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**The True Meaning of Relational Contracts: We Don't Care about the Mailbox Rule, Mirror Images, or Consideration Anymore - Are We Safe?**

THE TRUE MEANING OF RELATIONAL CONTRACTS:  
WE DON'T CARE  
ABOUT THE MAILBOX RULE,  
MIRROR IMAGES, OR CONSIDERATION ANYMORE—  
ARE WE SAFE?

MARIANNE M. JENNINGS\*

I. INTRODUCTION

While standing before an audience of purchasing managers involved in international sales transactions, the author was humiliated.<sup>1</sup> After the announcement of the seminar's coverage (offer, acceptance, consideration, and damages), one purchasing manager raised his hand and said, "Heck, I haven't used a contract since 1989."<sup>2</sup> The remaining thirty-nine managers confirmed this statement.<sup>3</sup> Adapting quickly, the author soon realized that basic contract law is basically irrelevant.<sup>4</sup> If this were a scholarly piece, the premise would be phrased as follows: Courts (and laws) have failed to comprehend the problems contracting parties face, ergo parties have resorted to developing relationships with each other in lieu of reliance on the law.<sup>5</sup>

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1. Please understand that being humiliated while speaking in front of groups is not, in and of itself, unusual for the author. During the summer of the alleged needles-in-the-Pepsi-can scandal she spoke to the Arizona State Bar Convention, a group consisting mainly of plaintiffs' lawyers, and suggested that complimentary syringes along with a Pepsi machine in their waiting rooms might not be a bad way to drum up business.

2. Please note that "Heck" is the way all purchasing managers begin their sentences:

"Heck, I've never had a full warranty."

"Heck, I can buy an Elvis PEZ holder in Beijing for 79 cents."

"Heck, my boss made me come to this seminar."

Speaking generically, but admittedly without *Bluebook* support, managers are a tough crowd.

3. They said, "Heck, me neither."

4. Cries of joy from first year law students may cause the journal to vibrate as you read. (Or Corbin has taken the form of a poltergeist and has returned to see that these purchasing people, Marianne Jennings, and those reading this piece suffer Stephen-King-like fright for such blaspheme.)

5. The law doesn't help them, so they're making stuff up. Instead of hiring a lawyer to handle the mailbox rule (*see infra* note 7) they're hiring, say, Dr. Ruth, to work through their relationships with them. *See infra* notes 109-10.

## II. BUYER AND SELLER CONTRACT RELATIONS

### A. *We Don't Match—Do We Have a Contract?*

The author was taught that buyers and sellers are natural enemies in a contractual relationship.<sup>6</sup> Without this basic premise, there really isn't any need for the mailbox rule.<sup>7</sup> Buyers believe sellers exist to take advantage of buyers<sup>8</sup> and sellers believe buyers exist to avoid payment.<sup>9</sup> These mutual bad faith assumptions allow contract law to exist.<sup>10</sup> When the legal profession discovered that these nervy buyers and sellers, also known as merchants,<sup>11</sup> were

6. Without this basic premise, we would never have use for the term *caveat emptor*. Why go to law school if you can't come out spouting things such as *respondeat superior*, *quid pro quo*, *sina qua non*, *sui generis*, and *Louie, Louie, Louie, Lou-I*. Note: the author inserted that last italicized, non-Latin term to be certain that the reader had not lost interest after the introduction. Bonus points are available for those who: (1) know what *sui generis* means and how to say it; and (2) can name the group that made "Louie, Louie" famous.

7. For those of you who have forgotten, the mailbox rule goes like this: if you sent your acceptance and used the right method of communication, you have a contract even if the other guy never receives your acceptance. In practice, here's how it looks:

September 1, 1995 - A mails an offer to B  
 September 2, 1995 - B receives the offer  
 September 3, 1995 - A mails a revocation  
 September 4, 1995 - B mails an acceptance  
 September 5, 1995 - B receives the revocation  
 September 6, 1995 - A receives the acceptance

Under the mailbox rule, A and B had a contract on September 4, 1995. Practically speaking, B received the revocation on September 5 and, not knowing or caring to understand the mailbox rule said, "What a jerk!" and contracted with someone else. In law school, many of us said, "This is too hard. Let's try consideration instead."

8. See *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709 (7th Cir. 1987). The Schulze & Burch Biscuit Co. ("Schulze") made toastettes. *Id.* at 710. For those of you breakfast illiterates, these are a lower grade (if this is possible) of the popular Kellogg's Pop-Tart toaster pastry: a little flour, a little grease, a lot of sugar, and a teensy tiny bit of fruit junk. Schulze contracted to purchase apple powder from Tree Top, Inc. ("Tree Top"). Tree Top, for those of you juice illiterates, mashes up apples to make apple juice. Schulze needed what's left after the juice is gone (dried by-products of scrunched up apples) to make *strawberry* and *blueberry* Toastettes (go figure). So, Tree Top agreed to sell its dehydrated apple powder (as opposed to its wet powder) to Schulze. All was well until Schulze ran the powder through its pastry equipment. *Id.* Seems the powder had stems, leaves, and wood splinters. *Id.* at 711. These kinds of things add good fiber to the diet, but: (1) folks buying the toastettes are not interested in dietary fiber—only the demented Nutri-Grain bar customers look for fiber in their breakfast pastries; and (2) stems, leaves, and wood splinters clog up pastry machines. Tree Top said, "Hey, not our fault!" Meanwhile, Schulze had to shut down to fix its machines all the while muttering, "Sellers exist only to take advantage of us buyers."

9. See *Smith-Scharff Paper Co. v. P.N. Hirsch & Co. Stores, Inc.*, 754 S.W.2d 928 (Mo. Ct. App. 1988). Smith-Scharff sold paper bags to P.N. Hirsch from 1947-1983 with the P.N. Hirsch logo on them. *Id.* at 929. In 1983, Dollar General bought the P.N. Hirsch Co. and didn't want \$65,000 worth of bags printed with the P.N. Hirsch logo. *Id.* at 930. So the customer's bag did not match the store name—picky, picky, picky. Dollar General left Smith-Scharff holding the bag. Actually, Smith-Scharff was left holding \$65,000 worth of bags and was overheard mumbling, "Buyers exist only to avoid having to pay."

10. And, accordingly, contract lawyers.

11. Can you believe that in the 20th century we still use the term merchant in a statute? Somehow I don't think of Target, with its clerks brandishing toe tattoos and plastic parrot stand earrings, as a "merchant." Now Shylock, the Merchant of Venice, there was a merchant. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*. And, I might add, he was a man with a good grasp on how to avoid that whole buyers-exist-to-avoid-paying-philosophy. However, the author is uncertain

actually conducting business without clear agreements,<sup>12</sup> we invented section 2-207 of the Uniform Commercial Code.<sup>13</sup>

### B. *Battling Forms—Dueling Merchants*

Section 2-207<sup>14</sup> was created when we realized merchants were actually doing business successfully<sup>15</sup> without following the mirror image rule.<sup>16</sup>

that Shylock's pound of flesh remedies would be sanctioned under seller's incidental damages in the Uniform Commercial Code. U.C.C. § 2-710 (1991) (Hereinafter all U.C.C. cites are to the 1991 version. I don't want to write (1991) after every U.C.C. section. I've always wanted to press a button in the weapons control room at the Pentagon *and* disobey the *Bluebook*. One wish has come true.) Further, the *full* pound of flesh might not be recoverable given the unconscionability constraints under U.C.C. § 2-302, but there are proposed revisions being examined for Article 2 that may allow recovery of the *full* pound. Shylock's notion may have its supporters, particularly among the New York representatives to the drafting committee. While the author is making up the New York thing (albeit with good cause), she is not spinning yarns about the U.C.C. revision. *See, e.g.,* Zan Hale, *UCC Article 2 Drafting Committee Faces Critics*, CORP. LEGAL TIMES, Oct. 1994, at 24. In fact, the revision gang has been working so hard on Article 2 that they even have proceedings: Richard S. Adams, *Proceedings in the Committee of the Whole, UCC Revised Article 2, Sales*, 1 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 1 (1995).

12. "Heck, so long as those Elvis PEZ deals arrive from Beijing, who cares?"

