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## The Subjective Perspective

### TRANSACTIONS AND CONTRACTS

*Black's Law Dictionary* offers four definitions of transaction:

- an “[a]ct of transacting or an instance of conducting any business or other dealings; esp[ecially] the formation, performance, or discharge of a contract”;
- “something performed or carried out; a business agreement or exchange”;
- “any activity involving two or more persons; [and]
- “[a]n agreement that is intended by the parties to prevent or end a dispute and in which they make reciprocal concessions.”<sup>1</sup>

Only the first three definitions are relevant here; the last pertains to civil law contracts. A contract, by comparison, is narrowly defined as “[a]n agreement between two or more persons creating obligations that are enforceable or otherwise recognizable at law.”<sup>2</sup> Whereas the parties’ contract is their legal agreement, their transaction includes

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<sup>1</sup> BLACK’S LAW DICTIONARY 1726 (10th ed. 2014).

<sup>2</sup> *Id.* at 388.

activities earlier and later than formation of the contract, including the negotiation and performance of their obligations under such a contract. Transaction has an even broader meaning, including in some more general or vague sense, the carrying on of business, conduct, and exchange, which may or may not relate to any specific contract.

This difference between the two—contract and transaction—is relevant to risk management because a successful outcome of an exchange according to the contract may not be the same as the successful outcome of the exchange the parties envisaged when negotiating the transaction. Simply stated, a successful outcome of a contract is the exchange of the performances to which the parties have legally agreed, no more or less. So long as each party gets what it agreed to receive, the deal is a success. If one party receives what it bargained for and the other does not, the deal is a success for the former but not the latter. Conceived as part of a plan with an objective, success is the satisfactory completion of the tasks to be completed during each phase, on time and on budget, and is the realization of the desired objective. So conceived, a transaction is akin to a project that must be planned and implemented, with the outcome favorable or not. The exchange of performances is the centerpiece of this effort, but its success does not ensure that the transaction will be a success.

## **EXPECTATION, HOPE, AND ASSUMPTION**

### **Expectation**

The starting point for identifying transaction risk is the nebulous, often half-baked subjective expectation and hope of a party, whether or not reduced to terms stated in a contract, that jurists eschew. This is because, by definition, a successful transaction is the realization of the benefits a party expected, hoped, or otherwise desired to realize from an exchange with another party or a series of exchanges with multiple parties, all at a cost and on a schedule also as anticipated. This is an initial definition of a successful transaction; it will be modified later in this chapter. It follows that expectation, hope, and desire form the starting point for articulating the benchmarks of success and failure, even if they vary from the terms of the contract. Also, expectation and hope may be misguided, inasmuch as a party may wrongly believe it needs or does not need something (a topic to which we will return later), but what is important is that a party understands what it expects or hopes will be achieved, what tasks it

expects to complete to do so, and how it anticipates contingencies will be addressed.

The textbook case *Frigalment Importing Co. v. B.N.S. International Sales Corp.*<sup>3</sup> illustrates why a party's expectation, and not the terms of a contract, must be the initial measure of success or failure in a transaction. A trader in New York agreed to sell chickens to a buyer in Switzerland; the contract described these chickens as "US Fresh Frozen Chicken, Grade A, Government Inspected, Eviscerated 2½–3 lbs. and 1½–2 lbs. each, all chickens individually wrapped in [C]ryovac, packed in secured fiber cartons or wooden boxes, suitable for export."<sup>4</sup> The buyer, who expected young birds suitable for broiling and frying, received birds suitable for stewing; it protested and sued the seller for breach. Circuit Judge Henry Friendly, who heard the case, began his decision by saying, "Assuming that both parties were acting in good faith, the case nicely illustrates Holmes' remark 'that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties' having meant the same thing but on their having said the same thing.'"<sup>5</sup> He acknowledged that "chicken" as used by the parties was ambiguous and had to be interpreted.<sup>6</sup> He considered and rejected the buyer's argument that chickens one and a half to two pounds must be young, as chickens, like apples, may come in all sizes.<sup>7</sup> He also rejected the buyer's contention that "chicken" meant young chickens in the poultry trade. The evidence of this was insufficient for Judge Friendly, who said the usage had to be proved to be so well-established that the seller's knowledge of it could be inferred, and this proof had not been supplied.<sup>8</sup> The buyer also pointed to the practice of a large poultry supplier that published prices separately for "chickens," which included broiler, fryers, and certain other categories, and "fowl," which included stewing chickens.<sup>9</sup> The seller's expert, who operated an eviscerating plant, said a "chicken" is "everything except a goose, a duck, and a turkey."<sup>10</sup> The buyer in its favor pointed to the prevailing price

