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CHAPTER 13

Contracts and Commercial Law

DONNA M. SHERRY

§13.1. Endorsement: Liability of Authorized Representatives. In affirming a summary judgment against the endorser of a check, the Supreme Judicial Court rendered an interesting interpretation under the Uniform Commercial Code ("Code")[1] of the liability of an authorized representative who endorses a check but fails to indicate his representative capacity. In *Commonwealth Bank & Trust Co. v. Plotkin,*[2] a bank brought suit to recover from a corporate officer on a check which had been deposited in the corporation's account and later dishonored for insufficient funds. In affirming a superior court judgment, the Supreme Judicial Court held that the defendant was prima facie personally liable to the bank as endorser under the Code and that the defendant had failed to make a sufficient factual showing to prevent summary judgment against him.[3]

The defendant Plotkin was president and treasurer of Creative Travel, Inc. ("Creative"), a corporation which had provided services to a partnership. In payment for these services, one of the partners issued a personal check dated March 24, 1973, for $6,038 payable to the order of Creative. The check was deposited in Creative's account at Commonwealth Bank and Trust Company. When this check was returned for insufficient funds, another partner issued a check dated April 13, 1973, in the same amount payable to Plotkin. Plotkin endorsed this second check by signing his name only directly beneath the stamp, "Creative Travel, Inc. for deposit only in account number 5-250," and deposited it in the corporation's account at the Commonwealth Bank. When the second check was returned for insufficient funds, it was redeposited at Plotkin's request but was again dishonored. The check was then charged

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§13.1. [1] G.L. c. 106, § 1-101 *et seq.*
[2] 1976 Mass. Adv. Sh. 2442, 355 N.E.2d 917.
[3] *Id.* at 2442, 355 N.E.2d at 918.

back to the corporation's account, resulting in an overdraft.[4] The bank brought suit against Plotkin to recover on his endorsement when it was unable to recover from the corporation.

In response to the bank's motion for summary judgment,[5] Plotkin submitted an affidavit which stated that a named vice-president of the bank "well knew" that the second check was issued in place of the dishonored first check which was payable only to the corporation; that the second check was dishonored only after the bank had advised Creative that the check had cleared and the proceeds were available in the corporation's account; that consequently the corporation issued checks against that account; that the bank on many prior occasions had credited the corporation's account with checks payable to Plotkin but which were deposited by Plotkin as agent for the corporation; and that the bank "well knew" that Creative and not Plotkin was entitled to the proceeds of the check.[6]

The Supreme Judicial Court framed the question on appeal as whether under Section 3-403(2)(b) of the Code Plotkin's signature on the back of the dishonored check was an individual endorsement for which he was personally liable or one made in a representative capacity for which he would not be liable.[7]

This section provides that "An authorized representative who signs his own name to an instrument . . . (b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity. . . . "[8]

Plotkin argued that this section entitled him to a determination of whether it was "otherwise established between the immediate parties"[9] that he signed in a representative capacity, that is, that a jury must consider whether parol evidence indicated that there was an under-

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[4] *Id.* at 2443, 355 N.E.2d at 918.

[5] Suit was originally brought in the Municipal Court of the City of Boston, was removed to the Superior Court, then was transferred to the Municipal Court of the City of Boston under G.L. c. 231, § 102C, for trial. Creative Travel, Inc. was added as a defendant and defaulted, and the Municipal Court found against Plotkin after a hearing. The case was then retransferred to the Superior Court. *Id.* at 2442-43, 355 N.E.2d at 918.

[6] *Id.* at 2143-44, 355 N.E.2d at 918.

[7] *Id.* at 2143, 355 N.E.2d at 918.

[8] G.L. c. 106, § 3-403(2)(b). Subsection (2)(b) provides:

(2) An authorized representative who signs his own name to an instrument—
(b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented, but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented, but does show that the representative signed in a representative capacity.

[9] *See id.*

standing or agreement between the bank and himself as to his representative capacity.[10] Plotkin argued that the statements in his affidavit that the bank "knew" that the designation of Plotkin as payee of the check was an error and that his endorsement was merely in a representative capacity created a triable issue for a jury.[11]

The Court accepted Plotkin's argument that section 3-403(2)(b) permitted him to prove that as to the bank he was not personally liable, noting however, that the burden was on him to do so,[12] but found that Plotkin's affidavit failed to satisfy the requirements of Mass. R. Civ. P. 56(e) and therefore did not prevent summary judgment against him as endorser.[13] The Court pointed out that the affidavit did not disclose who acted for the bank in the deposit of the check, the nature of the disclosure of Plotkin's intention that he not be liable and any manifestation of such an intention made on behalf of the bank, or the authority for such manifestation. The statements in the affidavit concerning the bank's knowledge, the Court concluded, "fall well short of showing an agreement by the bank to accept for deposit without recourse a check with the payee's endorsement missing."[14]

Although the Court accepted Plotkin's contention that section 3-403(2)(b) allowed him to prove that he was not personaly liable to the bank, the Court nevertheless observed that this contention presents at least two difficulties. First, the Court pointed out that section 3-403[15] seems to be directed to the obligations of the original parties to an instrument rather than to endorsers and endorsees. The Court noted,

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[10] *Id.*, § 3-403(2)(b), Official Comment 3.

[11] 1976 Mass. Adv. Sh. at 2444-45, 355 N.E.2d at 918-19.

[12] *Id.* at 2444, 355 N.E.2d at 918, *citing* Carleton Ford, Inc. v. Oste, 1973 Mass. App. Adv. Sh. 296, 295 N.E.2d 402 *and* Universal Lightning Rod, Inc. v. Risehall Electric Co., 24 Conn. Supp. 399, 192 A.2d 50 (Cir. Ct. 1962).

[13] 1976 Mass. Adv. Sh. at 2446, 355 N.E.2d at 919.

