October 2000

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Application of the Uniform Commercial Code to Option Contracts for the Sale of Goods, and Implying Promises to Find Sufficient Consideration: Why and How the North Carolina Supreme Court Got it Wrong in Fordham v. Eason*

“Oft times members of both the bench and bar are criticized for failing to distinguish the forest from the trees. In this case, however, the controversy arises from an attempt to separate the trees from the forest.” 1

I. INTRODUCTION

The North Carolina Supreme Court rarely ventures into cases involving contract disputes. However, in Fordham v. Eason, the court granted discretionary review to decide which of two logging companies had title to certain timber that each company had separately bargained for.2 In its analysis, the court’s discussion of consideration was incomplete. Further, the court erred by refusing to apply the Uniform Commercial Code to an option contract for the sale of timber. This article explores the mistakes in the Fordham opinion and examines why the court will probably have to reevaluate its decision at some point in the future.

II. FACTS AND BACKGROUND

Hurricane Fran hurled into eastern North Carolina around 8 p.m. on September 5, 1996.3 The category three hurricane brought wind gusts up to 120 mph and destroyed a large number of trees, power lines, and coastal homes.4 Taken collectively, the total damages and costs for North Carolina were estimated at approximately five billion dollars, more than one billion of which was the result of damaged forestry and timber.5

While many suffered from the storm, the timber industry spotted an opportunity to acquire fallen trees at a discount. Timber companies

* The author would like to thank Professor Richard A. Lord for his insight into the case, as well as the members of the Campbell Law Review who helped edit this article.
4. Id.
made substantial offers to North Carolina property owners in exchange for the right to enter and clear away fallen trees. Viewed from the standpoint of the property owners, these companies were paying for the right to rid the property owners' land of unwanted timber.

A.V. and Grace Eason owned real property (hereinafter "the Property") in Johnston County, North Carolina which was extensively damaged by Hurricane Fran. As a result of the damage, several timber buyers became interested in purchasing the Easons' timber.

In the summer of 1996, Wendell A. Fordham, the owner of Fordham Timber Company, Inc. (hereinafter "Fordham"), contacted A.V. Eason and expressed his desire to purchase the Easons' unwanted fallen timber. On November 11, 1996, the parties entered into a written agreement entitled "Timber Cutting Contract." This agreement granted Fordham the authority to "enter, cut and remove . . . forest products [all timber and pulpwood]" from the Easons' entire property until June 1, 1997. The agreement specified the "price per unit Fordham was required to pay for each different type of forest product cut and removed." In addition, it stated that the Easons were making the agreement "for and in consideration of the payment made or to be made by [Fordham]." The agreement was not recorded with the Register of Deeds.

The Easons apparently grew impatient with Fordham's lack of progress in removing the timber. As a result, on February 7, 1997, less than three months after the Fordham-Eason agreement was formed, the Easons entered into another agreement for the sale of their timber, this time with appellant American Woodland Industries, Inc. (hereinafter "AWI"). This agreement was entitled "Timber Purchase and Sales Agreement", and provided that the Easons were selling the "trees, tops or laps" on their property to AWI, and granted AWI until February 7, 1999 to "enter, cut, and harvest and remove said timber." AWI paid

7. Id.
8. Id.
9. Id.
10. Id. at 226-27, 505 S.E.2d at 896.
11. Id. at 227, 505 S.E.2d at 896.
12. Fordham, 131 N.C. App. at 227, 505 S.E.2d at 896.
13. Id. at 227, 505 S.E.2d at 896-97.
14. Id. at 227, 505 S.E.2d at 897.
15. Id.
the Easons a down payment of $30,000 on February 7, 1997.16 The agreement allowed AWI to deduct the cost of any timber removed, in accordance with the per-unit prices agreed upon, from the $30,000 down payment.17 AWI agreed to pay the Easons on a per-unit basis when the $30,000 deposit was depleted.18 Additionally, the agreement required the Easons to refund AWI’s deposit “if there is any stoppage of logging operations for any reason, less the amount of the stumpage cut.”19 The Easons signed the agreement with AWI on February 10, 1997 in the presence of a notary public, but the agreement was not signed by an AWI representative.20 However, AWI’s name, along with its corporate address, was listed at the bottom of the agreement.21

At trial, A.V. Eason testified that he entered into the agreement with AWI because he “didn’t get no results” from Fordham.22 At the time A.V. Eason signed the agreement with AWI, Fordham had not yet begun to cut or remove any forest products from the Property.23 Before signing the AWI-Eason agreement, AWI was aware that the Easons had entered into an agreement with Fordham, and that the Fordham-Eason agreement had not been recorded at the Register of Deeds office.24 After the execution of this new agreement and payment of the $30,000 deposit, AWI entered the Easons’ property and began to cut timber in February of 1997.25

Upon discovering the existence of the AWI-Eason agreement, Fordham immediately retained counsel and secured a temporary restraining order preventing AWI from cutting or removing any timber from the Easons’ property until the matter could be heard by the trial court.26 On February 14, 1997, Fordham filed a complaint requesting that a preliminary injunction be issued to prevent AWI from logging the Easons’ property until a final determination could be reached.27

