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Contracts

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CONTRACTS

I. EXCEPTION TO THE SURETYSHIP PROVISION OF THE STATUTE OF FRAUDS

The South Carolina Statute of Frauds[1] requires that certain agreements, to be legally enforceable, be in writing and signed. One such agreement is a "special promise to answer for the debt, default or miscarriage of another person."[2] An oral promise guaranteeing the debt of a third party, however, may be enforced under one of several "exceptions."[3] Two exceptions, the "main purpose" and the "original undertaking" doctrines, have been recognized by South Carolina courts for at least a century.[4]

The "main purpose" doctrine focuses on the primary motivation for the guarantor's promise. The South Carolina Supreme Court generally has concluded that " 'where the promise to pay a debt incurred by another is made as a part of the transaction where the *main purpose* and object of the promisor is not to answer for the debt of another, but to subserve some purpose of his own, his promise is not within the Statute.' "[5] The original undertaking doctrine, however, stresses facts which indicate that the guarantee is a new agreement separate from the underlying debt. The court frequently has asserted that " 'where the agreement to pay the debt of another is part of an *original undertaking* between the parties, and it is not collateral to the origination of the debt, the Statute does not apply.' "[6] Although the result

1. S.C. CODE ANN. § 32-3-10 (1976). This section is essentially unchanged from the seventeenth century English Statute from which it was adopted. An Act for Prevention of Frauds and Perjuries, 1676, 29 Car. 2, c. 3.

2. S.C. CODE ANN. § 32-3-10(2) (1976).

3. The term "exception" is used for convenience. The generally recognized "exceptions" more accurately refer to situations in which the Statute of Frauds is not applicable at all, rather than to exceptional circumstances carved out of the statutory scheme.

4. *E.g.*, Robertson v. Hunter, 29 S.C. 9, 13-14, 6 S.E. 850, 852-53 (1888). The court has indicated that there may be more than two exceptions. *See* Campbell v. Hickory Farms, 258 S.C. 563, 568-69, 190 S.E.2d 26, 29 (1972).

5. General Elec. Co. v. Lions Gate, 273 S.C. 88, 90, 254 S.E.2d 305, 307 (1979)(quoting Campbell v. Hickory Farms, 258 S.C. 563, 568, 190 S.E.2d 26, 29 (1972)). *See* Robertson v. Hunter, 29 S.C. 9, 13-14, 6 S.E. 850, 852-53 (1888).

6. General Elec. Co. v. Lions Gate, 273 S.C. 88, 90, 254 S.E.2d 305, 307 (1979) (quoting Campbell v. Hickory Farms, 258 S.C. 563, 568-69, 190 S.E.2d 26, 29 (1972)).

reached by the court when applying these two exceptions generally has been consistent,[7] the main purpose and original undertaking doctrines have not always been treated as conceptually distinct.[8]

In *General Electric Co. v. Lions Gate*,[9] the court, apparently applying both exceptions indistinguishably, held that an oral promise to pay a debt incurred by a party other than the promisor was enforceable despite the Statute of Frauds. In November, 1974, General Electric sold appliances to the general contractor for Lions Gate condominiums. The appliances subsequently were installed in the condominium units. The general contractor, however, failed to pay the purchase price for the appliances. When collection efforts against the general contractor proved futile, General Electric began negotiations with Lions Gate, the partnership that owned the condominiums. During these negotiations, General Electric mentioned the possibility of its filing a mechanic's lien on the condominiums if the delinquent account was not paid. To prevent this action, Lions Gate orally agreed to issue a check sufficient to satisfy the debt, jointly payable to General Electric and the general contractor. Lions Gate issued a check, payable only to the general contractor, one week later. General Electric was never paid.[10]

General Electric sued both the general contractor and the Lions Gate partnership. The general contractor defaulted and the case was tried only against Lions Gate. The jury returned a verdict against Lions Gate for the sale price of the appliances. The basis underlying the result in the trial court was that the partnership had guaranteed the payments owed by the general contractor. Lions Gate unsuccessfully attempted to defend by relying on the Statute of Frauds.[11] On appeal, the supreme court held that "[t]he evidence at bar was sufficient for the jury to

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7. *See, e.g.*, Crapps v. Spivey, 271 S.C. 29, 244 S.E.2d 520 (1978); Campbell v. Hickory Farms, 258 S.C. 563, 190 S.E.2d 26 (1972); Stackhouse v. Pure Oil Co., 176 S.C. 318, 180 S.E. 188 (1935); American Wholesale Corp. v. Mauldin, 128 S.C. 241, 122 S.E. 576 (1924); Gaines v. Durham, 124 S.C. 435, 117 S.E. 732 (1923); Lorick & Lowrance v. Caldwell, 85 S.C. 94, 67 S.E. 143 (1910); J. A. Ellis & Co. v. Carroll, 68 S.C. 376, 47 S.E. 679 (1904); Robertson v. Hunter, 29 S.C. 9, 6 S.E. 850 (1888).

8. See notes 13-15 and accompanying text *infra*.

9. 273 S.C. 88, 254 S.E.2d 305 (1979).

10. *Id.* at 89-90, 254 S.E.2d at 306-07.

11. *Id.* at 90, 254 S.E.2d at 307. See note 2 and accompanying text *supra*.

reasonably conclude that . . . [the oral] promise was supported by the consideration necessary to remove it from the statute of frauds."[12]

The court based its conclusion on the main purpose and original undertaking exceptions to the suretyship section of the Statute of Frauds, but did not differentiate between the two doctrines nor indicate which doctrine was controlling. After quoting a statement of the two doctrines from an earlier case,[13] the court referred to them as a single exception, stating that "[i]n determining whether an agreement can be classified under the 'main purpose' or 'original undertaking' *exception*, the courts must rely on the circumstances of each particular case . . . ."[14] At another point in the opinion, however, the court treated the two doctrines separately, asserting that "[t]o be enforceable under *either theory*, the promise like all other contractual obligations, must be supported by independent consideration in the form of advantage to the promisor or a detriment to the promisee."[15] This ambiguous treatment of the distinction between the main purpose and original undertaking doctrines presents conceptual problems.

Prior South Carolina cases recognized a distinction between the two exceptions. Some cases directed attention to only the main purpose doctrine,[16] while others referred only to the original undertaking doctrine.[17] Still others succinctly stated both doctrines as separate concepts, but perfunctorily arrived at a result without establishing which doctrine was controlling.[18] Any distinction, however, be illusory, as the supreme court's discussion of the concept of consideration in *Lions Gate* demonstrated.

The controlling factor, in the court's opinion, was the value

12. 273 S.C. at 92, 254 S.E.2d at 308.

13. *Id.* at 90, 254 S.E.2d at 307 (quoting Campbell v. Hickory Farms, 258 S.C. 563, 568-69, 190 S.E.2d 26, 29 (1972)).

14. 273 S.C. at 90, 254 S.E.2d at 307 (emphasis added).

15. *Id.* at 91, 254 S.E.2d at 307 (emphasis added).

16. *See, e.g.*, Crapps v. Spivey, 271 S.C. 29, 244 S.E.2d 520 (1978); American Wholesale Corp. v. Mauldin, 128 S.C. 241, 122 S.E. 576 (1924); Turner v. Lyles, 68 S.C. 392, 48 S.E. 301 (1904).

17. *See, e.g.*, Stackhouse v. Pure Oil Co., 176 S.C. 318, 180 S.E. 188 (1935); Gaines v. Durham, 124 S.C. 435, 117 S.E. 732 (1923); J. A. Ellis & Co. v. Carroll, 68 S.C. 376, 47 S.E. 679 (1904).

18. *See, e.g.*, Campbell v. Hickory Farms, 258 S.C. 563, 190 S.E.2d 26 (1972).

given to General Electric's decision not to file a mechanic's lien against Lions Gate. The court concluded that General Electric's forbearance to file a mechanic's lien was, under the facts of this case, sufficient consideration to support Lions Gate's oral guarantee of the contractor's debt.[19] The court held that General Electric relied to its detriment on Lions Gate's promise to issue a check jointly payable to General Electric and the general contractor. General Electric's forebearance was found also to directly benefit only the promisor partnership because the filing of a lien would have prejudiced Lions Gate's interest in the property.[20]

Any conceptual distinction between the main purpose doctrine and the original undertaking doctrine was blurred by the court's assertion that, to be enforceable under either, an oral promise must meet a single test. The court asserted that the oral promise "must be supported by an independent consideration in the form of an advantage to the promisor or a detriment to the promisee."[21] General Electric's forbearance was found not only to be "a sufficient consideration for a promise . . . in the general law of contracts,"[22] but also "*the consideration necessary* to remove . . . [Lions Gate's promise] from the statute of frauds."[23] The court's careful analysis of the detriment and benefit involved, and its apparent recognition of the necessity for one level of consideration under general contract law and a higher level to escape the Statute of Frauds, imply that the test for both doctrines is whether the consideration, in the particular case, has a sufficient value to except the promise from the signed writing requirement.