[14] *Id.*

[15] G.L. c. 106, § 3-403 provides:

> (1) A signature may be made by an agent or other representative, and his authority to make it may be established as in other cases of representation. No particular form of appointment is necessary to establish such authority.
>
> (2) An authorized representative who signs his own name to an instrument
>
> (a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;
>
> (b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.
>
> (3) Except as otherwise established the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity.

however, that courts in other jurisdictions have admitted extrinsic evidence to prove that irregular or anomalous endorsements out of the chain of title, which were placed on the instrument before its issue, were made in a representative capacity.[16] Therefore, the application of the subsection to regular endorsements by payees may be permissible, the Court reasoned.[17]

Second, the Court explained, if only the corporation had endorsed the check, the bank could have returned it without dishonor for lack of the payee's endorsement.[18] Moreover, the bank, having given value by permitting withdrawals, would have "the specifically enforceable right to have the unqualified endorsement" of Plotkin as "transferor,"[19] thereby making Plotkin personally obligated as endorser.[20] On the other hand, if Plotkin had transferred the check without endorsement to the corporation rather than to the bank, and then the corporation transferred to the bank by endorsement, Plotkin would not be one of the "immediate parties" to the endorsement transaction within section 3-403(2)(b).[21]

The Court's reluctance to apply section 3-403(2)(b) to endorsements is well-founded. Although the difficulty foreseen by the Court if Plotkin had transferred the check without endorsement to the corporation does not arise under the facts of the case, a further weakness is demonstrated by the facts. In this case, the bank was simply a holder of the instrument[22] and was not one of the "immediate parties" to the underlying instrument or transaction. The decisions from other jurisdictions cited by the Supreme Judicial Court as applying section 3-403(2)(b) to endorsements are inapposite since those decisions,[23] unlike the instant case, involved disputes between the endorser and the *payee* of an instrument. While these cases stand for the proposition that parol evidence as to the representative capacity of Plotkin would be admissible in a dispute between the payee (Plotkin) and an endorser, they do not support the proposition that such evidence is admissible in a dispute be-

[16] *Id.* at 2445, 355 N.E.2d at 919, *citing* Weather-Rite, Inc. v. Southdale Pro-Bowl, Inc., 301 Minn. 346, 347, 222 N.W.2d 789, 791 (1974), Central Trust Co. v. J. Gottermeier Dev. Co., 65 Misc. 2d 676, 677, 319 N.Y.S.2d 25, 26 (Sup. Ct. N.Y. 1971), *and* Trenton Trust Co. v. Klausman, 222 Pa. Super. 400, 405, 296 A.2d 275, 277 (1974).

[17] The Court analogized a regular endorsement to a new instrument written on the back of the original instrument. 1976 Mass. Adv. Sh. at 2445, 355 N.E.2d at 919.

[18] *See* G.L. c. 106, §§ 3-507(3), 3-411(3).

[19] 1971 Mass. Adv. Sh. at 2445-46, 355 N.E.2d at 919, *citing* G.L. c. 106, § 3-201(3).

[20] *See* G.L. c. 106, § 3-414.

[21] 1976 Mass. Adv. Sh. at 2446, 355 N.E.2d at 919.

[22] The Code defines a "holder" as "a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order to bearer or in blank." G.L. c. 106, § 1-201(20).

[23] *See* note 16 *supra* and cases cited therein.

tween the bank as a holder of the check and Plotkin as an endorser.[24] Plotkin therefore should not have been permitted to raise the defense that extrinsic facts demonstrated that Creative was the intended payee and that he therefore signed in a representative capacity.[25] Accordingly, under section 3-307(2) of the Code, where signatures are admitted as genuine, as in the instant case, the bank, as holder, was entitled to recover on production of the check since Plotkin was unable to establish a defense.[26]

§13.2. Negotiability of Postdated Check: Accelerability. In *Smith v. Gentilotti*,[1] the Supreme Judicial Court was presented with the question of whether a payee could recover on a postdated check which contained the drawer's endorsement stating that the face amount of the check should be paid from his estate if he died before the date of the check. Relying primarily on the Uniform Commercial Code, the Court held that the check was a negotiable instrument payable on demand from the drawer's estate.[2]

The drawer executed a check on November 25, 1969, payable to the order of his son in the sum of $20,000, postdated it to November 4, 1984, and delivered it to the mother for safekeeping. The drawer also endorsed the check on the reverse side as follows: "For Edward Joseph Smith Gentilotti, My Son If I should pass away the amount of $20,000.00 dollars Shall be taken from My Estate at death."[3] After the father died in 1973, a demand for payment was made to the father's executrix. Upon her refusal to pay, the mother and son sued the executrix in probate court to recover the amount of the check. The Supreme Judicial Court, on its own motion, ordered direct review after the probate judge reported the case to the Appeals Court.[4]

The executrix defended on the grounds that the check was both not negotiable and unenforceable for want of consideration. The Court rejected both contentions. It first pointed out that on its face the check possessed the requisite elements to qualify as "negotiable" under Section 3-104 of the Uniform Commercial Code:[5] it was an instrument in

[24] G.L. c. 106, § 3-403, Official Comment 3.

[25] *See* American Exchange Bank, Collinsville, Okla. v. Cessna, 386 F. Supp. 494 (N.D. Okla. 1974) (bank which had honored check on which payment was stopped could recover from maker whose corporate title did not appear on the check to recover funds advanced to payee).

[26] G.L. c. 106, § 3-307(2) (1957). The Supreme Judicial Court also dismissed a defense in the nature of estoppel for lack of an adequate factual predicate in Plotkin's affidavit. 1976 Mass. Adv. Sh. at 2447, 355 N.E.2d at 919.

§13.2. [1] 1977 Mass. Adv. Sh. 220, 359 N.E.2d 953.

[2] *Id.* at 221-22, 359 N.E.2d at 955.

[3] *Id.* at 220, 359 N.E.2d at 953.

