Marquette Law Review

Volume 49
Issue 1 *Summer 1965*

Article 3

The Sales Contract - Formation

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THE SALES CONTRACT--FORMATION*

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INTRODUCTION

Introduction to the Sales Transaction

A "sale" consists in the transfer of the general property interest in goods from the "seller" to the "buyer" for a consideration called the "price." A "contract for sale" (or sales agreement) includes both a present sale of goods and a contract to sell goods at a future time. A "present sale" means a sale which is accomplished by the making of the contract. The concept of "sale" necessarily implies contractual arrangements and excludes gratuitous transfers.[1]

The former Wisconsin law of sales was incorporated in Wis. Stat. §§121.01 to 121.79, enacting the Uniform Sales Act,[2] which remained substantially unchanged until enactment of Article 2 (the "Sales Article," chapter 402 of the Wisconsin Statutes) of the Uniform Commercial Code. The Uniform Sales Act was essentially a codification of the common law as of the date of its promulgation.[3]

The Uniform Sales Act provided few rules governing the formation of sales contracts, leaving this matter primarily to the common law. The Code, on the other hand, contains a number of special contract formation provisions which depart from common-law principles. These special rules are specifically designed to meet mercantile problems and apply only to sales of goods; they do not displace common-law rules in such matters as contracts for personal services or for the sale of real property. Further, and very important, where the Code provides no special rule, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause supplement the Code.[4] It should also be noted that under the Code legal consequences are stated as following directly from the contract and action taken under it; considerations of when property or title passed or was to pass are not decisive.[5]

Contracts may alternatively be regarded as "negotiated" (contracted between parties on a face-to-face basis) or "form" (created by execut-

* This article is substantially the same as that contained in a chapter of the same title and by the same author appearing in the *Wisconsin Uniform Commercial Code Handbook,* a joint activity of the state bar of Wisconsin, Marquette University, and the University of Wisconsin.

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1 WIS. STAT. §402.106(1).

2 1911.

3 1906.

4 WIS. STAT. §401.103.

5 WIS. STAT. §402.401.

ing a form or forms prepared by the buyer, or seller, or both) or "oral" (frequently made by telephone and sometimes confirmed by letters employing standard jargon). Some of the special contract formation rules contained in the Code are more clearly applicable to one of these basic types of contracts than to the others.

Practice Tips Summarized

In most respects contract formation problems will be governed by the same principles under the Code as under pre-Code law, for common-law contract rules continue in force unless displaced by the Code. In several respects, however, the Code makes important changes, which are discussed at appropriate places throughout this article. Some of the more important points which the parties and their attorneys must keep in mind are the following:

(1.) "Merchants" who make "firm offers" will, within statutory limitations, be bound by them, notwithstanding a lack of consideration to support them. It therefore becomes important to express precisely the offeror's intent, particularly as to the expiration date of the offer.

(2.) The common-law rules of offer and counter offer in form contracts have been drastically changed by section 402.207, but the impact of this section may be modified by appropriate provisions in the purchase order and acknowledgement forms.

(3.) A seller no longer may rely upon the conclusion of simple contract law that a shipment of *nonconforming* goods is not an acceptance and therefore cannot constitute a breach. If the seller who ships nonconforming goods wishes to avoid being held liable for a breach, he must seasonably notify the buyer that the goods are shipped only as an accommodation.

(4.) In the case of an ambiguous offer where the beginning of performance may be a reasonable mode of acceptance, the offeree should notify the offeror that he has accepted the offer and not rely solely on the beginning of performance as an acceptance.

(5.) Important changes have been made in the Statute of Frauds governing the sale of goods. In particular, buyers and sellers should be aware of section 402.201(2) requiring written notice of objection to a letter of confirmation of an oral contract to be given within 10 days after receipt of the letter in order to retain the protection of the Statute.

