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# Oversight and Rejection Risks

## OVERSIGHT AND REJECTION

When planning any major, nonroutine transaction, a party should

- identify all benefits that might be realized, both as a result of the transaction and other transactions that might be affected by that transaction, and select and prioritize those it wishes to realize;
- identify and describe all of the tasks that must be completed for the realization of the benefits chosen to be realized, and decide who is expected to complete those tasks;
- identify and describe all the conditions and contingencies that will facilitate and impede completion of such tasks and realization of such benefits; and
- assign to one or both parties legal responsibility for the losses that will occur if such benefits are not realized, such tasks are not completed, such conditions do or do not exist as supposed, and such contingencies do or do not occur.

When successfully completed, such efforts will have avoided the creation of any of the hazards that errors in planning create. The outcome of the planning phase or activities is successful, whether or not the time and cost of completing that phase may have fallen short of expectations.

A failure to successfully complete one or more of the actions described in the preceding bullets will be the result of one or more of the following:

- overlooking a benefit, task, condition, contingency, or responsibility that was—but with hindsight, should not have been—omitted from the plan for the transaction,
- choosing to include or to omit a benefit, task, condition, contingency, or responsibility that, with hindsight, should not have been included or omitted from the plan, and
- misunderstanding what a benefit, task, condition, contingency, or responsibility includes, whether or not it was included or omitted.

The party that stands to lose in the scenarios described in the first two bullets also causes the potential for loss: the party that will suffer any loss is that which overlooks or makes a decision it later regrets about a benefit, task, condition, contingency, or responsibility—what will be referred to as benefit, task, etc., remorse. The party that stands to lose in the scenario described in the third bullet may but will not always be the cause of the loss; the other party and third parties may also be causes. This chapter describes the risks created by oversights and regrettable decisions about benefits, tasks, conditions, contingencies, and responsibility. The following chapter describes the risks created by misunderstandings about the same.

The following cases illustrate benefit oversight and remorse, respectively:

- *Wildmon v. Berwick Universal Pictures*[1]: Paul Yule, who was producing a television program about censorship in the United States—in particular, the battle over public funding of two artists, Andres Serrano and Robert Mapplethorpe—asked Donald Wildmon, who was a prominent figure in promoting censorship of the media and arts in the United States and had campaigned against the public funding of both artists, for an interview. Wildmon replied to Yule, saying, "A contract would also have to be signed, containing a substantial damage clause, forbidding the interview or any part of the interview being used in any manner other than that stipulated in the contract without my prior written permission."[2] The contract, prepared by Wildmon's attorney, read:

> Mr. Yule agrees specifically to refrain from making the interview available to any other media outlet including any portions that are not used in the television presentation made by Berwick Universal Pictures, London for Channel 4. In addition, Mr. Yule agrees that any material obtained from the interview or derived from this interview shall not form the basis of any other media presentation or [sic] in England, the United States or any other country without written permission from American Family Association.

Yule decided to broadcast the original Channel 4 program in the United States. Wildmon objected. One benefit to each party was control over use of the interview in later productions, and another was control over the original program. If Wildmon's benefits included both, his consent was required for the broadcast in the United States. Otherwise Yule was primarily at liberty to profit from subsequent broadcasts.[3] If the contract stated Wildmon's intent at contract formation, he overlooked control over rebroadcasting of the original program as a benefit. The hazard to Wildmon was his lack of control over repeated broadcastings of the original program. His oversight of the benefit enabled the hazard to occur (assuming he would have insisted upon controlling subsequent broadcasts of the original production).

- *Cleary v. News Corporation*[4]: Cleary signed a contract in 1965 with the publisher of *Robert's Rules of Order* that stated the royalty he would be paid but did not mention attributing credit to him and reserved all rights to the author. Cleary first assisted the original author's daughter-in-law to revise the book for the 1970 edition, and the title page named him as one who had assisted the author, as did the 1980 edition, on which he also provided assistance. He made no contribution to the 1990 edition, however, and no credit was attributed to him. Cleary claimed that the title page of that edition should have done so. He acknowledged, however, that attribution credit had not been overlooked or considered important at contract formation: "[I]t was not important that there be name credit, but it became in my mind more and more important as my involvement grew and grew by considerable degrees over the period of the ensuing years."[5] When he signed the contract, he did not insist upon receiving attribution credit. Later, he discovered more value in such credit and decided he did want it after all.[6] Cleary decided against attribution as a benefit and later changed his mind. This is a clear case of regret over initially rejecting a potential benefit. The hazard was the absence of a commitment by the publisher to give Cleary attribution credit; his decision not to ask for it enabled the hazard to occur.

### Benefit Oversight and Rejection

A benefit is a discrete value or utility that is realized from a transaction when successfully completed. In *Wildmon*, the benefit to Yule was value, the revenue to be received from broadcasting and rebroadcasting the program; to Wildmon it was utility, control that ensured the use of the interview material promoted his cause. The control of subsequent broadcasts for Wildmon would have been additional to his control over the interview material in subsequent productions and for Yule additional to the value he received from the initial broadcast of the original program. Overlooking such additional or incremental value or utility is a lost opportunity. Once missed, the other party is unlikely to cede it because in many transactions, as in *Wildmon*, one party's loss is another party's gain. This zero-sum game in incremental benefit allocation in a transaction underscores the importance of identifying and selecting benefits no later than contract formation. In other transactions, completion of additional tasks may be required to yield the additional benefit, and those efforts will likely increase the performing party's costs. In the best case, a party will identify all such potential incremental benefits; in the worst, it misses them all. A hazard occurs when a potential benefit is omitted, as the party that would have enjoyed the benefit may later come to regret the omission.

Transactions in which a party could have augmented the anticipated value or utility and later regretted its failure to do so include the following:

- A separate, often closely associated, value could have been realized.
- Additional value might be realized in the future had the present transaction been differently structured.
- Separate value in the information about the transaction may be realized or its realization is controlled by the other party.
- Value to one party's reputation from doing business with the other is controlled by the other.

The preceding list is not exhaustive but illustrative of incremental value and utility, the oversight of which is often regretted after contract formation.

**Associated Benefits.** A party may anticipate that because it will realize one benefit, especially the principal benefit, it will or should realize another benefit. This will often be the case where one benefit cannot realistically be realized without the other. Such other benefit is a discrete value that might require separate tasks to be completed for it to be realized. In that case, it should be unbundled and identified as a distinct potential benefit so that the list of anticipated benefits is clear and the costs associated with each can be identified and calculated. It may also be a benefit that is often realized when another benefit is realized, even though different tasks must be completed for its realization. Overlooking or rejecting such an associated benefit creates a hazard, the omission of the benefit.

The following illustrate associated benefits that were overlooked:

- *Allen v. Kaiser Aluminum and Chemical Corp*.[7]: A seller supplied a machine that met the expressly stated performance specifications— that the technology provided would be "sufficiently developed to permit commercial operation." The contract disclaimed all other warranties. The machine could not be operated safely without changes.[8] The buyer claimed the machine should have been capable of safe operation. The claim was, in effect, that one benefit—that a machine conformed to the specifications—included a second—that the machine must also operate safely. This is also a case in which the realization of the first benefit, use of the equipment as specified, was not realistically possible without realization of the second benefit, safe operation of the equipment. Assuming the first included the second benefit enabled the hazard to occur.
- *H.M. Holdings, Inc. v. Rankin*[9]: A seller conveyed real property, the title to which was to be "clean" and merchantable. The buyer claimed the seller thereby warranted that the soil on the property was physically clean and clear of contaminants. The claim that clean title entitled the buyer to clean soil is that the one benefit somehow necessarily included the other.[10]
- *Carlock v. Pillsbury Co*.[11]: Häagen-Dazs (HD) licensed Carlock (C) to sell HD's ice cream at a specific site and agreed to impart to C the necessary know-how to operate an HD store and to prepare and sell HD ice cream and other frozen desserts. C claimed, in a class action suit against HD, that "know-how" included the skills needed to improve the profitability of his store and that HD had failed to impart these skills. The claim was that training in the know-how of the franchisor's business, a narrow benefit, included training in how to operate a profitable business, a more expansive benefit.[12] Learning to operate an ice cream store was confused with the development and management of a successful business.

In all three cases, oversight of the additional benefits resulted in missing the additional tasks that would have had to have been completed for those benefits to have been realized: design and fabrication for safety in the first, remediation in the second, and management training in the third.

**Future Benefits.** A benefit that cannot be realized at contract formation but might be at a future time, a future benefit, may be additional to that anticipated in the then-current transaction. Like an associated benefit, a future benefit may or may not add value to one party's benefits without subtracting value from the other's benefits. Such a benefit may or may not be identifiable at contract formation because the technology for producing it does not then exist. Few such benefits enter the parties' contemplation when planning a transaction because they usually seem too speculative and remote to warrant time and effort to plan for their realization. Overlooking or rejecting such a benefit is still a hazard even though the probability may be low that a party will come to regret not devoting the time and effort to identify and protect them.

The following illustrate omissions of future benefits that proved problematic with hindsight:

- *Pantry Pride Enterprises, Inc. v. Stop & Shop Companies, Inc.*[13]: A sublessee granted its sublessor a right of first refusal on an assignment of the sublease. The sublessee operated a supermarket at the subleased site. It was one of twenty supermarkets the sublessee owned. The sublessee wanted to sell the chain of supermarkets, which would include the real property interests, and the equipment located, in the stores. The price allocated to the store on the subleased site was $571,000. The price for the sublease alone was $142,750.[14] The hazard to the sublessee was the potential for the first refusal right to apply even when the sublease was bundled with all the assets comprising the supermarket chain. The hazard was the broad first refusal right, which may have been caused by the sublesse overlooking the breadth of that right when the first refusal right was granted. In any event, the oversight resulted in the sublessee missing an opportunity to eliminate the hazard: the sale of the sublease with the business of which it was a part could have been excluded from the first refusal right. As the sublease had to be sold separately to the sublessor, the sublessee lost the incremental value that would have been realized had the sublease been included with the sale of the other supermarket chain assets.
- *Cragmere Holding Corp. v. Socony-Mobil Oil Co., Inc.*[15]: A lessor agreed in a lease that it would not allow another tenant to operate a business on its property that competed with the tenant's business within an agreed distance of the tenant's leased site. The lessor later acquired a parcel of land adjacent to the leased site that was within the agreed distance. The tenant claimed the additional parcel was also subject to the noncompete restriction.[16] The hazard to the landlord was the potential for the noncompete restriction to extend to any additional adjacent parcels within the agreed distance acquired by the landlord. The cause of the hazard was the broadly worded noncompete restriction. The landlord's oversight of the application of the restriction on any additional adjacent land within the agreed distance that it might purchase contributed to the creation of the hazard. Acquiring the additional parcel was a further cause of the harm. As the tenant was correct, the lessor lost the additional rent it could have realized from renting the additional parcel to a competing business.
- *Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola, Inc.*[17]: The contract between Coke and a number of bottlers required each gallon of the syrup supplied by Coke to contain a fixed quantity of cane or beet sugar, based on a 1921 consent decree. The price charged to the bottlers was partly based on the published market price of beet sugar. In 1987, Coke began unilaterally substituting high-fructose corn syrup for sugar because the corn syrup had become available, did not alter the taste, and cost less. Coke continued to calculate the price based on sugar. The bottlers objected to the substitution. The hazard to Coke was a fixed formula for the syrup that precluded using substitutes that might yield cost savings. The decision not to consider or oversight of the potential use of substitutes in 1921 enabled the hazard to occur. Had Coke been entitled to substitute syrup for sugar without the bottlers' consent, it alone would have enjoyed, and the bottlers would not have enjoyed any, of the additional, resulting value. Otherwise, it had to come to terms with the bottlers over how the additional value would be shared.[18]

