New Rules Adopted for Software Contracts

Conference of the Association for Software Testing
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Conference Abstract

On May 19, 2009, the American Law Institute (ALI) unanimously approved the Principles of the Law of Software Contracts. This will probably play a major role in American commercial/computer law for the next 20 years. What does this have to do with you? Most quality-related disputes in the US are decided as commercial-law disputes. To a large degree, the Principles lay out the ground rules under which your company (or clients) buy, sell or support software. If you want to use the law to argue that a bug will get your company into trouble, this is a key source for your arguments.

Dr. Kaner started working in this effort in 1995 and was elected to the ALI in 1999 in recognition of his work on computer law. He helped write some of the provisions that relate to the law of software quality. He'll lay out a few of the key provisions, sketch a wee bit of the controversy, and open the floor for discussion, providing specific answers and details as they are relevant to the interests of the room. As with all talks at CAST, we encourage discussion and debate in our sessions and we keep lively sessions going until they come to a natural close. Conferences are for conferring, after all.

We expect this session to be lively because this work has so been controversial for so long and has been the target of so much honest debate and so much more disinformation. As a recent example, last May on Slashdot you might have seen much ado about a letter from Microsoft and the Linux Foundation to the ALI, whining that a provision of the Principles would destroy free software. The provision requires software publishers (like Microsoft) to reveal known defects in their software -- but it explicitly excludes free/open-source software from this requirement.

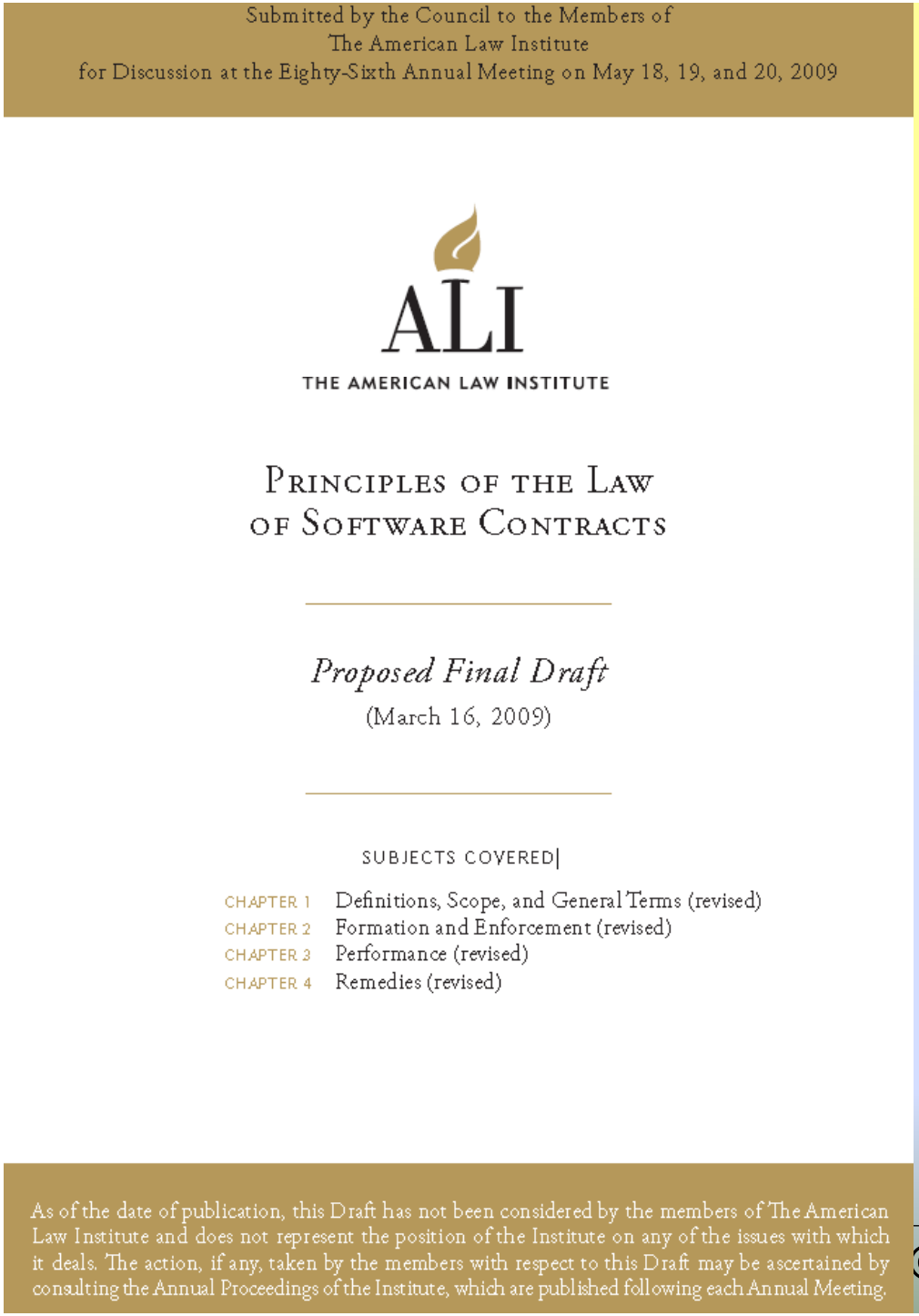
Legislatures in the United States have not yet passed laws to govern computing-related contracts. Until they do, when a case involving the development, sale or licensing, maintenance or support of software comes to court, the judge has to apply commercial laws written 50+ years ago. The Principles are not legislation--they are guidance for judges and business people. The ALI has high credibility with judges (because its works are so well researched and because so many ALI members are judges). ALI reviews of the law are heavily cited in legal opinions written in Courts of Appeal and the (state and federal) Supreme Courts. Until the legislatures finally speak, the Principles will probably play a major role in American commercial/computer law.

