IS A SIGNED OFFER SUFFICIENT TO SATISFY THE STATUTE OF FRAUDS?

GREGORY SCOTT CRESPI*

I. INTRODUCTION

If one seeks to enforce a contract governed by an applicable statute of frauds, it is universally deemed necessary under all such statutes to establish the existence of a "sufficient writing" signed by the party against whom enforcement is sought. Suppose that the only document that was signed by the other party is the offer that was accepted (or forseeably relied upon) to form the contract. Is a signed offer a "sufficient writing" to satisfy the statute of frauds requirement?

One would expect that the standard contract law treatises would provide a simple and consistent yes-or-no answer to this seemingly straightforward question. Unfortunately, this is not the case. For example, the well-known Murray on Contracts treatise[1] flatly states that a signed offer will not suffice to satisfy the "typical American statute of frauds,"[2] while the equally well-know Calamari and Perillo Contracts treatise[3] states on the authority of the first and second editions of the Restatement of the Law of Contracts that a signed offer will be sufficient.[4] The perhaps most widely consulted Farnsworth Contracts treatise[5] states that "[a]n offer . . . should suffice,"[6] but later recognizes there is some authority holding to the contrary when applying Section 2-201 of the Uniform Commercial Code,[7] a result that Farnsworth views as in conflict with the intent of the drafters of the UCC.[8] Finally, the well-regarded Uniform Commercial Code treatise by White and Summers[9] states that to be sufficient under UCC Section 2-

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* Professor of Law, Dedman School of Law, Southern Methodist University. J.D. 1985, Yale Law School; Ph.D. 1978 University of Iowa.

1. JOHN EDWARD MURRAY JR., MURRAY ON CONTRACTS (4th ed. 2001).

2. *Id.* at 378 (stating, "[i]t is important to emphasize the requirement that the writing evidence a *contract* rather than a mere offer of preliminary negotiation.") (emphasis in original).

3. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS (4th ed. 1998).

4. *Id.* at 754 n.2 (citing RESTATEMENT OF CONTRACTS § 207(a) (1932); RESTATEMENT (SECOND) OF CONTRACTS § 131(b) (1979)).

5. E. ALLAN FARNSWORTH, CONTRACTS (3rd ed. 1999).

6. *Id.* at 395-96.

7. *Id.* at 396.

8. *Id.*

9. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (3rd ed. 1988).

201, the writing "must indicate the consummation of a contract, not mere negotiations, nor a mere offer, nor a counter-offer."[10]

The treatise writers appear to be in some disagreement. In this short article I will attempt to clarify the law on this point and offer one suggestion for change. This article will seek to demonstrate that much of the confusion noted above stems from the writers sometimes failing to distinguish clearly between the general run of "common law" state statutes of frauds and UCC Section 2-201, which states the "sufficient writing" requirement very differently.

As I will show, this great weight of the authority with regard to the "common law" statutes of frauds has long been in favor of regarding a signed offer as a sufficient writing. In contrast, the cases are divided regarding UCC Section 2-201. Most courts that have interpreted that provision have found that a signed offer is *not* sufficient to satisfy that statute. I will argue that this majority interpretation of UCC Section 2-201, as contrary to common law authority, is open to criticism in that it gives primacy to a literal reading of the language of the statutory text despite reasonable arguments that can be offered that this interpretation does not reflect the intent of its drafters. Finally, I will attempt to show that another reasonable interpretation is available for Section 2-201 that is probably literal enough for all but linguistic purists, and that would in my opinion better reflect the intent of the drafters of the UCC.

