Chapter 6: Contracts and Commercial Law

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§ 6.1. Employment Contracts — Employment Contract at Will — Good Faith Requirement Implied in Discharge Cases. In *Maddaloni v. Western Massachusetts Bus Lines, Inc.* the Supreme Judicial Court considered whether an employee retained at will and discharged in bad faith could recover lost wages and fringe benefits in addition to commissions related to actual past services. The case came before the Court after the superior court refused to allow the question of damages to go to the jury on the grounds that lost wages and fringe benefits were unrelated to past services, and were neither contemplated by the plaintiff nor included in his written employment contract.

The plaintiff Maddaloni, who had considerable experience appearing before the Massachusetts Department of Public Utilities ("DPU") and the Interstate Commerce Commission ("ICC"), was hired in 1964 as the defendant's general manager. The employer was interested in obtaining a
grant of interstate charter rights from the ICC and intended to use Maddaloni’s services to achieve this goal.\(^7\) Under the terms of his employment contract, Maddaloni was to receive a five per cent commission on special and charter revenues accruing to the defendant once the interstate charter rights were granted.\(^8\)

In 1970, a new owner took control of the employer corporation.\(^9\) Maddaloni continued to work under his contract as general manager and met with this new owner to discuss the need to obtain interstate charter rights.\(^10\) On October 1, 1973, the ICC awarded the defendant a grant of interstate charter rights.\(^11\) In accordance with his employment contract, Maddaloni received his commission payments for October, November and December of 1973. On January 19, 1974, however, he was discharged.\(^12\)

The Supreme Judicial Court indicated that there was sufficient evidence in the record from which the jury could have found that the defendant discharged Maddaloni without good cause to avoid payment of future commissions to Maddaloni and to retain such financial benefits for itself.\(^13\) The Court found that Maddaloni had performed all the services required of him once the interstate charter rights were granted. The Court determined that Maddaloni therefore was entitled to the monthly payment of commissions while the ICC charter rights remained outstanding.\(^14\) The Court concluded, however, that lost wages and lost fringe benefits were too remote to be recoverable as damages. The Court held that where such amounts are unrelated to actual past services,\(^15\) and are neither contemplated by the plaintiff nor provided for in his employment contract, they

\(^{7}\) Id. at 878, 438 N.E.2d at 353. Interstate charter rights are the most substantial income producing rights that a common carrier can possess. Id. at 878 n.1, 438 N.E.2d at 353 n.1.

\(^{8}\) Id. at 879, 438 N.E.2d at 353.

\(^{9}\) Id. at 880, 438 N.E.2d at 353.

\(^{10}\) Id.

\(^{11}\) Id. Earlier the ICC had granted the defendant interstate charter rights which were revoked by the ICC after five months. Maddaloni had been paid the 5% commission during that five month period. Id. at 879-80, 438 N.E.2d at 353.

\(^{12}\) Id. at 880, 438 N.E.2d at 353. After his discharge, Maddaloni sued, claiming he was discharged in bad faith by the defendant who sought to avoid the continued payment of commissions. Id. at 881, 438 N.E.2d at 354. Maddaloni at that time earned $250 weekly, received certain pension benefits and had the use of a car with all expenses paid. Id. at 882, 438 N.E.2d at 355.

\(^{13}\) Id. at 881-882, 884, 438 N.E.2d at 355 (citing Fortune v. National Cash Register Co., 373 Mass. 96, 104-05, 364 N.E.2d 1251, 1257 (1977)).

\(^{14}\) Id. at 884, 438 N.E.2d at 355. The Court concluded that Maddaloni's express contract with the defendant provided for the vesting of the commission. Id. Maddaloni had performed the services required for such commission payments. Id. at 883-84, 438 N.E.2d at 355.

\(^{15}\) Id. at 884, 438 N.E.2d at 356. The commissions, however, had vested in Maddaloni for prior services he actually rendered.
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will not be properly included in damages awarded for a breach of the employment contract.\textsuperscript{16}

As in *Fortune v. National Cash Register Co.*,\textsuperscript{17} the Court in *Maddaloni* declined to speculate whether a good faith requirement is to be implied in every contract for employment at will.\textsuperscript{18} In both cases, the Court did award damages for the termination of an employment at will contract, but only to the extent of a dollar amount which could be specifically tied to actual past services rendered by the employee. The reluctance of the Court in *Maddaloni* to award damages for lost wages and fringe benefits\textsuperscript{19} indicates that neither *Fortune* nor *Maddaloni* should be viewed as other than a particular exception to the age-old Massachusetts rule that employment at will contracts may be terminated with or without cause, by either party, at any time.\textsuperscript{20}

§ 6.2. Sales — Buyer’s Repudiation of Contract — Measure of Seller’s Damages. In Massachusetts, the measure of damages recoverable by a seller where the buyer has repudiated the contract of sale is governed by chapter 106, section 2-708 of the General Laws.\textsuperscript{1} Section 2-708(2) pre-

\textsuperscript{16} Id. The Court reserved for future determination whether public policy or statutory policy may ever mandate a different or additional measure of damages. Id. at 884 n.7, 438 N.E.2d at 356 n.7; see *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973) (employee’s application for workmen’s compensation benefit caused discharge); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (employee’s acceptance of jury duty caused discharge). Generally such cases involve conduct of the employer which violates statutory policy.

\textsuperscript{17} 373 Mass. 96, 364 N.E.2d 1251 (1977).

\textsuperscript{18} 386 Mass. at 881, 438 N.E.2d at 354.

\textsuperscript{19} Id. at 879, 438 N.E.2d at 353.

\textsuperscript{20} The common law rule, as adopted in earlier Massachusetts case law, is that in the absence of an explicit contractual provision to the contrary, every employment is an employment at will, and either the employer or the employee is free to terminate the relationship at any time without notice. See, e.g., *Linscott v. Millers Falls Co.*, 316 F. Supp. 1369 (D. Mass. 1970), \textit{aff'd} 440 F.2d 14 (1st Cir. 1971); *Askivas v. Westinghouse*, 330 Mass. 103, 111 N.E.2d 740 (1953); *Steranko v. Inoforex*, 5 Mass. App. Ct. 253, 362 N.E.2d 222 (1979). The exception spelled out in *Maddaloni* seems to reaffirm the existence of the general rule. See 386 Mass. at 879, 438 N.E.2d at 353. Statutory enactments providing for specific reasons or standards for discharge of public employees are not relevant. See G.L. c. 31 § 41 (civil service employee dischargeable for “just cause”); G.L. c. 71 § 42 (public school teachers dischargeable for “good cause”).

§ 6.2. 1 G.L. c. 106, § 2-708 states:

\textit{Seller Damages for Non-acceptance or Repudiation.}

(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (section 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (section 2-710), but less expenses saved in consequence of the buyer’s breach.
scribes a measure of damages that is to be used only when the recovery under section 2-708(1) would be "inadequate to put the seller in as good a position as performance would have done." In the 1972 decision of Jericho Sash & Door Co., Inc. v. Building Erectors, Inc., the Supreme Judicial Court outlined a formula to be used in determining damages under section 2-708(2). During the Survey year in Teradyne, Inc. v. Teledyne Industries, Inc. the United States Court of Appeals for the First Circuit had an opportunity to apply section 2-708(2) and the Jericho Sash & Door formula.

On July 23, 1976, the defendant Teledyne contracted with the plaintiff Teradyne to buy a T-347A transistor test system for $98,400, discounted to $97,416. Teradyne packaged the T-347A for shipment. Teledyne then repudiated the contract two days before the date of shipment. Teradyne sold the T-347A to another buyer for $98,400. Teradyne apparently would have made the alternative sale in addition to the intended sale to Teledyne were it not for Teledyne's repudiation. Consequently, Teradyne lost the profit from one sale when it was entitled to the benefit of both sales.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (section 2-710), due allowance for costs reasonably incurred and due credit for payments of proceeds of resale.

2 See supra note 1.
4 676 F.2d 865 (1st Cir. 1982).
5 Id. at 866. The agreement between the parties actually involved two contracts. The contract executed July 23, 1976 was modified by a later contract executed July 30, 1976, which, inter alia, provided the buyer with the discounted price. The retail price was $98,400.
6 Id.
7 Id. Teradyne offered to purchase a separate piece of equipment from Teradyne for $65,000 as a substitute. Teradyne refused to waive its remedies. Id. at 866, 870; see G.L. c. 106, § 1-107.
8 676 F.2d at 868.
9 Id. Teradyne was a manufacturer-merchant seller which had the means and capacity to duplicate the T-347A for resale ("lost volume merchant seller"). Id.; see G.L. c. 106, § 2-104; Note, A Radical Restatement of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared, 18 Stan. L. Rev. 66 (1965).
10 676 F.2d at 866-67.
11 A literal reading of section 2-708(2) would require the court to conclude that Teradyne was not entitled to the benefit of the second sale and that no damages were recoverable. Section 2-708(2) states, in part, that the seller must give the buyer "due credit for payments or proceeds of resale." It was universally accepted under judicial decision prior to the enactment of section 2-708(2), however, that a merchant seller who sells volume and standard goods is entitled to the profit claim for each sale. 676 F.2d at 868.
Teradyne brought suit in federal district court in Massachusetts. Jurisdiction was based upon diversity of citizenship. Accordingly, Massachusetts substantive law controlled. Teledyne conceded that under the law of the Commonwealth, it breached its agreement to purchase the T-347A from Teradyne. Furthermore, the parties agreed that section 106, section 2-708(2) of the General Laws and the formula expressed in Jericho Sash & Door Co., Inc. v. Building Erectors, Inc. provided the proper measure of damages in the case before the court. The dispute concerned which direct cost variables should be deducted from Teradyne's lost gross profit in determining Teradyne's damages under section 2-708(2).

Teradyne contended that the proper measure of damages under 2-708(2) was the contract price minus ascertainable costs saved as a result of the buyer's breach. Teradyne measured its cost prices according to the Inventory Standards Catalogue and determined a cost savings of $22,638. The company representative admitted, however, that the company had not included in the cost savings figure the labor costs of employees who tested, shipped, installed, serviced or performed warranty services. He also admitted that Teradyne had not included in the submitted cost savings figure an employee 12% fringe benefit applicable to all employee's labor costs. Teledyne asserted that a Teradyne 10-K report filed with the Securities & Exchange Commission was a better index than the

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12 Id. at 866.
13 Id. Teradyne, Inc. is a Massachusetts corporation which contracted through a subsidiary defendant. Teledyne, Inc. is a California corporation. Id.
14 See id. at 866-70.
15 Id. at 869.
16 See supra note 1.
18 676 F.2d at 869. Section 2-708(2) is the proper measure of damages only when recovery under section 2-708(1) would be "inadequate to put the seller in as good a position as performance would have done." See supra note 2 and accompanying text. The measure of damages under section 2-708(1) is the difference between the market price, $98,400 in this case, and the unpaid purchase price, $97,415 in this case. Accordingly, Teradyne would have received virtually no recovery under section 2-708(1). The parties' agreement that section 2-708(2) was the appropriate measure of damages in this case therefore was unquestionably legally correct.
19 676 F.2d at 869.
21 676 F.2d at 867. The Inventory Standard Catalogue admittedly disclosed law inventory valuations and had been used for tax purposes. Id.
22 Id. (direct labor costs of $3301, material charges of $17,045, sales commission of $492 and other expenses of $1800).
23 Id. He also admitted that such costs would not be included in or treated by the company as overhead costs. Id.
24 Id.
Catalogue figures. The master appointed by the district court to review the case agreed with Teradyne's contentions, and concluded that under section 2-708(2) Teradyne should recover $75,392 in damages.

On review, the federal court of appeals vacated the judgment of the district court. Under section 2-708(2), a seller is entitled to the profit it would have realized had the buyer fully performed the contract, including reasonable overhead. Direct costs avoided by the seller as a result of the buyer's breach, however, must be subtracted from the measure of damages under section 2-708(2). The court of appeals concluded that the employee 12% fringe benefit and the significant cumulative wages of testers, shippers, and other Teradyne employees, all of whom directly dealt with the T-347A equipment, were not overhead costs but rather were direct costs saved by Teradyne upon Teledyne's repudiation. Accordingly, the court of appeals held that such amounts must be deducted from Teradyne's recovery. The court remanded the case to the district court to determine the actual dollar value to be subtracted from Teradyne's gross profit in order to compute Teradyne's proper recovery under section 2-708(2).

25 Id. The 10-K report evidenced:
- Profit 9%
- Selling & Administrative Expense 26%
- Interest 1%
- Cost of Sales & Engineering 64%

26 Id. The master attributed a savings of $22,638 to Teradyne from Teladyne's breach. To this, he added the discount of $984 provided to Teledyne, and then subtracted the $614 cost to Teradyne for repackaging and reassembling. The master thereby arrived at a total figure of $23,008 to be deducted from Teradyne's gross profit, the contract price of $98,400, in determining Teradyne's damages under section 2-708(2), accounting for his conclusion of $75,392 as the proper amount of damages attributable to Teledyne's breach. Id. at 866; see G.L. c. 106, § 2-708(3), 2-710. The master declined to deduct further from the $75,392 damage figure because of Teledyne's offer to buy the Field Effects Transistor System ("FETS") which Teradyne refused. 676 F.2d at 866. The court of appeals later concluded that Teledyne's offer to buy the FETS on the condition that Teradyne waive its profit-loss claim was not available to Teledyne to reduce damages. Teradyne was not obligated to mitigate or minimize damages where the offer of Teledyne was so conditioned. Id. at 870; see 5 A. CORBIN, CONTRACTS § 1043, at 274 (2d ed. 1964).

27 676 F.2d at 870.


29 See supra note 28.

30 676 F.2d at 867. The court refused to distinguish between employees who actually built the machine and those whose work efforts were directly connected to its sale, delivery and warranty. Nor did the court accept the argument that, because the shipper was involved each day in several shipments of machines, one or more shipments were irrelevant or incidental. Id. at 867, 870.

31 Id. at 870.

32 Id. The court of appeals did conclude, however, that the master's use of the Catalogue to determine reliable costs saved, rather than the 10-K report of the Securities & Exchange Commission, was not clearly erroneous. Id. at 869-70.
§ 6.3. Negotiable Instrument — Mistaken Payment by Bank — Damages — Burden of Proof — Subrogation. During the Survey year in Siegel v. New England Merchants National Bank the Supreme Judicial Court was asked to define the prospective rights of a customer and his payor bank where the payor bank paid a post-dated check in advance of such date and debited the customer’s account. On September 14, 1973 David Siegel, a customer of the defendant bank, drew and issued a check for $20,000, payable November 14, 1973, to the payee Peter Peters. Peters immediately deposited the check in his bank which, through the collection process, presented the check to the defendant for payment. The defendant bank overlooked the date on the check, and on September 17, paid it and debited its customer’s account. In late September, Siegel discovered that this check had been paid when another check he had drawn and presumably issued was dishonored. Siegel duly notified the defendant that the check had been post-dated, that he wanted payment of the check stopped, and that he wanted his account credited in the amount of $20,000. The trial judge entered a $20,000 judgment for Siegel on his claim and dismissed the defendant bank’s counterclaims.