References on software quality law

I'll zip through the 10 areas, because my goal is only to lay foundation for the ALI Principles, not to review the build-up in detail

For lots of references, see:

- Cem Kaner, "Bad software—Who is liable?" (Invited address) *Proceedings of the American Society for Quality's 52nd Annual Quality Congress*, Philadelphia, May, 1998. http://www.kaner.com/pdfs/WhoLiable.pdf
- Cem Kaner, "Software engineering & UCITA." *John Marshall Journal of Computer & Information Law*. Vol. XVIII, Issue 2 (Winter), p. 435-546, 1999, http://www.kaner.com/pdfs/engr2000.pdf
- Cem Kaner, "Why software quality professionals should oppose UCITA." *Software Quality Professional,* May/June 1999, http://www.kaner.com/pdfs/asqucita.pdf
- Cem Kaner, "A response to: Why software professionals should support the Uniform Computer Information Transactions Act (and what will happen if they don't)" (Solicited response for *Software Quality Professional*'s website) July, 1999, http://www.kaner.com/pdfs/asqrebut.pdf



Principles of the Law of Software Contracts - Proposed Final Draft

This draft comprises four chapters: Chapter 1. Definitions, Scope, and General Terms. Chapter 2. Formation and Enforcement. Chapter 3. Performance. Chapter 4. Remedies. Approval of this draft will clear the way for publication of the official text.

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Approved unanimously by the ALI membership in May, 2009

What does this mean for us?

Laws Matter

- You probably agree that "laws matter" (or you wouldn't be at this session)
- But a dismaying number of people in our field seem to believe that the laws are largely irrelevant to what we do and/or they wish that most laws would go away.
  - They aren't going to go away. They can stay the same, get better or get worse.
  - They create the foundation for our work.
    - What claims can we lawfully make about our products?
    - How are contracts formed?
    - What are the consequences of defects in our products?
    - Can people limit how or when we use products they sell to us?
    - What rights do we have to learn from the products of others?
- **We can influence the development of laws that affect us.**

Laws matter -- Copyright

"Copyright" has not been with us forever, and it is not a "right" that all cultures recognize.

- Chinese established first copyright law in the turn of the last millennium. Your right to copy documents was subject to the approval of the Emperor. Politically unacceptable material was not copyable.
- British established copyright law with the Stationers Act of 1556, allowed members of the Stationers Company to have a monopoly on printing. Authors and the public had no rights, only this group of publishers. Anyone else who printed documents could be shut down and have their press destroyed. (Enabled the Crown to ban printing of "heretical" texts and other texts that attacked the King or Queen.)
- Lipservice for authors, and some public interest rules came with the 1704 Statute of Anne

US Constitution extended the trend, creating a balancing act: "Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Laws matter -- Copyright

"Copyright" has not been with us forever, and it is not a "right" that all cultures recognize.

- US Constitution (Art 1 Sec 8) extended the trend, creating a balancing act: "Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."
  - This provision creates:
    - a public interest (promote progress; limited time)
    - an author's interest
  - Publisher's interest derives from the author, and the contracts the author signs with the publisher.
- This entire structure is man-made and relatively recent. The balance of power (who gets to restrict what, why?) is subject to statutory change

Laws matter -- Market failure and monopolies

I decided to start working on the commercial law of software quality back in 1985, when I realized that many of the quality-related problems in our industry were playing-field problems:

- Deceptive marketing might eventually kill a company, but it might kill all the honest competitors first
  - I argued in 1997, at Ralph Nader's ***Appraising Microsoft*** conference (which kicked off the antitrust prosecutions of MS in the United States) that Microsoft had become the major power in many software markets not because it competed dishonestly but because dishonest or irresponsible competitors wiped out smaller, honest, competitors and then self-destructed. In a market like that, all that MS had to do was to survive (provide adequate software) and then market aggressively when a vacuum appeared.
  - See "Restricting competition in the software industry: Impact of the pending revisions to the Uniform Commercial Code." *Cyberspace Lawyer*, Vol. 3, #3 (May) p. 11 1998, http://www.kaner.com/pdfs/appraising_ms.pdf