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<sup>3</sup> 190 F. Supp. 116 (S.D.N.Y. 1960).

<sup>4</sup> *Id.* at 117.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 118.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 119.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 119–20.

for broilers at thirty-five cents and thirty-seven cents per pound, when the price for stewing chickens was thirty cents per pound; thirty-three cents per pound was closer to the price of broilers than stewing chickens. Judge Friendly dismissed this evidence: “Plaintiff must have expected defendant to make some profit—certainly it could not have expected defendant deliberately to incur a loss.”<sup>11</sup> He juxtaposed the “subjective intentions” or expectations of the parties with the objective meaning of “chicken”: “Defendant’s subjective intent would not be significant if this did not coincide with an objective meaning of ‘chicken.’ Here it did coincide with one of the dictionary meanings, with the definition in the Department of Agriculture regulations to which the contract made at least oblique reference, with at least some usage in the trade, with the realities of the market, and with what plaintiff’s spokesman had said.”<sup>12</sup> Judge Friendly acknowledged how a party’s “subjective intention” or understanding or expectation about what it would buy or sell can differ from its “objective intention.” Only the latter is relevant in court.<sup>13</sup> Having reviewed all the evidence, the judge concluded the buyer failed to prove “chicken” had the meaning it claimed, and because the buyer had the burden of proof, its claim failed.<sup>14</sup>

If the performances are taken in isolation from the buyer’s objectives or desired benefits, it received what it bargained for because the court found that the buyer had not proved that it had bargained for anything more than the stewing chickens it received. So viewed, the transaction was certainly not a failure for the buyer, though this is clearly not the case because the buyer considered what it received to be inferior to what it thought it bargained for. To make sense of this disappointment, the outcome of the transaction must be assessed according to what the buyer expected, not contractually agreed, to receive. What went wrong in the *Frigaliment* transaction occurred when the buyer agreed on the terms with the seller because the buyer either chose the wrong counterparty, which did not share its understanding of what the word “chicken” meant, or chose the wrong words to specify the type of chickens the seller was to deliver. In the latter case, it failed to get the documentation sufficiently precise such that the seller would have no choice but to deliver the expected young birds. So viewed, the terms of the contract, instead of

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<sup>11</sup> *Id.* at 120.

<sup>12</sup> *Id.* at 121.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

serving as the measure of success, are themselves the outcome of the events that contributed to the ultimate outcome, successful or otherwise. Whether the outcome is successful turns on whether the seller's performance was consistent with the buyer's expectations, which are the benchmark of a successful outcome, not the terms of the contract.

## Hope

Expectation is only one measure of success in a transaction, as hope often plays the role expectation occupied in *Frigaliment*, where the buyer presumably anticipated that whatever bird it would receive would be young. Where expectation connotes a level of certainty that an event will occur, hope connotes optimism tinged with well-justified doubt. Routine transactions in which at least one party repeats its performances with different parties generate expectations, not just hopes, about what will be exchanged. *Frigaliment* was probably such a case. In these deals, the party repeating a type of transaction can specify the actions that must be completed and can also forecast with near certainty when they must, and will be, completed, subject to interruption by contingent events. In industries in which a party performs with a high level of predictability, those receiving that performance come to expect it. In others, where the performance is less predictable, they hope for the best. Airlines, for example, publish schedules and endeavor to operate flights accordingly, with the result that passengers expect, albeit skeptically, on-time departures and arrivals, at least on some routes and with some airlines, in the absence of disruptive events outside the carriers' control; passengers on other carriers only hope for the best. In a deal that is novel or relatively novel to a party, it may cast about for comparable deals in its effort to predict how the novel deal might turn out. This is as true for a corporation embarking on a major acquisition as it is for the car and home buyer; while the car or house can be identified with particularity, the buyer may harbor hopes about what intangible benefits, such as status, the purchase will yield. In transactions in which chance plays a critical role, a party can but hope for a successful outcome. A rational lottery ticket buyer does not expect to win; she expects to receive a valid lottery ticket and for the contest to be operated by the rules, and she hopes, albeit faintly, to win. She does not expect to realize the benefits of winning—the lifestyle and whatever she hopes to acquire with the winnings—because she does not expect to win. That faint hope is the key driver to the buyer's purchase of the ticket: lottery ticket buyers often indulge in flights of fancy about

