NEGLIGENT BREACH OF K

AJAX HARDWARE MANUFACTURING CORPORATION, Plaintiff-Appellant,

v.

INDUSTRIAL PLANTS CORPORATION, Defendant-Appellee.

No. 32, Docket 75–7663.

United States Court of Appeals, Second Circuit.

Argued Oct. 21, 1976.

Decided July 13, 1977.

Rehearing Denied August 16, 1977.

On appeal in a diversity action to recover damages for breach of contract, negligence and fraud (1) from an order entered after the first jury trial in the Southern District of New York, Richard H. Levet, J., denying plaintiff's motion for judgment n. o. v. or a new trial limited to the issue of damages, but granting on the ground of an improper compromise verdict defendant's motion for a new trial on all issues; and (2) from a judgment dismissing the complaint by the jury at the second trial before Judge Levet, the Court of Appeals, Timbers, Circuit Judge, held (i) that a new trial on all issues was properly ordered after the first trial; but (ii) that at the second trial the court erred in dismissing plaintiff's claims for negligence and fraud and in restricting the scope of its claim for breach of contract.

Reversed and remanded for new trial.

Oakes, Circuit Judge, filed a concurring opinion.

1. **Federal Civil Procedure** ⇐2337

Inference of a jury compromise extends from an inconsistency between the verdict and the facts adduced at trial, and such an inconsistency is most clearly apparent when the plaintiff sues for a liquidated sum, when the only defense is denial of the obligation, and when the verdict for plaintiff is in an amount substantially less than that claimed.

2. **Federal Civil Procedure** ⇐2337, 2344

Order granting a new trial, after first trial, could not be sustained on the ground upon which the district court granted it, namely, an improper compromise verdict, but the order could be sustained on a different ground, namely, inadequacy of the verdict which was well below the amount agreed to represent liquidated damages.

3. **Federal Civil Procedure** ⇐2315

Since, in light of the conflicting inferences from the record of first trial, it could not be said that there "clearly" was no relationship between the jury's finding of liability and its inadequate damages award, and bearing in mind also the district court's discretion in choosing between a partial and a complete new trial, the order granting a new trial on all issues was warranted by the reasonable possibility of a compromise verdict.

4. **Contracts** ⇐312(1), 352(1)
Negligence ⇐1, 136(14)

Negligent performance of a contract may give rise to a claim sounding in tort as well as one for breach of contract; the two claims may be submitted as alternatives to the jury, as a matter of both New York substantive law and federal procedural law. Fed.Rules Civ.Proc. rule 8(e)(2), 28 U.S.C.A.

5. **Federal Civil Procedure** ⇐2155

In suit by one company against another, seeking damages for breach of contract, negligence and fraud arising from defendant's performance under a contract to appraise certain machinery which secured plaintiff's guarantee of a loan extended to the machinery owner, dismissal of plaintiff's negligence claim was improper, as it did not merge with the breach of contract claim, as there was testimony from which jury could have found that defendant contracted to make an appraisal of the machinery's forced sale value as well as fair market value, and as there was evidence from which jury could have further found both breach of a duty of care and a causal connection between it and plaintiff's injury without having to rely on fair market value figures.

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6. Fraud ⇐58(1)

On its fraud claim, plaintiff had the burden of producing "clear and convincing" evidence.

7. Fraud ⇐50

New York imposes a burden of proof for fraud far more demanding than that for breach of contract and negligence.

8. Fraud ⇐64(1)

In suit by one company against another, seeking damages for breach of contract, negligence and fraud arising from defendant's performance under a contract to appraise certain machinery which secured plaintiff's guarantee of a loan extended to the machinery owner, dismissal of plaintiff's fraud claim was improper, as the jury could have found that certain false statements were made by defendant, including a statement that it had applied its independent professional judgment to the job, that the statements were material, and that plaintiff relied on them to its detriment.

9. Contracts ⇐312(1)

In suit by one company against another, seeking damages for breach of contract, negligence and fraud arising from defendant's performance under a contract to appraise certain machinery for plaintiff, no legal infirmity compelled, in respect to plaintiff's breach of contract claim, exclusion of its theory that defendant had breached a contract whose terms left the type of appraisal to its professional judgment, and that defendant, by its negligent performance, had breached a contract for a fair market value appraisal.

10. Federal Civil Procedure ⇐2236

While the trial court has broad discretion in framing interrogatories for special verdicts, this discretion does not warrant withdrawing from the jury valid theories of recovery upon which a plaintiff has produced sufficient evidence. Fed.Rules Civ.Proc. rule 49(a), 28 U.S.C.A.

Murray Gartner, New York City (Edward A. Brill, and Poletti Freidin Prashker Feldman & Gartner, New York City, on the brief), for plaintiff-appellant Ajax Hardware Mfg. Corp.

Arnold C. Stream, New York City (Robert G. Smith, and Monasch Chazen & Stream, New York City, on the brief), for defendant-appellee Industrial Plants Corp.

Before SMITH, OAKES and TIMBERS, Circuit Judges.

TIMBERS, Circuit Judge:

In this diversity action plaintiff Ajax Hardware Manufacturing Corporation (Ajax) sought to recover from defendant Industrial Plants Corporation (Industrial) damages for breach of contract, negligence and fraud arising from Industrial's performance under a contract to appraise certain machinery for Ajax.

There have been two jury trials in the Southern District of New York before Richard H. Levet, *District Judge*. Ajax appeals (1) from an order entered after the first trial denying its motion for judgment n. o. v. or a new trial limited to the issue of damages, but granting on the ground of an improper compromise verdict Industrial's motion for a new trial on all issues; and (2) from a judgment dismissing the complaint entered upon a verdict for Industrial returned at the second trial.

We hold that a new trial on all issues was properly ordered after the first trial, but that at the second trial the court erred in dismissing Ajax's claims for negligence and fraud and in restricting the scope of its claim for breach of contract. Accordingly, we reverse and remand for a third trial.

I. FACTS

In August 1966 Ajax was negotiating with the United States government for a $3,500,000 contract to manufacture time fuses. In order to perform the contract Ajax required a subcontractor which had light precision watchmaking equipment. Time & Micro Instruments, Inc. (T&M) had such a facility which was lying idle. Ajax, contemplating either a subcontractor or a joint venture, entered into negotiations

with T&M. Since the latter could not participate without an infusion of cash, the deal was to include a $350,000 loan from an institutional lender to T&M. Ajax, secured by the machinery at the T&M plant, was to guarantee T&M's obligation.

In anticipation of a commitment to guarantee the loan to T&M, Ajax engaged Industrial to appraise the machinery at the T&M plant. Ajax acted through its Vice President, Howard Klein. On August 12 Klein concluded an oral agreement with Industrial's Vice President, Jesse Thaler. The terms of this agreement give rise to the principal factual question in the case. According to Klein, he informed Thaler that Ajax intended to guarantee a loan and wanted to know whether the T&M machinery would be adequate security. Klein testified that he told Thaler that Ajax "wanted to know the forced liquidation value of the equipment in case there was a default on the loan. . . ." According to Thaler, Klein requested an appraisal based on the market value of the plant in place, intact and ready for operation—not based on the forced liquidation value of the individual machines.

Thaler inspected the T&M plant on August 15 and telephoned a preliminary evaluation to Klein. According to Klein, Thaler reported fair market value of approximately $900,000 and a forced liquidation value of $500,000. Klein requested a confirming telegram which Thaler sent on August 17. The telegram stated that the machinery and equipment had a "fair market value" of $919,072 and an additional "in place value" of $137,806, for a "total in place value" of the plant of $1,056,878. The telegram further stated that "[w]hile it is difficult to project market values for the next two years it is inconceivable that the value of this plant would be less than 60 percent of the appraised figure." The telegram further stated that the machinery was of Swiss manufacture and difficult to obtain in this country; that delivery of equivalent machinery required two or three years; that manufacturers would pay premiums to procure an existing plant; and that prices on the general "machinery market" were high at that time.

Industrial sent a formal appraisal report and letter to Ajax on August 19 which reiterated the substance of its telegram of August 17 in all material respects. The appraisal was received by Ajax on August 22. It set forth a list of each piece of machinery with an individual dollar value for each. The sum of these individual valuations was substantially in accord with the figures stated in the August 17 telegram.

On August 18 Ajax signed a commitment to obtain and guarantee a $270,000 loan to T&M. Under the agreement Ajax had until September 9 to perform or to cancel and pay a $20,000 penalty. Ajax performed, secured by the machinery appraised by Industrial. T&M later defaulted. A subsequent "forced sale" of the plant equipment at auction netted only $144,000. As a result, Ajax had to repay the lender $163,270.70, the unpaid balance of the $270,000 T&M loan after application of the $144,000 proceeds from the sale. Ajax's explanation for the discrepancy between the $144,000 figure and the values reported by Industrial is that in 1966 the watchmaking industry in this country was moribund; in fact no market existed for the T&M machinery.

Ajax commenced the instant diversity action on May 5, 1969 against Industrial to recover the resulting $161,895.75 deficiency on its T&M guaranty, i. e. $163,270.70 less certain adjustments. Ajax alleged breach of contract, negligence and fraud on the part of Industrial in rendering its appraisal.

II. FIRST TRIAL

The first trial began on April 23, 1975 and was concluded on May 1, 1975 when the jury returned a $70,000 verdict in favor of Ajax on its negligence claim and a verdict against Ajax on its contract and fraud claims. Ajax made a motion to set aside the $70,000 verdict in its favor, requesting either that judgment be entered n. o. v. in amount of $161,895.75 or that there be granted a new trial limited to the issue of damages. Industrial moved that the entire verdict be set aside and for a new trial on

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all issues on the alternative grounds that the $70,000 verdict was against the weight of the evidence or an improper compromise between liability and damages. Both parties argued that if Ajax was entitled to damages at all it was entitled to the liquidated sum of $161,895.75. Judge Levet, focusing on the jury's return of a verdict which fell substantially below that liquidated sum, held that the verdict was a compromise one and granted Industrial's motion for a new trial on all issues.

[1] The facts as stated present the very situation out of which an inference of a compromise verdict most readily arises. As we said in *Maher v. Isthmian Steamship Co.*, 253 F.2d 414, 416–17 (2 Cir. 1958), the inference of a compromise stems from an inconsistency between the verdict and the facts adduced at trial, and "[s]uch an inconsistency is most clearly apparent when the plaintiff sues for a liquidated sum . . . where the only defense is denial of the obligation, and the verdict for the plaintiff is in an amount substantially less than that claimed." But a compromise on the issue of liability is not the only reasonable explanation for the instant $70,000 verdict. Judge Levet instructed the jury on compensatory damages as follows: "If you should find that the plaintiff is entitled to compensatory damages, your award *cannot exceed* the total sum claimed for such damages, which is $161,895.75." (emphasis added). The jury might well have understood this to mean that it was permissible to award any sum that did not exceed the stated limit.[1]

[2] Ajax contends that the district court's finding of a compromise verdict must be reviewed in the light of the *Maher* formulation: "[T]he record itself viewed in its entirety must clearly demonstrate the compromise character of the verdict . . . ." 253 F.2d at 419. See also *Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 511 F.2d 839, 846 (4 Cir. 1975). Recognizing the correctness of the *Maher* rule in an appropriate case, we do not believe that this is such a case—for the simple reason that such a demonstration on the entire record is not feasible here. While a compromise may have occurred, there is an equally reasonable and perhaps even better explanation which involves no jury misconduct. In short, we hold that the new trial cannot be sustained on the ground upon which the district court granted it.

The order for a new trial, however, can be sustained on a different ground. *Maher* and its successor, *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2 Cir.), *cert. denied*, 359 U.S. 1000 (1959), were cases in which it was contended that juror misconduct had tainted otherwise legally sustainable damage awards. Here, however, the verdict might well have been set aside on the ground of inadequacy. In view of the parties' agreement that the damages were liquidated and absent any support in the record for the $70,000 award, failure to have set aside the verdict would have been an abuse of discretion. See *Caskey v. Village of Wayland*, 375 F.2d 1004, 1007–08 (2 Cir. 1967). The issue here in our view is the propriety of the district court's decision between the three alternatives urged by the parties in their motions—judgment n. o. v.

1. Ajax contends that any inference of a compromise verdict is negated by the sequence of the jury's deliberations.

After 4 hours of deliberations, the jury sent a note to Judge Levet stating that it could not reach agreement on the contract claim but had reached agreement on fraud, negligence and damages. Judge Levet reported to counsel that the jury was unable to reach agreement, but did not inform counsel that agreement had been reached on 4 of the 5 special verdict questions. He then instructed the jury to continue its deliberations, adding that he did not want to see a mistrial. The jury returned its verdict 15 minutes later.

We fail to see how the jury's inability to agree on the contract claim until 15 minutes before returning its verdict conclusively rebuts the inference of a compromise. Ajax argues that, if a compromise had occurred at the earlier point when the jury decided Industrial was liable for negligence, it hardly would have continued deliberating on the contract claim. While this is not an unreasonable inference, others are equally permissible—including inferences of one or more compromises. As Judge Medina observed in *Maher v. Isthmian Steamship Co.*, *supra*, 253 F.2d at 419, "one inference is as good as another" in this kind of situation.

in the liquidated sum of $161,895.75, a new trial limited to the issue of damages, or a new trial on all issues.

A new trial limited to the issue of damages requested by Ajax would have been a proper remedy only if the district court had been satisfied that the jury properly determined the issue of liability. See 6A Moore's Federal Practice ¶ 59.06, at 59–80 to 59–83 (2d ed. 1974); *Scheurholz v. Roach*, 58 F.2d 32, 33–34 (4 Cir.), *cert. denied*, 287 U.S. 623 (1932).[2] As with any other jury impropriety, evidence of a compromise verdict must be considered in making this determination. For example, in *Hatfield v. Seaboard Air Line R. Co.*, 396 F.2d 721 (5 Cir. 1968), a jury had returned a one dollar verdict for the plaintiff despite uncontroverted evidence of substantial physical injuries. The Fifth Circuit set aside the verdict for inadequacy and ordered a new trial on all issues, pointing to "some kind of jury impropriety" and mentioning a compromise as a possibility. The court stated that the case was not one where an "erroneous damage finding *clearly had no effect* on the findings of liability." (emphasis added). 396 F.2d at 724.

[3] Although the facts in the instant case are not as extreme as those in *Hatfield*, the conflicting inferences from the record make this a case in which it cannot be said that there "clearly" was no relationship between the jury's finding of liability and the inadequate damage award. Bearing in mind the district court's discretion in choosing between a partial and a complete new trial, 6A Moore's Federal Practice, *supra* ¶ 59.06, at 59–80, we hold that the reasonable possibility of a compromise verdict warranted a new trial on all issues.[3]

2. Nor can the questions of liability and damages be so interwoven that a second jury could not fairly consider damages alone. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931). In the instant case liability and damages were readily severable questions.

3. Cf. *Edwards v. Sears, Roebuck and Co.*, 512 F.2d 276, 282–83 (5 Cir. 1975); 6A Moore's Federal Practice, *supra*, ¶ 59.05[3], at 59–59.

III. SECOND TRIAL

(a) *Negligence and Fraud Claims*

At the conclusion of Ajax's case at the second trial on October 23, 1975, the district court, on motions for a directed verdict by Industrial, dismissed Ajax's negligence and fraud claims, holding that the negligence claim was "completely merged in the alleged breach of contract" and that the evidence of fraud was insufficient. We hold that the dismissal of these claims was erroneous.

[4] Negligent performance of a contract may give rise to a claim sounding in tort as well as one for breach of contract. See Prosser, The Law of Torts § 92 (4th ed. 1971); Restatement (Second) of Torts §§ 323, 324A (1965). The two claims may be submitted as alternatives to the jury, as a matter of both New York substantive law, *Victorson v. Bock Laundry Machine Co.*, 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975), and federal procedural law. Fed.R.Civ.P. 8(e)(2).

[5] Industrial contends that regardless of any merger of claims Ajax failed to sustain its burden of proving negligence. It argues that a fair market value appraisal was made; that Ajax knew that a fair market value appraisal had been received; and therefore that Ajax could not possibly have relied upon the appraisal in committing itself to the T&M guaranty. Industrial also emphasizes Ajax's failure to prove the individual figures in the appraisal to have been erroneous reflections of fair market value.

This argument, which more appropriately should be addressed to a jury, ignores the evidence Ajax did adduce. On the basis of

While this is not the ground upon which Judge Levet granted a new trial, Industrial made it the basis for one of its motions and argued it on appeal. As the Supreme Court noted in *Dandridge v. Williams*, 397 U.S. 471, 475 n. 6 (1970): "The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court."

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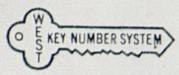
by what petitioner terms it was forced to vilify and publish at its own expense the respondent's unproved accusations.[7] No absence of due process exists[8] and the Act does not amount to a bill of attainder.[9]

The Petition for Review is DENIED and DISMISSED.



UNITED TELECOMMUNICATIONS, INC., a Kansas Corporation, Plaintiff-Appellee,

v.

AMERICAN TELEVISION AND COMMUNICATIONS CORPORATION, a Delaware Corporation, Defendant-Appellant.

No. 75-1462.

United States Court of Appeals, Tenth Circuit.

Argued and Submitted March 23, 1976.

Decided June 16, 1976.

Telephone company which exchanged its interest in a cable television company for shares of defendant corporation brought action for breach of contract and breach of warranty in that defendant failed to use its best efforts to register its shares. The United States District Court for the District of Colorado, Richard P. Matsch, J., entered judgment for plaintiff and defendant appealed. The Court of Appeals, William E. Doyle, Circuit Judge, held that interest costs or borrowing costs or expenses which plaintiff paid as result of failure of defendant to use its best efforts to bring about registration did not constitute prejudgment interest barred by Colorado law; that circumstances that effort of defendant to bring about merger with another corporation made it unfeasible for defendant to proceed with the registration warranted submission of count charging violation of paragraph of agreement stating that the carrying out of the agreement would not conflict with the other agreement to which defendant was a party; that trial court properly excluded expert opinion as to the meaning of "best efforts" where expert's definition was not substantially different from the common meaning of the words; and that trial court properly excluded letters which were written after the happenings giving rise to the suit and which were offered to show defendant's good faith.

Affirmed.

1. Interest ⇐39(2)

Claim of plaintiff which exchanged its interest in a company for shares of defendant corporation that as a result of breach of defendant's obligation to use its best efforts to obtain registration of its shares plaintiff incurred interest costs or borrowing costs was not a claim for "prejudgment interest" barred by Colorado statute. C.R.S. '73, 5-12-102.

See publication Words and Phrases for other judicial constructions and definitions.

2. Interest ⇐3

Under Colorado law, the judicial award of interest is governed by statute. C.R.S. '73, 5-12-102.

3. Contracts ⇐325

Under Colorado law, contractual rights are governed by the place where the contract was made and the place designated by the parties as governing.

7. Requirement that employer post the citation in a conspicuous place to inform employees of the protections and obligations of the law does not violate any constitutional right. Cf. *Lake Butler v. Secretary*, supra.

8. See *Beall Construction Co. v. OSHRC*, 507 F.2d 1041, 1044 (8th Cir.), and *McLean Trucking Co. v. OSHRC*, 503 F.2d 8 (4th Cir.); *Clarkson Construction Co. v. OSHRC*, 531 F.2d 451 (10th Cir. No. 75-1070, filed January 21, 1976.

9. Bill of attainder and ex post facto laws apply to criminal acts and have no application here. *Johannesen v. U. S.*, 225 U.S. 227, 242, 32 S.Ct. 613, 56 L.Ed. 1066.

4. Damages ⇐45

Under North Carolina law, borrowing costs and expenses may be recovered as an element of damages for breach of contract.

5. Courts ⇐376

In diversity case, federal law governs in selection of the standard applicable to the determination of sufficiency of the evidence.

6. Federal Civil Procedure ⇐2127

Evaluation of evidence must be made in light most favorable to party against whom motion for directed verdict is made.

7. Exchange of Property ⇐13(4)

Evidence in action by plaintiff which exchanged its interest in a company for defendant's shares of stock warranted submission of count charging that defendant's agreement to merge with another company violated paragraph of agreement that the carrying out of the agreement would not conflict with any agreement to which defendant was a party.

8. Courts ⇐376

In diversity action tried prior to the effective date of the federal rules of evidence, reviewing court would look to state law or the rules of equity of the federal courts for the standards governing the admissibility of expert testimony.

9. Evidence ⇐507

While expert testimony is warranted where the facts are such that inexperienced persons are likely to prove incapable of forming a correct judgment without expert assistance, expert testimony is not necessary where the matter in issue is such that the jury can be expected to draw the correct inferences from the facts presented.

10. Courts ⇐406.5(18)
Evidence ⇐546

The determination of competency and admissibility of expert testimony is within the discretion of the trial court and is reviewable only for abuse of that discretion.

11. Courts ⇐406.6(9)

Exclusion of expert testimony defining the phrase "best efforts" as used in contract pursuant to which defendant, which exchanged its shares for plaintiff's interest in a company, agreed to use its best efforts to register its shares, was not prejudicial error where the expert's definition was not substantially different from the common meaning of the words.

12. Evidence ⇐506

Expert testimony is not excludable because it bears on the ultimate issue.

13. Courts ⇐406.6(9)

Error in specifying grounds for exclusion of evidence is harmless where the evidence is excludable on some other ground.

14. Evidence ⇐271(19)

Letters written after a breach and after a party has become aware that litigation is imminent are self-serving and inadmissible.

15. Evidence ⇐271(19)

In breach of contract action, it was within province of trial court to exclude letters which were written by defendant's general counsel after the happenings giving rise to the suit.

16. Exchange of Property ⇐13(4)

Instructions in action for breach of contract by plaintiff which exchanged its interest in company for shares of defendant corporation which defendant agreed to use its best efforts to register adequately defined "best efforts."

17. Federal Civil Procedure ⇐2174

It was unnecessary to give instructions unsupported by the evidence.

18. Damages ⇐6

Difficulties in assessing damages do not preclude an injured party from recovering compensation.

David M. Ebel, of Davis, Graham & Stubbs, Denver, Colo. (Robert H. Harry and Alan M. Loeb, of Davis, Graham & Stubbs, Denver, Colo., on the brief), for plaintiff-appellee.

Harry L. Hobson, of Holland & Hart, Denver, Colo. (Robert T. Connery and Stephen L. Pepper, of Holland & Hart, Denver, Colo., of the brief), for defendant-appellant.

Before BREITENSTEIN, McWILLIAMS and DOYLE, Circuit Judges.

WILLIAM E. DOYLE, Circuit Judge.

This is a diversity action in which the appellant was defendant in the trial court and suffered the award of a judgment based on a jury verdict in the amount of $2,021,500. The action brought by plaintiff-appellee was for a breach of contract and breach of warranty. The case was filed December 5, 1973 and was tried in March 1975.

Involved here is the exchange of an interest in Jefferson-Carolina Corp., a cable television company, by United Telecommunications, Inc. ("United") for 175,000 shares of American Television & Communications Corp. ("ATC").

United is said to be the third largest telephone company in the United States. ATC is a Delaware corporation based in Denver and the operator of cable television systems. The purchase agreement between United and ATC was signed on Februry 22, 1972. It outlined the basic terms, that is, that United would receive 175,000 unregistered shares of ATC. The agreement also gave United the right to demand registration of these shares any time after the transaction was closed. Upon the making of such a call by United, ATC undertook to use its "best efforts" to obtain registration by preparing and filing a registration statement and by causing the statement to become and remain effective. In addition, ATC represented and warranted that the execution and carrying out of the agreement and compliance with the provisions of it by ATC would not conflict with or result in any breach of any of the terms, conditions or provisions of any agreement to which ATC was a party or by which it was bound or affected. Further provisions in the agreement were that all ATC representations and warranties would be true and correct as of the closing and would survive the closing. The closing occurred on August 16, 1972, in Greensboro, North Carolina. Immediately following the closing, United called for registration of its ATC shares.

In May 1972, ATC entered merger negotiations with Cox Cable Communications, Inc., and by July 19, 1972, the two companies had reached an agreement on the merger, which agreement was announced. United was informed of it on July 19, 1972, at which time it was told that a representative from Cox Cable ("Cox") would be present at a meeting scheduled for July 20. In an effort to secure the registration of the shares and also to gain approval for the proposed merger with Cox, ATC submitted the two propositions together to the Securities and Exchange Commission and did so on September 29, 1972. Due to the fact that the registration statement did not include the consents of the Cox nominees for board members of the surviving corporation and did not request SEC waiver, the registration was not approved. Subsequently, ATC sought to obtain the consents of the nominees, but was unable to get them. A further problem with the registration statement was that it needed to include certain information about Cox Cable for the accuracy of which ATC, its officers, directors and an underwriter would be held liable. Cox, however, refused ATC's request for indemnification.

At a meeting which was held on November 8, 1972, with Cox, United and ATC present, ATC said that it had decided to postpone registration until the Cox merger was completed. This decision had actually been reached earlier on November 2. At the meeting Cox announced that the merger could not proceed if the registration went forward first. United stated its position that it would not acquiesce to the postponement of the registration. The merger between Cox Cable and ATC was substantially completed on December 15, 1972, at which time United voted for the merger. It was, however, thwarted by a suit filed by the Department of Justice on antitrust grounds. The registration statement never became effective and was withdrawn by the SEC at ATC's request on April 6, 1973. In conjunction with the withdrawal of the reg-

istration statement the price of ATC stock declined from $45.75 on November 8, 1972 to $34.50 on April 6, 1973 and finally to $7.75 as of the time of the filing of this action on December 3, 1973.

The essence of this action by United is that ATC failed to use its best efforts to register United's ATC shares and, secondly, it was alleged that ATC's simultaneous merger with Cox was in conflict with its undertaking to register the stock. The claim was for $9.6 million in damages. However, the jury awarded a lesser amount, $2,021,500.

ATC's appeal is based on the following contentions:

1. That it was error for the court to charge the jury that United was entitled to recover interest costs or borrowing costs or expenses which allegedly it paid as a result of failure of ATC to use its best efforts to bring about the registration.

2. The alleged error of the court in failing to direct a verdict on the issue of ATC's conflict arising from the effort to bring about the merger and the registration at the same time.

3. The exclusion of expert testimony tendered by ATC.

4. The refusal of the trial court to instruct on waiver and ratification and an inadequate instruction on estoppel.

5. The alleged error in failing to instruct on "best efforts."

6. The error of the court in failing to give instructions which were specific with respect to damages.

I.

WHETHER UNITED WAS ENTITLED TO RECOVER INTEREST AS DAMAGES

At the trial United presented testimony which showed the amount of its borrowing costs and the nexus between these costs and the breach of ATC. United also presented testimony showing that ATC was aware before entering into the agreement that United had planned to convert the ATC stock to cash and would use that cash to reduce its short-term debts. Evidence was also offered to show that parties were aware that registration was necessary in order to have a successful public sale of the stock and that they also were aware that a private sale could be obtained only at a significant discount. For this element of damage United claimed the sum of $1.6 million.

The trial court explained to the jury that the plaintiff was claiming that it suffered an additional direct loss "by being unable to reduce its short-term debt by the amount of money which it would have received on the sale to the public of the registered shares of ATC stock." The trial court also explained that the claim was that the cost of continued borrowing was a part of actual damages from the breach. The court then continued:

> "As to this claim, you must find from a preponderance of the evidence that this was a natural and probable consequence of the claimed breach of contract by the defendant and also that at the time the parties entered into the contract, the defendant reasonably could have anticipated from the facts and circumstances which it then knew or should have known, that these damages would probably be incurred by the plaintiff if the defendant breached the contract."

ATC maintains that this instruction was erroneous. Its argument is that the instruction allowed United to recover prejudgment interest, and that applicable Colorado law bars such interest. United responds that this is not prejudgment interest in that it is not the kind of interest contemplated by the Colorado statutes and, instead, it is, according to United, borrowing costs which are recoverable like any other element of contract damage.

[1, 2] In general, we agree with the United argument and with the position taken by the trial court that interest as an item of damage or loss related to the substantive claim differs from interest meas-

ured by a percentage of the judgment.[1] In our view the kind of interest that was here awarded is not barred or limited by the Colorado interest statute and the Colorado cases. Here our concern is with United's borrowing costs and expenses. The Colorado statute does not deal with interest charges which arise from an independent debt owed by the plaintiff to a third party. So even on the assumption that the law of Colorado governs, it would not be the *Hays v. Arbuckle, supra*, line of cases together with the interest statute which would apply.

Had United claimed damages of $8 million for lost market value stemming from the stock not being registered together with interest measured by a percentage of that loss, the claim would have been one for prejudgment interest subject to the limitations of Colorado law. When United claims, however, that it is entitled to recover from ATC expenses which resulted from interest which it was obligated to pay on money which it was required to borrow as a result of ATC's unwarranted delays and manipulations, a wholly different theory is presented. This latter type of interest is not regulated by the Colorado interest statute.

[3] So, having determined that the substantive rights here asserted by United are governed by general damage principles, we need not pursue the *Hays v. Arbuckle, supra*, doctrine as to the choice of law in the area of prejudgment interest. Contractual rights such as we are here considering are under Colorado law governed by the place where the contract was made and the place designated by the parties as governing. *See Western Enterprises, Inc. v. Robo Sales, Inc.*, 28 Colo.App. 157, 470 P.2d 931 (1970).[2] In this case, that is North Carolina.

[4] Finally, we consider whether the North Carolina court would allow recovery of borrowing costs and expenses as an element of damages. We conclude that it would and does. North Carolina recognizes that a party injured by a breach of contract has a right to be compensated "insofar as this can be done by money." Also, "he is entitled to be placed in the same position he would have occupied if the contract had been performed." *Perfecting Service Co. v. Produce Dev. & Sales Co.*, 259 N.C. 400, 131 S.E.2d 9, 21 (1963). *Accord, Tillis v. Calvine Cotton Mills, Inc.*, 251 N.C. 359, 111 S.E.2d 606 (1959). Indeed, North Carolina has specifically endorsed the doctrine of *Hadley v. Baxendale*, 9 Ex. 341 (1854). *See Perkins v. Langdon*, 237 N.C. 159, 74 S.E.2d 634, 643 (N.C.1953), holding that a defendant is liable for damages based upon proximate cause and foreseeability, including damages flowing from "special circumstances known and communicated." *See Perkins, supra*, 237 N.C. at 170, 74 S.E.2d at 643; *Tillis, supra; Chesson v. Kieckhefer Container Co.*, 215 N.C. 112, 1 S.E.2d 357 (1939); *Industrial Circuits Co. v. Terminal Comm., Inc.*, 26 N.C.App. 536, 216 S.E.2d 919 (N.C. App.1975). The instruction given by the court in which foreseeability is the guide is in accord with North Carolina law on the subject. None of the cases cited are closely analogous to the present case with the pos-

1. ATC has made a somewhat elaborate and well structured argument based on the applicability of the limitations of the Colorado interest statute. 1973 C.R.S. 5-12-102. *Hays v. Arbuckle*, 72 Colo. 328, 211 P. 101 (1922) is relied on for the proposition that the law of the forum applies to the award of interest. United also cites *North Drive-In Theatre Corp. v. Park-in Theatres, Inc.*, 248 F.2d 232 (10th Cir. 1957), wherein this court took an expansive view of *Hays*. *Cf. Stemple v. Phillips Petroleum Co.*, 430 F.2d 178 (10th Cir. 1970), and *see also Anderson-Thompson, Inc. v. Logan Grain Co.*, 238 F.2d 598, 602 (10th Cir. 1956). Unquestionably under Colorado law the judicial award of interest is governed by the statute. It does not come from common law. *See Hendrie v. Board of County Commissioners*, 153 Colo. 432, 442, 387 P.2d 266, 271 (1963). It is idle, however, for us to speculate on whether Colorado allows recovery of prejudgment interest on an unliquidated sum in a breach of contract action since no such claim is made here.

2. *See also Denver Truck Exch. v. Perryman*, 134 Colo. 586, 307 P.2d 805 (1957); *Gossard v. Gossard*, 149 F.2d 111 (10th Cir. 1945); *Baxter v. Beckwith*, 25 Colo.App. 322, 137 P. 901 (1913); Ehrenzweig, Conflict of Laws 467-68 (1962).

sible exception of *Gulf States Creosoting Co. v. Loving*, 120 F.2d 195 (4th Cir. 1941).

Cases from other jurisdictions do give credence to the proposition here approved. *See New Amsterdam Cas. Co. v. Mitchell*, 325 F.2d 474 (5th Cir. 1963) (additional interest on construction loan because of builder's delay); *Thompson v. Hanson*, 6 Wash. App. 1, 491 P.2d 1065 (1971) (semble); *Herbert & Brooner Construction Co. v. Golden*, 499 S.W.2d 541 (Mo.App.1973) (semble); *Repinski v. Clintonville Federal S&L Ass'n*, 49 Wis.2d 53, 181 N.W.2d 351 (1970) (recovery of additional interest charge because of S&L's promise to loan money at favorable rates.) [3]

II.

WHETHER SUBMISSION OF COUNT II TO THE JURY WAS ERROR

Count II of the complaint alleged that ATC's July 19, 1972 agreement (in principle) to merge with Cox Cable was basically inconsistent with and specifically a breach of paragraph 4(i) of the February 22, 1972 Purchase Agreement between ATC and United.

ATC, of course, maintains that there was a dearth of evidence to support Count II and hence that its motion for a directed verdict ought to have been granted. The provision which United says was violated is paragraph 4(i) of the February 22, 1972 agreement between ATC and United. Paragraph 4(i) states in part as follows:

> The execution and carrying-out of this Agreement and compliance with the provisions hereof by ATC will not conflict with or result in any breach of the terms, conditions, or provisions of, or constitute default under . . . any . . . agreement . . . or other instrument to which ATC or its subsidiaries is a party or by which any of them is bound or affected.

ATC's position is that there is no direct evidence supporting that there was a conflict between the ATC/United Purchase Agreement and the Cox merger. The argument contends that as of July 19 United did not own any ATC shares and that it (ATC) did not know when United might exercise its right to call for registration. They also say that the refusal of Cox to cooperate with the registration was unforeseeable and unexpected.

[5, 6] This being a diversity case, federal law governs in selection of the standard applicable to the determination of sufficiency of the evidence. *Palmer v. Ford Motor Company*, 498 F.2d 952 (10th Cir. 1974); *Kiner v. Northcutt*, 424 F.2d 222 (10th Cir. 1970). Our court's rule is that a directed verdict is to be granted "only where the evidence and all the inferences to be drawn therefrom are so patent that minds of reasonable men could not differ as to the conclusions to be drawn therefrom." *Taylor v. National Trailer Convoy, Inc.*, 433 F.2d 569, 571–72 (10th Cir. 1970); *Symons v. Mueller Company*, 493 F.2d 972 (10th Cir. 1974). The evaluation must be in the light most favorable to the party against whom the motion is made. *Symons v. Mueller Company, supra.*

We disagree with ATC's argument that the evidence in this case is all one way and susceptible of no reasonable inferences which sustain the position of United (against whom the motion was made). *Palmer v. Ford Motor Company*, 498 F.2d 952, 953 (10th Cir. 1974).

It is not surprising that there is a lack of direct evidence on this question. This does not mean, however, that there is no evi-

3. *See also Carl Beasley Ford, Inc. v. Burroughs Corp.*, 361 F.Supp. 325 (E.D.Pa.1973), *aff'd in unpub. op.*, 493 F.2d 1400 (3rd Cir. 1974) (upon revocation of acceptance of defective computer which failed to work during whole year when in plaintiff's possession, plaintiff may recover as consequential damages interest on third party loan that defendant knew it would take out to finance purchase). *Cf. Weiner v. 222 East Chestnut Street Corp.*, 303 F.2d 630 (7th Cir. 1962) (upon failure of defendant's appeal from zoning variance allowed plaintiff, plaintiff allowed to recover as part of supersedeas damages the increased interest costs resulting from delay caused by the appeal).

dence since the circumstances plainly demonstrate the existence of an ATC conflict between the Cox merger and the stock registration agreement. ATC and Cox entered into an agreement in principle to merge; Cox, being interested in merger and only secondarily interested in registration of stock, refused to cooperate with the registration. We disagree with ATC's argument that this was not to be anticipated. The fact that a conflict developed is strong evidence that the two subjects were in some ways opposed. We also disagree with ATC's argument that it was not required to anticipate that there would be no demand for registration immediately after the closing, whereby it was not required to obtain a commitment from Cox ahead of time to cooperate in the registration. The registration was of primary importance to United and so it could not have been surprising that United called for registration immediately.

[7] The evidence also shows that ATC postponed the registration effort until the merger question was resolved. Again this demonstrated a basic conflict between the merger and registration. From these facts the jury was at liberty to infer that the merger did come into conflict with the purchase agreement as shown by the fact that it created circumstances which made it unfeasible for ATC to proceed with the registration.

In summary, viewing the facts most favorably to United, the agreement to merge set in motion a chain of events which made registration incompatible with merger. Thus, it could be considered in conflict with the purchase agreement. These circumstances sustained United's claim sufficiently to justify submission of the cause to the jury for it to determine whether the merger agreement in principle was not in conflict with the purchase agreement. The result we reach is that the court did not abuse its discretion in denying the motion.

III.

"BEST EFFORTS" TO PREPARE AND FILE . . . A REGISTRATION STATEMENT

Paragraph 14(a) of the February 22, 1972 Purchase Agreement is the provision in which appellant ATC agreed "to use its best efforts to prepare and file . . . a Registration Statement" and to "use its best efforts to cause such Registration Statement to become and remain effective" upon the written demand of United. ATC here argues that these words "best efforts" have a specialized or technical meaning, one in which expert assistance was necessary to jury understanding. Specifically, ATC's argument is that the trial judge erroneously excluded evidence regarding the meaning of "best efforts" and that the trial judge should have instructed the jury in greater detail on the meaning of the term.

A. *Exclusion of Opinion Evidence*

Expert testimony regarding the meaning of "best efforts" in registration covenants was offered by ATC. It sought to present the testimony through its expert witness, Francis M. Wheat, a lawyer who had been an SEC Commissioner from 1964 through 1969. Mr. Wheat was allowed to testify as to the meaning of "best efforts" in underwriting agreements. The trial court, in response to defendant's objections, excluded evidence regarding the meaning of the phrase in registration covenants.[4] ATC says that since the case involved the "complexities" and "intricate interaction and effect" of a merger upon an impending registration, the jury required the assistance of an expert in determining whether or not ATC fulfilled its "best efforts" obligation.

[8–10] Since this diversity action was tried prior to the effective date of the newly-promulgated Federal Rules of Evidence, we look to Colorado law or the rules of equity of the federal courts for the standards governing the admissibility of expert

4. In addition, the court ruled that it would sustain objections to questions whether or not ATC had used its best efforts, and it excluded questions intended to elicit illustrations of the meaning of "best efforts" from Mr. Wheat's own experience.

testimony. 5 J. Moore, Federal Practice, paragraph 43.02(4). Expert testimony is warranted "where the facts are such that inexperienced persons are likely to prove incapable of forming a correct judgment" without expert assistance. *City of Pueblo v. Ratliff*, 137 Colo. 468, 327 P.2d 270, 274 (1958); *Clifton v. Mangum*, 366 F.2d 250 (10th Cir. 1966). On the other hand, expert testimony is not necessary where the matter in issue is such that the jury can be expected to draw the correct inferences from the facts presented. In this situation the expert will not provide material assistance to the jurors. *McNelley v. Smith*, 149 Colo. 177, 368 P.2d 555 (1962); *Bridges v. Lintz*, 140 Colo. 582, 346 P.2d 571 (1959); *New Mexico Savings & Loan Association v. United States Fidelity and Guaranty Company*, 454 F.2d 328 (10th Cir. 1972). The determination of competency and admissibility of expert testimony is within the discretion of the trial court, *City of Pueblo v. Ratliff, supra*; *New Mexico Savings & Loan Association v. United States Fidelity and Guaranty Company, supra*, and is reviewable only for abuse of that discretion.

From an examination of Mr. Wheat's proposed testimony, set out in appellant's offer of proof, it appears that his response was not directed toward clarifying a highly technical issue. His testimony in part would have been as follows:

> In my opinion, a "best efforts" registration obligation does not preclude the company from proceeding with important agreements, and among those important agreements would be a proposed merger, so long as that process is done in a good faith and without an intent to—a specific intent to impede or to prevent the carrying out of the obligation.
>
> In other words, the obligation, the "best efforts" obligation is subject to those matters of significance to the business, the ongoing business which impacts the company from time to time during its history.
>
> And the demand for registration, which may come shortly, or it may come years later, under these circumstances and in the light of that specialized meaning, simply cannot prevent the company from going forward with such matters of business which are important to it.

The proposed testimony was framed in terms of "good faith" and "specific intent to impede" the effectuation of the registration. This language is just as general as "best efforts." The jury would still be left to determine whether the actions which ATC took relative to the Cox merger and the registration statement manifested bad faith or an intent to impede. Moreover, in testifying about the meaning of "best efforts" in the analogous context of underwriting agreements, Mr. Wheat used equally general language:

> It [best efforts] means that the person obligated by that covenant must use diligent and competent efforts to cause the registration statement to become effective consistent with its ongoing business and the problems and the opportunities of the business.
>
> In other words, those competent and diligent efforts do not require the company subject to that obligation—do not put it under an absolute obligation to cause the registration statement to become effective.
>
> It puts it under an obligation which is substantially less than an absolute obligation.

In applying the analogy, the jury would be required to determine whether the appellant acted in a "competent and diligent" manner. A "competent and diligent" standard is not materially different from "best efforts." [5]

5. In *Republic Technology Fund, Inc. v. Lionel Corporation*, 345 F.Supp. 656 (S.D.N.Y.1972), aff'd in part and rev'd in part, 483 F.2d 540 (2d Cir. 1973), *cert. denied*, 415 U.S. 918, 94 S.Ct. 1416, 39 L.Ed.2d 472 (1974), relied on by ATC, the expert testimony was as general as the testimony offered here. The expert stated that a "best efforts" commitment obligated Lionel to work "diligently and competently" to effectuate the registration statement. Since the testimony in *Lionel* was received without objection, its admissibility was not in issue.

The cases which appellant submits in support of its argument do not materially aid its position. *Phillips Petroleum Co. v. Payne Oil Corporation*, 146 F.2d 546 (10th Cir. 1944) involved the question of whether or not certain expenses incurred with respect to an oil well were "cost[s] and expense[s] of operation" or "cost[s] and expense[s] of drilling", a technical question peculiar to the oil industry for which specific guidance was provided by the expert. *Arkla Exploration Company v. Boren*, 411 F.2d 879 (8th Cir. 1969) involved the accuracy of the court's instructions concerning a term ("practically impenetrable substance") used in an oil well operating agreement. In a dictum comment on the industry meaning of the term, shown by the expert testimony offered without objection by both parties, the court noted that there was no substantial difference between the general meaning of the words and the meaning attributed to them by the industry.

[11–13] Similarly, Mr. Wheat's definition of "best efforts" both in the context of the registration covenant, as shown by the offer of proof, and in underwriting agreements was not substantially different from the common meaning of the words. His testimony would not have contributed any specific facts or conclusions to aid the jury in determining whether the covenant was breached. We find, then, that the court's ruling was not prejudicial error and that reversal is not required.[6]

B. *Exclusion of ATC Letters Offered to Show its Good Faith*

ATC tendered four letters in evidence, all of which were written after the happenings giving rise to the suit. All were excluded by the court. Three were dated November 15, 1972, October 1, 1973 and October 9, 1973. These discussed ATC's position with respect to the Cox merger and were written by Mr. Davis, ATC's general counsel. The fourth one was also written by Davis and was dated November 4, 1972. this one was addressed to Cox and commented on Cox's position on the registration.

