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Reading *Wood v Lucy, Lady Duff-Gordon* With Help From the Kewpie Dolls

Victor P. Goldberg

Abstract -

In *Wood v. Lucy, Lady Duff Gordon*, Cardozo found consideration in an apparently illusory contract by implying a reasonable effort obligation. Unbeknownst to Cardozo, Wood had agreed to represent Rose O'Neill, the inventory of the kewpie doll in an earlier exclusive contract. Wood sued O'Neill two months prior to entering into the Lucy arrangement. That contract included an explicit best efforts clause. The failure to include such a clause in this contract was, quite likely, deliberate, suggesting that Wood was trying to avoid making a binding commitment to Lucy. The paper examines both the kewpie doll and Lucy contract in some detail. It then goes on to argue that the decision's role in finding consideration is probably minimal—it would be easy enough for the parties to provide an alternative source of consideration if they desired. The mischief of the opinion is its impact on contract interpretation. The UCC and some common law courts have taken to imposing a vague effort standard on promisors, even if there exists an explicit source of consideration.

In *Framing contract law: an economic perspective*, Harvard University Press, 2006.

Everyone knows about *Wood v. Lucy, Lady Duff-Gordon*. It is in virtually every Contracts casebook and is still widely cited by courts.¹ In a decision marked by rather colorful language, Cardozo found consideration for a promise despite the fact that, if read literally, the contract bound Otis Wood to do nothing. Although Wood had not overtly promised to do anything, a promise could fairly be implied, said he. “His promise to pay the defendant one-half of the profits and revenues resulting from the exclusive agency and to render accounts monthly, was a promise to use reasonable efforts to bring profits and revenues into existence.” (p. 92) When I first began this project I thought this an easy case. Cardozo got the result right, but for the wrong reasons. The consideration lay not in the implied promise to use reasonable efforts, but in the contract’s incentive structure. I had assumed that Wood, the professional repeat player, had used a standardized form slightly customized for this particular client and that in that era, parties had not yet thought of making explicit promises to use reasonable or best efforts.

It turns out that I was quite wrong. Fortunately for posterity (less so for Wood), he was involved in one other piece of litigation against a different client, Rose O’Neill, the mother of the Kewpie doll, who, he claimed, had breached a contract in which he was to be the exclusive agent. The differences between his contract with Lucy and Rose O’Neill show that there was no need for a court to imply a promise to use any particular level of effort—the parties were quite capable of doing so themselves and apparently chose not to do so.

Moreover, even if Wood and Lucy had a valid, enforceable contract, it is not clear which of Lucy’s actions amounted to a breach. She entered into endorsement contracts with at least two third-parties, Sears, Roebuck & Co. and Chalmers Motors, during the term of Wood’s

exclusive deal, but entering into those transactions did not necessarily violate her agreement. It depends on what you mean by “exclusive.” The Kewpie contract suggests that “exclusive” is a lot more ambiguous than it looks. Indeed, the Kewpie definition makes it more likely that Lucy had not entered into an enforceable bilateral contract. Cardozo’s claim that to hold otherwise would put Lucy at the mercy of Wood, oft-cited as the basis for inferring an obligation, is undercut if the Kewpie definition were to hold.

In Section 1, I analyze *Wood v. Lucy* in light of the prior Kewpie contract. I provide some historical background on the parties, and details about both contracts and the litigation. If Cardozo had all this information available to him, I conclude that he would most likely have held that there was no enforceable agreement.

Does it matter whether Cardozo got it right? That is the subject of Section 2 and the answer is that for his ostensible purpose—finding consideration when there is no other source—probably not much. I say that despite the decision’s enthusiastic reception and its being the basis for UCC §2-306(2) and an illustration in Restatement (Second) of Contracts. Since it would be easy enough for the parties to incorporate an explicit form of consideration into their agreement, at most the *Lucy* rule provides protection for lazy or sloppy drafting. On the negative side, it exposes parties to the risk that some over-zealous court will find an enforceable contract where none was intended.

However, *Lucy*’s reach has been extended beyond this limited purpose, and therein lies its adverse impact. It imposes an ill-defined standard on an ill-defined set of promisors. The

meaning of an implied efforts clause (reasonable, best, or otherwise) is, at best, unclear. To make matters worse, some courts have chosen to impose an implied efforts clause even in instances in which there is a separate source of consideration. Doctrinal evolution, unchecked by any sensitivity to the economic context, has produced an incoherent mess. The nature of this mess will be sketched out in Section 2.

1. WOOD V. LUCY

A. *The Players.*

Because the case record is so sparse, I have supplemented it with material from a wide variety of sources: paper, internet, and human (or at least their e-mail manifestations).² I begin with a bit of biographical background.

Lucy, Lady Duff-Gordon. As Cardozo put it, Lucy “styles herself ‘a creator of fashions.’ [whose] favor helps a sale.” And so she was. Cardozo was not, as Llewellyn (1962, pp.637-8) argued, making a rhetorical dig in order to incline his readers against her. This was how she was described in the contract and this is how she billed herself to the public. She had an illustrious career as a fashion designer in the early twentieth century, providing elegant gowns to European royalty (including the queens of England and Spain) and leading entertainers (including Irene Castle and Mary Pickford). She was the first British-based fashion designer to achieve an international reputation. In addition to her couture business, she wrote columns on fashion for the Hearst newspapers, *Good Housekeeping*, and *Harper’s Bazaar*. In these columns she

referred to herself as the “greatest living creator of fashions.” She and her second husband, Cosmo Duff-Gordon, survived the Titanic, although their reputations were tarnished by the manner in which they survived. Cosmo was accused of bribing the sailors to secure positions in the lifeboats. The accusation generated considerable negative press coverage ultimately leading to a formal board of inquiry. While the charges were not proved, the suspicion remained. However, the incident did not affect Lucy’s business adversely. Her arrangement with Otis Wood was, it appears, one element in a repositioning strategy, aimed at broadening her market, reaching women of more modest (but not very modest) means. Her entry into an agreement with Sears, Roebuck & Co. (described below), was another manifestation of that strategy. In the 1920's she suffered some business reversals and eventually went bankrupt. Lucy’s life has been documented in a number of places, most recently in the forthcoming biography by Randy Bigham, so I need not provide more detail.

While Lucy was a famous public figure, Otis was not exactly chopped liver. He came from a prominent, wealthy, and controversial family. Although his family background has no bearing on the case, it is too colorful to ignore entirely. For those uninterested in such gossip, I recommend skipping the next few pages. For those more curious, here are a few branches from his family tree.

Father Fernando. Otis’s father was a three-time mayor of New York. He amassed a considerable fortune early in his career in shipping and later in New York real estate. He married Otis’ mother (his third wife) when he was 48 and she 16. He fathered many children, his biographer reckons somewhere between 14 and 17, although his *New York Times* obituary listed

only three, none of which was Otis. A *New York Times* article on the centenary of his birth began: “Of all the Mayors of New York City from the beginning of the century up to 1881 [the year of his death] the names of only two have passed into tradition--DeWitt Clinton and Fernando Wood.” He merited almost an entire chapter in *The Gangs of New York* (Asbury, (1928, pp. 96-107)) and a bit part in the movie of the same name. He was the first mayor elected by the Tammany Hall machine, although he later broke with it. He was instrumental in the development of Central Park. During the Civil War he was a leading “peace Democrat,” sympathizing with the South and strongly opposing abolition. His opposition to the War and his battles with Albany led him to propose that New York City secede from the Union on the eve of the war. His position on the crucial issue of the day was laid out starkly in a speech made while serving as a congressman during the War: “This is a government of white men made by white men for . . . the protection of the states and the white people thereof Yet it is proposed to oppress the white and elevate the social and political condition of the black race Under the organic law slaves are property. They have no other status in the Constitution and as property cannot be taken except by giving just compensation in return.” He is credited (blamed) for being one of the leaders of the New York draft riots, although his brother Benjamin likely played a larger role.

In 1867, Wood and Boss Tweed secured a nomination to the New York Supreme Court for Albert Cardozo. Shortly thereafter Cardozo ruled in Wood’s favor in the so-called “Wood Lease” case (*New York v. Wood*), a controversial decision in which Wood was accused of procuring a lucrative lease arrangement from the City by fraud or bribery; the judge rejected the city’s evidence on technical grounds, giving a directed verdict for Wood. (Cardozo subsequently

resigned from the bench when confronted with impeachment for misbehavior in other cases.) A half century later Albert's son, Benjamin, found in favor of Fernando's son, Otis. Fernando spent the last two decades of his life in the House of Representatives, eventually becoming Chairman of the Ways and Means Committee. He died while still in office in 1881.

