

FINAL EXAMINATION

CONTRACTS

HOUSE OF RUSSELL

INSTRUCTIONS:

1. **DEADLINE:** This is a 75-hour examination. You may begin the exam at any time after 3 pm on Friday, 10 December 2010. You must submit your answers by 6 pm on Monday, 13 December 2010. **If you turn in your answers after 6 pm on 13 December, then you will receive an F for your Contracts grade. NO EXCUSES.**
2. **TURNING IN YOUR ANSWERS:** Turn in your answer by sending the file to registrar@law.du.edu. It's a good idea to send your answer with either a send receipt or a delivery receipt. As well, send yourself a copy of the message that you send to the registrar. This will verify the fact and time of your sending your answer. **DO NOT SEND A COPY OF YOUR ANSWER TO PROFESSOR RUSSELL; YOU VIOLATE THE HONOR CODE IF YOU SEND A COPY OF YOUR ANSWER TO PROFESSOR RUSSELL.** In the subject line of your email, put the following text: "Russell-Contracts-[exam number]" where [exam number] is your exam number. Name the file that contains your answer using the same convention: Russell-Contracts-[exam number]. If you have technical problems turning in your answer, please contact the registrar. If you have additional difficulties, please contact Ms. Diane Bales at dbales@law.du.edu or at 303-871-6580. **Do NOT contact Professor Russell with difficulties related to exam submission.**
3. **OPEN-BOOK:** This is an open-book, take-home examination. Your answer must be of your own composition. You may work on this examination wherever you wish, and you may consult any written material that you wish. However, you violate the Honor Code if you discuss, show, or distribute this examination or your answers to anyone at all before 6 pm on Monday, 13 December. Be cautious, for example, about posting anything on

Facebook that looks like a request for assistance. Once the exam starts, you may not discuss it with anyone at all before the examination ends at 6 pm on 13 December 2010.

4. **EXAM NUMBER:** Please put your exam number on each page. The easiest way to do this is to put the exam number in a header on each page. **Do not put your name anywhere on the exam.** You should name the file Russell-Contracts-[Exam Number]
5. **LENGTH:** This examination consists of one question. You may use no more than 2,500 words to answer the question. Reducing your answers to this word limit will be one of the challenges of this examination. **Include the word count at the end of your answer.**
6. **SPACING:** Please double-space your answers. Avoid miniature fonts, okay?
7. **HOW TO ANSWER:** In answering, use judgment and common sense. Be organized. Emphasize the issues that are most important. Do not spend too much time on easy or trivial issues at the expense of harder ones. If you do not know relevant facts or relevant legal doctrine, indicate what you do not know and why you need to know it. You must connect your knowledge of law with the facts before you. Avoid wasting time with lengthy and abstract summaries of general legal doctrine. Discuss all plausible lines of analysis. Do not ignore lines of analysis simply because you think that a court would resolve an ambiguous question one way rather than another.
8. **JURISDICTION:** The laws of the 51st state of the union apply to all of the issues in this examination. This state has adopted the Uniform Commercial Code. The 51st state is NOT Colorado.
9. **CONCISION:** Quality, not quantity is desired. Think through your answer before you begin to write. You have a lot of time to write and edit your answer. You will earn a

better grade by being thorough and concise. And, of course, well-organized answers will be the best answers that earn the highest grades.

10. **ERRORS:** Sometimes, there are typos or continuity errors in House of Russell exams. For example, you may meet someone named Helen on one page and two pages later, she may be called Jane. If you spot such errors in the exam, please send a correction to Professor Russell. If the correction is warranted, then Professor Russell will send a note to the entire class using this list only. Please note that the cutoff for such corrections will be 10 a.m. on Saturday morning. After that, the exam stands as written.
11. **EXPERTISE:** Please note that sometimes House of Russell exams deal with subject matter about which some of you may have expertise. You have to accept the exam's presentation as true. For example, if there is lava in the exam, the exam indicates that lava is 1,500 degrees Fahrenheit, but you happen to know that lava is much hotter, then you should put aside your superior knowledge and accept the lava as being the temperature that the exam says it is. Typically, House of Russell exams try to simplify some issues by mashing down the science just a bit.
12. **KEEP A COPY:** You should feel free, of course, to keep a copy of the exam. Please keep your answer also.
13. **CHEATING:** If, in preparing for this examination you have violated the Honor Code, or if, during this examination, you violate the Honor Code, the best course of action is for you to report to the Dean of Students immediately after this examination ends.
14. **GOOD LUCK:** Good luck and have a great break.

KUSHSYLVANIA

Four years ago, Kushsylvania became the 51st state. Kushsylvania followed the models of Nevada and Delaware. The tiny state of Delaware became a corporate powerhouse by having sophisticated, corporate-friendly laws and a talented group of judges who thoroughly understand corporate transactions. Likewise, Nevada overcame the fact that there is no reason to live there by using its jurisdictional powers to attract business and visitors. First with divorce, then with gambling, and third with prostitution by county option, Nevada has legalized activities that are illegal in nearby California and elsewhere. Both Nevada and Delaware have filled their state's coffers with revenue generated from the businesses that have flocked to their states because of the friendly legal outlook. Just as Delaware turned to corporations and Nevada turned to divorce, gambling, and prostitution, Kushsylvania has turned to marijuana. Immediately after becoming the 51st state, Kushsylvania legalized all uses of marijuana within its borders.

Under federal law, marijuana remains illegal. The Controlled Substances Act classifies marijuana as a Schedule I drug and defines it as a drug "with no accepted medical value in treatment." Although advocates of legalization point to a long history of the use of marijuana as a medication, federal law classifies marijuana as a "new drug" and allows legal access only through an Investigational New Drug Application (INDA) that the Food and Drug Administration (FDA) rarely issues. However, two years ago, President Obama issued an executive order that henceforth the federal government would not prosecute persons who used marijuana for medicinal purposes, and he directed the Justice Department to stop prosecuting anyone who used medical marijuana. Kushsylvania's legislature immediately passed legislation declaring that marijuana was medically beneficial in all forms to all its users.

Kushsylvania's legalization of marijuana is an experiment in federalism. It is also a challenge to the supremacy of federal law. In some ways, Kushsylvania's marijuana laws represent a truce with the federal government. Interstate shipment of marijuana remains a federal crime as does using the US Postal Service to ship marijuana. However, as long as Kushsylvania's marijuana business stays within its state borders, federal law enforcement officials have enacted policies that they will not interfere with those growing, selling, or using marijuana in Kushsylvania.

I. Entrepreneurs

Billy Bud was one of Kushsylvania's first marijuana entrepreneurs. Before leaving for Kushsylvania, Bud had been in the taxi business in Denver, Colorado. But, Bud found that the Colorado Public Utilities Commission was a completely captured regulatory agency that insulated existing cab companies from new competition, was very slow to act, and generally refused to apply the law. Consequently, forming and running a new taxicab company in Colorado was nearly impossible. By contrast, getting into the marijuana business was quite easy and far more lucrative.

Bud was among the rush of new entrepreneurs who came to the new marijuana-friendly state. Initially, there were many, many pot shops, but within a short time, many of the enterprises went out of business--often because the operators or employees smoked the inventory themselves. But Bud's model expanded to 75 different stores throughout the state where customers could buy, smoke, and eat marijuana in very comfortable, clean surroundings. The local business newspapers started referring to Bud's Kush Joints as the Starbucks of the marijuana business.

Other entrepreneurs came as well. Nearly one-third of the glass-blowing community of Seattle, Washington moved to Kushsylvania. They came to produce glass pipes and bongs. And, of course, they came to smoke pot.

Other smart business people created intrastate shipping businesses that ship marijuana within the state's borders.

And, of course, the number of musicians increased exponentially.

II. Bud's Kush Joints

Bud called his businesses Bud's Kush Joints. He and some of his friends came up with the name one night after smoking a lot of marijuana. At the time, the name seemed very funny and creative.

Starbucks is an apt analogy for Bud's businesses. His businesses are clean and bright with nice, seasonally adjusted music and many retail tie-ins such including pipes, storage containers, marijuana-related magazines, and t-shirts. His staff are friendly and well-trained. He does not hire employees who act like stoners. His Joints are predictably uniform. Bud has directed his marketing efforts at middle-class people especially in the suburbs where, he felt, people were bored and might prefer to spend their afternoons and evenings stoned.

III. Carpeting and Parquet floors.

Bud is very attentive to flooring. (Flooring means, simply, what is on the floors--carpet, wood, tile, linoleum, etc.) Bud likes wood flooring but is concerned about noise and echoes if there is too much wood in his stores. He consulted with an acoustical engineer who recommended that the flooring in his stores include a mix of 60 percent wooden floors with 40 percent carpet in his stores.

Two years ago, just before President Obama’s executive order, Bud had the floors in all of his stores redone. He correctly foresaw a boom in business. He followed the advice of the acoustical engineer with regard to the flooring, and he chose the recommended mix of wood and carpeting for his flooring. For the wooden portion of the flooring, Bud chose parquet flooring because Bud had grown up watching the Boston Celtics play on the hardwood parquet floor of the Boston Garden. The installation of parquet flooring was more labor intensive than the installation of carpeting and therefore more costly.