[14, 15] The action of the court in excluding letters written after the fact will seldom be disturbed. Apart from the hearsay aspect—and there is such a problem—letters written after a breach and after a party has become aware that litigation is imminent are seldom received. They are characterized as self-serving and inadmissible. *See Stone v. Union Fire Ins. Co.*, 106 Colo. 522, 107 P.2d 241 (1940); *Farris v. Sturner*, 264 F.2d 537 (10th Cir. 1959). The rationale for rejection of such evidence is that a party may not create evidence supportive of its position. Three of these letters were drafted after the decision to postpone registration (November 2, 1972) and after the announcement to United of this decision, November 8, 1972. The fourth was written following ATC's decision to defer registration—at a time when there must have been knowledge that a lawsuit was in the offing. In our view, the decision of the court to exclude was within its province.

C. *The Trial Court's Instructions*

ATC's next point expresses its dissatisfaction with the trial court's instructions.

First, it says that the definition of "best efforts" was inadequate. The court should have charged the jury on "the distinct legal meaning of the term" in accordance with its instruction number 8.[7]

6. The trial court excluded Mr. Wheat's testimony on the ground that it went to the "ultimate issue." The rule of both Colorado and the Tenth Circuit is that expert testimony is not excludable because it bears on the "ultimate issue." *Millers' National Insurance Company v. Wichita Flour Mills Company*, 257 F.2d 93 (10th Cir. 1958); *Bridges v. Lintz*, 140 Colo. 582, 346 P.2d 571 (1959). Such an error in specifying the grounds for exclusion, however, is harmless if, as here, the evidence is excludable on some other ground. 1 Wigmore on Evidence Section 18 (3d ed. 1940); 11 Wright & Miller, Federal Practice and Procedure: Civil Section 2885. In effect, the court here appeared to be holding that the proffered testimony would not have aided the jury. *Cf. New Mexico Savings & Loan Association v. United States Fidelity and Guaranty Company*, 454 F.2d 328 (10th Cir. 1972).

7. The proposed instruction was as follows:

A "best efforts" obligation does not require ATC to accomplish a given objective; *i. e.*,

[16] We disagree with the contention that the court's instruction was inadequate. Little difference can be perceived between the court's instruction and the tendered one.[8] The court's charge set forth ATC's theories and contentions regarding the meaning of "best efforts" and also included the issue whether ATC met its obligations. The language is consistent with the proposed instruction, the testimony and exhibits and the offer of proof.

Contrary to the further contention of ATC, the court charged the jury on the legal standards applicable to the evidence of "best efforts."[9] Both parties had introduced evidence bearing on the negotiations and the meaning intended for the term "best efforts." When the interpretation is in dispute as it was here, it is a question for the jury.[10] The factual dispute was properly submitted to the jury.

We have not overlooked ATC's assertions relative to other trial court instructions. We find these also to be without merit:

[17] It was unnecessary to instruct on waiver or ratification in the absence of evidence to support such instructions. *Smith v. Mill Creek Court, Inc.*, 457 F.2d 589, 592 (10th Cir. 1972).

The court's instruction on estoppel was correct. *See Boddie v. Bond*, 154 N.C. 359, 70 S.E. 824 (1911); *Walker v. Philadelphia Life Ins. Co.*, 127 F.Supp. 26, 30 (E.D.N.C. 1954).

[18] We disagree with ATC's contention that in its instruction on damages the court gave the jury a license to speculate. It is well settled that the difficulties in assessing damages do not preclude an injured party from recovering compensation. *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265, 66 S.Ct. 574, 90 L.Ed. 652 (1945).

The judgment of the district court is affirmed.

register United's stock. Rather, it requires ATC to make a diligent, reasonable and good faith effort to accomplish that objective. The obligation takes into account unanticipated events and the exigencies of continuing business and does not require such events or exigencies be overcome at all costs. It requires only that ATC exercise all reasonable efforts within a reasonable time to overcome any hurdles and accomplish the objective. The fact that the objective is not accomplished is no indication that the party has not utilized its "best efforts."

8. The court's instruction is as follows:

Defendant contends that it did not breach its contract of February 22, 1972, with the plaintiff in any way. Defendant asserts that the phrase "best efforts" protects the party who has given the promise from the risk that the goal to be achieved will not be reached due to the acts of third parties over which it has no control and allows continuation of normal business efforts and operations so long as it continues to exert diligent, reasonable and good faith efforts to obtain the goal.

Defendant asserts that it did everything reasonably possible to cause the Registration Statement to become effective by reason of action or inaction by third parties over whom ATC had no control.

The defendant asserts that it made a diligent good faith attempt to cause the Registration Statement to become effective.

9. The court's instruction reads as follows:

There has been some evidence introduced in this case that the term "best efforts" has an established usage or special meaning in underwriting agreements between the issuer of securities and an underwriter.

The contract before you is not such an underwriting contract and neither of the parties is an underwriter. Therefore, before you can consider any special meaning given to these words in such underwriting contracts, you must find from all of the evidence that the parties used this language with the intention to adopt that special meaning.

* * * * * * *

To establish its claim of breach of contract under Count I the plaintiff must show by a preponderance of the evidence that the defendant failed to use its best efforts to cause a registration statement to become effective, that is, that the defendant should have done something more than it did or did something that it should not have done.

10. *Jaeco Pump Company v. Inject-O-Meter Manufacturing Company*, 467 F.2d 317, 320 (10th Cir. 1972); 3 Corbin on Contracts Section 554, pp. 226–227; 9 Wigmore on Evidence Section 2256 (3d ed. 1940).

EXCUSE FROM PERFORMANCE

§ 87.02

EASTERN AIR LINES, INC., Plaintiff-Appellant-Cross Appellee,

v.

McDONNELL DOUGLAS CORPORATION, Defendant-Appellee-Cross Appellant.

No. 74-2235.

United States Court of Appeals, Fifth Circuit.

May 17, 1976.

An airline brought an action against an aircraft manufacturer for damages for breach of a contract to manufacture and deliver 99 jet airplanes, contending that the airplanes were delivered a total of 7,426 days late. The United States District Court for the Southern District of Florida, at Miami, C. Clyde Atkins, J., entered judgment on the jury's verdict in the airline's favor for the sum of $24,552,659.11 plus costs of $241,149.02, and the manufacturer appealed. The Court of Appeals, Ainsworth, Circuit Judge, held, inter alia, that the informal but nonetheless concerted governmental priorities policy in effect during the life of the contracts came within the terms of both the excusable delay clause in the contracts and exoneration provisions of the Defense Production Act, thereby excusing the manufacturer for delays proximately resulting from the government's priorities policy arising out of the Vietnam war; that the evidence presented a jury issue as to the adequacy of the airline's notice to the manufacturer that late delivery was regarded as a breach of contract; that the trial judge erred in instructing the jury that military priorities or any other event specifically provided for in the excusable delay provision of the contracts must have been unforeseeable at the time of contracting; and that the manufacturer was entitled to raise any defense available to it under the impracticability doctrine expressed in the Uniform Commercial Code.

Reversed and remanded for new trial.

1. Contracts ⇐252

Under California law, to "terminate" contract means to abrogate so much of it as remains unperformed, doing away with existing agreement upon terms and with consequences mentioned in such writing.

See publication Words and Phrases for other judicial constructions and definitions.

2. Bailment ⇐22

Where aircraft manufacturer first entered into agreement with airline to lease 15 jet planes, but such agreement was thereafter terminated so that ten planes which remained to be manufactured could be financed as group by third party, with parties contracting in their "agreement to terminate" that lease agreement was terminated and that all obligations of parties thereunder were of no further force and effect except for liabilities and obligations which might have accrued thereunder, termination agreement had effect of freeing aircraft manufacturer from its obligation under original lease agreement to deliver undelivered and not already overdue aircraft on dates specified in original agreement.

3. Limitation of Actions ⇐6(1)

Where airline and aircraft manufacturer first entered into agreement for lease of aircraft to airline and then, after some aircraft had been delivered late, terminated that contract by agreement and entered into another contract under which remaining aircraft would be sold to bank and leased by it to airline, statute of limitations enacted after first contract was terminated was inapplicable to airline's claims that first contract was breached because of delivery delays. West's Ann.Cal.Com.Code, § 2725(4).

4. Limitation of Actions ⇐46(6)

Airline's cause of action for breach of contract for lease of aircraft accrued, at latest, on date when performance under contract ceased because of contract's early termination by parties' agreement; suit filed more than four years after such date

EXCUSE FROM PERFORMANCE

8:03

of contract's termination was therefore barred by applicable statute of limitations. West's F.S.A. § 95.10; West's Ann.Cal. Code, Civ.Proc. § 337.

5. Sales ⇐406, 413

Notification of seller by buyer of breach after buyer has accepted tender of goods is integral part of buyer's cause of action and is not affirmative defense of seller; therefore, buyer must both plead and prove that notice requirement has been complied with. West's Ann.Cal.Com.Code, §§ 2607, 2607(3)(a).

6. Sales ⇐285(1)

Provision of Uniform Commercial Code to effect that where tender has been accepted by buyer, buyer must notify seller within reasonable time after he discovers breach or be barred from any remedy, is applicable to delivery delays as well as other breaches; trial court therefore erred in not applying such section to delivery delays at issue in airline's action against aircraft manufacturer for alleged delays in delivery of jet airplanes. West's Ann.Cal.Com.Code, §§ 2607, 2607(3)(a).

7. Sales ⇐420

In action by airline against aircraft manufacturer for damages for delay in delivery of jet aircraft, evidence made jury issue as to whether airline gave adequate and timely notice to manufacturer, after accepting delivery of planes, that late delivery was regarded as breach of contract; such notice was not, as matter of law, inadequate or untimely. West's Ann.Cal.Com. Code, §§ 1201(26), 2103(1)(b), 2104, 2104(1), 2607; West's Ann.Cal.Civ.Code, § 1721 et seq.

8. Sales ⇐285(3)

Notice of breach of contract given by buyer after it accepts tender from seller need not be specific claim for damages or assertion of legal rights, but not every expression of discontent by buyer always satisfies requirement for such notice; thus, while buyer must inform seller that transaction is "still troublesome," notification must be such as to inform seller that transaction is claimed to involve breach, and thus open way for normal settlements through negotiation. West's Ann.Cal.Com.Code, § 2607.

9. Sales ⇐285(3)

Merchants will be held to higher standard than ordinary buyers in manner in which, after delivery is accepted, seller is informed that buyer asserts claim for breach of contract; unlike ordinary purchaser, merchant's good faith in serving such notice will be measured by reasonable commercial standards of fair dealing in trade. West's Ann.Cal.Com.Code, §§ 2103(1)(b), 2104, 2104(1), 2607.

10. Sales ⇐285(1)

Buyer's good faith is governing criterion under section of Uniform Commercial Code requiring buyer to give notice to seller of any breach of contract asserted after acceptance of tender by buyer; even though adequate notice may have been given at one point in transaction, subsequent actions by buyer may have dissipated its effect and buyer's conduct, then, taken as whole, must constitute timely notification that transaction is claimed to involve breach. West's Ann.Cal.Com.Code, §§ 1201(26), 2607.

11. Sales ⇐81(4)

Government's "jawboning" policy in effect during period of nation's heavy involvement in Vietnam war, under which aircraft manufacturing industry was informally forced to grant priority to military aircraft production, came within terms of excusable delay clause in aircraft manufacturer's contract with airline to supply 99 civilian aircraft, contrary to airline's contention that only priorities imposed under Defense Production Act would qualify to excuse delay under such contract clause. Defense Production Act of 1950, §§ 2, 101 et seq., 101(a), 103, 703, 704 as amended 50 U.S.C.A. App. §§ 2062, 2071 et seq., 2071

(a), 2073, 2153, 2154; Executive Order Nos. 10161, 10480, 50 U.S.C.A. App. §§ 2071 note, 2153 note; Federal Rules of Evidence, rule 803(8) 28 U.S.C.A.; West's Ann.Cal.Com. Code, §§ 2615, 2616, 2616(2).

12. Sales ⇐81(4)

Where contract for manufacture and sale of 99 jet aircraft to airline provided that excusable delay must be result of "one or more of the listed events" in the excusable delay clause of the contracts, doctrine of ejusdem generis did not limit aircraft manufacturer's affirmative defense to delays caused by events similar to those specifically listed when, in fact, contract excused all delays which were not manufacturer's fault; contract provisions therefore did not result in waiver of applicability of doctrine of commercial impracticability. West's Ann.Cal.Com.Code, §§ 2615, 2616, 2616(2).

13. Sales ⇐127

Where both parties to contracts for manufacture and sale of commercial jet airliners continued to perform under contracts as though they remained in force, without ever making reference to procedures proscribed by Uniform Commercial Code for termination of contract on showing of commercial impracticability, contracts were not automatically terminated under such procedures. West's Ann.Cal.Com.Code, §§ 2615, 2616, 2616(2).

14. Courts ⇐376

Burden of proof in diversity cases is substantive question which is controlled by state law.

15. Contracts ⇐322(1)

In California law, promisor seeking to be excused from performance has burden of proving all elements of his affirmative defense.

16. Sales ⇐415

Trial court in action for breach of contract to manufacture and deliver commercial jet aircraft did not err in instructing jury that manufacturer had burden of proving excusable delay.

17. Contracts ⇐309(1)

Parties to contract may enlarge upon or supplant Uniform Commercial Code provisions concerning commercial impracticability. West's Ann.Cal.Com.Code, § 2615.

18. Contracts ⇐309(1)

Under Uniform Commercial Code, "mercantile sense and reason" is general standard governing construction of agreements enlarging upon protections of section dealing with commercial impracticability; where there is doubt concerning parties' intention, exemption clauses should not be construed as broadening excuses available under Code's impracticability rule. West's Ann.Cal.Com.Code, § 2615.

19. Sales ⇐172

Where excusable delay clause in contracts for manufacture and sale of commercial jet aircraft was phrased in general terms, court could not, in absence of evidence to contrary, hold that aircraft manufacturer was exempt from all liability for any delay, regardless of foreseeability, due to causes beyond its control. West's Ann. Cal.Com.Code, § 2615.

20. Contracts ⇐309(1)

Exculpatory provisions which are phrased merely in general terms will be construed as excusing only unforeseen events which make performance of contract impracticable, and if promisor desires to broaden protections available under excuse doctrine, he should provide for excusing contingencies with particularity and not in general language. West's Ann.Cal.Com. Code, § 2615.

21. Contracts ⇐309(1)

Section of Uniform Commercial Code dealing with commercial impracticability does not impose fixed standard governing interpretation of exemption clauses in contracts, and Code establishes no absolute requirement that any agreement purporting to enlarge upon commercial impracticability exemption must do so in putting in specific language. West's Ann.Cal.Com.Code, § 2615.

EXCUSE FROM PERFORMANCE

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22. Customs and Usages ⇐15(1)

Even in absence of detailed wording in exculpatory clause of contract, trade usage and circumstances surrounding particular agreement may indicate that parties intended to accord seller exemption broader than that available under Uniform Commercial Code's provision dealing with commercial impracticability. West's Ann.Cal. Com.Code, § 2615.

23. Sales ⇐421

In action for breach of contract to manufacture and sell commercial jet airplane to airline, trial court erred in instructing jury on foreseeability so as to imply that events specifically listed in excusable delay clause in contract must have been unforeseeable at time agreement was executed. West's Ann.Cal.Com.Code, § 2615.

24. Contracts ⇐309(1)

Rationale for doctrine of impracticability is that circumstance causing breach has made performance so vitally different from what was anticipated that contract cannot reasonably be thought to govern. West's Ann.Cal.Com.Code, § 2615.

25. Contracts ⇐322(1)

Because purpose of contract is to place reasonable risks of performance on promisor, he is presumed, in absence of evidence to contrary, to have agreed to bear any loss occasioned by event which was foreseeable at time of contracting; underlying such presumption is view that promisor can protect himself against foreseeable events by means of express provision in agreement.

26. Contracts ⇐309(1)

When promisor has anticipated particular event by specifically providing for it in contract, he should be relieved of liability for occurrence of such event regardless of whether it was foreseeable.

27. Sales ⇐172

Where, under contract for sale of commercial jet airliners to airline, manufacturer was exonerated only for delays which were not attributable to its fault, it was not excused by delays caused by fault of subcontractors.

28. Sales ⇐172

Where, under terms of excusable delay clause in contract for sale of commercial jet airplanes to airline, delay was excusable if caused by "act of government," such phrase encompassed informal demands by government that manufacturer accorded priority to military contracts, and it was not necessary that government obtain precedence for its orders by means of formal, published regulations and orders under Defense Production Act. Defense Production Act of 1950, §§ 101(a), 704, 707 as amended 50 U.S.C.A. App. §§ 2071(a), 2154, 2157; National Defense Act, § 120, 39 Stat. 166; Second War Powers Act, 1942, § 301, 56 Stat. 176; 5 U.S.C.A. §§ 551 et seq., 552(a)(1).

See publication Words and Phrases for other judicial constructions and definitions.

29. War and National Emergency ⇐44

Defense Production Act granted government authority to seek compliance with its priorities programs by informal means of persuasion, whether written or oral. Second War Powers Act, 1942, § 301, 56 Stat. 176; Defense Production Act of 1950, § 707 as amended 50 U.S.C.A. App. § 2157.

30. Sales ⇐172

Even assuming that government's informal method of obtaining defense priorities with aircraft manufacturers during Vietnam hostilities had to have been published in manner prescribed by Administrative Procedure Act in order for such policy to be relied on by aircraft manufacturer in excusing delay in fulfillment of nongovernment contract, airline could not, in its suit for damages for delay in delivery of commercial jet aircraft, rely on lack of such publication when it was, by its own admission, well aware of government's policy. 5 U.S.C.A. §§ 551 et seq., 552(a)(1).

31. Contracts ⇐309(1)

Under section of Uniform Commercial Code dealing with commercial impracticability, good faith, commercially reasonable

belief in validity of governmental interference with contract will justify exoneration of promisor. West's Ann.Cal.Com.Code, § 2615.

32. War and National Emergency ⇐44

Provision in Defense Production Act to effect that no person shall be held liable for any act or failure to act resulting directly or indirectly from compliance with rule, regulation or order issued pursuant to Act did not extend only to government requisitions which were issued in strict accordance with published regulations and which contained threat of some sanction for failure to obey; clause applied equally to informal "jawboning" by which government obtained informal priority for military orders from aircraft manufacturers during Vietnam hostilities. Defense Production Act of 1950, § 707 as amended 50 U.S.C.A. App. § 2157.

33. War and National Emergency ⇐44

Provision in Defense Production Act exonerating persons from liability resulting from compliance with rule, regulation or order issued pursuant to Act, aside from its exoneration of breaches resulting from compliance with priority orders subsequently held to be invalid, is declaratory of common-law doctrine of impossibility. Defense Production Act of 1950, § 707 as amended 50 U.S.C.A. App. § 2157.

34. Evidence ⇐571(10)

Jury's award of damages may have adequate support in evidence even though expert's assumptions and methodology may not have been only permissible ones for determining damages.

35. Evidence ⇐571(10)

In reviewing expert's testimony on subject of damages, district court must do more than merely weigh probative value of expert's testimony considered as whole; where practical, trial judge should exclude particular assumptions or other aspects of expert's testimony which, considered individually, do not meet "minimum of probative value."

36. Evidence ⇐555

In action by airline to recover damages for delay in delivery of commercial jet aircraft purchased from manufacturer, expert witness in damage phase of trial should have considered whether airline's estimated loss of profits was reduced by cost of financing those planes which were purchased rather than leased.

37. Witnesses ⇐246(2)

District court has discretion to call expert witness on its own.

38. Witnesses ⇐246(2)

In view of unusual difficulty of estimating major airline's lost profits resulting from extensive delays stretching over period of three years and involving 90 jet aircraft, trial court, in damages phase of airline's suit against aircraft manufacturer to recover such lost profits, should have considered calling its own neutral expert as witness.

E. Smythe Gambrell, James H. Bratton, Jr., Atlanta, Ga., Charles A. Kimbrell, William G. Bell, Jr., Miami, Fla., for plaintiff-appellant-cross appellee.

Veryl L. Riddle, Thomas C. Walsh, St. Louis, Mo., William S. Frates, Larry S. Stewart, James D. Little, Miami, Fla., for defendant-appellee-cross appellant.

Appeals from the United States District Court for the Southern District of Florida.

Before JONES, WISDOM and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge:

This important Florida diversity case involves an appeal from a judgment for damages for breach of contract in favor of Eastern Air Lines against McDonnell Douglas Aircraft, Inc. based on a jury verdict in Eastern's favor for the sum of $24,552,659.11 plus costs of $241,149.02—one of the largest jury verdicts ever reviewed by this Court. Involved is a series of contracts covering the years 1965–1968 by which

Douglas Aircraft, Inc.[1] agreed to manufacture and sell to Eastern Air Lines nearly 100 jet planes for approximately a half billion dollars. Suit was filed by Eastern against Douglas on July 31, 1970, based on allegations that 90 of these planes were delivered a total of 7,426 days late. It was not until July 12, 1973, after almost three years of pretrial motions and discovery and four and one-half months of trial, that the jury's verdict was rendered in the District Court.

Our review of the case convinces us that the District Court made a diligent effort to resolve the many difficult matters before it. Nevertheless, we conclude that the trial judge committed substantial and prejudicial errors in a number of his rulings and instructions to the jury, which require reversal of the judgment and a new trial. Accordingly, we reverse and remand.

I. *Background*

Eastern Air Lines decided in 1964 to replace what remained of its outmoded propeller-driven fleet in an effort to reverse a serious five-year financial decline. Ever since the advent of the commercial jet age in 1959, Eastern had lagged behind its competitors in the purchase of jet-powered planes. Consequently, the company's decision to order 100 new planes made it the last major trunk carrier to purchase a large number of jet aircraft.

Although Eastern is one of the largest passenger carriers in the world, its route system has historically been composed of relatively short segments. In 1964, only Boeing and Douglas could offer a small, twin-engine, short-range jet suited to Eastern's needs. Eastern's decision to purchase the Douglas DC–9 rather than Boeing's 737 was based in part on Douglas' offer to lease it a number of DC–9–14's as an interim plane until the larger "stretched" DC–9–31's were available.[2] Boeing had been unable to provide Eastern with an equivalent aircraft as a substitute for its short-haul, twin-engine 737 which was not due to be delivered until a year after Douglas was to begin producing the DC–9–31. For its longer range flights, Eastern also ordered a number of DC–8–61 jets which are Douglas' equivalent of the Boeing 707.[3]

Letters of intent providing for Eastern's lease or purchase of DC–9–14's and for its purchase of the "stretched" DC–9–31 and the DC–8 planes were signed in February of 1965. The following July, Douglas and Eastern entered into the first three of what was to be a series of eight contracts providing for the delivery of a total of 99 planes. Five of the eight contracts were amended, some a number of times, between 1965 and 1968.[4]

1. As will be noted below, Douglas merged with the McDonnell Aircraft Company on April 28, 1967 to become the McDonnell Douglas Corporation. Although we will occasionally refer to "Douglas" in discussing acts which antedated the merger, the company will generally be denominated "McDonnell" or "McDonnell Douglas" during the course of this opinion.

2. The DC–9 is a "second generation" commercial jet with two engines mounted on its tail and is designed for short to medium-haul service. The DC–9–14 is capable of carrying approximately 65 passengers while the "stretched" model DC–9–31 can carry 100 passengers.

3. The DC–8–61 planes ordered by Eastern are large (200 passenger), medium-range (2,000 miles), four-engine jets. The Model 61 is a larger and more advanced version of the DC–8 introduced in 1959.

4. SUMMARY OF CONTRACTS BETWEEN DOUGLAS AIRCRAFT AND EASTERN AIR LINES AND AMENDMENTS THERETO

Contract No.	Date	No. of Aircraft
DAC 65-41-L (DC-9-14)	July 9, 1965	15
Amendments		
No. 1	April 26, 1966	(Decreased aircraft to 14)
No. 2	May 13, 1966	(Decreased aircraft to 13)
No. 3	May 19, 1966	(Decreased aircraft to 12)
No. 4	May 27, 1966	(Decreased aircraft to 11)
No. 5	July 1, 1966	(Decreased aircraft to 10)
Agreement to Terminate, dated July 14, 1966 (Terminated Contract DAC 65-41-L)		

Footnote 4 continued on next page

Although varying in details, all the agreements are basically similar; each required Douglas to manufacture a number of planes at a stipulated price per aircraft to be paid upon the delivery of each plane at Douglas' California plant. Each jet was designated for delivery during a particular calendar month. In addition, every contract contained two provisions which are of special importance to these appeals. One clause is a choice of law provision which requires that the contracts' construction and performance be determined under California law.[5] The other provision is an "excusable delay" clause which exempts Douglas from liability for delays beyond its control and not its fault.[6]

Footnote 4—Continued

Contract No.	Date	No. of Aircraft
DAC 64-105-D (DC-9-31)	July 9, 1965	24
Amendments		
No. 1	Mar. 15, 1966	(Increased aircraft to 27)
No. 2	Mar. 15, 1966	(Decreased aircraft to 17)
No. 3	July 11, 1966	(Increased aircraft to 39)
No. 4	Aug. 18, 1966	(Increased aircraft to 40)
No. 5	Aug. 28, 1966	(Deleted 5 options)
DAC 66-40-D (DC-9-31)	Mar. 15, 1966	10
DAC 66-136-D (DC-9-31)	Aug. 28, 1966	5
DAC 67-51-D (DC-9-31)	Oct. 5, 1967	12
DAC 65-65-D (DC-8-61)	July 9, 1965	4
Amendments		
No. 1	Oct. 5, 1965	(Increased aircraft to 5)
No. 2	Feb. 1, 1966	(Increased aircraft to 7)
No. 3	July 12, 1966	(Increased aircraft to 9)
No. 4	Aug. 28, 1966	(Deleted 2 options)
DAC 66-130-D (DC-8-61)	Aug. 28, 1966	3
Amendments		
No. 1	Mar. 20, 1967	(No additions or deletions)
No. 2	Apr. 27, 1967	(No additions or deletions)
No. 3	Oct. 5, 1967	(Deleted 3 options)
DAC 67-47-D (DC-8-61)	Oct. 5, 1967	5
Amendment		
No. 1	June 10, 1968	(Deleted 10 options)

5. APPLICABLE LAW AND VARIANCES

This Agreement shall be construed and performance thereof shall be determined according to the laws of the State of California, U.S.A.

6. EXCUSABLE DELAY

Seller shall not be responsible nor deemed to be in default on account of delays in performance of this Agreement due to causes beyond Seller's control and not occasioned by its fault or negligence, including but not being limited to civil war, insurrections, strikes, riots, fires, floods, explosions, earthquakes, serious accidents, any act of government, governmental priorities, allocation regulations or orders affecting materials, equipment, facilities or completed aircraft, failure to obtain Federal Aviation Agency Airworthiness and Type Certificate or Certificates, acts of God or the public enemy, failure of transportation, epidemics, quarantine restrictions,

Problems developed in the Douglas-Eastern relationship before even the first plane was scheduled to be delivered. In January 1966, it became evident to both parties that Douglas would be unable to complete its DC–9–14 jets in time to meet the contract delivery dates. In an early exchange of letters on the subject, Douglas attributed the delivery delays to "our nation's rapidly increasing commitments in Southeast Asia," and Eastern replied by expressing concern and noting that "[i]t appears to us that some of this slippage really should have been avoidable."

Subsequently it appeared that the delays could not be confined to the DC–9–14 deliveries. During 1966 and 1967, Douglas repeatedly revised its scheduled delivery of DC–8's and DC–9–31's. These further delays were viewed with "great concern" by Eastern executives who informed Douglas that the late deliveries were imposing a "substantial burden" on the airline.

Throughout this period, Douglas was confronted with a mounting financial crisis which, to some extent, was the result of the DC–8 and DC–9 delivery delays. In the summer of 1966, Douglas forecast a loss of almost $30 million in its operations for the year. By November, Douglas' cash shortage reached such catastrophic proportions that the company's creditors insisted that a solvent merger partner be found. The natural choice was the McDonnell Aircraft Company whose military and space activities effectively complemented Douglas' strength in the commercial aircraft field. After McDonnell infused into Douglas over $68 million in new funds, a merger was consummated on April 28, 1967. The new McDonnell Douglas Corporation assumed all the obligations and liabilities of the former Douglas Aircraft Company.

Delivery delays continued after the merger until the last of the planes was delivered in January 1969. On the average, each of the 90 late planes was delivered 80 days after the month specified in the contract date. Several months after performance had been completed under the last of the eight contracts, Eastern wrote McDonnell on May 29, 1969 presenting a claim for damages resulting from the late deliveries over the previous three years. The airline alleged that these delays could not be deemed excusable under the applicable clause in the agreements. McDonnell rejected the claim and suit was filed in the District Court for the Southern District of Florida.

On the order of the District Judge, the trial was bifurcated with the liability phase to be tried first; to be followed, if necessary, by a trial on damages before the same jury. The greater part of the three-month liability trial was devoted to McDonnell's efforts to prove that the delivery delays were the product of events covered by the excusable delay clause in each contract. Although McDonnell produced evidence that some of the deliveries were late because of strikes and labor shortages, the heart of its defense was that most of the delays were caused by the rapid military buildup occasioned by the war in Vietnam. During the 1966–1968 escalation of the war, the Government asked the aviation industry to accord specific military projects priority over civilian production. Although military priority, in some cases, was gained through written directives and ratings issued pursuant to the Defense Production Act of 1950 ("D.P.A."), the Government often effectively achieved the same result by more informal and less direct means. McDonnell endeavored to show that, because its subcontractors cooperated with this "jawboning" policy of the Government, there were serious delays in the delivery of parts vital to DC–8 and DC–9 production. Throughout the course of this phase of the trial, however, the District Judge took the position that the only excusable delays were those resulting from written government orders issued in strict compliance with procurement regulations. As a result, the trial

failure of vendors (due to causes similar to those within the scope of this clause) to perform their contracts or labor troubles causing cessation, slow-down, or interruption of work, provided such cause is beyond Seller's control.

judge refused to allow the jury to consider evidence of less formal efforts by the Government to expedite military production.

McDonnell Douglas also contended that Eastern had failed to give timely and reasonable notice of the breaches, that one of the contracts was no longer enforceable, and that Eastern should be estopped from pursuing any of its claims. The District Court, however, ruled against McDonnell on all these issues.

At the close of the liability trial, the jury was instructed that McDonnell bore the burden of proving that the delays were caused by events which were excused under the contracts. Furthermore, according to the court's instructions, no event could be an excuse unless it was not reasonably foreseeable at the time the particular contract was entered into. On May 16, 1973, the jury's verdict, in the form of answers to special interrogatories, found that none of the 7,426 days of delay was excusable.

During the six-week damages phase of the trial, each side presented testimony concerning the effect of the delivery delays on Eastern's operations during the 1966–1968 period. Eastern's expert estimated the airline's lost profits to be $23,400,000 while McDonnell's expert witness was of the opinion that no such damages resulted from the delays. The airline also presented evidence to support its claims for damages resulting from surplus pilot time expense, wasted pilot training and wasted schedule expense. In addition to these claims, the District Judge permitted the jury to consider Eastern's contention that, under Florida law, it was entitled to prejudgment interest from the time of the breach. On July 12, 1973, the jury returned a special verdict awarding Eastern a total of $22,219,601 in compensatory damages and $9,650,715 in interest.[7]

7. Special Verdict
July 12, 1973
Miami, Florida

We, the jury award the Plaintiff, EASTERN AIR LINES, INC. damages as follows:

1. Lost Operating profit:			
(a) DC-9-14 Aircraft for	(1)	1966	$ 1,360,000
(b) DC-9-31 Aircraft for	(1)	1966	$ 000
	(2)	1967	$ 3,145,000
	(3)	1968	$ 2,720,000
(c) DC-8-61 Aircraft for	(1)	1966	$ 85,000
	(2)	1967	$ 8,075,000
	(3)	1968	$ 4,505,000
2. Wasted Pilot Training			$ 313,438
3. Surplus Pilot Time Expense			$ 1,816,163
4. Wasted Schedule Expense			$ 200,000

INTEREST: To be determined from categories 1(a)(b)(c) and 2, 3, and 4 above and 5 below.

1(a)(1) DC-9-14 Aircraft	$ 561,000
1(b)(1) DC-9-31 Aircraft	000
1(b)(2) DC-9-31 Aircraft	$ 1,132,200
1(b)(3) DC-9-31 Aircraft	816,000
1(c)(1) DC-8-61 Aircraft	$ 35,062
1(c)(2) DC-8-61 Aircraft	$ 2,907,000
1(c)(3) DC-8-61 Aircraft	$ 1,351,500
2. Wasted Pilot Training	$ 129,291

Footnote 7—Continued on next page

Subsequently, on McDonnell's motion for judgment notwithstanding the verdict, the District Judge, on March 26, 1974, filed an opinion holding that prejudgment interest was a matter of California law and therefore could not be awarded by the jury as a matter of right. The court, however, did exercise the discretion available to it under California law in awarding Eastern $2,333,-058.11 in prejudgment interest.[8] Finally, on June 24, 1974, the District Court denied McDonnell's motion to review the $241,-149.02 in costs taxed against it.

In its appeal, McDonnell Douglas' most fundamental contentions concern the District Court's rulings on excusable delay, Eastern's obligation to give reasonable and timely notice of breach, and the enforceability of one of the contracts.

Eastern appeals from the trial judge's determination that the award of prejudgment interest is controlled by California law, arguing that the jury's award of $7,-753,215 in prejudgment interest should be reinstated.

Footnote 7—Continued

3. Surplus Pilot Time Expense	$ 749,162
4. Wasted Schedule Expense	$ 72,000
5. Depreciation Reserve	$ 1,897,500

So say we all.

Jonathan Gillingham, FOREMAN

II. *Enforceability of Contract 65–41–L*

A significant preliminary issue concerns the effect to be given Douglas' agreement to lease to Eastern 15 DC–9–14 aircraft until its larger DC–9–31 planes could be delivered.[9] On July 9, 1965, Contract 65–41–L, which covered this arrangement, was executed simultaneously with a side letter agreement[10] which gave Douglas the option of selling a particular aircraft to a nonuser third party who would assume the financial burden of leasing the plane to Eastern.[11] Because of its mounting cash shortage, Douglas exercised this option on all the planes covered by Contract 65–41–L.

Pursuant to the contract and the side agreement, Douglas sold each of the first five DC–9–14's manufactured to several equipment leasing corporations. As each of these jets was delivered between April and July of 1966, Eastern and Douglas executed an amendment to 65–41–L to reflect the fact that the plane was being financed by a

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8. In addition, Eastern was awarded $514 under Rule 37(b) because of McDonnell's failure, in several instances, to comply with discovery orders.

9. The delivery dates originally specified in Contract 65–41–L are as follows:

FAA Registration No.	Delivery Date
N8901E	March 1966
N8902E	March 1966
N8903E	April 1966
N8904E	April 1966
N8905E	May 1966
N8906E	May 1966
N8907E	June 1966
N8908E	June 1966
N8909E	July 1966
N8910E	July 1966
N8911E	August 1966
N8912E	August 1966
N8913E	September 1966
N8914E	September 1966
N8915E	October 1966

10. Side Letter Agreement No. 10, July 9, 1965.

11. Lease back financing is a way of life in the aircraft industry. Rather than borrowing the money needed to purchase a plane, a manufacturer or a purchaser causes a third party to buy the aircraft and lease it back to the airline. From the standpoint of the financing party, the lease is merely another way of lending money to the aircraft operator. Because the underlying agreement for the acquisition of the plane remains between the manufacturer and the airline, the lessor's principal function in the transaction is to supply the purchase price. The airline, on the other hand, accepts delivery and actually operates the aircraft financed by the lease back method.

third party rather than by Douglas.[12] On July 14, however, the Contract 65–41–L was terminated so that the ten DC–9–14's which remained to be manufactured could be financed as a group by Bankers Trust Company. In relevant part, the "Agreement to Terminate" provides:

> The Agreement to Lease, as amended . . . is hereby terminated and all obligations, duties and liabilities of the parties thereunder are of no further force and effect, . . . except for any liabilities and obligations which may have accrued thereunder and which may not have been performed or discharged prior to the date hereof.

Simultaneously with the termination of Contract 65–41–L, Douglas executed a contract selling the ten planes to Bankers Trust, and Eastern executed a lease of those planes with the bank.[13] Douglas' agreement with Bankers Trust provided for delivery dates which were substantially later than those originally required under Contract 65–41–L.[14]

12.

Amendments to Contract 65-41-L

Amendment No.	Date	Buyer	Aircraft No.
1	4/26/66	Railway Equipment Leasing Corporation	N8901E
2	5/13/66	Greyhound Equipment Leasing Corporation	N8902E
3	5/19/66	Greyhound Equipment Leasing Corporation	N8903E
4	5/23/66	Greyhound Equipment Leasing Corporation	N8904E
5	7/1/66	Greyhound Equipment Leasing Corporation	N8905E

13. Contract 66–119–D, entitled a "Purchase Agreement" governed Douglas' sale of the ten planes to Bankers Trust. Eastern's relationship with the bank was governed by a "Lease" also executed on July 14, 1966.

14.

Plane No.	65-41-L Delivery Date	Bankers Trust Delivery Date	Actual Delivery Date	Days Late Under 65-41-L	Days Late Under Bankers Trust
N8906E	5/66	7/66	7/19/66	49	0
N8907E	6/66	8/66	8/29/66	60	0
N8908E	6/66	8/66	9/11/66	73	11
N8909E	7/66	9/66	11/7/66	99	38
N8910E	7/66	9/66	10/27/66	68	27
N8911E	8/66	10/66	11/24/66	85	24
N8912E	8/66	10/66	11/30/66	91	30
N8913E	9/66	11/66	12/22/66	83	22
N8914E	9/66	11/66	12/29/66	90	29
N8915E	10/66	12/66	2/8/67	57	0*
			Total	755	Total 181

*Aircraft N8915E was accepted by Bankers Trust on December 31, 1966, and was therefore delivered on time.

The trial judge ruled as a matter of law that Douglas was bound by the original delivery dates specified in Contract 65–41–L for all 15 planes even though seven of them were not scheduled for delivery until after the contract was terminated.[15] In the District Judge's view, the above-quoted provision of the termination agreement preserved "any Douglas liability for late deliveries."[16] Douglas attacks this ruling as being contrary to the unambiguous language of the termination agreement.[17]

[1] Under California law, the jurisdiction whose rules control the construction of all the contracts involved in this case,[18] to "terminate" a contract "means to abrogate so much of it as remains unperformed, doing away with an existing agreement upon the terms and with the consequences mentioned in the writing . . . ." *Sanborn v. Ballanfonte*, 1929, 98 Cal.App. 482, 277 P. 152, 155; *accord, Grant v. Aerodraulics Co.*, 1949, 91 Cal.App.2d 68, 204 P.2d 683, 687; *Blodgett v. Merritt Annex Oil Co.*, 1937, 19 Cal.App.2d 169, 65 P.2d 123, 125. Thus, as of July 14, 1966, Contract 65–41–L was no longer binding on Douglas unless the termination agreement specifically continued certain portions of it in effect. *See Blodgett v. Merritt Annex Oil Co., supra.*

[2] There is no support in the unambiguous, if somewhat awkwardly phrased, language of the "Agreement to Terminate" for the proposition that the original delivery dates were to continue in effect after July 14, 1966. Eastern and Douglas quite explicitly "terminated all . . . obligations . . . and liabilities . . . except for any . . . which may have accrued . . . prior to [July 14, 1966]."[19] In the ordinary sense of the word,[20] "to accrue" means "to come into existence as an enforceable right."[21] Since Douglas was not required to deliver the last seven planes until after July 14, 1966,[22] no obligation to deliver these particular aircraft can be deemed to have accrued at the time Contract 65–41–L was terminated.[23]

Eastern contends, however, that its claims under Contract 65–41–L for the last seven DC–9–14's to be delivered are preserved because Douglas' obligation to deliver in a timely fashion "accrued" when the contract was first executed. If we were to adopt Eastern's view that the accrual of an

15. These planes, numbered N8909E through N8915E, were the last seven DC–9–14's scheduled to be delivered under Contract 65–41–L. *See* note 9 *supra*.

16. District Court's Order on DC–9–14 Delivery Dates, filed March 2, 1973.

17. Douglas also contends that Eastern's claims arising from the late delivery of the first five DC–9–14's to be delivered were waived by the five amendments to Contract 65–41–L which accompanied the sale of those planes to leasing corporations. For reasons to be discussed below, we do not reach this issue.

18. The relevant contract provision is set out at note 5 *supra*.

19. It is helpful to compare the wording of this provision with that of the clause inserted in the amendments to Contract 65–41–L which accompanied the sale of each of the first five planes produced under the contract. *See* note 12 *supra*. Each of these amendments specifically provided that "[a]ll the terms of this Agreement shall remain in full force and effect except as herein expressly changed . . . ."

20. In California as elsewhere, "[t]he words used in a contract must be given their ordinary meaning, unless there is evidence that the parties intended to use them in a unique sense or to give the words some different meaning." *Moss Development Co. v. Geary*, 1974, 41 Cal. App.3d 1, 9, 115 Cal.Rptr. 736, 741.

21. Webster's Third New International Dictionary 13 (unabridged ed. 1961); *see* Uniform Commercial Code § 2–725(2); *Irvine v. Bossen*, 1944, 25 Cal.2d 652, 155 P.2d 9, 13.

22. *See* note 9 *supra*.

23. As will be demonstrated below, even if these obligations were deemed to have "accrued" prior to the termination of Contract 65–41–L, they would nevertheless be barred by California's four-year statute of limitations.

obligation is the same as its creation, none of the obligations arising under the contract could be deemed terminated despite wording which is explicitly to the contrary. In short, Eastern's proposed construction would render the entire July 14, 1966 "Agreement to Terminate" a nullity.[24]

Because the termination agreement cannot reasonably be interpreted as preserving the original delivery dates for those planes manufactured after July 14, 1966, the trial judge erred in using the Contract 65–41–L schedule to measure delays in the delivery of the seven DC–9–14's which were not overdue at that time.[25] While we recognize that the termination agreement was executed at Douglas' behest in order to help it secure third-party financing, it cannot now be rewritten merely because it operates to Eastern's disadvantage. *See Cousins, Inc. v. Hastings Clothing Co.*, 1941, 45 Cal.App.2d 141, 147, 113 P.2d 878, 881. Courts cannot redraft contracts under the guise of construing them. *Hinckley v. Bechtel Corp.*, 1974, 41 Cal.App.3d 206, 211, 116 Cal.Rptr. 33, 36; *see Moss Development Co. v. Geary*, 1974, 41 Cal.App.3d 1, 9, 115 Cal. Rptr. 736, 741.[26]

[3] Having determined that the termination agreement forecloses any action under Contract 65–41–L for delays which occurred after July 14, 1966, we turn to McDonnell's contention that those claims which were preserved by this agreement are barred by the statute of limitations. The limitation period to be applied in this diversity case is that which would be applied by the Florida courts. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 73 S.Ct. 856, 97 L.Ed. 1211 (1953); 2 J. Moore, Federal Practice ¶ 3.07[2] at 744–746 (1975). As the trial judge correctly held, Florida's borrowing statute refers us to the applicable statute of limitations imposed by California, the state in which this action arose.[27] Under California law, an action for breach of Contract 65–41–L must be brought within four years of the time in which it accrued. Cal.Code Civ.Pro. § 337.[28]

The District Court held that since Contract 65–41–L was not divisible, the four-

24. Eastern also points to an internal memorandum prepared by a McDonnell official in 1969 after Eastern had formally presented its claim. This document construed the termination agreement as preserving the original contract dates specified in Contract 65–41–L. Even if this document cast any light on the intention of the parties at the time Contract 65–41–L was entered into, it would not be admissible to prove a meaning contradictory to the clear language of the termination agreement. *See Brant v. California Dairies, Inc.*, 1935, 4 Cal.2d 128, 133, 48 P.2d 13, 16; *Crow v. P. E. G. Construction Co.*, 1957, 158 Cal.App.2d 271, 319 P.2d 47, 50; Cal.Civ.Code §§ 1638, 1639; Cal.Comm.Code § 2202. *See generally* R. Nordstrom, Handbook on the Law of Sales §§ 46, 53 (1970).

