

ESSAY

DEVELOPMENTS IN CONTRACT LAW DURING THE 1980'S: THE TOP TEN

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THERE IS A tyranny to the number ten. Surely it offends common sense to suppose that history can be neatly packaged in decades, yet we commonly speak of the events of "the 50s" or of "the 60s." And while it strains credulity to believe that excellence can be conveniently identified by lists of ten, recurrent reference is made to the "top ten" or the "ten best." Thus, in a year that began with the likes of "the top ten news events of the 80s" and "the ten best movies of the decade," it may not be amiss for an observer of the changing scene in contract law to succumb to this tyranny and pick the top ten developments in that field during the 1980s.

The most furious activity in contract law over the past decade focused on the development, sometimes successful and sometimes not, of theories expanding contractual liability. Three of the top ten developments fall under this heading: bad faith breach,¹ at-will employment,² and precontractual negotiations and preliminary agreements.³ Other areas which showed change include long-term contracts,⁴ intimate contracts,⁵ and the debate over formali-

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1. See *infra* text accompanying notes 11-25.
2. See *infra* text accompanying notes 26-45.
3. See *infra* text accompanying notes 46-60.
4. See *infra* text accompanying notes 61-76.

ties versus reliance;⁶ each of these developments is remarkable for its departure from the expected path. Conversely, the areas of the relationship of contract to tort law,⁷ unconscionability,⁸ and contract theory⁹ are conspicuous for failing to fulfill their anticipated impact on contract law. Finally, the 1980s saw the internationalization of contract law — a legislative event that was the culmination of an effort spanning half a century.¹⁰

1. BAD FAITH BREACH

Perhaps the most astonishing development among the top ten is the rise and fall of the doctrine of bad faith breach — though both “rise” and “fall” involve some hyperbole. While courts typically are loath to award punitive damages for breach of contract, they have at times been willing to do so where the breach involves conduct that is “tortious” in some respect.¹¹ What better way for courts to justify an award of punitive damages than to invent a new tort: “bad faith breach of contract.”

The first application of this tort came during the 1950s and involved actions against insurers who refused to accept reasonable settlements of third party claims.¹² During the 1970s the tort of bad faith breach was extended to first-party cases where the

5. See *infra* text accompanying notes 77-97.

6. See *infra* text accompanying notes 98-109.

7. See *infra* text accompanying notes 110-16.

8. See *infra* text accompanying notes 117-35.

9. See *infra* text accompanying notes 136-47.

10. See *infra* text accompanying notes 148-59.

11. See generally E. FARNSWORTH, *CONTRACTS* § 12.8, at 875-79 (2d ed. 1990) (discussing the evolution of bad faith breach).

12. See, e.g., *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 660, 328 P.2d 198, 201 (1958) (insurer refused to defend insured or settle a claim against insured within the policy limits, court held insurer liable for the entire amount of the judgment against insured, even the amount in excess of the policy limits, if insurer “[was] guilty of bad faith in refusing settlement.”); *Zumwalt v. Utilities Ins. Co.*, 360 Mo. 362, 370, 228 S.W.2d 750, 753 (1950) (insurer who refuses in bad faith to settle a claim is liable to insured for the amount of the judgment exceeding the policy limits); *Southern Fire & Casualty Co. v. Norris*, 35 Tenn. App. 657, 668, 250 S.W.2d 785, 790 (1952) (“The courts seem to be unanimous in holding an insurer liable in tort for an excess over the policy limit where as here it has exclusive control over investigation and settlement of claims and its refusal to settle within the policy limits is fraudulent or in bad faith.”); *Evans v. Continental Casualty Co.*, 40 Wash. 2d 614, 627, 245 P.2d 470, 478 (1952) (insurer liable for entire judgment in excess of policy limits where insurer rejected settlement offer in bad faith). See generally Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136 (1954) (discussing insurer’s duty of good faith and reasonable care in making settlement decisions).

breach consisted of the insurer's unreasonable denial of benefits to the insured.¹³

Not until 1984, however, was there a serious suggestion that the tort of bad faith breach could extend beyond the insurance context. In that year the California Supreme Court decided *Seaman's Direct Buying Service v. Standard Oil Co.*¹⁴ in which a would-be oil dealer claimed damages from an oil company that had refused to honor a contractual obligation to supply the dealer with oil.¹⁵ In dictum the court expanded the bad faith breach tort to impose liability where a party to a contract "in addition to breaching the contract, . . . seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists."¹⁶ The court declined to indicate whether and under what circumstances a breach of the implied covenant of good faith and fair dealing in a commercial contract might give rise to an action in tort but stated there had to be some "special relationship" such as that between insurer and insured.¹⁷ The court observed further that there are similar relationships "deserving of similar legal treatment"¹⁸ but neglected to enumerate them.

The suggestion that the tort of bad faith breach might apply to noninsurance contracts that exhibit characteristics similar to insurance contracts spawned considerable discussion in the law reviews¹⁹ and substantial litigation in the California courts.²⁰ In 1988, however, the California Supreme Court dealt a severe blow to the extension of bad faith breach that it fostered only a few years earlier by refusing to apply the *Seaman's* dictum to an em-

13. See, e.g., *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 575, 510 P.2d 1032, 1038, 108 Cal. Rptr. 480, 486 (1973) ("when the insurer unreasonably and in bad faith withholds payment of the insured's claim, it is subject to liability in tort.").

14. 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984).

15. *Id.* at 759-61, 686 P.2d at 1160-62, 206 Cal. Rptr. at 356-58.

16. *Id.* at 769, 686 P.2d at 1167, 206 Cal. Rptr. at 363.

17. *Id.* at 768-69, 686 P.2d at 1166, 206 Cal. Rptr. at 362.

18. *Id.* at 769, 686 P.2d at 1166, 206 Cal. Rptr. at 362.

19. See, e.g., Putz & Klippen, *Commercial Bad Faith: Attorney Fees — Not Tort Liability — Is the Remedy for "Stone Walling,"* 21 U.S.F. L. REV. 419 (1987); Note, *Extending the Bad Faith Tort Doctrine to General Commercial Contracts*, 65 B.U.L. REV. 355 (1985); Comment, *Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort*, 74 CALIF. L. REV. 2033 (1986); Note, *Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm*, 86 COLUM. L. REV. 377 (1986).

20. See, e.g., *Wallis v. Superior Court*, 160 Cal. App. 3d 1109, 207 Cal. Rptr. 123 (1984) (employee who alleged that former employer abused its position of financial control succeeded in pleading cause of action for tortious breach of contract).

ployer's discharge of an employee. In *Foley v. Interactive Data Co.*,²¹ the court objected to the "uncritical incorporation" by some California decisions "of the insurance model into the employment context, without careful consideration of the fundamental policies underlying the development of tort and contract law in general or of significant differences between the insurer/insured and employer/employee relationships."²² The court concluded, "we are not convinced that a 'special relationship' analogous to that between insurer and insured should be deemed to exist in the usual employment relationship"²³

Only a few states have followed *Seaman's*,²⁴ and it seems likely that *Foley* will go far to check the spread of the doctrine of bad faith breach during the 1990s.²⁵ Nonetheless, the spectre of bad faith breach promises to haunt contract law until future cases determine its fate.

2. THE EMPLOYMENT AT-WILL DOCTRINE

If there was a development to rival the importance of bad faith breach during the 1980s, it was the re-examination of the employment at-will doctrine. Under this doctrine, either the employer or the employee may terminate the relationship unilaterally at any time, for any lawful reason or for no reason at all.²⁶ Breach of contract claims made in the context of an at-will relationship proved troublesome on two levels: the validity of the at-will doctrine itself and the modification of that relationship by representations made in an employment handbook.

First, such claims challenged the continuing vitality of the

21. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

22. *Id.* at 689, 765 P.2d at 393, 254 Cal. Rptr. at 231-32.

23. *Id.* at 692, 765 P.2d at 395, 254 Cal. Rptr. at 234.

24. *See, e.g., K-Mart Co. v. Ponsock*, 732 P.2d 1364 (Nev. 1987) (compensatory and punitive damages awarded to employee in suit against employer who fired employee in order to avoid paying retirement benefits). *But see, e.g., Betterton v. First Interstate Bank*, 800 F.2d 732, 736 (8th Cir. 1986) (in view "of the Arizona Supreme Court's demonstrated antipathy towards extension of the bad faith tort beyond the insurance context, we conclude that any breach of the duty of good faith . . . would involve only contractual remedies.").