Acme Flooring was Bud’s flooring contractor. When he discussed the job with Acme’s manager, Bud learned that the total cost for labor equaled the total cost for materials in the contract. Acme’s manager said that the cost would be \$20,000 per store to redo the flooring. The layout of the different stores varied somewhat, but they were roughly equal in square footage.

The day after he discussed the cost with Acme’s manager, Bud sent a fax to Acme. He faxed his standard purchase order, on which he had handwritten “Redo flooring in all 75 stores. Flooring to be 60 percent sealed hardwood parquet as discussed and 40 percent carpet.” The printed terms on Bud’s form included, in large type, “Time is of the essence in all work performed at Bud’s Kush Joints. Every hour that a store is closed means lost revenue for the business. If the store is closed, Bud can’t make money.”

Acme’s manager sent back its standard Acknowledgement of Order form, on which Acme’s manager wrote by hand “Redo Bud’s flooring. 60% sealed hardwood parquet/40% carpeting.”

The form also included a list of printed terms. Term number 8 read as follows:

“The parties agree that the any action for breach of contract for sale must be commenced within two years after the cause of action has accrued. See UCC § 2-725.”

Three days after sending the Acknowledgement of Order form, the Acme manager made a decision. He decided to use engineered wood flooring rather than hardwood flooring. Engineered wood flooring contains layers of wood and other artificial material. This flooring has a top layer of hardwood that is 1/13 inch thick and appears to be strips of hardwood, a second layer of softwood that is three millimeters thick, and artificial material between the layers. Although engineered flooring looks like hardwood flooring, engineered flooring is not as stable or durable as hardwood, cannot be sanded and restained, and is vulnerable to swelling and shrinking from humidity.

Engineered flooring was less expensive for Acme to buy and easier to install. Acme was barely making enough money to stay in business, and so Acme’s manager was under pressure from his bosses to increase the profit margin for the jobs that he supervised. Acme’s manager presumed that Bud meant solid hardwood flooring when he talked about the floor at the Boston Garden. However, great strides had been made in recent years with regard to the manufacture of engineered wood flooring, and he doubted that Bud would ever notice the difference.

Installation of the flooring--the wooden parquet and the carpeting--took place quickly and without any problems. Bud was very pleased that the job took less time that he had anticipated. The disruption of his businesses was very minimal.

IV. Hoover SteamVac All-Terrain Carpet and Hard Floor Cleaner

Bud learned about Hoover's SteamVac while reading *Consumer Reports* magazine, which he read avidly along with *High Times* and *The Economist*. *Consumer Reports* gave the Hoover vacuum a top rating.

What appealed to Bud about the Hoover SteamVac All-Terrain Cleaner was that the machine met all three of his floor cleaning needs. There was a switch on the base of the machine with three positions. Hard Terrain, Carpet Terrain, and Spill Pick-up. Hard Terrain was good for his flooring; Carpet Terrain for the carpet; and Spill Pick-up he could use for bong water spills at his



stores. Bud emphasized to his staff that quick cleanup of bong water spills was essential in order to avoid having all his stores smell like stoner hangouts.

Bud contacted Hoover directly about purchasing two of their machines for each of his 75 stores. Bud explained that his stores had both hardwood surfaces and carpeting. He noted that he needed a good vacuum for spills, too. As they talked on the phone, the Hoover salesperson first sent Bud email that included the following detail.

The **Hoover SteamVac All Terrain Carpet and Hard Floor Cleaner** gives you the correct amount of SpinScrub action for all your floor-cleaning needs. This all-in-one machine scrubs the thickest carpeting, removing deep-down dirt. Switch to hard floor mode and it will gently clean and squeegee dry the most delicate hard surfaces and sealed hardwood floors.

Hoover SteamVac All Terrain Carpet and Hard Floor Cleaner:

- All-Terrain Cleaning feature is designed to clean a variety of surfaces
- Dual V nozzle technology provides equal suction across the full width of the Hoover SteamVac nozzle
- Patented SpinScrub brushes for carpets and hard floors
- Automatic detergent mixing system provides the correct mix of detergent and water for optimal cleaning results
- Auto Rinse feature rinses your carpet and hard floors, leaving less detergent residue behind
- Removable transparent nozzle for quick rinse cleaning
- Heated Cleaning applies heat directly to the floor
- Eight foot hose and removable tool caddy
- On-board SpinScrub hand tool
- Edge cleaners
- Thirty-foot power cord
- Thirteen-inch nozzle
- Powerful 12-amp motor provides maximum suction and cleaning power
- Cleaning solutions included: Floor-to-Floor and Ultra Detergents

Bud read through the list and asked a few questions. He asked, for example, whether the machine could be used with no detergent at all, that is, whether it could be used just for a hot-water rinse of the carpeting. The salesperson said yes.

After listening to Bud and answering his questions, the Hoover salesperson agreed with Bud that the SteamVac All-Terrain Vacuum sounded ideal for his needs. Bud, while still talking on the phone with the salesperson from Hoover, replied to the email with a list of the addresses of all 75 of his stores. While still talking with Bud on the phone, the salesperson looked over the list and offered to sell Bud 150 of the machines for \$200 each with free-shipping to his stores. The Hoover salesperson also offered to have a local Hoover technician come to each store in order to assemble the machines and instruct his employees how to use them. Bud said that sounded like a pretty good deal and that he would decide later that day.

Later that same day, Bud faxed a purchase order to Hoover. On it he wrote “150 Hoover Steam Vacs @ \$200 delivered to Bud’s Kush Joints.” He received a mailed acknowledgment in reply that included his purchase order stapled to a Hoover form. The Hoover form included fine print that Bud did not read. Among the terms was number 6. “One year limited warranty.”

The shipped SteamVacs started arriving at Bud’s stores at around the same time that Acme Flooring was installing the carpet and wood flooring. One of Bud’s managers called Hoover about having someone come to assemble the machines and train the staff, but it turned out that the Hoover salesperson with whom Bud had negotiated had left the company. Hoover told Bud’s manager that they had no record of any agreement to assemble the machines and also that it seemed unlikely for “liability reasons” that the salesperson would have made that promise. However, assembly was very easy and there was a one-page instruction sheet in each box that explained how to put the machine together and use it. If Bud’s staff had problems, they could call Hoover for help.

Assembly of the machines turned out to be very easy, and all the store managers were happy with them. They worked well on spills, carpet, and on the parquet floors as well. They helped to give the stores the clean, fresh scent that Bud wanted.

Problems with the Hoover machines did not emerge until just after one year of use. There were two problems. The first issue was that the tanks started leaking. One tank held fresh water for rinsing. The other tank held the dirty water. Leaking fresh water was not such a big problem; it just left little water spots. But, when the dirty water tank leaked, it dripped stinky bong water all over the store. A majority of the store owners, when asked, reported that the machines started leaking after a year in use.

The second problem was a greater problem. After a year of cleaning the new parquet floors, store managers started reporting that the SteamVac was causing the parquet floor to come apart. The top layer of the floors were coming apart. When Bud learned of these two problems with the SteamVacs, he ordered the stores to stop using them. He bought two new Bissell carpet cleaners for each store at a cost of \$250 each plus \$25 shipping, plus he sent his managers to Home Depot to buy Swedish Bona wood care kits for an additional \$50 per store.

Later, one of Bud's store managers found the original Hoover instruction booklet. No one had ever read the original booklets, which had been in the boxes with the machines when they arrived. The store managers or their employees had assembled the machines using the one-page instruction sheets, which also explained how to use the machines.

Page 29 of the booklet included the following text:

Limited ONE Year Warranty (Domestic Use)

WHAT THIS WARRANTY COVERS

When used and maintained in normal household use and in accordance with the Owner's Manual, your HOOVER® product is warranted against original defects in material and workmanship for a full one year from date of purchase (the "Warranty Period"). During the Warranty Period, Hoover® will provide labor and parts, at no cost to you, to correct any such defect in products purchased in the United States, U.S. Military Exchanges and Canada.

HOW TO MAKE A WARRANTY CLAIM

If this product is not as warranted, take or send the product to either a Hoover® Sales and Service Center or Hoover® Authorized Warranty Service Dealer along with proof of purchase. For an automated referral to authorized service outlets in the U.S.A., phone: 1-800-944-9200 OR visit Hoover® online at www.hoover.com. For additional assistance or information concerning this Warranty or the availability of warranty service outlets, phone the Hoover® Consumer Response Center, Phone 1-800-944-9200, Mon-Fri 8am-7pm EST.

WHAT THIS WARRANTY DOES NOT COVER

This Warranty does not cover: use of the product in a commercial operation (such as maid, janitorial and equipment rental services), improper maintenance of the product, damage due to misuse, acts of God, nature, vandalism or other acts beyond the control of Hoover®, owner's acts or omissions, use outside the country in which the product was initially purchased and resales of the product by the original owner. This warranty does not cover pick up, delivery, transportation or house calls. However, if you mail your product to a Hoover®

Sales and Service Center for warranty service, cost of shipping will be paid one way.

This warranty does not apply to products purchased outside the United States, including its territories and possessions, outside a U.S. Military Exchange and outside of Canada. This warranty does not cover products purchased from a party that is not an authorized retailer, dealer, or distributor of Hoover® products.

OTHER IMPORTANT TERMS

This Warranty is not transferable and may not be assigned. This Warranty shall be governed and construed under the laws of the state of Ohio. The Warranty Period will not be extended by any replacement or repair performed under this Warranty.