25. These are the DC–9–14's numbered N8909E through N8915E. *See* note 9 *supra*.

26. Inasmuch as the point was neither ruled on by the court below nor briefed before us, we intimate no view on the question of whether Eastern was a third-party creditor beneficiary under Douglas' agreement with Bankers Trust.

27. Fla.Stat. § 95.10 provides as follows:

Limitation upon causes of actions arising out of the state

When the cause of action has arisen in another state or territory of the United States, or in a foreign country, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, no action thereon shall be maintained against him in this state.

28. The trial judge erred in applying the four-year limitation period established by section 2–725 of the California U.C.C. which is applicable only to actions accruing after its effective date. Cal.Comm.Code § 2725(4). Because section 2–725 was not enacted in California until 1967, Contract 65–41–L is governed by section 337 of that state's Code of Civil Procedure which applies a four-year limitation period to written contracts. These two sections, however, are in accord. *Hachten v. Stewart*, Super.Ct.1974, 42 Cal.App.3d Supp. 1, 3, 116 Cal. Rptr. 631, 632.

year limitation period did not begin to run until after October 1966, the time originally specified for delivery of the fifteenth and final plane to be manufactured under this agreement.[29] McDonnell argues that the agreement was severable because each plane was delivered and paid for separately, and therefore the statute of limitations began to run on each plane as it became overdue. However, because we hold that the July 14, 1966 agreement effectively terminated the contract, we need not decide whether Contract 65–41–L was severable or unitary.

[4] There can be no doubt that Eastern's cause of action under the contract accrued, at the latest, on July 14, 1966 when, for all intents and purposes, performance under Contract 65–41–L ceased. Since this suit was filed more than four years later on July 31, 1970, Eastern's claims arising from the late delivery of the first eight DC–9–14's scheduled to be manufactured under Contract 65–41–L should have been barred by the District Court.

In conclusion, then, the termination agreement and the statute of limitations together preclude Eastern from bringing suit under Contract 65–41–L for delays in the delivery of DC–9–14 aircraft.

III. *Notice of Breach Under the Uniform Commercial Code*

During the trial and in final instructions to the jury, the District Court held that Eastern need not prove, as a predicate for recovery in this suit, that it had given McDonnell Douglas reasonable and timely notice of the delivery delays. McDonnell strongly contests the trial judge's rulings for Eastern on this issue and argues either that the airline should, as a matter of law, be barred from any recovery or, alternatively, that the issue of timely notice should have been submitted to the jury.

[5] The statute governing this question is section 2–607(3)(a) of the Uniform Commercial Code[30] which provides in part as follows:

> (3) Where a tender has been accepted
>
> (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy;
>
> . . . .

McDonnell contends that the trial judge denied it the benefits of this provision, both by ruling that section 2–607 does not apply to late deliveries and by holding in the alternative that Eastern gave adequate notice. Because we are unable to agree with the District Court's ruling on either ground, we hold that the question of timely notice under section 2–607 should have been submitted to the jury.[31]

A. *Applicability of U.C.C. § 2–607(3)(a)*

[6] Even though section 2–607, by its very terms, governs "any breach," the trial court found the notice requirement to be inapplicable to delivery delays because a seller necessarily has knowledge of this sort of contract violation. Relying on the case of *Jay V. Zimmerman Company v. General Mills, Inc.*, E.D.Mo., 1971, 327 F.Supp. 1198, 1204, the District Judge concluded that no-

29. *See* note 9 *supra*.

30. As we have seen, the choice of law provision found in all the contracts refers us to California law. *See* note 5 *supra*. California has adopted section 2–607(3)(a) without change. Cal. Comm.Code § 2607(3)(a).

31. Notification under section 2–607 is an integral part of a buyer's cause of action and is not an affirmative defense of the seller. Therefore, the buyer must both plead and prove that the notice requirement has been complied with. *See Redfield v. Mead, Johnson & Co.*, 1973, 266 Or. 273, 512 P.2d 776; *L. A. Green Seed Company of Arkansas v. Williams*, Ark.1969, 438 S.W.2d 717; *Carey v. I. J. Kayle & Associates*, 1970, 122 Ill.App.2d 403, 259 N.E.2d 304; 2 R. Anderson, Uniform Commercial Code § 2–607:22–23 (1971).

tice is useless where a breach is apparent to both parties.[32] The trial court apparently was of the view that the sole function of section 2–607 is to inform the seller of hidden defects in his performance. Under this approach, the only purpose of notice is to provide the seller with an opportunity to remedy an otherwise unknown nonconforming tender. *See Reininger v. Eldon Mfg. Co.*, 1952, 114 Cal.App.2d 240, 250 P.2d 4, 8; *Chemetron Corporation v. McLouth Steel Corporation*, N.D.Ill., 1974, 381 F.Supp. 245, 254.

Section 2–607's origins, however, reveal that it has a much broader function. The Code's notice requirement was derived from decisional law in California[33] and several other states which sought to ameliorate the harsh common law rule that acceptance of goods by the buyer waived any and all of his remedies. *Franck v. J. J. Sugarman-Rudolph Co.*, 1952, 40 Cal.2d 81, 251 P.2d 949, 953; *Whitfield v. Jessup*, 1948, 31 Cal.2d 826, 829, 193 P.2d 1, 2; *see* 3 S. Williston, Contracts § 714 (rev. ed. 1961). This approach was codified under section 49 of the Uniform Sales Act[34] which was adopted in California as Civ.Code § 1769.

As Professor Williston, the author of the Sales Act, has noted, section 49 continued the common law rule treating a seller's tender of goods as an offer of them in full satisfaction. 3 S. Williston, Contracts § 714 (rev. ed. 1961). The buyer, though, was permitted to accept the offer without waiving any claims if he gave the seller prompt notice to this effect. *See Reininger v. Eldon Mfg. Co., supra*, 250 P.2d at 7. This approach reconciled the desire to give finality to transactions in which goods were accepted with the need to accommodate a buyer who, for business reasons, had to accept the tendered goods despite unsatisfactory performance by the seller. *Metro Invest. Corp. v. Portland Rd. Lumber Yard, Inc.*, 1972, 263 Or. 76, 501 P.2d 312, 314. Pre-U.C.C. decisions in California and elsewhere, therefore, recognized that the primary purpose of notice is to inform the seller that, even though his tender has been accepted by the buyer, his performance is nonetheless considered a breach of contract. *E. g., Columbia Axle Co. v. American Auto-*

32. In relevant part, the *Zimmerman* opinion reads as follows:

> In the present, as in any case involving late delivery, both the seller and the buyer are necessarily fully aware *prior* to tender that the seller's contract obligation to timely deliver has not been complied with. It would be an unreasonable, if not absurd, construction of the statute to require a renewed notice of breach *after* acceptance of the goods under the facts here involved. A party has notice of a fact when he has actual knowledge of it. Section . . . 1–201(25) of the Uniform Commercial Code. The purpose of a notice in the context of this section . . . is to *inform* the seller of matters which would not normally come to the buyer's attention until *after* the goods came into his possession. The legislative intent was to make provision with respect to the effect of acceptance of allegedly defective or inferior goods or those allegedly not meeting warranted standards of quality. In that situation it is reasonable to require the buyer to inform the seller of the existence of a possible factual dispute relating to matters of which the buyer presumably was not aware prior to his acceptance of a tender of the goods.

Jay V. Zimmerman Company v. General Mills, Inc., E.D.Mo., 1971, 327 F.Supp. 1198, 1204 (emphasis in original).

33. *Reininger v. Eldon Mfg. Co.*, 1952, 114 Cal. App.2d 240, 250 P.2d 4, 7; *see* the authorities cited by the California Supreme Court in *Franck v. J. J. Sugarman-Rudolph Co.*, 1952, 40 Cal.2d 81, 251 P.2d 949, 953.

34. This provision of the Uniform Sales Act is similar in wording to section 2–607:

> In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

Uniform Sales Act § 49.

mobile Ins. Co., 6 Cir., 1933, 63 F.2d 206, 207; *Reininger v. Eldon Mfg. Co., supra*, 250 P.2d at 8.

Under section 49 it was irrelevant whether a seller had actual knowledge of a nonconforming tender. Instead, the critical question was whether the seller had been informed that the buyer considered him to be in breach. Consequently, in Professor Williston's words, "the section is applicable not only to defects in quality but to breach of any promise or warranty, as, for instance, *delay in time.*"[35] 5 S. Williston, Contracts § 714 at 409 (3d ed. 1961) (emphasis supplied). Pre-U.C.C. decisions, therefore, applied the notice requirement in delivery delay cases.[36] Judge Learned Hand, for example, applied section 49 in a case in which performance had been delayed, noting:

> The plaintiff replies that the buyer is not required to give notice of what the seller already knows, but this confuses two quite different things. The notice "of the breach" required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of buyer's claim that they constitute a breach. The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning.

American Mfg. Co. v. United States Shipping Board E. F. Corp., 2 Cir., 1925, 7 F.2d 565, 566; *cited with approval Whitfield v. Jessup, supra*, 31 Cal.2d at 830, 193 P.2d at 4; *Reininger v. Eldon Mfg. Co., supra*, 250 P.2d at 8. *But see Johnson v. Comptoir Franco Belge D'Exportation, etc.*, 1955, 135 Cal.App.2d 683, 288 P.2d 151, 156.

As the drafters of Article 2 acknowledge, section 2–607 continues the basic policies underlying section 49 of the Uniform Sales Act.[37] Indeed, the notice requirement developed in pre-U.C.C. cases is entirely consistent with the Article 2 goals of encouraging compromise and promoting good faith in commercial relations.[38] As Comment 4 to section 2–607 indicates, the purpose of notice is not merely to inform the seller that his tender is nonconforming, but to open the way for settlement through negotiation between the parties. In the words of the California Supreme Court, "the sound commercial rule" codified in section 2–607 also requires that a seller be reasonably protected against stale claims arising out of transactions which a buyer has led him to believe were closed. *Pollard v. Saxe & Yolles Development Company*, 1974, 12 Cal.3d 374, 115 Cal.Rptr. 648, 525 P.2d 88; *see* Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1130 (1960). Early warning permits the seller to investigate the claim while the facts are fresh, avoid the defect in the future, minimize his damages, or perhaps assert a timely claim of his own against third parties. *See* Phillips, Notice of Breach in Sales and Strict Tort Liability

35. Section 412 of the *Restatement of Contracts* states the same rule as the Uniform Sales Act. *Franck v. J. J. Sugarman-Rudolph Co.*, 1952, 40 Cal.2d 81, 251 P.2d 949, 953. Illustration (1) under section 412 gives the following example:

> A contracts to sell to B a specific automobile on June 1. A tenders it on June 15 and B accepts it without comment. On July 15, B brings an action against A for injury caused by the fortnight's delay. B cannot recover.

36. *See, e. g., Klein v. American Luggage Works, Inc.*, Del., 1960, 2 Storey 406, 158 A.2d 814; *Wildman Manufacturing Co. v. Davenport Hoisery Mills*, 1923, 147 Tenn. 551, 249 S.W. 984; *Trimount Lumber Co. v. Murdough*, 1918, 229 Mass. 254, 118 N.E. 280; *Mason v. Valentine Souvenir Co.*, 1917, 180 App.Div. 823, 168 N.Y.S. 159.

37. The Code Comment for section 2–607 indicates that the purpose of the provision is "[t]o continue the prior basic policies with respect to acceptance of goods while making a number of minor though material changes in the interest of simplicity and commercial convenience." California Code Comment No. 4 states that the provision "continues the rule of former § 1769."

38. *See* Phillips, Notice of Breach in Sales and Strict Tort Liability Law: Should There Be A Difference?, 47 Ind.L.J. 457, 469 & n. 51 (1972).

Law: Should There Be A Difference?, 47 Ind.L.J. 457, 465–70 (1972); Note, Notice of Breach and the Uniform Commercial Code, 25 U.Fla.L.Rev. 520, 521–25 (1973).

Given these undeniable purposes, it is not enough under section 2–607 that a seller has knowledge of the facts constituting a nonconforming tender; he must also be informed that the buyer considers him to be in breach of the contract. The Code's notice requirement, then, is applicable to delivery delays as well as other breaches.[39] *MacGregor v. McReki, Inc.*, 1971, 30 Colo. App. 196, 494 P.2d 1297, 1299; R. Anderson, Uniform Commercial Code § 2–607:13 at 211 (1971); Note, Notice of Breach and the Uniform Commercial Code, 25 U.Fla.L.Rev. 520, 526 (1973); *see Warren's Kiddie Shoppe, Inc. v. Casual Slacks, Inc.*, 1969, 120 Ga.App. 578, 580, 171 S.E.2d 643, 645; *Beacon Plastic & Metal Prod., Inc. v. Corn Products Co.*, App.Term, 1968, 57 Misc.2d 634, 637, 293 N.Y.S.2d 429, 433. Accordingly, we decline to follow the reasoning of the *Zimmerman* decision, and we find that the trial court erred in not applying section 2–607 to the delivery delays at issue in this case.

B. Adequate Notice Under Section 2–607(3)(a)

Turning next to the lower court's alternative rationale for ruling against McDonnell on the issue, we must determine whether the notice given by Eastern was both sufficient and timely as a matter of law. Finding the facts "essentially uncontradicted," the trial court concluded that Eastern adequately informed McDonnell that it considered the delivery delays to be an actionable breach:

> Eastern's management repeatedly protested the delays and requested negotiation of the dispute, but they were always put off by McDonnell Douglas with the assurance that the matter would be taken up once the assembly line was back on schedule. When production was again on-line many months later it became obvious to Eastern that no good-faith settlement negotiations would take place.[40]

Because the court's ruling was, in effect, a directed verdict, it can be sustained only if there is no conflict in substantial evidence and the inferences from these facts "point so strongly and overwhelmingly" in favor of Eastern that reasonable men could not have arrived at a contrary verdict. *Boeing Company v. Shipman*, 5 Cir., 1969, 411 F.2d 365, 374–75 (en banc). As will be demonstrated below, the adequacy and timeliness of notice under section 2–607 typically depend upon the reasonableness of the buyer's efforts to communicate his dissatisfaction. *See United States v. Crawford*, 5 Cir., 1971, 443 F.2d 611, 614. Therefore, whether the notice requirement has been complied with is a question which is particularly within the province of the jury. *See Pritchard v. Liggett & Myers Tobacco Company*, 3 Cir., 1961, 295 F.2d 292, 298; *L. A. Green Seed Company of Arkansas v. Williams*, Ark., 1969, 438 S.W.2d 717; 2 R. Anderson, Uniform Commercial Code § 2–607:24 (1971). As was noted by the Third Circuit:

> Where more than one inference may be drawn from undisputed facts, or the facts are disputed, the timeliness and sufficiency of a notice of breach . . . are questions for the jury to resolve. The question of reasonableness must be determined from the circumstances in the individual case.

Pritchard v. Liggett & Myers Tobacco Company, supra (applying Uniform Sales Act); *see Columbia Axle Co. v. American Automobile Ins. Co.*, 6 Cir., 1933, 63 F.2d 206, 208.

[7] Applying this standard of review to the facts, we find that there was at least

39. Notice, however, is not required when the seller has failed to deliver the goods. *Chemetrom Corporation v. McLouth Steel Corporation*, N.D.Ill., 1974, 381 F.Supp. 245, 254; R. Nordstrom, Handbook of the Law of Sales 425 (1970). Section 2–607, by its terms, does not apply where there has been no tender or acceptance of the goods.

40. District Court's Order Granting in Part Defendant's Motion for Judgment Notwithstanding the Verdict and Denying Defendant's Motion for New Trial, March 26, 1974.

one substantial factual dispute before the court and that the trial judge's interpretation of the facts in the case was not the only reasonable inference that could be drawn from them. We, therefore, reverse on this issue as well. We do not agree, however, with McDonnell's contention that, as a matter of law, Eastern's notice was inadequate and untimely.

As we have seen, the contractual relationship between Douglas and Eastern stretched over a number of years and was governed by a series of separate agreements, several of which were amended a number of times.[41] The complexity of these agreements and the large number of planes involved required the parties to be in constant communication with each other. Indeed, throughout this period, Eastern was informed of all significant developments by one of its own engineers who was in residence at the Douglas plant. Eastern, therefore, often knew of anticipated delivery delays before being formally informed of them by Douglas.

By early January of 1966, both parties were aware that production under Contract 65–41–L, the agreement with the earliest delivery dates, was behind schedule. Douglas did not officially notify Eastern of the impending delays until February when it sent several letters ascribing the DC–9–14 production difficulties to delays by subcontractors and a shortage of skilled labor. In Douglas' view, all of these problems were due to "our nation's rapidly increasing commitments in Southeast Asia." Douglas also indicated that it was making every effort to mitigate the impact of its subcontractors' difficulties.

Eastern replied on March 15, stating that it was "most disappointed with the delivery status" of the DC–9–14's. The airline noted that it had repeatedly expressed concern over the lack of early notification by Douglas. Without contesting Douglas' assertions concerning the Vietnam War, Eastern stated that

> It appears to us that some of this slippage really should have been avoidable if corrections had been rigorously pursued when it first became apparent. In light of this, we believe the Douglas Company has a responsibility to assist Eastern wherever possible in the reduction of our own preinauguration activities. Some of the areas that assistance would be beneficial [sic] are training (flight crews, cabin attendants, mechanics, and inspectors) and additional introductory service support.
>
> While it may be too early to evaluate completely, we assume your corrective actions will preserve the presently planned deliveries for the DC–9–31 and the DC–8–61 currently on order by Eastern.

On May 4, Douglas wrote Eastern expressing its willingness to discuss ways of "minimizing the difficulties these delays are causing you." Douglas, however, asked the airline to defer such conversations until production was back on schedule. There was no further correspondence concerning Contract 65–41–L, and, as we have seen, the agreement itself was terminated on July 14, 1966.

By fall of 1966, however, it became apparent that there also would be delays in the delivery of the DC–9–31 and DC–8–61 planes. Between October 1966 and September of 1967, Douglas wrote Eastern at least four times informing the airline of further delays in the production of these two types of aircraft. In a September 28, 1967 letter, written after the April merger, McDonnell Douglas again attributed the delays to "the worker shortage and continuing material and equipment shortages."

Eastern's first formal response to this series of announcements came on October 6, 1967. This letter informed McDonnell that "the delays in aircraft delivery have been very expensive to Eastern Airlines and we must view continuing slippage with great concern." Eastern went on to state that

> the delivery delays have cost Eastern so heavily that it would now appear that we made a mistake in going the DC–9 and DC–8–61 routes. Terms that were of-

41. *See* note 4 *supra*.

fered to us by another manufacturer would have been far less costly and although all aircraft manufacturers have suffered to some degree from common problems, it is apparent that the delivery schedule offered to us by your competitors have been more realistic than those attained by Douglas.

. . . . .

The delivery record of your current series of aircraft must necessarily be taken into account as we evaluate the purchase of the next series of airplanes. Unless there is concrete evidence that we can expect the DC–10 to be delivered in accordance with schedules offered by Douglas, it will be very difficult for us to decide in favor of your product as compared with that of another manufacturer.

On November 7, 1968, Eastern's Chief Financial Officer, Mr. Simons, wrote McDonnell Douglas asking that every effort be made to deliver several planes on schedule because a delay during the peak holiday season would place "a substantial burden on Eastern which is more severe than that imposed on your other customers."

There were no further significant written communications from Eastern until May 29, 1969 when McDonnell was formally presented with a claim for damages, in a letter from Eastern reading, in part, as follows:

> Eastern has made a full study of such delays and their economic impact and has concluded that Eastern has sustained very substantial damages as a result of delays which cannot be deemed "excusable" within the meaning of the definition in the applicable Purchase Agreements. At its meeting on May 27, 1969, our Board of Directors instructed management to present and process a claim for such damages.

In addition to this undisputed documentary evidence, the District Court had before it testimony concerning Eastern's attitude toward the delivery delays. Eastern's Chairman, Floyd Hall, testified that he "talked with almost every one of the top officials [of Douglas and then of McDonnell Douglas] at one time or another. . . . [E]very time I met them I reminded them of the late delivery of their aircraft." W. Glenn Harlan, Eastern's Senior Vice President of Legal Affairs, also testified that he refused Douglas' request to waive the airline's claims concerning the late deliveries.

The record, however, also contains testimony that Eastern informed McDonnell executives that it did not intend to make a claim for the late deliveries. James S. McDonnell, Chairman of McDonnell Douglas, testified that, as late as October 1968, Eastern's President, Arthur Lewis, assured him that no damages would be sought. Another McDonnell executive, Jackson R. McGowan, also testified that Eastern's Chairman, Floyd Hall, told him that no legal action was contemplated.[42] These allegations were denied by Eastern's witnesses.

Eastern contends that these facts are more than sufficient to constitute adequate notice as a matter of law. The Code, in Eastern's view, does not require the buyer to inform the seller that he is presenting a claim under the contract. This contention is based on Comment No. 4 to section 2–607 which states, in part, that "[t]he content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched." Eighth Circuit decisions[43] and at least one

42. In a memorandum to Mr. McDonnell, apparently written after Eastern had formally presented its claim in 1969, McGowan wrote concerning this conversation:

> From his remarks I took him to mean that he was trying to be understanding of our problems and did not anticipate taking legal action. On the other hand, I did not get the opinion that he was giving up his legal rights.

We note here that section 2–607 does not require an explicit waiver of legal rights for a buyer's claim to be defeated. McGowan's memorandum, therefore, does not necessarily support the trial court's directed verdict on the notice issue.

43. *Bonebrake v. Cox*, 8 Cir., 1974, 499 F.2d 951, 956–57 (letter informing seller that equipment not installed within meaning of contract sufficient notice as a matter of law); *Lewis v. Mobil*

commentary [44] have relied on this sentence from Comment No. 4 for the proposition that almost any indication of dissatisfaction on the buyer's part meets the requirements of section 2–607. Under this standard, there would be little doubt that Eastern's letters concerning the delays constituted sufficient notice under the U.C.C.

It appears that Comment No. 4 was aimed at remedying a rule adopted under section 49 of the Uniform Sales Act by some courts that a mere complaint of a breach was not adequate notice.[45] In California [46] and a number of other states,[47] for example, a buyer was required to indicate that he intended to look to the seller for damages. Several jurisdictions, moreover, required the buyer to specify in detail the basis for his claim that the contract was breached. *E. g., Idzykowski v. Jordon Marsh Co.*, 1932, 279 Mass. 163, 181 N.E. 172, 173.

[8] These technical requirements were dispensed with because they frequently served to deny an uninformed consumer of what was otherwise a valid claim.[48] As is noted in the draftsmen's comments, "the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy." [49] Eastern is therefore correct in asserting that notice under section 2–607 need not be a specific claim for damages or an assertion of legal rights. 2 R. Anderson, Uniform Commercial Code § 2–607:25 at 218 (1971).

However, the fact that the Code has eliminated the technical rigors of the notice requirement under the Uniform Sales Act does not require the conclusion that any expression of discontent by a buyer always satisfies section 2–607. As Comment 4 indicates, a buyer's conduct under section 2–607 must satisfy the Code's standard of commercial good faith. Thus, while the buyer must inform the seller that the transaction is "still troublesome," Comment 4 also requires that the notification "be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation."

Oil Corporation, 8 Cir., 1971, 438 F.2d 500, 509 (constant communications from buyer concerning his suspicion that improper oil was being supplied sufficient to support jury verdict of adequate notice); *Boeing Airplane Company v. O'Malley*, 8 Cir., 1964, 329 F.2d 585, 593–96 (failure to perform properly in front of seller's expert and resulting shutdown of buyer's operations sufficient evidence for jury's finding on notice).

44. J. White & R. Summers, *Handbook of the Law under the Uniform Commercial Code* 347–48 (1972). The authors of this treatise conclude that

> Quite clearly the drafters intended a loose test; a scribbled note on a bit of toilet paper will do. . . . Under [Comment No. 4], it is difficult to conceive of words which, if put in writing, would not satisfy the notice requirement of 2–607. Indeed a letter containing anything but the most exaggerated encomiums would seem to tell the seller that the transaction "is still troublesome and must be watched."

See R. Nordstrom, Handbook of the Law of Sales 430 (1970).

45. *See, e. g., Moosbrugger v. McGraw Edison Company*, 1969, 284 Minn. 143, 170 N.W.2d 72, 78–80; *Nugent v. Popular Markets, Inc.*, 1967, 353 Mass. 45, 228 N.E.2d 91, 94; *Clarizo v. Spada Distributing Co.*, 1962, 231 Or. 516, 373 P.2d 689, 692–93, 693 n. 4; Ezer, The Impact of the Uniform Commercial Code on the California Law of Sales Warranties, 8 U.C.L.A.L.Rev. 281, 332 (1961); Project: A Comparison of California Sales Law and Article Two of the Uniform Commercial Code (Part II), 11 U.C.L.A.L.Rev. 78, 90 (1963); Note, Notice of Breach and the Uniform Commercial Code, 25 U.Fla.L.Rev. 520, 536 (1973).

46. *Whitfield v. Jessup*, 1948, 31 Cal.2d 826, 193 P.2d 1, 4; *see Silvera v. Broadway Department Store, Inc.*, S.D.Cal., 1940, 35 F.Supp. 625, 626.

47. *Clarizo v. Spada Distributing Co.*, 1962, 231 Or. 516, 373 P.2d 689, 692–93; *see Dailey v. Holiday Distributing Corp.*, 1967, 260 Iowa 859, 151 N.W.2d 477; *Lieberman v. W. M. Gulliksen Mfg. Co.*, 1955, 332 Mass. 439, 442–43, 125 N.E.2d 396, 398.

48. This occurred in at least two California decisions. *Silvera v. Broadway Department Store, Inc.*, S.D.Cal.1940, 35 F.Supp. 625, 626; *Arata v. Tonegato*, 1957, 152 Cal.App.2d 837, 314 P.2d 130, 132–33.

49. Uniform Commercial Code § 2–607, Comment 4.

[9] In arguing that these requirements have been complied with, Eastern cannot rely on the same minimal standards of notice developed for ordinary consumers. The measure of good faith required under the Code varies with a buyer's commercial status. Unlike an ordinary purchaser, a merchant's [50] good faith is measured by "reasonable commercial standards of fair dealing in the trade." [51] Therefore, as the Comments to section 2–607 indicate, what constitutes adequate notice from an inexperienced consumer may not be sufficient in a transaction between professionals.[52] While an ordinary purchaser is generally ignorant of his obligation to give timely notice,[53] a merchant buyer should be well aware that some form of notice is a requirement of his trade. We find merit, then, in those decisions which have indicated that, under section 2–607, merchants will be held to a higher standard than ordinary buyers. *Nugent v. Popular Markets, Inc.*, 1967, 353 Mass. 45, 59, 228 N.E.2d 91, 94; *Ford v. Barnard, Sumner & Putnam Co.*, Mass.App., 1973, 294 N.E.2d 467, 469; *see* Note, Notice of Breach and the Uniform Commercial Code, 25 U.Fla.L.Rev. 520, 536–38 (1973).

We note, moreover, that the trial judge's rationale for ruling against McDonnell on the notice issue appears to have been based on a single letter written by Douglas in response to Eastern's March 15, 1966 request for aid in reducing its "pre-inauguration activities." In his post-trial memorandum, the District Judge appeared to infer a waiver of Douglas' right to notification concerning any future breaches from its request that this aid be postponed. In our view, though, the March 15 letter from Eastern does not constitute adequate notice as a matter of law. Indeed, a close reading of the communication reveals that Eastern's primary concern was the lack of early notification of impending delivery delays rather than the validity of Douglas' contention that these delays were the product of the Vietnam War. Although Eastern expressed the view that some of the delays should have been avoided, it requested merely that Douglas help to mitigate the delays' impact upon Eastern's operations. A jury, therefore, might reasonably infer from this correspondence that Eastern was not claiming a breach of the particular contract involved.[54]

[10] More importantly, the District Court's reliance on these two particular letters evidences a failure to recognize that the buyer's good faith is the governing criterion under section 2–607. As we have seen, the Code's draftsmen disposed of rigid technical requirements which would frustrate the notice requirement's design of de-

50. Section 2–104(1) defines "merchant" as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction . . . ." Comment No. 2 to this section provides that

"[t]he term 'merchant' as defined here roots in the 'law merchant' concept of a professional in business. The professional status under the definition may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both . . . ."

51. Section 2–103(1)(b) reads as follows: " 'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

52. Although the following statement concerns the time in which notification must be given, we consider it equally applicable to the issue of the content of adequate notice under section 2–607:

> The time of notification is to be determined by applying commercial standards to a merchant buyer. "A reasonable time" for notification from a retail consumer is to be judged by different standards . . . .

Uniform Commercial Code § 2–607, Comment 4.

53. *See Greenman v. Yuba Power Products, Inc.*, 1962, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897, 900 (Traynor, J.); Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1130 (1960); Note, Notice of Breach and the Uniform Commercial Code, 25 U.Fla.L.Rev. 520, 536–38 (1973).

54. The exchange of letters relied on by the trial judge was concerned exclusively with delays arising under Contract 65–41–L which, as we have seen, cannot be the subject of an action by Eastern. See Part II *supra*.

feating commercial bad faith.[55] Therefore, the fact that dissatisfaction may once have been communicated to the seller should not preclude an inquiry into the buyer's good faith as evidenced by his entire course of conduct. *See United States v. Crawford, supra*, 443 F.2d at 614. Even though adequate notice may have been given at one point in the transaction, subsequent actions by the buyer may have dissipated its effect. The buyer's conduct, then, taken as a whole, must constitute timely notification that the transaction is claimed to involve a breach.[56]

It is particularly important in continuing contractual relationships—such as the one which bound Eastern and McDonnell Douglas together for almost four years—that all of a buyer's dealings with a seller be evaluated under the good faith standard. An overly mechanical application of the notice requirement to complex or ongoing agreements would frequently frustrate the section 2–607 design of defeating commercial bad faith.

Reviewing Eastern's entire course of conduct during the years 1965–1969, and recognizing that Eastern must be held to a higher standard of good faith than an ordinary consumer, we conclude that a jury could reasonably find, as one of its options, that adequate notice was not given. In analyzing the record before us, we are guided by the *Boeing Company v. Shipman, supra*, requirement that we give McDonnell the benefit of every reasonable inference.

We note first that even Eastern's most strongly worded communications can reasonably be construed as an effort to prod McDonnell Douglas into minimizing the Vietnam War's impact upon production rather than as a claim for breach. As we have seen, Eastern's March 15, 1966 letter to Douglas—perhaps its single most forceful expression of dissatisfaction—can be viewed as a request for aid in minimizing the impact of the delays rather than an assertion that Douglas had violated the contract.

Eastern, moreover, did not dispute McDonnell Douglas' contention that the delays were caused by the Vietnam War until the airline presented its formal claim for damages in 1969. Indeed, throughout the life of all the contracts, Eastern was advising its shareholders,[57] the public,[58] and, in sworn testimony, the Federal Government,[59] that war-related defense priorities were causing the delivery delays. Inasmuch as the "excusable delay" clause found in all the contracts provides that the "[s]eller shall not be . . . deemed to be in default" on account of delays caused by "governmental priorities," Eastern may well have led McDonnell to believe that it was not in breach of the agreements.

We disagree with Eastern's contention that it "had no choice but to accept what Douglas was saying as the truth." Eastern was in constant communication with its own engineer who was in residence at the

55. Indeed, the Code focuses so heavily on the buyer's conduct that notice is deemed given merely if the notifying party has taken reasonable steps to give the requisite notice to his counterpart. Uniform Commercial Code § 1–201(26) [Cal.Comm.Code § 1201(26)]. Thus, if a reasonable effort has been made by the buyer, it is not necessary that the seller actually learn of the breach for a buyer's rights to be preserved under section 2–607. *Smith v. Butler*, 1973, 19 Md.App. 467, 311 A.2d 813, 817.

56. We emphasize that even though a buyer's notification under this test may be adequate in terms of content, it may nonetheless be untimely. *See* Uniform Commercial Code § 2–607 Comment 4. The jury could have found, for example, that Eastern had given timely notice with regard to only some of the delivery delays.

57. Eastern's 1966 Annual Report, for example, stated that the aircraft deliveries were being delayed because of "the war demands on the aerospace industry and its suppliers."

58. On March 2, 1966, an Eastern press release stated that its "ability to increase available seat miles . . . is being restricted by the slow rate of the new aircraft deliveries by both Boeing and Douglas caused by the military requirements in Viet Nam."

59. Before the Civil Aeronautics Board, on December 8, 1967, Eastern stated that "Eastern, like other purchasers, has experienced substantial delays in delivery of DC–9–31 aircraft, largely because of military requirements for the Vietnam conflict."

Douglas plant throughout this period.[60] Furthermore, Eastern and, indeed, the entire aviation industry were aware that Douglas' catastrophic financial crisis was, to some degree, precipitated by internal management difficulties.[61] As early as the summer of 1966, therefore, Eastern had ample opportunity to assert then, as it does now, that the delivery delays were caused by internal problems rather than the Vietnam War. It failed to do so.

Eastern's commercial good faith is subject to further challenge because it continued to negotiate new contracts and amend old ones throughout the period in which the delays occurred. Two of the agreements, in fact, were executed in October of 1967 after 44 of the planes were already late. At no time during the negotiation and execution of any of these contracts did Eastern seek a settlement of its claims or even dispute McDonnell's Vietnam excuse. This may very well have led McDonnell to believe that, even though Eastern was unhappy about the delays, it did not consider them to be a breach of the contract.[62]

In addition to supporting the inference that adequate notice was not given, the record reveals a conflict in the evidence which, under *Boeing Company v. Shipman*, *supra*, is sufficiently substantial to preclude a directed verdict for Eastern. As we have seen, both Mr. McDonnell and Mr. McGowan testified that Eastern's management had assured them that no damages would be sought because of the delivery delays. Eastern's witnesses disputed this contention. If such assurances were in fact given, Eastern's conduct may well have violated the requirements of commercial good faith. This conflict alone, then, is sufficient to render the question of notice an issue for the jury.

The evidence reflected in the record, however, is also insufficient to support a directed verdict in favor of McDonnell Douglas on the issue of notice. There was no evidence at trial concerning the "reasonable standards of fair dealing" in the commercial aviation industry. We, therefore, cannot determine whether Eastern's conduct failed to satisfy contemporary standards of commercial good faith. Additionally, the conflict in evidence described above, the testimony that Eastern in several instances refused to waive its legal rights,[63] and the dissatisfaction with the delays evident in several of the airline's communications with McDonnell, are sufficient to create a jury question. In conclusion, therefore, the issue

60. At oral argument, in fact, Eastern's counsel stated that the airline's representative at the Douglas plant "had a better estimate of when the planes were coming out than Douglas did."

61. Counsel for Eastern conceded as much in oral argument. When questioned by the court concerning when the airline first became aware of Douglas' internal problems, Eastern's counsel stated that by the summer of 1966 both Eastern and the general public "became aware of what the problems were inside of Douglas."

62. We recognize, of course, that once an airline begins to build a fleet with a particular make of airplane it cannot easily switch to a competing manufacturer. Eastern, therefore, is correct in pointing out that as of 1965, it was effectively "married" to Douglas. The conjugal nature of its relationship with Douglas, however, did not relieve Eastern of its obligation of commercial good faith. As we have seen, the notice requirement reconciles the seller's right to early warning of claims for breach with the need to accommodate the buyer who, for reasons of necessity, has to accept a tender which is not in full compliance with the contract. In a continuing contractual relationship, therefore, the buyer must decide whether the benefits of claiming a breach of contract outweigh the need for a close rapport with the seller.

63. McDonnell also contends that the District Judge erred in ruling against and not submitting to the jury its contentions that Eastern had waived its claims and was otherwise estopped from pursuing this cause of action. Because they parallel McDonnell's contentions under section 2–607 and are based on the same evidence, the defenses of waiver and estoppel will be effectively decided by the jury's determination of the notice issue. *See* note 42 *supra*. Our holding concerning section 2–607, therefore, obviates the need for any separate consideration of these contentions. However, because we find no reasonable support in the record for McDonnell's contention that Eastern executed an accord and satisfaction with it, we do conclude that the District Judge correctly ruled against McDonnell on this particular issue.

of notice under U.C.C. § 2–607 should have been submitted to the jury with instructions that it determine whether Eastern's conduct throughout the life of the contracts constituted adequate and timely notice to McDonnell that it was considered to be in breach of the contracts.

IV. *The Vietnam War as an Excuse for Delayed Deliveries*

Much of the trial below was devoted to McDonnell's defense that the delivery delays were the result of the escalation of the war in Vietnam and were therefore excusable under the contracts, the Defense Production Act, and the Uniform Commercial Code. To prove this contention, McDonnell introduced evidence of government pressure on its suppliers and subcontractors to accord military orders priority over civilian projects. McDonnell asserts that its efforts to raise the defense of government "jawboning" was frustrated by the trial judge's ruling and subsequent instructions to the jury which held that the only excusable delays were those resulting from formal ratings and directives issued in strict compliance with the Defense Production Act. Issue is also taken by McDonnell with the lower court's rulings that it had the burden of proof in establishing its defenses, that the U.C.C. is not applicable to this question and that any excusing event must have been unforeseeable.

Because we find that the Government's "jawboning" policy in effect during the years 1966–1969 comes within the terms of the contracts' excusable delay clause and the exculpatory provision of the Defense Production Act, we hold that the District Judge committed reversible error on this issue. The jury should have been instructed that McDonnell was not liable for any delays proximately caused by this government policy. The trial judge also erred in instructing the jury both that these particular delays had to have been unforeseeable and that the Code's impracticability defense was not available to McDonnell.

A. The Government's "Jawboning" Policy

[11] Although the origins of American involvement in Vietnam can be traced back to World War II, direct military intervention did not begin on a significant scale until after the overthrow of the Diem Regime in November of 1963. During the ensuing year, the United States increased the number of its troops stationed in that country from 1,000 to 20,300. This American commitment, however, constituted a relatively insignificant part of our total military budget and had no substantial effect on the national economy.[64] Even after the Gulf of Tonkin Resolution of August 2, 1964, our troop commitment in Vietnam remained stable with the total size of the army, in fact, declining. The massive American buildup did not begin in earnest until January of 1965,[65] and it was not until mid-1966 that the United States assumed the bulk of the combat role in Vietnam.

Thus, in February 1965, when Eastern and Douglas signed the letter of intent concerning all the agreements ultimately executed between them, the Vietnam conflict was having no significant effect on the American economy. There was, moreover, little indication at that time of the proportions which the war was quickly to assume.[66]

Date	Number of troops
December 31, 1964	23,000
June 30, 1965	103,000
December 31, 1965	184,000
June 30, 1966	322,000
December 31, 1966	455,000

64. One expert witness testified that, prior to the fiscal year ending in 1966, the Vietnam conflict imposed no more than $100 million a year in "additional costs" on the military budget. This is a relatively insignificant factor in a $50 billion military budget or a $700 billion economy.

65. The bombing of North Vietnam did not officially begin until February 1966. As is indicated below, the number of American troops in Vietnam increased by 800 per cent during 1965:

66. For example, Secretary of Defense McNamara announced in 1965 that "We have stopped losing the war." At the time, President Johnson estimated that the military budg-

It was not until 1966 that the war first began to have a substantial impact on the American economy. During that year, for example, the armed forces absorbed over two-fifths of the nation's available manpower. A substantial share of the remaining available work force was taken by firms confronted with a rising backlog of defense-related orders. As one expert testified at trial, this military buildup was

> superimposed on an economy which was rapidly approaching full employment. . . . Hence there wasn't the available capacity in the American economy to absorb the Vietnam requirements on top of existing civilian requirements.

This, of course, led to conflicts between already scheduled commercial production and sudden, unexpectedly-large military needs. Rather than abandoning entirely the "guns and butter" policy upon which the war had been predicated, the Government sought instead to have military suppliers accord first priority to war production.

The vehicle by which military orders gained precedence over civilian production was the Defense Production Act of 1950 ("D.P.A."). 50 App.U.S.C. § 2061 *et seq.*[67] Section 101 of the D.P.A. grants the President broad authority to require that priority be given to "contracts or orders . . . which he deems necessary or appropriate to promote the national defense."[68] Under section 704, the President is authorized further to "make such rules, regulations, and

et for the fiscal year ending in 1965 would be lower than that of the previous year. As late as 1966, American fiscal policy was being formulated on the assumption that the war would be over by June 1967. In March of that year, therefore, Secretary of the Treasury Fowler publicly expressed the hope that "no one will base his economic decisions on the purely speculative assumption that our Vietnam needs will exceed current expectations." The cost of the war in the fiscal year ending in 1967, however, exceeded the Government's estimates by almost 100 per cent.

67. The Defense Production Act has recently been amended. Defense Production Act Amendments of 1975, Pub.L. No. 94–152. 89 Stat. 810 (1975). Although the D.P.A. was changed in some significant respects, those provisions directly relevant to this appeal were unaffected. *See* S.Rep. No. 353, 94th Cong., 1st Sess. (1975). H.R.Conf.Rep. No. 673, 94th Cong., 1st Sess. (1975). Excerpts of the legislative history of the 1975 amendments are provided at 1975 U.S.Code Cong. & Admin.News p. 1588.

68. In full, section 101(a) reads as follows:

> The President is authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.

50 App.U.S.C. § 2071.

The broad latitude given the President in this area can also be inferred from the declaration of policy found in section 2:

> The United States is determined to develop and maintain . . . military and economic strength . . . . Under present circumstances, this task requires diversion of certain materials and facilities from civilian use to military and related purposes. It requires expansion of productive facilities beyond the levels needed to meet the civilian demand. In order that this diversion and expansion may proceed at once, and that the national economy may be maintained with the maximum effectiveness and the least hardship, normal civilian production and purchases must be curtailed and redirected.
>
> It is the objective of this Act . . . to provide the President with authority to accomplish those adjustments in the operation of the economy. It is the intention of the Congress that the President shall use the powers conferred by this Act . . . to promote the national defense, by meeting, promptly and effectively, the requirements of military programs in support of our national security and foreign policy objectives, and by preventing undue strains and dislocations upon wages, prices, and production or distribution of materials for civilian use, within the framework as far as practicable, of the American system of competitive enterprise.

50 App.U.S.C. § 2062.

orders as he deems necessary or appropriate to carry out the provisions of this Act." [69]

As provided under the D.P.A.,[70] the President in 1953 delegated his priority powers to the Director of what was then the Office of Emergency Planning ("O.E.P."), a part of the Executive Office of the President.[71] Pursuant to this delegation, the O.E.P., in turn, delegated priority authority over the air transport and other industries to the Secretary of Commerce. Within the Commerce Department, the Business and Defense Services Administration ("B.D.S.A.") was charged with administering the Defense Production Act.[72]

Pursuant to these delegations, the B.D.S.A. adopted rules and regulations governing the precedence to be given certain civilian and military orders.[73] The highest priority under these regulations was achieved by "directives" issued by the B.D.S.A. or the Office of Emergency Preparedness to schedule production at a particular plant.[74] "DX" ratings were intended to be used "to obtain products and materials in cases of extreme urgency," [75] and were accorded precedence over "DO"-rated orders which, in turn, had priority over all unrated goods in a particular area of production.[76]

Because of its importance both to the economy and to national defense, production for civil air carriers, ever since the Korean War, had been accorded the same general "DO" priority rating given military aircraft. By having equal preferential status with military production, the manufacturers of commercial planes were guaranteed prior access to the hardware and vital raw materials also being sought by less essential industries.

Occasionally, "DO"-rated civilian orders would delay military requirements with the same priority rating. Prior to 1966, these conflicts were usually resolved by a Defense Department application to the B.D.S.A. for a "bottleneck-breaking DX rating." After a number of weeks, the B.D.S.A. would issue the requested rating if it determined that civilian orders were in fact delaying military production.

By the end of 1965, however, the enormous increase in urgent military orders had made this process so unwieldy that the Defense Department sought to have the "DO"

69. In relevant part, section 704 provides:

> The President may make such rules, regulations, and orders as he deems necessary or appropriate to carry out the provisions of this Act . . . . Any regulation or order under this Act . . . may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions as in the judgment of the President are necessary or proper to effectuate the purposes of this Act . . ., or to prevent circumvention or evasion, or to facilitate enforcement of this Act . . ., or any rule, regulation, or order issued under this Act . . . .