Both plaintiff and defendant agreed that the defendant should not have paid the post-dated check drawn on it. Clearly the defendant could only pay a check drawn by its customer which was properly payable. The post-dated check was not properly payable on the date the bank paid it.

The central issue before the Court was whether the defendant’s wrongful act in paying the $20,000 post-dated check and debiting its customer’s account automatically foreclosed any defense the defendant bank might have paid the post-dated check drawn on it. Clearly the defendant could only pay a check drawn by its customer which was properly payable. The post-dated check was not properly payable on the date the bank paid it.

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have against its customer to prove the customer did not suffer any actual loss.\footnote{386 Mass. at 675, 437 N.E.2d at 224. Siegel contended that, on these facts, the Court should automatically grant him judgment for $20,000 because he lost $20,000 from his account. The bank was his debtor to that extent prior to payment of the check. \textit{Id.}}

Assuming that Siegel did owe Peters the $20,000, the defendant's honoring of the post-dated check may have discharged such debt. The Court recognized that if Siegel owed the money to Peters, and if the debt had been discharged by payment of the check, Siegel's recovery of $20,000 from the defendant would constitute unjust enrichment.\footnote{Id.} He would no longer owe Peters $20,000 and his bank account would not have been debited in that amount.\footnote{See G.L. c. 106, §§ 3-601(1)(a), 3-603(1). The initial delivery (issuance) of the check is conditional payment by Siegel. G.L. c. 106, § 3-802(1)(b). Normally, payment of the check discharges the underlying indebtedness between drawer and payee.} Chapter 106, section 4-407 of the General Laws specifically provides that a payor bank may be subrogated to the rights\footnote{386 Mass. at 676, 437 N.E.2d at 221-22. The bank is subrogated to the rights of prior check holders, including the payee's rights on the check or under the underlying transaction out of which the check was issued. See G.L. c. 106, § 4-407; see also G.L. c. 106, § 3-102(1)(a).} of the drawer (its customer), the payee (or other holder) or a holder in due course, if it mistakenly honors a check over a stop payment order, even if the stop payment order was received in sufficient time in which to act.\footnote{G.L. c. 106, § 4-407 (subrogation rights); see G.L. c. 106, § 4-403 (stop payment rights).} It also provides that if the bank has paid the check "under circumstances giving a basis for objection by the drawer . . ., to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item the payor bank shall be subrogated to the rights . . ." of numerous parties.\footnote{G.L. c. 106, § 4-407.} The defendant bank in \textit{Siegel}, based on the potential risk of unjustly enriching its customer, had asserted the subrogation claim of Peters, the payee, as a counterclaim against Siegel.\footnote{386 Mass. at 675, 437 N.E.2d at 222.} The bank was of course entitled under section 4-407 to assert its subrogation rights against a customer who brought suit for wrongful debit.\footnote{\textit{Id.; see Univ. C.I.T. Credit Corp. v. Guaranty Bank \\& Trust Co., 161 F. Supp. 790, 794 (D. Mass. 1958).} At trial, however, neither Siegel nor the bank had introduced evidence concerning Peters' rights against Siegel.\footnote{386 Mass. at 677, 437 N.E.2d at 222.}

Because the evidence on the actual loss, if any, suffered by Siegel was inadequate, burden of proof became a crucial issue. The Court had to decide whether the customer was obligated to prove his loss or if instead it was the burden of the bank to prove that its customer did not suffer any
loss. The Court therefore compared section 4-403(3) which provides that where improper payment over a stop payment order is alleged, the burden is on the customer of the bank to prove his loss. Acknowledging that the case before it did not involve the issue of improper payment, the Court reasoned that a parallel to section 4-403 could still be drawn based on the purpose that section held in common with section 4-407 of avoiding unjust enrichment. Reasoning by analogy, the Court read the provision of section 4-403(3) into section 4-407, and concluded that the plaintiff Siegel had the burden to prove his loss.

The customer knows best whether he has valid defenses against the party with whom he dealt. The customer is therefore required to prove any facts which might demonstrate an actual loss.

Because no evidence was introduced at trial regarding whether Siegel owed money to Peters or had a valid defense to Peters' claim, the Court vacated the judgment and remanded the case to the trial court. The Court's decision leaves Siegel with a $20,000 claim against his bank for paying a check not properly payable. Siegel must prove the facts establishing his loss. His bank is entitled to assert any available subrogation rights which the payee of the check, Peters, may have against Siegel, on or off the check. The bank is required to prove that Peters was a holder of the check. Siegel has the burden of proving defenses valid against the

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20 386 Mass. at 677, 437 N.E.2d at 223.
21 Id.
22 Id.
23 Id. at 678, 437 N.E.2d at 223.
24 Id. The language of the opinion makes it clear that the burden of proof imposed upon the bank's customer is imposed whether the bank asserts the subrogation of the payee or subsequent holders.
25 Id. at 679, 437 N.E.2d at 223. The Court points out that certain courts have sought to harmonize section 4-403(3) with sections 4-401(1) and 4-407 in terms of shifting the burden of production and persuasion. Thus, when a bank pays over a stop payment order, there is established a prima facie case for recovery by the customer. The bank then must show the customer suffered no loss or owed the money to the holder. If the bank does so, then the customer must prove a valid defense to the payee or other holder. The Supreme Judicial Court refused to accept such reasoning. Id. at 679 n.8, 437 N.E.2d at 223 n.8; compare Thomas v. Marine Midland Tinkers National Bank, 86 Misc.2d 284, 290-91, 381 N.Y.S.2d 797, 802 (N.Y. Sup. Ct. 1976).
26 386 Mass. at 681, 437 N.E.2d at 224.
27 The commercial code comments state that the bank which improperly pays a check over a stop payment is prima facie liable to its customer. See G.L. c. 106, § 4-407 comment 1.
28 The bank may assert subrogation rights, either on or off the check, on the underlying transaction out of which the check was issued. 386 Mass. at 681, 437 N.E.2d at 222-23; see G.L. c. 106, § 3-413(20).
29 See G.L. c. 106, §§ 1-201(1)(a), 1-201(20), 3-202(1). The bank's argument that it became a holder in due course when it paid the check was meritless. Payment of the check is not negotiation (section 3-202) nor can the bank be treated as a person in possession of an
payee on or off the instrument arising out of the underlying transaction from which the check was issued.

The Court’s conclusions in Siegel are reasonable. Moreover, the decision provides a useful analysis of the relationship between section 4-407 and 4-403 of the Massachusetts commercial code. The Court’s statements on allocation of the burden of proof and rights of subrogation in cases involving the mistaken payment by a bank of a post-dated check provide the practicing attorney with rules of law not previously posited in the Commonwealth with any degree of certainty.

§ 6.4. Negligent Failure to Procure Insurance — Rights of Intended Third Party Beneficiary. During the Survey year in Rae v. Air Speed, Inc. the Supreme Judicial Court considered the liability of an insurance agent or broker who negligently fails to fulfill a contractual obligation to obtain insurance for the benefit of a party other than the insured. The question of whether such a potential beneficiary could sue the agent or broker directly presented an issue of first impression in Massachusetts. Specifically, the Rae Court examined the situation where an insurance agent contracts with an employer to provide insurance coverage on behalf of the employer for the benefit of an employee, and then negligently fails to obtain such coverage. The Court determined that in such circumstances, the employee can sue the insurance agent directly, and can recover under either a tort theory or under a contract theory as an intended third party beneficiary.

Thomas Rae, an employee of Air-Speed, Inc., died in the crash of an airplane owned by Executive Airlines, Inc. ("Executive") and leased to Air-Speed. Rae’s wife, on her own behalf and as administratrix of the estate of Thomas Rae, brought suit against Executive, Air-Speed, and Hansman, McAroy & Co., Inc. ("Hansman"). The plaintiff alleged that Hansman, as an insurance agent and broker, had contracted with Air-Speed in early 1977 to provide worker’s compensation coverage for the...
benefit of Air-Speed's employees. She further alleged that Hansman notified Air-Speed that such coverage was in effect as of July 14, 1977, but that prior to the date of her husband's accident Hansman failed to forward premium payments to the insurer, thereby leaving her husband without coverage at the time of his death. The plaintiff claimed a right of recovery both in tort, based on the asserted negligence of Hansman in failing to forward the premium amounts, and in contract, based on the contention that she and her deceased husband, Thomas Rae, were intended beneficiaries under the contract between Hansman and Air-Speed capable of suing Hansman directly for breach. Hansman filed a motion to dismiss, claiming that it owed no duty to the decedent, and that the decedent and his widow were not beneficiaries capable of recovering under any contract between Hansman and Air-Speed. The trial court dismissed the plaintiff's claims against Hansman, without leave to amend her complaint. The Supreme Judicial Court accepted the case on direct appeal on its own motion.

The Court first reviewed the plaintiff's negligence claims. The Court acknowledged a "well settled rule" that an insurance agent or broker who negligently fails to procure insurance for another is liable for any resultant damage. Accordingly, the Court noted, Massachusetts law permits a potential insured, such as Air-Speed, to recover in tort from the negligent agent. The Court recognized, however, that no Massachusetts decision to date had considered whether a potential beneficiary such as the plaintiff had the same recourse available to her against the insurance agent. The Rae Court concluded that it would extend the right to recover to potential beneficiaries. The Court rejected the argument that the agent owed no duty to such beneficiaries, stating that it could often be foreseeable that the agent's negligent failure to obtain the insurance coverage would cause harm to the beneficiary as well as the insured. The Court referred to recent Massachusetts decisions which demonstrated an evolution of the law.

6 Id. at 188-90, 435 N.E.2d at 629-30.  
7 Id.  
8 Id. at 190, 435 N.E.2d at 630.  
9 Id.  
10 Id.  
11 Id. at 192-93, 435 N.E.2d at 631-32.  
12 Id. at 192, 435 N.E.2d at 631 (citing Annot., 64 A.L.R.3d 398, 404, 410 (1975)).  
13 Id. (citing Rayden Engineering Corp. v. Church, 337 Mass. 652, 660, 151 N.E.2d 57, 62-63 (1958)).  
14 Id. The Court observed that the plaintiff, as the dependent of the deceased employee (her husband), was an intended beneficiary of the contract for worker's compensation insurance between Air-Speed and Hansman. Id. at 195-96, 435 N.E.2d at 633.  
15 Id. at 193, 435 N.E.2d at 632.  
16 Id.
of negligence in the Commonwealth consistent with the rule announced in \textit{Rae}.\footnote{Id. at 192-93, 435 N.E.2d at 631-32 (citing McDonough v. Whalen, 365 Mass. 506, 313 N.E.2d 435 (1974); Craig v. Everett M. Brooks Co., 351 Mass. 497, 222 N.E.2d 752 (1967)).} The Court therefore found that the plaintiff should be allowed to amend her complaint because the harm she alleged might well be a foreseeable result of Hansman's failure to obtain the insurance coverage in question.\footnote{Id. at 193, 435 N.E.2d at 632.}

The Court next addressed the plaintiff's contract claim.\footnote{Id. at 193-96, 435 N.E.2d at 632-33.} For the purposes of this claim, the Court assumed the existence of a valid contract between Air-Speed and Hansman.\footnote{Id. at 194, 435 N.E.2d at 632.} The issue, the Court observed, was whether the plaintiff and the decedent were intended third-party beneficiaries under the contract who could sue Hansman directly for breach even though they had not contracted with Hansman and were not creditors of Air-Speed.\footnote{Id. at 194-95, 435 N.E.2d at 632.} The Court noted that under prior Massachusetts decisions the right to recover under a contract had been limited to actual parties to the agreement and "creditor type" third-party beneficiaries.\footnote{Id.; see \textit{Choate, Hall & Stewart v. SCA Services Inc.}, 378 Mass. 535, 536, 392 N.E.2d 1045, 1046 (1979).} The Court observed that the decedent and the plaintiff did not fit in either of those two categories.\footnote{386 Mass. at 194, 435 N.E.2d at 632.} The Court then focused its attention on section 302 of the Restatement (Second) of Contracts.\footnote{Id.; see \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 302(1)(b).} Section 302, the Court indicated, espoused a somewhat broader rule than Massachusetts decisional law.\footnote{Id. at 194-95, 435 N.E.2d at 632-33.} In addition to a "creditor beneficiary," section 302 recognizes a beneficiary to whom the promisee intends to give the benefit of the promised performance as a party who can sue on the contract.\footnote{386 Mass. at 195, 435 N.E.2d at 632-33.} The \textit{Rae} Court expressly adopted section 302 as the new rule of the Commonwealth.\footnote{386 Mass. at 195-96, 435 N.E.2d at 633.} The Court then found that under the contract in the case before it the plaintiff and her deceased husband were within the latter class of third party beneficiaries recognized under section 302.\footnote{Id.} This was true, according to the Court, because the promisee, Air-Speed, intended to give the benefit of the promised performance under its contract with Hansman, coverage under worker's compensation insurance, to its employee Thomas Rae and his dependents.\footnote{386 Mass. at 195-96, 435 N.E.2d at 633.} Furthermore, the \textit{Rae} Court applied
its new rule "retroactively" to the case before it.\textsuperscript{30} The Court stated that this result was justified in light of its prior decisions predicting the eventual adoption of the rule of section 302.\textsuperscript{31}

In conclusion, the Court made some general observations about the plaintiff's claim which it had just recognized as stating valid causes of action. First, the Court stated that the plaintiff "stands in the shoes" of Air-Speed in enforcing the contract under a third-party beneficiary theory.\textsuperscript{32} Therefore, any defense which Hansman would have against Air-Speed will be available to Hansman in the plaintiff's contract action.\textsuperscript{33} Furthermore, the Court remarked, the plaintiff's potential recovery "is limited by the amount she proves that she would have recovered if Hansman had performed its obligations under the contract and Rae's decedent had been covered by a worker's compensation policy at the time he died."\textsuperscript{34} While the plaintiff will have both the negligence and the contract theories available to her, she is precluded from obtaining a double recovery.\textsuperscript{35} Finally, the Court remanded the decision to the trial court for appropriate amendments to the complaint and further proceedings consistent with the new rule of law enunciated in the opinion.\textsuperscript{36}

The \textit{Rae} decision is a highly significant development in the area of tort as well as contract law in the Commonwealth. The Court made it clear that insurance agents and brokers may now be held liable to potential beneficiaries as well as to the insured for harm caused by their negligent failure to arrange insurance coverage for the insured. The Court's holding on the negligence question is a welcome answer to a question which had not previously been addressed in the Commonwealth. The \textit{Rae} decision also breaks new ground in the area of the rights of third-party beneficiaries in Massachusetts. The Court adopted the broad rule of section 302 of the Restatement (Second) of Contracts, thereby expanding the class of non-parties eligible to sue on a contract in Massachusetts. Nevertheless, it cannot be said that the results of the \textit{Rae} decision were unexpected. As the \textit{Rae} Court itself noted, "the handwriting has long been on the wall."\textsuperscript{37}

\section*{\textsection 6.5. Ownership of Motor Vehicle — Transfer of Title — Insurance Contract — Condition Precedent to Recovery Under Liability Policy. During the \textit{Survey} year in \textit{Fireman's Fund Ins. Co. v. Blais}\textsuperscript{1} the Massachu-}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 195, 435 N.E.2d at 633.
\item \textit{Id.}
\item \textit{Id.} at 196, 435 N.E.2d at 633.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 191, 193, 196, 435 N.E.2d at 630-33.
\item \textit{Id.} at 195, 435 N.E.2d at 633.
\end{enumerate}
\end{footnotesize}
setts Appeals Court considered the obligation of an insured to maintain a minimum amount of primary liability insurance under a contract for excess coverage on an automobile. As a preliminary matter, the Blais court had to determine ownership of the motor vehicle in question. The court discussed the implications of transfer of title to a motor vehicle under chapter 106, section 2-401(3)(a), and chapter 90D, section 15 of the General Laws. The Court then addressed the insurance issue, and concluded that where a minimum amount of primary coverage is made a condition precedent to the contract for excess liability insurance, failure to procure the minimum amount will render the contract for excess coverage void.