13. U.C.C. § 2-207 was drafted for "merchants" because these gutsy folks were not following the mirror image rule. The mirror image rule was one of the truly bizarre common law inventions, along with such other tortuous devices as the rack, the stockades, and the English Monarchy. The rule provided that offerees could not change one darn thing in their acceptance or they didn't really have acceptances, but counteroffers. RESTATEMENT (SECOND) OF CONTRACTS § 60 (1981). This mirror image deal worked in common law England because when you got an offer you had to decide: is the darn thing I want added important enough to (a) find someone who can write? and (b) important enough to wait three weeks for them to rewrite it? Three weeks in common law England could mean your head serf has taken over your castle and you. So, everyone pretty much said, "Deal," once they got a written contract. For *Bluebookites*, the mirror image rule provided that an acceptance "must be 'positive, unconditional, unequivocal and unambiguous, and must not change, add to, or qualify the terms of the offer.'" *Wagner v. Rainier Mfg. Co.*, 371 P.2d 74, 77 (Or. 1962) (quoting *Shaw Wholesale Co. v. Hackbarth*, 201 P. 1066, 1067 (Or. 1921)). Note: the serf part is an author embellishment, but, then again, hasn't everything been so far?

14. Here is the precise language of the little devil:

§ 2-207. Additional Terms in Acceptance of Confirmation.

(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.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a unreasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

U.C.C. § 2-207 (1991). O.K. Maybe I will follow *some Bluebook* rules.

Note: the author had to put this statutory language in for annual review purposes. How well do you think citing "Louie, Louie" as authority is going to go over with a dean as a means of establishing ongoing scholarly work?

15. *See* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963), in which a sociologist discovered that business people didn't need contracts or lawyers. He also spoke to a state bar convention, was humiliated and mutilated, and is

Worse yet, these so-called merchants were doing business with forms<sup>17</sup> containing unmatching terms without experiencing the accompanying nausea and fever lawyers warned would result.<sup>18</sup> So, the UCC crowd<sup>19</sup> developed some nifty rules for the merchants' battle of the forms.<sup>20</sup> What happened occasionally was that the buyers and sellers got into disputes<sup>21</sup> because their forms did not agree.<sup>22</sup> As a result, their forms battled, or the merchants battled with their forms.<sup>23</sup>

Now the battle of the forms and/or merchants is bad enough.<sup>24</sup> But, as it turns out, the courts have waged their own battles over how to resolve the battle of the forms.<sup>25</sup> In fact, the courts have developed categories of form

the dead hero in a yet-to-be-released John Grisham novel entitled *The Sociologist*. Another guy, Russell J. Weintraub, also did a similar study in 1992 on contracts that found the same thing about lawyers' demise, but the name Macaulay makes for a better movie script. Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WISC. L. REV. 1.

16. Section 2-207 was not the original statutory proposal when the American Law Institute and the National Conference of Commissioners on Uniform State Laws uncovered Macaulay and these nifty merchants. The original sanction under § 2-207 for not following the mirror image rule was the death penalty, but many lawyers felt that the proposal was unconstitutional. *See e.g.*, Earl Warren. *But see* Antonin Scalia.

17. Buyers and sellers love forms—invoices, purchase orders (“POs” or “heck, POs” in purchasing agent lingo), and receipts. Indeed, a guy in a *Harvard Law Review* piece says forms are used in 99% of all contracts. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971). Why be in business if you can't have carbonless forms?

18. The so-called “Pepto-Bismol” clause is a little-cited, and often not printed, comment to § 2-207. It provides:

Often the seller's form contains terms different from or additional to those set forth in the buyer's form. Nevertheless, the parties proceed with the transaction. Shame on them. Further, the parties may experience nausea, fever, and the wrath of God for proceeding without matching forms, meeting minds, or seeing a lawyer.

U.C.C. § 2-207 cmt. 1 (1991).

Okay, so I embellished Comment 1 to § 2-207 a bit.

19. The U.C.C. crowd is the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

20. Merchants' Battle of the Forms will be Super Nintendo's next game release. The game is said to rival the action level and fatal wounding tally of Mortal Kombat. Merchants who attempt to add conditional terms have pounds of flesh sucked out of them by purchasing agents (the author is, of course, describing what happens in the Super Nintendo game, not under § 2-207, at least not under the current version). *See supra* note 16.

21. Well, perhaps more than occasionally buyers and sellers get into disputes. Contract suits are 40.8% of all business litigation. *Business Cases Clog Courts*, NAT'L L.J., Aug. 7, 1995, at A1.

22. There's a lovely piece that confirms the author's suspicions that merchants' forms were written to create the § 2-207 battle of the forms, thus drumming up loads of legal business. *See* John E. Murray, *The Chaos of the “Battle of the Forms”: Solutions*, 39 VAND. L. REV. 1307 (1986). Now the Japanese took one look at § 2-207 and concluded, “Ignoring this will be our chance to gain complete competitive advantage over the U.S. It looks like they'll be busy battling forms.” So, the Japanese do business without contracts. If you can believe this, they don't even agree on a price term; they're flexible: “For example, if a supplier is faced with an unexpected rise in costs beyond its control, it can often persuade its customers to accept an increase in price with the understanding that the supplier will return a similar favor later.” Thomas Lifson, *Managing Without Lawyers*, WALL ST. J., Sept. 24, 1979, at 30. Ignoring § 2-207 may be why the Japanese have the Lexus and we have the Hornet and Pacer.

23. A pretty picture does not come to mind. Just imagine purchasing managers bludgeoned to death with invoices while pleading for mercy, “Heck, I didn't write the form.”

24. Further, it is the author's understanding that no v-chip has been developed to eliminate these skirmishes from the workplace.

25. Even White and Summers, the Siskel & Ebert duo of the Uniform Commercial Code,

battles and their results differ according to categories.<sup>26</sup> Here are the possibilities:<sup>27</sup>

- (1) The parties send forms to each other and the printed forms don't match;<sup>28</sup>
- (2) The first form has a term in it, and the second form doesn't have such a term;<sup>29</sup>
- (3) The second form has a term in it, and the first form doesn't have such a term;<sup>30</sup>
- (4) The second form has a term in it, and the first form has a conflicting term;<sup>31</sup>
- (5) The first form provides, "There ain't no contract unless we do it my way";<sup>32</sup>
- (6) The parties reached an oral agreement and then thought some forms would be a good idea;<sup>33</sup>
- (7) The forms and their terms are completely different;<sup>34</sup>

have a split in their thumbs up signals on how to resolve battling forms and merchants. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 34-36 (3d ed. 1988).

26. At this juncture of the article, you should be saying to yourself, "The Japanese have a point. Let's not have contracts anymore." *Supra* note 22.

27. These are only the possibilities to date. Section 2-207 possibilities are like 7-11s—they spring up everywhere, seemingly without construction time, and occupy street corners you never knew existed.

28. An example would be a naive purchasing manager's form reading, "We get full and complete warranty protection on every used rental car we purchase from you for one year." And the seller/car rental firm's invoice reads, "These rental cars have been driven into the ground by travelers who left chewed gum in the glove compartment and used beach sand to fill the radiator. Needless to say, you're lucky the car still has a chassis. Does the term 'AS IS' ring a bell?"

29. The author has often thought that a good term for a purchasing manager to stick in would be, "Seller agrees to provide day care for purchasing manager's children on those days when her children have chicken pox, raging influenza, or head lice so that she can continue to come to work and purchase away with great zeal." What seller in America, other than maybe the Ben & Jerry Ice Cream guys, is going to allow a provision for day care of sick children in its invoice form? Ben & Jerry's Homemade Inc. holds its annual meeting among the cows on the hills of Vermont. The agenda goes something like this, "Oh wow, man. Let's hear from the auditors." Ben & Jerry (who, by the way look like Siskel & Ebert) hired their current CEO after judging entries submitted in a contest "Why I would be a Great CEO for Ben & Jerry's." See Ellen Neuborne, *Salary Cap Thaw*, USA TODAY, June 14, 1994, at 2B; see also William M. Bulkeley & Joann S. Lublin, *Ben & Jerry's New CEO Will Face Shrinking Sales and Growing Fears of Fat*, WALL ST. J., Jan. 10, 1995, at B1.

30. For example, say a beauty supply store (merchant of hair stuff) placed an order (via purchase order) with José Eber for 100 sets of his infamous hair extenders. José (or more likely one of his flunkies) ships the order with an invoice that includes the following term:

These hair extension pieces are really a joke. Sure, we've sold a few to the poor souls watching infomercials at 2:30 A.M., but let's face it, who couldn't tell that you've clumped a swatch of pony tail onto a frosted shag? So, don't come whining to us when people start giggling hysterically while looking at your head. You've been warned.

31. This situation is actually the same as situation one. The author was just checking to see if you were really paying attention. Go back to note 28 for the example. In *Bluebookese*, *supra* note 28.

32. This would be the classic, "Acceptance is limited to these terms," which many purchasing managers slip in. However, they don't read their invoices and act as if a contract exists. Then, when there's trouble, they whine about their preemptive strike.