Uncle Ben. Fernando's younger brother Benjamin was, for the 40 years prior to his death, the publisher and editor of the *New York Daily News* which, under his leadership grew to have the largest circulation of any newspaper in the country. He served two short stints in the House of Representatives. His views on the war, race, emancipation, and the draft were, if anything, more extreme than his brother's. Both he and his newspaper were in constant battle with Lincoln (who he labeled a dictator) during the war. The paper was forced to suspend publication for over a year and he was at various times threatened with both arrest and court martial.

In his later years he spent little time with the newspaper, but continued to receive a large income from it, much of which he gave to his second wife, Ida. When in 1899 his income diminished, his wife gave him \$100,000 on condition that he turn the newspaper over to her, which he did. He died the following year.

The Wacky Widow. Ida and Benjamin had been prominent members of the New York social scene. Ida accumulated a substantial fortune so that by the time of her husband's death her holdings were well over \$1 million. She suffered some financial losses in the Panic of 1907, and panic she did. She sold the newspaper, withdrew \$750,000 from the banks and, along with

her sister and daughter, moved into the Herald Square Hotel, from which, for the next quarter century, she did not venture out. The women shared two rooms, cooked their own meals, and saw no one. She died in 1932 at the age of 93. Her sister and daughter predeceased her, setting the stage for a notorious battle for her fortune upon her death.

After her sister's death, Ida's nephew Otis reentered her life. He instituted proceedings to declare her incompetent, and to be named her guardian. He succeeded. The case generated considerable press coverage, as did the subsequent battle over her estate. Ida, who became known as the Recluse of Herald Square, died within a year of Otis being named her guardian. Despite her irrational fear of poverty, it turned out that she was still extremely wealthy. Her rooms contained trunks of items, including lots of junk (for example, bushels of hotel soaps) and some very valuable jewelry (one piece was appraised at \$38,000). She also had substantial amounts of cash. Sewn into the lining of one garment was an envelope containing 50 very old \$10,000 bills. Total cash holdings exceeded \$750,000 including some that was actually hidden in the mattress. Upon her death, Otis was initially named the administrator of the estate. Her will left her entire estate to her sister and daughter, but because they were both deceased, the court treated her as having died intestate. This precipitated a battle over the estate which dragged on for seven years with over 1,000 hopefuls making claims. Early on in the battle Otis was ousted as administrator, and he, and others from Benjamin's side of the family, were denied any share of the estate. Ultimately, ten of her relatives received equal shares of the estate which was valued at \$877,500.

Brother Henry. Henry A. Wise Wood, one of Otis's many brothers, was a successful inventor and businessman and a political gadfly. He was the inventor of the high speed printing press. According to his obituary in the *New York Times*, he "invented much of the intricate modern machinery that makes possible the large circulation of daily newspapers today." His prominence in the business is indicated by his appointment as chairman of the Code Authority for the newspaper machinery industry under the National Recovery Act. He also was a noted aeronautical engineer. He was a strong supporter of America's entry into World War I and a harsh critic of President Wilson's policies both before the United States entered and after the armistice. He vigorously opposed America's entry into the League of Nations and petitioned Congress to impeach President Wilson. He died in 1939, less than one month before his younger brother, Otis.

Otis Fenner Wood. By contrast to these folks, Otis appears to be the bland sheep of the family. Born in the same year that Albert Cardozo decided the "Wood's Lease" case, Otis died a bachelor in 1939. His business career spanned almost fifty years, but from the few shards of historical material available, we can't say whether the promotion/agency activity promised to Lucy was a core part of his business or merely a sideline. We know how he characterized his business affairs. His contract with Lucy asserts that he "possesses a business organization adapted to the placing of . . . endorsements." In his brief he states that he "has been for over a quarter of a century engaged in the business of advertising and promoting and securing a market for novelties, ideas and plans for the promotion of trade in addition to the marketing of special articles for newspapers and other publications, throughout the United States and other parts of the world." (PB, pp. 1,2) The evidence with regard to the second half of his statement

syndication) is pretty clear; there is less of an obvious fit between the first half (promotion, alas, the relevant half) and the limited descriptions of his other business background. He began his career writing for the *Philadelphia Inquirer*. His first known employment in New York was as cofounder of a firm engaged in lithography in Manhattan in 1892. Within a few years, business directories have him listed as both a lithographer in Manhattan and a publisher in Staten Island (his home). In 1901, The Types Publishing Company, of which he was one of three directors, was dissolved. (The other two directors were his younger brother Benjamin and Benjamin's brother-in-law E. F. Hutton—the same E. F. Hutton who founded the eponymous brokerage house a few years later.) There is no evidence as to when the publishing company was formed, what it did, or what his role was other than as a director. By the time of the *Lucy* litigation, he is listed in business directories as the president of two corporations, one on Staten Island and a second in Manhattan. The latter, identified as a newspaper syndicate, was most likely his primary business. His obituary, over two decades later, noted that he was still associated with the syndicate.

Rose O'Neill. We have no idea how many other clients Wood had, but of one we are certain. Less than two years before entering into the contract with Lucy, Otis entered into an agreement with Rose O'Neill to promote her Kewpie dolls, and two months before the Lucy deal, he sued O'Neill for breach. O'Neill was a prominent illustrator with hundreds of illustrations in *Puck* and other major periodicals. She also did illustrations for advertisements, Kellogg's Corn Flakes and Jell-o being two of her more significant clients. She illustrated books, wrote books, and wrote poetry. In 1907, she divorced her second husband, the author and playwright Harry Leon Wilson (hence the name of the case, *Wood v. Wilson*). Two years later,

she published drawings of Kewpies along with some of her poetry in the *Ladies Home Journal*. They were a big hit, indeed a phenomenon. Rose had copyright and trademark rights in the Kewpies and in March of 1913 she obtained patent rights. Weeks later she entered into her contract with Otis and shortly thereafter production of Kewpie dolls commenced. Kewpies were everywhere. As she wrote in her autobiography, there were “Kewpies holding candlesticks, ash-trays, ink-pots, umbrellas, puppies, kittens, rabbits, Easter-chicks. They were painted on dishes and cards, fans, and all sorts of objects. They appeared on buttons, jewelry, children’s clothing, toy furniture.” (O’Neill, 1997, p. 110) Various sources have her Kewpie royalties at about \$1.4 million, although some suggest that was over her lifetime while others suggest that she received that amount within one year. I suspect the first is closer to the truth, but it doesn’t much matter. The main point is that the Kewpies were an instant success and her royalties were huge. (The fact that she managed to spend it all and die relatively poor need not concern us.)

B. The Contracts.

My initial presumption was that Wood had a standard contract and that Lucy had accepted it with minimal revisions, but, as I noted earlier, this was not the case. These two contracts, at least, looked very different, although they treated some issues in a similar way, albeit with very different language. I first describe the two contracts and then I describe the litigation in the two cases. Then I turn to the analysis. Neither contract is presented in the published decisions. However, they can be found in the very slim records available to their respective courts, although the courts in neither case had access to both contracts. The Lucy

contract was reproduced in the Amended Complaint at pages 5-8; the Kewpie contract was reproduced as Appendix A to Wood's Affidavit at pages 15-20.

Lucy. The Kewpie dispute was already in the courts when Wood entered into his agreement with Lucy. I suspect that the form the contract took was to some degree influenced by the problems arising under the Kewpie contract, but there is no direct evidence of that. Wood's counsel asserted that the "contract . . . was drawn by the parties themselves and without 'the technical accuracy and with obvious attention to details' that an inspection of the contract will reveal, which would have avoided any controversy between the parties thereto." (PB, p. 11) I find it hard to believe that the contract was the work of the parties, not of lawyers. Counsel's argument was no doubt designed to take advantage of a precedent, *Booth v. Cleveland Mill Co.*, that relaxed the standard for finding consideration because the contract language was informal and colloquial. We do not know which law firms were involved in drafting the agreements; we do know, however, that Wood used different law firms to litigate the two cases. In *Wood v. Wilson* he used Kelley & Becker and in *Wood v. Lucy, Lady Duff-Gordon* his lawyer was John Jerome Rooney (a published poet and, subsequently, a judge).

