CHAPTER 8

Contracts and Commercial Law

SURVEY STAFF†

§ 8.1. Consumer Law — Chapter 93A — Employment Contracts.* Massachusetts General Laws chapter 93A, commonly known as the Massachusetts Consumer Protection Act (the "Act"),[1] declares in section 2 that unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.[2] Section 9 of the Act provides a private cause of action to consumers who suffer a loss as a result of such unlawful practices by business persons.[3] In 1972 section 11 was inserted[4] to extend the same right to business persons.[5] Section 11 thus provides a private cause of action to business persons who suffer a loss as a result of unfair or deceptive acts or practices by other business persons.[6]

Availability of a remedy under chapter 93A, section 11 depends in part on whether the parties are engaged in "any trade or commerce" with respect to the transaction at issue.[7] The private cause of action created by section 11 has been held to be available to a prospective advertiser against a newspaper,[8] by a client against his booking agency,[9] and by the owner of

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§ 8.1. [1] *See* Manning v. Zuckerman, 388 Mass. 8, 8, 444 N.E.2d 1262, 1262-63 (1983).

[2] G.L. c. 93A, § 2(a). *See* Slaney v. Westwood Auto, Inc., 366 Mass. 688, 694, 322 N.E.2d 768, 773 (1975).

[3] G.L. c. 93A, § 9(1).

[4] Acts of 1972, c. 614, § 2.

[5] Nader v. Citron, 372 Mass. 96, 96-97, 360 N.E.2d 870, 871-72 (1977). Section 11 provides in pertinent part:

> Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or any unfair or deceptive act or practice declared unlawful by section two . . . may . . . bring an action in the superior court, . . . whether by way of original complaint, counterclaim, cross-claim or third-party action for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

[6] *Id.*

[7] *See supra* note 5; Begelfer v. Najarian, 381 Mass. 177, 190, 409 N.E.2d 167, 175 (1980).

[8] PMP Assocs. v. Globe Newspaper Co., 366 Mass. 593, 321 N.E.2d 915 (1975).

[9] Nader v. Citron, 372 Mass. 96, 96, 360 N.E.2d 870, 870 (1977).

a duplex house against a contractor.[10] In some cases, however, the plaintiff has been denied a remedy under section 11 because the parties or the transaction at issue were found not to meet the statutory requirement of "trade or commerce."[11] Often relying on language from section 9 cases, the courts in these cases have suggested that the statutory requirement is not met where the transaction complained of is strictly private in nature and is in no way in the ordinary course of a trade or business.[12]

Twice during the *Survey* year the Supreme Judicial Court held that the distinction between a private transaction and one that occurs in the conduct of any trade or commerce excludes transactions involving employer-employee relationships from the scope of chapter 93A. In *Manning v. Zuckerman*,[13] the Court held that unfair or deceptive acts committed in the context of an employer-employee relationship do not occur in the ordinary course of any trade or commerce as contemplated by the statute.[14] One month later, in *Weeks v. Harbor National Bank*,[15] the Court reaffirmed its decision in *Manning*, holding that an employee's allegations of unfair and deceptive acts committed by his employer in discharging him were outside the scope of chapter 93A, section 11.[16]

In *Manning*, the plaintiff was employed by Atlantic Monthly Company, a co-defendant, as an editor of its magazine from 1966 to 1980.[17] In 1980, the defendant Zuckerman sought to purchase all the company's outstanding stock.[18] He assured the stockholders that Manning would remain as editor of the magazine.[19] The company and Manning signed an employment contract to that effect in April, 1980, at which time Zuckerman effected his purchase of the stock.[20] Zuckerman personally guaranteed

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[10] Linthicum v. Archambault, 379 Mass. 381, 398 N.E.2d 482 (1979).

[11] Begelfer v. Najarian, 381 Mass. 177, 191, 409 N.E.2d 167, 176 (1980) (defendant creditors on a promissory note, who ran a pharmacy as their usual business, not in trade or commerce as regards the note); Second Boston Corp. v. Smith, 377 Mass. 918 (1979) (order for summary disposition stating that claim of employer against employee for breach of duties of employment not a section 11 claim); Newton v. Moffie, 13 Mass. App. Ct. 462, 476, 434 N.E.2d 656, 659 (1982) (dispute between partners regarding breach of fiduciary duty not section 11 claim).

[12] *See* Begelfer v. Najarian, 381 Mass. 177, 190, 409 N.E.2d 167, 175-76 (1980) (citing Lantner v. Carson, 374 Mass. 606, 608, 373 N.E.2d 973, 974-75 (1978)). *Lantner* held that section 9 does not apply to a homeowner's sale of her private residence because such a transaction is "strictly private in nature" and not in the ordinary course of trade or business. *Id.* at 607-08, 373 N.E.2d at 974.

[13] 388 Mass. 8, 444 N.E.2d 1262 (1983).

[14] *Id.* at 14-15, 444 N.E.2d at 1266.

[15] 388 Mass. 141, 445 N.E.2d 605 (1983).

[16] *Id.* at 144, 445 N.E.2d at 607.

[17] 388 Mass. at 9, 444 N.E.2d at 1263.

[18] *Id.*

[19] *Id.*

[20] *Id.*

payment of certain "additional retirement benefits" in the contract if it were to be terminated for any reason other than for cause.[21]

Despite his earlier assurances, Zuckerman repeatedly interfered with Manning's editorial activities after taking control of the company.[22] On October 1, 1980, the company and Manning executed a new contract that terminated the April 1980 agreement.[23] Under the new contract, Manning received a leave of absence through May 31, 1981, and agreed to consult with the Atlantic staff from time to time during October 1980.[24] Pursuant to the terms of the new agreement, Manning was to be treated as an employee for the purpose of pension plan benefits and health coverage.[25] Unless the parties mutually agreed "to extend his employment beyond May 31, 1981," however, all reciprocal obligations would cease except for certain retirement provisions, some of which were personally guaranteed by Zuckerman.[26] When the first retirement benefit payment came due in November 1981, both defendants refused to pay it. Consequently, Manning commenced his action under section 11 of chapter 93A, alleging that the defendants committed unfair and deceptive acts in connection with the agreement terminating his employment.[27] The defendants moved for dismissal of the section 11 claim, asserting failure to state a cause of action upon which relief could be granted.[28] That motion was allowed, and the plaintiff applied for direct appellate review.[29] The Supreme Judicial Court affirmed the trial court's dismissal of the section 11 claim.[30]

In its opinion the Court first considered whether the Legislature intended, in section 11, to grant a cause of action to a former employee against his former employer in a dispute arising out of the employment relationship.[31] Manning had characterized his position subsequent to the October 1980 contract as that of an independent consultant in business for himself.[32] The Court, however, determined that Manning was an em-

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 10, 444 N.E.2d at 1263.

[25] *Id.*

[26] *Id.*

[27] *Id.* Manning also sought a declaratory judgment concerning the contractual rights and obligations of the parties under G.L. c. 231A, §§ 1, 5, and damages for breach of contract. *Manning*, 388 Mass. at 8 n.2, 444 N.E.2d at 1263 n.2. The Court has noted that a plaintiff seeking relief under section 11 need not make a written demand on the defendant as a condition precedent to bringing an action. *See* Nader v. Citron, 372 Mass. 96, 99, 360 N.E.2d 870, 873 (1977).

[28] *Manning*, 388 Mass. at 9, 444 N.E.2d at 1263.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 10-11, 444 N.E.2d at 1264.

[32] *Id.*

ployee of the company at the times relevant to his section 11 action.[33] According to the Court, the words of the agreement revealed that he was an employee through May 31, 1981.[34] The agreement also stated that Manning would be terminated on May 31, 1981, unless the parties mutually agreed "to extend his employment."[35] The Court concluded that the alleged unfair and deceptive acts occurred in the context of the parties' employment relationship, "and not in an arms-length commercial transaction between distinct business entities."[36]

Finding that the plaintiff was an employee, the Court then considered the general question of whether employment contracts constituted trade or commerce within the meaning of the Act.[37] While the Court noted that chapter 93A is broad in scope, it concluded that the Legislature did not intend the statute to embrace employment contract disputes.[38] The Court interpreted the reference in section 11 to unfair or deceptive acts committed by "another person who engages in any trade or commerce" to refer to marketplace transactions, not to claims arising in the relationship between an employee and the organization of which he is a member.[39] Although the statutory definition of trade or commerce includes the "offering for sale . . . any services," the Court held that the services contemplated were those offered for sale to the public in a business transaction, and not those offered by an employee to an employer.[40] An employee and an employer, the Court stated, "are not engaged in trade or commerce with each other."[41]

The Court continued its analysis by considering the employer-employee relationship within the general context of the Act.[42] The Court pointed to the broad language of the statute that embraces "any trade or commerce

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[33] *Id.* at 11, 444 N.E.2d at 1264.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 13, 444 N.E.2d at 1265.

[38] *Id.* at 12, 444 N.E.2d at 1265. The Court noted that employees enjoy comprehensive protections from abuses of the employment relationship, both under state law and under the National Labor Relations Act. *Id.* at 11-12, 444 N.E.2d at 1264.

[39] *Id.* at 13, 444 N.E.2d at 1265.

[40] *Id.* The Court also relied on the definitional section of the Act, section 1(b), to find that employment agreements do not constitute trade or commerce. *Id.* G.L. c. 93A, § 1(b) provides:

> 'Trade' and 'commerce' shall include the advertising, the offering for sale, rent or lease, the sale, rent, lease or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this commonwealth.

[41] 388 Mass. at 14, 444 N.E.2d at 1265.

[42] *Id.*

directly or indirectly affecting the people of this commonwealth."[43] Such broad language, according to the Court, indicates the Legislature's intention was to protect the public as a whole.[44] The Court interpreted that intent as referring to unfair or deceptive acts or practices in the marketplace.[45] In contrast, contract disputes between an employer and an employee, the Court stated, are principally "private in nature."[46] The Court concluded that claims of employees against employers are excluded from the protection of the Act.[47] The Court therefore affirmed the trial judge's dismissal of the plaintiff's section 11 claim.[48]

In *Manning* the Court halted the plaintiff's attempted expansion of section 11 into the area of employment disputes. The Court reached its decision regarding the proper scope of section 11 by reference to the broad purposes of chapter 93A — to improve commercial relations between business persons and between consumers and businesses.[49] Case law under section 9 had already established that commercial relations between consumers and businesses do not include private transactions.[50] *Manning* showed that transactions within entities are also outside the scope of commercial relationships between business persons as covered by section 11. In thus distinguishing private from commercial activity under section 11, the Court focused on two factors: the character of the parties and the character of the transaction. Emphasis on these factors reinforced the principle that a section 11 dispute arises only between persons engaged in an arms-length transaction in a business context. A dispute is private under the statute if it arises within the business entity itself. In addition to this general outline of the scope of section 11, the Court gave special consideration to the particular relationship between employer and employee. *Manning* establishes, as a matter of law, that the employment relationship is not covered by chapter 93A.[51]

This conclusion is borne out by the Supreme Judicial Court's decision in a second employment contract case arising one month after *Manning*.

