

Old Wine in New Bottles

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Who is this guy?

- Professor of Business Law
University of Nebraska at Omaha
- Editor, *Journal of Legal Economics*
The journal of American Academy of Economic
and Financial Experts (www.AAEFE.org)
focuses upon
proof of monetary damages in a litigation context.
- Newbie beekeeper

You want what?

- The law seeks to satisfy the People's **reasonable expectations**.
 - The law cannot anticipate; the law only reacts.
- Changing technology changes expectations.
- Changing demographics change expectations.
- The law favors the **objective** over the **subjective**.

Wine is not ambrosia.

- What is legal is not necessarily ethical.
- What is ethical is not necessarily legal.

ETHICAL **UNETHICAL**

LEGAL

hypocritical

ILLEGAL MLK

Will that be **red** or white wine?

- **Common law contract law**
 - Agreement, consideration, capacity, form, reality of assent, and **any legal subject matter**

- **UCC Art. 2, Sale of Goods**
 - Tangible and moveable personal property
 - Predominate nature of the transaction
 - **Services are not goods.**
 - Nebraska is not California, so only UCC.

The more things change, ...

- The application of principles change far more than the principles themselves.

- Statute of Frauds
 - Now starts at \$5,000:
was \$500
under the UCC, Article 2 (but, 2A leases \$1,000).

- A "signature" is any mark with the current intent to authenticate the record.
 - *Usually*, a mouse click is "any mark".

Are you a connoisseur or dilettante?

- The UCC reacts differently based on person's status: merchant versus consumer.
- All owe a duty of **good faith** (under the UCC).

Four standards of good faith.

	subjective	and objective
Common law consumer	honesty in fact	<i>none</i>
UCC consumer	HiF	commercial reasonableness
merchant	HiF	commercial reasonableness
fiduciary (<i>utmost good faith</i>)	HiF	personalized objective

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7

The more things change, ...

- Good faith, yes, but.
 - Both a consumer and a merchant owe **honesty in fact** and **commercial reasonableness**; but, a consumer's commercial reasonableness is *not* a merchant's commercial reasonableness.
- Also, Nebraska is not California, so only UCC.

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8

The more things change, ...

- **Liability flows towards those whose actions are both knowing and voluntary.**
- Accordingly, public policy does not favor **adhesion contracts**, except when
required by the transaction
(e.g., insurance contract)
or
required by public policy
(e.g., Equal Protection of the Laws).

Wine skin flexes, but a bottle breaks.

- Contract boilerplate is dangerous: use it wisely.
 - Choice of law, forum, venue, and language
 - Alternative Dispute Resolution
 - *Force Majeure* Clause
- *Negotiation practice tip:*
only use ALL CAPS
for form language drafted by your lawyer
that your lawyer does not want you to change
without prior lawyer approval.

Drunk with power.

- Contract boilerplate is dangerous: use it wisely.
 - Exculpatory Clauses
 - Liquidated damages clauses

Today's puzzler: introduction.

Buyer phones Seller seeking an estimate of inventory, delivery time, and price for the Good Stuff.

Seller has the Good Stuff inventory Buyer is seeking with an acceptable delivery time even if it's a bit pricey.

But Seller is very eager to move some stagnant segments of Seller's inventory at a deep discount and rapid delivery, the So-So Stuff.

Buyer ends with phone call without reaching an agreement with Seller.

Just a sip.

- Have Buyer and Seller formed a common law contract?
- Have Buyer and Seller formed a UCC contract?

Today's puzzler: part 2.

Seller phones Buyer, but only gets voice mail, so Seller leaves a message.

Seller's message asks about Buyer's continuing interest. Seller repeats the sale information about the Good Stuff and the So-So Stuff.

Buyer returns Seller's phone call, but only gets voice mail, so Buyer leaves a message.

Buyer's message thanks Seller for the return call, notes differences between the Good Stuff and So-So Stuff, and ends with an obviously theatrical "Deal".

A fine nose.

- What major new issues just arose?
- Have Buyer and Seller formed a common law contract?
- Have Buyer and Seller formed a UCC contract?

Today's puzzler: part 3.

- Seller promptly ships Buyer the So-So Stuff along with Seller's signed form contract.
- The invoice price of the So-So Stuff is \$10,000. Per their conversations, Good Stuff price was \$20,000.
- When the So-So Stuff arrives, Buyer is on a two week vacation, but the loading dock personnel inspect and accept the So-So Stuff.

Slaking one's thirst.

- What major new issues just arose?
- Have Buyer and Seller formed a common law contract?
- What UCC contract have Buyer and Seller formed?

Today's puzzler: part 4.

- Because of Seller's longstanding relationship as an "Gold Star Vendor" of Buyer's, Buyer's accounting folks send the "full payment" of invoice price minus their standard quick payment discount of 15%.
- Buyer accompanies the \$8,500 check with Buyer's signed standard form contract.
- Seller promptly cashes the check; which clears.

A nice little buzz.

- What major new issues just arose?
- Have Buyer and Seller formed a common law contract?
- How have Buyer and Seller modified their UCC contract?

Today's puzzler: part 5.

- Buyer returns from two week vacation. Standing at Buyer's office door are some folks from marketing with loud complaints about "that junk".
- None too pleased, Buyer phones Seller, only gets voice mail, and hangs up. Buyer immediately sends Seller an email rejecting the very notion of a contract, and rejecting the So-So Stuff if there was a contract. Buyer prints off the email and then both faxes and surface mails signed copies to Seller.

Why is the room spinning?

- What major new issues just arose?
- Have Buyer and Seller formed a common law contract?
- How have Buyer and Seller modified their UCC contract?

Today's puzzler: part 5b.

- The head of marketing stops by Buyer's office to apologize for the rude greeting and to inquire "When can Buyer get more of that So-So Stuff?".
- The head of marketing compliments Buyer on the purchase of the So-So Stuff.
The So-So Stuff moved out the door very fast because of the new price point.
Those complaining were annoyed because their commissions were less than on the Good Stuff, even though revenue and profit were up.
- Buyer's phone rings, so marketing head departs.

Today's puzzler: part 5c.

- Seller is surprised by the tone of Buyer's email and fax.
- Seller immediately phones Buyer, Seller invokes mandatory arbitration in Seller's city, per Seller's form contract.
- Seller reminds Buyer there are no quick pay discounts on So-So Stuff, and demands immediate payment of the missing \$1,500.
- On a roll and none too pleased, Seller invites Buyer to find new uses for the "Gold Star Vendor" plaque.
- Sell slams down the phone as Buyer cries out "Wait!".

I don't feel so good.

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- Have Buyer and Seller formed a common law contract?
- How have Buyer and Seller modified their UCC contract?

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Questions ?