what they will do with their winnings, while acknowledging winning is most unlikely. While a rational party will accept a dashed hope better than it will accept a disappointed expectation, because it sanguinely recognizes the uncertainty of the outcome, hope often drives parties into deals as passionately as expectation; the failure to receive what was hoped for nonetheless reflects an adverse outcome. Hope plays a significant role in cutting-edge, experimental, and other major transactions. As such, hope, like expectation, serves as another measure of the outcome of a transaction, whether or not those wishes are manifest in the contract.

*Leasco Corporation v. Taussig*,<sup>15</sup> in which the parties were seasoned players in mergers and acquisitions, illustrates how hope plays a key role in a major commercial deal. Leasco, started in 1961 by Saul Steinberg, then twenty-two years old, leased small office data-processing equipment, expanded rapidly, and in 1965 went public, raising \$750,000 in an initial public offering. It then began buying businesses. During a five-month period ending in September 1968, it acquired 91 percent of the shares, notwithstanding the target's opposition, of Reliance Insurance Companies of Philadelphia, which had been underwriting fire and casualty insurance policies since 1817. Reliance was attractive to Steinberg because, like other insurance companies, it held substantial cash reserves to meet potential insured claims that could be released for other acquisitions. Leasco's equity capital increased from \$70 million to \$236 million. Leasco's shares were trading at \$140, a 5,400 percent increase since its initial public offering in 1965.

In November 1968, Leasco began buying Chemical Bank shares and in January 1969 drafted a tender offer to Chemical Bank's shareholders but decided against releasing it. William Renchard, chairman of Chemical, learned of Leasco's plans and organized a counterattack, first leaking news of Leasco's plans to the press, then devising a plan to have large blocks of Leasco's stock dumped on the market, suggesting to other banks that they not lend money to the acquirer, and having a bill introduced in the U.S. Senate that would make bank acquisitions more difficult. New York Governor Nelson Rockefeller urged the state legislature to enact a similar law applicable to banks in New York. Leasco's shares had dropped to ninety-nine dollars in February, two weeks after Renchard's campaign began, and to seven dollars by May 1969.<sup>16</sup>

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<sup>15</sup> 473 F.2d 777 (2d Cir. 1972).

<sup>16</sup> DAVITA SILFEN GLASBERG, *THE POWER OF COLLECTIVE PURSE STRINGS*, ch. 4 (1989), <http://publishing.cdlib.org/ucpressebooks/view?docId=ft4x0nb2jj&chunk.id=d0e3625&toc.depth=1&toc.id=d0e3625&brand=ucpress>.

Steinberg, in the meantime, acquired Louis Berger, Inc. (Berger) and its subsidiary, Louis Berger Associates, an international civil engineering and consulting firm; after closing the acquisition, Leasco's vice president and general counsel, Frederick Jackson, hired Peter T. Taussig (who had civil engineering and law degrees and had practiced law—primarily concerned with construction contracts—in New York City for several years) as Berger's vice president and counsel.<sup>17</sup> Berger then incorporated McCreary-Koretsky International, Inc. (MKI) to acquire the assets of McCreary-Koretsky Engineers, Inc. (MKE), another civil engineering and consulting firm, based in California, which was facing potential bankruptcy because of a lawsuit by a client and income taxes owed to the federal government. The price agreed to was a percentage of MKI's profits. Taussig reviewed MKE's service contracts, balance sheet, and income statement. This acquisition closed in September 1970, and Taussig became vice president of MKI.<sup>18</sup> In December, Leasco's management decided to sell MKI because it lacked experience in the civil engineering business and disliked the income fluctuations characteristic of the industry.

