



*In re Kiddie-Gym
Systems, Inc.*

July 1997, Test 1



Preface

The National Conference of Bar Examiners inaugurated the Multistate Performance Test (MPT) in 1997. This publication is a reprint of one of the first two MPTs, which were administered in July 1997 in eight states: Colorado, District of Columbia, Georgia, Hawaii, Iowa, Missouri, Nevada, and New Mexico.

The instructions for the test appear on the back cover. For further information regarding the test, see the **MPT Information Booklet**.

In re Kiddie-Gym Systems, Inc.

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FILE

**Elmore, Anderson & Reed
Attorneys at Law
3722 Page Park Road
Bradley Center, Franklin 33092
(489) 555-7108**

M E M O R A N D U M

To: Applicant
From: Marla Reed
Date: July 29, 1997
Subject: Kiddie-Gym Systems, Inc.

Our client, Kiddie-Gym Systems, Inc.(KGS), has been in business for almost a year. It furnishes and installs prefabricated indoor playground equipment for developers and operators of shopping malls, day-care centers, fast-food outlets, and other entities that want to provide such facilities for children of their customers. Earlier today, Jerry Martin, the president of KGS, came in to get our advice on a business problem involving playground equipment KGS bought from Poly-Cast, Inc. and installed at Bradley Center Mall, one of Cornet Development Corporation's shopping malls. The playground equipment was destroyed by a fire at the mall. I told him we would give him a written opinion within a few days.

I've transcribed my notes of the discussion I had with Mr. Martin, and they are included in the file along with some documents Mr. Martin left with me. I've also included parts of the Franklin Commercial Code (which is identical in substance to the Uniform Commercial Code) and some cases that may or may not be relevant. Here's what I would like you to do for me:

Draft for my signature an opinion letter to Mr. Martin addressing the following questions:

- (1) As between KGS and Cornet, which bears the risk of loss for playground equipment destroyed in the fire at Cornet's Bradley Center shopping mall?
- (2) Is KGS obligated to pay the shipping and handling charges billed by Poly-Cast?

Attached for your guidance is a memorandum regarding our firm's practice in writing opinion letters.

**Elmore, Anderson & Reed
Attorneys at Law
3722 Page Park Road
Bradley Center, Franklin 33092
(489) 555-7108**

MEMORANDUM

September 8, 1995

To: Associates

Re: Opinion Letters

The firm follows these guidelines in preparing opinion letters to clients:

- State each client question independently.
- Following each question, provide a concise one-sentence statement giving a "short answer" to the question.
- Following the short answer, write an explanation of the issues raised by the question, including how the relevant authorities combined with the facts lead to your conclusions and recommendations.
- Bear in mind that, in most cases, the client is not a lawyer, so use language appropriate to the client's level of sophistication. Remember also to write in a way that allows the client to follow your reasoning and the logic of your conclusions.

NOTES OF DISCUSSION WITH JERRY MARTIN, PRESIDENT OF KGS
July 29, 1997

KGS installs indoor molded plastic playground equipment in places like fast-food restaurants, shopping malls, day-care centers, etc.

- A little over 2 months ago, KGS landed its largest contract so far—with Cornet Developers—3 major shopping centers in Franklin—1st one, in Bradley Center, just completed and opened to the public on July 23, 1997—2 other malls under construction. Contract drafted by Cornet's attorneys.
- Martin shopped Cornet's specifications around and found a new supplier, Poly-Cast, Inc., located in Copley, about 100 miles from here—Poly-Cast's playground equipment meets Cornet's specs—got what he thought was very favorable pricing from Melissa Parker, Poly-Cast's sales manager.
- Poly-Cast shipped 1st playground system to Bradley Center job site on time and in good condition—it arrived at the site in heavy protective wooden crates—unnecessary as far as Martin is concerned—it just costs Poly-Cast money to do the crating and costs KGS time and labor to uncrate and dispose of the wood.
- Re Bradley Center Mall, KGS crew began assembly on July 21, 1997 and finished physical installation of playground equipment and general site clean-up on July 22—removed construction barriers at end of the day and told Charlie Short, Cornet's job superintendent, Martin would be back the next day to do final site check and crew would return within 2 weeks to do final "tune-up."
- Martin went to job site the next day, July 23, about 11:00 a.m. and found 20 - 30 kids already playing on the equipment; checked with Charlie Short and learned that he had given the mall manager the green light to let the kids begin using the playground—Martin did a visual check, found things in order, and left, intending to send crew back in two weeks to do final tune-up per contract.
- Fire broke out at Bradley Center Mall on July 24—damaged part of the mall and destroyed the playground equipment—best guess is that the fire started from a cigarette someone threw into a trash bin.