II. DISCUSSION

The original English Statute of Frauds adopted in 1677 required that to enforce a contract, "the agreement . . . or some memorandum or note thereof, shall be in writing and signed by the party to be charged."[11] Virtually all American jurisdictions have long since enacted their own versions of this statute.[12] These formulations have identical or very similar specifications of the writing requirement.[13] The Restatement of the Law of Contracts at Section 207 attempts to summarize the applicable case law that has elaborated upon these various statutes of frauds as of 1932 when it broadly stated that "any document or writing" that is signed by the party to be charged is sufficient if it identifies the parties, subject matter, and terms and conditions of the contract. [14] Also presented at Illustration 2 to Section

10. *Id.* at 85 §§ 2-4 (footnotes omitted).
11. FARNSWORTH, *supra* note 5, at 364 (citing 1677, 2 Car., c.3, §4 (Eng.)).
12. *Id.* at 364-65.
13. *Id.*
14. RESTATEMENT OF CONTRACTS § 207 (1932).

207 is a hypothetical indicating a published offer would be sufficient.[15] In addition, Section 209 declares "[i]t is not essential to the validity of a memorandum under the Statute that the writing shall have been made as a memorandum of a contract."[16] Presented at Illustration 3 to Section 209 is a hypothetical demonstrating that a signed offer sent to the offeree will be sufficient.[17]

The subsequent Restatement (Second) of Contracts at Section 131 is more succinct with regard to the issue considered.[18] It states that a signed writing that identifies the subject matter and essential terms of the contract is acceptable if it "is sufficient to indicate that a contract with respect thereto has been made between the parties *or offered by the signer to the other party*."[19] Official Comment f to Section 131 states "[a] signed written offer to the public may be sufficient even though the offeree is not identified."[20] Illustration 2 to Section 131 presents another hypothetical used to show that a published offer would be sufficient.[21]

Two substantial mid-twentieth century American Law Reports annotations demonstrate that the Restatement position is not mere professorial conjecture or an aspirational norm, but is grounded solidly in an extensive body of case law holding offers sufficient to satisfy the various state "common law" statutes of frauds.[22] While these annotations each present some authority to the contrary, they together identify numerous cases from many jurisdictions, decided in many different contexts that support the proposition that a signed offer will be sufficient.[23] A few cases decided after these annotations were published and are also consistent with this proposition.[24] Excerpts from the Calamari & Perillo and Farnsworth treatises noted above are based upon this body of case law and the resulting Restatement formulations.[25]

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15. *Id.* § 207, illus. 2.
16. *Id.* § 209.
17. *Id.* § 209, illus. 3.
18. RESTATEMENT (SECOND) OF CONTRACTS § 131 (1979).
19. *Id.* (emphasis added).
20. *Id.* § 131 cmt. f.
21. *Id.* § 131, illus. 2.
22. A.M. Swarthout, *Memorandum Which Will Satisfy Statute of Frauds, as Predictable in Whole or in Part upon Writings Prior to the Oral Agreement*, 1 A.L.R.2D 841, 852-53 (1948); E. LeFevre, *Oral Acceptance of Written Offer by Party Sought to be Charged as Satisfying Statute of Frauds*, 30 A.L.R.2D 972, 972-86 (1953).
23. *Id.*
24. *See, e.g.*, Kirschling v. Lake Forest Sch. Dist., 687 F. Supp. 927 (D. Del. 1988); Benya v. Stevens and Thompson Paper Co., 468 A.2d 929 (Vt. 1983).
25. *See generally*, FARNSWORTH *supra* note 5; *see also* CALAMARI & PERILLO, *supra* note 3.

What appears to have caused some confusion is that the drafters of the UCC in formulating Section 2-201 significantly departed from the general language of the various state statutes of frauds when they adopted a statute of frauds requirement for sale of goods transactions over $500 in amount of a "writing sufficient to indicate that a contract for sale has been made."[26] The most literal and straightforward reading of this provision gives a clear negative answer to the question considered in this article since this existence of an offer, no matter how well established by written evidence, does not necessarily mean that "a contract for sale has been made" since that offer may have been rejected or otherwise terminated before being accepted. Formation of a contract generally requires the acceptance of an offer, as well as the satisfaction of any applicable mutual assent or consideration requirements, or at least foreseeable reliance upon the offer under a promissory estoppel contract formation theory, none of which could be ascertained from the text of the offer alone. Therefore, UCC Section 2-201 by its requirements appears to preempt the prior common law practice of accepting a signed offer as sufficient. Instead, it apparently imposes the more stringent evidentiary requirement of a signed writing that evidences all elements of contract formation, or at least evidence of an acceptance as well as an offer. Most courts that have considered the status of signed offers under UCC Section 2-201 have followed the lead of the earliest appellate case to address this question, and without engaging in extended discussion have also read the "a contract for sale has been made" phrase literally to hold those offers to not be sufficient.[27] The Murray, White & Summers, and second part of the Farnsworth treatise excerpts are based primarily upon this UCC Section 2-201 case law.[28]