Taussig offered to buy MKI and met Jackson to discuss price. Taussig estimated MKI's pretax earnings for the year ending September 20, 1971, would be \$200,000, Jackson suggested that an appropriate sale price would be ten times that amount, or \$2 million; they halved this amount, because under the agreement with MKE, MKI had to pay MKE 50 percent of its profits. In this manner, they landed on a \$1 million purchase price. Leasco and Taussig signed the agreement for the sale of MKI in February 1971, with a closing date of April 15, later extended to May 28.

In March, Taussig received MKI's February income statement, reporting a \$4,702 loss, which he learned, after traveling to San Francisco, had been caused by a design error on one of MKI's construction projects. This error also resulted in losses for the months of March and April. Taussig indicated to Jackson he might not go through with the purchase and refused to accept MKI's stock at the May 28 closing.

Leasco sued Taussig, who claimed mutual mistake, that a basic assumption of the contract was that the pretax earnings of MKI for the year ending September 30, 1971, would be \$200,000, and misrepresentation

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<sup>17</sup> 473 F.2d 777, 779.

<sup>18</sup> *Id.*

that Leasco misrepresented MKI's financial condition.<sup>19</sup> The district court awarded Leasco \$669,000 and Taussig appealed. Circuit Judge William Timbers began by distinguishing Taussig's claims: "The legal concept of 'mistake' is similar to the legal concept of 'misrepresentation' in that, under each, a party to a contract may be relieved from his obligations if he was unaware of certain material facts. 'Mistake,' however, is only such error as is made without representation or deception by the other party to the transaction."<sup>20</sup> He stated the rule that where the mistake is unilateral, the contract is not voidable, but where it is mutual, the contract is voidable. This was not a case of mutual mistake, even if both parties assumed, when calculating the purchase price, that MKI's earnings would be \$200,000. "In the instant action, we hold that there was no mutual mistake. . . . Neither party intended to allow rescission of the agreement if, as it turned out, one party got a better bargain than had been anticipated."<sup>21</sup> The court also dismissed the misrepresentation claim and upheld the judgment. Taussig could not have expected that MKI would have \$200,000 of pretax earnings. The court concluded he was too sophisticated a buyer to have harbored such a naïve expectation. Judge Timbers said, "Both parties had equal access to information indicating that such a projection would be highly unreliable. Indeed, Taussig probably knew more about the business of MKI than anyone else at Leasco since he originally had investigated it, he served as its vice president, and he was a liaison executive between Leasco and MKI."<sup>22</sup> It was thus inconceivable that Taussig could have considered any projection of MKI's income certain or had an expectation that the business would be profitable. The judge instead pointed to hope: "Both Taussig and Leasco may have hoped, but surely could not have been certain, that MKI would earn \$200,000 in fiscal 1971. . . . The civil engineering and consulting business is personalized, highly technical, and extremely risky. . . . Neither party could safely assume that the projected earnings would be realized."<sup>23</sup>

Taussig may have been optimistic or even highly optimistic that the target earnings would be achieved, but he could not have expected this to be so. Jackson offered the number for the purpose of calculating the price of MKI. Like someone who bets on a proven winner in a horse

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<sup>19</sup> *Id.* at 780.

<sup>20</sup> *Id.* at 781.

<sup>21</sup> *Id.* at 782.

<sup>22</sup> *Id.* at 781.

<sup>23</sup> *Id.*



race, Taussig bet on the target's projections. Moreover, he confused expectation and hope, what he hoped to realize with what he expected to receive from the seller. The deal failed for Taussig because his hopes about the benefits of the deal would not be realized.