Professor Corbin contends that "certain kinds of consideration will prevent a promise from being one 'to answer for the debt of another' and will make the promisor a debtor on his own account."[24] In some cases, states Corbin, "the consideration will be found to be of such a character as in itself to be practically decisive; generally, however, it is merely one of the facts to be

19. 273 S.C. at 91-92, 254 S.E.2d at 307.
20. *Id.* at 91, 254 S.E.2d at 307.
21. *Id.* at 91-92, 254 S.E.2d at 307.
22. *Id.* at 91, 254 S.E.2d at 307.
23. *Id.* at 92, 254 S.E.2d at 308 (emphasis added).
24. 2 A. CORBIN, CORBIN ON CONTRACTS § 367, at 279 (1950). *See* 37 C.J.S. *Statute of Frauds* § 21(a), at 521 (1943).

given weight as evidence of other more important ones."[25] Neither a characterization of the undertaking as collateral or original[26] nor a determination of the leading object (main purpose) is an adequate test,[27] according to Corbin. This preeminent author thus blends the two doctrines conceptually and postulates that in determining the applicability of the Statute of Frauds, a court must judge in each case the objects, motives, and purposes as well as the beneficial character of the consideration.[28]

If the court's opinion in *Lions Gate* was both a blending of the two doctrines and a determination that the character of the consideration was itself decisive, the case is supported by Professor Corbin's view. For the consideration to attain the required higher level, however, the court should have established that General Electric's forbearance from pursuing the lien "seemed of such advantage to the promisor that he made the promise in return for it quite irrespective of any contemplated benefit to a third person, and his purpose was to get this advantage and not to benefit another."[29] The South Carolina Supreme Court found that General Electric's "forbearance would and could have inured *only* to the *personal* benefit of appellant."[30] The court did not expressly conclude that Lions Gate's purpose was to gain the advantage of the forbearance, but that purpose seems clearly implied in the quoted language. The opinion, interpreted in this manner, seems to fit well within Corbin's approach.

Lions Gate, therefore, may provide an important step toward clarification in South Carolina of the conceptual problems in attempted distinctions between the main purpose doctrine and the original undertaking doctrine. As Professor Corbin indicates, courts that merely categorize, under either the main purpose or original undertaking doctrine, the basis for excepting a particular oral promise from the Statute of Frauds do not adequately analyze the issue.[31] Prior South Carolina cases at-

25. A. CORBIN, *supra* note 24, § 377, at 308.

26. *Id.* § 348, at 218.

27. *Id.* § 377, at 308 (Corbin uses the term "leading object" as a synonym for "main purpose.")

28. A. CORBIN, *supra* note 24, § 377, at 308.

29. *Id.* § 379, at 313. *See* 37 C.J.S. *Statute of Frauds* § 21(a), at 531 (1943).

30. 273 S.C. at 92, 254 S.E.2d at 307 (emphasis added).

31. See notes 26 & 27 and accompanying text *supra*.

tempted varying degrees of categorization.[32] In *Lions Gate*, the court's discussion of the type of consideration necessary to remove an oral promise from the Statute of Frauds closely aligns South Carolina law with Corbin's views and tends to alleviate the conceptual problems inherent in prior attempts at doctrinal distinctions. The test to be used under both the main purpose and original undertaking doctrines after *Lions Gate*, therefore, is whether the consideration in support of the oral promise guaranteeing the debt of another is of a quality sufficient to ensure that the consideration alone constitutes the actual inducement for the promise. Because the test for both doctrines is the same, any distinction between the two is unimportant and they become essentially one exception.

II. Breach of "At-Will" Employment Contracts

Legal and social aspects of breaches of "at-will" employment contracts are the subjects of recent national[33] and international[34] academic concern. Judicial decisions in this area are especially important because of their impact on other areas of the law[35] and on the status of traditional rules.[36] From its formulation in the 1870s until 1959,[37] the common-law rule regarding

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32. See notes 16-18 and accompanying text *supra*.

33. *See, e.g.*, Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 Ohio St. L.J. 1, 1-4 (1979).

34. *See* England, *Recent Developments in Wrongful Dismissal Laws and Some Pointers for Reform*, 16 Alta. L. Rev. 470 *passim* (1978)(discussing the Nova Scotia Code and Canadian developments); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481, 508-19, 532 (1976)(discussing the developments in France, Germany, Great Britain, and Sweden).

35. Decisions regarding breach of employment contracts have a broad impact on (1) master and servant law, *See* Blumrosen, *Settlement of Disputes Concerning the Exercise of Employer Disciplinary Power: United States Report*, 18 Rutgers L. Rev. 428, 432 (1964); *see generally* Kahn-Freund, *Blackstone's Neglected Child: The Contract of Employment*, 93 Law Q. Rev. 508, 509 (1977), (2) workmen's compensation law, *see, e.g.*, Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); *Workmen's Compensation, Annual Survey of South Carolina Law*, 32 S.C.L. Rev. 219 (1980), (3) constitutional law, *see* Peck, *supra* note 33, at 4, 13-42, and (4) labor law, *see Note, A Common Law Action for the Abusively Discharged Employee*, 26 Hastings L.J. 1435, 1443-45 (1975).

36. *See, e.g.*, Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974); Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum. L. Rev. 1404, 1418 (1967).

37. An exception to the general rule was first recognized in Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959). See text accompany-

termination of "at-will" employment contracts remained virtually unchanged in all United States jurisdictions:[38]

> Despite its sometimes harsh operation and the obvious opportunities for abuse it affords an unscrupulous employer, few legal principles would seem to be better settled than the broad generality that an employment for an indefinite term is regarded as an employment at will which may be terminated at any time by either party for any reason or for no reason at all.[39]

The South Carolina Supreme Court reaffirmed its consistent and strict adherence to this rule[40] in *Ross v. Life Insurance Co. of Virginia*[41] and *Hudson v. Zenith Engraving Co.*[42] Although the South Carolina court continues to apply the common-law rule, it does recognize that disagreement among commentators and other courts exists on this issue. The time for reconsideration of the rule in light of the modern employer-employee relationship has arrived.

In *Ross*, the Life Insurance Company of Virginia terminated plaintiff-salesman's employment for reasons that plaintiff felt were unjustified. Plaintiff, asserting that he had performed faithfully, sued his defendant-employer for wrongful discharge. The lower court sustained defendant's demurrer to the complaint for failure to state a cause of action and the supreme court affirmed. Plaintiff unsuccessfully suggested several theories of recovery to the court.[43] He failed principally, as the court explained, because South Carolina embraces the general rule that at-will employment contracts may be terminated at any time for any reason or for no reason at all.[44]

The *Hudson* decision was more complex. Plaintiff was in-

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ing notes 52-62 *infra*.

38. Peck, *supra* note 33, at 2.

39. Annot., 62 A.L.R.3d 271, 271 (1975).

40. *See, e.g.*, Gainey v. Coker's Pedigreed Seed Co., 227 S.C. 200, 87 S.E.2d 486 (1955); Raley v. Darling Shop, Inc., 216 S.C. 536, 59 S.E.2d 148 (1950); Sheally v. Fowler, 182 S.C. 81, 188 S.E. 499 (1936).

41. ___ S.C. ___, 259 S.E.2d 814 (1979).

42. ___ S.C. ___, 259 S.E.2d 812 (1979). See *Workmen's Compensation, Annual Survey of South Carolina Law*, 32 S.C.L. REV. 219, 219 (1980).

43. Plaintiff's theories were wrongful termination, conspiracy, and tortious interference. ___ S.C. at ___, 259 S.E.2d at 815.

44. *Id.*

jured on his job at the Zenith Engraving Company and was attempting to obtain workmen's compensation benefits when he was fired. Defendant presented three reasons for terminating plaintiff's at-will employment: Plaintiff did not show intention to return to work; plaintiff did not demonstrate the physical ability to resume his duties; and the position plaintiff had occupied previously was discontinued.[45] Plaintiff appealed from the trial court's granting of defendant's motion for summary judgment and presented two theories of recovery to the supreme court. First, he argued that Zenith's termination of his employment contract breached an implied promise of continued employment created when defendant arranged less strenuous work for plaintiff during prior periods of disability.[46] Second, he asserted that termination during pursuit of workmen's compensation benefits, because maliciously motivated, violated public policy.[47] The court rejected both of these theories, concluding that the employer has "exercised only its legal right to terminate . . . [plaintiff], who was an employee at will."[48] The court acknowledged that an exception to the general rule regarding at-will employment contracts has been recognized by "a minority of jurisdictions . . . when there has been a violation of public policy."[49] The court, however, neither recognized nor rejected the exception, but rather avoided its consideration by relying on the traditional common-law rule and South Carolina precedent.[50]

The court in *Ross* and *Hudson* aligned contemporary South Carolina law with the common-law rule that an employer has a right to terminate for any reason or for no reason at all. Language in the *Hudson* opinion, however, acknowledges the current trend of both courts and commentators toward mitigating the harshness of the rule. No South Carolina decision to date has adequately dealt with the issues presented by this trend.[51]

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45. ___ S.C. at ___, 259 S.E.2d at 813.

