THE UNIVERSITY OF TEXAS AT AUSTIN
School of Law
8 December 1992, 8:30 a.m.

EXAM NO. _____

CONTRACTS
Professor Russell

NAME _____

(**NOTE TO STUDENT**: It is your responsibility to remember your exam number. The Main Office will not give you your exam number, nor will they give you your grade over the counter; the grade will be mailed if you provide a self-addressed, stamped envelope, or you can order an unofficial transcript for a fee.)

(__) Check if you do not want the grade for this exam to be posted

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MIDTERM EXAMINATION
CONTRACTS

INSTRUCTIONS:

1. This examination consists of two (2) questions on six (6) pages. Please make sure that you have all six (6) pages. For grading purposes, the questions are weighted equally. You have an hour and a half (90 minutes) to spend on the examination. You should divide your time with these weights in mind, that is, take 45 minutes to answer each question.

2. This examination is open book. You may refer to any written material that you wish, although your answer must be of your own composition.

3. **You must begin the second question in a new bluebook.** Please be sure to put your examination number on each bluebook that you use. Do not write on both sides of the page. If you type, double space. If you write by hand, you must write legibly. Do not use pencils that are not sharp or pens that are nearly out of ink.

4. In answering each question, use judgment and common sense. 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 contract law with the facts before you. Avoid 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, clearly, a court would resolve an ambiguous question one way rather than another.

5. You should assume that you are in a common law jurisdiction that has adopted the Uniform Commercial Code.

6. Quality, not quantity is desired. Think through your answer before you begin to write. Keep in mind that some professors do not distribute bluebooks until twenty minutes after the examination has begun.

7. You may keep your copy of the exam questions.

8. The full text of the Honor Code is as follows:

> **HONOR CODE:** The study of law is an integral part of the legal profession. Students engaged in legal studies should learn the proper ethical standards as part of their education. All members of the legal profession recognize the need to maintain a high level of professional competence and integrity. A student at The University of Texas at Austin School of Law is expected to adhere to the highest standard of personal integrity. Each student is expected to compete honestly and fairly with his or her peers. All law students are harmed by unethical behavior by any student. A student who deals dishonestly with fellow law students may be dishonest in the future and harm both future clients and the legal profession. Under the honor system, the students must not tolerate unethical behavior by their fellow students. A student who knows of unethical behavior of another student is under an obligation to take the steps necessary to expose this behavior. Students in The University of Texas at Austin School of Law are governed by the Institutional Rules on Student Services and Activities. Students may be subject to discipline for cheating, plagiarism, and misrepresentation.

9. Thank you and have a happy, safe break.

(Question One Begins on Next Page.)

QUESTION ONE (45 minutes)

On January 1, 1992, Bob Buyer entered into a written contract with Sue Seller (an authorized Dodge dealer) for the purchase of a new Dodge minivan. The vehicle was to be delivered on February 28. The contract called for heavy-duty, extra-wide tires. Bob stated that his occupation as a salesperson of women's apparel demanded that he travel extensively, sometimes in excess of 200 miles per day on local freeways, carrying extremely heavy sample cases, often in the early morning hours in order to arrive at retail outlets as they were opening.

On February 28th, Bob picked up the minivan. Four days later (March 4) he noticed that it did not have a spare tire. (While some Dodge cars have only a miniature emergency spare tire, designed to get them to the nearest service station, the minivan specifications called for a normal spare tire.) The following morning, March 5, Bob telephoned Sue saying that he insisted upon having a spare tire immediately, and when Sue said that there was no spare tire then available, Bob informed Sue that he would stop payment on the check that he had tendered for the $19,000 purchase price and told Sue that the vehicle could be picked up in front of Bob's home.

Bob parked the minivan in front of his home, where it remained for one month, until the dealer's temporary registration sticker had expired. The police towed the minivan away for violation of a law requiring all parked vehicles to have a valid registration sticker or license plate, and informed both Bob and Sue that they had the minivan and would release it upon payment of a $100 fine and a $50 towing charge. Bob told Sue that he would not pick up the minivan. Sue paid the $150 and picked up the minivan, because she was afraid that the police would sell the minivan at the next abandoned car auction.

Sue sues Bob for the purchase price of the vehicle. Bob retains you to advise him. Your research uncovers the following facts: (1) Bob had completed an application for title to the minivan and given this application to the dealer; (2) the space for the spare tire was under a fastened panel, covered by carpet, and concealed from view; (3) on March 5, after hearing from Bob, the dealer put Bob's application for title into his safe and never mailed it to the State Motor Vehicle Title and License Bureau; (4) on April 15, the dealer sold the vehicle to Jane Jones for $17,500; (5) the dealer had paid the manufacturer $16,000 for the minivan; (6) on March 9, the manufacturer had raised its price to $17,000 for this model minivan.

What do you advise Bob and why?

END OF QUESTION 1

QUESTION TWO (45 minutes)

John McGreevy was appointed assistant professor of literature at Weston College beginning September 1, 1986. He knew that in the course of his seventh year (1992-1993), he would be considered for tenure. A grant of tenure means that an assistant professor is promoted to associate professor, but more important than this change of title is the fact that a grant of tenure means that a professor can keep his or her job for the rest of his or her life. A denial of tenure means that the assistant professor does not get promoted and must leave the college.

