

IN THE SUPREME COURT OF OHIO

ROBERT H. DUES

Appellant/Cross-Appellee,

vs.

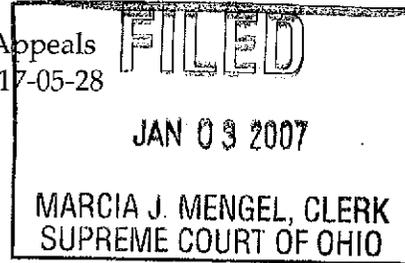
MINSTER FARMERS COOPERATIVE
EXCHANGE COMPANY, INC.

Appellee/Cross-Appellant.

* Ohio Supreme Court
* Case No. 2006-1069
*

* On Appeal from the Court of Appeals of
* the Third Appellate Judicial District of
* Ohio, Shelby County
*

* Court of Appeals
* Case No. 17-05-28
*



MERIT BRIEF OF APPELLEE/CROSS-APPELLANT

MINSTER FARMERS COOPERATAIVE EXCHANGE COMPANY, INC.

IN RESPONSE TO APPELLANT/CROSS-APPELLEE ROBERT H. DUES'

MERIT BRIEF AND IN SUPPORT OF CROSS-APPEAL

Bryan A. Niemeyer (0068255)
FAULKNER, GARMHAUSEN,
KEISTER & SHENK
Courtview Center – Suite 300
100 S. Main Avenue
Sidney, Ohio 45365
(937) 492-1271 (telephone)
(937-498-1306 (facsimile)
bniemeyer@fgks-law.com
Counsel for Appellant/Cross-Appellee,
Robert H. Dues

Michael A. Burton (0064921)
15 Willipie Street, Suite 310
PO Box 33
Wapakoneta, Ohio 45895
(419) 738-8195 (telephone)
(419) 738-8182 (facsimile)
wlawmab@bright.net
Counsel for Appellee/Cross-Appellant,
Minster Farmers Cooperative
Exchange Company, Inc.

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STATEMENT OF FACTS

This case concerns a contract governed by Ohio's version of the Uniform Commercial Code ("UCC"), codified in R.C. § 1302 et seq., for goods, between merchants, containing a finance charge.¹ (See October 14, 2005 Order-Entry of the Shelby County Court of Common Pleas at pages 2, 3, and 4 ("Trial Court Decision")).

Minster Farmers Cooperative Exchange Company, Inc. ("Minster Farmers") is a cooperative commercial farm elevator. (See Minster Farmers' Complaint). Dues acquired one (1) share of common stock in the cooperative as voted at a regular board meeting on March 17, 1982. As a voting member, Dues would have received notice, as well as financial statements, of Minster Farmers annual meeting held on the first Monday in March each year. Dues maintained a commercial account with Minster Farmers from 1988 through the beginning of this case, purchasing primarily fuel, dairy cattle feed, and miscellaneous farm supplies. Minster Farmers always assessed a finance charge to Dues' account. On or about January 1, 1998 Dues was informed the finance charge would be 2% per month on all amounts not paid after 30 days. All invoices, delivery tickets, and monthly statements informed Dues of this 2% per month on all amounts not paid after 30 days.²

Dues received hundreds of pieces of correspondence from Minster Farmers since his account was opened in 1982 like the Invoices. Quotes from the Invoices are:

1. Delivery Ticket – "1% Cash discount on balance over \$25.00 if paid by the 15th of the month following purchases. Net due last day of the month. 2% finance charge per month after 30 days. (24% Annual)."

¹ Appellant/Cross-Appellee Robert H. Dues ("Dues") agrees with these facts. He did not argue against this at the Court of Appeals or in his Merit Brief.

² See, the testimony of David Reichhart and Brenda Albers (hereinafter "Employee Testimony") and see Plaintiff's Trial Exhibit A and Defendant's Trial Exhibits 1 and 3 (hereinafter collectively "Invoices") attached to the July 6, 2005 trial transcript.

2. Regular Invoice – **“1% CASH DISCOUNT ON CURRENT BALANCE OVER \$25.00, IF PAID BY THE 15TH OF THE MONTH FOLLOWING PURCHASES. NET DUE LAST DAY OF THE MONTH. 2% FINANCE CHARGE PER MONTH AFTER 30 DAYS. (24% ANNUAL)”** (bold in original).
3. Finance Charge Invoice – **“DEDUCT CASH DISCOUNT SHOWN ABOVE IF PAID BY TERMS LISTED. NET DUE LAST DAY OF MONTH. 2% FINANCE CHARGE PER MONTH AFTER 30 DAYS. (24% ANNUAL)”** (bold in original).
4. Monthly Statement – “ACCOUNTS ARE SUBJECT TO F/C 2.0% PER MONTH-ANNUAL RATE 24% ON AMOUNTS NOT PAID BY [each month end statement contains a date which is 30 days after the month end statement date]”.

Dues never objected to these monthly finance charges orally or in writing.³ Over the years, Dues made numerous payments on his account and on rare occasions took advantage of the cash payment terms evidencing his knowledge of the finance charge policy.

Minster Farmers’ invoices and monthly statements clearly informed customers the finance charge is considered a separate invoice, is included in the ending balance due, and is due in 30 days. Minster Farmers’ policy is to apply the 2% per month finance charge to all unpaid invoices at the end of each month more than 30 days past due, which include prior months unpaid finance charges. (See the Employee Testimony).

Minster Farmers agrees with the procedural posture of this appeal outlined by Dues in his Merit Brief with the addition Minster Farmers timely filed a Notice of Cross-Appeal on the finance charge calculation issue on June 12, 2006. (See Appendix, p. 1). This Court accepted the appeal of Dues and the cross-appeal of Minster Farmers.

³ In a letter dated May 6, 2003 Dues makes his first mention in writing of the finance charge. By this time, Dues would have received hundreds of Invoices from Minster Farmers since his account was opened in 1982. See Exhibits 1 and 2 attached to Dues’ answer to Minster Farmers’ complaint.

APPELLEE'S REPLY ARGUMENT REGARDING APPEAL

Merely asserting Ohio's usury law does not apply because the instant transaction is governed by Article 2 of the UCC is not determinative. "The UCC has no direct effect on the usury laws." 2 *Anderson on the Uniform Commercial Code* § 2-101:50 (3rd ed. 2006). "Whether a transaction is usurious is determined by general principals of law and statutes that continue in force under the UCC." 1A *Anderson on the Uniform Commercial Code* § 1-103:315 (3rd ed. 2006). Nevertheless, this does not mean that the UCC cannot be applied to find an agreement between merchants, which governs interest terms, so as to remove the transaction from the usury laws, where an agreement to interest is an exception to usury. Stated another way, Minster Farmers must find an exception to the usury statute in R.C. § 1343 to assess a finance charge exceeding the usury rate.

Minster Farmers offers three arguments which make this transaction an exception to the usury statute. First, Ohio's appellate courts are too narrowly interpreting the "written contract" requirement of R.C. 1343.03(A). Second, the cooperative and corporate law provisions in R.C. 1729.27, 1702.37, and 1701.68, take this transaction out of the usury statute in R.C. 1343. Third, under R.C. 1343.01(B)(6)(a), the usury provisions do not apply to this transaction. Once out of the usury statute, R.C. 1302.10 governs this transaction. See Appellee's Proposition of Law No. IV herein.

Appellee's Proposition of Law No. I: Invoices and account statements, provided to a purchaser after each individual transaction on a book account, satisfy the written contract requirements of R.C. § 1343.03(A) so the usury provisions do not apply. Thereafter, R.C. 1302.10 governs a contract between merchants, for goods where a merchant continued to receive monthly statements, continued to order goods, made payments on account, and failed to make timely objection to the additional finance charge term contained in invoices and monthly statements.

Appellant in his argument cites R.C. 1343.03(A) and urges a “written contract” is required to overcome this usury statute. Appellant admits the legislature when adopting R.C. 1343.03(A) does not provide further guidance as to what constitutes a “written contract”. Several cases from different Appellate Districts have addressed this issue. Seven cases support Dues’ narrow definition that a written contract must actually be signed by the party to be charged. One case supports Minster Farmers’ more broad definition that confirming invoices and account statements satisfy the written contract requirement. See, *Champaign Landmark, Inc. v. Dean McCullough* (Nov. 27, 1990), 3rd App. District, 1990 Ohio App. Lexus 5279.