**Information Benefits.** Information that two parties engage in an exchange and the details of that exchange have value distinct from the benefits that drive the parties to transact with each other. Information one party receives from the other party may be the benefit the latter expects to realize. Such is the case where one party licenses another to use proprietary information.[19] The parties expect value to be created by the use of that information. That information and its value differ from the information about the parties and their deal. Value in information about the parties and deal can be realized by adding a party's name to a customer, client, partner, or other list used for marketing or by compiling statistical data about that and similar deals that can be sold or otherwise used by financial and other advisors and rating agencies.[20]

The utility or value in such information flows to the party or parties that can exploit it. That may or may not be the same as the party who controls that exploitation. The possibilities are:

- one party controls the exploitation by both parties of all information about itself, the other party, and the transaction,
- both parties jointly control the exploitation by either party of all such information, and
- each party is free to exploit such information.

Control over such information is a zero-sum game: the control one party has over information comes at the expense of the other party. In all three instances, both parties can realize the potential value of such information, but its ability to do so varies with control over its exploitation of such information. In the first, the controlling party alone decides when information about itself, the other party, or the transaction may be exploited. In the second, neither can exploit such information and realize its value without the agreement of the other. In the third, both are free to realize the value of such information without having to obtain the other's consent. Neither party has control over the other party's exploitation in that situation.

The following cases illustrate how control over the flow of information about each of the parties and their transaction can be an important benefit to one or both parties, independent of the other benefits the parties expect to realize:

- *Grunseth v. Marriott Corp.*[21]: A lobbyist and candidate for governor stayed at a hotel in Washington D.C. A reporter obtained a copy of the receipt for that night's stay and published a story that the candidate had stayed the night with a woman with whom he was having an affair. The information about the candidate's stay had value to the reporter. Possibly, the candidate assumed the facts concerning his stay were private, though there was no contract with the hotel to that effect. The hazard to the candidate was his lack of control over the information. The causes of the harm were the hotel's disclosure of the information to the reporter and the reporter's use of the information. The hotel and party were each at liberty to use the receipt—information about the candidate's stay—as it saw fit. His oversight resulted in his missing whatever opportunity he might have had to insist upon the information about his stay remaining private. To that extent, his oversight enabled the hazard to occur.[22]
- *Personal Touch, Inc. v. Lenox, Inc.*[23]: Personal Touch (PT) designed a commemorative plate, contracted with Lenox (L) for its manufacture at $35 per plate, and organized a marketing campaign. L published a brochure that included a picture of the prototype of the plate and a price of $20. The design of the plate had value to L distinct from the value to be received from sales to PT. It hoped to generate additional sales to third parties. That information is likely to have had similar value to PT. Where PT assumed it alone controlled flow of the information about the design, L assumed each party was free to use it as it saw fit. The contract was silent on the issue.[24] The absence of control over the information imparted to L was a hazard for PT. The cause of the loss was PT's publication of the design and price. PT's oversight resulted in missing the opportunity to avoid the hazard.
- *Hoffman v. L & M Arts*[25]: The seller of a valuable Mark Rothko painting displayed in a museum sold it privately, rather than through an auction, to avoid publicity about her financial condition. The buyer agreed to "make maximum efforts" to keep all aspects of the sale confidential indefinitely. Nearly three years later, the buyer consigned the painting to public auction at Sotheby's, causing the seller the very embarrassment she had sought to avoid. The information about the sale had value to the buyer, as it could realize a higher price by selling at a public auction at Sotheby's. It was also useful to the seller, as its disclosure would and did embarrass her. The case was one in which one party, the seller, expected to control all dissemination of information about her and the sale, even though doing so might require controlling future sales and information about those sales because any such sale would reveal that she had sold the painting.[26] Because the buyer paid less for the painting than if he had bought it a public auction, he received value for the value given in the confidentiality agreement. He may have underestimated or later regretted the value he gave when agreeing to an indefinite term for the confidentiality agreement.

**Reputation.** The fact that a party engages in a transaction or that the transaction is with a particular counterparty may enhance or harm a party's reputation or good will. That effect has value to the party whose reputation is affected. That value is part and parcel of the benefit the party expects to receive when the good reputation of the party completing a task is material to the principal value the other party expects to receive. A producer of a movie, television program, concert, or performance enlists a star to perform because of the additional value his or her reputation brings to the performance.[27] When the reputation of the party completing the task does not so enhance the value the other party receives, any positive or negative value is independent of the primary benefit. In either case, the potential for a transaction to damage a party's reputation is a hazard; overlooking it contributes to the hazard. In both cases, a morals clause[28] allocates and mitigates the loss of value to a party that may result from conduct by the other party.

Following are illustrations of how the conduct of a party may adversely affect the other party's reputation:

- *In re NWFX, Inc.*[29]: A company sold money orders through stores, which, as agents, issued the money orders, collected the money from the customers, held that money in trust for the company, and periodically paid it to the company less their commissions. Financially troubled, the company instructed the stores to stop selling its money orders. To minimize the loss of good will with their customers, two such stores used part or all of the sums held in trust for the benefit of the company to refund amounts paid by their customers whose money orders were dishonored or to pay amounts to payees to whom the money orders had been payable. The stores had no obligation to their customers or the payees to refund or pay on the money orders, nor did the contract expressly entitle the stores to make such payments.[30] The stores most likely overlooked how the company's default on its commitments to the stores' customers could damage good will with those customers, and the resulting hazard was the absence of an express right to refund and pay customers following a default by the company.
- *BP Products North America Inc. v. Twin Cities Stores, Inc.*[31]: The morals clause in a gas station lease obligated the gasoline retailer lessee "not conduct itself at any [TCS store] in a manner that, in Twin Cities' sole discretion, may reflect poorly on Twin Cities' name or business reputation or may offend an appreciable segment of the public." The retailer set its prices above those of its competitors, which drove away customers from the stores. The contract expressly reserved to the retailer the right to set prices of its products. The hazard to the lessor was the potential for the gasoline retailer to set gasoline prices that would drive away other business. The lessor, however, had not overlooked the potential negative effect of gasoline prices on other business in the stores, as the contract expressly allowed the gasoline retailer to set its prices. The lessor may have underestimated the potential negative effect of the lessee having gasoline prices higher than its competitors on other business; it had come to regret accepting the risk it had assumed.

### Task Oversight and Rejection

**Value-Creating Tasks.** A task is to a benefit what a means is to an end. It is an act that when completed (or not completed in the case of forbearance) will contribute to realization of a benefit. It may not be the only task that must be completed for a benefit to be realized, and alternative actions may achieve the same result. When it is one of the means by which such a contribution can be made, it or its alternatives must be identified and completed. It may be a task that one party completes for the benefit of the other or for its own benefit. Ideally, it will be identified and responsibility for its completion allocated to one of the parties before or at contract formation.

When, at contract formation, a task that must be completed for a benefit to be realized is not included in the list of such tasks, a gap in that list is created. That gap is also a hazard, depending upon which party must complete the task and which will benefit from its completion. Two such hazards are as follows:

(1) The missed or rejected task is one that must be completed by one party for the other to realize a benefit.
(2) The missed or rejected task is one that must be completed by a party for it to realize a benefit.

Scenario (1) creates two potential hazards: (a) The party that anticipates realizing a benefit stands to lose that benefit or incur additional cost to have the other party complete a task if the latter is not obligated to do so. (b) The other party—which must complete the missed or rejected task—stands to incur additional cost to complete the task or liability for failing to do so. In scenario (2), the party anticipating to benefit stands to incur the additional time and cost of completing the missed task or choosing to abandon the transaction because such additional time and cost overshadow the value of the anticipated benefit. What separates scenarios (1)(a) and (1)(b), on one hand, and (2), on the other, is that in the former a party is expected to complete a task for the benefit of the other, whereas in the scenario in (2) it is expected to complete the task for its own benefit.

Following are cases that illustrate these hazards:

