Chapter 5: Regulating the Bargaining Process

A. Introduction

B. Duress

1. A Note on the Relationship of Duress to the Pre-Existing Duty Rule:

a. Suppose the seller of goods threatens to breach its sale contract unless the purchaser agrees to pay a higher price. If the seller agrees, is the new promise enforceable? No: there was no consideration for the promise to pay a higher price except for the seller's return promise not to breach, and the seller does not have the right to breach.

b. Suppose, though, that the seller in exchange for the higher price agrees to deliver the goods early. Now, the pre-existing duty rule is not implicated, and the contract is supported by consideration. Should the new terms (higher price in exchange for early delivery) be enforced?

c. If the new contract was freely negotiated, we should have no problem enforcing it. But what if the buyer needed the goods and could not obtain a replacement elsewhere? In such circumstances, the courts have been willing to let the buyer out of her promise to pay a higher price on the theory of duress (or "economic duress," to distinguish it from threats of physical injury).

2. Hypos:

a. Seller delivers goods on 90 days credit. Sixty days after delivery, buyer offers to pay only 75% of what is owed and asserts that he will never pay more. Seller needs the money for mortgage payment. Duress? No.

b. Workers on Alaska pipeline are supposed to be paid every week. Employer offers 80% of wages one day before pay day, threatening to pay no more. Without funds, workers will be unable to leave area or purchase necessities. Duress? Probably. What if the employer asserts that laborers did not perform as they promised under the employment contract?

c. Reconsider *Alaska Packers' Ass'n v. Domenico* (p. 381). Assume that the workers alleged that the fishing nets provided by the employer were inadequate, and assume further that such nets were in fact adequate. Does duress exist? What if the workers erroneously but in good faith believed that the nets were inadequate?

3. *Wolf v. Marlton Corp.* (p. 403): Builder refused to close the sale of a house after the buyers threatened to resell the house to some undesirable purchaser and thereby ruin the builder's business reputation. The threat was made because the buyers wanted out of the contract without paying the amount agreed upon in the contract as liquidated damages. (Do not assume such a clause is enforceable. Apparently, the buyers thought it was.) *Held*, such facts will support a finding of duress. Note that in this case the builder did not make a new promise in response to the wrongful threats but instead refused to proceed with the original contract. The court apparently holds that these threats by the buyers constitute a material breach of contract, justifying the builder's refusal to continue.

4. *Austin Instrument, Inc. v. Loral Corp.* (p. 409):

a. Does the pre-existing duty rule apply here? No: As part of the renegotiation, Austin Instrument agreed to do new work under the second contract.

b. What does the court tell us constitutes economic duress? See the second full paragraph on page 410. Why is it relevant that Loral was unable to obtain a new supplier on such short notice? Why was Loral's judicial remedy inadequate? Note that Austin's breach of this contract likely would cause Loral to become ineligible to bid on future government contracts. The loss to Loral from this future injury is substantial but not susceptible of reasonably measurement and so likely nonrecoverable.

c. Why might the trial court have come to an opposite conclusion?

5. *Post v. Jones* (Note 5 at 417): A ship washed ashore in circumstances such that neither the crew nor the cargo could be saved unless nearby ships transported both several thousand miles. The nearby ships required the master of the injured vessel to auction his cargo, and the masters of the seaworthy vessels bid insignificant amounts and thereby allegedly purchased that cargo. *Held*, the sales will not be enforced, although the ships which saved the crew and cargo are entitled to reasonable compensation for their salvage efforts.

a. Quaere: is it relevant whether the nearby vessels had a duty to render assistance to crew and cargo? Arguably, the law of salvage is like the doctrine of conditional privilege; that is, perhaps the nearby ships were required to save the injured ships and its cargo and so they cannot threaten otherwise.

b. Suppose only a single ship had the ability to rescue the injured ship, and assume that even without assistance, the crew of the injured ship would have been able to reach shore safely. That is, assume that all that was at stake was the cargo of the injured ship. In such circumstances, the parties are faced with a *bilateral monopoly*: there is but a single seller (the injured ship) and a single buyer (the rescue ship). Does one have more market power than the other? Note that together, the two ships can get the cargo to market cheaply, thereby generating a large profit. But separately, neither has anything. Thus, each can threaten to let the cargo of the injured ship sink. There is a profit to be made, and each wants the lion's share. Should a court rearrange the parties' agreement in such circumstances? Probably not.