The American marketplace

- Uniform Sales Act, 1906, then Uniform Commercial Code, 1952
- Core intent of the UCC was to structure contracting process such that the ultimate deal would look much like what the parties would have found acceptable if they had negotiated every term
  - Creates default rules (what the rule is if no one says otherwise)
  - Creates implied warranties (warranties automatically written into the contract unless the contract clearly excludes them)
  - Creates rules for dealing with deals that change or have contradictory terms
  - Establish remedies for broken contracts and defective products
  - Establishes some fundamental rules (duty of good faith & fair dealing, ban on unconscionable clauses)
- The stance was intentionally party-neutral (doesn't favor vendors or customers) but with some protection for parties too small to negotiate effectively

UCC and the Software Marketplace

The UCC (USA) was the law for a century of huge commercial success.

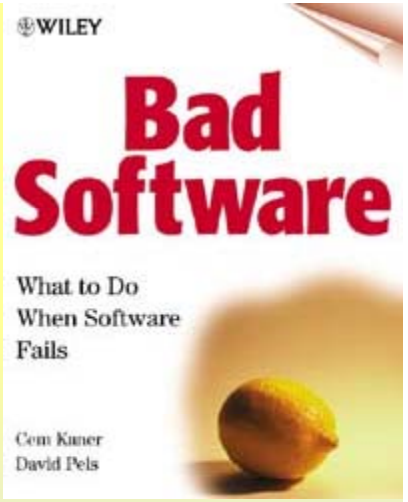
- It created a solid foundation for a successful marketplace
- Many believe that the US was, for most of the century, the best place to shop (to make deals) in the world

Software was initially treated as within the scope of the UCC but software companies developed a new contracting structure:

- completely nonnegotiable
- postsale presentation of terms
- disclaim all warranties, exclude damages to the max extent possible
- assert IP rights far beyond the balance in the Copyright Act (no fair use or first sale)

In 1988, ABA started trying to develop a software-specific law to supplement or replace UCC Article 2. Evolved into NCCUSL / ALI UCC-2B project, evolved into UCITA.

UCC and the software marketplace



David Pels and I spent 5 years researching and writing Bad Software (now available free at http://www.badsoftware.com/wiki/)

- Contracts were outrageous
- Support was getting worse
- Customers were getting furious, surveys showed that mass-market customers were increasingly dissatisfied and losing trust

In 1990's hearings on UCITA, I warned repeatedly that if customers lost enthusiasm for software, they would stop making discretionary purchases of software.

I also warned that if clients could not hold software service firms accountable, they would seek lower-cost providers offshore. (If you can't get good service, at least get it cheap)

UCC and the software marketplace

- 2002 saw the bottom fall out of the American software industry
- We can blame this on the "dot-bomb" and that might explain drop in stock prices
- But dot-bomb doesn't explain:
  - why people stopped buying mass-market software
  - why software companies had to adopt force-you-to-upgrade sales models
  - why newspapers stopped talking about new software products on their main pages
- We alienated our markets and they decided to spend their money somewhere else.
- We are still recovering from that market failure.

UCC, UCITA, Principles

- In the mid-1990's, when I started working on the Article 2B project, there was a strong bias in favor of software vendors:
  - Legislators (NCCUSL) thought software was a uniquely American industry and protecting it was vital to our national interest
  - Legislators were afraid that "harsh" (even UCC) liability rules could kill the industry before it matured.
    - Even holding companies to published statements of fact (express warranties under UCC) was controversial
- But in the mid-1990s' there was room for compromise. We went to dinner together, hit the bars together, and looked for common ground. Several joint proposals.
- In the 1990s, Newt Gingrich pushed an anti-collegial vision as the way for Republicans to regain power. This cancer spread from Congress to the States and to NCCUSL. Compromise became impossible. Co-submitted proposals (Nader / Software Publishers Association; Microsoft & me) weren't even allowed to go to a vote.

UCC, UCITA, Principles

- Article 2B polarized.
  - "Stupid customers? That's redundant!"
- Article 2B drafts evolved into an increasingly polarized document reflecting a right-wing agenda. ALI repeatedly protested, with Annual Meeting resolutions asserting that Article 2B was :
  - granting publishers intellectual property rights that trumped the limitations built into the Copyright Act
  - taking the publishers' side in contracting matters (formation, warranties, breach, liability) (National Association of Attorneys General argued that the purpose of commercial law was to promote commerce and that Article 2B was so extreme that it would harm commerce instead, along with wiping out much consumer protection)
- ALI withdrew, killing 2B as a UCC project. NCCUSL reissued it as UCITA, which passed in 2 states and was rejected every else. Four states even passed laws rejecting UCITA-based terms.

UCC, UCITA, Principles

After UCITA failed, software industry faced the same legal vacuum as before. Application of UCC to software has serious problems.

