Golden Gate University Law Review

Volume 10 | Issue 2 Article 2

January 1980

Crestwood Lumber Company v. Citizens Savings & Loan Association: The Ursury Law and Liquidated Damages in the Sale of Goods Transactions

Joseph M. Loomis

CRESTWOOD LUMBER COMPANY v. CITIZENS SAVINGS & LOAN ASSOCIATION: THE USURY LAW AND LIQUIDATED DAMAGES IN SALE OF GOODS TRANSACTIONS

Joseph M. Loomis*

Suppose a "merchant"[1] buyer orders "goods" from a "merchant" seller. Suppose, as is common practice, the seller responds by shipping the goods along with an invoice stating that a late charge of one and one-half percent per month will be assessed in the event the goods are not paid for in full within ten

* Member of the California Bar; A.B., University of California, Berkeley, 1967; J.D., Golden Gate University School of Law, 1974.

1. This Article will discuss only transactions "between merchants" as that term is defined in CAL. COM. CODE § 2104, and the Official Comments thereto.

> (1) "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. . .
>
> . . . .
>
> (3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants. . . .

CAL. COM. CODE § 2104(1) & (3) (West 1964).

> There is no California counterpart, case or statutory, for this special treatment given to merchants. "Merchants" under the code have their own special rules for behavior between themselves and these are new. . . .

Cal. Comment foll. CAL. COM. CODE § 2104 (West 1964).

> 1. This Article assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer. It thus adopts a policy of expressly stating rules applicable "between merchants" and "as against a merchant," wherever they are needed instead of making them depend upon the circumstances of each case as in the statutes cited above. . . .
> 2. The term "merchant" as defined here roots in the "law

days of receipt.[2] Would the buyer be bound by the late charge provision even though he or she did not expressly agree to it? Students of classic contract principles would be inclined to say *no*.[3] Persons who engage in business regularly would be inclined

---

> merchant" concept of a professional in business. The professional status under the definition may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both, and which kind of specialized knowledge may be sufficient to establish the merchant status is indictated by the nature of the provisions.
>
> The special provisions as to merchants appear only in this Article and they are of three kinds. Sections 2-201(2), 2-205, 2-207 and 2-209 dealing with the statute of frauds, firm offers, confirmatory memoranda and modification rest on normal business practices which are or ought to be typical of and familiar to any person in business. For purposes of these sections almost every person in business would, therefore, be deemed to be a "merchant" under the language "who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . ." since the practices involved in the transaction are non-specialized business practices such as answering mail. In this type of provision, banks or even universities, for example, well may be "merchants." But even these sections only apply to a merchant in his mercantile capacity. A lawyer or bank president buying fishing tackle for his own use is not a merchant.

Id. U.C.C. Comments, 1 & 2. *See* J. WHITE and R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE at 22-29 (1972). The issue of whether the parties involved in the *Crestwood* case were "merchants" was never addressed by the court. However, it can be assumed from the foregoing authorities that both Crestwood Lumber Company and Nachtsheim Associates were "merchants" under the Code's broad definition.

In today's market conditions of high interest rates, buyers purchasing from sellers have lost considerable incentive for paying their bills on time in favor of paying other bills which bear a higher rate of "interest." The purpose of this Comment is to clarify the law with respect to transactions "between merchants." It is also important to note that this Comment is only applicable to sales of goods transactions. Division Two of the CAL. COM. CODE only applies to "transactions in goods." CAL. COM. CODE § 2102 (West 1964). *See also* CAL. COM. CODE § 2105 (definition of "goods") and CAL. COM. CODE § 1103 (other law not displaced by provisions of the CAL. COM. CODE shall supplement the Code's provisions).

2. This represents the fact situation presented in the *Crestwood* case. Crestwood Lumber Co. v. Citizens Sav. and Loan Ass'n, 83 Cal. App. 3d 819, 829, 148 Cal. Rptr. 129, 131 (1978).

3. The U.C.C. has drastically altered traditional contract notions, and "lawyers will find that the normal rules of contract often do not apply to sales in the Commercial Code States." CALIFORNIA CONTINUING EDUCATION OF THE BAR (CEB), SALES AND BULK TRANSFERS, at Preface (1965) [hereinafter cited as SALES].

> Some of the Article Two provisions on the formation of contracts for the sale of goods have not only radically altered sales law but have influenced the new Restatement, Second,

to say yes, it happens all the time; everyone is aware of it, and it serves as an incentive for prompt payment as well as providing fair compensation to a seller whose customer fails to make timely payments.[4] To persons sophisticated in business dealings

---

> Contracts as well. In most fundamental terms Article Two expands our conception of contract. It makes contracts easier to form, and it imposes a wider range of obligations than before.

J. WHITE & R. SUMMERS, *supra* note 1, at 22. *See also* Cal. Comments foll. CAL. COM. CODE § 2207 (West 1964) ("mirror-image" rule of offer and acceptance in contract formation abolished in sale of goods transactions).

4. Business people commonly deal with each other in ways which impose conditions beyond what is required by traditional contract law. For example,

> Under California precode law, an offer was revocable by the offeror until proper acceptance except in special situations. Notwithstanding their legal power to revoke, businessmen commonly extended offers that both they and the offerees treated as irrevocable. Business practice and the law were thus out of step.

SALES, *supra* note 3, at 18. Business people commonly assume that late charges are binding, customary in industry, and fair compensation for the seller where an account is delinquent, even if the charges were not expressly agreed to. *See* CAL. COM. CODE §§ 1205, 2208 (West 1964).

> It is a sad fact that many sales contracts are not fully bargained, not carefully drafted, and not understandingly signed or otherwise acnowledged by both parties. Often here is what happens: underlings of seller and buyer each sit in their respective offices with a telephone and stack of form contracts. Seller's lawyer has drafted seller's forms to give him advantage. Buyer's lawyer has drafted buyer's forms to give him advantage. The two sets of forms naturally diverge. They may diverge not only in substantive terms but also in permissible methods of contract formation. The process of "contracting" begins with underling telephoning underling or with the dispatch of a form. When the process ends, there will usually be two forms involved, seller's and buyer's, and each form may even be signed by both underlings. The deal will coincide with respect to the few bargained terms such as price, quality and quantity terms, and delivery terms. But on other terms, the respective forms will diverge in important respects. Frequently this will pose no problem, for the deal will go forward without breakdown. But sometimes the parties will fall into dispute even before the occasion for performance. More often, one or both will perform or start to perform and a dispute will break out. In all such cases the parties will then read their forms—perhaps for the first time—finding that their forms diverge. Is there a contract? If so, what are its terms?

J. WHITE & R. SUMMERS, *supra* note 1, at 23.

This Comment will demonstrate how the California Commercial Code solves this problem in the absence of an express agreement. The purpose of the late charge is to provide "a fair average compensation for any loss that may be sustained" by the seller "as the result of" the buyer's "failure to make timely payments." Crestwood Lumber Co. v. Citizens Sav. and Loan Ass'n, 83 Cal. App. 3d 819, 827, 148 Cal. Rptr. 129, 133 (1978).

and familiar with the operation of the California Commercial Code, the second answer would appear to be correct. However, according to the California Court of Appeal, first appellate district, in its recent decision in *Crestwood Lumber Co. v. Citizens Savings and Loan Association,*[5] the answer is no, the buyer is not bound by the late charge provision.

Sellers of goods in California who engage in "cash" sales of goods,[6] and who are in the habit of imposing late charges on delinquent accounts, would be well-advised to carefully scrutinize the *Crestwood* decision. Depending on the amount of the late charges and how they are imposed, such sellers may be in danger of violating California's Usury Law,[7] a felony,[8] or they may be

---

See also Fox v. Federated Dep't Stores, Inc., 94 Cal. App. 3d 867, 887, 156 Cal. Rptr. 893, 905 (1979).

5. 83 Cal. App. 3d 819, 148 Cal. Rptr. 129 (1978) (Paik, J., assigned by the Chairperson of the Judicial Council, Caldecott, PJ., and Christian, J., concurring).

6. A "cash" sale is one in which the full price of the goods is due in a lump sum on a specific date. By contrast, a "credit" or "installment" sale is one in which the price is paid in pre-designated installments over a period of time, and the deferred price is often much higher than the cash price. *Id.* at 825, 148 Cal. Rptr. at 132. Only cash sales will be discussed in this Article because bona fide installment sales are not subject to the usury law and the additional cost of the goods represented by the deferred price is not considered a liquidated damage. *See* Fox v. Federated Dep't Stores, Inc., 94 Cal. App. 3d at 872, 156 Cal. Rptr. at 898 and Crestwood v. Citizens Sav. & Loan Ass'n, 83 Cal. App. 3d at 825, 148 Cal. Rptr. at 132. *Fox* was primarily concerned with the relationship of the Unruh Act (CAL. CIVIL CODE § 1801 *et seq.* (West Supp. 1978)) and the usury law, CAL. CONST., art. XV, § 1 (West Supp. 1979). It is important to note that the Unruh Act does not allow anyone to violate the usury law. It merely recognizes that installment sales are not subject to the usury law and merely imposes a 1-½% per month additional maximum cost that sellers can add to the price of goods on an installment plan in consumer transactions. *See* Fox v. Federated Dep't Stores, Inc., 94 Cal. App. 3d at 875-881, 156 Cal. Rptr. at 898-903.