- Charlie Short has told Martin that KGS won't get paid for Bradley Center job until it installs replacement equipment—Charlie also said no pay because title to the playground system hadn't yet passed to Cornet.
- Martin says Short had already given his OK for kids to begin using the equipment—can't understand why KGS should bear the loss—the fire wasn't KGS's fault—KGS hasn't been able to afford insurance for this kind of loss; is pretty sure Cornet is insured. KGS might be willing to make some accommodation on labor costs during installation of replacement system at Bradley Center Mall, at least to the extent of Cornet's insurance deductible, if any.
- Obviously, KGS can't perform final tune-up on the system that was destroyed—Martin says final tune-up is no big deal—the Poly-Cast systems shouldn't need much if any final adjustments and, at most, it would've been an hour's work by 2 workers.
- To make matters worse, Martin just received Poly-Cast's invoice for the first system, and Poly-Cast has included a \$2,500 charge for shipping and handling (amount not surprising, judging from the fancy wooden crate job)—Martin got a range of quotes that would meet specs from Melissa Parker, Poly-Cast's sales manager; the one for Model PC 443-7 was \$25,000 per playground system—no mention of additional charges—that's why KGS's purchase order states "price all-inclusive."
- Martin didn't look too closely at Poly-Cast's acknowledgement form when he received it on or about June 16, 1997, other than to notice that it agreed with the price on KGS's purchase order—just yesterday, noticed the fine print re shipping and handling.
- Even if KGS doesn't have to pay the cost to replace the Bradley Center unit, if KGS has to pay the \$2,500 in freight charges, KGS will barely break even (maybe even take a slight loss) on the Cornet contract after labor and overhead. If he'd known, he could have had his own driver pick up the shipment at Poly-Cast plant—no trouble for him to do that.
- KGS is between a rock and a hard place with respect to both Cornet and Poly-Cast—can't afford to eat the loss on the Bradley Center Mall or agree to pay the Poly-Cast freight, but needs to preserve relations with both because of the other 2 malls.

CONSTRUCTION AND SERVICE CONTRACT

This contract for construction and services is made and entered into by and between Cornet Development Corporation ("Cornet") and Kiddie-Gym Systems, Inc. ("KGS") this 23rd day of May, 1997.

1. Work: KGS shall furnish all labor, equipment and materials necessary for the installation of molded plastic indoor playground equipment ("playground systems") at each of the three (3) Cornet shopping malls listed below. The playground systems shall be installed at locations designated by Cornet within each mall and shall conform to the specifications prepared by Cornet and delivered previously to KGS. Not later than 30 days after completion of installation of each playground system, KGS shall perform a follow-up inspection and make such final adjustments ("tune-up") of the system as shall be required, if any, as the result of initial use by patrons of the mall.

2. Mall Sites and Projected Opening Dates: KGS shall perform its work at the following mall sites and shall complete installation no later than one day before the projected opening date of each mall: Bradley Center, due to open July 23, 1997; Sedona Hills, due to open September 29, 1997; and Mayfair, due to open January 26, 1998.

3. Price and Payment Terms: The total price to be paid by Cornet to KGS is \$120,000, each playground system to be paid for at \$40,000 ("site price") upon completion of the work at each mall site.

4. Passage of Title: Title to each playground system shall pass to Cornet upon completion by KGS of the final tune-up of the system.

5. Penalty for Delay: KGS shall forfeit \$500 for each day of delay in the completion of the installation of the playground system at each site.

6. Entire Agreement: This writing sets forth the entire agreement of the parties, and any prior or contemporaneous promises or representations made and not set forth in this writing shall be of no effect. No modification of this agreement may be made except in a writing executed by both parties.

Cornet Development Corporation

Kiddie-Gym Systems, Inc.

By _____
Thomas G. Bodette
Vice President for
Development

By _____
Jerome A. Martin
President

PURCHASE ORDER

Date: May 29, 1997

No. 447A

Kiddie-Gym Systems, Inc.
4722 Industrial Way
Bradley Center, FN 33087
(489) 554-6249

Seller: Poly-Cast, Inc.
790 Polypropylene Way
Copley, FN 33124

Ship To: Per Instructions

This constitutes order by Kiddie-Gym Systems, Inc. of three (3) Poly-Cast molded playground systems, Model No. PC443-7. Systems per sample shown and to conform to Cornet Development specifications furnished to Poly-Cast.