Because there are almost no laws specifically directed to software transactions, judges have to create the laws under which software contracts are interpreted. (Until the legislatures finally pass their laws

ALI formed a new Principles project in 2004:

- *Principles* are not legislation, they are guidance for judges and suggestions for legislatures
- *Principles* emphasize the issues and concepts but do not attempt to develop refined statutory language

Legislative Idiots and Market Failure

- The legislature creates the ground rules for economic transactions.
- Short-term thinking that focuses on benefit to one group of players in the marketplace will destroy the marketplace over time.
- Let me step back from our industry to another area of law that concerns everyone in this room--the bankruptcies of large American companies who can't afford to fund their pension plans
  - Watch Bloomberg or Fox this week. Pension plans are frequently blamed for the uncompetitiveness of companies like GM, Chrysler, US Steel, etc.
  - Why are these plans underfunded today? The aging of the population was not exactly unpredictable and the companies have had decades to save the money that was needed.
- Let's take a time machine back to 1987, when it became clear that this was going to become a big future problem. How did the legislature respond?

Typical lawsuit from that time

DISTRICT 65, UAW, et al., Plaintiffs, v. HARPER & ROW PUBLISHERS, INC., et al., Defendants; RAYMOND C. HARWOOD, et al., Plaintiffs, v. HARPER & ROW, PUBLISHERS, INC. et al., Defendants

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

576 F. Supp. 1468; 1983 U.S. Dist. LEXIS 10314; 4 Employee Benefits Cas. (BNA) 2586; Fed. Sec. L. Rep. (CCH) P99,608

December 30, 1983

A publishing company terminated its retirement plan, liquidated the fund, and recaptured excess contributions to purchase outstanding shares of its stock. The union and participants in the retirement plan alleged violations of the Employee Retirement Income Security Act (ERISA), 29 U.S.C.S. § 1001 et seq., securities laws, and common law. The court allowed consolidation to avoid duplication of discovery. The court found that the union had no standing to assert claims under ERISA because the union was not a participant, beneficiary, or fiduciary. The court found that the decision to terminate the retirement plan was exempt from ERISA's fiduciary standards.

Another typical example: Schick buys Reeves Brothers

See "Workers worry as companies tap excess cash in pension funds, Christian Science Monitor, March 24, 1987."

In May 2006, Schick Inc. agreed to buy Reeves.

> "To get banks to help finance the deal, the two companies agreed to pay the banks a maximum of $20 million out of Reeves's two pension funds. Under current law, the only way they could get their hands on the money was to terminate the plans.
>
> "This is a new twist on a problem pitting some 53 million workers who are covered by private pension plans against their employers."

Many other cases involved hostile takeovers.

- Company A had a well-funded pension
- Company B decided to buy Company A
- B borrows money to buy A, then takes the money out of A's pension fund to pay back the loan

Corporations Accused of Mishandling Retirement Funds
The Associated Press, March 24, 1987

"Corporations have stripped employee pension plans of nearly $16 billion in excess assets since 1980 while making $145 billion in empty promises of retirement income and health care to workers without setting aside money to pay for them, Congress was told Tuesday.

A growing corporate practice of terminating retirement plans **-- often using surplus assets in takeover wars and sticking the government with unfunded liabilities** -- is putting at risk millions of Americans who look to defined-benefit pensions to take care of them in their old age, witnesses said.

The Labor Department, in a 1984 study, concluded that workers in terminated plans lose about 45 percent of [expected] benefits....

The last time Congress comprehensively addressed pensions ...1974 ... the Employee Retirement Income Security Act, or ERISA, following well-publicized abuses in the handing of pension funds ....

... established the federal Pension Benefit Guarantee Corp., or PBGC, to insure those benefits promised to retirees, much like the Federal Deposit Insurance Corp. insures bank depositors against losses."

Corporations Accused of Mishandling Retirement Funds
The Associated Press, March 24, 1987

"ERISA [created] two new [problems]...

Pension plans fat with surplus assets as a result of double-digit interest rates in the late 1970s and early 1980s and then a booming stock market became a target for both corporate raiders and entrenched managements desperately seeking funds to fight them off.

"Companies have turned their pension plans into corporate piggy banks," complained Sen. Howard Metzenbaum, D-Ohio. "And in the process workers have lost retirement security. The situation cries out for reform."

According to the Labor Department, many of the nation's 110,000 voluntary and private defined-benefit pension plans have surplus assets -- the amount of money needed to cover the benefits they have promised -- totaling $263 billion.

Under ERISA, companies can retrieve those excess assets only by terminating the plans and establishing new ones in their place or turning responsibility for the benefits over to an insurance company.

Since 1980, 1,338 pension plans have been terminated to capture nearly $16 billion in surplus assets, the PBGC said. ... new plans established in their wake may not have adequate resources if there is an economic downturn....

Corporations Accused of Mishandling Retirement Funds
The Associated Press, March 24, 1987

"Rather than terminate the plans to get at those excess assets, the administration would allow companies to withdraw surpluses that exceed the total of a plan's liabilities _ but only after a 25 percent "cushion" is established to protect the participants against future investment risks.