46. *Id.*

47. *Id.*

48. Hudson v. Life Ins. Co., ___ S.C. at ___, 259 S.E.2d at 814.

49. *Id.* at ___, 259 S.E.2d at 813.

50. *Id.* (citing Raley v. Darling Shop, Inc., 216 S.C. 536, 59 S.E.2d 148 (1950)). In *Raley*, plaintiff's job was threatened when she filed for workmen's compensation benefits. After filing, she was fired. The court skirted any public policy exception by pointing out that, although plaintiff had been threatened, she still filed her claim.

51. In Raley v. Darling Shop, Inc., 216 S.C. 536, 59 S.E.2d 148 (1950), the court approached these issues but avoided decision. See note 50 *supra*. *Raley* was a pre-1959

A number of states that consistently had adhered to the common-law rule succumbed recently to the academic sentiment toward harshly-treated employees.[52] The academic criticism has resulted in the recognition of a strong exception to the common-law rule rather than its complete abrogation. The exception has taken the form of a "trilateral" balancing scheme:[53] "the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two."[54] Commentators still recommend that either the legislatures[55] or the courts[56] abrogate the entire common-law rule, but no jurisdiction yet has taken this step.[57] Since the exception was first recognized in *Petermann v. International Brotherhood of Teamsters*,[58] commentators have postulated several possible theories of recovery: in addition to the theory based on public policy, suggestions include prima facie tort,[59] breach of an implied contract,[60] and violation of fourteenth amendment due process[61] and equal protection.[62]

While academicians have recommended numerous bases for recovery, the courts have acknowledged the exception only under three interrelated theories. Initially these theories of recovery were used successfully in a trilogy of frequently cited cases.[63] In *Petermann*, the cause of action was based on a breach

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case. *See* note 58 and accompanying text *infra*.

52. Academic pressure clearly has influenced New Hampshire. *See* Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974)(citing several law review articles as support for its holding). *See generally* Peck, *supra* note 33, at 1.

53. *See* 14 RUTGERS L. REV. 624, 625 (1960).

54. Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974).

55. Comment, *Workmen's Compensation—No Private Right of Action For Retaliatory Discharge in North Carolina*, 15 WAKE FOREST L. REV. 139, 151 (1979); Summers, *supra* note 34, at 491.

56. Peck, *supra* note 33, at 3.

57. *See generally* Peck, *supra* note 33, at 1. Several states have a very limited legislative abrogation in the area of workmen's compensation. *E.g.*, TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Cum. Supp. 1980); Annot., 62 A.L.R.3d 271, 271 (1975).

58. 174 Cal. App. 2d 184, 344 P.2d 25 (1959). *See, e.g.*, 14 RUTGERS L. REV. 624 (1960).

59. *See* Blades, *supra* note 36, at 1418.

60. *See, e.g.*, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 325 (1974).

61. *See* A. BERLE, THE THREE FACES OF POWER 39-50 (1967).

62. *See* Peck, *supra* note 33, at 35-42.

63. *See* notes 64-66 and accompanying text *infra*.

of contract that was considered to be a violation of public policy.[64] A violation of public policy was also present in *Frampton v. Central Indiana Gas Co.*,[65] but that court relied on a tort theory to grant recovery. Finally, in *Monge v. Beebe Rubber Co.*,[66] the court relied on a breach of contract theory to allow recovery. The *Monge* decision was based on bad faith and malicious motivation, instead of a violation of public policy. These three interrelated theories of recovery are practical manifestations of the acceptance of the exception by different courts.

These cases provide courts in other jurisdictions with the doctrinal avenues necessary to mitigate the harsh effects of the common-law rule. The most persuasive support for acceptance of the exception in South Carolina are the viability of the exception as a salubrious appendage to the common-law rule and the current status of the exception's recognition in other jurisdictions.

The viability of the exception is a function of the anachronistic nature of the common-law rule itself. Analyses of the traditional justifications, which have been offered to support the rule, illustrate this anachronistic nature. Proponents of the rule have proffered four basic justifications. The most frequently used is the concept of freedom of contract; parties have an inherent right to contract as they please. An employment contract necessarily includes, by choice of the parties, the right to terminate the relationship without reason or for any reason.[67] Second, "mutuality of contract"[68] is satisfied by the common-law rule since *both* parties retain an equal right to terminate.[69] Third, the rule protects the parties' expectations with respect to the contractual relationship.[70] The employer expects to retain full

64. 174 Cal. App. 2d 184, 186, 344 P.2d 25, 27 (1959).

65. 260 Ind. 249, 251, 297 N.E.2d 425, 427-28 (1973)(tort of retaliatory discharge).

66. 114 N.H. 130, 133, 316 A.2d 549, 551 (1974).

67. *See* Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130, 1131 (Ala. 1977); Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118, 129-30 (1976).

68. Mutuality of contract is an abstract concept dealing with the relative distribution of the burdens and benefits to the parties under the terms of the contract. *See generally* Mattei v. Hopper, 51 Cal. 2d 119, 330 P.2d 625 (1958)(mutuality of exchanged executory promises); Spooner v. Reserve Life Ins. Co., 47 Wash. 2d 454, 287 P.2d 735 (1955)(mutuality and illusory contracts).

69. Summers, *supra* note 34, at 484, 491.

70. Blumrosen, *supra* note 35, at 432-33.

control over business policy, unhampered by a limited contract, while the employee expects to be able to quit at any time. Finally, the common-law rule is economically justifiable because employers are able to move their capital quickly and without expense from salaries to other areas more conducive to industrial expansion.[71]

When these four justifications are applied to the realities of contemporary society, the anachronism becomes evident; thus the justifications tend to vitiate rather than to support the rule. In the modern employer-employee relationship, equality of bargaining power is a fiction. Employment contracts "are imposed on a take-it-or-leave-it basis by the corporate employer."[72] The employee has no real freedom in his efforts to obtain an acceptable contract. The employers' freedom of contract has been eroded by labor unions which impose terms and lobby for legislative restrictions in employment and termination procedures.[73] The National Labor Relations Act,[74] statutes in over twenty states prohibiting racial discrimination in hiring and promotion,[75] the Fair Labor Standards Act,[76] and, in more than fifteen states, legislative prohibition of age discrimination in employment,[77] demonstrate that neither federal nor state legislators consider the right to freely contract inviolable. Because the employee has no real freedom to contract and because the employer's freedom has been encroached upon significantly by unions and legislatures, this concept is no justification for the common-law rule.

Similarly, the mutuality of contract concept does not necessarily support the common-law rule in light of modern employment conditions. Commentators have stressed the obvious importance of employment to the employee.[78] In an era of high unemployment, an employee's "dependence is not exclusively economic," but extends to the need for social status and self-

71. *Id.*
72. Note, *supra* note 35, at 1443.
73. Blumrosen, *supra* note 35, at 433; Peck, *supra* note 33, at 8.
74. 29 U.S.C. §§ 151-169 (1976).
75. *See* Blumrosen, *supra* note 35, at 429.
76. 29 U.S.C. §§ 201-219, 255 (1976).
77. *See* Blumrosen, *supra* note 35, at 430.
78. Note, *supra* note 35, at 1444.

esteem.[79] No mutuality exists in this area as that term traditionally has been conceptualized. The employee may have the right to quit, but social and economic factors may render the exercise of that right impractical or impossible. The employer's right to fire, however, remains a valid and continuing option. The concept of mutuality may serve, however, as persuasive justification for abrogating or excepting from the common-law rule. The South Carolina court in two recent cases[80] asserted that "[i]t is implicit in any contract for employment that the employee . . . has a duty of fidelity to his employer."[81] Other cases imply a requirement that employees perform their jobs in a reasonably satisfactory manner.[82] From these implied terms benefiting the employer, a duty of good faith and fair dealing by the employer toward the employee may be extrapolated.[83] Implying such a duty on the part of the employer promotes mutuality. Under such a rationale, an employer should not be able to terminate his employee's job without justification, and, even then, only in a manner consonant with good faith.[84]

If the common-law rule ever conformed to the actual expectations of both parties to the employment contract, those expectations have now changed drastically.[85] The rule's origin can be traced to Professor Wood's nineteenth-century treatise on master-servant relations and the quick acceptance of his statements in the courts of New York.[86] Authorities are in agreement that Professor Wood's formulation of the rule in 1817 was both

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79. *Id. See also* J. RAWLS, A THEORY OF JUSTICE § 67 (1971).

80. Berry v. Goodyear Tire & Rubber Co., 270 S.C. 489, 242 S.E.2d 551 (1978); Loundes Prods., Inc. v. Brower, 259 S.C. 322, 191 S.E.2d 761 (1972).

