after making the contract.⁸² In light of the wide acceptance of the "performable" interpretation of the one year rule, it is a wonder why defense counsel even argued this issue.

The one case where the statute of frauds was used to prevent the proof of a contract was *Lee v. Central National Bank & Trust Co.*,⁸³ and ironically it was a case where a writing signed by the proper party actually existed. The problem was that it came into existence too late. Prior to their marriage, Olive and Orin Cox made a verbal agreement in which each disclaimed any interest in any property owned by the other. This agreement was later recog-

80. ILL. REV. STAT. ch. 59, § 1 (1971), which reads in part:

no action shall be brought . . . upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

81. 9 Ill. App. 3d at 271-72, 292 N.E.2d at 57, quoting *Mutual Life Insurance Co.*, 242 Ore. 407, 413, 408 P.2d 198, 201 (1965).

82. Some courts have not equated the possibility of the performer's death within a year with "completed performance" of the contract. See e.g., *Gilliam v. Kouchoucos*, 161 Tex. 299, 340 S.W.2d 27 (1960).

83. 11 Ill. App. 3d 60, 296 N.E.2d 81 (1973).

nized in a written agreement executed by them after their marriage. When Olive died, representatives of Orin wanted the agreement set aside, and the question raised was whether an antenuptial agreement, reduced to writing after marriage, was violative of the Illinois statute of frauds.⁸⁴ The Second District Appellate Court, relying on a case decided in 1887,⁸⁵ held that it was. Interestingly, the statute nowhere specifies at what point in time the requisite writing must come into existence, but the court overlooked this point.

In two cases where attorneys attempted to introduce evidence not contained in written documents, they were permitted to do so because of exceptions to the parol evidence rule. In *Haas v. Cohen*⁸⁶ the plaintiffs were real estate brokers who listed for sale property owned by the defendants Cohen and Muzzy. Cohen signed the listing agreement, a document complete and unambiguous on its face, but co-owner Muzzy did not sign it. Later, the plaintiffs found a prospective purchaser and submitted a written offer to the defendants. Again, Cohen signed but Muzzy did not. When the deal was ready to be closed, both defendants refused to perform, arguing that the second owner's signature was a condition precedent to any contract—an event which never materialized. The plaintiffs objected to any testimony which tended to prove such condition, but the trial court overruled the objection and held for Cohen and Muzzy. In affirming the ruling, the Third District Appellate Court stated:

Ordinarily parol evidence is not admissible to vary, alter or contradict the terms of a written contract, which also would include a situation where a condition which is not provided for in the contract is imposed by parol. . . . If, however, parol evidence is offered to show that a contract was intended to take effect only upon compliance with a certain condition it is admissible.⁸⁷

It is easy to see how such a rule might be abused, since some parties

84. Although the court does not cite the specific part of the Illinois statute of frauds it felt was applicable to the case, it apparently felt the case was covered by ILL. REV. STAT. ch. 59, § 1 (1971) which reads, in part:

no action shall be brought . . . to charge any person upon any agreement made upon consideration of marriage, . . . unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized:

85. *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N.E. 397 (1887):

86. 10 Ill. App. 3d 896, 295 N.E.2d 28 (1973).

87. *Id.* at 898-99, 295 N.E.2d at 30.

may be tempted to introduce evidence of fictionalized conditions. Perhaps it was in recognition of that very danger that the court modified the lower court's decision by allowing only Muzzy, the non-signing owner, to avoid liability for the broker's commission. Cohen, however, was found liable.⁸⁸

*General Casualty Co. v. Elam*⁸⁹ raised an interesting and unusual parol evidence question: whether evidence which clearly would be inadmissible when two contracting parties are involved in litigation suddenly becomes admissible when a stranger to the contract is involved in the suit. The Fifth District Appellate Court held in the affirmative, although conceding that there was very little Illinois authority on point. Relying on interpretations from other jurisdictions, notably Oregon,⁹⁰ Alabama,⁹¹ and California,⁹² the court stated that parol evidence was admissible to contradict or vary the terms of the insurance contract in question where one of the parties to the suit was not a party to the contract. This exception to the parol evidence rule apparently would apply even where the evidence is not offered by the stranger, but by a party to the contract.⁹³ The rationale for the court's holding, or for the holding in any of the cases cited by the court, was not given.

INTERPRETATION

Illinois courts resolved several important cases this past year by rendering their own peculiar interpretations of contractual language. They made it evident, for example, that a crucial difference exists between a covenant not to sue and a release and they showed how one word or one phrase—either added to or deleted from a contract

88. The court concluded that Muzzy and Cohen were co-owners of the property and that one had a right to enter a listing agreement with a broker without the other. "The fact that the seller may not be the sole owner of the property neither renders the sales agreement unenforceable nor affects the seller's liability under the listing agreement where the broker has performed according to its terms." 10 Ill. App. 3d at 900, 295 N.E.2d at 32 (1973).

89. 8 Ill. App. 3d 215, 289 N.E.2d 699 (1972).

90. *Cranford v. McNiece*, 252 Oregon 446, 450 P.2d 529 (1969) and *Carolina Cas. Ins. Co. v. Oregon Auto. Ins. Co.*, 242 Oregon 407, 408 P.2d 198 (1965).

91. *Shelby County v. Baker*, 110 S.2d 896 (Ala. 1963).

92. *Kassianov v. Raisses*, 200 Cal. App. 2d 573, 19 Cal. Rptr. 614 (1962).

93. This proposition was made in *Carolina Cas. Ins. Co. v. Oregon Auto. Ins. Co.*, 242 Ore. 407, 413, 408 P.2d 198, 201 (1965).

—can be made the focal point of an entire opinion. For attorneys who draft contracts, these cases should be of particular interest.

