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ENFORCING THE CONTRACT TO BARGAIN

CHARLES L. KNAPP

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For our purposes, therefore, it will be sufficient to further describe and define the two "middle" positions outlined above, in order to stress the essential similarity between them and the difference between these two categories and other, more conventional analyses. Thus, it has been suggested that in each of the two hypothetical cases above, the parties have reached agreement to such a degree that they regard themselves as bound to each other to the extent that neither can withdraw for an "unjustified" reason, and yet still free enough that neither will be compelled to perform if - after good faith bargaining - actual agreement cannot be reached. This situation, if recognized at law in the manner suggested, might be most accurately denominated a "contract to bargain." This nomenclature seems accurate for the following reasons: (1) Use of the word "contract" stresses the fact that the relationship, to at least some extent, entails binding obligations, the breach of which will give rise to a legal remedy 40 (2) Use of the term "bargain" emphasizes that such a contract imposes neither an absolute duty to perform the contemplated exchange, nor even an absolute duty to agree to perform it. Rather it creates a present duty to "bargain" - to engage, in good faith, in the process of attempting to reach agreement on the terms of the proposed exchange, for as long as may reasonably be required under the circumstances. 41

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This leads to the second objection that whenever an extraneous factor, such as a better offer from a third party, makes withdrawal from the contract materially advantageous to one party, that party runs the risk of being held liable even if he withdraws from the transaction only after extensive bargaining has failed to produce a complete agreement. Two factors, however, seem to minimize the likelihood of such occurrences. One is the possibility of creating a record of bargaining sufficient to demonstrate that agreement clearly could have been reached had the plaintiff 723 really desired it; second, even those courts willing to recognize the contract to bargain will do so with extreme caution, and only where the justice of plaintiff's claim is virtually beyond question. These two factors suggest that a contract to bargain is likely to be enforced only where there has been either a unilateral withdrawal from negotiations or at least an insistence on terms so clearly unreasonable that they could not have been advanced with any expectation of acceptance, coupled with some demonstrable advantage to be gained by defendant in avoiding the contemplated transaction.

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*Professor of Law, New York University School of Law. BA., 1956, Denison University; LL.B., 1960, New York University

40The UCC distinguishes between the terms "agreement" and "contract," using the former to refer to the bargain of the parties and the latter to mean the legal obligation created thereby. UCC § 1-201(3), (11).

41Use of the verb form "to bargain" (rather than "contract of bargain" or just "bargain contract") is intentional, in the hope of stressing the process of bargaining which remains to be performed, rather than the agreement (if any) which will result therefrom.

Referring Principles:

IV.8.1 - Principle of pre-contractual liability