In *Champaign Landmark* the 3rd District upheld a 2% per month finance charge. The Court reasoned that Champaign Landmark’s customer knew of the credit policy, took advantage of the discount policy and paid finance charges. The evidence also showed that credit terms were contained on copies of charge slips. The *Champaign Landmark* Court in part states:

“In the instant case, there is no question what the interest rate on past due accounts was. Whether defendant received the original credit policy, he was aware of it. Additionally, it was stated on each charge slip prepared. The slips were received by defendant. Defendant continued to charge merchandise knowing full well of plaintiff’s credit policy and on occasion paid charges without protest. . . .

The fact that defendant did not sign any documents purporting to be a contract is not determinative. Even though a writing is not signed it may still be a contract between the parties, if the party not signing takes the same into his possession or control. . . .”

As recently as February 23, 2004, the 3rd Appellate District in *Hamilton Farm Bureau Cooperative, Inc. v. Ridgeway Hatcheries Incorporated* (Feb. 23, 2004), 3rd App. District, 2004 Ohio App. Lexus 746 upheld a 2% per month finance charge. The *Hamilton Farm Bureau* decision correctly makes no mention of R.C. 1343.03. Rather, it focuses on the concept of an account stated, to which assent can either be expressed or implied, by the parties that the balance

is correct. See, *Creditrust Corp v. Richard* (July 7, 2000), 2nd District, 2000 Ohio App. Lexus 3027, citing 1 Ohio Jurisprudence Third (1998) 202, Accounts and Accounting Section 24. An account rendered by one person to another and not objected to by the latter within a reasonable time becomes an account stated. *Id*, 2000 Ohio App. Lexus 3027. This Court reasoned that what constitutes a reasonable time within which objection must be made to an account rendered in order to preclude a presumption of assent and thus prevent it from becoming an account stated, depends on the particular facts of each case, such as the nature of the transaction, the relation of the parties, their distance from each other and the means of communication between them, the usual course of business between them, and their business capacity and intelligence.

The cases cited by Dues too narrowly define the “written contract” requirement of R.C. 1343.03(A). After citing his cases at page 4 of his Merit Brief, Dues states:

“While the facts of these cases vary, the central theme is consistent: a creditor cannot establish the **assent** of a debtor to a non-statutory interest rate by sending invoices and account statements to a debtor after-the-fact, without obtaining the debtor’s signature **or other written assent to that interest rate.**” (emphasis added).

The logical interpretation of Dues’ Merit Brief and his line of cases is the written contract requirement of R.C. 1343.03(A) can only be achieved by a contract document signed by the party to be charged. Dues further cites Black’s Law Dictionary as defining a “written contract” as “one which in all its terms is in writing”. *Black’s Law Dictionary* (1990), 6th ed., p. 325. This interpretation offered by Dues and his line of cases is too restrictive and will have a chilling effect on modern commerce in Ohio.

Dues’ interpretation is interesting in that it requires a higher level of assent regarding the interest than is required to form the underlying contract itself. Dues acknowledges he did not sign a writing in this case. He does not dispute any of Minster Farmers’ shipments and is

prepared to agree a contract exists, governed by Ohio's UCC, as to all elements of the contract such as quantities and product received and pricing, except the finance charge. This two level assent requirement, one for the underlying contract, and a higher level for the finance charge, is too restrictive an interpretation of the words "written contract" as contained in R.C. 1343.03(A).

Several other jurisdictions have interpreted their usury laws more liberally in the context of commercial transactions, for goods, between merchants, than the narrow definition offered by Dues. For example, in *Advance Concrete Forms, Inc. v. McCann Const. Specialties Co.*, 916 F.2d 412 (7th Cir. Wis. 1990), the court, applying Wisconsin law and Wisconsin's version of UCC 2-207, held that a seller could charge 18% interest despite the Wisconsin usury law that "when an interest rate higher than 5% is imposed upon a party, that rate shall be clearly expressed in writing." Applying UCC 2-207, the court found that "the 18% interest charge was part of the agreement" between the merchants. In that case, the 18% interest charge was contained on invoices given to the buyer, which invoices and its interest terms became a part of the parties' contract under UCC 2-207. Therefore, in that case, the seller was able to avoid any usury restrictions by convincing the court that the parties had an agreement concerning interest so as to remove it from usury.

Likewise, in *Review Video, LLC v. Enlighten Technologies, Inc.*, 2005 WL 91297 (N.D. Iowa 2005), the court, applying Iowa law and Iowa's version of the UCC and its usury law, held that the merchant seller could charge 1.5% monthly interest on past due amounts (18% per annum) even though the Iowa law provided for a maximum default interest rate of 5% per annum "for cases other than those in which the parties have a written agreement governing a rate". Applying UCC 2-207 (Iowa's version thereof) the court indicated that "the term setting

forth a 1.5% monthly interest charge on past due amounts is part of the contract” and removed it from the 5% cap. The 1.5% interest term was contained on invoices sent to the merchant buyer.

In *Vulcan Automotive Equipment, Ltd. v. Global Marine Engine & Parts, Inc.*, 240 F.Supp.2d 156 (D.R.I. 2004), the court, applying Rhode Island law and its version of the UCC, held that a merchant supplier could collect 18% per annum, as provided in the supplier’s invoices sent to the buyer, even though Rhode Island law provided for a maximum statutory rate of interest of 12% “in the absence of an otherwise provided for contractual rate of interest”. Each invoice which the supplier/seller sent to the buyer expressly stated that a 1.5% per month service charge would be applied to overdue accounts. The court, applying UCC 2-207 (Rhode Island’s version thereof) correctly concluded that, “[T]he 1.5 percent service charge is an additional term, then the statutory rate does not apply”.

In *Preston Farm & Ranch Supply, Inv. v. Bio-Zyme Enterprises*, 625 S.W.2d 295 (Tex. 1982), the seller, suing on a sworn account, was faced with an individual buyer’s claim of usury where the seller was charging the individual 12% per annum and this service charge to the individual was higher than the maximum rate allowed to be charged to individuals under Texas law. Applying Texas’ version of the UCC, including UCC 2-207, the court held that the seller and the individual buyer had an agreement regarding the 1% per month service/interest charge, where the charge was contained on statements received by the buyer each month. Thus, applying the UCC merchant provisions, the seller, establishing an agreement as to interest between the parties, was able to avoid the usury claim.

Other courts have also indicated that a merchant seller whose transaction was subject to the UCC could avoid usury, but these cases, at least with respect to the usury issue, turned on non-UCC grounds. See e.g. *Southwest Concrete Products v. Gosh Construction Corp.*, 274

Cal.Rptr. 404 (1990) (late charge of one-and-one-half percent per month which supplier charged when customer failed to make timely payment on invoice was not subject to state usury law, and this charge which was part of the seller's invoices became a part of the parties' contract per UCC 2-207 when the buyer failed to object to the charge after it had received the invoices); *Rangen, Inc. v. Valley Trout Farms, Inc.*, 104 Idaho 284 (1983) (additional provision in invoice relating to late charges was not a material alteration of the contract and thus the term became part of the contract by operation of law). These last two cases are actually more consistent with Appellee's Proposition of Law No. III outlined below.

In summary, invoices and account statements, provided to a purchaser after each individual transaction on a book account, satisfy the written contract requirements of R.C. 1343.03(A). To hold otherwise requires a higher level of assent than necessary to form the underlying contract. Furthermore, to hold otherwise would appear to put Ohio law in a minority position, creating a chilling effect on commerce.

Appellee's Proposition of Law No. II: R.C. 1729.27, 1702.37, and 1701.68, operate to preclude a usury defense. Thereafter, R.C. 1302.10 governs a contract between merchants, for goods where a merchant continued to receive monthly statements, continued to order goods, made payments on account, and failed to make timely objection to the additional finance charge term contained in invoices and monthly statements.