Only one case, *Ore & Chemical Corporation v. Howard Butcher Trading Corporation*,[29] departs from this now-entrenched literal interpretation of UCC Section 2-201 to find that a signed offer is sufficient.[30] In

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26. U.C.C. § 2-201 (2000).

27. *See, e.g.*, Arcuri v. Weiss, 184 A.2d 24, 26 (Pa. Super. Ct. 1962) (stating, "[s]ince this is the first appellate decision touching upon this [status of offers under UCC Section 2-201] question we feel some comment is needed. [T]his section does require some writing which indicates THAT A CONTRACT FOR SALE HAS BEEN MADE.") (emphasis in original). *See also* Barak Int'l Corp. v. Mast Indus. Inc., 535 N.E.2d 633, 638 (N.Y. 1989); Micromedia v. Automated Broad. Controls, 799 F.2d 230, 234 (5th Cir. 1986); Howard Constr. Co. v. Jeff-Cole Quarries, Inc., 669 S.W.2d 221, 227 (Mo. App. 1983); Martco Inc. v. Doran Chevrolet, Inc., 632 S.W.2d 927, 928 (Tex. App. 1982); Oakley v. Little, 272 S.E.2d 370 (N.C. Ct. App. 1980); Barber v. McNamara-Vivant Contracting Co., 293 N.W.2d 351, 355 (Minn. 1979); Maderas Tropicales v. S. Crate & Veneer Co., 588 F.2d 971, 973-74 (5th Cir. 1979).

28. *See generally* MURRAY, *supra* note 1; FARNSWORTH, *supra* note 5; WHITE & SUMMERS, *supra* note 9.

29. 455 F. Supp. 1150 (E.D. Pa. 1978).

30. *Ore*, 455 F. Supp. at 1151-52.

Ore, Judge Huyett disagreed strenuously with prior interpretations of the statute's writing requirement.[31] He stated:

> Some [UCC Section 2-201] cases have emphasized the language "has been made" and held writings ineffective because they were "future oriented" . . . [citations omitted] . . . However, an examination of those cases reveals that the writings involved were not offers but merely tokens of negotiations, one step further back in the bargaining process. Keeping the purpose of the Statute of Frauds in mind, we think the words "has been made" refer to the evidentiary value of the writing and not to the situation that is, whether a contract had been formed at the time the writing was signed. The official comment is enlightening, "[a]ll that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction." We do not believe that the drafters intended to reject the rule applicable in pre-code cases and render impermissible the use of a written offer as a memorandum once that offer has been accepted. Any other conclusion leads to an absurd result.[32]

Judge Huyett's quotation makes two points. First, it claimed that at least some of the earlier UCC Section 2-201 cases that have held offers to be insufficient can be distinguished on the basis that the "offers" there considered were too tentative and preliminary to truly constitute offers.[33] This may be true for some or all of these particular cases, but it does not address the main question here considered: what about signed offers? More importantly, the argument was advanced by Judge Huyett that the UCC drafters did not intend to preclude the long-established common law principle that signed offers are sufficient to satisfy the statute of frauds, and that the Section 2-201 provision that the writing be sufficient to indicate that a contract "has been made" should therefore be interpreted only to require the writing to verify one aspect of a contract formation process, the making of the offer, and not necessarily to also verify that the offer had been accepted.[34] In the view of this court, to interpret UCC Section 2-201 to impose a more stringent writing requirement than that applied under the "common law" statutes of frauds and thereby find signed offers to be insufficient would be "an absurd result."[35]

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31. *Id.* at 1153.
32. *Id.* at 1153-54.
33. *Id.*
34. *Id.* at 1150.
35. *Id.* at 1153-54.