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[43] *Id.*, (quoting G.L. c. 93A, § 1(b)).

[44] *Id.* at 14, 444 N.E.2d at 1266.

[45] *Id. See* Rice, *New Private Remedies for Consumers: The Amendment of Chapter 93A*, 54 MASS. L.Q. 307, 308 (1969).

[46] 388 Mass. at 14, 444 N.E.2d at 1255.

[47] *Id.* at 14-15, 444 N.E.2d at 1255. *See* Second Boston Corp. v. Smith, 377 Mass. 918 (1979) (summary dismissal of a claim by an employer against its employee for breach of duty as being outside the scope of G.L. c. 93A).

[48] 388 Mass. at 15, 444 N.E.2d at 1266.

[49] *Id.* at 12, 444 N.E.2d at 1265.

[50] Lantner v. Carson, 374 Mass. 606, 607-08, 373 N.E.2d 973, 974-75 (1978). *See supra* note 12.

[51] 388 Mass. at 15, 444 N.E.2d at 1266.

In *Weeks v. Harbor National Bank*,[52] the Court held that an employee's section 11 claim that his employer committed unfair and deceptive acts in discharging him was outside the scope of chapter 93A.[53]

In *Weeks*, the plaintiff accepted employment with the defendant bank after the employer promised that it would have a pension or retirement plan in effect by the end of the year.[54] The defendant, however, never formulated or implemented any such plan.[55] Two years later, the bank's major shareholders sold their controlling interests in the bank.[56] The new management reviewed Weeks' performance and concluded that he lacked the requisite skills to hold his position.[57] Subsequently, Weeks was asked to resign.[58] Weeks brought suit against the employer in superior court, alleging, among other counts, violation of chapter 93A, section 11.[59] The judge ruled, as a matter of law, that section 11 did not apply to the employment relationship presented in the case.[60] The Supreme Judicial Court granted a request for direct appellate review.[61]

Relying on its decision in *Manning*, the Court held that the plaintiff had no section 11 remedy for his dispute with his employer.[62] The Court found that the alleged deceptive acts occurred in the context of the parties' employer-employee relationship and not in a commercial transaction between distinct business entities.[63] As an employee, according to the Court, the plaintiff failed to meet the section 11 requirement that he be a business person engaged in trade or commerce with another business person.[64]

Manning, reinforced by *Weeks*, thus demonstrates the Court's unwillingness to extend chapter 93A to disputes arising in the context of the employment relationship. Practitioners representing employees in such disputes should turn instead to the recent Massachusetts case law involving employment at will. The Court itself in *Manning* cited some of those cases in support of its denial of a chapter 93A cause of action.[65] This

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[52] 388 Mass. 141, 445 N.E.2d 605 (1983).
[53] *Id.* at 144, 445 N.E.2d at 607.
[54] *Id.* at 143, 445 N.E.2d at 606-07.
[55] *Id.* at 143, 445 N.E.2d at 607.
[56] *Id.*
[57] *Id.* at 143-44, 445 N.E.2d at 607.
[58] *Id.* at 144, 445 N.E.2d at 607.
[59] *Id.* at 142, 445 N.E.2d at 606.
[60] *Id.* at 144, 445 N.E.2d at 607.
[61] *Id.* at 141, 445 N.E.2d at 605.
[62] *Id.* at 144, 445 N.E.2d at 607.
[63] *Id.*
[64] *Id.*
[65] 388 Mass. at 11-12, 444 N.E.2d at 1264. *See, e.g.*, Gram v. Liberty Mut. Ins. Co., 384 Mass. 659, 429 N.E.2d 21 (1981) (employee at will entitled to identifiable, reasonably anticipated future compensation, based on past services, after discharge without cause);

reference by the Court perhaps suggests that any future expansion in the protection of non-union employees from wrongful discharge will occur in the area of employment at will.

§ 8.2. Real Estate Options To Purchase Leased Premises.* An option is a unilateral contract which does not bind the optionee to do anything, but grants him the right to accept or reject the optionor's offer in accordance with the terms of the option agreement.[1] It has long been recognized at common law that when an option is exercised in conformity with its terms, it automatically ripens into a bilateral purchase and sale contract, which is binding upon both parties and can, in appropriate circumstances, be enforced by specific performance.[2] In order to exercise the option effectively, the optionee must act unconditionally and in precise accord with the agreed terms of the option.[3] Options for the sale of real estate, for example, may require acceptance by a promise to pay the purchase price or by actual tender of the purchase price.[4] Timely payment of the price is a condition for the effective exercise of the option only if the option agreement unequivocally requires actual tender of the purchase price before the termination date of the option.[5]

These settled principles are reaffirmed in a number of Massachusetts cases. In *Cities Service Oil Co. v. National Shawmut Bank*,[6] for example, a lease granted the lessee an option to purchase the leased premises during the term of the lease.[7] The option could be exercised by the lessee giving to the lessor written notice of its intention to purchase and making a down payment of $200 "on notice of intention to exercise the option."[8] On the date of expiration of the lease, the lessee mailed a letter to the lessor, accompanied by a certified draft for $200, which was not received by the lessor until the next day.[9] The lessor refused to convey the property.[10] The Supreme Judicial Court held that the option had not been

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Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977) ("bad faith" termination of employment at will contract was actionable breach of contract).

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§ 8.2. [1] 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 61B (3d ed. 1961 & Supp. 1983).

[2] *Id.* § 61A; 1A A. CORBIN, CONTRACTS § 259 (1963 & Supp. 1981).

[3] 1 S. WILLISTON, *supra* note 1, § 61D, at 205-06; 1A A. CORBIN, *supra* note 2, at § 264, at 523.

[4] 1 S. WILLISTON, *supra* note 1, § 61D, at 205-06.

[5] *Id.* at 206.

[6] 342 Mass. 108, 172 N.E.2d 104 (1961).

[7] *Id.* at 109, 172 N.E.2d at 105.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 109-10, 172 N.E.2d at 105.

timely exercised.[11] The Court found that the language of the option required *both* the giving of notice *and* the payment of $200 accompanying the notice of exercise of the option.[12] The Court construed this condition as mandating payment in legal tender *prior to* the expiration of the lease.[13] Since the draft was not legal tender and was not received before the term of the lease had expired, the Court held that no bilateral contract of purchase and sale arose between the lessee and the lessor.[14] The holding in *Cities Service* implied that if payment by means of legal tender had been made so as to be received before the expiration of the lease, the option would have been properly exercised despite the fact that both the balance of the payment and the conveyance of title would have occurred *after* the expiration of the lease.[15]

An express time limitation for the conveyance of the leased premises to the lessee following notice of its intention to exercise the purchase option was the issue in *C. & W. Dyeing & Cleaning Co. v. De Quattro*.[16] In that case the lease provided that if the lessee gave two months written notice to the lessor of its intention to purchase the leased premises, the lessor would convey the property to the lessee on or before the expiration of such notice.[17] The lessee gave the lessor written notice of its intention to exercise the option more than two months prior to the expiration of the lease term.[18] The Court held that as soon as the lessee gave written notice within the agreed time, it duly accepted the lessor's irrevocable offer to convey the leased premises and a bilateral purchase and sale agreement came into effect at that moment.[19] The Court then distinguished between exercise of the option and consummation of the purchase and sale contract, and found that the lease contained the further condition that the contract be performed on or before the expiration of the two months notice and, regardless of when the option was exercised, not later than five years from the commencement of the term of the lease.[20] Since the purchase and sale contract could not be consummated within the stated time limits because of the lessee's inability to pay the purchase price, the Court held that the lessor was not thereafter obligated to convey the property.[21]

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[11] *Id.* at 110, 172 N.E.2d at 105.
[12] *Id.* at 110-11, 172 N.E.2d at 106.
[13] *Id.* at 111, 172 N.E.2d at 106.
[14] *Id.*
[15] 17 Mass. App. Ct. 262, 266, 457 N.E.2d 668, 671 (1983).
[16] 344 Mass. 739, 184 N.E.2d 61 (1962).
[17] *Id.* at 740, 184 N.E.2d at 62-63.
[18] *Id.* at 740, 184 N.E.2d at 63.
[19] *Id.* at 741, 184 N.E.2d at 63.
[20] *Id.* at 741-42, 184 N.E.2d at 64.
[21] *Id.* at 742, 184 N.E.2d at 64.