Also in this complaint, Fordham alleged breach of contract by the Easons, as well as interference with contractual relations and unfair

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17. Id.
18. Id.
19. Id.
20. Id.
21. Id. at 156, 521 S.E.2d at 705.
22. Fordham, 131 N.C. App. at 227, 505 S.E.2d at 896.
23. Id.
24. Id.
25. Id.
26. Id.
27. Id. at 227-28, 505 S.E.2d at 896.
and deceptive trade practices by AWI. 28 On February 17, 1997, the trial court granted a preliminary injunction barring AWI from “harvesting or logging any of the timber located on those lands owned by Defendants Eason.” 29

Several days later, Fordham entered the Property and began cutting and removing timber. 30 AWI then filed an answer to Fordham’s complaint on March 21, 1997, denying all pertinent allegations and alleging several counterclaims, including trespass, wrongful timber cutting, interference with contractual relations, unfair and deceptive trade practices, and abuse of process. 31 Fordham responded to AWI’s counterclaims on April 29, 1997, also denying all pertinent allegations. 32 Meanwhile, Fordham and the Easons voluntarily dismissed their claims against each other, leaving only a dispute between Fordham and AWI. 33 Fordham and AWI each filed for summary judgment of the other’s claims. 34 The motions were heard and the trial court entered an order granting Fordham’s motion for summary judgment on all of AWI’s counterclaims, and further granting AWI’s motion for summary judgment on all of Fordham’s claims. 35 AWI appealed the order granting Fordham’s motion for summary judgment as to AWI’s counterclaims. 36

The case was heard in the North Carolina Court of Appeals on October 20, 1998. 37 In an opinion by Judge Horton, the court first noted that AWI’s claims of unfair and deceptive trade practices and interference with contractual relations had been abandoned for failure to address them in the appellate brief. 38

In regard to the wrongful cutting of timber claim, the court applied the North Carolina statute that addresses “[d]amages for unlawful cutting, removal or burning of timber”, 39 and held that AWI

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28. Fordham, 351 N.C. at 152, 521 S.E.2d at 702.
29. Id. See also Fordham, 131 N.C. App. at 228, 505 S.E.2d at 897.
30. Fordham, 131 N.C. App. at 228, 505 S.E.2d at 897.
32. Id. at 153, 521 S.E.2d at 702.
33. Fordham, 131 N.C. App. at 228, 505 S.E.2d at 897.
34. Id.
35. Id.
36. Fordham, 351 N.C. at 153, 521 S.E.2d at 703.
37. Fordham, 131 N.C. App. at 226, 505 S.E.2d at 895.
could not recover from Fordham because AWI was not the "owner" of the lands in question. 40 Accordingly, the court dismissed the wrongful cutting of timber claim. 41 As to the trespass claim, the court stated that the element requiring possession of the property by the plaintiff in such an action could not be fulfilled because AWI was not the owner of the land. Therefore, the court dismissed the trespass claim. 42 The Court of Appeals further reversed the order of the trial court as to the abuse of process claim, stating that the evidence showed that AWI had raised a genuine issue of material fact as to Fordham's motives and actions in regard to the injunction. 43

Both Fordham and AWI petitioned for writ of certiorari to the North Carolina Supreme Court, and on March 3, 1999, the court allowed discretionary review of AWI's trespass action. 44 In an opinion by Justice Orr, the Supreme Court reversed the decision of the Court of Appeals, holding that AWI did have sufficient ownership rights to bring an action for trespass. 45 As this article will reveal, the Court of Appeals was correct in dismissing AWI's trespass claim; however, it did so for the wrong reasons.

Any person, firm or corporation not being the bona fide owner thereof or agent of the owner who shall without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable wood, timber, shrub or tree therefrom, shall be liable to the owner of said land for double the value of each wood, timber, shrubs or trees so injured, cut or removed.

Id. 40. Fordham, 131 N.C. App. at 229, 505 S.E.2d at 895.
41. Id. at 227, 505 S.E.2d at 898 (citing Woodard v. Marshall, 14 N.C. App. 67, 69, 187 S.E.2d 430, 431 (1972) (Here, the Court of Appeals held that a plaintiff must show he is the owner of the land from which the timber was cut in order to state a cause of action for wrongful cutting of timber.)).
42. Id.
43. Id. at 229-30, 505 S.E.2d at 898-99 (citing Edwards v. Advo Sys. Inc., 93 N.C. App. 154, 157, 376 S.E.2d 765, 767 (1989) (stating the elements of abuse of process), rev'd on other grounds, Johnson v. Ruark Obstetrics, 327 N.C. 283, 395 S.E.2d 85 (1990); Petrou v. Hale, 43 N.C. App. 655, 659, 260 S.E.2d 130, 133 (1979) (in which the court held that the improper use of the process after it has been issued is determinative in an abuse of process claim); N.C. Gen. Stat. § 1-487 (1996) (providing that "no order shall be made pending such action, permitting either party to cut said timber trees, except by consent until the title to said land or timber trees is finally determined in the action").
44. Fordham, 351 N.C. 151, 521 S.E.2d 701.
45. Id. at 159, 521 S.E.2d at 706.
III. Analysis