81. Berry v. Goodyear Tire & Rubber Co., 270 S.C. at 491, 242 S.E.2d at 552.

82. Blumrosen, *supra* note 35, at 435.

83. *See* Deering Milliken Research Corp. v. Textural Fibers, Inc., 310 F. Supp. 491 (D.S.C. 1970).

84. Standards of good faith may include notice, hearings, severance pay, etc. *See* England, *supra* note 34, at 505-06.

85. Blumrosen, *supra* note 35, at 433. Blumrosen asserts that

> both employees and employers now expect fair treatment and fair dealing, proof before discipline, and uniform enforcement of reasonable rules of conduct and discipline. These expectations exist whether or not there is collective bargaining, and they cannot be protected under the principle that employment contracts are to be regarded by the courts as presumptively at will.

Id. See also notes 86 & 87 and accompanying text *infra.*

86. H. WOOD, MASTER AND SERVANT § 133, at 272 (1877). *See* Feinman, *supra* note 67, at 128-29.

unsupportable and erroneous.[87] It is unlikely, therefore, that the rule represented the expectation of either employers or employees even then,[88] and modern expectations are even less likely to be consistent with the rule.

Evidence that "both employees and employers now expect fair treatment and fair dealing"[89] exists in contemporary corporate structure. Seniority, retirement, and other employee fringe-benefit programs commonly are implemented by employers to foster fidelity and encourage conscientious, hard work. The value of these benefits to the employee fairly approximates the employer's costs. Normal expectations of fair dealing arise when this system of reciprocal benefits is combined with the realization that members of management are also employees in the multitiered corporate system. Because the boss is also an employee, lower-level employees expect "that management should recognize basic rights to job security."[90] Authorities have suggested that the common-law rule "permits employers . . . to . . . discharge employees in a manner that is not consistent with standards of civilized society."[91] The influences of contemporary corporate policy support the employee's expectation of fair treatment—treatment that would instead be "consistent with the standards of civilized society."

Economic realities suggest that contemporary society is quite different from the period of rapid industrialization that spawned the common-law rule in the late nineteenth century. Militating against retention of the rule of terminability at-will and without cause are five modern economic factors. First, the high unemployment rate and statistics demonstrating that at least sixty to sixty-five percent of the work force is employed under at-will contracts[92] combine to create instability and economic uncertainty in the work force. Second, some authorities assert that the employee's interest in the continuation of his em-

87. Peck, *supra* note 33, at 2; Summers, *supra* note 34, at 485. From the perspective of a Marxist histo-economist, the justification for Wood's statement of the rule was to enable capitalists to exercise unyielding control over labor and hence to advance industrialism. Feinman, *supra* note 67, at 131.

88. Feinman, *supra* note 67, at 131.

89. Blumrosen, *supra* note 35, at 433.

90. Note, *supra* note 34, at 1445.

91. Peck, *supra* note 33, at 49.

92. Peck, *supra* note 33, at 9.

ployment contract rises to the level of a constitutionally protected property right.[93] Third, vast industrial expansion no longer is a primary goal of society in the United States; rather, the goals of modern society seem better represented by the attitudes underlying the civil rights movement of the 1960s and economic relief programs of the 1970s. These attitudes are characterized more by equality and fairness than by capitalistic yearnings. Fourth, approximately twenty-eight percent of the national work force is protected by union contracts; the benefits of grievance and arbitration procedures available under the usual collective bargaining agreements[94] conform more closely to employee expectations of fairness and fulfillment of economic needs than does the common-law rule. South Carolina's continued adherence to the harsh common-law rule may become a factor promoting the unionization of this typically nonunion state. Fifth, other nations have recognized that the rule of terminability at-will and without cause is disconsonant with modern economic reality.[95] Thus economic realities—in a manner similar to freedom of contract, mutuality of contract, and employer-employee expectations—no longer support the common-law rule.

An exception for discharge in bad faith or in violation of public policy is necessary, therefore, to eliminate the anachronistic nature of the traditional common-law rule. Not only is an exception necessary, but it is also viable in light of the effects of contemporary social realities on the four justifications for the law of at-will employment contracts. None of the justifications, as modified by modern realities, militate against the exception, and several strongly support it. The exception is indeed a viable and judicially practicable alternative to the harsh rule.

The status of the exception in the fifty-one jurisdictions of the United States is not entirely clear. In *Hudson*, the South Carolina Supreme Court asserted that courts in only "a minority of jurisdictions . . . have recognized an exception to the general rule."[96] The court cites cases in only four states—Indiana, Mas-

93. Summers, *supra* note 34, at 532. *But see* England, *supra* note 34, at 471 (the employee's property-right theory is unsound; one cannot assign a job like one can assign a house).

94. Peck, *supra* note 33, at 8-10.

95. Summers, *supra* note 34, at 508-19.

96. ___ S.C. at ___, 259 S.E.2d at 813.

sachusetts, Oregon, and California.[97] The court's citations, however, do not indicate the full extent of the acceptance of the exception. Twenty-five states have considered adoption of the exception in at least one case.[98] Since 1959, only two states of the twenty-five, Alabama and Florida, have unequivocally rejected the exception.[99] Missouri state courts have rejected the exception in all forms,[100] but a Missouri federal court may have recognized a public policy variety of the exception in dictum;[101] thus Missouri's position is equivocal. The courts of Utah and Louisiana are noncommittal in their response to the issue.[102] At least twenty of the twenty-five states, however, recognize the viability of the exception in one or more of its forms.[103] Thus, the

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97. *Id.* (citing Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (1976); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959)).

98. The twenty-five states are Alabama, Arizona, California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Texas, Utah, Washington, and West Virginia. See notes 99-103 *infra*.

99. The two states rejecting the exception are Alabama, Hinrichs v. Tranquilaire Hospital, 352 So. 2d 1130 (Ala. 1979), and Florida, Segal v. Arrow Indus. Corp., 364 So. 2d 89 (Fla. Dist. Ct. App. 1978).

100. Narens v. Campbell Sixty-Six Express, Inc., 347 S.W.2d 204 (Mo. 1961); Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956). *But see* Mitchell v. St. Louis County, 575 S.W.2d 813 (Mo. App. 1978)(dictum)(referred to exception).

101. Percival v. General Motors Corp., 400 F. Supp. 1322 (D.C. Mo. 1975)(court found no clear public policy violated).

102. Stephens v. Justiss-Mears Oil Co., 300 So. 2d 510 (La. App. 1974); Mann v. American W. Life Ins. Co., 586 P.2d 461 (Utah 1978).

103. The twenty states showing a positive reception to the exception are listed below:

Arizona—See Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (1977)(dictum)(employee fired for refusing to consent to psychological tests; although court held mere bad faith not sufficient to support excepion, violation of public policy apparently would be sufficient).

California—See Raden v. City of Azusa, 97 Cal. App. 3d 336, 158 Cal. Rptr. 689 (1979)(employee fired for filing workmen's compensation claim; civil remedy in tort was available); Glenn v. Clearman's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961)(employee fired for attempting to unionize; public policy supported exception); Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959)(employee fired for refusing to commit perjury; recovery allowed under public policy exception). *But see* Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960)(employee fired for accepting jury duty; court refused to extend exception).

Colorado—See Lampe v. Presbyterian Medical Center, 590 P.2d 513 (Colo. App. 1978)(dictum)(nurse fired for refusing to falsify documents; court found no public policy of "fair dealing," but recognized public policy exception).

Hudson opinion's characterization of the minority status of the

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Idaho—See Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977)(dictum)(employee fired for alleged misappropriation of funds; no facts to support exception but public policy version recognized).

Illinois—See Kelsay v. Motorola, Inc., 23 Ill. 559, 384 N.E.2d 353 (1978)(employee fired for filing workmen's compensation claim; public policy exception supported recovery); Leach v. Lauhoff Grain Co., 5 Ill. App. 3d 1022, 366 N.E.2d 1145 (1977)(employee fired for filing workmen's compensation claim; public policy exception supported recovery).

Indiana—See Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973)(workmen's compensation); Martin v. Platt, ___ Ind. App. ___, 386 N.E.2d 1026 (1979)(dictum)(employee fired for reporting supervisor taking kickbacks; court stated that legislature must define public policy, but exception recognized).

Iowa—See Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978)(dictum)(employee fired for making false statements against employer; court found no violation of public policy, but recognized exception).

Kansas—See Johnston v. Farmers Alliance Mut. Ins. Co., 218 Kan. 543, 545 P.2d 313 (1976)(employee fired for reporting another's embezzlement; court allowed exception based on tort and implied one exists based on public policy). *But see* Lorson v. Falcon Coach, Inc., 214 Kan. 670, 522 P.2d 449 (1974)(court held employee presented no cause of action).

Kentucky—See Scroghan v. Kraftco Corp., 551 S.W.2d 811 (Ky. App. 1977)(dictum)(employee fired for attending night school; court found no violation of public policy under facts, but recognized exception).

Massachusetts—See Fortune v. National Cash Register Co., ___ Mass. ___, 364 N.E.2d 1251 (1977)(salesman fired for "bonus sale credit" received; recovery granted on an implied covenant of good faith theory).