25. *See Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 187 (9th Cir. 1989) ("[T]he *Foley* court dramatically curtailed the expansion of bad faith liability beyond the traditional insurer-insured relationship.").

26. *E.g., Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100, 103, 483 N.E.2d 150, 153 (1985).

employment at-will doctrine, or Wood's rule.²⁷ Beginning in the late 1970s and continuing into the 1980s discharged employees were generally successful in establishing public policy exceptions to Wood's rule.²⁸ For instance, an employer is not free to discharge an employee if the reason for the discharge is that the employee had informed the authorities of some illegal activity by the employer.²⁹ Employees generally were not successful, however, in replacing Wood's rule with one allowing an employer to discharge an employee only for good cause or in good faith.³⁰ Attempts by employees to establish such a limitation on an employer's ability to act suffered a resounding defeat in California in 1988 when, in *Foley v. Interactive Data Co.*,³¹ the state supreme court reversed its field.³² The *Foley* court declined to extend the doctrine of bad faith breach to the employer-employee relationship, reasoning that "a breach in the employment context does not place the employee

27. The employment at-will doctrine was first enunciated in 1877 as a rule of evidence by Horace Grey Wood, who wrote:

With us the rule is inflexible that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, or no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.

H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877). See generally E. FARNSWORTH, *supra* note 11, § 7.17, at 557-59 (discussing Wood's rule and cases attacking it). For a defense of Wood's rule, see Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984) (examining the employment at-will doctrine in light of intrinsic fairness, wealth enhancement, and distributional fairness).

28. *E.g.*, *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (employees cannot be dismissed from employment because they have filed a worker's compensation claim); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980) (plaintiff cannot be discharged for refusing to violate a code of ethics); *Holien v. Sears, Roebuck and Co.*, 298 Or. 76 689 P.2d 1292 (1984) (discharge for resisting sexual harassment held wrongful).

29. See, *e.g.*, *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980) (the court held that at-will employee who alleged that he had been dismissed in retaliation for his insistence that his employer comply with requirements of the Food, Drug, and Cosmetics Act sufficiently alleged a cause of action in tort for wrongful discharge).

30. See, *e.g.*, *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985) (concluding that the implied covenant of good faith and fair dealing does not limit the employer to for cause terminations). *But see* MONT. CODE ANN. § 39-2-904(2) (1989) (a discharge is wrongful if it "was not for good cause.").

31. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

32. Prior to *Foley*, the California appellate courts had concluded that the employment relationship imposed a duty of good faith on employers. Consequently, employees could only be discharged for cause. See, *e.g.*, *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

in the same economic dilemma that an insured faces when an insurer in bad faith refuses to pay a claim or to accept a settlement offer within policy limits."³³ Thus, Wood's rule remains the principle governing most employment relationships although the 1980s saw the establishment of some limited exceptions to this general rule.

With Wood's rule intact, challenges to termination decisions arose on a second front. Employees claimed that the at-will nature of the employment relationship had been modified by an agreement between the employer and the employee. Generally, the claim that the at-will employment relationship had been modified was based on representations made in an employment handbook.³⁴

To succeed in such a claim an employee must show that the employer made such a representation. If the handbook containing policies on termination was promulgated at the time the employee began working for the employer, there is no difficulty in enforcing these policies against the employer.³⁵ Even if representations bearing on the employment relationship are made at some later time, it is still possible to show that such representations constitute a modification of the employment at-will relationship. Here, the reasoning is that the employer makes an offer that the employee accepts by continued service and forbearance from accepting other employment opportunities, thus satisfying the traditional elements of contract formation.³⁶ Furthermore, if the employer makes a promise upon which the employee relies in continuing to work for the employer, the traditional requirements of promissory estoppel are satisfied.³⁷ Some courts have gone even further, holding that

33. *Foley*, Cal. 3d at 692, 765 P.2d at 396, 254 Cal. Rptr. at 234.

34. See E. FARNSWORTH, *CONTRACTS* § 3.15a (lawyer's ed. 1990).

35. See, e.g., *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 614, 292 N.W.2d 880, 892 (1980) (where employee is given a personnel manual when hired, the manual "can give rise to contractual rights in the employees . . .").

36. See, e.g., *Martin v. Federal Life Ins. Co.*, 109 Ill. App. 3d 596, 601, 440 N.E.2d 998, 1002-03 (1982) (employee's agreement to forego a more lucrative position in exchange for employer's promise of job security creates contract that alters the at-will nature of the employment relationship).

37. E.g., *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100, 483 N.E.2d 150 (1985). In *Mers*, the court held:

[T]he doctrine of promissory estoppel is applicable and binding to oral at-will employment agreements. . . .

The test in such cases is whether the employer should have reasonably expected its representation to be relied upon by its employee and, if so, whether the expected action or forbearance actually resulted and was detrimental to the employee.

traditional contract rules do not apply in the employment context; thus, it is unnecessary for an employee to prove knowledge of or reliance upon the employer's offer.³⁸ In *Toussaint v. Blue Cross & Blue Shield*,³⁹ for example, the Michigan Supreme Court concluded that it is "unnecessary for [the employee] to prove reliance on the policies set forth in the manual in order to prove an obligation on the part of the employer to follow those policies."⁴⁰ Such decisions marked a radical departure from traditional contract law and also produced the salutary result that all employees, those who had read the handbook and those who had not, were treated alike.

A second issue concerns the existence of consideration, or some substitute such as reliance, for the employer's promise in the handbook.⁴¹ Again, if a handbook is made available when an employee is hired, or if it is furnished when an employee threatens to quit, plainly there is consideration, or at least reliance, in the employee's subsequent service.⁴² If, however, the handbook is simply distributed after the employment relationship is established, the issue is less clear. In 1983 the Supreme Court of Minnesota, in *Pine River State Bank v. Mettelle*,⁴³ held that "[t]he employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer."⁴⁴ By allowing an employee's continued service to constitute consideration even though it is not in response to an employer's promise, courts have departed from the traditional contract law requirement that consideration be part of every bargain.⁴⁵

Id. at 105, 483 N.E.2d at 155.

38. *Cf. Scwhartz v. Michigan Sugar Co.*, 106 Mich. App. 471, 477-78, 308 N.W.2d 459, 462 (1981) (generally "an employer's conduct and other pertinent circumstances may establish an unwritten 'common law' providing . . . a just cause termination policy," though particular employee's claim was based merely on his own subjective expectancy).

39. 408 Mich. 579, 292 N.W.2d 880 (1980).

40. *Id.* at 613 & n.25, 292 N.W.2d at 892 & n.25.

41. *See generally* E. FARNSWORTH, *supra* note 34, § 2.9a (discussing the different theories of consideration advanced by employees to support an employment contract).

42. *See, e.g., Martin v. Federal Life Ins. Co.*, 109 Ill. App. 3d 596, 602-03, 440 N.E.2d 998, 1003-04 (1982) (where an employee foregoes another job offer in reliance upon the employer's promise of permanent employment, that contract is supported by sufficient consideration and is enforceable).

43. 333 N.W.2d 622 (Minn. 1983).

44. *Id.* at 627.

45. *See generally* E. FARNSWORTH, *supra* note 11, § 2.2 (discussing the bargain theory of consideration).

In the 1980s, then, the at-will employment cases pressed for the expansion of liability in traditional contract law on three fronts: Wood's rule itself, handbooks as offers or at least promises, and consideration.

3. PRECONTRACTUAL NEGOTIATIONS AND PRELIMINARY AGREEMENTS

The 1980s saw a marked increase in claims based on precontractual negotiations and preliminary agreements,⁴⁶ sparked in good part by the spate of mergers and acquisitions that characterized the decade. A leading example of this trend is *Texaco Inc. v. Pennzoil Co.*,⁴⁷ one of the most celebrated, perhaps notorious, cases of the decade.⁴⁸ Pennzoil sued Texaco over the sale of Getty Oil Company stock to Texaco by various Getty entities after Pennzoil had agreed to purchase the same stock.⁴⁹ Pennzoil first attempted to sue Getty for breach of contract. When this foray into the Delaware courts proved abortive,⁵⁰ Pennzoil shifted its

46. For a general treatment of precontractual liability and preliminary agreements in the context of negotiations, see Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987).

