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CONTRACTS—SALES

EDWARD J. BENETT*

INTRODUCTION

Both the courts and the legislature have been active in the contracts-sales area of the law—the courts dealing primarily with contract principles and the legislature with sales principles. In recent cases, Illinois Appellate Courts have re-examined such familiar contract trouble spots as the requirement of mutuality, the parol evidence rule and "mirror image" acceptances. At the same time, they have explored such novel questions as whether an insured's cause of action against his insurer can be the subject of an assignment. A new concept, called a "preliminary contract," was announced for credit card companies who solicit insurance from their subscribers; and a lawyer's conflict of interest was utilized to have a release contract set aside. Meanwhile, the Illinois Legislature was busy trying to protect Illinois consumers without seriously offending big business lobbies, the result being a series of consumer-oriented statutes which lacked substantial force. This survey is in two sections: the first is on contract developments, all of which are in the form of case reports, and the second is on sales developments, which include the legislation noted above and cases applying the Uniform Commercial Code and the state's Retail Installment Sales Act.

CONTRACTS

OFFER & ACCEPTANCE

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1. There were no significant contracts cases from the Illinois Supreme Court. Cases for the survey are taken from Volumes 1-4 of the Illinois Appellate Reports (Third Series) and from volumes 271-78 of the Northeastern Reports (Second Series).

companies who offer insurance to their members through mailed brochures. In that case, the Illinois Appellate Court, Third District, found the mailing of a brochure with a cover letter and application blank to a credit card holder, followed by the cardholder’s completion and return of the application, constituted a “preliminary contract” which bound the credit company to provide the insurance coverage stated in its advance materials. The contract acts as a binder to any subsequent policy which may be issued by the company and is effective even before the policy is issued.

Mary Lou and Albert Fuller, holders of a Standard Oil credit card, received a letter, brochure and application for travel accident insurance in December, 1962, from Imperial Casualty and Indemnity Company, a subsidiary of Standard Oil of Indiana. Mary Lou completed the application blank and named Albert, her husband, as beneficiary. She sent the application to the company in December, 1962, and a policy was issued to her the following month. However, the coverage described in the policy was slightly different from that appearing in the previously mailed brochure—the policy containing a broader exclusionary clause for certain types of airplane accidents. In April, 1965, Mary Lou died as a result of a private plane crash and Albert tried to recover under the broader terms of the brochure; the company claimed the coverage was governed by the narrower policy provisions. The appellate court initially accepted the plaintiff’s notion that a “preliminary contract” was formed based on the terms found in the brochure and application. Relying on a similar 1969 New Jersey case, the court stated that in the unorthodox method of selling insurance disclosed by the Fuller facts, “the prospective insured becomes eligible for the insurance by his membership in the class, i.e., the credit card holder, and the insurer does not retain the customary option or discretion to accept or reject an application.

Then, after adopting the “preliminary contract” notion, the court turned around and concluded that the contract was not breached, holding for the defendant-company. “The facts disclosed do not indicate that the insured’s loss of life occurred [even] within the

4. 1 Ill. App. 3d at 802, 274 N.E.2d at 867 (1971).
terms of the general insuring provision [of the brochure].”⁵ Though Albert Fuller was correct in his view that the contract included the terms appearing in the brochure, he merely read those terms too broadly. Thus, the concept of a preliminary insurance contract is reduced to *dictum*; but the case should still serve as a warning to other credit card companies who plan to solicit insurance from their subscribers in the same manner as Standard Oil of Indiana.

In *Stura v. Krilich*,⁶ the Appellate Court for the Second District retained the “mirror image rule” for sales of real estate. In that case, a prospective purchaser of property submitted a written offer, in the form of a sales contract, to the vendors, who signed it only after inserting a clause which made the sale subject to an easement. The purchaser refused to proceed with the sale and the court upheld his right to do so. The insertion of the additional clause constituted a rejection of the purchaser’s offer and acted as a counter-offer. The counter-offer was then rejected by the purchaser, ending negotiations between the parties. The court indicated that in order to have a valid acceptance of an offer for the sale of real estate that would constitute a contract, acceptance must conform exactly to the offer.⁷ Thus, while the Uniform Commercial Code has abandoned the strict “mirror image” test for sales of goods (allowing an acceptance to vary or add to the terms of an offer),⁸ courts are reluctant to do the same for sales of real estate; considering the uniqueness of realty and flexibility of goods, it is probably wise to retain the two different rules.

