Appeal No. 2005AP1628 **Cir. Ct. No. 2004CV662**

WISCONSIN COURT OF APPEALS
DISTRICT II

CONVERTING/BIOPHILE LABORATORIES, INC.,

PLAINTIFF-APPELLANT,

V.

LUDLOW COMPOSITES CORPORATION AND D. C. HENNING, INC.,

DEFENDANTS-RESPONDENTS.

FILED

MAR 15, 2006

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Snyder, P.J., Nettesheim and Anderson, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

1. Does WIS. STAT. § 402.207 (2003-04)[1] allow an invoice to add terms to an existing commercial agreement where the goods covered by the

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

parties' agreement have already been delivered by the seller and received and accepted by the buyer?

2. Does a forum selection provision in an invoice materially alter the parties' agreement under WIS. STAT. § 402.207(2)(b), rendering the provision unenforceable?

Converting/Biophile Laboratories, Inc. (CBL) appeals from an order dismissing its complaint against Ludlow Composites Corporation and D.C. Henning, Inc. (Ludlow). The trial court agreed with Ludlow that CBL's action was improvidently commenced in Wisconsin because a forum selection provision in Ludlow's invoice to CBL required that all claims resulting from the parties' commercial transaction be brought in Ohio.

BACKGROUND

The relevant facts of this case are not in dispute. CBL is a Wisconsin corporation that manufactures an "ear muffin," which is used to test an infant's hearing at birth. Ludlow, a Delaware corporation with headquarters in Ohio, manufactures foam for use in industrial applications. During 2003, Ludlow provided CBL with free samples of its foam product. CBL tested the product with a view to possibly using it in production of the ear muffin. After testing the product, CBL placed a purchase order with Ludlow on December 5, 2003. This purchase order was stated in terms of a designated number of rolls of foam at a stated cost per roll, for a total purchase price of $2449.44. Ludlow responded with a confirmation order to CBL on December 8. This confirmation order stated the order in different terms—linear feet of foam at a stated cost per linear foot for a total cost of $2100. On December 30, Ludlow shipped the order to CBL.

On January 5, 2005, Ludlow sent an invoice to CBL for the shipment. The bottom of the invoice stated in capitalized bold type: **"IMPORTANT: THIS SALE IS MADE SUBJECT TO THE TERMS AND CONDITIONS SET FORTH ON THE REVERSE SIDE HEREOF."** The reverse side of the invoice was titled in capitalized letters: "ADDITIONAL TERMS AND CONDITIONS OF SALE." These additional terms consisted of ten paragraphs, including paragraph 8, which was titled in capitalized letters: "JURISDICTION, VENUE AND TIME FOR BRINGING CLAIMS." This provision read as follows:

> All claims arising from the sale of the Products hereunder, including any claim for breach of these Terms and Conditions shall be brought within one (1) year from the date that the cause of action arises, or within two (2) years from the date of the sale of the Products, whichever is shorter. *Buyer hereby consents to and submits to the jurisdiction of the courts of the State of Ohio and further consents to venue of any such proceeding in the Common Pleas Court of Sandusky, Ohio, or the United States District Court for the Northern District of Ohio, Western Division, based upon the location of Seller's principal place of business.* (Emphasis added.)

CBL paid this invoice on February 5, 2005.

Before paying the invoice relating to the parties' transaction documented above, CBL placed a second purchase order with Ludlow on January 6, 2004. This second transaction spawned the litigation in this case. As with the first transaction, CBL's second purchase order was stated in terms different from Ludlow's ensuing confirmation orders. CBL requested two hundred rolls of foam, twenty-five to thirty feet in length, at a price of $166.22 per role for a total price of $33,244. Ludlow acknowledged this transaction in three separate confirmation orders. The first, dated February 2, recited an order of three thousand linear feet of foam at $7 per linear foot for a total of $21,000. The

second, dated February 12, recited an order of five hundred linear feet of foam at $5.60 per linear foot for a total of $2800. The third, dated February 16, recited an order of fifteen hundred linear feet of foam at $5.60 per linear foot for a total of $8400. In sum, the three confirmation orders documented an order of five thousand linear feet at an average price of $6.44 per linear foot for a total of $33,200. Ludlow shipped the product to CBL via two shipments, one on February 17, 2004, and the other on February 28, 2004.