[4] *Id.*

[5] *Id.* at 221, 355 N.E.2d at 955, *citing* G.L. c. 106, § 3-104.

writing signed by the drawer ordering the bank to pay a sum certain on demand.[6] The postdating of the check did not affect its negotiability under the Code;[7] the "1984" date merely determined the time at which the check was to be payable.[8]

The Court then reasoned that the endorsement modified the check in two ways.[9] First, it provided for an acceleration of the time of payment, a permissible practice under the Code.[10] Second, the endorsement required direct payment from the father's estate, rather than presentment to the drawee bank. Payment from the father's estate upon his death would have been prescribed by law in any event,[11] the Court noted, because the bank was not authorized to pay the check more than ten days after the drawer's death if it had knowledge of his death.[12] The Court, therefore, excused presentment to the bank as a "futile gesture" and held that the mother and son, as holders, had an immediate right to demand payment from the father's estate.[13]

With respect to the executrix's second contention, the Court acknowledged that the mother and son, unless they had the rights of a holder in due course, held the check subject to the defense of want of consideration.[14] The Court noted, however, that under the Code the mother and son established a prima facie case by producing the check and proving the signatures[15] and the executrix had the burden of proving as an affirmative defense the lack of consideration. The Court, after reviewing the findings and evidence, accepted the probate court's ruling that the executrix failed to prove her defense of lack of consideration.[16]

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[6] G.L. c. 106, § 3-104 provides, in relevant part:

(1) Any writing to be a negotiable instrument within this Article must
(a) be signed by the maker or drawer; and
(b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker of drawer except as authorized by this Article; and
(c) be payable on demand or at a definite time; and
(d) be payable to order or to bearer.

[7] *Id.*, § 8-114(1).

[8] *Id.*, § 3-114(2).

[9] 1977 Mass. Adv. Sh. at 222, 359 N.E.2d at 955.

[10] G.L. c. 106, § 3-109(1)(c).

[11] *Id.*, §§ 3-413(2), 3-507(1)(b).

[12] *Id.*, § 4-405. Under the Code, provisions relative to the source of payment of an instrument do not make an otherwise unconditional promise conditional, which would destroy negotiability. *Id.*, §§ 3-105(1)(f), 3-104.

[13] 1977 Mass. Adv. Sh. at 221-22, 349 N.E.2d at 955.

[14] *Id.* at 222, 359 N.E.2d at 955.

[15] *Id. See* G.L. c. 106, §§ 3-306(c), 3-307(2). *Cf.* Loew v. Minasian, 361 Mass. 390, 391, 280 N.E.2d 688 (1972) (summary judgment for plaintiff upheld for failure to present facts on affirmative defenses).

[16] 1977 Mass. Adv. Sh. at 222, 359 N.E.2d at 955.

The Supreme Judicial Court's view of the negotiability of the check in *Smith* is supported by Code principles and is consistent with the view taken by Code commentators.[17] The Code draws a distinction between instruments payable upon the happening of an event which will happen at an uncertain time and those payable at a definite time subject to an acceleration.[18] The former are always nonnegotiable even though it is certain that the event will happen at some time or, in fact, has happened.[19] Thus, an instrument payable only upon the death of the maker is nonnegotiable because when made, the time of maker's death is uncertain.

Instruments, payable at a definite time but subject to acceleration, however, are not subject to the same uncertainty despite the presence of the acceleration provision.[20] Even if the time of acceleration or acceleration itself is uncertain, there is still a certain time of payment, beyond which the instrument cannot run, stated on the face of the instrument.[21] Therefore, commentators maintain that, as in the *Smith* case, a check payable on a certain date or upon the death of the maker, whichever occurs first, is negotiable.[22] The death of the maker simply accelerates the time of payment to the date of his death rather than the date of the check. Thus, the acceleration clause does not affect a check's negotiability, because the time of payment "is no less certain than a note payable on demand, whose negotiability never has been questioned."[23]

§13.3. Revocation of Acceptance: Effective Notice. In *Dixon v. Yale Manufacturing Company,*[1] the Appellate Division of the District Courts held that a notice of revocation of acceptance need not be in writing in order to be procedurally effective under the Uniform Commercial Code ("Code"). The Appellate Division's holding comports with principles embodied in the Code but it does conflict with approaches taken by some other jurisdictions in this area of Code interpretation.

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[17] See note 20 *infra.*

[18] G.L. c. 106, § 3-109(1)(c) and (3).

[19] G.L. c. 106, §§ 3-104, 3-109(2) & Mass. Code Comment.

[20] *Id.*, § 3-109(1)(c) & Official Comment 4.

[21] *Id.*

[22] "It would appear, however, that an instrument payable June 1, 1995, or upon the death of the maker, whichever occurs first is a negotiable instrument because it is a note payable at a definite time subject to acceleration." F. HART & W. WILLIER, COMMERCIAL PAPER § 2.13(3) *Bender UCC Serv.* Professor William D. Hawkland also presents an example of a valid acceleration clause: "I promise to pay 100 years from date, but payment shall be accelerated by the death of my Uncle George to a point in time 6 weeks after said death." Hawkland, Commercial Paper 14-19 (Joint Committee on Continuing Legal Education of the American Law Institute and American Bar Association, November 1959).

[23] G.L. c. 106, § 3-109, Official Comment 4.

§13.3. [1] 1977 Mass. Adv. Sh. (App. Div.) 57.

In *Dixon,* the plaintiff, who planned to open a beauty parlor in her new home, ordered beauty shop equipment consisting of two wet booths, two chairs, two sinks and two mirrors from the defendant manufacturer, and made a deposit therefor on July 26, 1971. When she went to pick up the equipment, she discovered that the two wet booths were the incorrect style and left them with the defendant. Nevertheless, she paid the balance of the purchase price including the amount due for the wet booths. Four days later she discovered that the chairs were defective and returned them to the defendant who agreed to fix the chairs and to deliver the correct wet booths within two weeks. When the equipment was not ready within that period, the plaintiff installed her old equipment in her new home and had her attorney write the defendant on September 29, 1971, requesting the return of the money she had paid for the wet booths and the chairs.

The defendant responded by letter on October 1, 1971, stating that the equipment had been manufactured according to her specifications and that he was awaiting shipping instructions. On December 21, 1971, the defendant, without prior notice, delivered the wet booths and chairs to the plaintiff's home, leaving them in the garage because no one was home. The plaintiff declined to utilize the equipment and on February 29, 1972, she again had her attorney write the defendant requesting return of the money she had paid for the two wet booths and chairs. The attorney's letter specifically pointed out that the booths and chairs were neither merchantable nor conformed to contract specifications.[2] Obtaining no satisfaction, the plaintiff brought a contract action in the Municipal Court of the City of Boston.