47. 729 S.W.2d 768 (Tex. Ct. App. 1987), cert. dismissed, 108 S. Ct. 1305 (1988).

48. For an in-depth analysis of the key figures involved in the various negotiations, the negotiations themselves, and the resulting lawsuits, see T. PETZINGER, OIL & HONOR: THE TEXACO-PENNZOIL WARS (1987).

49. Pennzoil first expressed an interest in acquiring the Getty Oil Company in late December of 1983. At that time, Pennzoil announced an unsolicited public tender offer for sixteen million shares of Getty Oil stock at \$100 per share. Within days of this public offer, Pennzoil contacted Gordon P. Getty, a director of Getty Oil, who was also the trustee of the Sarah C. Getty Trust (the "Getty Trust") which held approximately 40.2% of the outstanding shares in Getty Oil stock. In addition, Pennzoil contacted a representative of the J. Paul Getty Museum (the "Getty Museum") which held 11.8% of the Getty Oil stock. After a few days of negotiations, a Memorandum of Agreement was prepared which outlined the terms of the sale of stock owned by the Getty Trust and Getty Museum to Pennzoil. This Memorandum was later signed by the parties. The terms set forth in the Memorandum were communicated to and rejected by the Getty Oil board of directors. A revised Pennzoil offer was also rejected but evidence indicated that a counter-proposal by Getty Oil was accepted by Pennzoil. Getty Oil and Pennzoil each announced through press releases that the companies had reached "an agreement in principle" to merge. While the attorneys were attempting to finalize a formal agreement between Getty Oil and Pennzoil, Texaco approached the representative of the Getty Museum with a better offer for the Museum's stock. The Museum representative accepted this offer and, later that day, Texaco met with Gordon Getty to discuss the sale of the Getty Trust stock. Getty accepted Texaco's more lucrative offer and signed a letter of intent to sell the Trust stock to Texaco. Subsequently, Texaco issued a press release stating that Texaco and Getty Oil would merge. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d at 785-87.

50. *Pennzoil Co. v. Getty Oil Co.*, No. 7425 (Civ.) (Del. Ch. Feb. 6, 1984) (LEXIS).

strategy to the Texas courts and sued Texaco there for tortious interference with an alleged contract between Pennzoil and the Getty stockholders. The resulting verdict totaled almost \$11 billion and included an award of punitive damages amounting to \$3 billion. The award was upheld by the Texas Court of Appeals with a reduction in the amount of punitive damages to one billion.⁵¹ The Supreme Court of the United States subsequently refused to relieve Texaco of the burden of filing a supersedeas bond, as required by Texas law in order to appeal,⁵² causing Texaco to file for bankruptcy. The Texas Supreme Court denied Texaco's request for review, but Texaco was able to settle with Pennzoil for three billion dollars, thereby allowing Texaco to emerge from bankruptcy.

Viewing *Pennzoil* through the lens of a European civil law system provides an interesting criticism of the American law and, indeed, the common law. Had the transactions between Getty and Pennzoil, and later Getty and Texaco, occurred in a European civil law system, Pennzoil's recourse would have been against Getty rather than Texaco. Pennzoil's action against Getty could have been based either on breach of a preliminary agreement, as in Pennzoil's claim against Texaco, or on breach of a court-imposed duty of good faith.⁵³ Damages for breach of the preliminary agreement would include Pennzoil's full measure of lost expectation, but punitive damages could not have been awarded. Damages for breach of a court-imposed duty of good faith would have been far more modest — Pennzoil's out of pocket expenses in negotiating and perhaps some allowance for lost opportunities.⁵⁴

51. *Texaco Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987), *cert. dismissed*, 108 S. Ct. 1305 (1988).

52. 481 U.S. 1 (1987).

53. See Farnsworth, *supra* note 46, at 239-42. "European courts have been more willing than American ones to accept scholarly proposals for precontractual liability based on a general obligation of fair dealing." *Id.* at 239. For example, in Germany damages are awarded where a party to the contract "awakes in the other confidence in the imminent coming into existence of a contract." *Id.* at 240 (citation omitted). Similarly, the courts in France impose precontractual liability under a tort theory where a party breaks off negotiations unjustifiably or where the party had no intention of contracting. *Id.* at 241.

54. See *id.* at 223-29. These damages appropriately represent the injured party's reliance interest. Reliance damages are intended to restore the injured party to the position it would have been in had the negotiations not taken place. Lost opportunities are arguably a proper component of the reliance measure if the plaintiff can prove the value of these opportunities with reasonable certainty. *Id.* at 225. For a European perspective on the case, see Draetta, *The Pennzoil Case and the Binding Effect of the Letters Intent [sic] in the International Trade Practice*, 1988 REVUE DE DROIT DES AFFAIRES INTERNATIONALES 155.

Thus, it would have been possible to give Pennzoil adequate relief without going to the extreme of the actual verdict upheld by the Texas courts. Under the common law's all-or-nothing approach, there was no such middle ground.

In 1989, as the decade drew to a close, the Second Circuit decided a case that further illustrates this all-or-nothing aspect of the common law system. In *Arcadian Phosphates, Inc. v. Arcadian Corp.*,⁵⁵ the prospective purchaser of a fertilizer business sued the prospective seller for breach of a preliminary agreement.⁵⁶ The court, unlike the *Pennzoil* court, held the agreement unenforceable as a contract to sell the business, but remanded for consideration of the possibility that the language of the agreement amounted to a promise to negotiate in good faith on which the prospective purchaser had relied.⁵⁷ If the prospective purchaser was successful in demonstrating promissory estoppel, the purchaser would be entitled to compensation in the amount of its reliance interest, but not its full expectation interest.⁵⁸

Pennzoil and *Arcadian Phosphates* demonstrate the importance of the enforceability of preliminary agreements. Absent such a preliminary agreement as that present in *Pennzoil*, the court will not protect the disappointed party's lost expectation. Absent a preliminary agreement such as that found in *Arcadian Phosphates* the court will not even impose a duty of good faith.⁵⁹

Liability arising out of precontractual negotiations and the enforceability of preliminary agreements are clearly issues that will not be confined to the decade of the 1980s.⁶⁰

55. 884 F.2d 69 (2d Cir. 1989).

56. The preliminary agreement specified the purchase price of the business, the timing and amount of the payments, the assets to be purchased, and a closing date. The agreement also included the "framework" for further negotiations for the purchase of the seller's finished product. This agreement was subject to the approval of both companies' boards, but some terms were not wholly specified, such as what participants would be allowed to take part in the joint venture and the method of payment. The agreement also included a statement indicating the parties' intention to "cooperate fully and work judiciously in order to expedite the closing date and consummate the sale of the business." *Id.* at 70-71.

57. *Id.* at 72-73.

58. *Id.*

59. "It is not easy to justify the refusal of [American] courts to recognize a duty of fair dealing under an agreement to negotiate when they have been willing to recognize such a duty either under an ultimate agreement or an agreement with open terms." Farnsworth, *supra* note 46, at 268.

60. The pace of this development may be quickened if there should develop an awareness of the possibility of a more general ground for relief along with a general dissatisfaction with the common law remedies of restitution and damages based on reliance or

4. LONG-TERM CONTRACTS

While expanded liability concerns followed a fairly predictable direction, other issues in contract law deviated from their expected path. Problems relating to long-term contracts came to the fore with the energy crisis of 1973, when suppliers sought to be excused from their obligations under long-term requirements contracts on the ground of commercial impracticability.⁶¹ A case which exemplifies the difficulty in reforming long-term contracts is the noted dispute between Westinghouse and the utility companies to which Westinghouse had agreed to supply a large amount of uranium.⁶² Westinghouse attempted to terminate the long-term supply contracts, claiming that a three-fold increase in the price of uranium made fulfillment of the agreements commercially impracticable.⁶³ Litigation ensued, but this dispute failed to produce a definitive, reported opinion, and thus further clouded the issue.⁶⁴

One of the most controversial cases concerning long-term contracts appeared at the start of the 1980s: *Aluminum Co. of America v. Essex Group, Inc.*⁶⁵ Under a sixteen year contract which was renewable for an additional five year term, the Aluminum Company of America ("ALCOA") was to receive alumina from Essex Group, convert it into molten aluminum, and return it to Essex for further processing. The contract contained a price escalation clause, devised when the contract was made in 1967, based in part on the Wholesale Price Index for Industrial Commodities ("WPI").⁶⁶ By 1979 it had become evident that the WPI

specific promises. Farnsworth, *supra* note 46, at 242.