Minster Farmers is a cooperative governed by R.C. Chapter 1729 et seq. Former R.C. 1729.27 provides, Sections 1701.01 (General Corporation Law) to 1702.58 (Nonprofit Corporation Law), inclusive, apply to cooperatives.⁴

⁴ Former 1729.27 was repealed by House Bill 600, effective August 5, 1998. This former version was effective at the formation of the parties' contract. Additionally, the concept that Chapters 1701, General Corporation Law, and 1702, Nonprofit Corporation Law, provide gap fillers to the other Chapters of Title 17 still applies.

R.C. 1701.68; R.C. 1702.37; and R.C. 1705.33 collectively mean for profit corporations, nonprofit corporations, and limited liabilities companies cannot raise a defense or make a claim of usury in any proceeding upon or with reference to any obligation of such entity.

This Court should apply former R.C. 1729.27, R.C. 1701.68, and R.C. 1702.37 so the usury provisions in R.C. 1343 et seq. do not apply to cooperatives and merchants such as Dues. There is no maximum limit on the interest rate payable by a corporation. See, *Ohio Valley Mall Co. v. Fashion Gallery, Inc.* (1998), 129 Ohio App.3rd 700. A corporate debtor could not claim usury as a defense and an agreement providing for an open account for a corporate buyer with a finance charge of 1.5% per month to be added to the unpaid balance will not be set aside as usury. See, *Openings, Inc. v. Sedon Consrt. Co.* (1982), 1 Ohio Misc.2nd 5.

The *Ohio Valley Mall* case involved a written lease signed by both parties. The *Openings, Inc.* case however is almost identical to this case in that it involved a finance charge of 1.5% per month to be added to the unpaid balance. Both of these cases applied R.C. 1701.68 to preclude a usury defense.

Although Dues is not a for profit corporation, nonprofit corporation, limited liability company, or cooperative; he is a commercial sole proprietor, involved in a transaction governed by the UCC. Furthermore, one party to this transaction, Minster Farmers, would be precluded from asserting a usury defense because it is a cooperative. As a matter of policy, a merchant governed by the UCC, should be treated in the same fashion and should not receive any protection from a usury defense in R.C. 1343.03(A).

This commercial credit transaction between a cooperative and a merchant should take this transaction out of the usury statute in R.C. 1343 and the battle of the forms provision in

R.C. 1302.10 should apply to create a finance charge of 2% per month on all amounts not paid after 30 days as argued in Appellee's Proposition of Law IV below.

The existence of R.C. 1701.68, R.C. 1702.37, and R.C. 1705.33 and their preclusion of a usury defense for corporations, nonprofit corporations, and limited liability companies further support the policy arguments underlying the broad definition of "written contract" argued by Minster Farmers at Appellee's Proposition of Law No. I above.

Appellee's Proposition of Law III: The usury provisions of R.C. 1343.03(A) do not apply to transactions governed by R.C. 1343.01(B)(6)(a). Thereafter, R.C. 1302.10 governs a contract between merchants, for goods where a merchant continued to receive monthly statements, continued to order goods, made payments on account, and failed to make timely objection to the additional finance charge term contained in invoices and monthly statements.

R.C. 1343.01 in part provides: Maximum rate of interest; exceptions

(A) The parties . . . , may stipulate therein for the payment of interest upon the amount thereof at any rate not exceeding eight per cent per annum payable annually, except as authorized in division (B) of this section.

(B) Any party may agree to pay a rate of interest in excess of the maximum rate provided in division (A) of this section when:

...

(6)(a) The loan is a business loan to . . . , a person owning and operating a business as a sole proprietor; . . . ,

...

(b) As used in division (B)(6)(a) of this section, "business" means a commercial, agricultural, or industrial enterprise which is carried on for the purpose of investment or profit. . . .

To qualify for the R.C. 1343.01(B)(6)(a) usury exception the transaction must be a business loan, to a sole proprietor, which is an agricultural enterprise carried on for profit. The instant credit transaction between merchants is a business loan. Dues operated as a sole

proprietor, whose primary or sole source of income was farming. He is an agricultural enterprise operating for profit.

Use of the word “loan” in R.C. 1343.01(B)(6)(a) is more broad than use of the words “bond, bill, promissory note, or other instrument of writing, for the forbearance or payment of money at any future time” contained in R.C. 1343.01(A). Since R.C. 1343.01(B) contains exceptions to R.C. 1343.01(A), it is logical its scope can be more broad. The only other possible interpretation is to be an exception under R.C. 1343.01(B), the transaction must first meet the restrictions of R.C. 1343.01(A). The drafters of the statute could have said the same. Since they did not, it is logical the exceptions in 1343.01(B) are more broad than those items listed in R.C. 1343.01(A).

Minster Farmers is aware of the opinion written by former Justice Wright in *WC Milling, LLC v. Grooms* (2005), 164 Ohio App. 3d 45 wherein he disregarded a similar argument by another seller of agricultural products to a farmer. When analyzing the interaction between R.C. 1343.01 and R.C. 1343.03, at pages 51 and 52 of the *WC Milling* decision, former Justice Wright states:

“Given that similar language is used in both R.C. 1343.01 and R.C. 1343.03, it is only logical to extend its holding to R.C. 1343.01. The trial court may be correct that the transaction constitutes a business or commercial account, but that fact alone does not trigger R.C. 1343.01”.

Review of Justice Wright’s Opinion raises two points. First, he did not overrule the *WC Milling* trial court decision that a transaction identical to the one at issue was taken out of the usury statute by R.C. 1343.01(B)(6)(a). Second, he incorrectly limited the R.C. 1343.01 usury exceptions to be the same as the usury exceptions in R.C. 1343.03. Reading the first sentence of R.C. 1343.03(A), precludes Justice Wright’s interpretation, where it states, “(A) In cases other

than those provided in sections 1343.01 and 1343.02 of the Revised Code, . . .”. This language from 1343.03(A) makes it clear the exceptions in R.C. 1343.01 and R.C. 1343.02 stand alone and are not subject to R.C. 1343.03. To hold otherwise would make the exceptions in R.C. 1343.01 meaningless because they would still have to comply with the requirements of R.C. 1343.03(A).

Accordingly, since this transaction is a credit sale, representing a business loan, to a sole proprietor involved in an agricultural enterprise for profit, it is not subject to the usury requirements in Chapter 1343 and the parties’ contract is governed by the UCC provisions in the battle of the forms in R.C. 1302.10 as outlined in Appellee’s Proposition of Law IV below.

This Proposition of Law No. III is somewhat consistent with the *Southwest Concrete and Rangen, Inc.* cases cited near the end of Appellee’s Proposition of Law No. I from California and Idaho respectively. In both of those cases, the respective State Supreme Courts found a general broad business exception to the usury statute, allowing commercial parties to contract for a finance charge in excess of the state’s usury rate.

Appellee’s Proposition of Law No. IV: The rate of a finance charge can be greater than the usury rate when an exception applies, where the contract is for goods, between merchants, governed by R.C. § 1302 et seq., and the parties’ contract contains the additional nonmaterial term of a higher finance charge pursuant to R.C. 1302.10 and where a merchant continued to receive monthly statements, continued to order goods, made payments on account, and failed to timely make objection to the additional finance charge term contained in invoices and monthly statements.

Once this Court finds a usury exception as argued in Appellee’s Propositions of Law No. I, II or III, the analysis turns to R.C. 1302.10.

Dues had an account with Minster Farmers for 23 years. Minster Farmers sold him goods in the form of fuel, dairy cattle feed, and other farm supplies. Undisputed trial testimony from Dues proved he farmed for a number of years and farming is his sole or primary source of

income. It is settled law in Ohio, transactions such as those at issue are for goods and farmers with Dues' experience are merchants under R.C. 1302.01(A)(5). See, *Adams Landmark Inc. v. Eddie Moore* (Nov. 5, 1987), 4th Appellate District, 1987 Ohio App. Lexus 2513; *Ohio Grain Co. v. Swisshelm* (1973), 40 Ohio App. 2nd 203; and *Burkhart, dba Burkhart Farms v. Marshall* (1989), 63 Ohio App. 3rd 281.

Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, a contract exists unless written notice of objection to its contents is given with ten (10) days after it is received. See R.C. 1302.04(B). In the *Adams Landmark* and *Burkhart Farms* cases the Defendants asserted the statute of frauds defense in R.C. 1302.04(A) arguing they needed to sign documents for the contracts to be enforced. These are both agricultural cases similar to this case with finance charges being a large part of the underlying dispute. Both courts correctly rejected the statute of frauds defense and applied 1302.04(B) to enforce the parties' underlying contract as well as permitting the collection of finance charges.

Over the years Dues received several if not hundreds of pieces of correspondence from Minster Farmers in the form of a 1998 letter, delivery tickets, monthly invoices, and monthly statements advising him and reaffirming the 2% per month finance charge provision on amounts not paid after 30 days. (See Invoices as part of July 6, 2005 Trial Transcript).

- A. **A finance charge, whether in the initial contract or a subsequently imposed additional term, is permissible because it is not material and because Dues failed to object.**

R.C. 1302.10 contains the UCC battle of the forms provision. A written confirmation of a transaction sent within a reasonable time operates as an acceptance even though it states additional or different terms. See R.C. 1302.10(A). Additional terms are to be construed as

proposals for addition to the contract. Between merchants, the terms become part of the contract unless one (1) of the exceptions in R.C. 1302.10(B) apply.

R.C. 1302.10 states: Additional terms in acceptance or confirmation

(A) A definite and seasonable expression of acceptance or a written confirmation that is sent within a reasonable time operates as an acceptance even though it states terms additional or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(B) The additional terms are to be construed as proposals for addition to the contract. Between merchants, the terms become part of the contract unless one of the following applies:

(1) The offer expressly limits acceptance to the terms of the offer.

(2) They materially alter it.

(3) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(C) Conduct by both parties that recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of Chapters 1301., 1302., 1303., 1304., 1305., 1307., 1308., 1309., and 1310. of the Revised Code.

Applying these rules Minster Farmers can include a finance charge provision in the written confirmation of the contract and the term will be incorporated into the contract, since the parties are merchants, unless one of the exceptions in R.C. 1302.10(B) apply. The first exception does not apply because there is no language limiting the offer and acceptance to their initial terms. R.C. 1302.10(B)(3) does not apply because no objection was ever received from Dues within a reasonable time. Dues first raised an objection in his May 6, 2003 letter, after doing business with Minster Farmers for over twenty years and after receiving almost four and

one-half years of invoices, delivery tickets, and monthly statements containing the finance charge terms which commenced in January, 1998.

Dues' only argument is the finance charge is a material alteration as stated in R.C. 1302.10(B)(2). The imposition of a finance charge does not satisfy the materiality language of R.C. 1302.10(B)(2). See, *Hamilton Farm Bureau Cooperative, Inc. v. The Ridgeway Hatcheries Incorporated* (Feb. 23, 2004), 3rd Appellate District, 2004 Ohio App. Lexus 746. The *Hamilton Farm Bureau* case reviewed official comment five (5) to the UCC, Section 2-207 which provides,

“Examples of clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given:...a clause providing for interest on over due invoices or fixing the seller's standard credit terms where they are within the range of trade practice and do not limit any credit bargained for;...”

Two other cases have applied Ohio law determining a finance charge provision contained in confirming invoices and statements sent by sellers to buyers do not materially alter the parties' agreement and do become part of the contract. Neither of these cases contains a written contract signed by the buyer, the requirement asserted by Dues. See, *Crown Foodservice Group, Inc. v. Donald Hughes* (S.D. Ohio 1999), 1999 U.S. Dist. LEXIS 21701 and *Elgin Steel, Inc. v. Perfection Manufacturing Corporation* (April 14, 1981), 5th Appellate District, Case No. CA - 1955. *Crown Foodservice* concerned an oral contract, between merchants, for goods, regarding finance charges of 1.5% contained in a seller's confirming invoice. Preliminarily, *Crown Foodservice* at page 21 noted the Sixth Circuit, in *McJunkin Corp. v. Mechanicals, Inc.*, 888 F.2d 481 (6th Cir. 1989), held § 1302.10 answers the question of

what terms govern the contractual relationship between parties when they “have failed to incorporate into one formal, signed contract the explicit terms of their contractual relationship”.

Crown Foodservice reviewed both comments four and five of the UCC Committee to § 2-207, codified in Ohio as R.C. § 1302.10. Comment four offers examples of clauses which would normally “materially alter” the contract and so result in surprise or hardship. These provisions are a clause negating such standard warranties as that of merchantability or fitness for a particular purpose; a clause requiring a guarantee of an unusually high percentage of deliveries; a clause reserving to the seller the power to cancel the contract upon the buyer’s failure to meet an invoice when due; a clause requiring that complaints be made in a time materially shorter than customary or reasonable.

Comment five provides examples of clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given. The provisions are a clause setting forth and enlarging slightly a seller’s exemption due to supervening causes beyond his control; a clause fixing a reasonable time for complaints within customary limits; a clause providing for interest on over due invoices or fixing the seller’s standard credit terms; and a clause limiting the right of rejection for defects which fall within the customary trade tolerances for acceptance.

Based upon these Comments four and five, a term will materially alter the parties’ agreement if its inclusion will result in surprise or hardship. See e.g. *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 7 F. Supp. 2d 954, 964-65 (N.D. Ohio 1998) (interpreting Ohio Revised Code § 1302.10(B)). Relying upon *Elgin Steel* and comment five of the UCC Committee, the *Crown Foodservice* Court held a seller’s confirming invoice fixing standard

credit terms was not a material alteration resulting in surprise or hardship and therefore became part of the parties' contract.

Hamilton Farm Bureau, Elgin Steal, and Crown Foodservice should be applied to this case to permit Minster Farmers' finance charge of 2% per month on amounts not paid after 30 days. The finance charge is not material, and will not result in surprise or hardship to Dues. He clearly knew of the finance charge and how it worked and never objected in a timely manner.

Appellant's Proposition of Law No. II: Even if a purchaser could be deemed to have assented to a non-statutory interest rate set forth in invoices and account statements, such assent cannot exist when the interest rate as calculated by the seller and disclosed to the purchaser is inconsistent with the written interest rate set forth on those documents, preventing a "meeting of the minds" with respect to that interest rate.

In his Proposition of Law No. II, Dues argues even if a contract exists outside of the usury statute in Chapter 1343, a contract does not exist regarding the finance charge term because there was not a "meeting of the minds". The majority of this Proposition of Law is already dealt with elsewhere in this brief. Dues' argument is also somewhat confusing because it intermingles the 2% per month argument with the compounding argument. Dues will have an opportunity to reply to the cross-appeal compounding argument when he responds to this brief.

This argument should be disregarded. Dues is impliedly, for the first time, at this Supreme Court level asking this Court to overturn a factual finding made by the trial court. Dues however, throughout the remainder of his brief, makes no argument the factual finding was an abuse of discretion. This Court should resist Dues' inference, for the first time at this level, to make a factual determination.

Second, Dues' argument implies the finance charge, even using Minster Farmers' numbers, is mathematically incorrect. This is not true. See the Affidavit of Michelle Blomberg, the Chief Executive Officer of AgVantage, Inc., Minster Farmers' software supplier for all times

related hereto attached at Appendix p. 16 ("Blomberg Affidavit"). The Blomberg Affidavit explains the finance charge, documents her review of the computer code, and indicates the finance charge on customer accounts like Dues' were correctly calculated in total. See Blomberg Affidavit at paragraphs 8 through 12 at Appendix p. 16. Minster Farmers is not attempting to introduce evidence at this stage, the Blomberg Affidavit is merely necessary in response to Dues' argument.

Based upon the foregoing, Appellant's Proposition of Law No. II should be disregarded.

ARGUMENT REGARDING CROSS-APPEAL

Cross-Appeal Proposition of Law No. I: A contract for goods between merchants governed by Ohio's Uniform Commercial Code bearing a finance charge at the rate of 2% per month on all amounts not paid after 30 days is not usurious, although it stipulates that the monthly unpaid finance charges shall also bear a finance charge at the same rate of 2% per month if not paid when due.⁵

Dues uses terms such as "compound interest", "interest on interest", and "2% per month (24% per annum)". Minster Farmers asks this Court to resist Dues' temptation contained in these emotional terms and carefully examine the unambiguous contractual terms on the Invoices; as well as the course of dealing between these parties.