- *Holston Valley Hospital and Medical Center, Inc. v. The Ashford Group Ltd.*[32]: A contractor agreed to transfer a hospital's data from a Honeywell to an IBM computer. While the contract required the hospital to provide readable computer tapes, it did not state which of the parties was to render those tapes usable on the IBM machine. Either party could convert the data, but this would require considerable time and cost to complete. The contractor abandoned the contract when the hospital failed to provide such tapes. Both parties overlooked conversion of the data on the tapes (assuming neither identified the task and chose not to allocate it to one or the other). The contractor expected the hospital to convert the data on the tapes. Had it been correct, the case would illustrate the hazard in (2), where the hospital overlooked a task it had to complete to realize its anticipated benefit (and for the contractor to perform, transferring the data to the new computer). The hospital expected the contractor to convert the data. The case thus illustrates a potential scenario (1)(a) and an actual scenario (1)(b): the hospital and the contractor each overlooked a task that the hospital successfully claimed the contractor had to perform for the benefit of the hospital.[33]
- *Cenex, Inc. v. Arrow Gas Service*[34]: Cenex purchased Arrow Gas's propane business for a base price of $1.6 million, paid at the closing, subject to adjustment depending upon the actual number of gallons of propane gas Cenex sold during the two-year period following the closing date. The purchase price was reduced by $.40 per gallon for each gallon below 6,000,000 gallons of propane sold, up to a total of $200,000, and increased by $.40 per gallon for each gallon above that figure, up to a maximum of $400,000. The total amount of propane sold in the applicable two-year period following the closing date was 4,603,100 gallons, resulting in a payment due to Cenex in the amount of $200,000. The acquisition contract did not specify what, if anything, Cenex was required to do to promote sales. The seller overlooked the tasks the buyer had to complete to boost sales so that the maximum earn-out payments became due and payable. No effort by Arrow Gas was required.[35] The case illustrates the scenario in (1)(a): Cenex lost the additional payments because Arrow Gas did not have to make any particular effort to boost sales.
- *Sonoran Scanners, Inc. v. PerkinElmer, Inc.*[36]: Sonoran Scanners, Inc. (SSI) developed a high-speed computer-to-plate (CTP) technology it hoped to market to the newspaper and graphic arts industries and, by 2000, it built a prototype machine that would save its users significantly in the long-term. It failed to sell any machines because they were expensive and potential customers had concerns about SSI's ability to support a new technology. Short of cash, indebted to its suppliers and other creditors, and having exhausted its founder's $3.5 million investment, SSI sold its business to PerkinElmer, Inc. (PEI) for $3.5 million paid at closing, a significant portion of which went to SSI's creditors, and an additional $3.5 million in "earn-out" payments over five years: $750,000 if three machines were sold in the first year, $1.5 million (less the prior earn-out payment) if ten machines were sold during the first two years, and additional payments if the CTP machines yielded certain margins. PEI also hired SSI's founder under a separate employment agreement for $150,000 per year plus up to $6.6 million in bonuses, calculated in a manner similar to the earn-out payments.[37] Three and a half years later, during which time only one CTP machine had been sold, PEI shut down the CTP business and laid off the associated staff, including the founder. Neither contract, however, specified what, if anything, PEI was to do to develop and promote the CTP business. Still, as SSI and the founder successfully claimed, PEI had to reasonably help SSI and its founder to earn their earn-out payments.[38] What those tasks included had been overlooked by both parties. Because PEI was obligated to help the founder and the seller earn the earn-out payments, the outcome was the opposite of *Cenex*, and the case illustrates scenario (1)(b); both parties overlooked a task the buyer had to perform for the seller's benefit.
- *Stevedoring Services of America, Inc. v. Marvin Furniture Manufacturing, Inc.*[39]: A tenant leased a warehouse to store foam rubber used to manufacture mattresses. After the lease was signed, the fire department insisted upon the installation of a "one-hour" separation barrier and a sprinkler system to protect the building from the fire hazard created by the storage of the foam rubber. The tenant nowhere claimed the landlord was responsible for the improvements. The landlord's task was delivery of possession of the leased premises. Although the tenant did not expect to do so, one of its tasks was to make changes that would enable it to store foam rubber at the site. In this case the party would have completed the task for its own benefit. The case illustrates scenario (2).[40]

The hazard in each of the preceding cases is an omission from the list of tasks and the terms of the contract of the task that had to be completed by one of the parties. Assuming the party could have identified and eliminated the omission but for the oversight, its oversight enabled the omission to become a hazard.

**Value-Preserving Tasks.** In addition to those that must be completed for a benefit to be realized, certain additional tasks when completed will enhance or protect that benefit from diminution after its initial realization. The hazards are comparable to those in scenario (1): for the party expecting to realize a benefit, the hazard is the possibility the other party will not complete the additional task that will protect that benefit in scenario (1)(a). The hazard for the other party is having to complete a task it did not expect to complete in scenario (1)(b).

The following illustrate such tasks:

- *Bessemer Trust Co. v. Branin*[41]: Branin was a shareholder in a financial services firm that sold substantially all its assets, including its client accounts, to Bessemer, was employed by Bessemer for a short while thereafter, and left to join a third financial services firm. One of his former clients contacted him and met with representatives of his new firm and him to decide whether to transfer its account to Branin's new firm. The contract was silent on what contact Branin could have with his old clients. The parties may have overlooked what marketing and business the sellers could do with their former clients after the closing. They had an implied obligation not to solicit their former clients, however.[42] To that extent, they had a task they had to complete that they had not specified in the contract. The sellers were permitted to trade with their former clients whom they had not impermissibly solicited. To that extent, Bessemer had missed a task it might have required of them.[43] How a seller was to respond to solicitations from his former clients without breaching the implied duty not to solicit was a fact to be determined in each case.[44] The hazard to the buyer was the potential for the sellers to receive business from their former clients, business which the buyer expected to have after the sale. Oversight of or a decision to ignore that potential enabled it to result in a loss.
- *Dushkin v. Desai*[45]: Desai formed a small community, appointed himself as its leader, and for twenty-five years presented himself as its authentic guru, "a 'teacher and object of veneration' who attains his status in part through several forms of abstinence, including refraining from sexual activity and material pursuits." In fact, he had sexual affairs with some of his followers and received a portion of the revenues from the community's operations. During the last fifteen years of its operation, the community had 15,000 paying guests a year and a staff of 250 resident members who worked for room and board and a small stipend, largely out of dedication to Desai. The contract between Desai and his staff nowhere prohibited his hypocritical behavior,[46] though the utility of the counseling was diminished by his behavior when it became known. The hazard to the followers was the absence of any restraint on the guru's actions; their oversight of or decision to ignore the potential for such actions enabled him to behave hypocritically with impunity.
- *Cordonier v. Century Shopping Plaza Associates*[47]: A lease for a space in a shopping mall obligated the lessor to lease two large spaces to a chain supermarket and a chain drug store, respectively. The lessor leased such spaces as required, but the tenants vacated. The lessee claimed the lessor was also obligated to keep such spaces continually rented to such stores. One of the lessee's anticipated benefits was a volume of foot traffic in the shopping mall commensurate with that which had a chain supermarket and a chain drug store. The lessee identified one task the landlord could complete (the landlord had to lease spaces to a chain supermarket and chain drug store), but missed another (these spaces had to be so leased repeatedly, whenever a supermarket or drug store tenant vacated).[48] Unlike the two previous cases, where value or utility is preserved by forbearance from actions that diminish the same, value is preserved, in this case by actions by the landlord.

## Condition and Contingency Oversights

Conditions and contingencies can be overlooked during transaction planning. A condition is a circumstance that exists at contract formation and impedes or facilitates the completion of a task or realization of a benefit. Oversight of a condition may result in ignorance of how a benefit or task is impossible or more or less difficult or expensive to complete. A contingency is an event that occurs after contract formation. The occurrence of a contingency alters the conditions that facilitate or impede benefit realization or task completion. Oversight of a contingency may or may not have an adverse effect on a transaction, depending whether it occurs.

The following cases illustrate condition and contingency oversight:

- *Griffith v. Brymer*[49] and *Krell v. Henry*[50]: In the first case, Griffith hired a room from Brymer to view King Edward VII's coronation procession. Unknown to either party, an hour earlier a decision had been reached to cancel the parade.[51] Before and at contract formation, the hazard to the renter was a condition: that there was no longer scheduled a parade to watch. After contract formation, the condition, together with the parties' actions, resulted in losses for the parties. In the second case, the parade was canceled after the renter agreed to rent the room to watch the parade. The hazard that existed at and after contract formation was a contingency: the potential for the parade to be canceled, whatever the reason. Oversight of the condition in the first case and the contingency in the second precluded opportunities to address the hazards.[52]
- *Grenall v. United of Omaha Life Ins. Co.*[53]: Grenall paid a single, substantial premium for an annuity payable in monthly installments for the rest of her life. Unknown to her, she had a fatal disease when she bought the annuity. She died after receiving only three payments. Because the disease had been contracted before contract formation, it was a condition that affected the value of the annuity to the annuitant. The hazard to the annuitant was her illness that would eventually prevent her from realizing anywhere near the amount she anticipated. Her ignorance of her condition precluded her acting to avoid the loss that would result from the hazard.[54]

More detailed descriptions of contingencies that may be overlooked are described in chapters 10, 11, and 12.

### Commitment and Responsibility Gaps

**Commitment Gaps.** A contractual commitment is a promise to complete or forbear from completing certain actions or to cause an outcome or result or a warranty that an outcome or result will occur. To the extent a party commits to do any of the foregoing, it assumes responsibility for certain of the losses the other party incurs because it fails to do so, subject to contract law principles that discharge or excuse it from performance.

A task to be completed by one party for the benefit of the other may be identified but no commitment given to complete it. Either the commitment has been overlooked by the party for whose benefit it would be completed or, if the commitment has not been overlooked, such party decided to proceed without it. The latter is an instance of rejection. The opposite side of the coin is that a party gives a commitment without recognizing that it has done so or, if it has recognized that it has, it later regrets having done so. The latter is another instance of remorse.

*City of Yonkers v. Otis Elevator Co.*[55] illustrates a commitment gap. Yonkers induced Otis, who had been located there since 1853, to remain, using its urban renewal powers to facilitate expansion of Otis' plant by acquiring and transferring to Otis land adjacent to the Otis factory. In exchange, Otis renovated and expanded its plant. Changes in technology during the next few years rendered the plant obsolete, and six years later Otis closed it. The contract did not include an express promise by Otis to continue its operations in Yonkers for any period of time and none was implied. Yonkers had identified the task it wanted Otis to perform, continued operation at its location, but overlooked getting a commitment from Otis to do so.[56] The resulting hazard to Yonkers was the potential for Otis to leave before Yonkers had realized all anticipated benefits. The cause of harm to Yonkers was Otis' decision to leave Yonkers. Yonkers' oversight of Otis' lack of commitment enabled the hazard to occur, assuming it would have insisted upon a firm commitment for Otis to remain had it recognized the omission. Had an implied commitment by Otis been found, Otis would have overlooked it, finding itself with a burden it did not expect it had.

The terms obligor, obligee, promisor, promisee, and obligation are inapplicable where no commitment or promise has been made. Completion of a task may be obligatory or optional. A task is optional when the party expected to complete a task for the benefit of the other party is not liable for any such losses that flow from a failure to complete the task. When optional, no obligation exists, and the party expected to complete it is not an obligor. The task may be for the benefit of the party completing it or the other party. When it is for the benefit of the party completing it, it cannot be an obligation and the party completing it is not an obligor. It may be an obligation only when the task must be completed by one party for the benefit of the other. For convenience, a party expected but not obligated to complete a task for the benefit of the other is referred to as a "putative obligor" and the party expected to so benefit a "putative obligee."

**Sequential Tasks.** A task may be one in a sequence of tasks to be completed by the same party and can be completed only if each of the preceding tasks is completed. All the tasks must be completed for the other party to realize its anticipated benefit. If a commitment gap exists as to any one of these tasks, it creates a commitment gap as to all the tasks that follow it. This will be the result even if the party is committed to completing the later tasks. The hazard to the party for whose benefit a task will be completed is the gap in the commitment to complete the earlier task. In addition, the fact that a party has a commitment to complete an earlier task does not ensure it has a commitment to complete a later one.