The contract, dated April 1, 1915, was an evergreen contract, one that is renewed automatically unless either party gives appropriate notice of nonrenewal; here the term was one year and the notice period 90 days. Unlike the Kewpie contract, Lucy's contract included recitals regarding what each party brought to the arrangement:

Whereas, the said Otis F. Wood possesses a business organization adapted to the placing of such endorsements as the said Lucy, Lady Duff-Gordon, has approved

Whereas, [she] occupies a unique and high position as a creator of fashions in America, England, and France

Whereas, her personal approval and endorsement over her own name of certain articles and fabrics used not only in the manufacture of dresses, millinery and other adjuncts of fashion, but also divers other articles of use to people of taste has a distinct monetary value to the manufacturers of such articles

Whereas, [her] approval and selection of certain articles and fabrics used in the manufacture of her model gowns, millinery and other adjuncts of fashion which she designs has a distinct monetary value to the manufacturers of such articles used

Whereas, [she] creates from time to time different articles, such as parasols, belts, handbags, garters, etc., etc., and these also have a distinct monetary value independent of their specific use in her own dress creations sold at her own houses of 'Lucile'

Wood had the exclusive right to place endorsements and negotiate terms and conditions as well as the exclusive right to sell or license rights to ancillary fashion items. However, all such deals were subject to the judgment of Lucy or her personal business adviser, Abraham Merritt, that the deals be "most advantageous to the said Lucy, Lady Duff-Gordon and the said Otis F. Wood." The exclusivity covered articles of clothing, various inputs (e.g., fabrics), and accessories. There were some itemized exceptions: any of her contracts executed or pending, moving pictures, theatrical projects, performances, lectures, distribution of photographs of her gowns, articles or books. If a contract with a client went beyond the term of the contract, Wood

would continue to receive his share of the profits during the life of the client agreement; however, if that client renewed following termination of the Wood-Lucy agreement, Wood would not be entitled to a share of the proceeds. The costs of obtaining and protecting intellectual property were to be borne equally. Wood could not initiate a suit to protect the intellectual property without her consent. Presumably, the decision to defend a suit or to manage the litigation once it had begun was in his hands, although the contract is silent on that.

All revenues under the contract were to be paid to Wood who would then pay Lucy her share. The revenues were to be shared equally. “IT IS AGREED, that all profits and revenues derived under any contracts made with third persons hereunder are to be paid over and collected by the said Otis F. Wood, and that all said profits and royalties are to be divided equally between the parties hereto.” He was to account to her monthly for all moneys received by him. Any costs incurred by Wood in promoting Lucy were for his own account.

Kewpies. The initial contract with O’Neill was a three-year exclusive contract dated March 19, 1913. That contract is unavailable. The dispute was over the amended contract dated April 21, 1914. My presumption, based on the following language, was that only Wood’s share, not the basic structure of the contract, was affected by the amendment, but of that we cannot be certain: “Whereas the parties heretofore have by correspondence made certain modifications . . . whereby in certain particulars the compensation of [Wood] has been increased.”

Some of the terms were similar to those in the Lucy contract. Wood had the exclusive right to negotiate sale and disposition of Kewpies, to represent her in all publicity in connection

with Kewpies, and promote sales, licenses, and rights for “Kewpie forms and figures made up into all kinds and classes of merchandise.” As in Lucy’s contract, there were exceptions: production of art prints, wallpaper, books and all customary book rights including “Kewpie Kut-Outs.” She had the right to refuse any deal that he arranged: “[N]o contract or agreement shall be binding ... until it shall be so signed by her.” The contract had the same sort of continuation arrangement as Lucy’s. The language was different, but the results the same. Compare: “IT IS AGREED, that in the event any arrangement is made with the third party running longer than the time stated in this agreement, that the said Otis F. Wood is to share in the returns from same during his lifetime of such agreement, and the said Otis F. Wood’s rights hereunder are not to cease at the expiration of this agreement.” (Lucy) “The said compensation to [Wood] . . . shall continue throughout the period of any such contracts and agreements, although the period of the said contracts and agreements be longer than the period covered by this instrument.” (Kewpies) The costs of acquiring or protecting patents, trademarks, and copyrights were to be borne in proportion to division of royalties between them, although unlike Lucy, O’Neill did not have any control over the decision to bring suit. While in the Lucy contract all revenues were to go first to Wood who would then pay Lucy her share, in the Kewpie contract all revenues were to be paid to a named trustee who would then disburse the funds to both Wood and O’Neill.

Two other differences were of much greater significance, putting a new spin on the Lucy contract. First, the Kewpie contract included a “best efforts” term: He “will use his best efforts and devote so much of his time as shall be necessary diligently to promote the sale or licenses and rights for said ‘Kewpies’ in all materials, and that in agreements for the manufacture and sale of said ‘Kewpies’ which he shall negotiate, he, as her agent, will use his best efforts to

obtain, and will obtain, for [her] the highest possible royalty.” The existence of an explicit “best efforts” promise in the Kewpie contract makes Cardozo’s implication of such a promise in Lucy’s contract (entered into only one year later) at least problematic.

Second, the compensation arrangement was different and somewhat more complicated. Apparently, after the initial success of the Kewpie dolls, the parties amended the agreement to increase Wood’s share. (I don’t know why; the more natural thing to do would be to reduce his share since her input was responsible for most of the success.) Under the new arrangement, for five contracts that had already been procured and for all subsequent business obtained by Wood, he would get 40%. For business obtained by her without his assistance, Wood would get 20%; the burden of proof as to who generated the business would be on her. The clear implication of this formula is that “exclusive” refers only to other agents. O’Neill had the right under the agreement to enter into deals directly, but if she did so, Wood would still get 20% of the revenue. The exclusivity appears to mean only that she was not free to work with another agent to generate business. The significant point is that even though the contract labeled Wood’s right “exclusive,” the contract clearly presumed that Rose O’Neill was free to develop business on her own.

Other Forms. It is possible that one or both of Wood’s contracts were based on standard forms in common use in this period. However, I think that unlikely. I reviewed three contemporaneous form books (Cowdery (1905), Jones (1909), and O’Malley (1916)) and found that none included a form covering this type of relationship. The closest was a contract between a company and a retailer which required that the “retailer shall use his best endeavors and skill to

procure the greatest possible sale of all such goods which he shall be employed to sell” and that “he shall act in such manner as he may believe to be most advantageous to the company.”³

(Jones 1909, p. 94) Exclusivity was the opposite of the Wood contracts: “Said retailer shall devote his whole time and attention exclusively to said agency, and shall not engage in any other business whatsoever.” (Jones 1909, p. 96) That same form book also included a number of patent license arrangements and mining agreements, most of which included a royalty, a fixed payment, and a minimum usage requirement. (Jones 1909, pp. 114-115, 481-484, and 730-745) So, although there were no forms that matched Wood’s business needs, there were some dealing with contingent compensation and unspecified levels of effort. And in these, the parties surmounted the consideration hurdle with fixed fees and/or minimum levels of effort (or results). They would not have to fall back on their agreements being “instinct with an obligation.”

C. The Litigation.

Unfortunately, neither case advanced very far so the records are very slim. Still, there are some useful tidbits.

Kewpie. The Kewpie litigation involved only a procedural question—could Wood get O’Neill to give some pre-complaint testimony. The answer: No. Bits of the story emerge from the various affidavits and Briefs and from these I can put together at least some indication of what was going on. Wood served O’Neill with a summons in January, 1915. (My proceduralist sources tell me that this was an appropriate way of initiating litigation in New York at the time. The filing of the Complaint could come later.) Shortly after the April, 1914 renegotiation of the

contract on terms more favorable to Wood, the parties seem to have had a falling out. In one of her affidavits she states: “Mr. Wood alleges . . . that I have refused to have business dealings with him. I am free to admit that it is most distasteful for me to meet Mr. Wood personally. When I took up my residence in New York City last June I requested Mr. Wood to come see me which he did. At that time I asked him to advise me concerning the performance of his obligations to me as my exclusive agent. . . . This he refused to do, and his manner of refusal was such that I have never again requested him to discuss personally with me any matters relating to the Kewpie business.”

At about that time she appointed her sister, Callista, to attend to her business affairs, a fact that she acknowledges in her autobiography. Otis Wood, I should note, does not appear in that autobiography. He claimed that Callista’s appointment violated his right to be the exclusive representative; she said that Callista’s role was not that of an agent, and her appointment was, therefore, consistent with the contract. There is not enough material in the record to settle this dispute.

Wood alleged that there might have been other agents appointed, but he had no proof. Indeed, he claimed that he needed O’Neill’s pre-complaint testimony on this matter to properly draft a complaint. He also alleged that royalties that should have been paid to the trustee had been paid directly to her. She denied that, claiming that the only funds paid directly to her, prior to the commencement of this litigation, were for matters not covered by his contract. O’Neill took the position that once Wood had brought suit for a breach of contract, she was free not to perform. So, she was free to hire other agents and to inform all third parties that they should no

longer send royalty payments to the trustee, but should send them directly to her. (The trustee resigned at the end of April 1915.) Wood, she claimed, had no further right to royalties, only to damages for breach.