C. Fraud

1. Hypos:

a. Fan shoves a paper in front of Star and asks for an autograph. Unknown to Star, the paper is a contract selling Star's home to Fan for $100. Binding? No: *fraud in the execution.*

b. Husband asks wife to sign a document, saying it is a form qualifying them for reduced property taxes on their home. In fact, it is a contract transferring her share of the home to him for $100. Binding? Fraud in the execution? Probably, even though she knows she was signing a document having legal significance. The rationale is less clear in this case but presumably is based on an ad hoc *fiduciary relationship* (that is, the victim places trust in the counter party, and the counter party accepts that trust. Most clearly a problem when the counter party sought the trust, as here). See Restatement of Contracts (Second) §169 (p. 21).

c. Husband asks wife to sign a document transferring her share of the home to him to reduce taxes. In fact, it has no effect on taxes. Binding? Clearly not fraud in the execution; possibly fraud in the inducement.

2. Willful and Negligent Misrepresentation

a. *Spiess v. Brandt* (p. 421):

i. Facts: Two brothers purchased a resort in Minnesota for $95,000, payable $10,000 down and the remainder over time. The brothers had no experience in running a resort, and they expected to make payments on the purchase-money note out of earnings. In fact, the resort had made little, if any, money over the past several years. The brothers had requested to see the books of the enterprise, but the sellers kept putting them off. Now that the brothers have run the resort for a couple of years and cannot make the note payments, they seek to rescind the contract.

ii. *Held*, recession as requested by buyers because the sellers' statements that they had made "good money" during the previous few years and their suggestions that the buyers would make sufficient money to pay off the loan constitute fraud in the inducement.

iii. If the sellers had said that their resort offered "more fun to its patrons than any other resort," would that statement be fraudulent if some patrons of other resorts had more fun? Is a statement that they were "making good money" similar?

iv. Why is it relevant that fair appraisals of the resort showed that its value was no less than $100,000? What must be proved to establish fraud in the inducement? See the top of page 423. Must the buyers show that the resort is worth less than they paid or only less than they had been told it was worth? Note that the buyers spent considerable funds on capital improvements. How should that affect the outcome? Are the buyers complaining that they sellers did not make "good money" or that they, the buyers, did not make "good money"?

(v) See Restatement of Contracts (Second) §§162 and 164 (at 19-20). Note that a fraudulent misrepresentation and a material misrepresentation are treated the same under Restatement of Contracts (Second) §164. What is the difference between a "fraudulent" misrepresentation and a "material" misrepresentation? See Comment b. to §162.

b. *Dannan Realty Corp. v. Harris* (p. 428)*:* The plaintiff purchased a building, allegedly based on misrepresentations as to the annual expenses. The contract of sale had a merger clause which included the statement that no representations had been made regarding income or expenses of the building and that the buyer had inspected the premises and takes the building "as is." The court enforces the specific language of the disclaimer, saying (at the top of page 428-29) that: "[s]uch a specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral representations." Is that true? Does the existence mean that there was no reliance or that the reliance was not justified? Can one disclaim fraud?

i. Why might a party include such a disclaimer if not in an attempt to disclaim fraudulent conduct? See Note 3 (at 434-35) and consider the case of a party unlikely to appeal to the sympathies of a jury (such as a bank or an insurance company).

ii. A rule that a specific disclaimer can be effective, like any rule, will be both over- and under-inclusive. Should we care more about the possibility of fraud or the possibility of post-contractual holdup? Who should be protected, the ill-advised or the disreputable?

c. Remedies for Fraud: In Note 4 (p. 435), the textbook refers to a restitutionary remedy. Restitution means giving back the value of that which was taken. Thus, it requires a showing that the defendant now has some value obtained from the plaintiff. A claim giving rise to restitution is also called a claim alleging unjust enrichment.

