STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2007AP1120
Dane County Circuit Court Case No. 05-CV-3412
Honorable Sarah B. O'Brien, Presiding

RICHARD G. McLELLAN, RICK BOGLE, and
PRIMATE FREEDOM PROJECT,

Plaintiffs-Respondents-Cross-Appellants-Petitioners.

v.

ROGER L. CHARLY,

Defendant-Appellant-Cross-Respondent.

RESPONSE TO PETITION FOR REVIEW
OF DEFENDANT-APPELLANT-CROSS-RESPONDENT ROGER L. CHARLY

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INTRODUCTION

I. THE ISSUES.

The Petition presents two issues regarding the enforceability of an option to purchase real estate located at 26 North Charter Street, Madison, Wisconsin.[1] Applying settled Wisconsin law, the Court of Appeals held that the option did not bind the Seller because the Buyers failed to provide the Seller with any consideration for the option.

Buyers' primary issue asks this Court to overturn over a century of settled Wisconsin real estate contract law in favor of adopting a contrary position proposed in 1981 in the Restatement (Second) of Contracts. There are three compelling reasons why the Court should not accept review to consider this issue:

First, even if this Court were otherwise interested in considering adoption of the Restatement position, the facts of this case would not permit this Court to reach the issue.

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[1] For clarity, plaintiffs-respondents-cross-appellants-petitioners Richard G. McLellan, Rick Bogle and the Primate Freedom Project are referred to collectively as "Buyers," and defendant-appellant-cross-respondent Roger L. Charly is referred to as "Seller."

Second, Buyers' request to overturn a century of settled Wisconsin substantive law should be directed to the Legislature, not this Court.

Third, the Restatement position would disserve the public interest in the state by undermining the certainty and predictability of commercial real estate sale transactions. The flaws in the Restatement position likely explains why, in the twenty-seven years since it was issued, only one state – Texas – has adopted it.

Buyers' second issue is whether to change settled real estate law so courts may infer sufficient consideration from a purchase contract to bind a seller on the option portion of the agreement or from unbargained for third party efforts to arrange financing for the purchase. These are fact-driven inquiries about error correction and would not advance this Court's law development function if review were granted. Although Buyers fault the factual determinations made by the lower court on the issue and the fact that the Court of Appeals relied on authority from other jurisdictions, Buyers do not point to a single case from Wisconsin or any other jurisdiction which directly supports the novel position they urge this Court to adopt.

II. BACKGROUND.

The property at issue is located between the Wisconsin National Primate Research Center and the Wisconsin Harlow Center for Biological Psychology, the two major primate research facilities operated by the University of Wisconsin (the "University"). Buyers are animal-rights activists who openly acknowledged in the trial court that, if the option is enforced against Seller, they intend to use the site as a platform for staging animal rights protests aimed against the University's primate research centers.

One of the Buyers testified that:

> (c) One of his goals is to shut down all of the primate research centers in the U.S. . . .
>
> (g) If 1,000 people were willing to join him, he fantasizes about attacking the UW Primate Center with a sledge-hammer and having others take his place after he gets hauled away. Ex. 17.

(Trial Court Finding of Fact 38, App. 037, paraphrasing Rick Bogle. *See also* extensively quoted testimony of Mr. Bogle in the Petition at pages 14-16.)

The Option to Purchase ("Option") was drafted by Buyers' lawyer (Finding of Fact 14, App. 036). Seller did not have an attorney review it before it was executed (*id.*).

The Option does not recite or otherwise describe what consideration was provided to the Seller to support the Option. *See* App. 074. It does state that "[t]here shall be no payment due Seller for the rights granted hereunder" (*id.*). It is undisputed that no monetary consideration was bargained for or paid by Buyers to Seller for the Option.

After the Option was signed, but before it was exercised or any consideration paid to Seller, Buyers used the site to stage a protest rally directed against the two flanking University primate research centers. Mr. Bogle "unveil[ed] a 4 x 8 foot sign reading 'Future Home of National Primate Research Exhibition Hall' on which was a picture of a monkey with a devise screwed into his skull." (Finding of Fact 22, App. 026.)