Determining damages for breach could be pretty tricky. Wood's claim appears to be that he would have been able to get 20% of her actual royalties. Her counsel argued for less: Wood "had no vested interest in any royalties. He was entitled to a percentage of them as compensation for his services only in case of his performance during the entire term of the agreement of all of his obligations. The question of his performance is at issue in this action." (DB, p. 7) If at trial it was found that she had not breached at the time he filed his claim, then, arguably, he breached his best effort obligation and would have no claim to future royalties.

She went further than this, counterclaiming that he had failed to use best efforts. "[T]he plaintiff has failed and refused to use his best efforts and devote as much of his time diligently to promote the sale of licenses and rights for the said Kewpies as he had agreed to do; . . . he has failed and refused to use his best efforts to obtain, nor has he obtained for the defendant the highest possible royalty in agreements which he, as agent, had negotiated for the defendant." The counterclaim is somewhat ambiguous in that it does not say whether the failure to use best efforts preceded Wood's filing a claim. Regardless, she asked for damages of \$10,000. (In his complaint he was asking for \$50,000.) The court never had to face these issues. Wood lost his motion and the case disappeared. If O'Neill paid anything to settle the case, there is no record.

Lucy. It appears that Wood's performance in the first term of the contract was satisfactory. According to Randy Bigham, he succeeded in placing a number of commercial endorsements including a new Manhattan retail outlet, Bedell Fashion Shop,⁴ Essanay Film Studios, Mallinson Silks, the Model Brassiere Co., Heatherbloom Petticoats, Hartmann Trunks, and O'Conner-Goldberg Shoes. Things began to unravel in year two when Lucy bypassed Wood and directly entered into a contract with Sears, Roebuck & Co. The Sears ad announcing the new arrangement appeared in the October 1916 *Ladies Home Journal*. The Sears deal was an attempt to reach an entirely new market. The advertisement, in the form of an interview, gives her rationale:

Yes, of course, I have designed gowns for most women of note in the world, I suppose—Queen Mary of England, Queen Victoria of Spain, the Duchess of Roxborough, for coronation ceremonies and millionaire's weddings—and I shall continue to do this through the 'Lucile' establishments in London, Paris, New York, and Chicago.

But what of that? It is nothing. This other it has been *my one dream* to make clothes for the women who have *not* hundreds of dollars to spend on one frock. They have not come to me naturally because they could not through the house of 'Lucile.' But now these men in Chicago who have grasped my idea are giving us our opportunity to reach each other. I am going to design clothes for the women who have twenty-five or fifty or ten dollars to spend. The garments will be made up under my personal supervision and this great Chicago house of

yours will then pass them on to these women. Oh, I can help them so much with their clothes! Won't you tell them so for me?

There is some controversy as to how successful the Sears move was. The two extreme versions are embodied in the following quotation.

It is reasonable to assume from what is known of Sears, Roebuck's general merchandising philosophy, that, with the rare exceptions like groceries, those items which held sway in the catalogue for any length of time met with reasonable satisfactory public response—sufficient, at least, to pay their way in space consumed. There were, however, several ventures in this period which met with less fortunate results—and did not long remain in the catalogue. One of these, launched in 1916, was the “Lady Duff-Gordon” line of women's style clothing. Lady Duff-Gordon, one of the best-known fashion stylists in America, was engaged by Sears, Roebuck to design fairly expensive clothes for women. One magazine reported the arrangement in these terms:

Lucile, the trade-name of Lady Duff-Gordon, has become a name to conjure with. She has designed frocks for the queens of Europe and wives of America's finance kings, for millionaire weddings, for stage stars and grand opera prima donnas, for coronation fetes and the like. Her name has been tied up inseparably . . . with smartness and elegance. And now comes a great mail-order house,

Sears, Roebuck & Company, of Chicago, hires Lucile to design clothes for its patrons at prices ranging from \$20 to \$45, and sells the same in huge quantities. Romance and a sense of surpassing smartness are thus brought into the remotest homes that the Sears-Roebuck catalogue reaches. . . . The great mail order house stimulates its movement of women's wear to a degree that could probably never have been attained in any other way. Sears-Roebuck puts on the "dog" and multitudes of women put on Sears-Roebuck clothes. (Fuessle, 1916, p. 54)

Fuessle's reference to Sears, Roebuck selling those exotic creations "in huge quantities" could hardly have been farther off the mark. The venture into Continental fashions for the farm wives of the Plains was a resounding failure. Lady Duff-Gordon christened each of her creations with a name. One gown was titled "I'll Come Back to You." Company records, according to former employees, bore the name out in cold statistical terms; two were sold, and both came back. (Emmet and Jeuck 1950, p. 225)

The truth lies somewhere in between. Sears sold about \$90,000 worth of her dresses in six months at about \$26,000 less than it paid for them. While the venture ultimately turned out poorly for Sears, it was, at least initially, pretty good for Lucy. Her biographer, Randy Bigham, says that in the first season her collection almost completely sold out, but that it did less well in the second (and last) season.

Wood's complaint cited Lucy's contracts with Sears and Chalmers Motors. The logic behind her deal with Sears is easy to understand. Less obvious is her deal with Chalmers Motors. What, one might reasonably ask, does a dress designer have to contribute to automobile sales? Her answer is in the opening lines of a full page advertisement in the *Saturday Evening Post* signed by Lucy:

I have been engaged by the Chalmers Motor Company to select materials for furnishing the interiors of their new closed cars.

As for myself — I am not interested in the exterior of this Chalmers town car. If external things interest you, glance at the picture.

Neither am I concerned in the least with the motor. I know not and care not whether it be what mechanical men call a six, a 22, or a 3400. *Les détails m'ennuie*. I leave them to Monsieur Chauffeur.

My only interest is in the vitally important thing — the interior. All important because there is where I have to sit. It is my sun-parlor on wheels, and if colors clash or upholstery fabric grates on my nerves, how am I to love the car?

Nothing can recompense for poor taste.

The Sears dresses were marketed to the middle class; they were generally in the \$20-45 price range. Given that per capita annual income at the time was \$450, (Johnston and Williamson, 2002) this was a considerable part of the farmer's wife's budget which probably explains why Sears dropped the line. Nonetheless, it was at least within the reach of the mass market. Not so

the Chalmers car with its list price of \$2,480. Those able to buy such a car could, no doubt, leave the mechanical details to Monsieur Chauffeur.

In his complaint, dated December 7, 1916, Wood asserted that Lucy had violated the agreement by entering into at least these two contracts and having the revenues from them paid directly to her. The case raced through the courts. Her motion for judgment on the pleadings was denied on January 6, 1917. That decision was reversed in Appellate Division on April 20, 1917 by a unanimous court which held the agreement void for want of mutuality. It was argued before the Court of Appeals on November 14, 1917, and in a 4-3 vote, Cardozo issued the opinion for Wood on December 4, 1917, just shy of one year from the filing of the complaint.

The complaint is a bit fuzzy as to what constituted the breach. It seems to suggest that by entering into the Sears and Chalmers (and perhaps other) contracts Lucy breached. Two other alternatives are hinted at. First, she entered into those contracts “without the knowledge or consent of plaintiff.” Second, the revenue from those other contracts did not go directly to Wood to be divided equally between them. If we take the Kewpie definition of “exclusive,” Lucy could bypass Wood and directly enter into endorsement contracts with third parties. Contracting with Sears would not have been a breach; having an agent arrange the Sears transaction or having the Sears payments go directly to her instead of Wood would be a violation.

This interpretation of “exclusive” is not unique to the Kewpie contract. In *Commercial Wood & Cement Co. v. Northampton Portland Cement Co.*, cited by the Appellate Court and in the briefs of both parties, the plaintiff was to be the “sole selling agent of the entire output of

cement of the defendant for the period of five years.” Even if the plaintiff did nothing, the court noted “it could be entitled to demand from the defendant a commission . . . upon all cement that the defendant manufactured and sold.” “Sole” like “exclusive” did not seem to preclude sales by the defendant.

However, in another contemporaneous case “exclusive” did preclude sales by the defendant. In *Ehrenworth v. George F. Stuhmer & Co.*, a baker of pumpernickel agreed to sell all his bread in one area of Brooklyn through a single distributor who, in turn, had agreed that he would carry the pumpernickel of no one else. After the baker expanded, it began to sell directly and the distributor claimed that this amounted to a breach. The New York Court of Appeals agreed, and it found mutuality in the oral contract for so long as both parties remained in business. That breach occurred in March 1915, just before Wood entered into his contract with Lucy. A few years later, in a 4-3 decision (Cardozo in the majority), the court found for the distributor. The definition of exclusivity was not challenged; it was simply assumed that selling direct would violate the distributor’s exclusivity.