After losing in Municipal Court, the defendant appealed. In the Appellate Division, the defendant's principal argument was that the letters from the plaintiff's attorney did not constitute a procedurally effective revocation of acceptance.[3] The Appellate Division disagreed and affirmed the trial court's judgment, stating that it was not necessary to rely solely upon the letters to find an effective revocation.[4] Thus, the Appellate Division looked at the entire record and found that it contained sufficient additional evidence upon which the trial court could have based its finding that there was a procedurally effective revocation of acceptance. Specifically, the appellate court pointed to the plaintiff's oral notification when she returned the defective chairs that she would be "forced" to reinstall her old equipment if the defects and nonconformities were not remedied expeditiously.[5] This oral notification, the

[2] *Id.* at 575.
[3] *Id.* at 576.
[4] *Id.* at 578.
[5] *Id.* at 577-78.

appellate court reasoned, and the fact that the equipment was left in the plaintiff's garage some four months later without notice to her constituted additional evidence of an effective revocation of acceptance. Thus, because the letters were not dispositive of the issue of the revocation's effectiveness, the appellate court refused to consider arguments as to whether the letters, standing alone, constituted an effective revocation of acceptance.[6]

The appellate court's ruling as to the effectiveness of the plaintiff's revocation comports with principles embodied in the Code. Under the Code, the buyer is liable for the price of "goods accepted," unless he makes a procedurally effective revocation of acceptance for which there are substantive grounds.[7] Such a revocation then will bar the seller's right to recover the price of the goods previously accepted.[8] Section 2-608 of the Code sets up the specific conditions under which a buyer can make such a revocation.[9] It requires that the goods be nonconforming, that the nonconformity substantially impair the value of the goods to the buyer, that the nonconforming goods be accepted on the reasonable assumption that the nonconformities would be seasonably cured, and that the nonconformities were not so cured.[10] In addition, notice of revocation must be given within a reasonable time after the buyer discovers the nonconformity.[11]

The Code, however, does not set forth any requirements for the form or content of the notice of revocation. However, the Official Comment to Section 2-608 does offer some guidelines: the content of the notice "is to be determined . . . by considerations of good faith, prevention of surprise, and reasonable adjustment."[12]

This comment, when viewed in conjunction with the language of Section 2-608 itself, supports the Appellate Division's conclusion that a "revocation under . . . the Uniform Commercial Code does not have to be in writing to be effective."[13] The comment envisions that a court will

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[6] *Id.* at 578.

[7] G.L. c. 106, § 2-709(1).

[8] *Id.*

[9] G.L. c. 106, § 2-608. *See generally* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 253-66 (1972 ed.).

[10] *Id.*, § 2-608(1)(a).

[11] *Id.*, § 2-608(2). Revocation of acceptance therefore is available in a more limited number of instances than rejection of goods prior to their acceptance; rejection is available for any nonconformity in goods or their tender of delivery whether or not value is impaired. *Id.*, § 2-601.

[12] *Id.*, § 2-608 Official Comment 5. The comment also states that "the reqirements of the content of notification are less stringent in the case of a nonmerchant buyer." *Id.* The Appellate Division in *Dixon* did not indicate whether it considered the plaintiff a merchant or nonmerchant buyer.

[13] 1977 Mass. Adv. Sh. (App. Div.) at 578, *citing* Performance Motor Inc. v. Allar, 280 N.C. 385, 395 (1972).

do as the *Dixon* court did; it will analyze the totality of the facts and circumstances to determine the propriety of a purported revocation.[14]

In *Dixon,* there was evidence that the seller knew that the wet booths were the incorrect style, that the chairs were defective, and that these nonconformities would have to be cured within a short time if the goods were to be of value to the plaintiff.[15] Written notice of these facts was not necessary to give the seller an opportunity to make a substitute performance.[16] Hence, the Appellate Division's holding that the plaintiff's oral statements, the attorney's letters and the defendant's own actions supported the trial court's finding of a procedurally effective revocation under Section 2-608 cannot be said to be erroneous.

Courts in other jurisdictions which have considered the requisites of an effective notice of revocation under Section 2-608, however, have reached divergent results with respect to the requirement that the notice be in writing. Most courts have found that any kind of notice is effective if in any reasonable manner it informs the seller that the buyer has revoked acceptance, identifies the particular goods which are nonconforming, and discloses the nature of the nonconformity.[17] Indeed, one court has said that effective notice may be implied solely from the conduct of the parties where a nonmerchant buyer is involved.[18] Yet some jurisdictions have not been so liberal, requiring notice of revocation to be in writing and to be carefully drafted at that.[19]

The construction of Section 2-608 adopted the the Appellate Divison and by most jurisdictions is preferable where the seller has adequate and timely notice and the buyer has substantive grounds to revoke accept-

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[14] 1977 Mass. Adv. Sh. (App. Div.) at 574-75, 577.

[15] From the facts reported, it does not appear that the buyer ever accepted the wet booths, but rejected them upon tender as authorized under section 2-601 of the Code. G.L. c. 106, § 2-601.

[16] *See, e.g.,* Boysen v. Antioch Sheet Metal, Inc., 14 U.S.C. Rep. 120 (Ill. App. Ct. 1974) ("Notice of revocation need not be in any particular form or use particular words if the buyer has adequately informed the seller that he does not want the goods and does not wish to retain them"); Lynx v. Ordnance Products, Inc., (Md. Ct. App. 1974). ("The criterion of good faith and the consideration that a speedy inexpensive method of operation is desirable lead to the conclusion that the form and content of such notice of revocation should inform the seller that the buyer has revoked, identify the particular goods as to which he has revoked and set forth the nature of the non-conformity since such notice would corroborate the buyer's good faith and give the seller an opportunity to make a substitute performance to maintain good will or avoid litigation").

