M E M O R A N D U M

TO: Contracts Students

FROM: Thomas D. Russell
DATE: 25 April 2011
SUBJECT: Spring 1997 Final Examination

This memo includes a sample student answer for each part of the exam. These student answers are followed by two answers that I wrote. As always, these answers are high scoring but may contain imperfections. My answer, for example, does not contain every imaginable issue.

STUDENT SAMPLE ANSWER - PART I - SPRING 1997 CONTRACTS EXAM

1A. Under § 2207, it would seem so. The terms are different but it appears to be sufficiently aligned. It would depend on the importance of the number of cars.

1B. No. S would appear to be the offerer. As such, her form is the measure of deviations based on § 2-207. It would seem that under (2) this would be a material alteration of the deal by B.

2. We see the UCC seeking the intent of the parties in a number of sections. For example, comment 2 of § 2-317 says that warranties are based on the intention of the parties. Contract is thus becoming very flexible and moving towards viewing the context of the K and the surrounding circumstances. The rules revolve more around the circumstances now than they did in the 19th century (Williston). So intention of the parties is key to almost all the rules.

3. This would appear to be an installment K. As such, C can get either restitution or his E.I. As the work is not complete and O made a good deal, C may want to claim quantum merit and recover the full value of his services. The breach seems trivial so this is possible. Under E.I., failure to pay may be substantial enough that C should get full money. In this case that would be $10,000 as he saved $5,000 from the breach.

4. Lord Devlin would probably disagree with the 7th circuit Pro-CD case. Devlin in McCutcheon believed that you could leave prior dealings out and look to the reasonable expectations of the party buying. This would seem to fit the first Pro-CD case we read. Devlin would agree that the B should be able to bargain and object because the K is binding. Shrinkwrap should not impose its terms.

5. We have a number of guarantees in this advertisement.

I. Creation of Express § 2-313

There are some affirmations of fact in this ad. The Superthrive must be made from C-H-O organic crystals and have 50 pure complexes. This is distinguished from the opinion that nothing is like it. There is also a promise to see more flowers and leaves on inside plants. However, the 2-year tree growth seems to be an opinion as it is distinguished by a ?

It also must be the #1 plant activator world champion or you get $5,000. Also possible double money back by Better Homes. Must also fulfill any description of Superthrive on basis of its name.

II. Implied Merchantability § 2-314

As Superthrive is a merchant of g's of this type within 2-104, the g must pass under trade descriptions and be usable within for ordinary purposes.

III. Implied Fitness For Particular Purpose §2-315

It would not seem there is any here because ?? is not relying on anyone's skill. He picks the g himself for his own purposes.

Disclaimers: Any express would not seem limited by any language.

Implied:

Merchant: Not disclaimed. Needs express language.

Fitness: If any exists, it would seem to be disclaimed by the general language of "not responsible for use."

6. Under Traynor's opinion in Drennan, there is an implied subsidiary promise the sub will keep the offer open and not revoke for a reasonable amount of time. However, as it appears the Gen is bid shopping since he got the grant, the sub in no longer bound to the option. No deal.
7. There would seem to be a question of misunderstanding (§20) or a mistake (§153).
   § 20 It seems both parties attached different meanings to fifty-six twenty. So long as neither party has reason to know of the meaning attached by the other or A & O are not trying to rip one another off--then no deal.
   § 153 A thought it was a cheaper necklace without the rare pinklestones. Arguably the enforcement of this K would be unconscionable to him due to the large px. So it would be voidable.
   problem: A could have done more research to clarify the px and stones. He treated his knowledge as sufficient.
8. This would seem to allow O the value of the 6 lost foals that he expected (§2-105) as unborn young are covered by UCC. He should be able to get market-based money under §2-713. O has a warranty of fitness for a particular purpose and one of merchantability. So he should be allowed recovery.
   Also, seems O has a good case for misrep ad based on statutes, he could recover treble money.
9. It doesn't seem there is too much if you're in a Corbin juris. You can't admit contradictory ev., but you are allowed to supplement and clarify meanings in a partial integration. Any course of dealing, trade usage, etc. is allowed as well. The context seems to rule and the K is only becoming a piece of the ev. See Masterson. Willistonian jurisdictions still maintain PER. Only admit evidence to clarify meaning. If the K looks complete then it probably is. The juris are more likely to find a complete integration. Also likely to think that any oral ev. as a collateral (separate) agreement. See Mitchell.
10. Instead of arguing maximum pieces vs. maximum lbs., the Buyer should have argued, "What do we mean by capacity?" To clarify this meaning, we need PER. B could argue 1) How many could go through without the machine breaking down? vs. 2) How many can go through and get the right amount of coating?
    As such, B could argue he should have been getting sub-par cookers (based on pieces), but the machine should not have broken down (based on lbs.).