3. Duty to Read

a. Hypo: A homeowner buys a new house and ships her goods using a national moving company. When they pick up the goods they ask her to sign a consignment receipt describing the goods being shipped. When the goods arrive at the new house, the movers request the homeowner to sign a receipt that the goods were delivered. After the homeowner unpacks, she discovers that some goods are missing and others are damaged, with a total loss of $5,000. The moving company refuses to pay, saying that the receipt she signed on delivery contained a statement that the homeowner acknowledges that all goods have been received in satisfactory condition. In addition, the document she signed on pick-up limits the company's liability to $1.00 per pound of goods. Because the damaged goods weigh 50 pounds, the moving company says its liability is limited to $50 in any event. What result?

i. Is it relevant what the driver said to the homeowner when the goods were picked up and delivered?

ii. Is it relevant how the clauses were displayed in the writing or how they were worded?

b. *Merit Music Service v. Sonneborn* (p. 438): Bar owners borrowed $1,500 from a lessor of bar amusement equipment. As part of the transaction, the bar owners agreed to rent a music machine and a bowling machine. The writing signed by the bar owners provides that they will pay a minimum of $42 per week for the equipment and that they will not permit other, similar equipment in the bar during the duration of the contract. The bar owners allege that these provisions were added to the writing after the contract had been agreed upon and after they had signed the document, but they admit they did not read the writing prior to signing it. *Held*, even though the terms are harsh they are enforceable if there was informed consent, and the bar owners have failed to establish a lack of informed consent because they cannot prove what was in the writing when they signed it.

c. *Caspi v. Microsoft Network, LLC* (1999): MSN included in its on-line terms of service a forum selection clause providing that the courts in King County, WA, had "exclusive jurisdiction and venue" over all disputes. As a result, out-of-state users of MSN would be forced to litigate disputes in a distant (and so expensive) forum. The plaintiffs argued that the forum selection clause should not be treated as part of the agreement because they did not receive adequate notice of the agreement. *Held*, the clause is valid because it was not unfairly hidden and the plaintiffs know they were entering into a contract.

i. The court's statement that the plaintiffs knew they were entering into a contract eliminates the argument that this was a fraud in the execution case.

ii. Is the holding of this case consistent with modern economic practices? Is it relevant that almost no user reads the full contract and that MSN was aware of that? What limits might a court impose on the terms of the contract as written by MSN?

iii. Suppose an auction house prepares a brochure of art to be auctioned that day, with a detailed description for each piece of the artist and his other works. If the back page of the brochure includes a statement that "no representations have been made concerning the identity of the artist," would that clause be effective?

iv. A computer store once hung a banner over the front door with "We Want Our Customers to Be Happy With Every Purchase" in large print. Below that line in much smaller print read" "So be careful what you purchase. No refunds." How is this different from *Caspi*?

v. If we agree that cases such as *Caspi* are unfair in today's world, what type of limits should be imposed, procedural or substantive? What is the difference? If a term is eliminated from a contract, what should cover the issue? Why do some loan agreements provide that interest on late payments will accrue interest "at 28% per year, or the highest rate allowed by law, whichever is higher"?