The following cases illustrate how the existence or absence of a commitment to complete an earlier task affects the commitment to complete a later, sequential task:

- *Nalle v. Taco Bell Corp*.[57]: Premises were leased "for the purpose of conducting thereon the business of a TACO BELL retain (sic) food outlet and for incidental purposes related thereto, or for any other legally permissible business or commercial venture as shall be provided by Lessor in writing." The rent was the higher of a fixed amount or a percentage of the gross receipts of the restaurant. The lessee stopped operating a restaurant on the premises after seventeen years, began using the site to store materials for the business, which it operated elsewhere, and paid the fixed rental amount. Two tasks were sequential and had to be completed in order for the lessor to realize the maximum benefits of its lease: (1) the lessee had to operate a restaurant on the site, and if it did, (2) it had to pay a percentage of its receipts as rent (if higher than the fixed rent). If the lessee had no commitment to complete (1), it effectively had no commitment to complete (2). Apart from the statement about how the premises could be used, the lease did not expressly state if there was a commitment to operate a restaurant on the site.[58]
- *Cenex, Inc*.[59]: This case is previously summarized.[60] The purchase price of a business increased or decreased depending upon the gross sales of the business after closing. Two tasks were sequential and had to be completed in order for the seller to realize the full benefit of the sale: (1) sufficient effort had to be made to sell a quantity of products that ensured the price would be increased by the maximum amount, and (2) the price increase had to be paid. It is conceivable that the buyer might do nothing to maintain or increase sales and the targets still be met, but that would be a scenario where the completion of (1) was not essential to the completion of (2). In effect, the business would generate sufficient sales notwithstanding the absence of effort by the buyer. If the completion of (1) was essential to the completion of (2), the absence of a commitment to complete (1) left the buyer at liberty to avoid payment of any price increase.
- *City of Yonkers*.[61]: This case is previously summarized.[62] Three tasks had to be completed for the city to realize its benefits: (1) it had to transfer the adjacent land to Otis, (2) Otis had to renovate and expand its plant, and (3) Otis had to remain and operate there. Yonkers had a commitment to complete (1) and Otis (2) but not (3). That Otis was obligated to complete (2), a substantial investment, did not imply a commitment to complete (3), however.

## Buyer's Remorse

Regret over decisions about benefits, tasks, conditions, contingencies, and responsibility occur after contract formation, while implementation is in progress, or when the deal is completed. In the latter case, the regret may be that a better deal was not struck or, if the outcome was unsuccessful, regret over decisions that led to such outcome.

**Buyer's Remorse.** A party may have second thoughts about the deal it has struck at any time after contract formation. Those second thoughts may be about its choice of the benefits it expects, the benefits the other party expects, the tasks it or the other party must complete, and the commitments it has given to complete the tasks it must complete for the benefit of the other party or the lack of commitments by the other party to complete the tasks it must complete. The hazards to one party are that it may come to regret its choices or the other party may come to regret its choices.

Following are examples of regret that occurred immediately after contract formation, in the first case over benefits chosen and in the second over the tasks a party committed to complete:

- *Empire Gas Corp. v. American Bakeries Co*.[63]: In response to the increase in gasoline prices in the late 1970s, a bakery agreed to have its fleet of delivery trucks converted to propane by a gas company, following which the gas company would supply all of the bakery's propane gas requirements. A few days later, the bakery changed its mind about the project and never ordered the conversion of any of its trucks. The report of the case does not explain why the bakery abandoned the project so soon after contract formation. If, as seems likely, the cost savings no longer appeared as important as they had at contract formation, perhaps because management modified its priorities, the case illustrates remorse over the chosen benefits.[64]

- *Resource Management Co. v. Weston Ranch and Livestock Co.*[65]: Four brothers were the shareholders and officers of a company that owned 8,000 acres of ranch land in Utah. After they were asked if they would lease their properties for oil and gas exploration and production and two of the brothers signed leases separately for parcels they owned, one of the brothers met the president of Resource Management Co. (RMC), a consulting firm, at a cattlemen's convention. Months later, he and the four brothers met for three days and negotiated a two-page consulting agreement, obligating RMC to prepare evaluations of the company's land and provide advice on proposals and negotiations for mineral leases. The contract generously gave RMC a two percent interest in all hydrocarbons produced on the subject property, an undivided one percent interest to all other minerals produced on the property, thirty-one percent of the royalties in excess of fourteen and one-half percent received by the owners, and thirty-one percent of all cash or other income or consideration received by the owners from the sale, leasing, or other development of the minerals underlying the real property. A year and a half passed, during which the brothers and the company negotiated and executed several mineral leases without asking RMC for assistance. The brothers apparently wanted advice on the best terms of mineral leases and found it elsewhere. Their remorse was over the high fees they agreed to pay RMC. This case illustrates how quickly after contract formation a party comes to regret the task it has committed to complete when it learns it ceded more than normal value.[66]

Following are examples of regret over benefits, tasks, and commitments that came after the performance had been partly or wholly completed:

- *Cleary*[67]: This case is previously summarized.[68] Cleary acknowledged that he had considered attribution credit but did not think important enough to ask for at contract formation: "[I]t was not important that there be name credit, but it became in my mind more and more important as my involvement grew and grew by considerable degrees over the period of the ensuing years."[69] The case illustrates remorse by a party over its omission of a benefit.
- *Greenfield v. Philles Records, Inc.*[70]: The Ronnettes music group signed a contract with Philles Records in 1963, giving the latter "the right to make phonograph records, tape recordings or other reproductions of the performances embodied in such recordings by any method now or hereafter known." In the late 1980s, interest in the Ronnettes' music revived, and Philles Records licensed some of their records for use in movies and television and master recordings through a new process referred to in the industry as "synchronization."[71] The case illustrates how the potential for a future benefit can be identified and allocated in a contract, how the value one party gains is the other party's loss, and how a party who does not know the value of a benefit, because it is speculative at contract formation, may come to regret its decision to cede it to the other party.
- *Davis v. General Foods Corp.*[72]: Davis wrote to General Foods to indicate she had an idea for making flavors to be used in the household for making ice cream. General Foods replied, "We shall be glad to examine your idea for a new food product, but only with the understanding that the use to be made of it by us, and the compensation, if any, to be paid therefor, are matters resting solely in our discretion."[73] General Foods used her recipe and paid her nothing. Davis sued.[74] While knowing that General Foods had no commitment to pay, Davis expected to receive compensation if her recipe was used. The case illustrates how a party comes to regret not obtaining from the other party a commitment to complete a task that will yield the benefit.
- *U.S. v. Bethlehem Steel Corp.*[75]: Fleet agreed to build vessels for the government for price equal to its actual cost plus one-half the difference between the estimated and actual costs. After completion, the government refused to pay the profit portion of the price when it learned the difference would be approximately 22 percent of the shipbuilder's actual costs (excluding any profit Bethlehem Steel made selling the steel to its shipbuilding subsidiary), claiming the shipbuilder had misrepresented its estimated costs, and even if it had not done so, the half-savings clause was unconscionable. The unconscionability defense illustrates how a party, in this case the government, came to regret its commitment to complete a task for the benefit of the other party—paying the profit portion of the price—having made the commitment in desperation.[76]

**Busted Deals.** Blame and regret are common reactions to an unsuccessful transaction outcome, especially when the transaction is important to one or both parties. Regret over a decision is an acknowledgment that the party could have done better by making a decision that could have either avoided the unsuccessful outcome or mitigated its resulting losses. Hindsight enables a party to spot where a different decision would have yielded a favorable result. It may regret not having fully appreciated the probability or significance of a potential adverse outcome of its decision at contract formation.

Following are cases that illustrate such remorse:

- *Emerson v. Adult Total Community Services, Inc.*[77]: Emerson, an 83-yearold man, elected to live in a one-bedroom apartment (and not a personal care unit where a nurse was on duty in the personal care wing twenty-four hours a day) in a retirement residence community and receive meals and certain services. He paid an $83,000 entrance fee and monthly fees. He suffered a stroke five and one-half months later, following which he lay undiscovered for two days in his apartment and died two weeks after his discovery. Clearly, the outcome for Emerson was unsuccessful. While the report of the case does not indicate whether he regained consciousness to regret his decision—to forego the protection of a nurse on duty 24-hours a day—his estate did so on his behalf.[78] This is an example of a deal gone sour because a party decided against choosing the appropriate benefit: more attention in the personal care wing.
- *Stedman v. Hoogendoorn, Talbot, Davids, Godfrey & Milli*[79]: A North Carolina client asked his Chicago attorney to ascertain quickly (within 72 hours) if a Minneapolis rare coin dealer had any negative history, such as a bankruptcy, civil or criminal investigation, litigation, or conviction of any kind. The attorney hired a Wisconsin private investigator to conduct the investigation. The investigator collected information available electronically and reported his findings, highlighting the gaps in the information and his strong reservations. The client ignored the warnings and bought coins from the dealer that proved to be counterfeit. Only a search on site of the records of criminal convictions in the county where the dealer lived would have revealed his conviction for fraud. The client knew what benefit it hoped to realize (sufficient evidence concerning the coin dealer's character) and knew the tasks that had to be performed (a search of the county

records) to ensure the benefit was realized, but the client chose not to have that task completed to save time and money, hoping the task was unnecessary.[80] This is an example of a deal gone sour because a party rejected a task the other would have had to perform for its benefit.

## OVERSIGHT AND REJECTION RISK MANAGEMENT

The hazards that go unnoticed due to oversights and decisions a party comes to regret may be avoided, mitigated, and allocated through the use of the following:

- diligence that identifies that which would otherwise be missed,
- a cooling-off period that allows a party to further reflect on its efforts, possibly catching what it missed or decisions it will come to regret,
- disclaimers of commitments, which allow a party to escape responsibility for oversights and decisions it might come to regret,
- low standards of performance, which minimize a party's commitment to perform,
- amendments to correct oversights and decisions it comes to regret, and
- termination of contracts that are so flawed by oversights and decisions the party has come to regret that termination is preferable to continuing.

### Diligence

Diligence will mitigate, if not avoid, most of the benefit, task, and commitment oversight and remorse risks previously described. Identifying a benefit, task, or commitment eliminates the risk it will be missed. For example, had Wildmon (in *Wildmon*[81]) identified control over subsequent broadcasting of the original program as an additional benefit he expected to realize, he could have included it in the contract. Had the parties identified the conversion of the data as a task that had to be completed in *Holston Valley Hospital and Medical Center, Inc.*,[82] responsibility for completing that task would have likely been allocated to one or the other party, and possibly the fee would have been adjusted accordingly, or there would have been no deal. In *Bessemer Trust Co.*,[83] had the parties identified and recognized the importance of the potential for the sellers to recover their clients' business at another firm, they could have detailed when it would be permissible. Decisions will still have to be made whether to include or omit a benefit, task, or commitment. Investigating and analyzing the possible outcomes of such decisions one way or another will further mitigate the benefit, task, and commitment remorse risks. This text does not attempt to summarize the diligence that might or should be done to identify and assess benefit, task, and commitment oversight and omission risks in any specific transaction or type of transaction.