Systems to be delivered by Poly-Cast to Cornet Development job sites per instructions to be given by Kiddie-Gym Systems. First system to be delivered to Bradley Center Mall job site not later than July 21, 1997. Delivery to other job sites (Sedona Hills and Mayfair) per later instructions.

Price: \$25,000 per unit, all-inclusive, per quote from Melissa Parker. Payable net 60 days after delivery.

General Conditions

Seller warrants all goods are of merchantable quality and fit for the intended purpose. Seller warrants that all goods are free and clear of all liens and claims by third parties and that Seller possesses all rights to sell said goods free and clear.

Date: May 30, 1997

Authorized Signature: _____
Jerome A. Martin

ACKNOWLEDGEMENT OF ORDER

POLY-CAST, INC.
Premier Molded and Extruded Plastic Products
790 Polypropylene Way
Copley, FN 33124
(489) 550-0900

No. 277695

Date: June 9, 1997

BuyerKiddie-Gym
4722 Industrial Way
Bradley Center, FN 33087
(489) 554-6249

Ship To: Per Instructions

Contact: Jerry Martin

Poly-Cast hereby acknowledges your Order per your PO #447A dated May 29, 1997:

- Three (3) Model PC443-7 playground systems
Unit price \$25,000
- Systems to conform to Cornet Development specs
- Will ship first system to Cornet site at
Bradley Center Mall by July 21, 1997 per instructions
- Will wait for shipping and delivery instructions on
Sedona Hills and Mayfair sites
- Payable net 30 days from date of invoice

Arthur Haskins
Vice President/Sales

Conditions Applicable To All Sales: All goods subject to limited warranties of merchantability and fitness. All shipments subject to charges for shipping and handling to be paid net 30 days from date of invoice. Goods are guaranteed against defects discovered and reported within ten (10) days of delivery. Late charges at 10% per month for past due payments; minimum late charge \$10.00. Shipments travel at the risk and cost of Buyer. Risk of loss passes to Buyer at time of identification

of goods to the contract at Seller's loading dock.

POLY-CAST, INC.
Premier Molded and Extruded Plastic Products
790 Polypropylene Way
Copley, FN 33124
(489) 550-0900

I N V O I C E

Date: July 25, 1997

No. 114076-96

Customer: Kiddie-Gym
4722 Industrial Way
Bradley Center, FN 33087

Attention: Jerry Martin
Your PO# 447A

<u>Quantity</u>	<u>Description</u>	<u>Price</u>
1	Poly-Cast playground system - Model PC443-7 delivered July 21, 1997 per customer's instructions	\$25,000.00
	<u>Shipping & handling</u>	<u>\$ 2,500.00</u>
	Total Due (net 30 days)	\$27,500.00

Make checks payable to Poly-Cast, Inc.

LIBRARY

Franklin Commercial Code

* * * *

§ 2102. Scope: Unless the context otherwise requires, this division of the Commercial Code applies only to transactions in goods; it does not apply to any transaction which is solely for the sale of services.

* * * *

§ 2104. Definitions: "Merchant"; "Between Merchants":

(1) "Merchant" means a person who deals in goods of the kind . . . involved in the transaction

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

§ 2105. Definitions: "Goods": "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.

* * * *

§ 2207. Additional Terms in Acceptance or Confirmation:

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

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) The offer expressly limits acceptance to the terms of the offer;

(b) They materially alter it; or

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

(3) Conduct by both parties which 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 a 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 this

code.

* * * *

§ 2319. F.O.B.:

(1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which

(a) When the term is F.O.B. the place of shipment, the seller must at that place ship the goods and bear the expense and risk of putting them into the possession of the carrier; or

(b) When the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them.

* * * *

§ 2401. Passing of Title: Each provision of this division of this code with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision of this code refers to title. Insofar as situations are not covered by the other provisions of this division of this code and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract. Subject to these provisions, title to goods passes from the seller to the buyer in any manner and on conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods.

* * * *

§ 2503. Manner of Seller's Tender of Delivery: Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery.

* * * *

§ 2509. Risk of Loss in the Absence of Breach: The risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery. The provisions of this section are subject to contrary agreement of the parties.

Coakley, Inc. v. Washington Plate Glass Co.

Franklin Court of Appeal (1991)

PER CURIAM: Washington Plate Glass Co. had a contract "to furnish and install aluminum and glass curtain wall and storefront work" on a building owned by Coakley, Inc. To accomplish its contractual undertaking, Washington purchased the glass required from Shatterproof Glass Corp. Other materials were acquired elsewhere.