Michigan—See Prussing v. General Motors Corp., 403 Mich. 366, 269 N.W.2d 181 (1978)(bad-faith exception recognized, but no recovery because plaintiff did not sign affidavit; willingness to abrogate the common-law rule indicated); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976)(employee fired for filing workmen's compensation claim; exception allowed if firing in violation of public policy or statute). *But see* Hendren v. Consumers Power Co., 72 Mich. App. 349, 249 N.W.2d 419 (1977)(no cause of action for wrongful dismissal based on age; capricious discharge allowed).

New Hampshire—See Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974)(employee fired after dispute about her "going out" with foreman; recovery allowed under exception based on bad faith and maliciousness).

New Jersey—See Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 399 A.2d 1023 (1979)(doctor dismissed after dispute about his desire for full use of skills in drug research; exception for violation of public policy allowed but to be circumscribed on case-by-case basis); O'Sullivan v. Mallon, 160 N.J. Super. 416, 390 A.2d 149 (1978)(nurse fired for refusing to undertake illegal duties; exception recognized in public interest).

New York—See Wegman v. Dairylea Corp., Inc., 50 App. Div. 2d 108, 376 N.Y.S.2d 728 (1975)(dictum)(employee fired for refusal to illegally standardize milk products; exception based on tort not allowed, but court left open exception based on breach of contract). Chin v. American Tel. & Tel. Co., 90 Misc. 2d 1070, 410 N.Y.S.2d 737 (1978)(dictum)(employee fired for political beliefs; public policy exception recognized, but no violation of public policy found on these facts).

North Carolina—See Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971)(employee fired for assertion of constitutional rights; exception recognized). *But see* Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978)(retaliatory discharge for

exception may not have been quite accurate.

Authors of the most recent articles on this issue confidently indicate that the current dispute is not about the acceptability of the exception, but rather concerns the proper governmental branch to legally adopt the exception.[104] Some authorities have argued that the courts have the responsibility to modify the common-law rule because the only at-will employees who face the harshness of the rule are, of course, unorganized employees. Being unorganized, these employees lack lobbying strength before the legislature.[105] In a traditionally nonunion state, this lack of power is particularly injurious to the interests of at-will employees because any vote for employee rights appears pro-union to legislators' constituents. Other authorities, however, have argued that abrogation or modification by statute is more propitious and more probable. Courts, as institutions guided by precedent, tend to experience inertia and naturally avoid "uncharted territory."[106]

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filing of workmen's compensation claim not in violation of public policy as established by legislature).

Oregon—See Brown v. Transcon Lines, 284 Or. 597, 588 P.2d 1087 (1978)(exception based on violation of public policy recognized when employee fired for filing workmen's compensation claim); Campbell v. Ford Indus., Inc., 274 Or. 243, 546 P.2d 141 (1976)(dictum)(employee/shareholder fired for demanding right to view corporate books; public policy exception recognized, but not applicable on these facts); Nees v. Hocks 272 Or. 210, 536 P.2d 512 (1975)(employee fired for accepting jury duty; exception allowed for firing in violation of public policy).

Pennsylvania—See Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974)(dictum)(salesman fired for pointing out unsafe product although recovery not allowed under exception, court acknowledged its responsibility to society and pertinence of exception under some facts); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978)(employee fired for accepting jury duty; exception supported recovery).

Texas—See Texas Steel Co. v. Douglas, 533 S.W.2d 111 (Tex. Civ. App. 1976)(employee fired for filing workmen's compensation claim; violation of public policy, as established by statute, supported recovery).

Washington—See Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 568 P.2d 764 (1977)(dictum)(firing characterized as age discrimination, not in violation of public policy, but public policy exception recognized).

West Virginia—See Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978)(employee of bank fired for reporting violation of consumer credit statute to superior; exception supported recovery when motive contravened public policy).

104. Peck, *supra* note 33, at 1; Comment, *supra* note 55, at 151.

105. Peck, *supra* note 33, at 3.

106. Peck, *supra* note 34, at 491; Comment, *supra* note 55 at 151. Texas has adopted a limited statute. TEX. CIV. STAT. ANN. art. 8307c (Vernon Cum. Supp. 1980). Minimum elements of fairness for any statutory scheme purporting to protect employees should include:

The South Carolina Supreme Court in *Hudson* did not reject the possibility of adopting the exception to the common-law rule, but neither did the court indicate that its attitude toward the exception was favorable. The opinion contains the language "even if this exception to the general rule were to be recognized . . . ."[107] Read together with the *Ross* decision and the consistent application of the common-law rule in past South Carolina cases,[108] *Hudson* does not represent a positive recogni-

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1. Guidelines for the tribunal and industry as to "fair" standards should be publicized in a government Code of Practice. A "roving inspectorate" should be established with powers to examine existing dismissal procedures and to recommend reforms. "Unfair" dismissals in breach of such recommended reforms should result in double compensation for the worker and the denial of government contracts to the firm in question.

2. The tribunal should have a broad discretion to determine "fairness" subject to the following, which should be stated in the Code of Practice:

(a) Certain grounds should be automatically unfair in addition to those currently prohibited in human rights and labour legislation, notably sexual orientation, familial relationship and political opinion. Redundancy should only be a "fair" reason for dismissal if a "reasonable" employer would have cut back on labour in the circumstances of the case, and if the employer gives reasonable notice, attempts to avoid redundancy by other means, tries to find the worker other employment in his or associate firms, allows time off to find other work, and selects those to be made redundant in accordance with a bilaterally formulated procedure, which may be "last in—first out". In addition, statutory compensation for "fair" redundancy dismissals should be introduced.

(b) The dismissal procedure must be formulated and administered bilaterally and provide for "progressive discipline", notice of the alleged offence, right to state a case, right of appeal to a body above the original decision-making body, maintenance of the "status quo" pending final determination, and the onus of proving "fairness" should be on the employer.

(c) The work rules and penalties for breach thereof should be formulated bilaterally and publicized, they should be applied consistently and non-discriminatorily, any changes therein or new rules should be publicized and a reasonable period for readjustment allowed, dismissal should be "unfair" where the employer raises new offences so as to "surprise" the worker, employer condonation of previous offences should preclude their being utilized to discharge a worker subsequently, even in combination with a fresh offence committed by the worker, the severity of the penalty must be related to the nature of the offence and the offender so that mitigating circumstances are taken into account, a minimum one year "wipe the slate clean" provision should apply universally, and the tribunal should be allowed to question the employer's business decisions by reference to the "reasonable" employer.

England, *supra* note 34, at 505-06.

107. ___ S.C. at ___, 259 S.E.2d at 813.

108. See notes 40, 43 & 44 and accompanying text *supra*.

tion of the exception.

The common-law rule, allowing the termination of at-will employment contracts by either party at any time for any reason or no reason at all, is no longer supported by the justifications that have been offered for it over the past century. The justifications of freedom to contract, mutuality of contract, expectations of the parties, and economic realities support either a broad exception to the rule or its complete abrogation. Courts in at least twenty of the twenty-five jurisdictions that have considered this issue have viewed favorably an exception which balances the interests of the employer, the employee, and society. South Carolina, in *Ross* and *Hudson*, held firmly to the common-law rule. For political reasons there appears to be little hope that the South Carolina legislature will act on this subject. The obligation to reconsider the exception, therefore, falls squarely on the state's supreme court.

III. Form of Notification Under the Uniform Commercial Code

Adoption of the Uniform Commercial Code[109] by the South Carolina legislature established a comprehensive network of rules governing business transactions in this state. Judicial interpretation, however, is necessary to fill gaps in the statutory language. Since the terms of the U.C.C. must be applied to a never-ending variety of business transactions, its initial interpretation is especially difficult.

A particularly troublesome area of the U.C.C. has been the meaning of the term "notify."[110] The U.C.C. definition fails to indicate expressly whether notification must be in writing to be effective.[111] Certainty in the meaning of this term[112] is vital since

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109. S.C. Code Ann. §§ 36-1-101 to 36-11-108 (1976). South Carolina adopted the U.C.C. in 1954.

110. Note, *Notice of Breach and the Uniform Commercial Code*, 25 U. Fla. L. Rev. 520, 520 (1973). *See generally* Annot., 17 A.L.R.3d 1010, 1102-05 (1968).

111. The definitional section of the U.C.C. states only that

> a person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when
>
> (a) it comes to his attention; or
>
> (b) it is duly delivered at the place of business through which the con-

it appears frequently in the U.C.C.[113] and may have a direct impact on the enforceability of contracts between parties to a business transaction.[114] In 1979, the South Carolina Supreme Court first considered the proper form of notification under the U.C.C., in *Southeastern Steel Co. v. Burton Block & Concrete Co.*[115] The court clearly concluded that notification must be in writing in order to be effective under the U.C.C., but its analysis cannot withstand critical review.