THIS WARRANTY IS THE EXCLUSIVE WARRANTY AND REMEDY PROVIDED BY HOOVER®. ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE, ARE DISCLAIMED. IN NO EVENT WILL HOOVER BE LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES OF ANY KIND OR NATURE TO OWNER OR ANY PARTY CLAIMING THROUGH OWNER, WHETHER BASED IN CONTRACT, NEGLIGENCE, TORT OR STRICT PRODUCTS LIABILITY OR ARISING FROM ANY CAUSE WHATSOEVER. Some states do not allow the exclusion of consequential damages, so the above exclusion may not apply to you. This warranty gives you specific rights; you may also have others that vary from state to state.

After switching to the Bona products for cleaning the parquet floors in his stores, the deterioration of the wood floors stopped. Only recently did one of the store managers--who had previously installed wooden flooring--take a close look at the parquet floor in his store. He discovered that the floor was not hardwood but that it was engineered flooring instead. Knowing of Bud's special interest in good flooring, he was surprised that Bud might have cut corners by using a cheaper product for the flooring. After thinking about it for a few days, the manager called Bud to let him know that the engineered flooring was coming apart in the stores. The

manager noted, as gently as he could, that the heated water of the Hoover machine likely accelerated the degradation of the engineered flooring.

Bud was not pleased to learn that he had received engineered flooring when he thought he was getting solid hardwood. He asked his manager to look into what it would cost to replace all the floors and how long it would take. His manager reported back that the removal of the old floors and their replacement with the hardwood parquet floors that Bud originally wanted would cost \$15,000 per store and would require that each store be closed for two days.

V. Bongs

Just as Starbucks sells coffee mugs and coffee makers for home use, so too do Bud's Kush Joints sell pipes for marijuana smoking. Under Kushsylvania state law, selling and possessing marijuana pipes is legal.

Bud's first-cousin once-removed is a talented glass blower who had trained with Dale Chihuly in Seattle. Jesse had moved from Seattle to Kushsylvania three years before. Bud had seen and admired Jesse's work, which included vases, lamps, chandeliers, and remarkably beautiful depictions of various fruits and vegetables. Jesse was exceptionally talented and his design, color, and clarity of glass made his work readily distinguishable from that of other glass blowers. Jesse channeled the talent of Dale Chihuly.

Notwithstanding his talent, though, Jesse never really made enough money. He lived the Bohemian life of the glass blower--usually broke, run-down car, etc.

Like every other glass blower in the state, Jesse occasionally made bongs--that is, waterpipes for use in smoking marijuana. No matter what project a glass blower started with, in moments of boredom the project always transmogrified into a bong. Jesse's bongs were

exceptionally attractive and also quite sturdy. After visiting his studio, Bud contacted Jesse about the possibility of supplying bongos for all 75 Bud's Kush Joints.

Bud called Jesse and said, "Jess, I love your work. Are you ready to make some money?"

Jesse, who was often a little paranoid, asked what Bud had in mind.

"I want you to supply all my shops with your glass, Jesse. I want you to be the exclusive contract supplier of high-end bongos at Bud's Kush Joints."

"Contract?" said Jesse. "I hate contracts. I avoid contracts. Cell phone companies have screwed me too many times with contracts."

"I can sell 500 high-end bongos every month," Bud told Jesse. "If you can make about 20 bongos per day and ship them to me in monthly lots of 1,000, then I will pay you \$50 per item."

"Bud, a contract will ruin my creative process. I can't be tied down by business," Jesse replied.

"Think of the money, Jesse. You can hire some better helpers than the \$90 per day guys that you have in your studio now. You can put aside some money. With what you'll be making, you can buy a house."

Jesse told Bud that "Twenty bongos per day is a lot of work. That would take all my time, and I'd have to have the studio furnace going 12 hours per day, 5 days per week. Really, I'm not sure I can make 20 bongos every day."

"Okay, tell you what," said Bud, "For one year, I will buy your entire output of bongos with a target of 500 per month. For that I will pay you \$50 per bong. All first-quality from your shop with no more than 5 bubbles per bong with none of those broken. Think about it."

"Okay, I'll think about it," Jesse replied.

That night, Jesse talked over the proposed deal with his girlfriend. She had hopes that they might get married and own a house one day, but she knew that few glass blowers achieved that kind of success. Most ended up selling insurance or going to law school.

The next morning, Jesse sent this text message to Bud.

If U pay me \$60 per I accept ur offer to buy all I produce. Can begin delivery in one month.

Sent via Jesse's Droid on Verizon Wireless.

Bud texted back:

That's a deal, Jesse. I'll buy your output estimated 500 per month.

Sent via Bud's iPhone on AT&T.

One month later, Bud started receiving Jesse's new work--500 bongs. The pieces were breathtakingly beautiful and perfectly functional, too. Bud easily sold 500 per month, even after he marked them up to \$150 each. Jesse's hand-blown bongs became extremely popular among Bud's suburban customers. As the respectability of marijuana use climbed, Jesse's bongs became sought-after status symbols--much like fancy espresso machines have at times been very popular.

For the first six months, Jesse produced an average of 500 bongs per month. But after six months, Jesse's shipments to Bud slowed. In the seventh month, there were only 400 pieces. In the eighth month, there were only 250. In month nine, no more bongs.

Bud called to check on Jesse. "What's wrong buddy? Your shipments have disappeared. I have customers waiting for your work."

"The bong muse left me, man," said Jesse. "My girlfriend's right that I should get back to my artistic roots. Chihuly trained me, and I'm going back to art glass. For the last three months, I have been switching production over to pieces for Nordstrom, and they want more. A

Nordstrom buyer told me he wants my work, that he loves my bowls, the fruit and veggie pieces, and that he would like me to do a couple of thousand glass ornaments for this year's Christmas catalogue. Bongs for suburban yuppies are just not where my art needs to be."

"So, your work needs to be on suburban Christmas trees instead? You're breaching the contract? I can't believe this. After all I've done for you!"

"Bud, I told you I hated contracts. I'm an artist. I need to be free."

"That's great, Jesse, but I've got back-ordered bongs and my customers will be angry. Your work is the hottest thing; all the reviewers agree. There's nothing available that's near as nice as what you make. I cannot replace your work."

"I feel your pain, Bud. I'd like to help," Jesse said. "But, how can I ask my girlfriend to marry a bong maker? I really want to do more business with Nordstrom. So does my girlfriend." He paused for a second. "But Nordstrom is slow to pay--usually 60 days. And to your credit Bud, you pay right away."

"I tell you what," Jesse continued. "You are selling my bongs for \$150 to your customers. That's a hefty markup. I'd like to share some of that profit. If you keep buying all my output and increase my pay to \$100 per unit, then I'll finish the last three months of our contract and tell Nordstrom to wait for the production glass they want."

"What happened to our deal, Jesse?"

"Bud, this is bidness now. Plus, I have to make payments on my Mercedes."

"Okay, then," said Bud.

Thereafter, Jesse started delivering 700 per month for each of the last three months of the one-year contract. At first, Bud was delighted. He was able to fill the back orders and buyers kept coming. However, at the start of the eleventh month, sales slowed. Bud sold only 400 of

Jesse's bongos that month. Then, a devastating newspaper story about the bongos appeared. A reporter discovered that Jesse was no longer making the bongos himself; instead, he had shifted to mass production in the Czech Republic. This was how he was able to step up the production to 700 per month. This was also part of the reason that shipments had slowed in months six through eight. The knockoff Czech bongos were not quite as beautiful and slightly less sturdy. There were more flaws in the glass. After the news article appeared, Bud's sales of Jesse's bongos dropped to zero.

Bud has a thousand of Czech bongos left in the warehouse, and he still owes Jesse \$500,000.

VI. YOUR JOB

You are Bud's lawyer. Specifically, you are his Contracts lawyer. Bud has an army of lawyers who handle criminal law, torts, regulatory matters, and other legal issues. You confine yourself to Contracts matters.

Your job is to advise Bud regarding any Contracts claims concerning Acme Flooring, Hoover, and Jesse. Advise him completely regarding any claims that he may have against these three persons/entities and advise him, as well, if he should expect claims to be made against him.

END OF EXAM

Professor Thomas D. Russell, Ph.D.

Memorandum

To: Fall 2010 Contracts students

From: Thomas D. Russell

RE: Contracts Final

Date: January 13, 2011

The Fall 2010 was long and challenging though not as difficult as the Spring 2010 Contracts exam. The exam rewarded expertise with common law contract doctrine and the Uniform Commercial Code; legal analysis of a complicated fact pattern; organization; and thoroughness.

As always, my practice is to read all the exam answers and then assign a provisional grade using a post-it to each one. I sort the exams from strongest to weakest and then re-read the exams to ensure consistency in my grading. This time, I read through each exam two or three times. I do not assign points to exams.

Attached to this memo are three excellent, high-scoring answers. Attached, please find the three **A** answers in the class. Each exam answer is high-scoring but imperfect. Exam 173 was the strongest exam but would have been stronger with a clearer understanding of the Common Law's last-shot principle with regard to the Battle of the Forms. I commend these essays to you as great examples of how to do well in law school and, later, with the bar examination.

The first problem in the exam dealt with flooring in Bud's Kush Joints. Because the original contracts were divided equally between goods and services, your analysis should have included BOTH the UCC and the Common Law. Fewer than 20 percent of the students in the class analyzed both the UCC and the Common Law for the flooring problem.