61. See, e.g., *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 437-42 (S.D. Fla. 1975) (Gulf and Eastern entered into a requirements contract whereby Gulf agreed to supply all of Eastern's requirements for jet fuel at certain airports. Gulf contended that this requirements contract had become commercially impracticable due to increased fuel costs, but failed to show the extent of expected losses from performing the contract and thus failed to prove the defense of impracticability).

62. Jennings, *Commercial Impracticability—Does It Really Exist?*, 2 WHITTIER L. REV. 241, 251-52 (1980).

63. See generally *id.* at 251-56 (discussing the application of U.C.C. § 2-615 to the Westinghouse case).

64. See Eagan, *The Westinghouse Uranium Contracts: Commercial Impracticability and Related Matters*, 18 AM. BUS. L.J. 281, 298 (1980) (describing the Westinghouse litigation, the author commented, "[r]arely have judges worked so diligently to avoid handing down decisions . . .").

65. 499 F. Supp. 53 (W.D. Pa. 1980).

66. Under the price escalation formula, \$.03 per pound of the original price was to escalate with the WPI and \$.03 per pound was to escalate with an index based on the wage rates paid to ALCOA employees. Only the portion of the formula based on the WPI was at

was not keeping pace with the sharp rise in the cost of energy to ALCOA, and the company stood to lose \$60 million over the balance of the contract term.⁶⁷ ALCOA sought relief on the ground of mutual mistake. The district court judge concluded that the parties had chosen the WPI to reflect changes in ALCOA's non-labor costs after a careful investigation by both parties showed that the WPI had for some years tracked fluctuations in those costs without marked deviations.⁶⁸ In doing so, the judge concluded, the parties had made an error "of fact rather than one of simple prediction of future events."⁶⁹ Instead of allowing the usual remedy of avoidance and rescission for mutual mistake, however, the judge reformed the contract by modifying the price clause to "yield Essex the benefit of its favorable bargain," but "reduce ALCOA's disappointment to the limit of risk the parties expected in making the contract."⁷⁰ Although the case was the subject of scholarly commentary,⁷¹ it had a negligible impact on the development of contract law during the 1980s.

This development was unexpectedly stunted during the 1980s. As the decade progressed, energy prices fluctuated and buyers, as

issue in the case. *Id.* at 56.

67. *Id.* at 73. The failure of the WPI escalation provision was explained as follows: Beginning in 1973, OPEC actions to increase oil prices and unanticipated pollution control costs greatly increased ALCOA's electricity costs. Electrical power is the principal non-labor cost factor in aluminum conversion, and the electric power rates rose much more rapidly than did the [WPI]. As a result, ALCOA's production costs rose greatly and unforeseeably beyond the indexed increase in the contract price.

Id. at 58.

68. *Id.* at 63.

69. *Id.*

70. 499 F. Supp. at 80. The judge decided that granting rescission would give ALCOA a windfall gain in the inflated aluminum market and deny Essex the assured long term aluminum supply and "gains it legitimately may enforce within the scope of the risk ALCOA bears under the contract." *Id.* at 79.

71. See, e.g., Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U.L. REV. 1 (1984) (criticizing the ALCOA decision and concluding that judges should refrain from "rewriting the contracts of other people."); Speidel, *The New Spirit of Contract*, 2 J.L. & COM. 193 (1982) (discussing the new spirit of contract law, as opposed to the classical model, concluding "that the 'new' spirit of contract is a form of tort — a duty of good faith in performance and enforcement of a contract imposed without the parties' consent."); Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 Nw. U.L. REV. 369 (1981) (concluding that a duty to bargain should be imposed when unanticipated changes during the performance of a long-term contract cause substantial unbargained for gains and losses, that judicial intervention should be limited to those cases when the bargaining fails, and that the ALCOA court's intervention was inappropriately premature.).

well as sellers, became victims of their long-term contracts. A flood of cases arose out of take-or-pay contracts in the natural gas industry, in which pipeline companies sought relief from long-term contracts to purchase natural gas that required the pipelines to pay for gas even if they did not take any.⁷² Pipelines suffered great losses under these contracts when gas prices dropped. Courts generally showed little sympathy for pipelines that found themselves in this situation. The Tenth Circuit stated in 1985 that a buyer under a take-or-pay contract "can perform in either of two ways. It can either (1) take the minimum purchase obligation of natural gas (and pay) or (2) pay the minimum bill. . . . [T]he impracticability of one alternative does not excuse the promisor"⁷³

This toughening judicial attitude toward excuse based on changed circumstances is epitomized by *Northern Indiana Public Service Co. v. Carbon County Coal Co.*⁷⁴ This case involved a contract, containing a price escalation clause, under which Northern Indiana Public Service Company ("NIPSCO") had agreed to buy 1.5 million tons of coal per year for twenty years from Carbon County Coal Company ("Carbon"). When it became cheaper to buy electricity from neighboring utilities than to produce it internally, the Indiana Public Service Commission ordered NIPSCO to buy electricity from other utilities at the lower rate. Because NIPSCO did not expect to be allowed to recover the cost of buying coal from Carbon in its electrical rates, NIPSCO refused delivery from Carbon and sought a declaration that it was excused from its contractual obligations to Carbon.⁷⁵ NIPSCO was unsuccessful in obtaining the declaration. As Judge Richard Posner of the Seventh Circuit expressed it:

[A] fixed-price contract is an explicit assignment of the risk of market price increases to the seller and the risk of market price decreases to the buyer, and the assignment of the latter risk to

72. See generally Medina, McKenzie & Daniel, *Take or Litigate: Enforcing the Plain Meaning of the Take-or-Pay Clause in Natural Gas Contracts*, 40 ARK. L. REV. 185 (1986) (estimating the number of cases arising from take-or-pay agreements at over one hundred and analyzing litigation strategies for both buyers and sellers).

73. *International Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879, 885 (10th Cir. 1985) (purchaser was forced to change its operations, which lowered its need for natural gas, in order to comply with intervening environmental regulations. The court found that this prevented the purchaser from taking the gas, but not from paying for it).

74. 799 F.2d 265 (7th Cir. 1986).

75. *Id.* at 267-68.

the buyer is even clearer where, as in this case, the contract places a floor under price but allows for escalation.⁷⁶

Thus, although not all courts turned a deaf ear to arguments based on changed circumstances or impracticability, the "new spirit of contract," as expressed in *ALCOA*, failed to win the day.

5. INTIMATE CONTRACTS

Long-term contracts was not the only area of contract law that took an interesting turn during the 1980s. The field of intimate contracts, which encompasses agreements made within family and other intimate relationships, also held some surprises.⁷⁷

The 1970s saw a wave of cases upholding prenuptial agreements despite precedent that held such agreements unenforceable as unreasonably impairing an essential incident of marriage, the duty of support that the husband owes the wife.⁷⁸ In *Posner v. Posner*,⁷⁹ an influential case from 1972, the Florida Supreme Court ruled that "inadequate and disproportionate provision for the wife . . . will not vitiate an antenuptial agreement."⁸⁰ This trend toward freedom of contract in the area of prenuptial agreements continued during the 1980s and was formalized by the promulgation of the Uniform Premarital Agreement Act in 1983. The Uniform Premarital Agreement Act allows the parties entering into a prenuptial agreement to contract with respect "to the modification or elimination of spousal support"⁸¹ as well as "any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty."⁸²

During the 1970s, courts were confronted with the legal difficulties raised by agreements made between people who chose to live together without marrying.⁸³ These "cohabitation contracts"

76. *Id.* at 278.

77. For a more complete discussion of this area, see E. FARNSWORTH, *supra* note 11, § 5.4.

78. *E.g.*, *Motley v. Motley*, 255 N.C. 190, 120 S.E.2d 422 (1961) (antenuptial agreement which relieves the husband from the duty of supporting his wife is against public policy and therefore null and void).

79. 257 So. 2d 530 (Fla. 1972).

