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Commercial Law—Uniform Commercial Code—Sale of Goods: Foster v. Colorado River Co., 381 F.2d 222 (10th Cir. 1967).

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COMMERCIAL LAW—UNIFORM COMMERCIAL CODE—SALE OF GOODS*

Article 2 of the Uniform Commercial Code, as enacted in New Mexico,[1] applies to transactions in goods.[2] Goods, as defined by the UCC, means all things which are movable at the time of identification to the contract for sale.[3] The main question to be discussed in this Comment is whether or not a transaction, in which the sale of goods is only incidental to the contract, should be governed by the provisions of the UCC.

Foster v. Colorado Radio Corp.[4] concerned a contract for the sale of a New Mexico radio station. The assets involved in the sale included the license, good will, real estate, studios, transmission equipment, office equipment and furnishings. Under the contract Mrs. Foster, the buyer, was required to make application to the Federal Communications Commission for transfer of the radio license. This she failed to do. After making demand by telegram that the application be filed and receiving no response, Colorado Radio filed suit for breach of contract.[5]

Shortly after suit was filed Colorado Radio negotiated a private resale of the radio station to a third party. At the trial the parties stipulated that, aside from incidental damages, the measure of damages would be the difference between the resale price and the contract price. The trial court found for the plaintiff and awarded damages of $15,750.

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* Foster v. Colorado Radio Corp., 381 F.2d 222 (10th Cir. 1967).

1. New Mexico's version of the Uniform Commercial Code, N.M. Stat. Ann. §§ 50A-1-101 to -9-507 (Repl. 1962) was originally based on the 1958 Official Text, promulgated jointly by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. In 1967 the New Mexico statute was amended in order to adopt most of the changes found in the 1962 Official text.

All references to New Mexico's version of the Code, often designated U.C.C. both in footnotes and text, will omit the full statutory citation. Citation to "Comments" are those accompanying the 1962 Official Text.

2. U.C.C. § 2-102.

3. U.C.C. § 2-105(1):

> "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be served from the realty (Section 2-107).

4. 381 F.2d 222 (10th Cir. 1967).

5. The trial court found this demand to be sufficient to satisfy the requirements of N.M. Stat. Ann. § 50-7-3 (Repl. 1962). This provision requires that demand for performance be made before a contract can be converted into a money demand.

The buyer appealed the court's award on the theory that the entire sale of the business was a "sale of goods," and because Colorado Radio failed to give notice of the intended resale, it was barred from recovery by certain provisions of the UCC. These provisions permit a seller of goods to resell the goods and compute damages as the difference between the contract price and the resale price, but require reasonable notice to the buyer where a private sale is intended.[6] Consideration of this issue was not foreclosed by the parties' stipulation, since it was intended to mean that if Colorado Radio properly resold, its damages would be computed on the basis of the resale price. Plaintiff at trial argued that the subject matter of the contract was not "goods" and therefore the sale should not be controlled by the UCC. The trial court upheld this contention.

On appeal to the Tenth Circuit Court of Appeals, *held,* Affirmed as Modified.[7] The license, good will, real estate, studios and transmission equipment are not movables and thus are not "goods" within the meaning of sections 2-105(1) and 2-107(2).[8] However, the remaining assets sold under the contract, i.e. the office equipment and furnishings,[9] are movables and thus governed by Article 2 of the Code. As to these assets the remedy provided by the UCC was foreclosed to the plaintiff since he failed to give notice of the resale.[10] The purpose of this Comment is to alert the attorney to the signifi-

6. U.C.C. § 2-706(1):

> Under the conditions stated in section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this article (section 2-710), but less expenses saved in consequence of the buyer's breach.

U.C.C. § 2-706(3): "Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell."

7. 381 F.2d 222 (10th Cir. 1967).