### Cooling-Off Period

A period following contract formation before a contract becomes effective or, if effective at contract formation, during which a contract can be terminated with impunity allows a party to reflect upon the deal before committing to proceed with the implementation phase. It would have been useful in *Resource Management Co.*,[84] where shortly after contract formation the mineral lessors learned how much they had agreed to give their consultant. Having agreed to terms, they could have checked with other advisors, such as their attorney, as to whether the compensation they agreed to pay was excessive. The cooling-off period would not have been helpful in *U.S. v. Bethlehem Steel Corp.*,[85] where the government did not learn of the high compensation until Fleet's performance under the contract had been completed. In *Grenall*,[86] the annuitant might have discovered her fatal illness during a cooling-off period. In both *Resource Management Co.* and *Grenall*, only diligence, on the level of fees in the first and the annuitant's health in the second could have revealed the hazards, though that could have been done before contract formation in both cases.

### Commitment Disclaimer

Contract interpretation principles are the primary tools for allocating responsibility for oversight of, and regret over, decisions about benefits, tasks, condition, contingencies, and responsibility. A benefit or task that has been omitted, whether it has been overlooked or deliberately excluded, can be included by an implied term. Technically, the term was present in the contract from contract formation, and the later determination that the term was implied is a recognition that it was there from the beginning. For example, in *City of Yonkers*,[87] Yonkers claimed a duty on Otis to continue operations in the city should have been implied even though none was stated in the contract. The court declined to rescue Yonkers by implying the missing term. Responsibility for the risk of the absence of a commitment to complete the task—remaining in Yonkers—was thus allocated to Yonkers. In *Cenex*,[88] the seller claimed the duty of good faith and fair dealing implied a duty to use reasonable efforts to generate revenues that would yield the additional purchase price. The court's refusal to imply such a term allocated to the seller responsibility for the risk that the buyer had no commitment to promote propane sales. In *Sonoran Scanners*,[89] in which the court held the buyer had such a duty, the court allocated responsibility for the risk to the buyer.

An express disclaimer of any commitment can be used to mitigate the chance that a commitment will otherwise be implied by the application of contract interpretation principles.[90] A disclaimer negates or limits a party's responsibility for losses that result when a task has not been completed or a desired result has not been achieved. A commitment disclaimer may be broad or narrow:

- A party may commit to complete a task but disclaim that its effort will yield or contribute to yielding an anticipated benefit, thereby disclaiming responsibility for losses that occur because the desired result is not achieved.
- A party may commit to complete a task but disclaim any commitment to complete the task when applicable contract principles excuse or discharge its performance.
- A party may disclaim any commitment to complete a task.

A disclaimer creates a commitment gap to the extent one party still hopes or expects the other party to complete a task and no commitment to complete it or to complete it as anticipated is given. The party that accepts the disclaimer assumes the risk that the task for which no commitment to complete is made will not be completed or the outcome of completion of a task will not be as anticipated.

*Seegers v. Pioneer Hi-Bred International, Inc*.[91] illustrates how a disclaimer limits an obligor's commitment. A seed company supplied corn seeds to farmers who agreed to grow the crop and deliver it to the seed company. The farmers planted the seeds. When grass began to encroach on the crop, they treated the grass with a pesticide, also supplied by the seed company. The pesticide damaged the crop.[92] Their contract with the seed company provided that the farmers "accept full responsibility for performance of such materials [fertilizers and pesticides] both to this crop and any succeeding crops."[93] Once the seed company accepted orders for seeds, it was obligated to supply them. That did not commit the seed company to ensure the seeds achieved any result, and the express disclaimer negated responsibility for the result falling below the farmers' expectations. The case illustrates the disclaimer described in the first bullet.

By disclaiming any commitment to complete a task, a party also reserves until the time for completion is to begin a right to decide whether to complete that task. It thus enables a party that is uncertain about whether it has identified or made good decisions about all the benefits that might be realized, the tasks that must be completed, and the costs of completing them, and the conditions and contingencies that might affect their completion to wait until the last possible moment to decide to commit or to complete a task without committing to do so. Following are three cases that illustrate such use of disclaimers:

- *Flight Concepts Limited Partnership v. The Boeing Company*[94]: Flight Concepts granted a Boeing subsidiary an exclusive worldwide license to manufacture and sell a "multirole" aircraft, the design for which was owned by Flight Concepts, in return for a royalty payment of $150,000 per aircraft sold by Boeing, such license to continue for ten years from the date of first sale. Before granting the license, Flight Concepts had unsuccessfully approached the Italian government and other aircraft manufacturers. The license not only did not obligate Boeing to produce any aircraft, it stated clearly that Boeing had no such obligation.[95] Boeing disclaimed any commitment to use the licensed intellectual property. Boeing produced no aircraft using the design and terminated the license after two years. Flight Concepts had identified the benefit it hoped to realize (profits from aircraft sales), the task to be completed to realize that benefit (production and sale of the aircraft), and the commitment it needed from Boeing to get that task completed, but it failed to get Boeing to commit to produce and sell them and later regretted this unsatisfactory outcome.[96] Flight Concepts also unsuccessfully claimed Boeing had an implied duty, based on its duty to act in good faith and fair dealing. The disclaimer effectively trumped the contract interpretation principle that would have implied such duty. The case illustrates the disclaimer in the third bullet.
- *MJ & Partners Restaurant Ltd. Partnership v. Zadikoff* [97]: Michael Jordan, a famous basketball player, granted a partnership that owned and operated restaurants an exclusive license to use his name, voice, and likeness at a restaurant in the Chicago area and in a separate letter agreement reserved to himself "the right to review and approve each additional restaurant opportunity on a case-by-case basis."[98] The restaurant was a success and the partnership opened a second restaurant using Jordan's name in Chicago without his prior approval. The right to review and grant or refuse consent in its sole discretion negated any commitment by Jordan to allow the use of his name by the partnership.[99] The partnership also unsuccessfully claimed that Jordan had an implied duty to consent, given the success of the first restaurant, based on the duty of good faith and fair dealing. The express reservation trumped the principle that would have implied such duty. The case illustrates the disclaimer described in the third bullet.
- *G. Golden Associates of Oceanside, Inc. v. Arnold Foods Co., Inc*.[100]: Golden Associates (GA) sold the technical information for making a flat bread product it had developed and associated trademarks in exchange for a percentage of the net sales proceeds of the flat bread products sold by the buyer. The contract also stated that the buyer knew best how to develop, manufacture, and sell such products. It further stated that the buyer "shall have complete and total discretion in determining the manner and extent to which it will manufacture, distribute, sell or promote the [p]roducts, and grant licenses of its rights."[101] The buyer produced and sold the flat breads for a little over a year and ceased production. Arnold Foods (AF) acquired the buyer and resumed production for eighteen months and ceased production. About the same time, AF acquired another company that produced flat bread products under its own name. The quoted language disclaimed any responsibility to do anything with GA's products. Less clear, however, was whether the disclaimer allowed AF to favor competing products.[102] That disclaimer was qualified, however, by application of the duty of good faith and fair dealing, which implied a commitment not to favor such competing products. The case illustrates a qualified version of the disclaimer described in the third bullet.

## Performance Standards

A party may commit to act in a certain manner when endeavoring to complete or completing a task. The task might not be completed when the commitment is to act in a certain manner when endeavoring to complete a task. By accepting a commitment from the obligor to complete a task in a certain manner, the obligee assumes responsibility for the risk that performance will be completed—the obligor will act in the prescribed manner when completing the task—but the result of such completion may not yield the result the obligee hopes for. For example, a lawyer who represents a client in a trial commits to perform to a standard but does not thereby assure the client of a favorable result. A gap exists between the lawyer's commitment to represent the client and the client's desired outcome of the efforts made during such representation, and nothing can be done to close that gap. It may do all that is required and yet complete a task that does not contribute toward benefit realization, or it may fail to complete a task that even if completed would not necessarily so contribute. That commitment gap is increased by lowering the standard of performance: the lower the standard, the wider the gap. For example, were the lawyer to commit only to act honestly, disclaiming all other assurances about its competence, it would have set a low bar for its performance, leaving the client to hope for a successful outcome with little reason to do so. The standard to which an obligor is expected to perform determines the gap between a compliant obligor's performance and the contribution the completed task is expected to make to the realization of the benefit the obligee expects or hopes to realize.

*Chemical Bank v. Security Pacific National Bank*[103] illustrates the gap between a low performance standard and the level of performance expected by an obligee. An agent bank filed a form financing statement to perfect a security interest in its own name but not in its capacity as agent for the syndicated banks. As a result, the syndicated banks did not have a perfected security interest in the debtor's assets, a failure that the court characterized as negligent and a breach of a fiduciary duty. The contract between the agent and the syndicate banks stated the agent would be liable only for its gross negligence and willful misconduct. Any lower standard would have been unenforceable. The agent bank failed to complete the required task, perfecting the syndicated banks' security interest, but such failure did not amount to a breach because it was not gross negligence.

By accepting the lower standard of performance, the syndicate banks assumed responsibility for the risk the agent bank's compliant performance would not yield or even contribute to the anticipated benefit, a perfected security interest. The agent bank correspondingly reduced its risk of liability for its inept efforts to perfect the security interest.

### Contract Modification

Contract amendments can be used to fill in gaps created by oversight and rejection and not filled by terms implied by contract interpretation principles. A modification is a "change to something; an alteration or amendment."[104] Modification and amendment are used interchangeably with regard to contracts. Any term of a contract may be modified as specified in the contract or in the absence of such a provision as permitted by law.

Because a modification, when effective, can add to or change the terms in a contract, it trumps the allocation of risk implied by the application of contract interpretation principles. It can also reverse decisions made at contract formation that a party later regrets. Missed and omitted benefits, tasks, and commitments can be added to the contract after contract formation. Benefits, tasks, and commitments that come to be regretted after contract formation can be deleted or modified, short of terminating the contract.

That procedure may be the mutual agreement of all parties, a percentage of the parties, or one party. The party that controls the amendment procedure also allocates benefit, task, and commitment oversight, and remorse risks. If, by amendment, an obligee can unilaterally add benefits, tasks, and commitments to be completed by the obligor, the latter will be responsible for completing such tasks and commitments. The omission of anticipated benefits, tasks to be completed by the other party, and commitments to complete those tasks that the obligee has come to regret after contract formation can be added or modified. Conversely, an amendment procedure can allow an obligor to modify or delete tasks and commitments it agreed to complete. If it missed such a task, the deletion enables the obligor to correct its oversight. If it included such a task and later regrets the inclusion, the amendment procedure allows it to assuage its regret. The party or parties that decide what contract amendments are allowed also decide when benefit, task, and commitment hazards can be eliminated and thereby have the power to allocate responsibility for the risk of their continuation after contract formation.