A slight variation on the same basic pattern was discussed in *American Oil Co. v. Cherubini*,[22] where the lessee was given an option to purchase the demised premises at any time during the term of the lease for an agreed price.[23] The option could be exercised by sending written notice to the lessor.[24] The agreement further provided that settlement of the purchase price and conveyance of the property to the lessee were to be made within sixty days of the giving of notice.[25] The Court held that the option had been effectively exercised by the sending of written notice within the stated time, without concomitant tender of the purchase price.[26] According to the Court, the obligation of the lessee to pay the purchase price and the obligation of the lessor to convey the premises by deed were concurrent and mutually dependent, and tender of payment was not required to exercise the option.[27]

During the *Survey* year, the Massachusetts Court of Appeals in *Roberts-Neustadter Furs, Inc. v. Simon*[28] reaffirmed these principles in the case of an option to purchase contained in a real estate lease. The appeals court construed the language in the option regarding manner of acceptance strictly and held that when the lessee/optionee exercises the purchase option in exact accord with its terms, the lessor/optionor becomes automatically bound to convey the leased premises.[29]

In *Roberts-Neustadter Furs, Inc. v. Simon*, the plaintiff-lessee leased storefront property from the defendant-lessor for a five-year term beginning in 1975.[30] The lease contained an option to purchase the land and building containing the leased premises at any time before the expiration of the initial five-year term of the lease.[31] The lease agreement provided that the option should be exercised "by notice in writing stating the date on which title shall pass; in no event, however, shall the date specified by lessee for passage of title be less than sixty (60) days or more than ninety (90) days from the date of giving such notice."[32]

One day before the termination of the 1975 lease and after three months of negotiations, the parties signed a new lease.[33] Immediately thereafter and before the expiration of the initial five-year lease term, the lessee

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[22] 351 Mass. 581, 222 N.E.2d 892 (1967).
[23] *Id.* at 582, 222 N.E.2d at 893.
[24] *Id.* at 583, 222 N.E.2d at 893.
[25] *Id.* at 583, 222 N.E.2d at 893-94.
[26] *Id.* at 585, 222 N.E.2d at 894.
[27] *Id.* at 585, 222 N.E.2d at 895.
[28] 17 Mass. App. Ct. 262, 457 N.E.2d 668 (1983).
[29] *Id.* at 269, 457 N.E.2d at 673.
[30] *Id.* at 263, 457 N.E.2d at 669.
[31] *Id.*
[32] *Id.* at 263, 457 N.E.2d at 669-70.
[33] *Id.*

notified the lessor in writing that it was exercising its option to purchase the premises for the agreed price.[34] The lessee's letter designated a date eighty-five days from the date of the letter, as the closing date.[35] On that date the lessee tendered the purchase price and requested passage of title.[36] The lessor refused to convey the property on the ground that the option had not been properly and effectively exercised by the lessee.[37]

The lessee brought an action against the lessor for specific performance of the option contract.[38] In response, the lessor argued that the terms of the option required the lessee both to give written notice of intent to exercise the option and to complete the conveyance prior to the termination of the initial five-year term of the lease.[39] As stated above, notice had been properly given according to the contract, but the conveyance was scheduled for after the termination of the lease term.[40] The Superior Court for Suffolk County agreed with the lessor and granted his motion for summary judgment.[41] The plaintiff-lessee appealed and the appeals court reversed.[42] The appeals court found that the unequivocal language of the option provision gave the lessee the right to exercise the option simply by giving written notice at any time until the last day of the initial five-year lease term and that the lessee exercised the option in strict compliance with its terms in a timely way.[43] The court therefore held that a bilateral purchase and sale contract was formed.[44]

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[34] *Id.*

[35] *Id.* at 263-64, 457 N.E.2d at 670.

[36] *Id.* at 265, 457 N.E.2d at 670.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 265, 457 N.E.2d at 670. The lessor also counterclaimed that if judgment should be rendered in favor of the plaintiff-lessee, directing the defendant-lessor to convey the property to it, then the lessor should be entitled to reimbursement of the sum of $25,000 spent to improve the leased premises in reliance on the lessee's conduct in negotiating a new lease, because the lessor would not have made those expenditures had he known that the lessee intended to exercise the option. *Id.*

[40] *See supra* notes 35-37 and accompanying text.

[41] 17 Mass. App. Ct. at 263, 457 N.E.2d at 669.

[42] *Id.* The case was remanded to the lower court for determination of the appropriate remedy. *Id.*

[43] *Id.* at 269, 457 N.E.2d at 673.

[44] *Id.* The Appeals Court noted that ordinarily in circumstances such as the ones in the present case the lessee would be entitled to specific performance of the option contract. *Id.* at 270, 457 N.E.2d at 673. The court stated, however, that a judge has a reasonable range of discretion to grant or deny specific performance and that specific performance can be refused if granting it would impose undue hardship upon one party to the agreement or permit the other party to obtain an inequitable advantage. *Id.* (quoting Freedman v. Walsh, 331 Mass. 401, 406, 119 N.E.2d 419, 423 (1954)). The court found that the lessor's counterclaim, *see supra* note 19, raised the question whether specific performance ought to be denied on equitable grounds because of the lessee's conduct in negotiating a new lease and delaying its exercise of the purchase option. 17 Mass. App. Ct. at 270, 457 N.E.2d at 673.

The court in *Roberts-Neustadter* distinguished between options that require purchase within a specified period of time but make no reference to notice as a method of acceptance, and options that expressly provide that the optionee can exercise the option by giving notice to the optionor.[45] In the former case, under Massachusetts law, the option can only be exercised by actual tender of the agreed purchase price within the time specified in the option.[46] In the latter case, acceptance of the offer is accomplished by giving written notice in the manner and within the time period specified in the option.[47] The option in *Roberts-Neustadter* was of the second type.[48]

The appeals court in *Roberts-Neustadter* construed the option agreement as containing two time limitations.[49] The first limitation was that the lessee could only exercise the option by giving written notice within the initial five-year term of the lease.[50] No other condition was imposed for the effective exercise of the option.[51] The second limitation was that the lessee specify in his notice the time for passage of title, which was to be neither less than sixty days nor more than ninety days from the giving of such notice.[52] This second limitation, according to the court, related to the consummation of the purchase and sale contract created by the effective exercise of the lessee's option and not to the exercise of the option itself.[53] As in *American Oil Co.*, the agreement differentiated between the effective exercise of the option and the consummation of the closing.[54] In

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Since the lessee's conduct caused the lessor to expend a considerable amount of money for improvements, the question also arose whether specific performance could be granted, but made conditional upon the lessee's paying the reasonable value of the improvements made by the lessor. *Id.* In light of the disputed question of material fact raised by the counterclaim, which had not been addressed by the lower court, the Appeals Court remanded the case to the superior court. *Id.*

[45] *Id.* at 265, 457 N.E.2d at 670-71.

[46] *Id.* at 265, 457 N.E.2d at 670 (quoting Hurd v. Cornier, 358 Mass. 736, 267 N.E.2d 116 (1971)); *see also* Hunt v. Bassett, 269 Mass. 298, 168 N.E. 783 (1929); Mayer v. Boston Metropolitan Airport, Inc., 355 Mass. 344, 244 N.E.2d 568 (1969).

[47] *See, e.g.*, American Oil Co. v. Cherubini, 351 Mass. 581, 222 N.E.2d 892 (1967); C. & W. Dyeing and Cleaning Co. v. De Quattro, 344 Mass. 739, 184 N.E.2d 61 (1962); Cities Service Oil Co. v. National Shawmut Bank, 342 Mass. 108, 172 N.E.2d 104 (1961).

[48] American Oil Co. v. Cherubini, 351 Mass. 581, 222 N.E.2d 892 (1967); C. & W. Dyeing and Cleaning Co. v. De Quattro, 344 Mass. 739, 184 N.E.2d 61 (1962); Cities Service Oil Co. v. National Shawmut Bank, 342 Mass. 108, 172 N.E.2d 104 (1961), which the court cited repeatedly in *Roberts-Neustadter*, all involved options of the second type as well.

[49] 17 Mass. App. Ct. at 268, 457 N.E.2d at 672.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 268-69, 457 N.E.2d at 672.

[53] *Id.*

[54] *Id.* at 268-69, 457 N.E.2d at 672-73.

contrast to the *C. & W. Dyeing & Cleaning* case, however, there was no requirement that *closing* take place before the expiration of the lease.[55]

The court also construed the language of the option as giving the lessee the right to exercise its option by giving notice until the *very end* of the initial five-year term of the lease.[56] Consequently, the court found that the lessee had timely exercised its option in strict compliance with its terms, thereby creating a bilateral purchase and sale contract to be performed on the date indicated by the lessee, which was in accordance with the option's requirement.[57]

In *Roberts-Neustadter*, the appeals court clearly showed that option agreements must be construed strictly and in close adherence with the ascertainable meaning of their language.[58] The court noted that if the optionor intends to impose additional conditions and limitations on the manner or time for the effective exercise of the option, he can easily insert express language to that effect in the text of the option.[59] In the absence of express provisions, the court will not only refuse to imply additional requirements[60] or to hear parol evidence explaining the option's meaning,[61] but it will also take such an absence as an indication that no additional requirements were actually intended.[62] This approach is supported by the leading commentators[63] and is consistent with Massachusetts precedent.

Practitioners should be appreciative of the court's strict construction of option agreements. Adherence to the express language of the option adds certainty to the arrangements made between the parties and prevents either party from trying to take advantage of favorable shifts in the market while trying to shield themselves from unfavorable ones. A strict rule of interpretation also promotes careful and skillful drafting on the part of counsel to achieve the exact allocation of risk as to market prices that is agreed upon by the parties to the contract. The incentive to use ambiguous language that lends itself to self-serving arguments is minimized by

[55] *Id.* at 268-69, 457 N.E.2d at 672.

[56] *Id.* at 268-69, 457 N.E.2d at 673. The court distinguished between the rights of the lessee to exercise the option "right up to the last day" of the lease term, thereby giving rise to an enforceable bilateral purchase and sale contract, and the rights of the lessee to obtain specific enforcement of said contract, given that the lessee "strung [the lessor] along in negotiating a new lease causing the expenditure of a considerable amount of money for improvements." *Id.* at 270, 457 N.E.2d at 673. The court stated that although the enforceability of the contract was not in doubt, relief in the form of specific enforcement might be refused on equitable considerations. *Id.* at 270-71, 457 N.E.2d at 673.

[57] *Id.* at 269, 457 N.E.2d at 673.

[58] *Id.* at 264-65, 269 n.3, 457 N.E.2d at 670, 673 n.3.

[59] *Id.* at 269 n.3, 457 N.E.2d at 673 n.3.

[60] *Id.*

[61] *Id.* at 269-70 n.4, 457 N.E.2d at 673 n.4.

[62] *Id.* at 269 n.3, 457 N.E.2d at 673 n.3.

[63] 1 S. WILLISTON, *supra* note 1, at § 61D; 1A A. CORBIN, *supra* note 2, at § 264.

the risk that courts will refuse to look beyond the four corners of the agreement.

At the same time, however, it would be naive to believe that strict construction will provide an answer for every question. The *Roberts-Neustadter* court acknowledged that unforeseen and probably unintended results are often produced by a strict interpretation of the language employed by the parties. The court noted that interpreting the lease in question as giving the lessee the right to exercise its option up to the very end of the lease term, while postponing the closing for sixty to ninety days, left a "two or three months hiatus" between the expiration of the lease and the consummation of the purchase and sale contract.[64] According to the court, this occurrence "must be deemed to have been within the contemplation of the parties"[65] and the lessee would clearly be "liable for rent (probably at the rate established by the lease)."[66] The court, however, could point to no language in the agreement making express provision for this conclusion. A plausible argument could be made that the absence of an express provision indicated an implied understanding between the parties that the option should be exercised in time to allow the closing to take place before the expiration of the term of the lease. The court, however, was unwilling to read this understanding into the option agreement.