[17] *See* Fentar v. Contemporary Dev. Co., Inc. 529 P.2d 883 (Wash. Ct. App. 1974). *See* note 12 *supra.*

[18] *See, e.g.,* Grossman v. D'Or, 98 Ill. App. 2d 198, 240 N.E.2d 266 (1968) (buyer's letters asking credit on return of unused merchandise did not meet notice requirement of section 2-608); *see also* Cohen Salvage Corp. v. Eastern Elec. Sales Co., Inc., 205 Pa. Super. Ct. 26, 206 A.2d 331 (1965) (notice of rejection must be in writing).

[19] G.L. c. 106, § 1-106.

ance. To require the notice to be in writing in such cases simply does not comport with the principle that the Code's remedies should "be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party has fully performed. . . ."[20]

§13.4. Construction Bonds — Timely Filing of Claim — Actual Use of Materials. In two cases decided during the *Survey* year, the Supreme Judicial Court was presented with the opportunity to construe the statutes[1] relating to public and private construction surety bonds. The Court's primary concern in each case was ensuring that a supplier's legitimate claim for payment under a surety bond for materials furnished to a contractor would not be thwarted by a technical interpretation of the applicable bond statute.

In the first case, *International Heating & Air Conditioning Corp. v. Rich Construction Co., Inc.*,[2] a subcontractor on a municipal construction project issued a purchase order to the supplier for certain equipment which the supplier shipped in four installments. Approximately one year after the date of the last shipment, the supplier, when testing the installed equipment for proper functioning, discovered that four rubber pads used as vibration eliminators for a large piece of the equipment had not been installed. Shortly thereafter, the supplier sent the rubber pads to the job site without charge, but apparently they were never installed nor used in the project. Within ninety days after the rubber pads were sent, the supplier filed a sworn notice of claim for payment under a surety bond of the project's general contractor.[3]

Since this was a public construction project, the general contractor was required to obtain the bond by Section 29 of Chapter 149 of the General Laws to secure "payment . . . for materials used or employed."[4] The statute also permits a supplier furnishing materials to a subcontractor on the project to recover under the bond by filing a claim within ninety days after the day on which the claimant last furnished materials.[5]

The surety's sole contention before the Supreme Judicial Court was that the supplier's claim was not timely filed. Based on a strict interpretation of the bond statute, the surety argued that the statutory "claim" or "debt" arises on the date that the last materials furnished are incorporated into a project. Therefore because the rubber pads were not so

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[20] G.L. c. 106, § 1-106.

§13.4. [1] G.L. c. 149, § 29, 29A.

[2] 1977 Mass. Adv. Sh. 458, 360, N.E.2d 636.

[3] *Id.* at 458, 460, 360 N.E.2d at 636, 637. Subsequently, the supplier intervened as plaintiff in a suit brought by another claimant against the general contractor and the surety company. Similarly, the subcontractor to whom the materials had been supplied intervened as defendant. *Id.* at 459, 360 N.E.2d at 636.

[4] G.L. c. 149, § 29.

[5] *Id.*

incorporated, the statutory filing period had expired almost a year earlier.[6] Support for this argument was found in the earlier Supreme Judicial Court decision of *Lock Joint Pipe Co. v. Commonwealth,*[7] where the Court, in construing a similar bond statute, stated in dictum: "The import of our cases is that the sworn statement of claim must be filed within [ninety] days after the claimant furnishes the last materials which become part of the installation."[8]

Before addressing the surety's contention, the Court first reviewed the legislative and judicial history of the Massachusetts public construction bond statute. It pointed out that its underlying purpose was to provide laborers and materialmen security equivalent to the lien created on private property under the mechanics' lien statute.[9] The Court then noted that it formerly viewed the early mechanics' lien law as a purely statutory right which required strict compliance with its requirements.[10] Accordingly, it previously had construed that statute as creating no lien for material furnished unless the materials were physically incorporated into the construction work.[11] This reasoning, the Court explained, had been extended by analogy to preclude claims under the public construction bond statute until a materialman's performance was complete.[12]

The Court declined, however, to continue construing the public construction bond statute according to the same principles as utilized in construing the mechanics' lien statute.[13] Rather, the Court stated that under the modern view the bond statute is to be given a "broad or liberal construction to accomplish its intended purpose."[14] Consistent with this view, claims in *Lock Joint Pipe* and other cases[15] were upheld because they were filed within the statutory period after the date of last delivery of materials for a project even though "some of the materials . . . were never installed."[16] Thus, the Court held that the supplier's claim in the instant case was timely filed since it was filed within ninety days of the date on which the last materials for the project — the rubber pads —

[6] 1977 Mass. Adv. Sh. at 462, 360 N.E.2d at 638.

[7] 331 Mass. 346, 118 N.E.2d 869 (1954).

[8] *Id.* at 351-52, 118 N.E.2d at 873.

[9] The mechanics' lien law is presently codified at G.L. c. 254, §§ 2, 3.

[10] 1977 Mass. Adv. Sh. at 462, 360 N.E.2d at 638. *See* Gale v. Blaikie, 129 Mass. 206, 209 (1880).

[11] 1977 Mass. Adv. Sh. at 461, 360 N.E.2d. at 637. *See* Walsh Holyoke Steam Boiler Works, Inc. v. McCue, 289 Mass. 291, 294, 194 N.E. 117, 118 (1935). *See also* George A. Sampson Co. v. Commonwealth, 202 Mass. 326, 88 N.E. 911 (1909).

[12] 1977 Mass. Adv. Sh. at 461, 360 N.E.2d at 637, *citing* International Business Machs. Corp. v. Quinn Bros. Elect. Co., 321 Mass. 16, 19, 71 N.E.2d 406, 408 (1947).

[13] 1977 Mass. Adv. Sh. at 462-63, 36 N.E.2d at 638.

[14] *Id.*

[15] *See, e.g.,* American Filler Co. v. Innamorati Bros., 358 Mass. 146, 260 N.E.2d 718 (1970).