**CONSIDERATION—MUTUALITY OF OBLIGATION**

Ever since Justice Cardozo’s famous opinion in *Wood v. Lucy-Lady Duff-Gordon*,⁹ courts have been increasingly willing to uphold

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⁵. Id. at 802, 274 N.E.2d at 868.
⁷. Id.
⁸. *Uniform Commercial Code* § 2-207 provides (in part): “(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.” (Emphasis added.) *See Ill. Rev. Stat. ch. 26, § 2-207* (1971).
⁹. 222 N.Y. 88, 118 N.E. 214 (1917).
exclusive agency agreements which on their surfaces appear to be indefinite and lacking in mutuality of obligation. Cardozo's method of "saving the contract," where the writings exhibited no explicit commitment from the agent, was to find an implied promise by the agent to use reasonable efforts in selling the goods. ¹⁰ This implied promise thus provided the consideration to make the seller's promise of exclusiveness binding. The "implied promise" concept has been expanded since the Wood case and employed in other types of contracts such as requirement and output contracts.¹¹ The second objection noted above—indefiniteness—has been overcome by courts supplying "reasonable" terms once they find an intention to be bound by both parties. Both the "implied promise" and "reasonableness" notions have been codified for sales of goods by the Uniform Commercial Code.¹²

Now, an Illinois appellate court has returned to the past and refused to enforce a distributorship contract because of the historical objections based on indefiniteness and lack of mutuality. In Kraftco Corporation v. Kolbus,¹³ Kraftco, the manufacturer of Sealtest dairy products, gave Kolbus assurances that if Kolbus became a distributor for Sealtest, he would "continue as a distributor," his territory would be exclusive and he would receive help in finding a new buyer in the event he wished to sell out. Kolbus, on the other hand, agreed to distribute Sealtest products and to use his "best efforts" in doing so. This agreement took place in 1959. For ten years thereafter, Kolbus proceeded to distribute Sealtest products, accumulating over two million dollars worth of sales. Then in June, 1969, Kraftco, without any notice, terminated the distributorship and filed suit for several unpaid bills. Kolbus raised a breach of contract action by way of a counterclaim. The circuit court struck the counterclaim and the appellate court affirmed for Kraftco.

In explaining the decision, Justice Smith of the Fourth Appellate District said he was disturbed first by the lack of specificity as to the terms of the alleged 1959 contract. It lacked agreement as to

¹⁰ In Wood, the subject matter of the contract was Ms. Gordon's endorsements on women's clothing.
¹³ 1 Ill. App. 3d 635, 274 N.E.2d 153 (1971).
duration, prices, area, products, quotas and other terms. The judge stated:

Such contracts extending for a long duration and resting entirely on parol should have for their basis definite and certain mutual promises. The words and the manner of their utterance should not be of that informal character which expresses only long continuing good will and hopes for eternal association.\(^{14}\)

However, the Justice overlooked the fact that for ten years both Kraftco and Kolbus continued to act as if there had been a contract made in 1959. It is surprising the court did not examine the parties' dealings over that period of time and supply "reasonable terms" based on those dealings. As late as March, 1972, an Illinois appellate court declared it was permissible to look to the acts and conduct of the parties subsequent to the date of their alleged contract in order to determine if a contract existed and what its terms were.\(^{15}\)

Justice Smith's second point of concern was based on a lack of mutuality, despite the fact that with the expressed "best efforts" promise, he had much more evidence to work with than Cardozo had in Wood.

There was no obligation on Kolbus other than to use his best efforts. He had no obligation to sell any specific quantity and no obligation to meet any quotas. The operation of this contract was totally dependent upon the actions of Kolbus. The mere allegation of best efforts is too indefinite and uncertain to be an enforceable standard. As such, the contract was lacking in mutuality of obligation and unenforceable.\(^{16}\)

Justice Smith apparently did not have the Uniform Commercial Code in mind when making this statement because Section 306 of Article II of that document specifically endorses the phrase "best efforts" for exclusive agency agreements.\(^{17}\) Of course, the alleged contract in Kolbus was made six years before the Code was adopted in Illinois, and so was not governed by it. The U.C.C. notwithstanding, Jus-

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\(^{14}\) Id. at 638, 274 N.E.2d at 155, quoting from Heuvelman v. Triplett Electrical Instrument Co., 23 Ill. App. 2d 231, at 236, 161 N.E.2d 875, at 878 (1959).


\(^{16}\) 1 Ill. App. 3d at 639-40, 274 N.E.2d 156 (1971).