The terms on the documents are rewritten here and must be taken as a whole. They state:

1. Delivery Ticket – "1% Cash discount on balance over \$25.00 if paid by the 15th of the month following purchases. Net due last day of the month. 2% finance charge per month after 30 days. (24% Annual)."
2. Regular Invoice – "1% CASH DISCOUNT ON CURRENT BALANCE OVER \$25.00, IF PAID BY THE 15TH OF THE MONTH FOLLOWING PURCHASES. NET DUE LAST DAY OF THE MONTH. 2% FINANCE CHARGE PER MONTH AFTER 30 DAYS. (24% ANNUAL)" (bold in original).

⁵ Consideration of this cross-appeal argument is only necessary if this Court affirms the Appellate Court and finds the usury provisions do not apply to this contract.

3. Finance Charge Invoice – “**DEDUCT CASH DISCOUNT SHOWN ABOVE IF PAID BY TERMS LISTED. NET DUE LAST DAY OF MONTH. 2% FINANCE CHARGE PER MONTH AFTER 30 DAYS. (24% ANNUAL)**” (bold in original).
4. Monthly Statement – “ACCOUNTS ARE SUBJECT TO F/C 2.0% PER MONTH-ANNUAL RATE 24% ON AMOUNTS NOT PAID BY [each month end statement contains a date which is 30 days after the month end statement date]”.

These documents, as well as the parties' course of dealing, indicates the parties' intention of the contractual term that all amounts not paid after 30 days, including finance charges, would be assessed a 2% per month finance charge. This Court dealt previously with a similar issue in the context of a promissory note. See, *Taylor et al. v. Hiestand & Co.* (1889), 47 Ohio St. 345. See also, *Solomon J. Firestone v. John A. Dellenbaugh et al.* (1907), 10 Ohio C.C. (n.s.) 153. *Taylor* found a promissory note bearing interest at the rate of 8% per annum, payable semiannually, is not usurious, even if it stipulates the semiannual installments of interest shall also bear interest at the same rate if not paid when due. See, generally, the syllabus of *Taylor*. The *Taylor* court stated:

“Take another view of the subject: If the first installment had been paid, it is clear that a new loan could have been made between the parties of the money at the rate of eight percent. per annum. If it was not paid, a right of action to recover it would at once accrue to the payee; and we think it clear the parties would be clothed with full power, under the statute, to stipulate for its payment at a future day with interest at eight percent. per annum. If this can be done after default made in the payment of an installment, no reason is apparent why the parties in the first instance might not anticipate and provide in advance for the contingency of a default.” (*Taylor* at 348).

Restated in more modern terms, consistent with this case, if the parties agree all amounts, including monthly finance charges, are due within 30 days, any amounts unpaid at the end of said 30 days will be included in the account balance and will be subject to a finance charge of 2% per month.

This construction of the contract is consistent with its clear terms, with the parties' intent, and with their course of dealing. The finance charge terms on the Invoices clearly indicate a 2% percent finance charge per month after 30 days. While the use of the words 24% percent annual may raise a question, the hundreds of documents sent to Dues during the parties' course of dealing informed him the finance charge is considered a separate invoice, is included in the ending balance due, and is due in 30 days. However, he never objected to those terms until he was sent a collection letter by Minster Farmers' attorney. Instead, over a period of several years he ordered product, accepted product, made payments on account, and continued to do business with Minster Farmers without objection.

Minster Farmers is aware of the case of *Champaign Landmark, Inc. v. Dean McCullough* (Nov. 27, 1990), 3rd App. District, 1990 Ohio App. Lexus 5279. The *Champaign Landmark* Court agreed with Minster Farmers that a finance charge of 2% per month is valid. However, near the end of the *Champaign Landmark* decision, the Court did not allow *Champaign Landmark* to compound. *Champaign Landmark* is distinguishable because it did not consider the prior holding from the Ohio Supreme Court in *Taylor*, which permits finance charges on top of finance charges, when the parties agree in advance this can occur.

Based upon the foregoing, Minster Farmers is entitled to a finance charge of 2% per month on amounts not paid after 30 days. This agreement is not usurious because it complies with the unambiguous contractual terms on the Invoices, as well as the course of dealing between these parties.

CONCLUSION

The trial court correctly granted judgment for Minster Farmers against Dues in the sum of \$40,990.00 as of April 30, 2005, plus a finance charge of 2% per month thereafter, to the date

of judgment, which was October 14, 2005. The trial court also correctly permitted finance charges on top of finance charges for all amounts due not paid after 30 days. The court of appeals correctly affirmed the trial court's decision on the finance charge of 2% per month, using the expanded definition of written contract in *Champaign Landmark* that invoices and statements satisfy the "written contract" requirement of R.C. 1343.03(A). The appellate court incorrectly reversed the trial court on the compounding issue, because it did not rely upon the *Taylor* case.

This Court should affirm the appellate court's decision by ruling this transaction is not governed by Ohio's usury statutes as set forth in Appellee's Propositions of Law No. I, II, or III. This Court should reverse the appellate court's decision on the compounding issue because finance charges can be assessed on unpaid finance charges where this is a term of the parties' contract.

This Court should then remand this case to the trial court for calculation of the balance due, plus finance charges, consistent with the properly decided Trial Court Decision dated October 13, 2005.

Respectfully submitted,

By 
Michael A. Burton

COUNSEL FOR
APPELLEE/CROSS-APPELLANT,
MINSTER FARMERS COOPERATIVE
EXCHANGE COMPANY, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief of Appellee/Cross-Appellant has been sent to counsel for Appellant/Cross-Appellee, by regular United States Mail, postage prepaid, this 3rd day of January, 2007.



Michael A. Burton
Counsel For Appellee/Cross-Appellant,
Minster Farmers Cooperative Exchange
Company, Inc.

APPENDIX

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IN THE SUPREME COURT OF OHIO

ROBERT H. DUES

Appellant/Cross-Appellee,

vs.

MINSTER FARMERS COOPERATIVE
EXCHANGE COMPANY, INC.

Appellee/Cross-Appellant.

* Ohio Supreme Court
* Case No. 2006-1069
*

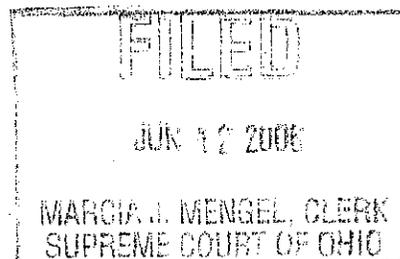
* On Appeal from the Court of Appeals of
* the Third Appellate Judicial District of
* Ohio, Shelby County
*

* Court of Appeals
* Case No. 17-05-28
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NOTICE OF CROSS-APPEAL OF APPELLEE/CROSS-APPELLANT
MINSTER FARMERS COOPERATIVE EXCHANGE COMPANY, INC.

Bryan A. Neimeyer (0068255)
FAULKNER, GARMHAUSEN,
KEISTER & SHENK
Courtview Center - Suite 300
100 S. Main Avenue
Sidney, Ohio 45365
(937) 492-1271 (telephone)
(937-498-1306 (facsimile)
bniemeyer@fgks-law.com
Counsel for Appellant/Cross-Appellee,
Robert H. Dues

Michael A. Burton (0064921)
15 Willipie Street, Suite 310
PO Box 33
Wapakoneta, Ohio 45895
(419) 738-8195 (telephone)
(419) 738-8182 (facsimile)
wlawmab@bright.net
Counsel for Appellee/Cross-Appellant,
Minster Farmers Cooperative
Exchange Company, Inc.

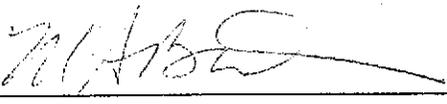


Notice of Cross-Appeal of Appellee/Cross-Appellant
Minster Farmers Cooperative Exchange Company, Inc.

Appellee/Cross Appellant Minster Farmers Cooperative Exchange Company, Inc. gives notice of its cross-appeal to the Supreme Court of Ohio from the judgment of the Shelby County Court of Appeals, Third District Appellate District, entered in Court of Appeals Case No. 17-05-28 on April 17, 2006. Appellant's Notice of Appeal was filed June 1, 2006.