### **Assumptions**

The expectation and hope by which a successful transaction outcome is measured include completion of the actions and the occurrence of the events that must take place for a party to realize a desired benefit as well as the realization of those benefits. A party will usually expect its counterparty to perform fully its contractual obligations, and the counterparty's failure to perform as expected will constitute a disappointment. A party may also expect or hope a circumstance material to completion of a task or realization of a benefit exists. It may also expect or hope that events that must occur will occur and events that must not occur will not occur. We noted the lottery ticket buyer hopes, not expects, her numbers will be drawn. The failure of the event to occur as hoped is an unsuccessful outcome, even if the hope was faint. Such expectations and hopes are focused on key events that will yield the desired benefits rather than the benefits themselves. Just as an individual planning a trip might try to identify all the actions and events that might facilitate and impair her journey, a party planning a transaction might identify all the circumstances that must exist at contract formation and events that must occur and must not occur after contract formation for it to realize its desired benefits, on time and on budget, forming expectations and hopes concerning each.

However, all too often the party will have given no thought to such circumstances or events. The existence or nonexistence of such facts or the occurrence or nonoccurrence of such events may be so extraordinary that it is not surprising that the party has given it little or no consideration when planning the transaction and negotiating the contract, let alone addressing it in the contract.<sup>24</sup> This is not always the case, however; the

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<sup>24</sup> An example is the cancellation of King Edward VII's coronation procession, due to his illness, in *Krell v. Henry*, [1903] 2 K.B. 740, [1900-3] All E.R. 20, 72 L.J. (K.B.) 794, 89 L.T. 328, 52 W.R. 246, 19 T.L.R. 711, 12 Digest (Repl.) 435 (Ct. App. 1903), where a renter agreed to rent a room in a flat in Pall Mall to view such procession. The renter refused to pay the agreed rent, the landlord sued, and the court held for the renter. Lord Justice Vaughan Williams described the cancellation of the coronation procession as "an event 'of

circumstances and contingencies may well be within contemplation. The response by the party to such facts when they prove to be different or to such events when they occur is often that the party assumed that such fact did or did not exist or that such an event would or would not occur. A sympathetic court will reformulate the point, saying that an assumption that such a fact existed or did not exist or that such an event would or would not occur was a basis on which the contract was made; in the former, the contract may be rescinded because of a mutual mistake of fact and in the latter because of frustration of contract or impossibility of performance. A statement that an assumption about some existing fact or future event has been made may be, first, an acknowledgment that no thought was given to the fact or event that the party assumed existed or did not exist or would or would not occur. If a party actually recognized that such fact might or might not exist or such an event would or would not occur, it either expected or hoped such fact did or did not exist or would or would not occur. Second, the statement is also one about expectation. An assumption of which a party making it is ignorant is functionally equivalent to an expectation or hope about the existence or nonexistence of the fact or occurrence or nonoccurrence of the assumed event; the party is disappointed when a fact proves to be different than assumed or an event that was assumed would not occur, occurs. What is meant is the party expects or hopes to be treated by others as if, all along, it contemplated that all matters to which it gave no thought would be as they normally are or in some sense were understood to be so, and by implication, such facts would or would not exist and such events would or would not occur.

Whether the law should recognize and somehow allow for such assumptions is not the concern here. Assumptions play a significant role in transactions: they supplement the conscious expectations on which transactions are premised. Just as expectations serve as the benchmarks by which a successful outcome is measured, assumptions about material facts and events serve as additional benchmarks where expectations about such facts and events are absent at contract formation.

*Chic Organization, Ltd. v. Motown Record Corporation*<sup>25</sup> illustrates how a party makes an assumption about an event, the occurrence or nonoccurrence of which will result in an unsuccessful outcome. Chic and Motown agreed that Chic would produce a record album for Motown

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such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when made.” [1903] 2 K.B. at 797.

<sup>25</sup> 582 F. Supp. 812 (S.D.N.Y. 1984).

with Diana Ross, a famous singer under exclusive contract with Motown. As a bonus, the contract also provided that if the sales of the record exceeded \$1 million, then Chic could produce a second record with Ross. Chic produced the record, and its sales exceeded \$1 million, but after Chic produced the first record and before Chic exercised its option to produce the second record, Ross's contract with Motown expired and Ross refused to do any further work for Motown.<sup>26</sup> Chic sued Motown for breach of contract, and Motown responded that Ross's decision not to do further work for Motown excused its failure to deliver her collaboration. It is interesting that Motown insisted, when the contract was negotiated, that Chic's two principals sign the contract, thus committing them to personally participate in the production of the record.<sup>27</sup> Chic did not do likewise with Ross, a fact that prompted the trial judge to ask Chic's lawyer who negotiated the contract if Ross's leaving Motown had occurred to him. "Well honestly, Judge," the lawyer answered, "it didn't even occur to me."<sup>28</sup> He elaborated, "She started as a child and like Stevie Wonder and all the other Motown people out of the original Motown and everyone assumed it was going on forever."<sup>29</sup>