Burton Block and Concrete Company (Burton Block) was a subcontractor on the Beaufort Waterfront Project. Since its tasks included the construction of prestressed concrete members, Burton Block contracted with Southeastern Steel Company (Southeastern Steel) to supply it with steel reinforcement bars (rebar), a necessary component of these prestressed members. Southeastern Steel made a number of deliveries of rebar to the construction site which "were inspected at once, and complaints of nonconforming and/or defective rebar were made *by telephone* to Southeastern."[116] Burton Block refused to pay the amount due for the alledgedly defective rebar. Southeastern Steel, denying receipt of any notification regarding the defects, sued Burton Block for the balance due on the contract. The rebar remained on Burton Block's job site.[117]

The special referee concluded that Burton Block owed Southeastern Steel more than $27,000. The trial court, however, offset this amount by more than $14,000, which represented the cost of the defective rebar rejected by Burton Block through the telephone complaints. Justice Ness, writing for a unanimous[118]

> tract was made or at any other place held out by him as the place for receipt of such communications.

S.C. CODE ANN. § 36-1-201(26) (1976).

112. The term "notify" and related terms "notice," "notification," and "send notice" are defined and used similarly. *See* S.C. CODE ANN. § 36-1-201(25), (26), (27), & (38) (1976).

113. *E.g.*, S.C. CODE ANN. §§ 36-2-602, -604, -607, -608, -612, 36-3-302, -304, 36-4-303, 36-9-312, -504 (1976).

114. Late or insufficient notification may result in forfeiture of rights. *See generally* Annot., 17 A.L.R.3d 1010, 1102-05 (1968) and cases cited therein.

115. ___ S.C. ___, 258 S.E.2d 888 (1979).

116. *Id.* at ___, 258 S.E.2d at 889 (emphasis added).

117. *Id.* at ___, 258 S.E.2d at 888-89.

118. The South Carolina Supreme Court first issued an opinion on July 31, 1979, in which Justice Littlejohn dissented to the written notification requirement laid down by the majority. Without explanation, Justice Littlejohn switched to the majority view in

supreme court, concluded that Burton Block's telephone notification to Southeastern Steel did not satisfy the requirements of the U.C.C., and thus, Burton Block was not entitled to the offset.[119]

The supreme court asserted that the case turned on the sufficiency of oral notification under U.C.C. section 2-602 which provides that "[r]ejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller."[120] Relying on authority from outside this jurisdiction,[121] the court held that the trial court "committed an error of law in concluding that oral notice of rejection suffices under the UCC."[122] The stated policy underlying this holding was its consistency with "the better business practice."[123] The court interjected that "[i]t is inconceivable . . . that a business concern, claiming an offset of more than $14,000, would not have registered its complaints to the supplier *in writing*."[124] This holding is only superficially sound; further analysis of the court's sources of authority and policy reasoning indicate that the court's reliance on the insufficiency-of-oral-notification theory was unwise. Several alternative theories were available for a similar resolution of the dispute.

In support of its interpretation of the notification requirement under the U.C.C., the supreme court relied on three sources of authority: (1) case law seemingly in accord with the requirement of a writing, (2) an apparent lack of case law allowing oral rejections, and (3) a well-known commercial code hornbook. When examined closely, however, these sources do not necessarily support the court's holding in *Southeastern Steel Co.*

The court cites a 1965 Pennsylvania case, *Julian C. Cohen Salvage Corp. v. Eastern Electric Sales Co.*,[125] as the principal

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the final opinion of September 26, 1979. The only changes in the second opinion dealt with a tax issue unrelated to the U.C.C. notification issue.

119. ___ S.C. at ___, 258 S.E.2d at 888-89.

120. S.C. CODE ANN. § 36-2-602(1) (1976).

121. The court cited a Pennsylvania and an Illinois case, Burton Block's inability to cite any case in its favor, and a commercial code hornbook. ___ S.C. at ___, 258 S.E.2d at 889-90. See notes 125-32 and accompanying text *infra*.

122. ___ S.C. at ___, 258 S.E.2d at 890.

123. *Id.* at ___, 258 S.E.2d at 889.

124. *Id.* at ___, 258 S.E.2d at 890.

125. 205 Pa. Super. 26, 206 A.2d 331 (1965).

precedent for its proposition that notification must be in writing. This case, however, is distinguishable and supports the proposition, if at all, only in dictum. The buyer in *Julian C. Cohen Salvage Corp.* had an opportunity to inspect the goods at the seller's warehouse before purchase, and did not attempt any complaint or rejection until one month after receipt of the goods. The Pennsylvania court stressed these facts in its determination that the buyer failed to notify the seller of rejection *at all.*[126] When viewed from this perspective, the portion of the *Julian C. Cohen Salvage Corp.* opinion quoted by the South Carolina Supreme Court indicates that the Pennsylvania court was *not* ruling on the issue of oral versus written notification.

> In order to avoid the conclusion that . . . [the buyer] had accepted the . . . [goods], . . . [the buyer] offered testimony that it had notified . . . [the seller] of its rejection shortly after the . . . [goods were] received. However, there was no written notice of rejection. *Moreover,* the testimony that . . . [the buyer] notified . . . [the seller] of the rejection of these goods is not credible . . . .[127]

The buyer's failure to give written notification was not the fatal factor in its case; instead, the lack of written notification was merely one element in the proof of the seller's allegations that *no* notification was given. The buyer's failure to show a written notification merely undermined his credibility. Instead of holding that the alleged oral notification was insufficient—the proposition for which *Southeastern Steel Co.* cites the *Julian C. Cohen Salvage Corp.* case—*Julian C. Cohen Salvage Corp.* held that "in view of its *failure to act* with respect to the . . . [goods] it is clear that the . . . [buyer] accepted the goods."[128] Stated simply, the Pennsylvania court did not believe that the buyer had given the seller *any* notification of rejection. The *Julian C. Cohen Salvage Corp.* case, therefore, is not sound authority for a written notification requirement.

The *Southeastern Steel Co.* opinion also refers to an Illinois Appellate Court case, *Grossman v. D'Or,*[129] as "holding tele-

126. *Id.* at 28, 206 A.2d at 333.
127. *Id.* at 29, 206 A.2d at 334 (emphasis added).
128. *Id.* (emphasis added).
129. 98 Ill. App. 2d 198, 240 N.E.2d 266 (1968).

phonic notice insufficient under . . . the UCC."[130] The buyer's attempted notification in *Grossman* consisted of several uncompleted telephone calls. The seller was never reached by phone. The case did not hold that telephone notification was insufficient; rather, *Grossman* stands for the proposition that "uncompleted telephone calls are [not] evidence of notice within the meaning of the Uniform Commercial Code."[131] *Grossman,* therefore, also is not authority for the rule announced in *Southeastern Steel Co.*[132]

The second "source" of authority relied upon by the supreme court was the buyer's inability to cite any case holding that oral notification is sufficient under the U.C.C.[133] Unless the buyer, Burton Block, simply failed to anticipate this question from the court, such failure is indeed a mystery.[134] At least nine other jurisdictions have held oral notification to be sufficient under U.C.C. section 2-602 and other sections in Article Two.[135]

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130. ___ S.C. at ___, 258 S.E.2d at 890.

131. 98 Ill. App. at 203, 240 N.E.2d, at 268 (1968).

132. Only one case clearly holds that notification must be written. *See* Foundation Discounts, Inc. v. Serna, 81 N.M. 474, 468 P.2d 875 (1970). That case, however, has been severely criticized for its misinterpretation of authority. *See* Crest Inv. Trust, Inc. v. Alatzas, 264 Md. 571, 577-78, 287 A.2d 261, 264 (1972).

Several other cases lend support to the proposition that written notification is preferable. *See* A & G Constr. Co. v. Reid Logging Co., 547 P.2d 1207, 1216 (Alaska 1976)(distinguishable from *Southeastern Steel Co.* because decision based on special Alaskan Statute of Frauds); North Am. Steel Corp. v. Siderius, Inc., 75 Mich. App. 391, 401, 254 N.W.2d 899, 905 (1977)(dictum)(requirement of written notification implied in court's holding that telephone call constituted "rejection," but only subsequent letter constituted "notification").

A few cases have held that notification must be written when the pertinent U.C.C. section requires that a party "send" notice. *See* Available Iron Metal Co. v. First Nat'l Bank, 56 Ill. App. 3d 516, 371 N.E.2d 1032 (1977)(U.C.C. § 4-302) Delay First Nat'l Bank & Trust Co. v. Jacobson Appliance Co., 196 Neb. 398, 243 N.W.2d 745 (1976)(U.C.C. § 9-504); Valley Bank & Trust Co. v. First Security Bank, 538 P.2d 298 (Utah 1975)(U.C.C. Article 4; distinction between "sending" notice and "giving" notice). These cases are clearly distinguishable from *Southeastern Steel Co.* because § 36-2-602 does not require the buyer to "send" notification. For statutory text, see note 111 *supra.* The view that written notification is required by the word "send" has been severely criticized for "creat[ing] a new . . . statute of frauds and add[ing] to the mountain of paper" already required. 17 U.C.C. REP. 480 (editor's note).