Problems of Certainty and Mutuality

Seals or Witnesses not Required

Under the Code the use of seals or witnesses in connection with a sales contract is unnecessary and does not enhance the rights of the parties, either with respect to the requirement for consideration or with

respect to the tolling of the statute of limitations in an action brought on the document.[6]

Section 328.27 of the Wisconsin Statutes, to the effect that a seal shall be presumptive evidence of a sufficient consideration, is thus, in the case of sales contracts, nullified by the Code. Further, section 330.16(2) and section 330.18(2) pertaining to extending statutes of limitation for sealed documents no longer apply to contracts for the sale of goods.

The Code does not, however, change the statutory or other significance of a seal in authenticating corporate or official documents or in other matters related merely to signatures or to authentication of execution and the like.[7]

The Effect of Indefiniteness

Under simple contract law agreements were sometimes held to be unenforceable because they were so vague and indefinite as not to fully reveal the intention of the parties. The Code[8] meets the problem of indefiniteness by providing that "[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."[9]

Consideration; The Firm Offer

In general, the Code does not change the common-law requirement of consideration. An exception to this general principle is discussed below in connection with the "firm offer." Another exception is found in section 402.209(1) of the Wisconsin Statutes relating to agreements to modify sales contracts.

Under simple contract law an offer supported by a promise not to revoke it (a "firm" offer) which was made without consideration was not enforceable and could be revoked at will. This inability to make a firm offer unsupported by consideration has been the subject of much controversy and criticism over the years. It would seem that the unenforceability of such firm offers violated one of the fundamental objectives of contract law, namely, the realization of reasonable expectations induced by promises. From time to time the doctrine of promissory estoppel has been invoked to achieve this objective in the face of the consideration difficulty.

The Code meets the problem neatly by providing that:

> An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if

[6] WIS. STAT. §402.203.

[7] See UNIFORM COMMERCIAL CODE §2-203, comment 2.

[8] WIS. STAT. §402.204(3).

[9] For specific applications of the philosophy of this section, see WIS. STAT. §§402.205 (open price term), 402.306 (output requirements and exclusive dealings) and 402.311 (options and cooperation respecting performance).

no time is stated for a reasonable time, but in no event may such period of irrevocability exceed 3 months unless consideration is given; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror."[10]

There are several aspects of this provision which combine to allow firm offers to be flexibly employed while, at the same time, providing safeguards against over-reaching and surprise in their use, as follows:

(1.) The term "signed" comprehends "any symbol executed or adopted by a party with present intention to authenticate a writing."[11]

(2.) The section is, of course, limited to offers pertaining to the sale of "goods" as defined in the Code.[12]

(3.) The section has application only to firm offers made by "merchants," a term defined in the Code[13] and meaning in general a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(4.) The section does not apply to long-term options; and options for a period longer than three months intended to be enforced under this section will be enforced to the extent of three months only.

(5.) The Code does not state how the period of irrevocability is to be computed. Therefore, to achieve precision in the firm offer, it should state the precise time of its expiration (e.g., "This offer will remain effective until 11:00 A.M., C.S.T., November 1, 1964, and will then expire.") rather than stating that the offer will expire after 30 days or three months or some similar period. If the period of irrevocability must remain indefinite because it is made dependent on a contingency which may or may not occur within a three-month period (such, for example, as the availability of certain materials), the firmness should be guaranteed until the happening of the contingency. If the contingency does not occur within the three-month period, the offer lapses at the expiration of the period.

(6.) The section affords protection against the inadvertent signing of a firm offer prepared by the offeree by requiring that such

[10] WIS. STAT. §402.205.
[11] WIS. STAT. §402.201(39).
[12] WIS. STAT. §402.105.
[13] WIS. STAT. §402.104.

a term must be separately authenticated by the offeror. Initialing such a clause would seem sufficient authentication.

PROBLEMS OF OFFER AND ACCEPTANCE

The Circumstances of Offer and Acceptance

The Code provides that, "A contract for sale of goods may be made in any manner sufficient to show agreement, *including conduct by both parties which recognizes the existence of such a contract.*"[14] (Emphasis supplied.)