50 App.U.S.C. § 2154.

Section 103 imposes criminal sanctions for the violation of "any rule, regulation or order" issued under the Defense Production Act. 50 App.U.S.C. § 2073.

70. Under section 703,

> "the President may delegate any power or authority conferred upon him by this Act . . . to any officer or agency of the Government, including any new agency or agencies (and the President is authorized to create such new agencies . . . as he deems necessary), and he may authorize such redelegations by that officer or agency as the President may deem appropriate."

50 App.U.S.C. § 2153.

71. Exec. Order No. 10480, 18 Fed.Reg. 4939 (1953).

72. 18 Fed.Reg. 6503 (1953).

73. Reg. 2, Basic Rules of the Priorities System, 18 Fed.Reg. 1684 (1953), as adopted by the B.D.S.A., 18 Fed.Reg. 6503 (1953). Although Regulation 2 was initially promulgated under the National Production Authority (NPA), the B.D.S.A.'s predecessor in the Commerce Department, Exec. Order No. 10161, 15 Fed.Reg. 6105 (1950), the provision was specifically continued in force when B.D.S.A. was created. 18 Fed.Reg. 6503, 6505 (1953).

74. See Reg. 2, § 16, 18 Fed.Reg. 1684 (1953).

75. Reg. 2, § 3(a)(2), 18 Fed.Reg. 1684 (1953).

76. Reg. 2, §§ 3(b)(1) & (2), 18 Fed.Reg. 1684 (1953). Reg. 2 also provides that all DO-rated orders have equal preferential status. Reg. 2, § 3(b)(2).

rating removed from commercial aircraft production.[77] This request alarmed the entire aviation industry because it would have severely impeded its access to scarce raw materials and the heavy industry which was then processing these materials at full capacity. The airlines themselves were concerned that the loss of "DO" priority would further slow the production of planes already being delayed by a war-caused shortage of jet engines, and that non-urgent military orders would be filled at the expense of pressing commercial needs.

In the face of this widespread opposition, the military withdrew its request that the "DO" rating be removed from commercial aircraft production. As a *quid pro quo*, however, the Defense Department insisted that particular military orders be given preference on an individual and informal basis. It appears that the aviation industry agreed to the proposed arrangement.[78] Official recognition of the new policy is found in a July 22, 1966 letter from Farris Bryant, Director of the Office of Emergency Planning, to the Assistant Secretary of Defense, Paul R. Ignatius:

> It is my understanding that, by voluntary agreement between the Department of Defense and the aircraft manufacturers, actions have been taken which permit the manufacturers to produce military orders ahead of all civil air-carrier aircraft although both have equal priority rating.
>
> If this policy has resulted in deliveries which are satisfactory to your Department, it should continue. However, to insure its performance, I am requesting the Secretary of Commerce to use his directive authority wherever necessary to guarantee delivery of military aircraft and associated equipment.[79]

That same day a copy of this letter was forwarded to the Secretary of Commerce, John T. Conner, with a request that he instruct the B.D.S.A. "to take all necessary actions to insure the prompt delivery of military aircraft." The Secretary of Commerce replied on July 27, 1966, stating that

77. Between 1965 and 1966, the number of Defense Department requests for DX ratings increased from 1,172 to 5,212.

78. William N. Lawrence, the official in charge of the priorities office within the Office of Emergency Planning during the period at issue, testified that the aircraft manufacturers "voluntarily" agreed to the Defense Department's proposal. An executive of Pratt & Whitney, the sole suppliers of jet engines to Douglas, testified that the aircraft industry acceded to a system of "voluntary compliance" in order "to prevent the removal of the ["DO"] priority rating from commercial [production]." Even representatives of the airlines themselves acknowledged as early as July 1966 that "there are informal means by which the military orders can be given priority at the factory." "Staff Study" at 6, attached to letter to William N. Lawrence from F. E. Brown, Director of Supplies, Air Transport Association of America, July 14, 1966.

79. The evidence establishes that the Bryant letter was approving, after the fact, a policy which the B.D.S.A. had been pursuing for some time. *See* note 80 *infra*. This letter was excluded from evidence because the trial judge considered Mr. Bryant's "understanding" that a voluntary agreement had taken place to be hearsay. Tr. 2362–2372. It should be noted, however, that the District Court relied on this same letter in his denial of McDonnell's motion for a new trial. District Court's Order Granting in Part Defendant's Motion for Judgment Notwithstanding the Verdict and Denying Defendant's Motion for a New Trial, March 26, 1974. Regardless of whether the letter would otherwise be excludable as hearsay, *see* Fed.R. Evid., Rule 803(8), 28 U.S.C., it should have been admitted because it does establish that the official to whom the President had delegated all his powers under the D.P.A. approved of the informal "jawboning" at issue in this case.

In the 1966 annual report of the Department of Commerce to the Joint Committee on Defense Production, the congressional group charged with overseeing the D.P.A., 50 App.U.S.C. § 2162, the Department noted that "many successful actions taken by BDSA to expedite defense deliveries were accomplished without formal action." This report was included in the Sixteenth Annual Report of the Activities of the Joint Committee on Defense Production, H.R.Rep. No. 1, 90th Cong., 1st Sess. 174 (1967). The District Court excluded the above-quoted sentence from evidence, Tr. 7446. This statement is clearly admissible as being part of a public agency's report "setting forth . . . the activities of the office or agency." Fed.R. Evid., Rule 803(8), 28 U.S.C.

> With regard to the limitations imposed on the use of priorities, I have directed the Business and Defense Services Administration to take all necessary actions to insure the appropriate administration of the priorities activities in accordance with the policies outlined in your letters to Mr. Ignatius and to us.

Mr. Bryant's letters to Ignatius and Conner were disseminated among the manufacturers and suppliers in the aviation industry, and the policy outlined in them became public knowledge.

That "jawboning" of aircraft manufacturers continued to be the policy of the Executive Branch throughout the period at issue in this case is evident in an August 1, 1969 letter from the Acting Secretary of Commerce, Rocco C. Siciliano, to General G. A. Lincoln, Director of the Office of Emergency Preparedness, which was the successor to the Office of Emergency Planning. In reply to Lincoln's inquiry concerning the aviation industry's request for an extension of its "DO" priority rating, Siciliano noted that his Department had no objection and stated:

> It is recommended that any extension of the provisions of the July 22, 1966 letter from the Director of OEP [Bryant] to the Assistant Secretary of Defense [Ignatius] be for a period coterminous with any extension of the Defense Production Act of 1950, as amended; that it be subject to continuing arrangements that will assure deliveries of military needs in advance of civil orders; and that it be subject to termination by the Director of OEP at any time.

As explained by William J. Zepp, the Commerce Department official in charge of the B.D.S.A., the policy approved by Mr. Bryant was that when "DO"-rated orders conflicted, the military came first." [80] Individual firms, moreover, were told that any resistance to informal requests by representatives of the military would result in a formal directive being issued against

80. The statement, along with the colloquy in which it appeared, was stricken by the District Court:

> Q. Let me ask you this, sir. As a result of your receipt of the letters that you have just been shown, was there any different policy followed by your office as priorities officer and executive secretary of the Business and Defense Services Administration regarding DOA1 ratings of military planes and commercial planes in handling special assistance cases?
>
> . . . . . .
>
> Q. You may answer.
> A. Those letters more or less reflected existing policy.
>
> . . . . . .
>
> Q. Now, Mr. Zepp, you said on the last question, sir, that—I believe you said that the effect of these letters was already existing Government policy, am I correct in that? Or you put it in your words.
> A. Reaffirmation of existing policy.
> Q. Reaffirmation of existing policy.
> Mr. Zepp, my question to you is: When you had, or were there instances where you had a situation where commercial aircraft, DO rated orders, and military aircraft DO rated orders conflicted, what policy, sir, had been followed by you preexisting these letters?
>
> . . . . . .
>
> A. Yes. The policy was that the military came first. This is a reflection of the Defense Production Act and the way the President's powers were to be used by our office.
> Q. Is that the policy you, as top priorities officer in the Department of Commerce, exercised?
> A. It was. I am referring to Section 101 of the Act.

The District Court also struck the following exchange during Eastern's cross-examination of Mr. Zepp.

> Q. Can you tell this jury, where you have a situation where a commercial DO rated order and a military order—DO order—were received by a supplier relating to the same identical order, engines, or whatever, how would it be handled by the supplier?
> A. He would have to work on the military order first.

The trial judge struck this testimony pursuant to his holding that only delays caused by formal ratings are excusable. Since we hold this to be an erroneous interpretation of the contracts and the Defense Production Act, all evidence of this sort should be presented for the jury's consideration upon the retrial of this case.

them.[81] For example, Pratt & Whitney, the sole supplier of engines to Douglas, was "overwhelmed" in 1966 by government demands that its production of military engines be accelerated.[82] These requests were being acceded to, in the words of one Pratt & Whitney executive, "to prevent the removal of the priority rating from the commercial [orders]."

Similar pressures were being applied to the manufacturers of Douglas' landing gear. Gerald Lynch, President and Chairman of Menasco, Inc., testified that the underlying reason for his firm's delay in delivering landing gear to Douglas was "the extraordinary unanticipated requirements for . . . military spares." When questioned by Eastern's counsel concerning why Menasco gave the military priority over Douglas, Lynch replied that

> the Douglas program was the most important program in the house. There is no question about that, and it was. After all, Douglas is a continuing customer,

81. William N. Lawrence, the official charged with administering the O.E.P.'s priorities program, gave the following testimony:

Q. And when you say "jawboning," sir, what do you refer to?

A. I refer there to where a telephone call is used rather than a formal directive to expedite delivery of a particular item from a particular plant.

Q. And you say the telephone call is used, the jawboning, in a sense, if it is not done a priority would be directed?

A. A directive would be issued.

In a letter dated July 12, 1966, Major General C. W. Cecil of the Air Force wrote to Douglas urging compliance with the priorities policy of the Government, noting that "[a]s you are undoubtedly aware, production under [military] contracts assigned a priority rating will take precedence over unrated or civilian orders." The trial judge again erroneously refused to admit this evidence of informal government pressures.

82. The nature and extent of these demands are revealed in a letter from Lieutenant General Gerrity of the Air Force to Pratt & Whitney dated December 23, 1966. General Gerrity reaffirmed his position that

> the Air Force is not "standing in line" to receive . . . engines on any schedule short of our established requirements. . . . [W]hile I'm completely sympathetic to your overall problem of attaining increased capacity to meet both commercial and military schedules, I must re-emphasize that if you cannot meet both, then the priority should go to our military engines.

This evidence was stricken by the trial judge. Eastern contends that Gerrity's evidence was properly excluded because the General could not himself issue a "DX" rating, and therefore could not have overridden the commercial, "DO"-rated orders. This is not entirely clear, however. Gerrity was Air Force Deputy Chief of Staff, Systems and Logistics, as well as Administrative Head of the Joint Aeronautical Materials Activity Command. The Commerce Department's report on the activities of the B.D.S.A. during 1966 includes as an exhibit a Defense Department presentation given throughout the nation to firms having defense contracts. The opening paragraph of this presentation states that each of the armed services had the right to apply "DX" priority to their orders:

> [T]he Business and Defense Services Administration has delegated to the Secretary of Defense and the Chairman of the Atomic Energy Commission, three main priorities and allocations authorities; namely, to rate their contracts and orders with DX or DO; to assign the right to apply the DX or DO ratings for capital equipment; and to allocate steel, copper, aluminum and nickel alloys for their A products. The Secretary of Defense has delegated these powers to the Assistant Secretary of Defense for Installations and Logistics. These powers, in turn, have been delegated . . . to the Army, Navy, Air Force. . . .

H.R.Rep. No. 1, 90th Cong., 1st Sess., 192–93 (1967).

This description of the delegation of authority under the D.P.A. is supported by testimony of William N. Lawrence. Moreover, Major General Cecil of the Air Force wrote to Douglas on July 12, 1966, that both "DO" and "DX" ratings were "assigned by the procuring authority [*i. e.* the Air Force]."

Mr. Zepp's testimony, though, would seem to indicate that only the B.D.S.A. had authority to issue a "DX" rating. However, even assuming that General Gerrity did not himself have authority to issue the required rating, there is no doubt that a request from him to the B.D.S.A. would have achieved the same result. As Zepp testified, the B.D.S.A.'s procedure merely determined whether or not the Defense Department's claim of delay was accurate. Because Zepp and the B.D.S.A. subscribed to the "military first" policy, it would have been futile for affected firms to resist the informal jawboning. Consequently, the Gerrity letter should have been admitted as evidence of the government pressures placed on defense suppliers to grant military requirements over other "DO"-rated orders.

would have been a continuing customer through 1972 or '73.

It was to our economic interest to meet the Douglas requirement first and all other requirements second. However, as I pointed out, we were under the power of what I construed to be higher priority items, as far as the military were concerned. I couldn't commit capacity to Douglas ahead, if you will, of military projects. . . . There was just no way for us to do it, as I read the Defense Production Act and the orders.

I am familiar with the Defense Production Act. I was in Washington when the Act was developed. I was there throughout the entire Korean War, and I understood fully the significance of a military order.

There was no question in my mind then, nor is there any question in my mind now, that a military order had preference over any commercial order in the house. Even though it was not to Menasco's economic interest to place military orders ahead of commercial orders, I knew that.

Mr. Kimbrell, you have to understand that we do business with the military on kind of a casual, desultory basis. We do business with the military on spares when they need spares. But the continuing viability of our company depends upon our ability to meet the requirements of the prime contractors, which are Douglas, Lockheed, Grumman, Boeing and the rest of them. . . . [T]here is an overriding consideration that must be acknowledged, and that was the prior treatment that in my opinion, and I think in the opinion of the entire industry, we had to give military orders preferential consideration.

Cleveland Pneumatic Tool Company, the other supplier of landing gear to Douglas also gave military orders priority despite the "DO" rating given its civilian contracts. In response to McDonnell Douglas complaints concerning the delays, the firm sent a telegram on February 2, 1968 stating:

> We are attempting to do everything possible to improve our schedule position. However, we are constantly reminded by the military that where commercial work and military work of equal priority conflict, industry has agreed that it will support the military requirement first. We believe that Douglas subscribed to this policy. We have no choice but to adhere to it.

Taking the view that the jawboning policy described above was voluntarily acquiesced in by the aviation industry, the District Court ruled and subsequently instructed the jury during the liability phase of the trial that only delays resulting from the actual issuance of formal ratings or directives could be deemed excusable.[83] Consistent with this approach, the trial judge either

83. The District Court's jury instructions on this issue were as follows:

> I charge you that in order for McDonnell Douglas to establish that delivery delay was due to governmental priorities, allocation regulations or orders affecting materials, equipment, facilities or completed aircraft, McDonnell Douglas must show by the greater weight of the evidence:
>
> 1. That a government order had been actually assigned a DX rating by the Business and Defense Services Administration of the Department of Commerce or other appropriate government agency, or that a supplier had been issued a directive by the Business and Defense Services Administration to allocate a portion of its production to a government order rather than a commercial order, and
>
> 2. That a recipient actually complied with the DX rating or directive, and
>
> 3. That compliance with the DX rating or directive proximately caused delivery delays to Eastern airplanes which are the subject matter of this suit.
>
> A voluntary preference given to a government order by McDonnell Douglas or one of McDonnell Douglas' subcontractors does not excuse any failure on defendant's part to deliver the aircraft on time.
>
> . . . . . .
>
> I charge you that the only acts of government which you may consider as excusing factors under the excusable delay clause of the contracts are acts taken by government officials in the lawful exercise of their authority, including the acts of issuing DX ratings by the government agencies and directives by the Business and Defense Services Administration.

excluded or struck evidence concerning government jawboning of Douglas' suppliers.

In an effort to blunt McDonnell's attack on the trial judge's rulings and instructions, Eastern devoted a great deal of its briefs and oral argument to a recitation of purported management difficulties at Douglas during the years 1965–1966. Eastern implied that even if the District Court erred in its approach to the Government's jawboning policy, there are no grounds for reversal because the delivery delays were in fact the product of Douglas mismanagement rather than the Vietnam conflict.

Under the *Boeing Company v. Shipman* standard, however, there is ample evidence in the record to make this issue one for the jury. Not only does it appear that there was a substantial war-caused labor shortage in Douglas' recruiting area,[84] but Douglas' suppliers testified that their own delays were the product of similar labor shortages.[85] There is also direct evidence indicating that the delivery schedules of the manufacturers of Douglas landing gear[86] and engines[87] were delayed by the war. In short, the proof indicating that there were at least some war-caused delivery delays is not so inadequate as to eliminate the prejudicial effect of the trial court's rulings on military jawboning.[88] We turn, therefore, to an examination of the legal basis for those of the court's rulings and instructions

84. The California Department of Employment Research, for example, reported that

> The coincidence of the upsurge in the demand for aircraft production workers and the accelerated hiring among firms affected by developments in Vietnam, caused a rapid spread of recruitment problems involving a wide variety of occupations. Because of the prolonged slump in aircraft production, the supply of experienced aircraft workers had long since been diverted into other industry occupations and areas. The renewed demand quickly exhausted the supply of qualified machine shop metal trades and related workers. As the supply diminished, hiring specifications eased until the point was reached where there was mass hiring of trainees. California Department of Employment Research and Statistics, Los Angeles Metropolitan Area, *Economic Background of Los Angeles County 21* (April, 1967).

85. The President and Chairman of Menasco, one of Douglas' landing gear suppliers, testified that his firm had to "beat the bushes" for skilled workers because of "the added volume that was unanticipated and was imposed by the Southeast Asian operation."

86. Menasco, for example, was four months late in its deliveries of landing gear during 1966. As Eastern's counsel noted at oral argument, McDonnell presented claims to Menasco and Cleveland Pneumatic and, in fact, has received an out-of-court settlement from Cleveland Pneumatic.

87. There is evidence that Douglas had to reschedule its production of DC–8 and DC–9 aircraft as a result of engine delivery delays. During this period, Pratt & Whitney expressly admitted to "delaying Douglas."

> Although Eastern's counsel conceded in oral argument that Pratt & Whitney was late in delivering engines, he pointed to testimony of Arthur E. Smith, an executive of Pratt & Whitney, indicating that "by extraordinary effort," Douglas could get the engines installed out of their normal sequence on the assembly line without delaying delivery of the airplane. However, the record reveals that when Smith was asked directly whether the delivery of a Douglas plane to a customer was delayed by a lack of an engine, he replied:
>
> > What I am saying is that airplanes *that were ready to be delivered* were not delayed by lack of an engine. I think that is the proper context of what I am trying to get across.
>
> A jury could infer from this testimony that, while aircraft already on the assembly line were not delayed by Pratt & Whitney, the manufacturing process could have been hindered at some earlier point by the engine delays.

88. Interestingly enough, Boeing announced in May of 1966 that the delivery of its 707 and 727 aircraft would be delayed for periods of thirty days until as late as 1969. The anticipated delays were attributed to "the increasing military requirements for [Pratt & Whitney] engines and engine parts." As the Chairman and President of Menasco testified, the entire aviation industry appeared to be experiencing similar problems:

> I don't know of anybody in . . . the aircraft manufacturing business—starting out with machine tool builders and forging houses, to manufacturers—who were not impacted in about the same way and about the same degree.

to the jury which related to McDonnell's Vietnam War defense.

B. The "Excusable Delay" Clause

McDonnell Douglas contends that the trial judge's instructions to the jury undercut the defense available to it under the excusable delay clause found in all of the contracts at issue in this appeal. In relevant part, the provision reads as follows:

> Seller shall not be responsible nor deemed to be in default on account of delays in performance . . . due to causes beyond Seller's control and not occasioned by its fault or negligence, including but not being limited to . . . any act of government, governmental priorities, allocation regulations or orders affecting materials, equipment, facilities or completed aircraft, . . . failure of vendors (due to causes similar to those within the scope of this clause) to perform their contracts . . . , provided such cause is beyond Seller's control.

1. *Ejusdem Generis and the Applicability of U.C.C. § 2–615*

McDonnell's first contention in this regard is that the District Court unduly narrowed the scope of this clause by instructing the jury that an excusable delay must be the result of "one or more of the listed events in the excusable delay clause of the contracts, or . . . a similar cause beyond the defendant's control. . . . " This instruction, in McDonnell's view, effectively construes the specifically listed excusable causes of delay as restricting the application of the more general phrase which exempts Douglas from liability for delays beyond its control and not due to its negligence. McDonnell feels, therefore, that its affirmative defense was unjustifiably limited to delays caused by events similar to those specifically listed when, in fact, the contracts excused all delays which were not its fault.

The trial judge's construction of the clause, moreover, affords McDonnell Douglas a narrower range of excuses than is available under the modern view of impossibility as it is codified in U.C.C. § 2–615.[89] Simply stated, section 2–615 excuses delay or nondelivery when the agreed upon performance has been rendered "commercially impracticable" by an unforeseen supervening event not within the contemplation of the parties at the time the contract was entered into. Uniform Commercial Code § 2–615 [Cal.Comm.Code § 2615] Comments 1 & 8; *see* Restatement, Contracts §§ 454, 457 (1932); 6 A. Corbin, Contracts §§ 1321, 1339 (1962).

Under section 2–615, the impossibility defense is available to the seller only if he has not "assumed a greater obligation" than that imposed upon him by this provision. During the trial, the court below ruled that section 2–615 was not applicable for this reason. Although the trial judge failed to explain his holding, it must have been based upon his restrictive construction of the excusable delay clause. Presumably, then, the protections of section 2–615 were deemed to have been waived because the contracts were interpreted as limiting McDonnell's impossibility defense to delays caused by events similar to those specifically provided for in the excusable delay clause.

[12–16] In support of this approach, Eastern argues that the District Court correctly applied *ejusdem generis,* a canon of judicial construction limiting the application of general terms which follow specific ones to matters similar in kind or classifica-

89. In relevant part, section 2–615 reads as follows:

> *Excuse by Failure of Presupposed Conditions*
>
> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

tion to those specified. *See Bumpus v. United States*, 10 Cir., 1963, 325 F.2d 264, 266–67; *Ruth v. Pacific Gas & Electric Co.*, 1972, 23 Cal.App.3d 806, 819, 100 Cal.Rptr. 501, 509. This maxim, however, "is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty." *Gooch v. United States*, 297 U.S. 124, 128, 56 S.Ct. 395, 397, 80 L.Ed. 522, 526 (1936); *accord, City of Los Angeles v. Superior Court*, 1934, 2 Cal.2d 138, 39 P.2d 401. Obviously, the application of the doctrine in this case would make superfluous the unambiguous words "including but not being limited to" which precede the specifically listed excuses for delay.[90] It is clear, then, that by excusing delays not within McDonnell's control nor due to its negligence, "including but not being limited to" governmental acts, priorities, or orders, the parties intended to excuse all delays coming within the general description regardless of their similarity to the listed excuses. Consequently, there is no basis for the trial judge's conclusion that McDonnell waived the protections of section 2–615 and that its contract excuses are narrower than those available under the doctrine of commercial impracticability.[91]

2. *The Foreseeability Issue*

McDonnell also challenges the trial judge's jury instruction which limited excusable delivery delays to those resulting from events which were not "reasonably foreseeable" at the time a contract was

90. *Ejusdem generis*, by its very terms, applies only where the general terms of an exculpatory clause follow a more specific listing of excused events. Here, of course, the general terms of the excusable delay clause precede the more specific provisions. Most decisions limiting the application of similar clauses can be distinguished on this basis as well. *See, e. g., Excelsior Motor Mfg. & Supply Co. v. Sound Equipment, Inc.*, 7 Cir., 1934, 73 F.2d 725, 728.

It is true, however, that, in one case, the United States Court of Claims limited an almost identical exculpatory provision to the specifically listed events despite words expressly stating that the general provision included but was not restricted to those events. *Austin Co. v. United States*, Ct.Cl., 1963, 314 F.2d 518, 520, 161 Ct.Cl. 76, *cert. denied*, 375 U.S. 830, 84 S.Ct. 75, 11 L.Ed.2d 62. In our view, this decision merits the criticism it has received from Professor Corbin:

> The court interpreted the . . . "exculpatory clause" as not including the inherent "impossibility" as alleged by the plaintiff, since it was not *ejusdem generis* with the causes specifically listed. It does not comment on the words "but are not restricted to," words that in the opinion of this treatise prevent the *ejusdem generis* rule from being very clearly applicable.

6 A. Corbin, Contracts § 1328 n. 40 (1962, Supp.1964).

91. McDonnell Douglas argues that Eastern is precluded from maintaining this action because the contracts all lapsed under section 2–616, the U.C.C. provision which outlines the procedures to be taken when a seller justifies a breach under section 2–615. Section 2–616 reads as follows:

> (1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this Article relating to breach of installment contracts (Section 2–612), then also as to the whole,
>
> (a) terminate and thereby discharge any unexecuted portion of the contract; or
>
> (b) modify the contract by agreeing to take his available quota in substitution.
>
> (2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract lapses with respect to any deliveries affected.
>
> (3) The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section.

While it is true that Eastern failed to pursue the options available to it under section 2–616, both parties during the years 1966–1969 continued to perform as though the agreements remained in force without ever making reference to the Code procedures. Therefore, we cannot accept McDonnell's belated assertion that all the contracts were automatically terminated under section 2–616(2). A seller cannot employ this thirty-day termination provision to deprive an unwary buyer of his U.C.C. rights and remedies. Such an approach would frustrate section 2–616's purpose of protecting the buyer confronted with a claim of excuse under section 2–615. *See* Project, A Comparison of California Sales Law and Article Two of the Uniform Commercial Code (Part II), 11 U.C.L.A.L.Rev. 78, 104 (1963).

executed.[92] By writing a foreseeability requirement into the excusable delay clause, the District Court appeared to construe the contracts as constituting nothing more than an application of the Code's commercial impracticability rule to those particular events specified in the contracts.[93]

[17] Although there has been some doubt expressed as to whether the Code permits parties to bargain for exemptions broader than those available under section 2–615, this concern is ill-founded. *See* Hawkland, The Energy Crisis and Section 2–615 of the Uniform Commercial Code, 79 Com.L.J. 75 (1974). Comment 8 to this provision plainly indicates that parties may "enlarge upon or supplant" section 2–615. *See United States v. Wegematic Corp.*, 2 Cir., 1966, 360 F.2d 674, 677 (Friendly, J.).

[18–20] There appear to be, however, certain strictures imposed upon judicial interpretation of such agreements. Comment 8 provides:

> Generally, express agreements as to exemptions designed to enlarge upon or supplant the provisions of this section are to be read in light of mercantile sense and reason, for this section itself sets up the commercial standard for normal and reasonable interpretation and provides a minimum beyond which agreement may not go.

While this provision could have been drafted in less vague terms, we presume that Comment 8 establishes "mercantile sense and reason" as a general standard governing our construction of agreements enlarging upon the protections of section 2–615.[94] As we understand Comment 8, where there is doubt concerning the parties' intention, exemption clauses should not be construed as broadening the excuses available under the Code's impracticability rule. Applying this standard to the excusable delay clause, we cannot, in the absence of evidence to the contrary, hold that McDonnell is exempt from liability for any delay, regardless of its foreseeability, that is due to causes beyond its control. Exculpatory provisions which are phrased merely in general terms have long been construed as excusing only unforeseen events which make performance impracticable. *Vernon Lumber Corp. v. Harcen Construction*, E.D.N.Y., 1945, 60 F.Supp. 555, 558, *aff'd on other grounds*, 2 Cir., 1946, 155 F.2d 348; *see Inter-Coast Steamship Co. v. Seaboard Transportation Co.*, 1 Cir., 1923, 291 F. 13, 18; 3A A. Corbin, Contracts § 642 (1960); 6 A. Corbin,

92. McDonnell contends further that the District Court erred in instructing the jury that it had the burden of proving excusable delay. The burden of proof in diversity cases is a substantive question which is controlled by state law. *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 96 (1939). As we have seen, the contracts provide that performance is to be determined according to California law. In California, a promisor seeking to be excused from performance has the burden of proving all the elements of his affirmative defense. *See Ocean Air Tradeways, Inc. v. Arkay Realty Corp.*, 9 Cir., 1973, 480 F.2d 1112, 1117; *Lloyd v. Murphy*, 1944, 25 Cal.2d 48, 54, 153 P.2d 47, 50–51. The excusable delay clause, moreover, cannot be viewed as shifting this burden to Eastern. *See* 3A A. Corbin, Contracts § 642 at 73 (1960). Consequently, the trial judge's burden of proof instructions were correct.

We do note, however, that the trial judge may have misled the jury by instructing it that McDonnell's defense would fail if the jury could not determine "what number of days of delay . . . was proximately caused by excusable factors." The court could more properly have informed the jury that McDonnell had to prove that a certain proportion of the delays were due to circumstances coming within the excusable delay clause without intimating that a particular day of delay had to be attributed to a specific excusing event.

93. The trial court's instructions on this issue were as follows:

> In seeking to excuse its delayed performance on the theory that the delays were due to causes beyond its control and not occasioned by its fault or negligence, the defendant has the burden of proving that any excusing event or occurrence upon which it relies was not reasonably foreseeable at the time the contract was entered into.

94. Professor Hawkland's discussion of Professor Llewellyn's purposes in preparing the forerunner to section 2–615 and of the legislative history of this provision before the American Law Institute provides some insight into this question. *See* Hawkland, *supra*, at 77–79.

Contracts § 1342, at 409 (1962). Courts have often held, therefore, that if a promisor desires to broaden the protections available under the excuse doctrine he should provide for the excusing contingencies with particularity and not in general language. *See S. L. Jones & Co. v. Bond*, 1923, 191 Cal. 551, 217 P. 725; *Tomlinson v. Wander Seed & Bulb Co.*, 1960, 177 Cal.App.2d 462, 2 Cal.Rptr. 310; *Beatty v. Oakland Sheet Metal Supply Co.*, 1952, 111 Cal.App. 2d 53, 244 P.2d 25; Hawkland, *supra*, at 76, 79.

We realize, of course, that this rule of construction developed in the pre-U.C.C. era when the scope of the impossibility and frustration doctrines was unclear and varied from jurisdiction to jurisdiction. Because of the uncertainty surrounding the law of excuse, parties had good reason to resort to general contract provisions relieving the promisor of liability for breaches caused by events "beyond his control." Although the Uniform Commercial Code has ostensibly eliminated the need for such clauses, lawyers, either through an abundance of caution or by force of habit, continue to write them into contract. *See generally* Squillante & Congalton, Force Majeure, 80 Com.L.J. 4, 8–9 (1975). Thus, even though our interpretation would render the general terms of the excusable delay clause merely duplicative of section 2–615, we will adhere to the established rule of construction because it continues to reflect prevailing commercial practices.

[21, 22] We reiterate, however, that we are applying only a canon of contract interpretation which generally reflects commercial standards of reasonableness. We disagree with the suggestion of one commentator that section 2–615 imposes a fixed standard governing the interpretation of exemption clauses.[95] The Code establishes no absolute requirement that any agreement purporting to enlarge upon section 2–615 must do so in plain and specific language. Even in the absence of detailed wording, trade usage and the circumstances surrounding a particular agreement may indicate that the parties intended to accord the seller an exemption broader than is available under the U.C.C.[96]

[23–25] While we hold that the provision of the excusable delay clause exempting McDonnell from liability for delays beyond its control should be interpreted as incorporating the Code's commercial impracticability doctrine, we disagree with the trial judge's jury instruction on foreseeability insofar as it implies that the events specifically listed in the excusable delay clause in each contract must have been unforeseeable at the time the agreement was executed. The rationale for the doctrine of impracticability is that the circumstance causing the breach has made performance so vitally different from what was anticipated that the contract cannot reasonably be thought to govern. 6 S. Williston, Contracts § 1963 at 5511 (rev. ed. 1938). However, because the purpose of a contract is to

95. Professor Hawkland suggests that Comment 8

> would appear to have reference to the common law limitations on the enforceability of exemption clauses, namely that the excusing contingencies must be stated with particularity and not in general language, and that their occurrence actually must have prevented or delayed the seller's performance in spite of his reasonable efforts to perform.

Hawkland, *supra*, at 79.

96. As Comment 8 indicates, however, there is a point beyond which any such agreement may not go. Professor Hawkland suggests that the "minimum" established by section 2–615 includes the duty of the seller to allocate deliveries among his customers and to notify the buyer of any delivery delay or nondelivery. Hawkland, *supra*, at 79. One student commentator, though, appears to construe Comment 8 as limiting the degree to which a seller's protections under section 2–615 can be narrowed. Note, UCC § 2–615: Sharp Inflationary Increases in Cost as Excuse from Performance of Contract, 50 Notre Dame Law. 297, 300–301 (1974). In any event, exemption provisions are limited by those sections of the Code prohibiting agreements which are "manifestly unreasonable" [§ 1–102(3)], in bad faith [§ 1–203], or unconscionable [§ 2–302]. *See Transatlantic Financing Corp. v. United States*, 1966, 124 U.S.App.D.C. 183, 363 F.2d 312, 315 n. 3.

place the reasonable risk of performance on the promisor, he is presumed, in the absence of evidence to the contrary, to have agreed to bear any loss occasioned by an event which was foreseeable at the time of contracting. *Lloyd v. Murphy*, 1944, 25 Cal.2d 48, 54, 153 P.2d 47, 50 (Traynor, J.); *see Madeirense Do Brasil S.A. v. Stulman-Emrick Lumber Co.*, 2 Cir., 1945, 147 F.2d 399, 403; *McCulloch v. Liguori*, 1948, 88 Cal. App.2d 366, 373, 199 P.2d 25, 30. Underlying this presumption is the view that a promisor can protect himself against foreseeable events by means of an express provision in the agreement.

[26, 27] Therefore, when the promisor has anticipated a particular event by specifically providing for it in a contract, he should be relieved of liability for the occurrence of such event regardless of whether it was foreseeable.[97] *See Edward Maurer Co. v. Tubeless Tire Co.*, 6 Cir., 1922, 285 F. 713, 714–15. As Justice Traynor noted for the California Supreme Court under different but nonetheless analogous circumstances,

> the question whether a risk was foreseeable is quite distinct from the question whether it was contemplated by the parties. . . . When a risk has been contemplated and voluntarily assumed . . . foreseeability is not an issue and the parties will be held to the bargain they made.

Glenn R. Sewell Sheet Metal, Inc. v. Loverde, 1969, 70 Cal.2d 666, 451 P.2d 721, 728 n. 13; *see Lloyd v. Murphy, supra*, 153 P.2d at 50. In this case, it is clear that Eastern specifically "contemplated and voluntarily assumed" the risk that deliveries would be delayed by governmental acts, priorities, regulations or orders. Moreover, unlike the only case cited to us by Eastern which construes a similar provision, *United States v. Brooks-Callaway Co.*, 318 U.S. 120, 63 S.Ct. 474, 87 L.Ed. 653 (1943), there is no indication from the wording of the excusable delay clause that McDonnell's defenses are to be limited to breaches caused by unforeseeable events. Therefore, we must conclude that the trial judge erred in instructing the jury that the events specifically listed in the excusable delay clause must have been unforeseeable at the time the contracts were entered into for McDonnell to claim exemption from liability.[98]

3. *Informal Demands for Priority as an "Act of Government"*

[28] Turning next to the question of whether the Government's informal priorities policy came within the ambit of the excusable delay clause, we have seen in Part IV–A of this opinion that McDonnell and its suppliers, in granting priority to the military, were cooperating with the established, publicly announced procurement policy of the Federal Government. Eastern contends, however, that this informal program did not come within the scope of the contract clause specifically excusing "any act of government, governmental priorities, allocations, or orders affecting materials." Asserting that the Defense Production Act authorizes the Government to obtain precedence for certain orders only by means of formal, published regulations, Eastern concludes that any other method is illegal, if not unconstitutional, and therefore cannot be deemed an act of Government. We disagree for the following reasons.

97. Foreseeability may be a factor in determining whether the intervening event is caused by an allegedly negligent act of the promisor. Of course, the term has a completely different meaning and purpose in this context. *See* W. Prosser, *Handbook of the Law of Torts*, §§ 31, 43–44 (4th ed. 1971).

98. McDonnell also argues that the trial judge erred in narrowing the excuses available as a result of its suppliers' delays to those available to McDonnell directly. In McDonnell's view, it should be exonerated for any delays caused by its subcontractors regardless of whether these delays were the subcontractors' fault. This construction, however, would write out of the excusable delay clause the parenthetical expressly limiting excusable vendor-caused delays to those "due to causes similar to those within the scope of this clause." For this phrase to have any meaning, it must be construed as limiting excusable vendor-caused delays to those beyond a vendor's control and not due to his negligence.

The Defense Production Act, in "a sweeping delegation of power," [99] grants the President broad authority to require that defense-related contracts be given precedence over less essential orders. D.P.A. § 101(a), 50 App.U.S.C. § 2071(a).[100] Congress created no detailed scheme by which this power was to be exercised, providing only that "[t]he President may make such rules, regulations, and orders as he deems necessary or appropriate." D.P.A. § 704, 50 App.U.S.C. § 2154.[101] There is, moreover, nothing in either the legislative history of the D.P.A.[102] or in the wording of the Act itself which gives any indication that the Government may not seek compliance with its priorities policies by informal means.[103] It is reasonable to conclude, therefore, that Congress intended to accord the Executive Branch great flexibility in molding its priorities policies to the frequently unanticipated exigencies of national defense.

This conclusion is reinforced by the fact that the Defense Production Act of 1950 was enacted in the face of established legal authority which had consistently construed previous procurement statutes as authorizing informal and indirect methods of securing compliance with the Government's military priorities policy. *E. g., L. N. Jackson & Co. v. Royal Norwegian Government*, 2 Cir., 1949, 177 F.2d 694, *cert. denied*, 339 U.S. 914, 70 S.Ct. 574, 94 L.Ed. 1340 (1950); *Roxford Knitting Co. v. Moore & Tierney, Inc.*, 2 Cir., 265 F. 177, *cert. denied*, 253 U.S. 498, 40 S.Ct. 588, 64 L.Ed. 1032 (1920); *Dorsey v. Oregon Motor Stages*, 1948, 183 Or. 494, 194 P.2d 967; *Tidewater Portland Cement Co. v. Lincoln*, 1923, 142 Md. 193, 120 A. 365; *Nitro Powder Co. v. Agency of Canadian Car & Foundry Co.*, 1922, 233 N.Y. 294, 135 N.E. 507; *Mawhinney v. Millbrook Woolen Mills, Inc.*, 1921, 231 N.Y. 290, 132 N.E. 93; *Tipler-Grossman Lumber Co. v. Forrest City Box Co.*, 1921, 148 Ark. 132, 229 S.W. 17, 19–20; Pedrick & Springfield, War Measures and Contract Liability, 20 Texas L.Rev. 710, 719 (1942); Dodd, Impossibility of Performance of Contracts Due to War-Time Regulations, 32 Harv.L.Rev. 789, 796–805 (1919); *cf. Texas Co. v. Hogarth Shipping Corp.*, 256 U.S. 619, 41 S.Ct. 612, 65 L.Ed. 1123 (1921). It was recognized that, for reasons of practical necessity, urgently needed government orders had to be obtained "by non-mandatory directions based ultimately on the powers of compulsion rather than by the actual exercise of the statutory compulsive powers." Dodd, Impossibility of Performance of Contracts Due to War-Time Regulations, 32 Harv.L. Rev. 789, 798 (1919). The military's need for speed and flexibility in directing the flow of necessary materials precluded a ponderous bureaucratic procurement process. Thus, even though the World War I National Defense Act, 39 Stat. 213 (June 3, 1916), specifically provided that either the President or a department head placed priorities orders, several decisions held that literal compliance with this requirement was not necessary. *Roxford Knitting Co. v. Moore & Tierney, Inc., supra; Mawhinney v. Millbrook Woolen Mills, Inc., supra.*

In both *Roxford Knitting* and *Mawhinney*, it was asserted that because the

99. Note, The Defense Production Act: Choice as to Allocations, 51 Colum.L.Rev. 350 (1951).

100. Quoted in full at note 68 *supra*.

101. Quoted at note 69 *supra*.

102. *See* Note, The Defense Production Act: Choice as to Allocations, 51 Colum.L.Rev. 350, 351 n. 6, 358 & n. 71 (1951).

103. Eastern's reliance on *The Steel Seizure Case* is therefore misplaced. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). In that case, the Supreme Court held that the Defense Production Act did not implicitly authorize the seizure of a plant as a means of preventing work-stoppages because, in 1947, the Congress had rejected an amendment to the labor laws which would have explicitly permitted such an action. *Id.* at 586, 72 S.Ct. at 866, 96 L.Ed. at 1167. Consequently, the President's seizure of the Youngstown mills was held invalid because:

> The Defense Production Act affords no ground for the suggestion that the 1947 denial to the President of seizure powers has been impliedly repealed, and its legislative history contradicts such a suggestion.

Id. at 607, 72 S.Ct. at 895, 96 L.Ed. at 1177 (Frankfurter, J., concurring).

government orders were in the form of an ordinary contract and were signed by relatively low-ranking officials, the materials involved were not legally requisitioned, and therefore were obtained merely as the result of a voluntary agreement. The courts, however, permitted the Government wide latitude in its methods of securing precedence for military orders. Applying a pragmatic test to determine whether the transaction conformed with the priorities act, the *Roxford Knitting* court stated:

> And when a manufacturer is given to understand that he is required to supply certain goods to the government of the United States, and is told that he has no option to decline to comply, we are satisfied that as to those goods an "order" has been placed or received, within the spirit and intent and the letter of the statute, whether the authoritative direction is written or oral, and notwithstanding the fact that the parties actually come to an agreement in what has the form of a contract. Substance is not to be sacrificed in such cases to form.

265 F. at 191; *accord Mawhinney v. Millbrook Woolen Mills, Inc., supra,* 231 N.Y. at 300, 132 N.E. at 96.

During World War II, a similarly liberal view was taken of the Government's procurement authority. *See Dorsey v. Oregon Motor Stages,* 1948, 183 Or. 494, 194 P.2d 967; Pedrick & Springfield, War Measures and Contract Liability, 20 Texas L.Rev. 710, 719 (1942); Brown, The Effect of Conscription of Industry on Contracts for the Sale of Goods, 90 U.Pa.L.Rev. 533, 546 & n. 82 (1942); *cf. Alexewicz v. General Aniline & Film Corp.,* Sup.Ct.1943, 181 Misc. 181, 43 N.Y.S.2d 713, 723–25. Inasmuch as the D.P.A., in significant respects, contains the language of the World War II statute,[104] it is unlikely that there was any intention to redirect, *sub silentio,* the trend of judicial construction in this area. In fact, the D.P.A. appears to accord the President broader powers than those granted in World War II. Note, The Defense Production Act: Choice as to Allocations, 51 Colum.L.Rev. 350 n. 2 (1951).

[29] There can be little question, then, that the Defense Production Act granted the Government authority to seek compliance with its priorities programs by informal means of persuasion whether written or oral.[105] For this reason, many of the decisions relied on by Eastern are inapposite here. *E. g. Northern Pacific Ry. v. American Trading Co.,* 195 U.S. 439, 25 S.Ct. 84, 49 L.Ed. 269 (1904).

We note, moreover, that this case precisely fits an established pattern of decisions rejecting the contention that breaches of contract are excused only by formal or technical acts of Government. Whether predicated on a contractual provision or simply on the common law defense of impossibility these decisions indicate in the clearest terms that fundamentally coercive acts of Government, whatever their form, constitute an excuse for breach. Thus, a promisor is not liable merely because the government order causing a breach is technically deficient. *Texas Co. v. Hogarth Shipping Corp.,* 256 U.S. 619, 41 S.Ct. 612, 65 L.Ed. 1123 (1921). Neither is he required to resist a government requisition in order to be excused from performance. *The Claveresk,* 2 Cir., 1920, 264 F. 276. As the *Claveresk* court observed, "it would be 'a strange law' which required . . . [a promisor] to resist, 'till the hand of power was laid upon him, an order which it was his duty to obey'." 264 F. at 280–81. The Supreme Court, moreover, has excused breaches caused by a promisor's anticipation of government action. *The Kronprinzessin Cecilie,* 244 U.S. 12, 37 S.Ct. 490, 61 L.Ed. 960 (1917). Writing for the Court, Mr. Justice Holmes found the impossibility doctrine applicable to a ship which returned to port

104. *See* The Second War Powers Act ch. 199, § 301, 56 Stat. 177 (1942).