\(^{17}\) \textit{Uniform Commercial Code} § 2-306 provides (in part):

"(3) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale." Comment 2 to that Section specifically states that such a contract does not lack mutuality of obligation. See ILL. REV. STAT. ch. 26, § 2-306. (1971).
tice Smith left little doubt that Illinois courts would reach the same result on contracts made today. He cited several Illinois cases which reinforce the same strict constructionist view;¹⁸ and, as if to leave a message for drafters of future exclusive agency, distributorship, requirement or output contracts, he added the familiar conservative quotation: "It is not up to the court to write an agreement for the parties."¹¹⁰

CONSIDERATION—IMPLIED PROMISE TO FORBEAR

The same court,²⁰ which was so reluctant to "write an agreement for the parties" in Kraftco, had no trouble in finding an implied promise in order to save a contract in Zimmerman v. Cheney.²¹ In that case, a woman signed a blank form contract with the intention of keeping her grandson out of criminal trouble. The grandson had purchased a car from plaintiff-car dealer and forged the grandmother's name as a co-signer. Upon discovering the forgery, the car dealer asked the grandmother to sign the blank "replacement contract," but promised her nothing—at least not in expressed terms—in return for her signature. The court held for the car dealer by finding that an implied promise to forbear from repossessing the car was given in exchange for the grandmother's promise to sign. "An agreement to forbear," stated the court, "need not be in express terms or for an exact period of time; the terms may be gathered from the surrounding circumstances from which forbearance for a reason-
able time may be implied."²²

Defendant alternatively argued that the consideration was tainted with illegality because, by agreeing not to take criminal action against the boy, the car dealer was compounding a crime. The court rejected this argument because of inadequate proof.

The finding by the [trial] court that defendant signed believing it would prevent prosecution of her grandson is distinguishable in its legal effect from a finding that a creditor has promised to forbear from prosecuting a crime.²³

¹⁹. 1 Ill. App. 3d at 638, 274 N.E.2d at 155 (1971).
²⁰. The Second instead of the Fourth District of the Illinois Appellate Court.
²². Id. at —, 271 N.E.2d at 684.
²³. Id.
Furthermore, the court pointed out that proof of the criminal offense must be beyond a reasonable doubt where a defendant is relying upon the compounding of a crime as a defense to defeat an action.  

ASSIGNMENT OF CAUSE OF ACTION

If the holder of a liability insurance policy has a cause of action against his insurer for bad faith in failing to settle a claim within the policy limits, can he assign that cause of action to a judgment creditor? That was the question considered by the Illinois Appellate Court, Fourth District, in Brown v. State Farm Mutual Auto Insurance Association. Marion Brown's representative and Rose Nale were involved in an auto accident; Rose was insured for $20,000 by defendant-insurance company. With the company assuming Rose's defense, Brown offered to settle his claim against Rose for an amount within the policy limit. The company refused to settle, apparently concluding that since it could not lose more than $20,000 under the policy and the settlement would be close to that anyway, it might as well take the case to court. At trial, Brown recovered a judgment of $40,000 against Sam Nale, administrator for Rose. The insurance company paid its $20,000 share of the judgment, leaving the balance unsatisfied. Sam Nale felt he had a good cause of action against the insurance company for its bad faith in failing to settle Rose's case within the policy limits. Accordingly, he assigned that cause of action to Brown so that Brown might be able to satisfy the remainder of the judgment by pursuing the insurance company.

The company objected to the assignment, arguing first that other states such as Delaware, Washington, New Jersey, Colorado, Missouri, Georgia, New Hampshire, Utah, Tennessee and New York have not allowed such causes of action to be assigned, and secondly that a provision in the Nale policy expressly prohibited assignments without the consent of the insurer. The court, with no Illinois precedent on point, distinguished the Brown case from all the cases of other states cited by the insurance company, and accepted the out-

24. Id.
26. See cases from these states cited Id. at 49, 272 N.E.2d at 263-64. Connecticut has a statute which subrogates the injured party to all rights of the insured, thereby reaching the same result.
of-state cases cited by the plaintiff in favor of the assignment. The court thus aligned itself with Pennsylvania, Oregon, California, Kentucky and Connecticut, all of which permit policyholders to assign their causes of action against insurers so long as no collusion is evident. The court reasoned that an insurance company, by assuming control of litigation, obligates itself to treat the insured party fairly; and "[w]hen the suit is in excess of the policy the insurer may, by deciding to continue litigation, expose the insured to a far greater risk than it takes." The court went on to state that this duty to act fairly arises from the insurance contract and thus is contractual in nature.

As for the express anti-assignment clause in the policy, the court said, "Such provision . . . has been held not to bar the assignment of the cause of action after the loss has occurred." Thus, by combining a strict interpretation of the anti-assignment clause with a broad interpretation of the insurance company's contractual duties, the court allowed Brown, the judgment creditor-assignee of Nale, to proceed with the suit. The court hastened to add, however, that it was not deciding that a cause of action for the insurance company's bad faith actually existed against the company; only that if one did exist, Brown was permitted to assert it.