Sales contracts are frequently formed by the buyer's executing and sending of a purchase order (offer) to the seller which the seller accepts by executing it and sending his acknowledgement form to the buyer. The purchase order form usually originates with the buyer, but a seller with strong bargaining power may require use of his own forms by the buyer. In such a case, there usually is no problem of conflicting terms in the purchase order and acknowledgement, such as are discussed in this article. There may, however, be a question as to when exactly the contract is formed. The terms of the purchase order itself may provide some guidance, or usage of the trade or course of dealing between the buyer and seller may determine whether the buyer's signing of a purchase order operates (1) to create an offer which is subsequently accepted by the seller at its home office or elsewhere or (2) to create an acceptance by the buyer of an offer deemed to be made by the seller in supplying the form.[15]

Similarly, there may be an analogous problem in situations where an acknowledgement form (a form which ordinarily emanates from the seller) is supplied by the buyer to the seller. The execution of such an acknowledgement by the seller may be treated either as an offer by the seller requiring subsequent acceptance by the buyer or as an acceptance of the buyer's offer as represented by the acknowledgement. Usually, however, an acknowledgment prepared by the buyer takes the form of an acknowledgement copy of the purchase order, which the seller is directed to sign if it wishes to make the sale. In this event the purchase order, the contract, both under simple contract law and under the acceptance.[16]

No specific provision of the Code deals with the question whether a "quotation" constitutes an offer; therefore, simple contract law applies. It is a question of fact whether a catalog description or other quotation amounts to an offer by the seller which may be accepted by the buyer's submission of a "clean" purchase order in response thereto. A "clean" purchase order is, of course, one which contains no terms or conditions of its own but has the effect of accepting seller's offer on

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[14] WIS. STAT. §402.204(1).
[15] *Ibid.*
[16] See 1 HAWKLAND, A TRANSACTIONAL GUIDE TO THE UCC 12.

its own terms. On the other hand, the circumstances may be such that the purchase order is construed to be an *offer* incorporating expressly or impliedly the catalog description or other quotation, in which case the contract is made when the seller replies with its order acknowledgment form.

If a quotation by the seller does not amount to an offer or a counteroffer and buyer's subsequent purchase order is therefore properly deemed to be the offer, contract formation depends upon the further acts of the seller. Thus, if the seller merely signs a copy of the purchase order, the contract, both under simple contrac tlaw and under the provisions of the Code, is formed on the buyer's terms and conditions. Some difficulty may be encountered if the seller responds with his own clean acknowledgment even though the buyer's purchase order contains an acknowledgment clause indicating that no contract shall be formed except by signing the acknowledgment copy of the purchase order. Theoretically, in such a case, the seller's acknowledgment form constitutes a counteroffer which in many cases is deemed to be accepted by the buyer's conduct. Presumably, under the Code,[17] the contract is formed if the buyer fails to object to the seller's use of its own clean acknowledgment form.

The Battle of the Forms

Under the common law serious problems were presented in the situation where a purchasing order intended as an offer was responded to by an acknowledgment form containing different or additional terms. In this case, prior to the Code, such an exchange of non-matching documents (constituting an "offer" and a "counteroffer") resulted in no contract even though businessmen almost universally believed that under these circumstances they had made a deal. In legal contemplation, however, no contract was formed until the seller shipped the goods and the buyer accepted them, the theory being that buyer's conduct (by way of acceptance of the goods) amounted to acceptance of the seller's counteroffer (on seller's terms). These applications of traditional contract principles have been radically modified by section 402.207, the thrust of which is to sustain the contract if a contract was intended and to provide a means for determining the terms of the contract from among the provisions of the forms exchanged by the parties.

Section 402.207(1) provides in effect that where the order acknowledgment form contains additional or different terms from those found in the purchase order, such terms do not necessarily prevent a contract from coming into being. A contract is created if (1) there is a "definite and seasonable expression of acceptance or a written confirmation" and (2) the "acceptance is [not] expressly made conditional an assent to the additional or different terms." Under this provision,

[17] WIS. STAT. §402.204(1).

the language of the acknowledgment form characterizing or otherwise making reference to its own terms and conditions may be critical.