A. The Classification of Timber: Real or Personal Property?

The first issue the Supreme Court addressed was whether to evaluate this cause of action by using a trespass to chattel or trespass to realty theory. Fordham argued that the timber should be classified as realty, whereas AWI contended the timber should be classified as goods governed by the Uniform Commercial Code (hereinafter “UCC” or “the Code”) as adopted in Chapter 25 of the North Carolina General Statutes. The Supreme Court correctly agreed with AWI and classified the timber as a good, thereby requiring an analysis using the elements of a trespass to chattel cause of action.

The law has traditionally treated a timber interest as an interest in real property. Early twentieth century case law classified timber as realty. As realty, timber transactions had to comply with the formalities required for a transfer of an interest in land. Several cases also distinguished the classification and treatment of standing timber from severed timber, holding that standing timber was realty while severed timber was personalty.

It is well established that timber trees may be sold and conveyed separately from the land on which they stand. Thus, when there is a sale of standing timber where the buyer has retained the right to cut and remove the timber, the timber is a sale and not a mere license. Further, a logging contract results in a present sale of the described timber, transferring title at the time of the execution of the contract.

46. Id. at 153-54, 521 S.E.2d at 703.
47. Id. at 154, 521 S.E.2d at 703.
48. Id.
49. Id. (citing Drake v. Howell, 133 N.C. 162, 165, 45 S.E. 539, 540 (1903); Mizell v. Burnett, 49 N.C. 249, 252 (1857)).
50. Fordham, 351 N.C. at 154, 521 S.E.2d at 703 (citing Williams v. Parsons, 167 N.C. 529, 531, 83 S.E. 914, 915 (1914); Hawkins v. Goldsboro Lumber Co., 139 N.C. 160, 162, 51 S.E. 852, 853 (1905)).
52. Id. (citing Austin v. Brown, 191 N.C. 624, 627, 132 S.E. 661, 662 (1926); Frank Hitch Lumber Co. v. Brown, 160 N.C. 281, 283, 75 S.E. 714, 714-15 (1912)).
54. See 52 Am. Jur. 2d Logs and Timber § 13 (citing Dunham v. Taylor, 317 P.2d 926 (Or. 1957)).
55. Id. (citing Padilus v. Yarbrough, 347 P.2d 620 (Or. 1959)).
While the common law treated timber interests as interests in land, the UCC changed the classification of timber when timber is the subject of a contract for sale. The UCC's classification of timber is the result of a 1972 amendment to the UCC that has been adopted by North Carolina. Basing its decision on this amendment, the Fordham court correctly held that the sale of timber is now considered a sale of goods, regardless of whether removal is by the seller or the buyer. Therefore, "[a] dispute over a trespass to timber where the claim of a possessory interest arises under a contract for the sale of timber should be settled using a trespass to chattel analysis."

B. Consideration

As discussed infra, the North Carolina Supreme Court should have applied the liberal rules of the UCC when analyzing the Fordham-Eason agreement. However, regardless of whether the common law or the UCC was applied, the fact that Fordham was not explicitly bound

A contract for the sale . . . of timber to be cut is a contract for the sale of goods within this article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties by identification effect a present sale before severance.


The legal consequences are stated as flowing directly from the contract and the action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.

Id.

57. U.C.C. § 2-107(2); N.C. Gen. Stat. § 25-2-107(2). See also 67 Am. Jur. 2d Sales § 58 (1985). "Before the amendment the Code provided that the sale of standing timber under an agreement for severance by the buyer did not constitute a sale of goods but was a contract affecting land." Id. (citing Leonard v. American Walnut Co., 609 S.W.2d 452 (Mo. Ct. App. 1980); Barry v. Bank of New Hampshire, 293 A.2d 755 (N.H. 1972), appeal filed, 304 A.2d 879 (N.H. 1973)).

58. Fordham, 351 N.C. 151, 521 S.E.2d 701. But see Haw River v. Ins. Co., 152 F.3d 275, 278 (4th Cir.1998) (where the Fourth Circuit, interpreting North Carolina law, adhered to the common law classification and treated timber as realty when the subject of a sale). Though Haw River is not binding in North Carolina, a more thorough analysis would have addressed the Fourth Circuit's interpretation, noting that North Carolina has adopted the UCC's classification of timber.

59. Fordham, 351 N.C. at 155, 521 S.E.2d at 704 (citing W. Page Keeton, Prosser and Keeton on the Law of Torts § 14, at 85 (5th ed. 1984) (discussing that trespass to chattel involves personal property or chattel)).
by the agreement to remove any of the Easons' timber should not have led the court to conclude that the agreement failed for want of consideration.