80. *Id.* at 534. However, such an agreement will not be enforced if one of the parties fails to "exercise a high degree of good faith and candor bearing upon the contract." *Id.* at 535 (quoting *DelVecchio v. DelVecchio*, 143 So. 2d 17, 21 (Fla. 1962)).

81. UNIF. PREMARITAL AGREEMENT ACT § 3(a)(4), 9B U.L.A. 371, 373 (1983).

82. *Id.* at § 3(a)(8), 9B U.L.A. at 373.

83. E. FARNSWORTH, *supra* note 11, § 5.4, at 366.

were frowned upon by courts as "immoral and a threat to the institution of marriage"⁸⁴ and, by implication, a threat to the interests of the state.⁸⁵ In 1976, however, the California Supreme Court's decision in *Marvin v. Marvin*⁸⁶ broke with this judicial inclination. The court upheld a contract between Lee Marvin, the movie actor, and Michelle Marvin, a former entertainer. The couple lived together for seven years and agreed to hold themselves out as husband and wife. In return for rendering services "as a companion, homemaker, housekeeper and cook," Michelle Marvin was to "share equally any and all property accumulated as a result of their efforts whether individual or combined."⁸⁷ Noting the "substantial increase in the number of couples living together without marrying,"⁸⁸ the court concluded that "a contract between nonmarital partners is unenforceable only to the extent that it *explicitly* rests upon the immoral and illicit consideration of meretricious sexual services."⁸⁹

Although the *Marvin* case has not found universal favor,⁹⁰ it had a substantial impact in other jurisdictions in the 1970s⁹¹ and this continued in the 1980s.⁹² As with prenuptial agreements, cohabitation contracts reinforced the idea that freedom of contract should prevail over traditional moral restraints. Indeed, as two perceptive observers wrote, "this approach gives cohabitants more freedom in structuring their relationships than that given spouses, since there are significant limitations upon the permissible scope of marital contracts."⁹³

84. *Id.*

85. *E.g.*, *Hewitt v. Hewitt*, 77 Ill. 2d 49, 58, 394 N.E.2d 1204, 1207-08 (1979) (the "impact" of the recognition of legal rights of people living together outside of the marital relationship may "weaken marriage as the foundation of our family-based society.").

86. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

87. *Id.* at 666, 557 P.2d at 110, 134 Cal. Rptr. at 819.

88. *Id.* at 665, 557 P.2d at 109, 134 Cal. Rptr. at 819.

89. *Id.* at 669, 557 P.2d at 112, 134 Cal. Rptr. at 819 (emphasis in original).

90. *See, e.g.*, *Hewitt v. Hewitt*, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979) (the decision to grant legal status to private agreements that substitute for the institution of marriage is better left to the legislature).

91. *See, e.g.*, *Carlson v. Olson*, 256 N.W.2d 249, 252 (Minn. 1977) (adopting the *Marvin* court's resolution to enforce cohabitation agreements and its "guiding principles for dealing with claims of property rights arising out of non-marital relationship.").

92. *E.g.*, *Boland v. Catalano*, 202 Conn. 333, 341, 521 A.2d 142, 146 (1987) (citations omitted) ("[T]he decided trend among commentators and courts that have found an agreement between unmarried cohabitants is to endorse the enforcement of such agreement.").

93. Oldham & Caudill, *A Reconnaissance of Public Policy Restrictions upon Enforcement of Contracts Between Cohabitants*, 18 FAM. L.Q. 93, 140 (1984).

In the 1980s, however, the judicial trend toward endorsing freedom of contract in the context of intimate relationships was abruptly halted in the face of moral outrage over one of the most famous intimate contract cases of the decade. In *In re Baby M*,⁹⁴ the New Jersey Supreme Court held a surrogate parenting agreement unenforceable. The court concluded that the "contract's basic premise, that the natural parents can decide in advance of birth which one is to have custody of the child, bears no relationship to the settled law that the child's best interests shall determine custody."⁹⁵ Much has been written on the *Baby M* case and the New Jersey Supreme Court's response to surrogate motherhood, most of it approving.⁹⁶ In addition, a number of states have enacted statutes making such contracts unenforceable.⁹⁷

Thus, the 1980s witnessed a sharp limitation on party autonomy in one area of intimate contracts, specifically surrogacy contracts. This limitation reversing the trend of the 1970s toward freedom to make intimate contracts was something of an anomaly in a decade characterized by deregulation.

6. FORMALITIES VERSUS RELIANCE

The third example of theoretical turnabout occurred in the tug of war between formalities and reliance. In contract law, a perennial tension between these two legal concepts, gives rise to interesting issues concerning the enforceability of promises. Should the mere utterance of a promise, supported by what

94. 109 N.J. 396, 537 A.2d 1227 (1988).

95. *Id.* at 434, 537 A.2d at 1246.

96. See, e.g., Areen, *Baby M Reconsidered*, 76 GEO. L.J. 1741, 1754 (1988) (arguing that a contract such as the one in *Baby M* violates public policy because it "commercializes [a] relationship previously based on personal intimacy, and . . . place[s] . . . children and poor women at risk in the future."); Wagner, *The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique*, 41 CASE W. RES. L. REV. 1 (1990). But see Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 326-337 (1988) (a contract to act as a surrogate promotes ideas such as convenient child-bearing which detract from the conventional parent-child relationship). For further discussion of the arguments for and against the enforcement of surrogacy agreements, see M. FIELD, *SURROGATE MOTHERHOOD* (1988).

97. See, e.g., IND. CODE § 31-8-2-2 (1979) (surrogate agreements are void); MICH. COMP. LAWS § 722.855 (1979) ("A surrogate parentage contract is void and unenforceable as contrary to public policy."). But see, e.g., ARK. STAT. ANN. § 9-10-201(c)(1) (1989) (the child is that of the "woman intended to be mother."); NEV. REV. STAT. § 127.287(5) (1989) (statute prohibiting baby-selling inapplicable where there is a "lawful contract to act as a surrogate.").

Holmes suggested was the formality of consideration,⁹⁸ be sufficient to bind the promisor, or should some reliance by the promisee be required? If the law requires some formality, such as a writing, to render a promise enforceable, should that formality be dispensed with if the promisee detrimentally relies upon the promise?

The 1970s saw a significant judicial erosion of the requirement of a writing imposed by Uniform Commercial Code § 2-201, the statute of frauds for the sale of goods.⁹⁹ Courts were confronted with a rash of grain cases that grew out of sharp price increases in 1973 and 1974. Farmers who made oral contracts to sell to grain elevators reneged on their contracts using the statute of frauds as a defense. The grain elevators claimed that they had relied on the farmers' promises by making resale contracts and that the farmers were therefore precluded from relying on the statute of frauds to avoid enforcement of the contracts. Although some courts adhered to the traditional position that such reliance did not make the farmers' oral promises enforceable,¹⁰⁰ other courts accepted the argument of the grain elevators and enforced the farmers' oral promises.¹⁰¹

The expansion of the role of reliance, and the simultaneous erosion of the role of formalities, did not continue in the 1980s. Indeed, with the notable but single exception of the somewhat confused Seventh Circuit case of *Wisconsin Knife Works v. National Metal Crafters*,¹⁰² the trend appears to be in the other

98. See *Krell v. Codman*, 154 Mass. 454, 456, 28 N.E. 578, 578 (1891) ("consideration is as much a form as a seal.").

99. See generally E. FARNSWORTH, *supra* note 11, § 6.12, at 455-59 (reviewing the case law that has eroded the requirement of a writing set forth in U.C.C. § 2-201).

100. See, e.g., *Farmland Serv. Coop. v. Klein*, 196 Neb. 538, 542, 244 N.W.2d 86, 89 (1976) (reviewing summary judgment in favor of the reneging seller, the court succinctly analyzed the case: "The sale was for much more than \$500. It was not in writing It was not within any of the exceptions enumerated in Section 2-201(3), U.C.C. [Therefore], the trial court properly sustained the [defendant farmer's] motion for summary judgment.").

101. E.g., *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339 (Iowa 1979) (recognizing promissory estoppel as a means of circumventing the statute of frauds); *Jamestown Terminal Elevator, Inc. v. Hieb*, 246 N.W.2d 736, 738 (N.D. 1976) ("promissory estoppel may act as a bar to the raising of the statute of frauds as a defense in oral agreements for the sale of goods.").