The most effective way to handle the analysis of this problem would have been to follow the UCC analysis to the end. After that, circle back and point out the differences with the Common Law--particularly with regard to formation and the mirror image problem; content and the problem of handling the extra terms in the acceptance; and warranty issues.

The second problem concerned the Hoover steam vacs. This was a UCC problem. The most interesting part of the problem was the treatment of the disclaimers and the relationship of the 2-207 issues to the warranty disclaimer provisions of the Code.

The bong issue was also a UCC problem. At the heart of this problem were two bad-faith breaches by Jesse--one when he diverted his own production to Nordstrom and the other when he

shifted all of his bong production to the Czech Republic. The latter part of the problem created the need for Bud to use 2-608 to revoke his acceptance of the Czech-made bongs.

A	3
A-	6
B+	19
B	13
B-	10
C+	4
C	3
C-	3
D+	0
D	0
D-	0
F	0
	61

Everyone passed the exam. The distribution of grades was as follows:

Consistent with the law school policy, the mean was 3.0 and the median grade was a B. The law school curve resulted in higher grades for nearly everyone.

There were no honor code issues, although I did discover that with at least some word processors bullet points end up being counted as words when the registrar rechecks the word total.

There is no appeal of your grade in the course. You may not bargain for a higher grade. By law school policy, grades do not change unless there is an arithmetic error. I used no math when I assigned grades.

I made only a few marginal comments on the exams, and if you would like to look at your exam, they will be available from the registrar. Once the semester is underway, I can make arrangements to meet with you to discuss your exam if you would like to do so.

The six students with grades of C and C- are obliged to meet with Ms. Mary Steefel to review their exams. I am not involved in that process.

I will review the exam during the first Torts class.

Faux Boston Garden Flooring

Bud should sue Acme on a CL restitution theory. Hybrid sale of goods/service probably not under UCC. Under CL probably no enforceable K. If a K, we overcome Acme's no-lawsuit term by liberal interpretation of "reasonable time" if UCC or time-shifting if CL. Restitution damages of \$1.5M.

I. Installation contract is a hybrid

- a. Bonebrake test for hybrid service/goods: predominant thrust. Carpet installation contracts are for services, and parquet installation is even more labor-intensive. Sometimes hybrid contracts have outcomes between CL and UCC, rather than pure CL or UCC outcomes. Acme claimed costs for labor/materials were 50%/50%. Probably CL but Kush court may (mis)apply UCC or intermingle analysis.

II. Loose UCC allows K, but K in CL less clear

- a. §2-204 allows K when formation is indeterminate if parties act like K exists and remedy exists, as here.
- b. CL requires precise mirror-image formation. Pre-existing duty rule disallows additional terms without consideration. A counteroffer is treated as rejection and offer. Objective test looks to moment in time of formation. Here, there are three possibilities: (1) despite exchanges that resembled formation, at no point in time was K formed, there was only negotiation and performance (2) a contract was formed when Bud accepted Acme's offer by sending his purchase order, but

before Acme attempted to insert additional terms lacking consideration, and (3) an Acme contract was formed when Bud tacitly accepted Acme's performance. Most likely, there was never a contract. Acme's response was more like a counteroffer than an acceptance. The counteroffer was a new offer that did not create an express power of acceptance. Any supposed Acme inducement to the counteroffer was already spent in the offer Bud accepted. We argue that this indeterminacy results in no K, but the alternate still allows damages if the term limiting action for breach (SOL term) is defeated (infra).

- c. K exists under a PE theory if required. Acme promised hardwood parquet, and this induced Bud to pay Acme.

III. Acme will assert deal contained agreement not to sue after two years, and was for engineered "sealed hardwood parquet"

- a. Terms: we defeat Acme SOL by
 - i. UCC §2-207(2) invites additional non-material terms into a contract between merchants. Acme added terms to K, including limiting SOL to two years.
 - 1. Liberal application §1-106 to make aggrieved party whole. §2-207(2)(c) bars additional terms if notice of objection is given within a reasonable time as defined in §1-204. §2-207 disfavors sharp dealing and buyer surprises. Bud may object to this term now and invoke §2-207(2)(c), even though two years have passed, because a §1-204 "reasonable time" for a §2-602 rejection turns

on the fact that the latent defect was purposefully hidden.

Allowing the objection now (in spite of the language in §2-725(2)) would result in the UCC desired intent of curbing sharp dealing, not surprising a good faith buyer, and liberal application to make the aggrieved party whole.

2. §2-207(2)(b) disallows terms that materially alter K, and a term that preempts remedy for a fraudulent sale is material.

ii. CL

1. If no K, no SOL term
 2. If K, it was formed under Bud's terms, and Acme terms are another offer that is rejected for want of consideration and lack of acceptance by Bud
 3. If Acme K, a supervening authority to prevent injustice
 - a. Court will find ambiguity, interpret, or construct so as to prevent an injustice
 - b. Cause of action clock begins when fraud discovered, as in most SOL situations (e.g. surgical scissors in stomach)
 4. If no supervening clause, term 8 is invalid anyway
 - a. Cannot invoke UCC in a CL contract, unless Acme intended to operate within UCC (then analysis supra applies).
- b. Acme interprets "hardwood parquet" to mean engineered hardwood

- i. Parol evidence admitted if K not full integration. If full integration, PE modifies because of fraud. R2d§203(d) dickered terms have most weight. R2d§214 allows prior negotiations. §2-202(b) alongside §1-103(b) if UCC. If one side understands multiple meanings, and the other understands only one, the burden is on the more aware. Contracts are interpreted against drafter. Here, Bud told Acme he wanted hardwood parquet like the floor at Boston Gardens, and he thought he was getting hardwood. Acme understood this probably meant solid hardwood rather than engineered wood. In supplying the engineered wood as a 'term', Acme became 'drafter' of that term. Bud's only written dickered term stated "60% parquet hardwood as discussed, and 40% carpet," not "60% parquet hardwood and 40% carpet, as discussed." This emphasis on the hardwood demonstrates Bud's particularity (if Acme asserts §2-605 under UCC, or denies evidence of particularity). Bud's managers knew his parquet fetish. Bud wanted genuine "Boston Garden" hardwood, and generic carpet.

IV. If K, Acme breached by failing to tender solid hardwood

- a. UCC: If Acme attempts §2-602 unseasonable rejection, we assert no §2-606 reasonable opportunity to inspect the defective nature of the goods, then pursue breach of IWFPP.

V. Seek expectation interest if daily profit is substantial and K exists, otherwise restitution

- a. Expectation
 - i. Removal and installation of solid hardwood, \$1.125M
 - ii. Incidentals: engineered-hardwood-incompatible cleaners, \$30,000
 - iii. Consequential: daily profit foregone during installation, the greater of two days or how long it took Acme. Hadley switch engaged by Bud's PO.
- b. Reliance, square zero solution of removal and replacement with previous flooring and reimbursement for hardwood portion of expenditure, if not full \$1.5M.
- c. Restitution=\$1.5M. The no K scenario removes any obligation of Bud to pay for the carpet.
- d. §2-721 remedies for fraud allows full recovery of expectation interest damages in a UCC K scenario even in rescission (if analysis is intermingled by court).

VI. Defenses

- a. Limitations (supra)

Hoover Cleaners Suck!

Hoover breached multiple warranties made to Bud, which should allow him to recover expectation damages of \$45,000 plus overhead and consequential damages to the hardwood.

- I. Under UCC, although Hoover may argue for Ohio law as stipulated in hidden terms (infra).
- II. Enforceable under §2-204 because conduct indicates existence of K.

- a. PE offers alternate formation because Hoover used deliberate words and conduct that misled Bud to rely on Hoover promises, induced Bud's action, and requires enforcement to avoid injustice.
- III. Hoover created multiple warranties that formed the basis of the bargain**
- a. Terms (Parol)
 - i. UCC §2-202(b) required to allow oral and e-mail negotiation that formed the basis of the bargain.
 - b. Warranties
 - i. §2-313(1)(a) express warranties are created by seller's promises and affirmations. Such warranties form the basis of the bargain. Comment 4 states a contract is for "something describable and described...A clause generally disclaiming 'all warranties, express or implied' cannot reduce the seller's obligation with respect to such description." Warranties are created by specifications, and by §2-317(a) such warranties are senior terms in the contract. Here, Hoover specified that it would "gently clean...the most delicate...sealed hardwood." Hoover knew or should have had adequate judgment to infer a domestic cleaner was inappropriate. Hoover has an express warranty to tender a commercial (see details infra in iii) cleaner that would gently clean delicate sealed hardwood.
 - ii. §2-314 IW:Merchantability requires goods pass without objection in the trade under the contract description and conform to promise or

affirmation of fact. This implied warranty broadens and ramifies the existing express warranties.