105. Even if we were to conclude that the D.P.A. did not authorize informal priority efforts, McDonnell would be exonerated by a provision of the Act which exculpates any compliance with a government order regardless of whether it is later determined to be invalid. 50 App.U.S.C. § 2157. This provision is discussed in the following section of this opinion.

in expectation of World War I but before its actual declaration:

> [I]t hardly could change . . . [the ship owner's] liability that he propheticaly and rightly had anticipated the . . [war] by twenty-four hours. We are wholly unable to accept the argument that although a shipowner may give up his voyage to avoid capture after war is declared, he never is at liberty to anticipate war.

244 U.S. at 24, 37 S.Ct. at 492, 61 L.Ed. at 966. Thus, the "apprehension of restraint, something much less than actual government compulsion, may suffice to dissolve the obligation of a contract." *The Claveresk, supra,* 264 F. at 282.

In a similar manner, decisions arising under previous versions of the Defense Production Act have focused upon "the reality of coercion" rather than the form which it may have taken. *L. N. Jackson & Co. v. Royal Norwegian Government, supra,* 177 F.2d at 699; *see Roxford Knitting Co. v. Moore & Tierney, Inc., supra,* 265 F. at 191; *Dorsey v. Oregon Motor Stages, supra,* 194 P.2d at 983; *Nitro Powder Co. v. Agency of Canadian Car & Foundry Co., supra,* 135 N.E. at 508. Courts have held, therefore, that, where compulsion is actually present, a vendor is justified in complying with a government request for priority, no matter how informally presented or politely phrased that demand may have been. *See, e. g., Roxford Knitting Co. v. Moore & Tierney, Inc.,* N.D.N.Y., 1918, 250 F. 278, 286, *aff'd,* 2 Cir., 265 F. 177, *cert. denied,* 253 U.S. 498, 40 S.Ct. 588, 64 L.Ed. 1032; *Mawhinney v. Millbrook Woolen Mills, supra,* 132 N.E. at 96; 6 A. Corbin, Contracts § 1345 at 425 n. 23 (1962). As one commentator has noted, a court would be

> taking an entirely artificial and unrealistic position in holding that a practice deliberately adopted by the executive and enforceable through the exercise of powers granted by the legislature will not be treated by the judiciary as governmental action which private citizens are justified in obeying. The refusal by the courts so to treat it will result, from the standpoint of defendants, in protecting only the unusually cautious and the unusually recalcitrant. . . .

Dodd, Impossibility of Performance of Contracts Due to War-Time Regulations, 32 Harv.L.Rev. 789, 799 (1919).

[30, 31] Eastern contends, however, that these authorities are not applicable here because the B.D.S.A.'s published regulations guaranteed "DO"-rated civilian orders "equal preferential status" with similarly rated military contracts. Regulation 2 § 3(b)(2), 18 Fed.Reg. 1684 (1953). It is Eastern's view that because the Government was violating its own regulations, McDonnell could have successfully resisted its demands.[106] The priority enjoyed by commercial aircarrier manufacturers, though, was a privilege granted by the same officials responsible for the informal jawboning policy which prevailed during the Vietnam War. Inasmuch as the program was approved by Bryant—who had complete authority to remove the "DO" rating accorded the aviation industry—and administered by Zepp—who had the power to summarily issue supervening directives and "DX" ratings—it would have been futile for McDonnell or its suppliers to resist the Government's demands for priority.[107] In

106. Eastern also contends that, under the Administrative Procedure Act, it was entitled to rely upon its DO rating. Section 3 of the Act provides, in part, that "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552(a)(1). Even assuming that the Government's informal method of obtaining priorities had to have been published, the A.P.A. is clearly not applicable to this case. The above-quoted provision is specifically limited to persons not having "actual and timely notice" of the unpublished information. *See Kessler v. F. C. C.,* 1963, 117 U.S.App.D.C. 130, 326 F.2d 673, 690; *United States v. Aarons,* 2 Cir., 1962, 310 F.2d 341, 347–48. As we have seen, Eastern by its own admission, was well aware of the Government's policy. *See* notes 57–59 *supra.*

107. Failure to perform a contractual obligation may be excused even though an attempt to do so may only have *appeared* to be futile. For example, one court has held that even illegal acts of government could serve as an excuse

short, the preferential status accorded some civilian contracts under the Defense Production Act was not a right which ran to the parties to those agreements but rather an instrument of national defense policy to be employed at the discretion of the executive.

Consequently, we will not permit the form of the military priorities policy to disguise what was in substance a governmental act beyond the control of McDonnell Douglas. The excusable delay clause cannot be made to turn on a distinction which for so long has been held to be entirely artificial and unrealistic. As Mr. Justice Holmes stated in a very similar context, "[b]usiness contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs." *The Kronprinzessin Cecilie, supra,* 244 U.S. at 24, 37 S.Ct. at 492, 61 L.Ed. at 966.

This approach, moreover, is consistent with that required under the Uniform Commercial Code. In Comment 10 to section 615, the draftsmen of Article 2 stated:

> Following its basic policy of using commercial practicability as a test for excuse, this section . . . disregards any technical distinctions between "law," "regulation," "order" and the like. Nor does it make the present action of the seller depend upon the eventual judicial determination of the legality of the particular governmental action. The seller's good faith belief in the validity of the regulation is the test under this Article and the best evidence of his good faith is the general commercial acceptance of the regulation.

Given McDonnell's unquestioned good faith in complying with the Government's demands for priority and the uncontroverted evidence of the entire aviation industry's acceptance of the policy, we must hold as a matter of law that McDonnell is not liable for any delivery delay proximately resulting from the informal procurement program.

C. Exoneration under the Defense Production Act

[32] Even if the contract clause did not apply to informal government pressures, McDonnell asserts that delays resulting from this policy were nevertheless excused under the Defense Production Act. Section 707 of the D.P.A., in relevant part, provides that

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from

for nonperformance. *J. & G. Lippman v. Rice Millers' Distrib. Co.*, 1924, 156 La. 471, 100 So. 685, 687. A contrary view, however, is evident in *Roxford Knitting Co. v. Moore & Tierney, Inc., supra:*

> [I]t is not decisive to ascertain what the plaintiff or the [government employee] thought was being done, or intended to do. The real question is as to what in fact was done. In order that civil contracts should be postponed by "orders" subsequently placed by the government, it is necessary that those orders should be placed in accordance with the commandeering act, if the act indicates the method to be pursued. If officials of the War and Navy Departments entertain erroneous views of their power and of the construction to be placed upon an act of Congress, their decision cannot make it the duty of the courts to perpetuate the error, and override the statute, and deprive individuals of their contract rights.

265 F. at 190 (dictum).

As will be discussed below, this issue has been resolved by section 707 of the D.P.A., 50 App.U.S.C. § 2157, which excuses all breaches resulting from compliance with a government order whether or not it is subsequently determined to be invalid. We note further, though, that the legality of a government act, while relevant, should not be the only factor considered in impracticability cases. Under section 2–616 of the Code, a good faith, commercially reasonable belief in the validity of a governmental interference with a contract would justify exoneration of the promisor. *See* Uniform Commercial Code § 2–615, Comment 10; *cf. The Kronprinzessin Cecilie*, 244 U.S. 12, 23–24, 37 S.Ct. 490, 492, 61 L.Ed. 960 (1917). As one court has demonstrated, in an analogous case, all the circumstances surrounding a breach which is claimed to be excused because of a supervening event should be examined to determine whether the promisor acted reasonably in failing to perform. *Paper Makers Importing Co. v. City of Milwaukee*, E.D.Wis., 1958, 165 F.Supp. 491.

compliance with a *rule, regulation, or order issued pursuant to this Act . . .*, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid.

50 App.U.S.C. § 2157 (emphasis added). Eastern argues for a narrow construction of this provision, asserting that the Government's requests in this case could not be considered "order[s] issued pursuant to" the D.P.A. It is Eastern's position that the exculpatory provision extends only to government requisitions which are issued in strict accordance with published regulations and which "contain the threat of some sanction for failure to obey." In other words, Eastern contends that, despite the Act's exoneration of persons complying with illegal orders, Congress nevertheless intended to narrow the common law impossibility defense to only those breaches resulting from formally issued and technically worded requisitions. Thus, while one supplier would be exempt because of his compliance with a technically sufficient but substantively invalid order, another would be held liable for acceding to a government demand which was ultimately within the Government's power to enforce but which was deficient in some formal sense. There is nothing in the Defense Production Act or its history which requires this unreasonable result.

[33] This Court has already expressed the view that aside from section 707's exoneration of breaches resulting from compliance with priority orders subsequently held to be invalid, the provision "is simply declaratory of the common law [doctrine of impossibility]." *United States v. Texas Construction Company*, 5 Cir., 1955, 224 F.2d 289, 293. As we have seen above, the Government's procurement policy clearly gives rise to a defense under this doctrine.

Other courts, moreover, have repeatedly held that the term "order" as it has been used in previous procurement statutes includes informally presented requests for priority. *See, e. g., Roxford Knitting Co. v. Moore & Tierney, supra; Mawhinney v. Millbrook Woolen Mills, supra.* In the absence of any definition of the term in the D.P.A., there is no reason why the construction given "order" under the World War I priority acts should not be applicable to this case:

> It must be admitted that neither the National Defense Act nor the Navy Purchase Act prescribe any stereotyped form of order which must be used. An order might be placed under the form and terms of polite request. It is left to the discretion of the government to determine the manner in which orders are to be placed, and how its intentions are to be communicated, orally or by writing.

Roxford Knitting v. Moore & Tierney, supra, 265 F. at 188. The similarly worded exoneration provision found in the World War II procurement acts [108] has been analyzed as applying to defaults resulting from any steps taken by the Government to carry out its priority requirements. *L. N. Jackson & Co. v. Royal Norwegian Government, supra*, 177 F.2d at 701–702 (dictum); *see Dorsey v. Oregon Motor Stages, supra.* We find nothing in the legislative history of section 707 or its World War II ancestor which indicates that Congress intended it to have a narrower application.[109] *See* H.R.

108. The Second War Powers Act, ch. 199, § 301, 56 Stat. 177, 180 (1942), provided in relevant part:

> No person shall be held liable for damages or penalties for any default under any contract or order which shall result directly or indirectly from compliance with this subsection (a) or any rule, regulation or order issued thereunder, notwithstanding that any such rule, regulation or order shall thereafter be declared by judicial or other competent authority to be invalid.

109. Eastern's construction of the term "order" is at odds with the B.D.S.A.'s own published regulations. Section 22 of Regulation 2 states that

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation or order of NPA [now BDSA] (*including any direction, directive or other instruction*), notwithstanding that any such rule, regulation or order shall thereafter be declared by judicial or other competent authority to be invalid.

Rep.No.460, 77th Cong., 1st Sess., 4–6 (1941); Hearing on S. 3936 before the Senate Committee on Banking and Currency, 81st Cong., 2d Sess. 292 (1950); 87 Cong. Rec. 3799–3803 (1941) (remarks of Rep. Vinson, sponsor of H.R. 4534); Frey, Contract Defaults and Cancellations in Wartime, 38 Ill.L.Rev. 167, 169–70 (1943).

To the contrary, the legislative hearings on the D.P.A. evidenced a strong congressional preference for nonmandatory civilian cooperation with the Government's procurement policies. *See* Hearings before Committee on Banking and Currency on S. 3936, 81st Cong., 2d Sess. 82, 87, 93, 95 (1950); Note, The Defense Production Act: Choice as to Allocations, 51 Colum.L.Rev. 350, 358 (1951). The Secretary of Commerce, moreover, testified during the D.P.A. hearings that voluntary methods would be used before the Government actually invoked its priorities powers and that the threat of mandatory powers would be used as a "big stick" to induce voluntary cooperation. Hearings before Committee on Banking and Currency on S. 3936, 81st Cong., 2d Sess. 82–95 (1950); *see* Hearings before Committee on Banking and Currency on H.R. 9176, 81st Cong., 2d Sess. 106 (1950).

We have already indicated that a cumbersome and inflexible administrative process is antithetical to the pressing necessities of military procurement. This, however, would be the inevitable result of a narrow construction of section 707. As the Congress recognized, a flexible and efficient program is best achieved through prompt and willing civilian cooperation with government requests for priority. *See* Note, Impossibility of Performance Due to War-Time Governmental Interference, 28 Va.L.Rev. 72, 78–79 (1941). If the D.P.A.'s exoneration provision were given a narrow and technical construction, vendors would insist that all government orders meet rigid specifications. *See* Brown, The Effect of Conscription of Industry on Contracts for the Sale of Goods, 90 U.Pa.L.Rev. 533, 545 n. 76, 547 n. 87 (1942). As the New York Court of Appeals stated in *Mawhinney v. Millbrook Woolen Mills, supra,*

> The one who gave his service with alacrity . . . should at least be considered with as much favor as he who held back until threatened or his property commandeered. The laggard who feared the financial results under his civilian contracts merits no encouragement. . . . The act of Congress, the necessity of the times, brooked no delay.

132 N.E. at 96; *accord,* Dodd, Impossibility of Performance of Contracts Due to War-Time Regulations, 32 Harv.L.Rev. 789, 799 (1919).

In summary, then, we hold that the informal but nonetheless concerted government priorities policy in effect during the life of the contracts at issue in this case comes well within the terms of both the excusable delay clause and section 707 of the Defense Production Act. Therefore, McDonnell is excused under either of these provisions for any delays proximately resulting from the Government's priorities policy. We also conclude that the trial judge erred in instructing the jury that military priorities or any other event specifically provided for in the excusable delay provision must have been unforeseeable at the time of contracting. And finally, we hold that McDonnell was entitled to raise any defense available to it under the impracticability doctrine found in U.C.C. section 2–615. These errors by the District Judge deprived McDonnell of the substance, if not the form, of the defense accorded it by both contract and statute, and therefore necessitate our reversal of the judgment below.

V. *The Determination of Eastern's Damages*

During the six-week damages phase of this bifurcated trial, the jury was confronted with a staggering array of highly technical evidence concerning the lost profits, surplus pilot expenses, wasted pilot training and rescheduling costs which Eastern alleges it suffered as a result of the delivery

18 Fed.Reg. 1684 (1953) (emphasis supplied). Certainly a government demand need not be in the form of a priority rating in order to constitute a "direction" or an "instruction."

delays. The complexity of the airline business and its special sensitivity to economic and market fluctuations made the determination of Eastern's lost profits especially difficult. This is best reflected, perhaps, by the extreme variation between the estimates provided by the parties' experts.[110] Eastern's primary witness on the damages issue, Mr. Wemple, estimated that the delivery delays caused the airline to lose $23,400,000 in profits. McDonnell's expert, Mr. Simat, on the other hand, estimated that Eastern saved at least $1,294,000 because the planes were not delivered on time.[111] Throughout the damages trial, therefore, each side undertook extensive cross-examination of the other's witnesses in an effort to account for this $24,600,000 discrepancy.

At trial and on appeal, McDonnell has vigorously contested several of the basic assumptions underlying Eastern's estimate of its damages. McDonnell relies on the established proposition that an expert's opinion as to lost profits and other damages must be predicated on assumptions which have a reasonable basis in the evidence. *See, e. g., Terrell v. Household Goods Carriers' Bureau*, 5 Cir., 1974, 494 F.2d 16, 22–24; *Benham v. World Airways, Inc.*, 9 Cir., 1970, 432 F.2d 359, 360–61.

[34] It is not enough, however, that several of Wemple's assumptions may be open to question.[112] Instead, the issue is whether the probative value of the expert's testimony was so slight that it should not have been submitted to the jury. *Greene v. General Foods Corp.*, 5 Cir., 1975, 517 F.2d 635, 666.[113] A jury's award of damages, therefore, may have adequate support in the evidence even though an expert's assumptions and methodology may not have been the only permissible ones for determining damages. *See id.* at 666 n. 23.

Rather than anticipate the relitigation of this issue, we pretermit any assessment of the Wemple testimony. We do, however, make several suggestions which the District Court may consider in the event that a retrial of Eastern's damages claims becomes necessary. In our view, the trial judge is obliged to scrutinize most carefully un-

110. The primary witnesses for each side had each presented similarly contrasting views in a case involving the damages suffered by Trans World Airlines because of a failure to deliver a number of aircraft. *Trans World Airlines, Inc. v. Hughes*, S.D.N.Y., 1969, 308 F.Supp. 679, *aff'd*, 2 Cir., 1971, 449 F.2d 51; *rev'd on other grounds*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973).

111. Mr. Simat estimated that, as a result of late deliveries, Eastern suffered a loss in operating profit of at most $0.3 million. This loss, in Mr. Simat's view, was more than offset by the added costs of capital Eastern would have incurred in order to obtain and pay for the Douglas aircraft. These added costs, which were not considered by Mr. Wemple, were estimated as being over $1.6 million.

112. McDonnell's primary contention is that there is no basis in the evidence for Mr. Wemple's assumption that the 3 per cent increase in capacity which would have resulted from timely deliveries would have been matched by an equivalent increase in passenger traffic. However, McDonnell also argues that Wemple's use of "system wide average passenger yields" overstated the gross revenues which Eastern would have received because the airline's yields on Douglas jets were substantially lower than the system average. McDonnell contends further that Wemple assigned additional passenger traffic and revenue to Eastern's shuttle services when, in fact, all passengers desiring to use this service were being accommodated. Another Wemple assumption challenged by McDonnell is that 20 per cent of Eastern's costs—$164.5 million—would not have increased at all even if the Douglas planes had been delivered on time. McDonnell also claims that it was speculative for Wemple to assume that Eastern would have derived extra cargo income on a percentage basis equivalent to the assumed increase in passengers. Finally McDonnell attacks Wemple's failure to deduct from Eastern's estimated lost profits the cost of financing those aircraft which were purchased rather than leased.

113. Both *Terrell, supra*, and *Greene* were actions brought under the Sherman Act. The proof of damages in private antitrust suits is significantly less arduous than is usually the case in other actions. *See Greene v. General Foods Corp., supra*, 517 F.2d at 662. Therefore, our reliance on *Terrell* and *Greene* should not be taken as indicating that in this case, Eastern must not be held to the traditional rule against speculative or conjectural estimates of damages in contract actions. *See Center Chemical Co. v. Avril, Inc.*, 5 Cir., 1968, 392 F.2d 289, 291.

usually technical or complicated expert testimony. A court must be mindful of the particular difficulties that can arise when a plaintiff resorts, in Judge Friendly's words, "to an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it." *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 2 Cir., 1962, 297 F.2d 906, 912, *quoted with approval* in *Greene v. General Foods Corp., supra*, 517 F.2d at 665–66.

[35] The District Court must do more than merely weigh the probative value of an expert's testimony considered as a whole. Where practical, a trial judge should exclude particular assumptions or other aspects of an expert's testimony which considered individually do not meet the "minimum of probative value." [114] *Herman Schwabe, Inc. v. United Shoe Machinery Corp., supra*, 297 F.2d at 912. This more detailed scrutiny is necessary because some telling errors may become virtually unreviewable once the jury has returned its verdict.

[36] In this case, for example, Wemple should have considered whether Eastern's estimated loss of profits was reduced by the cost of financing those planes which were purchased rather than leased.[115] McDonnell argues that this was an error which overstated the airline's lost profits by $1.6 million. However, because Eastern was awarded only 85 per cent of the damages estimated by Wemple, it cannot be said that McDonnell's cross-examination did not bring this point home to the jury. In complicated or technical cases, therefore, an expert's testimony should be cleansed of unsupportable assumptions or clear errors which have less than the minimum of probative value. This would reduce the possibility of a confused jury and an arbitrary verdict.

[37, 38] Finally, we note that the District Court has the discretion to call an expert witness on its own. *See Danville Tobacco Assoc. v. Bryant-Buckner Associates, Inc.*, 4 Cir., 1964, 333 F.2d 202, 208–209, *cert. denied*, 387 U.S. 907, 87 S.Ct. 1688, 18 L.Ed.2d 624 (1967); *Scott v. Spanjer Bros., Inc.*, 2 Cir., 1962, 298 F.2d 928; Judicial Conference of the United States, *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351, 421–22 (1960); C. McCormick, *Handbook of the Law of Evidence* § 17 (1954); C. Wright & A. Miller, *Federal Practice and Procedure* § 2239 at 696 (1970), § 2602 at 778–79 (1971). The unusual difficulty of estimating a major airline's lost profits resulting from extensive delays stretching over a period of three years and involving 90 jet aircraft suggests to us that the jury might benefit from the testimony of a neutral expert in this case. Because a court-appointed witness would be unconcerned with either promoting or attacking a particular estimate of Eastern's damages, he could provide an objective insight into the $24.5 million difference of opinion between the parties' experts. Indeed, the mere presence of a neutral expert may have, in Judge Prettyman's phrase, "a great tranquilizing effect" on the experts retained by Eastern and McDonnell. Proceedings of the Seminar on Protracted Cases for United States Circuit and District Judges, 21 F.R.D. 395, 469 (1957).

VI. Conclusion

Because of serious errors committed by the District Judge on a number of important and decisive questions of law—especially those relating to Eastern's obligation

114. Frequently, this may be possible only by means of a curative instruction given to the jury after the expert has testified.

115. McDonnell estimates that, had the aircraft been delivered as originally planned, Eastern would have borrowed $113 million at the time of delivery for the purchase. In *Trans World Airlines, supra*, both the District Court and the Second Circuit specifically approved of deducting interest costs from estimates of loss profits due to delivery delay. *Trans World Airlines v. Hughes, supra*, 308 F.Supp. at 694, *aff'd*, 449 F.2d at 79.

ASSIGNED FOR PRE-TRIAL CONFERENCE AT PIKEVILLE JUDGE UNTHANK

ON ~~JANUARY 26, 1983~~ adjourned 12-29-82 AT 1:00 P. M.
January 3, 1983 - 10:30AM

CIVIL ACTION NO. COVINGTON 76-2

NATIONAL AMUSEMENTS, INC. — Charles G. Atkins, William R. Jacobs, William I. Bubenzer, Bart J. Vinik, Louis Winter

VS:

JOSEPH A. SETA, INC.; — William B. O'Neal
ALLIED CHEMICAL;
ILER CONSTRUCTION CO., INC.; — Richard S. Nelson, C. Donald Heile
CHRONIS CONSTRUCTION CO.; — Ron Parry/ A. J. JOLLY/ B. STORM
RAYMOND KEYES ENGINEERS; — W. Roger Fry/LEONARD WEAKLEY, JR.
H. C. NUTTING CO. — Thomas J. Kirkwood

6/7/82 TRIAL BEGAN, JURY SWORN, INTRODUCTION OF EVIDENCE FOR PLFF BEGUN NOT CONCLUDED.

6/8/82 TRIAL CONTINUED W/ PLFF RESUMING EVIDENCE. WITNESS, Kimberly Bunger, referred to Insurance Co., in testimony, in the presenc of jury. out of jury's presence, parties jointly moved Court for mistrial, said joint motion, SUSTAINED.

matter continued to JANUARY 26, 1983, for Pre-trial Conference at PIKEVILLE

TRIAL SET FOR FEBRUARY 14, 1983, 9:00 A. M. -PIKEVILLE, KY.

(273) 11/22/82 LIST OF LAY & EXPERT WITNESSES on behalf of defts, Raymond Keyes Engineers, Inc.

(274) 11/24/82 LIST OF EXPERT WITNESSES on behalf od deft, R.Keyes Engineers

(275) 12/2/82 LIST OF TRIAL WITNESSES, EXPERT & OTHERWISE, of deft/3rd pty plf Iler Construction Co.

(276) 12/6/82 LIST OF TRIAL WITNESSES, EXPERT & OTHERWISE of plff

(277) " FORMAL PRE-TRIAL MEMO & LIST OF TRIAL WITNESSES of deft H.C. Nuttin

(278) " LIST OF TRIAL WITNESSES of deft, Joseph A. Seta, Inc. & Allied Ch

(279) 12/13/82 LIST OF TRIAL WITNESSES, Expert & General of 3rd pty deft, C CHRONIS CONSTRUCTION

(280) PRE TRIAL MEMORANDUM of deft, Raymond Keyes Engineers, Inc. P.C.

(281) 12/15/82 FORMAL PRE TRIAL STATEMENT of deft/3rd pty plff, Iler Const. Co.

(282) 12/17/82 PRE-TRIAL STATEMENT of defts/3rd pty plffs, Joseph A. Seta & Allied Chemical

CIVIL ACTION #76-2

NATIONAL AMUSEMENTS, INC. VS. JOSEPH A. SETA, INC. ET AL

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AND DEFENDANT

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William B. O'Neal
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Cincinnati, OH 45202

(3) ILER CONSTRUCTION CO., INC.

Richard S. Nelson
11 W. 6th Street
Covington, KY 41011

C. Donald Heile
LINDHORST & DREUDAME
American Bldg.
Central Okway at Walnut
Cincinnati, OH 45202

CHRONIS CONSTRUCTION CO.

Ron Parry
A. J. Jolly & Beverly Storm
30 West Fourth Street
P. O. Box 368
Newport, KY 41072

DEFENDANTS

(5) RAYMOND KEYES ENGINEERS — 3rd Party Defts.

W. Roger Fry
Leonard Weakley
907 Central Trust Tower
Cincinnati, OH 45202

(6) H. C. NUTTING CO.

Thomas J. Kirkwood
ROLF & ROLF
Attorney at Law
412 First National Bank Bldg.
Cincinnati, OH 45202

1 Int —

(a) Finding of fact as to date turned over

(b) Finding of fact - property not what should be

2. Real estate value (as is) (as should be)

3.

Cost of repairs

Instructions by interrogatory

(1) Date turned over

Contract breached

(2) property not what should be

(3) (a) Value as is

(b) Value as should be

defenses to breach of K

waiver

estoppel

A damages for breach of K

Cannot exceed ~~value~~ on difference in value as to what it should have been ~~on the~~ as shown in 3(b)

TENTATIVE ISSUES TO BE SUBMITTED TO JURY

1. Date property turned over to plaintiff

2/ Whether or not contract breached

Performance.....full and/or substantial

defense negating performance

3. Value of property as is on date turned over. $_____

Value of property as it should be ond such date $_____

4. Damage jury finds that plaintiff has received by reason of such breach, if any. However, same cannot exceed difference in ~~cost~~ fair and reasonable market value of what it was and what it should have been.

United States District Court
FOR THE
Eastern District of Kentucky

Chambers of
G. Wix Unthank
Judge
Pikeville, Kentucky 41501

October 19, 1982

Honorable C. Donald Heile
LINDHORTS & DREIDAME
Attorneys at Law
1200 American Building
Central Parkway at Walnut
Cincinnati, Ohio 45202

In re: Civil Action No. 76-2
National Amusements, Inc. vs.
Joseph A. Seta, Inc., et al vs.
Chronis Cnstruction Company, Inc., et al

Dear Mr. Heile:

Pursuant to your request to have a substitute attorney attend the pretrial conference on December 29, 1982, in the above referenced case, I see no problem with this.

Very truly yours,

G. Wix Unthank
Judge

GWU:mem

LINDHORST & DREIDAME

ATTORNEYS AT LAW

AMBROSE H. LINDHORST
WILLIAM J. WALSH
LEO J. BRESLIN
JAMES L. O'CONNELL
JOHN A. SPAIN
RICHARD J. SCHIMPF
WILLIAM M. CUSSEN
C. DONALD HEILE
CHARLES J. KELLY
THOMAS J. BRADY
STEPHEN A. BAILEY
THOMAS M. TEPE

JOHN A. GOLDBERG
JAMES M. MOORE
JAMES J. SLATTERY, JR.
WILLIAM N. KIRKHAM
JAY R. LANGENBAHN
JAMES H. SMITH III
J. ROGER BLUST
THOMAS E. MARTIN
CHRISTOPHER P. DIETZ
JAMES F. BROCKMAN

1200 AMERICAN BUILDING
CENTRAL PARKWAY AT WALNUT
CINCINNATI, OHIO 45202
(513) 421-6630

ROBERT F. DREIDAME
(1914-1978)

October 13, 1982

The Honorable G. Wix Unthank
Judge, United States District Court
Federal Building
Pikeville, Kentucky 41501

In re: Civil Action No. 76-2
National Amusements, Inc. vs.
Joseph A. Seta, Inc., et al. vs.
Chronis Construction Company, Inc., et al.
Our File No. W-4675T

Dear Judge Unthank:

I have just received your Order dated October 4, 1982, changing the pretrial conference from January 26, 1983, to December 29, 1982.

I have already made another commitment for the week following Christmas, and, since we have already marked the exhibits and fully discussed all possibilities of settlement, I would like to have one of my partners attend the pretrial conference in my place and stead. Of course, he will have full authority in the matter, although I will try the case.

Very truly yours,

LINDHORST & DREIDAME

C. Donald Heile

CDH:elc

I have no problem with this
10/18/82 Judge

STRAUSS, TROY AND RUEHLMANN CO., L. P. A.
ATTORNEYS AND COUNSELORS AT LAW
2100 CENTRAL TRUST CENTER
201 EAST FIFTH STREET
CINCINNATI, OHIO 45202

TELEPHONE (513) 621-2120
TELEX: 214240
CABLE: STARCO

KENNETH D. TROY
EUGENE P. RUEHLMANN
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MARK H. BERLIANT
DOUGLAS G. COLE
CHARLES G. ATKINS
WILLIAM V. STRAUSS
RICHARD D. HEISER
MITCHELL B. GOLDBERG
ERNEST A. EYNON II
LARRY A. NEUMAN *
C. FRANCIS BARRETT
ALAN C. ROSSER
THOMAS C. RINK
H. PATRICK WEBER

WILLIAM R. JACOBS
MICHAEL R. OESTREICHER
RICHARD BOYDSTON
EDWARD M. FRANKEL
JAMES G. HELDMAN
CHARLES J. POSTOW***
CHARLES C. BISSINGER, JR.
M. MICHELE FLEMING **
ANN McLEOD GERWIN
JOANNE M. SCHREINER
PAUL B. CALICO*
LARRY A. TEMIN
JEFFREY D. TROY
DAVID A. GROENKE
GREGORY A. RUEHLMANN
ANDREW M. SHOTT

LUCIEN G. STRAUSS (1900-1982)
ORVILLE A. TROY (1896-1967)

*ALSO ADMITTED TO PRACTICE IN KENTUCKY
**ALSO ADMITTED TO PRACTICE IN INDIANA
***ALSO ADMITTED TO PRACTICE IN FLORIDA

File in National Amusements

August 11, 1982

Hon. G. Wix Unthank
Judge, U.S. District Court
United States Courthouse
Pikeville, Kentucky

Re: National Amusements, Inc. v. Joseph A. Seta, Inc., et al v. Chronis Construction Company, et al
Civil Action 76-2

Dear Judge Unthank:

In response to your honor's Order of August 2, 1982 concerning certain documents which were inadvertently misplaced by the Clerk, this is to advise:

a. I am not presently able to locate my copy of the deposition of Kenneth Mock which was filed September 13, 1977. However, this deposition turned out to be a relatively unimportant one and I do not believe the counsel involved with this suit would consider it prejudicial if the deposition was not recovered. In the event I can find my copy I will supply it to the Court.

b. I enclose Docket Entries 92 and 93 which are the depositions of Mr. Rankin and also Docket Entries 109 and 110, the deposition of V. P. Chronis. With respect to the deposition of Mr. Chronis I have not included the exhibits attached to his deposition because they are odd sized and voluminous. I will supply them at the time of trial, if this meets with your honor's approval. If any of the counsel or your honor still wish us to reproduce the exhibits attached to Mr. Chronis' deposition, then we certain will do so promptly.

Thank you for your attention to this matter.

Respectively,

STRAUSS, TROY AND RUEHLMANN CO., L.P.A.

Charles G. Atkins

mas
enclosures

cc: C. Donald Heile, Esq.
Thomas J. Kirkwood, Esq.
William B. O'Neal, Esq.
Beverly R. Storm, Esq.
Leonard J. Weakley, Jr., Esq.

Covington Civil Action No. 76-2

National Amusements, Inc. v. Joseph A. Seta, Inc., Allied Chemical, Iler Construction Co., Inc. v. Chronis Construction Co., Raymond Keyes Engineers, H. C. Nutting Co.

Court's rulings made on motions during hearing held in Covington, Kentucky, February 2, 1982.

No. 170 — Motion of third-party defendant, H.C. Nutting Co., for separate trial. OVERRULED.

No. 177 — Motion of defendant, Joseph A. Seta, Inc. and Allied Chemical Co. for pretrial determination of certain issues of law and order limiting introduction of evidence to conform to such determination. Mr. O'Neal and Mr. Heile(on behalf of Iler) made this motion. FORMAL RULING WITHHELD.

No. 180 — Motion of third-party defendant, Raymond Keyes Engineers for summary judgment. OVERRULED.

No. 181 — Motion of defendants, Joseph A. Seta and Allied Chemical Corporation, for summary judgment. OVERRULED.

No. 182 — Motion of third-party defendant, Chronis Construction Company, for summary judgment as to third-party complaints of Joseph Seta, Inc. and Allied Chemical Corporation. OVERRULED.

No. 184 — Motion of third-party defendant, H.C. Nutting Company, for summary judgment as to third-party complaints of Joseph Seta and Allied Chemical. OVERRULED.

No. 186 — Motion of defendants, Joseph A. Seta, Inc. and Allied Chemical Corporation to amend answer. SUSTAINED.

No. 187 — Motion of defendant, Iler Construction Co., to amend answer. SUSTAINED.

No. 188 — Motion of defendant, Iler Construction Co., for pretrial order on issues of law regarding damages. FORMAL RULING WITHHELD.

No. 192 — Motion of defendant, Joseph A. Seta and Allied Chemical Corporation to amend answer. SUSTAINED.

THE COURT: Gentlemen, let me make this suggestion. What if we just overruled everyone's motion, just say no amendments to the answers or anything and set this thing for pretrial and trial. What is your gentlemen's position on that?

MR. O'NEAL: Well,--

THE COURT: If we get into amendments are we just going to continue this thing and go back through another barrage of pleadings?

MR. O'NEAL: No, sir. I don't think anybody is really objecting to these motions except perhaps the one. They merely incorporate facts which already appear in the evidence. It is merely talking about trying to fit the pleadings to fit the evidence like duress. (more discussion followed.)

THE COURT: Let motion 186 and 187 be SUSTAINED.

MR. WEAKLEY: 192, also, I believe, Your Honor.

THE COURT: All right.

MR. O'NEAL: 186 and what, please?

MR. HEILE: 187 and 192.

THE COURT: Let's see, I believe it's 186, 187 and what other?

MR. HEILE: 192.

THE COURT: 192. Is that it?

MR. KIRKWOOD: That's it, Your Honor.

THE COURT: All right, let those motions be SUSTAINED.

Discussion concerning filing of amended third-party complaints:

THE COURT: Let's do this. The Court will permit the filing but we will permit them to file their written objection to the filing. Let's do that.

MR. HEILE: That's a good idea. That will be 193, 195.

THE COURT: Yes, sir, 193, 195, 196, 201 and 202.

(Court allowed thirty days within which to file objections.)

Covington

ASSIGNED FOR HEARING ON PENDING MOTIONS AT ~~PIKEVILLE~~, KENTUCKY

ON ~~FEBRUARY 18, 1982~~ February 2, 1982 AT ~~1:00 P.M.~~ 9:00 A.M.

COVINGTON
~~PIKEVILLE~~ CIVIL ACTION NO. 76-2

NATIONAL AMUSEMENTS, INC.

Charles G. Atkins
William R. Jacobs
William I. Bubenzer
Bart J. Vinik
Louis Winter

vs:

JOSEPH A. SETA, INC. — William B. O'Neal
ALLIED CHEMICAL — " " "
ILER CONSTRUCTION CO., INC. — Richard S. Nelson
C. Donald Heile

vs:

CHRONIS CONSTRUCTION CO. — Ron Parry & A. J. Jolly
RAYMOND KEYES ENGINEERS — W. Roger Fry & Leonard Weakley
H. C. NUTTING COMPANY — Thomas J. Kirkwood

Beverly Stan for Jolly

HEARING ON PENDING MOTIONS

1/12/76 #1 COMPLAINT fil.
3/05/76 #7 ANSWER & COUNTERCLAIM, of deft Joseph SEta & Allied Chemical
3/19/76 #8 ANSWER of deft Iler Const. Co.
#9 Answer of Iler Const. to Crossclaim of Joseph Seta
#10 CROSSCLAIM, of deft Iler Const against Joseph Seta
4/07/76 #12 THIRD PARTY COMPLAINT
3/23/76 #13 Answer of defts Allied Chemical & Joseph Seta to cross claim of Iler Const. Co.
3/25/76 #14 ANSWER, of plff to defts Counterclaim
5/04/76 #19 ANSWER, of 3rd pty. deft, Chronis Const. Co. to 3rd party complain
12/31/80 #107 AMENDED ANSWER, of deft Iler Const. Co.

PENDING MOTIONS

04/21/81 #170 MOTION, of 3rd pty deft, H.C. Nutting Co. for sep. trial, TAKEN UNDER ADVISEMENT

10/05/81 #177 MOTION, of deft, Joseph A. Seta, INc. & Allied Chemical Co. Pre-Trial Determination of certain issues of law & order limiting introduction of evidence to conform to such determination.

10/07/81 #180 MOTION, of third party deft, Raymond Keyes Engineers, P.C. for s/j w/memo. in support.

#181 MOTION, of defts, Joseph A. Seta, Inc. & Allied Chemical Corp. for s/j

#182 MOTION, of third party deft, Chronis Const. Co. for s/j as to third party complaints of Joseph A. Seta, INc. & Allied Chemical Corp.

#184 MOTION, of third party deft, The H. C. Nutting Co., for s/j as to third party complaints defts, Joseph Seta & Allied Chemical

#186 MOTION, of defts, Joseph A. Seta, Inc. & Allied Chemical Corp. to amend answer

SECOND AMENDED ANSWER, of defts, Joseph Seta, Inc. & Allied Chemical TENDERED 10/7/81

10/08/81 #187 MOTION, of deft, Iler Const. Co. to amend answer

AMENDED ANSWER, of deft, Iler Const. Co. TENDERED 10/8/81

10/08/81 #188 MOTION, of deft, Iler Const. Co. for pretrial order on issues of law regarding damages

10/22/81 #192 MOTION, of deft, Joseph A. Seta & Allied Chemical Corp. to amend answer

SECOND AMENDED ANSWER, COUNTERCLAIM & CROSSCLAIM, of defts, Joseph A. Seta, Allied Chemical Corp. TENDERED 10/22/81

#193 MOTION, of third party deft, Chronis Const. Co. to fil amended third party complaint

AMENDED THIRD PARTY COMPLAINT, of defts', Joseph A. Seta & Allied Chemical Corp. TENDERED 10/22/81

10/28/81 #195 MOTION, of deft & third pty. plff to fil amended third party complaint

AMENDED THIRD PARTY COMPLAINT, of defts, Joseph A. Seta, Inc. & Allied Chemical Corp. TENDERED 10/28/81.

10/29/81 #196 MOTION, of deft/third party plff, Iler Const. Co., to amend third party complaint

#201 MOTION, of Iler Const. Co. To fil Amend 3rd pty Complaint
AMENDED THIRD PARTY COM PLAINT, of Iler Const. Co., Inc. against Raymond Keyes Engineers, P.C.& H.C. Nutting Co. TENDERED 10/29/81

#202 MOTION, of Iler Const. Co., Inc. to fail amended third party complaint against Chronis Const. Co.

AMENDED THIRD PARTY COMPLAINT, of deft & 3rd pty plff Iler Const. Co. against Chronis Const. Co. TEND. 10/29/8

LAW OFFICES
KILCOYNE, O'NEAL, MEIER & VARNAU
310 CENTRAL TRUST TOWER
CINCINNATI, OHIO 45202
(513) 621-6080

JOHN W. KILCOYNE
WILLIAM B. O'NEAL
URBAN C. VARNAU
PHILLIP F. CAMERON

COUNSEL
CARL L. MEIER

February 12, 1982

Honorable G. Wix Unthank
The United States District Court
P.O. Box 278
Pikeville, Kentucky 41501

Re: Civil Action No. 76-2
National Amusements, Inc. vs.
Joseph A. Seta, Inc., et al vs.
Chronis Construction Company, Inc.
et al

Dear Judge Unthank:

May I respectfully suggest an apparent inadvertence in your Order of February 9, 1982, which incorporated your findings at the February 2, 1982 hearing on various Motions in the case of National Amusements vs. Seta, et al, being Number 76-2 in your Court.

Numerical Section 7 of your Order recites "Motion of defendants, Joseph A. Seta, Inc., and Allied Chemical to Amend Answer filed October 7,1981 - overruled."

It is my recollection of events, at this hearing, that no Motions to Amend were overruled and the amendments were ordered filed. To verify my impression, I have talked to Mr. Leonard Weakley, counsel for Keyes, and he shares this recollection and has consented that I so inform the Court.

In substantiation that it was not the intent of the Court to overrule Seta's Motion of October 7, 1981 to Amend, I would point out that this amendment sought to assert affirmative defenses of setoff and duress. A copy of this Motion and Amendment is attached for the convenience of the Court. Numerical Paragraph 8 of the February 9, 1982 Order recites, "Motion of defendant, Iler Construction to Amend Answer -- Sustained. Amended Answer tendered on October 8, 1981 is to be filed." The Iler

Amendment of October 8, 1981 sets forth the affirmative defenses of setoff, duress, accord and satisfaction, release and novation. A copy of the Iler Motion and Amendment is attached for the Court's convenience.

Patently, the Court would not intend to permit the affivmative defenses of setoff and duress to Iler and deny them to Seta and Allied.

I would also respectfully point out that, in filing the Amended Third Party Complaints, the Court decreed that they would be traversed or denied of record by third party defendants, without the necessity of the filing of written Answers.

If the Court should require the foregoing to be presented by formal written Motion, will you kindly so advise me.

Respectfully,

William B. O'Neal
Attorney for Seta and Allied

WBO:dd

Enclosure

cc: Charles Atkins
C. Don Heile
Leonard A. Weakley, Jr.
Beverly R. Storm
Thomas J. Kirkwood

CDH:elc 10/8/91

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

AT COVINGTON

NATIONAL AMUSEMENTS, INC. Plaintiff	:	
vs.	:	CASE NO. 76-2
JOSEPH A. SETA, INC. and ALLIED CHEMICAL COMPANY Defendants and Third Party Plaintiffs	:	MOTION OF DEFENDANT ILER CONSTRUCTION COMPANY TO AMEND ANSWER
and ILER CONSTRUCTION COMPANY, INC. Defendant and Third Party Plaintiff	:	
vs.	:	
CHRONIS CONSTRUCTION COMPANY RAYMOND KEYES ENGINEERS, P.C. and H. C. NUTTING COMPANY Third Party Defendants	:	

Defendant Iler Construction Company respectfully moves the Court for leave to amend the answer heretofore filed herein to assert the additional affirmative defenses of setoff, duress, accord and satisfaction, release and novation.

C. Donald Heile
LINDHORST & DREIDAME
Attorneys for Defendant
Iler Construction Company, Inc.
1200 American Building
Cincinnati, Ohio 45202
(513) 421-6630

MEMORANDUM IN SUPPORT OF MOTION

Since the taking of the depositions of the plaintiff's expert witnesses with regard to damage, it is apparent that the remedial action suggested to be taken with reference to repair of the parking lot will include adding an overlay of thickness of blacktop concrete over the entire surface of the extensive parking lot.

