

1998

## Medical Buyer Fails to Prove that Letter Evidenced a Valid Requirements Contract

Karina Zabicki

Follow this and additional works at: <http://lawcommons.luc.edu/lclr>

 Part of the [Consumer Protection Law Commons](#)

---

### Recommended Citation

Karina Zabicki *Medical Buyer Fails to Prove that Letter Evidenced a Valid Requirements Contract*, 10 Loy. Consumer L. Rev. 217 (1998).  
Available at: <http://lawcommons.luc.edu/lclr/vol10/iss3/5>

This Recent Case is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

And, part three required that the “exercise of jurisdiction must be reasonable.”

Cybersell AZ relied on several cases for support, but the court found the cases unpersuasive because the holdings were broader than Cybersell AZ suggested. For example, Cybersell AZ relied on an Arizona case where the court stated that a defendant should not “escape traditional notions of jurisdiction” because of modern technology. *EDIAS Software International, L.L.C. v. BASIS International Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996).

In *EDIAS*, Plaintiff claimed that Defendant promulgated advertisements and defamatory assertions via the Internet. Defendant had a contract with Plaintiff, and it solicited business in the Arizona, the forum state. Additionally, Defendant’s employees traveled to Arizona for business engagements with Plaintiff. Hence, Defendant’s contact with the forum state was not limited to Internet correspondences.

The Ninth Circuit distinguished this case from the present one.

Unlike the defendant in *EDIAS*, Cybersell FL’s only contact with Arizona was the information it posted on its web page. As a result, the court found *EDIAS* unpersuasive for Cybersell AZ.

Instead, the Ninth Circuit determined that Cybersell FL took no steps to “purposefully avail” itself of Arizona’s benefits, whereas the defendant in *EDIAS* did. The court found that Cybersell FL did not conduct any commercial activity over the Internet in Arizona. Cybersell FL did not form contracts with anyone in the state. Moreover, the court found that the company did not actively encourage Arizona residents to use its site, there was no evidence that Cybersell FL pursued business in Arizona, Cybersell FL did not advertise in Arizona, and it derived no any income from Arizona.

The court also noted that Arizona citizens had no interaction with Cybersell FL’s web page. Not one person in Arizona “hit Cybersell FL’s web site.” Cybersell FL never sent electronic messages to people or

companies in Arizona. Moreover, there was no evidence that any Arizonan had enlisted Cybersell FL’s web assistance. Essentially, Cybersell FL’s presence in Arizona was negligible.

The court concluded that posting information on the Internet without taking steps to purposefully avail oneself of the laws of the forum state did not establish personal jurisdiction. Since the court concluded that Cybersell FL’s contacts with Arizona did not amount to purposeful activity in the state, the court stopped its analysis without examining the second and third prongs of its test. The case did not change any preexisting laws about personal jurisdiction simply because this case involved an Internet. Instead, the court demanded the same level of minimum contacts that it would in other cases. Accordingly, the court concluded that Cybersell FL did not establish the requisite minimum contacts with Arizona, and affirmed the lower court’s dismissal.

**CLR**

## Medical Buyer Fails to Prove that Letter Evidenced a Valid Requirements Contract

by Karina Zabicki

In *Orchard Group, Inc. v. Konica Medical Corp.*, 135 F.3d 421 (6th Cir. 1998), the United States Court of Appeals for the Sixth Circuit reversed the decision of the district court holding: (1) when a principal allows its agent to modify existing contracts, confirm contracts

and conclude contract negotiations between the principal and third parties without further approval, the doctrine of apparent authority will bind the principal to the contract formed by its agent; (2) the letter sent by the Konica Medical Corporation agent to an Orchard Group

Incorporated agent was not a valid contract because it neither contained a quantity term in compliance with the Statute of Frauds, nor met the definition of a “requirements contract” because nothing in the letter indicated how a quantity term could be implied; and (3) the letter

did not evidence an exclusive relationship between the two parties which would circumvent the need for either an implied quantity estimate, which could be derived from the parties' prior dealings, or a real quantity estimate.