In *Edgar County Bank and Trust Co. v. Paris Hospital, Inc.*⁹⁴ a 17-month old baby was allegedly injured for life when he was taken to the emergency room of defendant hospital and improperly given a hypodermic needle in his buttocks. The shot allegedly damaged his sciatic nerve, causing a foot drop and resulting in his having to wear a leg brace. Suit was filed against the doctor who administered the injection and the nurse who assisted him, as well as the hospital which employed them. The boy's guardian first accepted a \$25,000 settlement of the claim against the doctor, and then decided to pursue its claim against the hospital on the theory of *respondet superior*. The question was raised whether the execution of a covenant not to sue the doctor operated to release the hospital. The Fourth District Appellate Court, in an opinion written by Judge Simkins, first noted that where the master's liability is vicarious, a release of the employee by the injured party will release the employer as well. However, he went on to say that a covenant not to sue does not have the same legal effect as a release. Such covenant has no effect on the liability of other wrongdoers not a party to the covenant.⁹⁵ Whether an instrument is a covenant or a release depends, said the court, "upon the language used, the substance of the agreement, and the intention of the parties."⁹⁶ In *Paris Hospital*, the covenant language was repeatedly used in the settlement agreement and the document explicitly stated that no one but the doctor was to be affected by it, and thus the court action against the hospital was allowed to proceed.

Interpretation of imprecise language in a post-nuptial settlement was the issue in *Richheimer v. Richheimer*,⁹⁷ a case heard by the First District, Fifth Division. The settlement agreement, incorporated into a divorce decree, provided that the plaintiff was to receive more than \$2,000 a month for 121 months following a her remar-

94. 10 Ill. App. 3d 465, 294 N.E.2d 319 (1973).

95. *Id.* at 470, 294 N.E.2d at 323. The court relied on *Chicago and A.R.R. Co. v. Averill*, 224 Ill. 516, 79 N.E. 654 (1906) and *Aiken v. Insull*, 122 F.2d 746 (7th Cir. 1941).

96. 10 Ill. App. 3d at 470, 294 N.E.2d at 323, the court relied on *A.P. Freund Sons v. Vaupell*, 30 Ill. App. 2d 271, 174 N.E.2d 882 (1961).

97. 9 Ill. App. 3d 376, 292 N.E.2d 190 (1972).

riage. She remarried, but the defendant failed to keep his promise to make the payments, contending he could avoid them on the basis of an Illinois statute. The statute reads:

A party shall not be entitled to alimony and maintenance after remarriage; but, regardless of remarriage by such party or death of either party, such party shall be entitled to receive the unpaid installments of any settlement in lieu of alimony ordered to be paid or conveyed in the decree.⁹⁸

It became crucial, then, whether the promised monthly payments were to be regarded as periodic alimony, in which case they could be stopped under the statute, or whether they were to be considered as installments on a guaranteed lump sum settlement, in which case the statute would mandate that they be continued.

The lower court accepted the former interpretation and refused to admit evidence from plaintiff tending to prove the latter. The appellate court, in an opinion by Judge Lorentz, found the language in the agreement to be characteristic of both periodic alimony and a lump sum settlement.⁹⁹ On the one hand, the agreement referred at several points to the payments as "alimony" while on no occasion did it give a gross sum figure to be paid. On the other hand, explicit language that payments were to continue for a fixed period of time following plaintiff's remarriage indicated an intent to have a gross sum settlement. Furthermore, the agreement recited that it was to be charged against the husband's estate in the event of his death, another bit of support for the lump sum interpretation, since alimony is limited to the life span of the husband. The appellate court could only conclude that an ambiguity existed in the language of the agreement and that the lower court should have admitted more evidence to resolve the ambiguity. Thus, the case was reversed and remanded.

A favorable interpretation of the word "condition" enabled a lessee to break a lease in *S & H Realty and Investment Co. v. Consumers Budget Loan Co.*,¹⁰⁰ a case heard last year by the Fifth District Appellate Court. The lease was for office space in a building owned by the plaintiff in East St. Louis, Illinois. One paragraph in the

98. ILL. REV. STAT. ch. 40, § 19 (1969) (this language remains unchanged in the 1971 code).

99. 9 Ill. App. 3d at 379-80, 292 N.E.2d at 193.

100. 8 Ill. App. 3d 206, 289 N.E.2d 696 (1972).

lease gave the lessee the right to cancel upon ninety-day written notice if

any law, decision, regulation or condition exists, continues or is made effectual in this City, State or Nation which in the judgment of the lessee adversely affects or makes it unprofitable for the lessee to carry on its business in these premises. . . .¹⁰¹

In cancelling the lease, the lessee took the word "condition" to mean any economic or environmental circumstance which made his business unprofitable. There were several such circumstances: 1) the loss of some \$86,000 in receivables; 2) the Federal Reserve Bank's increase in the prime interest rate; and 3) several armed robberies which made customers reluctant to do business in the defendant's locale.

The lessor, on the other hand, believed that the word "condition" in the lease should have been subjected to a much narrower interpretation, restricting it, through the rule of *ejusdem generis*,¹⁰² to a meaning of the same general character as the three words preceding it in the lease, namely "law, decision and regulation." According to the plaintiff's definition, the word condition would be limited to an enactment or ruling of a governmental unit. The court accepted defendant's position, stating, in an opinion by Judge Jones:

The words "law, decision, regulation" for all practical purposes exhaust the genus of enactments or rulings of governmental units, and, therefore, the general word "condition" must refer to some larger class. The maxim *ejusdem generis*, thus must yield to another rule of construction of written contracts. "No word in a contract is to be treated as meaningless if any meaning which is reasonable and consistent with other parts can be given to it."¹⁰³

The court skimmed over the suggestion that a clause so heavily favorable to a lessee might make the entire lease illusory or lacking in mutuality of obligation.¹⁰⁴ Even if it had dwelt on this point,

101. *Id.* at 207, 289 N.E.2d at 697.

102. It is a commonly applied rule of construction that when general words follow particular words, the former can mean only things or persons of the same kind or class as those which are particularly mentioned. *See Gage v. Cameron*, 212 Ill. 146, 72 N.E. 204 (1904).

103. 8 Ill. App. 3d at 208, 289 N.E.2d at 698.

104. The court stated:

It may be heavily favorable to the lessee, but that does not make it fail for want of consideration or mutuality. The agreement was not illusory and lacking in mutuality because both were bound, the lessor to provide certain space, the lessee to pay certain rentals, the term is for a specific time unless

however, the result of the case in favor of the lessee would have been the same because the lessor would not have been able to enforce an illusory lease or one lacking mutuality.

The Illinois Supreme Court also found interpretation to be an effective means of resolving contract disputes this past year. In *Kadansky v. Fickett*¹⁰⁵ the question raised was whether an attorney's wording of a letter was sufficiently definite and unconditional in order for it to operate as an exercise of an option on behalf of his clients. The plaintiffs had paid \$100 for an option to purchase real estate and within the time limit of the option, they directed their attorney to mail to the defendants' attorney the following letter:

Please be advised that my clients . . . wish to exercise their option to purchase the property . . . pursuant to the terms of their Option Contract.