Section 402.207(1) is intended to end the "ribbon matching" approach of the common law under which no contract is formed unless the acceptance exactly matches the offer. Section 402.207(2), on the other hand, governs the disposition to be made of additional or different terms of the acceptance since, "[b]etween 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 reasonable time after notice of them is received." The question whether under (b) there has been a material alteration is a question of fact to be determined under all the circumstances.

In any event, section 402.207(1) must be relied upon to determine whether there has been a definite and seasonable expression of acceptance or a written confirmation such as to create a binding contract in spite of the inclusion in the "acceptance" or confirmation of additional or different terms; but section 402.207(2) must be relied upon to ascertain which, if any, of the additional or different terms become part of the contract. In some cases "different" terms should be deemed excluded because under section 402.207(2)(c) "notification of objection to them has already been given" by reason of the terms of the offer.

NOTE: Section 402.207(2) refers to the possible incorporation into the contract of "additional or different" terms and thereby deviates from the official text of the Code which refers only to "additional" terms.

Subsection (3) of section 402.207 abrogates the so-called "last shot" principle of negotiations at common law. Under this principle, the seller's acknowledgment (the "last shot" in the formal negotiations) may be deemed to be accepted, and its terms thereby binding. If the buyer accepts goods sent to him by the seller pursuant to such acknowledgment. Section 402.207(3) reverses this result by making clear that subsequent conduct of the parties in pursuance of the contract does not necessarily result in adoption of the last proposal of the formal negotiations. Under this subsection the terms of a contract for sale based upon conduct of the parties "consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this code." Thus a term of the acknowledgement which materially alters the contract as proposed in the offer,[18] does not necessarily become part of the contract arising from acceptance of the *goods* after shipment by the seller. Such a material alteration ought to be binding on the buyer only if the buyer ex-

[18] WIS. STAT. §402.207(2)(b).

pressly assents to it or if it arises by operation of law under any other provisions of the Code including those of section 402.207.

> EXAMPLE. Suppose there is a disagreement as to warranties between buyer's purchase order and seller's acknowledgment. Under the "last shot" principle, a seller's disclaimer of warranties might become effective by reason of the buyer's acceptance of the good shipped. Under the Code, however, unless the buyer's terms as to warranties accord with the seller's, a unilateral disclaimer by the seller should not be deemed effective, and implied warranties recognized by *Roto-Lith, Ltd. v. F. P. Bartlett*,[19] construing the Massachusetts counterpart of section 402.207, reaches the opposite conclusion but is generally considered to have been wrongly decided.[20]

Presumably, both parties can expressly limit the operation of section 402.207 in some of its aspects:

(1.) A buyer's purchase order containing a provision that "acceptance is strictly limited to these terms" can prevent seller's "non-material" additional or different terms from becoming binding "modifications" through silence or inaction.[21]

(2.) The seller may prevent a contract from coming into being on the buyer's terms by providing that the acknowledgment is an acceptance if, but only if, the buyer is willing to assent to the additional terms contained therein.[22] In the latter case, however, the seller should not ship the goods relying upon the "last shot" principle to carry into effect the terms of the acknowledgment since the "last shot" rule is nullified by section 402.207(3), and there seems to be no way to revive it, at least by unilateral contractual provision.

In appropriate cases buyer and seller may avoid problems resulting from the exchange of forms containing conflicting terms by entering into a specially "negotiated" contract or, in the case of a contemplated series of transactions, by entering into an "overriding agreement" which would govern the transactions regardless of the forms used.