In asserting its trespass to chattels claim, AWl alleged that at the time Fordham entered the Property and began removing timber, AWl had present legal rights to the timber. Specifically, AWl asserted that the Fordham-Eason agreement was not binding, while asserting that the AWl-Eason agreement was a valid contract. Thus, the determinative issue before the court was whether the Fordham-Eason agreement was a legally binding contract. A finding that the Fordham-Eason agreement was binding would have required the court to conclude that Fordham had a superior possessory right to the timber. This contractual right would free Fordham from any liability to AWl. Furthermore, the common law principle of "first in time, first in right" would clearly establish that Fordham was vested with better title to the timber. Alternatively, if the court found the Fordham-Eason agreement was invalid, and the AWl-Eason agreement was a binding contract, Fordham would be liable to AWl in trespass.

Ultimately, the court determined that the Fordham-Eason agreement lacked consideration, and that AWl was in possession of the timber when Fordham began logging the Property. The court based its conclusion, in part, on the premise that the Fordham-Eason agreement bound Fordham to do nothing at all. By contrast, the court ruled that the $30,000 paid by AWl to the Easons constituted sufficient consideration. While correct in stating the Fordham-Eason agreement did not require Fordham to remove any timber, the court failed to address the fact that AWl was similarly not obligated to remove any timber, regardless of the $30,000 deposit paid to the Easons. The court also neglected to address the fact that the down payment made to the Easons was entirely refundable in the event that AWl did not log the Property. The fact that Fordham did not pay any monetary consideration should not have been determinative to the outcome of this dispute. Further, the court failed to explore the possibility that the law
has traditionally implied a promise in similar instances in order to prevent the intended agreement from being illusory. 69

Before arriving at its conclusion that the Fordham-Eason agreement lacked consideration, the court acknowledged that the Fordham-Eason agreement required Fordham to pay a per unit price for all timber removed during the contract period. 70 Moreover, as pointed out by the Court of Appeals, the Fordham-Eason agreement specifically provided that it was made "for and in consideration of the payment made or to be made by Fordham." 71 Holding this agreement was not binding for lack of consideration was the court's first error in what turned out to be a poorly reasoned opinion.

1. The Common Law

As a general rule, consideration is required in order for a promise to be enforceable. 72 In North Carolina,

there is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not. 73

A promise which otherwise appears illusory 74 will be deemed to have sufficient consideration when the contracting parties are obligated to act in good faith. 75 Further, when the parties to an agreement are economically dependent upon one another, courts have traditionally implied a promise to satisfy the consideration requirement. 76 As one leading treatise on the law of contracts has stated, "a party must exer-

69. See, e.g., Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917) (the leading case from which nearly every first year law student learns that, under certain circumstances, courts will imply a promise in order to satisfy the consideration requirement).
70. Fordham, 351 N.C. at 158, 521 S.E.2d at 705-06.
71. Fordham, 131 N.C. App. at 227, 505 S.E.2d at 896.
73. Helicopter Corp. v. Cutter Realty Co., 263 N.C. 139, 147, 139 S.E.2d 362, 368 (1964) (citing 17 C.J.S. Contracts § 74, at 426.).
74. See 3 Williston, supra note 72, § 7:7, at 88-89 (defining illusory promises). Where an illusory promise is made, that is, a promise merely in form, but in actuality not promising anything, it cannot serve as consideration. Even if it were recognized by law, it would impose no obligation, since the promisor always has within his power to keep his promise and yet escape performance of anything detrimental to himself or beneficial to the promisee.

Id.
cise good faith when that party has an unlimited discretionary power over a term of the contract if necessary to effectuate the parties' intent and to save a contract from being held to be illusory."77 A proper analysis of the circumstances should have led the court to imply a promise that Fordham would use, at the very least, good faith, to remove the timber bargained for. This implied promise would have provided the Fordham-Eason agreement with sufficient consideration to form a binding contract.

North Carolina courts have historically implied similar promises under like circumstances. In Mezzanotte v. Freeland, the North Carolina Court of Appeals held that "[when] a contract confers on one party a discretionary power affecting the rights of the other, this discretion must be exercised in a reasonable manner based upon good faith and fair play."78 Mezzanotte further explained that a promise conditioned upon an event within the promisor's control is not illusory if the promisor also "impliedly promises to make reasonable effort to bring the event about or to use good faith and honest judgment in determining whether or not it in fact has occurred."79 Such an implied promise is enforceable by the promisee and constitutes a legal detriment to the promisor.80 Therefore, this implied promise furnishes sufficient consideration to support a return promise.81 Because the Fordham-Eason agreement provided Fordham with such discretionary power to remove the timber,82 Fordham was bound to act in a "reasonable manner", thereby satisfying the consideration requirement. Mezzanotte was a case of first impression; therefore, the Court of Appeals cited to several jurisdictions that had correctly decided the issue, acknowledging that while "there [were] no North Carolina cases specifically in point, courts in other jurisdictions have recognized that a conditional promise may be accompanied by an implied promise of good faith and reasonable effort, and that it need not be illusory."83