STATUTE OF LIMITATIONS

Another case where an insurance company fared poorly against a judgment creditor of an insured was Olipra v. Zambelli, heard last year by the First District Appellate Court. Olipra was injured by Zambelli on August 10, 1952, and filed suit on September 17, 1952. On December 8, Zambelli's insurance company, New Amsterdam Casualty, denied liability for the accident and refused to assume Zambelli's defense. Almost six years later, on November 26, 1958, judgment was entered in favor of Olipra against Zambelli for $12,000. Six years after that, on August 4, 1964, Olipra attempted to

27. Id. at 49-51, 272 N.E.2d at 263-64.
28. Id. at 50, 272 N.E.2d at 264.
29. Id. at 51, 272 N.E.2d at 264.
30. Id.
31. Id. at 50, 272 N.E.2d at 264.
satisfy his judgment by filing garnishment proceedings against the insurance company. One of the company's defenses was the statute of limitations, which the company claimed began to run in 1952 when it denied liability under the terms of the policy. Under this interpretation, the garnishment action was initiated two years after the Illinois statute of limitations had expired.33

The court, however, arrived at a different interpretation, based upon a condition of the company's own policy, reading:

[N]o action shall lie against the company . . . until the amount of the insured's obligation to pay shall have been finally determined either by a judgment against the insured after actual trial or by written agreement of the insured, the claimant, and the company.34

Since Zambelli's liability to Olipra became fixed when judgment was entered on November 26, 1958, the statute of limitations did not run against the insurance company until that time. Thus, Olipra commenced garnishment proceedings against the company with four years to spare. Ironically, without the insurer's own condition in the policy, its defense may have been successful.35

RELEASE—CONFLICT OF INTEREST

In Scheffki v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company,38 the First District, Second Division, of the Illinois Appellate Court set aside a contract because both parties to a release contract had the same attorney. The contract was made between the father of a twelve-year old boy injured by a train and the railroad on whose property the accident occurred. The facts disclose an unscrupulous practice by the railroad's representatives; yet the appellate court, while declaring the release void, was careful not to reprimand the railroad employees, particularly the claims adjuster and attorney.

Donald Scheffki in April, 1954, had to have both his legs amputated as a result of a moving train striking him while he was playing on railroad property. The boy's father, Clement Scheffki, testified

33. ILL. REV. STAT. ch. 83, § 17 (1971) provides for a ten-year statute of limitations for such actions.
34. 1 Ill. App. 3d at 611, 274 N.E.2d at 880 (1971).
35. Another interesting point is that plaintiff-Olipra has waited more than 20 years since his accident without collecting any money.
that two employees of the railroad visited him while his son was in the hospital and told him they had heard of cases where the railroad paid $5,000 and $10,000 for cases like Donald's. Clement, a man with an eighth grade education, said the employees cautioned him not to get a lawyer because if he did, the railroad would not have anything to do with him. Later, a claims adjuster for the railroad offered Scheffki $15,000 in settlement of his son's claim and, according to Scheffki's testimony, the adjuster said he thought it was a very good settlement and that Scheffki would get it so long as he was willing to cooperate and did not get his own lawyer. The adjuster offered to get a lawyer for Scheffki, according to the testimony. The adjuster did not deny these statements in either direct or cross-examination at trial. Scheffki and his wife were taken by the adjuster to the office of a lawyer who was selected, employed and paid by the defendant railroad. Scheffki said the lawyer told him the settlement was a good one and prepared papers to be signed. That same day, in a two-minute hearing, an estate for the boy was opened and the father was appointed guardian. The Probate Court of Cook County approved the settlement, and the release was signed by Clement on behalf of his son in exchange for the sum of $15,000 which was deposited in two trust accounts for the son.

Nine years later, when Donald reached age 21, he filed a suit for $400,000, alleging the release signed by his father was procured by fraud and should be declared null and void. The circuit court accepted the argument and after a hearing and jury trial on the issues of liability and damages, judgment was entered for $85,000. The appellate court affirmed, but not on the basis of fraud. It chose to resolve the case in plaintiff's favor because of the lawyer's conflict of interest, stating that "[A] lawyer cannot represent conflicting interests nor undertake to discharge inconsistent duties, no matter how honest his motives or intentions." It is disappointing, however, that the court did not take the opportunity to condemn the unscrupulous practices of the railroad's attorney and claims adjuster. Rather than speaking in apologetic tones, the court should have

37. See appellate court's report of testimony, id. at 560, 274 N.E.2d at 633.
38. Id. at 562, 274 N.E.2d at 634.
39. The court said the contract would be set aside "regardless of the honesty of (the lawyer's) purposes." Id.
recommended disciplinary action against the two railroad representatives who abused their professional position for the sake of saving their employer money. A firm stand should be taken against such persons who deceive innocent claimants into making quick settlements of their claims against their best interests.