7. While this comment was being drafted, California voters, at a special statewide election on November 6, 1979, approved Proposition 2 amending CAL. CONST. art. XV, § 1, the usury law. (See 1979 Cal. Legis. Serv. Pamphlet No. 8, at xxvii.) However, it is important to note that the usury law does not apply to two prevalent situations. First, the usury law does not apply to liquidated damages assessed by sellers who engage in "cash sales," for example, full payment due 30 days after receipt of the invoice. *See* CAL. COM. CODE § 2718 (West, 1964). Second, the usury limit does not apply to installment sale transactions, for example full payment not due on any specific date. 83 Cal. App. 3d at 825, 148 Cal. Rptr. at 132. In consumer transactions, interest on deferred payment is limited to 18% per annum by the Unruh Act. *See* CAL. CIV. CODE § 1810.2 (West 1973). In summary, the usury law applies only to loans or forbearance of money, goods, or things in action. CAL. CONST. art. 15 § 1 (West Supp. 1979).

8. Cal. Uncodified Measures, § 3 at 1919-1 (Deering 1973), spells out the rights of people paying illegal interest and the penalties for violations:

> (a) Every person, company, association or corporation, who for any loan or forbearance of money, goods or things in action

unilaterally assessing invalid liquidated damages.[9] However, this Comment will demonstrate that the *Crestwood* court's reasoning is faulty and that sellers may continue to assess reasonable late charges without fear of imprisonment for violating the usury law and without fear of violating the law applicable to liquidated damages.

Further, it is apparent from the *Crestwood* decision that the court overlooked the California Commercial Code in reaching its decision. This is a glaring oversight since consideration of the Code is indispensable to a correct decision involving a sale of goods transaction. If the Code had been considered, it is the opinion of this author that a different result would have been reached.[10]

> shall have paid or delivered any greater sum or value than is allowed to be received under the preceding sections, one and two, may either in person or his or its personal representative, recover in an action at law against the person, company, association or corporation who shall have taken or received the same, or his or its personal representative, treble the amount of the money so paid or value delivered in violation of said sections, providing such action shall be brought within one year after such payment or delivery.
>
> (b) Any person who willfully makes or negotiates, for himself or another, a loan of money, credit, goods or things in action, and who directly or indirectly charges, contracts for, or receives with respect to any such loan any interest or charge of any nature, the value of which is in excess of that allowed by law, is guilty of loan-sharking, a felony, and is punishable by imprisonment in the state prison for not more than five years or in the county jail for not more than one year. This subdivision shall not apply to any person licensed to make or negotiate, for himself or another, loans of money, credit, goods, or things in action, or expressly exempted from compliance by the laws of this state with respect to such licensure or interest or other charge, or to any agent or employee of such person when acting within the scope of his agency or employment.

See also Committee Against Unfair Interest Limitations v. State, 95 Cal. App. 3d 801, 157 Cal. Rptr. 543 (1979) (constitutionality of California's usury law upheld).

9. 83 Cal. App. 3d at 824-27, 148 Cal. Rptr. at 131-33.

10. Since the transaction between Crestwood Lumber Company and Nachtsheim Associates was unquestionably a "transaction in goods" (the sale of lumber) it is explicitly governed by CAL. COM. CODE § 2102 (West 1964) which states that:

> Unless the context otherwise requires, this division applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this division impair or repeal any statute regulating sales to consumers, farmers or other specified clas-

I. SYNOPSIS OF *CRESTWOOD LUMBER COMPANY v. CITIZENS SAVINGS & LOAN ASSOCIATION*

The facts of the *Crestwood* case indicate that Crestwood Lumber Company contracted to sell lumber to Nachtsheim Associates, who was constructing improvements on its property. According to the court, the significant language of the sales orders concerned the interest charged for late payment:

> ACKNOWLEDGEMENT OF YOUR ORDER . . . TERMS AND CONDITIONS ON REVERSE SIDE . . . TERMS: PAYMENT DUE WITHIN 10 DAYS FROM DATE OF INVOICE—LESS 2%. On the reverse side, subsequent to provisions regarding cancellation and delivery, the orders stated: A FINANCE CHARGE OF 1-½% PER MONTH (ANNUAL PERCENTAGE RATE 18 PERCENT) WILL BE MADE ON ALL OVERDUE ACCOUNTS. The invoices sent with the lumber shipments also state: INTEREST CHARGED AT THE RATE OF 18% PER ANNUM ON ALL OVERDUE ACCOUNTS.[11]

When Nachtsheim Associates failed to pay the lumber company, Crestwood filed a stop notice action against Citizens Savings and Loan Association, the lender for the construction work.[12] The savings and loan association did not dispute Crestwood's claim for the principal and costs, but opposed the claim for interest and attorney's fees. The trial court agreed with Citizens on the interest issue and decided that the provision for interest of one and one-half percent per month was usurious and thus unenforceable.[13]

The court of appeal, *inter alia,* agreed with the trial court's finding of usury. It reasoned from an examination of the lan-

---

ses of buyers.

and CAL. COM. CODE § 1103 which states that:

> Unless displaced by the particular provisions of this code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

See also SALES *supra* note 3, at 11-13, and English v. Ford, 17 Cal. App. 3d 1038, 1046, 95 Cal. Rptr. 501, 505 (1971).

11. 83 Cal. App. 3d at 823, 148 Cal. Rptr. at 131-33.

12. *Id.*

13. *Id.*

guage in Crestwood's invoices and sales orders that the lumber company, by implication, was granting Nachtsheim Associates an extension of time for payment of the goods beyond the due date in exchange for an eighteen percent per annum surcharge on the principal. The court of appeal reasoned that the transaction was a "cash sale" rather than a "credit" or "installment" sale so the additional charge could not be construed as part of the sale price, but rather was interest on the forbearance of the matured debt. As such, the transaction did not come under the installment sale exception to the usury law. Since the interest exceeded the ten percent usury limit, Crestwood Lumber Company was in violation of the usury law.[14] The court of appeal also found that the finance charge could be construed as a liquidated damage clause. However, since the parties had not actively bargained on the amount of the liquidated damages, the clause was also unenforceable and void as a penalty in violation of California Civil Code sections 1670 and 1671.[15] The result was that Crestwood Lumber Company received absolutely no compensation for Nachtsheim Associates' failure to make timely payment.[16]

II. THE FINDING OF FORBEARANCE

A. THE *Crestwood* COURT'S ANALYSIS

The *Crestwood* court's holding that if anyone extends time for payment of a matured debt he or she is subject to usury law is not disputed.[17] In addition, the court's finding that the lumber company was engaging in a "cash" sale, rather than an "installment" sale, because the full price for the goods was due on a specific date is also not disputed.[18] The issue that is subject to controversy is the court's finding that Crestwood Lumber Company extended time for payment of a mature debt.[19]

The *Crestwood* court found an "implied agreement" to forbear on the part of the lumber company based solely on an examination of the terms of the company's invoices and sales or-

14. *Id.* at 523-27, 148 Cal. Rptr. at 131-33.
15. *Id.* at 826-27, 148 Cal. Rptr. at 133.
16. *Id.* at 827, 148 Cal. Rptr. at 133.
17. *Id.* at 825, 148 Cal. Rptr. at 132.
18. *Id.*
19. *Id.*

ders.[20] This finding is questionable since the court examined the documents without the aid of extrinsic evidence.[21] The court could have allowed extrinsic evidence pursuant to the parol evidence rule embodied in section 2202 of the California Commercial Code to find out the true nature of the particular transaction.[22] No decision should be the product of the triumph of form over substance[23] especially when the threat of imprisonment looms as the penalty for violation of the usury law.[24] Crestwood Lumber Company apparently did not direct the trial court's attention to section 2202 of the California Commercial Code.[25] Section 2202 states in part that the writings of the party may be *explained* or supplemented by course of dealings or usage of trade or by course of performance.[26] Moreover, it should be noted that the parol evidence rule in a commercial setting *does not require* that the writing be ambiguous as a prerequisite to the application of the rule.[27]

---

20. *Id.* at 825, 148 Cal. Rptr. at 132.

21. *Id.* at 826, 148 Cal. Rptr. at 133.

22. CAL. COM. CODE § 2202 (West 1964). Ironically the court stated that, "it is recognized that, where the question is one of law alone, an appellate court is not bound by concessions of counsel; nor are we constrained by the interpretation of documents made by the trial court without the aid of extrinsic evidence." 83 Cal. App. 3d at 826, 148 Cal. Rptr. at 133. *See also* Young v. Lane Realty, 96 Cal. App. 3d 294, 158 Cal. Rptr. 71 (1979).