8. U.C.C. § 2-105(1) *supra* note 3. U.C.C. § 2-107(2):

> A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) is a contract for the sale of goods within this article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

9. Movable goods comprised 5-10% of the total assets sold under the contract. 381 F.2d at 226.

10. *Supra* note 6.

cance of the decision and to point out some of its possible effects.[11]

There is a dearth of case law concerning the application of the Code to cases of this sort. *Foster,* by applying the notice requirement to part of a resale of an ongoing business has taken a broad approach to the applicability of the UCC. Here the parties to the contract were not dealing in goods but rather were buying and selling a radio station. Cases somewhat analogous to the *Foster* decision have held that a transaction is not governed by the Code where the transfer of goods is only incidental to the transaction. *Epstein v. Giannattasio*[12] involved the application of a beauty product to the plaintiff's hair, following which the plaintiff suffered acute dermatitis and disfigurement. In a breach of implied warranty action under the UCC, the court held that the subject matter of the contract was not a sale of goods but rather a rendering of services. "The materials used in the performance of those services were patently incidental to that subject, which was a treatment and not the purchase of an article."[13]

There is also a line of cases involving claims for injuries resulting from blood transfusions administered to patients by hospital employees.[14] Plaintiffs in these cases have generally proceeded on the theory that the supplying of blood constitutes a sale of goods and that, as a consequence, there is attached an implied warranty of fitness. The court stated in *Perlmutter v. Beth David Hosp.*:[15]

11. The implication arises that other provisions of the Code will also apply to transactions of this type.

12. 255 Conn. Supp. 109, 197 A.2d 342 (C.P. Fairfield County 1963). The reasoning in *Epstein* was argued by the appellee in *Foster;* however, the court distinguished it on its facts, saying that it was not applicable because it concerned the sale of a service rather than the sale of a group of assets.

13. 197 A.2d at 345.

14. Branca v. Amano, 2 U.C.C. Rep. Serv. 893 (Callaghan & Co.) (N.Y. Sup. Ct. 1965); Permutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E. 2d 792 (1954); Dibblee v. Dr. W. H. Groves Latter-Day Saints Hosp., 12 Utah 2d 241, 364 P.2d 1085 (1961). *See also* cases involving construction contracts which hold that transactions which include materials to be incorporated into the structure are not "sales of goods." Aced v. Hobbs-Sesack Plumbing Co., 55 Cal. App. 2d 573, 360 P.2d 897, 12 Cal. Rptr. 257 (1961); Schroeder v. Cedar Rapids Lodge No. 304, 242 Iowa 1297, 49 N.W.2d 880 (1951); Crystal Recreation, Inc. v. Seattle Assn. of Credit Men, 34 Wash. 553, 209 P.2d 358 (1949); Victor v. Barzaleski, 19 D. & C.2d 698, 49 Luz. L. Reg. R. 155 (Luzerne County Ct., Pa., 1959). *But see* Marks v. Lehigh Brickface, Inc., 19 D. & C.2d 666, 73 Dauph. Co. Rep. 244 (Dauphin County Ct., Pa., 1957). In an action for recovery of purchase price and damages, the court in Marks held that a contract for the installation of brick facing on a home was governed by the provisions of the Code. For a discussion of this case see Annot., Willier and Hart, U.C.C. Reporter Digest § 2-608, A2 (1967).

15. 123 N.E.2d at 795.

> The conclusion is evident that the furnishing of blood was only an incidental and very secondary adjunct to the services performed by the hospital and, therefore, was not within the provisions of the Sales Act. . . . [I]t is the transaction, regarded in its entirety, which must determine its nature and character.

These decisions have generally held that the transaction is not a sale of goods but rather the sale of services.[16]

The facts in these decisions differ from the facts in *Foster* in that there the transfer of movable goods was incidental to a sale of services, whereas in *Foster* the sale of movable goods was incidental to the sale of assets of a radio station.[17] However, in both types of transaction the primary purpose of the contract was not the sale of movable goods.

The court in *Foster* points out: "It is quite conceivable . . . that a business could be sold in which all the assets aside from good will would be goods."[18] In a transaction in which all of the assets are goods, the sale of those assets would not be incidental to the contract but would probably be the foremost reason for the contract.

