

From: Frank Snyder <fsnyder@LAW.TXWES.EDU>  
Date: October 12, 2004 6:12:38 PM EDT  
To: AALSContracts@LISTS.UMN.EDU  
Subject: [AALS-KS] ProCD v. Zeidenberg  
Reply-To: aalscontracts <AALSContracts@LISTS.UMN.EDU>

I'm teaching ProCD v. Zeidenberg tonight and I'm puzzled (again) by this line from the opinion: "Zeidenberg does argue, and the district court held, that placing the package of software on the shelf is an 'offer,' which the customer "accepts" by paying the asking price and leaving the store with the goods."

Why did he argue this? If putting the box on the shelf is the "offer," and the box explicitly incorporates other terms, then Easterbrook didn't even have to ignore 2-207. The terms would be part of the offer, not the "expression of acceptance" or the "written confirmation," and 2-207 isn't implicated. On the other hand, if Zeidenberg is the offeror, and taking the box to the counter is the offer, then the terms do arrive after the contract has been formed and 2-207 is implicated. Wouldn't that have been a stronger argument?

Frank

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Easterbrook attributes this view to Zeidenberg and the district court. However, the next sentences says something like "So far, so good." In fact, we know that traditional retail offer-and-acceptance law is, as you note, that the customer makes the offer when he or she takes the box to the counter.

Rather than say that Easterbrook makes a mistake, I would suggest he just doesn't care because he is moving on to what he sees as a better argument.

As you point out, if Easterbrook were willing to conclude that all the license terms were included in the original offer from Pro CD (because of the notice on the box) and then accepted by the customer at the store, he wouldn't need to move past this point.

However, it shouldn't matter for this analysis who makes the offer and who the acceptance. We could also argue that an offer by a purchaser to buy the box includes by implication all of the terms easily read on the box. I assume Easterbrook felt that the mere notice on the box was not sufficient to include the terms at this point.

With respect to 2-207, isn't it Easterbrook's position that there must be two writings for the section to apply. If the offer to buy is from the customer (and the license terms are not incorporated in the offer merely because of the notice on the box) then the confirmation or acceptance is by the store clerk (in the traditional analysis). If we think of Zeidenberg as making an offer to purchase directly to Pro-CD, then its license agreement might be a confirmation, but it seems a stretch.

This case is certainly not one of Easterbrook's best articulated statements of law. He is perhaps saying that the offer is made by Pro-CD and acceptance must be made by customer conduct ( a unilateral contract), which conduct includes paying the price and loading the program and accepting the terms.

Maybe Easterbrook is just making an exception or a new twist on offer-and-acceptance law to cover terms later agreements. What makes it a great opinion is the Realist approach and his statements of policy on why the economy depends on making license agreements enforceable.

From: "Prof. Deborah Post" <DEBORAHP@TOUROLAW.EDU>  
Date: October 12, 2004 7:36:00 PM EDT  
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I don't think it was a mistake either, but for different reasons. I think he is consciously and purposely remaking the common law rules (not just the UCC). Remember in Gateway he tells us that the "vendor is master of the offer." I think he is "modernizing" common law contracts to make it fit with his notion of how modern commercial transactions take place.

Deborah

From: Miguel Schor <mschor@SUFFOLK.EDU>  
Date: October 12, 2004 8:45:09 PM EDT  
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Subject: Re: [AALS-KS] ProCD v. Zeidenberg  
Reply-To: aalscontracts <AALSContracts@LISTS.UMN.EDU>

I have to agree with Professor Post but I was wondering whether Easterbrook was right that 2-207 requires two forms. No doubt the section is designed to deal with the battle of

the forms but I would think that a confirmation with different/additional terms does not require two forms. I thought that the reason Easterbrook was not willing to rely on having a contract formed at the moment of sale with the seller's terms included because of the notice on the box was to protect other vendors from having to deal with the vagaries of 2-207. They would have little protection in consumer transactions. Assuming that the transaction in ProCD was between merchants, I would think that the terms the seller sought to enforce would be a material alteration.