Orchard Group Incorporated ("OGI") commenced litigation proceedings against Konica Medical Corporation ("Konica") on September 3, 1992 in the United States District Court in the Northern District of Ohio Eastern Division, claiming breach of contract and fraudulent misrepresentation. On May 27, 1994, upon the close of discovery, Konica filed a motion for summary judgment, which the district court denied on January 8, 1996. The case proceeded to trial on February 26, 1996 and culminated in a \$1,000,000 jury verdict in favor of OGI on its breach of contract claim and a verdict in favor of Konica on the fraudulent misrepresentation claim. OGI then filed a motion for pre-judgment interest on March 12, 1996. On March 21, 1996, Konica filed a motion for judgment as a matter of law, which essentially repeated all of the claims made in its motion for summary judgment filed in 1994. The district court denied both the motions of OGI and Konica on May 13, 1996 without filing a written opinion. The Sixth Circuit Court of Appeals only reviewed the district court's denial of Konica's motion for judgment as a matter of law filed in March of 1996, as it was based upon the complete trial record.

***Konica Agrees To Sell X-Ray Film To OGI At Discounted Prices To OGI Members***

OGI is an Ohio corporation formed in order to act as a buying group whose goal was to obtain group discounts on medical supplies for small non-hospital health care providers. During March of 1992, an OGI representative held discussions with Barbara Hunter, a Konica sales representative, regarding the Cleveland marketplace. The negotiations centered around Konica possibly supplying x-ray film at a discounted price to OGI members.

On March 31, 1992, Ms. Hunter, the agent for Konica, sent a written proposal to an OGI representative which set forth Konica's agreement to offer x-ray film to OGI members at a 40% discount. The two parties orally agreed to the terms of the letter and the OGI representative asked whether OGI needed to sign off on any document. Ms. Hunter claimed this was unnecessary, stating that the letter was the written agreement. Ms. Hunter received her boss's approval of this letter and subsequently relayed this information to the OGI representative. Previously, while employed by a different company, the OGI representative had dealt with both Ms. Hunter and her boss on similar written proposals. These proposals did not indicate that the OGI representative needed approval for the offered terms from anyone with a higher position than Ms. Hunter and no one at Konica had told the OGI representative that Ms. Hunter had limited authority; in fact, Konica knew that Ms. Hunter was making such proposals.

***Konica Agent Sends A New Letter To OGI Which Modifies The Previous Deal***

In early April 1992, Ms. Hunter put the OGI representative in touch with Robert Weaver, Konica's Southwest Regional Manager. Regional managers were two tiers below the top position at Konica. Mr. Weaver relayed to the OGI representative that a 45% discount to OGI customers for the x-ray film would be more competitive. Subsequently, Mr. Weaver told Ms. Hunter that he and the OGI representative had negotiated a 45% discount. Ms. Hunter delivered these new terms in a letter dated April 13, 1992 to the OGI representative "in return for a film commitment of 36 months." The OGI representative orally accepted this new offer and Ms. Hunter again informed the OGI representative that the offer stood without any need for further approval.

A few weeks following Ms. Hunter's April 1992 letter and with Ms. Hunter's knowledge, OGI began soliciting group membership for the discounted price. During this time, Robert Weaver, the Konica regional manager who had initiated the 45% discount, told a potential OGI member of the 45% discount that Konica had agreed to offer OGI members. Nonetheless, three weeks following the April 13 letter, Konica informed OGI that there was no deal—Konica did not enter into any such agreements and would not approve of this type of deal. Unable to find another supplier, OGI was forced to close its doors.

***OGI Files Suit For Breach Of Contract And Fraudulent Misrepresentation***

OGI initiated this lawsuit

claiming that Konica breached its contract with OGI and that Konica had made fraudulent misrepresentations. Following the close of discovery, Konica moved for summary judgment on these claims. Konica stated that the alleged contract was invalid as it did not comply with the Statute of Frauds and was invalid as a requirements contract. After this motion was denied and the trial completed, Konica reasserted these claims in its motion for judgment as a matter of law, adding the argument that the Konica representatives that dealt with OGI lacked the authority to bind the corporation to the alleged contract. The Sixth Circuit Court of Appeals proceeded to resolve these issues.

### ***Konica Is Bound By Agent's Actions Based On Doctrine Of Apparent Authority***

In appealing its motion for judgment as a matter of law, OGI used the doctrine of apparent authority to claim that Konica's agents bound Konica to the alleged contract with OGI. In deciding this issue, the Court cited *Master Consolidated v. BancOhio Nat'l Bank*, 575 N.E.2d 817 (Ohio 1991), to explain the doctrine of apparent authority. Apparent authority is determined by the actions of the principal, not the agent. It is created if a principle either holds out an agent to the public as having the authority to act or knowingly acquiesces in the agent's acts demonstrating authority. In addition, the person dealing with the agent must have a reasonable, good-faith belief that the agent possessed the

requisite authority to bind the principal. When these two factors are met, the agent binds its principal to a contract.