Between these two extremes, unilateral and mutual amendments, are compromises that give the other party a voice in any decision about an amendment and limit the decision-making authority of the party authorized to unilaterally modify the contract. The decision-making party may be required to notify the other party of the amendment or consult with or obtain the consent of such other party. That consent may be withheld in the discretion of the consenting party or only with reason. A decision to modify terms might be limited by a reasonableness requirement: the amendment must be reasonably related to a condition or contingency.

The following cases illustrate unilateral modification procedures:

- *Rodman v. Safeway Inc*.[105]: Safeway's standard terms and conditions for online purchases stated:

  > [Safeway] reserves the right to, from time to time, with or without notice to you, in [Safeway's] sole discretion, amend the Terms and Conditions for use and purchases regarding the online shopping services. Any amendment by [Safeway] will be effective only as to orders you place after [Safeway's] revisions of these Terms and Conditions as displayed on the Web site.

  The terms and conditions also stated Safeway "has no responsibility to notify you of any changes before any such changes are effective." In 2010, Safeway modified its policy for pricing products sold online, charging a premium for such products where it previously priced products at the prices in its physical stores. In 2011, Safeway notified its customers that it had modified its online pricing policy: "Please note before shopping online at [Safeway.com] that online and physical store prices, promotions, and offers may differ." After discovering a discrepancy between prices for products sold online and those in physical stores, Rodman sued, claiming the higher online prices breached the terms of service for online purchases. Safeway's unilateral amendment procedure proved ineffective because the changes had not been clearly brought to the customer's attention.[106] Because the customers had to assent to the changes by continuing to purchase online, Safeway used the amendment procedure to change terms applicable to future transactions. The procedure enabled it to unilaterally avoid oversight and other hazards in those future transactions. Because the amendment procedure did not change the terms of past or existing transactions, it did not enable Safeway to allocate to the customers responsibility for risks from oversight and other hazards in those transactions.[107]
- *Marriott Corp. v. Dasta Construction Co*.[108]: Marriott hired a contractor for a fixed price to complete the exterior skin work on a fast-track hotel construction project. "[T]he architectural plans and specifications are designed and modified as the building's actual construction progresses" in a fast-track project.[109] The parties thus acknowledged that the drawings and specifications had gaps without knowing what those gaps were. The contract excluded nearly all entitlements to change orders. Still, the contractor had to provide sufficient workers to comply with the schedule, even if the order of the work changed; the contractor had to suffer the additional costs that resulted from delays caused by Marriott, whether by negligence or otherwise, and other events, such as fires and storms, and the contractor had to bear additional costs, foreseen and unforeseen, including from unforeseen and unusual obstructions. Marriott frequently and significantly changed the plans and the order in which the work was done, resulting in the contractor being unable to use its workforce efficiently. Other problems occurred, for the most part stemming from the fast-track nature of the project. When the contractor had exhausted its funds, it submitted an "efficiency claim" for $1.5 million (its original bid was just over $3 million). Marriott refused to pay any of the claimed amount. By allowing Marriott to unilaterally amend the drawings and specifications for the portion of the project the contractor had to complete, the contractor assumed responsibility for the risks— task oversight and omission risks—that tasks appropriate to the project that were not yet identified therein would be identified and added later, as they were.

The full import of the allocation of responsibility for oversight and rejection risks effected by the unilateral amendment procedure in *Marriott Corp*. depended upon the compensation terms with which it was combined. The contractor assumed responsibility for the risk that its actual costs might exceed its estimated costs when it agreed to complete the work for a fixed price. It was not entitled to additional compensation for the changed or added tasks. The greater the discrepancy between its anticipated and actual costs for the additional tasks, the greater losses and responsibility for the risk assumed by the contractor.

Had the contractor been compensated on the basis of a price for each unit by which tasks were measured, it would have assumed responsibility for a different financial risk: the risk that its cost per unit for the additional tasks would have been higher than anticipated, perhaps because each additional unit would have more difficult to complete than estimated. Because its compensation would not have been calculated on the basis of the actual scope, the contractor would not have assumed the risk that the scope was greater than anticipated. Had the contractor been compensated on the basis of its costs plus a profit, it would have been compensated for the additional tasks on the same basis. The contractor would have passed back to Marriott responsibility for the financial risk that the cost of completion might be greater than anticipated. The contractor assumed responsibility for the greatest risk under the unilateral amendment procedure when it agreed to perform for a fixed price, whatever the changes, and would have assumed the least risk had it performed for a cost-plus price.

## Contract Termination

A contract may state when and how it may be terminated or rescinded, which may be upon the agreement of the parties, the occurrence of certain events, or the decision of one party. In this last instance, a party can, in effect, terminate its commitment at any time, subject to the terms permitting termination. A party allowed to terminate for convenience can do so because it missed or regrets its choice of benefits, tasks, or commitments and prefers to terminate instead of continuing with the transaction.

In the absence of breach or other terms to the contrary, termination leaves the parties where they stand at the time of termination, each having to bear its costs of performing until that time and to forego whatever further benefits might have been realized. By terminating, a party reduces potential losses that might result or are resulting from oversight and rejection hazards. The other party suffers the loss of its investment in the transaction and its potential benefits. To that extent, it also bears responsibility for benefit, task, and commitment oversight and remorse that adversely affect the terminating party. Termination is a "nuclear" option for eliminating risks as it destroys all potential benefits that might be realized by both parties from the terminated transaction. Responsibility for losses that result to a party that result from termination by the other party can be shifted to the terminating party by having it pay a fee or compensation upon termination.

The following cases illustrate how the exercise of unilateral termination rights both eliminate hazards for the terminating party and burden the nonterminating party with a share of the resulting losses:

- *Piantes v. Pepperidge Farm, Inc.*[110]: For 24 years, Piantes distributed Pepperidge Farm, Inc.'s (PFI's) baked goods in certain suburbs of Boston under a consignment agreement. PFI asked Piantes to sell a portion of its franchise "route" because PFI wanted to introduce a new product and decided Piantes, being already overstretched, lacked the capacity to deliver the additional product. Piantes rejected the offer. The contract allowed PFI to terminate at any time and without cause but required PFI to pay Piantes 125 percent of the fair market value of the franchise, as determined by a panel of arbitrators. PFI terminated the agreement.[111] The potential hazard to PFI at contract formation was the chance that PFI's commitment to Piantes would impair realization of a new benefit at a future date. That potential hazard became a hazard that threatened losses when the new product was developed and the contract with Piantes impeded its distribution. Those potential losses were mitigated by the broad termination right PFI had reserved. The hazard to Piantes at contract formation was the unilateral termination right. To the extent PFI had to compensate Piantes, it, not Piantes, bore responsibility for Piantes's losses upon termination; and to the extent such compensation was less than Piantes's losses, Piantes bore responsibility for them.
- *United Airlines, Inc. v. Good Taste, Inc.*[112]: A contract between a caterer and an airline had a three-year term but allowed either party to terminate upon 90 days' prior written notice.[113] The caterer invested approximately $1 million in equipment to perform under the contract. Sixteen months later, the airline gave 90 days' termination notice.[114] The caterer unsuccessfully claimed the airline had to exercise the termination right reasonably, consistent with its, the caterer's, expectations. The report of the case does not explain why the airline terminated. It may have had remorse over the deal. Still, the case illustrates how a broad, unilateral termination right allowed the terminating party to terminate its commitment upon short notice and thus mitigate whatever risk had occurred. The termination right was also a hazard to the caterer because it would, as it did, lose its investment and potential benefits without any compensation.
- *Ace Flying Service, Inc. v. Colorado Department of Agriculture*[115]: A contract for the spraying of one million acres of insect-infested lands for 13.75 cents per acre provided, "[t]he State and its cooperators may terminate this contract at any time subject only to the service guarantee herein specified." The guarantee obligated the state to pay fixed amounts for aircraft that the agency requested to spray, had been readied for flying to the point they were on the airstrip, but did not spray because of unforeseen conditions. The contractor incurred $32,532.18 in expenses and sprayed 243,792 acres for which it received $32,518.65 for the acreage sprayed, plus the sum of $1,500, upon termination of the contract. As in the previous case, the report does not indicate why the state agency terminated the contract. The case also illustrates how a broad termination right allowed the state to mitigate any benefit, task, or commitment oversight or remorse risks. Finally, it illustrates how the losses that the nonterminating party may suffer as a result of termination can be mitigated by compensation paid by the terminating party.

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1 803 F. Supp. 1167 (N.D. Miss. 1992).

2 *Id*. at 1170.

3 *Id*. at 1171. While media releases were commonplace, contracts giving the photographed or interviewed subject a degree of control over the use of the material were not, at least to the point that forms had been published; the Wildmon contract was an attempt to specify the benefit he expected to enjoy. When, after airing the program in Britain, Channel Four sought to distribute it in the United States, Wildmon sued for damages, claiming his consent was required to show the film outside of England. The court held that the quoted language was ambiguous because it could be read "as preventing the distribution of the interview in any form and any manner except for scheduled showings by Channel Four in Great Britain [or] . . . as preventing the distribution of only the footage taken of Wildmon to other producers and interviewers for use in other productions." *Id*. at 1174. The plaintiff's motion for summary judgment was accordingly denied.

4 30 F.3d 1255 (9th Cir. 1994).

5 *Id*. at 1264.

The court denied him credit, however, holding that the absence of the attribution clause in the contract warranted the conclusion that the publisher "did not intend to contract to give Cleary name credit." *Id*. at 1263.

6

7 585 F. Supp. 154 (E.D. Mo. 1984).

8 An employee was killed using the equipment. The buyer unsuccessfully claimed that a warranty that the equipment was safe to use should be implied, even though the only express warranty given was that technology provided shall be "sufficiently developed to permit commercial operation" and all other warranties were expressly disclaimed.

9 70 F.3d 933 (7th Cir. 1995).

10 The buyer's claim was unsuccessful. The contract stated the land was otherwise sold "as is."

11 719 F. Supp. 791 (D. Minn. 1989).

12 The court dismissed his claim, holding that C had received what HD had committed to provide: the manual and training in how to prepare and sell HD's ice cream and other products. The missing task that C tried to shoehorn into "know-how" was training in marketing and managing the franchise business; the implicit benefit was business management skill.

13 806 F.2d 1227 (4th Cir. 1986).

14 The court held the sublessor-grantee was entitled to purchase the sublease without the equipment located on the site.

15 65 N.J. Super. 322, 167 A.2d 825 (N.Y. App. 1961).

16 After the lessor purchased additional property adjacent to and within 1,000 feet of the leased parcel, it sought a judicial declaration that it could be used to operate a service station. The court held the restriction extended to the subsequently acquired parcel.

17 988 F.2d 386 (3d Cir. 1993).