. . . .

Mr. Kadansky has advised me that our clients have agreed in a general way to method of payment which varies with that set out in the agreement. Please let me know if this is correct.¹⁰⁶

The defendants refused to convey the property on the grounds that the letter was not an unconditional exercise of the option. The circuit court held for the buyers. The First District Appellate Court, First Division reversed on the basis that the letter did not exhibit a present intent to exercise the option but merely a desire to exercise it at some future time.¹⁰⁷ The supreme court, however, adopted the circuit court's position, holding that the letter was sufficient to exercise the option. Also, rather than viewing the second paragraph of the letter as a request for a change in payment terms, the court interpreted it as a mere request for the defendants' attorney to confirm or deny a report that the parties had agreed to payment terms different from those in the original agreement. In calling to mind the strictness usually associated with the interpretation of contracts, for the sale of land, one should consider the plaintiff's attorney extremely fortunate in obtaining this favorable result from the supreme court. Still, the lesson to be learned is that even in letter-

described circumstances made continuance unprofitable for the lessee, the lessor to be advised and notified in a certain manner.

8 Ill. App. 3d at 209, 289 N.E.2d at 699.

105. 54 Ill. 2d 14, 294 N.E.2d 262 (1973).

106. *Id.* at 15, 294 N.E.2d at 263.

107. *Id.*

writing, imprecise language can cause considerable delays, expenses and risks to clients.

In another supreme court decision, *Tatar v. Maxon Construction Co.*,¹⁰⁸ the meaning of an indemnity clause in a contract between a subcontractor and general contractor was at issue. The plaintiff, Tatar, was an employee of Freesen Brothers, a subcontractor for grading and leveling work. He was injured when a wooden beam fell on him, allegedly caused by the negligence of employees of Maxon, the general contractor. Tatar sued Maxon and Maxon subsequently filed a third party complaint against Freesen on the basis of the indemnification clause in the subcontract. That clause provided that Freesen would indemnify Maxon

against all expenses, claims, suits, or judgments of every kind whatsoever . . . by reason of, arising out of, or connected with, accidents, injuries, or damages, which may occur upon or about the Subcontractor's work.¹⁰⁹

The subcontractor, Freesen, argued that such a clause should be interpreted to require indemnification only for the negligence of the subcontractor or persons other than the general contractor. The supreme court accepted this position, relying on a 1947 Illinois case which stated:

It is quite generally held that an indemnity contract will not be construed as indemnifying one against his own negligence, unless such a construction is required by clear and explicit language of the contract, or such intention is expressed in unequivocal terms.¹¹⁰

Not finding anything in the subcontract to offset this narrow construction the supreme court affirmed the dismissal of the third party complaint against Freesen, and required the general contractor to defend against Tatar's action alone.

INSURANCE CONTRACTS

In four of the five insurance cases selected for this survey, insurance companies fared poorly either because of their own delays in acting or because of courts' willingness to "re-write" policies. In *McMahon v. Coronet Insurance Co.*¹¹¹ the Appellate Court First

108. 54 Ill. 2d 64, 294 N.E.2d 272 (1973).

109. *Id.* at 66, 294 N.E.2d at 273.

110. Westinghouse Elec. Elevator Co. v. LaSalle Monroe Bldg. Corp., 395 Ill. 429, 433, 70 N.E.2d 604, 607 (1947).

111. 6 Ill. App. 3d 704, 286 N.E.2d 631 (1972).

District, First Division found that the company had waived the requirement of a sworn statement from an insured within 30 days after an accident, and the court allowed the plaintiffs to proceed with arbitration of their case. The policy holders had failed to give the requisite statement at any time during the two years following the accident, although they did notify the company in a number of less formal ways. Within several days of the accident, for example, the plaintiffs made a telephone report to the company. Also, a comprehensive report was sent to the company on its own forms and statements were given to a company representative who visited plaintiffs at their home. The insurance company never indicated it was seeking formal notice until the time of trial. The court held that such conduct created in the plaintiffs a reasonable belief that it was unnecessary for them to comply with the strict requirements of the policy. "This provision was placed in the policy for the benefit of Coronet," the court noted, "[t]herefore, it was within the power of Coronet to waive its right to receive such formal statement."¹¹²

The second case in which an insurance company's delay was costly was *Talbot v. Country Life Insurance Co.*,¹¹³ a case decided this year by the Third District Appellate Court. The company took five months to pass on an application for a life insurance policy. Within that time, the applicant died and the company thereafter returned the premium he had paid with its rejection of the application. The court held against the company even though it admitted there was no basis for an action in contract.

[T]he application, being a mere offer or proposal for a contract of insurance, is not a contract. The existence of a contractual relationship between the parties (absent a binder) depends upon the acceptance by the insurer of the application.¹¹⁴

The court chose to base recovery on a negligence theory, finding a legal obligation on the part of an agent or insurer to act with reasonable promptness on an application by providing either the requested coverage or by notifying the applicant of its rejection. The court, however, hinted it might have been equally receptive to a complaint based on promissory estoppel. Although not mentioning such doctrine by name, it pointed to the fact that between the

112. *Id.* at 709, 286 N.E.2d at 634.

113. 8 Ill. App. 3d 1062, 291 N.E.2d 830 (1973).

114. *Id.* at 1063, 291 N.E.2d at 831.

time of application and death, the applicant was in good health and would have obtained a policy from another company had it not been for the representations made by the defendant insurance company.

In *Burgo v. Illinois Farmers Insurance Co.*¹¹⁵ a one year time limitation in a liability policy was declared void as against public policy by a divided appellate court.¹¹⁶ The insurance contract required that if an insured was involved in an accident with an uninsured motorist he had one year either to file suit against such motorist or to institute arbitration proceedings. The plaintiffs took the latter course, but not until seventeen months after the date of their accident with an uninsured motorist. During that time, they made several unsuccessful attempts to settle their claim with the defendant insurance company. The company refused to submit the claim to arbitration because the plaintiffs' demand was made after the one year time limit.