Judge Huyett has a good point, although it is not as well articulated as it might have been. The UCC was intended to be "liberally construed to promote its underlying purposes and policies,"[36] one of which is "to simplify. . .the law governing commercial transactions."[37] I am not aware of any evidence that the drafters of the UCC intended to impose a more stringent statute of frauds requirement, and at least one knowledgeable commentator has claimed that their intention with regard to the statute of frauds was in fact "to relax the requirements of the statute."[38] The Official Comment to Section 2-201, quoted by Judge Huyett, while not explicit concerning the statutory objectives and their relation to the prior jurisprudence does suggest intent to relax rather than increase the burden of compliance with the statute of frauds.[39] If this was in fact the drafters' intent, the literal reading of UCC Section 2-201 that has been widely accepted and which mandates that signed offers are insufficient, while not in my opinion an "absurd result" given the obvious textual support for this reading and given the increased protection it would provide offerors from false allegations of contracts formed through acceptance of such offers, might nevertheless be an inferior result compared to what could be achieved through a somewhat more strained but not indefensible reading of the language that better achieved the drafters' desired objectives. However, Judge Huyett to this end argues rather unconvincingly that the "has been made" phrase does not relate to whether a contract was formed, but only to the evidentiary value of the writing, which unfortunately is a more tortured reading of this phrase than the words will reasonably bear.[40]

A more fruitful approach to an alternative interpretation of Section 2-201 might be to consider what it means to "indicate" something. There is linguistic room here for one to reasonably argue that when Section 2-201 states that the writing must only be sufficient to "indicate" that a contract has been made, in a context where it is quite clear from the rest of the statute that the writing need not set out completely or even correctly the

36. U.C.C. § 1-102 (2000).

37. *Id.* § 1-102(2)(a).

38. FARNSWORTH, *supra* note 5, at 396.

39. Ore & Chemical Corp. v. Howard Butcher Trading Corp., 455 F. Supp 1150, 1153-54. For example, Official Comment 1 quoted by Judge Huyett states that only the writing "afford a basis" for believing that a real transaction has occurred is required, rather than requiring that the writing demonstrate this fact conclusively. *Id.* Similarly, this Comment later summarizes the sufficiency requirements by stating in part only that the writing must evidence a contract, as opposed to demonstrating this fact conclusively. *Id.* A merely suggestive rather than a comprehensive and definitive signed writing may be all that the UCC drafters intended to require, as is consistent with the prior common law position. *Id.*

40. *Id.* at 1153.

terms of the contract.[41] Given that the statute of frauds inquiry was never intended to be definitive as to the existence of a contract because even a written and signed contract may be a forgery, a signed offer should be regarded as sufficient to satisfy the statute.[42] A signed offer does in fact serve as such an "indicator" of the existence of a contract that screens out some false allegations, even though it does not prove or even indicate—and thus leaves open to some doubt—the existence of the other necessary contract formation elements, such as acceptance or foreseeable reliance. To merely "indicate" the existence of a contract it is not necessary to "fully specify" or "prove" its existence; indicators necessarily abstract from the full complexity of the circumstances they relate to and are generally recognized as helpful but not completely reliable.[43] This interpretation of Section 2-201 does get to Judge Huyett's preferred result, which I also favor, but does so in a much more satisfactory and defensible fashion.