- iii. §2-315 IWFPP requires that if seller knows the particular purpose for which the goods are required, and buyer relies on seller's judgment, goods must be fit for that particular purpose. Bud stated he needed machines that would clean carpet, hardwood, and spills for his 75 stores. He sent a list of 75 addresses. Hoover stated the Hoover SteamVac All-Terrain Carpet and Hard Floor Cleaner (SVATC&HFC) was ideal for his (commercial) needs. The SVATC&HFC's must be fit for commercial use as Bud described.
- iv. §2-316 disclaimers for IW:M and IWFPP must be "conspicuous" per §1-201(10): so presented that a reasonable person ought to have noticed it. Hoover had two disclaimers:
 1. A 'fine-print' term on Hoover's standard form that stated "one-year limited warranty"
 - a. This term is conspicuous, and enters the contract via §2-207(2)(b). Fortunately for Bud, it disclaims nothing (the disclaimer is not appended to any warranty, express or implied).
 2. Warranty disclaimers that were contained on page 29 of a superfluous instruction booklet that was inside the already-shipped packages.

a. This is deceptively hidden, and even Easterbrook agrees “one cannot agree to hidden terms.” Unlike the license in Zeidenberg that was a referenced term, Hoover’s “one-year limited warranty” term does not point the buyer to the terms on p.29.

c. Even if disclaimers are not inconspicuous, they fail to enter K from §2-207(2)(b) by materially altering the basis of the bargain.

IV. After Bud accepted goods, Hoover breached express warranties, the warranty of merchantability, and warranty of fitness for a particular purpose.

V. §2-712, §2-714, and §2-715 remedies apply, PE theory probably only achieves reliance.

a. Expectation interest (\$45,000 plus employee labor, plus max \$1.125M consequential)

i. §2-712 Cost of cover exceeding contract (assuming Bissell fulfills the Hoover warranties, namely, that it is commercial grade, and Bud acts in good faith)

1. $\$250 \times 150 = \$37,500$ for Bissells
2. plus $\$50 \times 75 = \$3,750$ for Buna
3. minus Contract price ($\$200 \times 150 = \$30,000$)
4. net \$11,250

ii. §2-714 Contract price (\$30,000)

iii. §2-715(1) Incidentals

1. Shipping= $\$50 \times 75 = \$3,750$
 2. Overhead required for assembly
- iv. §2-715(2)(b) allows consequential damages resulting from injury to property from breach of warranty. Hadley switch (reasonably foreseeable) for consequential damages is on because Bud stated particular purpose. This claim hinges on common-sense to avoid the appearance of fishing for damages.
1. Damage to hardwood flooring. At most ask for \$1.125M, but a judge might require convincing evidence or catastrophic damage. Furthermore, damages would most likely be scaled back to the cost of an engineered floor replacement, rather than a solid-wood replacement. This claim needs to be cleanly presented.
- b. Reliance
- i. Status quo damages include reimbursement of original \$30,000 contract price plus consequential damages (supra) that arose from reliance on Hoover's promises.
- c. Restitution= $\$30k$

VI. Hoover's unfair contract terms are unconscionable

- a. §2-302 aims to prevent oppression and unfair surprise. Hoover's deceptive action should sway the court to strike the unfair contract terms that attempt to disclaim Hoover warranties.

Summary: Jesse, a merchant, entered into an enforceable UCC output K to sell genuine bongos to Bud, then breached. ~\$270k Expectation interest is significant if Jesse can pay.

I. UCC applies

- a. Jesse may argue his artwork is a service like a canvas painting. We assert §2-105(1) includes specially manufactured goods like unique bongos that could be mass-produced (as these eventually are). Critical to stay within UCC to garner good faith remedies.

II. Under both UCC and CL, K is formed after exchange of text messages.

- a. UCC: K formed by §2-204 and §2-206
- b. CL: Bud offered to buy output estimated at 500/month for \$50/bong, and Jesse texted “I accept ur offer to buy all I produce” at \$60/bong, and Bud responded, “that’s a deal, Jesse. I’ll buy your output estimated at 500/ month.” Bud’s reply is not a counteroffer because it is simply a restatement of a previously dickered term that should enter the K via R2d§213. (SOF analysis in VI.)
- c. R2d§90 PE available since Jesse promised genuine Jesse-bongos, this induced Bud to pay for them and entwine his reputation and livelihood with Jesse’s, and in breaking this promise Jesse caused harm, loss, and injustice to Bud.

III. Deal is an output contract that Jesse attempted to modify during course of performance

- a. Modification under §2-209(1) requires §2-103(1)(b) good faith or the modification is barred, even if accepted. §2-306 (regarding output/requirements contracts) demands good faith and best efforts to deliver. The essential test is

whether the party is acting in good faith. Jesse deceived Bud initially by not informing him of his non-delivery and re-allocation of deliveries to Nordstrom (also denying Jesse any contrived 2-615 excuse). Jesse then deceived Bud by switching production to the Czech Republic. Jesse fails the test for good faith, so the original terms stand (~500@\$60).

- b. Jesse created §3-313 express warranties by promising to supply first-quality bongs from his own shop within quality tolerances. Jesse eventually turned to producing counterfeit bongs of reduced quality.
- c. Jesse cannot delegate performance as in §2-210 because Bud has a substantial interest in having Jesse perform.

IV. Jesse breached by dealing in bad faith and delivering defective goods

V. Remedies under §2-713, §2-714, §2-715

- a. Expectation interest based on \$60 cost and \$150 retail, given reasonably certain volume and sales, diminished output as result of bad faith, beginning in month 7:
 - i. 7: $\$90 \text{ profit per bong} \times 100 \text{ bongs withheld} = \$9,000$
 - ii. 8: $\$90 \times 250 = \$22,500$
 - iii. 9: $\$90 \times 500 = \$45,000$
 - iv. 10: $\$90 \times 500 = \$45,000$ minus $\$50 \times 700 = \$35,000 \rightarrow \$12,000$
 - v. 11: $\$45,000$ minus $\$20,000 \rightarrow \$25,000$
 - vi. 12: $\$45,000$ (assert lost volume is result of bad faith breach, otherwise reasonably certain at 500+)
 - vii. Total: $\$158,500$

1. Mitigation: minus resale value of fake bong
- viii. Incidental damages: costs of reselling fake bong (shipping, marketing other bong sellers, inventory costs)
- ix. Consequential damages
 1. Damages required to provide refunds to customers that bought the fake bong ($\$100 \times 1,100 = \$110,000$)
 - a. Foreseeable that supplying fake bong would lead to customer rejection.
 2. Alternatively, loss of goodwill (if can demonstrate loss of revenue/profit from declined patronage directly arising from breach with certainty)
 - a. Bud told Jesse the importance of genuine Jesse-bong in keeping his customers happy.
- b. Reliance
 - i. Although Bud cannot claim lost profits, he can still pursue incidental and consequential damages (supra) based on a result of his reliance on Jesse's promise to supply Jesse-bong.
- c. Restitution
 - i. Bud gets \$110,000 for costs of buying fake bong, inventory returns to Jesse.

VI. Jesse may claim he is within the statute of frauds and the K is unenforceable.

- a. §2-201(2) states between merchants a writing satisfied the requirements to enforce a K that is within statute of frauds (>\$500). §2-104(3) defines “between merchants” as a transaction to which both parties are chargeable with the knowledge or skill of merchants. §2-104(1) calls a merchant a person who deals in goods of the kind. Electronic communication qualifies as a writing under the UCC proposed codes §2-211(2003 proposed) legal recognition of electronic records and §2-213(2003 proposed) electronic communication, and also by other CL statutes (“E-Sign” and UETA, all accessed by §1-103 if required). If under CL, a signature is required, but what constitutes an electronic signature is unclear. Jesse is a bong merchant. He employed \$90/day labor to make bongs. He deals in goods of the kind. Under UCC, his text creates an enforceable K within §2-201. Under CL, his name in the text “Sent via Jesse’s Droid” is probably sufficient for a signature. He is within the SOF and the K is enforceable.
- b. In theory, Jesse could attempt an R2d§16 intoxicated persons defense, but Kush courts would likely disfavor the policy results from a successful defense (business would grind to a halt).

Words: 2,486.

General Notes:

- We'll argue Acme and Hoover are each liable for the full cost of replacing floors, thus arguing in the alternative in case one claim fails. This secures the most money, though unjust enrichment is not permitted.
- Each argument for damages under UCC seeks remedies to be liberally administered to put Bud in as good a position as he'd be if contract correctly performed (UCC§1-106).
- In each case, the largest damages will be sought first, with alternative remedies presented as fallbacks.

Bud v. Acme Flooring

What law applies?

- Bonebrake: The predominant thrust of contract isn't easily determined because costs of goods(flooring) and services(installment) are equal. UCC yields better results for Bud, and Acme's form specifies UCC. Still, both UCC and Common Law will be analyzed for diverging outcomes.
- Access to CL will be via UCC§1-103 if necessary.

Enforceability:

Offer & Acceptance

- Common law: No contract was formed. Bud's purchase order was offer. Acme's acknowledgement form added terms and was not a mirror image acceptance (Restatement§59).
- UCC: A contract is formed without the additional terms (UCC§2-207).

Consideration

- A promise (install floors) for a promise (pay \$20,000x75=\$1,500,000).

Promissory Estoppel

- Both parties induced action by performance and a remedy to avoid injustice can be enforced under Restatement§90 (see damages). *If* common law applies (see above) the remedy granted for breach will be limited as justice requires.

Content of the deal:

UCC§2-207

- Under UCC§2-207(1), Acme's confirmation was acceptance with additional terms. Bud and Acme are merchants (UCC§2-104), therefore UCC§2-207(2)(b) applies and those terms become part of deal unless they materially alter it. Term 8 is kicked out. It materially alters deal because it limits Bud's ability to sue.
- Forms agree that hardwood parquet be used.