102. 781 F.2d 1280, 1286-87 (7th Cir. 1986) (holding that an oral modification of a contract which includes a clause precluding such modification complying with U.C.C. § 2-209(2) operates as a waiver under U.C.C. § 2-209(4) if there is reliance on the attempted modification).

direction.

On the judicial front, consider *Voest-Alpine International Corp. v. Chase Manhattan Bank*.¹⁰³ This case arose when Chase Manhattan Bank agreed to confirm a letter of credit issued by a foreign bank. Chase Manhattan informed a beneficiary of the letter of credit that it would pay the credit despite the fact that the beneficiary's documentation did not conform to the requirements of the letter of credit.¹⁰⁴ The beneficiary argued that the bank waived its right to demand strict compliance with the letter of credit, while the bank argued that it could not have waived incurable defects in the beneficiary's documentation. The court held that "waiver . . . is defined as the intentional relinquishment of a known right," and that the incurability of the defects is irrelevant to a waiver.¹⁰⁵ There was no requirement that the beneficiary prove it relied on the bank's waiver in order to collect on the letter of credit. Rather, the court held that a mere declaration, a formality of sorts, suffices even in the absence of reliance. The *Voest-Alpine* court's disregard for reliance is inconsistent with *Wisconsin Knife*, in which the court imposed a reliance requirement where none was mandated by U.C.C. § 2-209(4),¹⁰⁶ and demonstrates the trend favoring formality over reliance.

On the legislative front, law makers placed even greater emphasis on formalities than did judges. In 1980 the Minnesota legislature mandated that a cohabitation agreement concerning property or finances be "written" in order to be enforceable.¹⁰⁷ The Uniform Premarital Agreement Act, promulgated in 1983, likewise requires that a premarital agreement "be in writing and signed by both parties."¹⁰⁸ In 1987 the California Supreme Court

103. 707 F.2d 680 (2d Cir. 1983).

104. The court explained the requirement of strict compliance under a letter of credit:

[T]he doctrine of strict compliance with the terms of the letter of credit functions to protect the bank which carries the absolute obligation to pay the beneficiary Literal compliance with the credit . . . is . . . essential so as not to impose an obligation upon the bank that it did not undertake and so as not to jeopardize the bank's right to indemnity from its customer.

Id. at 683-82

105. *Id.* at 685.

106. See 781 F.2d at 1286-87. U.C.C. §2-209(4) provides that an oral modification that is not in writing as required by U.C.C. § 2-209(2), (3) can operate as a waiver. U.C.C. § 2-209(4) does not, on its face, require reliance by the party seeking to enforce the oral modification. U.C.C. § 2-209(4) (1989).

107. MINN. STAT. § 513.075 (1989).

108. UNIF. PREMARITAL AGREEMENT ACT § 2, 9B U.L.A. 371, 372 (1983).

took note of this trend, stating that "legislative preference for written contracts is stronger than ever before."¹⁰⁹ Thus the continuing appeal of formalities during the 1980s, despite the contrary movement in the 1970s, constitutes the third surprising twist.

7. RELATIONSHIP OF CONTRACT AND TORT

The 1980s were also remarkable for the developments which did not take place. For example, Grant Gilmore made one of the more celebrated predictions of the 1970s in *The Death of Contract*:

[W]e might say that what is happening is that "contract" is being reabsorbed into the mainstream of "tort." Until the general theory of contract was hurriedly run up late in the nineteenth century, tort had always been our residual category of civil liability. As the contract rules dissolve, it is becoming so again.¹¹⁰

Gilmore maintained that the facade of classical contract theory crumbled with the emergence of ideas such as unjust enrichment and promissory estoppel to supplement, and eventually supplant, bargain theory.¹¹¹ He further stated that these developments, as well as the similarity between tort and contract damages, leave no "viable distinction between liability in contract and liability in tort."¹¹²

The 1980s, however, did not witness the death of contract. Academic attempts to merge contracts into torts in courses called "contorts" failed to flourish and it may be argued that contracts, through liberal application of third party beneficiary doctrine, invaded the domain of tort during the 1980s. For example, a woman to whom a testator intended to leave the bulk of his estate under his will recovered damages for breach of contract from the lawyer whose negligence in having the woman witness the will resulted in

109. *Phillippe v. Shapell Indus., Inc.*, 43 Cal. 3d 1247, 1265, 743 P.2d 1279, 1289, 241 Cal. Rptr. 22, 32 (1987), *cert. denied*, 486 U.S. 1011, *reh'g denied*, 487 U.S. 1243 (1988). The court went on to list many types of consumer contracts that are required to be in writing in California, including home improvement contracts in excess of \$500, mobile home sales, prepaid rental listing services, home solicitation contracts, automotive repairs, dance studio lessons, health studio services, discount buying services, funeral services, and attorney fee contracts. *Id.* at 1265-66, 743 P.2d at 1289, 241 Cal. Rptr. at 32.

110. G. GILMORE, *THE DEATH OF CONTRACT* 87 (1974).

111. *Id.*

112. *Id.* at 88.

her taking nothing under it.¹¹³ Similarly, a tenant who sustained injuries in a fall on a dark walkway recovered damages for breach of contract from the power company that had contracted with the landlord to install and maintain outdoor lights.¹¹⁴

Indeed, as early as the 1981 Association of American Law Schools conference, Justice Abramson of the Wisconsin Supreme Court reported that contracts was "viable as a litigation category" and that Gilmore's report of the death of contract was highly exaggerated.¹¹⁵ At the same conference, Gilmore himself attempted to provide "an explanation of why this field of law, which somebody or other said was dead, some time ago, is not only alive and well but bursting at the seams."¹¹⁶

8. UNCONSCIONABILITY AND RELATED DOCTRINES

Another arrested development in contract law concerned unconscionability and related doctrines. The 1970s were undeniably the decade of the consumer in contract law. In 1975 Congress enacted the Magnuson-Moss Act to provide minimum disclosure standards for written consumer product warranties, and to define minimum content standards for those warranties.¹¹⁷ During the

113. *Guy v. Liederbach*, 501 Pa. 47, 459 A.2d 744 (1983). The Supreme Court of Pennsylvania justified its reliance on contract law in enforcing the intended beneficiary's claim by pointing out that arguments supporting negligence analysis are:

based on a common confusion of negligence doctrines relating to standard of care with those relating to scope of the risk, i.e., the class of persons to whom a duty is owed, analyzed in negligence in terms of foreseeability. Thus, although a plaintiff on a third party beneficiary theory in contract may in some cases have to show a deviation from the standard of care . . . to establish a breach, the class of persons to whom the defendant may be liable is restricted by principles of contract law

Id. at 62, 459 A.2d at 752. The class of potential plaintiffs is limited by the contract principle found in section 302 of the *Restatement (Second) of Contracts*, restricting the ability to sue to intended beneficiaries. RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979). In *Guy*, the intended beneficiary was easy to identify because she was named in the will. *Guy*, 501 Pa. at 61, 459 A.2d at 751-52.

114. *Vick v. H.S.I. Mgmt. Inc.*, 507 So. 2d 433 (Ala. 1987). Unlike the plaintiff in *Guy*, the plaintiff in *Vick* was not specifically mentioned as a beneficiary in the contract between the defendant power company and the landlord. The Supreme Court of Alabama, however, imposed a duty on the defendant under the contract because the defendant knew that the tenants of the building were relying upon proper performance of the contract to install lights. *Id.* at 436.

115. Kelso, *The 1981 Conference on Teaching Contracts: A Summary and Appraisal*, 32 J. LEGAL EDUC. 616, 616 (1982).

116. *Id.* at 640.