In Blais, Nur-Rest, Inc. owned a station wagon covered by two insurance policies. The first policy issued by Fireman’s Fund provided liability coverage to $100,000. The policy contained the statutorily required clause terminating insurance coverage upon sale or transfer of the insured vehicle. The other policy, issued by Insurance Co. of No. America (INA), afforded the insured excess insurance coverage up to $1,000,000 for losses over $300,000. The latter policy included a provision wherein the insured agreed to maintain a primary limit of $300,000 per occurrence, per person. The INA policy also provided that no action would lie against INA “unless as a condition precedent thereto,” the insured shall have been in full compliance with all the terms of the INA policy.

The defendant Douglas Blais, an employee of Nur-Rest, Inc., generally was authorized to use the station wagon. In March of 1976, Nur-Rest, Inc. agreed to sell the vehicle to Blais. The sales price was the outstanding balance Nur-Rest, Inc. owed the Attleboro Trust Co. which held a security interest in the car. On April 1, 1976, Blais executed a security agreement and note for $1321.08 to the bank. The note of Nur-Rest, Inc. was cancelled and delivered to Blais who placed it in the office drawer of Thibeault, a representative of Nur-Rest, Inc. Thibeault, a principal shareholder and a representative of Nur-Rest, Inc., erroneously believed the INA excess policy covered liability claims in excess of $100,000. Id.

2 Id. at 255-56, 438 N.E.2d at 362.
3 Id. at 256, 438 N.E.2d at 362.
4 Id. See G.L. c. 175, § 113A(a)(A).
6 Id.
7 Id.
8 Id.
9 Id. at 256-57, 438 N.E.2d at 362.
10 Id.
11 Id. at 257, 438 N.E.2d at 362.
12 Id.
vehicle's title certificate to Blais or to the Registrar of Motor Vehicles.\textsuperscript{13} Blais took possession of the automobile, retained Nur-Rest Inc.'s license plates, did not obtain automobile insurance coverage and did not register the vehicle in his name.\textsuperscript{14} 

On April 3, 1976, Blais, while operating the wagon, struck Carl Weber, a minor, causing injury.\textsuperscript{15} Weber, by his father and next friend, instituted a suit in tort against both Blais and Nur-Rest, Inc.\textsuperscript{16} Thereafter, Fireman's Fund and INA instituted an action for declaratory judgment, seeking to determine whether Nur-Rest, Inc. was the owner of the wagon on April 3, 1976, and, if so, whether the Fireman's Fund policy and the INA policy could be applied to Weber's claims.\textsuperscript{17} The trial judge held that Nur-Rest, Inc. was the owner of the vehicle on the date of the accident, but because of Nur-Rest, Inc.'s failure to maintain $300,000 of primary coverage, the INA policy could not be applied to the injury in question.\textsuperscript{18} The Appeals Court affirmed.\textsuperscript{19} 

The Appeals Court first considered the issue of ownership of the motor vehicle on April 3, 1976.\textsuperscript{20} The court determined that under chapter 106, section 2-401(3)(a) of the General Laws, title for the automobile would not pass until the document of title was delivered to the new owner.\textsuperscript{21} The court found that section 2-401(3)(a) was clearly applicable to the facts before it; delivery was to be made without moving the goods.\textsuperscript{22} Accordingly, absent an explicit agreement between the seller and the buyer providing otherwise, title would pass at the time the documents of title were delivered.\textsuperscript{23} Moreover, the court stated, chapter 90D, section 15 of the General Laws buttressed the result indicated by the provisions of the commercial code.\textsuperscript{24} Section 15 requires the seller of a motor vehicle to transfer the certificate of title to the purchaser or the Registrar of Motor Vehicles and to execute an application for a new certificate of title upon or promptly after delivery of the vehicle.\textsuperscript{25} Section 15 further states that "[e]xcept . . . as between the parties, a transfer by an owner is not effective until the provisions of this section . . . have been complied with.

\begin{itemize}
\item \textsuperscript{13} Id. at 257-58, 438 N.E.2d at 362.
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id. at 255, 257-58, 438 N.E.2d at 361-62.
\item \textsuperscript{16} Id. at 255, 438 N.E.2d at 361.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Id. at 258-61, 438 N.E.2d at 363.
\item \textsuperscript{21} Id. at 259, 438 N.E.2d at 363.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id. at 259-60, 438 N.E.2d at 363.
\end{itemize}
On the basis of its interpretation of the commercial code and section 15, the Appeals Court concluded that, because Nur-Rest, Inc. had neither transferred the certificate of title for the vehicle nor executed an application for a new certificate as of April 3, 1976, Nur-Rest, Inc. still owned the vehicle on that date.

The court’s application of section 2-401(3)(a) of the commercial code in Blais could reasonably be questioned. It is at least arguable that the ownership question before the court would have been more properly resolved under section 2-401(2) where the title to goods passes when the seller has physically delivered the goods to the buyer. Because the parties believed that title to the automobile had passed and because Blais had physical possession of the car, it can reasonably be argued that title had already passed. This is true even though a document of title is to be delivered at a different time. The court’s alternative reliance on chapter 90D, section 15 of the General Laws, however, makes it uncertain whether reference to this different provision of the commercial code would change the ultimate conclusion that Nur-Rest, Inc. still owned the vehicle on April 3, 1976.

Because Nur-Rest, Inc. still owned the vehicle on April 3, 1976, the court observed, it was clear that the Fireman’s Fund policy could be applied to the injuries suffered by Carl Weber as a result of the accident on that date.

As to coverage under the INA policy, however, the court affirmed the trial judge’s determination that the excess coverage insurance policy issued by INA was rendered void by Nur-Rest Inc.’s failure to maintain the primary minimum coverage with Fireman’s Fund of $300,000 per person, per occurrence. Whether contractual language operates as a condition precedent or otherwise is a question of law for the court. The court reviewed the explicit language contained in the INA insurance policy to determine whether it could reasonably be construed to require, as a condition precedent to the issuance of the INA policy, Nur-Rest, Inc.’s maintenance of the $300,000 primary insurance coverage. The court concluded that the explicit language in INA’s insurance policy demonstrated that the insured’s agreement to provide the $300,000 primary insurance coverage related essentially to INA’s decision to issue its policy and that that term of the policy was made a condition precedent to

28 See G.L. c. 106, § 2-401(2).
29 See id.
31 Id. at 261-62, 438 N.E.2d at 363.
32 Id.
33 Id. at 262, 438 N.E.2d at 363.
recovery under the INA policy. Nur-Rest, Inc.'s failure, albeit innocent, to maintain the primary $300,000 liability insurance coverage with Fireman's Fund rendered void INA's excess-coverage insurance policy.

**STUDENT COMMENTS†**

§ 6.6. Forfeiture of Deferred Compensation Provisions in Employment Contracts.* In the interest of retaining a highly valued employee, an employer might enter into an agreement with that employee which would make it economically unfavorable for the employee to leave his current employer to work for a competitor. This agreement applies what are called "golden handcuffs" by offering the employee certain deferred compensation which will be forfeited if the employee jumps to the competition in violation of the terms of the agreement. During Survey year, in *Kroeger v. The Stop & Shop Companies, Inc.*,¹ the Massachusetts Appeals Court was faced with a situation where Stop & Shop sought to enforce such a forfeiture provision against an employee who, rather than jumping to the competition in preference over his former employment, had been involuntarily discharged by Stop & Shop through no fault of his own, and then had taken a job with a competitor of theirs.²

Until recently, the apparent rule in Massachusetts was that forfeiture for competition provisions would be unconditionally enforced.³ The rule was altered, however, by the Supreme Judicial Court in *Cheney v. Automatic Sprinkler of America*.⁴ In *Cheney*, the Court held that the enforcement of forfeiture for competition clauses would be held to the same standard of reasonableness as is applied to the enforcement of covenants not to compete,⁵ and that even when the non-competition component of the provision was reasonable, the amount of the resultant forfeiture was subject to modification if it was overly burdensome.⁶ In *Kroeger*, the Appeals Court was

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34 *Id.*

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² *Id.* at 313-15, 432 N.E.2d at 568-69.


required to interpret and apply the general principles enunciated in the *Cheney* decision to determine to what extent to enforce a forfeiture for competition clause when it was the employer, rather than the employee, who initiated the chain of events leading to the employee’s departure and subsequent employment with a competing business.

Robert Kroeger was a successful employee of The Stop & Shop Companies. In 1961, after a substantial period of climbing through the corporate ranks at Stop & Shop, Kroeger was in a position to request a deferred compensation agreement from his employers. Stop & Shop obliged Kroeger, but made the agreement subject to a forfeiture provision whereby Kroeger would lose the promised compensation if he left Stop & Shop and worked for a competing business east of the Mississippi at any point in time for as long as he lived. While Kroeger’s current compensation was in no way reduced due to his obtaining this arrangement, it is apparent that the deferred benefits were intended as compensation for services to be rendered by Kroeger, and were not a gratuity.

Kroeger’s success continued until 1971, by which time he was a vice president with substantial responsibilities. At that time, however, a new president took over at Stop & Shop. A basic ideological conflict created friction between Kroeger and his new superior. Kroeger was asked to depart, and did in fact leave. Upon a request from his employer, Kroeger signed a letter confirming the forfeiture provision of the agreement governing the deferred benefits promised him by Stop & Shop.

Within six months, Kroeger found new employment as a vice president with an Ohio company which owned a subsidiary, P & C Supermarkets, Inc. In his new position Kroeger had responsibility for about 300 stores, with locations in New York, New Hampshire, Vermont, and Massachu-

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8 Id.
9 Id. at 311 & n.1, 313-14, 432 N.E.2d at 567 & n.1, 568-69. Specifically, the agreement provided that after leaving Stop & Shop, Kroeger, for so long as he lived, could not have an interest in excess of $100,000 in, or be an officer, director, partner, trustee, proprietor, or employee of, any business located in any state east of the Mississippi River, except for Florida, Georgia, Alabama, Mississippi, and Louisiana, which was substantially similar to Stop & Shop’s business at the end of his employment. This restraint was expanded in 1969 to cover Stop & Shop’s entrance into the discount department store field. Id. at 311 n.1, 432 N.E.2d at 567 n.1.
10 Id. at 314, 320 n.9, 321 n.10, 432 N.E.2d at 569, 572 n.9, 573 n.10.
11 Id. at 314, 432 N.E.2d at 569.
12 Id.
13 Id.
14 Id.
15 Id.
16 Id.
setts.\textsuperscript{17} Stop & Shop had stores in all of New England, New York and New Jersey.\textsuperscript{18} Kroeger's employment with P & C Supermarkets, Inc. violated the non-competition restraints of the deferred compensation agreement, and Stop & Shop therefore claimed that Kroeger had forfeited any right to that money under the terms of the agreement.\textsuperscript{19} The issue addressed by the Appeals Court was the reasonableness of that forfeiture provision which Stop & Shop sought to enforce.\textsuperscript{20}

The \textit{Kroeger} court began its examination with the inquiry of whether the non-competition restraint imposed upon Kroeger by the forfeiture provision\textsuperscript{21} was reasonably related to the protection of a legitimate business interest of Stop & Shop.\textsuperscript{22} This inquiry entailed the initial step of determining what, if any, legitimate business interests Stop & Shop had to protect in this situation.\textsuperscript{23} The court noted that the interests of an employer which would be entitled to protection fell into three categories: trade secrets, confidential data, and good will.\textsuperscript{24} Stop & Shop had conceded that no trade secrets were involved,\textsuperscript{25} and the court found that since Kroeger had no connection with customer relations, he posed no threat to Stop & Shop's interest in preserving good will.\textsuperscript{26} The court found, however, that Stop & Shop did have a legitimate interest in restraining Kroeger from moving to a competitor in order to protect confidential data.\textsuperscript{27} The court indicated that the position which Kroeger had attained at Stop & Shop had provided him with access to important information which could be used advantageously by a competitor of Stop & Shop, and therefore Stop & Shop had a valid interest in restraining Kroeger from working for the competition.\textsuperscript{28}

Having determined that Stop & Shop did have a legitimate business interest to protect in this situation, and that some form of restraint was therefore reasonable, the court turned to the second part of the first inquiry; the determination of whether the terms of the restraint were

\textsuperscript{17} Id. at 314-15, 432 N.E.2d at 569.
\textsuperscript{18} Id. at 315, 432 N.E.2d at 569. The only instance of direct competition, however, was in Manchester, New Hampshire. Manchester did not become a site for both chains until four years after Kroeger left Stop & Shop. \textit{Id}.
\textsuperscript{19} Id. at 316, 432 N.E.2d at 570.
\textsuperscript{20} Id. at 311-12, 432 N.E.2d at 567.
\textsuperscript{21} \textit{See supra} note 9 and accompanying text.
\textsuperscript{22} 13 Mass. App. Ct. at 316-18, 432 N.E.2d at 570.
\textsuperscript{23} Id. at 316, 432 N.E.2d at 570.
\textsuperscript{24} Id. (citing New England Canteen Services, Inc. v. Ashley, 372 Mass. 671, 674, 363 N.E.2d 526, 528 (1977)).
\textsuperscript{25} Id.
\textsuperscript{26} Id. "Good will generally applies to customer relationships." \textit{Id} (citing Angier v. Weber, 96 Mass. (14 Allen) 211, 215 (1867)).
\textsuperscript{27} Id. at 316-17, 432 N.E.2d at 570.
\textsuperscript{28} Id.
reasonable in light of the interest to be protected. The court found a restriction covering the geographic area east of the Mississippi overly extensive in view of the fact that Stop & Shop's area of operation was limited to New England, New York, and New Jersey, and there was no evidence of any intended expansion beyond those regions. The court also found the intended duration of the forfeiture for competition clause, "so long as [Kroeger] lives," to exceed the scope of Stop & Shop's valid interests. The court noted that any confidential information which Kroeger took with him from Stop & Shop would be useful to competitors for only a limited period of time. The court therefore agreed with the superior court judge that the terms of the forfeiture for competition clause were broader than necessary to protect Stop & Shop's interest in preserving confidential data, and concluded that the superior court's modification of those terms to only cover competitors in New England, New York, and New Jersey for a period of one year was reasonable.