33. To wit, "I guess we're not true merchants with a true contract unless we battle over forms."

34. Two clueless merchants who don't have a contract. See the following example:

- (8) The parties throw caution to the wind, don't use forms and instead have messages, letters, e-mails, and cocktail napkins with terms on them;<sup>35</sup>
- (9) The second form provides that there is no acceptance until the first form person<sup>36</sup> agrees to the new terms.<sup>37</sup>

There you have it. Nine different ways to do battle with your forms.<sup>38</sup> In addition, courts have developed about nine different ways to resolve each of the nine different battles. Some courts follow the Montessori playground philosophy of who hit first; that is, if there is a term in the offer (purchase order) and not in the acceptance, the term comes in as part of the contract.<sup>39</sup> In states where courts follow this "me first" Montessori philosophy, all merchants possess a strong desire to be an offeror.<sup>40</sup> Other courts follow a "huh-uh, no

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PARTY 1:	DISNEY
PARTY 2:	ABC*
SUBJECT MATTER:	TV NETWORK
<u>Terms of Disney's Purchase Order</u>	<u>Terms of ABC's Invoice</u>
All on-air talent must be committed to corporate goals	No news anchors in the Disney World electric light parade
We don't have to deal with Roseanne and her husband(s)	No way; but they can be used in the electric light parade
Ted Koppel's hairpiece included	All hairpieces (including Josè Eber extensions) extra
Seinfeld renewed	Wrong network, buddy

\* Technically speaking, Disney was not buying goods as they are defined under U.C.C. § 2-101, but really, what could be funnier than Goofy and Sam Donaldson side-by-side?

35. And this is the way, heck, purchasing and sales people do business, except many of them have only the napkins. See *infra* notes 72-73 and 82-88.

36. Formee. Offeror. The first guy. The one who sent the first form or fired the first napkin. You should take a look at Thomas J. McCarthy, *An Introduction: The Commercial Irrelevancy of the "Battle of the Forms"*, 49 BUS. LAW. 1019 (1994) for more examples of throwing caution to the wind under § 2-207.

37. Also known as the § 2-207 Microsoft Principle: Hey, either Gates' way or you're not getting Windows '95. Do it my way or find something other than a computer to work with. See, e.g., Justice Department.

38. Actually, eight. Remember, situations one and four were the same for purposes of an attention span test. The author theorizes that there are many statutes similar to this list in that the same category is listed twice, but we are just confused or too embarrassed to ask, "Say, aren't these the same?" For example, § 2-501(a) of the U.C.C. provides that identification of goods occurs when the goods are identified. There you have it.

39. Advantage offeror. However, one could make the argument that it is probably a good idea to read the offers one receives. Well now, if we adopt that philosophy we aren't going to need a § 2-207, the purchasing managers won't need lawyers, we'll start working out details and avoiding lawsuits—it'll be anarchy. Courts following this notion of the offeror did it first are numerous. See, e.g., *Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F. Supp. 1 (S.D.N.Y. 1973) (holding that the seller breached express warranties made in its offer); *Earl M. Jorgensen Co. v. Mark Constr., Inc.*, 540 P.2d 978 (Haw. 1975) (rejecting the mirror image rule and finding that the buyer accepted the seller's offer, including a limitation of warranty term).

40. White and Summers part thumbs here. One says (I forget who said what, but I never knew who was MacNeil and who was Lehrer either, or who was Cagney and who was Lacey, (but Laverne was the one with the "L," actually "L" on all her clothes)) it's silly to give the advantage to the first guy. The other says the recipient (formee? offeree?) should at least look over the terms



sir" philosophy and provide that conflicting terms or terms found in one form but not in the other, cancel each other out.<sup>41</sup> Still other courts follow the "come back when you can agree" philosophy.<sup>42</sup> These courts get into the issue of conditional acceptance<sup>43</sup> and from there dive head-on into the intricacies of section 2-207 and the realization that section 2-207 applies to *additional* terms, not *different* terms.<sup>44</sup> Which brings us to another crowd of courts<sup>45</sup> that say, "Look, if these folks can't agree and their dang forms conflict, toss everything out and rewrite the dang contract for them."<sup>46</sup> The thought of judicial drafting of commercial contracts is perhaps what drove purchasing managers to the uncharted waters of doing business sans contracts or even cocktail napkins.<sup>47</sup> But the purchasing managers, along with forty-seven footnotes to date, make the following point: the complexities of contract law don't help businesses do business.<sup>48</sup> In fact, reliance on the law appears to be disappear-

of an offer before responding. Ah, the grueling demands of contracting. WHITE & SUMMERS, *supra* note 25, at 34-35.

41. Please excuse the preposition, but there is support for this proposition and preposition. In *Lea Tai Textile Co. v. Manning Fabrics, Inc.*, 411 F. Supp. 1404, 1407 (S.D.N.Y. 1975), the buyer and seller had conflicting arbitration terms, so the court said there was no arbitration clause. These cases remind me of yet another game played on the Montessori playground:

"I want arbitration."

"Huh-uh . . . I want arbitration *my* way."

"No, sir. Then you can't have *any* arbitration."

42. The most famous of the "come back when you can agree" cases is *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962). The case involved the small problem of the parties' failure to agree on a delivery date. *Id.* at 498. The court said, "You guys don't have a contract here. Go get the basic offer and acceptance and then we'll do the § 2-207 bit." (Note: the author is paraphrasing).

43. Which, as we all know, is a misnomer because a conditional acceptance is really a counteroffer and rejection! RESTATEMENT (SECOND) CONTRACTS § 59 (1981). For example, in *Dataserv Equip., Inc. v. Technology Fin. Leasing Corp.*, 364 N.W.2d 838, 840-41 (Minn. Ct. App. 1985), one party wrote in a cover letter accompanying a form contract that "three changes need to be made." Well, things didn't work out, the parties ended up in court, and the court said the "so-called 'acceptance' . . . was without any legal effect whatsoever, except to create a new offer . . ." *Id.* at 841. Are you like me? Are you thinking, how do we ever get any business done? PLEASE *see supra* note 22.

44. Are you like me? Are you thinking if the provision on day care isn't in the first form but is in the second form, isn't that different? But isn't it also additional? And couldn't there be additional different terms? By definition if the terms are the same, how can they be additional? And if a purchase order falls from a desk and no one is in the office, does it make a noise? And if we are able to show through DNA testing that the purchase order, in fact, was delivered in a White Bronco by Rosa Lopez to Kato Kaelin, . . . Sorry, § 2-207 hallucinations caused by too much exposure to comments, White & Summers, and the Simpson trial.

45. One court among this crowd decided the case of *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569 (10th Cir. 1984). There the court just said, "We'll take it from here, boys." (Note: author is paraphrasing) (again).

46. It is a frightening thought to realize that the same people who found nine ways (okay, eight) to break down § 2-207 have been rewriting parties' contracts. However, the judicial drafting of U.S. business contracts could explain several heretofore unexplained natural disasters such as the cost of Kevin Costner's "Waterworld," the Presley-Jackson marriage, and the success of Regis and Kathie Lee.

47. "Heck, I can write as good as them guys."

48. *See Askco Eng'g Corp. v. Mobil Chem. Corp.*, 535 S.W.2d 893 (Tex. Ct. App. 1976), in which Askco and Mobil shipped 166,105 pounds of plastic across Texas, back and forth to each other, in a dispute over the plastic's suitability for use in manufacturing Hefty trash bags. Very productive use of time and facilities. Litigation to the appellate level. And Mobil "buried" the plastic. *Id.* at 897. The EPA will be entering the fray soon for CERCLA clean-up purposes. *See* 42 U.S.C. § 9601 (1988). And, although the author has no authority to cite, she has heard from reli-

ing as businesses develop reliance on relationships—partnerships among buyers and sellers.<sup>49</sup> Part III describes those relationships<sup>50</sup> and Part IV offers suggestions on how parties can minimize legal difficulties.<sup>51</sup>

### III. THE NEW LOOK OF BUSINESS: LOOK AT US, WE KIND OF HAVE A CONTRACT AND WE LIKE EACH OTHER

#### A. *The Paperless/Contractless World*

Contract scholars<sup>52</sup> refer to this new business practice of half-heartedly negotiating a contract, and not really caring, as relational contracts.<sup>53</sup> Lawyers and economists describe these relational contracts as incomplete.<sup>54</sup> The question that puzzles economists<sup>55</sup> is why, when the parties have asymmetric information,<sup>56</sup> are they willing to jump in and do business without a complete contract. Why does, for example, Wal-Mart say to Procter & Gamble, “We’ll buy as many Luvs diapers as we want?”<sup>57</sup> More importantly, why does

able sources that the EPA does not give two hoots about § 2-207 battles causing the burial of plastic. “Heck, we’re the EPA. We don’t have to care.”