In conclusion, courts in Massachusetts will continue to construe the language of option agreements strictly. When the optionee exercises the option in accord with the "ascertainable meaning" of the option terms, Massachusetts courts will hold that the optionor is bound to convey the property covered by the agreement, even though the consequences of the court's construction of the agreement would justify an argument that different terms were actually intended by the parties. The courts' refusal to look beyond the "four corners" of an option agreement creates an incentive for the parties and their counsel to draft option contracts carefully and unambiguously to reflect the exact allocation of risk agreed upon by the parties.

§ 8.3. Security Interests in Aircraft — Notice of Prior Interest — Federal Preemption of G.L. c. 109.* During the *Survey* year, in *South Shore Bank v. H & H Aircraft Sales, Inc.*[1] the Massachusetts Appeals Court considered the issue of whether a security interest in an aircraft registered with

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[64] 17 Mass. App. Ct. at 269-70 n.4, 457 N.E.2d at 673 n.4.

[65] *Id.*

[66] *Id.*

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§ 8.3. [1] 16 Mass. App. Ct. 472, 452 N.E.2d 276 (1983).

the Federal Aviation Administration ("FAA") takes priority over a prior, albeit unregistered, sale of the aircraft to a third party. In reaching its decision, the court applied the United States Supreme Court's holding in *Philko Aviation, Inc. v. Shacket*[2] that section 503 of the Federal Aviation Act of 1958[3] (the "Act") invalidates the transfer of aircraft with respect to third parties unless the transfer was evidenced by a written instrument recorded with the FAA.[4] The Massachusetts Appeals Court in *South Shore Bank* held that a bank's security interest in an aircraft, if filed with the FAA, prevails over the right of a prior purchaser of the aircraft who purchased in a sale that was not recorded with the FAA.[5]

In August of 1979, Olympic Sales Club, Inc. ("Olympic"), a Massachusetts corporation, contracted to purchase a particular aircraft from H & H Aircraft Sales, Inc. ("H & H"), a New York corporation, for $172,000 and made a down payment on the contract price.[6] The aircraft was delivered to Olympic in Massachusetts in October of 1979, at which time the balance of the purchase price was paid by Olympic.[7] H & H agreed to change the aircraft's registration number with the FAA and to register the transfer of ownership of the aircraft to Olympic with the FAA.[8] Although H & H later changed the registration number of the aircraft with the FAA, it did not record the bill of sale evidencing the transfer of ownership.[9]

Subsequent to the sale of the aircraft to Olympic, the South Shore Bank made two loans to H & H in December of 1979, and a third loan in March of 1980.[10] All three loans were secured under loan agreements that gave the bank security interests in the aircraft that previously had been sold to Olympic.[11] Prior to making each of the loans, the bank obtained a FAA title search of the FAA registry in Oklahoma City, which indicated that H & H was the registered owner of the aircraft.[12] The bank recorded its security interest with the FAA in January of 1980.[13] In the course of attempting to take possession of the aircraft after H & H's default in February of 1981,[14] the bank discovered that H & H had sold the aircraft to Olympic before any of the loans had been made.[15] Olympic had not

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[2] 103 S. Ct. 2476 (1983).
[3] 49 U.S.C. § 1403 (1982).
[4] *Philko*, 103 S. Ct. at 2477.
[5] 16 Mass. App. Ct. at 475, 452 N.E.2d at 278.
[6] *Id.* at 472, 452 N.E.2d at 276.
[7] *Id.* at 472-73, 452 N.E.2d at 277.
[8] *Id.*
[9] *Id.*
[10] *Id.* The loans were for $86,000, $31,000 and $85,000 respectively.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*

recorded its purchase of the aircraft with the FAA prior to the time the bank had recorded its lien, and had not recorded its interest in the aircraft with the FAA at the time of the suit.[16]

The bank sued H & H, Olympic, and Olympic's president (and major shareholder) for possession of the aircraft, damages, an injunction against transfer of the aircraft, and declaratory relief,[17] and obtained temporary injunctive relief.[18] Subsequently, the bank, and Olympic and Olympic's president, filed cross-motions for summary judgment, relying on the facts as stated above.[19] The superior court granted summary judgment to the bank, including a judgment for immediate possession of the aircraft.[20] Olympic and Olympic's president appealed to the Massachusetts Appeals Court,[21] which held that the United States Supreme Court's interpretation of section 503 of the Act[22] in the *Philko* case controlled, and affirmed the superior court's judgment of possession for the bank.[23]

In *Philko*, a Mr. Smith sold and transferred possession of an aircraft to Mr. and Mrs. Shacket, but failed to register the sale with the FAA, despite assuring the Shackets that he would do so.[24] Smith then fraudulently purported to sell the same aircraft to Philko.[25] After inspecting the FAA title records, both Philko and the bank financing its purchase of the aircraft were satisfied with Smith's representation that the absent aircraft was away having electronics installed.[26] Subsequently, documents evidencing Philko's purchase of the aircraft were recorded with the FAA.[27] When the fraud became apparent, the Shackets filed suit to determine title to the aircraft.[28] In its defense, Philko relied on section 503(c) of the Act, which states that no conveyance of an aircraft, or of various aircraft parts, shall be valid against innocent third parties before a record of the conveyance is filed with the FAA.[29] The district court and

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[16] *Id.*

[17] *Id.* at 472-74, 452 N.E.2d at 276-77.

[18] *Id.* at 474, 452 N.E.2d at 277.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] 49 U.S.C. § 1403 (1976).

[23] 16 Mass. App. Ct. at 475, 452 N.E.2d at 278.

[24] *Philko*, 103 S. Ct. at 2477. The defendants also failed to register their title with the FAA, instead relying on Smith's assurance that he would record the transfer. *Id.*

[25] *Id.*

[26] *Id.* at 2477-78. The FAA records did not, however, reflect that Smith owned or ever had owned the aircraft. *Id.* at 2478 n.1.

[27] *Id.* at 2478.

[28] *Id.*

[29] *Id.* Section 503(c) of the Act is codified at 49 U.S.C. § 1403(c), which states in relevant part:

> No conveyance or instrument, the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft . . . against any person

the Seventh Circuit both held that the Act did not preempt state law concerning the validity of the transfer of the aircraft, and that therefore the Illinois version of the Uniform Commercial Code (U.C.C.) applied.[30] Both courts found that the Shackets, as purchasers in the ordinary course of business under U.C.C. 1-201(9), had therefore obtained good title under either U.C.C. 2-403(2) or 2-403(1).[31]

Philko appealed the decision of the Seventh Circuit, and the Supreme Court reversed.[32] In its opinion, the *Philko* Court reasoned that Congress intended, in enacting section 503(c) of the Act, to require that before a transfer of aircraft can have effect on innocent third parties, the transfer must be evidenced by an instrument recorded with the FAA.[33] The Court stated that as Congress intended that the interests of innocent third parties not be affected by unrecorded transfers of aircraft, it must also have been the intent of Congress to preempt state laws that provided that unrecorded transfers would have effect against innocent third parties.[34] The *Philko* Court determined that state law that enabled unrecorded transfers of aircraft to be valid against third parties was in conflict with the intent of Congress to provide a central registry for interests in aircraft.[35] Therefore, the Court held that state laws that allow undocumented or unrecorded transfers of aircraft to affect the rights of innocent third parties who have complied with the Act's registration provisions are preempted by the Act.[36] The Court limited the extent of the preemption of state law regarding priority of interests, however, by stating that while interests must be federally recorded before they can obtain the priority they are entitled to under state law, state law determines the priority of interests.[37] The Court stated that state law is preempted by the Act only where a security holder has failed to record his interest with the FAA.[38]

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other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation . . . .

[30] Shacket v. Philko Aviation, Inc., 681 F.2d 506, 509-10 (7th Cir. 1982); Shacket v. Roger Smith Aircraft Sales, 497 F. Supp. 1262, 1266-67 (N.D. Ill. 1980). The Illinois version of the U.C.C. is ILL. ANN. STAT. ch. 26, §§ 1-101 to -318 (Smith-Hurd 1974).

[31] Shacket v. Philko Aviation Inc., 681 F.2d 506, 511-12 (7th Cir. 1982); Shacket v. Roger Smith Aircraft Sales, 497 F. Supp. 1262, 1266-71 (N.D. Ill. 1980).

[32] *Philko*, 103 S. Ct. at 2481.

[33] *Id.* at 2478.

[34] *Id.* at 2479.

[35] *Id.*

[36] *Id.* at 2480.

[37] *Id.*

[38] *Id.* (citing Scott, *Liens in Aircraft: Priorities*, 25 J. AIR L. & COMMERCE, 193, 203 (1958)). The *Philko* Court's holding that an interest must be federally recorded before it is entitled to any priority under state law preempts any state priority rules that give unrecorded interests priority over recorded interests. In one leading circuit case dealing with preemption of state law by the Act prior to *Philko*, Judge Wisdom of the Fifth Circuit had decided that

In deciding a similar issue in *South Shore*, the Massachusetts Appeals Court stated that the *Philko* case[39] governed, and that *Philko* made it unnecessary to discuss whether Massachusetts's enactment of the U.C.C., chapter 106, section 9-307, applied to the facts.[40] The appeals court likened Olympic's behavior in relying on H & H to record the transfer of the aircraft with the FAA to the Shackets' behavior in *Philko*.[41] The appeals court noted that the Supreme Court had suggested that a holder of an unrecorded interest could assert it against a third party only if either (a) the third party had actual notice of the prior transfer or (b) the holder of the unrecorded interest had used reasonable diligence to file and thus could not be faulted for the failure of the crucial documents to be on record.[42] The court rejected Olympic's contention that the bank had had actual notice of the sale of the aircraft prior to obtaining its security interest.[43] Olympic had asserted that the bank's receipt of a large deposit from H & H from the proceeds of the sale of the aircraft to Olympic should have put the bank on notice of the sale. The appeals court ruled that because Olympic had moved for summary judgment, in effect representing that there were no genuine issues of material fact, the issue could not be raised for the first time on appeal.[44]

The *Philko* Court's extension of the preemptive effect of the Federal Aviation Act of 1958 to reject the effect of all unrecorded transfers of aircraft on the interests of innocent third parties is consistent with two primary objectives of the law in commercial contexts: simplicity and predictability.[45] One who wishes to ensure that there can be no competing interest in a particular aircraft can rely to a great extent on a title search

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the Act only preempted state law to the extent that it provided an exclusive registry for security interests in aircraft, but that the Act did not preempt state priority rules such as U.C.C. § 9-307(2) or § 9-310, which allow unrecorded interests to have priority over recorded interests in situations where policies other than encouraging recordation come into play. *In re* Gary Aircraft Corp., 681 F.2d 365, 370 (5th Cir. 1982).