4. Disclosure and Concealment

a. *Obde v. Schlemeyer* (p. 449): The purchasers of an apartment house sue the sellers for fraudulently concealing a termite infestation. The sellers concede that they knew of the infestation but they took steps to eliminate the problem. However, they did not accept the advice of the pest control specialist to treat inaccessible areas of the structure. Instead, they only treated and repaired visible areas. *Held*, the sellers had a duty to inform the buyers of the possible termite infestation because this defect in the structure was both *dangerous* and *latent* (i.e., not readily observable upon reasonable inspection). Note that by partially treating the infestation, the sellers took steps to conceal the defect. Would it be reasonable to require a seller to disclose any defect of which the seller is aware?

i. Buyer purchases the home of Seller for $100,000. Shortly after moving in, Buyer discovers that the structure is infested with wood-boring beetles. Seller did not know of the infestation. Buyer sues to rescind the contract or for damages. Is *Obde* authority for the proposition that Buyer should win? Why not?

ii. Same as above but assume Seller knew of the infestation. Is *Obde* now on point? Why not?

iii. Now assume that there is no pest problem, but that Seller had learned the construction of a highway would begin nearby, and that such construction would substantially diminish the value of the house. Any relief for Buyer? Does it matter how Seller came by the information? If asked, should Seller be permitted to lie?

b. *Reed v. King* (p. 452): In California, the seller of real estate has a duty to disclose "where the seller knows of facts *materially* affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer." (p. 453) What might affect the desirability without affecting the value? What information is not "within the reach of the diligent attention and observation of the buyer"? Should the focus be on whether can obtain the information or how the seller learned of the information?

c. *L & N Grove v. Chapman* (1974): The seller of property, an experienced real estate broker, sold land in 1966 that became substantially more valuable when the construction of Disney World began in 1970. The seller seeks to recover from the buyer the profit that the buyer made by reselling the property after the Disney World construction began. When purchasing the land, the buyer said that he intended to use the land as an orange grove although he in fact bought the land because he believed it was well situated relative to the future amusement park. *Held*, even though the buyer misrepresented his intentions with respect to the property, no fraud was committed because the buyer did not have inside information that the land would increase in value but instead merely exploited information available to all. Should this case have come out differently if the buyer had been an executive of Disney? If so, why? Who would the buyer have victimized?

d. What factors are important? Buyer vs. seller? Casually-acquired information vs. expensive information? Nondisclosure vs. concealment?

e. Problems (p. 459)

i. Problem a: While the seller has important, casually-acquired information, it is information that is easily obtainable. What if the frat house was down the block? Around the corner? Two streets over?

ii. Problem b: Is John's information casually acquired? It seems to be expert information (broadly defined)? Should a buyer be obligated to educate a seller as to the value of the goods offered for sale?

iii. Problem c: Now it is clear that the seller has made a mistake rather than an error of judgment. Or was it an error in judgment hiring an amateur to work at the store? An error of judgment in how to operate the store?

iv. Problem e: Seems a pretty clear violation of the (implicit) terms of the employment contract.

f. Hypos:

i. Largest sapphire in the world for sale at school rock show.

ii. What is insider trading. Should it be illegal? Why?

D. Capacity to Contract

1. Infancy

a. *Kiefer v. Fred Howe Motors, Inc.* (p. 465): What is the appropriate result if a minor misrepresents his age to obtain credit? One possibility is to hold an estoppel prevents the minor from disaffirming the contract; a second possibility is to permit disaffirmance but allow the minor to be sued for deceit. Is there a difference? The court seems to think that the tort action will, in general, result in less loss to the minor. Is that necessarily true?

i. What does it mean when the court says the minor was "emancipated"?

ii. Why was there no misrepresentation in this case?

b. *Halbman v. Lemke* (Note 3, p. 470): A married, fully emancipated minor purchased a car. Thereafter, the car broke, and the minor took the cars for repairs. He then refused to pay for the repairs, disaffirmed the original sale, and sought a refund of his purchase price. Directly above his signature on the sale contract was a form representation that the minor was at least 21 years of age. At issue was the minor's ability to disaffirm the contract, whether he would be liable for misrepresentation, and whether he would be responsible for the damage to the car. *Held*, the minor need only return the car as is at the time of disaffrmance and is not responsible for use or depreciation.

c. Questions:

i. Does it make sense to distinguish between situations in which the minor is the defendant in a breach of contract action and situations in which the minor is a plaintiff seeking recovery of his consideration? Should the credit risk allocation of the parties be determinative? Probably not: we probably should protect against a hasty expenditure just as we protect against a hasty encumbrance. If so, note that a minor cannot make a (legally effective) gift.

ii. Does it make sense that a minor is responsible for his torts but not for his contracts?