The Court then proceeded to analogize the facts of *General Electric Co. v. G Siempelkamp GmbH & Co.*, 29 F.3d 1095 (6th Cir. 1994), decided under the *Master Consolidated* standard, to the facts in the present case. In *General Electric*, the Sixth Circuit Court of Appeals held that a manager bound his principal, GE, to a contract with a manufacturer because of his apparent authority. In that case, a contract was evidenced by a purchase order from GE to the manufacturer. The manufacturer submitted a counter-offer, which the GE manager accepted by signing on the "accepted" blank. The parties had followed this same procedure one year prior, with the same manager negotiating and concluding the contract. The court ruled that by these actions, the principal held out the manager as possessing the necessary authority to act as its agent. Relating the foregoing facts to the present case, the Court stated that Ms. Hunter also had prior dealings with the OGI agent and in all of those dealings, Ms. Hunter had orally accepted OGI's proposals, assuring the OGI agent that no further confirmation was necessary.

The Court cited another similarity between the facts of GE and the facts of the present case. In both cases, there was an absence of any express direction from the principals to the third parties that their agents lacked the authority to bind them. General Electric never expressly informed the German manufacturer that the manager did not have the

authority to bind it, just as Konica never expressly informed OGI that its agent's authority was limited.

A third analogous set of facts was found in the contract modifications. Just as the manager in GE continually signed contractual modifications throughout the parties' negotiations, Ms. Hunter had modified the originally negotiated discount of 40% to 45% in the April 13 letter she sent—an increase negotiated by the OGI representative and Konica's regional manager, not Ms. Hunter.

In holding that Ms. Hunter did have the apparent authority to bind Konica, the court distinguished *Dayton Bread Co. v. Montana Flour Mills Co.*, 126 F.2d 257 (6th Cir. 1942), a case where the court found that a salesman lacked the apparent authority to bind the company. In distinguishing *Dayton* from the case at hand, the Court found that the *Dayton* decision was influenced by an Ohio law which forbade selling commodities without an intent to deliver the commodities in order to speculate on price fluctuations. In contrast, the Court reasoned that in this case, the Konica agents were executing valid agreements under Ohio state law.

When the jury decided the case at the trial court level, it did not specify whether apparent authority or implied authority bound Konica to the terms of the April 13 letter. The Court did not discuss whether Konica's agent would have bound Konica by implied authority, which is found when an agent, by his words or conduct, induces a party to believe that the agent has the requisite authority to bind the principal. The Court stated that

while the elements of apparent authority are factual matters that a jury determines, apparent authority is a legal question and reasoned that it was obvious that this case was decided under the doctrine of apparent authority.

### ***OGI Fails To Convince The Court That The April 13 Letter Was A Requirements Contract***

The breach of contract that OGI alleged was evidenced by the April 13 letter from Ms. Hunter to the OGI representative. The Court held that, contrary to OGI's position, the April 13 letter did not evidence a valid "requirements contract" because nothing in the letter expressed how a quantity term could be calculated or implied. Furthermore, the contract did not indicate exclusivity in the dealings between the two parties in order to circumvent the necessity for a stated or implied estimate so as to form a valid requirements contract.

Under the Statute of Frauds provision in the Uniform Commercial Code ("UCC"), codified in Ohio as Ohio Revenue Code § 1302.04, a contract for the sale of goods for \$500 or more is unenforceable unless there is some writing which evidences the contract between the two parties. A necessary term for enforceability is a quantity term. In the present case, there was no express quantity term, yet OGI argued that the contract was nonetheless enforceable because it met the definition of a "requirements contract". The court determined that the April 13 letter did not meet the definition of a requirements contract

under UCC 2-306(1).

A requirements contract derives its name from the fact that one party supplies material to another party for as much material as necessary to run its specific business. The Court set forth the standard for a requirements contract, citing *Cyril Bath Co. v. Winters Industries*, 892 F.2d 465, 467-68 (6th Cir. 1989):

A term which measures the quantity by the output of the seller or 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.

The April 13 letter did not meet this definition because it lacked a stated estimate and because there was no prior course of dealing between the two parties from which to formulate an implied quantity term. Disposing of this argument, the Court proceeded to resolve the final issue.