Although the *Philko* Court stated that it was inclined to agree with the rationale of *In re Gary Aircraft*, it clearly held that the Act rendered unrecorded transfers invalid as to innocent third parties irrespective of state law. *Philko*, 103 S. Ct. at 2481.

[39] *Id.*

[40] 16 Mass. App. Ct. at 475-76, 452 N.E.2d at 278.

[41] *Id.* at 477, 452 N.E.2d at 279.

[42] *Id.* at 476-77, 452 N.E.2d at 279. In her concurrence to *Philko*, Justice O'Connor suggested that the Court should have refrained from suggesting that one who makes a reasonably diligent effort to record could obtain the protection of recordation because the issue had not been before the Court. *Philko*, 103 S. Ct. at 2481.

[43] 16 Mass. App. Ct. at 477-79, 452 N.E.2d at 279-80.

[44] *Id.* at 479-80, 452 N.E.2d at 280-81.

[45] *See, e.g.*, G.L. c. 109 § 1-102(2)(a), which provides: "The underlying purposes and policies of this act are . . . to simplify, clarify, and modernize the law governing commercial transactions."

with the FAA. In *South Shore*, the Massachusetts Appeals Court applied the rule of the *Philko* case in a straightforward manner, but suggested in dicta that the Massachusetts treatment of unrecorded transfers may be more liberal than the *Philko* decision.[46] The court intimated that a reasonable attempt to register a transfer of title with the FAA that is unsuccessful, by no fault of the claimant to the title, could provide an exception to the rule that the rights of innocent third parties cannot be affected by an unrecorded interest in an aircraft.[47]

§ 8.4. Right of a Secured Creditor to Recover a Deficiency — Failure to Conduct Foreclosure Sale in Commercially Reasonable Manner.* Under article 9 of the Uniform Commercial Code ("U.C.C."),[1] the default of a debtor who has signed a security agreement gives his secured creditor an automatic right to seize and sell collateral covered under the agreement.[2] Section 9-504(3) imposes upon the secured creditor an obligation to conduct the foreclosure sale of the debtor's collateral in a "commercially reasonable manner."[3] This section seeks to ensure that the sale brings fair market value for the collateral and thereby reduces the debtor's obligation to the greatest extent possible. If the foreclosure sale is conducted in a commercially reasonable manner and the proceeds of the sale fall short of satisfying the secured creditor's claim, the debtor remains liable to the secured creditor for the deficiency.[4] Courts and commentators are divided, however, on the issue of whether a commercially reasonable foreclosure sale is a precondition to the secured creditor's ability to recover a deficiency remaining after the sale.[5]

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[46] 16 Mass. App. Ct. at 476-77, 452 N.E.2d at 279.

[47] *Id.*

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§ 8.4. [1] The Uniform Commercial Code as adopted in Massachusetts appears at G.L. c. 106, §§ 1-101 - 9-507.

[2] G.L. c. 106, § 9-504.

[3] G.L. c. 106, § 9-504(3), provides in pertinent part: "(3)[E]very aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable."

[4] G.L. c. 106, § 9-504(2) states in pertinent part: "(2)If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency."

[5] *Compare* Skeets v. Universal C.I.T. Credit Corp., 222 F. Supp. 696 (W.D. Pa. 1963) (holding secured creditor barred from deficiency judgment after he failed to conduct a commercially reasonable foreclosure sale) *with* Savings Bank v. Booze, 34 Conn. Supp. 632, 382 A.2d 266 (Conn. Super. Ct. 1978) (holding secured party not barred from deficiency judgment but placing burden of proof on secured creditor to show that the sale yielded fair market value) *with* Leasco v. Sheridan Indus., Inc., 82 Misc. 2d 897, 371 N.Y.S.2d 531 (N.Y. Civ. Ct. 1975) (placing burden on debtor to show harm from commercially unreasonable sale in order to bar deficiency judgment). *See* Comment, *Commercially Unreasonable Repossession Sales in Oklahoma: Wilkerson Motor Co. v. Johnson*, 13 TULSA L.J. 820,

Courts have developed three general approaches for defining a secured creditor's right to a deficiency when he fails to comply with the provisions in part five of U.C.C. article 9.[6] First, some jurisdictions completely bar a secured creditor from recovering a deficiency because of his noncompliance.[7] Second, other jurisdictions do not bar recovery of the deficiency, but create a rebuttable presumption that the collateral was worth at least the amount of the debt.[8] To recover a deficiency, the burden of proof is then on the secured creditor to show that the noncompliance sale brought the fair market value of the collateral.[9] Finally, other jurisdic-

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827-35 (1978); Henszey, *A Secured Creditor's Right to Collect a Deficiency Judgment Under UCC Section 9-504: A Need to Remedy the Impasse*, 31 BUS. LAW. 2025, 2025-26 (1976); Comment, *Creditor's Deficiency Judgment Under Article 9 of the Uniform Commercial Code: Effect of Lack of Notice and a Commercially Reasonable Sale*, 33 MD. L. REV. 327, 327-28 (1973); J. WHITE AND R. SUMMERS, UNIFORM COMMERCIAL CODE § 26-15 (2d ed. 1980).

[6] 13 TULSA L.J. at 828.

[7] The jurisdictions that have barred the deficiency are: DISTRICT OF COLUMBIA: Commercial Credit Corp. v. Lloyd, 12 U.C.C. Rep Serv. 15 (D.C. Super. 1973); FLORIDA: Turk v. St. Petersburg Bank & Trust Co., 281 So. 2d 534 (Fla. Dist. Ct. App. 1973); GEORGIA: Gurwitch v. Luxurest Furniture Mfg. Co., 233 Ga. 934, 214 S.E.2d 373 (1975); MAINE: C.I.T. Corp. v. Haynes, 161 Me. 353, 212 A.2d 436 (1965); MICHIGAN: Cities Serv. Oil Co. v. Ferris, 9 U.C.C. Rep. Serv. 899 (Mich. Dist. Ct. 1971); NEW MEXICO: Foundation Discounts v. Serna, 81 N.M. 474, 468 P.2d 875 (1970); OKLAHOMA: Davidson v. First State Bank & Trust Co., 559 P.2d 1228 (Okla. 1976); PENNSYLVANIA: Skeets v. Universal C.I.T. Credit Corp., 222 F. Supp. 696 (W.D. Pa. 1963), *modified on other grounds*, 335 F.2d 846 (3d Cir. 1964); UTAH: Chrysler Credit Corp. v. Burns, 562 P.2d 233 (Utah 1977); VIRGINIA: *In re* Bishop, 482 F.2d 381 (4th Cir. 1973); WYOMING: Aimovetto v. Keepes, 501 P.2d 1017 (Wyo. 1972).

[8] The jurisdictions not barring the recovery of a deficiency but placing the burden of proof on the secured creditor to show that the sale yielded the fair market value are: ALASKA: Kobuk Eng'r & Contracting Serv., Inc. v. Superior Tank & Constr., 568 P.2d 1007 (Alaska 1977); ARKANSAS: Farmers Equip. Co. v. Miller, 252 Ark. 1091, 482 S.W.2d 805, 810 (1974); COLORADO: Community Management Ass'n v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (Colo. Ct. App. 1973); CONNECTICUT: Savings Bank v. Booze, 34 Conn. Supp. 632, 382 A.2d 266 (Conn. Super. Ct. 1978); ILLINOIS: General Foods Corp. v. Hall, 39 Ill. App. 3d 147, 349 N.E.2d 573 (Ill. App. Ct. 1976); INDIANA: Hall v. Owen County State Bank, 175 Ind. App. 150, 370 N.E.2d 918 (Ind. App. 1978); MISSISSIPPI: Walker v. V.M. Box Motor Co., 325 So. 2d 905 (Miss. 1976); NEBRASKA: Bank of Gering v. Glover, 192 Neb. 575, 223 N.W.2d 56 (1974); NEVADA: Levers v. Rio King Land Inv. Co., 93 Nev. 95, 560 P.2d 917 (1977); NEW JERSEY: Franklin State Bank v. Parker, 135 N.J. Super. 476, 346 A.2d 632 (Union County Court 1975); NEW MEXICO: Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 535 P.2d 1077 (1975); NEW YORK: Security Trust Co. v. Thomas, 59 A.D.2d 242, 399 N.Y.S.2d 511 (N.Y. App. Div. 1977); NORTH CAROLINA: Hodges v. Norton, 29 N.C. App. 193, 223 S.E.2d 848 (N.C. Ct. App. 1976); TENNESSEE: Investors Acceptance Co. v. James Tallcott, Inc., 61 Tenn. App. 307, 454 S.W.2d 130 (Tenn. Ct. App. 1969); TEXAS: United States v. Whitehouse Plastics, 501 F.2d 692 (5th Cir. 1974).