Consequently, the lot will exceed the specifications set forth in the original agreement as alleged by the plaintiff's complaint, and will therefore be increased in value. The evidence will further demonstrate that the plaintiff threatened to file extensive law suits and exerted other pressure to force this defendant to cause compaction of the fill material and other portions of the lot at times when the fill was too wet for proper compaction. In addition, we believe that a full review of the evidence will demonstrate that a novation occurred some time in October or November, 1974, in which the parties abandoned the original agreement and mutually agreed to undertake final construction of the parking lot under adverse weather conditions, knowing that the same would not be done in accordance with the original specifications.

Respectfully submitted,

C. Donald Heile
LINDHORST & DREIDAME
Attorneys for Defendant
Iler Construction Company, Inc.
1200 American Building
Cincinnati, Ohio 45202
(513) 421-6630

I hereby certify that I have mailed a copy of the foregoing motion to Charles G. Atkins, William B. O'Neal, Leonard A. Weakley, Jr., Thomas J. Kirkwood and A. J. Jolly this 8th day of October, 1981.

C. Donald Heile
Attorney at Law

CDH:elc 10/8/81

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

AT COVINGTON

NATIONAL AMUSEMENTS, INC. Plaintiff vs. JOSEPH A. SETA, INC. and ALLIED CHEMICAL COMPANY Defendant and Third Party Plaintiffs and ILER CONSTRUCTION COMPANY, INC. Defendant and Third Party Plaintiff vs. CHRONIS CONSTRUCTION COMPANY RAYMOND KEYES ENGINEERS, P.C. and H. C. NUTTING COMPANY Third Party Defendants	:	CASE NO. 76-2 AMENDED ANSWER OF DEFENDANT ILER CONSTRUCTION COMPANY

For its amended answer to the complaint of the plaintiff herein, the defendant Iler Construction Company adopts, reiterates, realleges and reaffirms each and every allegations and each and every defense in the answers heretofore filed, and the counterclaims, cross-claims, and third party complaints filed herein the same as if fully rewritten herein, and further alleges as follows:

SECOND DEFENSE

10. The damages sought by the plaintiff include work which will increase the value of the parking lot for an amount over and above the thickness of the lot called for by the specifications, and such repairs will increase the market value of the lot beyond that called for by the contract.

11. This defendant is entitled to have any damage awarded diminished by the increase in value as a setoff for the amount of such enhancement.

THIRD DEFENSE

12. The work done by the defendant Iler was done under adverse weather and other conditions because the plaintiff exerted pressure and duress upon said defendant to force and compel it to compact under adverse weather conditions. Said duress and threats produced the damage of which plaintiff complains.

FOURTH DEFENSE

13. In order to induce the defendant Iler to proceed with the compacting work, the plaintiff, National Amusement Company, acting through its agents and representatives, agreed to give the defendant Iler Construction Company a waiver or hold-harmless agreement absolving said defendant from any liability resulting from failures resulting from compaction, since the plaintiff was aware of the fact that the fill material was wet and could not be compacted in accordance with the specifications relative to moisture.

14. Said defendant alleges that such conduct operates as a release and a novation of said agreement, and/or, in the alternative, that the plaintiff is estopped to claim noncompliance with the contract by reason of its acts.

15. Said defendant states that the consideration for the novation and termination of the original agreement was the further and continued work of Iler under adverse conditions with the knowledge of the plaintiff.

WHEREFORE, defendant prays that the complaint of the plaintiff be dismissed at the costs of the plaintiff, reserving and reiterating such allegations and averments contained in its third party complaint, counterclaims and cross-claims.

C. Donald Heile
LINDHORST & DREIDAME
Attorneys for Defendant
Iler Construction Company
1200 American Building
Cincinnati, Ohio 45202
(513) 421-6630

I hereby certify that I have served a copy of the foregoing amended answer on Charles G. Atkins, William B. O'Neal, Leonard A. Weakley, Jr., Thomas J. Kirkwood and A. J. Jolly this 8th day of October, 1981.

C. Donald Heile
Attorney at Law

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

AT COVINGTON

NATIONAL AMUSEMENTS, INC.	:	
Plaintiff	:	NO. 76-2
-vs-	:	MOTION BY DEFENDANTS, JOSEPH A. SETA, INC. AND ALLIED CHEMICAL CORPORATION TO AMEND ANSWER AND AMENDED ANSWER
JOSEPH A. SETA, INC., et al	:	
Defendants Third Party Plaintiffs	:	
-vs-	:	
CHRONIS CONSTRUCTION COMPANY, INC., et al	:	
	:	
Third Party Defendants	:	

The defendants, Joseph A. Seta, Inc., and Allied Chemical Corporation, respectfully move that leave be granted them to amend their Answer and Amended Answer, heretofore filed herein, to assert additional affirmative defenses of set off and duress. A copy of said Amended Answer is attached hereto and submitted herewith.

William B. O'Neal
Attorney for Defendants,
Joseph A. Seta
and
Allied Chemical Corporation
310 Central Trust Tower
Cincinnati, Ohio 45202
Telephone: (513) 621-6080

MEMORANDUM IN SUPPORT OF MOTION

The parking lot in issue in this case was paved in accordance with the provisions of a contract to a depth of four and one-half inches of bituminous concrete. It appears to be the concensus of experts that this is a very marginal design. These same experts recommended remedial action in the form of an additional overlay of bituminous concrete, over the entire surface of the lot, which will substantially increase the depth of the paved surface, and should produce a better lot than that provided in the contract. If the

lot is better than the one for which the contract was entered, a dimunition of damage or a setoff in favor of defendants for its increased value should be allowed. The evidence will further show that plaintiffs exerted great pressure to force defendants to install said paving on said lot at times when weather and surface conditions were not favorable for the application of paving.

William B. O'Neal
Attorney for Defendants,
Joseph A. Seta
and
Allied Chemical Corporation
310 Central Trust Tower
Cincinnati, Ohio 45202
Telephone: (513) 621-6080

CERTIFICATION

I hereby certify that a true copy of the foregoing Motion with Second Amended Answer attached was mailed this 7th day of October, 1981 to: C. Donald Heile, 1200 American Building, Cincinnati, Ohio 45202, Attorney for Iler Construction Company; Charles G. Atkins, 1800 First National Bank Building, Cincinnati, Ohio 45202, Attorney for National Amusements, Inc.; Thomas J. Kirkwood, 412 First National Bank Building, Cincinnati, Ohio 45202, Attorney for H. C. Nutting Company; Leonard A. Weakley, Jr., 900 Central Trust Tower, Cincinnati, Ohio 45202, Attorney for Raymond Keyes Engineers, P.C.; and Beverly A. Storm, 30 West Fourth Street, Newport, Kentucky 41072, Attorney for Chronis Construction Company.

William B. O'Neal

10-7-81

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

AT COVINGTON

NATIONAL AMUSEMENTS, INC.	:	
Plaintiff	:	NO. 76-2
-vs-	:	SECOND AMENDED ANSWER OF DEFENDANTS, JOSEPH A. SETA, INC. AND ALLIED CHEMICAL CORPORATION
JOSEPH A. SETA, INC., et al	:	
Defendants Third Party Plaintiffs	:	
-vs-	:	
CHRONIS CONSTRUCTION COMPANY, INC., et al	:	
Third Party Defendants	:	

For their Second Amended Answer, defendants, Joseph A. Seta, Inc., and Allied Chemical Corporation, adopt and reiterate each and every allegation and each and every defense contained in their Answer, Counterclaim and Crossclaim, and their Amended Answer heretofore filed herein, the same as if fully rewritten herein and for their Fifth Defense and Sixth Defense, say:

FIFTH DEFENSE

1. That the damages sought by plaintiff, include the costs of repairing and adding to the paving depth of substantial portions of, or all of the parking lot, which is the subject of this action.

2. That such additional paving will substantially add to the strength, supportive capabilities, life, and value of said lot and will increase the value of said lot over the value of a parking lot constructed of four and one-half inch depth of bituminous concrete, as provided by the contract.

3. That the remedial repairs will create a parking lot superior to that specified in the contract and will increase the market value of said lot beyond its value as provided for in the contract, and defendants are entitled to have damages, if any, awarded

to plaintiff, diminished by said value increase and are entitled to a set-off in the amount of the enhancement.

SIXTH DEFENSE

1. That large portions of said lot were installed by defendants at times when weather, soil, and surface conditions were not favorable for successful paving; that defendants advised plaintiff of such adverse conditions and probable failures of paving under such conditions; that plaintiff exerted pressure and duress against defendants to force and compel defendants to install said paving under said adverse conditions.

2. That said duress produced the damage of which plaintiff complains.

WHEREFORE, defendants, Joseph A. Seta, Inc., and Allied Chemical Corporation, demand that the Complaint of the plaintiff be dismissed, and adopt and reiterate the demands made in their Answer, Counterclaim and Crossclaim and Amended Answer, heretofore filed herein.

William B. O'Neal
Attorney for Defendants and
Third Party Plaintiffs,
Joseph A. Seta
and
Allied Chemical Corporation
310 Central Trust Tower
Cincinnati, Ohio 45202
Telephone: (513) 621-6080

1st Value of ~~shed~~ the lot (paved
in accordance w/ IC)
in Dec. 1975 ~~with~~ when
Taken over by TT.

$ _____

2nd ~~Damages~~ Defects Known
& Made Known to TT on
Dec 1975.

(a) Costs of repair of these
defects, using cost of
repair of April 1976

$ _____

Alice N. Bishop
Junior No (69)

My grandmother is
in critical condition and
I may be called to
West Virginia any time.
Please excuse me this
time.

(21 20) - Mrs. Dawahare
Son has tonsilitis.

(7)

National Amusement

liability

damages

Value of ~~[illegible]~~ & lot what should have been
on Dec. 1975 $ _____
if K had been comp. →
Value of → Dec. 75
theatre + lot Dec. 1975 $ _____

using values → April. 76
of repair as of →

Damages Dec 1975

Cost of repairs to this damage April 76
Sub from

a

#9

Thelma Meade

Car trouble - cannot get a car to repair us.

(1) Ladies and Gentlemen of the prospective jury you have been called today for the purpose of selecting from your number a jury to hear evidence of a dispute between the plaintiff and defendants and to make a finding of fact with regard thereto.

The court is goind to call the names of the plaintiff and defendants separately and request that lead counsel identify himself and his client to the prospective jury. Will counsel at the time of introduction please state the principle business of his client.

(1) National Amusemnts Co., Inc. (Plaintiff)

PPB Bld & op. theatres

PB Boston, Mass.

Attorneys: Atkens, Chaffins

(2) Joseph A. Seta, Inc. (Defendant) ①

PPB

PB

Attorneys: Wm. ONeal

(3) Allied Chemical △ ②

PPB New Jersey

PB

Attorneys:

(4) ILLER Construction Co., Inc.

PPB

PB Florence, Ky

Attorneys: Don Heile

(5) CHRONIS Construction Co.

PPB Cinn Ohio

PB

Attorneys: A J Jolley

Bev. Storm

(6) Raymond Keyes Engineer

PPB

PB

Attorneys: Leonard Weakley

(7) H. C. Nutting Co.

PPB

PB

Attorneys: Tom Kerkwood

This dispute arises out of a contract. In this instance it is an agreement between the plaintiff and defendants which was reduced to writing and signed by the parties. The plaintiff contends the defendants breached the contract....The defendants deny that they breached the contract and contend that the plaintiff was the one who breached the contract.

It appears in 1974 the plaintiff purchased some land near Erlanger, Kentucky for the purpose of developing and operating a Movie Theatre. The defendants were involved in the construction of the Movie Theatre. Subsequently (Circa 1974-6.) difficulties were encountered in the parking lot around the theatre.

(1) Multi party and Multi claim.

(a) Each claim and each party is to be considered separately ;

(b) Plaintiff, or one affirmatively making a claim has the burden of proving by a preponderance of the evidence. Preponderance of evidence is that it is more likely so than not.

(c) Corporations vs. individuals. (every one the same)

Anticipated that trial will last approximately 3 days.

Judge

ASSIGNED FOR TRIAL AT PIKEVILLE, KENTUCKY

ON ~~APRIL 19, 1982~~ June 7 AT 9:00 A.M.

COVINGTON

~~XXXXXXXXX~~ CIVIL ACTION NO. 76-2

NATIONAL AMUSEMENTS, INC.

William R. Jacobs ✓
Charles G. Atkins ✓
William I. Bubenzer
Bart J. Vinik
Louis Winter
Rostoto

VS:

JOSEPH A. SETA, INC.
ALLIED CHEMICAL and
ILER CONSTRUCTION COMPANY, INC.;
Defts. & Third Party Plffs.

William B. O'Neal
"
Richard S. Nelson
C. Donald Heile
Beverly Storm

VS:

CHRONIS CONSTRUCTION CO.;
RAYMOND KEYES ENGINEERS, P.D.
H. C. NUTTING CO.
Third Party Defendants

A. J. Jolly & Ron Parry
Leonard Weakley & W. Roger Fry
Thomas J. Kirkwood

TRIAL

Oral Motions in Limine by parties at Pre-trial Conf on 5/18/82 Taken Under Advisement

Stipulation attached - to be read at onset of Trial

Deposition of Floyd Ellis filed 6-3-82 at Covington

Rule of evidence

Never Mention Ins

reason - jury's [illegible] & pay lot ins

(1) When attorney in auto case represented client who didn't have ins felt this was prej because most everyone assumed to have ins who op motor vehicle.

(1) Wouldn't be fair to find of evidence doesn't sustain

(2) Raise ins passes on premiums - penalize others

(3) Not everyone has ins

CIVIL ACTION #76-2

NATIONAL AMUSEMENTS, INC. VS. JOSEPH A. SETA, INC. ET AL

ATTORNEYS OF RECORD FOR PLAINTIFF
AND DEFENDANT

PLAINTIFF

NATIONAL AMUSEMENTS, INC.

William R. Jacobs
Charles G. Atkins
2100 Central Trust Center
Cincinnati, OH 45202

William I. Bubenzer
1492 Dixie Highway
Covington, KY 41011

Bart J. Vinik
Suite 1150
31 St. James Avenue
Boston, MASS 02116

Louis Winter
WINTER, ABRAMS, SHUMAN & HERSHFANG
73 Tremont Street
Boston, MASS 02108

DEFENDANTS

(1) JOSEPH A. SETA, INC.

William B. O'Neal
310 Central Trust Towers
Cincinnati, OH 45202

(2) ALLIED CHEMICAL

William B. O'Neal
310 Central Trust Towers
Cincinnati, OH 45202

(3) ILER CONSTRUCTION CO., INC.

Richard S. Nelson
11 W. 6th Street
Covington, KY 41011

C. Donald Heile
LINDHORST & DREUDAME
American Bldg.
Central Okway at Walnut
Cincinnati, OH 45202

CHRONIS CONSTRUCTION CO.

Ron Parry
A. J. Jolly & Beverly Storm
30 West Fourth Street
P. O. Box 368
Newport, KY 41072

DEFENDANTS

(5) RAYMOND KEYES ENGINEERS — 3rd Party Defts.

W. Roger Fry
Leonard Weakley
907 Central Trust Tower
Cincinnati, OH 45202

(6) H. C. NUTTING CO.

Thomas J. Kirkwood
ROLF & ROLF
Attorney at Law
412 First National Bank Bldg.
Cincinnati, OH 45202

DIST/OFFICE	DOCKET YR.	DOCKET NUMBER	FILING DATE MO.	DAY	YEAR	J	N/S	O	R	R 23	DEMAND $	OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR.	DOCKET NUM
643 2	76	2	01	12	76	4	195	1	22		2,500		4305	P	76	2

PLAINTIFFS

NATIONAL AMUSEMENTS, INC.

DEFENDANTS G. WIX UNTHA

(1) Joseph A. SETA, INC.
(2) ALLIED CHEMICAL and
ILER CONSTRUCTION CO., INC.
Defts & 3rd pty -- DEFTS. & 3RD PARTY PLAINTIF
(3)plffs

CROSSCLAIM & COUNTER-CLAIM OF DEFTS SETA & ALLIED CHEM. fil 2/9/82

(4)
(5)
(6)
(7)

THIRD PARTY DEFENDANTS:
CHRONIS CONSTRUCTION CO.
KENNETH MOCK, AIA Per Order
(RAYMOND KEYES ENGINEERS, P.
(H. C. NUTTING CO.
(3rd Pty. Defts.
(re: 3rd-pty compla
of deft. Iler Cont

CAUSE

Action for breach of contract, negligence, and breach of implied warranty of merchantability, regarding parking lot installed for plaintiff by defendants

All Plaintiff's Counsel

William R. Jacobs
Charles G. Atkins
1800 1st Nat'l Bank Bldg.
Cincinnati, O. 45202

William I. Bubenzer
1492 Dixie Highway
Covington, Ky. 41011

Bart J. Vinik
Suite 1150
31 St. James Avenue
Boston Massachusetts 02116

Louis Winter
Winer, Abrams, Shuman & Hershfang
73 Tremont St.
Boston, Massachusetts 02108

2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202

ATTORNEYS

(1) Joseph A. Seta, Inc.
(2) Allied Chemical
Wm. B. O'Neal
310 Central Trust Towers
Cincinnati, Ohio 45202

(3) Iler Construction Co., Inc.
Richard S. Nelson
11 W. 6th St.
Covington, Ky. 41011

(3) ~~William O. Bertelsman~~ ~~303 Lawyers Bldg.~~ ~~Newport, Ky. 41071~~ ORDER: 6/ ~~Scott Pow~~ ~~400 Lawye~~ ~~4th & Yo~~ ~~Newport,~~

(6) RAYMOND KEYES ENGR.
W. Roger Fry + Leonard Wilke
907 Central Trust Tower
Cincinnati, O. 45202

(4) Chronis Construction
Ron Parry & A.J. Jolly
30 West Fourth Street
P. O. Box 368
Newport, Kentucky 41072

Chronis Construction Co.:
~~Leonard L. Kopowski~~
~~2414 Kroger Bldg.~~
~~Cincinnati, O. 40502~~

(3) C.Donald Heile (7)
Lindhorst & Dreidame
American Bldg.
Central Pkway at Walnut
Cincinnati, OH 45202

H. C. NUTTING COMPANY
Thomas J. Kirkwood
ROLF AND ROLF
Attorney at Law
412 1st Nat'l. Bank Bldg.
Cincinnati, Ohio 45202

(5) Kenneth Mock, AIA
Edwin J. Lowry
500 Legal Arts Bldg.
200 S. 7th St.
Louisville, Ky. 40202

CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	DATE	RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CA
	1-12-76	FILING FEE PAID #76841	23	CARD DATE MA JS-5 JS-6

PLAINTIFF'S
EXHIBITS

National Amusement, [illegible]
VS.
Joseph A. Seta, Inc., et al.

CAUSE NO.
76-2

DATE	Identification No.	Identification Witness	DESCRIPTION	OFFERS OBJECTIONS RULINGS EXCEPTIONS
	100		Specifications of Raymond Keyes (Bunger Ex. 2)	
	101		Specifications of David Reisman (Bunger Ex. 3)	
	102		Punch List dated 3/19/75	
	103		Ex. 13 to Chronis dep. (map of progress of site work)	
	104		Ex. 15 to Chronis Dep. (map of progress of paving)	
	105		Letters from Berling to Chronis dated 7/30/74 and 7/23/74 w/ invoices attached.	
	106		Letter from Keyes to Chronis 5/24/74	
	107		Seta Invoice dated 12/30/74 with attachments	
	108		Seta Recap of tonnage of asphalt by date	
	109		Seta Recap of tonnage by by location with individual sheets showing daily tonnage.	
	110		Letter from Rankin to Chronis dated 3/16/75.	
	111		Ex. A to Rankin dep. - site plan w/ notations.	

PLAINTIFF'S
EXHIBITS

National Amusements, Inc.
VS.
Josepeh A. Seta, Inc.

CAUSE NO. 76-2

DATE	Identification No.	Identification Witness	DESCRIPTION	OFFERS OBJECTIONS RULINGS EXCEPTIONS
	112		Letter from Feldman to Chronis dated 3/24/75 w/ Punch list attached.	
	113		Record of Cincinnati hotel reservations for Sam Feldman and Louis Rostanzo.	
	114		Letter from Feldman to Nethero dated 10/31/75.	
	115		Letter from Feldman to Flaherty dated 10/31/75.	
	116		Letter from Feldman to Rankin dated 10/31/75.	
	117		Invoice from Boone - Kenton Blacktop dated 8/26/79.	
	118		Invoice from John R. Jurgensen dated 11/26/76.	

PLAINTIFF'S EXHIBITS

National Amusements, Inc.
VS.
Josepeh A. Seta, Inc.

CAUSE NO. 76-2

DATE	Identification No.	Identification Witness	DESCRIPTION	OFFERS OBJECTIONS RULINGS EXCEPTIONS
	112		Letter from Feldman to Chronis dated 3/24/75 w/ Punch list attached.	
	113		Record of Cincinnati hotel reservations for Sam Feldman and Louis Rostanzo.	
	114		Letter from Feldman to Nethero dated 10/31/75.	
	115		Letter from Feldman to Flaherty dated 10/31/75.	
	116		Letter from Feldman to Rankin dated 10/31/75.	
	117		Invoice from Boone - Kenton Blacktop dated 8/26/79.	
	118		Invoice from John R. Jurgensen dated 11/26/76.	
	119		Recap of parking lot expenses through 5-15-78	
	120		Invoices for repair 1977	
	121		Invoices for repair 1978	
	122		Invoices for repair - 1980	
	123		Invoices for repair - 1981	
	124		Reserved. Invoiced for repair 1982	
	125		Photograph - original site	

EXHIBITS

National Amusements, Inc.
VS.
Joseph A. Seta, Inc.

CAUSE NO. 76-2

	DATE	Identification No.	Identification Witness	DESCRIPTION	OFFERS OBJECTIONS RULINGS EXCEPTIONS
		126A-B		Aerial Photographs-Feb. 1977	
		127A-CC		Photographs - Feb. 1976	
		128A-I		Photographs - Sept. 1976	
		129A-F		Photographs - Sept. 1978	
		130		map	
		131		Schedules	

AO 187
(Rev. 1/80)

EXHIBITS

NATIONAL AMUSEMENTS, INC.
vs.
JOSEPH A. SETA, ET AL

CAUSE NO. 76-2

	DATE	Identification No.	Identification Witness	DESCRIPTION	OFFERS OBJECTIONS RULINGS EXCEPTIONS
		300P to			
		318P		19-8"x10" black and white photographs taken 11/6/75	
		319P to			
		321P		3-8"x10" black and white aerial photographs of project - taken by plaintiffs (1977?)	
		322		Test location plan showing places of testing of Bowser-Morner, Thelen and H. C. Nutting	
		323		Compaction and moisture content profile of test sites shown on above #322	
		324		Draft by John H.Meyer of Raymond H. Keyes Engineering of Minutes of Meeting Dated 11/7/75	

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(Rev. 1/80) ⊕

EXHIBITS

NATIONAL AMUSEMENTS, INC.

vs.

JOSEPH A. SETA, INC., ET AL

Page Number Two

CAUSE NO. 76-2

DATE	Identification No.	Identification Witness	DESCRIPTION	OFFERS OBJECTIONS RULINGS EXCEPTIONS
	325		Second draft of minutes referred to above in 324	
	326, 326A, 326B			
	326C, 326D		Calendar August through December 1974 for showing days of performance by Seta and Iler and weather	
	327		Enlargement of portion of Chronis contract	
	328, 328A, 328B		Enlargements of portions of Seta contract	
	329, 329A, 329B		Enlargements of portions of Iler contract	
	330 to 364		The results of the tests of compaction, moisture, (CBR, filed and lab) and related tests performed on subgrade and tests of bituminous concrete by Bowser-Morner,	

AO 187
(Rev. 1/80)

EXHIBITS

NATIONAL AMUSEMENTS, INC.

vs.

JOSEPH A. SETA, INC., ET AL

CAUSE NO.
76-2-

	DATE	Identification		DESCRIPTION	OFFERS OBJECTIONS RULINGS EXCEPTIONS
		No.	Witness		
				employees, including	
				David Cowherd and	
				Kenneth Taylor	
		365		Paving sequence -	
				Rostanzo deposition	
		366		Letter dated April 18,	
				1975 from Feldman of	
				National Amusements	
				to Chronis	

AO-187

Third Party Defendant Chronis Construction Co.

EXHIBITS

NATIONAL AMUSEMENTS, INC.

VS.

JOSEPH A. SETA, INC., ET AL

CAUSE NO. 76-2

DATE	Identification No.	Identification Witness	DESCRIPTION	OFFERS OBJECTIONS RULINGS EXCEPTIONS
	701		Contract between Plaintiff & Perfection Heating Co.	
	702		Letter from R.B. Brunemann to S. Feldman (11/6/75)	
	703		Letter from S. Feldman to V.P. Chronis (1/23/75)	
	704		Letter from Freway Glass to V.P. Chronis (12/23/74)	
	705		Letter from S. Feldman to Iler (relates to Plaintiff Exhibit) (11/4/74)	
	706		Letter from S. Feldman to LR (11/4/74)	
	707		Letter from Chronis Const. Co. to S. Feldman (1/28/75)	
	708		List of Chronis' sub-contractors	
	709		Letter of proposal from Chronis to S. Feldman (6/13/74)	
	710		Letter from H.C. Nutting to S. Feldman (8/6/74)	
	711		Invoice of extra charges patching (11/20/74)	
	712		Invoice of extra charges snow removal (12/2/74 - 12/3/74)	

AO-187

Third Party Defendant
Raymond Keyes Engineers, P.C.

EXHIBITS

National Amusements, Inc.
vs.
Joseph A. Seta, Inc., et al

CAUSE NO. 76-2

DATE	Identification No.	Identification Witness	DESCRIPTION	OFFERS OBJECTIONS RULINGS EXCEPTIONS
	900-918		8" x 10" color aerial photographs of Erlanger site on 5/19/81	
	919		7 color photographs taped for panoramic view from west side of Erlanger site taken in September, 1978	
	920		4 color photographs taped for panoramic view of south side of Erlanger lot taken in September, 1978	
	921		4 color photographs taped for panoramic view from northeast corner of Erlanger site taken in September, 1978	
	922		2 color photographs taped of parking lot of Erlanger lot taken in 1978	
	923		3 color photographs taped ~~for panoramic view of~~ entrance of Erlanger site taken in September, 1978	
	924		3 color photographs taped for panoramic view of south west corner of Erlanger site taken in September, 1978	
	925		color photograph of parking lot taken in September, 1978	
	926		color photograph of Erlanger site taken in September, 1978	
	927		SPECIFICATIONS OF RAYMOND KEYES (BUNGER EX 2)	
	928		SPECIFICATIONS OF DAVID REISMAN (BUNGER EX 3)	

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EXHIBITS

NATIONAL AMUSEMENTS, INC.
vs.
JOSEPH A. SETA, INC., et al

CAUSE NO. 76-2

DATE	Identification No.	Identification Witness	DESCRIPTION	OFFERS OBJECTIONS RULINGS EXCEPTIONS
	1101		Six profiles on two boards of various cross sections of the parking lot cut and fill embankments.	
	1102		August 6, 1974 letter from L. R. Scott to National Amusements.	
	1103		Color photo 4 x 4, 7/6/81	
	1104		Color photo 4 x 4, 9-75	
	1105		Color photo 4 x 4, 7/6/81	
	1106		Color photo 4 x 4, 9-75	
	1107		Color photo 4 x 4, 7/6/81	
	1108		Color photo 4 x 4, 9-75	
	1109		Color photo 4 x 4, 7/6/81	
	1110		Color photo 4 x 4, 9/75	
	1111		Color photo 4 x 4, 7/6/81	
	1112		Color photo 4 x 4, 9-75	
	1113		Color photo 4 x 4, 7/6/81	

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EXHIBITS

NATIONAL AMUSEMENTS, INC.
vs.
JOSEPH A. SETA, INC., et al

CAUSE NO. 76-2

DATE	Identification No.	Identification Witness	DESCRIPTION	OFFERS OBJECTIONS RULINGS EXCEPTIONS
	1114		Color photo 4 x 4, 7/6/81	
	1115		Color photo 4 x 4, 9/75	
	1116		Color photo 4 x 4, 7/6/81	
	1117		Color photo 4 x 4, 7/6/81	
	1118		Color photo 4 x 4, 7/6/81	
	1119		Color photo 4 x 4, 9-75	
	1120		Color photo 4 x 4, 9/75	
	1121		Color photo 4 x 4, 9/75	
	1122		Color photo 4 x 4, 9/75	
	1123		Color photo 4 x 4, 9/75	
	1124		Color photo 4 x 4, 9/75	
	1125		Color photo 4 x 4, 9/75	
	1126		Color photo 4 x 4, 9/75	
	1127		Color photo 4 x 4, 9/75	

AO-187

EXHIBITS

NATIONAL AMUSEMENTS, INC.
VS.
JOSEPH SETA, INC., et al

CAUSE NO. 76-2

DATE	Identification No.	Identification Witness	DESCRIPTION	OFFERS OBJECTIONS RULINGS EXCEPTIONS
	1128		Color photo 4 x 4, 7/6/81	
	1129		Color photo 4 x 4, 7/6/81	
	1130		Color photo 4 x 4, 7/6/81	
	1131		Color photo 4 x 4, 9/75	
	1132		Color photo 4 x 4, 7/6/81	
	1133		Color photo 4 x 4, 9/75	
	1134		Color photo 4 x 4, 9/75	
	1135		Color photo 4 x 4, 7/6/81	
	1136		Color photo 4 x 4, 7/6/81	
	1137		Color photo 4 x 4, 9/75	
	1138		Color photo 4 x 4, 7/6/81	
	1139		Color photo 4 x 4, 7/6/81	
	1140		Color photo 4 x 4, 7/6/81	
	1141		Color photo 4 x 4, 7/6/81	

AO-187

EXHIBITS

NATIONAL AMUSEMENT, INC.
vs.
JOSEPH A. SETA, INC, et al

CAUSE NO. 76-2

DATE	Identification No.	Identification Witness	DESCRIPTION	OFFERS OBJECTIONS RULINGS EXCEPTIONS
	1142		Color photo 4 x 4, 9/75	
	1143		Color photo 4 x 4, 7/6/81	
	1144		Color photo 4 x 4, 7/6/81	
	1145		Color photo 4 x 4, 7/6/81	
	1146		Color photo 4 x 4, 9/75	
	1147		Color photo 4 x 4, 9/75	
	1148		Black and white aerial photo 8 x 10 1977	
	1149		Black and white aerial photo 8 x 10 1977	
	1150		Black and white aerial photo 8 x 10 1977	
	1151		Color photo 3 x 5 11/5/81	
	1152		Color photo 3 x 5 11/5/81	
	1153		Color photo 3 x 5 11/5/81	
	1154		Color photo 3 x 5 11/5/81	
	1155		Color photo 3 x 5 - 11/5/81	

PRETRIAL SET FOR TUESDAY, MAY 18, 1982

NATIONAL AMUSEMENTS V. JOSEPH SETA, ET AL.

The following have been filed:

A. Pretrial Memorandum: Raymond Keyes (#226 vol. IV)
National Amusements (#225 vol. IV)
Allied Chemical & Seta (#227 vol. IV)
Chronis Construction (#231 vol V)
Iler Construction (#233 vol V)
H.C. Nuttting (#234 vol. V)

a) Supplemental Pretrial memo by H.C. Nutting (#245 vol. V): just wish to strike part of their earlier pretrial memo.

B. Lists of Witnesses & List of Exhibits: National Amusements (#225)
Iler (#233 and #246)
Seta and Allied (#241 and #244)
Raymond Keyes (#242 and #243)
H.C. Nutting (#234)
** Chronis (none)

C. Stipulations ~~(#233)~~

#237 and #247

Conclusion: only Chronis has failed to file list of witnesses and exhibits.

ISSUES TO BE DISCUSSED AT PRETRIAL: an exhaustive list of the issues involved in this case is found in ~~Seta's amendment~~ plaintiff's pretrial memo (#225).

I also foresee some discussion on the issue of damages. I see that you ruled that damages would be determined as of the time of the injury and I assume that you will allow the jury to determine when the injury occurred. If that's the case, there should be no discussion except on how you will instruct the jury.

Chronis might want to bring up the Kentucky apportionment statutes, if it didn't already do it at the last conference. Take a look at #231.

dwt

ASSIGNED FOR FINAL PRE-TRIAL CONF AT PIKEVILLE JUDGE UNTHANK

DATE May 18, 1982 AT 10:00 A. M.

CIVIL ACTION NO. COVINGTON 76-2

NATIONAL AMUSEMENTS, INC.	William R. Jacobs William I. Bubenzer Bart J. Vinik Louis Winter
VS:	
JOSEPH A. SETA, INC.; ALLIED CHEMICAL; ILER CONSTRUCTION CO., INC.;	William B. O'Neal Richard S. Nelson C. Donal Heile
CHRONIS CONSTRUCTION CO.; RAYMOND KEYES ENGINEERS; H. C. NUTTING CO.	Ron Parry W. Roger Fry Thomas J. Kirkwood

*****TRIAL SET FOR June 7, 1982 at 9:00 A. M.*****

BY JURY

4/23/82	#241	LISTING OF TRIAL WITNESSES by deft, Joseph A. Seta, Inc. & Allied CHemical Co. - Fil in Chambers
	#242	LIST OF EXPERT WITNESSES of deft, Raymond Keyes, Engineers. - Fil in Chambers
5/3/82	#243	LIST OF LAY & EXPERT WITNESSES of deft, Raymond Keyes Engineers.
5/6/82	#244	LISTING OF TRIAL WITNESSES by deft, Joseph A. Seta, Inc. & Allied Chemical
	#245	SUPPLEMENTAL FORMAL PRE-TRIAL MEMO of 3ed ptys deft, H. S. Nutting
	#246	LISTING OF TRIAL WITNESSES, EXPERT & OTHERWISE, of deft, Iler Construction Co.
5/11/82	#247	STIPULATION of ptys per Order fil 4/7/82 (REF# 238)

beyond scope –
thickness less than adequate –

1

Lother Beatty – W/ not be here

Joint exhibits I – 29
Roman numerals 1-29.

3 – TT – 100 ✓ 1
3 Seta – 300 1
3 ✓ Ilex – 500 1
3 Chronos – 700 1
3 Keye – 900 1
3 Nutting – 1100 1 – 1160 – 1161

Meyer 6
Keyes 2
11
(8)

40
24

✓ 1.8
✓ 1.1
29

35

MEMORANDUM OF CALL

TO:

☐ YOU WERE CALLED BY— ☐ YOU WERE VISITED BY—

OF (*Organization*)

☐ PLEASE CALL ⟶ PHONE NO. CODE/EXT.

☐ WILL CALL AGAIN ☐ IS WAITING TO SEE YOU

☐ RETURNED YOUR CALL ☐ WISHES AN APPOINTMENT

MESSAGE

Copy given to David —

M.

RECEIVED BY	DATE	TIME

STANDARD FORM 63
REVISED AUGUST 1967
GSA FPMR (41 CFR) 101-11.6

GPO : 1969—c48—16—80341-1 332-389

63-108

the matter of W. Inman

has to stop some where

Else there is no

need to establish

cut off dates of discovery

and do away with

rules regarding

surprise

N

RENDIGS, FRY, KIELY & DENNIS

ATTORNEYS AT LAW
900 CENTRAL TRUST BANK TOWER
FOURTH & VINE STREETS
CINCINNATI, OHIO 45202

PHONE (513) 381-9200

WRITER'S DIRECT DIAL NUMBER

DON BURKHOLDER
WILLIAM H. HUTCHERSON, JR.
JOHN P. KIELY **
RALPH F. MITCHELL
W. ROGER FRY
D. MARC ROUTT
THOMAS S. SHORE, JR.
WILLIAM P. SCHROEDER
DAVID WINCHESTER PECK
J. KENNETH MEAGHER *
EMMETT R. MOORE
PAUL F. WENKER
EDWARD R. GOLDMAN
MICHAEL E. MAUNDRELL
FREDERICK BROCKMEIER IV
JOHN W. HUST
JOSEPH W. GELWICKS *

LAWRENCE E. BARBIERE
LEONARD A. WEAKLEY, JR. *
CAROLYN A. TAGGART
DOUGLAS W. RENNIE *
CHARLES D. MAYS *
LISA M. DEBBELER

*ALSO ADMITTED TO PRACTICE IN KENTUCKY
**ALSO ADMITTED TO PRACTICE IN INDIANA

COUNSEL
AUGUST A. RENDIGS, JR.
JOHN A. KIELY
ROBERT M. GALBRAITH

ROBERT M. DENNIS (1917-1973)
WILLIAM H. FRY (1905-1975)

May 13, 1982
FEDERAL EXPRESS

Hon. G. Wix Unthank
Judge, U.S. District Court
Eastern District of Kentucky
P. O. Box 278
Pikeville, Kentucky 41501

RE: National Amusements, Inc. vs.
Joseph A. Seta, Inc., et al v.
Chronis Construction Company, Inc., et al
Civil Action No. 76-2
RFK&D Ref. 80-326

Dear Judge Unthank:

In my May 12th correspondence to the Court I indicated that all discovery should be completed one month before trial date. I note, however, that your most recent Standing Order of April 29, 1982, clearly states that all discovery shall be completed two weeks prior to the pretrial conference, or May 4th. This Standing Order is equally as clear that the expert witness lists of those experts which the parties intend to call at trial be submitted thirty days prior to pretrial conference, or April 18, 1982. Iler's submission of their new expert, Paul Michaels, on May 5, 1982, is after the cut-off date set forth by the Court and should therefore be stricken or denied.

Sincerely,

Leonard A. Weakley, Jr.

LAW:jma

CC: C. Donald Heile, Esq.
Charles G. Atkins, Esq.
William B. O'Neal, Esq.
Thomas Kirkwood, Esq.
Beverly R. Storm, Esq.

5-13-82

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*ALSO ADMITTED TO PRACTICE IN KENTUCKY
**ALSO ADMITTED TO PRACTICE IN INDIANA

May 12, 1982

Hon. G. Wix Unthank
Judge, U.S. District Court
Eastern District of Kentucky
P. O. Box 278
Pikeville, Kentucky 41501

RE: National Amusements, Inc. v. Joseph A. Seta, Inc., et al
v. Chronis Construction Company, Inc., et al
Civil Action No. 76-2
RFK&D Ref. 80-326

Dear Judge Unthank:

As counsel for Raymond Keyes Engineers, P.C., we would like to strongly object to the addition of Iler Construction Company's new expert witness, Paul F. Michaels, due to the lateness of notice. Notice of this additional expert on the issue of negligence, which has been presenct in this case since its inception in 1976, was given on May 5, 1982. By this Court's Order most recently received, discovery cut-off was one month before the trial date, or May 7th. Such a result is clearly not contemplated under the rules of discovery and clearly a hardship and injustice on those parties affected by this new expert's testimony. Should the Court allow this extra witness of Iler's remain on the witness list, we must request that the Order relating to discovery be extended so as to allow the parties to take the deposition of this new witness.

Sincerely,

Leonard A. Weakley, Jr.

LAW:jma

cc: C. Donald Heile, Esq.
Charles G. Atkins, Esq.
William B. O'Neal, Esq.
Thomas Kirkwood, Esq.
Beverly R. Storm, Esq.

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Attorneys and Counselors-at-law

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30 West Fourth Street
P.O. Box 368
Newport, Kentucky 41072
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May 11, 1982

Hon. G. Wix Unthank
Judge
United States District Court
Federal Courthouse
Pikeville, Kentucky 41501

Re: National Amusements, Inc. v. Joseph A. Seta, Inc., et al
v. Chronis Construction Company, Inc., et al
Civil Action No. 76-2

Dear Judge Unthank:

On May 6th we received a "listing of trial witnesses, expert and otherwise", from Defendant Iler Construction Company and a listing of trial witnesses from Defendant Joseph A. Seta and Allied Chemical Co.

Each of these lists contained the name of a new expert, who, according to the summary of expected testimony, will testify as to an opinion concerning the duties and obligations of third party defendant Chronis Construction Company, Inc.

Since your prior orders, including the most recent order furnished to all counsel by your letter of May 5th, indicates that all experts must be furnished 30 days prior to the pre-trial on May 18th, all witnesses two weeks prior to the pre-trial and all discovery complete two weeks prior to pre-trial, our receipt of the names of these new experts for the first time on a date less than two weeks before the pre-trial, is extremely prejudicial to our client, Chronis Construction Company.

We would request that the court disallow these two new experts from testifying at the trial, or grant us leave and additional time within which to depose these new witnesses and obtain a rebuttal testimony and/or witness for our client.

Thank you for your consideration.

Sincerely,

Beverly Storm

Beverly R. Storm

BRS:mr
cc: All counsel of record

United States District Court
FOR THE
Eastern District of Kentucky

Chambers of
G. Wix Unthank
Judge
Pikeville, Kentucky 41501

May 5, 1982

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Mr. Leonard Weakley
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Re: National Amusements, Inc. v. Joseph A. Seta, Inc., et al,
v. Chronis Construction Company, Inc., et al

Dear Counselors:

Pursuant to your request, the Court is pleased to supply you with copies of its standing orders concerning pretrial procedures.

Very truly yours,
G. Wix Unthank
G. Wix Unthank
Judge

GWU:mem

Encl:

Eastern District of Kentucky
FILED
APR 29 19
AT PIKEVILLE
DAVID T. McGARVEY
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

STANDING ORDER

IN RE: PRE-TRIAL PROCEDURES IN CIVIL ACTIONS

The Court's standing order of October 21, 1980, (as amended on March 1, 1982), is hereby superseded and the following procedure for civil pre-trial conferences is in force. This outlined procedure is, of course, always subject to alteration by Court order pertaining to certain specific cases.

Counsel are expected to prepare thoroughly for these conferences and to observe strictly all requirements contained in this order. Extensions of the time deadlines herein may be granted upon motion and affidavits for good cause shown.

The Court is hopeful that SANCTIONS to ensure compliance with this order will not be required; however, WHATEVER SANCTIONS ARE NECESSARY WILL BE IMPOSED.

I.

THIRTY DAYS PRIOR TO PRE-TRIAL CONFERENCES:

All counsel shall submit a list containing the names, addresses, and qualifications of those EXPERT WITNESSES whom they intend to call at trial, along with a short summary of the expected testimony of each.

II.

TWO WEEKS PRIOR TO PRE-TRIAL CONFERENCES:

A. All discovery shall be completed, including physical examinations;

B. All pre-trial motions shall be filed, together with supporting memoranda;

C. Each party shall file a pre-trial memorandum, updating the matters addressed in the party's preliminary conference memorandum, and addressing any which have arisen in the interim since the preliminary conference;

D. Each party shall file a statement of those factual matters to which the party will stipulate; and,

E. Each party shall file a list of witnesses whom the party intends to call at trial, accompanied by a short narrative of the expected testimony of each. As to expert witnesses, an exhibit shall be prepared, setting forth the qualifications and experience of each.

III.

AT PRE-TRIAL CONFERENCES:

A. Attendance - The pre-trial conference shall be attended by the parties and their trial attorneys. A corporate or other organizational party shall have at the conference its representative who will stand for it at trial.
In accordance with the Court's standing order on the identification and introduction of exhibits, filed the 29th day of June, 19 82, any witnesses who are required for laying foundations for exhibits shall attend the pre-trial conference.

B. Items to be submitted -

1. Any amendments to the pleadings, with support showing their necessity or desirability;

2. Stipulations as to undisputed facts;

3. Exhibit lists, along with exhibits pre-marked for identification, (as prescribed in the Court's standing order regarding the identification and introduction of exhibits);

4. Stipulations and/or waivers as to exhibit foundations over which there is no dispute;

5. Trial memoranda, updating the matters addressed in pre-trial memoranda, and addressing any new matters which have arisen since submission of the pre-trial memoranda, which were due two weeks prior to the conference.

C. Matters to be discussed, (although this list cannot be exhaustive);

1. Any pending pre-trial motions;

2. Preliminary reference of issues to a master for findings to be used as evidence;

3. The need for separate trials;

4. Procedures for cross-examination and for objections where there are multiple counsel;

5. The order of proof and arguments where there are multiple counsel;

6. The possibility of settlement;

7. The trial date;

8. Use of juror information sheets;

9. Conduct of voir dire;

10. The number and use of peremptory challenges;

11. A tentative date for submission of suggested jury instructions, with citations.

(Continued on page 3)

D. Pre-trial procedure as to exhibits

1. The Court's standing order filed the 29th day of April, 1982, sets forth the full procedure to be used in the identification and introduction of exhibits.