23. "[T]he substance of the transaction not its form is what is important in determining whether it is or is not a credit sale." Fox v. Federated Dep't Stores, Inc., 94 Cal. App. 3d at 873, 156 Cal. Rptr. at 898.

24. *See* text accompanying note 8 *supra.*

25. The opinion does not mention the California Commercial Code. 83 Cal. App. 3d 819, 822-23, 148 Cal. Rptr. 129.

26. According to CAL. COM. CODE § 2202 (West 1964),

> [T]erms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented,
>
> (a) By course of dealing or usage of trade (Section 1205) or by course of performance (Section 2208); and
>
> (b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

27. "Article Two broadens the notion of contract insofar as § 2-202 on parol evidence permits parties to prove extrinsic terms not provable under various pre-Code versions of the parol evidence rule." J. WHITE & R. SUMMERS, *supra* note 1, at 23. "Even if the writing is a 'complete and exclusive' statement of the terms of the agreement, parties

In reality, sellers of goods rarely extend time for payment, and if an extension is granted, the matured obligation is commonly reduced to a promissory note at a rate of interest which will avoid violation of the usury law.[28] However, this evidence can be gleaned only by an examination of the facts in the commercial setting, that is, beyond the four corners of the documents involved. Such examination appears appropriate where the document is subject to more than one interpretation.[29] No facts were present in the *Crestwood* record indicating whether Crestwood Lumber Company had ever communicated with Nachtsheim Associates and expressly agreed to allow Nachtsheim an extension of time for payment.[30] Moreover, none of Crestwood's sales orders or invoices expressly indicated on their face that Nachtsheim Associates was granted more than ten days to pay.[31] In the ordinary commercial setting, this is indica-

---

may still introduce course of dealings, usage of trade, or course of performance to explain or supplement the agreement. This is so even where the language of the agreement is *unambiguous* on its face." (emphasis added). *Id.* at 73.

See also California and U.C.C. Comments which plainly recognize that § 2202 enlarges on the traditional parol evidence rule and encourages the examination of extrinsic evidence of course of dealings, usage of trade, and course of performance in the real commercial world to ascertain the true understanding of the parties as to the nature of their dealings with each other. California Comments and U.C.C. Comments foll. CAL. COM. CODE § 2202 (West 1964).

28. Note that Crestwood Lumber Company did not extend time for payment but brought suit to enforce collection. 83 Cal. App. 3d at 823, 148 Cal. Rptr. at 131.

29. The *Crestwood* court stated that the language of the invoices and sales order could be indicative of either forbearance or an attempt to assess a late charge, but did not decide between the two. *Id.* at 823-27, 148 Cal. Rptr. at 131-33.

It seems obvious that Crestwood Lumber Company's conduct had to be one or the other. According to CAL. COM. CODE § 2204 (West 1964),

> (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
>
> (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
>
> (3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

30. "So far as the record shows, appellant did not consult with Nachtsheim concerning overdue charges. Appellant merely sent a sales order and invoice with each shipment, unilaterally notifying Nachtsheim of a finance charge in the event of non-payment within 10 days." 83 Cal. App. 3d at 827, 148 Cal. Rptr. at 133.

31. The sales orders stated in bold type: "TERMS: PAYMENT DUE WITHIN 10 DAYS OF DATE FROM INVOICE—LESS 2%." *Id.* at 823, 148 Cal. Rptr. at 131. "[L]ess 2%" commonly means that if a buyer pays on time he or she is entitled to a 2%

tive of an absolute requirement by the seller of full payment

discount. If he or she doesn't pay on time, the account is considered overdue. "The invoices sent with the lumber shipments, also stated: 'INTEREST CHARGED AT THE RATE OF 18% PER ANNUM ON ALL *OVERDUE* ACCOUNTS.' " (emphasis added). *Id.* It is hard to imagine how an account which is stated in writing to be *overdue* in ten days would give rise to an implication that a buyer may have *extra time* for payment beyond the ten days. *Crestwood's* finding of implied forbearance defies logic. Also, it should be noted that Nachtsheim Associates had ample notice of the late charge term because Crestwood Lumber Company's sales orders were sent with each shipment of lumber and apparently there were several shipments. *Id.* at 827, 148 Cal. Rptr. at 133. "Appellant merely sent a sales order and invoice with each shipment, unilaterally notifying Nachtsheim of a finance charge in the event of non-payment within ten days." *Id.*

The CAL. COM. CODE § 1201(25)-(27) (West Supp. 1978) establishes what constitutes sufficient notice in the commercial setting:

> (25) A person has "notice" of a fact when
>
> (a) He has actual knowledge of it; or
>
> (b) He has received a notice or notification of it; or
>
> (c) From all the facts and circumstances known to him at the time in question he has reason to know that it exists.
>
> A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this code.
>
> (26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when
>
> (a) It comes to his attention; or
>
> (b) It is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.
>
> (27) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

In Gateway Co. v. Charlotte Theaters, Inc. 297 F.2d 483 (1st Cir. 1961), the court issued a warning to persons dealing pursuant to the Commercial Code that they cannot safely follow William Randolph Hearst's maxim: "Throw it in the wastebasket Every letter

within ten days as a condition of doing business with its customers. Thus, the so called "finance charge" is an assessment of liquidated damages in the event that the ten-day payment term is violated.[32]

The sales order and invoices of Crestwood Lumber Company stating payment was due in ten days or else a "finance charge" would be imposed belies any implied agreement to extend the due date. If it were true that the lumber company's invoices and sales orders constituted an implied agreement to give further time for payment in exchange for an eighteen percent surcharge on the principal, as found by the *Crestwood* court,[33] then the buyer would be free to ignore the payment of the principal amount due as long as he or she paid the one and one-half percent service charge each month for as long as he or she wished. Such a result would be illogical, impractical, prohibitive, and economically disastrous to sellers.[34] The consequences

---

answers itself in a couple of weeks." *Id.* at 486. *See also* J. WHITE & R. SUMMERS, *supra* note 1, at 37. There is apparently only one case which addressed the issue of a "service charge" type of term, Loizeaux Builders Supply Co. v. Donald B. Ludwig Co., 144 N.J. Super. 556, 366 A.2d 721, 725 (1976). *Loizeaux* implies that if the disputed "service charge" had appeared on the invoice mailed to defendant, it would have become binding on him. With regard to other disputed charges which were allowed, the court stated: "defendant was alerted to these additional charges at the time he received his first invoice from plaintiff, which contained an itemization of these additional charges. If defendant disagreed with these charges, it was free to cease ordering its supplies from plaintiff." *Id.* at 561-62, 366 A.2d at 724. The court also stated: "At the outset it should be noted that the contractual dealings between the parties extended for a period in excess of one year. . . ." *Id.*

32. As the *Crestwood* court stated: "If we examine the provision in question closely, it appears to be an attempt to assess liquidated damages." 83 Cal. App. 3d at 826, 148 Cal. Rptr. at 133.

33. *Id.* at 825, 148 Cal. Rptr. at 132.

34. Obviously, a seller must get paid sometime or his or her business will fail. Under the *Crestwood* logic the principal would never have to be paid. This result cannot have been the natural intention of the parties. A businessperson cannot exist on late charges alone with no payment toward the principal. If Crestwood Lumber Company operated by allowing its customers to pay on the installment plan, it would require specific monthly payments toward the principal as well as an extra charge to compensate for the fact that it was not receiving cash immediately. This is the only way an installment plan can be profitable. The *Fox* court held that:

> There are two different methods being used for determining the amount of the finance charge. One is the 'time price differential' method, which provides for the addition of a precomputed amount to the amount being financed, and the other is the 'credit service charge' method which provides for payment by the buyer of a percentage of the outstanding balance at the end of each monthly period. Each of these methods is consid-

in the commercial world would be that sellers would never be able to exert their rights under the Mechanics' Lien Law by serving a stop notice or recording a lien,[35] because the lenders and owners would raise the defense that the so called "matured debt" had been extended by implication forever and had no specific due date![36] Consequently, Crestwood Lumber Company would never be able to sue Nachtsheim Associates because Nacthsheim would argue it need only pay the monthly service charge, month by month, and conceivably never pay the principal due.

Other perplexing questions arise. For example, what would be the amount of the minimum monthly installments, and could the debt be accelerated if a monthly installment were missed? The lumber company's invoices and sales orders exhibited none of the additional terms and conditions usually reflected in a loan transaction document. Moreover, Crestwood Lumber Company emphatically denied that it extended time for payment, and, in fact, filed suit to enforce collection of a matured debt! Accordingly, the *Crestwood* court's finding of an implied forbearance, if examined closely and extended to its logical result, makes no sense. It appears that, in reality, the "finance charge" operated to induce customers to pay on time—in other words, as a liquidated damages provision. It also appears that under the liberal rules of section 2202 a finding of forbearance would necessarily require an explicit rather than implicit arrangement.[37] Finally, Civil Code section 1619 states that "a contract is either expressed or implied."[38] Civil Code section 1620 states that "an express contract is one, the terms of which are stated in

---

> ered as the difference between a cash price and a time price for the purpose of affording the seller or holder a return on his investment plus his operating costs and profit, but neither method is looked upon as interest for a loan or forbearance.