[9] Henszey, *supra* note 5, at 2029-30.

tions hold recovery is not absolutely barred and require the debtor to prove noncompliance with part five and the sustaining of a loss.[10]

During the *Survey* year, the appeals court in *Poti Holding Co. Inc. v. Piggot*[11] held that a secured creditor's failure to conduct a foreclosure sale in a commercially reasonable manner did not preclude the secured creditor from recovering the deficiency remaining after the sale.[12] It was the first decision in which a Massachusetts higher court addressed the effect of a creditor's noncompliance with U.C.C. requirements for a foreclosure sale on the creditor's right to full satisfaction of his claim against the debtor.[13] In determining that the secured creditor's failure to conduct a commercially reasonable sale did not result in a forfeiture of his right to a deficiency judgment, the appeals court in *Poti Holding Co.* emphasized that the fair market value of the collateral had been realized from the foreclosure sale.[14] Further, the court stressed that the secured creditor had not engaged in "sharp or unconscionable practices."[15] In *Poti Holding Co.*, the appeals court followed the current trend in other jurisdictions[16] of allowing a secured creditor who has failed to meet the U.C.C. requirements for a foreclosure sale to receive nevertheless a deficiency judgment if he can show that the sale yielded the fair market value of the collateral.[17]

In *Poti Holding Co.*, a secured creditor whose debtor defaulted on the payment of a promissory note brought suit against the guarantor of the note.[18] The creditor had foreclosed on certain wire insulating machinery which was the collateral securing the note.[19] In its effort to sell the

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[10] The jurisdictions placing the burden of proof on the debtor to show harm are: MICHIGAN: Jones v. Morgan, 58 Mich. App. 35, 228 N.W.2d 419 (Mich. Ct. App. 1975); MISSOURI: Wirth v. Heavey, 508 S.W.2d 263 (Mo. Ct. App. 1974); NEW MEXICO: Crosby v. Basin Motor Co., 83 N.M. 77, 488 P.2d 127 (1972); NEW YORK: Leasco v. Sheridan Indus., Inc., 82 Misc. 2d 897, 371 N.Y.S.2d 531 (N.Y. Civ. Ct. 1975); PENNSYLVANIA: Mercantile Fin. Corp. v. Miller, 292 F. Supp. 797 (E.D. Pa. 1968); Alliance Discount v. Shaw, 195 Pa. Super. 601, 171 A.2d 548 (Pa. Super. Ct. 1964); TENNESSEE: Commercial Credit Corp. v. Hold, 17 U.C.C. Rep. Serv. 316 (Tenn. Ct. App. 1975); WASHINGTON: Grant County Tractor Co. v. Nuss, 6 Wash. App. 866, 496 P.2d 966 (Wash. Ct. App. 1972).

[11] 15 Mass. App. Ct. 275, 444 N.E.2d 1311 (1983).

[12] *Id.* at 280, 444 N.E.2d at 1314.

[13] *Id.* at 279, 444 N.E.2d at 1313-14.

[14] *Id.* at 276, 444 N.E.2d at 1312.

[15] *Id.* at 277, 444 N.E.2d at 1312.

[16] *See* Comment, *Commercially Unreasonable Repossession Sales in Oklahoma: Wilkerson Motor Co. v. Johnson*, 13 TULSA L.J. 820, 830 & n.49 (1978) and accompanying text (noting that the trend in other jurisdictions is to allow a deficiency judgment after a commercially unreasonable sale as long as the sale yielded fair market value).

[17] 15 Mass. App. Ct. at 277, 444 N.E.2d at 1312.

[18] *Id.* at 275, 444 N.E.2d at 1312.

[19] *Id.*

machinery, the creditor had placed advertisements in the Boston Herald American, the Wall Street Journal and a local newspaper.[20] The creditor had also notified at least 210 parties, including the guarantor, and two of the nine or more companies in the eastern United States in the high temperature wire business.[21]

The creditor finally sold the collateral for a price that the guarantor conceded was the fair market value.[22] The proceeds from the sale, however, were insufficient to satisfy the debt claim.[23] Consequently, the creditor brought suit against the guarantor, seeking to recover the deficiency amount.[24]

The superior court referred the case to a master.[25] The master found that the sale had not been conducted in a commercially reasonable manner under the U.C.C. standard.[26] In reaching this conclusion, the master relied on the fact that the creditor had not advertised in any publication of the wire industry.[27] The master also observed that the creditor failed to submit evidence as to the normal commercial practices for disposing of collateral of this type, including the experience of the auctioneer, the area of circulation of the newspapers in which the advertisements were placed, and whether there were experienced brokers available to sell goods of this type.[28]

Nevertheless, based on the guarantor's prior admission that the ultimate sale price was fair, the master concluded that the sale yielded the fair market value of the collateral.[29] The master left for the superior court the question of whether the creditor was entitled to recover any deficiency remaining after the sale in light of the fact that the creditor had failed to comply with the U.C.C.'s commercially reasonable standard.[30] The superior court entered a judgment for the creditor in the amount of the deficiency because it found that the guarantor had not suffered any loss as a result of the sale.[31]

The guarantor appealed on two grounds.[32] First, the guarantor contended that there was no competent evidence of the fair market value of

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[20] *Id.* at 277, 444 N.E.2d at 1313.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 275, 444 N.E.2d at 1312.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at 277, 444 N.E.2d at 1312-13.
[28] *Id.*
[29] *Id.* at 278, 444 N.E.2d at 1313.
[30] *Id.* at 275-76, 444 N.E.2d at 1312.
[31] *Id.* at 276, 444 N.E.2d at 1312.
[32] *Id.*

the collateral.[33] Second, the guarantor asserted that the creditor's noncompliance with the commercially reasonable standard governing foreclosure sales precluded the creditor from obtaining a deficiency judgment.[34]

The appeals court affirmed the superior court's decision.[35] The court held that the fair market value had been "conclusively established" by the guarantor's prior admission as to the fair market value of the collateral.[36] Furthermore, the appeals court determined that the creditor's commercially unreasonable sale did not mandate forfeiture of its right to recover the deficiency under either the U.C.C. or Massachusetts common law.[37]

At the outset, the appeals court noted that authorities continue to disagree on the relationship between a creditor's noncompliance with U.C.C. standards and its right to recover a deficiency.[38] The court acknowledged cases and commentators supporting the guarantor's position that a creditor's failure to comply with the U.C.C. provisions governing foreclosure sales triggers a forfeiture of its right to collect any remaining deficiency.[39] The court, however, rejected that absolute approach, concluding instead that it should balance the equities between the parties and tailor the relief to the circumstances of the case.[40]

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[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 280, 444 N.E.2d at 1314.

[38] *Id.* at 277, 444 N.E.2d at 1313 (citing J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 26-15 (2d ed. 1980)).

[39] 15 Mass. App. Ct. at 277-78, 444 N.E. 2d at 1313 (citing Gurwitch v. Luxurest Furniture Mfg. Co., 233 Ga. 934, 936, 214 S.E.2d 373, 375 (1975); Bank Josephine v. Conn., 599 S.W.2d 773, 775 (Ky. Ct. App. 1980); 2 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.9.4, at 1264 (1965) (each taking the position that a creditor's noncompliance automatically bars him from recovering a deficiency)). The court also cited cases in which, unlike in *Poti Holding Co.*, the creditor failed to give the debtor notice of sale, and thus the defect was well-defined. *See, e.g.*, Skeels v. Universal C.I.T. Credit Corp., 222 F. Supp. 696, 702 (W.D. Pa. 1963), *modified on other grounds*, 335 F.2d 846 (3d Cir. 1964); Herman Ford-Mercury, Inc. v. Betts, 251 N.W.2d 492, 496 (Iowa 1977); Delay First Nat'l. Bank & Trust Co. v. Jacobsen Appliance Co., 196 Neb. 398, 409, 243 N.W.2d 745, 751 (1976); Camden Nat'l. Bank v. St. Clair, 309 A.2d 329, 332 (Me. 1973).

[40] 15 Mass. App. Ct. at 278, 444 N.E.2d at 1313. The court cited numerous cases from other jurisdictions adopting this balancing approach: Barbour v. United States, 562 F.2d 19, 21 (10th Cir. 1977) (applying Kansas law); United States v. Whitehouse Plastics, 501 F.2d 692, 695 (5th Cir. 1974), *cert. denied sub nom.*, Baker v. United States, 421 U.S. 912 (1975) (applying Texas law); Kobuk Eng'r. & Contracting Serv., Inc. v. Superior Tank & Constr., Inc., 568 P.2d 1007, 1013 (Alaska 1977); Universal C.I.T. Credit Co. v. Rone, 248 Ark. 665, 669, 453 S.W.2d 37, 39 (1970); Savings Bank v. Booze, 34 Conn. Supp. 632, 636-37 (1977); Hall v. Owen County State Bank, 175 Ind. App. 150 (1977); Levers v. Rio King Land & Inv. Co., 93 Nev. 95, 99, 560 P.2d 917, 919 (1977); Clark Leasing Corp. v. White Sands Forest

The court noted that *Poti Holding Co.* was a case of first impression in the Commonwealth regarding the specific issue of the effect of a creditor's noncompliance with U.C.C. standards on its ability to recover a deficiency.[41] Lacking any specific precedent, the court relied on analogous Massachusetts cases and statements in the U.C.C. to conclude that the forfeiture of a deficiency judgment under such circumstances would be inappropriate.[42] The court first supported its position by emphasizing the common law principle reflected consistently in its cases that the court disfavors forfeitures and penalties.[43] More specifically, the court noted that in Massachusetts cases in which violations of the U.C.C. are not involved, but in which the creditor has acted unreasonably in some manner, the wrongdoings of a creditor do not normally preclude recovery of a deficiency.[44] The court cited, for example, *Mechanics Nat'l Bank v. Killeen*,[45] a contract action in which a bank was held liable in damages for wrongfully foreclosing on a debtor's stock.[46] In that case, not only was there no suggestion that the debtor's remaining obligations were extinguished, but the obligations were reduced only by the fair market value of the stock at the time of wrongful sale.[47]

Secondly, the court found support for its position in the U.C.C. which, the court noted, does not require automatic forfeiture as a result of creditor misconduct.[48] The court observed that article 9 of the U.C.C. provides specific remedies against a secured creditor who fails to sell collateral in a commercially reasonable manner.[49] A debtor, the court continued, may restrain an improper sale of collateral and has a right to recover from the secured creditor any loss caused by the failure to comply

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Prod., Inc., 87 N.M. 451, 456, 535 P.2d 1077, 1081 (1975); *cf.* Franklin State Bank v. Parker, 136 N.J. Super. 476, 482 (1975).

[41] 15 Mass. App. Ct. at 279, 444 N.E.2d at 1313-14.

[42] *Id.*

[43] *Id.* (citing Valley Stream Teachers Fed. Credit Union v. Commissioner of Banks, 376 Mass. 845, 852, 387 N.E.2d 200, 207 (1978); Shepard v. Finance Associates of Auburn, Inc., 366 Mass. 182, 188, 315 N.E.2d 597, 602 (1974); Howard D. Johnson Co. v. Madigan, 361 Mass. 454, 456, 280 N.E.2d 689, 690-91 (1972); Beach Associates, Inc. v. Fauser, 9 Mass. App. Ct. 386, 393-95 (1980); *cf.* Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. 257, 269, 47 N.E.2d 265, 272 (1943); Boott Mills v. Boston & Me. R.R., 218 Mass. 582, 589, 106 N.E. 680, 683-84 (1914) (each holding no punitive damages in Massachusetts in absence of statute)).