49. It’s a lot like the difference between going out when you’re dating and going out when you’re married. When you’re dating, it matters who pays because you have other opportunities. In marriage, the movie ticket cost all comes out of the same pot, you both benefit, so, who cares?

50. The clean parts.

51. Lobbying for repeal of § 2-207 would be a start.

52. As opposed to Marianne Jennings, who is more along the lines of a contract goof.

53. Allowing the parties involved to thus have contractual relations.

54. See Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271 (1992).

55. Just about everything puzzles economists. Economists take something that occurs in real life and write about how it shouldn’t happen in theory. For example, Nobel economist Gary Becker once wrote an eight-page article on how dumb it was to stand in line for a table at one seafood restaurant when another seafood restaurant across the street had plenty of tables, lobster, butter, and squid. Gary S. Becker, *A Note on Restaurant Pricing and Other Examples of Social Influences on Price*, 99 J. POL. ECON. 1109 (1991). Gary obviously has not experienced a Planet Hollywood or Hard Rock Cafe. Denny’s has better food and no waiting, but it also has no T-shirts or tidal-wave producing music sounds. It’s not the squid, it’s the ambience of potential deafness and bad food.

56. Now, don’t get excited. I’m not cussing in the heart of a law review article. I’m not going to risk Old Testament curses for swearing, or worse, risk the revenge of the economists. (By the way, “The Revenge of the Economists” would make an excellent screenplay: take a group of economists (wardrobe note: tan pants with black belt cinched just below the pectoral muscles and Hush Puppies) and have them roam the city forcing people to explain marginal cost using graphs. It’s a tale of horror too cruel to describe. The United Nations would be forced to intervene.) After 18 years in academe, I have come to learn that asymmetric information means this: both parties don’t have access to the same information. The seller doesn’t tell the buyer (purchasing manager) everything (“Golly, I can’t believe I’m unloading these Elvis PEZ containers from Beijing. This guy must be an economist.”).

57. The author is not singling out P&G. There are other companies that say, “We’ll buy as many \_\_\_\_\_ as we need.” For example, Intel buys as many math errors as it wants for the Pentium Chip. IBM, GE, Buick, Eaton, Black & Decker, Westinghouse, John Deere, Harley-Davidson, and Hugh Grant are all involved in “buy what you want” contract relationships. Buying just what you need, just-in-time purchasing (JIT) is something we borrowed from the Japanese. W.E. Deming brought it over along with this caveat, “Here’s something that will turn business upside down if you can get rid of that § 2-207 thing.” MASAOKI IMAI, *KAIZEN: THE KEY TO JAPAN’S COMPETITIVE SUCCESS* (1986); RICHARD J. SCHONBERGER, *JAPANESE MANUFACTURING TECHNIQUES: NINE HIDDEN LESSONS IN SIMPLICITY* (1982) [hereinafter SCHONBERGER, *SIMPLICITY*]; RICHARD J. SCHONBERGER, *WORLD CLASS MANUFACTURING* (1986); *The Louisville Slugger*

Procter & Gamble, with the look of a stumped "Price is Right" player, say, "Okey dokey"?<sup>58</sup>

The answers to both questions are simple.<sup>59</sup> These folks have redefined contractual relationships. Yes, behind our backs,<sup>60</sup> buyers, sellers, merchants,

*Hits for JIT*, THE ECONOMIST, Mar. 18, 1989, at 68. Those of you who are experts in consideration (also known for wearing Hush Puppies) might be saying that buying as many Luvs as you want might be illusory, particularly when there is no requirement to buy any Luvs at all. But, again, business people don't seem to care. Consideration just doesn't seem to be a problem in purchasing anymore, *supra* note 22. It's a game of delivering it right and on time.

58. The term "Okey dokey" is always indicative of an asymmetric information situation when used in response to a question such as "Want to contract?" See *supra* note 56 for the definition of asymmetric. For a definition of "okey dokey," watch the late night re-runs of "Taxi," an early 1980s program that included the Reverend Jim Ignatowski, (JI of T), who replied "okey dokee" to everything because he had no brain cells left after the 60s. A true asymmetric.

59. The answers might be simple, but take a gander at this explanation in a piece on relational contracts:

Courts also may (and sometimes do) supply terms when contracts apparently *lack* gaps. A sale between a manufacturer and a wholesaler illustrates how courts come to have this discretion. Suppose the wholesaler will face only two states of demand in his market, high or low. Then consider two possible contracts that the parties could make: (a) the manufacturer's price for each of five units is \$20 if the wholesaler faces a high demand and \$10 per unit for a low demand; (b) the price is \$20 per unit for five units. The second contract apparently is complete; it sets a price and names a quantity. The wholesaler, however, never has an incentive to breach contract *a* because the price will be appropriate to either contingency. In contrast, he has an incentive to breach contract *b* if demand turns out to be low: the price then will be too high. This example suggests that the phrase "incomplete contract" should include more than the gap case.

The definition used here (which is now popular among economists) holds either that an incomplete contract has a true gap—for example, no price term—or that it partitions future states or potential contracting partners "too coarsely." Regarding the additional aspect of the definition, parties to sales transactions may face a large number of possible future states: demand in the wholesaler's market may be extremely high, very high, moderately high, average, and so forth. The initial contract *a* is complete under the definition because (it is assumed) only two contingencies could materialize and the contract has a two-state partition: it sets prices for the high- and low-demand states. Contract *b* is incomplete because it has a one-state partition in a two-state world: that is, the contract sets one price and, so, necessarily fails to treat one of the two cases that could arise.

To understand the relevance of this new definition to legal issues, one must recall that the wholesaler has an incentive to breach the incomplete contract. If he were to do so, then he likely would claim in a lawsuit that contract *b* is only superficially complete: it does not treat the low-demand state. Contract *b* nevertheless is sufficiently detailed to be the basis for a legal remedy: the seller could be awarded the difference between the contract price and the market price for five units. The court thus has a choice: it can supply a term that governs when the contract price arguably is inappropriate to the *ex post* state, or it can enforce the contract as written. The courts' rhetorical strategies sometimes conceal the existence of this discretion. A court that wants to excuse the buyer will supply a term and stress the parties' failure to consider the situation at hand—that is, the court will stress the contract's incompleteness. A court that prefers to enforce will give the seller damages and stress the contract's (apparent) completeness; the judge will recite the maxim that courts do not make contracts for the parties. Recognizing that contract *b* is incomplete despite what some courts say permits this article to rephrase the question asked above in a more illuminating way: why do courts complete some incomplete contracts but not others?

See Schwartz, *supra* note 54, at 272-73. (footnotes omitted) (with good cause).

Please note, as much as she would like to take credit for the humor of this satirical piece, the author did not write it. Sadly, it was not written as satire either. Is it any wonder the Federal Reserve can't fix the economy? It's run by economists who write pieces about theoretical contract *a* and theoretical contract *b*.

60. That would be the collective backs of lawyers and the drafters of § 2-207, if there were

and purchasing agents got together and discovered you can: (1) have a contract without hating each other;<sup>61</sup> (2) make some dough;<sup>62</sup> and (3) not always end up in litigation.<sup>63</sup>

### B. *Let's Not Argue over Mailboxes: Let's Be Partners*

The newest highfalutin term for all this non-contractual business is "strategic supplier partnering."<sup>64</sup> Other terms<sup>65</sup> have been coined as well,<sup>66</sup> such as "proactive procurement"<sup>67</sup> and "reverse marketing."<sup>68</sup> But the "SSP" term is the biggie and it means that buyers and sellers are working together so that they both make more dough.<sup>69</sup> The formal definition of SSP is: "An ongoing relationship between buying and supplying firms involving a commitment over an extended time period, and a mutual sharing of information; it may include the sharing of the risks and the rewards of the relationship."<sup>70</sup>

indeed any non-lawyers among them. Can you imagine, though, anyone who is not a lawyer participating in a U.C.C. drafting session? Wouldn't it be more fun to go and wait in line at the Department of Motor Vehicles everyday? There would at least be an occasional break in monotony provided by collecting data each day on how many DMV patrons wore socks.

61. *Supra* notes 8 and 9.