Miguel

From: "Keith A. Rowley" <keith.rowley@CCMAIL.NEVADA.EDU>  
Date: October 13, 2004 12:52:44 AM EDT  
To: AALSContracts@LISTS.UMN.EDU  
Subject: Re: [AALS-KS] ProCD v. Zeidenberg  
Reply-To: aalscontracts <AALSContracts@LISTS.UMN.EDU>

What is the sound of one form battling?

Both the comments to § 2-207 and case law support your position that a written confirmation that varies the terms of a prior oral agreement between the parties can trigger a "battle of the forms." See UCC § 2-207 cmt. 1; see, e.g., *Tubelite v. Risica & Sons, Inc.*, 819 S.W.2d 801 (Tex. 1991) (Section 2-207 "is intended to address ... situations ... in which agreement has already been reached by the parties, either orally or through informal writings, and is later followed by a formal confirmation containing both terms agreed upon and additional terms not discussed ...."). *Tubelite's* not the greatest case, but it's the one I have readily at hand.

Keith

From: John Haley <johaley@WULAW.WUSTL.EDU>  
Date: October 13, 2004 8:41:23 AM EDT  
To: AALSContracts@LISTS.UMN.EDU  
Subject: Re: [AALS-KS] ProCD v. Zeidenberg  
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The retail offer and acceptance rule is not as settled or uniform as stated. In many jurisdictions the seller is deemed to make the offer by placing the goods on the shelf. The buyer accepts by taking it to the counter for payment. see *Fender v. Colonial Stores, Inc.* 138 Ga App. 31, 225 S.E.2d 6791 (1976). See Annot. 78 A.L.R. 3d 696 (1977).

John O. Haley

From: Val Ricks <ricks@STCL.EDU>  
Date: October 13, 2004 9:55:44 AM EDT  
To: AALSContracts@LISTS.UMN.EDU  
Subject: Re: [AALS-KS] ProCD v. Zeidenberg  
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Courts in a number of cases have held that

"A merchant who utilizes the self service shopping method thereby makes an open invitation to the public to enter his store and to inspect and take possession of any item so displayed. The merchant's act of stocking these self-service displays with goods thereby makes an offer to the shopper to enter an contract for their sale."

Barker v. Allied Supermarket, 596 P.2d 870, 871-72 (Okla. 1979) (case in which a bottle of soda exploded in the shopper's cart on her way to the checkout counter). Likewise, the shopper's "act of taking physical possession of the goods with the intent to purchase them manifested an intent to accept the offer and a promise to take them to the check-out counter and to there pay for them." Fender v. Colonial Stores, Inc., 225 S.E.2d 691, 693-94 (Ga. Ct. App. 1976) (another exploding bottle case). Courts stick with this position even though stores universally allow the customer to put items back before paying for them. See Barker, 596 P.2d at 872; Fender, 225 S.E. at 694.

So far as I can discern, the push in these cases is for implied warranties to apply on the way to the checkout counter so that the purchaser can use them in the personal injury suit against the store or product maker.

Val

From: Bill Whitford <whitford@LAWMAIL.LAW.WISC.EDU>  
Date: October 13, 2004 10:35:37 AM EDT  
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Subject: [AALS-KS] ProCD v. Zeidenberg  
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With respect to the debate concerning the offer and acceptance issue in ProCD v. Zeidenberg, I call attention to the just published symposium issue of the Wisconsin Law Review [vol. 2004, issue #2]. The issue contains three articles discussing the case, by James J. White, Clayton Gillette, and Jean Braucher. None of the articles defend Easterbrook's legal analysis: White describes Easterbrook's analysis of the Article 2 issues in Zeidenberg's case as "sloppy" (p. 741). I would also like to call attention to the neglected trial court opinion in this case, to be found at 908 F. Supp. 640. It contains a much sounder analysis of the legal issues, in my opinion.