77. See Farnsworth on Contracts § 7:17, at 370 (1996 Supp.). "Courts have often supplied a term requiring one party to exercise good faith when that party has been given a discretionary power over one of the terms of the contract." Id. at 348.
78. Mezzanotte, 20 N.C. App. at 17, 200 S.E.2d at 414.
79. Id. at 17, 200 S.E.2d at 415 (quoting 1 Arthur L. Corbin, Corbin on Contracts § 149, at 659 (1960)).
80. Id.
81. Id.
82. Fordham, 131 N.C. App. at 226-27, 505 S.E.2d at 896.
83. Id. (citing Jay Dreher Corp. v. Delco Appliance Corp., 93 F.2d 275 (2d Cir. 1937) (in which the court implied a promise that defendant was required to use honest judgment in a contract granting plaintiff a right to sell defendant's products, even though defendant reserved the right to reject any order sent in by plaintiff);
This "implied promise doctrine" was best explained in the leading case of Wood v. Lucy, Lady Duff-Gordon. In this case, the court implied a promise that bound the plaintiff to use reasonable efforts in procuring sales for the defendant where both parties to the agreement were completely economically dependent upon one another. Justice Cardozo, writing for the New York Court of Appeals, explained the policy behind Wood:

The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed. . . . If that is so, there is a contract.

This modern view of contract law focuses more on the intent of the parties than on the technical language of construction. Under this view of contract law, courts may imply promises to comply with what is a clear intent by the parties to contract.

Accordingly, Fordham's discretion to enter and remove timber from the Property had to be exercised in good faith. Based on the facts and circumstances of the case, the only way Fordham could have made any money via the agreement was to actually remove timber from the Property. Absent an implied promise that Fordham would exercise good faith to log the land, this transaction would make absolutely no economic sense. A proper common law analysis would have led the court to find that Fordham had a binding contract with the Easons, and therefore was not liable to AWI in trespass. Regardless, the Fordham court erred when it chose to analyze the Fordham-Eason agreement under the common law.

84. 118 N.E. 214 (N.Y. 1917).
85. Id.
86. Id. (citing Moran v. Standard Oil Co., 105 N.E. 217 (N.Y. 1914); McCall Co. v. Wright, 117 N.Y.S. 775 (N.Y. App. Div. 1909)).
88. Fordham, 351 N.C. at 152, 521 S.E.2d at 702.
2. The Uniform Commercial Code

While a common law analysis of the Fordham-Eason agreement should have led the court to find consideration, such an analysis was inappropriate in the first place. Because the court correctly stated that the sale of timber is now classified as a "good" under the UCC, it should have applied the liberal rules of construction set forth in the UCC.

A brief reference to the UCC would have provided the court with the information necessary to reach a correct holding. Proceeding from the premise that timber is a "good" governed by the UCC, the court merely had to apply UCC section 2-103, which states that "[e]very contract or duty within the [UCC] imposes an obligation of good faith in its performance or enforcement." When analyzing a contract for the sale of goods, courts are required to imply that the parties to an agreement act in good faith. This implied obligation of good faith transforms an otherwise illusory agreement into a binding contract with sufficient consideration. In short, the court should have held that the Fordham-Eason agreement, governed by the rules of the UCC, was a binding contract for the sale of timber based upon this implied obligation. This decision would have given Fordham a possessory right superior to that of AWI. Therefore, Fordham should not have been held liable to AWI in trespass.

3. Identical Agreements

The court ultimately found that the Fordham-Eason agreement was not a binding contract. However, even if this decision were correct, the court did not follow what should have been the next logical step in this analysis, which would have required a similar finding that the AWI-Eason agreement also lacked consideration. Neither Fordham nor AWI were obligated to remove any timber via their agreements. Moreover, the $30,000 down payment made by AWI to the Easons was

89. Id. at 154, 521 S.E.2d at 704.
92. U.C.C. § 1-203, official comment. "'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." Id. See also 3 Williston, supra note 72, § 7:7. "Under the [UCC], the seller would be obligated, at a minimum, to use good faith so that his ability to avoid his undertaking is not solely within his control." Id.
93. See 3 Williston, supra note 72, § 7:7.
94. Fordham, 351 N.C. at 157, 521 S.E.2d at 705.
95. Fordham, 131 N.C. App. at 227, 505 S.E.2d at 896.
entirely refundable in the event that no logging operations took place.\textsuperscript{96} In essence, if AWI had chosen not to log the Property, AWI's $30,000 would have been refunded, putting AWI in exactly the same position as Fordham.\textsuperscript{97} The only logical conclusion is either that both Fordham and AWI had binding contracts with the Easons, or neither did. Regardless of whether the contracts were binding, Fordham should not have been held liable to AWI.