62. In fact, by redefining contracts, merchants appear to be making more dough. For example, Levi Strauss & Co. takes up to a month to get new Levis to stores (buyers). But VF Corp. (these are the folks who bring us Lee and Wrangler Jeans) have hooked up market-response systems with their buyers (stores). VF knows immediately via computer when a fellow in Showlow, Arizona snaps up the only 48W/31L Wranglers in the state at the local Wal-Mart. Within three days, VF will have the wide-bodied (excuse me, portly, under the Americans with Disabilities Act, 42 U.S.C. § 12101 (1990)) jeans back on the shelf in Showlow. Three days is not enough time to even get warmed up under § 2-207, and VF and Wal-Mart have already had delivery. The result is VF's market share is up, Levi's is down. VF's sales and net income are up 150% and 200% respectively since 1990. There's no limit to what one can do without a contract. Joseph Weber, *Just Get It to the Stores on Time*, BUS. WK., Mar. 6, 1995, at 66-67.

63. If you don't care whether you have additional or different terms, litigation is not a big issue even in selling big Wranglers.

64. This here is one of them 'thar business school terms that will simply not catch on unless it is acronymized. Henceforth, therefore and ergo, we will refer to these non-contractual business relationships as SSPs ("SSP").

65. Additional terms, but not in the § 2-207 sense.

66. Both for descriptive and book-writing purposes. Business school professors are required to do two things: (1) create new terms and acronyms; and (2) use those terms and acronyms to write a book. *See, e.g.*, MICHAEL HAMMER & JAMES CHAMPY, REENGINEERING THE CORPORATION: A MANIFESTO FOR BUSINESS REVOLUTION (1993). You must buy the book just to see what the title means.

67. DAVID N. BURT, PROACTIVE PROCUREMENT: THE KEY TO INCREASED PROFITS, PRODUCTIVITY, AND QUALITY (1984). *See*, this is one of those business books. The standard formula and/or name for every successful business book is: ACRONYM: NEW TERM FOLLOWED BY PUFFERY (the type of statement that would be criminal fraud in most states such as: THE KEY TO WEALTH BEYOND YOUR WILDEST DREAMS).

68. Initially I thought reverse marketing would be defined as ways to be sure no one buys your product. Michael Jackson staged a brilliant reverse marketing ploy for the Pepsi folks and his own albums via several young boys. Hertz and its spokesperson, O.J. Simpson, will have some lovely reverse marketing going for years to come. However, what reverse marketing really means is that purchasing folks make the decisions about what to buy based on what sells. Tell us what you want so we're not offering Elvis PEZ holders at 75% off. Heck, that sounds exciting. *See* MICHIEL R. LEENDERS & DAVID L. BLENKHORN, REVERSE MARKETING: THE NEW BUYER-SUPPLIER RELATIONSHIP (1988).

69. In business lingo: maximize profits ("MP").

70. THOMAS E. HENDRICK & LISA M. ELLRAM, STRATEGIC SUPPLIER PARTNERING: AN

So, VF Corp. is paired<sup>71</sup> with Wal-Mart and J.C. Penney. Each night Wal-Mart sends VF its sales data, as entered through store scanners.<sup>72</sup> The next morning, VF sends out the replacement jeans for the Wal-Mart in Kenosha.<sup>73</sup> Here is what happens: not only are the jeans back on the shelf, the jeans the customers are interested in buying are back on the shelf. VF sells more jeans because Wal-Mart customers tell them what they want,<sup>74</sup> and Wal-Mart isn't stuck trying to sell stuff that customers didn't want at a discount.<sup>75</sup> The stuff you want is there when you want it, and you won't get stuck with Barney backpacks because Barney is out and the white Power Ranger is in.<sup>76</sup>

Actually, there are varying degrees of SSPs—the distinguishing characteristic between SSPs and contractual relations is that SSP partners share a common goal.<sup>77</sup> The idea behind SSPs is to create a win/win situation: if we work together we can help each other.<sup>78</sup> Further, it is important to note that the relationships survive without the benefit of contracts or section 2-207 because they are, or are intended to be, long-term.<sup>79</sup> Longevity contributes to flexibility in the relationship because either you cooperate or you're out.<sup>80</sup>

INTERNATIONAL STUDY (1993). For those of you still reading to date, you may realize that this definition defies all notions of contract law and asymmetric information. *See also supra* note 56. These SSP partners share information (there goes all the law on fraud and misrepresentation) and risks (there goes § 2-615 on commercial impracticability) and rewards (If you're both making more money because of each other, where is the incentive to sue and how do you establish damages when your profits are up 200%?).

71. Pun intended.

72. Scanners are those things the cashier runs the bar code over so manual price entry is not required, thus remarkably speeding up check out except for the twenty-two times the clerk must run the bar code over the scanner. I myself think that three times over the scanner without success should mean the item's free. Three strikes and it's free. Further, I will be lobbying to have this scan-it-in-three-or-it's-free provision put into the new Article 2 of the U.C.C. I believe it would fit nicely under § 2-509, the new "slipped-by" risk of loss.

73. In the author's ongoing effort to emphasize the death of contracts, please note that VF's shipment is a paperless transaction. No human beings spoke. Nobody said, "Deal." No one even thought of the mailbox rule. In fact, we're raising an entire generation of purchasing managers who say, "Mailbox rule? What mailbox rule? Heck, never heard of it. We have scanners."

74. Size 48 Wranglers and all-you-can-drink Diet Coke from the Wal-Mart snack area while you're shopping. All with a Wal-Mart red and white plastic cup for 79¢. Indeed, as of November, 1994, VF held 30% of the blue jeans market, up from 26% in 1989, while Levi has slipped from 21% to 17%. Weber, *supra* note 62, at 67.

75. No clearance sales mean higher profits and no annoying Blue Light Specials (or whatever this K-Mart equivalent is called at Wal-Mart).

76. There's nothing worse for a purchasing manager than to fall victim to the heartless winds of change in children's heroes. *See, e.g.*, Cabbage Patch dolls.

77. In straight (excuse me, simple) contractual relationships, one cannot assume a common goal. In ordinary contracts, the seller's goal may be to "Gouge the moron," while the buyer's goal may be, "Steal him blind."

78. And avoid that gouging and stealing bit altogether. There really is support in the literature for this statement. Okay, not for the gouging and stealing, but for the win/win bit. *See* Kate Bertrand, *Crafting 'Win-Win Situations' in Buyer-Supplier Relationships*, BUS. MKTG., June 1986, at 42.

79. Breathe a sigh of relief all of you law school deans stuck with two Contracts professors and one UCC professor, all of whom are tenured. Your professors can still teach limited sections of contracts for those one-time transactions like mergers, acquisitions, land sales, and marriages in which gouging and stealing remain as lofty goals.

80. Suppliers are learning to do business as if they depended on retailers, because they do. Suppliers have key retail accounts and retailers need the precision of just-in-time deliveries from

There are four types of SSPs.<sup>81</sup> At the very simplest levels, SSPs are ongoing relationships executed informally over time. Perhaps the single most important characteristic of this first type of informal relationship is that they are paperless. This first type of informal relationship may also be called the office supply relationship.<sup>82</sup> A corporation needs paper clips, glue-sticks, and that awful hard candy in clear wrappers office folks have had sitting around their offices untouched since the Nixon administration.<sup>83</sup> Rather than faxing invoices and POs back and forth,<sup>84</sup> the corporation has an agreement with an office supplier<sup>85</sup> and then for a year or so,<sup>86</sup> the corporate folks just use EDI (electronic document interchange, the net, the information super highway) to place orders. The office supply folks see the order on the computer and ship out whatever is listed. They don't seem to give two hoots about negotiation, nor do the corporate types who do the ordering.<sup>87</sup> The price is locked in, the Post-it notes arrive on time, and all is accomplished without ever uttering a form!<sup>88</sup>

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suppliers. Examples of the extent of interdependence:

Gibson Greeting	13% of its sales from Phar-Mor
Gitano	26% of its sales from Wal-Mart
Haggar	22.6% of its sales from J.C. Penney
	10% of its sales from Wal-Mart
Hasbro	17% of its sales from Toys "R" Us
Mattel	13% of its sales from Toys "R" Us
Mr. Coffee	21% of its sales from Wal-Mart
	10% of its sales from K-Mart
Procter & Gamble	11% of its sales from Wal-Mart
Rubbermaid	11.1% of its sales from Wal-Mart

Zachary Schiller et al., *Clout!*, BUS. WK., Dec. 21, 1992, at 66.

A group intertwined. If Wal-Mart goes under, all of the Midwest plus Arkansas and Alaska will find themselves in Chapter 11 Bankruptcy. The Orange County fiasco will pale in comparison.

81. Actually, I am not all that happy with the SSP acronym. SSP sounds like several of the immunizations my children got during their first two years of life.