Ludlow invoiced CBL for these shipments via three separate invoices. The first invoice recited a quantity of 624 linear feet of foam at $5.60 per linear foot for a total of $3494. The second invoice recited a quantity of 1540 linear feet of foam at $5.60 per linear foot for a total of $8624. The third invoice recited a quantity of 3371 linear feet of foam at $7 per linear foot for a total of $23,597. In sum, these three invoices documented shipments to CBL of 5617 linear feet of foam at an average price of $6.44 for a total of $35,715. As with the invoice covering the parties' first transaction, each of these invoices recited the bolded and capitalized language we have noted above and also included the same forum selection provision designating Ohio as the situs for any litigation. In due course, CBL paid these invoices.

Later, CBL determined that the foam delivered by Ludlow pursuant to the second transaction was defective. CBL commenced this action in the circuit court for Fond du Lac county seeking to recover expenses incurred in a recall of

its ear muffin product.[2] Ludlow moved to dismiss pursuant to the forum selection provision in the invoices. The trial court granted the motion. CBL appeals.

DISCUSSION

Introduction

WISCONSIN STAT. § 402.207 states:

> **Additional terms in acceptance or confirmation. (1)** A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance *even though it states terms additional to or different from those offered or agreed upon*, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> **(2)** The additional terms are to be construed as proposals for addition to the contract. *Between merchants such terms become part of the contract unless*:
>
> (a) The offer expressly limits acceptance to the terms of the offer;
>
> (b) *They materially alter it*; or
>
> (c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> **(3)** Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of chs. 401 to 411. (Emphasis added.)

[2] CBL's complaint alleged claims sounding in rescission, restitution, breach of contract, breach of warranty, misrepresentation, and product liability.

The wording of § 402.207 is identical to that of Uniform Commercial Code § 2-207.

A noted UCC commentator has observed that "Uniform Commercial Code § 2-207 changes the common law rule that an acceptance is only effective if it is a mirror image of the offer." 2 LARY LAWRENCE, ANDERSON ON THE UNIFORM COMMERCIAL CODE, § 2-207:3 (3d ed. 2004). In a nutshell, the statute abrogates, to a limited extent, the traditional common law requirement of contract law that the parties must have formally reached a meeting of the minds as to all aspects of their agreement. Instead, it allows that one party may add a provision not previously discussed so long as: (1) the prior agreement does not expressly limit acceptance to the terms of the offer, (2) the added provision does not materially alter the parties' existing agreement, or (3) the other party has already notified that the provision is not acceptable or gives such notice within a reasonable time after notice of the provision is received. UCC § 2-207; WIS. STAT. § 402.207.

The official comment to this provision of the UCC states:

> This section is intended to deal with two typical situations. The one is the written confirmation, where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon *and adding terms not discussed*. The other situation is offer and acceptance, in which a wire or letter expressed and intended as an acceptance or the closing of an agreement adds further minor suggestions or proposals ….

LAWRENCE, supra, at § 2-207:1 (emphasis added).

Ludlow contends that the forum selection provision in its invoices is enforceable under WIS. STAT. § 402.207 because the provision does not materially

alter the parties' agreement. CBL disagrees on two grounds. First, CBL contends on a threshold basis that Ludlow's order confirmations and shipment of the goods, followed by CBL's acceptance of the goods, precludes the application of § 402.207. Alternatively, CBL contends that even if the forum selection provision is considered as part of the parties' agreement, it is nonetheless unenforceable because it materially alters the agreement pursuant to § 402.207(2)(b).

The Trial Court's Ruling

Before taking up the merits of the certified issues, we address the trial court's ruling. The court concluded that the forum selection provision was enforceable against CBL because CBL had failed to read the provision. We think this approach misses the mark under WIS. STAT. § 402.207.

Practical considerations in the dealings of commercial parties lie at the heart of WIS. STAT. § 402.207. Lawrence's treatise has noted:

> UCC § 2-207 is designed to eliminate the problems raised by the presence of conflicting terms in different legal forms.
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> UCC § 2-207 is designed to eliminate the common law rule that required an acceptance to be identical in all terms with an offer. "Under Section 2-207 the result is different. This section of the Code recognizes that *in current commercial transactions, the terms of the offer and those of the acceptance will seldom be identical*. Rather, under the current 'battle of the forms,' each party typically has a printed form drafted by his [or her] attorney and containing as many terms as could be envisioned to favor that party in his [or her] sales transactions. Whereas under common law the disparity between the fine-print terms in the parties' forms would have prevented the consummation of a contract when these forms are exchanged, *[Section 2-207] recognizes that in many, but not all, cases the parties do not impart such significance to the terms on the printed forms*."

> *UCC § 2-207 furthers the Code's goal of promoting the formation of contracts by adding a presumption that the printed form will not always be read.*

LAWRENCE, supra, at § 2.207:6 (footnotes omitted; emphasis added).