Miscellaneous Acceptance Problems

Former technical rules as to acceptance, such as requiring that telegraphic offers be accepted by telegraphed acceptances, etc., are rejected and a provision that the acceptance be "in any manner and by any medium reasonable under the circumstances" is substituted.[23]

Under basic contract law an offer operates to create a power of acceptance in the offeree and in some cases of laconic offers (such as

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[19] 297 F. 2d 497 (1st Cir. 1962).
[20] See, for example, 1 HAWKLAND, A TRANSACTIONAL GUIDE TO THE UCC 16-17; Note, 30 U. CHI. L. REV. 540 (1963); Note, 111 U. PA. L. REV. 132 (1962).
[21] WIS. STAT. §402.207(2)(a).
[22] WIS. STAT. §402.207(1).
[23] WIS. STAT. §402.206(1).

"send 1,000 widgets Tuesday") there may be doubt as to whether acceptance is to be made through a promise or by the act of shipment of the goods. Section 402.206(1)(a) adopts the principle (at noted *supra*) that, "[u]nless otherwise unambiguously indicated by the language or circumstances . . . [a]n offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances; . . ." Section 402.206(1)(b), pursuing this general rule (as to facts such as those of the "widget" case, *supra*), provides that "[a]n order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by . . . prompt or current shipment. . . ."

A technical problem in simple contract law is also met by the latter portion of section 402.206(1)(b) which provides in effect that acceptance may be deemed to have been made by the shipment of *non-conforming* goods but that such a shipment of non-conforming goods does not constitute an acceptance if the seller reasonably notifies the buyer that the shipment is offered only as an accommodation. This provision means that a seller may not rely upon the conclusion of simple contract law that a shipment of non-conforming goods is not an acceptance and, therefore, cannot constitute a breach. Under the Code, such a shipment may be deemed to be both an acceptance and a breach, but the Code permits the seller to avoid this result by seasonable notification to the buyer that the goods in effect constitute a counter-offer. Hence, in appropriate circumstances sellers should be alert to the importance of making seasonable notification.

Under simple contract law in most situations the beginning of performance in response to an offer bars the offeror's power of revocation.[24] On the other hand, if the contract is unilateral, since acceptance is not made until the offeree's performance is complete, the offeree is free to continue or stop performance as the market dictates.

This disparity of rights between offeror and offeree is partially rectified by section 402.206(2), which provides that "[w]here the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance." This language would presumably not be of help to an offeror in cases where the offer is *clearly* one to enter into a unilateral contract since then *completion* of performance would be unambiguously indicated as the accepting event; hence the *beginning* of performance would not be a reasonable mode of acceptance; and, therefore, the language would be inapplicable. In the event of an *ambiguous* offer, however, where the beginning of a requested performance may be a reasonable mode of acceptance of an offer to enter into a contract, the section would require the offeree

[24] RESTATEMENT, CONTRACTS 45 (1932).

to notify the offeror that he had accepted the offer and started performance or risk the offeror's deeming the offeree's silence a rejection with consequent freedom to commence dealing elsewhere. This situation might most frequently present itself where special manufacturing is involved.

THE STATUTE OF FRAUDS

Scope and Effect of the Statute of Frauds

The Statute of Frauds set forth in section 402.201 applies only to sales of "goods." "Goods" may include under appropriate circumstances such forms of property severable from realty as timber, minerals and growing crops, but it does not extend to "choses in action" and in this respect differs from the Statute of Frauds in the Uniform Sales Act. However, there are Statutes of Fraud in the other chapters of the Code which apply to various types of intangible personal property.[25]

The monetary limit for application of the Statute of Frauds has been adjusted upward from the former amount of $50 to $500. Although the monetary limit under the Code is stated in terms of the "price" of the goods rather than of their "value," as under the Uniform Sales Act, the meaning of these terms is probably the same for this purpose.