STUDENT SAMPLE ANSWER - PART II - SPRING 1997 CONTRACTS EXAM

MEMO RE: MR. RODRIGUEZ

Mr. Rodriguez has enough evidence to make a strong claim showing an enforceable K, breach of that K, and due remedies. There are obstacles, however, that need to be overcome.

APPLICABLE LAW

This is a transaction in goods, tractors are movable, so Art. 2 of the UCC applies. The transaction also falls within the Statute of Frauds as the price of the goods exceeds $500.

FORMATION

We can confidently show that an enforceable K was formed. Mr. Martinez (M) offered to sell Mr. Rodriguez a tractor in early April of '94 and Mr. Rodriguez (R) accepted and paid. M gave R a receipt of the transaction which satisfies the three requirements of a writing under 2-201. The receipt contains (1) evidence of a K for the sale of goods (tractor), (2) a quantity (one), and (3) it is signed by the party against whom enforcement is sought (M). Also, M admitted in his pleadings that there was a K 2-201 (3)(b).

CONTENTS OF THE DEAL

The K states express warranties by stating in the description portion of the invoice that the good is a "580 CK Backhoe" and is in "working condition" (2-313 (1)(b)). Also, "FOB Progresso" establishes that M will ship and bear the expense and risk of shipping the tractor (2-319(1)(a)). An implied warranty of merchantability is created because M is a merchant and an implied warranty of fitness for a particular purpose is created because M said it would meet R's needs, but these are effectively disclaimed.

All implied warranties are effectively disclaimed by the language "AS IS" (2-316(3)). This puts the buyer on notice that the condition of the goods warrants suspicion. However, this phrase only applies to implied warranties, so the above express warranties are not disclaimed.

This K is not complete. Only the bare essentials to justify an enforceable K are present, so the Parol Evidence Rule (PER) will allow evidence to supplement the K, but not to contradict it (2-202). Williston himself might find a complete integration here and might only look at the 4 corners of the document. This would actually help our client because breach would be clear due to the fact that M failed to deliver a 580 CK Backhoe. However, our jurisdiction like most, will find this agreement, absent a merger clause, to be only partially integrated. PER only applies to prior and contemporaneous evidence. Whether M told R that he would refund his money if not satisfied before or after the K was signed is an issue. From R's and his wife's testimony, it seems that this was said just after signing, so PER would not exclude this evidence. Nevertheless, this statement does not appear to contradict any terms in the text, so this evidence should be allowed to supplement the agreement. This guarantee becomes an express warranty. This warranty of a refund can be reasonably construed with the AS IS language disclaiming implied warranties (2-316).

PERFORMANCE

The K states that M will deliver a 580 CK Backhoe. M failed to deliver goods conforming to this express warranty, so he breached his duty under the terms thus far (2-601). M tried to cure with a substitute tractor, but after testing the tractor, R determined that it was not suitable and notified M of his dissatisfaction in a reasonable time. M failed to refund R's money, so he breached the express warranty of refund.

REMEDIES

2-711 provides a menu of remedy options for R because M has breached. M has not covered, so under 2-713, he can recover the difference between the market price for a 580 CK Backhoe and the K price + incidentals and consequential damages. M could have foreseen consequential damages associated with the ordinary course of M's septic business (Hadley and 2-715). This measure of damages would give R his expectation damages, which puts R in as good a position as if the K would have been performed. This is what the Code favors (1-106). Reliance damages in this case would seek to put R in the position as if he never entered the K. R really hasn't spent much in reliance of this K in addition to the price of the tractor. 2-711 also provides explicitly for restitution which would refund R his $6,500 paid to M. Specific performance would not be ordered in this case because the right tractor in working condition is not available and money damages are accurate.

