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ProCD v. Zeidenberg: Judicial Activism By a Federal Court In a Diversity Case.

1. My presentation will focus on *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir., 1996). . My talk presumes familiarity with this case. For those interested in a fuller and more accurate account of the factual background of this case than is presented in the 7th Circuit opinion, see *ProCD v. Zeidenberg in Context*, 2004 Wis. L. Rev. 821-836.
2. I will consider *ProCD* as representative of a series of contracting situations in which the issue is whether “delayed terms” become part of the contract. By “delayed terms”, I mean that terms that are not made available in written form to a buyer before an event that would have conventionally have been considered formation (i.e, offer and acceptance). This includes all telephone sales, where terms are provided later, generally with delivery of the goods. See *Hill v. Gateway*, 105 F.3d 1147 (7th Cir., 1997). Familiarity with this decision will also be assumed.
3. I will assume, with elaboration, that the result in *ProCD* does not reflect settled law, and in fact runs contrary to what was previously assumed by most to be the most common interpretations of the UCC. My assumption reflects the commonly held position today. [For one account see James J. White, *Contracting Under Amended Section 2-207*, 2005 WIS. L. REV. 723, 736-51.]. It follows that the decision in *ProCD* is an activist, law-making one, made by a federal court made in a diversity case where Wisconsin law governed.
4. I will discuss 3 issues. (A) Was *ProCD* an appropriate circumstance for judicial activism? When in contracts cases should a court be activist? (B) Should the 7th Circuit have certified the substantive contract issue to the Wisconsin Supreme court? This raises a federalism issue. (C) Are (A) and (B) appropriate points to raise in a Contracts course?

A. When Should a Court be Activist in a Contracts Case?

1. There are the usual arguments from democratic theory for why the legislature is a more appropriate lawmaker than the courts. This is particularly true for delayed terms issues. Many new marketing technologies will work more efficiently if we facilitate delayed terms. If the conventional rules of contract formation and modification are modified to this end, other legal adjustments may be desirable to provide buyers the protections that formation and modification rules have provided. I will discuss the 12 principles developed by Americans for Fair Electronic Commerce Transactions (AFFECT) in this context. These principles can be found at www.fairterms.org. Detailed compromises like those proposed by AFFECT are best reached by legislatures.
2. Legislatures are very imperfect institutions, however. Collectively, they have a strong preference for inaction. Individual legislators are not likely to be held accountable electorally if the legislature as a whole fails to act. And legislative procedure strongly favors those who

oppose new legislation. Because of these legislative inadequacies, judicial activism or law-making in contract law is frequently desirable. There is no other practical alternative to preservation of the status quo.

3. In deciding whether and how to be activist, however, courts should consider how they could help the legislative process along. Not all interest groups have equal power to get legislatures to act. Concentrated interests where each person has a large stake (like retail sellers in an industry with only a few large participants) has greater capacity to influence the legislative process than dispersed interests where each person has only a small stake, like consumers. See generally NEIL KOMESAR, *IMPERFECT ALTERNATIVES*, ch. 3 (Chicago, 1994). If the goal is to get the legislature to act, courts should avoid adoption of rules that give concentrated interests an incentive to defeat any new legislation, for they will surely succeed.

4. In the context of *ProCD*, there was already a great deal of legislative activity dealing with delayed terms issues. One Uniform Law, UCITA, had been proposed but was not succeeding. Industry had made great efforts to achieve their ends by other legislative means. When the 7th Circuit, in *ProCD*, handed industry about as favorable a rule as they could have hoped for, their interests suddenly from promoting the adoption of legislation to blocking legislation, concentrating instead on persuading other courts to adopt this leading Seventh Circuit precedent. I conclude that it may have been premature for judicial activism with respect to delayed terms, because there was still a possibility for legislation. And if judicial activism was justified as a way of providing some certainty in the law, then a rule should have been adopted that would have given concentrated interests an incentive to seek legislation.

B. Should a Federal Court Be Activist in a Diversity Case?

1. *ProCD* was a UCC case, but the applicable Code provisions were not clear and hence subject to interpretation. This is particularly true of UCC §2-204, the section on which the opinion purports to rest. Different states could interpret the Code in different ways, as applied to delayed term transactions. One implication of this point is to question the reliance on *ProCD* as a precedent in *Hill v. Gateway*, since the former was a Wisconsin case and the latter an Illinois case.

2. In *ProCD* there were no Wisconsin precedents directly on point. However, in cases involving a standard form contract with a term excluding liability for negligence in cases of personal injury, Wisconsin has taken a position requiring very prominent disclosure of the provision. The leading case, *Yauger v. Skiing Enterprises*, 557 N.W.2d 60 (WI 1996), was decided months after *ProCD*, but the decision in *Yauger* was based on a series of earlier cases discussed in the opinion.

3. While delayed term transactions are easily distinguishable from exclusions of negligence liability, the WI cases like *Yauger* and its predecessors certainly suggest a scepticism about the efficacy of a policy that expects buyers to read the terms of a standard form contract. A court that truly wanted to know how the WI S.Ct. would have approached a delayed terms case could have certified the Code interpretation issue in *ProCD* to the WI Supreme Court for determination. WI is one of the approximately 3 states that have authorized certification of

issues directly to the State Supreme Court from a federal court of appeals. Wis. Stats. §§821.01 *et seq.*

4. The damage of *ProCD* to the policies of federalism is illustrated by what has happened in WI since that decision. There is still no state appellate decision on point. Delayed terms transactions almost always involve an out-of-state corporation that can claim diversity of citizenship. When the amount in controversy is relatively small, and below the jurisdictional amount, these corporations have an incentive to settle, to avoid a state court precedent that would undercut the authority of *ProCD*. When the stakes are large - as in a class action - the corporation simply removes to federal court.

C. Should a contracts course be concerned with issues like when a court should be activist and when it should be deferential to state law?

1. There is always more that could be covered in a contracts course than there is time available. Why take up topics that could, perhaps should, be covered by other courses?

2. Yet I fear that much less attention is devoted to these process issues today as compared to 40 years ago, when Legal Process courses were a common component of the first year curriculum, and the officially unpublished, but widely available, materials by Hart & Sachs were widely read and cited. This change may be partly due to the penetration of law and economics into the discourse of contracts and other areas. While law and economics has certainly enriched our understanding of many issues, it tends to focus attention on the substantive issues at the expense of process issues.

3. There is a great opportunity in contracts courses to direct attention to the process issues I have raised, and not just in connection with *ProCD*. Contract casebooks tend to include many precedent-making cases. Some of the other cases in my course in which I raise the activism issue include *Neri v. Retail Marine* (concerning UCC 2-708(2)), *Marvin v. Marvin* (contracts between co-habitators), *Tameny v. Atlantic Richfield* (employment at will), *Fullerton Lumber v. Torberg* (a WI case concerning severability of unreasonable restrictive covenants), and *Williams v. Walker-Thomas Furniture Company* (unconscionability). I also use the 7th Circuit opinions in my course to call attention to how faithfully that Court shows sensitivity to state law concerns. Sometimes they do and sometimes they don't.