2. Mental Illness

a. *Faber v. Sweet Style Manufacturing Corp.* (p. 474): Plaintiff was a manic-depressive who contracted to purchase certain land from the defendant. The court finds that the defendant understood his actions and the consequences that would follow from them but that these actions resulted from the compulsion of the disease. Accordingly, if the parties can be returned to the status quo ante, the plaintiff can disaffirm the contract. Quaere: to what extent does a case such as this encourage relatives of wealthy, eccentric individuals to try to have such individuals declared incompetent? Indeed, who brought this action, and why did the plaintiff not testify at trial?

b. *Uribe v. Olsen* (Note 1, p. 478): The defendant seeks to have a contract for sale set aside on the grounds that the seller was incompetent. Here, the seller has been declared incompetent, and the plaintiff is the seller's daughter and conservator. Why is the contract enforceable in this case? The seller behaved normally in her attempt to sell the land by seeking out a broker and requesting a national listing. In addition, the seller consulted with an attorney throughout the negotiations. Indeed, she rejected the initial offer as too low, and only her higher counter-offer was accepted. Why does the court say: "In fact, defendant's primary dissatisfaction with the deal appears to be the price obtained, not the fact that the property was sold."

c. Restatement of Contracts (Second) §§13, 15-16:

i. What is the difference between parts (a) and (b) of section 15(1)? Why is there that difference?

ii. How does section 16 differ from section 15? There is no subsection in §16 that corresponds to §15(2). What is there any difference? Because §15(2) only deals with situations in which the other party was (and should have been) unaware of the mental defect, and no allowance of any kind is make for an intoxicated person unless the other party has reason to know of the intoxication.

E. Public Policy Limitations

1. *Watts v. Malatesta* (p. 481): Plaintiff alleges that he bet and lost $37,773, and he seeks return of that money from defendant, his bookmaker. However, the evidence also shows that the plaintiff made several additional bets which he won, and he apparently was paid his winnings and he makes no offer to repay them.

a. Under the common law, gambling contracts were illegal and so unenforceable. How has the relevant statute involved in this case changed that outcome?

b. What motivates the majority to allow the plaintiff but not the defendant to obtain the benefit of the statute allowing recovery of his losses?

c. If casual gambling and maintaining a betting establishment were illegal, would cases such as the present one arise? When?

d. The dissent says that the majority opinion encourages gambling. Is that true? Does it encourage people to run betting establishments?

2. *In Re Baby M*. (p. 487): After delivery, a surrogate mother refuses to surrender her parental rights to the father and his wife. Under state law, paying money to adopt a child is illegal (with some exceptions not relevant here). To avoid the strict application of that law, the parties to the contract included only the father, mother, and the mother's husband. The Supreme Court of New Jersey holds that the surrogacy contract is unenforceable because under state law parental rights can be terminated only for lack of fitness. In addition, custody of a child as between parents should turn on the best interests of the child, an interest allegedly not taken into account in the contract. As to the last point, what does the famous story of the wisdom of Solomon tell you?

F. Unconscionability: In general, courts look for elements of both procedural unconscionability (i.e., a defect in the bargaining process) and substantive unconscionability (unusually harsh or surprising terms).