18 The bottlers sued for breach of contract, claiming Coca-Cola breached by substituting the syrup for sugar without their agreement, and alternatively, the contract should be re-formed to allow use of the syrup and pass the savings through to the bottlers. The bottlers were awarded damages by the district court. The appeal court affirmed the finding of breach, but because the bottlers had suffered no loss, reduced the judgment to $1. The court said of the alleged mutual mistake, "The fact that the parties failed in 1921 to anticipate and provide for the development of satisfactory sweeteners, other than sucrose, does not mean that they made a mutual mistake in reducing their shared intent to writing when they specified the sweetener for Coca-Cola Bottlers' Syrup would be 5.32 pounds sucrose per gallon. The fact that they based the price of the syrup on the market price of sucrose with a mark-up in absolute terms, instead of a percentage mark-up, is evidence to the contrary." *Id*. at 405.

19 *E.g*., Sunds Defibrator AB v. Beloit Corp., 20 U.S.P.Q.2d 1633, 930 F.2d 564 (7th Cir. 1991), where the agreement pursuant to which Sunds licensed Beloit to manufacture and sell pulp washers in North America using Sunds' nonpatented technology prohibited each party from disclosing and using technical information received from the other party "in any manner, except to the extent necessary to accomplish the purposes of this Agreement." Sunds developed a competing pulp washer and offered to sell it in Taiwan at a price lower than that offered by Sunds. Sunds sued for breach of contract; and the trial court awarded damages and ordered Beloit to withdraw its other bids to sell pulp washers around the world. The appeals court upheld the award and order, holding the license agreement prohibited Beloit's use of technical information disclosed to it even if it could have shown it was in the public domain and Beloit was permitted to disclose it.

20 *E.g*., All West Pet Supply Company v. Hill's Pet Products Division, Colgate-Palmolive Co., 847 F. Supp. 858, amended 842 F. Supp. 1376 (1994), where the distributor of pet food products claimed the manufacturer was contractually obligated to keep information about the distributor's customers confidential after termination of their distribution contract. The court held that the contractual obligation to keep the information confidential terminated with the contract.

21 872 F. Supp. 1069 (D.C. 1995).

22 The candidate sued the hotel, claiming breach of an implied contract to keep information about his stay confidential. The court dismissed the claim. "There is no evidence in this record to prove the existence of such an implied contract. Plaintiff never made nondisclosure of his hotel receipts a condition of his stay at the . . . hotel." *Id*. at 1073.

23 708 F. Supp. 108 (E.D. Penn. 1989).

24 PT canceled its order with L and demanded that L withdraw the brochure. When L refused, PT unsuccessfully sued, claiming L had a duty implied by trade usage and the covenant of good faith and fair dealing to keep information about the commemorative plate confidential. The court found no evidence of a trade usage and was unwilling to hold the duty of good faith and fair dealing implied a confidentiality obligation.

25 774 F. Supp.2d 826 (N.D. Tex. 2011).

26 The seller sued for breach of the confidentiality agreement, claiming that the publicity about the sale would allow an inference to be drawn that the seller had sold to the person offering to sell through the auction. The court held the claim was plausible and denied the buyer's motion to dismiss.

27 *E.g*., in RKO Radio Pictures, Inc. v. Jarrico, 128 Cal.App.2d 172, 274 P. 2d 928 (Cal. App. 1954), a longtime associate of a screenwriter testified before a congressional committee investigating communist activities in the motion picture industry that the screenwriter was a communist; the screenwriter, when called to testify, invoked his privilege against self-incrimination and refused to deny or confirm the allegation, and the motion picture production company that had hired the screenwriter to write the screenplay for a movie filed for declaratory relief, alleging the screenwriter had breached the morals clause in the contract that obligated him to "conduct himself with due regard to public conventions and morals and . . . not do anything which would tend to degrade him or bring him into public disgrace, obloquy, ill will or ridicule." The contract, which expressly recited that "essential consideration of the contract was the popularity and good reputation of appellant with the public," recognized that the value of the film could be affected by the writer's actions and reputation. *See* also RKO Radio Pictures, Inc. v. Scott, 240 F.2d 87 (9th Cir. 1957); Nader v. ABC Television, Inc., 330 F. Supp.2d 345 (S.D.N.Y. 2004).

28 *E.g*., Charter Practices Int'l, LLC v. Robb, 2014 WL 273855 (D. Conn. 2013), where a "charter practice" or franchise agreement for a pet hospital provided, "You must conduct your business following the highest standards of honesty, integrity, fair dealing and ethics. You must do nothing that would tend to discredit, dishonor, reflect adversely upon or in any manner injure the reputation of MMI, CPI, their affiliates, or the Network [of Banfield Pet Hospitals]."

29 864 F.2d 593 (8th Cir. 1989).

30 After the company filed for bankruptcy, its trustee claimed the deductions and setoffs for such payments against the funds held in trust were not permitted under the bankruptcy code, as the contract between the company and the stores did not permit them. The court held that because the stores had no obligation to their customers or the payees to refund or pay on the money orders and nothing in the contract with the company allowed them to do so, the deductions or set-offs were not allowed under the bankruptcy code. *Id*. at 596.

31 534 F. Supp.2d 959 (D. Minn. 2007).

32 661 F. Supp. 72 (E.D. Tenn. 1986).

33 The hospital sued the contractor for breach of contract. The district court held as a matter of law that because the hospital "was admittedly inexperienced in using IBM equipment and since [the contractor] represented itself to be experts, the Court finds it unreasonable to believe that Holston Valley [the hospital] would hire experts to convert the computer programs but would reserve the most difficult conversion task for its own inexperienced staff." *Id*. at 74.

34 896 F. Supp. 1574 (D. Wyo. 1995).

35 The court, granting summary judgment to the acquirer, held the seller had submitted no evidence that the covenant of good faith and fair dealing had been breached.

36 585 F.3d 535 (1st Cir. 2009).

37 *Id*. at 537–38.

38 SSI and the founder claimed PEI had an implied duty "to make good faith and reasonably competent and diligent efforts to develop, market, and sell [the] CTP products." *Id*. at 539. The federal district court granted summary judgment to PEI, but the appeal court reversed, ruling, "There was no language in the agreement negating an obligation by PerkinElmer to use reasonable efforts or conferring absolute discretion on PerkinElmer as to the operation of the business. Under these circumstances, we find that PerkinElmer had an implied obligation to use reasonable efforts to develop and promote SSI's technology." Id at 544.

39 54 Wn. App. 424, 774 P.2d 44 (Wash. App. 1989).

40 When the tenant was unsuccessful at persuading the fire department the fire code did not require these changes, it vacated the building and terminated the lease, claiming the changes required by the fire code were economically unfeasible and the lease had been frustrated by the fire department's actions. The trial court granted the landlord's motion for summary judgment. The appeal court affirmed the judgment, holding that in the absence of an attempt to resolve the dispute with the fire department through the applicable administrative procedure, it could not claim frustration of contract.

41 16 N.Y.3d 549, 925 N.Y.S.2d 371, 949 N.E.2d 462, 211 N.Y. Slip. Op. 03307 (N.Y. 2011).

42 Bessemer sued in the New York state court; the case was removed to federal district court, which referred to the New York Court of Appeals the question of whether an 'improper solicitation' occurred as a result of "(1) the active development and participation by the seller, in response to inquiries from a former client whose good will the seller has voluntarily sold to a third party, in a plan whereby others at the seller's new company solicit a client, and (2) participation by the seller in solicitation meetings where the seller's role is largely passive." 16 N.Y.3d 549, 551-2, 925 N.Y.S.2d 371, 374, 949 N.E.2d 462, 465.

43 "Moreover, the seller of a business is free to subsequently compete with the purchaser and even 'accept the trade of his former customers, provided that he does not actively solicit such trade'. . . . To militate against these risks, which extend beyond the limited scope of a seller's 'implied covenant,' a purchaser is free to negotiate an express covenant, reasonably restricting, for instance, a 'seller's right to compete in a particular geographical area or field of endeavor.'" 16 N.Y.3d 549, 557, 925 N.Y.S.2d 371, 377, 949 N.E.2d 462, 468 (citations omitted).

44 The court held "We conclude that, while a seller may not contact his former clients directly, he may, 'in response to inquiries' made on a former client's own initiative, answer factual questions. Furthermore, under the circumstances where a client exercising due diligence requests further information, a seller may assist his new employer in the 'active development . . . [of] a plan' to respond to that client's inquiries. Should that plan result in a meeting with a client, a seller's 'largely passive' role at such meeting does not constitute improper solicitation in violation of the 'implied covenant.' As such, a seller or his new employer may then accept the trade of a former client." 16 N.Y.3d 549, 559–60, 925 N.Y.S.2d 371, 380, 949 N.E.2d 462, 470.

45 18 F. Supp.2d 117 (D. Mass. 1998).

46 When the facts came to light, fourteen of his followers sued, claiming, among other things, breach of contract, in particular that the implied covenant of good faith and fair dealing obligated him to live to the standards he professed to follow. The court dismissed the claim, holding "nothing in the allegations indicates that any contract specifically required Desai to adhere to a particular code of conduct or abjure any specific behavior to maintain his status." *Id*. at 123.

47 82 Cal. App.3d 991, 147 Cal. Rptr. 558 (Cal. App. 1978).

48 The court held the lessee was entitled to introduce evidence that an obligation to keep spaces leased to a chain supermarket and drug store should be implied.

49 19 T.L.R. 434 (1903).

50 *Supra* ch.1, note 24.

51 Justice Robert Samuel Wright held the agreement was made on the "missupposition of facts" and void. 19 T.L.R. 434.

52 Lord Justice Vaughan Williams described the cancelation of the coronation procession as "an event 'of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when made.'" 72 L.J. (K.B.) 794, 797, 89 L.T. 328, 331, 19 T.L.R. 711, 713.

53 165 Cal. App.4th 188, 80 Cal. Rptr.3d 609, 08 Cal. Daily Op. Serv. 9581 (Cal. App. 2008).

54 The administrators of her estate sought to rescind the contract on the ground that her decision to purchase the annuity was based on a mistake of fact: her ignorance of her illness. Her estate's claim was dismissed, the court ruling that, as a matter of law, "A contracting party bears the risk of a mistake when the agreement so provides or when the party is aware of having only limited knowledge of the facts relating to the mistake but treats this limited knowledge as sufficient."

55 844 F.2d 42 (2nd Cir. 1988).

56 The city sued the company for breach of an implied promise to continue its operations there for a reasonable period of time, the contracts not having stated that the company was obligated to remain there. The court declined to imply such promise, while recognizing the purpose of the contract was to keep the company operating there. "The letter of intent . . . contains a clear distinction between 'goals' and 'commitments.' Otis' continuing presence was only a goal, not a commitment." *Id*. at 47.

57 914 S.W.2d 685 (Tex. App. 1996).