Thereafter, Seller informed Buyers in writing that he was revoking the Option to them because it was "voidable and void due to lack of consideration." (Finding of Fact 29, App. 036.) Shortly thereafter Seller received and accepted "an Option to Purchase the property from the UW in the amount of $1 million" (Ex. 27) [which] is still in effect." (Finding of Fact 32, App. 036.) Unless this Court accepts

review and overturns the Court of Appeals decision, the sale of the property to the University's Research Park will be finalized.

Buyers ask this Court to accept review and reverse the Court of Appeals under Rule 809.62(1)(c) 1. (requesting the application of a new doctrine) and 2. (raising a novel question, the resolution of which will have statewide impact). For the reasons discussed below, neither issue satisfies the criteria for review under Rule 809.62(1).

DISCUSSION

I. THE RESTATEMENT (SECOND) OF CONTRACTS ISSUE IS NOT APPROPRIATE FOR REVIEW.

As detailed below, there are multiple problems with Buyers' contention that this Court should accept review of this case to address whether to adopt the recommendation about the role of consideration in real estate option contracts made in 1981 by the American Law Institute in the Restatement (Second) of Contracts § 87(1) (the "Restatement").

A. The Facts of This Case Will Not Allow the Court to Reach the Restatement Issue.

This case is not a sound vehicle for reaching the Restatement issue urged by Buyers because the language

about consideration in the Option is inadequate to bind Seller even under the Restatement proposal. There are two distinct problems with the consideration for the Option. First, under the settled Wisconsin law applied by the Court of Appeals, the Option was not binding on Seller because Buyers did not give Seller any consideration for the Option. Second, the provision in the Option pertaining to consideration contains no description or other recitation about the specifics of the consideration. The Option provides as follows:

> 4. CONSIDERATION FOR OPTION.
>
> The parties acknowledge receipt of adequate consideration for this Option to Purchase. There shall be no payment due seller for the rights granted hereunder.

(Petition Appendix App. 144.)

The 1981 Restatement reads as follows:

> § 87. OPTION CONTRACT.
>
> (1) An offer is binding as an option contract if it
>
> (a) is in writing and signed by the offeror, **recites a purported consideration for the making of the offer,** and proposes an exchange on fair terms within a reasonable time; or
>
> (b) is made irrevocable by statute.

(Emphasis added.)

The Option does not recite what consideration was provided for the offer as required under even the relaxed Restatement standard.

The same issue was addressed in Texas which, as noted below, is the only state to have adopted the Restatement position. In *Sandel v. ATP Oil,* 243 S.W. 3d 749, 752 (Tex. App. 2007), the Texas court held that even though consideration need not be paid under the Restatement position, an option is only binding under the Restatement position if "the bargained for exchange [is] detailed or enumerated in the offer." *Id.* The Texas court addressed the requirement under Restatement § 87(1)(a) that the offer must "recite [] a purported consideration for the making of the offer." The court found that "the plain meaning of recite is 'to relate in detail' or 'to list or enumerate.'" *Id.*, citing the American Heritage Dictionary (4th ed. 2006); and Black's Law Dictionary 1298 (8th ed. 2004).[2]

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[2] It is appropriate for a court to rely upon definitions from recognized dictionaries to determine the meaning of an undefined term. *Stuart v. Weisflog's Showroom Gallery*, Inc., 2008 WI 86, ¶ 24, 753 N.W.2d 448. *See also State v. Quintana*, 2008 WI 33, ¶ 42, 748 N.W.2d 447 (noting that, when interpreting a word or phrase in a statute, it is often helpful for a court to refer to dictionary definitions of the word or phrase).

The nature of the bargained for consideration is not detailed or enumerated in the Option. Indeed, the only two sentences pertaining to the issue of consideration are vague and inconsistent. The first sentence does not describe what the consideration was, but merely states that the parties acknowledge its receipt, whatever it was; and the second sentence notes only that no payment was due the Seller for the option rights, suggesting the absence of consideration. Thus, even if this Court were otherwise interested in deciding whether to reverse a century of settled Wisconsin contract law in favor of the Restatement position, this case is unsuited on a factual level to reach the issue.