82. A term the author made up and for which she has absolutely no support.

83. On-time delivery is not an issue for office candy. It's one delivery every civil war. Food for thought: if we're not going to use § 2-207 anymore, will we really need office supplies?

84. Corporation: We need 200 bottles of Liquid Paper White-Out.

Office Supplier: Price is \$1 each.

Corporation: That's highway robbery.

Office Supplier: Well, you're the one who insists on doing this merchant battle deal. This luxurious battle of forms has its costs.

Corporation: OK. Deal.

Office Supplier: Now wait, are we under the Mailbox Rule?

Corporation: I could send a purchase order written on my lunch menu if that will help.

85. Footnote 84 is eventually resolved.

86. Depending upon when internal audit folks say, "Update that agreement."

87. Some companies have even banded themselves together on the information super highway to exchange orders. AT&T is working with Lotus and Novell to develop more interlinks between companies. These three are actually daring to work against § 2-207 and Bill Gates. Talk about tilting at windmills!! See Stephen H. Wildstrom, *In Search of the Paperless Contract*, BUS. WK., Aug. 29, 1994, at 14. And get this, there is no law governing EDI, and no one cares. Francoise Gilbert, *An Electronic Data Interchange Enables Companies to Purchase from and Sell to Each Other, but the Enforceability of 'Electronic Contracts' Can Be Problematic*, NAT'L L.J., May 16, 1994, at B6, B8.

88. Even this very simple SSP form enables both sides to benefit from a monogamous, non-coercive, non-competitive relationship. It's the marriage thing again. Sure Divine Brown is cheap-

From monogamous purchasing SSPs, we move to the second type of SSP, the supplier just-in-time relationships (“JITSSPs”).<sup>89</sup> The desire to have limited production runs, short set-up times, and quality control create the incentives for these relationships.<sup>90</sup> What they really do, however, is require the seller, as opposed to the buyer, to carry the inventory. Now, some of you may be asking, what is the distinction between the office supply SSP and this one?<sup>91</sup> Well, the difference is *Hadley v. Baxendale*.<sup>92</sup> Yes, it is the same *Hadley v. Baxendale* that has been studied in law schools on both sides of the Atlantic for a century and a half.<sup>93</sup> The distinction between office supply SSPs and JITSSPs is that if an office supplier goofs, the buyer goes without its Vis-a-Vis overhead projector pens for a few days. If a manufacturer’s just-in-time supplier goofs, factories shut down,<sup>94</sup> Chapter 11 bankruptcy ensues, towns

er, but Elizabeth Hurley is Ms. Dependable for Hugh Grant.

89. Here’s my book title: JITSSPs: THE KEY TO GETTING RID OF YOUR LAWYER, IF YOU CAN ONLY PRONOUNCE THAT ACRONYM CORRECTLY.

90. This is the sort of stuff we borrowed from the Japanese. SCHONBERGER, SIMPLICITY, *supra* note 57; KIYOSHI SUZAKI, THE NEW MANUFACTURING CHALLENGE: TECHNIQUES FOR CONTINUOUS IMPROVEMENT (1987); JAMES P. WOMACK ET AL., THE MACHINE THAT CHANGED THE WORLD (1990). When the Japanese say JIT, they mean JIT. Here’s an excerpt from the Womack guy (whose name sounds suspiciously like that of the producer of “Welcome Back Kotter”):

On the way back through the plant, we observed yet other differences between this [Japanese] plant and [the] Framingham [U.S. plant]. There were practically no buffers between the welding shop and paint booth and between paint and final assembly. And there were no parts warehouses at all. Instead parts were delivered directly to the line at hourly intervals from the supplier plants where they had just been made. (Indeed, our initial plant survey form asked how many days of inventory were in the plant. A Toyota manager politely asked whether there was an error in translation. Surely we meant *minutes* of inventory.)

*Id.* at 80.

91. Others of you may be asking, “How is it possible to have 90 footnotes on the premise we don’t need contracts anymore?”

92. 156 Eng. Rep. 145 (1854).

93. The author apologizes for all the excitement you have built up thinking that you would not be studying contracts anymore. Now, I am not guilty of true misrepresentation. Fraud, maybe. All I said was that the mailbox rule, mirror image rule, and consideration were irrelevant. I never said *Hadley v. Baxendale* was on the outs. So, even with all these groovy new SSPs, we must still face *Hadley* and consequential damages.

94. You may recall that in *Hadley*, the plaintiffs were flour millers in Gloucester. *Hadley*, 156 Eng. Rep. at 145. Their mills were run by a steam engine. The crankshaft on their steam engine broke. *Id.* It was the little engine that couldn’t. So, the millers contacted W. Joyce & Co. of Greenwich to build a new crankshaft using the old crankshaft as a model. *Id.* at 146. At this juncture, two irrelevant points must be made. First, you did not need to know Gloucester and Greenwich. However, those names are difficult to pronounce correctly, and the author enjoys the thought of readers saying “Glow’ Chester” and “Green-witch” instead of “Glowster” and “Grenitch.” Second, the author is grateful for the chance to review the facts in *Hadley v. Baxendale* because although she has taught contracts for 18 years, she has reached the point during classroom discussions where she is no longer sure which cases are real, which are hypothetical, and which are author-embellished. For example, when teaching *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928), she is able to work in terrorists, the lovely Donna Karan ensemble Mrs. Palsgraf was wearing, and the passengers who were cheering to the beat of Queen’s “We Will Rock You” as the idiot with the firecrackers was running to catch the train.

Anyway, back to *Hadley*. So, the millers (one of them must have been named Hadley or there just isn’t any explanation for the case name) (that’s Had’lee) contracted with W. Joyce & Co. *Hadley*, 156 Eng. Rep. at 146. The shaft was to be delivered (not given) by Pickford & Co., a common carrier, to W. Joyce & Co. within two days. *Id.* Now, Baxendale worked for Pickford, otherwise, again, we’re in trouble on the name. Baxendale/Pickford apparently had some troubles. It is rumored (author’s embellishment after 18 years) that they were asking how to get to

disappear and, most importantly, astronomical damages occur.<sup>95</sup>

"Astronomical damages" is a lay term for consequential damages: the same type of consequential damages which the court permitted recovery of in *Hadley*<sup>96</sup> and which are a strong possibility if a JITSSP doesn't work.<sup>97</sup> Now, folks since the time of *Hadley* have differed in their interpretations of what the case really said.<sup>98</sup> So have law reviews and books,<sup>99</sup> so did even the judges in *Hadley* itself,<sup>100</sup> and, of course, the courts.<sup>101</sup>

"Greenwich" and no one knew where they wanted to go until the seventh day when someone said, "Do you mean Grenitch?" To which Baxendale responded, "Well, wherever W. Joyce & Co. is located." So, Joyce got the old crankshaft, from which they were to make the new crankshaft, five days late. *Id.*

Meanwhile, back at the flour mill in Glowchester, customers were screaming for flour, employees were sitting around doing nothing and still being paid (and these were pre-union times), the millers had to buy other flour (i.e., "cover"—see U.C.C. § 2-712, which didn't exist in England in 1854, but it was what they were doing), and profits plummeted. The millers demanded £300 as damages. *Hadley*, 156 Eng. Rep. at 146. Baxendale said they would refund the cost of transportation, which, by the way is the standard FedEx remedy: "Guaranteed by 10:30 A.M. next day, but, if not, we'll give you a refund. No *Hadley v. Baxendale* stuff allowed."

95. The author could not find a definition of "astronomical damages" in the literature but would define it to include those damages that throw the seller into Chapter 11 bankruptcy after the buyer brings suit for its Chapter 11 bankruptcy.

96. Well, but not to the tune of the £300: "the loss of the profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract." *Hadley*, 146 Eng. Rep. at 151 (i.e., they didn't see the shaft coming).

97. In *Hadley* the court stated:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.

9 Ex. at 354-55, 156 Eng. Rep. at 151 (Note two cites provided in case your library carries both 1854 English reporters!) (Translation: if you could see it coming or should have seen it coming, you're responsible for their Chapter 11 bankruptcy.)

98. The pros and cons of *Hadley* are really beyond the scope of this piece. Are you like me? Are you thinking, "She's discussed everything from Elvis PEZ holders to Laverne & Shirley and now she has the nerve to say consequential damage theory is beyond the scope of this piece?" Okay, suffice it to say consequential damages are a BIG issue in JITSSP relationships. For the pros and cons on consequential damages in JIT contracts, see Robert B. Bennett, Jr., *Just-In-Time Purchasing and the Problem of Consequential Damages*, 26 UCC L.J. 332 (1994).

99. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 467-68 (1973); KEVIN M. TEEVEN, *A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT* 194-97 (1990); Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 (1975); E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1200-10 (1970); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 84-96 (1936); A.W.B. Simpson, *Innovation in Nineteenth Century Contract Law*, 91 LAW Q. REV. 247, 273-78 (1975); Comment, *Lost Profits as Contract Damages: Problems of Proof and Limitations on Recovery*, 65 YALE L.J. 992, 997 (1956); Note, *Lost Profits and Hadley v. Baxendale*, 19 WASHBURN L.J. 488 (1980).

Tell me we haven't overdone the analysis on the misdelivered flour mill crankshaft.

100. Danzig, *supra* note 99, suggests that the judges in *Hadley* had conflicts of interest and thus differed on the results:



A direct relationship between a manufacturer and retailer characterizes the third category of SSPs. It is the same type of cooperative/collaborative relationship described earlier between VF and Wal-Mart.<sup>102</sup> VF has access to Wal-Mart's computers, inventory, and sales information, and ships merchandise to Wal-Mart based upon this direct data. For the purposes of discussion, we will call this type of SSP the Wal-Mart SSP. The distinction between JITSSPs and the Wal-Mart SSP is the difference in consequences between a manufacturer not getting its supplies<sup>103</sup> and a size 48W/30L customer in Showlow going an extra day with a hole in his jeans.

The fourth category of SSPs involves expanded partnerships in which the buyer and seller work together to develop a product or establish a joint venture to sell a product.<sup>104</sup> The distinctions between this form of SSP and the

[I]t is worth noting that the predisposition of this panel seems clear. Two of the three Exchequer judges were tied to Pickfords in contexts likely to make them sympathetic to the company. Baron Martin had represented Pickfords before ascending to the bench, and Baron Parke's brother had been the managing director of the company before *Baxendale*.

Danxig, *supra* note 99, at 266-67 (citations omitted). This piece was worth reading just for this tidbit. I'll take *Hadley v. Baxendale* trivia for \$200, Alex.

101. Here's a list of some of the most charming cases:

*Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903); *Hendricks & Assocs., Inc. v. Daewoo Corp.*, 923 F.2d 209 (1st Cir. 1991); *Hampton ex rel. Hampton v. Federal Express Corp.*, 917 F.2d 1119 (8th Cir. 1990); *Rardin v. T & D Mach. Handling, Inc.*, 890 F.2d 24 (7th Cir. 1989); *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951 (7th Cir.), *cert. denied*, 459 U.S. 1017 (1982); *Hector Martinez & Co. v. Southern Pac. Transp. Co.*, 606 F.2d 106 (5th Cir. 1979), *cert. denied*, 446 U.S. 982 (1980); *Anna Ready Mix, Inc. v. N.E. Pierson Constr. Co.*, 747 F. Supp. 1299 (S.D. Ill. 1990); *Draft Sys., Inc. v. Rimar Mfg., Inc.*, 524 F. Supp. 1049 (E.D. Pa. 1981), *aff'd*, 688 F.2d 820 (3d Cir. 1982); *United States ex rel. Westinghouse Elec. Corp. v. Marietta Mfg. Co.*, 339 F. Supp. 18 (S.D.W. Va. 1972); *Oliver-Elec. Mfg. Co. v. I.O. Teigen Constr. Co.*, 177 F. Supp. 572 (D. Minn. 1959); *Jacobs v. Thomas*, 600 A.2d 1378 (Conn. App. Ct. 1991); *Cricket Alley Corp. v. Data Terminal Sys., Inc.*, 732 P.2d 719 (Kan. 1987); *Liberty Fin. Mgmt. Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40 (Mo. Ct. App. 1984); *Harmon Cable Communications v. Scope Cable Television, Inc.*, 468 N.W.2d 350 (Neb. 1991); *Conner v. Southern Nev. Paving, Inc.*, 741 P.2d 800 (Nev. 1987); *Hydraform Prods. Corp. v. American Steel & Aluminum Corp.*, 498 A.2d 339 (N.H. 1985); *Noye v. Hoffman-La Roche Inc.*, 570 A.2d 12 (N.J. Super. Ct. App. Div. 1990); *Glatt v. Bank of Kirkwood Plaza*, 383 N.W.2d 473 (N.D. 1986); *Dynagraphics, Inc. v. United States Nat'l Bank*, 785 P.2d 760 (Or. Ct. App. 1990); *Mead v. Johnson Group, Inc.*, 615 S.W.2d 685 (Tex. 1981); *Gagliardi v. Denny's Restaurants, Inc.*, 815 P.2d 1362 (Wash. 1991).

102. For a description of this relationship see *supra* notes 62-80 and accompanying text.

103. See, e.g., *Ohoud Establishment For Trade & Contracts v. Tri-State Contracting & Trading Corp.*, 523 F. Supp. 249, 255 (D.N.J. 1981) (citing *POOR RICHARDS ALMANAC* (1758)) (cited and translated liberally).

For want of a nail the shoe was lost;  
 For want of a shoe the horse was lost;  
 And for want of a horse the rider was lost;  
 For the want of a rider the battle was lost;  
 For the want of the battle the kingdom was lost;  
 And all for the want of a horseshoe-nail.

Non-delivery of nails can produce Chapter 11 fiascos. Non-delivery of jeans to a large, short man (portly) in Showlow may create aesthetic, and perhaps zoning, problems in Showlow, but both Wal-Mart and Showlow will survive. By the way, please note the *Poor Richards* deal was cited in a consequential damage case. I'll take *Poor Richards Almanac* combined with *Hadley* trivia for \$400, Alex.

104. An example of an expanded partnership was the development of the Dow Corning breast

others should be obvious: legal liability, exposure, possible public hatred and scorn, and a visit by an overzealous *Sixty Minutes* crew.<sup>105</sup> These folks may combine resources (raw materials with production) or distribution (railroads contracting to get the toys to Toys R Us). They are not just contracting, they are in business together.

#### IV. THE KEYS TO SUCCESS WITHOUT CONTRACTS

Now that you know folks are actually doing business without contracts, perhaps the question in your mind is, "Yes, but does it work or do we all end up like Hadley and Baxendale, fools written up 140 years ago to be studied by all smart-mouthed law students?"<sup>106</sup> We should begin by noting that many SSPs fail, in the sense that they are terminated<sup>107</sup> or do not produce the anticipated results.<sup>108</sup> What, therefore, are the keys to a good SSP relationship? When SSP participants were asked to rate factors that were or were not important in the failure of their relationships, two key factors appeared: lack of trust and lack of communication.<sup>109</sup> Thus, a key factor in the success of SSPs ap-

implants. I didn't say it was a good example. Litigation, bankruptcy, and national disgrace all resulted—but see part IV. *Dow Corning's Profits Down 84.4% in Quarter*, N.Y. TIMES, July 28, 1992, at D2; see also Tim Smart, *This Man Sounded the Silicone Alarm—in 1976*, BUS. WK., Jan. 27, 1992, at 34; Tim Smart, *Breast Implants: What Did the Industry Know and When?*, BUS. WK., June 10, 1991, at 94.

105. It is fair to say, however, that there have been some good alliances. Texaco and Subway are building combination gas station/sandwich shops. Be careful if you say "Hold the oil" in one of these combination fill-er-up stops. GTE has phones on airplanes. HENDRICK & ELLRAM, *supra* note 70, describe the types of SSPs in great detail with nifty charts and graphs. For example, most SSP supplier relationships (69%) are for made-to-order items. *Id.* at 19. This is what Hadley wanted: a made-to-order crankshaft.

106. Please, supply your own humor here.

107. VF is ousted by Wal-Mart. Or Wal-Mart is abandoned by VF. And Bill Gates quits selling software. And the check is in the mail. And the divorce will be final next week. These last four fairy tales were brought to you to emphasize that termination in these SSPs can be terribly one-sided. Wal-Mart will survive without VF. Can VF survive without Wal-Mart? As parties abandon contracts, and contract protections (i.e., damages), they should consider their vulnerability.

108. Not making as much dough as everyone thought.

109. Oddly, these are also the key factors in marriage dissolutions. Well, those and Sharon Stone. A full list of ffs (failure factors) is provided below.