C. Option Contracts Under the UCC

Though settling the consideration issue was probably all that was required to bring finality to this dispute, the Supreme Court instead went on to state that an option contract for the sale of timber—a good—is not governed by the UCC.\textsuperscript{98} Given the fact that timber is now treated as a good by the UCC, when it is the subject of a sale,\textsuperscript{99} by holding that an option contract for the sale of timber is not governed by the UCC, the \textit{Fordham} court has, in essence, held that an option contract for the sale of any good is also not governed by the UCC.\textsuperscript{100}

Assuming the court was correct in its conclusion that the Fordham-Eason agreement was, in fact, an option contract,\textsuperscript{101} the court was nonetheless incorrect in concluding that option contracts for the sale of goods are not governed by the Code.\textsuperscript{102} In reaching its conclusion, the North Carolina Supreme Court relied primarily on \textit{Fisher v. Elmore}, a 1986 Fourth Circuit case.\textsuperscript{103} The \textit{Fisher} court concluded that a timber purchase and sales agreement, similar to the one in \textit{Fordham}, created only an option to purchase timber rather than a contract for the sale of goods.\textsuperscript{104} \textit{Fisher}, interpreting North Carolina law, decided whether the proper classification for the timber in question was real or personal property for purposes of testamentary distribution.\textsuperscript{105} If analyzed as real property, the timber would have passed to

\textsuperscript{96} \textit{Fordham}, 351 N.C. at 156, 521 S.E.2d at 704.
\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id.} at 158, 521 S.E.2d at 706.
\textsuperscript{99} U.C.C. § 2-107(2) (2000).
\textsuperscript{100} \textit{Fordham}, 351 N.C. at 158, 521 S.E.2d at 706.
\textsuperscript{101} \textit{Id.} at 156, 521 S.E.2d at 704.
\textsuperscript{102} See \textit{id.} at 158, 521 S.E.2d at 706.
\textsuperscript{103} Fisher v. Elmore, 802 F.2d 771, 773 (4th Cir. 1986) (holding that the UCC did not apply to a bare option contract in North Carolina). \textit{Fisher}, however, did not recognize the UCC's classification of timber, and instead treated the timber as realty. \textit{Id.}
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.} at 772.
the devisees of the real property of the decedent. If the timber was considered personal property, it would have been distributed to the beneficiaries of the personal property under the will.

After stating that the option to purchase timber did not create a contract for the sale of goods, Fisher incorrectly held that an option contract for the sale of timber was not governed by the UCC. The Fisher court explained that a contract for sale would be formed only when the timber was actually removed. As a result, the manner in which the Code classifies timber (as personal property, whether severed or standing), did not come into play, and the common law classification of real property determined the outcome. Relying on Fisher was a poor decision; by doing so, the North Carolina Supreme Court avoided an analysis of the UCC in a case of first impression.

Fisher justified its conclusion by citing Rose v. Vulcan Materials Co., a 1973 North Carolina Supreme Court case that was decided before the UCC was adopted in North Carolina. From Rose, the Fisher court extracted the principle that an option to buy and a contract for sale are distinguishable. This principle formed the central premise upon which Fisher exclusively relied in concluding that option contracts for the sale of timber are not governed by the UCC. Both Fisher and Fordham erroneously relied on Rose. Rose, a case that dealt with completely different circumstances from those in Fisher and Fordham, centered around issues involving contract illegality and the appropriate damages therefor. In contrast to Fordham, Rose did not differentiate between a contract for sale and an option contract for purposes of application of the UCC. For a reason not relevant or applicable to the facts of either Fisher or Fordham, the Rose court stated: "Exhibit B was not itself a contract of sale. Instead, it gave plaintiff an option to buy." Fordham adopted this dicta from Rose, holding:

106. Id.
107. Id.
108. Id. at 773.
109. Id.
110. Id.
112. Fisher, 802 F.2d at 773; Rose, 282 N.C. 643, 194 S.E.2d 521.
113. Fisher, 802 F.2d at 773.
115. Id.
116. Id. at 668, 194 S.E.2d at 538 (citing 1 Samuel Williston, Treatise on the Law of Contracts § 61B (Walter H. Jaeger ed., 3d ed. 1957); 1A James Corbin, Corbin on Contracts § 157 (1963)). To determine the appropriate damages, the Rose court made
"Fordham and the Easons attempted to create an option to purchase timber. While contracts for the sale of timber are governed by the [Code] and are treated as goods, an option to purchase timber is not a contract for the sale of timber."^117 The Fordham court then went on to explain that "[s]ince the [Code] governs only contracts for the sale of timber, . . . an option to purchase timber is not governed by the [Code]. Instead, an option to purchase timber is governed by the common law."^118 The court concluded by reinstating the trespass to chattels claim against Fordham.^119

The Fordham court's treatment of option contracts was incorrect for several reasons. The Code defines a "contract for sale" as including "both a present sale of goods and a contract to sell goods at a future time."^120 In addition, the Code broadly states that "Article [2] applies to transactions in goods", rather than merely sales of goods.^121 This refutes Fordham's reasoning that contracts for the sale of timber are governed by the Code, while option contracts are not.^122 No good argument can be made that the Fordham-Eason agreement was not a "transaction in goods" within the meaning of the Code.^123 The UCC also states, in section 2-204(3), that "even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."^124 Applying this section to the facts in this case, it is clear that Fordham and the Easons

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This statement in an attempt to explain that, because the plaintiff had an option to buy, and not a contract for sale, "[e]ach time plaintiff placed an order with defendant there was an acceptance of the seller's offer and a contract of sale was formed[,]" therefore, "[e]ach time defendant refused to fill such order at the contract price a separate breach occurred." Rose, 282 N.C. at 668, 194 S.E.2d at 538.