This case is of public and great general interest.

Respectfully submitted,

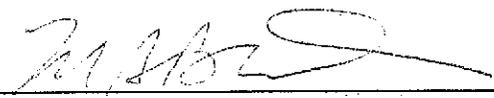
By 

Michael A. Burton

COUNSEL FOR APPELLEE/CROSS-APPELLANT,
MINSTER FARMERS COOPERATIVE
EXCHANGE COMPANY, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Cross-Appeal has been sent to counsel for Appellant/Cross Appellee, by regular United States Mail, postage prepaid, this 9th day of June, 2006.



Michael A. Burton

COUNSEL FOR APPELLEE/CROSS-APPELLANT,
MINSTER FARMERS COOPERATIVE
EXCHANGE COMPANY, INC.

§ 1302.01. (UCC 2-103 to 2-106) Definitions.

(A) As used in sections 1302.01 to 1302.98 of the Revised Code, unless the context otherwise requires:

(1) "Buyer" means a person who buys or contracts to buy goods.

(2) "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.

(3) "Receipt" of goods means taking physical possession of them.

(4) "Seller" means a person who sells or contracts to sell goods.

(5) "Merchant" means a person who deals in goods of the kind or otherwise by the person's occupation holds the person out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by the person's employment of an agent or broker or other intermediary who by the agent's, broker's, or other intermediary's occupation holds the person out as having such knowledge or skill.

(6) "Financing agency" means a bank, finance company, or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods.

(7) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

(8) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities, and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in section 1302.03 of the Revised Code.

Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "Future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

There may be a sale of a part interest in existing identified goods.

An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight, or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

(9) "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

APP 3

§ 1302.04. (UCC 2-201) Formal requirements; statute of frauds.

(A) Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this division beyond the quantity of goods shown in such writing.

(B) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of division (A) of this section against such party unless written notice of objection to its contents is given within ten days after it is received.

(C) A contract which does not satisfy the requirements of division (A) of this section but which is valid in other respects is enforceable:

(1) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(2) if the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(3) with respect to goods for which payment has been made and accepted or which have been received and accepted in accordance with section 1302.64 of the Revised Code.

HISTORY: 129 v S 5. Eff 7-1-62.

Analogous to former RC § 1315.05.

Official Comment

The changed phraseology of this section is intended to make it clear that:

1. The required writing need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad. It need not indicate which party is the buyer and which the seller. The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted.

Special emphasis must be placed on the permissibility of omitting the price term in view of the insistence of some courts on the express inclusion of this term even where the parties have contracted on the basis of a published price list. In many valid contracts for sale the parties do not mention the price in express terms, the buyer being

APP4

§ 1302.10. (UCC 2-207) Additional terms in acceptance or confirmation.

(A) A definite and seasonable expression of acceptance or a written confirmation that is sent within a reasonable time operates as an acceptance even though it states terms additional or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(B) The additional terms are to be construed as proposals for addition to the contract. Between merchants, the terms become part of the contract unless one of the following applies:

(1) The offer expressly limits acceptance to the terms of the offer.

(2) They materially alter it.

(3) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(C) Conduct by both parties that recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of Chapters 1301., 1302., 1303., 1304., 1305., 1307., 1308., 1309., and 1310. of the Revised Code.

HISTORY: 129 v S 5 (Eff 7-1-62); 144 v H 693 (Eff 11-6-92); 146 v S 155. Eff 8-15-96.

Analogous to former RC § 1315.04.

Official Comment

1. This section is intended to deal with two typical situations. The one is where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal acknowledgments or memoranda embodying the terms so far as agreed upon and adding terms not discussed. The other situation is one in which a wire or letter expressed and intended as the closing or confirmation of an agreement adds further minor suggestions or proposals such as "ship by Tuesday," "rush," "ship draft against bill of lading inspection allowed," or the like.

2. Under this Article [Chapter] a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore, any additional matter contained either in the writing intended to close the deal or in a later confirmation falls within subsection (2) and must be regarded as a proposal for an added term unless the acceptance is made conditional on the acceptance of the additional terms.

3. Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party. If, however, there are terms which would not so change the bargain they will be incorporated unless notice of objection to them has already been given or is given within a reasonable time.

4. Examples of typical clauses which would normally "materially alter" the contract and so result in surprise or

APP 5

§ 1302.64. (UCC 2-606) What constitutes acceptance of goods.

(A) Acceptance of goods occurs when the buyer:

(1) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or

(2) fails to make an effective rejection as provided in division (A) of section 1302.61 of the Revised Code, but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(3) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(B) Acceptance of a part of any commercial unit is acceptance of that entire unit.

HISTORY: 129 v S 5. Eff 7-1-62.

Analogous to former RC § 1315.49.

Official Comment

To make it clear that:

1. Under this Article [Chapter] "acceptance" as applied to goods means that the buyer, pursuant to the contract, takes particular goods which have been appropriated to the contract as his own, whether or not he is obligated to do so, and whether he does so by words, action, or silence when it is time to speak. If the goods conform to the contract, acceptance amounts only to the performance by the buyer of one part of his legal obligation.

2. Under this Article [Chapter] acceptance of goods is always acceptance of identified goods which have been appropriated to the contract or are appropriated by the contract. There is no provision for "acceptance of title" apart from acceptance in general, since acceptance of title is not material under this Article [Chapter] to the detailed rights and duties of the parties. (See Section 2-401). The refinements of the older law between acceptance of goods and of title become unnecessary in view of the provisions of the sections on effect and revocation of acceptance, on effects of identification and on risk of loss, and those sections which free the seller's and buyer's remedies from the complications and confusions caused by the question of whether title has or has not passed to the buyer before breach.

3. Under paragraph (a), payment made after tender is always one circumstance tending to signify acceptance of the goods but in itself it can never be more than one circumstance and is not conclusive. Also, a conditional communication of acceptance always remains subject to its expressed conditions.

4. Under paragraph (c), any action taken by the buyer, which is inconsistent with his claim that he has rejected the goods, constitutes an acceptance. However, the provisions of paragraph (c) are subject to the sections dealing with rejection by the buyer which permit the buyer to take certain actions with respect to the goods pursuant to his options and duties imposed by those sections, without effecting an acceptance of the goods. The second clause of paragraph (c) modifies some of the prior case law and makes it clear that "acceptance" in law based on the wrongful act of the acceptor is acceptance only as against the wrongdoer and then only at the option of the party wronged.

APP 6

§ 1343.01. Maximum rate.

(A) The parties to a bond, bill, promissory note, or other instrument of writing for the forbearance or payment of money at any future time, may stipulate therein for the payment of interest upon the amount thereof at any rate not exceeding eight per cent per annum payable annually, except as authorized in division (B) of this section.

(B) Any party may agree to pay a rate of interest in excess of the maximum rate provided in division (A) of this section when:

(1) The original amount of the principal indebtedness stipulated in the bond, bill, promissory note, or other instrument of writing exceeds one hundred thousand dollars;

(2) The payment is to a broker or dealer registered under the "Securities Exchange Act of 1934," 48 Stat. 881, 15 U.S.C. 78A, as amended, for carrying a debit balance in an account for a customer if such debit balance is payable on demand and secured by stocks, bonds or other securities;

(3) The instrument evidences a loan secured by a mortgage or deed of trust on real estate where the loan has been approved, insured, guaranteed, purchased, or for which an offer or commitment to insure, guarantee, or purchase, has been received, in whole or in part, by the federal government or any agency or instrumentality thereof, the federal national mortgage association, the federal home loan mortgage corporation, or the farmers home administration, all of which is authorized pursuant to the "National Housing Act," 12 U.S.C. 1701; the "Serviceman's Readjustment Act," 38 U.S.C. 1801; the "Federal Home Loan Bank Act," 12 U.S.C. 1421; and the "Rural Housing Act," 42 U.S.C. 1471, amendments thereto, reenactments thereof, enactments parallel thereto, or in substitution therefor, or regulations issued thereunder; or by the state or any agency or instrumentality thereof authorized pursuant to Chapter 122 of the Revised Code, or rules issued thereunder.