117. The Magnuson-Moss Act was enacted as Title I of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, 88 Stat.

1970s state legislatures also enacted consumer protection statutes.¹¹⁸ Ohio presaged this trend, adopting its Deceptive Trade Practices Act just before the decade began in 1969.¹¹⁹

Coinciding with these legislative developments, courts explored the impact of the doctrine of unconscionability. In 1973, for example, the New Jersey Supreme Court decided *Shell Oil Co. v. Marinello*.¹²⁰ This decision extended the protection of the doctrine of unconscionability to a gas station operator's lease and dealership agreement. The lease and dealership agreement between the parties granted Shell the right to terminate the lease by giving thirty days notice and to terminate the dealership agreement by giving ten days notice. Good cause for such termination was not required in either event.¹²¹ Initially, the court found that "Shell [was] the dominant party and that the relationship [lacked] equality in the respective bargaining positions of the parties."¹²² Under these circumstances, the court held that the clause granting Shell the unilateral right to terminate the agreement was the "grossly unfair . . . result of Shell's disproportionate bargaining position and," thus void as against public policy.¹²³

During the 1980s, the pendulum swung in the opposite direction. Some courts validated "due-on-sale" clauses in mortgages.¹²⁴ These clauses enabled the mortgagee to declare the remaining balance due immediately if the mortgagor sold the property, thus preventing the mortgagor from allowing the purchaser to assume a mortgage with a favorable interest rate. Many cases were generated by challenges to the validity of such clauses, though not all were based on claims of unconscionability.¹²⁵ Federal law now governs the matter through the Garn-St. Germain Depository Institutions Act of 1982, which precludes such challenges.¹²⁶ Follow-

2183 (codified at 15 U.S.C. §§ 2301-2312 (1988)).

118. See, e.g., Florida Deceptive and Unfair Trade Practices Act, FLA. STAT. §§ 501.201-501.213 (1988) (enacted in 1973).

119. OHIO REV. CODE ANN. §§ 4165.01-4165.04 (Anderson 1980).

120. 63 N.J. 402, 307 A.2d 598 (1973), cert. denied, 415 U.S. 920 (1974).

121. *Id.* at 405, 307 A.2d at 600.

122. *Id.* at 408, 307 A.2d at 601.

123. *Id.* at 409, 307 A.2d at 602.

124. See, e.g., *Martin v. Peoples Mut. Sav. & Loan Ass'n*, 319 N.W.2d 220 (Iowa 1982) (upholding the validity of a due-on-sale clause).

125. See generally Jennings, *The "Due-on-Sale" Bail-out for Mortgage Lenders: An Analysis of its Economic and Legal Soundness*, 30 ST. LOUIS U.L.J. 1151, 1154-55 (1986) (discussing clauses limiting remedies and attacks on these clauses by buyers).

126. 12 U.S.C. § 1701j-3(b) (1982) ("Notwithstanding any provision of the constitution or laws (including judicial decisions) of any State to the contrary, a lender may . . .

ing the trend disfavoring the unconscionability defense, the South Dakota legislature explicitly overruled a decision by that state's Supreme Court upholding a farmer's challenge to a limitation of warranty and remedy clause in a contract for the sale of seed corn.¹²⁷

The most active area for litigation over claims of unfair contract terms, however, did not involve consumers. Rather, commercial buyers of manufactured goods often chafed under sellers' insistence on inserting clauses limiting buyers' remedies to repair and replacement and precluding the recovery of consequential damages.¹²⁸ This "belt and suspenders" approach by sellers elicited a one-two punch from buyers.

Buyers began by arguing that if a seller's breach could not be cured, the repair and replacement remedy "failed of its essential purpose" under Uniform Commercial Code § 2-719(2).¹²⁹ Decisions addressing this argument began to appear in the 1970s, often in the federal courts on diversity grounds. In an early and influential case, the Fifth Circuit granted relief from such a clause, commenting that a "seller does not have an unlimited time for the performance of the obligation to replace and repair parts."¹³⁰

Having gained a foothold in their fight against the sellers, buyers then argued that the bar to recovery of consequential damages was so intimately connected with the repair and replacement provision, that when the latter failed of its essential purpose, the former fell as part of the same house of cards. In an early decision

enter into or enforce a contract containing a due-on-sale clause with respect to a real property loan." See generally Jennings, *supra* note 125, at 1157-74 (analyzing the effects of enforcing due-on-sale clauses under the Garn-St. Germain Act).

127. In *Hanson v. Funk Seeds Int'l*, 373 N.W.2d 30 (S.D. 1985), the Supreme Court of South Dakota upheld a trial court finding that a limitation of warranty and remedy clause was unconscionable because of the unequal bargaining power between a seed manufacturer and a farmer. In 1986 the South Dakota Legislature passed a law which abrogated the decision in *Hanson*. S.D. CODIFIED LAWS ANN. § 57A-2-316 (1988) (permitting exclusion or modification of warranties); S.D. CODIFIED LAWS ANN. § 57A-2-719 (1988) (permitting contractual modification or limitation of remedy).

128. See generally E. FARNSWORTH, *supra* note 11, § 4.28, at 335-37.

129. Section 2-719(2) provides that "where circumstances cause an exclusive or limited remedy to fail of its essential purpose" other remedies provided by the Code are available. U.C.C. § 2-719(2) (1989). For a discussion of this argument, see E. FARNSWORTH, *supra* note 11, § 4.28, at 336-37.

130. *Riley v. Ford Motor Co.*, 442 F.2d 670, 673 n.5 (5th Cir. 1971) (action against automobile manufacturer by purchaser for breach of warranty and for negligent repair of defects).

that accepted this argument, the Eighth Circuit concluded that "failure of essential purpose makes available all contractual remedies, including consequential damages," despite the limitation clause.¹³¹

During the 1980s, however, the house of cards argument fared badly. In *Chatlos Systems v National Cash Register Corp.*,¹³² the Third Circuit declared that the "better reasoned approach is to treat the consequential damage disclaimer as an independent provision, valid unless unconscionable."¹³³ Many cases followed *Chatlos*,¹³⁴ and even those that did not concluded that the matter should be decided by interpreting each contract on a case-by-case basis.¹³⁵

In sum, continued expansion of unconscionability and related doctrines did not occur in the 1980s as expected. Furthermore, the major push for expansion came in connection with commercial, rather than consumer, transactions. Regardless, the push was, on the whole, noteworthy mainly for its lack of success.

9 CONTRACT THEORY

Viewed from academe, the most significant non-event of the decade was the failure of contract theory to have a significant impact in practice. In 1981, at the start of the decade, the *Restatement (Second) of Contracts* appeared. It was the epitome of the traditional conception of contracts — at least as that conception appeared to the establishment as represented by the American Law Institute. Robert Braucher, my predecessor as Reporter, claimed that "[t]he effort to restate the law of contracts in modern terms highlights the resilience of private autonomy in an era of expanding government activity. Freedom of contract, refined and redefined in response to social change, has power as it

131. *Soo Line R.R. Co. v. Freuhauf Corp.*, 547 F.2d 1365, 1373 (8th Cir. 1977).

132. 635 F.2d 1081 (3d Cir. 1980), *cert. dismissed*, 457 U.S. 1112 (1982).

133. *Id.* at 1086 (footnote omitted).

134. *See, e.g., Kaplan v. RCA Corp.*, 783 F.2d 483 (4th Cir. 1986) (holding that failure of the repair and replacement warranty does not automatically invalidate a limit on consequential damages); *Kearney & Trecker Corp. v. Master Engraving Co.*, 107 N.J. 584, 596-99, 527 A.2d 429, 435-37 (1987) (explicitly adopting the approach of *Chatlos* and rejecting that of *Soo Line*).

135. *E.g., Fiorito Bros. v. Freuhauf Corp.*, 747 F.2d 1309, 1314-15 (9th Cir. 1984) (reasoning that the question of whether the limit on consequential damages is separable from the repair and replace clause depends on the intent of the parties in each case).

always had."¹³⁶ But others viewed the new *Restatement* and the traditional body of contracts scholarship that it represented with less enthusiasm.

During the 1970s scholars lamented what they believed to be the demise of contract law as its own distinct area. In 1974 Grant Gilmore proclaimed *The Death of Contract*,¹³⁷ while later, in 1979, Patrick Atiyah echoed similar sentiments in his book *The Rise and Fall of Freedom of Contract*.¹³⁸ Other commentators were not so quick to forecast the end of contract law, but merely complained of its developmental stagnation. In 1978 Ian Macneil denigrated the traditional view of contract law as "neoclassical," a body of inflexible law "epitomized by the U.C.C. Art[icle] 2 and [the tentative drafts of the] *Restatement (Second) of Contracts*" and founded on the system "developed in the 19th century and brought to its pinnacle by Samuel Williston," though "considerably modified in some of its detail."¹³⁹ Other writers, associated with the critical legal studies movement were even less charitable. Roberto Unger, one of the cardinals of critical legal studies, declared that "the modern law of contract . . . is hostile to personal authority as a source of order; it preaches equality in distrust. The mechanisms of egalitarian, self-interested bargaining and adjudication cannot be made to jibe with the illiberal blend of power and allegiance."¹⁴⁰

During this attack on the substance of contract law, many contracts scholars attempted to breathe new life into contract law by integrating principles of other disciplines. Some scholars explored the historical foundations of contract law¹⁴¹ while others

136. Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598, 615-16 (1969).