**PAROL EVIDENCE RULE**

Illinois contracts cases during the past year indicate that the parol evidence rule still provides much discussion, confusion and litigation among lawyers and judges. Several of the cases dealing with this area of law provide a compact review of the rule and its exceptions. The rule was stated by the appellate court in *Laver v. Bluestein*:

> "[W]here there is an unambiguous written agreement the intent of the parties thereto is to be determined solely from the language therein."

Besides clarity, the requirement that the writing represent a final and complete expression of the parties' intentions is usually included in the rule's definition. In *Laver* the defendant attempted to use an obvious method of avoiding application of the rule—arguing that an ambiguity existed in the written agreement which had to be clarified by referring to extrinsic evidence. The court, however, rejected the argument, declaring that:

> Since the contracts involved in this case are clear and unambiguous, we have decided the rights and obligations of the parties thereto solely from the terms of the contracts which they signed and without regard to any parol evidence, for in such cases the instrument itself affords the only criterion of the intention of the parties.

Another method of getting parol evidence admitted was attempted in *Bernard Klibanow & Co. v. Shafer*, where the final written contract made an express reference to a prior agreement. Defendants argued that by specifically referring to a prior agreement, the final written agreement was not intended to be the complete statement of the contract and evidence of the prior agreement should be admit-

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41. Id. at 521, 274 N.E.2d at 870.
44. 2 Ill. App. 3d 392, 276 N.E.2d 446 (1971).
In rejecting that contention, the court declared that such prior agreement may only be shown if it is not inconsistent with the final, written one since "all prior agreements, understandings and negotiations are deemed merged in the final written contract. . . ."\textsuperscript{45}

In \textit{Schuline v. Pelzer},\textsuperscript{46} a third, and more successful method of getting parol evidence admitted was tried when, because of a surveyor's mistake, a deed conveyed more land than the vendors wished to convey. Reformation of the deed was sought, and obtained, based on the mistake of fact common to all parties involved. Defendant-purchaser argued that, even though there was testimony that all parties intended to convey and purchase less than was stated in the deed, such testimony should have been excluded because of the parol evidence rule. The appellate court, relying on an 1874 Illinois case,\textsuperscript{47} stated:

Where mistake in the execution of an instrument is charged, parol evidence may be resorted to for the purpose of proving what was the real contract of the parties, and a court of equity may reform a contract according to the evidence of the intention of the parties. . . .\textsuperscript{48}

The court then listed three requisites for such equitable relief: (1) The mistake must be one of fact, not of law; (2) the mistake must be proved by clear and convincing evidence, and (3) the mistake must be mutual and common to both parties to the instrument.\textsuperscript{49}

The parol evidence rule does not apply to subsequent agreements between parties, only to prior ones, so that proof of a modification agreement is admissible to qualify an original contract.\textsuperscript{50} However, a problem arises when the original written contract requires all modifications to be in writing, and then the parties attempt to modify orally. Should a court apply the "subsequent agreement" rule noted above and admit evidence of the modification, or should it give effect to the contractual provision against unwritten modifications? The answer seems to vary according to the facts.

\textsuperscript{45} Id. at 399, 276 N.E.2d at 451.

\textsuperscript{46} 2 Ill. App. 3d 791, 276 N.E.2d 832 (1971).

\textsuperscript{47} See Kelly v. Trumble, 74 Ill. 428 (1874).

\textsuperscript{48} 2 Ill. App. 3d at 794, 276 N.E.2d at 834 (1972), quoting from Kelly v. Trumble, 74 Ill. at 430.

\textsuperscript{49} \textit{Id.}, quoting from Koch v. Streuter, 218 Ill. 546, 556, 75 N.E. 1049, 1052 (1905).

The question arose in two cases last year, and in both, the Illinois Appellate Court answered in favor of admitting the parol evidence, but for two different reasons. In *Capital Plumbing and Heating Supply Co. v. Snyder*, the owners of property argued that evidence of extras which they ordered from a contractor should be excluded because the orders were oral and the contract required written orders. The court held that since the extra items were actually placed on the owners' premises and there was uncontradicted testimony that they were in fact ordered, the owners were estopped from denying the obligation to pay for them.