[16] 1977 Mass. Adv. Sh. at 463, 360 N.E.2d at 638.

were delivered even though the pads were not installed.[17] The Court reasoned that:

> [i]t would be anomalous if the subsequent failure of the subcontractor to install [the rubber pads] were retroactively to render the supplier's claim untimely. The anomaly would not be founded in the words of the statute. In a case of first impression, we are not prepared so to extend the outworn analogy to superseded mechanics' lien statutes.[18]

The Court's broad view of the public construction bond statute expressed in *International Heating* resurfaced in *M. Lasden, Inc. v. Decker Electrical Corp.*,[19] where the Court construed Section 29A of Chapter 149 of the General Laws, the private construction bond statute. In *Lasden,* a supplier had furnished materials to a subcontractor on a private construction project for which the general contractor had obtained a surety bond, protecting all claimants of the contractor or his subcontractors. The surety bond secured payment only for materials "used or reasonably required for use in the performance of the Contract."[20] Unknown to the supplier, however, some materials shipped to the job site were not used in that construction project but were used by the subcontractor in other projects not covered by the bond. After the subcontractor was adjudicated bankrupt, the supplier filed suit against the subcontractor, the contractor and the surety to recover monies owed for supplies delivered. The superior court allowed recovery against the surety based on the theory that the bond covered the materials shipped to the job site because the shipper had a reasonable expectation that they would be used in the construction of the project.[21]

The surety's sole contention on appeal was that the bond's coverage was strictly limited by its terms. Accordingly, the surety argued that there could be recovery against the bond *only* for "materials either actually used in construction or those materials meeting the contractual specifications purchased by [the subcontractor] with the reasonable possibility that they would be so used."[22]

The Supreme Judicial Court first noted that the language of the bond in question tracked that of the private construction bond statute.[23] The

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[17] *Id.* at 464, 360 N.E.2d at 638.

[18] *Id.*, 360 N.E.2d at 638-39.

[19] 1977 Mass. Adv. Sh. 508, 360 N.E.2d 1068.

[20] *Id.* at 509, 360 N.E.2d at 1068.

[21] *Id.* at 510, 360 N.E.2d at 1069.

[22] *Id.* at 511, 360 N.E.2d at 1069.

[23] G.L. c. 149, § 29A, which provides, in relevant part:

> Whenever any surety bond shall be given in connection with any written contract for the erection . . . of any private building . . . containing a condition for the payment of all labor and material used or reasonably required for use in the per-

Court therefore reasoned that since the bond's enforceability apparently was contingent on that statute, it should be construed in light of the statute's policies.[24] Those policies, the Court explained, are similar to the policies underlying the public contruction bond statute: the broad remedial purpose of affording security to subcontractors and materialmen.[25] Having determined that the policies of the two bond statutes are similar, the Court pointed out, however, that there is a critical difference in the language of the two statutes. Specifically, the private construction bond statute, unlike the public bond statute, does not require that materials supplied be "used or employed" in a project in order for a supplier to have a right of payment; rather, the materials furnished must be only "used or reasonably required for use."[26] Therefore, the Court reasoned, it need not follow its earlier decision in *Walsh Holyoke Steam Boiler Works, Inc. v. McCue,*[27] where it had interpreted the public construction bond statute as requiring the actual use of material in a construction project as a prerequisite to recovery.[28] Instead, the Court held that the supplier in the instant case could recover against the bond for materials furnished to the subcontractor because he had a reasonable and good faith belief that the materials would be used in the construction project covered by the bond, even though they were not actually used.[29]

This conclusion, the Court noted, was in accord with interpretations of the federal public construction bond statute,[30] as well as mechanics' lien statutes of many other states.[31] Such statutes have been construed uniformly to cover materials that were supplied with the good faith belief that they were to be incorporated into a particular project even though not actually so incorporated.[32] Moreover, the Court indicated that its decision in *Lasden* not only was consistent with the policies enunciated in *International Heating* but also was supported by common business practices. A supplier falling within the protected class of the bond should not have his protections nullified by the unknown actions

formance of the contract, any person who furnishes such labor or materials shall be entitled to sue for his own use and benefit upon such bond in accordance with its provisions and need not prove that he relied upon the bond furnishing labor or material.

[24] 1977 Mass. Adv. Sh. at 512, 360 N.E.2d at 1070.

[25] *Id.*

[26] *See* G.L. c. 149, § 29A.

[27] 289 Mass. 291, 194 N.E. 117 (1935).

[28] 1977 Mass. Adv. Sh. at 512-13, 360 N.E.2d at 1070.

[29] *Id.* at 510, 515, 360 N.E.2d at 1069, 1071.

[30] 40 U.S.C. § 270(a) (1970).

[31] *See generally* Annot., 79 A.L.R.2d 843, 846-49 & n.13 (1961).

[32] *See, e.g.,* Idaho Lumber & Hardware Co. v. Digiacomo, 61 Idaho 383, 102 P.2d 637 (1940). *But cf.* Burnett v. Beadle, 142 Colo. 239, 75 P.2d 843 (1904).

of a subcontractor, nor should he be burdened with having to insure that materials supplied were actually incorporated into a project.[33]

The Supreme Judicial Court's opinions in *International Heating* and *Lasden* indicate that the Court is prepared to construe liberally both the public and private bond statutes and perhaps the analogous mechanic's lien statute as well.[34] The Court apparently has abandoned its former rule of strict construction of such statutes in favor of construction to effectuate the underlying purpose of the statutes of providing security for suppliers of material for construction projects.

This liberal approach, the Court noted, conflicts with its previous narrow position in *McCue* and other cases where it construed the public construction bond statute as requiring actual use of materials in the construction of a project before a supplier's claim would be upheld.[35] In *International Heating,* the Court did not consider whether recovery could be had under the public construction bond statute for materials delivered but not installed as the materials in that case (rubber pads) were provided without charge.[36] The Court, however, in *Lasden* deliberately refrained from overruling its decision in *McCue,* noting that the scope of materialman's protection under the public bond statute is extended by the "specific words" of that statute.[37] The difference in language between the private and public bond statutes thus seems anomalous in view of the Court's finding that the purposes of both statutes are identical.