2. At the pre-trial conference:

   a. All counsel shall bring his or her exhibits, pre-marked for identification using letters A through Z, (and, if necessary, A(1), etc.). A copy of an exhibit list showing these identification designations shall be filed with the Clerk of the Court at the conference, and copies will be served on opposing counsel.

   b. Any foundation necessary to authenticate each exhibit will be laid, leaving only the determination of the exhibit's relevance to be made at trial. The necessary witnesses for laying such foundation must be present at the pre-trial conference.

NOTE: Only those exhibits listed, marked, and founded as prescribed by this pre-trial procedure shall be offered in evidence at trial, except for good cause shown.

NOTE: Only those witnesses listed as prescribed by this pre-trial procedure shall be permitted to testify at trial, except for good cause shown.

This order is entered this 29th day of April, 1982.

G. WIX UNTHANK, JUDGE

Eastern District of Kentucky
FILED
APR 29 1982
AT PIKEVILLE
DAVIS T. McGARVEY
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

STANDING ORDER

IN RE: INTRODUCTION OF EXHIBITS

The Court has noted with concern the many and varied procedures used by counsel in the introduction of exhibits during trial. Such diversity not only diverts the attention of the Court and jury from the exhibits, but results in an unnecessary consumption of trial time.

Now therefore, the Court being sufficiently advised, the following is the procedure to which the Court requests all attorneys' adherence:

(1) All exhibits will be pre-marked for identification using letters A through Z, (and, if necessary, A(1), etc.). A copy of an exhibit list with the indentification designations will be filed with the Court Clerk at pre-trial conference, and a copy will be served on opposing counsel.

(2) At the pre-trial conference, any foundation necessary to authenticate the exhibit will be laid, leaving only the determination of relevance to be made at trial. The necessary witnesses to lay such foundation must be present at the pre-trial conference.

(3) During trial, at the appropriate time for each exhibit's introduction, counsel will request the Clerk to re-mark it as a trial exhibit, with a number to conform with the sequence of its introduction. The Clerk will inform the Court of such number by stating the number for purposes of the record. The U.S. Marshal will then display such exhibit to opposing counsel, stating that fact aloud for benefit of the record.

(4) The attorney offering the exhibit will then, by means of leading questions to the witness, elicit a descriptive identification of the exhibit and establish its relevance. The offering attorney will then immediately move that the exhibit be admitted into evidence. No substantive questions concerning the exhibit shall be asked of the witness prior to the exhibit's being admitted.

(5) The exhibit may be displayed to the jury <u>after</u> opposing counsel has had opportunity to cross-examine the witness.

The procedure described above is applicable in both criminal and civil cases.

Presumably, there will be some minor deviations from this procedure in certain cases. For example, there may be times when a prosecutor will wish to lay at trial an abbreviated foundation for a defendant's confession, to establish affirmatively that the confession was not the product of any coercion on the government's part. There will also be occasions when more extensive testimony will be required to establish the relevance of an exhibit.

If you find the procedure outlined to be unclear to you, or if you have any questions or difficulties with it, please advise the Clerk or the Court, and any necessary clarification will be made.

This 29th day of April, 1982.

G. Wix Unthank

G. WIX UNTHANK, JUDGE

AO-187

EXHIBITS

_____ VS. _____ } CAUSE NO.

	DATE	Identification		DESCRIPTION	OFFERS OBJECTIONS RULINGS EXCEPTIONS
		No.	Witness		

National Amendments

(a) the Complex w/ an unimproved parking lot in 1974

(b) the Complex w/ a defective parking lot in 1974

(c) the Complex w/ a parking lot that complied w/ the provisions of the K in 1974

I

this is in explanation of statement of Counsel that Complex had no value w/o parking lot.

II

Value of Complex, in 1974 with parking lot defects known in 1975

the injuries ~~of~~ were in 1974 – ~~whether~~ ~~it~~ Knowledge doesn't injure any more than hearing determines sound

Lot
$580,000

Dec 74

Dec 74

$1,580,000
1,000,000
580,000
380,000
200,000

74
158,000
1,000,000
580,000
380,000

74

Apr 76

$1,580,000
215,000
218,000
350,000
400,000

Dec 94

Value of Complex w/ IC Lot.

705,000
675,000
650,000.

so to do withdraw from the retirement fund more money than he has ever paid in, to wit, one half of the amount which this judgment requires the county to pay.

In my view, the result here was never the intent or purpose of the Legislature.

169 Ohio St., 505.

Visintine & Co., Appellee and Cross-Appellant v. The New York, Chicago & St. Louis Rd. Co. et al., Appellants and Cross-Appellees.

Supreme Court of Ohio.

(No. 35811—Decided July 15, 1959.)

Contracts — Third party beneficiary — Right of creditor beneficiary to sue for breach — Contract between state and railroads — Elimination of grade crossing.

1. *Contracts* Page § 153.
   Contracts O.Jur 2d §§ 177, 180.

APPEAL from the Court of Appeals for Franklin County.

The amended petition of the plaintiff, Visintine & Company, to which a demurrer was filed by each of the defendants, alleges two causes of action, one for breach of contract and one for negligence. The demurrers were sustained by the Court of Common Pleas.

The Court of Appeals reversed the judgment of sustention as to the contract cause and affirmed such judgment as to the tort cause.

Plaintiff's amended petition, containing as it does extended quotations from the contracts involved, is too long to set out in full here. The allegations of the petition are very fairly and succintly summarized in the opinion of the Court of Appeals, as follows:

"Prior to 1950 railroad tracks of each of the defendant companies, The New York, Chicago & St. Louis Railroad Company and The Baltimore & Ohio Railroad Company, crossed United States Route 23 at grade on Wood Street in the city of Fostoria, Ohio. In August, 1949, the city of Fostoria passed an ordinance giving its consent to the grade crossing elimination and agreed to bear certain costs of the improvement. In May of 1950 the Director of Highways for the state of Ohio, by official entry, declared that the separation of grades was rea- [506] sonably necessary and expedient. Following this, on the 17th day of July, 1950, the Director of Highways entered into a contract with the city of Fostoria and the defendant railroad companies, which contract set up the proportion of costs of the grade crossing elimination to be borne by each of the parties thereto, and also provided for certain work to be performed by the defendant companies. These contracts with the city of Fostoria and the railroads did not cover all the necessary work to be done on the project, the balance of which was to be performed under a separate contract and which was accordingly entered into at a later date, between the plaintiff-appellant Visintine Company, and the state of Ohio. Each of the separate contracts provided that the work should be performed in accordance with the plans and specifications submitted for the project and in the sequence designated. The nature of the work was such that none of the parties could perform its part in a single operation, but numerous ones were required and the time when each was to be performed was specified and spelled out in the plans and specifications agreed upon. These contracts were subsequently carried out and the project completed. Plaintiff now claims damages against the railroad companies as the result of said project and claims in the amended petition that the defendant railroad companies failed to perform their work as required by their contract with the state of Ohio."

The cause is before this court upon the allowance of motions to certify the record filed on behalf of both defendants and plaintiff.

Knepper, White, Richards, Miller &

Roberts and *John A. Jenkins*, of Columbus, for appellee and cross-appellant.

Wilson & Rector, Alexander, Ebinger & Wenger, of Columbus, *Harrington, Huxley & Smith* and *T. Lamar Jackson*, of Youngstown, for appellants and cross-appellees.

PER CURIAM. It is conceded that there was no actual contract between the plaintiff and either of the defendants. The [507] theory of plaintiff upon which it seeks to recover is that it was a third party beneficiary to the contracts of July 17, 1950, between the state of Ohio and each of the defendants.

In Restatement of the Law of Contracts, Section 133, a third party beneficiary is said to be either (a) a creditor beneficiary, (b) a donee beneficiary or (c) an incidental beneficiary. An incidental beneficiary under a contract to which he is not a party may not recover from the promisor. *St. Clair* v. *Williams*, 7 Ohio, Pt. II, 110, 30 Am. Dec., 194; *Blunk* v. *Dennison Water Supply Co.*, 71 Ohio St., 250, 73 N. E., 210; *Cleveland Window Glass & Door Co.* v. *National Surety Co.*, 118 Ohio St., 414, 161 N.E., 280.

If, therefore, the plaintiff was merely an incidental beneficiary under the contracts between defendants and the state of Ohio, obviously it can maintain no action against the defendants.

According to Restatement of the Law of Contracts, Section 133, a person is a creditor beneficiary if the performance of the promise will satisfy an actual, supposed or asserted duty of the promisee to the beneficiary and is not intended as a gift.

Although this Restatement definition distinguishes between a creditor beneficiary and a donee beneficiary, such distinction has little materiality so far as liability to the beneficiary is concerned because it is generally held that either type of beneficiary may recover. 11 Ohio Jurisprudence (2d), 429, 431. Familiar examples of recovery by third party beneficiaries, without any attempt to distinguish between creditor or donee, are by the beneficiary of a life insurance policy, by a person injured by the holder of a liability insurance policy, and by a materialman from a surety indemnifying an owner of a construction project against the defaults of a contractor.

The most frequent examples of the creditor-beneficiary situation outlined in the texts are those where one person contracts to pay the debts of another. But such need not always be the case. It is pointed out, as follows, in 4 Corbin on Contracts, 97, Section 787:

[508] "The promises on which a creditor beneficiary has been given judgment are nearly all cases where the consideration was executed and the promisor is a money debtor. The term 'creditor,' however, may properly be used broadly to include any obligee to whom the promisee owes a duty. There seems to be no good reason for restricting the rule to cases where the third party is a creditor in the narrow sense of one to whom the promisee owes a liquidated debt. Thus, if the promise is to perform labor or deliver goods instead of to pay money, or is to pay claims for unliquidated damages, the obligee should be able to maintain suit against a promisor who has assumed the duty."

The state of Ohio owed certain duties to plaintiff under the contract entered into between them. Among those duties was that of providing plaintiff with a site on which it could perform its work without hindrance or delay and of doing those things which it promised to do at such time and in such manner as would not hinder or delay the plaintiff. Even though the state, because of governmental immunity, can not be sued for its failure to perform those duties, the duties nevertheless existed. The performance of those duties was undertaken by the defendants under their contracts with the state of Ohio. Since the contracts between defendants and the state, in addition to the performance of certain obligations assumed by the defendants for the benefit of the state, provided, also, for the performance of certain obligations owed by the state to the plaintiff, it would seem

that plaintiff falls squarely within the definition of "creditor beneficiary."

Plaintiff's petition alleges that the contracts between defendants and the state of Ohio set out the standard specifications of the state of Ohio which specifically stated that those contracts and that between the state and plaintiff were entered into pursuant to the accomplishment of a single project, and that it was the duty of all contractors to co-operate and to co-ordinate their work. The petition alleges also and sets out in detail a schedule of construction contained in all contracts, [509] whereby mutual and reciprocal obligations were placed on the defendants and plaintiff to perform their respective portions of the work on time and in sequence.

It is urged by the defendants that the contracts between them and the state of Ohio do not clearly show an intent to benefit the plaintiff, and that such an intent cannot be implied. And several cases from outside Ohio to that effect are cited to us by the defendants. However, there appears to be no unanimity of opinion on this subject. In 4 Corbin on Contracts, 20, Section 776, the following is said about the intention to benefit the third party:

"It is clear that if the 'primary' and 'paramount' purpose seems to be to benefit the third person, as in the case of all sole and donee beneficiaries, he should have an enforceable right as the court says. But rights have not been limited so narrowly as this. In the case of most creditor beneficiaries, it is the purpose and intent of the promisee to procure the discharge of his obligation. The attainment of this end involves benefit both to himself and to his creditor. This 'benefit' he intends to bring about as an entirety, having no idea in his own mind as to its division between the persons receiving it or as to 'primary' or 'paramount' purpose. Neither should the court make such a division. It should content itself with bringing about the entire result that the promised performance would attain. That result was the 'paramount' object of desire and that result was the 'primarily' intended result, including not only the ultimate end in view but also the means used to bring it about. The great majority of the courts attain this desired result in full by giving a remedy to the creditor against the promisor. The question is not 'whose interest and benefit are primarily subserved,' but what was the performance contracted for and what is the best way to bring it about."

In the light of that statement, we concur in the analysis by the Court of Appeals, where, in the opinion by Judge Miller, it is said:

"° ° ° We are of the opinion that in considering the rail- [150] road contracts and the plans and specifications and sequence of work specifications it is apparent that it was intended to benefit the contractor, as they all provided for cooperation in order that the job might be completed as scheduled. ° ° ° Throughout all contracts it was made plain that the work of Visintine was dependent upon the performance by the railroads of their contractual obligations and vice versa. By each performing their obligations in the proper sequence a benefit was incurred upon the other by permitting them to complete their work in accordance with the terms of their various contracts."

Taken altogether, we believe the allegations of the petition are sufficient, as against demurrer, to qualify plaintiff as a beneficiary under the contracts between the defendants and the state of Ohio, particularly in view of the fact that the state is immune from suit for any alleged violations of the duties it assumed under its contract with plaintiff.

We agree with the Court of Appeals in its affirmance of the sustaining of the demurrer to the tort cause of action. Tort is based on a duty owed by one party to another. The duty owed here by the defendants was to the state of Ohio, not to the plaintiff. The duty arising out of contract upon which plaintiff may rely in its first cause of action was that owed to it by the state. If defendants are liable to plaintiff it is due to a breach of the contracts they made with the state of Ohio and not to the violation of any duty

owed directly to the plaintiff upon which a tort action may be based. *Wymer-Harris Construction Co.* v. *Glass, Admx.*, 122 Ohio St., 398, 171 N.E., 857, 69 A.L.R., 517.

Judgment affirmed.

WEYGANDT, C. J., MATTHIAS, BELL, HERBERT and PECK, JJ., concur.

TAFT, J., dissenting. See *Brotherton* v. *Merritt-Chapman & Scott Corp.*, 213 F. (2d), 477 (CCA2, 1954), *Clark* v. *P. M. Hennessey Construction Co.*, 122 Minn., 476, 142 N.W., 873 [511] (1913), *Reed* v. *Adams Steel & Wire Works*, 57 Ind. App., 259, 106 N.E., 382 (1914), Restatement of the Law of Contracts illustration under Section 147, 12 American Jurisprudence, 834, Section 281.

169 Ohio St., 511.

City of Akron, Appellee v. Mingo, Appellant.

Supreme Court of Ohio.

(No. 35916—Decided July 15, 1959.)

Arrest — Privilege from — While returning from court — Arrest for misdemeanor.

1. *Arrest* Page § 1.
Arrest O.Jur 2d § 60.

Sections 2331.11 to 2331.14, Revised Code, privilege parties, witnesses, attorneys and certain other officers of a court *only* from *civil* arrest while going to, attending or returning from court, and such sections do *not* privilege such persons from arrest for crimes or misdemeanors at such times. (Paragraph one of the syllabus of *Zumsteg* v. *American Food Club, Inc.*, 166 Ohio St., 439, 2 O.O.(2d), 437, explained.)

CERTIFIED by the Court of Appeals for Summit County.

On February 26 and 27, 1957, William Mingo, appellant herein, stood trial in the Akron Municipal Court on a charge of driving an automobile while under the influence of alcohol. At the conclusion of the trial the court discharged the jury and the defendant. Mingo immediately left the courtroom, went to his car and was returning to his home when he was stopped by a police officer, arrested, placed in jail and charged with operating his automobile through a red light and with driving without a driver's license, in violation of the ordinances of the city of Akron.

Contending that he was privileged from arrest by reason of the fact that he was returning to his home from attending [512] court, as provided in Section 2331.11, Revised Code, Mingo filed a motion in the Municipal Court, as provided by Section 2331.14, Revised Code, requesting that he be summarily discharged, and that the cases be dismissed with prejudice at the cost of the person suing out process, for the reason that the defendant was privileged from arrest. This motion was overruled, trial was had and Mingo was found guilty.

From the judgment of the Municipal Court, an appeal was taken to the Court of Appeals for Summit County, which court affirmed the judgment and, finding its judgment to be in conflict with the judgment of the Court of Appeals for Greene County in the case of *State* v. *McCoy*, 99 Ohio App., 161, 58 O.O., 270, 131 N.E. (2d), 679, certified the record of the cause to this court to resolve the conflict.

Harry N. VanBerg, director of law, of Akron, and *Robert W. Blakemore*, of Akron, for appellee.

Howard L. Calhoun, of Akron, for appellant.

MATTHIAS, J. The ultimate question to be determined is whether the privilege from arrest granted by Section 2331.11, Revised Code, to "suiters ° ° ° and witnesses while going to, attending, or returning from court" applies to a defendant who, while returning home after a trial on a charge of operating a motor vehicle while under the influence of alcohol, is arrested on the way home for violating the ordinances of a city by operating his

United States District Court
FOR THE
Eastern District of Kentucky

Chambers of
G. Wix Unthank
Judge
Pikeville, Kentucky 41501

April 19, 1982

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Re: Covington Civil Action 76-2
National Amusements, Inc.
vs:
Joseph A. Seta, Inc., et al

Gentlemen:

Through inadvertence, I stopped short of sending Judge Unthank's letter dated April 16, 1982, to all counsel of record in the subject case. I do extend my apologies and wish to express my thanks to Mr. O'Neil for calling this to my attention. A copy of the letter is enclosed.

Very truly yours,

Mary E. Mayfield

Mary E. Mayfield
Administrative Secretary

mem

Encl:

cc: Hon Charles G. Atkins
Hon. Leonard Weakley
Hon. Thomas J. Kirkwood

United States District Court
FOR THE
Eastern District of Kentucky

Copy

Chambers of
G. Wix Unthank
Judge
Pikeville, Kentucky 41501

April 16, 1982

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Dear Counselors:

Before getting into legal maxims, the Court wishes to apologize for an erroneous label of a legal citation. The Court used the term "London Case". In refreshing its recollection, it was found the case was City of Danville vs. Smallwood, et al, 347 S.W. 2d 516. However, as noted by Judge Jolly, although the case uses cost of repairs in determining dimunition in value of use of property, it is primarily a permanent versus temporary damage case.

It is believed that all will agree that an opinion in response to an assumed hypothetical question is an assumed hypothetical opinion. In an effort to facilitate settlement, if the parties are so disposed, the Court advances the following prospective opinion.

In accordance with the Kentucky cases, Baker Pool, 411 S.W. 2d 335; Mattingly, 399 S.W. 2d 301; and Dept. of Finance v. Miller, 385 S.W. 2d 211, the Court is of the opinion that the appropriate measure of damages for a defective performance in a construction contract is the amount reasonably necessary to make the object of the contract conform to the contract requirements. . . but in no event is the cost of repairs to exceed the difference between the fair and reasonable market value as to what is and what should have been. Further, the value of damages should be determinable as of the time of the injury.

With this premise in mind, the Court has three assumed date: 3 December,1974, 2 December, 1975, and 14 June, 1982.

a) The date 3 December, 1974, is the assumed date the object of the contract was turned over and accepted. There should be no difficulty in establishing the value of the property at this time without the enhancement, with the proposed enhancement, and with the defective enhancement.

b) The date 2 December, 1975, is the assumed date plaintiff was advised of core drills, tests, and of present and future defects of parking lot.

   (i) Plaintiff contends it is inequitable to determine the cost of repairs of which it acquired knowledge in 1975 by 1974 standards; plaintiff insists that the escalation of labor cost is at a substantial monthly rate.

   The Court feels that the value of the cost of repairs should be determined at the time the plaintiff reasonably knew or should have known of the necessity for such repairs.

Thus, if plaintiff became aware of defects in 1975 and should have made repairs at that time, the cost of repairs should be determined at that time.

c) 14 June, 1982, is the hindsight date, this is the date to establish whether information given by defendants to plaintiff in 1975 was correct and whether or not the plaintiff was diligent in diminishing damages.

The Court has been advised that its pretrial orders have not been amended to conform to statements made at the status conference. Notwithstanding such difference, the parties are requested to exchange a list of expert witnesses and summaries of their testimonies 30 days prior to the date of pretrial conference. The list of ordinary witnesses and summaries to be exchanged 15 days prior to the pretrial conference.

Very truly yours,

G. Wix Unthank
Judge

GWU:mem

CIVIL ACTION #76-2

NATIONAL AMUSEMENTS, INC. VS. JOSEPH A. SETA, INC. ET AL

ATTORNEYS OF RECORD FOR PLAINTIFF
AND DEFENDANT

PLAINTIFF

NATIONAL AMUSEMENTS, INC.

William R. Jacobs
Charles G. Atkins
2100 Central Trust Center
Cincinnati, OH 45202

William I. Bubenzer
1492 Dixie Highway
Covington, KY 41011

Bart J. Vinik
Suite 1150
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Boston, MASS 02116

Louis Winter
WINTER, ABRAMS, SHUMAN & HERSHFANG
73 Tremont Street
Boston, MASS 02108

DEFENDANTS

(1) JOSEPH A. SETA, INC.

William B. O'Neal
310 Central Trust Towers
Cincinnati, OH 45202

(2) ALLIED CHEMICAL

William B. O'Neal
310 Central Trust Towers
Cincinnati, OH 45202

(3) ILER CONSTRUCTION CO., INC.

Richard S. Nelson
11 W. 6th Street
Covington, KY 41011

C. Donald Heile
LINDHORST & DREUDAME
American Bldg.
Central Okway at Walnut
Cincinnati, OH 45202

CHRONIS CONSTRUCTION CO.

Ron Parry
A. J. Jolly
30 West Fourth Street
P. O. Box 368
Newport, KY 41072

DEFENDANTS

(5) RAYMOND KEYES ENGINEERS

W. Roger Fry
Leonard Weakley
907 Central Trust Tower
Cincinnati, OH 45202

(6) H. C. NUTTING CO.

Thomas J. Kirkwood
ROLF & ROLF
Attorney at Law
412 First National Bank Bldg.
Cincinnati, OH 45202

B

TELEPHONE 573-4260
AREA CODE 606

LAW OFFICES
G. E. REAMS
315 CENTRAL STREET
HARLAN, KENTUCKY 40831

April 5, 1982

Honorable J. Wix Unthank, Judge
Eastern District of Kentucky
United States District Court
Box 278
Pikeville, Ky., 41501

Dear Judge Wix:

Pursuant to our telephone conversation today, I checked through our Halcomb file and found one case listed in your notes which is City of Dammille v. Smallwood et al., Ky., 347 SW2d 516. That case holds that cost of rasonably necessary repairs and discomfort caused by injury, may be considered in determining diminution in value of use of property.

I understood you to refer to this case as being a "London case" but you will note it was appealed from the Boyle Circuit Court and seems to be the case to which you referred.

Yours truly

G. E. Reams

G. E. REAMS

Judge: Please note that the third party plaintiffs have filed their amended third party complaints as allowed by our order of Feb. 2. Keyes and Chronis have filed their objections to the amended third party complaints, stating in essence, that there was no third-party beneficiary cause of action. Note that H.C. Nutting did not file any objections. If you wish to talk about this, give me a holler. satch

Also

* answers to 2d set of interrogatories tendered ! proposed order attached.

COVINGTON

ASSIGNED FOR PRETRIAL CONFERENCE AT ~~PIKEVILLE~~ XXXXXXXXX, KENTUCKY

ON APRIL 1, 1982 AT 2:00 P.M.

COVINGTON
~~PIKEVILLE~~ CIVIL ACTION NO. 76-2

NATIONAL AMUSEMENTS, INC.

William R. Jacobs
Charles G. Atkins
William I. Bubenzer
Bart J. Vinik
Louis Winter

VS:

JOSEPH A. SETA, INC.
ALLIED CHEMICAL and
ILER CONSTRUCTION COMPANY, INC.;
defts. & third party plffs.

William B. O'Neal
"""""""""""""""""""
Richard S. Nelson
C. Donald Heile

VS:

CHRONIS CONSTRUCTION CO.;
RAYMOND KEYES ENGINEERS, P.C.
H. C. NUTTING CO.

A. J. Jolly & Ron Parry
Leonard Weakley & W. Roger Fry
Thomas J. Kirkwood

JURY DEMAND PLAINTIFF

PRETRIAL CONFERENCE

2/9/82 #213 MOTION, of deft, Iler Construct. Co. for pretrial order on issues of law regarding damages TAKEN UNDER ADVISEMENT

#213 MOTION, of of deft, Joseph A. Seta, Inc. Allied Chemical & Iler Const. Co. for pretrial determination of certain issues of law & order limiting introduction of evidence to conform w/determination fil 10/5/81 TAKEN UNDER ADVISEMENT

(REF # CIVIL MINUTES)

3/18/82 #225 PRE-TRIAL MEMORANDUM of plff, National Amusements. (NOTE: Item #6 is a list of witnesses w/summary of testimony)

#226 PRE-TRIAL MEMORANDUM OF 3rd Pty Deft, Raymond Keyes Engineers

#227 PRE-TRIAL MEMORANDUM of defts, Allied Chemical Co. & Joseph A. Seta, Inc.

3/17/82 #231 FINAL PRE-TRIAL STATEMENT of 3rd Pty deft, Chronis Const. Co.

3/22/82 #233 FORMAL PRE-TRIAL MEMORANDUM of deft, Iler Const. Co.

#234 FORMAL PRE-TRIAL MEMORANDUM of 3rd Pty deft, H. C. Nutting, Co., w/copy of Exhibit List attached.

TRIAL DATE BY JURY ON APRIL 19, 1982 at 9:00 A.M. at PIKEVILLE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

COVINGTON

COVINGTON CIVIL ACTION NO. 76-2

NATIONAL AMUSEMENTS, INC.	)	
	)	Exerpt from hearing held
	)	
VS:	)	in Covington, Kentucky,
	)	
	)	on February 1, 1982.
JOSEPH A. SETA, INC.	)	
ALLIED CHEMICAL	)	
ILER CONSTRUCTION CO., INC.	)	
	)	
	)	
VS:	)	
	)	
	)	
CHRONIS CONSTRUCTION CO.	)	
RAYMOND KEYES ENGINEERS	)	
H. C. NUTTING CO.	)	

APPEARANCES

For the Plaintiff:	HON. CHARLES G. ATKINS HON. WILLIAM R. JACOBS Strauss, Troy & Ruehlmann 2100 Central Trust Center Cincinnati, OH 45202
For the Defendant, Joseph A. Seta, Inc., Allied Chemical:	HON. WILLIAM B. O'NEAL 310 Central Trust Tower Cincinnati, OH 45202
For the Defendant, Iler Construction Co.:	HON. C. DONALD HEILE Lindhorst & Dreidame American Bldg. Central Parkway at Walnut Cincinnati, OH 45202

For the Third-party Defendant, Chronis Construction Co.:	HON. BEVERLY STORM (on behalf of Hon. A.J. Jolly) 30 W 4th Street Newport, KY 41071
For the Third-party Defendant, Raymond Keyes Engineers:	HON. LEONARD WEAKLEY, JR. 900 Central Trust Tower Cincinnati, OH 45202
For the Third-party Defendant, H.C. Nutting Co.:	HON. THOMAS J. KIRKWOOD 412 First National Bank Bldg. 105 E 4th Street Cincinnati, OH 45202

THE COURT: Mr. Marshal, I wonder if we could get the paper out there somewhere and then maybe counsel can enlighten the Court some. I guess, Mr. Atkins, you being counsel for the plaintiff you might take the job.

MR. ATKINS: Would you like me--

THE COURT: First, I guess, basically, what the Court is interested in I guess National Amusements--I am wanting to get some chronological order--

MR. ATKINS: All right, sir.

THE COURT: --of the thing. Now, possibly the work didn't transpire as the parties came in, but now the Court is under the impression that National Amusements was the one who contracted to have the theater and the parking lot built. Is that correct?

MR. ATKINS: That is correct, sir.

THE COURT: The first person would have been, I guess, what? In the mind of the Court, would be Nutting, wouldn't it? The soil check. And would that be the first person?

MR. ATKINS: That would be the first person for purposes of

this suit. You are correct, sir. It would be on-sight, so to speak.

THE COURT: Right.

MR. ATKINS: So we have National.

THE COURT: Let me ask you this. Did the engineers draw the plans before Nutting or anyone else went to work?

MR. ATKINS: Yes. First, if I may just orally explain what we understand the sequence to be is that National sent some people who regularly do this, part of its personnel, into Erlanger, in that area, to look for a site for a theater. They have another theater on another part of the 275 loop, Your Honor, which is about from Covington approximately 18 miles north of here in Springdale, Ohio.

THE COURT: All right, let me get something where I can make some notes as we go along.

MR. ATKINS: All right.

THE COURT: All right, go ahead, sir.

MR. ATKINS: So the Springdale theater--it is a multi-theater much like the one at Erlanger--had already been built and it was determined by National to seek a site in Northern Kentucky to catch the flow that would come in from the Northern Kentucky and Southern Ohio environs as 275 finally opened the rest of the way.

They selected the site where the theater presently is built. It was a farm. They purchased the farm. Purchased some 100 acres in total. Of that 100 acres approximately 25 acres are devoted to the theater site.

So, again for purposes of this suit, the first thing that was done was that Raymond Keyes, who is a third-party defendant now, Keyes Engineering-- If I may, Your Honor, I will do this to what I remember to be the correct chronology.

THE COURT: All right.

MR. ATKINS: Keyes Engineering drew plans and specifications for the theater building and also for the parking lot.

THE COURT: All right.

MR. ATKINS: While this was going on, National Amusements contracted with it's--with the Chronis Company--

THE COURT: Just a moment.

MR. WEAKLEY: Your Honor, excuse me for interrupting but I believe Mr. Atkins said that the plans Raymond Keyes prepared were for the building as well.

MR. ATKINS: Building site.

MR. WEAKLEY: There are two sets of specifications.

THE COURT: We will just say "plans and specifications" and won't specify what the plans and specifications were at this time.

MR. WEAKLEY: Thank you.

MR. ATKINS: I will try to be careful in this, but it is hard to make a statement that isn't going to have some barb on it for somebody somewhere.

In any event, plans relating to the parking lot were certainly drawn by Raymond Keyes Engineering. And there was a contractual relationship between National and Raymond Keyes for that purpose.

At the same time, National Amusements also contracted with the Chronis Construction Company and, sir, that was for the purpose of Chronis being the general contractor on the job.

THE COURT: But it is my understanding Chronis was the one who built the theater building; is that correct?

MS. STORM: That is correct, Your Honor.

MR. ATKINS: And by contract Chronis also has responsibility for the overall site supervision of the entire project.

THE COURT: All right.

MR. ATKINS: Then about this time it was, of course, determined that there would have to be additional site investigations before the earthworks could begin and for that purpose there was a contract between National Amusements and the H.C. Nutting Company. And the provisions of that contract, sir, were for testing and supervision.

As Your Honor can see, the three parties whom I have named thus far ultimately turned out to be the third-party defendants in this case.

THE COURT: All right.

MR. ATKINS: When the actual earthwork was to commence it was to be in two parts, Your Honor. The first part was the clearing and grubbing of the land and then and in connection with that also the cutting and the filling of the land to bring it to a grade called for by the plans of Raymond Keyes so it could then have blacktop put on top of it.

The first section of that was again a contract and this time it was with the Iler Construction Company. The purpose for Iler was earth cutting and filling I think would be proper. And then there was another contract between National and that contract was with the other defendant whom we sued, Iler being a primary defendant in our suit and the other primary defendant being the Seta Company/Allied.

THE COURT: Well, it is my understanding Allied furnished the materials and Seta did the work. Is that correct?

MR. ATKINS: I think that's in substance correct, sir, and also Allied has since--our understanding is Allied has since acquired Seta.

MR. O'NEAL: Your Honor, I don't believe that is factually correct. I think Allied owned stock in Seta at the time this construction occurred. It wasn't an owned subsidiary of Seta. Separate corporate entities. I believe the blacktop was produced by mills that were owned by Allied and shipped over here.

THE COURT: Of course, you denied the agency.

MR. O'NEAL: Yes, we denied the agency.

THE COURT: They will have the burden of proving that.

MR. O'NEAL: Yes, sir, that is correct. Thank you, sir.

THE COURT: What about L N? The words "L N." They furnished concrete or something.

MR. ATKINS: That has to do, as I recall it, with some trucks or something that might have been on the job.

MR. O'NEAL: I think I can explain that.

THE COURT: They were never made a party?

MR. ATKINS: No, they weren't.

MR. O'NEAL: There was a motion by Iler to make L&N. L&N has a concrete plant just across the entrance. They have heavy trucks and there was evidence they were running across the lot. At one time I believe Iler contemplated bringing them in as party defendants and filed a motion to do so. It was sustained. I don't believe a summons was ever issued to do so.

THE COURT: Madam Reporter, please redline what is going on right here. She is going to redline this and write it up for the Court.

MR. ATKINS: All right.

THE COURT: The reason for that, gentlemen, is as some of you know we were here yesterday and you can get in these things. I have spent three hours, better than three hours just going through the record and when I pass on this today and a month later do it again I don't want to have to spend all of that time to refresh myself in this matter.

MR. ATKINS: Your Honor, just to continue to complete the attempted explanation here. The next thing is, as we explained, the contract between National and Seta/Allied. That was for compacting the last lift, for contouring land--

MR. O'NEAL: Excuse me. He is stating the contract with Seta/Allied. I don't believe it is quite factually correct.

The contract was with Seta.

MR. ATKINS: No question about that.

THE COURT: He is alleging agency, Mr. O'Neal. We will let him put there.

MR. O'NEAL: All right, sir.

THE COURT: This is just kindly general, I guess.

MR. ATKINS: I am going to put this in parentheses. I am not trying to get blood pressures up with Allied. That is where Allied belongs, at least at the present time. You may throw it out.

THE COURT: All right.

MR. ATKINS: Seta was to do compacting of the last lift, contouring of the land and paving it.

MR. O'NEAL: Your Honor, I will have to interject again. Seta was not to do the compacting of the last lift. Seta was to do the fine grading of one-tenth of one foot. There was no compaction requirement.

THE COURT: It is your contention Iler had to do the compacting; is that correct?

MR. O'NEAL: Yes, sir.

THE COURT: All right.

MR. ATKINS: I notice, Your Honor, that we are here on a summary judgment but I can't quite seem to get all the facts out without there being a genuine material issue already. I am just trying to explain to the Court as to who I think they are.

THE COURT: All right.

MR. ATKINS: In any event, sir, that is the way in which I think roughly the work flowed. These two defendants plus the Nutting Company were the ones in the field so to speak involved with earthworks and paving.

THE COURT: Let me ask you this: I think the initial suit was National versus Seta and whom?

MR. ATKINS: Seta and Iler.

THE COURT: All right.

MR. ATKINS: Then as third-party defendants-- If I may I am just going to draw another Delta signifying defendant and I will put a three in each one of these because these are the other third-party defendants.

THE COURT: All right.

MR. ATKINS: So we have two primary and three third-party defendants. The third-party defendants are Keyes, Chronis and Nutting. The primary defendants against whom National brought the action are Iler and Seta.

THE COURT: All right.

MR. ATKINS: Is there anything else, sir?

THE COURT: No, sir, that has it.

MR. ATKINS: Thank you.

THE COURT: Now let's get on with the motions, gentlemen. Let me get one more thing. When did National purchase the land? The farm?

MR. ATKINS: I believe, sir, it was in 1973, late '73, to my best recollection, because the contracts were let in 1974.

THE COURT: When did Keyes prepare the plans?

MR. ATKINS: I am not sure of the exact date, sir, but the plans bear a date of March of 1974.

THE COURT: All right. So Nutting did his work between April and August of '74, approximately?

MR. ATKINS: Actually, sir, he did his in two stages. He did some preliminary borings and site investigation and later he came back as the earthworks were progressing and did soil sampling for compaction and moisture content as the cut and fill took place.

Nutting did two things. He was on the job before Iler was on it and he was on the job during the time Iler was on it.

THE COURT: Now, Chronis. If I am not mistaken, Chronis was there between what? October and December of '74 and--

MR. ATKINS: He actually came on site I believe the record will show sometime in late June of 1974. He was--since he was a general contractor he moved his trailer on and so forth and probably--well, June is a good month. We can establish it. I don't have that date in my head. But June is certainly within a week or two one side or the other of when he got there.

Then Iler--all these contracts I might say, sir, which I have outlined on the board here, at least the contracts which deal with National and either Iler or Seta, in fact, Chronis, too, and even Nutting, were all made right around the same time, which was I believe June 22 or 24 of 1974. All of these contracts were in place within a matter of a week, as I recall it.

There was an earlier contract with Nutting back in I think March, but then there was another contract with Nutting again in June, as there was with Chronis, Iler and Seta. So I guess just to sum it up, sir, quickly is that we have contracts here in the first third up to the first half of 1974 between National and all the people that are named here.

THE COURT: What about when did the work take place?

MR. ATKINS: Work began, some work began clearing and grubbing, as I recall the record, as early as June of 1974. The only work so far as any of these defendants are concerned that was done before June was some preliminary site investigation drilling by the Nutting Company in order to tell us what was there, what we should expect and so on and so forth, but when the actual construction began I think that was about June 20, 22, something like that, of '74 and Iler and Seta came on the job some time later.

I am not exactly sure of the dates. Perhaps their counsel can refresh my recollection.

THE COURT: My understanding was Seta was September of '75.

MR. ATKINS: No, '74.

MR. O'NEAL: Excuse me, Your Honor. Iler and Seta contracts were interlocking as to time for a very definite and specific reason and that is that Seta was to follow Iler up in their paving and, obviously, they couldn't pave until their surface was prepared. The Seta contract required or rather the Iler contract required them to be completed by October 1 in their grading, cutting, filling up and compaction.

THE COURT: '74 or '75?

MR. O'NEAL: '74, sir.

THE COURT: All right.

MR. O'NEAL: I think the thrust of all the evidence here this morning will be in 1974. Iler was to have completed their cutting and filling and grading operations by October 1. Seta's contract provided that they would complete theirs by November 1.

As it developed, because of lack of subgrade preparation the actual paving operations were extended over into December. Now, as far as the actual date of Seta coming first on the job I don't believe that is actually in the record. If it is I am unaware of it. However, there is testimony which I have pointed out in a reply memorandum by Mr. Rankin, who is head of Iler, and by Mr. Bunker, who is managing agent for Seta, Seta did in fact follow up Iler as soon as any subgrade was prepared for them.

THE COURT: All right. All right, Madam Clerk, let's call the first motion. I guess it would be 177, isn't it?

THE CLERK: Yes, sir.

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*ALSO ADMITTED TO PRACTICE IN KENTUCKY
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March 26, 1982

Honorable G. Wix Unthank
Judge, U.S. District Court
P. O. Box 278
Pikeville, Kentucky 41501

RE: National Amusements, Inc., vs.
Joseph A. Seta, et al
Case No. 76-2
RFK&D Ref. 80-326

Dear Judge Unthank:

The Court has scheduled a formal pretrial in the National Amusements vs. Seta case, No. 76-2, for April 1st, at 2:00 p.m. The trial is scheduled for April 19th. Plaintiff's counsel, Mr. Atkins, has by letter dated March 10th, requested a short extension of the trial date.

At the present time I am in trial in the Hamilton County Common Pleas Court with Judge Paul George in a products liability case which was originally anticipated to last three or four days is now in its third week, with an anticipated completion date of April 7th. Due to the fact that I am still in trial, it will obviously conflict with the April 1st schedule for the formal pretrial. The unexpected duration of the present case that I am trying will also seriously shorten the time available for me to prepare for trial.

I have been in touch with other counsel in this case who have indicated by agreement to have the pretrial and the trial date rescheduled in the near future. Thank you for your consideration of this request.

Sincerely,

Leonard A. Weakley, Jr.

CC: Charles G. Atkins, Esq.
William B. O'Neal, Esq.
C. Donald Heile, Esq.
Beverly Storm, Esq.
Thomas Kirkwood, Esq.

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COUNSEL:
LUCIEN G. STRAUSS

*ALSO ADMITTED TO PRACTICE IN KENTUCKY
**ALSO ADMITTED TO PRACTICE IN INDIANA

March 10, 1982

Hon. G. Wix Unthank
Judge, United States District Court
United States Courthouse
Pikeville, Kentucky

Re: National Amusements, Inc. v. Seta, et al
Case No. 76-2

Dear Judge Unthank:

I write this letter to request a short extension of the trial date, April 19, in the National Amusement case. I would not make this request except for the fact that some circumstances which I believe extraordinary and certainly unforeseen occurred last Saturday which have seriously disrupted my schedule and my ability to prepare for the National Amusement trial.

The facts are that my partner, Douglas Cole, a senior trial counsel in the Beverly Hills litigation, which began this Monday, had to remove himself from the case because of physical difficulties which could have become life-threatening had he continued.

Our office has been involved in the preparation of this suit for more than two years, and we have been involved with particular intensity for the last five months. We represent one of the principal defendants, Uniroyal. Four other lawyers in our office have contributed to this work product besides Mr. Cole. However, it was Mr. Cole's job as senior counsel to direct our portion of the case, examine all fact and expert witnesses and cross examine the plaintiff's fact and expert witnesses. While the other counsel are quite able, none has the necessary experience to accept ultimate responsibility for the case and to fill in for Mr. Cole. It has become my obligation to undertake to do this and I am being force fed by our group in order to represent our client in this matter.

I would say that almost every waking hour presently is spent on getting me "up to speed" and giving me the opportunity to think and work on my own in order to begin the actual examination of witnesses tomorrow.

The case is scheduled to last two months, but it is the best estimate now that it probably will be concluded in five - six weeks. For this reason I am physically unable to meet my obligations in the proper preparation of the National Amusement case. It is for this unforeseen and critical reason that I respectfully and urgently request that the National Amusement case be set over to the next earliest mutually convenient date for the Court and counsel. Certainly our desire is not to postpone the National Amusement trial but even a three or four week extension would, I believe, be sufficient in order to enable me to meet both of these obligations.

My colleague, Mr. Jacobs, and I have talked about the matter and there is no reason, from our standpoint, to delay the pretrial conference scheduled on April 1, since Mr. Jacobs will attend and will be able to deal with any matters which we anticipate will be discussed at that time.

If I may assist the Court or other counsel in any way in order to schedule this slight extension of time which is so necessary, I will do my very best to comply with everyone's wishes.

Thank you for your consideration.

Respectfully,

STRAUSS, TROY AND RUEHLMANN CO., L.P.A.

Charles G. Atkins

mas

cc: William B. O'Neal, Esq.
Beverly Storm, Esq.
Thomas Kirkwood, Esq.
C. Donald Heile, Esq.
Leonard Weakley, Jr., Esq.

Covington

ASSIGNED FOR HEARING ON PENDING MOTIONS AT ~~PIKEVILLE~~, KENTUCKY

ON ~~FEBRUARY 18, 1982~~ February 2, 1982 AT ~~1:00 P.M.~~ 9:00 A.M.

COVINGTON
~~PIKEVILLE~~ CIVIL ACTION NO. 76-2

NATIONAL AMUSEMENTS, INC.

Charles G. Atkins
William R. Jacobs
William I. Bubenzer
Bart J. Vinik
Louis Winter

vs:

JOSEPH A. SETA, INC.
ALLIED CHEMICAL
ILER CONSTRUCTION CO., INC.

William B. O'Neal
" " "
Richard S. Nelson
C. Donald Heile

vs:

CHRONIS CONSTRUCTION CO.
RAYMOND KEYES ENGINEERS

H. C. NUTTING COMPANY

Ron Parry & A. J. Jolly
W. Roger Fry &
Leonard Weakley
Thomas J. Kirkwood

HEARING ON PENDING MOTIONS

1/12/76 #1 COMPLAINT fil.
3/05/76 #7 ANSWER & COUNTERCLAIM, of deft Joseph SEta & Allied Chemical
3/19/76 #8 ANSWER of deft Iler Const. Co.
#9 Answer of Iler Const. to Crossclaim of Joseph Seta
#10 CROSSCLAIM, of deft Iler Const against Joseph Seta
4/07/76 #12 THIRD PARTY COMPLAINT
3/23/76 #13 Answer of defts Allied Chemical & Joseph Seta to cross claim of Iler Const. Co.
3/25/76 #14 ANSWER, of plff to defts Counterclaim
5/04/76 #19 ANSWER, of 3rd pty. deft, Chronis Const. Co. to 3rd party complain
12/31/80 #107 AMENDED ANSWER, of deft Iler Const. Co.