(4) The instrument evidences a loan secured by a mortgage, deed of trust or land installment contract on real estate which does not otherwise qualify for exemption from the provisions of this section, except that such rate of interest shall not exceed eight per cent in excess of the discount rate on ninety-day commercial paper in effect at the federal reserve bank in the fourth federal reserve district at the time the mortgage, deed of trust, or land installment contract is executed.

(5) The instrument is payable on demand or in one installment and is not secured by household furnishings or other goods used for personal, family, or household purposes.

(6) (a) The loan is a business loan to a business association or partnership, a person owning and operating a business as a sole proprietor; any persons owning and operating a business as joint venturers, joint tenants, or tenants in common; any limited partnership; or any trustee owning or operating a business or whose beneficiaries own or operate a business, except that:

(i) Any loan which is secured by an assignment of an individual obligor's salary, wages, commissions, or other compensation for services or by his household furniture or other goods used for his personal, family, or household purposes shall be deemed not a loan within the meaning of division (B)(6) of this section;

(ii) Any loan which otherwise qualifies as a business loan within the meaning of division (B)(6) of this section shall not be deemed disqualified because of the inclusion, with other security consisting of

APP 7

business assets of any such obligor, of real estate occupied by an individual obligor solely as his residence.

(b) As used in division (B)(6)(a) of this section, "business" means a commercial, agricultural, or industrial enterprise which is carried on for the purpose of investment or profit. "Business" does not mean the ownership or maintenance of real estate occupied by an individual obligor solely as his residence.

HISTORY: 129 v S 5 (Eff 7-1-62); 133 v S 233 (Eff 10-22-69); 135 v H 1179 (Eff 9-30-74); 136 v H 485 (Eff 11-4-75); 140 v S 193 (Eff 10-8-84); 142 v S 130. Eff 6-29-88.

APP 8

§ 1343.03. Interest when rate not stipulated.

(A) In cases other than those provided for in sections 1343.01 and 1343.02 of the Revised Code, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract. Notification of the interest rate per annum shall be provided pursuant to sections 319.19, 1901.313 [1901.31.3], 1907.202 [1907.20.2], 2303.25, and 5703.47 of the Revised Code.

(B) Except as provided in divisions (C) and (D) of this section and subject to section 2325.18 of the Revised Code, interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct or a contract or other transaction, including, but not limited to a civil action based on tortious conduct or a contract or other transaction that has been settled by agreement of the parties, shall be computed from the date the judgment, decree, or order is rendered to the date on which the money is paid and shall be at the rate determined pursuant to section 5703.47 of the Revised Code that is in effect on the date the judgment, decree, or order is rendered. That rate shall remain in effect until the judgment, decree, or order is satisfied.

(C) (1) If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment, decree, or order shall be computed as follows:

(a) In an action in which the party required to pay the money has admitted liability in a pleading, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;

(b) In an action in which the party required to pay the money engaged in the conduct resulting in liability with the deliberate purpose of causing harm to the party to whom the money is to be paid, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;

(c) In all other actions, for the longer of the following periods:

(i) From the date on which the party to whom the money is to be paid gave the first notice described in division (C)(1)(c)(i) of this section to the date on which the judgment, order, or decree was rendered. The period described in division (C)(1)(c)(i) of this section shall apply only if the party to whom the money is to be paid made a reasonable attempt to determine if the party required to pay had insurance coverage for liability for the tortious conduct and gave to the party required to pay and to any identified insurer, as nearly simultaneously as practicable, written notice in person or by certified mail that the cause of action had accrued.

(ii) From the date on which the party to whom the money is to be paid filed the pleading on which the judgment, decree, or order was based to the date on which the judgment, decree, or order was rendered.

APP 9

§ 1701.68. Usury.

No domestic or foreign corporation, or anyone on its behalf, shall interpose the defense or make the claim of usury in any proceeding upon or with reference to any obligation of such corporation; nor shall any corporate note, bond, or other evidence of indebtedness, mortgage, pledge, or deed of trust, be set aside, impaired, or adjudged invalid by reason of anything contained in laws prohibiting usury or regulating interest rates.

HISTORY: 126 v 432(470). Eff 10-11-55.

Not analogous to former RC § 1701.68 (GC § 8623-59; 112 v 9; 113 v 413; Bureau of Code Revision, 10-1-53); but see former RC § 1701.85 (GC § 8623-78; 112 v 9(40), § 78; 122 v 155; Bureau of Code Revision, 10-1-53), former RC §§ 1701.68, 1701.85 repealed 126 v 432, § 5, eff 10-11-55.

APP 10

§ 1702.37. Usury.

No domestic or foreign corporation, or any one on its behalf, shall interpose the defense or make the claim of usury in any proceeding upon or with reference to any obligation of such corporation; nor shall any corporate note, bond, or other evidence of indebtedness, mortgage, pledge, or deed of trust, be set aside, impaired, or adjudged invalid by reason of anything contained in laws prohibiting usury or regulating interest rates.

HISTORY: 126 v 432(511), § 2. Eff 10-11-55.

Not analogous to former RC § 1702.37 (GC § 8623-129; 113 v 413(460); 123 v 275(303); Bureau of Code Revision, 10-1-53), repealed 126 v 432, § 5, eff 10-11-55.

APP II

§ 1705.33. Usury laws not applicable.

No domestic or foreign limited liability company and no person acting on its behalf shall interpose the defense or make the claim of usury in any action or proceeding upon or with reference to any obligation of that company. The notes, bonds, other evidences of indebtedness, mortgages, pledges, and deeds of trust of a limited liability company shall not be set aside, impaired, or adjudged invalid by reason of anything contained in any laws prohibiting or otherwise pertaining to usury or regulating interest rates.

HISTORY: 145 v S 74. Eff 7-1-94.

APP 12

Notes of Decisions and Opinions

In general 1

1. In general

Any corporation heretofore organized as an agricultural association for purposes simi-

lar to those for which a corporation may be incorporated under GC 10186-1 (RC 1729.01), et seq., may become a cooperative agricultural association as therein provided. 1930 OAG 1960.

1729.27 General corporation laws apply

Sections 1701.01 to 1702.58, inclusive, of the Revised Code, and all powers and rights under such sections, apply to an association organized under sections 1729.01 to 1729.27, inclusive, of the Revised Code, except where sections 1701.01 to 1702.58, inclusive, of the Revised Code, are in conflict with sections 1729.01 to 1729.27, inclusive, of the Revised Code.

(126 v 432, eff. 10-11-55; 1953 H 1; GC 10186-28)

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Historical and Statutory Notes

Pre-1953 H 1 Amendments: 110 v 91

Library References

Agriculture ⇐ 6.
WESTLAW Topic No. 23.
C.J.S. Agriculture § 138 et seq.

OJur 3d: 6, Associations and Corporations not for Profit § 108

Notes of Decisions and Opinions

In general 1

1. In general

Merger of agricultural cooperatives was not governed by statute relating to for-profit corporations which provided for voting and dissenting rights of preferred shareholders, but rather by provisions relating to nonprofit

corporations which did not. *Denes v. Countrymark, Inc.* (Madison 1989) 64 Ohio App.3d 195, 580 N.E.2d 1135.

Aside from the favoritism granted to a milk producers' federation by RC Ch 1729, such an association is governed by general corporation law. *Akron Milk Producers, Inc. v. Lawson Milk Co.* (Ohio Com.Pl. 1958) 147 N.E.2d 512, 77 Ohio Law Abs. 275.

1729.28 Consumers' co-operatives

An association incorporated for the purpose of purchasing, in quantity, grain, goods, groceries, fruits, vegetables, provisions, or any other articles of merchandise, and distributing them to consumers at the actual cost of purchasing, holding, and distribution, may employ its capital in the purchase of such merchandise as it desires, and in the purchase or lease of such real and personal estate, subject always to the control of the stockholders, as is necessary or convenient for purposes connected with its business.

Such association may adopt such plan of distribution of its purchases among its stockholders and others as is most convenient and best adapted to secure its proposed ends. Profits arising from the business may be divided among the stockholders from time to time, as the association deems expedient, in proportion to the several amounts of their respective purchases.