The court then turned to the second inquiry of whether the complete forfeiture of Kroeger's deferred compensation sought by Stop & Shop under the agreement was overly burdensome. The court indicated that while Kroeger had violated the terms of the agreement as modified by the court, a promise to forfeit deferred compensation upon competition, like an actual promise not to compete, must be reasonable under the circumstances. The court found an employee's status, and his relative bargaining power as a result of that status, to be germane to the determination of the reasonableness of a given forfeiture. The court indicated that because Kroeger was a key employee, with significant bargaining power, he could be held to a promise involving a more substantial forfeiture than would be reasonable with an employee with less bargaining strength.

The court, however, found another factor to be very relevant to the determination of what amount Kroeger should reasonably forfeit in this situation. That factor was the involuntary nature of Kroeger's departure from Stop & Shop. The court noted that termination at the behest of the
employer did not necessarily void a noncompetition clause.\(^{41}\) The court also indicated, however, that an otherwise reasonable restraint would not be enforced when the nature of the employee's discharge would make it inequitable to do so.\(^{42}\) The court stated that while Kroeger's discharge by Stop & Shop was neither arbitrary\(^{43}\) nor in bad faith,\(^{44}\) it was clear that the original intent of the agreement which Stop & Shop sought to enforce was to make Kroeger stay with Stop & Shop, and it was Stop & Shop who abandoned that purpose.\(^{45}\) Therefore, the court concluded, it would be inequitable to allow Stop & Shop to now extract the entire forfeiture amount originally contemplated by the agreement.\(^{46}\)

In determining what would be a reasonable amount for Kroeger to receive out of the amount which would have been forfeited under the terms of the original agreement, the court referred to the principle that the forfeiture of earned deferred benefits should be avoided whenever possible.\(^{47}\) The court stated the rule as, when an employee is terminated through no fault of his own,\(^{48}\) that employee's deferred compensation should not be forfeited to the extent that it has been earned, even if that employee breaches a valid post-employment restraint.\(^{49}\) The court found that the agreement between Kroeger and Stop & Shop had contemplated Kroeger working seventeen more years for Stop & Shop, and that Kroeger had in fact worked for ten of those years prior to his discharge.\(^{50}\) Therefore, the court concluded, Kroeger had earned and was entitled to $41,765 out of $71,000, ten-seventeenths of the value of the deferred compensation agreed to,\(^{51}\) despite his violation of the forfeiture for competition clause as modified by the court.\(^{52}\)

The court also determined that Kroeger forfeited the remaining seven-seventeenths or $29,235 of the deferred compensation amount without Stop & Shop having to show an exact dollar amount for the injury they

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\(^{41}\) Id. at 320, 432 N.E.2d at 572.

\(^{42}\) Id. (citing Economy Grocery Stores Corp. v. McMenamy, 290 Mass. 549, 551-53, 195 N.E. 747, 749-50 (1935)).

\(^{43}\) Id. at 320 n.8, 432 N.E.2d at 572 n.8.

\(^{44}\) Id. at 320, 432 N.E.2d at 572 (citing Fortune v. National Cash Register Co., 373 Mass. 96, 103-05, 364 N.E.2d 1251, 1256-58 (1979) as demonstrative of employer bad faith).

\(^{45}\) Id.

\(^{46}\) Id.

\(^{47}\) Id. at 320-21, 432 N.E.2d at 572 (citing Hoefel v. Atlas Tack Corp., 581 F.2d 1, 6 (1st Cir. 1978)).

\(^{48}\) See id. at 320 n.8, 432 N.E.2d at 572 n.8.

\(^{49}\) Id. at 321, 432 N.E.2d at 572-73.

\(^{50}\) Id.

\(^{51}\) Id.

\(^{52}\) Id. at 319, 432 N.E.2d at 571.
suffered through Kroeger's employment with P & C Supermarkets, Inc.53 The court noted that the calculation of actual damages from the violation of a non-competition agreement was particularly difficult.54 Thus, the court stated, the estimate of the parties would be accepted if reasonable, and the court found the forfeiture of $29,235 by Kroeger to be reasonable in this case.55

Finally, the court considered the fact that Kroeger had secured an additional deferred compensation agreement from his new employer, and agreed to reduce his benefits under it by whatever he eventually got from Stop & Shop.56 The superior court had denied Kroeger any recovery from Stop & Shop because of this new agreement, reasoning that Kroeger had suffered no harm, and that Stop & Shop should not be forced to pay for what the second employer was actually benefitting from.57 The court found this to be error on the part of the superior court.58 The court saw no reason why Kroeger could not assign his potential recovery to another party for other consideration.59 The Appeals Court accordingly reversed the judgment of the lower court.60

Judge Goodman, in dissent, expressed the viewpoint that Kroeger should have forfeited nothing in this situation.61 Judge Goodman disagreed with the majority's finding that Stop & Shop had a valid business interest to protect, and therefore saw no justification for imposing any restraint on Kroeger.62 He noted that the record failed to show any improper use of confidential data by Kroeger after leaving Stop & Shop, or any harm to Stop & Shop during the one year period of the modified agreement attributable to competition from P & C Supermarkets, Inc.63 As a result, Judge Goodman concluded, no reasonable relationship between the forfeiture and the actual harm to Stop & Shop had been shown.64

Judge Goodman also stated that there was no confidential data involved in this situation.65 He noted that there was nothing in the record to show that Kroeger obtained anything of competitive advantage while he was at

53 Id. at 321, 432 N.E.2d at 572.
54 Id. at 322, 432 N.E.2d at 573.
55 Id.
56 Id. at 323, 432 N.E.2d at 573.
57 Id.
58 Id.
59 Id.
60 Id.
61 Id. at 323-24, 329, 432 N.E.2d at 574-77.
62 Id. at 323-28, 432 N.E.2d at 574-76.
63 Id. at 324-25, 432 N.E.2d at 574.
64 Id. at 325, 432 N.E.2d at 574.
65 Id. at 325-28, 432 N.E.2d at 574-76.
Stop & Shop. Judge Goodman indicated that it was possible that Kroeger came to Stop & Shop with a considerable amount of knowledge in the field, and there was no showing that he left there with anything significant beyond his own skill and talent.

Finally, Judge Goodman criticized the majority’s willingness to hold key employees to more substantial restraints, and their inference that Kroeger was such a key employee with some sort of increased bargaining power. He stated that, apart from the absence from the record in this case of any showing of equality in bargaining strength, such a quality was too abstract to be effectively quantified by the courts. Judge Goodman concluded by stating that such a willingness to uphold these restraints conflicted with the public policy of increasing the mobility of labor and intellectual talent. Judge Goodman’s opinion indicated that he would more strictly limit the enforcement to any degree of forfeiture for competition provisions.

The result reached by the majority of the Appeals Court in Kroeger was attained through the analytical framework pronounced by the Supreme Judicial Court in Cheney v. Automatic Sprinkler of America. This framework basically applies a reasonableness test to forfeiture for competition provisions composed of two main inquiries. First, the court would determine whether it would be reasonable to enforce a covenant not to compete in the particular situation, and second, the court would assess whether the amount of the forfeiture was reasonable under the circumstances. The significance of the Kroeger decision lies in the Appeals Court’s resolution of this second inquiry.

The Kroeger court’s application of the first inquiry, whether a covenant not to compete could reasonably be enforced in this situation, was a sound recitation of the precedent of the Supreme Judicial Court in that area of the law. The court correctly restated the legitimate interests which an employer may seek to protect through such a non-competition provision. Having determined that Stop & Shop indeed had such an
interest in this case, the court properly modified the terms of the non-competition clause to that which was reasonably necessary to protect that particular interest. The court found that the enforcement of a modified covenant not to compete would have been reasonable and, in accordance with Cheney, moved to the second inquiry.

The Kroeger court began the second inquiry of whether the amount of the restrictive forfeiture was reasonable by restating the principle from Cheney that "key" employees will be more readily held to more substantial forfeitures because of their greater bargaining power. The court noted, however, that even a "key" employee will be held only to a "reasonable" forfeiture. Under Cheney, a forfeiture would be found to be unreasonable if the employer had acted in bad faith, or had overreached and unfairly imposed a forfeiture clause on an employee. In Kroeger, however, it was established that Stop & Shop had not acted in bad faith, and that Kroeger was a "key" employee capable of successfully negotiating a fair forfeiture for competition provision. Nevertheless, the Kroeger court found the forfeiture provision which Stop & Shop sought to enforce to be overly burdensome, and in doing so introduced another ground for finding a forfeiture for competition provision to be unreasonable in its application.

This new ground for holding a forfeiture amount to be unreasonable was based on the fact that Kroeger had been involuntarily terminated by Stop & Shop through no fault of his own. The Kroeger court announced its rule as, when an employee is terminated through no fault of his own, this determination seems reasonable, despite Judge Goodman's contentions to the contrary. See 13 Mass. App. Ct. at 324-28, 432 N.E.2d at 574-76 (Goodman, J., dissenting). The requirement has been phrased by the Supreme Judicial Court as the existence of a legitimate business interest, not actual harm to such an interest. See New England Canteen Services, Inc. v. Ashley, 372 Mass. 671, 673-74, 363 N.E.2d 526, 528 (1977). After all, the employee has agreed not to work for the competition. Upon the employee's breach of that promise, it would seem unreasonable to require the employee to prove specifically how he has been harmed. The existence of a legitimate interest in keeping the employee away from the competition would seem to prove sufficient harm. Id.

This determination seems reasonable, despite Judge Goodman's contentions to the contrary. See 13 Mass. App. Ct. at 324-28, 432 N.E.2d at 574-76 (Goodman, J., dissenting). The requirement has been phrased by the Supreme Judicial Court as the existence of a legitimate business interest, not actual harm to such an interest. See New England Canteen Services, Inc. v. Ashley, 372 Mass. 671, 673-74, 363 N.E.2d 526, 528 (1977). After all, the employee has agreed not to work for the competition. Upon the employee's breach of that promise, it would seem unreasonable to require the employee to prove specifically how he has been harmed. The existence of a legitimate interest in keeping the employee away from the competition would seem to prove sufficient harm. Id.

78 See id. at 147-48, 385 N.E.2d at 965.
79 See id. at 148, 385 N.E.2d at 965. "We do not discount, however, the possibility that a financial inducement to an employee, especially a key employee, to continue to work for his employer might be reasonable in particular instances." Id. (emphasis added).
80 See id.
81 See id. at 147-49, 385 N.E.2d at 965-66; Sherry, Contracts and Commercial Law, 1979 ANN. SURV. MASS. LAW § 10.3, at 310-12.
83 Id. at 319-21, 432 N.E.2d at 571-72.
84 Id.
85 See id. at 320 n.8, 432 N.E.2d at 572 n.8.
that employee's deferred compensation should not be forfeited to the extent it has been earned, even if the employee has violated a valid post-employment restriction. The court premised this rule on the concept that employers proffer forfeiture provisions like the one in *Kroeger* in the hopes of binding an employee to the business for an intended period of time, and when it is the employer who abandons the purpose of the agreement, it is inequitable to allow that employer to benefit by the entire forfeiture amount should the jilted employee move to the competition. In such a situation the *Kroeger* court determined that the employee should receive whatever he has earned, that is, a percentage of the deferred compensation promised based on how many years of the total time originally contemplated by the agreement which the employee has worked for the employer. Since the employer has not acted in bad faith, he need not pay benefits calculated on time the employee will now spend elsewhere.

The decision of the Appeals Court in *Kroeger* seems to be a sound compromise. Despite the public policy considerations voiced by Judge Goodman, it would seem incorrect to allow Kroeger to entirely avoid the forfeiture. It was not that long ago that such forfeiture provisions were unconditionally enforced, and the *Cheney* decision, which changed that rule, still shows a strong tendency to hold "key" employees like Kroeger to their promises. On the other hand, the inequity of allowing a total forfeiture in this situation, as recognized by the Appeals Court, seems clear. The course chosen by the *Kroeger* court is also consistent with the policy of avoiding the forfeiture of earned benefits which were to be paid to the employee at some future time. The *Kroeger* decision now affords a middle ground, beyond the unsophisticated employee with little bargaining power and the bad faith employer, for the modification of the enforcement of forfeiture for competition provisions in employment contracts.

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88 *Id.* at 320-21, 432 N.E.2d at 572.
89 *Id.* at 321, 432 N.E.2d at 572.
92 *Id.* at 328-29, 432 N.E.2d at 576-77.
§ 6.7. Anticipatory Repudiation — Rescission Following Repudiation.*
The common law doctrine of anticipatory repudiation of a contract traditionally has been rejected in Massachusetts.¹ The Commonwealth is the only jurisdiction in the country that has not fully recognized this doctrine.² In all other states, when a contract is repudiated by one party, the other party to the contract may treat the repudiation as a breach of the contract, despite the fact that the time for the performance of the agreement has not arrived.³ Under the doctrine of anticipatory repudiation, the non-repudiating party does not have to wait until the time set for the performance of the contract to initiate a lawsuit.⁴ In such a lawsuit, the injured party is entitled to all the usual remedies for breach of contract, including an award of damages.⁵

The rejection of this doctrine by the Supreme Judicial Court occurred over one hundred years ago in the case of Daniels v. Newton.⁶ In Daniels, the Court stated that until the time for performance arrives, the non-repudiating party can suffer no injury which could form a ground for damages.⁷ The Daniels Court reasoned that because the party had no rights before the time set for performance, he could not be injured by a repudiation until the time set for performance arrives.⁸ The Court held, therefore, that the non-repudiating party must show a refusal to perform

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² E. FARNsworth, CONTRACTS § 8.20, at 630 (1982). "With the notable exception of Massachusetts, courts have accepted the general rule that an anticipatory repudiation gives the injured party an immediate claim to damages for total breach, in addition to discharging his remaining duties of performance." Id.