Viewing the problem here in more general terms, what I perceive as having taken place in the opinions interpreting Section 2-201 is a typically "path-dependent" process of the accumulation of precedents into a line of authority that is in my opinion, as well as in Judge Huyett's view, inferior to what might have resulted had the first steps been taken down a very different interpretive path, but which now has some precedential force and inertia, and consequently will be difficult to reverse. The earliest relevant UCC Section 2-201 opinions that considered the status of signed offers focused only upon the most literal reading of the statutory "contract for sale has been made" phrase, and apparently did not seriously consider either the more expansive character of the prior common law in this area, or the probable intent of the UCC drafters with regard to retaining or even advancing the liberality of that common law authority.[44] If one reads Section

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41. U.C.C. § 2-201 (2000).

42. *Id.*

43. WHITE & SUMMERS, *supra* note 9, §§ 2-4 at 83. In their UCC treatise, White & Summers lend support to the argument for an expansive view of what writings will satisfy the "indicate" requirement of UCC section 2-201. *Id.*

> [E]ven if the plaintiff produces a writing . . . overwhelmingly "indicative" of a contract, the defendant may still deny and prove there was no contract. For the main theory of the writing sufficient under § 2-201(1) is not that it conclusively proves the existence of a contract but that it affords the trier of fact something reliable to go on in addition to the mere oral testimony of the plaintiff. . .The spirit of [Karl Llewellyn and the UCC Official Comments] seems to be that "sufficient to indicate" is roughly equivalent to "more probable than not" rather than "no doubt."

Id. at 83-84.

"The writers do recognize, however, that the courts have interpreted this requirement to hold mere offers to be insufficient." *Id.* at 84-85.

44. FARNSWORTH, *supra* note 5, at 396.

2-201 in isolation from those complicating contextual factors the most straightforward and reasonable interpretation of that phrase is obviously that signed offers are not sufficient.[45] Later cases then followed these early precedents without meaningfully revisiting and applying principles of statutory interpretation to this question. The one opinion that did take issue with this conclusion (the *Ore* opinion discussed above) unfortunately based its argument on a very strained interpretation of the "has been made" phrase, failed to adequately ground this interpretation in a convincing exposition of the pre-UCC common law and the probable intent of the UCC drafters, and has subsequently and perhaps partially as a result been ignored by later courts.[46]

III. CONCLUSION

The claims made by Calamari & Perillo[47] and Farnsworth[48] in their treatises, as to signed offers being sufficient for statute of frauds purposes, are correct in regards to the great weight of the case law interpreting the general "common law" state statutes of frauds.[49] With regards to UCC Section 2-201, however, the courts with only one exception have embraced the position taken by Murray[50] and White & Summers[51] in their treatises that signed offers are not sufficient to satisfy the statute. All of these treatise writers should make this distinction between the "common law" and the UCC-based statute of frauds jurisprudence more clear in their subsequent editions.

In my opinion, given the large body of common law authority heavily in support of allowing signed offers to satisfy the "common law" statute of frauds requirements, and given the general stance taken by the UCC drafters to relax common law technical requirements and formalities, the courts should be more reluctant than they have been to interpret Section 2-201 to hold signed offers insufficient, especially since they do have a (barely) adequate textual basis to hold those offers sufficient as being the necessary "indicators" of the existence of a contract that do serve to differentiate meaningfully the situation from the pure oral agreement situation where the statute of frauds protections are essential. I do hope that the next court that

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45. U.C.C. § 2-201 (2000).

46. Ore & Chemical Corp. v. Howard Butcher Trading Corp., 455 F. Supp. 1150, 1153-54 (E. D. Pa. 1978).

47. CALAMARI & PERILLO, *supra* note 3, at 754 n.2.

48. FARNSWORTH, *supra* note 5, at 395-96.

49. Swarthout, *supra* note 22, at 852-53; LeFevre, *supra* note 22, at 972-86.

50. MURRAY, *supra* note 1, at 378.

51. WHITE & SUMMERS, *supra* note 9, at 80.

is asked to address such a controversy under UCC Section 2-201 will give these thoughts that I here advance, as to both the desirability and the feasibility of taking a different interpretative approach, some consideration.