The same issue of Wisconsin Law Review contains, in an appendix, an edited transcript of a videotaped interview with Matt Zeidenberg and his attorney in the case. A digitalized version of the videotape can be seen at <http://students.law.wisc.edu/lawreview/zeidenberg>. In the interview Zeidenberg relates that the notice contained on the box (about terms inside) was in 6 point type. The same box stated in larger type "unlimited access and unlimited use of all 80 million listings, period. Other phone books limit you to a mere 500 records." (emphasis added) Could that language be reasonably interpreted as promising there were no limits on use of the data? If so, is it proper to limit that term by fine print on a form contained in the box, or in a pop-up page when the CD is loaded? That is another 2-207 issue not explored in the case. And frankly I certainly hope that the answer is no. In the interview Zeidenberg indicates that the promise (as he understood it) of unlimited downloading was the single most important consideration in his selection of ProCD over competing products (which were already available on the market).

A limited number of the symposium issues of the Wisconsin Law Review will be available to contracts teachers at no cost, through the generosity of Olin Center for Law & Economics at the Michigan Law School and the Contracts Enrichment Fund at Wisconsin Law School. These two organizations were the principal sponsors of the Freedom From Contract conference, the papers from which constitute the symposium issue of the Wisconsin Law Review. Look for a post on this listserv later this week with instructions about how to order a free copy of the Review if you are interested.

Bill Whitford

From: Frank Snyder <[fsnyder@LAW.TXWES.EDU](mailto:fsnyder@LAW.TXWES.EDU)>  
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A point I was trying to make is that if putting the box on the shelf is an offer, and we assume that an offer can include terms that are incorporated by reference (Carnival Cruise Line), then Zeidenberg's argument was the worst one he could have made. He should have argued, to the contrary, that he was the offeror. That seems to me to be the only way he'd have a chance of knocking the terms out. If ProCD is the offeror, then Easterbrook is right (though for the wrong reason) in saying that 2-207 doesn't apply.

Easterbrook aside, however, it's hard for me to have sympathy with Matt Zeidenberg. We're not talking about a victimized consumer here. We're talking about a commercial buyer. He concedes in his interview that he was deliberately and knowingly acting as a free rider in appropriating the work product that ProCD had paid millions of dollars to develop. He seems to have been aware that he could have bought the commercial version but bought the consumer version because it was cheaper. Zeidenberg and his lawyer are

both nice guys, but I don't believe he met the good faith requirement that the Code imposes on commercial buyers.

Frank

From: Avery Katz <ak472@COLUMBIA.EDU>  
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Subject: Re: [AALS-KS] ProCD v. Zeidenberg  
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Frank Snyder's appeal to the implied duty of good faith in Zeidenberg is plausible, but I think there is a more straightforward way to approach the case. I don't think that a representation of "unlimited access and unlimited use", appearing on a consumer off-the-shelf version of a product which is also offered in a more expensive commercial version and which reflects substantial costs in development, can be reasonably interpreted as authorizing commercial resale of the data by a competitor. Cf. *Lefkowitz v Great Minneapolis Surplus Store*, except I think that Zeidenberg presents a stronger case for the seller. And even in the pure consumer setting, facially unlimited offers often are more reasonably interpreted in context as subject to implied limits. For example, a representation that product X won't upset your stomach ought to be interpreted as saying that product X won't upset your stomach when consumed in reasonably foreseeable amounts. To the extent Bill Whitford rests his argument on the text alone, I find his interpretation to be wooden. Not that I find Easterbrook's approach to the case to be any less wooden.

Avery Katz

From: Bill Whitford <whitford@LAWMAIL.LAW.WISC.EDU>  
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With respect to Snyder's recent post, incorporation of fine print terms by reference on the box when those terms are 6 point type and other terms in 8 point type seemingly conflict with the referenced terms simply raise issues that require discussion. What terms are being offered when the box is put on the shelf? I stand corrected that this is not a 2-207 issue. But it is an issue.