133. ___ S.C. at ___, 258 S.E.2d at 891.

134. The trial court ruled that oral notification was sufficient. *Id.* at ___, 258 S.E.2d at 892. The brief for respondent Burton Block indeed cited no cases on this issue.

135. The nine jurisdictions are Alabama, Arkansas, Colorado, District of Columbia, Georgia, Maryland, New York, North Carolina, and Pennsylvania, which are represented by the following cases: *E.g.,* Traynor v. Walters, 342 F. Supp. 455 (M.D. Pa. 1972)(tele-

In addition, the courts in at least seven states have held that oral notification is satisfactory under comparable provisions in other articles of the U.C.C., particularly Articles Three, Four, and Nine.[136] No fewer than fourteen jurisdictions have expressly held that the U.C.C. definition of "notify" or "notice" encompasses both face-to-face oral notification and notification by telephone.[137] When compared with the paucity of cases supporting the requirement of written notification,[138] these seventeen cases from numerous jurisdictions indicate that the *Southeastern Steel Co.* position holding oral notification insufficient under the U.C.C. places South Carolina in the minority of jurisdictions

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phone notification acceptable under U.C.C. § 2-602); Page v. Camper City & Mobile Home Sales, 292 Ala. 562, 297 So. 2d 810 (1974)(face-to-face oral notification acceptable under U.C.C. § 2-607); Smart Chevrolet Co. v. Davis, 262 Ark. 500, 502, 558 S.W.2d 147, 148 (1977)("[w]ritten notice is not required by the Uniform Commercial Code"; case brought under U.C.C. § 2-714); VLN Corp. v. American Office Equip. Co., 536 P.2d 863, 867 (Colo. App. 1975)("there is no requirement that notification be formal or written" under U.C.C. § 2-607); Robinson v. Jonathan Logan Financial, 277 A.2d 115 (D.C. 1971)(dictum)(telephone notification not insufficient under U.C.C. § 2-602); Warren's Kiddie Shoppe, Inc. v. Casual Slacks, Inc., 12 Ga. App. 578, 171 S.E.2d 643 (1969)(telephone notification acceptable under U.C.C. §§ 2-605, -607); Smith v. Butler, 19 Md. App. 467, 311 A.2d 813 (1973)(efforts to contact by numerous unsuccessful telephone calls sufficient under U.C.C. § 2-607); International Paper Co. v. Margrove, Inc., 75 Misc. 2d 763, 766, 348 N.Y.S.2d 916, 919 (1973)(no authority "that the required notice must be in writing" under U.C.C. §§ 1-201(26), 2-607); Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972)(face-to-face statement may be sufficient as rejection under U.C.C. § 2-601; telephone notification acceptable under U.C.C. § 2-608; reference to U.C.C. § 2-602).

For the proposition that "sister state interpretations of the Code are more than mere persuasive authority," see A. J. Armstrong, Co. v. Janburt Embroidery Corp., 97 N.J. Super. 246, 259, 234 A.2d 737, 744 (1967).

136. The seven states are Indiana, Kansas, Maryland, Missouri, Montana, New Jersey, and New York. Cases holding that oral notification is acceptable under Articles 3, 4, and 9 of the U.C.C. include: GAC Credit Corp. v. Small Business Administration, 323 F. Supp. 795 (W.D. Mo. 1971)(under U.C.C. § 9-312); Hall v. Owen County State Bank, ___ Ind. App. ___, 370 N.E.2d 918 (1977)(under U.C.C. § 9-504); Leaderbrand v. Central State Bank, 202 Kan. 450, 450 P.2d 1 (1969)(under U.C.C. § 3-508); Crest Inv. Trust, Inc. v. Alatzas, 264 Md. 571, 287 A.2d 261 (1972)(under U.C.C. § 9-504); Fairchild v. Williams Feed, Inc., 169 Mont. 18, 544 P.2d 1216 (1976)(under U.C.C. § 9-504); Sun River Cattle Co. v. Miners Bank, 164 Mont. 237, 521 P.2d 679 (1974)(under U.C.C. §§ 3-508, 4-104, -302); A. J. Armstrong Co. v. Janburt Embroidery Corp., 97 N.J. Super. 246, 234 A.2d 737 (1967)(under U.C.C. § 9-504); Security Trust Co. v. First Nat'l Bank, 79 Misc. 2d 523, 358 N.Y.S.2d 943 (1974)(under U.C.C. § 3-508).

137. See notes 135 & 136 *supra*. The fourteen jurisdictions are Alabama, Arkansas, Colorado, District of Columbia, Georgia, Indiana, Kansas, Maryland, Missouri, Montana, New Jersey, New York, North Carolina, and Pennsylvania.

138. See notes 125-32 and accompanying text *supra*.

on this issue.

The final source of authority cited by the supreme court to support its holding is the following quote from the White and Summers Uniform Commercial Code hornbook:

> Section 2-602 provides that a buyer who wishes to reject must "seasonably notify" the seller . . . . *Needless to say such rejection . . . notice should be in writing, and it should be carefully drafted.* Those who have depended upon non-written notice or equivocal notice of rejection have not fared well in the courts.[139]

On its face this language appears to support the court's position; under careful scrutiny, however, this passage does not stand for the proposition espoused by the South Carolina court for three reasons. First, instead of using mandatory language such as "must" or "shall," the authors used the more permissive term "should" with reference to the need for writing. This wording intimates that a suggestion is being offered to the business community, not a statement of the law for practitioners. Second, the court omitted a portion of the passage quoted from the hornbook. The omitted portion refers to U.C.C. sections 2-605 and 2-608, both of which differ from 2-602 because they require particularized objections by the buyer.[140] The necessity of a writing in instances requiring particularization is logically justifiable, but that is not the case in section 2-602. The court's later reference to "such . . . notice," in the second of the quoted sentences, appears to refer to the omitted discussion of sections 2-605 and 2-608 rather than section 2-602. Thus, the hornbook authors seem to be admonishing businessmen to be especially cautious when

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139. ___ S.C. at ___, 258 S.E.2d at 889 (quoting J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 8-3, at 265 (1972)(emphasis added by court)). The full text of the quoted paragraph follows:

> Section 2-602 provides that a buyer who wishes to reject must "seasonably notify" the seller, *and section 2-608(2) contains a similar requirement for one revoking acceptance. Note that under 2-605 a buyer who fails to particularize his objection in connection with rejection may lose his right to rely on "the unstated defect" to justify the rejection or to establish a breach.* Needless to say such rejection *or revocation* notice should be in writing, and it should be carefully drafted. Those who have depended upon nonwritten notice or equivocal notice of rejection have not fared well in the courts.

S. WHITE & R. SUMMERS, *supra*, § 8-3, at 265 (emphasis added, footnote deleted). (This language is unchanged in the second edition of the hornbook. *Id.* at 315 (2d ed. 1980)).

140. *See* S.C. CODE ANN. §§ 36-2-605, -608 (1976).

dealing with sections 2-605 and 2-608. Finally, as authority for the statement that "[t]hose who have depended upon nonwritten notice . . . have not fared well in the courts,"[141] White and Summers cite *Julian C. Cohen Salvage Corp.* and *Grossman.*[142] As noted above, these decisions turned, in part, on whether the buyer notified the seller at all, rather than whether notice must be in writing.[143] The hornbook language quoted by the court in *Southeastern Steel Co.*, therefore, is not solid authority for the court's conclusion that oral notice is *legally* insufficient.

White and Summers, however, do establish in other portions of their hornbook that oral notification is sufficient under the U.C.C. In discussing section 2-607, the authors state that "an oral notice will suffice."[144] In the next paragraph, the writers discuss the differences between notification under section 2-607 and section 2-602, but find the only difference to be the time for the notification, not the form.[145] The authors also assert that Article Nine of the U.C.C. "permits oral notification."[146] Section 2-602 and the comparable Article Nine sections refer to section 1-201(26) to define "notify." This definition does not distinguish between oral and written notification.[147] Thus, in many respects, the source referred to by the court to strengthen its holding in *Southeastern Steel Co.* actually weakens it.

Two other commentators assert that oral notification is acceptable under the U.C.C. Professor Anderson, author of a multi-volume treatise on the U.C.C., states that in order "[t]o make an effective rejection of improper goods [under section 2-602] the buyer must comply with two requirements": reasonable time and seasonable notification.[148] Professor Anderson does not intimate anywhere that written rejection is necessary and, in fact, he states that under section 2-607 notification to the seller "may be either oral or written. A telephone call is a sufficient

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141. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 8-3, at 265 (1972).

142. See notes 125-32 and accompanying text *supra*.

143. *See* notes 126 & 131 and accompanying text *supra*.

144. J. WHITE & R. SUMMERS, *supra* note 141, § 11-9, at 348.

145. *Id.*

146. *Id.* § 25-5, at 918. *See id.* § 26-10, at 983.