B. Buyers' Request to Overturn a Century of Settled Wisconsin Law Should be Directed to the Legislature, Not This Court.

After devoting the first twenty-seven pages of their Petition to largely irrelevant background facts, Buyers finally get around to acknowledging that the Court of Appeals' ruling against them rests on a correct application of the well-settled legal principle in Wisconsin that, "for an offer to ripen into an irrevocable option, it must be supported by consideration." (*See* Petition at p. 27). Citing Wisconsin Supreme Court cases dating back to 1900, this Court held in

Bratt v. Peterson, 31 Wis. 2d 447, 143 N.W. 2d 538 (1966), that an option to purchase real estate "ripens into a binding and irrevocable 'option contract' if consideration is given, but can be withdrawn any time before acceptance if not based on consideration." *Id.* at 451, 143 N.W.2d at 540, citing various authorities including *Nelson v. Stephens*, 107 Wis. 136, 142-43, 82 N.W. 163, 165 (1900); *Dunham v. Fisher*, 191 Wis. 624, 628, 211 N.W. 757, 758 (1927) (holding that the defendant had an "unquestioned" right to withdraw from the real estate option before any consideration was paid).

The rule that options to purchase real estate in Wisconsin are revocable unless and until the optionee pays consideration relates in part to Wisconsin's long-standing statutory requirements governing transactions involving the conveyance of an interest in real property. *See, e.g., Bratt*, 31 Wis. 2d at 451, 143 N.W. 2d at 540, and *Dunham*, 191 Wis. at 627, 211 N.W. at 758, discussing Wisconsin's Statute of Frauds for real estate then codified at Wis. Stat. § 240.08, since amended and renumbered as Wis. Stat. § 706.02(1). If the statutory context for Wisconsin's rules about the importance of consideration in real estate contracts should be revisited, it should be done by the Legislature.

Interestingly, Buyers attach significance to the fact that "around the same time" as *Bratt*, when this Court rearticulated the long-standing rule about the importance of the optionee paying consideration, "the Wisconsin Legislature adopted a different rule with respect to sales of goods between merchants. *See* Wis. Stat. § 402.205 (UCC provision governing "Firm Offers")." (Petition at p. 27.) The real significance, however, is that although the Legislature changed the rule for payment of consideration as to "Firm Offers" for personal property "around the same time" as *Bratt* (Petition at 27), the Legislature made no change to the rule for real estate options reiterated in *Bratt*. It is well settled that where the legislature had the opportunity to respond to a court decision or line of cases, but declined to do so, the legislature intended to keep in force the law as stated in the decision. *Morris v. Juneau County*, 219 Wis. 2d 543, 557, 579 N.W.2d 690, 695 (1998).[3]

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[3] *Accord In re Custody of H.S.H.-K*, 193 Wis. 2d 649, 714, 533 N.W.2d 419, 444 (1995) (holding that when legislature enacts statute that does not affect judicial decision that legislature was aware of, than legislature was placing its stamp of approval on judicial decision); *Layton v. Rowland*, 197 Wis. 535, 537, 222 N.W.2d 811, 811 (1929) (holding that legislature's lack of action in response to judicial decision warrants against court reconsidering decision).

Buyers offer no authority for their sweeping assertion that "only the Supreme Court has the authority to adopt the relevant Restatement provision on consideration's role in option contracts." (Pet. at 4.) While this Court arguably may have the authority through an extreme act of judicial activism to sweep aside over 100 years of settled contract law and commercial expectations in the state, it is respectfully submitted that the type of fundamental change in Wisconsin commercial law sought by Buyers should be directed to the Legislature. The legislative process is more appropriately equipped to address the broad-based public policy considerations which would be involved in reshaping Wisconsin's contract law and Statute of Frauds.[4]

C. The Restatement Position is Flawed, Which Likely Explains Why, In the Twenty-Seven Years Since it Issued, Only One State – Texas – Has Adopted It.

Buyers exaggerate the extent to which the Restatement position has been adopted by other states. Prior

[4] This issue does not involve court procedure or the legal professional, the two areas where this Court has primary authority to make and change the law. Rather, the issue seeks changes to settled substantive contract and real estate law, the types of issues best left to statutory governance and the legislative process.

to the issuance of the Restatement position in 1981, the uniform rule across the country was that payment of consideration by the optionee was required in order to bind the optionor. In the twenty-seven years since the issuance of the Restatement position, only **one** court has adopted it. *See 1464-Eight Ltd. v. Joppich,* 154 S.W. 3d 101 (Tex. 2004).