Speaking for the majority of the court, Judge Dieringer declared the one year limitation in the policy to be a clever device by the company to defeat the purpose of the state's uninsured motorist statute,¹¹⁷ which was enacted to assure policyholders that they would be treated equally by their insurance company whether they were involved in an accident with an insured or uninsured motorist. Under the Illinois statute of limitations for personal injury actions,¹¹⁸ the plaintiffs would have had two years in which to file suit; therefore the contractual restriction of one year diminished their rights. Judge Dieringer then went even further by saying the time limit for suits against uninsured motorists should not be governed by the ordinary personal injury rule, but by the statute of limitations for contract actions, which for written contracts in Illinois is ten years.¹¹⁹ Even if the majority of the court had not chosen to make such a frontal attack on the one year policy provision, it still probably

115. 8 Ill. App. 3d 259, 290 N.E.2d 371 (1972). See Kirkland, *Casualty Insurance*, 23 DEPAUL L. REV. 18 (1973).

116. Judge Adesko of the First District, Fourth Division concurred with Presiding Judge Dieringer's opinion while the court's third member, Judge Burman, wrote a dissenting opinion, a rarity in the Illinois appellate courts.

117. ILL. REV. STAT. ch. 73, § 755.1a (1969).

118. The statute sets the limit at two years from the time the cause of action accrues. See ILL. REV. STAT. ch. 83, § 15 (1969).

119. ILL. REV. STAT. ch. 83, § 17 (1969).

would have found for the plaintiffs on the basis of the settlement attempts made during the year following the accident.

Courts have held that settlement negotiations toll the running of time limitations, even statutes of limitations, because the plaintiff cannot be lulled into a sense of security and then be barred from proceeding with a lawsuit when the negotiations fail.¹²⁰

In a well written dissenting opinion, Judge Burman found nothing objectionable in the one year limitation contained in the policy and argued for a rule of law which would require strict adherence to the conditions set out in an insurance policy, particularly when those conditions are phrased in unambiguous language.¹²¹ Stressing the fact that no time limit was written into the Uninsured Motorist Act,¹²² Judge Burman stated that "[i]f conditions such as the ones in the present case are thought to be against the public policy of this State, such a determination should be made by the legislature and not this court."¹²³

The most questionable decision against an insurance company was *State Farm Mutual Automobile Insurance Co. v. Hanson*¹²⁴ in which a court reformed an unambiguous liability policy in accordance with an insured's four year old recollection of events surrounding the purchase of the policy. The insured, Cheryl Hanson, was involved in an auto accident in which her sister Connie, a passenger, was injured. Cheryl's State Farm policy contained the following exclusionary clause, commonly known as a "household exclusion":

This insurance does not apply under:

. . . .
(i) coverage A, to bodily injury to the insured or any member of the family of the insured residing in the same household as the insured. . . .¹²⁵

120. 8 Ill. App. 3d at 263, 290 N.E.2d at 374.

121. Judge Burman wrote:

It is a well established rule that the court has the duty to enforce contracts as made by the parties thereto and not to rewrite the unambiguous terms agreed upon. The court cannot make for the parties better agreements than they themselves have been satisfied to conclude. . . . In the present case there is no claim that the language of the condition precedent is ambiguous, doubtful or unclear. There is also no contention that the insurer waived the time limitation or that the insured misapprehended the terms of the agreement.

8 Ill. App. 3d at 264, 290 N.E.2d at 375.

122. ILL. REV. STAT. ch. 73, § 755a (1969).

123. 8 Ill. App. 3d at 266, 290 N.E.2d at 376.

124. 7 Ill. App. 3d 678, 288 N.E.2d 523 (1972).

125. *Id.* at 679, 288 N.E.2d at 525.

Despite this clause, the injured sister filed suit against Cheryl, apparently hoping a court would rewrite the policy by deleting the household exclusion. The only basis for such hope was Cheryl's uncorroborated testimony that when she purchased the policy four years ago, her agent assured her that her coverage would encompass injuries to her brothers and sisters. She even admitted on cross examination that she read the policy, specifically the exclusion clause, at the time of purchase, but that she did not understand all of what she had read. Furthermore, the agent who sold her the policy contradicted her testimony. Nevertheless, the trial court concluded that a mutual mistake of fact had been made the inception of the contract, necessitating a reformation of the policy with the household exclusion clause being deleted. The Fourth District appellate Court appeared ready to reverse the decision, as it stated in the opinion by Judge Simkins:

We are mindful of the fact that one family member has sued another and then both have sought to reform an insurance contract to afford coverage for the initial lawsuit. The circumstances are, to say the least, suspect.¹²⁶

Surprisingly, however, the court affirmed the lower court's decision on the ground that it could not declare the decision to be contrary to the manifest weight of the evidence.

The *Hanson* decision must have caused insurance companies to wonder what they had to do to receive a favorable decision from the Illinois courts. Their concern was short-lived because a month after *Hanson* was decided the Illinois Supreme Court rendered a favorable interpretation of an exclusionary clause in a tenant's liability policy, allowing the defendant insurance company to avoid paying on the policy.¹²⁷ In that case, however, there was a dissenting opinion by Justice Goldenhersh which appears to reflect growing judicial dissatisfaction with insurance policies:

126. *Id.* at 685, 288 N.E.2d at 529.

127. *See* *Cobbins v. Gen. Accident Fire & Life Assurance Corp.*, 53 Ill. 2d 285, 290 N.E.2d 873 (1972), a case involving the interpretation of an owners landlord tenant liability policy. The insured store owner sold fireworks to an eleven year old boy in violation of a statute. The boy was injured by the fireworks at his home. The store owner had purchased coverage for premises-operations hazard but not for products-completed operations hazard, as defined in the policy. While it was contended that the premises-operation clause should apply because the "cause" of the injury—the illegal sale—took place in the store, the supreme court found it not to apply because the actual injury did not occur until after the boy left the store. Therefore, it concluded that the insurance company did not have to defend the suit brought by the injured boy.