In conformity with the Uniform Sales Act, section 402.201(1) provides that contracts for the sale of goods which violate the Statute of Frauds are "unenforceable" (rather than "void"). Consistent with this characterization, the Statute cannot be invoked by third persons not parties to the contract, and a buyer coming into possession of goods sold under an oral contract is not a trespasser. On the other hand Wisconsin case law holding that the Statute is not required to be affirmatively pleaded (and for this purpose characterizing it as rendering oral contracts "void") is presumably not overruled.[26]

Satisfying the Statute of Frauds

The Code overrules cases holding memoranda under the Statute of Frauds to be insufficient because of the omission or incorrect statement of a term of the contract. Thus, section 402.201(1) provides that "[a] writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in such writing."[27] Reasonable proof of the existence of the contract is assured by language in section 402.201(1) providing that the memorandum must take the form of

[25] See particularly WIS. STAT. §401.206.

[26] *Cf.* Holtan v. Bjornson, 260 Wis. 514, 51 N.W. 2d 719 (1952); Padgham v. Wilson Music Co., 3 Wis. 2d 363, 88 N.W. 2d 679 (1958); Draper v. Wilson, 143 Wis. 510, 128 N.W. 66 (1910).

[27] This provision is consistent with, and almost follows *a fortiori* from, the principles embodied in the other sections of the mode which do not render the contract unenforceable because certain material terms are unspecified, such as WIS. STAT. §402.305 relating to open price terms, WIS. STAT. §402.306 relating to output or requirements agreements and WIS. STAT. §402.311 relating to contracts leaving open the particulars of performance.

". . . some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker." Given the quality term of the contract, it is deemed more equitable to construct the omitted terms (even though perhaps imperfectly) than to render the entire transaction unenforceable.

A novel and useful approach by the Code is found in its handling of the "letter of confirmation." Under section 402.201(2), "[b]etween merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of sub. (1) against such party unless written notice of objection to its contents is given within 10 days after it is received." Thus, unless the recipient of a letter of confirmation objects to it within 10 days, neither he nor the sender can invoke the Statute of Frauds. Because of this provision buyers and sellers are well advised to write letters confirming their telephonic contracts. Equally important, buyers and sellers should be alert to object to written confirmations of agreements which they did not in fact make.

Section 402.201(3(c) provides that partial performance of an oral contract satisfies the Statute of Frauds only "[w]ith respect to goods for which payment has been made and accepted or which have been received and accepted. . . ." Thus receipt and acceptance as to a smaller quantity of merchandise will not bar the defense of the Statute as to a larger quantity. Under the prior law on the other hand, receipt and acceptance, for example, of one automobile would open the door to a claimed oral contract for many automobiles.

An area of doubt under section 402.201(3)(c) exists with respect to the situation where there has been part payment for good as distinguished from partial acceptance and receipt of them. Thus, if there has been an oral agreement to sell several units but only a *fraction* of the price of one unit has been paid, it may be argued alternatively that (1) payment has been made and accepted "with respect to" one unit, or (2) payment has been made and accepted "with respect to" no units at all. The better view, although it seems to depart from the plain language of the statutes, is that under these circumstances the sale of one unit is removed from the Statute of Frauds. It also appears reasonable to reject the possible third view that, absent other circumstances, the partial payment should be allocated to the *several* units involved and that, therefore, the defense of the Statute of Frauds is unavailable as to all these units.

Section 402.201(3)(b) provides that the Statute of Frauds is satisfied "[i]f the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was

made, but the contract is not enforceable under this paragraph beyond the quantity of goods admitted; . . ." This provision recognizes one line of cases to the effect that judicial admissions represent a *sui generis* method of satisfaction distinct from the method of incorporation in a memorandum. It is an interesting question of policy whether a party may be compelled over proper evidentiary objection to admit the existence of an oral contract. It is also not clear how liberally the provision is to be construed so as to include such subsidiary proceedings as pre-trial discovery proceedings.

Section 402.201(3)(a) continues the special manufacturing exception to the Statute of Frauds but with a somewhat modified rationale. *Under the Code* special manufacturing is protected because special manufacturers are presumed to be in a peculiarly vulnerable position with respect to disposition of the goods in case of repudiation of the contract; on the other hand, *under prior law* special manufacturing was excepted because, in some aspects at least, it was deemed tantamount to an agreement for "work and labor" rather than for the sale of goods. Hence, consistent with the revised rationale, under the Code a seller need not be himself the special manufacturer, but need only make commitments for procurement of specially manufactured goods. Consistent with the same approach, the seller, to have the benefit of the special manufacturing exception, must have changed his position in reliance on the alleged oral contract.