At the same time, other pension plans have deficits running a total of $45 billion below what they need to pay the promised benefits. More than half of those deficits are concentrated in the pension plans of 25 to 30 large corporations, said Kathleen Utgoff, the PBGC's executive director.

Brock and **several members of Congress acknowledged that no one anticipated that companies would terminate pension plans in the large numbers that they have.**

In the **past 12 years**, more than 1,300 private pension plans have defaulted and the PBGC is now running a $3.8 billion deficit in assuring that the 355,000 vested participants in them _ 108,600 of them from LTV Steel Corp. alone _ get their monthly retirement checks."

No one anticipated this... when???

- The Harper Collins case started in 1981.
- It was 1987 when Republican President Ronald Reagan's Labor Secretary William "**Brock and several members of Congress acknowledged that no one anticipated that companies would terminate pension plans in the large numbers that they have."**

How much "surplus" was in these pension funds?

Detailed report, "Pension surplus to lift earnings" in Pensions & Investment Age, October 5, 1987.

- Using traditional accounting assumptions, in 1980, pensions on average, were funded at 99% (slightly underfunded)
- But Salomon Brothers re-estimated, using different standards, and claimed that in 1980, pensions were 186% funded (had nearly double what they needed). They estimated the ratio rose as high as 235%, settling to 197% in 1987.
- Morgan Stanley estimated a surplus ratio at 157% in 1980, rising to 167% in 1987.
- Salomon Brothers described this "surplus" as a "corporate treasure chest."
- To the extent that you could open the chest, you could use it to buy other companies, or other companies could use it, to buy yours.