94 Cal. App. 3d at 879, 156 Cal. Rptr. at 902. *See generally* the authorities cited at note 7 *supra* (limited application of the usury law and the Unruh Act, CAL. CIV. CODE § 1802 *et seq.* (West 1973)).

35. *See generally* M. MARSH, CALIFORNIA MECHANICS' LIEN LAW HANDBOOK (3d ed. 1979).

36. This is the logical result of *Crestwood*'s implied forbearance holding: "It can hardly be asserted that such language did not constitute an implied agreement to give further time for payment in exchange for an 18% surcharge on the principal." 83 Cal. App. 3d at 825, 148 Cal. Rptr. at 132.

37. *See* CAL. COM. CODE § 2202 (West 1964).

38. CAL. CIV. CODE § 1619 (West 1973).

words."[39] And, Civil Code section 1621 states that "[a]n implied contract is one, the existence and terms of which are manifested by conduct."[40] Crestwood Lumber Company exhibited no conduct which would give the appearance of extending time for payment of a matured debt.[41]

The fact that the clause under consideration here is more likely than not a liquidated damage provision is bolstered by the court's own statement that:

> Although the trial court's judgment was correct as far as it resolved the issues presented to it, recent California cases have viewed "late charge" provisions such as the one before us not as interest, but as liquidated damage clauses. In the present case, no assertion was made below that the subject provision constituted anything other than interest, the points of dispute being whether such interest fell within the parameters of the usury laws. However, it is recognized that, where the question is one of law alone, an appellate court is not bound by concessions of counsel; nor are we constrained by the interpretation of documents made by the trial court without the aid of extrinsic evidence . . . . If we examine the provision in question closely, it appears to be an attempt to assess liquidated damages.[42]

The *Crestwood* decision appears to be internally inconsistent in finding that the late charge term can be interest on the forbearance of money and, at the same time, a liquidated damage provision.[43] Moreover, it is hard to determine whether the *Crestwood* court finally decided that Crestwood Lumber Company was loaning money or assessing liquidated damages. Perhaps what the *Crestwood* court was saying was that *if* forbearance is involved in a transaction then the usury law applies.[44] On

---

39. *Id.* § 1620.

40. *Id.* § 1621.

41. "So far as the record shows, appellant did not consult with Nachtsheim concerning overdue charges." 83 Cal. App. 3d at 827, 148 Cal. Rptr. at 133.

42. *Id.* at 826, 148 Cal. Rptr. 132-33.

43. *See* note 36 *supra*. In the second half of its decision the court stated that "the subject provision was void also as a penalty in violation of Civil Code sections 1670 and 1671." 83 Cal. App. 3d at 827, 148 Cal. Rptr. at 133.

44. This is reasonable and correct since it is true that forbearance of a matured debt is subject to the usury law which applies to both loans and forbearances of money. "No

the other hand, perhaps the court was also saying that if no forbearance is involved in a transaction, then the law of liquidated damages applies. However, the Crestwood court confusingly concluded by saying the provision was void as violating both the usury law and the law applicable to liquidated damages.[45]

B. *Fox v. Federated Department Stores, Inc.*

Eleven months after the decision in *Crestwood*, the California Court of Appeal, second appellate district, in *Fox v. Federated Department Stores, Inc.*[46] was presented with a fact situation identical in all relevant respects to that in *Crestwood*. The *Fox* court, however, reached a contrary result. This time, the court was called upon to scrutinize a sale which involved the following terms:

> Mobil issues two types of credit cards to its customers, viz., 1) a non-revolving plan for gasoline purchases, and 2) a revolving plan limited to purchases of tires, batteries and accessories. Only the non-revolving plan is involved here. Under this plan, payment for purchases is due upon receipt of the monthly statement, and if not paid within 25 days thereafter, a finance charge of 1-½% per month is assessed on the balance due.[47]

The *Fox* court found that such a transaction did not involve any element of forbearance, but was either an installment sale to which the time-price doctrine applied or was a cash sale calling for a valid liquidated damage provision:

> [T]he court holds that the time-price doctrine is applicable here, the finance charges are not interest and not subject to the usury law. . . . The Mobil finance charge is not usurious. As noted above, the Mobil credit card agreement requires the bill to be paid when rendered. It is only where the customer breaches the agreement and fails to

---

person, association, copartnership or corporation shall be charging any fee, bonus, commission, discount or other compensation receive from a borrower more than 10 per cent per annum upon any loan or forbearance of any money, goods or things in action." 83 Cal. App. 3d at 824, 148 Cal. Rptr. at 131 (quoting from CAL. CONST., art. XV § 1 (West Supp. 1979)).

45. *See* text accompanying note 43 *supra*.

46. 94 Cal. App. 3d 867, 156 Cal. Rptr. 893 (1979) (per Beach, J., Roth, P.J., and Fleming, J., concurring).

47. *Id.* at 884, 156 Cal. Rptr. at 905.

> make payment within twenty-five days of receipt of the bill that a finance charge is assessed. Since the contract at its inception does not require a usurious payment, and it is only because of the customer's voluntary act in failing to make the payment when due that a finance charge is levied, under the applicable law such charge cannot be usurious.[48]

The court went on to dispose of the argument that Mobil's finance charge was an invalid liquidated damages provision of penalty under California Civil Code section 1670:

> The uncontradicted evidence introduced here shows that Mobil's credit card operation operates at a substantial loss, that delinquent accounts cost a substantial amount to process, that the 1-½% percent late charge does not cover this extra expense, that it would be impracticable, extremely difficult and expensive to attempt to determine the actual damage sustained by Mobil as the result of a customer's default, and that the late charge represents a reasonable endeavor to fix Mobil's probable loss resulting from deliquent payments, bears a reasonable relation to such loss and is reasonable in amount. The court concludes that, if Mobil's finance charges are to be regarded as damages, they are a valid late charge and do not contravene sections 1670 and 1671 of the Civil Code.[49]

---

48. *Id.*

49. *Id.* at 885, 156 Cal. Rptr. at 905. It is puzzling why *Fox*'s first characterization of the transaction implied that it was an installment sale to which the time-price doctrine applied. The nonrevolving plan clearly calls for full payment upon receipt of the monthly statement which would make it a "cash" sale under *Crestwood*'s analysis. Perhaps *Fox*'s view can be explained by its equally puzzling statement that "the definitional sections of the Act made it clear that the Legislature intended to treat all retail installment credit sales conceptually as the same, regardless of distinction in form between revolving and nonrevolving transactions." *Id.* at 879, 156 Cal. Rptr. at 902. It is clear that the Unruh Act applies to installment sales only. CAL. CIV. CODE § 1801 *et seq.* (West Supp. 1978). The Unruh Act does not allow anyone to violate the usury law or to charge more than the usury limit on the forbearance of a matured debt. The Act merely puts a ceiling of 18% per annum on the deferred payment price in bona fide installment sales in consumer type transactions. CAL. CIV. CODE § 1801 et seq. (West Supp. 1973). Therefore, it is difficult to argue that retail sellers under the Unruh Act have more latitude than a merchant in a commercial transaction. In fact, in a bona fide installment sale in a commercial as opposed to consumer transaction a seller is permitted to charge in excess of 18% per annum. Fox v. Federated Dept. Stores, Inc., 94 Cal. App. 3d 867, 156 Cal. Rptr.

Because of the apparent conflict between these two appellate districts, especially as to whether there is any implied forbearance in a "cash sale"-type transaction seeking to impose a one and one-half percent finance charge on default, the issue appears to be ripe for review by the California Supreme Court.

C. Avoidance of a Finding of Implied Forbearance.

Assuming that *Crestwood* is correct in its finding of implied forbearance, there appears to be a very easy solution for sellers who wish to continue to assess reasonable late charges in excess of the usury limit without fear of being sent to state prison.[50] They could and should restructure their transactions and rephrase their documents to make it clear that they are not extending time for payment. Just how this might be done is beyond the scope of this Comment, and sellers are advised to seek specific legal advice from their attorneys.[51]

---

893. The *Crestwood* Court also stated that:

> On principle and authority, the owner of property . . . has a perfect right to name the price on which he is willing to sell, and to refuse to accede to any other. He may offer to sell at a designated price for cash or at a much higher price on credit, and a credit sale will not constitute usury however great the difference between the two prices.