The contract price under the Coakley/Washington contract was \$262,500. The glass purchased from Shatterproof cost \$87,715. The other materials necessary for the performance of the contract, aluminum, anchor clips, fittings, field fasteners, etc., cost approximately \$80,000.

Within a year, the glass began to discolor. When Coakley complained to Washington and Shatterproof, they declined to replace the glass, so Coakley filed suit against them in the Franklin District Court. Coakley alleged breach of implied warranties of merchantability and fitness for a particular purpose created by Franklin Commercial Code §§ 2314 and 2315.

Shatterproof moved for dismissal on the sole ground that the FCC was inapplicable. The District Court granted the motion and Coakley appeals.

Whether the FCC applies turns on whether the contract between Coakley and Washington involved principally a sale of goods or a

provision of services. Unless there has been a buyer of goods, the implied FCC warranties of merchantability and fitness do not apply. Thus, the question as to the availability of warranties comes down to whether the transaction between Coakley and Washington was a sale of goods or the provision of services. Any requirement for privity between Coakley and Shatterproof is abolished if the FCC applies. See FCC § 2314(1)(b): "Any previous requirement of privity is abolished as between the buyer and the seller in any action brought by the buyer."

The cases dealing with this issue turn upon whether the thrust of the contract is to supply goods or to furnish services. The mixed character of the contract does not remove it from the ambit of the sales division of the FCC. The words of § 2102 of the FCC support this conclusion: The sales division of the FCC "does not apply to any transaction which is solely for the sale of services."

Therefore, we apply the test articulated in *Wilson v. Sharpe* (Franklin Supreme Court, 1974): in situations where the contract is a mixed contract involving both the sale of goods and the rendition of services, it will be deemed that the contract comes within the sales division of the Franklin Commercial Code if the value of the goods being furnished under the contract exceeds one half of the total contract price. By that measure, at least, it can be clearly said that the predominant factor in

the contract is the sale of goods and that the sale of goods is more than merely incidental to the contract.

Applying that principle to the case at hand, we note that more than one-half of the price in the Coakley/Washington contract is attributable to the value of the goods to be furnished thereunder. The contract therefore falls within the Franklin Commercial Code. Accordingly, we reverse.

Hughes v. Al Green, Inc.

Franklin Court of Appeal (1993)

Laura Hughes purchased a new 1989 Lincoln Continental from Al Green Dodge-Lincoln. She tendered a cash down payment and arranged to finance the balance through a local bank. In the meantime, she completed the necessary application for a certificate of title. The parties agreed that Hughes would take immediate possession of the automobile but that she would return it to the dealership on the following Monday for certain new car preparations and installation of the CD player. En route from the dealership to her home, Hughes was involved in a collision and the automobile was substantially damaged. The title documents, showing Hughes as the legal owner, were subsequently delivered to her.

Hughes refused to pay the balance and sued Al Green, Inc. for breach of contract alleging that the vehicle had been transferred to her in a damaged condition. Her claim is based on the notion that, when the certificate of title was issued to her, thereby legally transferring title to her, she no longer possessed that for which she had bargained, i.e., an undamaged 1989 Lincoln Continental.

A jury found for Green. The case is now before us on appeal.

We must determine whether the buyer or the seller bore the risk of loss or damage to the automobile at the time of the collision. To say that the buyer had the risk of loss at the time the goods were destroyed is to say that the

buyer is liable for the price. To say that the seller had the risk of loss at the time the goods were destroyed is to say that the seller is liable in damages to the buyer for nondelivery unless he tenders a performance in replacement for the destroyed goods.

Franklin Commercial Code § 2509 provides that "the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery." This provision represents a significant shift away from the prior importance of the concept of title in determining the point at which risk of loss passes from seller to buyer. Under the common law, title to the contract goods determined the locus of risk of loss. Under the Commercial Code, however, each provision relating to the rights, obligations and remedies of sellers and buyers applies irrespective of title except where the provision of the code itself refers to such title. (FCC § 2401.)

FCC § 2509 sets forth a contractual approach, as distinguished from the property concept of title, to solving issues arising when goods are damaged or destroyed. The section focuses on specific acts, such as tender of delivery by the seller or receipt of the goods by the buyer. Title is relevant under this section only if the parties provide that risk of loss shall depend upon the locus of title. Unless the contract specifically provides that risk of loss depends

upon the locus of title, it is irrelevant where title resides.