Hence, *Lasden* and *International Heating,* when read together, suggest that legislative action would be appropriate to conform the public construction bond statute to its private bond counterpart so as to afford the same protection to suppliers of public and private construction projects. Indeed, in view of the Court's increasingly liberal construction of the payment bond statutes in general,[38] these two cases may foreshadow

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[33] 1977 Mass. Adv. Sh. at 513-15, 360 N.E.2d at 1070-71.

[34] The Court explained in a footnote that the question of whether delivery alone will sustain a mechanics' lien under G.L. c. 254, §§ 2, 3 is still open. *Id.* at 513 n.5, 360 N.E.2d at 1070. Yet, it seems that the Court's reasoning in *Lasden* can be extended by analogy to the mechanics' lien statute. Accordingly, the Court may find that delivery is sufficient to sustain such a lien in a case where the issue is properly before the Court.

[35] *Id.* at 514, 360 N.E.2d at 1071. *See, e.g., McCue,* 289 Mass. at 294, 194 N.E. at 118; American Casting Co. v. Commonwealth, 274 Mass. 1, 6, 174 N.E. 174, 176 (1931). *See also Lock Joint Pipe,* 331 Mass. at 353, 118 N.E.2d at 870, where the Court permitted recovery for the proportionate amount of materials installed as compared to the amount delivered.

[36] 1977 Mass Adv. Sh. at 464, 360 N.E.2d at 638. The Court stated, however, the issue in the instant case concerned the timeliness of the filed claim, and therefore, it did not reach the question "as to the amount to be recovered if the claim was timely filed." *Id.* at 463, 360 N.E.2d at 638.

[37] 1977 Mass. Adv. Sh. at 513, 360 N.E.2d at 1070.

[38] *See, e.g.,* American Air Filter Co. v. Innamorati Bros., 358 Mass. 146, 260 N.E.2d 718

the eventual overruling of *McCue* and its requirement that materials be actually used in a public construction project, even absent legislative action.

§13.5. Fair Trade Repealed. During the Survey year, the General Court of the Commonwealth joined a growing number of jurisdictions in repealing the state's Fair Trade Law.[1]

The Massachusetts Fair Trade Law, Sections 14A-14D of Chapter 93 of the General Laws, originally enacted in 1937, provided that no contract for the sale or resale of a commodity bearing a trademark, brand or name of the producer and in fair and open competition with commodities of the same general class produced by others would be in violation of any state law because the buyer agreed not to resell the commodity at less than a minimum stipulated price.[2] Further, the Fair Trade Law made it unlawful for a person to advertise, to offer for sale or to sell a fair-traded product below its fair trade price.[3]

Born in the Depression, fair trade legislation, commonly referred to as "resale price maintenance", was designed to protect trademark owners, distributors, and the public against injurious practices, such as loss-leader and cut-rate merchandising, in the distribution of products of a standard quality under a distinguishing trademark, brand or trade name.[4] California adopted the first state fair trade law in 1931[5]; during the 1930's a number of states followed suit, and by 1941 Delaware became the forth-fifth state to enact such legislation.[6] The constitutionality of state fair trade laws was upheld by the United States Supreme Court in 1936.[7] Shortly thereafter, federal legislation was enacted in 1937 and later in 1952, creating exemptions from the Sherman Antitrust

(1970); Warren Bros. Roads Co. v. Joseph Rugo, Inc., 355 Mass. 382, 245 N.E.2d 243 (1969).

§13.5. [1] Acts of 1977, c. 74, § 1. The General Court also eliminated reference to violation of the Fair Trade Law as grounds for suspension of a license or permit for alcoholic beverages. Acts of 1977, c. 74, § 2.

[2] G.L. c. 93, § 14A.

[3] G.L. c. 93, § 14B. In 1973 the Supreme Judicial Court held that the "nonsigner provision" of the statute, which compelled a person who had not entered into a "fair trade" contract to observe fair trade prices, amounted to an unconstitutional delegation of legislative power to private parties. Corning Glass Works v. Ann & Hope, Inc. of Danvers, 363 Mass. 409, 294 N.E.2d 354 (1973). *See* 1973 ANN. SURV. MASS. LAW § 10.15.

[4] For a more complete discussion, *see* Fulda, *Resale Price Maintenance,* 21 U. CHI. L. REV. 175 (1954); Herman, *Fair Trade, Origins, Purposes and Competitive Effects,* 27 GEO. WASH. L. REV. 621 (1959); 12 B.C. IND. & COM. L. REV. 982 (1971).

[5] CAL. BUS. & PROF. CODE § 16,900-13 (West 1964), repealed by Laws of 1975, Chapter 429 (effective January 1, 1976).

[6] DEL. CODE ANN., Title 6, c. 19, §§ 1901-07, *repealed by* Del. Laws of 1976, H.B. No. 356 (effective June 18, 1976).

[7] Old Dearborn Distributing Co. v. Seagram Distillers Corp., 299 U.S. 183 (1936).

Act[8] and the Federal Trade Commission Act[9] for state laws or policies legalizing "fair trade" practices.[10]

In the 1950's, however, numerous state courts began to invalidate, in whole or part, their fair trade legislation on state constitutional grounds.[11] In 1975, the Federal Consumer Goods Pricing Act[12] repealed the portions of the Sherman Antitrust Act and Federal Trade Commission Act which authorized states to insulate resale price maintenance from federal antitrust scrutiny. Of the forty-six states that had enacted fair trade laws,[13] fifteen states repealed them in 1975, with twelve more following suit in 1976 and 1977.

With the demise of the Massachusetts Fair Trade Law, legislative protection against predatory price cutting by merchants henceforth will be governed by the Unfair Sales Act, Sections 14E-14K of Chapter 93 of the General Laws. That Act effectively prohibits a retailer or wholesaler from selling merchandise at less than cost plus a mark-up to cover the cost of doing business.[14]

§13.6. Small Business Purchasing Program. The General Court established a statutory preference for purchases by the Commonwealth of goods and services from small businesses within the state.[1] Under this new statute the Secretary of Administration and Finance is charged with establishing and implementing a program that ensures that the aggregate amount of purchases by the state from small business equals or exceeds five (5) percent of the aggregate of all purchases made by the Commonwealth.[2] A "small business" is defined as a business which is independently owned and operated, has its principal place of business within Massachusetts, is not dominant in its field of operation, and is not a corporation which is a member of an affiliated group.[3] The Secre-

[8] 15 U.S.C. §§ 1-7 (1970).