It has been said facetiously of insurance policies 'The front page giveth but the back page taketh away'. . . . Ambiguity and incomprehensibility seem to be the favorite tools of the insurance trade in drafting policies. . . . It seems that insurers generally are attempting to convince the customer when selling the policy that everything is covered and convince the court when a claim is made that nothing is covered. The miracle of it all is that the English language can be subjected to such abuse and still remain an instrument of communication. . . .¹²⁸

OFFER AND ACCEPTANCE AT A DISTANCE

While the rules for when and where an acceptance becomes effective are still very much alive in contracts classrooms, they are seldom debated any more in practice. The case of *Nationwide Commercial Co. v. Knox*,¹²⁹ however, is an exception. The defendants, located in Ohio, contracted to buy certain equipment from a corporation located in Illinois. They received in the mail at their home an agreement which they signed and mailed in Ohio. After failing to pay for the goods, they had a judgment confessed against them by seller's assignee in the Circuit Court of Cook County. They filed a special appearance challenging the court's jurisdiction over them contending that the contract was not made in Illinois. If these had been the only facts, the buyers would have been correct since acceptance by an authorized means is effective when and where it is sent.¹³⁰ Acceptance in this case was sent in Ohio by an authorized means, the same method used to transmit the offer. However, one crucial fact was missing. The Illinois seller very conspicuously placed the following language on the document sent to the buyers:

This contract shall not be binding upon seller or become effective until and unless accepted on behalf of seller by seller's president, vice president or treasurer in writing at Chicago, Illinois.¹³¹

128. 53 Ill. 2d at 295, 290 N.E.2d at 879, quoting from Judge Biegelmeier's opinion in *Farmers Mut. Auto. Ins. Co. v. Bechard*, 80 S.D. 237, 122 N.W.2d 86 (1963) and from Judge Osborne's opinion in *Universal Underwriters Ins. Co. v. Travelers Ins. Co.*, 451 S.W.2d 616 (Ky. 1970).

129. 10 Ill. App. 3d 13, 293 N.E.2d 638 (1973).

130. See line of cases beginning with *Adams v. Lindsell*, 1 B. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818), including *Morrison v. Thelke*, 155 S.2d 889 (Fla. 1963) and *Linn v. Employers Reinsurance Corp.*, 392 Pa. 58, 139 A.2d 638 (1958). See also, *RESTATEMENT OF CONTRACTS* § 64 (1932) and *RESTATEMENT (SECOND) OF CONTRACTS* § 64 (Tent. Draft No. 1, 1964) and A. CORBIN, *CONTRACTS* § 78 (1952).

131. 10 Ill. App. 3d at 14, 293 N.E.2d at 639.

Such explicit language underscoring exactly when and where the acceptance was to become operative takes precedence over the "mail-box rules" stemming from *Adams v. Lindsell*.¹³² In effect, what the buyers sent from Ohio was not an acceptance, as they argued, but an offer. Acceptance took place in Chicago when the seller signed the document. Thus, since acceptance was the last event necessary in the formation of the contract, the Fourth Division of the Appellate Court's First District correctly held that the contract was "made" in Illinois, thereby giving Illinois courts jurisdiction over the Ohio defendants.

INCAPACITY: MINORS' CONTRACTS

Although the legislature recently lowered the age of majority in Illinois,¹³³ two appellate courts have indicated that the special status which the law has granted minors has been compromised in no other way. In *Logan County Bank v. Taylor*¹³⁴ the defendant, a minor, claimed that his act of telling the creditor-bank to come and get his car amounted to a disaffirmance of a contract that he had with the bank. The bank had given the youth money to purchase the car in return for a promissory note from him. After he made two payments on the note, he told the bank to pick up the car because he had been drafted into military service. The bank did so, then sold the car for salvage (\$30) and obtained a confessed judgment against the boy for the balance of the purchase price. The bank made three arguments in support of the judgment; first, that the boy's direction to pick up the car was not an act of disaffirmance; second, that even if it were, it was ineffective because it was made while the defendant was still a minor; and third, that the defendant "reaffirmed" the contract after returning from the service by telling the bank that he would pay off the debt.¹³⁵ The Fourth District

132. 1 B. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818); see also the cases cited in note 130 *supra* and *Holland v. Riverside Park Estates, Inc.*, 214 Ga. 244, 104 S.E.2d 83 (1958); *Paramount Pictures Distrib. Corp. v. Gehring*, 283 Ill. App. 581 (1936), *Hill v. Gulf Oil Corp.*, 200 Va. 287, 105 S.E.2d 625 (1958) and *RESTATEMENT OF CONTRACTS* § 61 (1932) and *RESTATEMENT (SECOND) OF CONTRACTS* § 61 (Tent. Draft No. 1, 1964).

133. ILL. REV. STAT. ch. 3, § 131 (1971) reads: "Persons of the age of 18 shall be considered of legal age for all purposes except that of the Illinois Uniform Gifts to Minors Act, and until this age is attained, they shall be considered minors."

134. 11 Ill. App. 3d 120, 295 N.E.2d 743 (1973).

135. The facts indicate that the youth's subsequent "reaffirmance" was made

Appellate Court rejected all three arguments. First, it said that the question of whether there was a disaffirmance was one of intent, and that the defendant's contacting the bank and telling them to pick up the car was an unequivocal renunciation of the contract.

True, he could have sent them a letter, registered mail, telling them just that, and maybe such could be characterized as "more unequivocal," but there is no requirement for the nth degree of unequivocalness.¹³⁶

Second, the court held that a minor's disaffirmance of a contract can be made during his minority just as easily as if he waits until he reaches his majority.¹³⁷ Finally, the court said there is no such thing as a "reaffirmance" of a contract which already has been disaffirmed because "Reaffirmance cannot be premised on an effort to reverse that which has been legally avoided."¹³⁸

In *Logan Furniture Mart, Inc. v. Davis*¹³⁹ two minors who were planning to be married wanted to purchase household furniture from the plaintiff's store. They were told they needed the signature of an adult on the retail installment contract. Upon obtaining such a signature, they received the furniture. After making payments for more than a year, the couple defaulted and the store obtained a confession of judgment against them both as well as against the adult who signed the contract for them. A lower court issued an order upholding the judgment against the minors, apparently on the basis that the furniture they bought (which included a television set) constituted necessities and thus was an exception to the rules on incapacity. The First District, Second Division Appellate Court did not decide whether the items of furniture were necessities, but concluded that in either event, the minors should not be held responsible for payment because the sale to them was not made on their own credit.

To recover from a minor for the reasonable value of necessities furnished them, it is essential that they shall have been furnished on his credit.

after the bank gave him some inaccurate legal advice:

[t]he bank called defendant in and demanded payment. Defendant advised them that he was a minor at the time the loan was executed, but was told in return that such fact was of no consequence, and he thereupon agreed to make payments of \$10 or \$15 a month—which he never did.