While Buyers suggest that "other states" have adopted the Restatement view that payment of consideration is necessary to make an option contract binding (*see* Petition at p. 1), no other state court has adopted the Restatement position. Several states have expressly declined to adopt it. *See, e.g., Hunt v. Coker*, 741 So. 2d 1011, 1015 (Miss. Ct. App. 1999); *Lewis v. Fletcher*, 617 P. 2d 834, 835-36 (Idaho 1980). In fact, what the Optionees suggest is a minority view is actually just the Texas court's decision in *Joppich*.[5] That is hardly a compelling basis on which to urge this Court to overturn a century of settled Wisconsin contract law.

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[5] Buyers seem to suggest that Pennsylvania adopted the Restatement position by statute. *See* Petition at pages 2, 10, 28 and 35, citing 33 Pa. Cons. Stat. § 6 (Purdon). In fact, however, the Pennsylvania statute was enacted in 1927, long before the Restatement position issued in 1981, and deals with a different issue involving releases and promises rather than real estate options.

There are several significant drawbacks to the Restatement approach of eliminating the payment of consideration as an element of proving the formation of a binding option contract:

First, requiring payment of consideration in order to bind an optionor lends certainty to the process of determining whether the offer has become binding on the offeror. It is relatively straightforward and objective to prove whether the optionee paid the optionor the negotiated consideration payment. The objective nature of proving the evidentiary point lends certainty and predictability to commercial real estate sale transactions.

Second, eliminating the requirement of paid consideration invites the type of convoluted claims of implied and inferred consideration which turned an obviously non-binding option in this case into a lengthy court dispute. As reflected in the Court of Appeals decision at ¶¶ 35-47 (App. 016-21), Buyers tried to replace the easy-to-prove element of paid consideration with a variety of types of nebulous benefits

from completing the sale which they claimed constituted adequate non-monetary consideration.[6]

Third, the Restatement position adds additional elements of fact-intensive proof. The Restatement position requires proof that the proposed exchange of consideration in the offer relative to the value of the option is "on fair terms within a reasonable time." *See* Restatement § 87(1)(a). In *Joppich*, *supra*, two of the Texas justices observed that:

> Yet another problem with the Restatement approach is that, in addition to mandating a recital of consideration, the Restatement requires that an option be "on fair terms" and that the exchange occur "within a reasonable time." Restatement (Second) of Contracts; 87(1)(a) (1981). This approach unduly complicates enforcement of option contracts, requiring a factual inquiry regarding fairness of terms and reasonableness of time in each case.

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[6] Buyers claimed that the non-monetary consideration included a leaseback provision and purchase price adjustment if the sale contract had closed (*id.* at ¶ 35), a purported "intent to be bound" which they sought to prove through various types of parole evidence (*id.* at ¶ 36), they claimed that a "personal satisfaction at 'tweaking' the University constituted separate consideration" (*id.* at ¶ 39), and the effort to obtain financing purportedly constituted consideration for the option (*id.* at ¶ 44). These fact-driven arguments about nontraditional forms of consideration consumed extensive trial time and appellate briefing.

154 S.W. 3d at 111 n.1. The two justices go on to note that "[p]erhaps this explains why . . . 'the Restatement . . . is admittedly the minority position." *Id.*

II. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE CONSIDERATION NECESSARY TO RENDER AN OPTION CONTRACT BINDING AND IRREVOCABLE ON THE SELLER MAY NOT BE INFERRED BY THE SEPARATE CONSIDERATION FOUND IN THE UNDERLYING PURCHASE CONTRACT OR FROM EFFORTS MADE BY A THIRD PARTY TO OBTAIN FINANCING.

Buyers' reasoning on this issue is specious. As the Court of Appeals observed:

> [I]f the consideration required to make an option a binding and irrevocable option contract could be found in the terms negotiated for the purchase, then every option would be binding and irrevocable because there would always be, by definition, at least a purchase price included in the option.

Decision at ¶ 23, App. 008.