³ 4 A. CORBIN, CONTRACTS § 959, at 853 (1959). The leading case on the doctrine of anticipatory repudiation is Hochster v. De La Tour, 2 El. & Bl. 618 (1853). In Hochster, the plaintiff was hired by the defendant to accompany him on a trip commencing June first. On May eleventh, the defendant repudiated the agreement. The court allowed the plaintiff to commence a suit for damages on May twenty-second, despite the fact that the time for performance had not arrived.

⁴ A. CORBIN, supra note 3, at § 959, at 853.

⁵ Id. at § 961, at 864.

⁶ 114 Mass. 530 (1874).

⁷ Id. at 533.

⁸ Id.
at the time when he is entitled to performance in order "to charge one in damages for breach."\(^9\)

Although the Court has rejected the doctrine of anticipatory repudiation, several exceptions to this rejection have been recognized.\(^10\) One of these exceptions is that the non-repudiating party to a contract is allowed to treat a repudiation by the other party as a rescission of the contract.\(^11\) In effect, this means that the non-repudiating party, by treating the repudiation as a rescission, can be excused from being prepared to perform his obligations under the contract.

During the Survey year, the Massachusetts Appeals Court decided a case which dealt with this rescission exception to the general Massachusetts rule which rejects the doctrine of anticipatory repudiation. In Bucciero v. Drinkwater,\(^12\) the court held that a disagreement over the meaning of a clause in a real estate contract which arose before the closing date did not justify the seller's refusal to go through with the deal.\(^13\) Because this ruling is supported by earlier Massachusetts decisions, the court's holding can be viewed as merely an application of prior law in Massachusetts concerning the rescission of a contract after a repudiation. The true significance of Bucciero, however, lies in the fact that the court managed to decide the case without mentioning the doctrine of anticipatory repudiation. The court's opinion thus sheds no light on the court's current view of the Massachusetts rule which does not fully accept the doctrine of anticipatory repudiation.

Michael Bucciero had an option to purchase land owned by the Drinkwater Realty Trust.\(^14\) Bucciero exercised the option, and August 14, 1979 was set as the closing date.\(^15\) On the day before the closing date, Bucciero met with Alfred and Louis Drinkwater to work out the details of the closing. At this meeting a disagreement arose as to who was responsible for paying the

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\(^9\) Id. In Daniels, the Supreme Judicial Court stated that a repudiation may allow the non-repudiating party to treat the contract as rescinded, or relieve him from the necessity of offering performance in order to enforce his rights. Id. A recent case has indicated that the rule announced in Daniels is still recognized in Massachusetts. Petrangelo v. Pollard, 356 Mass. 696, 702, 255 N.E.2d 342, 346 (1970) ("The words and actions of the defendants amounted to more than a mere anticipatory breach for which recovery would be denied under the rule of Daniels. . . ."); see also France, Anticipatory Repudiation, supra note 1, at 31.

\(^10\) France, Anticipatory Repudiation, supra note 1, at 31-34.


\(^12\) Id. at 556, 434 N.E.2d at 1318. The disagreement was over the meaning of a clause which allocated the payment of back taxes. Id.

\(^13\) Id. at 552, 434 N.E.2d at 1316.

\(^14\) Id.
back taxes still owed on the property. The Drinkwaters contended that Bucciero was responsible for all back taxes owed on the property, as well as the taxes due for 1979. Bucciero disagreed, saying that he would only pay the taxes due for 1979. The meeting broke up after the parties were unable to reach agreement on this point. Although Bucciero said he would appear at the closing the next day, prepared to pay the amount he thought he owed, the Drinkwaters said there was no point in meeting. Bucciero arrived the next day for the closing prepared to pay both the purchase price and all taxes due on the property, including the back taxes owed. The Drinkwaters' attorney called the office where the closing was to be held to say that they would not appear. Inexplicably, the attorney was not told that Bucciero was willing to pay all the back taxes to settle the only point that seemed to be disputed. Unable to agree on the terms of the sale, the parties had further meetings in August, September and October in an attempt to resolve the conflict. Bucciero brought an action for specific performance of the agreement. Bucciero apparently argued that he was entitled to specific performance because on the day scheduled for the closing he was ready, willing and able to purchase the property. The Drinkwaters argued that since Bucciero had not communicated his decision to pay all the back taxes to them, they had no duty to tender the deed.

The Middlesex Superior Court found that the terms of the sale were never agreed upon by the parties, and concluded that under the circumstances the Drinkwaters had no duty to tender a deed or be present for the closing. Thus, the judge ruled that all that Bucciero was entitled to was a return of his deposit. Bucciero appealed this decision, arguing that be-

16 Id. at 552-53, 434 N.E.2d at 1316. The agreement was a typed agreement, which the parties had amended by making interlineations. Id. at 552, 434 N.E.2d at 1316. The dispute arose over a clause in the agreement which stated that "the real estate taxes due on the parcel for the year in which the option is exercised and all [due and] subsequent years will be paid by the buyer. . . ." Id. (The bracketed words had been interlineated by hand).
17 Id. at 552-53, 434 N.E.2d at 1316.
18 Id. The back taxes amounted to approximately $84,000. Id. at 553, 434 N.E.2d at 1316. The total contract price for the sale of the land was in excess of $1.6 million. Id. at 555, 434 N.E.2d at 1318.
19 Id. at 553, 434 N.E.2d at 1316.
20 Id.
21 Id.
22 Id.
23 Id. at 553, 434 N.E.2d at 1317.
24 Id.
25 Id.
26 Id. at 553-54, 434 N.E.2d at 1317.
27 Id.
28 Id. at 554, 434 N.E.2d at 1317.
cause he was willing to perform the agreement on the closing date, he was entitled to specific performance.\(^{29}\)

The Massachusetts Appeals Court sustained Bucciero's appeal. In reversing the lower court's decision, the court stated that the evidence did not warrant a finding that the parties had never reached an agreement on the terms of the sale.\(^{30}\) The court noted that there was no evidence of any discussion or disagreement between the parties concerning the tax clause until the August thirteenth meeting.\(^{31}\) The court also noted that there was no indication of the circumstances surrounding the adoption of the agreement, or of the parties' subjective understanding as to its meaning.\(^{32}\) Because a written contract which contained all the material terms was executed, the court explained that the Drinkwaters had the burden of proving that an agreement was not reached.\(^{33}\) The court stated that the evidence was insufficient to meet this burden of proof.\(^{34}\) The court recognized that the clause concerning the payment of the property taxes was ambiguous and required construction. The court noted, however, that this problem does not enable a party to contend that an agreement was not reached.\(^{35}\) The court concluded, therefore, that a contract had been made.\(^{36}\)

The court next examined the issue of whether the position taken by Bucciero at the August 13 meeting amounted to a total repudiation of the contract so as to justify the Drinkwaters' refusal to perform.\(^{37}\) The court stated that for a repudiation by one party to a contract to operate as a discharge of the other party's obligations, the repudiation must either be with respect to the entire performance of the agreement or with respect to a part of the agreement which is so material as to go to the essence of the agreement.\(^{38}\) The court stated that the repudiation "must involve a total and not merely a partial breach."\(^{39}\)

\(^{29}\) Id. at 556, 434 N.E.2d at 1318.

\(^{30}\) Id. at 554, 434 N.E.2d at 1317. "The transcript is devoid of any evidence of discussion of disagreement between the parties concerning the tax clause until the meeting on August 13, the day before the scheduled closing." Id.

\(^{31}\) Id.

\(^{32}\) Id.

\(^{33}\) Id.

\(^{34}\) Id.

\(^{35}\) Id. (quoting Benjamin Foster Co. v. Commonwealth, 318 Mass. 190, 196, 61 N.E.2d 147, 150-51 (1945)).

\(^{36}\) Id.

\(^{37}\) Id. at 555, 434 N.E.2d at 1317. The Appeals Court agreed with the trial judge that under the contract, Bucciero was responsible for all back taxes. Id. at 554-55, 434 N.E.2d at 1317.

\(^{38}\) Id. at 555, 434 N.E.2d at 1318 (quoting 4 A. Corbin, Contracts § 975, at 918 (1951)).

\(^{39}\) Id. (quoting 4 A. Corbin, Contracts § 975, at 918 (1951)). "A total breach of contract is a non-performance of a duty that is so material and important to justify the injured party in regarding the whole transaction as at an end." 4 A. Corbin, supra note 3, at § 946, at 809.
In determining whether Bucciero’s actions amounted to a repudiation sufficient to discharge the Drinkwaters from their contractual obligations, the court examined two factors. First, the court considered whether the dispute over the back taxes went to the heart of the agreement. The court decided that this dispute over who was responsible for the payment of the back taxes was material, but that it did not “go to the essence of the agreement.” The court stated that the amount in dispute was relatively insubstantial when compared with the total purchase price for the property. The second factor considered by the court in determining whether Bucciero’s actions were enough to discharge the Drinkwaters from their obligations under the contract was the closing date. The court concluded that the date set for the closing did not go to the essence of the agreement, despite the fact that it had been set by the agreement. Generally, in a suit for specific performance, performance on the date specified in the agreement is not deemed to be of the essence unless either the parties expressly stipulate that time is of the essence, or such an agreement can be implied from the circumstances. Because neither of these conditions was present in Bucciero, the court concluded that the time of the closing did not go to the essence of the agreement. The court concluded, therefore, that Bucciero had not repudiated the contract and that when the closing date had passed Bucciero was not in default or breach. The court held that the Drinkwaters were not discharged from performance of the contract by Bucciero’s actions. Because Bucciero was not in default and was prepared to carry out the agreement on the closing date, and the Drinkwaters had clearly indicated their refusal to perform the agreement, the court held Bucciero was entitled to specific performance.

The court’s decision that Bucciero’s action did not justify the Drinkwa-

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40 13 Mass. App. Ct. at 555, 434 N.E.2d at 1317-18. The amount in dispute was less than $84,000; the total purchase price for the property was more than $1.6 million. Id.
41 Id. at 555, 434 N.E.2d at 1318. The court also stated that a mere refusal to pay money when due is not a repudiation of the contract. Id. (quoting Daley v. People’s Building, Loan and Savings Assn., 178 Mass. 13, 18, 59 N.E. 452, 453 (1901)).
42 Id. If the closing date had been of the essence of the agreement, the failure to close the deal on that day would have been a breach of the contract.
44 13 Mass. App. Ct. at 555, 434 N.E.2d at 1318. The court made a distinction between the two dates set in an option agreement. As to the first date, the date for the exercise of the option, time was of the essence. As to the second date, the closing date, time was not of the essence. Id.; see Boston & Worcester Street Railway Co. v. Rose, 194 Mass. 142, 149, 80 N.E. 498, 499 (1907); American Oil Co. v. Katsikas, 1 Mass. App. Ct. 437, 439, 300 N.E.2d 204, 206 (1973).
46 Id.
47 Id.
ters' refusal to perform the agreement was a tacit application of the common law doctrine of anticipatory repudiation. The conduct which the Drinkwaters alleged was repudiatory occurred at a meeting before the date set for the performance of the contract. Although the doctrine of anticipatory repudiation is not fully recognized in Massachusetts, the Drinkwaters were merely trying to treat Bucciero's allegedly repudiatory conduct prior to the time for performance as a rescission of the contract. As previously noted, rescission is one of the recognized exceptions to the general rule in Massachusetts that rejects the doctrine of anticipatory repudiation. The court had to determine if Bucciero's conduct amounted to a repudiation to determine if the Drinkwaters were entitled to treat the contract as rescinded. The court's conclusion that Bucciero's conduct did not amount to a repudiation is correct. In order for the repudiation by one party to act as a discharge of the other party, the repudiation must be with respect to the entire performance or to so much of the performance so as to go to the essence of the agreement. The amount in dispute, although substantial on its face, represented only five percent of the total purchase price and thus was not significant enough to go to the essence of the agreement.

The court's opinion, despite its correctness, is of little practical value in determining the court's current view of the doctrine of anticipatory repudiation. It is impossible to determine what significance, if any, to give to the court's failure to expressly consider the doctrine. The most that can be taken from the court's opinion is that the decision does solidify the rescission exception to the rule rejecting the doctrine of anticipatory repudiation.

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48 See supra notes 15-20 and accompanying text.
49 See supra notes 6-8 and accompanying text.
50 See supra note 26 and accompanying text.
51 See supra note 26 and accompanying text.
53 4 A. CORBIN, supra note 3, at § 975, at 918.
54 See supra at note 41 and accompanying text.
pudiation. This conclusion is evident, even though the court does not expressly rely on this exception. Despite this failure to rely on the rescission exception, it appears clear after Bucciero that Massachusetts courts will allow a non-repudiating party to a contract to treat a repudiation of the contract as a rescission if the repudiation is to the whole agreement, or to so material a part of the agreement as to go to the essence of the agreement. Whether the decision is also an indication of the court’s dissatisfaction with the fact that Massachusetts has not fully recognized the doctrine of anticipatory repudiation is unclear.55

§ 6.8. Statute of Frauds — Enforceability of Oral Contracts for the Sale of Real Estate.* The Statute of Frauds requires that contracts for the sale of land must be in writing to be enforceable.1 Courts have developed two doctrines, however, which in certain circumstances allow oral contracts for the sale of land to be specifically enforced despite the lack of a writing sufficient to satisfy the Statute of Frauds. They are the doctrines of equitable estoppel and part performance. Although the doctrine of part performance originally had its basis in equitable estoppel and fraud,2 the two doctrines are now distinct.3

The doctrine of equitable estoppel is used to prevent a party from using the Statute of Frauds to perpetrate a fraud.4 Where one party to an oral agreement has acted to his detriment solely in reliance on the oral agreement, the other party may be estopped from asserting the Statute of Frauds as a defense in order to prevent an “unconscionable” use of the statute.5

55 There have been other cases, however, that could be interpreted as steps towards Massachusetts’ “falling into line with the rest of the country.” 4 A. Corbin, Contracts § 961 n.8 (Supp. 1971). See, e.g., Tucker v. Connors, 342 Mass. 376, 382, 173 N.E.2d 619, 623 (1961) (a suit for specific performance brought after a repudiation but before the date set for performance was not premature because the equitable decree would not require performance until the date set for conveyance and the decree was made conditional on the payment of the purchase price); Petrangelo v. Pollard, 356 Mass. 696, 701-02, 255 N.E.2d 342, 346 (1970) (if one party repudiates, and the other party changes his position, he is discharged from performance).