Wood’s response to the claim that there was no mutuality was, first, that he had made an express promise to do something and if that promise were not sufficient, “the doctrine of implied covenant, where the minds of the parties have clearly met, . . . is sufficient to uphold the agreement between the parties in this case.” Regarding the express promise, Wood argued: “The Court must say whether such a promise can be put aside by plaintiff *at his mere whim*; or whether such a promise does not carry with it the use *of a reasonable and just exercise of the judgment of plaintiff* for the protection of the joint property of plaintiff and defendant in the

subject matter of the contract.” Alternatively, Wood argued, one could imply a duty to use “best endeavors and efforts” to provide sufficient consideration.

The defense argued that, because Wood had not bound himself in any way, there was no mutuality of obligation, and, hence, no consideration. It was improper to infer a best efforts obligation and the exclusion of any such obligation was a deliberate choice.

The agreement was drawn by this appellant, with clear language, tending to show the operation of the minds of the parties at that time. It is clearly visible that the contract was so drawn and worded with the express purpose and intention of avoiding any liability on the part of this appellant. There was no intention at any time that this appellant be compelled to perform any act or to pay damages in the event of any breach. It was simply a contract to measure compensation for any services that he might render in procuring articles for endorsement by this respondent. It was part and parcel of his advertising business, conducted by him in the ordinary course of business. The intention was that he be paid only for obtaining results and for business procured by him. The intention was not that he receive remuneration for the work performed by others. However, this, in fact, is what is trying to be accomplished, in this action. A recovery can only be had by the appellant for procuring endorsements and the collection of the funds and payment for the same. If he fails to perform any acts or if he fails to receive any endorsements or accomplish any results, then no recovery can be had. All is

dependent upon the actual labor and work performed by this appellant and results accomplished. Such was the intention of the parties. (DB, pp. 18-19)

The agreement, defendant continued, was a unilateral contract which specified the terms on which Wood would be compensated for business that he brought in. Wood was seeking compensation for business that he had not brought in, and it would be unjust to require Lucy to pay Wood for business he did not obtain.

The contract upon which this action is based was simply one by which the value of the appellant's services was to be measured and for which he was to be compensated. It was an agreement wherein the respondent bound herself to pay to this appellant fifty per cent (50%) of any moneys received by her for placing endorsements procured by this appellant. The action is not instituted for services rendered by this appellant, but it is one to recover for services rendered by others. It is conceded that no part of the services for which he desires to recover under this contract were rendered by him, nor the endorsements obtained by him. (DB, p. 20)

[Wood] seeks a recovery in this case and is attempting by legal means to coerce and compel this respondent to pay moneys for services which were not rendered by him, but by others and for which they have already been paid. If, under such circumstances, this Court sustains and upholds the agreement, it would in effect compel the respondent to pay twice for the same services and place this appellant

in a position wherein he would not be obliged to render any services or be compelled to perform any acts of omission or commission and be paid therefor.

DB, p. 21)

Note the clear implication that Lucy paid someone else to arrange the Sears and Chalmers contracts.

Wood did not spell out his damage claim, but both parties appear to have believed that had he won, the remedy would have been disgorgement. Wood would have been entitled to half the revenue from the contracts with Sears, Chalmers, and (perhaps) others. I don't know why they would have believed this; the standard damage remedy would at least subtract out the costs Wood would have incurred had he procured these contracts. The disgorgement remedy is consistent with one theory of the contract: the contract entitled him to half her revenues regardless of who developed the business, and her breach consisted of not paying him his contractually defined share. Below, I will suggest some other damage theories consistent with alternative interpretations of the contract.

Cardozo, as we all know, held for Wood, finding that “a promise may be lacking, and yet the whole writing may be ‘instinct with an obligation,’ imperfectly expressed. . . . His promise to pay the defendant one-half of the profits and revenues resulting from the exclusive agency and to render accounts monthly, was a promise to use reasonable efforts to bring profits and revenues into existence.” Because she was vulnerable to his decisions, he had a duty to use reasonable efforts. “Unless he gave his efforts, she could never get anything.” And, again: “She was to

have no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff. . . . We are not to suppose that one party was to be placed at the mercy of the other.”⁵ This argument could be turned on its head. Cardozo could have reasoned that since we are not to suppose that she would put herself at Wood’s mercy, she did not in fact do so. She would only be at his mercy if it were a legally binding contract; therefore, he could just as well have concluded that there was not a legally binding contract. And if Wood’s “exclusive right” in the Lucy contract was the same as his exclusive right in the Kewpie contract, Lucy again would not have been at his mercy. Indeed, even if she were “at his mercy,” that need not lead to Cardozo’s conclusion. To analyze the case properly it is necessary to consider three possible interpretations of Wood’s exclusivity.

D. The Analysis.

Leaving aside for the moment the precise meaning of exclusivity, what economic role does the concept play? The agent, Wood, is expected to expend energy (and time and money) drumming up business for his principal, Lucy. He must be wary of the “free rider problem.” Suppose Wood works hard to develop a particular endorsement deal and then some other agent swoops in to close the deal and reap the rewards. If Wood cannot protect himself from this and if his only compensation were contingent upon his closing the deal, he would be reluctant to put in the effort to get the deal done in the first place. If other agents feel the same way, then one plausible outcome is that none of them put in the effort and the endorsement never happens. This is not a happy outcome for the principal. One response would be for her to shield him from competition from other agents (or from herself). The shield could be absolute—the conventional

meaning of “exclusive.” Or it could be more finely tailored. The principal would recognize that there are costs and benefits arising from a weakening of the agent’s exclusivity. To put it in contemporary terms, Starbucks or MacDonalds must recognize that whenever they open an outlet it adversely affects the selling effort (and the incentives) of nearby outlets. Nonetheless, even though the selling efforts of one outlet might cannibalize sales from the others, both firms find it desirable to operate numerous outlets in a given market. That does not mean that they will build indiscriminately on every street corner (although sometimes it appears that Starbucks has done so). Rather, it means that the principal’s decisions on how much it should shield any individual agent from competition can be quite nuanced.

What if the agent enters into a contract with a client for, say, six months? At the end of that period, the principal could renew directly, cutting the agent out. The agent could attempt to shield itself from this possibility by maintaining a renewal right. Indeed, it could, conceivably, have the right to a share of the income from that client in perpetuity, or at least for some period beyond the term of the principal-agent agreement. Such arrangements are not uncommon. Recall (from chapter 1.1) that movie producers often have a claim on earnings from a sequel, even if they were no longer involved in the project. Insurance agents have substantial property rights in their customers, allowing them to receive commissions although they are no longer soliciting business. (See Joskow, 1973) Some states provide statutory protection to a sales agent from the principal’s opportunism.⁶ Neither of Wood’s contracts provided him with that much protection. Both contracts, if enforceable, appear to prevent the principal from cutting Wood out by contracting directly with the client at the renewal stage, but only so long as the contract remains in effect (although that might not be true under one interpretation).

Before starting this project, I had assumed that in the *Lucy* era, parties did not write “best efforts” or similar language into agreements. I believe that among contracts scholars I was not alone. The fact that Wood had a “best efforts” clause in the earlier Kewpie contract puts matters in a different light. Why imply a particular level of effort when Wood chose to exclude an express promise? What can we infer from the absence of the “best efforts” clause in Lucy’s contract? Had the two contracts been otherwise identical, we could be confident that the omission was deliberate. Wood, we could reasonably conclude, modified his way of doing business in response to problems that surfaced during the Kewpie litigation. The two contracts, however, are not the same. It is possible that the hand that drafted the Lucy contract knew neither of the Kewpie language nor the Kewpie dispute. I think it more likely than not that the Lucy contract was informed by the Kewpie experience, but we will never know for sure.

Assuming this to be so, the absence of “best efforts” was most likely deliberate, an attempt to get the benefits of the arrangement while shielding Wood from the potential exposure. O’Neill used the “best efforts” clause as the basis for her counterclaim, although it is possible that Wood did not know of nor anticipate the counterclaim since O’Neill’s response was not filed until May 8, about six weeks after the Lucy contract. Nonetheless, it is at least plausible that by eliminating the clause, Wood would have hoped to shield himself from a counterclaim (and the bargaining leverage inherent in a plausible counterclaim). On the basis of the Kewpie contract, I would be willing to draw the negative inference that the absence of any mention of effort in the contract was deliberate and Cardozo was wrong to find that any level of effort was implied.

Recall that in Wood's exclusive contract with Rose O'Neill she had the right to deal directly and he had a claim to a share of the business developed by her. The interpretation of his contract with Lucy depends on whether she had the right to deal on her own, and if so, how, if at all, he should share in the revenues from the business she developed. To simplify the following discussion, I will consider three possible scenarios: (1) only Wood could place endorsements; Lucy could do nothing; (2) Lucy, like Rose O'Neill, could also place endorsements and Wood would get 50% of all revenues regardless of who initiated the deal; (3) both could place endorsements, but Wood would only get 50% of the revenues from deals that he initiated and nothing from deals that she initiated. Cardozo, and I daresay every contracts scholar since, presumed the first scenario to be correct. None of the three, I believe, is entirely convincing. But under any of the scenarios, the "mercy" argument doesn't hold up very well.