Why is a surplus important? S & P 500 Stock Index, last 10 years

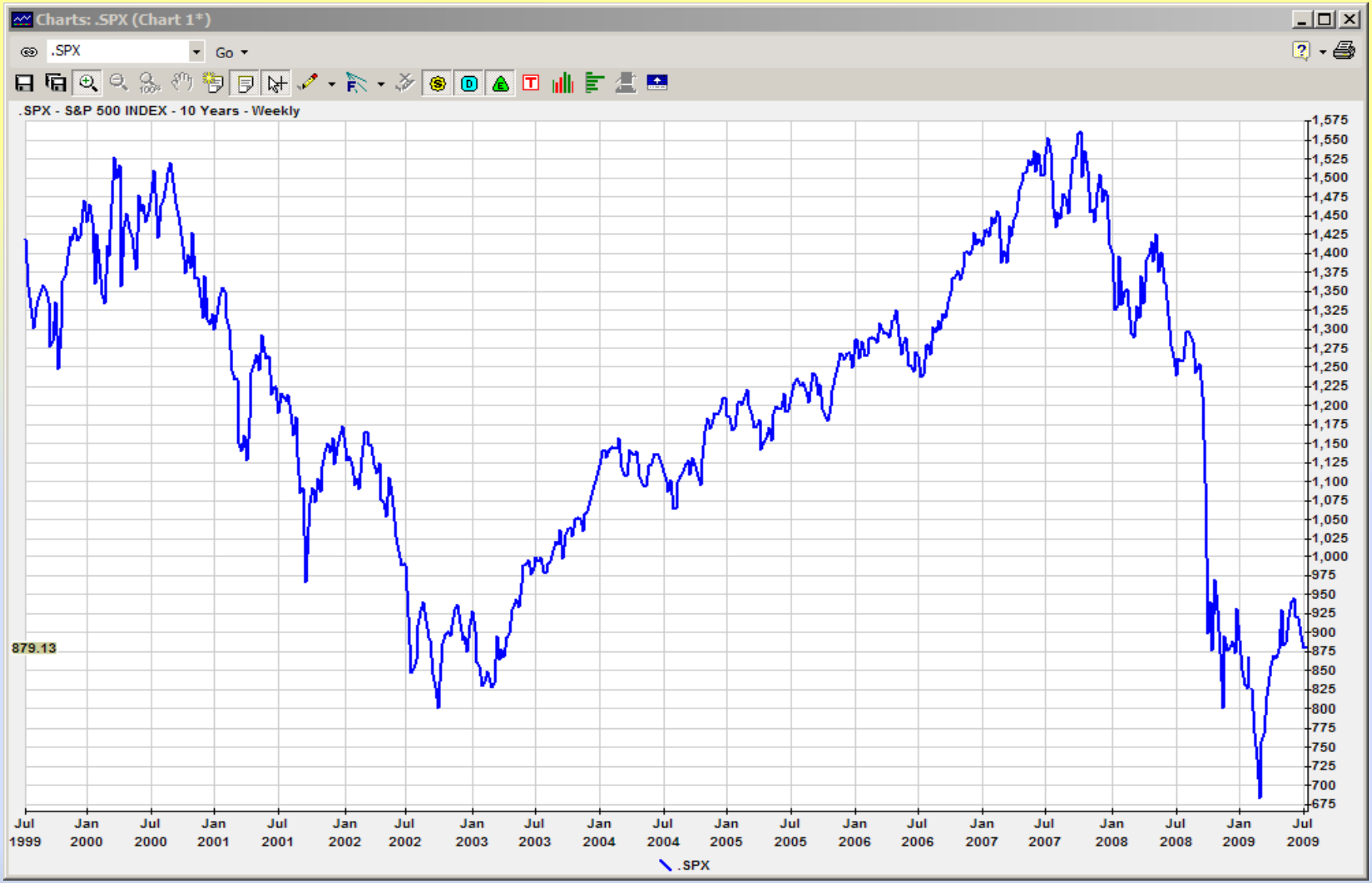


Chart generated by Fidelity's Active Trader Pro software.

So, how did the Reagan Administration fix this?

"Pension Law Revision's Quiet Death: Excess-Funding Rule Dropped From Measure", Washington Post, December 27, 1987

- After a year of hearings, the "Pension Protection Act" of 1987 imposed tough rules on companies with seriously underfunded pensions
- However, rules that were designed to limit raiding of "surplus" from well-funded plans were pulled from the Act at the last minute, when it got folded into an Omnibus budget act.
  - (The proposal that had been developed over the year said that when surplus is pulled out of the pension fund, half goes to the company and half to the workers whose pensions are being put at risk. This makes less money available to the corporate raider.)
- Instead, they came up with a brilliant new idea...

Congress' brilliant plan for protecting pension surpluses

We can eliminate raiding of pension surpluses IF WE ELIMINATE pension surpluses!

"The 1987 legislation resulted in plan sponsors of fully funded plans contributing only for minimum funding contributions, to avoid a surplus situation that would trigger the punitive 50 percent excise tax. Congress had imposed the 50 percent excise tax penalty in response to the raiding of pension plans in takeover situations to gain access to the surplus. Such approach prevented the raiding of pension plans, but *it also prevented employers from contributing ‘‘too much’’ (to protect the plan participants) as that excess would be lost in taxes if the plan terminated."*

Kathryn J. Kennedy, "Pension funding reform: It's time to get the rules right (Part 1)" TAX NOTES, August 22, 2005, pp 907-923, www.**jmls.edu**/facultypubs/Kennedy/**pension_funding_reform**_pt1.pdf

WHAT HARM COULD THAT POSSIBLY CAUSE?

Guess what happened to pension funds in mid-2000's?