* ROBERT L. MISKELL, staff member, Annual Survey of Massachusetts Law. § 6.8. 1 G.L. c. 259, § 1, in pertinent part, states:

No action shall be brought . . . [u]pon a contract for the sale of lands . . . [u]nless the promise, contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized.


3 Id. at § 533A, at 791. For an interesting examination of this distinction between the doctrine of part performance and the doctrine of equitable estoppel under California law, see Note, Part Performance, Estoppel, and the California Statute of Frauds, 3 Stan. L. Rev. 281 (1951) [hereinafter referred to as Note, Part Performance].

4 3 S. Williston, supra note 2, at § 533A, at 796-97.

5 Id.
The factors giving rise to such an estoppel are: a representation intended to induce a course of conduct on the part of the person to whom the representation is made; an act or omission resulting from the representation by the person to whom the representation is made; and detriment to such person as a result of the act or omission. This doctrine can be applied to oral contracts for the sale of real estate. Thus, if the requirements for equitable estoppel are satisfied, the defendant cannot assert the Statute of Frauds as a defense in a suit brought on an oral contract for the sale of land.

The doctrine of part performance also has as its purpose the prevention of what courts consider an improper use of the Statute of Frauds. Unlike the doctrine of equitable estoppel, the doctrine of part performance is usually applicable only to oral contracts involving the sale of real estate. Furthermore, under the doctrine of part performance, not only may a seller be precluded from asserting the Statute of Frauds as a defense, he may also be required to specifically perform his agreement. The doctrine of part performance therefore can provide greater relief than the doctrine of equitable estoppel to a party seeking to enforce an oral agreement. The factors to be considered in determining if the doctrine of part performance is applicable are completely different from those used to determine the applicability of the equitable estoppel doctrine. Historically, the Massachusetts courts initially adopted a very strict and limiting view as to what is required in order to invoke the doctrine of part performance. Specific enforcement was granted only where possession by the purchaser combined with a drastic change of position, such as substantial improvement of the property by the purchaser, created a situation where irreparable injury would result if the oral contract were not enforced. In recent years, however, Massachusetts courts have been more willing to find that the circumstances of a case satisfy the requirements for part performance. For instance, in one case a purchaser’s acts of taking possession and

8 Id. at 728, 320 N.E.2d at 923.
9 Note, Part Performance, supra note 3 at 282-83.
10 3 S. WILLISTON, supra note 2, at § 533, at 774-75.
11 Id. at § 533A, at 793-94.
12 See Burns v. Daggett, 141 Mass. 368, 373, 6 N.E. 727, 728 (1886); see also J. POMEROY, EQUITY JURISPRUDENCE § 1409, at 1057 (5th ed. 1941). The factors which determine the applicability of the part performance doctrine vary from state to state. E. RE, CASES AND MATERIALS ON EQUITY AND EQUITABLE REMEDIES 694-95 (1975).
13 E. RE, supra note 12, at 694; see also Andrews v. Charon, 289 Mass. 1, 4-6, 193 N.E. 737, 738-39; Moynihan, Property and Conveyancing, 1955 ANN. SURV. MASS. LAW § 1.4, at 9-10.
making minor repairs were sufficient to allow the purchaser to invoke the doctrine of part performance. In summary, recent decisions in this area have been steps toward liberalizing the requirements which are necessary in order for the doctrine of part performance to be available in Massachusetts.

During the Survey year, the Massachusetts Appeals Court decided a case that dealt with the specific performance of an oral contract for the sale of real estate. In Hickey v. Green, the court held that a seller of real property was estopped from asserting the Statute of Frauds because the purchaser, in reliance on the oral agreement, had made a down payment and had sold his own home. The court's opinion in Hickey constitutes another step in the recent trend in Massachusetts towards liberalizing the requirements which must be satisfied in order to allow a purchaser to obtain specific performance of an oral contract for the sale of real estate.

In July of 1980, Gladys Green reached an oral agreement with Thomas Hickey to sell to Hickey a lot she owned in Plymouth, Massachusetts. Hickey gave Green a check for $500 stating it was to be used as a deposit on the lot. Hickey also told Green that it was his intention to sell his present home and build on the lot. Hickey, relying on the agreement with Green, advertised his house in local newspapers and was successful in finding a purchaser. After Hickey had reached an agreement to sell his house, Green informed him that she no longer intended to sell her lot to Hickey.

Hickey brought suit in superior court seeking specific enforcement of the agreement. Green argued that because the agreement was oral, it was an unenforceable contract because of the Statute of Frauds. The trial judge rejected Green's argument and granted specific performance.


Id. at 676, 442 N.E.2d at 39.

Id. at 672, 442 N.E.2d at 37.

Id. Hickey had left the payee line on the check blank because he was unsure whether Green or her brother was to receive the check. Id. Green did not fill in the payee's name, and did not endorse or cash the check. Id.

Id.

Id.

Id. at 672, 442 N.E.2d at 38. Green had decided to sell the lot to another person who was willing to pay $1000 more than the price Hickey agreed to pay. Id.

Id.

Id.
On appeal of the trial court's decision to grant specific performance, Green again asserted the Statute of Frauds. The Appeals Court affirmed the trial judge's decision. The court explained that the rule applicable in most jurisdictions is that a contract can be enforced, despite a failure to comply with the Statute of Frauds, if the party seeking enforcement has, in reliance on the contract and with the knowledge of the other party, so changed his position that injustice can be avoided only by granting specific enforcement.  

The court stated that although early Massachusetts decisions had laid down strict requirements for "an estoppel precluding the assertion of the Statute of Frauds," more recent decisions indicated a trend away from such strict requirements.

In granting the plaintiff's request for specific performance, the Hickey court found it significant that there was no disagreement that an oral agreement had been made between Hickey and Green. The court also observed that neither party contemplated the negotiation of a written purchase and sale agreement. The court asserted, therefore, that it was permissible to infer that the rapid sale of Hickey's house was expected. The court decided that, in equity, Green's refusal to honor her agreement could not be condoned. The court thus concluded that specific enforcement of the agreement was appropriate. Although the court explicitly stated that granting specific enforcement in this case might extend the principles stated in prior cases, the court noted that no public interest

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25 Id. at 673, 442 N.E.2d at 38 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 129 (1981)).
26 14 Mass. App. Ct. at 673, 442 N.E.2d at 38. The court observed that in cases that have ordered specific performance, "there has been an actual change of possession and improvement of the transferred property, as well as full payment of the purchase price, or one or more of these elements." Id. at 674, 442 N.E.2d at 38. Over one hundred years ago, the Supreme Judicial Court stated the factors that must be present for a court to order specific performance of an oral contract for the sale of land. Glass v. Hulbert, 102 Mass. 24, 32-33 (1869) (possession accompanied with or followed by such change of position of the purchaser as would subject him to a loss for which he could not otherwise have adequate compensation or redress is necessary to remove an oral contract for the sale of land from the Statute of Frauds).
28 Id. at 675, 442 N.E.2d at 39. The court found this fact significant because the RESTATEMENT (SECOND) OF CONTRACTS § 129 comment d, states that if the making of the promise is admitted or clearly proved, it is not essential for the promisee to have taken possession, paid money, or made improvements, so long as he has somehow acted in reasonable reliance on the contract before the promisor has repudiated it. See 14 Mass. App. Ct. at 675 n.9, 442 N.E.2d at 39 n.9.
29 14 Mass. App. Ct. at 676, 442 N.E.2d at 39. The court noted the situation might be different if either party had expected the execution of a written agreement. Id.
30 Id.
31 Id.
32 Id.
behind the Statute of Frauds would be violated if Green were held to her bargain by the principles of equitable estoppel.

The Hickey court stated its decision in terms of the doctrine of equitable estoppel. On the other hand, however, the court cited many cases dealing with the doctrine of part performance. As indicated earlier, although the doctrines of equitable estoppel and part performance had a common basis in estoppel and fraud, they are now distinct concepts. The Hickey court made no distinction between these two doctrines. Furthermore, the court precluded Green from asserting the Statute of Frauds, even though Hickey’s conduct did not meet the requirements for either the doctrine of equitable estoppel or the doctrine of part performance as those doctrines had previously been stated in Massachusetts. The court’s decision, therefore, is an indication that Massachusetts is loosening the requirements which must be satisfied in order to preclude a defendant from asserting the Statute of Frauds under either doctrine. Future Massachusetts decisions are likely to resolve the issue of the enforceability of oral contracts by considering the equities involved, rather than by a rigid application of previously established requirements.

In this case Hickey’s conduct was not sufficient to meet the requirements for equitable estoppel that had been articulated in previous Massachusetts decisions. One of the key factors necessary for equitable es-

33 The policy behind the Statute of Frauds is to prevent fraud by requiring that certain contracts be evidenced by a writing.

34 14 Mass. App. Ct. at 676, 442 N.E.2d at 40. The court remanded to the trial judge and noted that since over two years had passed since the agreement was made, the trial judge may, in her discretion, receive evidence concerning the present status of Hickey’s obligation to sell his house to determine if specific performance is still warranted. Id. at 676-77, 442 N.E.2d at 40.

35 Id. at 676, 442 N.E.2d at 40. “No public interest . . . will be violated if Mrs. Green fairly is held to her precise bargain by principles of equitable estoppel . . . .” Id.

36 The court cited Glass v. Hulbert, 102 Mass. 24, 43 (1869) (oral agreement cannot be enforced in the absence of “evidence of change of situation or part performance creating an estoppel”); Hazelton v. Lewis, 267 Mass. 533, 538-40, 166 N.E. 876, 878 (1929) (acts of plaintiff do not make out part performance); Andrew v. Charon, 289 Mass. 1, 5, 193 N.E. 737, 739 (1935) (basis for estoppel against setting up Statute of Frauds is change of situation or part performance by the party seeking relief); Winstanley v. Chapman, 325 Mass. 130, 133, 89 N.E.2d 506, 508 (1949) (“We think the present case falls within the doctrine of part performance.”); Fisher v. MacDonald, 332 Mass. 727, 729, 127 N.E.2d 484, 486 (1955) (plaintiff’s actions sufficient to enable him to evoke the doctrine of part performance); Orlando v. Ottaviani, 337 Mass. 157, 161, 148 N.E.2d 373, 376 (1958) (issue is whether defendants are estopped from setting up Statute of Frauds by reason of plaintiff’s part performance of contract and change of position in reliance there on).

37 See supra notes 2-15 and accompanying text.

38 See infra notes 35-39 and accompanying text.

39 For the test the Massachusetts courts had previously used to determine the applicability of the doctrine of equitable estoppel, see supra note 4 and accompanying text.
toppel is a representation intended to induce a course of conduct on the part of the person to whom the representation is made. The court did not conclude that Green, by her agreement to sell her lot, intended to induce Hickey to immediately sell his house. Instead, the court found that Hickey’s sale of his house could have been “expected.” Similarly, it is clear that Hickey’s actions did not meet the requirements for part performance that had been previously established by Massachusetts decisions. In prior cases, the act of the purchaser taking possession of the property had consistently been required before the courts were willing to find part performance. Hickey did not take possession of property. Thus, the Hickey court granted specific enforcement of the agreement despite the fact that Hickey’s actions did not satisfy the requirements for either the doctrine of part performance or the doctrine of equitable estoppel. The court explicitly stated that it was loosening the standards for granting specific performance in order to reach an equitable result.

On a practical level, this new approach used by the court makes it easier for a disappointed purchaser to obtain specific enforcement of an oral real estate contract. The court has clearly adopted the approach stated in the Restatement (Second) of Contracts for problems of this type. Under the Restatement approach, the party seeking enforcement must have so changed his position, in reasonable reliance on the contract and on the continuing assent of the party against whom enforcement is sought, that injustice can be avoided only by specific enforcement. This is an easier standard to meet than the one required under prior Massachu-

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41 14 Mass. App. Ct. at 676, 442 N.E.2d at 39. Even this conclusion is questionable. It does not seem reasonable to expect that a purchaser of a vacant lot, who intends to build a house on the lot, would immediately sell his home before any work on his new home had even begun.


44 Id. at 673, 442 N.E.2d at 38 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 129 (1981)). Although RESTATEMENT (SECOND) OF CONTRACTS § 129 is entitled “Actions in Reliance: Specific Performance,” the comments to the section indicate that § 129 restates “what is widely known as the ‘part performance doctrine,’” RESTATEMENT (SECOND) OF CONTRACTS § 129 comment a (1981).

setts law for invoking either the doctrine of equitable estoppel or the doctrine of part performance. Unlike the prior standard used to determine the applicability of the doctrine of equitable estoppel, it is not necessary to show that the party made a representation that was intended to induce a course of conduct on the part of the other party. In contrast to the prior standard used to determine the availability of the doctrine of part performance, the plaintiff need not show that he took possession of, or made improvements in the property. Thus, Hickey's contract with Green was specifically enforced, even though there was no evidence Green intended to induce Hickey's course of conduct and Hickey never took possession of the land.

The Hickey court has continued the trend in Massachusetts law of making it easier for a disappointed purchaser under an oral agreement to estop the seller from asserting the Statute of Frauds. The Massachusetts Appeals Court has clearly indicated that it will use the approach of the Restatement (Second) of Contracts to determine the applicability of the doctrine of equitable estoppel. The manner in which the court's opinion was written is an indication that the court will also use this approach to determine the applicability of the doctrine of part performance and, consequently, the remedy of specific enforcement. By using this approach the court has more of an opportunity to examine the equities of the situation than it did under prior Massachusetts law, which required the existence of specific factors before the Statute of Frauds would become unavailable to a defendant. This ability to examine the equities of a given situation, rather than being limited by the strict requirements of the old doctrines of part performance and equitable estoppel, is an appropriate modification of the law. Under this new approach, courts have a greater opportunity to grant appropriate relief to injured parties.

§ 6.9. Brokerage Contracts — Real Estate Broker's Right to Commission.* The relationship between buyers, brokers and sellers of real property has been the source of much litigation. Controversy has arisen

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46 See supra note 6 and accompanying text.
47 See supra notes 13-15 and accompanying text.
48 Compare supra note 6 and accompanying text with supra note 45 and accompanying text.
49 Compare supra note 15 and accompanying text with supra note 45 and accompanying text.
50 See supra notes 35-37 and accompanying text.