Thus, WIS. STAT. § 402.207 presupposes that in certain instances a commercial party will fail to read a provision added to the parties' existing agreement by the other party. However, such failure is not fatal to enforcement of the added provision *unless* the offer is expressly limited to the terms of the offer, the provision materially alters the parties' existing agreement, or the recipient of the added provision has previously objected or objects within a reasonable time after receipt of the addition. ***Id.*** Thus, contrary to the trial court's approach, the resolution of this case is not controlled by the mere fact that CBL failed to read the forum selection provision.

We now move to the merits of the issues we certify.

The Invoices

The first question we certify is whether an invoice provision, which adds to the parties' existing agreement, is enforceable pursuant to WIS. STAT. § 402.207 when the goods covered by the agreement have already been delivered by the seller, accepted by the buyer, and all that remains is payment. CBL argues that the statute does not apply in that setting. Ludlow argues to the contrary.

In tendering this question to the supreme court, we acknowledge that in ***Mid-State Contracting, Inc. v. Superior Floor Co.,*** 2002 WI App 257, ¶¶7-17, 258 Wis. 2d 139, 655 N.W.2d 142, the court of appeals relied on WIS. STAT.

§ 402.207 when upholding an interest charge provision in an invoice that was not recited in the parties' prior agreement.[3] That holding makes sense since the interest provision related directly to the matter of pending payment. Here, however, the venue selection provision is unrelated to the matter of CBL's pending payment obligation. Separate and apart from whether the provision materially alters the parties' agreement, the first question presented in this case is whether a provision unrelated to the parties' underlying agreement can be introduced via an invoice. CBL reasons that the parties' agreement was completed, save for its payment, upon Ludlow's delivery and CBL's acceptance of the goods. Therefore, according to CBL, § 402.207 does not permit the introduction of a foreign topic not previously discussed by the parties.

WISCONSIN STAT. § 402.207 clearly requires an existing agreement between the parties before the question of the additional term comes into play. "When it is claimed that UCC § 2-207 is applicable to a writing that purports to confirm a prior agreement, no such application can be made if, in fact, there was no such prior agreement." LAWRENCE, supra, § 2-207:70. Here, there clearly was a prior agreement between the parties. But the question we certify is whether this provision of the UCC applies when the goods covered by the parties' agreement have been delivered by the seller and accepted by the purchaser *before* the additional term is introduced via an invoice. In other words, is there a "stopping

[3] The court of appeals cited to ***Advance Concrete Forms, Inc. v. McCann Construction Specialties Co.***, 916 F.2d 412 (7th Cir. 1990), as persuasive authority on the issue.

point" to the application of § 402.207 and, if so, where does the law draw that line?[4]

The court of appeals had this potential issue on its plate in ***Resch v. Greenlee Bros. & Co.***, 128 Wis. 2d 237, 381 N.W.2d 590 (Ct. App. 1985). There, the parties contracted for the delivery of a machine. Although the contract was silent on the question of indemnification, the seller included an indemnity provision in the invoice obligating the purchaser to hold the seller harmless from any claims arising from the use of the machine. ***Id***. at 239. The trial court ruled that the provision was unenforceable because the parties had completed their contract prior to delivery of the invoice. ***Id***. However, the ***Resch*** court never reached this issue because it held that even if the provision was valid, it represented a material alteration of the parties' contract. ***Id***. at 243-44.

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[4] As part of its argument in support of the application of WIS. STAT. § 402.207, Ludlow points out that the language in CBL's purchase order is stated in terms different than those in Ludlow's confirmation orders. For instance, the purchase order was stated in terms of rolls of foam at a stated price per roll whereas Ludlow's confirmation orders spoke in terms of linear feet of foam at a price per linear foot. Ludlow reasons that the invoice clears up this ambiguity and is therefore essential to an understanding of the parties' full agreement. However, the statute is not designed to cover such a situation. Instead, the statute envisions an *existing* agreement between the parties, which is then augmented by the addition of a new provision.

In addition, assuming that the negotiations between the parties were ambiguous, such ambiguity was cleared up by Ludlow's shipment and CBL's acceptance of the goods. In ***George J. Meyer Manufacturing Co. v. Howard Brass & Copper Co.***, 246 Wis. 558, 18 N.W.2d 468 (1945), the supreme court held: "Where, however, the terms of a contract are ambiguous and subject to different interpretations, another rule applies. Under such circumstances, the court ordinarily *will place that interpretation upon the terms of the contract which the parties in the course of their dealings have adopted*." ***Id***. at 574 (emphasis added). Here, CBL accepted the grounds tendered by Ludlow in response to CBL's purchase order. CBL never contended that the shipment was not in accord with its purchase order. Thus, it does not appear that the invoice was necessary or essential to clearing up the parties' understanding. Instead, the parties' conduct resolved any ambiguity.