In this case, the buyer had received possession of the automobile as partial execution of a merchant-seller's obligations under a purchase contract. There is no question but that the buyer, having physical possession and use of the vehicle, had "receipt" within the meaning of the FCC. Nothing in the contract purported to shift the risk of loss dependent upon the locus of title. Thus, Hughes, as a buyer in receipt of goods identified to the contract, must bear the risk of loss of the car's value resulting from the collision.

Affirmed.

Album Graphics, Inc. v. Craig Adhesive Company

Franklin Court of Appeal (1995)

Plaintiff Album Graphics, Inc. brought a complaint against Craig Adhesive Company alleging a breach of express and implied warranties. The trial court dismissed.

Album manufactures containers for cosmetics. Craig manufactures and sells adhesives (glue). A salesperson employed by Craig visited Album's plant and, after discussions with Album's manufacturing superintendent, offered to manufacture a special glue that would meet Album's needs for the assembly of newly designed cosmetics packages. During a later visit, the salesperson demonstrated the glue and instructed plaintiff's personnel on its use. As a result of the two meetings, Album ordered a quantity of the glue and used it on the new packages. Album sold a number of the new cosmetics packages to a customer. The packages fell apart, and Album had to recall and replace them using a different glue.

The parties in the present case do not dispute that a contract for sale was entered into, or that express or implied warranties may have been created on the basis of the facts pleaded in Album's complaint. Craig alleges that such warranties were effectively disclaimed. Craig asserts its disclaimer theory on two grounds. First, each container of glue delivered to Album had a label on which there was conspicuously printed language to the effect that the only warranty made was that all goods were manufactured of standard materials and, if any material proved to be defective, Craig

would either replace the goods or refund the price. Second, Craig's invoices also contained explicit disclaimers of warranties.

Though it may be questionable that the labels and invoices are "confirmatory memoranda" of the agreement reached by the parties, we will, for the purpose of analysis, accept the defendant's contention and assume that they are. Hence, they would be "written confirmation" of the prior agreement entered into by the parties as that term is used in Franklin Commercial Code § 2207.

The general purpose of § 2207 is to allow the parties to enforce their agreement, whatever it may be, despite discrepancies between an oral agreement and a written confirmation, and despite discrepancies between a written offer and a written acceptance. Also, it allows for additional terms stated in an acceptance or written confirmation to become terms of the agreement in certain cases. Hence, the section allows a written confirmation to "operate" as acceptance for the above purposes.

Here, the question is only whether the additional terms in the written confirmations became part of the agreement. For this, we must look at § 2207(2), which states in part: "Between merchants such terms become part of the contract unless: *** (b) They materially alter it. . . ."

Official Comment 4 to the FCC gives as

examples of typical clauses that would materially alter the contract and so result in surprise or hardship if incorporated without the express awareness by the other party: "a clause negating such standard warranties as that of merchantability or fitness in circumstances in which either warranty normally applies. . . ." We believe that Craig's unilateral disclaimer of warranties and limitation of damages clauses are such as to result in "surprise or hardship" and therefore could not become part of the contract under § 2207(2) because they "materially alter it." On that basis alone, Craig's disclaimers were ineffective.

There is, however, an additional basis for reaching the same result. Here, the parties effectively performed their contract without taking cognizance of the conflicting terms that later resulted in this dispute. That is to say, Album ordered the goods, Craig shipped them, and Album used them. In such circumstances, § 2207(3) comes into operation. Under that section, if the conduct of the parties recognizes the existence of a contract, then a contract for sale is formed even though the writings of the parties do not establish a contract. In such a case, the contract contains "those terms on which the writings of the parties agree," and all other terms either "drop out" or are supplied by the "gap-filling" provisions of the Commercial Code.

In the present case, since Craig's labels and the invoices do not contain a term which also appears as part of the writing sent by Album, the label and invoice terms cannot become

part of the contract. The terms relating to the warranty issue are then supplied by §§ 2314 and 2315, which are sections of the Code that statutorily create the implied warranties of merchantability and fitness for a particular purpose. The warranties created by those sections are imported as "gap fillers" into the contract by operation of § 2207(3). The contract is then deemed to contain the implied warranties. Accordingly, we reverse.

NOTES

INSTRUCTIONS

1. You will have 90 minutes to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.
3. You will have two kinds of materials with which to work: a File and a Library. The File contains factual information about your case. The first document is a memorandum containing the instructions for the task you are to complete.
4. The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.
5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 45 minutes to organizing and writing after you have studied and digested the materials. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet.
7. This performance test will be graded on your responsiveness to instructions regarding the task you are to complete given to you in the first memorandum in the File and on the content, thoroughness, and organization of your response.