In *T&T Trucking & Excavating Co. v. John F. Chapple Co.*, a subcontractor-excavator sued to recover the price of extra work ordered orally by a general contractor. During the course of a job, it became necessary to remove more ground than the contract called for and the subcontractor was told not to stop excavating but to continue with the additional work. The court held the general contractor had waived the condition of a writing and the subcontractor was entitled to recover. In both these cases—*Snyder* and *T & T*—it should be noted there was evidence of extra work actually having been performed and accepted by the party relying on the parol evidence rule. Without this fact, the results probably would have been different. Before applying either the estoppel or waiver analysis, courts seem to check whether one party has led the other into thinking that no writing was necessary, or has accepted the benefits of additional work before making an objection, or has stood idly by while the extra work was being done. Without evidence of this kind, courts will give effect to the contractual provision against oral changes and exclude evidence of any alleged subsequent agreements.

ASSIGNMENT OF WAGES

In *Kobus v. Jefferson Ice Co.*, plaintiff-employee was able to
reacquire money deducted from his wages by his employer under a wage assignment. The holder of the assignment had gotten plaintiff to assume payment for bad checks which had accumulated during plaintiff's previous job. Plaintiff was not responsible for the repayment of the checks since they were cashed without his approval or knowledge, but he gave the assignment anyway. The court held the assignment invalid because it was gratuitous and as such unenforceable under Illinois law. The statute says that assignment of wages earned or to be earned is not valid if not given to secure an existing debt of the wage-earner or one contracted by the wage-earner simultaneously with its execution. Thus, all amounts paid by plaintiff or deducted from his pay pursuant to the assignment were ordered returned to him.

DURESS BY CIRCUMSTANCE

Duress by circumstance was asserted by a seventy-one year old woman against a senior citizens’ residence home in Borgeson v. Fairhaven Christian Home. She initially signed a contract for lifetime care at the home in consideration of a fixed monthly rent. Then, the home asked her to sign a second contract for higher rent. After signing it, she contended that she had relied upon the first contract, had changed her financial situation on that reliance and because of her circumstances, had no choice but to sign the second contract.

The court took the occasion to review the law on duress in Illinois, saying that at common law, duress could be nothing less than a reasonable apprehension to life or limb. The doctrine has been broadened to include circumstantial and moral duress. Relief has been granted in cases where one party has obtained an advantage which in equity and good conscience he should not be permitted to retain. However, in all the cases considered by the court, the conduct of the party obtaining the advantage was tainted with some degree of fraud or wrongdoing. Looking for this element in Borgeson, the court found the proof inadequate to show the requisite fraud or wrongdoing on the part of the senior citizens’ home.

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57. 1 Ill. App. 3d 323, 272 N.E.2d 436 (1971).
58. Id. at 326, 272 N.E.2d at 438.
59. Id. See also cases cited therein.
It is surprising that Mrs. Borgeson's attorney did not make lack of consideration an alternative argument, since under the second contract, the home was not promising to do any more for Mrs. Borgeson than it was already obligated to do under the first contract.

SALES

RETAIL INSTALLMENT SALES ACT

Anco Investment Corp. v. Spencer exposes a weakness in either the drafting or interpretation of the Illinois Retail Installment Sales Act. Two sections of that Act were clearly violated when the buyer of an automobile was given a contract which did not contain the requisite notice to buyer, break-down of sales price, finance charges and other costs. The buyer, who eventually had judgment confessed against him for failing to meet his installments, appealed the judgment by arguing that the statutory violations made the contract illegal and unenforceable against him. He relied on a 1925 Illinois case which stated:

A contract expressly prohibited by a valid statute is void. This proposition has no exception, for the law cannot at the same time prohibit a contract and enforce it. The prohibition of the legislature cannot be disregarded by the courts.

The Illinois Appellate Court, First District, however, rejected the argument, saying the buyer was limited only to those remedies expressly mentioned in the statute and could not raise the defense of illegality as a total bar to recovery by the seller. The Installment Sales Act provides for criminal penalties and civil penalties preventing the seller from collecting charges. Yet, it does not expressly give the buyer the right to rescind a contract or avoid it when the statute is violated. Perhaps, then, an amendment to the Act is in

60. 1 Ill. App. 3d 445, 275 N.E.2d 263 (1971).
64. DeKam v. City of Streator, 316 Ill. 123, 146 N.E. 550 (1925).
65. Id. at 129, 146 N.E. at 553.
order to rectify this discrepancy and avoid future decisions like that in *Anco*.