OBSTACLES

There are several obstacles but each can be overcome. The testimony of M and Chavez paints a different picture than R and his wife. Chavez states that a new agreement was reached which made the sale of the replacement tractor a condition precedent to R getting his refund. M further states that he's just helping R sell the replacement tractor. Subsequent evidence not denied by PER. This testimony should be overcome by R and his wife's consistent testimony that a refund was promised. Also, M's suggested remedy is not a common or reasonable form of cure. Moreover, M's current use of the tractor is inconsistent with the claim that the tractor still belongs to R.

M could argue impracticability under 2-614. It was impracticable for M to deliver the CK because of its condition so he substituted with a commercially reasonable substitute tractor. R, however, has rejected this substitute for the same reasons as M is claiming that it was impracticable to deliver the CK, so this claim would likely fail.

M could claim mistake because both parties believed that the CK was in good condition. This mistake of fact makes the deal only voidable, however, so M would not be justified in keeping R's $6,500.

M's could try to prove substantial performance, but unlike the common law, the UCC favors perfect tender. Also, having a CK is not a fetish of R's. R needed the CK for business purposes which the substitute cannot perform. Even Cardozo would not find substantial performance here (Jacobs & Young).

Overall, our client has a strong claim to regain his $6,500 or more.

MODEL ANSWER - PART I - SPRING 1997 CONTRACTS EXAM

These answers would have earned all 60 available points.

1. a. There is no contract. By accepting a different quantity than Sally offered, Barbara made a counteroffer.

   b. If there were a contract, Barbara would not have a right to consequential damages because the inclusion of these in her "acceptance" materially altered the deal, 2-207(2).

2. The idea that will is the center of Contract law is very much a 19th-century idea. We have moved well beyond this idea with a turn to the objective standard. Plus, the idea that the rules of Contract can be derived from any one central idea is laughable. Good examples include the refusal to enforce the desires of the parties for reasons of public policy. As well, the imposition of terms such a good faith and implied warranties does not derive from the will of the parties.

3. The builder/contractor has substantially performed. He is entitled to his expectation interest, which would equal the final progress payment discounted by the cost of completing what little work remains to be done. Alternatively, because the Owner has prevented him from completing the work, he may be able to turn his back on the contract and seek a Quantum Meruit recovery. This restitution remedy would equal the value of the work done, $125K.

4. Lord Devlin would enforce a deal that had been signed, but he would not want to enforce shrinkwrap licenses because they could be known only to one side at the time of the contract. The license is an uncommunicated condition.

5. Express Warranties:
   The promises on the sheet are express warranties, such as that the product will make plants thrive, that it contains "Biousables," that it will enhance yields, etc. However, given the tabloid style of the sheet, some of these promises are just puffing, which would not amount to an express warranty.
   Implied Warranties:
   Merchantability: Because Wal-Mart or the SuperThrive manufacturer are merchants, this product must pass as merchantable in the trade. Just what the trade is may not be clear, but at the very least, this product should not kill plants, for example.
   Fitness for a Particular Purpose: It's not clear that Jim relied on anyone in purchasing this product, as he just went in and bought it from the shelf. If he did rely on the seller's expertise, that would create an IWFPP.
   Disclaimers:
   The sheet has a "non-warranty" in the corner, which attemps to disclaim all the promises/warranties made.
   With regard to the express warranties, the disclaimer will be ineffectual, because there is no reasonable way to interpet this disclaimer with the express warranties, so the ew's trump.
   IW Merch. The disclaimer is not conspicuous and it fails to mention "merchantability," so it does not operate as a disclaimer.
   IW FPP. Again, because not conspicuous, it does not disclaim this warranty, if there is one.

6. In California, if the General shops the bid, then the sub is relieved of its implied subsidiary promise to hold the bid open before acceptance. So, the sub could refuse to enter into a contract or do the work.

7. There is a mutual mistake. Both parties were in the dark as to the meaning of the other, and it is not clear from these facts that either one bore the risk. Maybe the jeweler should have articulated the price differently, maybe Artie should have known this was an expensive necklace. But, as neither appears to have been at fault, no enforceable deal, R, 2d, 20.

8. The horse owner should get the difference between the value of the vaccine promised and the value of the vaccine delivered, the latter being at most zero. This difference will be difficult to determine, though perhaps not impossible, Chatlos. The difference in value between the six mares that had miscarried and six that had not, plus the value of the colts, discounted by the likelihood that the mares might have miscarried even with an effective vaccine could be either a proxy for the value of the vaccine or this difference could be consequentials, to which

the buyer would be entitled along with incidentals.