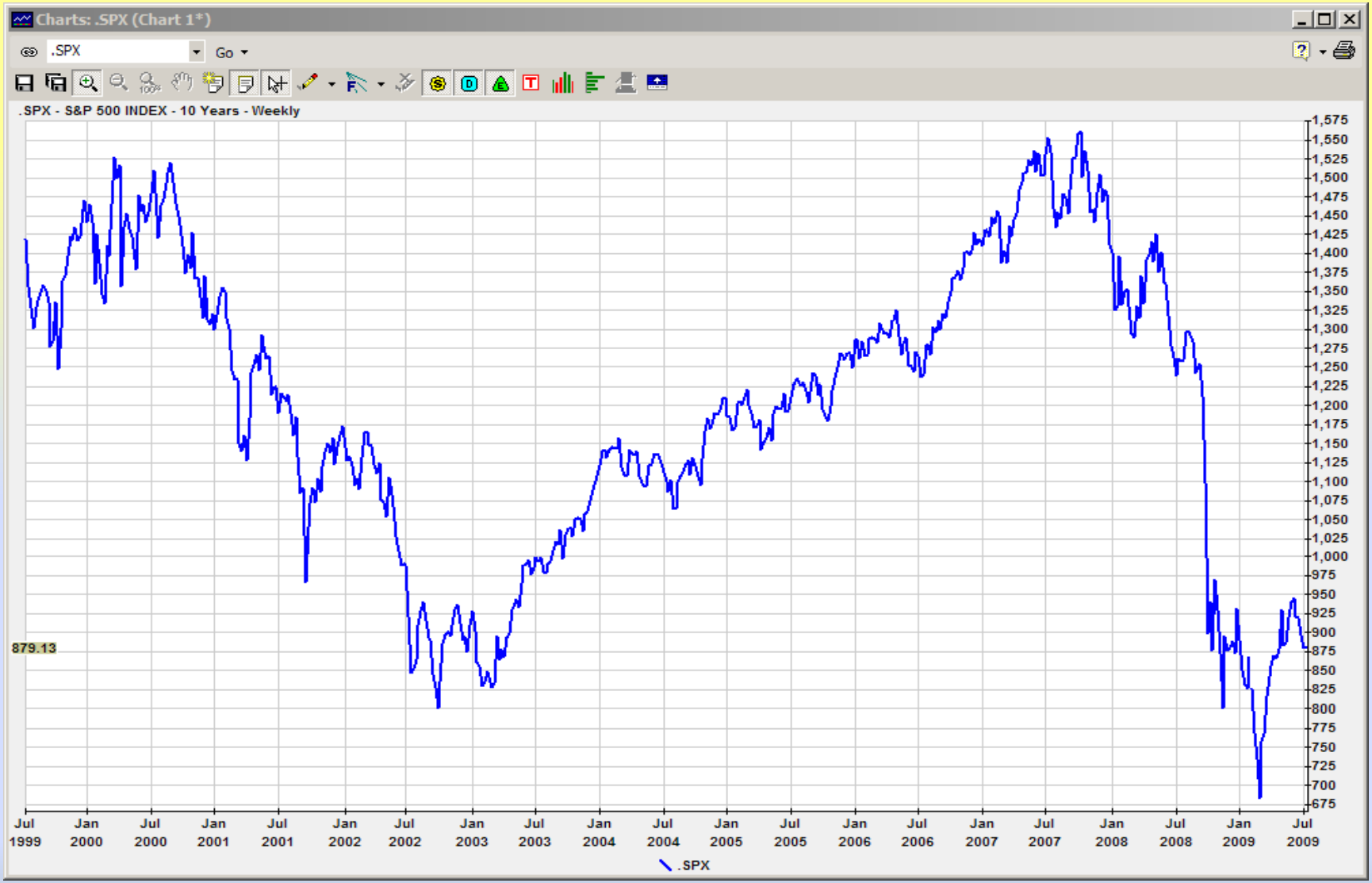


Chart generated by Fidelity's Active Trader Pro software.

The politicians were surprised ... again

"A wave of recent defaults on pension plans by big employers -- most notably the bankruptcy of United Airlines, which left longtime workers with a fraction of the retirement funds they had saved over the years -- has intensified interest in legislation to tighten companies' pension contribution requirements and to shore up the Pension Benefit Guaranty Corporation, the agency that insures private plans. The agency reported a $23.3 billion deficit at the end of the last fiscal year."

GOP links pensions, Social Security, Boston Globe, June 19, 2005

"In early June 2005, Sen. Chuck Grassley, R-Iowa, chair of the Senate Finance Committee, remarked, **"[t]he questions we are asking are simple . . . [h]ow did this happen, why did this happen, and, most importantly how can we stop it from ever happening again?'"**

(Quoted by Kennedy, 2005, p. 907)

"How did this happen? Why did this happen?"

Chart generated by Fidelity's Active Trader Pro software.

Now where are we?

- Congress passed the Pension Protection Act of 2006 (http://www.dol.gov/EBSA/pensionreform.html)
  - higher premiums to the (drowning) Pension Benefit Guaranty Corporation
  - Stricter rules against underfunding plans
  - Companies whose surpluses turned into shortfalls now had to find cash
  - Companies with underfunded pensions have huge debt compared to companies (e.g. non-US) who don't have this problem. This puts them at an enormous competitive disadvantage.
- Auto companies are going bankrupt
- US Steel is in trouble
- Many other companies (Fortune 500 level) are also in this situation.
- This disaster is a predictable (and predicted) consequence of an obviously-reckless legislative approach.

Back to software...

Several areas of law potentially apply to the same software transaction but none of them were written with a focus on (or usually, even awareness of) software transactions:

1. UCC law of sales (of goods) (tangible, movable property) (1906, 1952)
2. Common law governing service contracts
3. Malpractice or negligence law governing professional-service contracts
4. Intellectual property law (copyright, patent, etc.)
5. Licensing law (governing right to use, copy, or distribute intellectual property) (think of a license as similar to a rental agreement, but you rent one or more intellectual property rights rather than a car)
6. Products liability law if a product defect causes personal injury or damage to tangible property (goods, or "real" property such as land or house)
7. Law of misrepresentation (fraud, deceptive practices)
8. Consumer protection law (special rules for parties who are typically in a weak bargaining position, with less market information)
9. Antitrust law (making it hard to become "too big to fail") (maybe we should start enforcing these laws...)

The Principles collect ideas from several areas, into a unified approach, tailored for software

- Core areas of concern (for us):
  - Unified approach to sales & licenses, goods and services
  - The nature of assent to standard-form (non-negotiable) contracts
  - Public policy and unconscionability
  - Terms that restrict copyholder rights
  - Terms that govern the quality of the software

Unified approach to sales & licenses, goods and services

- Sales (USA and UCC)
- Services (common law)
- Licenses (intellectual property)

1.01(m) A "transfer" is a conveyance of rights in software or an authorization to access software, including by way of sale, license, lease or access agreement.

The nature of assent to standard-form (non-negotiable) contracts

"These Principles assume that market pressure is insufficient in software retail markets to assure the production of reasonable standard terms, both in presentation and substantive content."