83 Cal. App. 3d at 825, 148 Cal. Rptr. at 132 *quoting* Verbeck v. Clymer, 202 Cal. 557, 563, 261 P. 1017 (1927). It would be a gross misconception of the law to conclude that the retail sellers in *Fox* are allowed to charge 18% because of the Unruh Act and that commercial sellers do not enjoy the same benefit. It is the characterization of the sale as a cash or installment sale which is determinative. The only logical conceptual analysis is that in *Fox* and in *Crestwood* we are dealing with cash sales with liquidated damages assessed on default. Moreover, an installment sale is an installment sale regardless of whether it takes place in the so-called "retail" or "commercial" setting. The Unruh Act is entirely applicable to cash sales. Consequently, a retail seller in a cash sale transaction selling to a consumer can no more charge in excess of the usury limit on the forbearance of a matured debt than a merchant engaged in forbearance in a commercial setting. Each can assess liquidated damages in excess of the usury limit. *See* Angell v. Rowlands, 85 Cal. App. 3d 536, 542-3, 149 Cal. Rptr. 574, 578 (1978) (liquidated damage provision in a contract upheld even though the amount assessed, 27% per annum, exceeded the legal interest rate). The *Crestwood* and *Fox* courts based their reasoning on the wrong liquidated damage statutes, Cal. Civ. Code §§ 1670, 1671, now Cal. Civ. Code § 1671, instead of relying on Cal. Com. Code § 2718, in judging the enforceability of the late charge provision. *See* Crestwood Lumber Co. v. Citizens Sav. & Loan Ass'n, 83 Cal. App. 3d at 826-27, 148 Cal. Rptr. at 133, and Fox v. Federated Dep't Stores, Inc., 94 Cal. App. 3d at 885, 156 Cal. Rptr. at 905.

50. *See* note 8 *supra* and accompanying text.

51. In general, the solution would contemplate a specific written statement on the face of the invoice that no extension beyond the due date will be granted. The specific phraseology and method of restructuring the transaction would depend on the individual nature of each seller's business dealings with its customers. For that reason this Com-

III. APPLICATION OF THE COMMERCIAL CODE

A. ENFORCEMENT OF LIQUIDATED DAMAGES.

Assuming the transaction is structured to include a provision for liquidated damages, rather than interest on the forbearance on a matured debt, and assuming the parties have not expressly agreed to such liquidated damage, would such a liquidated damage provision be enforceable in light of *Crestwood*'s holding that it must be expressly agreed upon?[52] The answer is *yes* pursuant to Commercial Code section 2207(1)(2)[53] for transactions between merchants and *no* for transactions between nonmerchants. Under *Crestwood*'s fact situation, Nachtsheim Associates initiated the orders for lumber and Crestwood Lumber Company responded by shipping the lumber along with its

---

ment cannot provide a "boilerplate" type of solution that is guaranteed to work in every case. Also, sellers might be well-advised to have a competent criminal attorney scrutinize their transactions and documents to make sure they are not commiting a felony. *See* note 8 *supra* and accompanying text.

52. The sales orders and invoices in the present case contemplate a single performance, namely payment in full within 10 days of delivery, and assess an additional charge in the event of the purchaser's nonperformance. Since the interest charge is assessed only upon default, under *Garrett* it is invalid unless it meets the requirements of sections 1670 and 1671. (*Id.*) The validity of a liquidated damages provision requires that the parties to the contract "agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof." (§ 1671.) "This amount must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained["].

83 Cal. App. 3d at 826-27, 148 Cal. Rptr. at 133 (citations omitted).

53. (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) The offer expressly limits acceptance to the terms of the offer;

(b) They materially alter it; or

(c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

CAL. COM. CODE § 2207(1)(2) (West 1964).

invoice stating its standard payment terms.[54] Persons accustomed to traditional contract principles might be inclined to conclude that Nachtsheim Associates cannot be bound by a contractual term it did not expressly agree to. However, under the Commercial Code, lawyers will find that the traditional contract rules often do not apply.[55]

Express Agreement

Pursuant to Commercial Code section 2207(1), Crestwood Lumber Company's shipment of the lumber along with the invoice would constitute "[a] definite and seasonable expression of acceptance" of Nachtsheim Associates' offer to purchase lumber.[56] It would operate as an acceptance and a contract for the purchase of lumber would be formed even though the invoice states a term "additional" to "those offered or agreed upon," i.e., one and one-half percent late charge for failure to pay on time.[57] This raises the question of whether the added term can be considered part of the contract. The answer is found in section 2207(2). Between nonmerchants, the added term is considered a proposal for an "addition to the contract" and will not be included unless the buyer expressly agrees to it.[58] Where both parties are merchants, the liquidated damage term will be deemed to be a part of the contract by operation of law and without express agreement by the buyer unless (1) the buyer's offer to purchase lumber expressly precluded such a term, (2) the liquidated damages term materially alters the contract, or (3) the buyer objects to the additional term within a reasonable time.[59]

---

54. 83 Cal. App. 3d at 822-23, 148 Cal. Rptr. at 131.

55. *See* note 3 *supra.*

56. *See* note 53 *supra.*

57. *Id.* It is apparent from the text of Crestwood Lumber Company's sales orders and invoices that the acceptance of the order was not expressly made conditional on assent to the late charge term. If this were the case, the sales order would constitute a counter-offer and there would be no contract formed until Nachtsheim Associates expressly accepted Crestwood Lumber Company terms, including the late charge term. See Murray, *Intention Over Terms: An Exploration of Uniform Commercial Code 2-207 and New Section 60 Restatement of Contracts,* 37 FORDHAM L. REV. 317, 324, & 325 (1969). *See generally* Annot., 72 A.L.R.3d 479 (1976) (discussion of the operation of Commercial Code § 2207.)

58. "If a nonmerchant is involved in the transaction, the additional terms in the acceptance are mere proposals made to the offeror for which he must assent in order to be bound." Murray, *supra* note 57, at 327.

59. *See* note 53 *supra.*

An offeree's timely expression of acceptance of an offer for a

If the *Crestwood* court would have considered the operation of California Commercial Code section 2207, and if other prerequisites to the enforceability of a liquidated damage provision had been met,[60] the court would have been squarely faced with the obligation of deciding whether the finance charge was interest on the forbearance of a debt or a valid liquidated damage provision.[61] The fact that the finance charge exceeded the rate allowed by the usury law[62] is no stumbling block to its enforceability if it is characterized in substance as a liquidated damage provision.[63] The *Crestwood* court probably would have then

---

> sales contract forms a contract even though he states terms additional to or different from those of the offer, unless he makes his acceptance expressly conditional on the offeror's assent to the added terms. Unless the offeree expressly declares that *assent* to the additional terms is a condition precedent to acceptance (as dictinct from simply declaring acceptance subject to the added terms themselves), he will be immediately bound on the offeror's terms. (Emphasis in original.) *See* § 2207(1).
>
> The additional terms in the acceptance are only proposals; they are added to the contract if agreed to by the offeror. § 2207(2). If, however, both parties are merchants (§ 2104(1), (3)), the additional terms become part of the contract even without express assent by the offeror, unless:
>
> (a) the offer expressly limits acceptance to the offer's own terms;
>
> (b) the additional terms materially alter the offer;
>
> (c) the offeror has already given notice of his objection to them; or
>
> (d) the offeror gives notice of his objection within a reasonable time after learning of the proposed additional terms. (§ 2207(2)(a), (b), (c)).
>
> If the parties have exchanged writing insufficient to form a contract but have contractually bound themselves by conduct that recognizes the existence of a contract (see §§ 2204(1), 2207(3)), the terms of their contract consist of the terms on which both their writings agree, plus other terms supplied by law. § 2207(3). This rule eliminates each party's former incentive to manipulate the exchange of forms in such a way that his form will be last and so control as the counteroffer "accepted" by performance.

SALES, *supra* note 3, at 31-32. *See also* J. WHITE & R. SUMMERS, *supra* note 1, at 28-29 (discussing the *Roto-Lith* case).

60. *See* note 49 *supra*.

61. The *Crestwood* court concluded that the late charge term seemed to be more in the nature of a liquidated damages provision, stating "If we examine the provision in question closely, it appears to be an attempt to assess liquidated damages." 83 Cal. App. 3d at 826, 148 Cal. Rptr. at 133.

62. *See* note 7 *supra*.

63. *See* Angell v. Rowlands, 85 Cal. App. 3d 536, 542-43, 149 Cal. Rptr. 574, 578

found in favor of Crestwood Lumber Company and enforced the one and one-half percent charge as a valid liquidated damage provision,[64] assuming again that other prerequisites of enforceability were met.[65] From the tone of the *Crestwood* decision it appears that the court might have allowed the lumber company to collect its late charges if the court could have been convinced that the late charge term was binding on the buyer. However, the notion that a liquidated damages term can become binding without express agreement pursuant to Commercial Code section 2207 was not presented to the court.[66] Thus, the *Crestwood* court was left with two erroneous legal theories by which it could, and did, deny the lumber company its requested late charges—unlawful forbearance and invalid liquidated damages. For this reason, the *Crestwood* court did not have to decide between the two theories.