Avery Katz suggests my suggested interpretation of the explicit terms on the box (unlimited use) is wooden, and he and Frank Snyder suggest that Zeidenberg was in bad faith. It must be remembered in this case that the phone data was in the public domain. As Zeidenberg makes clear in his interview, he stumbled onto this whole problem when he became aware of the Feist case, making phone records public domain information. He

is not a lawyer and he learned about the decision after buying the ProCD product for personal use that was fully appropriate under the terms of any "contract" that ProCD included in the box. In the promotional material accompanying the product, the President of ProCD discussed Feist and how the company had obtained the basic data for nothing (though compiled at great expense by phone companies -- one of whom the founder of ProCD worked for before quitting to found ProCD). One can argue that this is exactly the policy underlying the public domain principle of the copyright laws - to make more available public domain data. Zeidenberg was doing nothing more than ProCD had done -- at some expense to himself, making more available public domain data that ProCD had itself obtained at no cost. A close reading of the opinion and the interview will indicate that Zeidenberg was very careful to avoid redistributing copyrighted software contained in the ProCD product.

Easterbrook held that contract could trump this policy of the copyright laws. One can hardly, in my judgment, characterize Zeidenberg's contrary position as held in bad faith. It was sustained in the court below. It was defended in the 7th Circuit in an amicus brief by Mark Lemley, a noted and published authority on copyright.

Bill Whitford

From: Bill Henning <bhenning@LAW.UA.EDU>  
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Everyone,

Because of my position as NCCUSL Executive Director I generally stay off the listserv debates regarding Article 2, but this issue is one with which I've wrestled for a long time so I'll break my own rule and jump in. Bear in mind that the position articulated here is my own and not necessarily that of NCCUSL or any of its members.

Regarding retail sales generally, notwithstanding the decisional law it seems to me pointless to try to locate offer and acceptance. There has been a "sale" and one of the incidents of the sale is an implied warranty of merchantability (note that 2-314 refers to "contract of sale" but that term is itself defined in 2-106(a) to include a present sale). This is consistent with 2-204, which provides that a contract for sale (again, including a present sale) can be formed by conduct of both parties which recognizes the existence of a contract. The application of 2-314 to a bottle that explodes prior to sale is, I think, best understood as an extension of Article 2 by analogy.

Regarding Judge Easterbrook's analysis, of course 2-207 does not require two forms and therefore he's being sloppy. Among the possibilities are an oral offer followed by a definite and seasonable expression of acceptance in a form, or a contract formed orally (or by email, or Instant Messenger, etc.) and a single form sent in confirmation.

Nevertheless, I buy Judge Easterbrook's approach as being an appropriate solution to a problem not envisioned by the original drafters, but with qualifications. Here is perhaps a more acceptable analysis: If a reasonable buyer would know or have reason to know that a seller does not intend a transaction to be final absent assent to later-provided terms, then the parties are still negotiating even though delivery has occurred and payment has been made. Seen this way, the terms in the box are not a 2-207 confirmation in that there is nothing yet to confirm. The buyer's use of the goods in this context would signify assent.

Set out below my signature is an elaboration of this theory that states most of my qualifications. It comes from a draft of amended Article 2 (November 1999) and was abandoned, but I always thought there was a lot to it (even though it did test the limits of what one can accomplish by way of comment). The text would have been part of 2-204.

Regards,

Bill

[Operative part of proposed Section 2-204(d)] ...[I]f a party uses language that indicates, or if circumstances give notice that a party has, an intention to defer contract formation pending agreement by the other party to terms proposed prevents contract formation until the other party agrees to the terms or conduct by both parties recognizes the existence of a contract.

Reporter's Note - Subsection (d) states the general proposition that the time of contracting can be postponed even though the language or conduct of the parties would ordinarily indicate that a contract exists. It deals, *inter alia*, with what is sometimes referred to as a "rolling" contract. In a typical case, the buyer will call the seller's toll-free telephone number and order goods, giving the seller a credit card number to pay for all or part of the price. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F. 3d 1147 (7th Cir. 1997). The seller will then ship the goods with its standard terms, and the issue is whether the buyer's retention of the goods will constitute acceptance of the seller's terms. If i) the buyer knows, perhaps because of the telephone conversation or from material in an ad or catalog, or from the circumstances surrounding the transaction has notice, perhaps having dealt with the seller before or having dealt with another seller in a similar transaction, of the seller's intention to defer contract formation, ii) the standard terms are packaged in such a way that they would come to the attention of a reasonable buyer, and iii) the terms expressly permit the buyer to avoid contract formation by returning the goods without use (except as may be necessary to have an opportunity to review the terms and as stated below), then the terms should be effective if the buyer chooses to retain the goods (subject, of course, to policing doctrines like unconscionability applicable to all terms in a contract for sale). Since the transaction has many of the features of a sale on approval, the buyer should be permitted to make use of the goods consistent with that concept for the purpose of trial before making a final decision whether to return them. Of course, they must still be in like-new condition upon their return. Under no circumstances should a seller's standard terms in a rolling contract be permitted to vary terms, like price, that