[44] 15 Mass. App. Ct. at 279, 444 N.E.2d at 1314.

[45] 377 Mass. 100, 386 N.E.2d 1052 (1979).

[46] 15 Mass. App. Ct. at 279, 444 N.E.2d at 1314.

[47] *Id.* The court also cited Lynn Five Cents Sav. Bank v. Portnoy, 306 Mass. 436, 439, 28 N.E.2d 418, 421 (1940) (mortgagor released only to extent injured by conduct of mortgagee).

[48] 15 Mass. App. Ct. at 279, 444 N.E.2d at 1314.

[49] *Id.*

with the U.C.C.[50] Despite the inclusion of these specific remedies, the court emphasized that article 9 does not mention forfeiture of a creditor's right to a deficiency judgment because of an improper sale of collateral.[51]

Finally, the court turned to article 1 of the U.C.C. for support. Article 1, the court noted, directs that U.C.C. remedies are to be liberally administered in order that the aggrieved party may be put in as good a position as if the other party had fully performed.[52] More importantly for support of its stance against deficiency judgment forfeiture, the court emphasized that article 1 prohibits consequential, special and penal damages except as specifically allowed in the U.C.C. or by other rule of law.[53] Given the specific remedies provided in the U.C.C., the historical reluctance of Massachusetts courts to impose forfeitures or to penalize creditor misconduct, and the explicit statement in the U.C.C. against penalties, the court was unwilling to assume that the legislature intended to effect such forfeiture of private contractual rights.[54]

The court then applied its approach to a secured creditor's right to a deficiency to the facts in *Poti Holding Co.*[55] The court, noting the lack of precision in the meaning of the term "commercially reasonable" tried to determine whether the creditor had failed to fulfill the U.C.C. standards.[56] According to the court, the determination of whether a commercially reasonable sale occurred depends on the particular facts of each case.[57] The court, however, did not then explicitly state whether the sale was "commercially reasonable," but instead emphasized that the creditor had not engaged in "sharp or unconscionable practices."[58] As a result, the court, apparently assuming the sale had not been conducted in a commercially reasonable manner, concluded that because the fair market value was realized, the creditor could recover a deficiency.[59]

In *Poti Holding Co.*, the appeals court adopted the approach followed by most other jurisdictions that allows a secured creditor who has not satisfied U.C.C. requirements for a foreclosure sale to retain the right to a deficiency judgment if the sale yielded the fair market value of the collateral.[60] The court also added a good faith requirement that the secured

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[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 279-80, 444 N.E.2d at 1314.

[54] *Id.* at 280, 444 N.E.2d at 1314 (quoting Shepard v. Finance Associates of Auburn, Inc., 366 Mass. 182, 188, 316 N.E.2d 597, 602 (1974)).

[55] *Id.* at 277, 444 N.E.2d at 1313.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 280, 444 N.E.2d at 1314. The court never expressly stated that the sale had not been conducted in a commercially reasonable manner.

[60] *Id.*

creditor show he has not engaged in "sharp or unconscionable practices."[61] This approach is more reasonable than either completely barring the deficiency judgment or requiring the debtor to prove both the creditor's noncompliance with article 9 in the conduct of the sale of collateral and a resulting loss. On one hand, the position automatically barring a deficiency judgment to a noncomplying creditor is unnecessarily harsh and amounts to punitive damages, which are disapproved of by both the U.C.C. and contract theory generally.[62] On the other hand, the *Poti Holding Co.* approach recognizes that the secured creditor, having failed to comply with the U.C.C. must bear the burden of proving what price a proper sale would have brought.[63]

Although the court chose the most reasonable approach, it left two critical issues unresolved. First, the court did not set out any guidelines for proving the fair market value of the collateral.[64] Second, the court did not address the more perplexing issue of how a secured creditor might prove that a proper sale would have brought that price.[65] The court should resolve the issue of value determination in order for the adopted approach to become completely workable.

In summary, after *Poti Holding Co.*, a secured creditor who has failed to conduct a foreclosure sale in a commercially reasonable manner may nevertheless recover a deficiency judgment in Massachusetts.[66] In order to do so, it has the burden of proving two elements. First, the secured creditor must prove that the sale actually yielded the fair market value of the collateral.[67] Second, it must prove that it has not engaged in "sharp or unconscionable practices" in the course of foreclosure.[68] The crucial question that was left open by the court is how, as a practical matter, secured creditors can prove that the foreclosure sale yielded the fair market value of the collateral.[69]

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[61] *Id.*

[62] G.L. c. 106, § 1-106 states in pertinent part that "neither consequential or special nor penal damages may be had except as specifically provided in this chapter or by other rule of law."

[63] Comment, *supra* note 5, at 327, 343. The proof incident to notice and resale is peculiarly within the creditor's knowledge. *Id.*

[64] 15 Mass. App. Ct. at 280, 444 N.E.2d at 1314. The court stated that because the fair market value of the collateral in this case had been established conclusively, it had no occasion to discuss questions of the burden of proof or presumptions as to the value of the collateral. These are matters on which, the court acknowledged, the authorities are also divided. *Id.* (citing Utah Bank & Trust v. Quinn, 622 P.2d 793, 796 (Utah 1980)).

[65] *See* Henszey, *supra* note 5, at 2025-26.

[66] 15 Mass. App. Ct. at 280, 444 N.E.2d at 1314.

[67] *Id.*

[68] *Id.* at 277, 444 N.E.2d at 1312.

[69] *Id.* at 280, 444 N.E.2d at 1314.

§ 8.5. Promissory Note — Accord and Satisfaction — Executory Accord.* During the *Survey* year, in *Lipson v. Adelson*,[1] the Massachusetts Appeals Court considered the validity of two affirmative defenses to an action for recovery on a promissory note.[2] The court was asked to consider when an executory accord can serve as an accord and satisfaction, and whether chapter 106, section 3-606, of the Massachusetts Uniform Commercial Code (U.C.C.), can be invoked by co-signatories to a promissory note.[3]

When a contract has been breached by one of the parties, and, in an effort to settle their differences, the parties enter into a new and valid contract whereby the defaulting party promises to do some other act in lieu of performance of the original contract, the new agreement will be characterized either as an executory accord or as a substituted contract.[4] Generally the new agreement is considered to be an executory accord which acts as a defense to an action on the original contract only if its terms have been fully performed.[5] An unexecuted accord usually does not operate to discharge liability on the original contract unless it appears that the parties intended the new contract to have that effect. In such a case the accord is in fact a substituted contract or a novation.[6] Unfortunately, many parties fail to make clear or even consider whether they in fact intend the second agreement to discharge the obligations of the first contract.[7] Consequently, when a dispute arises, the courts are faced with difficult interpretational problems.[8] In *Lipson*, the appeals court found that, where no conflicting evidence is introduced and where a written contract gives no clear indication of the parties' intentions, the second agreement is, as a matter of law, an executory accord, which does not discharge the parties from liability.[9]

In addition to addressing the issue of the character of the second agreement, the *Lipson* court also considered whether the co-signatory to

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§ 8.5 [1] 17 Mass. App. Ct. 90, 456 N.E.2d 470 (1983).

[2] Brief for Plaintiff at 1.

[3] 17 Mass. App. Ct. at 95, 456 N.E.2d at 473. G.L. c. 106, § 3-606 provides:

> The holder discharges any party to the instrument to the extent that without such party's consent the holder . . . without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person.

[4] SIMPSON AND ALPERIN, SUMMARY OF BASIC LAW, 14 MASS. PRACTICE SERIES § 838 (2d ed. 1974).

[5] *Id.*

[6] *Id.*

[7] 6 A. CORBIN, CONTRACTS § 1269, at 1027-28 (1952).

[8] *Id.*

[9] 17 Mass. App. Ct. at 94-95, 456 N.E.2d at 473.

the original contract, who did not sign the second agreement, was discharged from her obligations under the first contract by virtue of Chapter 106, section 3-606.[10] Section 3-606 states that the holder of a promissory note discharges "any party to an instrument" if the holder agrees, without the party's consent, not to sue any person against whom the party has, to the knowledge of the holder, a right of recourse.[11] The use of the words "any party to the instrument" has caused the courts some problems of interpretation.[12] According to the Official Comments to the U.C.C., the words "any party" were intended to cover anyone "in the position of a surety, having a right of recourse either on the instrument or dehors it including an accommodation maker or acceptor known to the holder to be so."[13]

The explanation has left some room for debate as to whether co-makers come under the protection of section 3-606.[14] According to one view, co-makers who have the right to claim contribution from each other have a right of recourse against each other and therefore fall within the statute.[15] Other courts, however, have held that co-makers per se cannot claim the section 3-606 defense.[16] In *Lipson* the appeals court indicated, albeit not explicitly, that it preferred the second position.[17]

In 1970, defendants Sheldon and Sandra Adelson executed a promissory note which the plaintiff Mr. Lipson signed as an accommodation party.[18] When the Adelsons did not pay the note as it became due, demand was made on Lipson, who paid it and thereby became the holder of the note.[19] Three years later, Lipson, Mr. Adelson, and a third party, Mr. Shapiro, signed an agreement in which Adelson acknowledged his debt to Lipson.[20] The agreement further stated that Mr. Lipson had lawsuits pending against both Mr. Adelson and Mr. Shapiro, and that all three parties desired to settle their differences out of court.[21] The agree-

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[10] *Id.* at 95, 456 N.E.2d at 473.

[11] G.L. c. 106, § 3-606.

[12] *See* Woholler v. St. Charles Lumber and Fuel Co., 25 Ill. App. 3d 812, 323 N.E.2d 134, *aff'd*, 62 Ill. 2d 16, 338 N.E.2d 179 (1975); Beneficial Finance Co. of New York, Inc. v. Husher, 82 Misc. 2d 550, 369 N.Y.S.2d 975 (1975).

[13] G.L. c. 106, § 3-606 (official comment).

[14] *See supra* note 12.

[15] Beneficial Finance Co. of New York, Inc. v. Husher, 82 Misc. 2d at 552, 369 N.Y.S.2d at 977.

[16] *See* Woholler v. St. Charles Lumber Fuel Co., 62 Ill. 2d 16, 20, 338 N.E.2d 179, 181 (1975).

[17] *See infra* notes 62-64 and accompanying text.