1. *Williams v. Walker-Thomas Furniture Co. I* (p. 53): The plaintiff purchased a stereo for $514 from the defendant on credit. Under the terms of the sales agreement, each purchase made by a buyer is secured by any property purchased from the defendant with an outstanding balance. Ms. Williams defaulted on her payments, and Walker-Thomas attempted to enforce the cross-collateralization provision by repossessing all her prior purchases. While this trial court was willing to uphold the contract because Ms. Williams's assent was not obtained by fraud or misrepresentation. it strongly condemned the sales practice of Walker-Thomas. The court observed that Ms. Williams was "a person of limited education separated from her husband," and that "with full knowledge that [Ms. Williams] had to feed, clothe, and support both herself and seven children on [her $218 monthly stipend from the government, Walker-Thomas] sold her a $514 stereo set. Is the court suggesting that Walker-Thomas should have refused to sell Ms. Williams the stereo because it, rather than she, knew what was best? Why is Ms. Williams's marital status relevant to the opinion? Is the court suggesting that when

a person accepts government stipends, she forfeits her right to be treated as an adult capable of making her own decisions?

2. *Williams v. Walker-Thomas Furniture Co. II* (p. 55):The circuit court, per Judge Wright, reversed the holding (but not the spirit) of the lower court. One possible interpretation of the opinion is that the cross-collateralization term is so burdensome and unusual that Walker-Thomas must prove that Ms. Williams knew of the term and understood it. If this is the proper interpretation of the opinion, the opinion seems both justified and conventional. But why does the court speak of unconscionability? If the term is unenforceable even if understood by both parties, who will be worse off? Presumably other potential customers of Walker-Thomas who cannot obtain credit elsewhere and, after this opinion, cannot obtain credit from Walker-Thomas either.

3. *Seabrook v. Commuter Housing Co.* (p. 501): Is it fair to say that the terms of paragraph 19 (set out at pages 503-04) likely would not be understood by a typical tenant as requiring the tenant to remain liable on a lease for an indefinite period of time? If so, then this case again might simply stand for the proposition that a court will refuse to enforce an unusually harsh term without proof of actual understanding of the term. Note, though, that the court says that the tenant lacked meaningful choice. Can this be true? And if so, might not this suggest that the cost of tailoring contracts to individual tastes in this market outweigh the perceived benefits to perspective tenants?

4. *Henningsen v. Bloomfield Motors, Inc.* (p. 504): Again, one possible interpretation of this case is that the limited import of the warranty term likely would be misunderstood by the typical car buyer. Note, though, that a car manufacturer who offers a minimal warranty presumably will spend less on quality control than a manufacturer who offers a longer warranty, all other things being equal. Can this case be justified on the theory that car accidents injure third parties, and so the courts properly can police car contracts to ensure that cars are safe? Note in response that third parties injured by defective cars presumably can sue the manufacturers directly, and fear of such lawsuits should encourage the manufacturers to produce safer cars. Can this case be described as involving both procedural and substantive unconscionability (that is, as having a defect in the bargaining process as well as a harsh or unfair term)? The court says yes: the procedural element is the inability to avoid the harsh term because (a) an automobile is a necessity and all new car sellers use the same contract, and (b) the limitation on consequential damages is exceptionally harsh given the substantial likelihood that if a car suffers is improperly manufactured, the injury likely will be substantial.

5. Contracts Limiting Negligence Liability (Note 7, p. 511);

a. *Mutual Marine Office, Inc. v. Atwell, Vogel & Sterling, Inc. Held*, that the exculpatory clause is enforceable. Was the low price charged by the defendant to perform the inspection relevant to the outcome?

b. *Ciofalo v. Vic Tanney Gyms, Inc. Held*, that the exculpatory clause is enforceable. Now overruled by statute.

c. Public Policy Considerations: If we use the term "public policy" to mean legitimate and substantial interests of nonparties to the contract, are there any public policy interests relevant to these contracts? Could a purchaser of an automobile agree that the manufacturer of tires would not be responsible if the tires negligently blew out? Should a surgeon or dentist be permitted to contract around negligence?