9. Not much. A lot depends on jurisidiction. If in a Willistonian jurisdiction like New York, then the rule retains much of its 19th–century vigor. Elsewhere—esp. Ca.--the rule is riddled with exceptions, although a fully integrated contract may be still be able to repel contradictory terms. This might be especially true between merchants.

MODEL ANSWER - PART II - SPRING 1997 CONTRACTS EXAM

This essay would have earned 33 points. The point totals for each section are indicated at the end of each paragraph in parentheses.

Memo

To: Rodriguez' attorney.

From: Exam no. 007

Re: Tractorgate

UCC? The transaction is primarily one for goods, so Art. II of the UCC applies. (1)

S/F? Because a sale over $500, it's within the statute of frauds, 2-201. But the writing satisfies the statute. (1)

Formation: There is an enforceable deal. Offer to buy a tractor, acceptance, exchange of money for the promise. Offer + Acceptance + Consideration. (2)

Defenses to Formation: There are no real defenses. Although they are neighbors, there is not really enough to establish a confidential or trust relationship. Also, although the buyer speaks only Spanish, it appears that they conducted their negotiations in Spanish. The receipt reflects their deal, although whether the buyer understood the meaning of "As Is" may be an issue. (1)

Content of the deal: The contract is for the sale of a Case 580-CK backhoe. That's what the buyer sought and agreed to buy. The receipt reflects that and creates a warranty of description. (2)

EW: There are other express warranties. The receipt indicates that the backhoe will be in 'Working Condition." Although the receipt also says "As Is," this does not disclaim that EW that the backhoe will be in working condition. 2-316 resolves this conflict in favor of the warranty. (3)

IW: Because the seller is a merchant, there is an implied warranty of merchantability. It is not clear whether the buyer relied on the seller's expertise in selecting the backhoe—it sounds as if he did not—but if he did, that would give rise to an implied warranty of merchantability for a particular purpose. (2)

Disclaimer: However, the "As Is" probably serves to dislaim these warranties, 2-316(3)(a). One difficulty here is that perhaps the buyer, who speaks only Spanish, did not understand the meaning of "As Is." If so, then perhaps the disclaimer won't work, although since the buyer is a merchant (or trying to be one), maybe he ought to understand "As Is." We'll need to research this. (2)

Finally, the buyer also says that the seller promised that he would get his money back if not satisfied. This expands slightly the buyer's entitlement under Art. II to restitution following breach. The PER may serve as an obstacle, but if this discussion came after the written contract, then the evidence should come in without problem. (2)

Performance/Breach.

The seller failed to deliver the backhoe for which the parties contracted. He took the buyer's money and came back without the backhoe he promised. That's a breach. (3)

Modification? Not! The seller claims instead to have modified the contract and appears to have been coached by his lawyer regarding what to say in his affidavit in order to make his breach look like a modification. But, let's not be fooled by that. Trying to turn a breach into a modification should run afoul of the 2-209 requirement of good faith.(1)

Cure: After breaching, the seller botches an effort at cure. He tries to get the buyer to accept an inferior John Deere machine, but the buyer, after inspecting it, refuses to accept it. At this point, he was entitled to the full range of buyers remedies under the UCC. (3)

Remedies:

Although the buyer wants only restitution, he is entitled to more.

LD: There is no liquidated damages clause. (1)

Expectation: Had he covered, he could have gotten cover damages. Instead, he can get market-based damages which would be the difference between the market price of a used CK 580 and $6,500 (actually, the market dams would be just the market price of the CK 580, since he has already paid the $6,500). (3)

Plus, he would get incidental costs associated with the breach and also consequentials, which would include the lost profits of his septic tank business. This latter, of course, would be hard to recoved given the new business rule. (2)

Reliance: His reliance damages would be everything he was out of pocket because of the transaction. This would be $6,500 plus any incidentals. He has paid loan interest, but he would be paying that anyway. (1)

Restitution: Under 2-711(1), he could just get his purchase price back (included as well under expect.) and walk away from the deal. This is really what he wants, but asking for more may help reach this goal, although the seller is so thinly capitalized, that there may be no money to be had. (1)

Alternative: One idea would be to somehow allow the buyer to file a lien against unsold equipment of the seller's, thereby locking in his entitlement to the proceeds when sold. But we'd have to learn more about liens. (1)

(Extra point for organization) (1)