**ARTICLE II CASES**

Considering the multitude of sales contracts, it is surprising that the Illinois appellate courts handled so few cases this past year on Article II of the Uniform Commercial Code. Perhaps this is because the Code is still relatively unfamiliar to many Illinois attorneys; or because decisions from other states can be relied on for Code interpretation and application; or because the Code is working as its drafters had intended, following the common sense expectations of businessmen. Whatever the reason, there were just four cases where Article II was called into play, and none of them was momentous. *Janssen v. Hook* involved a straightforward application of the warranties found in Sections 2-313 and 2-315. *Alco Standard Corp. v. F & B Mfg. Co.* held that a defaulting buyer need not be notified of a proposed resale of goods under the remedies provision of 2-706(3). The other two cases dealt with acceptance and rejection of goods after delivery.

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68. The *Uniform Commercial Code* became effective in Illinois on July 1, 1962.

69. Pennsylvania, for example, was the first state to adopt the Code (in 1954), and much of the litigation construing the Code is from that state.

70. *Uniform Commercial Code* § 1-102 states: "(2) Underlying purposes and policies of this Act are (a) to simplify, clarify and modernize the law governing commercial transactions. . . ."


72. In *Janssen*, plaintiff-seller of a truck, told the buyer it was in good condition when in fact it needed extensive repair. Defendant-buyer, however, admitted that he had inspected and worked on the truck prior to his purchase and was aware that it needed repairs. The court thus held that no express warranty under 2-313 was made. Furthermore, there was nothing to show that buyer's planned use for the truck would differ from the ordinary use of such truck or that the seller had any special skills about trucks on which defendant relied; so the court did not find a warranty of fitness for a particular purpose under 2-315. *See Ill. Rev. Stat. ch. 26, §§ 2-313, 2-315 (1971).*

73. 51 Ill. 2d 186, 281 N.E.2d 652 (1972).

74. *Uniform Commercial Code* § 2-706 states, in part: "(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell." (Emphasis added.) The court found that the seller did notify the buyer of an intention to resell, even though notice of the precise resale was not given to buyer, and it based its decision for the seller on that distinction. *See Ill. Rev. Stat. ch. 26, § 2-706(3) (1971).*
In Perkins Pipe and Steel v. Acme Valve and Fitting, defendant-buyer placed an order consisting of: two steel flanges, two stainless steel valves, two PRV-type valves, one steel flanged gate valve and seven used valves. In filling the order, plaintiff-seller mistakenly sent two cast iron flanges instead of the steel ones ordered. The remainder of the shipment was correct. The buyer offered to return the two wrong flanges at the seller's expense, but the seller insisted the buyer pay the freight cost of their return. Upon refusal of the buyer to pay for the non-conforming flanges or for the cost of shipping them back, the seller sued and obtained a $642 judgment from the lower court. In reversing for the buyer, the appellate court regarded the order as being for five separate "commercial units," as that term is defined in Section 2-105(6), with each type of item being a separate unit. Then, applying Section 2-601(c), the court said the buyer had the right to accept the four conforming units and reject the rest. Since the buyer had done this within a reasonable time after delivery and with notification to the seller, he was not obligated to pay for the cast iron flanges or their return shipment.

Had the buyer decided to use the non-conforming goods in Perkins, the result of the case would have been different. That was the lesson learned in Brule C.E. & E., Inc. v. Pronto Foods Corp. Plaintiff-seller installed an incinerator with a capacity which was higher than allowed by the permit obtained for it. Nevertheless, the defendant-buyer used the incinerator for two years—aware of its excessive capacity. Then, when the seller sued for the balance of the price, the buyer attempted to make a rejection under Section

76. Uniform Commercial Code § 2-105(6) reads: "'Commercial unit' means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole." See Ill. Rev. Stat. ch. 26, § 2-105(6) (1971).
77. "[I]f the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may . . . (c) accept any commercial unit or units and reject the rest." See Ill. Rev. Stat. ch. 26, § 2-601 (1971).
2-601. Although the trial judge held for the buyer, the appellate court reversed on the grounds that the buyer's conduct constituted acceptance of the goods under Section 2-606. The court indicated that Pronto could have accepted or rejected, but not both: "We hold that Pronto could not retain possession of the incinerator, use the equipment in its business for an extended period of time, and at the same time claim rejection."