117. Fordham, 351 N.C. at 158, 521 S.E.2d at 706.
118. Id.
119. Id.
121. U.C.C. § 2-102 (2000); U.C.C. General Comment (1962). "This Act purports to deal with all phases which may ordinarily arise in the handling of a commercial transaction, from start to finish." Id.
122. Fordham, 351 N.C. at 158, 521 S.E.2d at 706.

If parties intend to enter into a binding agreement, this subsection recognizes that agreement as valid in law, despite missing terms, if there is any reasonably certain basis for granting a remedy. The test is not certainty as to what the parties were to do nor as to the exact amount of damages due the plaintiff. Nor is the fact that one or more terms are left to be agreed upon enough of itself to defeat an otherwise adequate agreement. Rather, commercial standards on the point of 'indefiniteness' are intended to be
intended to make a contract (an option contract is, by its mere definition, a contract) for the removal of the timber in question; the Easons wanted the timber removed from their land, and Fordham wanted the timber for its business. Additionally, no outlandish circumstances existed which would present difficulty in determining a reasonable basis from which to grant a remedy in the event of a breach.

Several jurisdictions have correctly decided that option contracts for the sale of goods are governed by the UCC. In Merritt-Campbell, Inc. v. RxP Products, Inc., the Fifth Circuit dealt with the issue of "whether option contracts for the sale of goods are subject to the UCC." Interpreting Texas law, Merritt held that the lower court was incorrect in ruling that the Texas Business and Commercial Code (i.e., the UCC) did not apply to an option contract for the sale of goods. Continuing in their analysis, the Merritt court correctly stated:

Chapter 2 of the UCC applies to all transactions in goods. A contract for the sale of goods includes 'both a present sale of goods and a contract to sell goods at a future time'; therefore, rights of parties are not effected by whether the transaction is one for a present sale of goods or a contract relating to the future.

The Merritt court concluded by holding that the UCC clearly applies to option contracts for the sale of goods. The aforementioned Texas law is identical to the corresponding North Carolina statute.

As persuasive authority, Merritt cited In re Air Vermont, Inc. v. Beech Acceptance Corp., in which the Vermont Bankruptcy Court held that option contracts for the sale of land and personal property are subject to the UCC's statute of frauds. Also, Merritt pointed out

U.C.C. § 2-204, official comment (Purposes of Changes).

125. See 5 Williston, supra note 72, at 708. "[I]f consideration is paid for an offer, the offer again becomes a binding contract. Such contracts are generally called options." Id.

126. Fordham, 131 N.C. App. at 226, 505 S.E.2d at 896.

127. Id.

128. 164 F.3d 957, 961 (5th Cir. 1999).

129. Id. at 962.

130. Id. (citing Tex. Bus. & Com. Code Ann. § 2-106(a) (West 2000)).

131. Id. (citing W.H. McCrory & Co. v. Contractors Equip. and Supply Co., 691 S.W.2d 717 (Tex. App. 1985) (holding that an option contract to purchase a forklift must satisfy the statute of frauds)).


133. Merritt, 164 F.3d at 964 (citing 44 B.R. 446, 450 (Bankr. D. Vt. 1984)).
that the UCC has been held to be applicable to an alleged option con-
tract for the sale of an airplane.\textsuperscript{134}

Similarly, several federal district courts have held that option con-
tracts for the sale of goods are governed by the UCC. In Theus v. Pio-
neer Hi-Bred Int'l, the court held that an option contract which stated
that Company X "may, at its option," require Company Y to purchase
from Company X, was governed by the Code.\textsuperscript{135} Noting that this was
unquestionably an option contract for the sale of goods, the Theus
court reasoned that a contract for sale included "both a present sale of
goods and a contract to sell goods at a future time."\textsuperscript{136} In Honeywell v. Minolta Camera, the court also held that "[a]n option to purchase
goods at a future time is a type of contract for sale and is therefore
governed by the [UCC]."\textsuperscript{137} Further, the Fourth Circuit, in Florida
Power and Light Co. v. Westinghouse Elec. Corp., held that an option
contract for the purchase of equipment and nuclear fuel was governed
by the Code.\textsuperscript{138}

Based on the foregoing decisions, the error in Fordham becomes
apparent. Since timber is now classified as a good when it is the sub-
ject of a sale, and option contracts for the sale of goods are properly
governed by the UCC, it logically follows that option contracts for the
sale of timber similarly should be governed by the Code.