11 Ill. App. 3d at 121, 295 N.E.2d at 743.

136. *Id.* at 121, 295 N.E.2d at 744.

137. *Id.*

138. *Id.* at 122, 295 N.E.2d at 744.

139. 8 Ill. App. 3d 150, 289 N.E.2d 228 (1972).

. . . In this record, it plainly appears that when appellee on July 2, 1968 extended credit for the sale of its furniture, it did not do it solely on the credit of appellants who were minors.¹⁴⁰

ILLEGALITY: NO CONTINGENCY FEE FOR DIVORCE

In *Stoller v. Onuszko*¹⁴¹ an attorney unsuccessfully attempted to collect a contingency fee for a divorce case. The First District, Third Division Appellate Court reaffirmed a 1958 Illinois case, *In re Fisher*¹⁴² and held that “[i]t is against public policy for attorneys to enter into contingent fee contracts in divorce actions.”¹⁴³ The attorney argued that because he was wrongfully discharged by his client, the case should be governed instead by *Warner v. Basten*,¹⁴⁴ a 1969 case which approved the enforcement of an attorney’s lien in an amount equal to twenty five per cent of the settlement. The *Stoller* court, however, pointed to the fact that *Warner* was a personal injury action and not a divorce action. Alternatively the plaintiff argued that the 1965 case of *Zagar v. Zagar*¹⁴⁵ should control since in that case an attorney was allowed to recover a fifty per cent contingency fee in a divorce-related case. The court again found a distinction, noting that *Zagar* involved a contract to collect arrearages under a separate maintenance decree and not a contract to represent someone who wished to obtain a divorce. The court further said that the Attorney’s Lien Act¹⁴⁶ could not support the plaintiff’s position since the contract on which he based his purported lien was void and unenforceable. “We will not enforce an attorney’s lien,” said the court, “predicated on an invalid or unlawful contract of employment.”¹⁴⁷

THIRD PARTY BENEFICIARIES

Third party beneficiary law was the basis for the appeal in *Viny-*

140. *Id.* at 152-53, 289 N.E.2d at 230.

141. 10 Ill. App. 3d 598, 295 N.E.2d 118 (1973).

142. 15 Ill. 2d 139, 153 N.E.2d 832 (1958).

143. 10 Ill. App. 3d 599-600, 289 N.E.2d at 119.

144. 118 Ill. App. 2d 419, 255 N.E.2d 72 (1969).

145. 56 Ill. App. 2d 175, 205 N.E.2d 754 (1965).

146. ILL. REV. STAT. ch. 13 § 14 (1967) (this provision remains unchanged in the 1971 code).

147. 10 Ill. App. 3d at 600, 295 N.E.2d at 120.

last Corp. v. Gordon,¹⁴⁸ a case decided this year by the First District, Fifth Division Appellate Court. Vinylast was a creditor of Al-Fab Corporation, a storm window manufacturer, which in 1967 became unable to pay his debts. At that time, Al-Fab entered into an agreement with some of its other creditors—excluding Vinylast—in which it agreed to take steps to avoid bankruptcy in exchange for a one year extension for payment of its debts. Vinylast contended that it was a third party beneficiary of the creditors' agreement, and thus could sue the creditors who signed it. Vinylast pointed to several facts indicating the agreement was intended for its benefit.¹⁴⁹ The appellate court agreed that third parties may enforce agreements entered into for their benefit and that the creditors' agreement may have been made for Vinylast's benefit. Nevertheless the court affirmed a motion to dismiss Vinylast's complaint because it had sued the wrong party.

The remedy of a third party beneficiary lies against the party to the contract who is required to supply his benefits. In the instant case, although the creditors through their committee were to provide supervision, Al-Fab was to provide the benefits to plaintiff. Thus, Al-Fab was the proper defendant to an action on a third party beneficiary contract; but Al-Fab was not joined as a defendant in the instant case.¹⁵⁰

The court reveals by the above statement that it still embraces the Restatement I¹⁵¹ view of third party beneficiaries rights. That view distinguishes between beneficiaries classified as either donees or creditors, allowing the former to sue only the promisor, while allowing the latter to sue both promisor and promisee. Restatement II¹⁵² does not make such a distinction, and treats both types of beneficiaries as *intended*, thus giving both the same rights.

148. 10 Ill. App. 3d 1043, 295 N.E.2d 523 (1973).

149. In the agreement Al-Fab agreed (1) to establish a sinking fund to be administered by the creditors' committee for the payment of all creditors of the amounts owed prior to the execution of the agreement, (2) to give priority under the supervision of the creditors' committee to the normal operation of the business including payments for the purchase of new goods following the execution of the agreement, and (3) to give no liens without the consent of the creditors' committee.

Id. at 1049, 295 N.E.2d at 528.

150. *Id.*

151. RESTATEMENT OF CONTRACTS §§ 133, 141 (1932).

152. RESTATEMENT (SECOND) OF CONTRACTS §§ 133, 141 (Tent. Draft No. 1, 1972).

REMEDIES

Several important appeals were decided this year involving contractual remedies. In the only federal court case appearing in this survey, the Seventh Circuit Court of Appeals applied the seldom used remedy of quasi-contract¹⁵³ in reversing a district court decision. In *P.S. & E. Inc. v. Selastomer Detroit, Inc.*,¹⁵⁴ a diversity case, the plaintiff alleged a breach of an exclusive agency contract made in 1965. After entering the contract, the plaintiff claimed it had hired additional personnel and expended considerable effort and money in order to promote the defendant's product, a new type of packing device. The defendant, however, terminated the agreement and began invading the same market claimed by the plaintiff. The defendant sought a summary judgment on the ground that the agreement was terminable at the will of either party, and that its termination therefore was not a breach of contract. The district court granted the motion because the absence of a duration term from the contract was not disputed by the plaintiff.¹⁵⁵ The circuit court first agreed that under Illinois law a contract which fails to fix a time for its duration and calls for continual performance is ordinarily terminable at will.¹⁵⁶ However, the court did not agree that that should be the end of the matter. It felt that the plaintiff should be compensated for the expense, time and labor devoted in good faith for the defendant's benefit. In an opinion by Judge Sprecher, the court noted that Illinois courts have recognized quasi-contractual relief when one unjustly enriches himself at the expense of another.¹⁵⁷ Quoting from a similar 1947 diversity case decided in the same circuit,¹⁵⁸ the court stated that

[t]he law will not permit one thus to deprive another of value without awarding just compensation. The just principle acted upon by the courts

153. See RESTATEMENT OF CONTRACTS § 355 (1932).

154. 470 F.2d 125 (7th Cir. 1972).