It is common sense that there must be separate consideration to the seller in an option contract because the option contract and the contract of sale are two different agreements: An option "is a contract that vests the optionee with the unilateral right to accept a continuing offer during a stated period of time, while the sale contract comes into being

only if and when the optionee exercises the option." *Id.* at ¶ 25, App. 010, citing extensive case law.

Buyers' contention that the leaseback and repurchase provisions found in the purchase portion of the contract should serve double duty as consideration for the Option is illogical. The value extended by Seller in the Option was to lock in the terms for a purchase if Buyers elected to proceed to closing before the expiration of the Option period. Under settled Wisconsin law, the Option was revocable unless and until Buyers paid Seller consideration which was specifically negotiated and conveyed to Seller for the value of the Option. *Bratt*, 31 Wis. 2d at 451. Had the sale closed, the consideration from Seller would have been the property and other provisions specified in the purchase contract and the consideration from Buyers back to Seller would have been payment of the purchase price.

Buyers fail to cite a single case from any jurisdiction which supports their novel theory that consideration provided for the purchase portion of the contract may serve double duty to also support a separate option. As noted by the Court of Appeals, Buyers have been unable to identify any cases which "suggest that a benefit or

detriment that does not occur unless there is a sale constitutes the requisite separate consideration for the option." Decision at ¶ 34, App. 016.

Furthermore, adopting Buyers' proposed theory would be contrary to settled Wisconsin law. A promise whose performance depends "solely upon [the promisor's] option or discretion"—which is the case here as Buyers' promises in the purchase portion of the agreement were only binding if Buyers exercised the Option—cannot serve as consideration for an agreement. *First Wis. Nat'l Bank v. Oby,* 52 Wis. 2d 1, 7, 188 N.W.2d 454, 457 (1971); 17A Am. Jur. 2d *Contracts*, s. 129 (2004); *accord Cal. Wine Ass'n v. Wis. Liquor Co.*, 20 Wis. 2d 110, 121, 121 N.W.2d 308, 314 (1963 (contracts not binding unless the mutual promises impose an obligation on each party); *Hyman-Michaels Co. v. Ashmus Equip. Sales Corp.*, 271 Wis. 82, 85, 72 N.W.2d 742, 744 (1955) (same).

Buyers' final request is that this Court take review to formulate a bold new principle of real estate law under which the unbargained for efforts of a third party to obtain financing to effectuate a purchase contract may constitute adequate consideration to bind the Seller on the

separate option contract. It is undisputed that this is not a situation where the efforts to obtain financing were made by the holder of the option or where an agreement to obtain financing was a bargained for aspect of the Option. *Id.* at ¶ 44, App. 020.

If Buyers were correct, and the requirement of paying consideration to bind a seller on an option could be inferred from the efforts of a third party to assist the buyer in obtaining financing for the purchase, such consideration could be found in almost every transaction, as most real estate transactions involve some sort of financing. Such a rule would effectively negate the requirement that options must be supported by payment of consideration. Both the trial court and the Court of Appeals correctly rejected the Buyers' argument, holding instead that third party efforts to obtain financing may only serve as consideration if they were a specifically bargained for term of the Option. *Id.* at ¶¶ 44-46, App. 020; Trial Court Oral Ruling at 10-12, App. 048-050.

Not surprisingly, there is no authority to support Buyers' novel third-party consideration contention. Nor would it make sense for this Court to adopt such a rule.

Doing so would interject uncertainty and lack of predictability into commercial real estate transactions because sellers would never know if an option was binding (which they presently can readily determine by ascertaining whether they got paid for the option) due to the possibility that some third party friend may have voluntarily exerted efforts to obtain financing to assist the buyer.

This issue invites the Court to journey into a factual quagmire that is both far removed from its normal law-development function and which was properly decided by both counts below. The Court should decline Buyers' invitation that it do so.

CONCLUSION

Because the two issues cited in Buyers' Petition do not satisfy the criteria for review under Rule 809.62(1), the Petition should be denied.

Dated this 2nd day of September, 2008.

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CERTIFICATION AS TO FORM

I certify that this petition for review conforms to the rules contained in Wis. Stat. § 809.62(4) for a Response to a Petition for Review produced using the following font:

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Dated this 2nd day of September, 2008.

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