[18] 17 Mass. App. Ct. at 90, 456 N.E.2d at 470, 471.

[19] *Id.* at 90, 456 N.E.2d at 471.

[20] *Id.* at 91, 456 N.E.2d at 471.

[21] *Id.*

ment then provided for a three year moratorium of the principal payments due to Lipson and monthly payments of the interest then due in addition to a payment representing 7.5 percent interest on the principal owed.[22] In addition, Mr. Shapiro was to exercise an option allegedly assigned to him by Adelson to purchase certain shares of stock with an advance from Lipson, and put those shares into an escrow account for Lipson as security for Adelson's debt, subject to his paying the debt represented by the principal and interest payments and the funds advanced by Lipson to Shapiro for exercising the stock options.[23]

The stock option was exercised and the shares put into escrow, but Adelson did not make his payments.[24] At the end of the moratorium, Lipson chose not to exercise his stock option. Instead, he brought an action against Sheldon and Sandra Adelson to recover on the original promissory note.[25]

At trial the defendants pleaded as affirmative defenses: 1) failure to state a claim, 2) statute of limitations, and 3) estoppel.[26] The superior court granted summary judgment against both defendants and they appealed.[27] On appeal the defendants claimed that summary judgment should not have been allowed and advanced two new arguments for avoidance of their debt.[28] The first argument was that the agreement between Mr. Adelson, Lipson, and Shapiro was a substituted contract that discharged the Adelsons from their obligation on the original promissory note.[29] The second argument was that even if the 1973 agreement did not discharge Mr. Adelson, it did discharge Mrs. Adelson, who was not a signatory to the later agreement and thus did not consent to the moratorium.[30]

Addressing first the question of the substituted contract, the appeals court held that whether the second, 1973 agreement was a substituted contract or an executory accord was a question of law and not a question of fact for a jury.[31] The court explained that because an accord by itself rarely operates to discharge a preexisting indebtedness, a finding to that effect would have to be based on a clear and definitive indication of the parties' intent.[32]

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[22] *Id.*
[23] *Id.* at 91-92, 456 N.E.2d at 471.
[24] *Id.* at 92, 456 N.E.2d at 471.
[25] *Id.* at 90, 456 N.E.2d at 471.
[26] Brief for Plaintiff at 6.
[27] 17 Mass. App. Ct. at 90, 456 N.E.2d at 471.
[28] Brief for Plaintiff at 6.
[29] 17 Mass. App. Ct. at 92, 456 N.E.2d at 471.
[30] *Id.* at 95, 456 N.E.2d at 473.
[31] *Id.* at 92, 456 N.E.2d at 471.
[32] *Id.* at 92-93, 456 N.E.2d at 472.

In order to determine intent of the parties, the court examined the language of the 1973 agreement.[33] Carefully scrutinizing "nuances of expression," the court failed to discern any clear reference to the intention of the parties.[34] The court acknowledged that it could be legitimate to infer the creation of a substituted contract or a novation despite the lack of express language to that effect.[35] According to the court, however, the agreement provided no basis for such an inference.[36] As a final step in interpreting the agreement, the court applied what it referred to as the "inconsistency principle."[37] According to that principle, the court stated, the inconsistency between two agreements can be a valid indication of a substituted contract.[38] Although the court accepted the validity of the principle, it stated that, for the principle to apply, the substitution had to show an intention that was contrary to the intention of the first contract.[39] For example, the court explained, a second contract containing a revised payment schedule to accommodate the debtor does not constitute a showing that the creditor intended to reject the original timetable.[40] By the same token, an intention to work out a settlement does not by itself show that the parties intended to discharge preexisting obligations.[41]

Applying the above methods of interpretation, the court failed to find a clear indication of the parties' intent to discharge the obligations incurred on the promissory note when they signed the 1973 agreement.[42] Consequently, the court held that the agreement was not a substituted contract that discharged the defendants of their liability on the original note.[43]

Turning to the defendants' second argument, the appeals court rejected the contention that Lipson's agreement with Mr. Adelson and Shapiro discharged Mrs. Adelson from her obligation on the promissory note.[44] Mrs. Adelson asserted that she fell within the language of Chapter 106, section 3-606(1)(a), and thus was released from all obligations on the debt.[45] The court gave two grounds for holding that the 1973 agreement did not discharge Mrs. Adelson from her original obligation on the note.[46]

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[33] *Id.* at 93, 456 N.E.2d at 472.
[34] *Id.* at 94, 456 N.E.2d at 472.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 94, 456 N.E.2d at 473.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.* at 95, 456 N.E.2d at 473.
[45] *Id.* (quoting G.L. c. 106, § 3-606(1)(a)). *See supra* note 3 for text of § 3-606(1)(a).
[46] *Id.*

First, according to the court, the holder, Lipson, had not acted without Mrs. Adelson's consent when he signed the 1973 agreement.[47] The court found that Mrs. Adelson had in fact given advance consent to the 1973 agreement when she signed the original promissory note which stated that "each party hereby waives any defense by reason of any extension of time for payment or other indulgence granted to any party liable hereon."[48] Second, the court concluded that Mrs. Adelson had not proved that she was covered by the statute.[49] According to the court, section 3-606 by its terms covers only parties who have recourse against those persons released by the holder.[50] The court found that Mrs. Adelson made no showing that she would have had a right of recourse against her husband.[51]

In sum, the *Lipson* court rejected both of the defendants' arguments that they were discharged from their contractual liability to the plaintiff by virtue of a subsequent agreement of accord. In discussing the defense of accord and satisfaction and the suretyship defense provided by Chapter 106, section 3-606, the appeals court shed some light on two areas of uncertainty.

First, in cases where parties to a broker agreement sign a written agreement of accord, and a dispute later arises as to whether the second agreement by itself was intended to discharge the obligations of the original contract, the courts are often faced with the difficult task of trying to find evidence of intentions that were never expressed or even considered.[52] Where, as in *Lipson*, the original debt was undisputed, liquidated, and matured, courts are more likely to find an accord than a substituted contract.[53] In *Lipson*, however, the court went further, proposing as a rule of construction that where the issue is whether a written agreement is an executory accord or a substituted contract, the agreement is an executory accord unless there is a clear and definite indication to the contrary.[54] It is unclear, however, how broadly this rule can be applied. In *Lipson*, the debt was undisputed, and both the first and second agreements were breached by the debtor. While courts in cases similar to *Lipson* usually find in favor of the creditor and allow recovery on the first contract, the

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[47] *Id.*

[48] *Id.* (quoting § 3-606 comment 2, 2 Uniform Laws Annot., U.C.C., at 585 (1977)) ("consent may be given in advance, and is commonly incorporated in the instrument").

[49] *Id.*

[50] G.L. c. 106, § 3-606(1)(a).

[51] 17 Mass. App. Ct. at 95, 456 N.E.2d at 473.

[52] 6 A. CORBIN, *supra* note 7, § 1269 at 1028.

[53] 17 Mass. App. Ct. at 93 n.3, 456 N.E.2d at 472 n.3 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 279, comment c (1981)).

[54] 17 Mass. App. Ct. at 92, 456 N.E.2d at 472.

same courts are more likely to find in favor of the debtor where it is the creditor who breaks the second agreement.[55]

Second, in addition to outlining the requirements necessary to demonstrate that a written accord constitutes both accord and satisfaction, the *Lipson* court looked at an ambiguous area in section 3-606 of the U.C.C. According to that provision, any party to a note can claim discharge of liability, if, without his consent or a reservation of rights, the holder of the instrument releases or promises not to sue a person against whom the party has recourse.[56] The Supreme Judicial Court has held that the primary justification for the provision is the protection of parties who, upon paying the note, have a right of recourse against the principal debtor but are subrogated to the holder's rights.[57] According to the Official Comments to the U.C.C., the provision uses the words "any party" in order to make it clear that the suretyship defenses provided by section 3-606 are not "limited to the parties who are 'secondarily liable' but are available to any party who is in the position of a surety including an accommodation maker or acceptor known to the holder to be so."[58] The "knotty question" is whether suretyship defenses extend not only to an accommodation maker, but also to a co-maker who has not signed as an accommodation for the other co-maker.[59]

In *Lipson*, no explicit reference is made to Mrs. Adelson's status as a signatory on the promissory note. From the court's description of the facts, in which the Adelsons are referred to as signers of the note and Lipson is referred to as the accommodation party,[60] it can be inferred that the court assumed that Mr. and Mrs. Adelson were co-makers. This inference is further supported by the fact that, in holding that Mrs. Adelson was not protected by section 3-606, the court cited two cases in which the issue was whether co-makers were protected by the statute.[61] The first case, from Illinois, stands for the proposition that co-makers per se are not covered by section 3-606.[62] The *Lipson* court contrasted the Illinois case[63] to a New York case which held that a co-maker who has a right of contribution from another co-maker has a right of recourse within the meaning of section 3-606.[64]

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[55] A. CORBIN, *supra* note 7, § 1293, at 1050.

[56] 17 Mass. App. Ct. at 95, 456 N.E.2d at 473.

[57] Stanley v. Ames, 378 Mass. 364, 367, 391 N.E.2d 908, 911 (1979).

[58] U.C.C. § 3-606 comment 1.

[59] Beneficial Finance Co. of New York, Inc. v. Husher, 82 Misc. 2d 550, 369 N.Y.S.2d 975 (1975).

[60] 17 Mass. App. Ct. at 90, 456 N.E.2d at 470-71.

[61] *See supra* note 15.

[62] Woholler v. St. Charles Lumber and Fuel Co., 62 Ill. 2d 16, 20, 338 N.E.2d 179, 181 (1975).

[63] 17 Mass. App. Ct. at 95, 456 N.E.2d at 473.

[64] Beneficial Finance Co. of New York, Inc. v. Husher, 82 Misc. 2d 550, 552, 369 N.Y.S.2d 975, 977 (1975).

Even if the inference is correct that the *Lipson* court regarded Mr. and Mrs. Adelson as co-makers, it is still unclear whether the appeals court held that Mrs. Adelson was not covered by section 3-606 because that provision does not cover co-makers or because, as a co-maker, she had not demonstrated that she would have had recourse against her husband. Although the order of the cites to other jurisdictions suggests that co-makers to a note are not covered by section 3-606, the language of the opinion suggests that the court favored the proposition that co-makers are covered by the provision if they can prove a right of contribution. Unfortunately the *Lipson* court did not provide any clarification in this area.