155. *Id.* at 127.

156. *Id.* at 127-28, relying on *Joliet Bottling Co. v. Joliet Citizens' Brewing Co.*, 254 Ill. 215, 98 N.E. 263 (1912) and *Schoen v. Caterpillar Tractor Co.*, 103 Ill. App. 2d 197, 243 N.E.2d 31 (1968).

157. 470 F.2d at 129, citing *United States v. O. Frank Heinz Constr. Co.*, 300 F. Supp. 396 (S.D. Ill. 1969) and *Beatrice Foods Co. v. Gallagher*, 47 Ill. App. 2d 9, 197 N.E.2d 274 (1964).

158. *Fargo Glass & Paint Co. v. Globe Am. Corp.*, 161 F.2d 811, 813 (7th Cir. 1947).

in the circumstances suggested requires no more than that, in every instance, the agent shall be afforded a reasonable opportunity to avail himself of the primary expenditures and efforts put forth to the end of executing the authority conferred upon him and that, if such opportunity is denied him, the principal shall compensate him accordingly.¹⁵⁹

Quasi-contractual relief was also granted by a state appellate court last year in *Comm v. Goodman*,¹⁶⁰ a case in which an architect tried to collect from a real estate developer for services rendered without a contract. The two parties first performed under a contract for work on a preliminary plan for an apartment project. Then the plaintiff went on to do other work, such as determining expected gross revenues, expenses and profits for such apartment project, but could not later establish a contract for doing this extra work.¹⁶¹ Nevertheless, the trial court found that the defendant knew that the plaintiff rendered the additional services and that the defendant accepted the benefit of said services. Thus, the defendant was made to pay for their reasonable value. On appeal, the defendant argued that circumstances existed indicating that the developmental services were not rendered with the expectation of payment, and therefore could not have been the basis of *quantum meruit* relief. The defendant cited a 1964 case, *McRoberts v. Estate of Kennelly*,¹⁶² in support of its proposition. The First District, Fifth Division Appellate Court noted that factors existing in *McRoberts*—course of dealing, family relationship or long standing friendship—did not exist in *Comm* and so no inference of gratuitousness could have been supported by the evidence. In affirming the decision for the plaintiff, the court gave a brief review of the concept of quasi-contract:

A contract implied in law is equitable in its nature and is one which reason and justice dictate. It does not arise from an intent to contract or a promise to pay. It exists where there is a plain duty and a consideration. The consideration may be a parting with something by the party seeking to enforce the contract; the promise is presumed so that there will not be a failure of justice. Its essential element is the receipt of a benefit by one party which would be inequitable for that party to retain. It is predicated

159. 470 F.2d at 128. The *Fargo* court had in turn quoted from *Beebe v. Columbia Axle Co.*, 233 Mo. App. 212, 117 S.W.2d 624, 629 (1938).

160. 6 Ill. App. 3d 844, 286 N.E.2d 758 (1972).

161. The trial judge found the plaintiff's evidence to have been inadequate for the purpose of establishing the existence of a second contract, and the appellate court would not question this factual finding, 6 Ill. App. 3d at 852-53, 286 N.E.2d at 762-63.

162. 52 Ill. App. 2d 34, 201 N.E.2d 680 (1964).

on the fundamental principle that no one should unjustly enrich himself at another's expense.¹⁶³

In *Statistical Tabulating Corp. v. Hauck*¹⁶⁴ the First District, First Division Appellate Court found a circuit court to have been overly imaginative in its efforts to salvage an unreasonably restrictive employment covenant. In 1967, the defendant, while still an employee, signed an agreement in which he promised to refrain from divulging trade secrets, customer lists or any other confidential information, and also to refrain from competing, either directly or indirectly, with his employer for two years after the termination of his employment. The geographic restriction of competition was a 100 mile radius around each of nineteen major American cities in which his employer was then doing business. The plaintiff supplied data processing services and temporary office help to companies in those cities. The defendant was terminated in 1971 and, in violation of the negative covenant contained in his employment contract, organized his own business which competed with the plaintiff in Chicago. The plaintiff sought and obtained an injunction against the defendant, but the circuit court modified the geographical restriction on defendant's activities to an area equivalent to a twenty-five mile radius of Chicago.¹⁶⁵ The appellate court found the covenant to be an unreasonable restraint on trade and refused to enforce it, even in its modified form. While admitting there was a split of authority as to whether a court could properly modify an unreasonably restrictive covenant,¹⁶⁶ the court cited several Illinois cases¹⁶⁷ and one federal case¹⁶⁸ which prevented such attempts at modification. The court went on to state:

We, therefore, are in accord with the established weight of authority in Illinois when we hold that the attempted restriction upon the employee in

163. 6 Ill. App. 3d at 854, 286 N.E.2d at 763.

164. 10 Ill. App. 3d 50, 293 N.E.2d 900 (1973).

165. *Id.* at 52, 293 N.E.2d at 901-02.

166. Basically, it appears that there is some division in legal thought regarding solution of this problem. Some courts have modified and then enforced negative covenants which restrain competition. Other courts will do so only in cases involving protection of goodwill in sale of a business, secret processes or trade secrets.

Id. at 53, 293 N.E.2d at 902.

167. *House of Vision, Inc. v. Hiyane*, 37 Ill. 2d 32, 225 N.E.2d 21 (1967); *Barrington Trucking Co. v. Casey*, 117 Ill. App. 2d 151, 253 N.E.2d 36 (1969); *L.&R. Agency, Inc. v. McPhail*, 92 Ill. App. 2d 107, 235 N.E.2d 153 (1968).