G. The Statute of Frauds

1. Introduction: The Statute of Frauds requires, when it applies, a written memorandum signed by the party to be charged.

a. Note that the Statute of Frauds does not require that the entire contract be reduced to writing; in general, the writing need only establish that some contract was formed. However, the writing must be signed by the party to be charged; that is, signed by the defendant. Note that if the writing has been signed by only one of the parties, the contract may be enforceable in only one direction. However, if a nonsigner brings an action on the contract, the nonsigner cannot escape his duties under the contract.

b. The Equal Dignity Rule: If the Statute of Frauds applies to some contract and there is a memorandum that is signed by an agent of the party to be charged, the agency relationship becomes subject to the Statue of Frauds so that a written memorandum of the agency relationship must be signed by the actual party.

c. Many courts have shown great hostility to the statute of frauds. For example, courts have held that a memorandum on letterhead of the defendant satisfies the Statute because the letterhead can be treated as a signature that has been ratified by the party.

d. The most common transactions covered by the Statute of Frauds are:

i. Transfers of Interests in Real Estate: In most jurisdictions, leases in excess of one year are covered as well as sales.

ii. Sales of goods with a price of $500 or more. U.C.C. §2-201(1).

iii. Contracts including an obligation the performance of which cannot be performed within one year from the making of the contract.

e. Hypos:

i. Suppose I agree to work for you for two years? Falls within the statute.

ii. Suppose I agree to work for you until I die? Not within the statute.

iii. Suppose I agree to work for you for 2 years or until I die, whichever comes first. Not within the statute.

iv. Suppose I agree to work for you for six months, beginning in 9 months. Falls within the statute.

2. *McIntosh v. Murphy* (p. 515): Plaintiff alleges breach of a one-year employment contract. Defendant argues that the contract was at-will or, if not, then the contract falls within the statute of frauds because it was not to start for two days so that it could not be performed within one year. The Supreme Court of Hawaii holds the doctrine of promissory estoppel can overcome application of the statute of frauds. Note that this treats promissory estoppel as *more than* a consideration substitute. Who should win this case?

3. Part-Performance: Courts generally hold that some types of part performance will satisfy the statute, but these cases usually refer to a purchaser of land who either makes improvement on land or who pays the taxes. (Note that "part performance" is a term of art and does not generally refer to beginning performance of the underlying contract.) How does such part performance satisfy the concerns underlying the Statute of Frauds? See *Schwedes v. Romain* (p. 521).Does sending a check satisfy them as well. What if the seller accepts the check?

4.. Hypo: Buyer orders 500 reams of paper with the buyer's letterhead printed on the top. Should this be treated as a contract for the sale of goods or as a contract for the sale of labor? In this regard, assume that the seller delivers the paper one day late, that the buyer wants out of the contract, and consider U.C.C. §2-601(a). What assumption have the drafters of the U.C.C. made that underlies the "perfect tender rule" in §2-601? It is likely to hold true in sales of labor? Of sales for real estate?

5. *Monetti, S.P.A. v. Anchor Hocking Corp.* (p. 525): This case presents multiple issues.

a. Is a distributorship agreement covered by article 2 of the U.C.C. as a sale of goods? Judge Posner observes that courts have divided on the subject, using the predominant-purpose test. Judge Posner also observers that while article two of the UCC generally applies to "transactions" in goods (§2-102), the statute of frauds provision (§2-201(a)) is limited to "sales" of goods.

b. Can a writing satisfy the statute of frauds if it is written prior to formation of the contract? Judge Posner says that it can, but if the writing plainly comes prior to any binding agreement, the reasoning seems weak.

c. What is the effect of part performance on the statute of frauds? Under the common law, some forms of part performance are deemed to substitute for a writing. Compare that with U.C.C. §2-201(1).

d. Note also the partial elimination of the "party to be charged" limitation in U.C.C. §2-201(2).