147. See note 111 *supra*.

148. 2 R. ANDERSON, UNIFORM COMMERCIAL CODE: TEXT, CASES, AND COMMENTARY § 2-602:4, at 169 (2d ed. 1971).

notice . . . ."[149] Another commentator has noted that under both the old Uniform Sales Act and its replacement, the U.C.C., "no particular form of notice is required . . . notice may be oral or written . . . ."[150] The consensus of authoritative opinion, therefore, embraces an interpretation of the term "notify" which allows oral as well as written notification.

In addition to its reliance on three sources of authority, the court in *Southeastern Steel Co.*, relied on policy considerations. The court emphasized that written notification was a "better business practice."[151] The rationale underlying this contention was not explained. Various arguments can be suggested to support the court's position, but the most apparent reasons why written notification constitutes the better practice are that a writing will more efficiently convey the buyer's rejection and will serve as reliable proof in any subsequent litigation.[152] These reasons are not without opposition, however, and arguments can be formulated to support oral notification in terms of efficiency and proof in litigation, expectations, and the spirit of the U.C.C.

Commentators[153] and a wealth of case law[154] demonstrate that "reasonable time" requirements are paramount. Surely telephone notification is a more expeditious manner of informing the seller of the problems with delivered goods than is a writing. In one sense, at least, oral notification is less risky than written notice because the buyer is immediately informed of the seller's response. Each party can confirm concurrently the position of the other. Written notice can be delayed in the mail indefinitely with neither party knowing the other's position. Sufficient proof of oral notification is not impossible and to deny the buyer the right to notify orally simply in anticipation of litigation is unfair.[155] Other equally difficult factual determinations are required of juries, for example, what is a "reasonable time" within which a buyer's ignorance of breach of warranty under section 2-

149. *Id.* § 2-607:26, at 218.

150. Note, *supra* note 110, at 536.

151. ___ S.C. at ___, 258 S.E.2d at 891.

152. The court concluded that oral notification is "ineffective to constitute rejection" and asserted that such notice is particularly ineffective "where there is conflicting evidence." *Id.*

153. *See* Note, *supra* note 110, at 522.

154. *E.g.*, Annot., 17 A.L.R.3d 1010, 1103-05 (1968) and cases cited therein.

155. *See* 17 U.C.C. REP. 480 (editor's note).

607 is justified.[156]

Two categories of expectations must also be considered —commercial expectations arising from a course of dealing or trade and consumer expectations arising from unfamiliarity with the commercial community. Much negotiation in the business world takes place by telephone[157] and businessmen naturally have come to rely on that instrument to communicate information quickly when attempting to solve problems encountered with delivered goods. Commentators explain that "the courts have generally held that the standard for notice required for individual consumers is not the same as that applied to merchants."[158] A reasonable time period within which a consumer may give notification is generally longer than that for commercial buyers[159] and, hence, the required form of notification likewise should be relaxed. Consumers often do not have secretarial resources nor the business acumen to draft a notice, and the consumer accustomed to telephoning a catalogue sales order naturally will expect the right to telephone a complaint. Thus, the "possibility of injustice to the lay consumer" must be evaluated carefully.[160]

Courts and commentators indicate that the spirit of the U.C.C. requires no formality.[161] The common law held that buyers waived defects in and nonconformity of goods upon acceptance. The Uniform Sales Act eliminated the harshness of this rule, but added the notice requirement to provide protection for sellers. Notice gives sellers ample opportunity to cure defects or prepare for settlement or litigation. The Uniform Sales Act, therefore, balanced the benefit to buyers from elimination of the common-law rule regarding waiver with protection to sellers

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156. *See* S.C. CODE ANN. § 36-2-607 (1976). *See* Note, *supra* note 110, at 525.

157. *See generally* Julian C. Cohen Salvage Corp. v. Eastern Elec. Sales Co., 205 Pa. Super. 26, 29, 206 A.2d 331, 332-33 (1965); ___ S.C. at ___, 258 S.E.2d at 891 (telephone used frequently).

158. Note, *supra* note 110, at 527.

159. *See* Note, *supra* note 110, at 529.

160. *See* Note, *supra* note 110, at 524-25.

161. *See, e.g.*, Southern Concrete Prods. Co. v. Martin, 126 Ga. App. 534, 191 S.E.2d 314 (1972); Hall v. Owen County State Bank, ___ Ind. App. ___, 370 N.E.2d 918 (1977). *See generally* R. ANDERSON, *supra* note 148, § 2-607:27, at 218. *See also* Annot., 53 A.L.R.2d 270, at § 2[a] (1957)(analogy to cases under the Uniform Sales Act, the predecessor to the U.C.C.).

from creation of notice requirements.[162] Under the Uniform Sales Act, courts "recognized that the notice required . . . may be oral."[163] The successor to the Uniform Sales Act, the U.C.C., preserved this balance.[164] Since the policy reasons underlying the notification provisions of the Sales Act are identical to those underlying the U.C.C. requirements, courts' reasoning in cases under the Sales Act can be applied when interpreting the U.C.C. The purpose of notification is to communicate to the seller that the buyer is dissatisfied with the goods. Formality is not the goal. Oral and telephonic notification, conforms to the spirit of the U.C.C. by protecting the seller's interests to the same extent that written and formal notification does.

A review of the sources of authority for interpreting the notification requirement of the U.C.C. demonstrates that the *Southeastern Steel Co.* decision was based upon a less than sturdy foundation. Two statements by the court intimate that the crucial element in the case may not have been the legal insufficiency of oral notification, but rather Burton Block's inability to convince the court that it notified the seller at all. The opinion emphasizes that "[t]here was no evidence of rejection other than testimony of Burton's alleged telephone calls to Southeastern."[165] The court suggested that this type of notification "is ineffective . . . particularly where there is conflicting evidence of its receipt . . . ."[166] These statements suggest that the supreme court did not *believe* the buyer. If that was the court's position, the *Southeastern Steel Co.* opinion can be read as a penalty for the buyer's unwise choice of notification form, rather than the rule of law that only written notification is sufficient under the U.C.C. Instead of fashioning such a rule to justify holding for the seller, the court could have reached the same result under other more proper theories.

The authorities are in agreement that a "mere complaint" is not sufficient to constitute notification under the U.C.C.[167] The

162. Note, *supra* note 110, at 540.

163. Annot., 53 A.L.R.2d 270, at § 4 (1957).

164. Note, *supra* note 110, at 541.

165. ___ S.C. at ___, 258 S.E.2d at 889.

166. *Id.*

167. *See* Christensen v. McAndrews, 8 U.C.C. REP. 354 (1970); Bomyte Co. v. L-Co. Cabinet Corp., 5 U.C.C. REP. 1060 (Pa. Ct. Common Pleas 1968); *See* Note, *supra* note 110, at 526, 528.

buyer must clearly establish that he is *rejecting* the goods. Had the court investigated the legal sufficiency of the *content* of Burton Block's telephone conversations with Southeastern Steel, it is possible that a result in favor of the seller could have been sustained on this "mere complaint" theory. A permutation of the attempted written notification rule could have been supported by incorporating a standard of reasonableness into the preferred *form* of notification.[168] Standards of reasonableness are described in the U.C.C. section defining "notification" of a party[169] and have been applied to the required time for notification.[170] Thus, a reasonable *form* of notification can be implied from section 2-602. This standard of reasonableness can be applied flexibly according to the relative skills, experience, and expertise of the parties.[171] A lay consumer, therefore, would be held to a less stringent standard, while an experienced business man would be held to a more exacting standard with respect to time, content, and form of notification. The necessity for speed and any usual course of dealings between the parties also enter into a determination of reasonableness. By employing a standard of reasonableness, the court would place sufficiency of the notification form before the jury where other courts have advocated it belongs.[172]

The South Carolina Supreme Court purported to lend certainty to a troublesome area of commercial law by requiring that notification under U.C.C. section 2-602 be written. The court's use of authority and public policy, however, was not sound. Businessmen should not be confident that *Southeastern Steel Co.* will be either perpetual or unaltered precedent. The much desired certainty is thus undermined. The court could have achieved a similar result through the use of alternative theories without risking the untenable formulation of this new rule. If *Southeastern Steel Co.* is a statement of a new rule requiring written notification under the U.C.C., South Carolina joins a minority of jurisdictions asserting this position. At its next oppor-

168. *See* Fairchild v. Williams Feed, Inc., 169 Mont. 18, 23, 544 P.2d 1216, 1218-19 (1976)(reasonable notification includes oral notification).

169. *See* S.C. CODE ANN. § 36-1-201(26) (1976). See note 111 *supra.*

170. *See* Annot., 17 A.L.R.3d 1010, at § 39[b] (1968).

171. Note, *supra* note 110, at 527, 529.

172. *E.g.*, Smith v. Butler, 19 Md. App. 467, 473, 311 A.2d 813, 817 (1973).

tunity, the court should review its basis for this decision.

G. Marcus Knight