His assumption—that Ross would stay indefinitely at Motown—was not as implausible as it seemed, with hindsight. Ross started her singing career as the fourth and final member of the Primettes in 1960, while still in high school. That year Berry Gordy Jr. incorporated Motown, and the following year the Primettes changed its name to the Supremes and signed a contract with Motown. Under contract with Motown, Ross was the Supremes' lead singer during the following decade, became a television show host in 1971, and started her career as an actress in 1972, starring in Motown's first film, a hit biography of Billie Holiday, for which she was nominated for the Academy Award as best actress and received a Golden Globe. Her hits during that period included an album of duets with Marvin Gaye (1975) and "Do You Know Where You're Going To." She costarred with Billy Dee Williams in Motown's film *Mahogany*. In 1978, Ross starred in another Motown film, *The Wiz*, an African American reinterpretation of L. Frank Baum's *The Wonderful Wizard of Oz*.<sup>30</sup>

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<sup>26</sup> *Id.* at 815–16.

<sup>27</sup> *Id.* at 816.

<sup>28</sup> *Id.* at 817.

<sup>29</sup> *Id.*

<sup>30</sup> *Diana Ross*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Diana\\_Ross](http://en.wikipedia.org/wiki/Diana_Ross) (last visited Apr. 24, 2018).

The judge asked Chic's lawyer again, "Is that what you assumed?"<sup>31</sup> He answered, "Yes."<sup>32</sup> Still, given the importance of the contingency to the transaction and the fact that California law limited personal service contracts to seven years, the judge expressed astonishment at the lawyer's assumption. "Since Ross's presence was so fundamental to the success of the projects contemplated by the Agreement, it is incredible to me that Chic never once inquired as to the terms of Ross's ties to Motown."<sup>33</sup>

Chic clearly expected Motown to make Ross available if the option was exercised but gave no thought to the possibility that she might be able to refuse her collaboration, her contract with Motown having expired; it assumed she would remain under contract with Motown. The assumption went to a contingency, not the performance by Motown of an obligation or the realization of the benefits. That assumption functioned as an expectation or its equivalent: an unstated belief that Ross would remain available to enable Motown to perform.

In *Chic Organization, Ltd.*, the assumption could have been identified and verified. Chic could have asked Motown about the duration of Ross's contract and, upon learning that it was about to expire, could have asked Ross to sign, committing herself to Chic, as Chic's principals had committed themselves to Motown. The hazard—the possibility she might refuse to collaborate because she was not obligated to do so—would have been eliminated. A party in Chic's position must ask itself what due diligence is feasible. If the assumption concerns a condition, the existence or nonexistence of which can be verified, it can decide if it wants to verify it. If the assumption concerns a condition that cannot be verified<sup>34</sup> or the party chooses not to verify it, then the party can decide if it expects or hopes such condition to exist or not exist. What would have been an assumption thus becomes a hope or expectation like others in the transaction, unless confirmed. In the absence of converting an assumption into a hope or expectation, it remains an unstated benchmark for the successful outcome of a transaction.

However, hopes and expectations may differ from assumptions in that the party always has the former in its conscious sights when the contract is

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<sup>31</sup> 582 F. Supp. at 817.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *E.g.*, *Backus v. MacLaury*, 278 A.D. 504, 106 NYS 2d 401 (N.Y. App. 1951), where a bull calf was purchased in an auction for the purpose of breeding a herd on the incorrect assumption it was fertile. The calf was too young for its sterility to be determined.

formed, whereas when a party is unaware of the latter they are discoveries with hindsight. When a party discovers an assumption it made at contract formation is incorrect, it supplements the expectations and hopes it had at that time, effectively setting the bar for a successful outcome by a revised set of expectations or hopes. Using an assumption as a benchmark for success thus involves using revised expectations as the standard.