Express Warranties

- Acme's acceptance stipulated sealed hardwood parquet. UCC§2-313(b) requires the floors conform to description.

Implied Warranty of Merchantability

- Acme's floors must pass without objection in the trade as "hardwood parquet" and be fit for the ordinary purposes for which such goods are used (including cleaning) (UCC§2-314).

Implied warranty: Fitness for Particular Purpose

- Acme would likely argue Bud didn't mention his plans to use a SteamVac to clean the floors. If he did, we'll use UCC§2-315 and argue he relied on Acme's skill to furnish suitable goods for that purpose.

Exclusions:

Examining goods would not reveal defects so no exclusion of warranties (UCC §2-316(3)(b)).

Misunderstanding:

- Acme knew Bud meant solid hardwood rather than engineered, so Bud's meaning prevails (Restatement§§20(2),201(2)).

Breach?

- Acme breached express warranty that floors are sealed hardwood parquet.
- Acme breached warranty of merchantability. Floors would not pass without objection in trade under description "hardwood parquet."
- Floors can't be SteamVac'd. Acme breached warranty of fitness for particular purpose, provided Bud made Acme aware of this purpose and relied on their expertise.
- *If* common law applies, and *if* a contract was formed, Acme would try to argue substantial performance. However, the difference in wood materially altered the deal, evidenced by damaged floors (Restatement§241).

Remedy/Damages

- Under *Hadley* or UCC§2-715(2), Bud can recover lost profits. Bud told Acme closure meant lost profits, and they're not speculative because Bud's business is established.

Revocation:

- Bud could try to revoke acceptance of floors (UCC§2-608).
- Acme will argue a reasonable time passed. However, Bud's just now aware of substantial defects that were previously undiscoverable and that impair their value to him.
- They might argue a change in condition of goods, but we counter it's a result of defect (UCC§2-608).

Expectation:

- If Bud revokes (UCC§2-712) or uses (UCC§1-106) he can sue for difference between cost of cover (75x\$15,000) and contract price (percentage of \$1,500,000)

allocated to wood). Also add $75 \times ((\text{lost profits during reinstall}) + (\$50\text{Bona Kits}) + (\text{incidentals}) - (\text{expenses saved}))$.

- If bud uses UCC§2-714, he can recover difference between the value of the floors and the value they'd have had if they'd been as warranted + incidentals + consequential.

Reliance:

- $75 \times (\text{Contract price } \$20,000) + (2 \text{ days lost profits}) + (\$50\text{Bona kits}) + (\text{incidentals})$ minus (value of flooring if unreturned to Acme).
- We'd also seek money Bud spent on SteamVacs ($150 \times \$200$). Acme will argue these were expenses after performance rather than in reliance. We'll counter Bud relied on warranty of the materials which, unbeknownst to Bud, Acme breached.

Restitution

- To prevent unjust enrichment Acme will return contract price (\$1,500,000) minus any value added to Bud's floors.

Defenses:

- Acme will claim term 8 precludes Bud from action for breach. We'll counter that the term is not part of the deal (see above). Even if it was, the two year period begins when breach is discovered, which was only recently (UCC§2-725(2)).

Statute of Frauds

- Under UCC, contract over \$500 is within the statute. The forms are writings under UCC§2-201(2).

Mitigation

- Bud mitigated with Bona, preserving wood while seeking remedy.

Misrepresentation

- Acme misrepresented floors as hardwood rather than engineered and knew assertion was contradicted by fact (Restatement§162(1)(a)). Bud could rescind contract on this basis (Restatement§164(2)) if doing so made strategic/economic sense.

Bud v. Hoover

What law applies?

- Bonebrake: Predominant thrust is contract for goods (vacuums), with minor assembly service. The UCC applies.

Enforceability:

Offer & Acceptance

- Bud's order was offer. Hoover's acknowledgement was acceptance, though not a mirror image. Under UCC§2-207, a contract was formed without Hoover's additional terms.

Consideration

- A promise (vacuums and assembly) for a promise (payment \$200x150).

Promissory Estoppel

- Bud relied on Hoover's promise to send functional vacuums, which is enforceable promise under Restatement§90 via UCC§1-103.

Content of the deal:

UCC§2-207

- Under UCC§2-207(1), Hoover's confirmation was acceptance with additional terms. Bud and Hoover are merchants (UCC§2-104), therefore UCC§2-207(2)(b) applies and terms become part of the deal unless they materially alter it. Term 6 materially alters deal because it limits the warranty. The vacuum boxes contain warranty terms which materially alter deal and should also be rejected. We'll separately attack warranty disclaimers in case judge takes Easterbrook approach and rules Bud had reasonable time to reject warranties but didn't.

Parol evidence

- Hoover may argue salesperson's email and conversation with Bud are parol evidence. But forms lack merger clause and are not a complete integration. They can be supplemented by emailed information because it does not contradict those writings (UCC §2-202(b)). Suitability for commercial use might contradict the p.29 warranty (if valid). However, conversation also admissible as communication necessary to establish liability for consequential damages which Hoover attempted to disclaim. Ideally, Kushsylvania is Corbinesque rather than Willistonian state.

Express Warranties

- Salesperson's email warrants vacuums suitable for hard floors, even delicate ones. UCC§2-313(b) requires vacuums conform to "hard floor cleaner" description. Also warranted against defects in workmanship.

Implied Warranty of Merchantability

- Hoover's vacuum must pass without objection in trade as a hard floor cleaner and be fit for ordinary purposes (cleaning) for which such goods are used (UCC§2-314).

Implied warranty: Fitness for Particular Purpose

- Bud made salesperson aware of commercial nature of cleaning, and relied on salesperson's expertise (UCC§2-315). Hoover could counter that Bud did not specify engineered flooring, but email warranted use on all hard floors.

Disclaimers:

- Hoover's disclaimers are not part of deal under UCC§2-207(2).
- If disclaimers are part of deal, then Hoover's attempts to disclaim both implied warranties are ineffective. Disclaimers are not conspicuous in size or location (p.29 in manual, within box) (UCC§2-316(2)).
- Their disclaimer for commercial operation is trumped by warranty of fitness (UCC§2-317(c)).
- No exclusion of warranties because examining goods would not reveal defects (UCC §2-316(3)(b)).

Breach?

- Hoover breached express warranty of workmanship (vacuums leak). Vacuums unsuitable for hard floors.
- Warranty of merchantability breached. Vacuums damage hard floors and would not pass without objection in trade under "hard floor cleaner" description.
- Warranty of fitness for particular purpose breached because vacuums damage commercial hardwood floors.

Remedy/Damages

- In any remedy involving consequential damages. Hoover attempted to disclaim liability, but disclaimer not part of deal. (UCC§2-702(2)(b)). We'll argue under UCC§2-715(2)(b) for damages based on breach of warranty resulting in property damage to floors (75x\$15,000 for repair). Hoover's attempts at disclaimer of warranty are ineffective (see above).
- We'll also ask for consequential on lost profits while floors replaced, and lost business due to stinky bong-water. Mathematical certainty of damages unnecessary (UCC§2-715[comment 4]). Hoover will argue this was not foreseeable. However, their salesman was aware of commercial context. Ideally, Bud mentioned "time is money" with salesperson. We'll also add cost of time employees spent assembling vacuums (salesperson promised this service).

Revocation:

- Bud could try to revoke acceptance of vacuums. Hoover will argue a reasonable time passed. However, he's just now been made aware of a substantial defect that was previously undiscoverable and that impairs their value to him (UCC§2-608).
- Hoover might argue for use of warranty service. However, vacuum defect is likely fundamental and remedy would be ineffective (UCC§2-719(2)).

Expectation:

- Bud purchased replacement vacuums and can recover difference in cost 75x(\$250(Bissells)+\$25(shipping)+consequential(floors/profits/assembly/\$50 Bona kits)+incidentals-\$200(Hoovers)).
- Alternatively, Bud could seek difference between the value of vacuums and the value they'd have had if they'd been as warranted. (UCC§2-714).

Reliance:

- 75 x (\$200(cost of vacuums) + consequential(floors/profits/assembly/\$50Bona kits) + incidentals) – value of vacuums if unreturned.

Restitution

- To prevent unjust enrichment Hoover will return contract price (75x\$200) minus value of vacuums if unreturned.

Defenses:

Statute of Frauds

- Contract over \$500 is within the statute. The forms are writings covered by UCC§2-201(2).

Mitigation

- Bud mitigated damage by ceasing use of vacuums and using Bona.

Bud v. Jesse

Preliminary Notes:

- Bud can expect claims against him by people who purchased Czech bongs believing they were Jesse bongs. Bud can implead Jesse for indemnity based on Jesse's fraud/misrepresentation.
- Bud can expect claim by Jesse for \$100,000 for bongs received.
- All use of common law (below) via UCC§1-103.

What law applies?

- Contract for goods (bongs), UCC applies.

Enforceability:

Offer & Acceptance

- Jesse's text is a counter offer based on conversation. Bud's text is acceptance.

Consideration

- A promise of bongs for a promise to pay.

Promissory Estoppel

- If no contract based on texts, Bud relied on Jesse's promise of bongs, which is enforceable promise with remedy limited as justice requires (Restatement§90).

Content of the deal:

- Installment and output contract for approximately 500 bongos/month at \$60/bong for one year. Jesse's changes to terms ineffective due to duress/undue influence/pre-existing duty (see defenses).