Scenario 1. Cardozo put a considerable amount of emphasis on the fact that, if exclusivity meant that only Wood could place endorsements, Lucy would have been at the mercy of Wood, and, therefore, he must have promised to give at least some effort. Was Lucy really at Wood's mercy? She could not, given our present assumption, go out and get endorsements on her own and still comply with the contract. But what if she did not comply? If Wood could, or did, get an injunction then, indeed, she was at his mercy. But Wood didn't, and perhaps in that era he couldn't. His remedy was the quantity of mercy—money damages. He was asking for \$50,000 and, as I noted above, his damage theory seemed to be that Lucy must disgorge. But disgorgement is inconsistent with this theory of liability. Damage remedies in the Lucy-Kewpie era were skimpier than they are today. It is not implausible that a court of that era would have found the damages from breach of an exclusive contract too speculative, so that in practice the

damages would have been zero.⁷ My colleague, Mel Eisenberg, suggests that a court could find in reckoning damages that Wood would have made the sales that Lucy actually arranged and that no deduction of expenses for selling effort would have been necessary. The reason is that the court could find that there were no variable costs associated with the performance of Wood's obligation. It seems to me that, by definition, reasonable effort would entail a positive cost. But, given the loose relation between the law of remedies and economic reality, I suppose this interpretation would be possible. In any event, Lucy was at Wood's mercy on a formal level-- she couldn't solicit other business and comply with the contract. But on a practical level, she was vulnerable only to the extent that she would have had to pay a price, and that price might turn out to have been quite low.

As her inability to sell on her own has been overrated, so too has his incentive to perform been underrated. What made the deal attractive for Lucy (*ex ante*) was not the promise of any particular level of effort. The value came from the incentive structure. True, Wood could have chosen to do nothing. But if Wood did nothing, he would get nothing. His compensation was contingent upon his effort. The sharing arrangement encouraged both parties to contribute their efforts, he to promote her name and she to produce marketable designs. The contract gave Lucy a relationship with someone who could profit by promoting her name and her clothing. If the question is whether Lucy received something valuable in exchange for her promise, the answer should be Yes. So, in this scenario, one could find consideration for a contract, not from an implied level of effort, but from that which made the deal valuable to Lucy, namely, the incentive structure inherent in the deal. As a number of my contracts colleagues have told me, that is not the law; but if Cardozo is going to be innovative in stretching the doctrine, this would

seem to me a plausible direction. As I note below, I no longer believe it necessary to stretch to find consideration, but if one felt compelled to do so, I do think the incentive structure argument would be the better one.

Scenario 2. In the Kewpie contract, O'Neill was free to pursue business on her own; she had to pay the contractually determined share, 20%, to Wood if she did so. The 20% payment is the economic equivalent of a tax on O'Neill's selling effort. In Lucy's contract, there are two alternative definitions of her share. Business that she brought in could be treated like everything else, so that Wood gets 50%. Or their silence on the matter could be interpreted as meaning that her business is entirely hers, and Wood gets nothing. In this scenario, I assume the former. This scenario is consistent with the disgorgement remedy. Note first that in this scenario, on the formal level, Lucy is not at the mercy of anyone. She is perfectly free to court potential endorsees under the contract. But she would have to pay him half of all the revenues. That could well turn out to be greater than the damages reckoned in scenario 1. So, if we are to give any weight to Lucy's vulnerability to Wood's whims, there remains a nagging question: is she vulnerable because she can't do it without breaching (de jure) or is she vulnerable because doing it is expensive (de facto)?

In this scenario, Wood could sit home and do nothing and still be amply rewarded by Lucy's efforts. The Kewpie contract set two separate compensation rates. Why might O'Neill have been so generous to him for business developed by her? Some of Wood's effort on her behalf might otherwise remain uncompensated if Wood makes general investments in developing the Kewpie business and O'Neill closes the deal herself. Agents are generally

concerned that after they have put in effort developing a potential client, the principal would then do an end run and contact the client directly. Giving Wood a share of the business that O'Neill developed was one device the Kewpie contract used to cope with this problem. The second, and more overt, means was to put on her the burden of proof in any dispute about who was responsible for developing a particular contract. Would the parties go so far as to set the same compensation rate regardless of who brought in the business (as scenario 2 would have it)? I am skeptical, but an argument could be made for it. First, the single compensation rate eliminates the possibility of a dispute over who developed the business since the sharing is the same regardless. Second, while on its face the rule appears to have very bad incentive effects, imposing a 50% tax on Lucy's effort, in practice it might not be so bad. The high tax rate on Lucy and the belief that her costs of finding business would generally be higher might, in effect, convert the scenario into one in which Lucy isn't really expected to do anything, so they might as well presume that only Wood's efforts would generate revenue.

So, like the "mercy" argument, on a formal level (de jure) the incentive structure doesn't provide any value to Lucy, even though in practice (de facto) it could. As I read Cardozo, it is the formal interpretation that pushes him toward inferring something (reasonable efforts) that would provide consideration. In scenario 2, the formal interpretation is that she is not at his mercy and he can get paid for doing nothing and just waiting for her to get the business. Had Cardozo perceived scenario 2 to be the case, I do not believe he would have searched for a rationale for finding the contract enforceable.

Scenario 3. In this scenario, Lucy has the right to develop business on her own and doesn't have to pay Wood anything for it. For those who put great weight on her being at his mercy, this becomes an easy case. She is not at his mercy either explicitly as in scenario 1, or implicitly (with the 50% "tax") as in scenario 2. Lucy could pursue clients directly and presumably could approach Wood's clients directly when their initial agreements with Wood expired. She could not, however, use another agent to solicit clients. This wouldn't provide much protection from her free riding on his efforts, but it might well have been adequate. We don't know, unfortunately, how Wood ran his business. If, for example, the endorsement business was ancillary to the syndication business, so that he would incur most of the costs regardless of the behavior of a particular client, this might provide him with sufficient incentives. Lucy's interpretation was even stronger: the contract was only a unilateral contract which defined Wood's rights for any business he happened to bring in. The notion that the contract would apply only if Wood actually signs a client renders "exclusive" essentially meaningless.

In Sum. The Kewpie contract provides two bases for concluding that the Lucy contract should not have been found to be enforceable. First, the existence of an explicit "best efforts" clause in a contract Wood entered into shortly before the Lucy contract, and the fact that O'Neill was using that clause against Wood in litigation at about the time he entered into the Lucy contract, casts doubts on the notion that it was necessary to imply a reasonable efforts duty. Second, giving Wood an "exclusive right" did not necessarily put Lucy at his mercy; she might have been free to seek out clients regardless of what Wood did. And, even if not free, the legal penalty for her direct solicitation of business might well have been quite modest.

2. DOES IT MATTER?

My original presumption was that, with the common sense meaning of “exclusive” (only Wood can get customers and he only makes money if he does so), the agent’s incentive structure provided sufficient economic value to the principal to overcome the consideration hurdle. My concern was that imposing a “best efforts” duty (whatever exactly that is) would go beyond what an agent would promise. I had in mind a talent agent who typically puts together a portfolio of clients, most of whom will spend their careers waiting tables. I am now more inclined not to stretch to find consideration. If an agent really wants to make the agreement enforceable, it would be easy enough to do so. And, given that the agent has a strong concern about the free rider problem, he would have a powerful incentive to make the consideration unambiguous. There are many ways of doing so. An agent could use an express best efforts clause (or some variant) as Wood did in the Kewpie contract. Or the agent could avoid making any commitment as to any level of effort and simply make a cash payment, promise a minimum annual royalty, or promise a cash payment. The promised payment could even be offset against future expenses so that an unsuccessful client would end up receiving nothing. If the endorser were of sufficient notoriety, the minimum payment could be substantial as the multi-million dollar deals of some of today’s star athletes shows.

I also originally presumed incorrectly that Lucy agreed to Wood’s standard arrangement which was designed for the no-name talent. Her failure to get an advance, which would have rendered the consideration issue moot, I attributed to her documented lack of business acumen.⁸ Two factors lead me to believe that an advance would not have been forthcoming even for a

well-informed, prominent celebrity. First, there was none in the Kewpie contract. Second, Lucy's contract notes that she had a "personal business adviser," one Abraham Merritt. Randy Bigham informs me that Merritt had been a founding member of the board of directors of Lucile Ltd's New York branch in 1910. According to Bigham, "Merritt, a journalist by trade, was in fact the editor of Hearst's New York Sunday American for which Lucile penned a weekly fashion page." She was also, according to Bigham, represented by Thomas Powers who ran a wholesale fabric company and had been a former vaudeville agent. She might have been naive, but there is no reason to believe that her personal business advisers were as well. Rose O'Neill acknowledged in her affidavit that she also had a legal adviser; Paul Wilson. He was the trustee named in the contract, and he was authorized to act as her agent during the life of the contract; it is not clear whether he was also advising her when she was negotiating the contract, although it would be hard to imagine otherwise. So, it is most likely true that both women were well advised and that the advice did not include getting an advance.