[9] 15 U.S.C. § 45(a) (1970).

[10] 15 U.S.C. § 1 (1970) (Miller — Tydings Amendment to Sherman Antitrust Act); 15 U.S.C. § 45(a) (1970) (McGuire Act).

[11] By the end of 1977, five state fair trade laws had been held unconstitutional. 2 TRADE REG. REP. (CCH) ¶ 6041.

[12] Pub. L. No. 94-145, *amending* 15 U.S.C. §§ 1, 45(a) (effective March 11, 1976). 89 Stat. 801.

[13] Alaska, Missouri, Texas, and Vermont never had fair trade laws. 2 TRADE REG. REP. (CCH) ¶ 6041.

[14] The statutory mark-up is 6 percent of the total cost at the retail outlet and 2 percent of the total cost at the wholesale establishment. G.L. c. 93, § 14E(a), (b).

§13.6. [1] Acts of 1976, c. 434.

[2] The Secretary has the authority to include specific purchases in the program if necessary to achieve the five percent minimum. Acts of 1976, c. 434, § 3.

[3] An affiliated group is defined as one or more chains of corporations connected through ownership with a common parent corporation. A stock ownership test is established for the definition of an "affiliated group": (1) Stock representing 20 percent of voting power

tary has the further responsibility of ensuring that participants in the program include small businesses which are beneficially owned and controlled by one or more minority individuals.

§13.7. Automated Banking Facilities for Credit Unions. The authority to utilize remote, automated, unmanned facilities to electronically disburse funds for customer convenience, previously accorded only to trust companies and savings or cooperative banks, is now extended to credit unions.[1]

§13.8. Real Estate Loans. The General Court enacted a series of amendments relating to mortgage loans. First, it extended the maximum allowable term of the note for certain real estate loans secured by a first mortgage made, acquired, or participated in by cooperative banks to thirty-five years.[1] Second, cooperative banks were authorized to make or acquire loans secured by a second mortgage on residential real estate for noncommercial or non-business purposes for an amount up to ten thousand dollars.[2] Third, credit unions were authorzed to make ninety percent mortgage loans on single or two-family residences to an aggregate amount of fifteen percent of the aggregate balance of the shares, deposits, guaranty fund, reserve fund, and undivided earnings of the credit union.[3] Fourth, credit unions which are insured in full under federal or state law and whose shares and deposits aggregate more than two million dollars were authorized to loan up to fifty thousand dollars upon any parcel of real estate.[4] Fifth, credit unions were also authorized to make or acquire loans secured by a second mortgage on residential real estate for noncommercial or nonbusiness purposes. The aggregate amount of such loans may be ten percent of the credit union's assets, provided that the amount of any such loan, when added to the balance due on the first mortgage, does not exceed eighty percent of the value of the real estate as determined by the union's credit committee or ten thousand dollars, whichever is less.[5] Any such loan must be repaid within ten years. Sixth, savings banks were allowed to amortize certain real estate loans secured by a first mortgage (eighty percent, ninety

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of all classes of stock and at least 20 percent of each non-voting class of each member of the affiliated group (except parent) is owned directly by one or more members of the group; and (2) parent owns directly stock representing 20 percent of voting power of all classes of stock and at least 20 percent of each non-voting class of at least one of the other members of the group. Acts of 1976, c. 434, § 2(6).

§13.7. [1] Acts of 1977, c. 32, *amending* G.L. c. 167, § 65.

§13.8. [1] Acts of 1977, c. 70, *amending* G.L. c. 170, § 24(3), (3A), (3B).
[2] Acts of 1977, c. 195, *adding* G.L. c. 170, § 24B.
[3] Acts of 1977, c. 20, *amending* G.L. c. 171, § 24(B)(a)(4).
[4] Acts of 1977, c. 22, *amending* G.L. c. 171, § 24(B)(b)(8).
[5] Acts of 1977, c. 23, *adding* G.L. c. 171, § 24(B)(a)(7).

percent, and ninety-five percent of value) for a period of up to thirty-five years.[6] Seventh, savings banks were also allowed to make mortgage loans of ninety percent of the value of the property for up to sixty thousand dollars.[7] Finally, savings banks were authorized to make mortgage loans of up to seventy percent of the value of the real estate. These loans must be payable on demand or in not more than three years from the date of the note, and may not be in excess of one percent of the deposits of the savings bank corporation or fifty thousand dollars, whichever is greater.[8]

§13.9. Other Banking Statutes. The General Court also made some miscellaneous amendments to the banking laws. It allowed cooperative banks with assets of over five million dollars to make personal loans to a borrower in an amount up to nine thousand dollars if the amount of the loan over four thousand five hundred dollars is secured by a first lien on the borrower's property having a fair market value equal to the lien.[1] It also allowed them to invest in participation loans on real estate within their lending areas in an amount up to one and one-quarter percent of their deposits, or seventy-five thousand dollars, whichever is greater.[2] Finally, banking associations or corporations which exercise trust powers while acting as a fiduciary were authorized to establish a collective investment fund for the purpose of providing for temporary investment of cash held in a fiduciary capacity.[3] The collective investment fund must be administered in accordance with a declaration of trust, with the fund bearing the expenses of administration. The banking corporation or association however must pay the cost of establishing the fund.[4]

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[6] Acts of 1977, c. 364, *amending* G.L. c. 168, § 35(4), (6A), (6B).
[7] Acts of 1976, c. 62, *amending* G.L. c. 168, § 35(6A).
[8] Acts of 1977, c. 63, *amending* G.L. c. 168, § 35(2).

§13.9. [1] Acts of 1977, c. 34, *amending* G.L. c. 170, § 26(8).
[2] Acts of 1977, c. 46, *amending* G.L. c. 170, § 23(4).
[3] Acts of 1977, c. 92, *adding* G.L. c. 167, § 54E.
[4] *Id.*