Parol Evidence

- Jesse may argue the conversation prior to texts is parol evidence. We counter that the texts are not a total integration evidenced by lack of a merger clause, Jesse's reference to Bud's offer, and a lack of description of goods. The conversation supplements the writing (UCC §2-202(b)). Ideally, Kushsylvania is Corbinesque rather than Willistonian state.

Express Warranties

- The conversation stipulated first quality bongos from Jesse's shop with no more than 5 bubbles. Jesse's text confirmed he'd produce them.

Implied Warranty of Merchantability

- Bongos must run within variations permitted in agreement (no more than 5 bubbles). UCC§2-314(d).

Breach?

- Jesse will argue Bud breached by not paying \$100,000. We counter that Jesse breached first.
- In months 7,8,9, Jesse breached duty to provide roughly 500 bongos/month. Jesse will argue this was his output. We counter he did not meet good faith requirement by switching production to Nordstrom glass (UCC§2-306[comment2]).
- Jesse breached express warranty because he did not personally manufacture the Czech bongos in his shop.
- Czech bongos with more than 5 bubbles breach warranty of merchantability.
- In installment contracts, when non-conformity substantially impairs value of the whole contract, there is a breach of whole. We'd argue the Czech bongos impair value of whole contract (Bud's sales dropped off as quality declined). Jesse could argue Bud accepted installments without notifying of cancellation, but we'd argue defects were undiscoverable and cancellation is reasonable. Alternatively, we'd argue material breach (defects) on last 3 installments which Jesse did not assure cure of (UCC§2-612(3)).

Remedy/Damages

- Under UCC§2-715(2), Bud can seek consequential damages of lost profits due to damaged reputation to his bongos and Joints. Jesse will counter this is speculative, but Bud could get expert testimony on the impact to his business, as well as records of sales. Moreover, UCC§2-715[comment 4] rejects doctrine of certainty.
- Bud could try to reject the Czech bongos still in his possession for failure to conform to the contract (UCC§2-612(3)).
- If rejection barred, Bud could try to revoke acceptance of Czech bongos in his possession (UCC§2-608). Jesse will argue a reasonable time has passed but we

counter that Bud's just now aware of a substantial defect (inferior quality) that was previously undiscoverable, impairing their value to him (UCC§2-608(2)).

Specific Performance:

- If Bud still wants them (he might not due to decline in sales) he could request specific performance (UCC§2-716). This would require 1500 Jesse bongs (if not 2100) for final 3 months, plus 850 bongs that would have been delivered if Jesse supplied 500/month per course of dealing (UCC§1-205). Bud "cannot replace" Jesse's work and inability to cover is strong evidence specific performance necessary.

Expectation:

- Bud only needs damages on breaching installments (last 6 months).
- Consequentials + incidentals + difference between his anticipated profit (6 x \$90/bong x 500/month) and his actual profit ((90/bong x 650(months7,8,9) + \$50/bong x 1400(months10&11) – payments or bongs owed to Jesse.
- Alternatively, Bud could seek difference between value of Czech bongs and value they'd have had if they were Jesse bongs (UCC§2-714).

Reliance:

- Consequentials + incidentals + Jesse returns payments received from Bud on unsold installments, and Bud will return bongs or their value.

Restitution

- Bud will return any merchandise he is still holding in exchange for any payments Jesse received for them.

Defenses:

Statute of Frauds

- Jesse will argue the texts are not a writing, nor were they signed. We'll argue:
 - a) The text is written, and his name appears as a signature, or his Droid supplied it as an agent (UCC§2-201(1)).
 - b) Regardless, Bud and Jesse are merchants. Jesse had reason to know of the confirmation writings (UCC§2-201(2)).
 - c) A contract valid in other respects is enforceable when payment made/goods accepted (UCC §2-201(3)(c)).
 - d) If necessary, use promissory estoppel (Restatement§§139,375).

Pre-existing Duty

- Jesse had a pre-existing duty to perform contract as originally written. Attempt to modify requires a writing (UCC§2-209(3)). No additional writing.

Duress/Undue Influence

- Jesse attempted to modify using duress. Jesse will argue Bud had reasonable alternatives. However, Bud was back ordered, faced irate customers and loss of

business, and any “cover” was impossible due to uniqueness of Jesse’s bongs (Restatement§175).

- If duress argument failed we’d push undue influence, stressing that Jesse used his position as Bud’s relative and bong supplier to force modification quickly (Restatement§175).

Illegality

- Jesse could argue contract based on illegal goods under federal law (see Tommy Chong’s case). We’d counter Bud is selling legally in-state, or that bongs have legal uses (tobacco), or that court should ignore the potential illegal uses (see Whorehouse case).

Fraud/Misrepresentation

- Jesse made a fraudulent and material misrepresentation that the Czech bongs were his (Restatement§162). Jesse could argue that contract was for “all I produce” and that he’s producing these in Czech factory. However, the contract required bongs “from [Jesse’s] shop.” Even if “I produce” was ambiguous, meaning is interpreted against drafter (contra proferentem).
- Enforcing contract is in Bud’s interest, but he could void contract on this basis if doing so made strategic/economic sense (Restatement§164(2)).

Misunderstanding

- There is no misunderstanding. Jesse knew Bud wanted Jesse’s personal work. (Restatement§20(2)(b)).

Word count = 2,500

Claim 1: Acme Flooring**Applicable Law:**

- Although the costs of materials and labor are roughly equal, the primary purpose of the contract was for rendering services because the service component of installation slightly overwhelmed the material aspect. Supporting that deduction, Bud's purpose of contacting Acme was to install flooring in his stores, not to buy carpet and hardwood parquet. Therefore, common law controls.
 - Acme might argue that the contract was for the sale of goods. As will be seen in the analysis, any applicable differences are minimal and may even favor Bud if the UCC applied.

Enforceability:

- Offer and Acceptance: Bud offered to pay Acme to redo the flooring in all of his seventy-five stores; flooring to be 60% sealed hardwood parquet as they discussed and 40% carpet. Acme accepted the offer to redo Bud's flooring at the given percentages and price.
 - Acme will argue no mutual assent because the acceptance form adding the differing statute of limitations term was not a mirror image of the offer. Because both parties performed, however, the last shot rule upholds the formation of the contract with the terms being set forth in the last form sent.
 - UCC Difference: If the more lenient UCC governed, the contract for sale still does not fail for indefiniteness since the parties intended to make a contract.
- Consideration: Acme promised to do the installation work as outlined, and Bud promised to pay, which is an adequate exchange of promises supported by consideration.

- Promissory Estoppel: Even if consideration does not exist, enforcing Acme's promise to perform would avoid injustice because Acme could reasonably expect Bud to purchase SteamVacs in reliance on the promise.

Content of the Deal:

- Mistake/Misunderstanding: A court should construe "hardwood" to mean "solid hardwood" and not "engineered flooring." Bud wanted the flooring to be like the flooring in the Boston Garden, which is solid hardwood. Because Acme understood Bud's meaning of "hardwood," and Bud did not understand the meaning later attached by Acme, it was reasonable for Acme to bear the risk of the mistake and Bud's meaning prevails.
 - Acme will likely argue mutual mistake, that both parties were not aware of the understood meaning of "hardwood." Accordingly, Acme will claim the contract is voidable for lack of mutual assent. Bud was very clear about his meaning of "hardwood," however, thus no mutual mistake.
- Parol Evidence: Because Bud's term establishing liability for consequential damages was not included in Acme's form creating the enforceable contract under the last shot rule, the evidence is permissible notwithstanding the parol evidence rule. The fact pattern does not mention a merger clause in Acme's acknowledgment form, the existence of which may very well affect the analysis depending on Kushsylvania's Corbin vs. Williston viewpoint. The parol evidence rule, nonetheless, does not exclude evidence offered to prove communication made to flip the Hadley switch.
- Warranties: Since the common law governs the contract, *caveat emptor* dictates that there are no implied warranties for services.

- UCC Difference: If a court determines that the UCC governed the contract, Bud would get both implied warranties of merchantability and fitness for a particular purpose. These warranties would give Bud an additional avenue to claim contract breach.

Breach:

- Because a court will likely construe the term “hardwood” to mean “solid hardwood,” Acme materially breached the contract by installing engineered flooring in Bud’s stores.
 - Acme will argue that they substantially performed the contract with the installed engineered flooring. However, because engineered flooring is not as durable, stable, or resistant to swelling and shrinking from humidity as solid hardwood, the difference substantially impaired the value of the flooring; therefore, no substantial performance.
 - UCC Difference: If the UCC governed, perfect tender would require Acme to install the solid hardwood flooring understood in the contract with exactness.

Remedies:

- Expectation: The expectation interest puts Bud in as good a position as if Acme had fully performed the contract. A proper expectation measure of damages would be the difference in value of what Bud should have received and what he ended up with in the flooring installation: $75 * (\text{Incorrect hardwood material loss}) + \text{consequential damages for reasonable anticipated profits from each lost day during reinstallation} + \text{any applicable incidental damages in effecting cover}$.

- Reliance: A proper alternative reliance measure of damages would be the cost of the SteamVac cleaners + the money already paid to Acme + the cost of the Swedish Bona kits – value of the flooring installation at breach.
 - Acme will likely argue that the Swedish Bona kits were not reasonable expenditures spent in reliance on the contract, but rather a claim against Hoover. The damage to the hardwood parquet, however, resulted from the deviation in understood floor material. Acme should therefore be liable for the additional expenditure.
- Restitution: A proper restitution measure of damages would be the money already paid to Acme – the value of the flooring installation at time of breach.