Thus, the threshold question in this case is whether WIS. STAT. § 402.207 even comes into play in light of the fact that the parties had finalized their agreement with respect to the delivery and acceptance of the goods before the invoices with the forum selection provision were issued. We tender this open question under Wisconsin law to the Wisconsin Supreme Court.

Material Alteration

Assuming that the forum selection clause is sufficiently related to the parties' threshold agreement and therefore was properly added to the parties' agreement, the next question we certify is whether the provision "materially alter[ed]" the agreement, rendering the provision unenforceable pursuant to WIS. STAT. § 402.207(2)(b). Here again, no Wisconsin case law speaks to whether a forum selection provision constitutes a material alteration to the commercial parties' existing agreement.[5]

The limited case law from other jurisdictions that have addressed this issue uniformly holds that a forum selection provision is a material addition and is therefore unenforceable.[6] The common theme in many of these cases is that, while a forum selection provision is enforceable if bargained for, the

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[5] In ***Resch v. Greenlee Bros. & Co.***, 128 Wis. 2d 237, 381 N.W.2d 590 (Ct. App. 1985), the court of appeals held that an indemnification provision in an invoice was a material alteration under WIS. STAT. § 402.207 because "the potential monetary effect of such a shift is significant." ***Resch***, 128 Wis. 2d at 244.

[6] *See, e.g.,* ***Steiner v. Mobil Oil Corp.*** 569 P.2d 571 (Cal. 1977); ***Product Components, Inc. v. Regency Door and Hardware, Inc.***, 568 F. Supp. 651 (S.D. Ind. 1983); ***TRWL Fin. Establishment v. Select Int'l, Inc.***, 527 N.W.2d 573 (Minn. App. 1995); ***General Instrument Corp. v. Tie Mfg., Inc.***, 517 F. Supp 1231 (S.D.N.Y. 1981); ***Hugo Boss Fashions, Inc. v. Sam's European Tailoring, Inc.***, 293 A.D.2d 296 (N.Y. App. Div. 2002); and ***National Mach. Exch., Inc. v. Peninsular Equip. Corp.***, 431 N.Y.S.2d 948 (N.Y. Sup. Ct. 1980).

provision is not enforceable as an added provision under § 2.207 of the UCC. This is because the party against whom the provision is applied "is required to give up the right it would otherwise enjoy, to be sued where it is doing business, or in the state of its principal office, and consent to be sued in an adjoining state. A reasonable merchant would probably regard this as a material alteration." ***General Instrument Corp. v. Tie Mfg., Inc.***, 517 F. Supp 1231, 1235 (S.D.N.Y. 1981). Or, as another court has said, "This court likewise concludes that selection of a distant forum with which a party has no contacts, while enforceable if contained in an agreement freely and consciously entered into, can result in surprise and hardship if permitted to become effective by way of confirmation forms that unfortunately are all too often never read." ***Product Components, Inc. v. Regency Door and Hardware, Inc.***, 568 F. Supp. 651, 654 (S.D. Ind. 1983).

Although this foreign authority weighs against Ludlow, we can see arguments nonetheless in support of its position. CBL well knew that Ludlow was located in Ohio. Given that, Ludlow contends that the designation of Ohio as the litigation situs does not represent unwarranted surprise to CBL. Moreover, the forum provision does not intrude upon the core rights and duties of the parties under their agreement. Instead, the provision merely designates the situs of any litigation arising out of the contract.[7] Finally, the parties' initial transaction was completed without any complaint or objection by CBL to the forum selection provision. True, CBL never read the provision, but that history may have some bearing upon the enforceability question.

[7] We reject CBL's argument that the forum selection provision means that Ohio law—not Wisconsin law—will be applied in any Ohio litigation. The provision is a forum selection clause, not a law selection clause. It does not inexorably follow that Wisconsin law cannot be applied in any Ohio litigation between the parties.

CONCLUSION

Were the task before us simply to balance the competing arguments proffered by the parties under established Wisconsin law, we would not certify this case. But we first need to know what the rules are. First, what is the "stopping point" for the application of WIS. STAT. § 402.207 where the goods covered by the parties' commercial agreement have been delivered by the seller and accepted by the buyer and the new provision is unrelated to the buyer's only remaining obligation of payment? Second, assuming that a forum selection provision is permitted under § 402.207, is our supreme court persuaded by the decisions of the other jurisdictions that nonetheless hold that such provisions materially alter the parties' underlying agreement? We respectfully request the supreme court to address these two issues of first impression.