Ordinarily, an acceptance can be revoked under Section 2-608, but that course was not available to Pronto because it waited too long. Subsection 2 of 2-608 states:

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

RECENT SALES LEGISLATION

The most significant sales legislation over the past year has been in the area of consumer protection. Laws were enacted giving installment credit buyers a 30-day grace period after missing a payment; compelling creditors to adequately respond to letters of inquiry from debtors; limiting liability for lost or stolen credit cards; and providing consumers with more comprehensive drug labeling and disclosure. The bills were signed into law by Governor Richard B. Ogilvie, who said they "symbolize a major commitment by the General Assembly toward the enactment of a wide-ranging program of legislation on behalf of the Illinois consumer."
The statute giving defaulting buyers a "grace period,"\textsuperscript{90} states that the holder of a retail installment contract may not accelerate the maturity of any part or all of the amount owing unless the buyer has been in default for at least 30 days.\textsuperscript{91} This means a buyer who misses a payment does not have to worry about his creditor immediately demanding payment of the entire balance of the debt, as could be done in the past. However, the fact that the creditor can still accelerate the maturity of the remaining payments after 30 days takes much of the force from the statute.\textsuperscript{92} Included in the Act is a clause prohibiting sellers from contracting away liability for any legal remedies buyers may have against them,\textsuperscript{93} and this seems potentially more significant than the "grace period" sections of the statute.

It is very common for someone who writes a letter of inquiry about a billing error in his revolving charge account to get back only vague, computerized responses, or no responses at all. Now, the law states that a debtor who sends a letter of inquiry about an alleged error in his account must receive a "clear and definitive" response within 30 days or he does not have to pay any service charge on the disputed amount.\textsuperscript{94} Requisite for the statute to apply is a letter signed by the debtor, mailed within 60 days of his receipt of the disputed statement, and related to an alleged error in the account.\textsuperscript{95}

\textsuperscript{90} ILL. REV. STAT. ch. 74, § 4.2a (1971).
\textsuperscript{91} That section of the statute reads: "No provision in a retail installment contract under which the holder may accelerate the maturity of any part or all of the amount owing thereunder is enforceable, unless prior to such acceleration, the buyer has been in default for at least 30 days or the buyer has abandoned or destroyed the property or the holder has reasonable cause to believe that the buyer is about to leave the state." ILL. REV. STAT. ch. 121½, § 513 (1971).
\textsuperscript{92} Id.
\textsuperscript{93} ILL. REV. STAT. ch. 121½, § 513, par. 3 (1971) reads: "No provision in a retail installment contract relieving the seller from liability for any legal remedies which the buyer may have against the seller under the contract is enforceable."
\textsuperscript{94} ILL. REV. STAT. ch. 74, § 4.2a (1971) states: "If a lender or creditor, within 30 days from receiving a written letter, in clear and definitive terms, signed by the debtor, including his or her name, address, and account number, sent within 60 days of receipt by the debtor of the statement on which the alleged error first appears, concerning an alleged error in a revolving credit account fails to answer the specific question concerning such error in clear and definitive terms, for that 30 day period and for any further period that the lender fails to provide a clear and definitive answer, the debtor shall not be required to pay any service charge on the disputed amount."
\textsuperscript{95} Id.
Liability of credit card holders now is limited to a maximum of fifty dollars in the event of loss, theft or unauthorized use of the card.\textsuperscript{96} If the card is one without a signature panel, the maximum liability is only twenty-five dollars.\textsuperscript{97} Both dollar limits apply only to the time period prior to the card issuer’s receipt of notice of the loss, theft or unauthorized use. After notification, the cardholder is not liable for any amount. Furthermore, the issuer is required to provide a postage-paid, pre-addressed form for the holder to use for the notification.\textsuperscript{98} A rule of evidence is also given for proving whether a legitimate credit card purchase was made. When the card holder puts in issue a transaction from the use of his card, the burden of proving benefit, authorization, use or permission by him is put on the card’s issuer.\textsuperscript{99}

The new drug legislation\textsuperscript{100} requires every bottle of prescription medicine to show the proprietary name of the substance prescribed, unless a doctor prohibits such disclosure. This enables the consumer to know exactly what he is taking, and allows him to refill the prescription from any pharmacy without having to refer to the original pharmacist’s prescription files.\textsuperscript{101}

The legislature also amended the wage garnishment statute so that the amount of a worker’s earnings which is immune from garnishment is increased.\textsuperscript{102} Also, the 1968 “cooling off” statute, giving consumers three days to avoid contracts with door-to-door salesmen,\textsuperscript{103} was amended so that sales of $25 or more (instead of $50
or more, as originally stated) are now within the scope of the statute. In addition, the door-to-door salesman is now required to furnish the buyer with a “notice of cancellation” form which the buyer can mail to the seller’s address in order to effectuate the cancellation.104

While acknowledging that the legislation of the past year had been a start toward making Illinois citizens the best protected and best informed in the country, Governor Ogilvie admitted in his messages to the legislature that other reforms are still “badly needed.”105