Defenses:

- Illegality: Acme performed the contract before President Obama’s executive order and Kushsylvania’s legalization of marijuana. Consequently, Acme will claim that the contract was unenforceable because of illegality. Similar to the prostitute house case, a court will likely hold Acme’s installation contract did not actively participate in any illegal marijuana activity.
- Statute of Limitations: Bud must commence any action against Acme within the two-year statute of limitations, which may very well limit any claim against Acme depending on the dates of breach and commencement.
 - UCC Difference: The two-year statute of limitations term would also apply, unless a court deems it materially altered the contract under 2-207(2).

Claim 2: Hoover

Applicable Law:

- SteamVacs are goods; therefore, the UCC governs.

Enforceability:

- Offer and Acceptance: Hoover's salesperson demonstrated a willingness to enter a contract and invited acceptance by offering Bud 150 SteamVacs at \$200 per machine with free delivery and technician assembly. Bud reasonably accepted the offer by promptly faxing a purchase order to Hoover. Hoover sent an acknowledgment form with slightly different terms. Under 2-207(1), a paper deal was created despite the disagreement in forms.
- Consideration: Hoover promised to supply the SteamVacs, and Bud promised to pay the agreed upon price. Accordingly, consideration supported the agreement.
- Promissory Estoppel: Bud reasonably relied upon Hoover's promise to supply 150 SteamVacs; therefore, promissory estoppel established an enforceable promise.

Content of the Deal:

- Express Warranties: The email containing a description of the SteamVac created many express warranties pursuant to UCC 2-313. Notably, the SteamVac was able to clean a variety of surfaces, gently cleaning and squeegee drying the most delicate hard surfaces and sealed hardwood floors. Hoover, notwithstanding, attempted to disclaim any express warranties in the instruction booklet sent with the machines. A clause generally disclaiming all warranties, however, does not reduce Hoover's obligation with respect to the descriptions.
- Implied Warranty of Merchantability: Hoover was a merchant with respect to goods of the kind, thereby creating an implied warranty of merchantability. Although Hoover

reduced a disclaimer to writing and specifically mentioned “merchantability,” it was hardly conspicuous by being on page 29 of the instruction booklet found within the box of the machines when they arrived at the stores.

- Hoover will argue that the disclaimer was conspicuous, and Bud was aware of the limited warranty from the terms contained on their acknowledgment form. UCC 2-207(2) acknowledges that additional terms become part of an agreement between merchants; however, such terms do not become part of the deal if they materially alter the contract, as was the case in negating standard warranties. Therefore, the standard warranties apply.

- Implied Warranty of Fitness for a Particular Purpose: Hoover recommended the SteamVac for the particular purpose of cleaning both carpet and solid hardwood flooring. Bud relied on Hoover’s judgment, thereby creating an implied warranty of fitness for a particular purpose. Similar to the implied warranty of merchantability, Hoover’s disclaimer lacked conspicuousness and did not become part of the deal under 2-207(2).
- Contract Modifications: The two merchant parties mutually modified the original contract by dropping the requirement of technician assembly. UCC 2-209 provides that the mutual agreement did not need consideration for the modification to be binding.

Breach:

- Hoover breached the implied warranty of merchantability when the SteamVac tanks started leaking. Although the SteamVacs caused the engineered flooring to come apart, Hoover’s implied warranty of fitness for a particular purpose stems from recommending a product to clean solid hardwood floors. See Claim 1, supra.

Remedies:

- Expectation: Bud is entitled to buyer's remedies available in the UCC. Under UCC 2-714(2), Bud is entitled to the lost value of the defective cleaners, together with any incidental damages because of the breach. In light of the contract breach, Bud mitigated and covered by buying Bissell carpet cleaners without unreasonable delay and in good faith. Bud can therefore claim the difference in value between the SteamVac and the Bissell + the \$30k already paid to Hoover + the incidental shipping costs – the SteamVacs's value at breach.
 - Hoover will contest the value of the goods promised in the contract as being roughly equal to the value of the Bissell carpet cleaner, and that they should have had an opportunity to remedy the defect before effecting cover. Bud covered in good faith, however, because any unreasonable delay in receiving an adequate remedy would have a direct result on Bud's business.
- Reliance: Bud would be entitled to reliance damages to put him where he was before the contract formation. Bud can claim the money paid to Hoover for the SteamVacs + the salary/benefits of employees in accepting delivery and setting up the cleaners in the stores – the SteamVacs's value at breach.
- Restitution: Under UCC 2-711(1), Bud can claim restitution damages equal to the \$30k already paid to Hoover – the SteamVacs's value at breach.

Claim 3: Jesse

Applicable Law:

- Although producing the bongos required Jesse's labor, the primary thrust of the contract was for the sale of goods. Furthermore, the bongos are specially manufactured goods specifically outlined under Article 2. In either case, the UCC governs.

Enforceability:

- Offer and Acceptance: There was an objective manifestation of intent for Jesse to supply bongos to Bud. Bud offered to buy a target output of 500 bongos per month at \$50 per bong, with Jesse producing each bong in his shop. Jesse countered with \$60 per bong, and Bud accepted.
- Consideration: Bud promised to pay in exchange for Jesse's promise to supply the bongos, thus there was a promise for a promise.
- Promissory Estoppel: If a court holds that consideration was inadequate, enforcing Jesse's promise to produce the target amount of bongos would avoid injustice due to Bud's reasonable reliance on the contract by not seeking other bong producers.

Content of the Deal:

- Express Warranties: The contract was for production of 500 first-quality bongos per month at a cost of \$60 per bong. Additionally, Jesse was to produce each bong in his shop. Because these terms were part of the basis of the bargain, Jesse created express warranties that the bongos would conform as such. Further, Jesse did not disclaim these express warranties.
 - Jesse will likely contest the inclusion of the term requiring him to produce the bongos in his shop under parol evidence. UCC 2-202 requires, however, full integration of the agreement before parol evidence will deny the evidence's

admissibility. Neither party assented that any particular writing was the final expression of all the terms; therefore, parol evidence is admissible.

- Implied Warranties: An implied warranty of merchantability does not exist within the contract because Jesse was not a merchant with respect to goods of the kind. Likewise, Jesse did not create an implied warranty of fitness for a particular purpose since the bong was for their ordinary purpose.

Breach:

- Although 2-306 output contracts allow some variation in output, Jesse reduced bong production in months seven through nine in bad faith because he allocated production to Nordstrom instead.
- Following the reduction, Jesse demanded an increase in price per bong for inducement into fulfilling his remaining contract obligations. Under the pre-existing duty rule, the modification to the contract was unenforceable for lack of separate consideration.
 - Jesse will likely argue the existence of separate consideration and the creation of an enforceable contract superseding any pre-existing obligations. Even if a court finds separate consideration for the increased price, Bud's acceptance came under duress and because of undue influence.
- Furthermore, Jesse increased production in bad faith during months ten through twelve to take advantage of the increased price per bong.
- Moreover, Jesse started producing the bong in the Czech Republic, thereby breaching the express terms of the contract.

Remedies:

- Expectation: The expectation interest would place Bud where he would have been had the breach not occurred. Bud is therefore entitled to the lost profit derived from bong sales after the material breach. From the approximate 6,000 bongs expected over the course of the contract, Bud actually sold 4,750. Of the 4,750 sold, Bud sold 1,100 at a reduced profit margin due to the increased price demanded from Jesse. Bud is entitled to **\$44,000** in lost profits on the 1,100 bongs sold at the reduced margin, plus **\$112,500** in lost profits on the 1,250 bongs that could have been sold at the regular margin had the breach not occurred. Bud should revoke his acceptance of the 1,000 bongs still in his possession since non-conformity substantially impairs their value. Bud is also entitled to any incidental damages relating to the non-conforming goods.
 - Jesse will likely challenge the lost profit calculations on grounds of the new business rule. Bud had great success selling the bongs, however, even having customers back-order the item. Decrease in demand occurred only because of the newspaper article concerning the Czech knockoffs.
 - Jesse will also counterclaim for the \$100,000 still owed to him, stating Bud had already accepted the goods. Bud's proper revocation of acceptance promptly after discovering proper grounds will alleviate any obligation to pay. In order to prevent future litigation, however, Bud must hold the bongs with reasonable care for a time sufficient to permit Jesse to remove them.
- Reliance: The reliance interest would place Bud where he would have been had the contract not existed; any expenditure he made relying upon the contract would be appropriate.

- Restitution: Bud can make a claim for the value of the contract price already paid to Jesse. This type of remedy, though, will come under great scrutiny for Bud is no longer in possession of the goods and received enrichment from the profit of the sales.

Defenses:

- Statute of Frauds: Because the contract value was greater than \$500, Jesse will likely contend that the contract was within the statute of frauds and should require writing more substantial than the text messages. Despite the perhaps debatable method, the text messages satisfied the relaxed UCC requirements of evidencing a contract, having a signature, and specifying a quantity. The fact that the text message displays the sender of the text should be enough to satisfy the signature requirement. Nonetheless, since Bud received and paid for the bongs, performance by the parties can substitute for the required writing.

Word Count: 2500