The Fordham court also failed to apply, by way of analogy, other
provisions of the UCC that address option contracts for the sale of
goods. "Firm Offers", as defined in the UCC, explicitly deal with one
type of option contract.\textsuperscript{139} Though the Easons would probably not be

\begin{itemize}
\item \textsuperscript{134} Id. (citing McCollum Aviation, Inc. v. CIM Assocs., Inc., 446 F. Supp. 511, 513
(S.D. Fla. 1978)).
\item \textsuperscript{135} 738 F. Supp. 1252, 1255 (S.D. Iowa 1990).
\item \textsuperscript{136} Id. (relying on U.C.C. § 2-204 (open terms acceptable) and U.C.C. § 2-311
(option contracts)).
\item \textsuperscript{137} 1991 WL 841033 (D.N.J.), 5, 41 U.C.C. Rep. Serv. 2d (CBC) 403 (N.J. 1991)
A.2d 581 (Pa. 1985)).
\item \textsuperscript{138} 579 F.2d 856 (1978).
\item \textsuperscript{139} U.C.C. § 2-205 (2000).
\end{itemize}

An offer by a merchant to buy or sell goods in a signed writing which by its
terms gives assurance that it will be held open is not revocable, for lack of
consideration, during the time stated or if no time is stated for a reasonable
time, but in no event may such period of irrevocability exceed three months;
but any such term of assurance on a form supplied by the offeree must be
separately signed by the offeror.

\textit{Id.}
considered "merchants" within the meaning of the Code, the purposes behind the firm offers provision should nevertheless apply to this situation. By its plain language, the UCC, under the firm offers provision, governs a type of option contract for the sale of goods. Thus, it is reasonable to infer that the Code applies to all option contracts for the sale of goods. No authority exists to support the Fordham court's ultimate determination that some option contracts are governed by the Code while others are governed by the common law.

Moreover, the Fordham court apparently failed to realize that yet another type of option contract for the sale of goods is governed by the Code. "Agreements pursuant to which a buyer agrees to purchase what he needs or requires from a seller in exchange for the seller's promise to supply him are known as requirements contracts." At common law, requirements contracts were viewed by most courts as being illusory or lacking in consideration. However, a more modern view implies a promise by the seller to continue to produce or sell the goods in good faith, or implies that the buyer will maintain its business in order to take its good faith requirements. As a result, courts will imply

"Merchant" means 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 or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Id.

141. U.C.C. § 2-205.

A term which measured the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

Id.

143. 3 Williston, supra note 72, § 7:12, at 187.

144. Id. at 199 (citing Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975) (where the court stated: "In early cases, requirements contracts were found invalid for want of the requisite definiteness, or on the grounds of lack of mutuality.")).

145. Id. at 208-09 (citing Imperial Refining Co. v. Kanotex Refining Co., 29 F.2d 193 (Kan. 1928)).

146. Id. (citing Fashion House, Inc. v. K Mart Corp., 892 F.2d 1076 (R.I. 1989)) (this modern approach has been adopted by the UCC).
an obligation to carry out the [requirements] contract in the way anticipated, and not for purposes of speculation to the injury of the other party, recognizing at the same time, however, that either party might in good faith cease to have any output or requirements.147

While Fordham and the Easons did not have a requirements contract within the meaning of the Code, the purposes governing the UCC should have come into play in the court’s analysis. The possibility that the buyer in a requirements contract may not have any requirements, and thus, would not be bound to purchase from the seller, is analogous to an option contract for the sale of timber when the logging company is not explicitly bound to remove any of the timber.148 (Such agreements do not fail, but instead, under the UCC, imply a promise transforming these option contracts into “requirements contracts” governed by the Code.)149 Because the UCC explicitly governs this type of option contract,150 an option to purchase timber should similarly be governed by the UCC.

IV. Conclusion

The UCC is often praised for liberalizing the laws governing transactions in goods. There is no question that a careful reading and application of the Code can be tedious. However, the North Carolina Supreme Court should not have adopted a holding without first exploring all of the relevant issues. In Fordham v. Eason, the court conducted a mediocre analysis and ultimately reached the wrong decision. Perhaps the court’s conclusions were due to a bias for the common law rules governing contracts, or possibly due to an imprecise understanding of the UCC. Maybe the court hurriedly found what seemed to be an easy and correct solution. Whatever the reason, Fordham’s discussion of consideration was both inadequate and incorrect.

Further, the court’s contention that option contracts for the sale of timber, which is a good, are not governed by the UCC contradicts the purposes behind the Code as well as nearly every jurisdiction that has addressed the issue. Fisher was not binding law in North Carolina, and a more thorough venture into the law of contracts and the UCC should have taken place. Perhaps the most beneficial aspect of the Fordham opinion stems from the proposition that appellate courts

147. Id. at 211-14 (citations omitted).
148. See Fordham, 351 N.C. 151, 521 S.E.2d 701.
149. U.C.C. § 2-306(1).
150. Id.
should be especially careful when reviewing new and challenging areas of the law.

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