There is ample authority to support the proposition that contractual terms, including a liquidated damages provision, may be imposed by operation of law, pursuant to California Commercial Code section 2207, without the express agreement of the parties. For example, the California and U.C.C. comments to section 2207 make it clear that the so-called "mirror image" rule of offer and acceptance in the formation of contracts is no longer applicable in sale of goods transactions.[67] There are many

---

(1978) (liquidated damage provision in a contract upheld regardless of the fact that the amount assessed, 27% per annum, exceeded the legal interest rate).

64. *See* note 61 *supra*.

65. This conclusion was based on the assumption that the necessity of an express agreement would be eliminated. 83 Cal. App. 3d at 827, 148 Cal. Rptr. at 133.

66. *See* note 25 *supra*.

67. 3. Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party. If, however, they are terms which would not so change the bargain they will be incorporated unless notice of objection to them has already been given or is given within a reasonable time.

. . . .

5. Examples of clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are: a clause setting forth and perhaps enlarging slightly upon the seller's exemption due to supervening causes beyond his control, similar to those covered by the provision of this Article on merchant's excuse by failure of presupposed conditions or a

examples of the concept that the Commercial Code supplies terms not considered by the parties.[68] Suffice it to say that the

> clause fixing in advance any reasonable formula of proration under such circumstances; a clause fixing a reasonable time for complaints within customary limits, or in the case of a purchase for sub-sale, providing for inspection by the sub-purchaser; a clause providing for interest on overdue invoices or fixing the seller's standard credit terms where they are within the range of trade practice and do not limit any credit bargained for; a clause limiting the right of rejection for defects which fall within the customary trade tolerances for acceptance "with adjustment" or otherwise limiting remedy in a reasonable manner (see Sections 2-718 and 2-719).

Comments foll. CAL. COM. CODE § 2207 (West Supp. 1964).

68. The basic policy in the formation of contracts under the U.C.C. is "ease of contract" which is a dramatic departure from traditional technical contract principles.

> Except for special rules such as the statute of frauds and the parol evidence rule, the code authorizes a contract for the sale of goods to be made in any manner sufficient to show agreement between the parties. Sections 2204(1), 2207(3). Even subsequent conduct may show agreement if it recognizes the existence of a contract.

SALES, *supra* note 3, at 17.

> Thus, the contract consists of the terms upon which the parties originally agreed, terms on which the confirmations agree, *and terms supplied by the code.*
>
> The problem which promises great difficulty is one in which the offeror sends his order form to the offeree and the latter sends the purported acceptance on his form which contains additional or variant terms. The question here is whether there is a contract at all, and only if that question is answered affirmatively are we *then concerned with the terms of the contract.*

(emphasis added.) Murray, *supra* note 57, at 320 (1969).

Even under traditional contract law, a signature is not always necessary to bind a non-signing party to a written contract. *See* Bloom v. Hazzard, 104 Cal. 310, 312 37 P. 1037 (1894) *cited in* Feary v. Aaron Burglar Alarm, Inc., 32 Cal. App. 3d 553, 559, 108 Cal. Rptr. 242, 246 (1973). *See also* Steiner v. Mobil Oil Corp., 20 Cal. 3d 90, 141 Cal. Rptr. 157 (1977) (discussing CAL. COM. CODE § 2207). Even traditional contract theories are recognized by CAL. COM. CODE § 1103 (West 1964). For example, *see* CAL. CIV. CODE §§ 1565-1589 (West 1973) (concerning consent to proposed contractual provisions). *See also* C. Itoh & Co. (America) v. Jordan Int'l Co., 552 F.2d 1228 (7th Cir. 1977); Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc., 58 Wis.2d 193, 206 N.W.2d 414 (1973) and Annot., 72 A.L.R. 3d 479, 485-93 (1976) (each of which presents an excellent discussion of the operation of Commercial Code § 2207). Terms are also added to contracts between parties whether or not they are "merchants" via course of dealing and usage of trade in Commercial Code § 1205: "The agreement of the parties includes that part of their bargain found in course of dealing, usage of trade, or course of performance. These sources are relevant not only to the interpretation of the express contract terms, but *may themselves constitute contract terms.*" (Emphasis added.) CAL. COM. CODE § 1205 (West 1964).

Terms are also added to contracts between parties whether or not they are

Crestwood court overlooked an indispensable body of law, namely the Commercial Code, in dealing with a commercial transaction.[69]

Automatic Inclusion of a Liquidated Damages Clause

Although express agreement *may* be necessary for a liquidated damage term to become part of the contract between the parties under the new Civil Code section 1671 as found by *Crestwood*,[70] there appears to be no prohibition against "automatic" inclusion of a liquidated damage term in a sale of goods transaction governed by the Commercial Code. Clearly, under the Commercial Code, terms can be imposed upon a buyer without his or her express consent.[71] One might question very carefully, though, whether a liquidated damage clause, by its nature, is the type of term that requires express agreement. *Crestwood*, in discussing Civil Code sections 1670 and 1671, states emphatically that express agreement is necessary.[72] It is not the purpose of this Comment to pass judgment on the correctness of *Crestwood*'s analysis of Civil Code sections 1670 and 1671,[73] now merged in the new section 1671,[74] which drastically liberalizes

---

"merchants" pursuant to CAL. COM. CODE § 2204(1) which permits contracts to be formed by conduct of both parties which recognizes the existence of such a contract. CAL. COM. CODE § 2204 (West 1964).

See also Associated Hardware Supply Co. v. The Big Wheel Distributing Co., 355 F.2d 114, 120-21 (3d Cir. 1966) (acquiescence in the seller's terms by performing and paying on those terms prohibits later denial of acquiescence in the seller's terms).

69. *See* note 25 *supra*.

70. 83 Cal. App. 3d at 827, 148 Cal. Rptr. at 133.

71. *See* note 59 *supra*.

72. 83 Cal. App. 3d at 827, 148 Cal. Rptr. at 133.

73. "Every contract by which the amount of damages to be paid, or other compensation to be made, for a breach of an obligation is determined in anticipation thereof, is to that extent void except as expressly provided in the next section." CAL. CIV. CODE § 1670 (West Supp. 1980) (superceded by *id.* § 1671 (West Supp. 1980). "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when from the nature of the case, it would be impracticable or extremely difficult to fix the actual damages." *Id.* § 1671.

74. (a) This section does not apply in any case where another statute expressly applicable to the contract prescribes the rules or standard for determining the validity of a provision in the contract liquidating the damages for the breach of the contract.

(b) Except as provided in subdivision (c), a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the

prior law and encourages the use and enforcement of liquidated damage terms except against a consumer in a consumer case.[75] The purpose of this part of the Comment is to focus on the *Crestwood* court's detrimental and incorrect usage of the Civil Code liquidated damage statute instead of the Commercial Code liquidated damage statute to determine the enforceability of the provision.[76]

The Law Revision comments to the new Civil Code section 1671 make it abundantly clear that in a sales transaction under the Commercial Code, section 2718 is to be used in judging the enforceability of liquidated damages terms.[77] In this respect the new Civil Code section 1671 merely clarifies and restates pre-existing law.[78] Although Commercial Code section 2718 is used

---

> circumstances existing at the time the contract was made.
> (c) The validity of a liquidated damages provision shall be determined under subdivision (d) and not under subdivision (b) where the liquidated damages are sought to be recovered from either:
> (1) A party to a contract for the retail purchase, or rental, by such party of personal property or services, primarily for the party's personal, family, or household purposes; or
> (2) A party to a lease of real property for use as a dwelling by the party or those dependent upon the party for support.
> (d) In the cases described in subdivision (c), a provision in a contract liquidating damages for the breach of the contract is void except that the parties to such a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

CAL. CIV. CODE § 1671 (West Supp. 1980).

75. *See* 1 WITKIN, SUMMARY OF CALIFORNIA LAW § 419A-L (8th ed. 1978 Supp.).

"Section 1671 is amended to provide in subdivision (b) a new general rule favoring the enforcement of liquidated damages provisions except against a consumer in a consumer case. In a consumer case, the prior law under former Sections 1670 and 1671, continued in subdivision (d) still applies." Law Revision Commission Comment foll. CAL. CIV. CODE § 1671 (West Supp. 1980).

76. "Therefore, the subject provision was void also as a penalty in violation of Civil Code sections 1670 and 1671." 83 Cal. App. 3d at 827, 148 Cal. Rptr. at 133.

77. "Subdivision (a) makes clear that Section 1671 does not affect other statutes that govern liquidation of damages for breach of certain types of contracts. E.g., Civil Code §§ 1675-1681 (default on contract to purchase real property) Com. Code § 2718 (sales transactions under the Commercial Code)." Law Revision Comment foll. CAL. CIV. CODE § 1671 (West Supp. 1980).