were expressly agreed to by the parties. A seller should not be able to revoke its offer after initiating the process. The imposition of a fee, such as a restocking fee, upon return of the goods is inconsistent with the seller's claim that contract formation is being deferred.

If the buyer does not know or have notice of the seller's intention to delay contract formation, a contract may be formed when the seller takes the buyer's credit card number. The terms of the contract are those expressly agreed to by the parties and terms derived from any relevant course of dealing or usage of trade, supplemented by the gap-filling provisions of this Article. A record containing standard terms that accompanies the goods should be treated for the most part like a confirmation under Section 2-207(b); that is, the terms are proposals to modify the contract and are not effective unless expressly agreed to by the buyer. However, the buyer should be deemed to have agreed to any terms that are more favorable to the buyer than those contained in the contract.

From: John Kidwell <jkidwell@WISC.EDU>  
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While I usually agree with Frank, I must add, "not always." I doubt that Pro CD had spent "millions of dollars" to develop its product. I am quite sure that they had created their product by free-riding on the efforts of telephone companies which HAD spent millions of dollars compiling the information and verifying its accuracy. Zeidenberg was seeking to do to ProCD almost exactly what they had done to the telephone companies. But the Feist decision by the United Supreme Court had held that these compilations (the white pages) were not copyrightable, and that free-riding (by borrowing non-copyrightable compilations of information) was OK. What ProCD was seeking to do with the shrink-wrap contract was to use state contract law to defeat the Supreme Court's ruling that the listings were in the public domain. The question of whether that should be permissible represents another interesting and controversial part of the case.

It is interesting to note that the Supreme Court's decision in Feist seems to go out of its way to say that it would be unconstitutional for Congress to act under the Patent and Copyright clause to extend protection to telephone white pages, whereas a Federal Court, in purporting to construe a state statute, has as a practical matter overturned that outcome, since the ubiquitous shrink- or click-wrap "contract" provides an almost zero-cost way to prohibit the borrowing - and with none of the balancing which copyright law incorporates.

There is little doubt that Matt Zeidenberg was seeking to be a free-rider. But he believed that the U.S. Supreme Court had announced that he had a constitutional privilege to do so!

John K.

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I have a different take on PRO-CD. It seems to me that there are two distinct contracts. Z entered into a contract of sale with the retailer. If the box was empty or the disc was corrupted, he would have a warranty claim against the seller. He then took the disc home, put it into his computer and agreed to a separate license agreement with Pro-CD. Indeed, he may have had a separate contract with Pro-CD at the moment of sale. A unilateral contract. Analogy: a purchaser of a New Ford, say, enters into a contract of sale with the dealer. At the same time, the buyer is handed a written warranty made by the Ford Motor Co. The warranty is a unilateral contract ("If you buy a new Ford, we promise. . .") Under this analysis, 2-207 is not in the picture and Easterbrook got the right result despite the incredibly sloppy reasoning.

From: "Flechtner, Harry" <FLECHTNER@LAW.PITT.EDU>  
Date: October 13, 2004 1:10:52 PM EDT  
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I just wish to point out that Judge Easterbrook states as a fact that "[t]he database in SelectPhone [the database at issue in Zeidenberg] cost more than \$10 million to compile and is expensive to keep current." I assume the \$10 million refers to ProCD's costs (but maybe I'm naïve). On the other hand (and here I am more than usually susceptible to correction since this is outside my area) the cost incurred by those who assembled the white pages involved in Feist apparently did not entitle them to protection. If costs-incurred were not relevant to copyright protection, should they be relevant to contract protection?

Harry M. Flechtner