There are important ramifications of the Tenth Circuit's decision that a transaction of this nature is within the Code. Conceivably the Code will be held to govern the entire transaction in contracts of this type rather than merely the incidental goods. Other provisions of the Code also would seem to apply to a transaction involving only the incidental sale of goods.[19] The result of applying the Code to this type of contract may well create situations never intended by the parties to the transaction.

For example, under traditional contract law offers are usually revocable.[20] "When one party makes an offer to contract with another he creates a power of acceptance in that other; but also . . . he retains a power of revocation and withdrawal."[21] An offer, at common

16. However, see editor's notes, 2 U.C.C. Rep. Serv. 893, 894 (Callaghan 1966). They caution that these cases arose before the UCC was effective and state: "Whether the Uniform Commercial Code has changed the law . . . has not yet been passed upon."

17. *But see* Jackson v. Muhlenberg Hosp., 96 N.J. Super. 314, 232 A.2d 879 (1967). See Note 12 *supra* for the court's opinion on this issue.

18. 381 F.2d at 226.

19. For a discussion of these problems see Braucher, *Sales of Goods in the Uniform Commercial Code,* 26 La. L. Rev. 192 (1966).

20. Patton v. Paradise Hills Shopping Center, Inc., 4 Ariz. App. 11, 417 P.2d 382 (1966); Minner v. Sadler, 59 Cal. App. 2d 590, 139 P.2d 356 (Ct. App. 1943); Tatsch v. Hamilton-Erickson Mfg. Co., 76 N.M. 729 418 P.2d 187 (1966). For a discussion of *Tatsch* see 7 Natural Resources J. 407.

21. 1 A. Corbin, Contracts § 38, at 157 (1963).

law, is made irrevocable by a promise not to revoke only if the promise is binding by reason of a seal, consideration, or subsequent action in reliance on it.[22] Section 2-205 of the Code changes this rule[23] by making irrevocable a written offer to buy or sell goods, where assurance is given that the offer will be held open. If, in a *Foster*-type transaction the issue were whether a firm offer had been made, and the Code was held to apply to that part of the transaction concerning goods, an unusual result might occur. As to the goods it might be held that there was indeed an irrevocable offer but as to the rest of the contract the offer was revocable; thus the parties might find themselves with a contract only for the sale of goods whereas the real object of the offer or contract was the sale of a radio station. Neither party would have contemplated such a contract; their intentions would thereby have been completely negated.

The application of section 2-207 to a contract involving the incidental sale of goods might also create a result not thought of by the parties. That section provides that an acceptance is good even though it states additional or different terms from those offered.[24] Under traditional contract principles, a reply to an offer which purports to accept it, but which either adds qualifications or requires performance of conditions, is not an acceptance but a counteroffer.[25] If both traditional contract principles and the Code are applied to a contract which includes both movable and non-movable goods a reply to an offer may be deemed an acceptance as to the movables but a counteroffer as to the non-movables. If, as in *Foster*, the goods comprise only an incidental part of the transaction, the contract would be different from that which the parties expected. Again, it would in fact be a contract for the sale of goods rather than the sale

22. *Id.* § 43.

23. For a discussion of the practical effects of Article 2 on contracts for the sale of goods see Rapson, *An Introduction to Articles 2 (Sales) and 6 (Bulk Transfers) of the Uniform Commercial Code: Guidelines and Warnings for the Practitioner,* 35 N.Y. St. B.J. 417 (1963).

24. U.C.C. § 2-207(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.

25. Restatement of Contracts § 60 (1932); *but see* Restatement (Second) of Contracts § 60 (Tent. Draft No. 1, 1964). The tentative revision of § 60 changes the meaning so that a definite expression of acceptance will be operative even though terms or conditions are added if acceptance is not made to depend on the assent to the added terms or conditions. This may indicate the influence of U.C.C. § 2-207 on the general law of contracts.

of the entire group of assets which had been bargained for originally.[26]

The statutes of limitations provide another area in which the application of the rule in *Foster* might create an untoward result. Under the Code an action for breach of a sales contract must be commenced within four years unless the parties agree to reduce this period.[27] The statute of limitations in New Mexico provides for a six year limitation on actions brought on a written contract.[28] Thus, in an action brought on a contract that involves both goods and non-goods, two separate statutes of limtations may apply to the same transaction. This, in a sense, would create the same result that occurred in *Foster*. An action brought after the four year Code limitation but within the six year limitation provided by the New Mexico statutes would treat the transaction as two contracts: one for the sale of movable goods, and one for the sale of the other assets. Damages could be recovered on the contract only as to the non-goods.

