Don't Make Promises

It Could Be A Supreme Mistake

by Lawrence Savell

We've all heard the jokes about politicians habitually making promises to their constituents, promises they have no intention of keeping. But in the business world, people and companies that make promises to their customers can be held responsible when they break them.

In the collector car context, those who offer collectors products and services risk the institution of litigation and the assessment of damages if they breach their contracts. A recent illustrative case was *Circle B Enterprises, Inc. vs. Steinke,* decided on September 15, 1998 by the Supreme Court of North Dakota. That case raised two interesting issues: (1) is a restorer who breaches his or her contract nevertheless entitled to payment for the work that it *did* do; and (2) what is the effect of a provision in the contract that specifies in advance what the damages for a breach will be?

According to the court, in 1990, Jim Steinke (dba Heritage Corvette) and Circle B orally agreed that Steinke would restore Circle B's 1961 Corvette. When Steinke failed to do the restoration in a timely manner, Steinke and Circle B signed an agreement, dated October 26, 1994, requiring Steinke to finish the work by April 21, 1995. The written agreement stated that Circle B had paid Steinke $13,815, including $1,600 for a hard top and $2,161 as credit for unfinished work on the car. The agreement identified $14,094 in remaining work on the car and provided that, after credit for payments already made by Circle B, the balance due for the remaining work was $10,333.

The agreement specified: "In the event [Steinke] fails to complete and deliver the vehicle no later than April 21, 1995, there will then be a penalty of $100 per day assessed and deducted from the amount of $10,333, plus or minus items which have been added to the cost as set out in this agreement. Further, Circle B will then be free to contact a third party to perform what [Steinke] had agreed to perform on this vehicle, and any amount which Circle B does have to pay to that third party will be the responsibility of [Steinke]." The contract further declared: "Time is of the essence in the performance of each and every term of this agreement."

Steinke did not finish restoring the car by April 21, 1995. In July 1995, Circle B sued Steinke to enforce the agreement and recover possession of the car. The parties then agreed to extend the deadline for completion of the car to September 27, 1995, but Steinke did not finish the car by then, either, and it was returned to Circle B on September 28, 1995. Circle B hired another company to complete the work for $9,251.

The trial court ruled Steinke had breached "all agreements" with Circle B. The court found Steinke had performed $11,654 in work on the car, and Circle B had paid for that work, leaving a credit on account with Steinke of $2,161. The court ordered Steinke to pay Circle B $2,161 for that credit.

Although it recognized that damages for Steinke's breach of contract were difficult to ascertain when the contract was made, the court refused to enforce the $100 per day assessment against Steinke because it "related to the reduction in the final payment for the Corvette. The services were never completed by [Steinke] and the payment of $10,333 was not made to [Steinke]. The penalty clause relates to reducing the final payment for late *[completion]* of the project."

The court nevertheless decided Steinke's breach resulted in Circle B not having the car available to promote its restaurants and awarded Circle B $18,000 in damages for loss of use at $3,000 per year for six years.

Steinke appealed. Steinke contested the $18,000 loss-of-use damages as unfounded. Steinke argued he did $3,757 in work on the car after October 26, 1994, and the trial court erred in failing to recognize that work as an offset against the $2,161 credit Circle B had with Steinke at the time of the contract. Steinke contended he was entitled to be paid for that work based on the contract or, alternatively, because it constituted an "unjust enrichment" to Circle B.

Steinke also argued the court erred in not awarding him the $1,118 difference between the agreed amount of $10,333.42 for the remaining work and the actual amount of $9,251.13 that Circle B paid a third party to complete the work.

The Supreme Court affirmed the judgment for Circle B, although it reduced somewhat the amount of damages awarded. In next month's column, we will examine how the appellate court resolved the two interesting issues presented.

Lawrence Savell is Counsel at the law firm Chadbourne & Parke LLP in New York City. This column provides general information and cannot substitute for consultation with an attorney. Additional background on this and prior "Old Cars in Law" articles can be found on-line at www.lawrencesavell.com