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often regarding the circumstances under which a real estate broker may collect a commission. 2 Under well-settled Massachusetts law, a real estate broker is entitled to a commission if he produces a customer ready, able and willing to buy on the terms and for the price given to the broker by the owner. 3 The terms proposed by the broker and adopted in the sale need not be identical. 4 Rather, a real estate broker is required to prove that he was the effective cause of the sale in order to earn a commission. 5 During the Survey year in Bonin v. Chestnut Hill Towers Realty Co. 6 The Massachusetts Appeals Court considered the circumstances under which a real estate broker can recover a commission. In particular, the court addressed the issue of whether a real estate broker, employed to find a buyer for property, is entitled to a commission when a prospective buyer does not purchase the property, but rather arranges a syndication. 7 The Bonin court concluded that a real estate broker is not entitled to a commission when a syndication rather than a purchase results. 8

The plaintiff in Bonin was employed by the defendant, Chestnut Hill Towers Realty Company, to locate a purchaser for the defendant’s property, Chestnut Hill Towers. 9 By the terms of the oral agreement between the two parties, the plaintiff was to locate a buyer for the property and was expressly excluded from negotiating with syndicators. 10 In her attempts to locate a purchaser for the property, the plaintiff introduced Mr. Katz, a potential purchaser, to a representative of the defendant. 11 When

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7 14 Mass. App. Ct. at 64, 436 N.E.2d at 971. A syndication is a sale of limited partnership interests in a real estate venture. Id.

8 Id. at 75, 436 N.E.2d at 977.

9 Id. at 65, 436 N.E.2d at 971.

10 Id. at 65-66, 436 N.E.2d at 972. See supra note 7 for an explanation of the term “syndication.”

11 Id. at 65-66, 436 N.E.2d at 972.
Katz disavowed interest in the purchase, the plaintiff continued to solicit buyers as well as syndicators for the defendant's property.

During this period, however, Katz was consulted by an independent third party regarding a possible syndication of Chestnut Hill Towers. Katz thereafter commenced independent negotiations with the defendant regarding a syndication. These talks resulted in Katz's firm selling a number of limited partnerships in the subject property. The plaintiff, after learning of the syndication, unsuccessfully attempted to collect a commission from the defendant based on her role in precipitating the initial meeting between Katz and the defendant. At trial, the jury awarded a judgment for the plaintiff in the amount of $600,000. After denial of their motion for judgment notwithstanding the verdict, the defendants appealed.

On appeal, the Massachusetts Appeals Court considered whether there was sufficient evidence to allow the case to be submitted to the jury. In examining the lower court's denial of the defendant's motion for judgment notwithstanding the verdict, the court evaluated whether "the evidence was such that . . . there can be but one conclusion as to a verdict that reasonable men could have reached." The Bonin court described the circumstances under which a broker becomes entitled to a commission from a property owner for the sale of real estate. The court stated that, in general, the right to a commission attaches when the broker's actions are the "efficient or effective means of bringing about the actual sale." This ultimate question of whether the broker caused the actual sale cannot be reached, however, until three threshold factors have been established. A claimant for a broker's commission first must introduce evidence to support a finding that he was employed by the property owner, that the terms of the buyer's purchase were similar to those set

12 Id. at 66, 436 N.E.2d at 972.
13 Id. at 66-67, 436 N.E.2d at 972-73.
14 Id. at 67, 436 N.E.2d at 973.
15 Id.
16 Id. at 68, 436 N.E.2d at 973.
17 Id.
18 Id. at 64, 436 N.E.2d at 971.
19 Id.
20 Id.
21 Id.
22 Id. at 68-70, 436 N.E.2d at 973-74. In broad terms, a broker is entitled to a commission if he "produces a customer ready, able and willing to buy upon the terms and for the price given the broker by the owner." Tristram's Landing v. Wait, 367 Mass. 622, 629, 327 N.E.2d 727, 729 (1975).
24 Id. at 69-70, 436 N.E.2d at 974.
25 Id.
by the seller, and that the causal chain between the broker's efforts and the actual sale was unbroken. Only then can the jury consider whether the broker was the "efficient or effective" cause of the sale and therefore entitled to a commission.

After setting out these three factors, the court noted four problems the plaintiff in the case before it had to overcome in order to satisfy the threshold determination. The court identified these four problems as the limitation on the plaintiff's employment to finding a buyer, rather than a syndicator, the plaintiff's failure to pursue Katz's potential interest in the project, the fact that a third party unrelated to the plaintiff attempted to interest Katz in the syndication of the subject property, and the defendant's claim that an actual "sale" of the property never took place. In considering the first obstacle, the scope of the plaintiff's employment, the court found that the employment contract restricted the plaintiff to finding a purchaser for the property and barred her from dealing with syndicators. Since there was no conflicting evidence on this issue, there was no need to submit it to a jury. In contrast, the court found that the second and third problems raised questions which were appropriate for a jury. Considering the second question, the court stated that it was possible for a jury to determine that the plaintiff had been instrumental in maintaining Katz's interest in the property. As to the third obstacle, the court noted that the issue of whether the chain of causation in broker commission cases was unbroken traditionally has been left to the jury. Finally, in considering the fourth problem, the court determined that the plaintiff in Bonin failed to establish that an actual sale of real estate occurred. Rather, the court reasoned, the sale of the limited partnership interests constituted a sale of securities, which are classified as personal, rather than real, property. Thus, based on the failure of the plaintiff to produce sufficient evidence to mandate a jury determination of

26 Id.
27 Id.
28 Id. at 70, 436 N.E.2d at 974.
29 Id.
30 Id.
31 Id.
32 Id.
33 Id. at 70-71, 436 N.E.2d at 974-75.
34 Id.
35 Id. at 71-72, 436 N.E.2d at 975.
36 Id. at 71, 436 N.E.2d at 975.
37 Id. at 71-72, 436 N.E.2d at 975.
38 Id. at 72-75, 436 N.E.2d at 975-77.
39 Id. at 72-73, 436 N.E.2d at 975-76.
each of these four issues, the Appeals Court reversed the lower court’s decision and held that the plaintiff was not entitled to a commission.\textsuperscript{40}

The court’s analysis in \textit{Bonin} reiterated the three factors enunciated by the Supreme Judicial Court in \textit{Holton v. Shepard},\textsuperscript{41} which must be established for a real estate broker to be entitled to a commission:\textsuperscript{42} that the broker was employed by the property owner, that the property was bought on terms similar to those set by the seller, and that no forces intervened to break the causal connection between the broker’s actions and the sale.\textsuperscript{43} The \textit{Bonin} court, however, did not simply apply these three factors.\textsuperscript{44} Rather, the court also identified four problems, peculiar to the \textit{Bonin} case, preventing the satisfaction of the \textit{Holton} factors.\textsuperscript{45} Although the exact connection between the three threshold factors and the four \textit{Bonin} obstacles is unclear,\textsuperscript{46} it is nonetheless obvious from the \textit{Bonin} decision that the failure to satisfy any one of the three factors will be fatal to a broker’s assertion of his right to a commission.\textsuperscript{47}

The plaintiff in \textit{Bonin} was not entitled to a commission for two reasons.\textsuperscript{48} First, the plaintiff failed to satisfy the provision in her employment agreement, which required her to find a \textit{purchaser} for the property before a commission could be earned.\textsuperscript{49} Massachusetts case law clearly allows a seller to restrict the terms of a broker’s employment as a means of limiting the seller’s obligation to pay the broker’s commission.\textsuperscript{50} Thus the decision in \textit{Bonin}, denying a commission when a \textit{syndication}, rather than a purchase, results,\textsuperscript{51} is an important indication that agreements between brokers and sellers of real property will be constructed strictly. Massachusetts courts in the future, therefore, may analyze closely the terms of the

\textsuperscript{40} \textit{Id.} at 75, 436 N.E.2d at 977.
\textsuperscript{41} 291 Mass. 513, 197 N.E.2d 460 (1935).
\textsuperscript{42} \textit{Id.} at 516, 197 N.E.2d at 462.
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} 14 Mass. App. Ct. at 70-71, 436 N.E.2d at 974.
\textsuperscript{45} \textit{Id.} at 70, 436 N.E.2d at 974.
\textsuperscript{46} The court merely stated that “in the application of these principles the plaintiff in the instant case needed to overcome four major hurdles.” \textit{Id.} at 70, 436 N.E.2d at 974.
\textsuperscript{47} The court found that while the extent of Bonin’s interaction with Katz after their initial meeting, and the chain of causation could be left to the jury for determination, the plaintiff had failed to introduce sufficient evidence tending to show that her employment agreement allowed her to deal with syndicators and that an actual sale of the property occurred. \textit{Id.} at 70-75, 436 N.E.2d at 974-77.
\textsuperscript{48} \textit{Id.} at 70-72, 436 N.E.2d at 974-75.
\textsuperscript{49} \textit{Id.} at 70-71, 436 N.E.2d at 974-75.
\textsuperscript{51} 14 Mass. App. Ct. at 70-71, 436 N.E.2d at 974-75. It is unclear from the \textit{Bonin} decision whether the plaintiff and the defendant could have contracted that the plaintiff would receive a commission upon arranging a syndication.
parties’ agreement in an attempt to discern the terms of the engagement and clarify the often confusing broker-seller relationship.

In addition to the plaintiff’s failure to satisfy the terms of her employment agreement, the plaintiff was also unable to demonstrate that an actual sale of the property occurred.52 The court was unwilling to extend the right to a commission to a broker’s actions which resulted in a syndication, a transaction markedly different from that of an outright purchase.53 The Bonin decision thereby adopted, for Massachusetts courts, the position held in other jurisdictions that a sale of a partnership interest in a real estate transaction is a security, rather than an item of real or personal property.54 It is thus apparent that the term “sale” will be interpreted to require an actual purchase of the physical property, and not a mere transfer of an interest in the property.55 The refusal of the court to classify the transaction in Bonin as a “sale,” coupled with the limitations on the scope of the plaintiff’s employment to locating a buyer, proved fatal to the plaintiff’s claim for a commission.56

§ 6.10. Real Estate Brokerage Contracts — Statute of Frauds.* The Statute of Frauds requires that a contract for the sale of land must be in writing and signed by the parties to be enforceable.1 During the Survey year in MacGregor v. Labute2 the Massachusetts Appeals Court examined the effect of this rule upon an oral agreement for the payment of a brokerage fee in connection with a proposed real estate conveyance. Specifically, the MacGregor court considered whether the Statute of Frauds bars a real estate broker’s suit against a seller for breach of an oral contract requiring that the buyer, rather than the seller, pay the broker’s commission. The court concluded that such a suit is not barred.3

52 Id. at 72-75, 436 N.E.2d at 975-77.
53 Id. The test for recognizing a security interest such as that obtained via syndication is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial efforts of another. United Hous. Found., Inc. v. Forman, 421 U.S. 837, 852 (1975). By contrast, when a purchaser is motivated by a desire to use or consume the item purchased — “to occupy the land or to develop it themselves” — the securities laws do not apply. Id. at 852-53.
56 Id.

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Under the terms of the oral contract at issue in MacGregor, MacGregor agreed to find a purchaser for land owned by Labute. MacGregor and Labute stipulated that the purchaser would pay both the agreed selling price and the broker's commission. Labute's obligation under the oral agreement consisted of a promise to convey the property if the plaintiff found a purchaser willing to meet these terms. Although MacGregor complied with his obligation under the contract by locating a buyer, Labute refused to convey his property to the buyer. Consequently, MacGregor brought an action against Labute for breach of their oral contract in order to recover the amount of the commission he would have received if the sale had occurred. A superior court judge granted summary judgment for Labute. MacGregor sought review of his claim before the Appeals Court.

The Appeals Court in MacGregor began its analysis by stating that a broker generally can recover from a seller the damages resulting from the seller's breach of a contract to purchase land. Relying on case precedent from numerous jurisdictions, the seller is liable for the commission even though the contract provided that the broker was to be compensated by the purchaser. The MacGregor court rejected the seller's contention that pursuant to the terms of the oral contract, the broker must look to the buyer, rather than to the seller, for his commission.

After establishing that a broker may recover his commission from the seller under these circumstances, the court considered whether the Statute of Frauds relieved the seller of any liability for his refusal to complete the sale pursuant to the oral contract. Adopting the rationale of the Supreme Judicial Court in Palmer v. Wadsworth, the MacGregor court stated that if an oral contract obligates the seller to pay a broker's commission, the contract is not within the Statute of Frauds because it does not involve the purchase or acquisition of an interest in land. The

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4 Id. at 204, 437 N.E.2d at 574.
5 Id.
6 Id.
7 Id.
8 Id. at 203, 437 N.E.2d at 574.
9 Id. at 204, 437 N.E.2d at 574.
10 Id. at 208, 437 N.E.2d at 576-77.
11 Id. at 204, 437 N.E.2d at 575.
14 Id. at 205-06, 437 N.E.2d at 575-76.
15 Id. at 206-08, 437 N.E.2d at 575-77.
16 264 Mass. 18, 161 N.E. 621 (1928).
court then rejected the defendant’s assertion in *MacGregor* that the purchaser’s obligation to pay the broker’s commission rendered the broker’s commission part of the purchase price for the land thereby bringing the agreement within the Statute of Frauds. Rather, the court maintained that the agreement between MacGregor and Labute was not a contract for the sale of land but rather for brokerage services, and thus the Statute of Frauds did not apply to the commission agreement. The Appeals Court thereby reversed the Superior Court’s grant of the motion for summary judgment and remanded the case for further proceedings.

The *MacGregor* decision clarifies two issues regarding the ability of a broker to recover a commission which had not been previously litigated in Massachusetts courts. First, *MacGregor* established that a broker can recover his commission from a seller for the seller’s breach of his promise to convey, even if the contract provides that the buyer, not the seller, will pay the broker’s commission. This result is based on the rationale that the seller owes the broker a contractual duty to convey the subject property when a suitable buyer is found. In reality, the amount of the commission represents the damages the broker has suffered from the seller’s breach of his promise to convey. Therefore, holding the seller liable for the commission, even though the oral contract provides that the broker must collect his commission from the purchaser, provides a sensible remedy for the innocent broker.

Second, the *MacGregor* decision established that the Statute of Frauds does not bar a real estate broker’s suit for his commission against the seller of property, even though the broker orally has agreed to collect his commission from the buyer. The court held that the Statute of Frauds does not apply, because the oral contract between the broker and the seller concerns brokerage services, rather than the sale of an interest in land.