### Revised Expectations

Just as a party may receive exactly what it bargained for in the contract and still be dissatisfied with the outcome because the contract did not correctly state its expectations, hopes, and assumptions, a party might receive exactly what it initially hoped to receive and had successfully stated in the contract but still be dissatisfied because it has modified or abandoned those expectations or added new expectations that were not satisfied. Unlike the case where the party unconsciously assumed the existence of a condition or that a contingency would or would not occur, only to later find the assumption was or has been proven to be incorrect, the party consciously forms an expectation about the performance it will give or receive or the benefit it expects to realize, only to later decide that such expectation should be jettisoned for a fresh one. Whatever the reason—the party discovers a better use of its resources than its investment in the contemplated transaction, one or more additional benefits could have been realized but were not, or a better deal could have been made—the transaction fails or is somewhat less successful measured by the revised expectations. To the extent such potential changes in mind can be surfaced when the transaction is planned, they are relevant to the parties during that phase; either the party's expectations can be modified at that time or future changes can be avoided. To the extent such potential changes cannot be surfaced when the transaction is planned, there is nothing to be done at that time. The risk that such changes in mind may occur exists but is unavoidable, and that is a risk that, despite all the good effort in planning and implementing the transaction, it will still fail or be less successful because the revised expectations are not satisfied.

*Cutter Laboratories, Inc. v. Twining*<sup>35</sup> is good illustration of this risk. Twining, a cofounder and for thirty-five years an officer of Cutter Laboratories, agreed, in exchange for the company insuring his life for

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<sup>35</sup> 221 Cal. App.2d 302, 34 Cal. Rptr. 317 (Cal. App. 1963).

\$36,000, to surrender 1,800 of his 3,600 shares of stock in the company for twenty dollars per share upon his death, such shares being endorsed and irrevocably placed in escrow until that time.<sup>36</sup> Two years later, when the company valued its stock, then still privately held, at a price much higher than twenty dollars per share, the company asked Twining if he wanted to rescind, and he declined.<sup>37</sup> Seven years later, again, when the company reclassified and revalued its shares, it asked Twining if he wished to modify the agreement; Twining declined.<sup>38</sup> Four years later, after a further reclassification, split, and public offering of the company's stock, Twining's shares in escrow had a value of more than \$800,000.<sup>39</sup> Twining sought rescission, claiming lack of mutuality and frustration of purpose; the court refused him relief. While the value of the shares had increased more than twenty-fold, Twining's estate still stood to realize all the benefits he bargained for and presumably expected: his wife would receive a payment not subject to estate taxes because it would be under a life insurance policy not included in his estate, and it would be a fixed amount, not subject to the economic vagaries that could affect the price of the company's stock. Twining could not point to any assumption he had made about the circumstances in which he sold the stock or contingencies that had increased the stock's value; he could only cite their occurrence and their consequences—the potential occurrence of which were known to him when he sold his stock.<sup>40</sup>

What Twining valued as a worthwhile benefit when he sold his stock he no longer valued when the stock had increased more than twenty-fold; his expectation or hope about the value he should receive for those shares had changed. Because he had been asked when he sold his stock and on subsequent occasions if he wanted to rescind his deal, there seems little more that could have been done when the deal was incubated to have averted his later change in mind.

## CONCLUSION

An initial benchmark for a successful transaction for a party is not necessarily the counterparty's performance of its obligations under the contract. It may or may not be. Rather, it is the realization of the

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<sup>36</sup> *Id.* at 307.

<sup>37</sup> *Id.* at 308.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 310.

<sup>40</sup> *Id.*

benefit the party expected, hoped, and assumed it would receive. For convenience, this text—instead of speaking of what a party expected, hoped, or assumed—occasionally speaks of what the party anticipated. The counterparty's performance will usually be one component of a successful outcome. The initial benchmark is subject to revision with the benefit of hindsight, and when expectations, hopes, and assumptions later change, the outcome will be judged by the changed perspective.