FIGURE 42  
FACTORS CONTRIBUTING TO PARTNERSHIPS THAT HAVE NOT  
WORKED OUT OR WERE DISSOLVED

Mean ratings:

- 1= Hardly a factor
- 4= Neutral
- 7= Important factor

	<u>Buyers'</u> <u>Response</u>	<u>Suppliers'</u> <u>Response</u>
a. Lack of our top management support of the partnership	5.30	4.40*
b. Lack of partner firm's top management support	3.89	4.88**
c. Low status of customer's purchasing function	2.68	4.28***

pears to be prior experience<sup>110</sup> with the other party and an ability to communicate easily as the relationship evolves.<sup>111</sup> Interpersonal communication and skills count more than forms. SSPers say success hinges on the ability to “work together to identify and solve the problem” if problems arise.<sup>112</sup> Underlying these comments are the “damn lawyer” comments.<sup>113</sup> In short, folks are not interested in *Hadley v. Baxendale* damages when they are involved in an SSP, they are interested in long-term relationships. They’re not interested in

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d. Lack of strategic direction for the relationship	4.75	5.58**
e. Distance barriers	2.34	2.77
f. Poor up-front planning	4.89	5.21
g. Lack of central coordination of purchasing	3.30	4.19
h. Lack of shared goals	4.72	5.55***
i. Lack of trust	5.19	5.56
j. Poor communication	5.75	5.92
k. Top management differences	3.52	4.01
l. Lack of benefit/risk sharing	4.51	5.18*
m. Too many suppliers for customer to deal with effectively	3.57	3.92
n. Lack of distinctive supplier value-added/benefit	4.88	4.15*
o. Lack of total quality commitment by supplier	5.09	3.18***
p. Corporate culture differences	3.56	3.50
q. Ineffective mechanism for conflict resolution	4.58	5.00
r. Agreement not supportive of a partnering philosophy	4.23	4.79
s. Changes in the market	3.70	3.59

\* p < 0.05

\*\* p < 0.01

\*\*\* p < 0.001

NOTE: please do not ask the author what these mean. Statistics is a field that makes § 2-207 controversies look like a Barney song.

HENDRICK & ELLRAM, *supra* note 70, at 37.

110. Preferably a good experience (this is generally needed to build trust as opposed to exchanging gunfire over mailbox rule controversies, *supra* note 7). Although, the exchange of gunfire over the mirror image rule should not cause one to presume distrust. It is justifiable battery based upon inane common law contracts.

111. Again, some reassurance for all of you that one-time contracts will still require us to resort to mirror images and form battles. You can’t trust someone you don’t know, well, you can, but you may enjoy the fates of Hadley and Baxendale, *supra* note 94 and text accompanying note 106. For example, Dillard Department Stores contracted to buy Joseph Horne Company. Dillard’s began ordering merchandise and scaring off employees. In conducting its due diligence, Dillard’s also found less money in the coffers than expected. Dillard’s said, “Whoa!”—or legal words to that effect—and backed out of the deal. This one-time contact resulted in litigation, and yes, lawyers’ fees. See Michael Schroeder & Wendy Zellner, *Hell Hath No Fury Like a Big Store Scorned*, BUS. WK., Sept. 23, 1991, at 39.

112. HENDRICK & ELLRAM (again), *supra* note 70, at 41.

113. Purchasing folks put it this way, “Heck, it’s the damn lawyers screwing things up.”

what section 2-207 allows them for terms, they're interested in making the relationship work.<sup>114</sup>

Not to be a killjoy, but these SSPers need to evaluate some basic issues that trust and communication may not cover. Risk cannot be smoothed over with silky talk. What if Phar-Mor buys 11% of your greeting cards, and Phar-Mor goes bankrupt?<sup>115</sup> In such a tight SSP relationship you may lose 11% of your business. As the reliance and long-term relationship continue, can you get out? How do you know you have the best products at the best price?<sup>116</sup>

The mutual dependency of these non-contractual relationships makes it costly to lose them. It is difficult for the sellers to lose the relationship because of income losses, and even tougher for the buyer because of its reliance on a long-term, course-of-dealing contract.<sup>117</sup> And there are the logistical issues. If the SSPs are using EDI,<sup>118</sup> what forms of security exist for the communications?<sup>119</sup> There are also the competition issues. In the manufacturer/retailer relationship, the manufacturer has full access to sensitive sales and revenue information. Who can get the information? Are there restrictions on its access and use? What happens to the information when the relationship ends?<sup>120</sup>

Perhaps most telling in the SSP relationship evaluations are the comments made by participants:

"If we get too reliant upon a single partner supplier, how do we know if we are missing some competitive advantages available from other suppliers?"<sup>121</sup>

"The supplier has locked up a long-term guarantee for our business, and so now they can relax and take us for granted."<sup>122</sup>

"Single source partnering is dangerous. What if they shut you down?"<sup>123</sup>

114. And these SSPers appear to be good at making it work. The average number of years the respondents in the Hendrick and Ellram survey had supply contracts with the same supplier was 14-16 years. HENDRICK & ELLRAM, *supra* note 70, at 20. Clearly, purchasing managers outdo most marriages in terms of longevity.

115. Indeed, Phar-Mor did end up in Chapter 11. Zachary Schiller, *Wait A Minute—Phar-Mor is Still Kicking*, BUS. WK., Mar. 8, 1993, at 60-61.

116. In the basic office supply contract, many purchasing managers have resolved this issue by requiring reevaluation of suppliers. Some permit only a stocking program for one year, with possible roll over. Others limit contracts to two years. Others require an annual bid. Others have negotiated a cost-plus contract. HENDRICK & ELLRAM, *supra* note 70, at 21.

117. See U.C.C. § 1-205. If parties do business for a long time a certain way, it's tough for either to dump the other. See also *supra* note 9. (You remember . . . "holding the bag.")

118. On the QT and ASAP.

119. Wildstrom, *supra* note 87, at 14.

120. What the author is inartfully trying to say is that if these SSPs work, then the parties profit, fall in love, and sneer at lawyers. But if the SSPs fall apart, there are far more issues to resolve than consequential damages.

121. Competition? Bids go away. So also do the complexities of offers, but this SSPer points out the down side.

122. If there is no possibility of breach, damages, and all those good things in the 2-600s and 2-700s of Article 2 of the U.C.C.—why worry?

123. It's the *Hadley* (or is it *Baxendale*?) problem. If you have one supplier, and they fall through, the trains won't run on time. Indeed, the trains won't run at all.

“Watch out. Now that you are their partner, they will expect all of your business and for you to accept incremental price increases without much question.”<sup>124</sup>

“Watch out for partnering—the customer will use this as an excuse to demand annual price reductions even though your margins are already paper thin.”<sup>125</sup>

“Partnering is great as long as there is an adequate market and reasonable profits, but when things get tight, it’s back to survival of the fittest.”<sup>126</sup>

“All partnering is a fancy marketing tool. It seems every supplier’s sales force wants to become your partner.”<sup>127</sup>

“All partnering is a sly purchasing tool. All the buyer wants to do is buddy up to you to see if you will shave your prices.”<sup>128</sup>

Emerging from these comments are the standard issues covered by written agreements: quality, price, changes in conditions, and consideration so that prices aren’t changed willy nilly. These comments tell us that while SSPs are being used and the formalities of contracts are set aside, we may still need contract terms because when things go wrong, who ya gonna call?<sup>129</sup>

Author’s *ex post facto* notes:

RE: FN6

RE: *Sui generis*—I have no idea what it means. Say it like you’re calling a hog.

RE: “Louie, Louie,”—it was the Kingsmen. I’ll take law review trivia for \$300, Alex. Name the only law review and author to cite the Kingsmen’s song, “Louie, Louie.”

RE: FN90

The author stands corrected. It was James Komack. I’ll take bad television show trivia for \$200, Alex.

124. Now here’s where the concept of consideration would help. You can’t get more money for what you’re already obligated to do. But, as we learned from the Japanese, preserving the relationship may require you to accept price increases. *Supra* note 22.

125. *Id.*

126. Duress—that might help here. What you begin to see in the comments of SSPers is that they could occasionally use some help from the law, but they have abandoned the law as a means of resolution. Bottomline: these SSPs depend on ethical behavior from both sides. Again, just like marriage. To the extent one side takes advantage of the other (price increases by a sole source supplier with a JIT buyer), there is little recourse for the magnitude of the possible damages, so the buyer is left to pay increases in a locked-in situation. The unethical gain when there are no contracts. Words to live and battle forms by.

127. It’s a lot easier to market when your customers cannot defect. Forced sales.

128. HENDRICK & ELLRAM, *supra* note 70, at 43. These comments artfully tell us that all is not well in the land of SSPs. Do not go gently into that EDI. Walk softly and carry big damage clauses. And we may be back to the initial premise of contract law: do SSPs exist to allow one side to take advantage of another?

129. Someone who has studied *Hadley v. Baxendale supra*.