78. "Section 2718(1) applies to the sale of goods. Section 2102 expressly limits the division which includes 2718(1), to transactions in goods 'unless the context otherwise requires . . .'" Feary v. Aaron Burglar Alarm, Inc., 32 Cal. App. 3d at 556, 108 Cal. Rptr. at 244.

to judge the enforceability of a liquidated damage term once it becomes part of the contract between the parties, it is clear that initially Commercial Code section 2207 is the vehicle by which the liquidated damage term becomes incorporated in the agreement. Official Comment 5 to section 2207 of the Uniform Commercial Code specifically states that "a clause providing for interest on overdue invoices" is the very sort of term that becomes incorporated in the agreement without express consent by the buyer because it is the type of term that does not materially alter the contract between the parties.[79] The Comment specifically refers the reader to section 2718, indicating again that the purpose of section 2207 is to include the liquidated damage term automatically in a contract and that the purpose of section 2718 is only to judge the enforceability[80] of the liquidated damage term once it is found to be a part of the contract.[81]

Loizeaux Builders Supply Co. v. Donald B. Ludwig Co.[82] is apparently the only case in the United States which specifically addressed the issue of a "service charge" type of term. The court implied that if the disputed "service charge" had appeared on the invoice mailed to the defendant buyer, it would have become binding on him.[83] In allowing other disputed charges the court stated: "Defendant was alerted to these additional charges at the time he received his first invoice from plaintiff, which contained an itemization of these additional charges. If defendant disagreed with these charges, it was free to cease ordering its supplies from plaintiff."[84]

Moreover, Commercial Code section 2718[85] is phrased and interpreted differently from Civil Code sections 1670 and 1671.[86] Commentators have noted that because of this, there is no requirement that there be a reasonable endeavor by both of the

---

79. *See* note 67 *supra*.

80. In other words, whether it is "reasonable in light of the anticipated or actual harm caused by the breach." CAL. COMM. CODE § 2718(1) (West, 1964).

81. *See* note 67 *supra*.

82. 144 N.J. Super. 556, 366 A.2d 721 (1976).

83. *Id.* at 562-63, 366 A.2d at 725.

84. *Id.* at 561-62, 366 A.2d at 724 (citations omitted). The court also stated that "At the outset it should be noted that the contractual dealings between the parties extended for a period in excess of one year." *Id. See also* note 29 *supra*.

85. *See* notes 86 & 87 *infra*.

86. *See* note 73 *supra*.

parties to estimate a fair compensation for any loss that may be substained by reason of the buyer's failure to make timely payments as an indispensable prerequisite to the enforceability of the liquidated damage term in a commercial setting.[87] In other words, the seller may unilaterally select the amount of his estimated damages in the event of default by including his estimate on his own printed forms, and if the estimate is fair, and the buyer does not object, the buyer is bound regardless of whether he signs or agrees to anything.[88]

Section 2718 does not state that the parties must "consult" or expressly agree on a liquidated damage clause. The Code was enacted in recognition of the fact that in the quick pace of the commercial world business people do not always consult about everything.[89] Section 2207 is the code draftsmen's solution to

---

87. Section 2718 states:

> Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty. . . . Thus, the test is reasonableness of amount according to the code's criteria, and it appears that the clause will be enforced if the amount is reasonable either at the time the contract is made or at the time of trial. This goes farther than prior California cases in two major respects: First, there is no requirement that the amount selected *be a reasonable attempt to estimate damages.* Second, Section 2718 appears to validate clauses that appear to be reasoable in terms of anticipated damages *even where the court may believe that the damages are not difficult to ascertain at the time of trial,* What impact these changes will have is uncertain, because no *California* cases have interpreted this section.

CAL. COM. CODE § 2718 (West 1964). Sweet, *Liquidated Damages in California,* 60 CAL. L. REV. 84, 108 (1972) (emphasis added).

88. This is directly *contra* to the *Crestwood* holding. *See* note 52 *supra. See also* Comment 5 to CAL. COM. CODE § 2207 at note 67 *supra;* J. WHITE & R. SUMMERS, *supra* note 1, at 23.

89. *Id.* Also it is noted that CAL. COM. CODE § 2718 states: "Damages for breach by either party may be liquidated in the *agreement.*" (emphasis added). CAL. COM. CODE § 2718 (West 1964). The notes to § 2718 cross-reference the reader to the definition of "agreement" in CAL. COM. CODE § 1201 (West 1964). Thus, the scheme of § 2718 appears to assume the agreement has already been formed (e.g., pursuant to § 2207) and § 2718 is merely a device to judge the enforceability of the liquidated damage term once it has become a part of the agreement. Certainly in *Fox* it can be assumed that Mobil's customers merely signed the credit application and no active bargaining went on to determine the 1-½% late charge. Yet the court enforced it in a consumer transaction where a nonmerchant was involved. *See generally,* Fox v. Federated Dept. Stores, Inc., 94 Cal. App.

what has been termed "the battle of the forms," a phenomenon of the quick pace of the business world in which sales contracts are not always completely bargained for.[90]

In discussing a liquidated damages provision in a commercial setting the court in *Better Food Markets, Inc. v. American District Telegraph Co.*,[91] stated that,

---

3d 867, 156 Cal. Rptr. 893 (1979). Stricter requirements should not be required in transactions between merchants who are assumed to be more sophisticated than consumers. The liquidated damage clause pursuant to § 2718 may be judged in light of actual damages suffered after the fact. If § 2718 were interpreted to require express agreement at the outset, this would not only violate the express phraseology of the section, but would also fly in the face of the contract philosophy of the Commercial Code based upon the sophistication of merchants as opposed to consumers, the quick pace of the commercial world, and the Code's policy of automatic contracting. *See* CAL. COM. CODE §§ 2207, 1205, 2204 (West 1964)). If the drafters of the Commercial Code had intended express agreement for a liquidated damage clause, they would have required it in § 2718. *See* Murray, *supra* note 57, at 324. The merchant buyer is afforded protection against being bound by an unreasonable liquidated damage clause by virtue of his opportuity to preclude such clause in his purchase order. CAL. COM. CODE § 2207(2)(a) (West 1964)). Section 2207(2)(b) prohibits "automatic" terms which materially alter the contract, and § 2207(2)(c) allows timely objection if the customer does not agree with the seller's assessment of "an amount which is reasonable in light of anticipated or actual harm" that might be caused by the breach. *Id.* § 2718. Under the Commercial Code, there are other ways of "agreeing" besides face to face consultation across the bargaining table. *Id.* § 2207.

> In addition to the test supplied by Section 1671, courts have traditionally stated that 'The amount (fixed as damages) must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained.' This requirement implicitly allows the fact finder to examine the reasonableness of the bargaining process that settled upon the liquidated-damage figure. Until recently, however, courts have appeared to pay little attention to the process of negotiation involved in each transaction, particularly since the parties infrequently engage in active bargaining over damage estimates. Nevertheless, the growing awareness of the deleterious effects of adhesion contracts resulting from unequal bargaining situations has prompted at least one appellate court recently to require proof of informed consent to the specified liquidated damages as a factual prerequisite to the enforcement of such a clause.

O'Malley, *Late-Payment Charges: Meeting the Requirements of Liquidated Damages*, 27 STAN. L. REV. 1133, 1139 (1975) (footnotes omitted). Of course, in a commercial setting between sophisticated merchants pursuant to the "ease of contract" policy of the U.C.C. there is no need to protect the naive from the overbearing. In his article, Murray discusses how the drafters of the U.C.C. were very well aware of the choice of phraseology when they decided to include and exclude the word "expressly" in various provisions of the U.C.C. MURRAY, *supra* note 57, at 324.

90. *See* White, *supra* note 1, at 23.

91. 40 Cal. 2d 179, 253 P.2d 10 (1953).

> The plaintiff's contention that the agreed amount did not represent an endeavor by the parties to estimate the probable damage is based on evidence that the liquidated damages clause was part of the printed material in a form contract generally used by the defendant in dealing with subscribers such as the plaintiff, and that the defendant did not investigate the plaintiff's manner of conducting its business or the character and value of its stock. Nevertheless the parties agreed to the liquidated provisions, . . .[92]

By using the word "agreed" the court meant that the agreement for liquidation of damages appeared on the seller's form and was not hammered out over the bargaining table between the parties.[93] Moreover, there was "no evidence that they were not fully aware of circumstances making it desirable that liquidated damages be provided for."[94] The court went on to hold the liquidated damage clause enforceable despite the fact the parties did not actually consult about it.[95] It is commercially reasonable to assume that merchants understand that other merchants they deal with are harmed when payments are not made on time and that some compensation is appropriate for the harm done. A buyer who has paid service charges all along is less able to assert that he is not bound because he has not expressly agreed to such charges. This is clearly the case where a course of dealing has extended over a period of time.[96] However, as pointed out above,

---

92. *Id.* at 187, 253 P.2d at 15.
93. *Id.*
94. *Id.*
95. *Id.* at 188-89, 253 P.2d at 16.
96. (1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportuity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

CAL. COM. CODE § 2208(1) (West 1964).

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

. . . .

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

Commercial Code section 2207 will impose a late charge provision even where there has been but a single transaction.