168. *Central Specialties Co. v. Schaefer*, 318 F. Supp. 855 (N.D. Ill. 1970).

the case at bar, being manifestly unreasonable in its inception, was unenforceable and cannot be given legal life by an attempted partial enforcement. . . .¹⁶⁹

The case is one of hundreds in which employers have sought too much protection when they drafted restrictive covenants in employment contracts, and consequently wound up with no protection at all.¹⁷⁰

Welch v. Brunswick Corp.,¹⁷¹ decided this year by the First District, Fourth Division Appellate Court, could serve as a textbook review of remedies available to contracting parties. The buyers of bowling equipment filed a complaint seeking a declaration of rights, rescission of contract, injunction to maintain the status quo (allowing them to retain possession of the equipment), and damages for fraud and breach of warranty. The seller, Brunswick, filed its own complaint seeking replevin of the bowling equipment in the buyers' possession and damages for breach of the installment sales contract for the purchase of the equipment. In deciding for the seller, the appellate court concentrated on the rescission and replevin aspects of the two complaints. The court noted that in Illinois, several elements must be shown before a court will rescind a contract on the basis of fraud. There must first be a misrepresentation of a material fact; such a misrepresentation must be made for the purpose of inducing action; the misrepresentation must be known to be false by the party making it or at least not reasonably believed by him to be true; it must be reasonably believed by the party to whom it is made; and, it must be acted on to that party's damage.¹⁷²

There was conflicting evidence in *Welch* as to whether all these elements existed but the court refused to question the trial court's conclusions in favor of the seller.

From the foregoing, it is apparent that the evidence is in conflict as to many pivotal questions of fact, especially as to the cause of the plaintiffs' damages and whether they relied upon the representations made by Bruns-

169. 10 Ill. App. 3d at 54, 293 N.E.2d at 903.

170. See, e.g., *Samuel Stores, Inc. v. Abrams*, 94 Conn. 248, 256, 108 A. 541, 544 (1919) where the court said: "Covenantees [in contracts between employer and employee] desiring the maximum protection have, no doubt, a difficult task. When they fail, it is commonly because, like the dog in the fable, they grasp too much and so lose all."

171. 10 Ill. App. 3d 693, 294 N.E.2d 729 (1973).

172. *Id.* at 698, 294 N.E.2d at 732.

wick. It was the task of the trial judge to resolve these questions. In the present case, the proceedings took place over a period of several months. The trial judge observed the witnesses, heard the testimony, viewed the exhibits and made careful and complete findings of fact. In such cases the judgment will be affirmed if there is any evidence in the record to support it and will be reversed only if against the manifest weight of evidence.¹⁷³

As to the seller's action for replevin, the court found that all the procedural steps under the Illinois Replevin Act¹⁷⁴ had been properly followed and that Brunswick was entitled to possession of the bowling equipment. The last issue discussed pertained to the amount of damages Brunswick should have been awarded for the buyers' wrongful detention of the equipment. Brunswick offered evidence of damages on two theories—one based on the value the equipment would have had if it were available for lease to other operators, and the other based on the amount by which the equipment depreciated in value during the period of its detention by the plaintiffs. The trial court chose to apply the depreciation theory and the appellate court found that decision to be correct.¹⁷⁵ In determining the depreciation value, the trial court considered the fifteen year life expectancy of the equipment and arrived at a figure of over \$157,000. The appellate court reversed this aspect of the decision and limited the damages to \$74,000, Brunswick's valuation of the equipment in its writ of replevin. "[W]e believe that to permit Brunswick to recover damages in excess of the value stated by it in its affidavit would work a serious injustice."¹⁷⁶ The court reasoned that Brunswick was in the superior position to evaluate the equipment sold to the plaintiffs when it filed its writ.

The Third District Appellate Court had no difficulty in rescinding a contract on the basis of a material breach in *Siemens v. Thompson*.¹⁷⁷ The contract provided that the plaintiff would purchase forty-nine percent of the defendant corporation at a cost of \$49,000 and would work at a salary of not less than \$1,000 a month. After plaintiff worked a year under the contract, the corporation's cash position became so weak that the plaintiff's salary had to be

173. *Id.* at 700, 294 N.E.2d at 734.

174. ILL. REV. STAT. ch. 119, §§ 19, 23 (1971).

175. 10 Ill. App. 3d at 701, 294 N.E.2d at 735.

176. 10 Ill. App. 3d at 703, 294 N.E.2d at 736.

177. 11 Ill. App. 3d 856, 297 N.E.2d 241 (1973).

stopped. In allowing the plaintiff to rescind the entire contract, the court found the cessation of salary to be a substantial breach and stated that "[a]ccording to the rule in Illinois, when there is a substantial breach by one party to a contract the other party has the right to rescind the contract and to be restored to his former status."¹⁷⁸

The First District, Second Division Appellate Court had an opportunity to render an opinion which could have eventually been incorporated into contracts casebooks to illustrate the principles of consideration and promissory estoppel. Instead, the court chose to resolve the case on rules involving specific performance of contracts. The classic fact pattern found in *Pesovic v. Pesovic*¹⁷⁹ involved a father sending letters to his son in Greece urging the son to come with his family to the United States. The letters contained the following language, so reminiscent of questions appearing in law school exams:

[W]hen you come to me I will dress up and shoe you and your family.
I promise you that I will buy everything you and your family need. . . .
(You) will have (your) own home.¹⁸⁰

Prompted by these urgings, the son brought his family to this country and within a short time was given possession of a house owned by the father. However a serious family feud developed which could not be resolved outside of court. The father brought an ejectment action against the son and the son retaliated by demanding undisturbed ownership of the house. The court could have asked whether the son's coming to America was the *quid pro quo* for the father's promise of the house or whether it was merely a condition precedent to the father's making a gift of the house. Perhaps the court could have asked whether the son's coming to America amounted to a substantial detriment in reliance on the father's promise, estopping the father from dishonoring the promise. The court, however, chose to by-pass both questions and instead held for the father on the basis that a land contract needs to be definite and certain before it will be specifically enforced.

Specific performance of a contract to convey land requires one that is unambiguous, complete in its terms and clearly proven. . . . [It] must

178. *Id.* at 859, 297 N.E.2d at 243.

179. 10 Ill. App. 3d 708, 295 N.E.2d 261 (1973).

180. *Id.* at 710, 295 N.E.2d at 263.

point out the land to be conveyed or furnish the means of identifying the land with certainty.¹⁸¹

The letters sent to the son in Greece did not specify any particular house owned by the father, and in the opinion of the court, expressed nothing more than the heartfelt desires of a father who wished that his son would come to this country and improve his lot in life. The court did imply, however, that if the letters had been more definite as to the promised property, an enforceable contract would have been created.

181. *Id.* at 711, 295 N.E.2d at 264.