PENDING MOTIONS

overruled 04/21/81 #170 MOTION, of 3rd pty deft, H.C. Nutting Co. for sep. trial, TAKEN UNDER ADVISEMENT

passed 10/05/81 #177 MOTION, of deft, Joseph A. Seta, INc. & Allied Chemical Co. f Pre-Trial Determination of certain issues of law & order limiting introduction of evidence to conform to such determination.

overruled 10/07/81 #180 MOTION, of third party deft, Raymond Keyes Engineers, P.C. for s/j w/memo. in support.

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overruled #184 MOTION, of third party deft, The H. C. Nutting Co., for s/j as to third party complaints defts, Joseph Seta & Allied Chemical

overruled #186 MOTION, of defts, Joseph A. Seta, Inc. & Allied Chemical Corp. to amend answer

SECOND AMENDED ANSWER, of defts, Joseph Seta, Inc. & Allied Chemical TENDERED 10/7/81

10/08/81 #187 MOTION, of deft, Iler Const. Co. to amend answer

AMENDED ANSWER, of deft, Iler Const. Co. TENDERED 10/8/81

10/08/81 #188 MOTION, of deft, Iler Const. Co. for pretrial order on issues of law regarding damages

10/22/81 #192 MOTION, of deft, Joseph A. Seta & Allied Chemical Corp. to amend answer

SECOND AMENDED ANSWER, COUNTERCLAIM & CROSSCLAIM, of defts, Joseph A. Seta, Allied Chemical Corp. TENDERED 10/22/81

#193 MOTION, of third party deft, Chronis Const. Co. to fil amended third party complaint

AMENDED THIRD PARTY COMPLAINT, of defts', Joseph A. Seta & Allied Chemical Corp. TENDERED 10/22/81

10/28/81 #195 MOTION, of deft & third pty. plff to fil amended third party complaint

AMENDED THIRD PARTY COMPLAINT, of defts, Joseph A. Seta, Inc. & Allied Chemical Corp. TENDERED 10/28/81.

10/29/81 #196 MOTION, of deft/third party plff, Iler Const. Co., to amend third party complaint

#201 MOTION, of Iler Const. Co. To fil Amend 3rd pty Complaint
AMENDED THIRD PARTY COM PLAINT, of Iler Const. Co., Inc. against Raymond Keyes Engineers, P.C.& H.C. Nutting Co. TENDERED 10/29/81

#202 MOTION, of Iler Const. Co., Inc. to fail amended third party complaint against Chronis Const. Co.

AMENDED THIRD PARTY COMPLAINT, of deft & 3rd pty plff Iler Const. Co. against Chronis Const. Co. TEND. 10/29/81

ORAL ARGUMENT RE OUTSTANDING MOTIONS: February 2, 1982.

#177: Motion by Joseph Seta and Allied Chemical for pretrial determination of damages measurement formula, and a motion for an order limiting introduction of evidence to conform to such determination.

Recommendation: Judge, you might want to hear both sides of this just to see if one of them can convince you that the facts demand that a particular formula be used. Unfortunately, the facts are not well-enough defined as yet to allow a cut-and-dried formula. Nonetheless, you might want to adopt a formula and plug in the crucial dates later. It appears that the real question here is when the plaintiffs became aware of the problem...the whole problem.

There is one case you might want to look at in determining a formula.

Gray v. Mattingly, 399 S.W.2d 301

Also, look at the memo in support of #177 (#178).

#180: Motion by Raymond Keyes Engineers for summary judgment.

Recommendation: If any of the motions for SJ should be seriously considered, this one is it. In the third-party complaints against Keyes, negligence and breach of contract are alleged. Keyes says this boils down to a claim for professional malpractice. In such a case, the malpractice must be proved by expert testimony, unless the negligence is apparent enough for a layman to recognize it. Keyes contends that the expert testimony of Iler and Seta show no criticism of Keyes' work.

#181: Motion for summary judgment by defendants--Seta and Allied.

Recommendation: Deny it summarily.

#182: Motion for summary judgment by TPD Chronis against TPP--Seta and Allied.

Recommendation: Chronis argues that it has no contractual relationship with Iler or Seta, nor were they co-obligors with regard to the plaintiff. If any duty was owed, they say, it was to plaintiff. Assuming such duty were owed and assuming it were breached, no right of contribution or indemnity could be asserted against Chronis.

see: Lexington Country Club v. Brown Hotel, 224 S.W.2d 165

Chronis simply states that they are not in pari delicto. And further, they argue, they are not joint tortfeasors. I question whether they can escape contractual liability in this case as there is a genuine question as to whether they complied with their duty as prime contractor for the structure.

#184: Motion for summary judgment by H.C. Nutting against TPD--Seta and Allied. Also to 3rd party Company [illegible].

Recommendation: Nutting was hired by plaintiff to provide a "resident technician for inspecting compliance procedures at all times fill is actually being placed by Iler." Nutting states the claims against it as 1) breach of contract by not providing resident inspector, and 2) same because the inspector provided goofed up.

The real problem here concerns how long the inspector was to stay on the job. Here, it appears he left two months before completion, but Nutting says this contractual obligation was terminated by the owner (plaintiff).

But then Nuttting assumes that there is a genuine issue ~~of material fact~~ as to the facts surrounding the termination of Nutting's inspector, and says that those facts are not material to Iler's or Seta's theory of recovery. Nutting says that to recover against it, Iler and Seta must show they are third party beneficiaries or that Nutting had a duty to inspect which arose out of the relationship of the parties and not out of the contract.

I think there is a genuine issue of material fact as to the quality of the inspector's job--the negligence issue. However, Iler's own expert could not complain about the job done by ~~Chronis~~ Nutting. In Iler's response to this motion (#197), the third party beneficiary theory is argued, along with the two issues mentioned above.

I would suggest that you overrule this motion unless the oral argument convinces you otherwise.

#186: Motion by defendants Seta and Allied to amend answer and amended answer.

Recommendation: want to add an allegation of duress and set-off. I'd grant this motion and have the second amended answer filed. Before granting this, look at #192 below.

#187: Motion by Iler to amend its answer

Recommendation: let them do it, unless you are as sick of this barrage of motions as I am---then I'd deny them all.

#188: Motion by Iler for pretrial order on issues of law regarding damages and order limiting introduction of evidence.

Recommendation: This is a companion to #177. Refer to that one. ~~Also might want to look at the following cases~~

#192: Motion by Seta to file second amended answer, counterclaim and crossclaim.

Recommendation: Seta made a motion to file a second amended answer (see #186), but in this one we have together a complete set, so if you grant the motion you should have this one filed.

#193: Motion by Seta to file amended third party complaint against Keyes, Nutting and Chronis.

Recommendation: the reasons given are the same as for the amended answer, etc. As I said before, if you grant one, you probably should grant them all.

#195: Motion by Seta to file amended third party complaint; i.e. to add to said amended third party complaint (see #193) Count Number V, which is tendered.

Recommendation: seems the old chaps can't figure out how to approach this case. Let em file the extra count.

#19

#80

National Amusement – theatre – 1973.

↓ 4/2/74
8/2/74 (soil checks) 4/2/74 & 8/2/74

Nutting –

↓

Keyes (Engineers) – 3/74

↓

Chronis (Const Co.) bldg) ↔ (10/74 – 12/74)
6–74

↓

Iller (Const Co) clearing & grading sites ↔ 8/74 → 11/74

↓

Seta (paving Co) – 9/75 – 10/75

↓

allied chem. (materials for Paving)

#196: Motion by Iler to amend third party complaint.

Recommendation: they want to include the allegation that they are a third party beneficiary to the contracts between plaintiff and the third party defendants--Keyes, Chronis, and Nutting.

#201: Motion by Iler to file amended third party complaint against Nutting & Keyes. We need to grant the motion to amend and the motion to file to be consistent and thorough.

#202: Motion by Iler to file amended third party complaint against Chronis. Same recommendation as #201.

Conclusion: I'd be inclined to let them go to trial with this bloody thing and find out who can confuse the jury the least. These lawyers have engaged in a paper chase to end all chases, and I think their presentation at trial may be good for them. Thus, you'd probably want to deny all motions for summary judgment and have the other motions concerning new filings granted, and decide the damages thing at this hearing.

Buena suerte, mi Juez.

dwt

1 Complaint —

P.C.

National Amusement — vs: Seta — allied

Chemical — Iller — Excavation + Compactor

Ct I failed to comply w/ Specifications

Ct II Negligence

III Breach of Implied Warranty for merchantability

IV agent of allied chem

V. Count vs: Iller — excavation + filling — K

VI Iller neg.

VII Iller. breach of Warranty

Chronic — Construction } 3rd Parties

~~mock — assoc~~. S/J.

Keyes — Engineer — Planner

Nutting — Soil tests.

Covington

ASSIGNED FOR HEARING ON PENDING MOTIONS AT ~~PIKEVILLE~~, KENTUCKY

ON ~~FEBRUARY 18, 1982~~ February 2, 1982 AT ~~1:00 P.M.~~ 9:00 A.M.

COVINGTON
~~PIKEVILLE~~ CIVIL ACTION NO. 76-2

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William R. Jacobs
William I. Bubenzer
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vs:

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ILER CONSTRUCTION CO., INC.

William B. O'Neal
" " "
Richard S. Nelson
C. Donald Heile

vs:

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AMENDED THIRD PARTY COMPLAINT, of deft & 3rd pty plff Iler Const. Co. against Chronis Const. Co. TEND. 10/29/81

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PLAINTIFFS

NATIONAL AMUSEMENTS, INC.

DEFENDANTS G. WIX UNTH

(1) Joseph A. SETA, INC.
(2) ALLIED CHEMICAL and
Defts & 3rd pty - ILER CONSTRUCTION CO., INC
(3) plffs ~~DEFTS. & 3RD PARTY PLAINTI~~

THIRD PARTY DEFENDANTS:
(4) CHRONIS CONSTRUCTION CO.
(5) ~~KENNETH MOCK, AIA~~ Per Order
(6) (RAYMOND KEYES ENGINEERS, P
(7) (H. C. NUTTING CO.
(3rd Pty. Defts.
(re: 3rd-pty compla
of deft. Iler Cont

CAUSE

Action for breach of contract, negligence, and breach of implied warranty of merchantability, regarding parking lot installed for plaintiff by defendants

All Plaintiff's Counsel

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~~Charles G. Atkins~~
~~1800 1st Nat'l Bank Bldg.~~
~~Cincinnati, O. 45202~~

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(2) Allied Chemical
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Cincinnati, Ohio 45202

(3) Iler Construction Co., Inc.
Richard S. Nelson
11 W. 6th St.
Covington, Ky. 41011

~~William O. Bertelsman~~ (3) ORDER: 6/
~~303 Lawyers Bldg.~~ ~~Scott Pow~~
~~Newport, Ky. 41071~~ ~~400 Lawye~~
~~4th & Yor~~
~~Newport,~~

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~~2414 Kroger Bldg.~~
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CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS

FILING FEES PAID

DATE	RECEIPT NUMBER	C.D. NUMBER
1-12-76	#76841	23

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UNITED STATES DISTRICT COURT DOCKET

(1) National Amusement

K

Keyes Eng
Jelens & Spec'y.

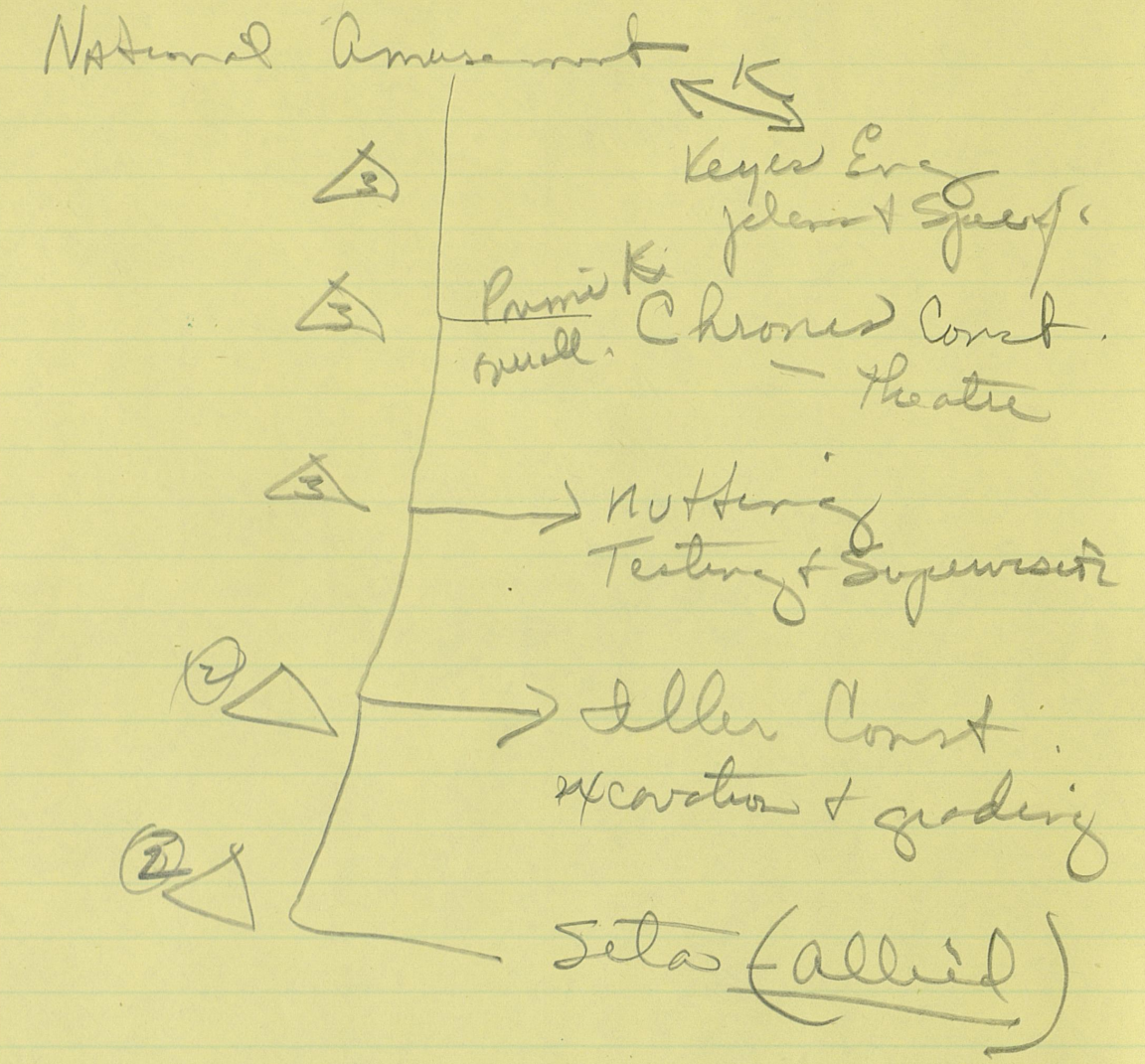
3

3 Prime K
overall. Chronis Const.
— theatre

3 → Nutting
Testing & Supervisor

2 → Iller Const.
excavation & grading

2 Seta (allied)



12:30
dentist

170 – Sego

177. ——— Neal – Role of Damage
Time of Turning over?

180 – overruled
Neal – Expert
Rankin –

181 – overruled

18 ✓ Chronic – Prime K

Passive – Actor

K.

incidental beneficiary?

as 3rd party beneficiary.

Judge

We have moved this hearing already —

B.

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A LEGAL PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW
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DONALD H. ROLF
DONALD H. ROLF, JR.
THOMAS J. KIRKWOOD

TELEPHONE
(513) 721-5790

January 14, 1982

The Honorable G. Wix Unthank
Judge, United States District Court
P. O. Box 278
Pikeville, Kentucky 41501

Re: Civil Action No. 76-2
National Amusements, Inc. v.
Joseph A. Seta, Inc., et al
v. Chronis Construction
Company, Inc., et al

Dear Judge Unthank:

We represent The H. C. Nutting Company, one of the third party defendants who has filed a Motion for Summary Judgment which is scheduled to be heard on oral argument February 18, 1982. I am presently (and have been since November, 1981) scheduled to be in trial beginning Wednesday, February 17 and continuing at least through Monday, February 22, 1982.

I therefore respectfully request that if it's at all possible the February 18, 1982 oral argument date be vacated and a new date set. I have spoken with counsel for three of the other five parties to this case and they have assured me that they would have no objection to such a change. As of this writing I have not, however, had the opportunity to discuss the matter with either counsel for the plaintiff or counsel for defendant, Iler Construction. Thank you for your time and attention.

Sincerely,

ROLF AND ROLF

Thomas J. Kirkwood

Thomas J. Kirkwood

TJK/je
cc: Charles Atkins
C. Donald Heile
William B. O'Neal
Leonard A. Weakley, Jr.
A. J. Jolly
Beverly Storm
G. J. Spieker

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JOHN W. KILCOYNE
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COUNSEL
CARL L. MEIER

September 16, 1981

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Mr. Charles G. Atkins
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Mr. A. J. Jolly
Attorney at Law
Thirty West Fourth Street
Newport, Kentucky 41072

Gentlemen:

As you know, the case of National Amusements, Inc. vs. Seta, et al has been set for trial at Covington, Kentucky on Monday, December 7, 1981. My principal witness and the person who was in charge of the construction of a parking lot forming the basis of this action is Mr. Kimberly A. Bunger, whose deposition you have taken on three separate occasions. Mr. Bunger, by virtue of his knowledge of the various facets of this controversy will be my principal witness and he is no longer employed by my clients, but has accepted employment in Baltimore, Maryland, from a totally unrelated firm. His distance from the court will preclude my issuing

a subpoena for Mr. Bunger and I will have to rely upon his voluntary appearance at the trial. This obviously poses some problems for Mr. Bunger in view of his current employment and the attendant expense. We have assured Mr. Bunger that we will pay all of his expenses for his attendance at this trial and have also assured him that he will suffer no financial loss resulting from any diminution of earnings because of his absence from his regular employment. We have agreed to reimburse Mr. Bunger for his travel, cost of maintenance locally and any earnings loss, which he may experience. By letter dated September 5, 1981, Mr. Bunger has confirmed that he plans to be available for the Seta trial on December 7, 1981, even though it will amount to a real hardship on his part to do so.

In the Court's Order of April 21, 1981 under Paragraph 6, it is recited, "All discovery depositions, etc., to be completed on or before September 23, 1981." At our meeting of the past week, I explained to all of you the problems relative to Mr. Bunger appearance at the trial and you have all agreed that, if it becomes necessary to depose Mr. Bunger in Baltimore, or other location, because of some intervening and unforseen condition, which makes his appearance locally at the trial impossible, such a deposition would not be considered a "discovery" deposition. You have indicated that, given reasonable notice, you would not object to a deposition being taken on Mr. Bunger at his residence location at any time between now and the trial date, provided some reasonable notice is given.

It would obviously be very detrimental to the presentation of my case if I should be deprived of the testimony of Mr. Bunger. I am of the firm opinion that Mr. Bunger will make himself available to testify at the trial, personally, but, if some intervening cause prevents this, then I will expect to have the opportunity to depose him between now and trial date. If I an in error in respect to any of my foregoing assumptions, I would appreciate immediate advice to this effect.

Sincerely yours,

William B. O'Neal

WBO:dd

cc: Honorable G. Wix Unthank

STRAUSS, TROY AND RUEHLMANN CO., L. P. A.
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JAY A. ROSENBERG
CHARLES G. ATKINS
WILLIAM V. STRAUSS
RICHARD D. HEISER
MITCHELL B. GOLDBERG
ERNEST A. EYNON II
LARRY A. NEUMAN *
C. FRANCIS BARRETT
ALAN C. ROSSER
THOMAS C. RINK
DANIEL H. DEMMERLE II *

H. PATRICK WEBER
WILLIAM R. JACOBS
MICHAEL R. OESTREICHER
RICHARD BOYDSTON
JOSEPH E. CONLEY, JR. * **
EDWARD M. FRANKEL
CHARLES J. POSTOW
CHARLES C. BISSINGER, JR.
M. MICHELE FLEMING
ANN W. McLEOD
JOANNE M. SCHREINER
PAUL B. CALICO
M. ELIZABETH HILS
LARRY A. TEMIN
JEFFREY D. TROY

COUNSEL:
LUCIEN G. STRAUSS

*ALSO ADMITTED TO PRACTICE IN KENTUCKY
**- LEAVE OF ABSENCE

June 22, 1981

William B. O'Neal, Esq.
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Leonard A. Weakley, Jr., Esq.
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A. J. Jolly, Esq.
30 West Fourth Street
Newport, Kentucky 41072

Thomas Kirkwood, Esq.
412 First National Bank Building
Cincinnati, Ohio 45202

Re: National Amusements v. Seta, et al

Gentlemen:

On Thursday I received your undated letter sent in connection with the scheduling of the expert witnesses which you intend to use at trial. Unless there is some compelling reason to keep sending these letters to Judge Unthank, I would suspect that he would rather be made aware of any problems we have rather than this unremarkable correspondence that goes on between us. If you wish to continue sending a copy of your letters to the Judge, I will of course continue sending copies of my letters to the Judge, but I see no useful purpose in doing so.

I was in trial all of last week and my secretary was on vacation. Therefore I have responded to your letter today rather than Friday. That said, I will now address the relevant portions of your letter.

At the present time the experts for the plaintiff, and the defendants Seta, Iler and Keyes have been scheduled:

Defendant Seta	Wednesday June 24 9:00 A.M	Deposition of Messrs Taylor and Cowherd from Bowser-Morner Testing Laboratories. Witness of W. O'Neal at his offices: 310 Central Trust Tower
Defendant Iler	Thursday June 25 10:30 A.M.	Deposition of David Paul, expert from Atlanta. Witness of D. Heile at his offices: 1200 American Building.
Plaintiff National Amusement	Friday June 26 9:00 A.M.	Deposition of Larry Jeffers. Witness of C. Atkins, 2100 Central Trust Tower
Third Party Defendant Keyes	Monday June 29 9:00 A.M.	Deposition of George Thelan. Witness of L. Weakley at his offices: 900 Central Trust Tower

It is my understanding that all parties who wish to inquire, may inquire of these witnesses during the deposition.

You make the comment that if the question of damages "becomes relevant from a damage standpoint" you will call Messrs. McConnell, Ellis and Brewer. I do not understand your phrase which I have quoted, but if you intend to call them I would like to depose them.

Bill O'Neal asked me to see if I had copies of exhibits which were attached to Mr. Bunger's deposition showing the progress of the paving operation during the course of the work. I indicated I would get these from our files if we had them and if not, I would call Jim Counts, the court reporter, and get them for Bill. As of this morning we have discovered that these do not exist in our files, at lease in the original form, and Jim Counts indicates that he believes he left them at our old office in the First National Bank Building sometime after he transcribed Mr. Bunger's deposition. Mr. Counts says he does not have the original copy of the exhibits to the deposition in his possession. I therefore have no idea where they are, but we will continue to look. We do have duplicate plans but without Mr. Bunger's markings on them which were made up during the deposition. Perhaps we can all reconstruct from the deposition those markings, but to date I have not tried to do such a reconstruction.

In addition, we intend to call Mr. Beatty and Mr. Watkins from the L. R. Juergenson Company. We would be pleased to discuss scheduling the depositions shortly after this coming week, probably at the same time we schedule your damage expert witnesses' depositions. That seems to make sense.

Insofar as getting together to discuss joint exhibits and a joint pretrial statement, I believe that could be done on a cooperative basis between the plaintiff and the defendants at the completion of the discovery process for the expert witnesses mentioned above. This should help to streamline the case substantially and I anticipate we will all work toward that end.

I am having this letter hand delivered to Messrs. O'Neal, Heile, Kirkwood and Weakley today. I have had brief discussions with counsel for Chronis as of Friday and I will therefore mail his letter today. If any of you have a question or further suggestions which would be helpful, please call me either later today or at your early convenience tomorrow morning.

Sincerely,

STRAUSS, TROY AND RUEHLMANN CO., L.P.A.

Charles G. Atkins

ms

cc: Hon. G. W. Unthank

Mr. Charles G. Atkins
Strauss, Troy, Ruehlmann Co., L.P.A.
2100 Central Trust Tower
Cincinnati, Ohio 45202

In re: National Amusements vs. Seta, et al

Dear Charlie:

In connection with the above-captioned litigation, it is our understanding that each of us agreed to fully cooperate in making the various expert witnesses we intended to use at trial available during the week of June 22, 1981.

To our knowledge, we have made arrangements to have all expert witnesses known to us at this time made available during times during that week and so advised you.

There are three other witnesses whom the defense intend to call in connection with a question of damage, if that issue becomes relevant from a defense standpoint. These witnesses are: 1) William F. McConnell, 1216 East McMillan Avenue, Cincinnati, Ohio; 2) Floyd Ellis of Interstate Asphalt Company and a Pinkney Brewer of the Brewer Company. We will be happy to schedule the deposition of these witnesses at mutually convenient times during the week of the 22nd or shortly thereafter, depending upon our various schedules. Please advise Don Heile immediately in writing if you desire the discovery depositions of any of these witnesses.

To date, we have been advised by you that you will make Mr. Larry Jeffers available Friday morning at 10:00 o'clock and we intend to attend his deposition.

Over a week ago, Bill O'Neal asked that you furnish him a copy of certain exhibits attached to the deposition of Mr. Kim Bunger showing the progression of paving operations during the course of the work. To date, none of us have heard from you in this connection and it is essential that this information be provided immediately. In addition, we have requested several

times that the deposition of your witnesses with respect to damages be made available during the week of the 22nd or sometime shortly thereafter and we have had no response to that request.

If we are going to follow the prescribed time table set by Judge Unthank,we feel that it is necessary that you immediately comply with the substance of the discussion and the Court's Order during the pre-hearing conference.

Demand is made herewith that all expert witnesses you intend to call be made available for deposition during the week of the 22nd or as soon thereafter as possible, and that the exhibit which you indicated you would furnish to Mr. O'Neal be furnished to him immediately.

Without limiting you to the expert witnesses you intend to call, your Answers to Interrogatories would indicate that you intend to call Luther Beaty and Robert Watkins of the L. R. Juergenson Company. If we do not hear from you regarding these two witnesses by the end of the week of June 22nd, we will presume that you do not intend to call them as witnesses.

Additionally, all defendants pursuant to the request of Judge Unthank, have met and discussed the above proposed witnesses in order to save the Court's time in the trial of this case. In addition, we are willing, in the spirit of the Court's Order, to sit down with you or your representative at any time to discuss any matter which will facilitate the trial of the case, including the presentation of expert testimony or the stipulation of exhibits.

In order to properly prepare our defense, it is essential for us to have the complete deposition testimony of all of your expert witnesses and, after thoroughly discussing the matter among the various defendants, we find it is difficult, if not impossible, to anticipate all of the issues which you intend to present during the trial of this case. Therefore,

your cooperation in connection with our preparation and in connection with the trial of this matter is requested.

Yours very truly,

William B. O'Neal
Attorney for Seta Construction
and Allied Chemical

C. Donald Heile
Attorney for Iler Construction

Thomas Kirkwood
Attorney for A. C. Nutting Company

A. J. Jolly
Attorney for Chronis Construction
Company

Leonard A. Weakley, Jr.
Attorney for Keyes Engineers

cc: Judge G. Wix Unthank

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ROBERT F. DREIDAME
(1914-1978)

June 4, 1981

Mr. Charles G. Atkins
Strauss, Troy and Ruehlmann Co., L.P.A.
Attorneys at Law
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202

In re: National Amusements, Inc.
vs. Seta, et al. vs.
Chronis Construction, et al.
U.S. District Court, Case #76-2
Our File No. W-4675T

Dear Charlie:

Please be advised that the deposition of our expert, David Paul, has now been set for 10:30 a.m. on Thursday, June 25, 1981, at our office, in connection with the captioned litigation.

We will see to the court reporter.

Very truly yours,

LINDHORST & DREIDAME

C. Donald Heile

CDH:elc
cc: Hon. G. Wix Unthank
Mr. Leonard A. Weakley, Jr.
Mr. Thomas J. Kirkwood
Hon. William B. O'Neal
Ms. Beverly R. Storm
Mr. Jack Porter

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File in ... file.

June 4, 1981

Mr. Charles G. Atkins
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Attorneys at Law
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202

In re: National Amusements, Inc.
vs. Seta, et al. vs.
Chronis Construction, et al.
U.S. District Court, Case #76-2
Our File No. W-4675T

Dear Charlie:

I observe that you have scheduled the deposition of Larry Jeffers on June 26, 1981. On behalf of all defendants, we want to take the deposition of Luther Beaty and all expert witnesses you intend to call at trial for any purpose whatsoever.

You have indicated to me at the pretrial conference in Pikeville, Kentucky, that you did not think you wanted to take the deposition of certain expert witnesses whom we expect to have for trial. We will, of course, make such witnesses available if you want to depose them.

In any event, I wish to make it clear on behalf of all defendants that we want to take the sworn testimony of all expert witnesses be they associated with National Amusements or otherwise whom you expect to call at trial.

Very truly yours,

LINDHORST & DREIDAME

C. Donald Heile

CDH:elc
cc: Hon. G. Wix Unthank
Mr. Leonard A. Weakley, Jr.
Mr. Thomas J. Kirkwood
Hon. William B. O'Neal
Ms. Beverly R. Storm

MAY 8 1981

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ROBERT F. DREIDAME
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May 6, 1981

Mr. Charles G. Atkins
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Attorneys at Law
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202

In re: National Amusements, Inc.
vs. Seta, et al. vs.
Chronis Construction, et al,
Civil Action No. 76-2
Our File No. W-4675T

Dear Charlie:

As of May 2, 1981, I have received communications setting depositions for Judge O'Neal's people on June 24th, my people from Atlanta on June 25th, and Len Weakley's for Friday, June 26th. Upon receipt of your letter of May 4, 1981, it would appear that the only dates remaining in that week, as agreed, are June 22nd and June 23rd.

Very truly yours,

LINDHORST & DREIDAME

C. Donald Heile

CDH:elc
cc: Hon. G. Wix Unthank
Mr. Leonard A. Weakley, Jr.
Mr. Thomas J. Kirkwood
Hon. William B. O'Neal
Ms. Beverly R. Storm

File in office file
Case

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M. MICHELE FLEMING
ANN W. McLEOD
JOANNE M. SCHREINER
PAUL B. CALICO
M. ELIZABETH HILS
LARRY A. TEMIN
JEFFREY D. TROY

COUNSEL:
LUCIEN G. STRAUSS

*ALSO ADMITTED TO PRACTICE IN KENTUCKY
**LEAVE OF ABSENCE

May 7, 1981

C. Donald Heile, Esq.
Lindhorst & Dreidame
1200 American Building
Central Parkway at Walnut
Cincinnati, Ohio 45202

Re: National Amusements, Inc. v. Seta, et al

Dear Don:

In response to your letter of May 6 inquiring about the date our expert is scheduled for deposition, please refer again to my letters of May 4 and May 6 to Leonard Weakley. I would assume Leonard can have his people testify on either June 22 or 23. The 26th is the only remaining available day that week for Mr. Jeffers, since June 24, which was also possible for him, has already been scheduled for another expert.

Sincerely,

STRAUSS, TROY AND RUEHLMANN CO., L.P.A.

Charles G. Atkins

Charles G. Atkins

ms

cc: Hon. G. Wix Unthank
Hon. William B. O'Neal
Leonard A Weakley, Jr., Esq.
Thomas Kirkwood, Esq.
Beverly R. Storm, Esq.

LINDHORST & DREIDAME

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ROBERT F. DREIDAME
(1914-1978)

April 29, 1981

Mr. Charles G. Atkins
Strauss, Troy and Ruehlmann Co., L.P.A.
Attorneys at Law
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202

In re: National Amusements, Inc.
vs. Seta, et al. vs.
Chronis Construction, et al.
Civil Action No. 76-2
Our File No. W-4675T

Dear Charlie:

In connection with the agreement reached by all counsel at prehearing conference before Judge Unthank in Pikeville, Kentucky, on April 20, 1981, we have now made arrangements for our expert, Mr. David Paul, from Atlanta, Georgia, to be here on Thursday, June 25, 1981, at 10:00 a.m.

If you or any of defendants' counsel which I have copied with this letter wish to take his deposition, please advise me immediately, in writing, since the trip is quite expensive.

Thank you for your attention and cooperation.

Very truly yours,

LINDHORST & DREIDAME

C. Donald Heile

CDH:elc
cc: Hon. G. Wix Unthank
Mr. Leonard A. Weakley, Jr.
Mr. Thomas J. Kirkwood
Hon. William B. O'Neal
Ms. Beverly R. Storm

APRIL 20, 1981 AT PIKEVILLE JUDGE UNTHANK

2:00 P.M.

PRELIMINARY CONFERENCE

COVINGTON CIVIL ACTION NO. 76-2

NATIONAL AMUSEMENTS, INC. — Charles G. Atkins, William I. Bubenzer, Bart J. Vinik, Louis Winter

vs:

JOSEPH A. SETA, INC.
ALLIED CHEMICAL, and
ILER CONSTRUCTION CO., INC.;WITH
ILER CONSTRUCTION CO. as 3rd party
plaintiff — Wm. B. O'Neal, Richard S. Nelson, Scott Powers

vs:

THIRD PARTY DEFENDANTS:

CHRONIS CONSTRUCTION CO. — Ron Parry
KENNETH MOCK, AIA — Edwin J. Lowry
RAYMOND KEYES ENGINEERS, P.C. — W. Roger Fry
H. C. NUTTING, CO. — Thomas J. Kirkwood

PRELIMINARY CONFERENCE

CLERK'S NOTE: No Preliminary trial memorandum was filed on behalf of deft Kenneth Mock, AIA according to the docket sheet. All other parties have filed one.

National Amusements v. Joseph Seta, et al v. Chronis Corp.

This is one of the Covington cases we inherited.

Essentially the issues concern a breach of contract/ warranty. National Amusements hired the defendants to build some moving picture theatres. Evidently the [illegible] surrounding parking lot did not stand up to use. Joseph Seta, et all have brought the subcontractor, Chronis Corp. into the suit, alleging that if there is liability then it should be on the subcontracter.

Parties and their relationships

National Amusements, Inc. --plaintiff, theatre owner and operator

Joseph A. Seta, Inc.--defendant, prime paving contractor

Allied Chemical--defendant, manufacturer of asphalt paving

Iler Construction Co. --defendant/third party plaintiff, prime grading contractor

Chronis Construction Co. --Third party defendant, prime general contractor

Raymond Keyes Engineering--Third party defendant, prime engineer/architect for the pavement design

H.C. Nutting Co.--Third party defendant, prime soils engineer and inspecting contractor.

Causes of Action

Plaintiff--Breach of contract
negligence
breach of implied warranty of merchantability

Defendants/third party plaintiffs-Indemnification, exoneration, and relief from responsibility

Defense

Assumption of risk/waiver. Allegations that plaintiff insisted on paving inspite of the warning from the defendants that the weather was unsuitable and that the asphalt would not perform.

NOTE TO THE COURT

Mary received a telephone call indicating that this action was in large part resolved. Therefore, by the time this hearing is conducted, if at all little will remain to be done.

TO BE DONE IN COURT

1. Order ameded third party complaint filed.

2. Order amended answer of Iler Construction Filed.

3. Set cut off date for discovery. Note very little discovery appears to have been done with the exception of a few interrogatories.

4. Set tentative trial date.

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COUNSEL:
LUCIEN G. STRAUSS

*ALSO ADMITTED TO PRACTICE IN KENTUCKY
** LEAVE OF ABSENCE

April 8, 1981

Hon. G. Wix Unthank
Judge, U.S. District Court
P.O. Box 278
Pikeville, Kentucky 41501

Re: National Amusements, Inc. v. Seta, et al
Civil Action 76-2

Dear Judge Unthank:

I am enclosing for your convenience a copy of the Preliminary Pretrial Memorandum of Plaintiff in the above referenced case.

Respectfully,

STRAUSS, TROY AND RUEHLMANN CO., L.P.A.

Charles G. Atkins

ms
enclosure

LINDHORST & DREIDAME

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ROBERT F. DREIDAME
(1914-1978)

File in Wm file

March 20, 1981

Mr. Charles G. Atkins
Strauss, Troy and Ruehlmann Co., L.P.A.
Attorneys at Law
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202

In re: National Amusements, Inc.
v. Seta, et al. v.
Chronis Construction, et al.
Civil Action No. 76-2
Our File No. W-4675T

Dear Charlie:

I am writing at the suggestion of several of the co-defendants in connection with your letter to Judge Unthank dated December 15, 1980, requesting a pretrial conference, which has now been set for April 20, 1981, at 2:00 p.m. in Pikeville, Kentucky.

Leonard Weakley, Judge O'Neal and I have been discussing the taking of discovery depositions of the various experts who are expected to testify on behalf of the various parties. We are all in agreement that it is appropriate that the experts of the plaintiff, National Amusements, be obtained prior to setting the depositions of the defendants' expert witnesses.

In reviewing the pleadings file, I note that on June 13, 1977, my predecessor, on behalf of Iler, requested that National Amusements identify various experts whom it intended to call in support of its position with regard to liability and damages. On July 13, 1977, National Amusements stated, "This has not been decided."

On July 10, 1979, Chronis Construction submitted a very comprehensive list of questions to your client, National Amusements, regarding expert witnesses, which interrogatories have been unanswered.

Re: National Amusements, Inc.
v. Seta, et al. v.
Chronis Construction, et al.
Our File No. W-4675T

In February, 1980, Keys Engineers requested that National Amusements identify its expert witnesses so that they could be deposed, and again on February 12, 1981, on behalf of Iler, I submitted another set of interrogatories requesting that National Amusements identify the expert witnesses National Amusements intends to call on the question of liability and damages. None of these interrogatories have been attended to by counsel for National Amusements. Yet, you have indicated to Judge Unthank in your request for trial setting, that you "hope that the matter could be scheduled for trial in late spring or early summer of 1981."

As Leonard Weakley indicated to all of us in his letter of March 13, 1981, the defendants had expected that discovery depositions could be completed before April 6, 1981, the deadline for the filing of pretrial statements. We feel that you should make your expert witnesses with regard to damage and liability available for discovery before the depositions of the other witnesses are obtained and before representing to the Court that the matter is ready for trial.

In the alternative, if you have no expert witnesses, the interrogatories referred to above should be answered with finality, whereupon we will immediately schedule the depositions of the various expert witnesses expected to testify on behalf of the various defendants and move this matter along.

As Leonard Weakley indicated in his letter of March 13, 1981, we do not feel that we can conduct a meaningful pretrial conference without full disclosure, and we therefore would appreciate your early reply to our long-awaited interrogatories.

Very truly yours,

LINDHORST & DREIDAME

C. Donald Heile

CDH:elc
cc: Hon. G. Wix Unthank
Mr. Leonard A. Weakley, Jr.
Mr. Thomas J. Kirkwood
Hon. William B. O'Neal
Ms. Beverly R. Storm

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JOHN H. METZ

COUNSEL
CARL L. MEIER

January 2, 1981

G. Wix Unthank, Judge
U. S. District Court
Federal Building
Pikeville, Kentucky

Dear Judge Unthank:

Enclosed you will find an Agreed Order, which has been endorsed by counsel for Chronis Construction Company, whereby this defendant grants additional time for my client to answer interrogatories. If you find this appropriate, will you kindly enter it of record.

Respectfully,

William B. O'Neal

WBO:dd

Enclosures

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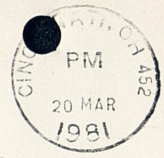
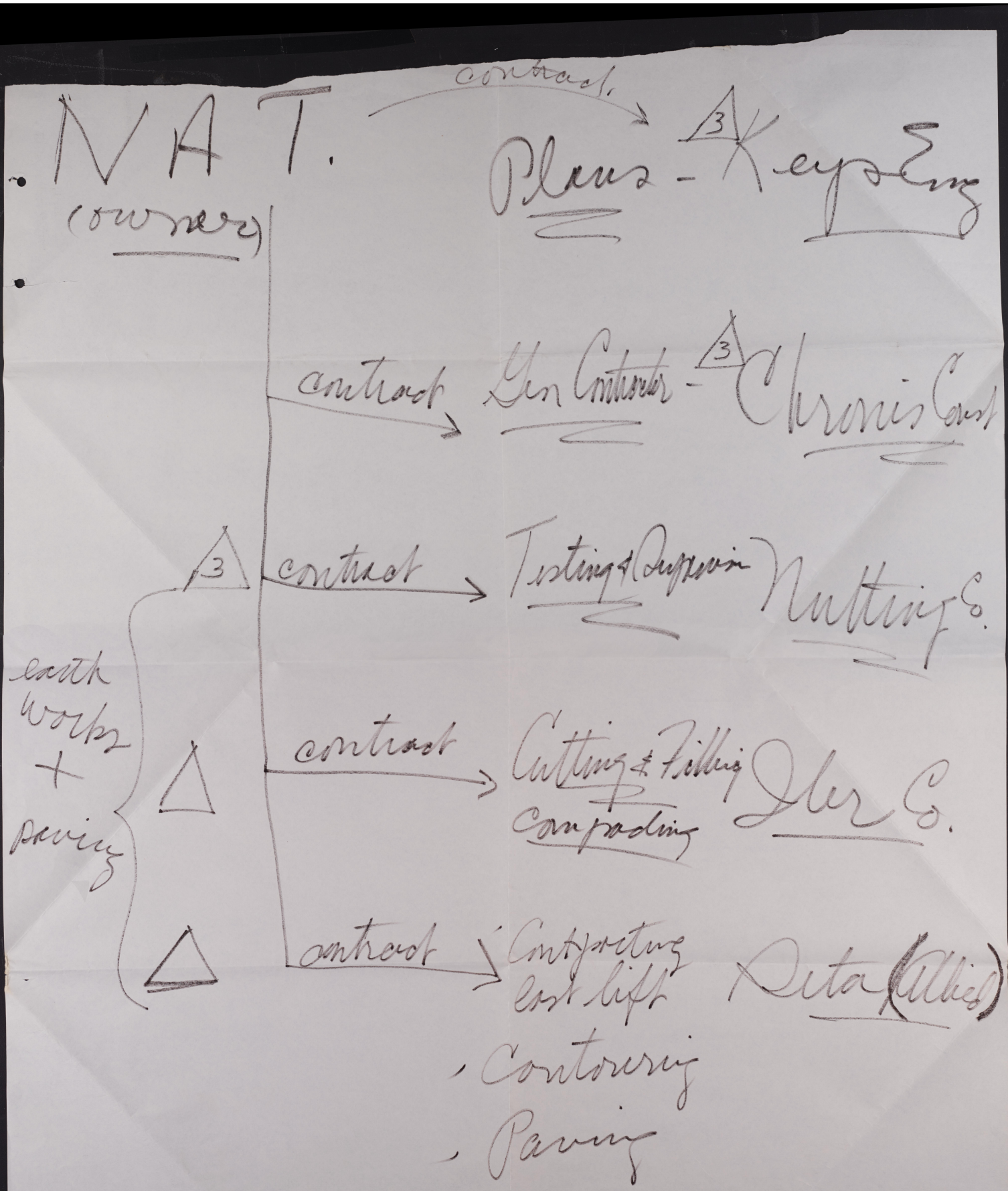




Hon. G. Wix Unthank
Judge, United States District Court
P.O. Box 278
Pikeville, Kentucky 41501



NAT. (owner) —contract→ Plans - Keys Eng

(3)

contract → Gen Contractor - Chronis Const

(3)

contract → Testing & Supervision Nutting Co.

earth works + paving

(3)

contract → Cutting & Filling Compacting Iler Co.

contract → Contracting last lift Seta (Allied)

, Contouring

, Paving