CONTRACT FORMATION PROBLEMS IN AUCTION SALES

Auctions With or Withou Reserve

Following the approach of the Uniform Sales Act the simple contract law applicable to auction sales has been amplified and clarified by the special provisions of section 402.328.

Subsection (3) of section 402.328 recognizes that an auction sale is "with reserve" unless specifically stated to be "without reserve." The subsection recognizes the general American rule that a sale may be made one "with reserve" by appropriate announcement before the goods are put up (even though the sale was previously advertised as being "without reserve.") It is, of course, conceivable that a prior advertisement of a sale "without reserve" could constitute a firm offer under section 402.205 if it were properly framed.

In an auction "with reserve" the auctioneer may reject all the bids and withdraw the goods without making a sale until he announces completion of the sale.[28]

Even in an auction sale "with reserve" there may be no bidding by the seller or on the seller's behalf unless notice has been given that liberty for such bidding is reserved.[29] In addition, the language of the

[28] WIS. STAT. §402.328(3).
[29] WIS. STAT. §402.328(4).

Code does not require the auctioneer, if he sells at all, to sell to the highest bidder, but since this is the usage of the trade,[30] notice must be given of any deviation from normal procedure.

If an auction is announced as "without reserve," although the bidder may retract his bid at any time before it is accepted, the auctioneer cannot withdraw an article or lot unless no bid is made within a reasonable time after bids on that article or lot are called for, and the auctioneer must, therefore, if bids are made, sell to the highest bidder.[31]

Section 402.328(2) provides that a sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Problems may arise as to the legal effect to be given to a bid made while the hammer is falling. Section 402.328(2) gives the auctioneer discretion either to honor the bid received before the fall of the hammer or to reopen the bidding.

Fraudulently Conducted Auctions

Secret bidding at auctions by the seller or one acting on his behalf (known as "puffing") is considered fraudulent because it creates a misleading impression as to competition for the goods and also may deprive the highest bona fide bidder of his right to the goods. Under section 402.328(4) the buyer, in the event of puffing, may at his option avoid the sale or take the goods at the price of the last good faith bid prior to completion of the sale. The interpretation of the words "last good faith bid" is sometimes difficult, but, in the case of a series of bids made by the same buyer, interspersed by puffer's bids, it would probably mean the last good faith bid made by the buyer prior to the bids made on the seller's behalf. On the other hand, if a buyer bids, for example, $100 and is overbid by a puffer's offer of $110 and an innocent third party thereupon bids $120, all of which bids are followed by subsequent bids by the original buyer and the puffer, the result ought seemingly to be that the buyer must pay $120 (the third party's bid) for the goods. This result tends to minimize the seller's fraudulent profit without unjustly depriving the third party of the goods.[32]

The converse of "puffing" by the seller is "chill bidding" wherein two or more buyers agreed not to bid against one another. Although section 402.328(4) does not deal explicitly with this problem, common-law remedies for fraud, which are not affected by the Code, would be available.

Under section 402.328(4) anti-puffing provisions do not apply to any bid at a forced sale. In construing this provision there is some ambiguity as to whether the "seller" (and hence the "puffer") is deemed to be a person whose goods are foreclosed against, or a person fore-

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[30] WIS. STAT. §401.205.
[31] WIS. STAT. §402.328(3).
[32] See 1 HAWKLAND, A TRANSACTIONAL GUIDE TO THE UCC 40.

closing against the goods of another. Relief from anti-puffing provisions may seem justified in the case of a debtor to prevent a depressed price from prevailing at the forced sale of his property. Such relief, however, would seem less justified as to a *creditor* who by puffing would be allowed to profit at the expense of third parties.