Enforceable Contracts Without Agreement on Price

FAST FACTS:

- A price need not be determined, or even determinable, when the goods are delivered and accepted.
- The Uniform Commercial Code includes several "gap-fillers" to complete sales contracts that are otherwise incomplete.
- The mere exchange of goods may not be enough to prove an enforceable agreement, or at the very least the exchange may be insufficient to prove the terms of the deal.

Avoiding the potential pitfalls of the incomplete

By Matthew J. Boettcher and Jeffrey C. Gerish

The Problem

Most contracts for the sale of goods include an agreed upon price, but not always. Assume that your client sold a truckload of oil pumps to a customer who later refused to pay the invoice claiming no knowledge that the price of the pumps went up two months earlier. Or assume your client sold his apple crop to a juice producer at a per-bushel price to be negotiated, but your client passed away before the negotiations were completed. Or what if your client signed an annual contract to buy monthly grain shipments at the average price published each month in a popular trade journal, but two months into the deal the journal stops publishing prices. In each case your client wants to know if the contract is now enforceable and, if so, for what price are the goods to be bought or sold. Would you know what to say?

An agreement or judicial determination as to price is, of course, necessary to complete an enforceable contract for the sale of goods. However, contrary to common perception, a price need not be determined, or even determinable, when the goods are delivered and accepted.[1] The omission of a price is sometimes inadvertent. However, sometimes the parties to a sales agreement intentionally:

> *omit the price term or leave it to be set by formula or other procedure. Parties may do this because they recognize their inability to set an agreeable and fair price in a long term contract. Some may even hope to have their cake and eat it too; these may hope to negotiate a better price later than they can negotiate initially. And there are parties too hurried to tie up the details; in the glow of "agreement in principle" these assume that completing the price negotiation will be no problem.*[2]

Whether intentional or inadvertent, the omission of a price term in a sale of goods is a business reality that oftentimes is either dictated by market conditions or simply serves the parties' interests. For attorneys who find comfort in the four corners of a signed, sealed writing, the realities of fast moving business transactions may rub against the grain. Nonetheless, such *incomplete* agreements occur more than you might imagine and are routinely enforced by the courts. Indeed, the digests are replete with examples of courts enforcing contracts where the parties have omitted or failed to agree on price.[3] So when your client calls after the goods have changed hands but with the price still unsettled and wants to know "what happens now," the answer is found in Section 2305 of the Uniform Commercial Code.

The Solution: The "Gap Filler" in Section 2305 of the Uniform Commercial Code

There are many important details in contracts for the sale of goods that are frequently omitted. The Uniform Commercial Code includes several "gap-fillers" to complete sales contracts that are otherwise incomplete. Common gap-fillers include place of delivery (unless otherwise agreed, delivery is at the seller's place of business),[4] time of delivery (unless otherwise agreed, delivery is at a reasonable time),[5] and time and place of payment (unless otherwise agreed, payment is due when the buyer receives the goods).[6]

Sometimes overlooked, however, is that the code also contains a gap-filler to be used when price is omitted, either intentionally or through inadvertence. A "complete gap" is said to exist when the parties have said nothing as to price.[7] A "partial gap" exists when the parties have specified the method for determining the price, but the method fails.[8] Regardless, in Michigan neither a complete gap nor a partial gap precludes the enforcement of a contract for the sale of goods, if, of course, an otherwise enforceable contract can be shown.[9]

In Michigan, the "gap filler" as to price is found in MCLA 440.2305. Generally, that section provides that when price has been omitted, the price is to be "a reasonable price at the time of delivery."[10] But Section 2305 says much more and requires more for its application. Section 2305 states:

> *(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if*
> *(a) nothing is said as to price; or*

(b) the price is left to be agreed by the parties and they fail to agree; or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

Before Section 2305 can be applied, the court must determine that the parties intended to form a contract. One might conclude that this is a self-evident or self-effectuating requirement when there has been an undisputed exchange of goods, but one would be wrong. The code provides that a contract can be made in any way that shows an agreement has been formed.[11] Often times this is shown by the parties' conduct that recognizes a contract has been formed.[12] For example, the shipment of goods clearly suggests that the seller believes a contract exists. Similarly, the buyer's acceptance and use of the shipped goods supports the conclusion that the buyer believes a contract has been formed. However, the mere exchange of goods may not be enough to prove an enforceable agreement, or at the very least the exchange may be insufficient to prove the terms of the deal.