58 The lessor sued, unsuccessfully claiming the lessee was obligated to continue operating a restaurant on the premises, either under the wording of the lease or the implied covenant of good faith and fair dealing. The court held the obligation to operate a restaurant at the site would not be implied where the fixed rent was substantial. "[The lessor] Jim Ray, the original lessor and Nalle's predecessor in interest, stated in an affidavit submitted by Nalle that the minimum rent covered his financing obligations. In addition, the lease obligated Taco Bell to pay taxes, insurance, repairs, and upkeep expenses. Evaluated at the time the lease was signed, this fixed rent was sufficiently adequate and substantial to prevent the implication of a covenant of continuous operation." *Id*. at 689.

59 896 F. Supp. 1574 (D. Wyo.1995).

60 *See* text accompanying notes 34 and 35.

61 844 F.2d 42 (2nd Cir. 1988).

62 *See* text accompanying note 55.

63 840 F.2d 1333 (7th Cir. 1988).

64 The gas company successfully sued for breach of contract, and the bakery appealed, arguing that because theirs was a requirements contract, it was allowed to reduce its requirements, to nothing if it chose to do so in good faith; its commitment was to buy whatever gas it chose to buy from the gas company. Judge Richard Posner explained the bakery could not reduce its commitment simply because it had second thoughts about the project; it needed to show it had legitimate business reasons for eliminating its needs. Because the bakery offered no such reasons, its reversal of its position on the project breached the contract.

65 706 P.2d 1028 (Utah 1985).

66 The company and the brothers, through their lawyer, claimed they were never bound by the contract with RMC, and if they were, RMC had breached it. They argued the contract was unconscionable because RMC had received far more than its services were worth, so it seemed in retrospect. The Utah Supreme Court held for RMC, ruling, "When viewed in light of the circumstances as they existed . . . when the instant contract was executed, we cannot say that the contract was so unfair or oppressive in its mutual obligations as to shock the conscience. The contract was essentially like other contracts dealing with that particular subject matter. The [brothers], before contracting with RMC, recognized that they needed advice and assistance in dealing with oil companies and their land men." *Id*. at 1043–44.

67 30 F.3d 1255 (9th Cir. 1994).

68 *See* text accompanying note 4.

69 30 F.3d at 1264.

70 98 N.Y.2d 562, 750 N.Y.S.2d 565, 780 N.E.2d 166 (2002).

71 Ronnie Greenfield, one of the Ronnettes, claimed the contract did not give such rights to Philles Records. The trial court ruled for Greenfield, a decision upheld by the appeal court. New York's highest court affirmed, finding the language in the contract quoted above gave Philles Records the "right to reproduce the performances by any current or future technological methods."

72 21 F. Supp. 445 (S.D. N.Y. 1937).

73 *Id*. at 446.

74 After General Foods used her recipe and paid her nothing, she sued. District Judge John Clancy held for General Foods, while noting, in passing, "the plaintiff in disclosing her recipe relied upon the good faith and sense of fairness of the defendant corporation to recompense her for the value of the recipe." *Id*. at 447.

75 315 U.S. 289, 62 S. Ct. 581, 86 L. Ed. 855 (1942).

76 The Supreme Court held for the shipbuilder. Justice Black noted, "[T]his, so far as we know, is the first instance in which government has claimed to be a victim of duress in dealings with an individual." He added, "The profits made in these and other contracts entered into under the same system may justly arouse indignation. But indignation based on the notions of morality of this or any other court cannot be judicially transmuted into a principle of law of greater force than the expressed will of Congress." 315 U.S. at 308–9.

77 842 F. Supp. 152, reconsideration den. 848 F. Supp. 44, *aff'd*. 39 F.3d 1169 (E.D. Penn 1994).

78 His executors unsuccessfully claimed breach of contract, namely that the community had failed to provide monitoring services that would have resulted in his immediate discovery after his stroke, and rescission, that the entrance fee was unconscionable where the resident had lived in the community for only six months.

79 843 F. Supp. 1512 (N.D. Ill. 1994).

80 The client sued his attorney for breach of contract, claiming that he would not have bought the rare coins had he known of this conviction. The attorney moved for summary judgment, and the court granted the motion, finding the attorney had not breached the contract by selecting the investigator. The court added the client had decided to proceed with the investment notwithstanding the strong reservations voiced by the investigator and attorney. The client was the putative obligee, the attorney the putative obligor, and the on-site search of the county court records the task that the client could have had completed once it received the investigator's report and recommendations. He rejected that task, hoping it was unnecessary in that it would not reveal any criminal convictions.

81 *See* text accompanying notes 1–3.

82 *See* text accompanying notes 32 and 33.

83 *See* text accompanying notes 41–44.

84 *See* text accompanying notes 65 and 66.

85 *See* text accompanying notes 75 and 76.

86 *See* text accompanying notes 53 and 54.

87 844 F.2d 42 (2nd Cir. 1988).

88 *See* text accompanying notes 34, 35, 59, and 60.

89 *See* text accompanying notes 36–38.

90 BLACK'S LAW DICTIONARY defines disclaimer of warranty as "[a]n oral or written statement intended to limit a seller's liability for defects in the goods sold." BLACK'S LAW DICTIONARY 562 (10th ed. 2014). Because warranties are given in a wide variety of transactions, in all of which they may be disclaimed, a definition limiting disclaimers to sale of goods transactions is too narrow. The definition in the text is adapted from the quoted definition.

91 997 F. Supp. 1124 (N.D. Ind. 1998).

92 The farmers sued the seed company for breach of contract. The court, granting summary judgment in favor of the seed company, held the quoted provision controlled liability for losses that resulted from the use of the pesticides, and the farmers, not the seed company, accepted that responsibility.

93 *Id.* at 1126.

94 819 F. Supp. 1535 (D. Kan. 1993).

95 The relevant term read, "It is the intent of the parties hereto, in consideration of the terms and conditions herein, that BMAC shall be under no obligation whatsoever to produce and/or sell Licensed Product(s) and/or any product utilizing Licensor's Know-How during any part of the term of this License Agreement, and the License Agreement shall not be terminable by Licensor for BMAC's failure to produce and/or sell Licensed Product(s) and/or any product utilizing Licensor's Know-How." *Id.* at 1541.

96 Flight Concepts sued, asserting various claims based on what Boeing had said or not said during the negotiations, as well as the contract; the court granted Boeing summary judgment on all claims. Flight Concepts argued that the duty of good faith and fair dealing implied in every contract obligated Boeing to produce the aircraft and that this implied duty overrode the exclusion clause. Dismissing this claim, the court said the exclusion clause "precludes the plaintiffs from contending that they had a reasonable expectation of any implied protection. The concept of good faith became irrelevant on these matters." *Id.* at 1551.

97 995 F. Supp. 929 (N.D. Ill. 1998).

98 *Id.* at 930.

99 Jordan sued the partnership for violation of his rights. The partnership argued that because he had profited considerably from the first restaurant he could not withhold his approval of his use of his name at the second. Judge James Moran, holding Jordan had reserved absolute discretion to decide when his name would be used, recognized that Jordan's discretion extended to deciding whether the benefits that might flow to him from his deal with the partnership were worthwhile relative to other deals he might strike: "The 'monetary benefits' Jordan has received or could possibly receive from [the partnership] pale in comparison to the international value of Jordan's name. It is not 'unreasonable,' then, for Jordan to want to strictly control the use of his name so that he could make decisions about its licensing that would allow him to achieve the highest possible financial return." *Id.* at 934.

100 870 F. Supp. 472 (E.D.N.Y. 1994).

101 *Id.* at 474.

102 GA sued AF, claiming the acquisition of a competitor breached the contract, in particular the implied covenant of good faith and due diligence. AF unsuccessfully sought summary judgment, contending nothing in the contract barred it from acquiring a competitor and the quoted language negated implying any duty to promote GA's flat bread. The court agreed that the contract could not be read to bar AF's acquisition of a competitor but did not agree that the duty of good faith and due diligence should not be implied. The court read the clause to say GA "would have the benefit of [the buyer's] expertise and [the buyer's] commitment to act for the 'mutual benefit' of the parties. Under this interpretation, [the buyer] would not have had the right to act solely in its benefit without consideration of [GA's] interests." *Id.* at 477–78.

103 20 F.3d 375 (9th Cir. 1994).

104 BLACK'S LAW DICTIONARY, *supra* note 90, 1156.

105 Case No. 11-cv-03003-JST. (N.D. Cal. 2015).

106 "Regardless of the version of the Special Terms that Class Members viewed when they registered with Safeway.com, it is undisputed that Class Members were not provided with conspicuous notice that changes had been made to the Special Terms at the time those changes were made. Therefore, those changes represent an offer to which the class members never expressed assent, and class members were therefore not bound by those changes."

107 *E.g.*, Rodriguez v. Instagram, LLC, 2013 WL 3732883 (N.D. Cal. 2013).

108 26 F.3d 1057 (11th Cir. 1994).

109 *Id.* at 1060.

110 875 F. Supp. 929 (D. Mass. 1995).

111 Piantes sued PFI for breach of contract, claiming the termination, inter alia, breached the implied covenant of good faith and fair dealing. The court granted the motion for summary judgment, holding, "This contractual remedy [payment of 125 percent of fair market value] makes it virtually impossible for PFI to take the kind of unfair advantage of Piantes which other franchisees have suffered, since PFI is obliged to pay Piantes in excess of the economic value of what he is losing." *Id.* at 940. Having the unilateral termination right enabled PFI to dictate the routes operated by the franchisees, thus maximizing their value to it.

112 982 P.2d 1259 (Alas. 1999).

113 "The term of this Agreement shall commence on May 1, 1988, and shall continue for a period of 3 years(s)[sic]; provided, however, either party may terminate this Agreement upon ninety (90) days' prior written notice." *Id.* at 1262.

114 The caterer successfully sued for breach of contract, arguing the implied covenant of good faith and fair dealing prohibited termination of the contract without a good reason. The Alaska Supreme Court reversed the judgment, holding the airline was entitled to summary judgment on the issue, as the caterer "could not reasonably expect something other than what it expressly bargained for: a contract expressly terminable for any cause or no cause upon ninety days' notice." *Id.* at 1267.

115 348 P.2d 962 (Colo. 1960). The contractor sued the state agency, claiming it was entitled $24,653.03 as preparatory expense on the unsprayed acreage, together with $16,939.51 for lost profits. The agency moved to dismiss the claim, the trial court granted the motion, and the court upheld the ruling on appeal. The state supreme court agreed, holding, "The obligations of the parties in the event of a termination were clearly stated in the contract. With full knowledge thereof, the plaintiff calculated its costs and was low bidder on the contract. Hence, the price was not dictated by defendants, but was the offer of the plaintiff. It is not unlikely that other bidders took the termination clause into consideration in making their bids, thus making it possible for plaintiff to underbid them and obtain the contract, which was plain in its terms." *Id*. at 965.