The effect of *Wood v. Lucy* in its primary role is likely modest. Courts will reduce one category of errors (failing to find an enforceable agreement when the parties meant to have one but were careless about it) and increase a second (finding an agreement enforceable when at least one of the parties did not intend it to be so). Because it is so easy for parties to provide explicit consideration, and not too difficult for parties to make clear that they do not mean for their agreement to be enforceable, I would be surprised to find *Wood v. Lucy* having a dramatic effect in either direction. Given the modern judicial propensity to err on the side of enforceability, the rule probably does a bit more harm than good, but not much.

Lucy's mischief is in its secondary role, defining the extent of the promisor's obligation. I want to consider two aspects—the effort level required and the domain of the rule. The latter can be subdivided: first, does the rule apply if there is an explicit source of consideration? Second, does the rule apply for arrangements that fall a bit short of exclusivity?

First, what is the extent of the implied obligation? Because Wood had expressly promised nothing, the contract appeared to lack consideration. To find an enforceable contract, Cardozo needed to find something to get past that hurdle. The law does not require a whole lot; traditional doctrine holds that even a peppercorn will do. Cardozo was pretty good at finding those peppercorns, as demonstrated by some of his subsequent decisions, *De Cicco v. Schweizer* and *Allegheny College v. National Chautauqua Bank*. All Cardozo needed in order to find consideration was a peppercorn worth of effort. There is no reason to believe that when he said “reasonable efforts” he meant any level of effort greater than was necessary to find the existence of consideration.

The Restatement and the Code upped the ante, requiring “best efforts.”⁹ To the extent that “best efforts” means more than the minimal amount of effort necessary to provide that peppercorn, it constitutes an unnecessary extension of Cardozo's holding. The law is far from clear on the differences, if any, between the many explicit effort standards: best efforts, reasonable efforts, reasonable best efforts, commercially reasonable efforts, due diligence, and, no doubt, others. Perhaps, as is suggested by the interchangeability of best and reasonable effort in many discussions of *Wood v. Lucy*, these are all synonyms. The UCC appears to treat them as such. While §2-306(2) refers to “best efforts,” the comment refers to “reasonable diligence” and

“reasonable effort and due diligence.” (§2-306(2), Comment 5) However, not all courts view all levels of effort as the same. “While the phrase ‘best efforts’ is often used to describe the extent of the implied undertaking, this has properly been termed an ‘extravagant’ phrase and it should not be literally interpreted. A more accurate description of the obligation owed would be the exercise of ‘due diligence,’ or ‘good faith.’” (*Perma Research & Development v. The Singer Company*). And again: “In the District Court and in its briefs on appeal, Emerson appeared to make the argument that Orion had an express obligation to exercise its ‘best efforts.’ At oral argument, Emerson clarified that it was only suggesting that Orion had an obligation to use ‘reasonable efforts’ or ‘due diligence.’” (*Emerson Radio Corp. v. Orion Sales, Inc.*)

It is hard enough for courts to determine what is required when the contract expressly states a particular level of effort. Indeed, in a minority of jurisdictions, express best efforts clauses have been held to be too vague to be binding. Yet in those same jurisdictions, an implied best efforts clause would be enforced. I’m not making this up. (See Van Vliet, 2000) How is a court to determine what is required by an implicit efforts clause? Should it look to the interpretations of express efforts clauses? In *Bloor v. Falstaff*, (analyzed in chapter 3.2) for example, the court misinterpreted an express best efforts clause, holding that Falstaff’s duty to promote Ballantine beer meant that it would have to do so, even if that meant losing money, as long as the losses were not “too much.” Would Wood or other agents have a duty to lose some money, but not too much, in representing their principal? For an agent with a portfolio of clients, most of whom will turn out to be losers, an implied efforts clause (best or otherwise) could mean imposing a promise of a greater level of effort than the agent would have agreed to.

Of course, if the *Lucy* rule is only a gap-filler, the problem should disappear if the contract provides another source of consideration, or otherwise expressly limits the promisor's responsibility. That raises the first question about the domain of the rule: does the rule apply if there is an explicit source of consideration? The UCC is ambiguous on this point. §2-306 (2) says nothing about confining its application to cases in which there is no other source of consideration. The statute merely imposes the best efforts obligation "*unless otherwise agreed.*" That could mean that any express consideration is sufficient to avoid the implied best efforts; or it could require an explicit statement that there is no promise of any particular level of effort. There is at least some case law interpreting §2-306 (2) as imposing an implied duty to use best efforts regardless of the existence of adequate consideration elsewhere in the agreement. See, for example, *MDC Corp. v. John H. Harland Co.* and *Tigg Corp. v. Dow Corning Corp.*.

Outside the sale of goods context, the judicial treatment has been mixed. In *Permanence Corporation v. Kennametal, Inc.*, the court refused to imply a duty of best efforts on the licensee because the licensee had paid over \$100,000 in advance royalties. It stated what appears to be the majority position: "Courts have held that by imposing a substantial minimum or advance royalty payment, the licensor, in lieu of obtaining an express agreement to use best efforts, has protected himself against the possibility that the licensee will do nothing. Rather than leaving the licensor at the mercy of the licensee, the demand for a substantial up-front or advance royalty payment creates an incentive for the licensee to exploit the invention or patent."¹⁰ (p. 102) In a similar vein, in *Emerson Radio Corp. v. Orion Sales, Inc.*, the court stated: "The courts in *HML*, *Permanence*, and *Beraha* did not blindly apply *Wood* to a situation involving an exclusive agreement and the payment of royalties but rather examined the mutual obligations and

intentions of the contracting parties. They found that a substantial advance or minimum royalty payment serves to protect the licensor/supplier from the possibility of the failure of the licensee/buyer to use reasonable or best efforts, the concern in *Wood*.” (p. 169) Note that both courts invoke a *substantial advance*, hardly the language of peppercorns.

Other courts have held to the contrary; see, for example, *Perma Research & Development v. The Singer Company*. This contrary position has been adopted in recent opinions in the Southern District of New York. Thus, in *Palazzetti Import/Export, Inc. v. Morson*, a furniture company granted an exclusive right to sell its products in the Boston market for ten years for which the licensee made a one-time payment of \$100,000. After operating under the agreement for one year, both sides complained about the other’s performance and the licensee stopped carrying the licensor’s goods, whereupon the licensor sued. The jury held for the licensor. On defendant’s motion for judgment as a matter of law, the court held that whether there was an implied covenant requiring that the licensee exploit the license was a question of fact and that the jury did not err in finding it so. In *New Paradigm Software Corp. v. New Era of Networks, Inc.*, a software licensee paid \$2 million plus a royalty of 5% of net revenue. When it phased out the software, replacing it with a similar package, the licensor sued. The court ruled in favor of the licensee’s motion for summary judgment, but it got there in a funny way. After discussing *Wood v. Lucy* and its progeny, the court concluded: “In short, the law in New York is far from clear. . . . The Court cannot rule as a matter of law that the Agreement may not contain an implicit obligation to use reasonable efforts to market the Copernicus software despite the absence of any express provision in the Agreement and despite the \$2 million up-front payment.” (p. 14) In a footnote it added: “Future contracting parties obviously could avoid the problem of any

ambiguity in the law by including an express ‘reasonable effort’ provision (or conversely, by explicitly disclaiming in the contract any such requirement).” (p. 14, n. 22) However, although the court extended the *Wood v. Lucy* reasonable efforts standard to protect the licensor, the licensor’s joy was short-lived. The court then proceeded to find that the breach of contract claim failed because the plaintiff had failed to present any evidence of damages.¹¹

The second question regarding the scope of the Lucy rule concerns the role of exclusivity: does the rule apply when the contract falls shy of absolute exclusivity? This question goes beyond the ambiguity of the definition exemplified by the Kewpie contract. The court and drafters of the UCC were motivated by the problem of finding a ground for enforceability rather than by any interest in the underlying economic function of exclusivity. As a result they created an artificial distinction. What if the relationship were not completely exclusive? The “at the mercy” rhetoric no longer seems so compelling. Both UCC §2-306(2) and the Restatement only refer to exclusive arrangements. If the arrangement were less than exclusive, would these still apply, either in determining the existence of a promise or its content? In both *Harland* and *Tigg* the court was faced with arrangements that were not purely exclusive. Whether they were exclusive enough to come under the statute would, apparently, be a fact question. “Harland must demonstrate that ... [the contract] puts Harland ‘at the mercy of’ Artistic in a particular market. Although Harland may not be able to make this showing, this court cannot decide, based on the pleadings and the text of the Agreements alone, that the Agreements do not constitute an exclusive dealing arrangement.” (pp 394-5)