Criteria For Enforcement Under the Commercial Code

Assuming we have a liquidated damage term added to the contract without express agreement between the parties, it will not be enforceable unless it meets the requirements of Commercial Code section 2718(1). The *Crestwood* court did not pass judgment on the reasonableness of a one and one-half percent charge since it stopped its inquiry with the erroneous express-agreement requirement.[97] *Fox*, on the other hand, found a one and one-half percent charge more than reasonable.[98] In addition to *Fox*, there are other authorities which address the question of judging the reasonableness of liquidated damage provisions.[99] There is a new liberal attitude by the legislature encouraging the use and enforcement of liquidated damage provisions.[100] There is also ample guidance for making a determination of whether or not a liquidated damage clause is reasonable.[101] Moreover, if a determination were made that a liquidated damage clause which exceeded the usury limit were reasonable and valid, it could not be argued that it violates the usury law.[102]

The average late charge in a sale of goods transaction appears to be one and one-half percent per month on the overdue balance. By comparison, the California State legislature, responding to *Clermont v. Secured Investment Corp.*[103] passed

---

Id. § 1205(1) and (3).

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

Id. § 2204(1).

97. Because the parties made no attempt to agree on any amount which would "estimate a fair average compensation for any loss that may be sustained" the clause fails to meet the requirements of sections 1670 and 1671; and it is not necessary for us to deal with the issues of "difficulty" or "impracticability" of estimation in advance.

83 Cal. App. 3d at 827, 148 Cal. Rptr. at 133 (citations omitted).

98. 94 Cal. App. 3d at 875, 156 Cal. Rptr. at 905.

99. *See* note 75 *supra*.

100. *Id; see* note 101 *infra*.

101. *See e.g.*, CAL. COM. CODE § 2718(1) (West 1964) and O'Malley, *supra* note 89 at 1143.

102. *See* note 63 *supra*.

103. 25 Cal. App. 3d 766, 102 Cal. Rptr. 340 (1972).

various statutes regulating the maximum amount of late charges that could be charged by various business entities.[104] The legislature explicitly recognized that late charges are not interest by mentioning the usury law in Business and Professions Code section 10242.[105] The legislature provided that a late charge on an overdue residential mortgage payment can be as much as ten percent of the monthly installment due,[106] which is an annual percentage rate of 120 percent! If other businesses can charge such large late charges, a nominal one and one-half percent per month does not appear unreasonable.

B. The Alternative of Actual Damages

Even if it were determined that the liquidated damage clause is void as being unreasonably high or for some other reason fails to meet the requirements of Commercial Code section 2718, and is therefore unenforceable, a buyer would not escape liability for damages as happened in the *Crestwood* case.[107] In *Garrett v. Coast & Southern Federal Savings & Loan Association,*[108] the court stated that,

> We do not hold herein that merely because the late charge provision is void and thus cannot be used in determining the lender's damages, the borrower escapes unscathed. He remains liable for the actual damages resulting from his default. The lender's charges could be fairly measured by the period of time the money was wrongfully withheld plus the administrative costs reasonably related to collecting and accounting for a late payment.[109]

A seller who is not paid on time may have to borrow against his accounts receivable to maintain cash flow, and the cost of borrowing money as of this writing is at an all time high. Therefore, a seller's damages when the buyer fails to pay on time could easily approach or exceed one and one-half percent per month on the unpaid balance because not only would he or she have to borrow money at a high rate of interest to maintain cash flow,

---

104. *See* O'Malley, *supra* note 89, at 1133, 1134, and 1144.
105. *Id.*
106. *Id.*
107. *See generally,* 83 Cal. App. 3d 819, 148 Cal. Rptr. 129.
108. 9 Cal. 3d 731, 511 P.2d 1197, 108 Cal. Rptr. 845 (1973).
109. *Id.* at 741, 511 P.2d at 1203, 108 Cal. Rptr. at 851 (footnote omitted).

but he or she would also incur additional expenses in pursuing delinquent accounts.[110]

In the absence of a contractual provision, the Code provides damages for the seller if the buyer fails to pay on time or otherwise breaches the contract.[111] Commercial Code section 1106(1) also provides that "[t]he remedies provided by this code shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed. . . ."[112] The *Crestwood* court overlooked this principle of law.[113] It appears the court should have decided whether the transaction involved forbearance or involved a liquidated damage clause. If the transaction involved forbearance, no damages could be awarded.[114] If the transaction involved a valid liquidated damage clause, Crestwood Lumber Company would get its

---

110. *See* O'Malley, *supra* note 89. *See also* CAL. CIV. CODE §§ 3300, 3302, 3387 for damages provided by statute for a breach of contract and wrongful withholding of money.

111. (1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price
(a) Of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and
(b) Of goods identified to the contract if the seller is unable after reasonable price or the circumstances reasonably indicate that such effort will be unavailing.
(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.
(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (Section 2610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for nonacceptance under the preceding section.
CAL. COM. CODE § 2709 (West 1964).
Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.
Id. § 2710.

112. *Id.* § 1106(1).

113. *See* note 107 *supra*.

114. *See* note 8 *supra*.

one and one-half percent per month service charge. If the late charge were deemed void for some reason, Crestwood would nonetheless be entitled to actual damages.

C. Other Alternatives

First, section 2209 of the Code contemplates that parties may modify or rescind their original contract, assuming extraneous requirements of section 2209 are met.[115] For example, *if* a buyer discovered he or she could not pay on time as originally agreed, the parties might reduce the matured obligation to a promissory note at eighteen percent per year. This course of conduct under section 2209 might be viewed as a modification or rescission of the original contract to convert to a credit sale on the installment plan; and, as noted above, an installment plan is not subject to the usury law.[116] Once the buyer has the goods in his or her possession and it is discovered that the buyer cannot pay for them on time, why should the seller be limited by the usury law on a deferred payment plan when other sellers get a much higher rate of return? For example, under the Unruh Act, eighteen percent is permitted when a seller starts with an installment plan at the outset.[117] There appears to be no reason for the parties to be bound by their original contract, and there is no reason to prohibit the conversion from a cash sale to a

---

115. (1) An agreement modifying a contract within this division needs no consideration to be binding.
(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.
(3) The requirements of the statute of frauds section of this division (Section 2201) must be satisfied if the contract as modified is within its provisions.
(4) Although an attempt at modification or rescission does not satisfy the requiremerements of subdivision (2) or (3) it can operate as a waiver.
(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.
Cal. Com. Code § 2209 (West Supp. 1979).

116. 83 Cal. App. 3d at 825, 148 Cal. Rptr. at 132.

117. Cal. Civ. Code §§ 1801—1812.10 (West Supp. 1980).

credit sale. The distinction between starting out with a cash sale agreement and converting to a credit sale appears so fine as to amount to a distinction without a difference. Secondly, the late charge term may be nothing more than fair compensation for services rendered in managing a credit department in its pursuit of the collection of delinquent accounts. Here, it would appear that the usury and liquidated damage laws would be inapplicable.[118] Finally, it is worthwhile to note that the court in *Abbot v. Stevens*[119] stated that "[t]o infect a transaction with the taint of usury, there must exist the corrupt purpose on one side to lend money at a usurious interest and on the other side to borrow on usurious terms dictated by the lender."[120]

It can be assumed that Crestwood Lumber Company, as well as other sellers of goods similarly situated, was not in the business of "loan-sharking" but was pursuing the business of selling lumber and deserves to be reasonably compensated when a customer does not pay on time. The *Crestwood* decision rests on highly technical points of law and falls short of dealing with the realities of the commercial world.

CONCLUSION

The *Crestwood* court's analysis that a one and one-half percent late charge on overdue accounts amounts to forbearance of collection of a matured debt is faulty. Even if the *Crestwood* analysis were correct, the usury problem could be easily circumvented by simply rephrasing the invoices to avoid the appearance of forbearance. Moreover, there are two appellate districts in conflict over the issue of how to characterize late charges in the cash sale situation. The first district (in *Crestwood)* characterized it as interest in violation of the usury law, and the second district (in *Fox)* characterized it as a valid liquidated damage provision. If the usury hurdle is cleared, a question arises as to whether the liquidated damage term may become part of the contract without express agreement between the parties. In general, many terms may be imposed without express agreement be-

118. *See* 43 Ops. Att'y Gen. 196, 197 (1964); Haines v. Commercial Mortgage Co., 200 Cal. 609, 255 P. 805 (1927) (discusses charges for actual services rendered as permissible unless merely disguised as "interest").

119. 133 Cal. App. 2d 242, 284 P.2d 159 (1955).

120. *Id.* at 249, 284 P.2d at 162.

tween merchants pursuant to various provisions of the California Commercial Code, most notably section 2207. There appears to be no reason why a liquidated damage type provision should not be automatically included if requirements of section 2207 are met. Once the liquidated damage term is deemed included in the agreement between the parties, section 2718 must then be consulted to judge whether it will be enforced, that is, is it reasonably related to anticipated or actual damages? If the rate of liquidated damages exceeds the new usury limit, the provision would not be invalid because liquidated damages are not subject to the usury law. Even if the liquidated damage term fails, the seller may nevertheless recover actual damages which may well exceed eighteen percent per annum in today's economy.