> **When advising clients involved in the sale of goods, the better practice is, of course, to ensure that in all cases your client does not ship or accept goods without an agreement as to price that is documented by a signed writing.**

A recent Sixth Circuit opinion provides helpful guidance to courts and practitioners who find it necessary to wade through Section 2305 and related Sections, and also demonstrates the sometimes complex nature of such an endeavor. In *Gage v Henkel*,[13] Gage and Henkel believed they had a contract under which Gage shipped products to Henkel for use, ultimately, at a Chrysler facility. The parties differed on their understanding of the price for the products. Gage quoted unit prices to Henkel that reflected a price increase from prior shipments. Henkel responded that it would honor any price increase so long as it was approved by Chrysler. Gage had previously approached Chrysler about the increase, and had been assured that the increase was to be approved. A series of deliveries from Gage to Henkel were subsequently made, for which Henkel issued purchase orders reflecting the prior, lower prices, while Gage submitted invoices with its shipments that reflected the new, higher prices. Henkel did not honor the higher prices, which prompted Gage to bring suit for the price difference. The trial court granted summary disposition in favor of Henkel, finding that, by shipping products in response to purchase orders that included a price, Gage implicitly accepted the prices reflected in the purchase orders.

Applying Michigan law, the Sixth Circuit reversed, holding that a question of fact existed as to the proper price pursuant to Sections 2204, 2207, and 2305. The court reasoned that there were two potential ways to view the evidence: either (1) Gage accepted Henkel's purchase orders but proposed different price terms, resulting in contract formation with an open price term; or (2) Gage rejected Henkel's purchase orders, in which case there was no contract formation. Under either view, held the Court, the question remained as to what prices Henkel was obligated to pay for goods it received from Gage. In the event the district court was to find on remand that there had been contract formation with an open price term, the price is to be determined by Section 2305(1), i.e., "a reasonable price at the time of delivery." If the district court determined that the parties had not formed a contract, Henkel would nonetheless be obligated to pay the "reasonable value" of Gage's product at the time of delivery if Henkel could not return the goods. In arriving at this conclusion, the Sixth Circuit discussed a number of decisions from various jurisdictions involving similar or analogous facts.

For example, in *McJunkin Corp v Mechanicals, Inc*,[14] McJunkin ordered stub ends, from Alaskan Copper Companies by an April 27 purchase order, which Alaskan shipped on April 29. On May 4, Alaskan sent McJunkin an acknowledgement of the order that contained terms and conditions of sale that were different from those in the purchase order. The court rejected McJunkin's argument that by shipping the stub ends, Alaskan accepted McJunkin's offer and, therefore, was bound by the terms of the offer. Rather, the court found that Alaskan's acknowledgement was a seasonable, yet conditional, response to McJunkin's purchase order, thereby precluding formation of a contract based on the parties' writings.[15]

The court noted that Alaskan did not intend to bind itself to McJunkin's written terms, but instead sought to incorporate its own terms into a contract with McJunkin.[16] Accordingly, the court found that McJunkin's terms were not dispositive of the parties' rights. Rather, the court reasoned that it first had to consider the "totality of circumstances" to determine whether McJunkin and Alaskan had assumed any contractual obligations and, if so, exactly what were the nature of those obligations.[17] Because McJunkin and Alaskan did not intend to agree on certain terms in the parties' writings, but because their actions suggested a contract, the court held that "the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of [the UCC]."[18]

McJunkin illustrates that under the code a court cannot enforce a contract, even when one is intended, until the contract's terms are identified *and* there is a reasonably certain basis for giving an appropriate remedy.[19] When one of the missing terms is the price, the court's task is compounded and that omission may preclude the contract's enforcement due to the court's inability to provide a remedy.

An example of such a case is found in *Quaker State Mushroom Company, Inc v Dominick's Finer Foods, Inc of Illinois*.[20] That case involved multiple sales of goods where the parties exchanged proposed prices but never actually agreed on a stated price. Dominick's had ordered four shipments of mushrooms under a price that had previously been in effect. Quaker State sent a notice of a price increase to Dominick's (after the second order was placed), and then shipped the mushrooms. Dominick's did not expressly agree to the price increase, and later claimed that by shipping mushrooms in response to Dominick's purchase orders, Quaker State agreed to the price in the purchase orders.

The court rejected Dominick's' argument, finding that the shipment could not be deemed an acceptance at the old price, because Quaker State had clearly indicated in its correspondence that the lower price was rejected. The court found that since the parties intended to contract, but had not agreed on a price, Section 2305(1) was implicated. The court concluded, however, that Section 2305(1) did not apply because it was not a case where the parties said nothing about price, left the price open, or left the price to be determined by an outside agent. Consequently, the court held that the parties did not have a contract, and, under Section 2305(4), Dominick's would be bound to return the mushrooms and get a refund, or, if it could not do so, "pay the reasonable value of the mushrooms at the time of delivery."[21]