137. See *supra* text accompanying notes 110-12.

138. P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979). Atiyah attributes the decline of contract in England to the waning role of the individual in the allocation of resources and the concomitant increase in Government regulation and involvement in the economy, a shift from the notion of the "value of free choice as a source of legal rights and liabilities and the consequent increase in importance attached to non-voluntary rights and duties, and finally, the change from contract as an instrument of risk-allocation to an instrument of exchange where terms are left "open to continuous adjustment as long as the relationship lasts." *Id.* at 716-17.

139. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854, 855 n.2 (1978).

140. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 624 (1983).

141. See, e.g., P. ATIYAH, *supra* note 138 (tracing the development of contract law

drew upon philosophy¹⁴² But by far the greatest number of scholars and commentators explored the relationship of contract law to economics.¹⁴³

This outpouring of contract theory has not, however, had a warm reception in the courts. Judge Judith S. Kaye of the New York Court of Appeals recently remarked that today most law review articles "are written by full-time academics."¹⁴⁴ She speculated that "the decrease in judges and practitioners writing for law reviews may evidence a growing distance between academia and the rest of us," with academia becoming "increasingly dedicated to abstract, theoretical subjects."¹⁴⁵ Judge Kaye described as "well-founded" the "concern that academics are writing for each other."¹⁴⁶ As evidence of this statement, Professor Jeffrey Harrison, after an analysis of fifty-eight books and articles on law and economics, reported that "approximately half had not been cited by a state or federal court," and "[t]he remainder were cited a total of 77 times," though in "35 instances the citation was no more than that — a mere notation."¹⁴⁷ This is a disappointing performance for a type of theoretical analysis that had for the entire decade a pervasive influence in academia, but is consistent with the overall disinterest of the courts in scholarly efforts.

10. INTERNATIONALIZATION

An observer of the international scene reportedly commented, "If the world comes to an end, I shall go to the Netherlands. There every thing happens fifty years later."¹⁴⁸ This observation might also apply to the United Nations, or at least to the United Nations Convention on Contracts for the International Sale of

in England beginning with its political, intellectual, and social roots in 1770); M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1960*, at 160-210 (1977) (change in the interpretation of contracts has coincided with the development of a market economy).

142. See, e.g., C. FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981) (contractual promises are binding as self-imposed moral obligation).

143. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1st ed. 1972).

144. Kaye, *One Judge's View of Academic Law Review Writing*, 39 *J. LEGAL EDUC.* 313, 320 (1989).

145. *Id.* at 319, 320.

146. *Id.* at 320.

147. Harrison, *Trends and Traces: A Preliminary Evaluation of Economic Analysis in Contract Law*, 1988 *ANN. SURV. AM. L.* 73, 80.

148. This statement has been attributed, in various forms, to both Heinrich Heine and Samuel Johnson. S. SCHAMA, *THE EMBARRASSMENT OF RICHES: AN INTERPRETATION OF DUTCH CULTURE IN THE GOLDEN AGE* 265 (1988).

Goods¹⁴⁹ — a remarkable achievement of the unification of law on an international plane that came to fruition in the 1980s, fifty years after work on it first began.

A committee comprised of European scholars commenced work on the drafting of a uniform law for international sales in the 1930s, at the behest of the International Institute for the Unification of Private Law, which operated under the auspices of the League of Nations.¹⁵⁰ Shortly before the outbreak of the Second World War, the committee completed a first draft and solicited comments which it incorporated into a revised draft. A short time after the conclusion of the War, the Dutch government appointed another committee to carry on the project. The work completed by this committee culminated in two companion uniform laws dealing with the international sale of goods which were approved at a diplomatic conference convened at the Hague in 1964.¹⁵¹

The United States quickly assembled a delegation to consider this draft prepared by a group of exclusively European scholars. The delegation's influence was not sufficient, however, to produce a final text which satisfied the interests of the United States and therefore was worthy of ratification, although eight other countries did adopt the new law.¹⁵²

Even before the new law had taken effect, efforts were afoot at the United Nations to produce a revised international sales law that would be more widely acceptable. In 1966 the United Nations General Assembly established the United Nations Commission on International Trade Law ("UNCITRAL").¹⁵³ UNCITRAL has "for its object the promotion of the progressive harmonization and unification of the law of international trade."¹⁵⁴ The thirty-six members of UNCITRAL include com-

149. UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, VIENNA, 10 MARCH - 11 APRIL 1980, U.N. Doc. A/Conf. 97/19, U.N. Sales No. E.81.IV.3 (1981) (documents of the conference and summary records of the Plenary Meetings and of the meetings of the Main Committees).

150. E. FARNSWORTH, *supra* note 34, § 1.9a, at 39.

151. *Id.* The two uniform laws adopted were the Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). For the text of the ULF and the ULIS, see J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 531, 539 (1982).

152. E. FARNSWORTH, *supra* note 34, § 1.9a, at 39.

153. *Id.*

154. G.A. Res. 2205, 21 U.N. GAOR Supp. (No. 16) at 99, U.N. Doc. A/6316 (1967).

mon law countries and civil law countries, "developing [countries] as well as industrialized countries, and countries with centrally planned economies as well as those with free-market economies."¹⁵⁵

In 1969 a fourteen member Working Group on Sales was selected by UNCITRAL to consider changes in the existing law that would make it "more acceptable to countries of varied legal, social, and economic systems."¹⁵⁶ In a departure from the previous draft, the United States actively contributed throughout the drafting process. In 1980, at the start of the decade, the United Nations held another diplomatic conference, this time in Vienna, to propose a final text of what came to be called "the Vienna Convention." The sixty-two countries involved with the convention diligently worked for five weeks to perfect this final text.¹⁵⁷

The final product of this fifty year effort consists of eighty-eight substantive articles, what American lawyers would call "sections", plus thirteen more articles on effective date, reservations, and the like.¹⁵⁸ This Uniform Law on International Sales was to take effect only after its adoption by ten countries. The ensuing decade of the 1980s would tell whether the Vienna Convention would be a practical success or merely an interesting academic exercise.

In retrospect, the decade has assured the Convention's success. Ratification by the United States, Italy, and the People's Republic of China brought the number to the required ten. Since January 1, 1988, American exporters and importers have been subject to the Convention when dealing with parties in other ratifying countries, now numbering over twenty and including Argentina, France, Germany,¹⁵⁹ Hungary, Mexico, Switzerland, and Yugoslavia. When the convention applies, it replaces most of Article 2, the sales article, of the Uniform Commercial Code.

155. E. FARNSWORTH, *supra* note 34, § 1.9a, at 39.

156. *Id.*

157. *Id.* at 39-40.

158. For the text of the 1980 Uniform Law for International Sales, see J. HONNOLD, *supra* note 151, at 469. Leading commentaries on the Convention include C. BIANCA & M. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION (1987); J. HONNOLD, *supra* note 151. For the legislative history of the Convention, see DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES (J. Honnold ed. 1989).

159. Both the Federal Republic of Germany and the German Democratic Republic ratified the convention, so there is no doubt that the unified Germany abides by the Convention's articles.

Other examples, on the judicial front, as well as the legislative front, could be given of the increasing internationalization of contract law, but the success of the Vienna Convention stands as the most important event of the 1980s in this field.

CONCLUSION

The events chronicled in this essay are not isolated decisions or statutes, but rather developments on a broader front than a single case or enactment. They are events with an impact on academia as well as the practice of law. Although a "top ten" list cannot encompass all of the evolutions and convolutions of the past decade, such a list does demonstrate the vitality of contract law.

At this point the reader may well ask if it would not have been more rewarding for the author to have predicted the top ten developments in contract law of the 1990s. Lacking a crystal ball, the author can only offer to do this in the year 2000 — a propitious time, indeed, for a review not only of the decade but of the century.