- Mandatory terms include warranty of no material hidden defects
- Suspect terms include installing spyware on your system
- Stronger assumption of enforceability if terms are more easily obtained and read before the transaction (e.g. before payment)

Public policy and unconscionability (these rules are standard, but their application is broader than, e.g. UCITA)

1.10 Public policy

A term of an agreement is unenforceable if the interest in enforcement of the term is clearly outweighed in the circumstances by a public policy against its enforcement.

1.11 Unconscionability

(a) If the court as a matter of law finds the agreement or any term of the agreement to have been unconscionable at the time it was made, the court may refuse to enforce the agreement or it may enforce the remainder of the agreement without the unconscionable term...

Reference to: European Union 1993 Directive on Unfair Contract Terms

Examples cited:

- Overly broad exculpatory clauses or limitation-of-action clauses
- Federal IP conflicts
- Restrictions on publishing reviews

Terms that restrict copyholder rights

1.09 Enforcement of terms under Federal Intellectual Property Law

A term of an agreement is unenforceable if it (a) conflicts with a mandatory rule of federal intellectual property law; or (b) conflicts impermissibly with the purposes and policies of federal intellectual property law; or (c) would constitute federal intellectual property misuse in an infringement proceeding

Problematic types of clauses include:

"(1) preclude the transferee generally from making fair uses of the work

(2) ban or limit reverse engineering

(3) restrict copying or dissemination of factual information; or

(4) forbid transfer of the software"

None of these are banned outright, but they are subjected to scrutiny and will often be rejected.

Terms that govern the quality of the software

3.02 Express Quality Warranties

(b)(1) An affirmation of fact or promise made by the transferor to the transferee, including by advertising or by a record packaged with or accompanying the software, that relates to the software and on which a reasonable transferee could rely creates an express warranty that the software will conform to the affirmation of fact or promise.

Similarly (summarized, not quoted)

(b)(2) Any description of the software made by transferor to transferee

(b)(3) Any demonstration of the software

These are from UCC 2 with some clarification of a drafting issue that also got fixed in recent amendments to UCC2.

These are generally difficult to disclaim but, unlike UCC, not impossible to disclaim.

Terms that govern the quality of the software

3.03 Implied Warranty of Merchantability

To be merchantable, software must (b)(1) pass without objection in the trade, (b) (2) be fit for the ordinary purposes for which such software is used...

- Can be excluded or modified (and will probably disappear in most standard-form contracts)
- Magnuson-Moss Act often blocked such exclusions in consumer contracts, but MM may or may not apply to software

3.04 Implied Warranty of Fitness for a Particular Purpose

If you know why someone is buying your software and sell it to them so they can do THAT, you impliedly warrant that they CAN do that with your software. -- Can be excluded or modified.

Terms that govern the quality of the software

Hidden, known defects.

3.05 Other Implied Quality Warranties

(b) A transferor that receives money or a right to payment of a monetary obligation in exchange for the software warrants to any party in the normal chain of distribution that the software contains no material hidden defects of which the transferor was aware at the time of the transfer. This warranty may not be excluded. In addition, this warranty does not displace an action for misrepresentation or its remedies.

Objections

The loudest objections have been to the warranty of no known, hidden material defects.

Reality:

- After all the nonnegotiable disclaimers and restrictions have been put into the contract, here's what we have left:
  - No clauses allowed that violate fundamental public policies or are unconscionable
  - Implied warranty of no known, hidden material defects
  - Maybe (maybe not) some express warranties.
- When Microsoft and the BSA say they want a warranty to be disclaimable, they mean they want the right to strike it out of every contract that they're involved in. That's not a warranty, it's a sham. In a market of non-negotiable standard forms, the only non-sham warranties are the ones that can't be disclaimed. The only rights you have (as a transferee) are the ones the vendor can't take away.

Objections

- Won't people stop testing so their company won't have to "know" about its defects?
  - That might work for a few days, but once you learn of a defect from your customers or users, you "know" about it. After that, if you transfer the software, you transfer with knowledge.
    - Better to know the problems in advance, and deal with them
  - You're not liable for the defect, you're liable for not disclosing it. If you document it, it's a feature. End of risk of liability. This is a better safe harbor than anything in the UCC for traditional industries.

Objections

- Won't this wipe out open source software, because we put them at risk of liability?
  - There's more risk for many open source developers under current law
  - The Principles carve out open source software distributed at no charge.
    - If you give the software away but sell training/consulting/support services, the fee for the services is not a fee for the software.
    - This is enormous, intentional protection for that community

Objections

- This project has been rushed and key people weren't given enough time to comment. It must be delayed!
  - The Principles project started in 2004, and almost all of the ideas in it now were in the early drafts.
  - The proposals in the Principles were all discussed in the UCITA / Article 2B meetings, which started in 1994.
  - The nondisclaimable implied warranty of no material hidden defects was proposed in 1995 and publicized then, in the mainstream press (Ed Foster; InfoWorld).
- There have been dozens of meetings of software lawyers on these issues, open to all of the lawyers who are protesting that they haven't had enough time, since this process started in 1988 at the ABA.
- If they haven't had enough time by now. . . . .