Applying Section 2305 to the hypotheticals described above reveals likely outcomes. Take the case of the client who sold the truckload of oil pumps to the customer who claimed no knowledge, and therefore no agreement, as to the price for the pumps. The facts suggest no issue that the parties intended to contract for the sale of the pumps, but that was true in *Quaker State* too. The buyer's claim, real or feigned, that he did not know the real price of the pumps could mean that no contract was intended because the buyer would not have made the purchase if the true price was known. As such, as in *Quaker State,* if the pumps can be returned, the agreement can be rescinded. But if the pumps have already been put into production, and since Section 2305(1) does not appear to apply, Section 2305(4) dictates that the buyer pay the reasonable value of the pumps at the time of delivery. Exactly what is a reasonable value will, of course, be a question of fact.[22]

In the case of the client who sold the apple crop for a price to be later negotiated and the negotiations could not be completed, the analysis is a bit different. Here there is no mistake or misunderstanding, nor a case where arguably nothing was said as to price, as was the case with the oil pumps. Rather, this case implicates Section 2305(1)(b). The nature of the sale of the apples leaves little doubt that the parties intended to contract. If that turns out to be true, Section 2305(1)(b) provides that in this scenario, because the price was left to be agreed upon by the parties and they fail to agree, the applicable price is not what the juice manufacturer sought to impose, but rather, is a reasonable price at the place and time of delivery.

Similarly, the client who signed an annual contract to buy monthly grain shipments at a published average price is not left without guidance or a remedy in the event of a dispute merely because the published price is no longer available. In that case, Section 2305(1)(c) provides that when the price is to be fixed in terms of some agreed market or other standard and, for whatever reason, it is not so set or recorded, the applicable price becomes a reasonable price to be determined at the place and time of each monthly delivery.

Conclusion

When advising clients involved in the sale of goods, the better practice is, of course, to ensure that in all cases your client does not ship or accept goods without an agreement as to price that is documented by a signed writing. When, however, a prior agreement as to price is not possible because of the exigencies or the practicalities of the market, or because of the unique circumstances of the sale, remember that Section 2305 is there to fill the gap and to ensure the enforcement of the parties' agreement when a dispute arises. ◆

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Footnotes

1. See, e.g., *Busch v Dyno Nobel, Inc,* 48 UCC Rep. Serv. 2d 874 (CA 6, 2002).
2. White & Summers Vol. 1, *Uniform Commercial Code* (4th ed.) sec. 3–8 at 147.
3. See, e.g., *Schwartz v Sun Co, Inc,* 276 F3d 900 (CA 6, 2002); *TCP Indust, Inc v Uniroyal, Inc,* 661 F2d 542 (CA 6, 1981); *Interstate Gas Supply, Inc v Wheeling Pittsburgh Steel Corp,* 283 B.R. 231, 237 (ND Ohio 2002); *Mathis v Exxon Corp,* 302 F3d 448, 452 (CA 5, 2002); *Marcor Mgt, Inc v IWT Corp,* 1998 US Dist. LEXIS 18410 (ND NY 1998); *In re Baronti,* 207 B.R. 106, 110 (WD Penn 1997); *Oblebay Norton Co v Armco, Inc,* 556 NE2d 515; 52 Ohio St. 3d 232, 236–37 (1990); *Landrum v Devenport,* 616 SW2d 359 (Tex App 1981); *Jackson v Meadows,* 264 SE2d 503, 505–06; 153 Ga. App. 1 (1980); *Propane Indust, Inc v General Motors Corp,* 429 F Supp 214, 221 (WD Mo 1977); *Silver v Sloop Silver Cloud,* 259 F Supp 187, 192 (SD NY 1966).
4. MCLA 440.2308(a).
5. MCLA 440.2309(1).
6. MCLA 440.2310.
7. MCLA 440.2305(1)(a).
8. MCLA 440.2305(1)(b) and (c).
9. *Barto v United States,* 823 F Supp 1369 (ED Mich 1993); *J W Knapp Co v Sinas,* 19 Mich App 427; 172 NW2d 867 (1969).
10. MCLA 440.2305(1).
11. MCLA 440.2204(1).
12. Id.
13. 2004 FED App. 0423P (6th Cir.) (decided December 9, 2004).
14. 888 F2d 481 (CA 6, 1989).
15. Id. at 487.
16. Id. at 487.
17. 888 F2d at 487.
18. Id. at 488 (citations omitted). See, also, MCLA 440.2207.
19. MCLA 440.2204(3).
20. 635 F Supp 1281 (ND Ill 1986).
21. Id. at 1286.
22. *Rose v Paint Mfg, Inc,* 311 Mich 428, 432; 18 NW2d 881 (1945); *American Parts Co, Inc v American Arb Assoc,* 8 Mich App 156, 176, 154 NW2d 5 (1967); *Powell Prod, Inc v Jackhill Oil Co,* 250 Mich App 89, 97, 645 NW2d 697 (2002).