The Court rejected OGI's second argument that the contract indicated an exclusive agreement between Konica and OGI, which may have allowed the enforceability of the requirements contract without the necessary quantity term. A party may forego a quantity term if it can demonstrate that the contract is exclusive between the two parties. The Court cited two cases where other circuit courts held that the exclusive agreements at issue were enforceable requirements contracts

even though missing the quantity terms, but distinguished those cases from the present case. In *O.N. Jonas, Inc. v. Badische Corp.*, 706 F.2d 1161 (11th Cir. 1983), exclusivity was found on the basis of a memo which summarized the history of the parties' prior dealings and stated, "A potential program utilizing our yarn was discussed in 1977 and we indicated that we would supply the yarn if we were provided a Heller guaranty on our form." *Id.* at 1164. The Eleventh Circuit Court of Appeals held that the evidence dispelled a need for a quantity term because both parties intended that their agreement be a requirements contract and cited the appellant's good-faith need for the negotiated product. The Third Circuit Court of Appeals in *Advent Systems Limited v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991), relied on *O.N. Jonas* and found that an exclusive contract did not need a quantity term because "good faith performance itself supplies a sufficient notice of quantity." In citing the foregoing cases, the Court reasoned that demanding strict compliance with the quantity term in the Statute of Frauds would undermine business reality and practices because a purchaser often does not know the exact amount of goods he will need.

The Court found that unlike in *O.N. Jonas*, the April 13 letter did not create an exclusive relationship because an intent to create was not apparent from the letter. The letter merely stated that Konica "is pleased to offer these terms in return for a firm commitment for 36 months." The Court found that rather than indicating exclusivity, the letter was actually open-ended because it

indicated that OGI would not have to order any units and would still be in compliance with the terms of the letter.

***The April 13 Letter Was Not A Valid Requirements Contract***

In conclusion, the Court found that although Konica's agent bound Konica to the terms of the April 13 letter through her apparent authority, nonetheless, the letter was not an enforceable requirements contract because it did not indicate how a

quantity term could be derived and further the letter did not evidence an exclusive requirements contract which would render the quantity term unnecessary.

**CLR**

## Third Circuit Finds TWA Insolvent

by Andrew Geier

In *In re Trans World Airlines, Inc. Nos. 97-7037, 97-7082, 1998 WL 15848 (3rd Cir. Jan. 20, 1998)*, the Third Circuit affirmed a bankruptcy court's finding that Trans World Airlines ("TWA") was insolvent under the formula prescribed by 11 U.S.C. § 101(32)(A) because the face value of its liabilities exceeded the fair market value of its assets. The Third Circuit ruled that, because TWA was insolvent on the date it deposited \$13.7 million with the clerk of the district court, the deposit constituted a transfer which was a voidable preference under 11 U.S.C. § 547(b) and was therefore unreachable by TWA's creditors.

***TWA Filed for Chapter 11 Bankruptcy***

In October, 1991, the United States District Court for the Southern District of New York awarded Travellers International A.G. ("Travellers") \$12.3 million for damages it incurred as a result of

TWA's breach of contract. See *Travellers Int'l A.G. v. Robinson*, 982 F.2d 96, 97 (3d Cir. 1992). The following November, TWA deposited \$13.7 million (which represented a recalculation of the judgment amount plus an eleven percent interest factor) with the clerk of the district court to obtain a stay of enforcement of the judgment. See *In re Trans World Airlines*, 180 B.R. 389, 392 (Bankr. D.Del. 1994).

In January, 1992, TWA filed a timely petition for reorganization under Chapter 11. TWA then attempted to prevent Travellers from making a claim to the deposit to satisfy its judgment by filing a complaint against Travellers in bankruptcy court. TWA sought a declaration that the \$13.7 million deposit was a voidable preferential transfer under 11 U.S.C. § 547(b) and could not be reached by Travellers in satisfaction of its judgment. See *Robinson*, 982 F.2d at 97. This section, commonly known as the "preference statute", provides in relevant part that:

"[a] trustee may avoid any

transfer of an interest of the debtor in property — (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before the transfer was made; (3) made while the debtor was insolvent; (4) made within 90 days before the date of the filing of the petition; (5) that enables such creditor to receive more than such creditor would receive if — (A) the case were a case under Chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title."

***Travellers Makes a Claim to TWA's Deposit***

Travellers contended that TWA's deposit did not fall within the preference statute because not all elements of the statute were satisfied. Specifically, Travellers argued