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18 Id. at 206-08, 437 N.E.2d at 575-77.
19 Id. at 206-08, 437 N.E.2d at 576-77.
20 Id. at 208, 437 N.E.2d at 576-77.
21 Id. at 206-08, 437 N.E.2d 575. The broker must establish that he is entitled to a commission. Id. Under Massachusetts law, a real estate broker is entitled to a commission if he produces a customer ready, able and willing to buy on the terms and for the price given to the broker by the owner. Tristram’s Landing v. Wait, 367 Mass. 622, 629, 327 N.E.2d 727, 729 (1975). *MacGregor* thus appears to make Massachusetts case law consistent with cases from other jurisdictions making similar findings. See, e.g., Woolley v. Bishop, 180 F.2d 188, 189, 193 (10th Cir. 1960); Kaercher v. Schee, 189 Minn. 272, 274, 276-77, 249 N.W. 180, 182-83 (1933); Aronson v. Carobine, 129 Misc. 800, 802, 222 N.Y.S. 721, 722-23 (N.Y. Mun. Ct. 1927).
22 Kaercher v. Schee, 189 Minn. 272, 277, 249 N.W. 180, 183 (1933).
25 Id. at 206-07, 437 N.E.2d at 575-76. The Statute of Frauds provides that certain contracts, in order to be enforced, must be in writing. See G.L. c. 259, § 1.
look to the purchaser for his commission does not bring the agreement within the Statute of Frauds by making the commission part of the purchase price for the land.\textsuperscript{26} Rather, the broker is entitled to compensation for the services he rendered, although the right to compensation admittedly arises from a transaction involving a conveyance of land. Authority to the contrary exists in other jurisdictions, and does not allow a broker to recover a commission based on an oral contract.\textsuperscript{27} The Massachusetts court, however, clearly has implemented a policy favoring the broker's ability to recover from the seller, and has rejected the Statute of Frauds as a bar to the broker's action, a position in accord with the weight of judicial thought in this area.\textsuperscript{28}

\section*{§ 6.11. Applicability of Identical Source Rule in Creditor-Surety Transactions.}

Massachusetts contract law has long recognized the general rule that where a debtor owes several debts to a creditor, the debtor initially has the power to direct the application of a payment to a particular debt.\textsuperscript{1} If the debtor fails to exercise this right before or at the time of payment, the power to direct application of the payment devolves to the creditor.\textsuperscript{2} In transactions where one debt is guaranteed by a surety, however, some courts have recognized an exception to this general rule.\textsuperscript{3} This excep-
tion, known as the identical source rule, states that when a debtor owes more than one debt to one creditor, and one of these debts is bonded, the surety has an equitable right to have the payment applied to the bonded debt. This exception applies only if the creditor knows at the time of receipt that the payment funds arose from the proceeds of the bonded contract. During the Survey year, in Warren Brothers Company v. Sentry Insurance, the Massachusetts Appeals Court considered whether the identical source rule could be applied to force a creditor to apply a received payment to a bonded debt.

The facts of the case were undisputed. The Healy Corporation, a contractor, owed the plaintiff Warren Brothers Company a subcontractor, a total of $52,000 for work done on three different construction sites. The three debts had been incurred in the following order: (1) $10,000 for a K-Mart Store in Fairhaven; (2) $10,000 for a Great Atlantic & Pacific Tea Company ("A & P") store in Brockton; and (3) $32,000 for an A & P store in Quincy. The debt on the Quincy project had been guaranteed by Sentry Insurance. Pursuant to a judgment on a complaint brought by Warren to reach and apply money owed to Healy by A & P, A & P paid Warren $20,000 for work Healy had done at the Quincy site. Warren, however, upon receiving this money, appropriated it to payment of Healy's earlier and unsecured debts. Healy subsequently demanded that the payment be applied to the Quincy contract. Warren then brought suit against Sentry, which had guaranteed the debt from the Quincy site, to recover the amount owed for its work at Quincy. Sentry sought enforcement of a claimed right to have A & P's payment applied against Healy's debt arising from the Quincy contract. The trial judge held for Warren, and entered judgment against Sentry for the full amount owed by Healy on account of the bonded contract.

4 A "bonded" debt is guaranteed by a surety.
5 For discussion and analysis of the identical source rule, see G. Couch, Cyclopedia of Insurance Law §§ 47.74-47.77 (2d ed. 1982); S. Williston, A Treatise on the Law of Contracts § 1795A (1972); L. Simpson, Handbook on the Law of Suretyship § 44 (1950); Restatement of Security § 142(d) (1941); Note, Application of Payments: Surety's Right or Risk, 23 Chi. Kent L. Rev. 76 (1944).
7 Id. at 432, 433 N.E.2d at 1254-55.
8 Id.
9 Id.
10 Id. at 431-32, 433 N.E.2d at 1254-55.
11 Id. at 432, 433 N.E.2d at 1254-55.
12 Id.
13 Id. at 431-32, 433 N.E.2d at 1254-55.
14 Id. at 432, 433 N.E.2d at 1255.
The Appeals Court began its analysis of the case by restating the common law of Massachusetts concerning when a debtor’s payment may be applied to one or more of several debts owed to the same creditor.\(^{16}\) The court first noted that under such circumstances the debtor initially has the power to direct application of the payment.\(^ {17}\) If the debtor fails to exercise this power before or at the time the creditor receives the payment, however, the court recognized that the creditor is then free to apply the payment to any of the several debts without concern for the debtor’s interests.\(^ {18}\) Moreover, according to the court, when both parties fail to exercise their respective rights and a court is required to direct application of payment, the court must direct payment on the basis of all the circumstances of the transaction.\(^ {19}\) In such cases, the court noted, the payment should be applied to the earlier debts first, unless the equities of the situation require a contrary result.\(^ {20}\)

The court next observed that neither a debtor nor a creditor can affect the application of a payment once it is enforced by judicial proceedings.\(^ {21}\) In the case before it, the court stated, this principle did not divest Healy or Warren of its right to apply the payment to the debt of its choice.\(^ {22}\) The court noted that although Warren originally brought suit to receive the amount owed for its work on the Quincy site, the trial court’s judgment in that suit did not require that Warren apply the payment received against that same debt.\(^ {23}\) The court therefore concluded that the fact that the judgment was based on the Quincy debt did not destroy Healy’s or Warren’s respective rights\(^ {24}\) to apply the payment to the earlier, unsecured debts.\(^ {25}\)

The court next considered whether Healy’s subsequent demand that Warren direct the payment to the Quincy contract was of any legal consequence.\(^ {26}\) The court first noted that, prior to Warren’s acceptance of

\(^{16}\) Id. at 433-34, 433 N.E.2d at 1255.
\(^{17}\) Id. at 433, 433 N.E.2d at 1255.
\(^{18}\) Id. (citing Ramsey v. Warner, 97 Mass. 8, 13 (1867); Spinney v. Freeman, 230 Mass. 356, 358, 119 N.E. 798, 799 (1918); 15 S. WILLISTON, supra note 5, at § 1796).
\(^{19}\) Id. at 433-34, 433 N.E.2d at 1255.
\(^{20}\) Id. (citing Crompton v. Pratt, 105 Mass. 255, 257 (1870)). The court cautioned in a footnote that these principles may not apply to consumer debts which are regulated by statute. Id. at 434 n.4, 433 N.E.2d at 1255 n.4. See G.L. c. 255D, § 18(B).
\(^{22}\) Id. at 434, 433 N.E.2d at 1256.
\(^{23}\) Id. at 435, 433 N.E.2d at 1256.
\(^{24}\) Id. at 434, 433 N.E.2d at 1256.
\(^{25}\) Id. at 434-35, 433 N.E.2d at 1256.
\(^{26}\) Id. at 435-36, 433 N.E.2d at 1256.
the $20,000 payment from A & P, Healy was aware that A & P was about
to pay Warren to satisfy its debt to Healy.27 According to the court, Healy
therefore had ample opportunity to direct the payment to the debt of its
choice.28 Once having made payment unconditionally, the court ruled,
Healy could not revoke its act and make the payment conditional.29 The
court acknowledged, however, an exception to the general rule that a
debtor has no right to direct the application after payment has been
made.30 In extreme situations in which a particular application of a pay­
ment would be unfairly disadvantageous to the debtor the court will
require that the creditor abide by the contrary subsequent demand of the
debtor.31 In the case before it, the court recognized that because Healy’s
desired application of the payment would be just as damaging to Warren
as Warren’s actual application was to Healy, no extreme situation
existed, and therefore the general rule would control the outcome.32
Accordingly, the court concluded that under the circumstances Healy’s
subsequent command to direct the payment to the secured Quincy debt
was without legal significance.33

The court next addressed Sentry’s argument that the above-mentioned
rules concerning application of payment are inapplicable where the debt in
issue is guaranteed by a surety.34 The court noted that other jurisdictions
have held that where the source of the funds for payment is a bonded
contract and the creditor knows the source of the funds when it receives
and applies them, the surety has an equitable right to have the payment
applied against the debt on the bonded contract.35 The court noted that
these jurisdictions have recognized this rule, known as the “identical
source” or “identical property” rule, as an exception to the rule that the
right of a debtor or creditor to direct the application of payment to one of
several debts is not affected by the fact that a surety is liable for one or
more of the debts.36 According to the court, the identical source rule is

27 Id. at 435, 433 N.E.2d at 1256.
28 Id.
29 Id. at 435-36, 433 N.E.2d at 1256 (citing 15 S. Williston, supra note 5, at § 1796; Backhouse v. Patton, 30 U.S. (5 Pet.) 160, 170 (1831); Page v. Patton, 30 U.S. (5 Pet.) 304, 310 (1831); Restatement of Contracts § 392 (1932)).
30 Id.
31 Id. at 436, 433 N.E.2d at 1256 (citing Restatement (Second) of Contracts § 259(2) and comment b (1979)).
32 Id. at 436, 433 N.E.2d at 1256-57.
33 Id.
34 Id. at 436-38, 433 N.E.2d at 1257-58.
35 Id. at 436-37, 433 N.E.2d at 1257 (citing United States v. Johnson, Smothers & Rollins, 67 F.2d 121, 123-24 (4th Cir. 1933); St. Paul Fire & Marine Ins. Co. v. United States, 309 F.2d 22 (8th Cir. 1962), cert. denied, 372 U.S. 936 (1963)). See supra notes 3-5 and accompanying text.
36 Id. at 436-37, 433 N.E.2d at 1257.
based on a theory that such payments are impressed with an equity in favor of the surety which entitles it to direct the payments against the liabilities incurred by the debtor under the bonded contract.  

The court stated, however, that insofar as the identical source rule confers an absolute right upon the surety to receive the benefit of a payment which the creditor knows to have been issued from the proceeds of the bonded contract, that exception to the rules of application of payments is neither fair nor sound. The court identified two policy reasons for not recognizing the identical source rule as an absolute protection for sureties. First, the court stated that since the identical source rule may burden a creditor with the responsibility of knowing the status of the debtor’s accounts and the status of the surety’s obligation to the debtor, an absolute rule would lead to instability in commercial transactions. Second, the court explained that because the surety business is inherently risky, sureties are likely to be more careful in their dealings with obligors. Thus, the court reasoned, it is less burdensome for sureties to guard against situations such as the one which arose in the present case. For these reasons, the court concluded that the identical source rule should only be considered one of several factors to be weighed by a court in reaching an equitable decision concerning where the funds should be directed.

In the case before it, the court noted that the contract between Healy and Warren for the Quincy project did not require that payments received from the proceeds of that contract be applied to that same contract. Moreover, the Court observed that there was no contract between Healy and Sentry requiring Healy to direct proceeds from the Quincy contract to payment for its debts issuing from that contract. The court stated that if Sentry’s bond had obligated Healy to direct the proceeds from the Quincy contract to the bonded debt, and if Warren had been aware of this arrangement, then Warren’s right to apply the payment otherwise would be doubtful. Moreover, the court observed, the record did not suggest that Warren and Healy colluded on the application of the payment or

37 Id. at 437, 433 N.E.2d at 1257.
38 Id.
39 Id. at 437-38, 433 N.E.2d at 1257 (quoting Standard Oil Co. v. Day, 161 Minn. 281, 286, 201 N.W. 410, 412 (1924)).
40 Id. at 437-38, 433 N.E.2d at 1257-58.
41 Id.
42 Id.
43 Id. at 438, 433 N.E.2d at 1257-58.
44 Id.
45 Id. at 438-39, 433 N.E.2d at 1258.
46 Id. (citing Restatement of Security § 142(d) (1941); Restatement (Second) of Contracts § 258(2) (1979)).
perpetrated a fraud upon the surety.\textsuperscript{47} The court concluded that, although under certain circumstances it may recognize a surety’s interest in the application of payments issuing from the bonded contract, in the case before it Sentry’s interest was not superior to Warren’s right to choose against which debt the payment would be applied.\textsuperscript{48}

*Warren Brothers v. Sentry Insurance* is a significant decision for two reasons. First, the court elected not to apply the identical source rule as an absolute exception to the principles which control the rights of debtors and creditors to channel payments toward the satisfaction of a given debt.\textsuperscript{49} The apparent result of the court’s decision is that sureties will have to take measures to ensure that proceeds arising from the bonded contract will be applied to the settlement of obligations associated with that same contract. The court, however, maintained that a surety’s interest in the application of such proceeds could be relevant to a court’s decision of whether the application of the funds is equitable.\textsuperscript{50} This dictum suggests that the surety’s interest may be important to a court’s determination of whether an “extreme situation” exists which requires an exception to the application of payment rules.\textsuperscript{51}

Second, although the decision apparently places an additional burden on a surety by limiting the identical source rule, it suggests measures the surety might employ to protect itself contractually from the adverse result suffered by Sentry.\textsuperscript{52} In dictum, the court suggested that where a debtor is obligated to a surety to apply a payment toward the discharge of a certain debt and the creditor is aware of this agreement, the payment must be applied to that debt.\textsuperscript{53} This dictum enables a surety to avoid the consequences suffered by Sentry by stipulating in its contract with the obligor that certain proceeds will be applied only to a certain debt and conditioning its own duties under the bonded debt upon the obligor’s informing the obligee of the obligor’s agreement with the surety to apply the specified proceeds toward the specified debt.\textsuperscript{54} Thus, by specifying to what debts the payments are to be applied and ensuring that the obligors are aware of this specification, the surety can protect itself from the debtor or creditor applying proceeds associated with the bonded debt to other unrelated debts.

\textsuperscript{47} *Id.* at 439, 433 N.E.2d at 1258.

\textsuperscript{48} *Id.* at 439-40, 433 N.E.2d at 1258.

\textsuperscript{49} *Id.* at 436-38, 433 N.E.2d at 1257-58.

\textsuperscript{50} *Id.* at 438, 433 N.E.2d at 1258.

\textsuperscript{51} See *id.* at 436, 433 N.E.2d at 1256.

\textsuperscript{52} *Id.* at 438-39, 433 N.E.2d at 1258.

\textsuperscript{53} *Id.*

\textsuperscript{54} *Id.* at 439, 433 N.E.2d at 1258.