(1953 H 1, eff. 10-1-53; GC 10185, 10186)

presidents, and other officers and assistant officers as necessary. The officers shall be elected by the board. The chairperson and any vice chairperson of the board shall be a director. Unless the association's articles of incorporation or bylaws provide otherwise, none of the other officers need be a director. Any two or more offices may be held by the same person, but no officer shall execute, acknowledge, or verify any instrument in more than one capacity if the instrument is required by law or by the articles or bylaws to be executed, acknowledged, or verified by two or more officers. Unless the articles or the bylaws provide otherwise, all officers shall be elected annually.

(B) All officers have the authority to perform, and shall perform, the duties as the bylaws provide, or as the board may determine in accordance with the bylaws.

(2004 H 238, eff. 9-3-04; 1998 H 600, eff. 8-5-98)

Historical and Statutory Notes

Ed. Note: Former 1729.26 repealed by 1998 H 600, eff. 8-5-98; 125 v 903, eff. 10-1-53; 1953 H 1; GC 10186-25.

Research References

Encyclopedias
OH Jur. 3d Associations & Corp. Not for Profit § 98, Generally.
OH Jur. 3d Associations & Corp. Not for Profit § 117, Generally.

OH Jur. 3d Associations & Corp. Not for Profit § 126, Marketing Contracts—Validity.

(PRESENT)

1729.27 Bonds of officials

If required by the association's bylaws, every officer, employee, and agent handling funds, negotiable instruments, or other property of or for an association shall execute and deliver adequate bonds for the faithful performance of the officer's, employee's, or agent's duties and obligations.

(1998 H 600, eff. 8-5-98)

Historical and Statutory Notes

Ed. Note: 1729.27 is former 1729.15, amended and recodified by 1998 H 600, eff. 8-5-98; 1953 H 1, eff. 10-1-53; GC 10186-12.

Ed. Note: Former 1729.27 repealed by 1998 H 600, eff. 8-5-98; 126 v 432, eff. 10-1-53; 1953 H 1; GC 10186-23.

Research References

Encyclopedias
OH Jur. 3d Associations & Corp. Not for Profit § 98, Generally.
OH Jur. 3d Associations & Corp. Not for Profit § 100, Applicability of General Corporation Laws.
OH Jur. 3d Associations & Corp. Not for Profit § 118, Fidelity Bonds.

Forms
Ohio Forms Legal and Business § 329, Drafting Preorganization Agreements and Certificates of Incorporation.
Treatises and Practice Aids
Blackford, Baldwin's Ohio Practice Business Organizations § 43, Requirement for Plans of Business Entities.

1729.28 Removal of officers or directors

(A) Any member of an association may bring charges against an officer or director of the association by filing them in writing with the secretary of the association, together with a petition, signed by twenty per cent of the members, requesting the removal of the officer or director in question. The removal shall be voted upon at the next regular or special meeting of the members of the association and, by a vote of a majority of the members, the association may remove the officer or director and fill the vacancy. The director or officer against whom such charges are brought shall be informed in writing of the charges previous to the meeting and shall have an opportunity at the meeting to be heard in person or by counsel and to present witnesses, and the persons bringing the charges against the director or officer shall have the same opportunity.

(B) If grading, membership of the board to the grade of if question 1729.29

Ed. Not amended 1953 H 1.

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OH Jur. § 121, F
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OH Jur. § 132,
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EX 12
(181)
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THE MINSTER FARMERS COOPERATIVE EXCHANGE, INC.

MAIN PLANT
P.O. Box #100
Minster, Ohio 43863
Phone: 419-628-2367

BRANCH PLANT
P.O. Box #125
Osgood, Ohio 43061
Phone: 419-582-3602

BRANCH PLANT
P.O. Box #5
New Bremen, Ohio 43889
Phone: 419-628-2000

BRANCH PLANT
P.O. Box #7
Russell, Ohio 43083
Phone: 607-526-4786

Dear Customer,

We are enclosing a copy of our new credit policy. The Management and Board of Directors studied this policy in depth, before passing it during the August board meeting. We have delayed implementing this policy in order for you to get your crop harvested and to have the opportunity to get your account in order.

We have made three major changes to the credit policy. The first change is increasing our finance charge from 1 1/2% to 2% per month (24% annually). The second item is to charge a \$1.00 minimum finance charge. Our third change is to place any customer with a balance over 90 days on a cash basis.

Patrons with gas cards for our self-serve stations will continue under the same policy. You must keep your account paid by the end of the following month in order to keep your card turned on.

These three changes were made in order to cover our costs on credit and to better control and minimize our delinquent accounts. Any uncollectible accounts raise our cost of doing business. We must continue to monitor our credit policy to keep our cost of goods as low as possible to you the customer.

We want to thank you for your patronage. We assure you that if any of you have past due accounts, we will be happy to work on an acceptable payment plan. We also encourage you to look at our lower cost finance programs. We are offering finance programs by both Minster Farmers and suppliers. We can receive answers on these credit programs with minimal information in less than 1 hour.

If you have any questions on our credit policy or anything about Minster Farmers, feel free to call me at 628-2367 or our new toll free number 1-888-628-2505.



Thank you
David A. Reichhart
David A. Reichhart

Grain Elevators — Quality Feeds — Fertilizers — Farm Supplies

App 15

IN THE SUPREME COURT OF OHIO

ROGER H. MEYER

Appellant/Cross-Appellee,

vs.

MINSTER FARMERS COOPERATIVE
EXCHANGE COMPANY, INC.

Appellee/Cross-Appellant.

* Ohio Supreme Court
* Case No. 2006-1061
*
* On Appeal from the Court of Appeals of
* the Third Appellate Judicial District of
* Ohio, Shelby County
*
* Court of Appeals
* Case No. 17-05-32
*
*
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*
*

AFFIDAVIT OF MICHELLE BLOMBERG

State of Minnesota

County of Olmsted

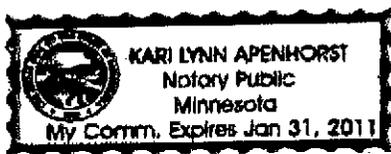
Now comes, Affiant, Michelle Blomberg, after first being duly cautioned and sworn, and states and avers as follows:

1. Affiant is the Chief Executive Officer of AgVantage, Inc., Rochester, Minnesota and has personal knowledge of the facts stated herein.
2. For all times from 1997 to the present, AgVantage supplied accounting software to Minster Farmers Cooperative Exchange Company, Inc. ("Minster Farmers") which performed Minster Farmers' monthly finance charge calculation.
3. The monthly statements from Minster Farmers to all customers contain a finance charge warning which states, "F/C 2% per month - annual rate 24% on amounts not paid by (the end of the next month, which would be 30 days)".
4. The AgVantage accounting software program evaluates each invoice date in the data base and calculates a finance charge of 2% per month for each individual invoice 30 or more days old.
5. Each monthly finance charge is treated as a separate invoice with its own invoice date and invoice number.

6. Each 2% monthly finance charge is shown as a separate invoice on each month's statement and is then added into the ending account balance each month.
 7. Once each monthly finance charge invoice is 30 or more days past due a 2% per month finance charge is also applied to this invoice because it has not been paid.
 8. Affiant has reviewed the two page summary of Roger Meyer's Account #6002088 attached to the Merit Brief of Appellant/Cross-Appellee Roger H. Meyer as Appendix Pages 29 and 30.
 9. Affiant's employees have reviewed the computer code of the software prepared and sold by AgVantage to Minster Farmers. The computer code, from 1997 through the present, accurately calculates each customer's finance charge in the manner stated above.
 10. AgVantage did make two software amendments in November 2003 and June 2006 to all customers', including Minster Farmers', software regarding the monthly finance charge calculation.
 11. The finance charge on customer accounts like Mr. Meyer's were correctly calculated in total; however, finance charges were misclassified from one month to the next because the AgVantage software program was not including certain invoices which were 30 or more days past due in the correct month's finance charge.
 12. Based upon Affiant's review of the summary of Roger Meyer's Account #6002088 at Appendix Pages 29 and 30, and considering the software corrections outlined above, Mr. Meyer's finance charge in total related to this case is correctly calculated.
- Further Affiant sayeth naught.

X Michelle Blomberg
Michelle Blomberg

Sworn to before me and subscribed in my presence this 21st day of December, 2006.



X Kari Apenhorst
Notary Public