Ironically, at about the same time that the UCC was being adopted, the courts, under the antitrust laws, were attacking vertical restraints of all sorts, including exclusive dealing. For reasons that need not concern us here, that was unwise policy, and the Supreme Court finally reversed itself in *Continental T.V. v. GTE Sylvania* in 1977. For a summary of the development of the per se rule against exclusive territorial restrictions in the 1950's and 1960's by a fan, see Sullivan (1977, pp. 402-406); for why this attack on vertical restraints was a bad idea, see Goldberg (1984b). The judicial hostility to vertical restraints encouraged the development of clauses that had roughly the same effect, but gave the agent a less-than-exclusive right. The agent could have a “primary area of responsibility” or it might use a “profit pass through” (if another agent sells in the territory it must pay some fraction of its earnings to the first agent). The antitrust air was full of cries for “less restrictive alternatives.” Sometimes these alternatives were adopted to avoid antitrust liability; sometimes they were adopted because the most effective distribution arrangements required less than exclusive dealing. As I noted above, principals have incentives to fine-tune the restrictions they impose on their agents. There is no good reason why the enforceability or the extent of the agent’s effort obligation in these contracts should hinge on the precise manner in which the parties chose to provide assurance to the agent. It seems clear that in the 1960's the left hand of contract law did not know what the right hand of antitrust law was doing. In a stunning display of consistency, they both got it wrong.

3. CONCLUDING REMARKS

The most plausible story is, I believe, an ironic one. My suspicion is that, following his bad experience with Rose O'Neill, Wood was trying to avoid making an enforceable commitment; Lucy, on the other hand, likely assumed that her contract would be enforceable. When Lucy walked, their positions were reversed, with his lawyers arguing that there really was a contract and hers that there was not.

My colleague, Marvin Chirelstein (2001, p. 212) writes:

Much more often than not, the unexpressed intention of the parties--“what they would have wanted”--is less than obvious and can only be identified through inference and surmise. Any number of cases can be cited for this proposition, among them the well-known Cardozo [decision] in *Wood v. Lucy*. . . . Assuming [that decision is] correct, as almost everyone believes, the great strength of the Cardozo [opinion] consists not in the application of fixed and overriding rules, but in the Court's acute perception of the local factual setting and the individual aims and attitudes of the parties themselves.

He is right, I think, in describing what everyone believes. But what everyone believes ain't necessarily so.

Even if there is no factual basis for Cardozo's characterization of the Wood-Lucy contract, courts and scholars will, no doubt, carry on as if it were true. Such is the nature of precedent. Perhaps this exercise in legal archeology will at least encourage skepticism about the invocation of an implied efforts standard both for finding the existence of a contract and for determining the extent of the promisor's obligation. Further, I would hope that it would buttress

the efforts of those courts that have resisted the temptation to imply a duty of any sort where the contract includes financial consideration, even if the amount be modest.

ENDNOTES

1. A Westlaw citation count found 520 cases and 308 secondary source citations (Nov. 22, 2005). The totals are growing at a rate of about three per month. For some background on the case, see Pratt (1988).
2. There is lots of public material on Lucy; see, for example, Etherington-Smith & Pilcher (1986). I received a tremendous amount of help from Randy Bryan Bigham, who is writing a biography of Lucy. See the website: Lucy Christiana, Lady Duff Gordon (née Sutherland). On Otis Wood's family, Pleasants (1948) and Mushkat (1990) provided some background. The web has a number of short biographical notes on his father Fernando and uncle Benjamin. On the interaction between the fathers of Wood and Cardozo, see Kaufman (1998, pp.12-14). I also received some useful information from Jerome Mushkat, a biographer of Otis's father. Additional information came from the archives of the *New York Times*, *Women's Wear Daily*, and *Printer's Ink*. On Rose O'Neill, see Armitage (1994) and O'Neill (1997) and these websites: Rose Cecil O'Neill; Female Inventors: Rose O'Neill.
3. The contract has a certain quaintness befitting its age: "Said retailer shall . . . provide a clerk who writes a good hand and understands accounts and bookkeeping for the purpose of constantly assisting him in the management of said business." (p. 95)
4. The ad for the opening featured a letter from Lucy:

My Dear Mr. Bedell:

After my visit today, I admire your courage in opening your beautiful new store in Thirty-fourth Street. We are much alike in that neither of us knows fear.

I would have no hesitancy in opening such an extensive establishment myself.

You have displayed wonderful taste in the selection of your models. And what a variety! I do not see how it is possible to offer such extremely attractive things at the prices you are asking. It is a revelation to me. I am glad to know that in reality I am your first customer in your new shop. The black-and-white coat which I have selected is perfectly adorable, and the gray motor coat will be exactly what I want for my personal use. I must send coats like these to my girls in England.

You may tell the public that the blue evening gown which I admired so much I have christened with my first name (Christiana) and that this is the first time I have ever given permission to use my name in connection with a model. I shall be glad to visit your opening Monday. I wish you every success in your new establishment and I know it is assured. Sincerely yours,

Lucie Christiana Duff-Gordon

5. This vulnerability is often cited as the basis for finding an implied covenant. A Lexis search of Wood/Lucy/Duff/Gordon/mercy turned up 32 hits. A typical statement goes as follows:

A typical example of an implied covenant to exploit is found in a leading case in New York on the subject. *Wood v. Lucy, Lady Duff-Gordon*. There the defendant, a fashion designer, gave the plaintiff the exclusive privilege of marketing defendant's design. Although the plaintiff did not expressly agree to exploit the design, the court implied such an obligation, since defendant's sole revenue was to be derived from plaintiff's sales of clothes designed by defendant and defendant was thus at the plaintiff's mercy. In this and in similar cases the circumstances revealed that such an obligation was essential to give effect to the

contract between the parties and was in accord with their intent.

. . . In the *Wood* case, for example, the most important factor in the decision was that the fashion designer would not receive any revenue unless the plaintiff sold the designer's clothes. (*Permanence Corporation v. Kennametal, Inc.*, 1989) quoting *Vacuum Concrete Corp v. American Machine & Foundry Co.*, 772-73.

This passage illustrates the transmutation of facts in the legal process. Wood's job, recall, was to place endorsements, not to sell clothes.

6. See for example, Michigan's statute (M. C. L. A.) §600.2961 providing for treble damages for wrongful withholding of commissions to sales persons. See also *Kingsley Associates, Inc. v. Moll Plasticrafters, Inc.*

7. While damage remedies are more liberal today, a court could still find zero damages; see the discussion below of *New Paradigm Software Corp. v. New Era of Networks, Inc.*

8. Her *New York Times* obituary (April 22, 1935) noted that in the course of her bankruptcy proceeding she "exhibited poor business ability in the hearings before the Recorder in Bankruptcy. That official asked her: 'Can you give me some particulars of your shareholding?' 'It is all Greek to me' she replied. 'I don't know what a share is.'"

9. Apparently, "due diligence" was changed to "best efforts" in the 1953 draft of the UCC; see Van Vliet (2000, p. 702).

10. See also *HML Corp. v. General Foods Corp.*, *Vacuum Concrete Corporation of America v. American Machine & Foundry Co.*, *Beraha v. Baxter Health Care Corp.*, and Eckstrom's Licensing in For. & Dom. Ops. §2:28 ("For the most part, a best efforts obligation is implied only where the licensor has, as a practical matter, put the productiveness of the licensed property

solely at the mercy of the licensee. A best efforts obligation is implied in such a situation on the ground that if the parties addressed this matter, such obligation would have been specified.

Therefore, a best efforts obligation is usually implied only for exclusive licenses which do not include safety factors for the licensee, such as minimum royalty provisions.” (footnotes omitted))

11. The finding of zero damages was not inevitable, but was dictated by the plaintiff’s framing of the damages issue and the judge’s (magistrate judge, actually) annoyance with the quality of lawyering. In that portion of the opinion in which he found that the \$2 million cash payment did not preclude an implied “best efforts” clause, he testily complained: “The Court notes that New Paradigm’s counsel did not cite *any* of these cases. The Court is tired of attorneys who do a mediocre research job and thereby impose a heavy research burden on the Court. Nevertheless, this is not moot court, and this Court must determine the law, not decide which party would win based solely on the cases cited in the parties’ briefs.” (p.13, n. 21)