The requirement of notice, as applied in *Foster,* is in itself a meritorious rule. Required notice before resale, though not an absolute rule, is desirable because of its bearing on the good faith of the parties in their manner of resale.[29] However, if the Code in its entirety is held to apply to some parts of those contracts in which the sale of goods is only incidental, much confusion may result. Parties to these contracts must be aware of two, sometimes differing, standards of law: traditional contract principles and the Uniform Commercial Code.

The *Foster* case points out the need for the practitioner to be familiar with the provisions of the Code, and to consider them when dealing with any transaction that in any way concerns the sale of movable goods. For example, even the sale of a furnished house might be held to be partly controlled by Article 2.

Some of the difficulties which might arise as a result of this application can be remedied by utilizing some of the devices provided in the Code itself. Section 1-102(3) of the UCC indicates that freedom of contract is an underlying principle of the Code. The effect of the Code's provisions may be varied by agreement of the parties ex-

26. By its terms, parties can control the operation of § 2-207. The offer can be made to expressly limit acceptance to the terms of the offer or acceptance can be expressly conditional on assent to the additional or different terms.

27. U.C.C. § 2-725.

28. N.M. Stat. Ann. § 23-1-3 (1953).

29. 5 S. Williston, Contracts § 1379C (rev. ed. 1937).

cept where this right is denied in particular sections or where it is an attempt to disclaim obligations of good faith, diligence, reasonableness and care.[30] Thus it is possible to control the application of the Code to some degree. For example, section 2-206(1)(a) states that "an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances." However, this does not apply if it is "otherwise unambiguously indicated by the language or circumstances."[31] If it is determined that the Code might apply and the offeror desires a particular mode of acceptance he can insure compliance with his wishes by carefully indicating the particular mode of acceptance in the offer.

Few of the problems discussed in this Comment have actually been litigated. When and if they are, the courts should look to the entire contract and ascertain the reasonable expections of the parties in determining whether or not the Uniform Commercial Code should apply. The court in *Foster* failed to do this. Comments to Article 2 indicate that the reason for many of the provisions where the Code changed prior law was to implement the expectations to the parties in the light of "commercial understanding."[32] By applying the Code to transactions where the sale of goods constitutes but an insignificant part of the contract, the purposes for which the parties entered the contract may be thwarted and a contract enforced that was never anticipated. In applying the rule established by *Foster,* courts should be mindful of the ramifications which may follow in order not to undermine the underlying purpose of all contract law, that is, the realization of the reasonable expectations that have been induced by the making of a promise.[33]

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30. U.C.C. § 1-102(3). U.C.C. § 1-102, Comment 2 provides that while the effect of the Code's provisions may be changed by agreement, "the meaning of the statute itself must be found in its text, including its definitions, and in appropriate extrinsic aids; it cannot be varied by agreement."
U.C.C. § 1-102(4):

> The presence in certain provisions of this act of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).

31. U.C.C. § 2-206(1). U.C.C. § 2-206, Comment 1 explains: "Any reasonable manner of acceptance is intended to be regarded as available unless the offeror has made it quite clear that it will not be acceptable."

32. U.C.C. § 2-206, Comment 2: "In accordance with ordinary commercial understanding the section interprets an order looking to current shipment as allowing acceptance either by actual shipment or by a prompt promise to ship. . . ."
U.C.C. § 2-207, Comment 2: "Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract."

33. 1A. Corbin, Contracts § 1 (1963).