According to the Weston College Faculty Handbook, the quality and quantity of his contributions to scholarship would form "about one half" of the basis for the faculty and Dean's decision to grant (or deny) tenure. Recent experience in the Literature Department at the College indicated that if one were to publish three or four good articles and one reasonably good book, or seven or eight good articles and no book during the first six years of employment, one would certainly meet the tenure standard for publication.

John proved to be a fast writer. In his first three years, he published four articles, three of which were much admired by his peers. He then (fall 1989) conceived an idea for a book on the rise and fall of Greek drama. (He knew three ancient languages well!)

Eva Maggs, a representative of Prinz-Hall Publishers (P-H), a major publishing house, called on John on October 3, 1989. Eva was not only a book seller, but was always on the lookout for manuscripts, and she expressed strong interest in John's project. John sent a prospectus to Eva, which she showed to the editorial department at P-H. John made a trip to Englewood Bluffs, the town where P-H had its offices, to discuss a possible contract.

This trip cost John $700 in plane and taxi fares. P-H paid the hotel and meals. While there, before his meeting with Maggs, John visited a number of book stores. In one store, he found an excellent set of Greek classics for a very good price: $2,000. In anticipation of the beginning of his research for his book on Greek drama, John bought these books.

(Question 2 Continues on Next Page)

On October 29, 1989 John and P-H signed a contract that included 27 provisions. Among those provisions were the following:

> "(1) Author grants Publisher exclusive rights to publish and sell Author's work."
>
> "(5) Publisher hereby agrees to publish and sell said book unless Publisher determines it not to be suitable for publication, a decision that Publisher must make within sixty days, in which event this agreement terminates."
>
> "(6) Author shall receive royalties of 10% of the net selling price to Publisher."
>
> "(9) Upon delivery of said manuscript, Author shall be paid $4,000, as an advance on royalties, a sum that Author shall be entitled to retain in the event of any breach of this contract by Publisher."

Ten days after signing (November 9, 1989), John bought two computers for use in his work, one for the office and one for his study at home. The total cost of them was $2,500.

One year later, on November 9, 1990 (two years before his tenure decision would be made), he completed the manuscript of "The Rise and Fall of Ancient Greek Drama." He sent it to P-H immediately, and immediately received $4,000 from P-H.

On April 15, 1991, he received bad news. P-H had decided not to publish his book. The likely net selling price to the Publisher, if published, would have been about $20 a copy.

John was furious, and all this left him very unsettled. He had known it would take only about six months to copyedit, proofread galleys, and publish the book, and he had hoped it would appear by August or September 1991 at latest, and thus be out long in advance of consideration by his peers in his tenure case during 1992-93. He immediately made 5 copies of the manuscript and sent them to other publishers, and turned back to his teaching (at which he had been quite successful). The cost of the copies and mailing amounted to $500.

During the 1991-92 academic year, and during the Fall of 1992, John was unable to place his manuscript for publication, although he revised it once in this time period. In the late Fall of 1992 (by which time John had published two additional items, both book reviews) the Literature Department tenure committee denied tenure in John's case on the ground that his publication record was not adequate.

(Question 2 Continues on the Next Page)

John then resigned his job at the university and one day later found a job as an editor at a University Press at a monthly salary $500 lower than his academic salary had been. He has been on this job for 10 months.

John has now come to you. Assume all the details recited above are true. Assume also that John on his own had developed reliable information that the cost of publishing his book would be about $30,000. Assume also that an acquaintance in the book publishing business would be willing to testify that "first books" in this field often sell about 2,000 copies at most. John has asked you for your opinion as to what you think his rights and remedies against P-H are, if any. Please answer this question, with reasons. (Be sure, so far as possible, to arrive at relatively definite figures as to any damages you think relevant.)

END OF QUESTION 2/END OF EXAMINATION

M E M O R A N D U M

TO: Contracts Students, Section One

FROM: Thomas D. Russell TDR

DATE: 21 January 1993

SUBJECT: Contracts Midterm

This memorandum consists of two parts. The first part describes the calculation of raw scores, adjusted scores, and grades. The second part includes four student sample answers, two for each of the two exam questions.

Grading

I graded each of the questions independently. That is, I separated the bluebooks into two piles with all of Question One in one pile and all of Question Two in the other. Then I graded all of the answers to Questions One. Next, I graded all of Question Two, without reference to how that particular examinee had done on Question One. Finally, I loaded all of the scores into some spreadsheet software to calculate the grades.

For Question One, the raw scores ranged from 9 to 46, with a mean of 27 and a standard deviation of 7.7. For Question Two, the raw scores ranged from 10 to 47, with a mean of 29 and a standard deviation of 8.4.

In order to add the raw scores from each question together, I used a statistical procedure to convert the raw scores into something known as standard scores or Z-scores. Standard scores are derived by subtracting the mean on any given question from the student's raw score; that difference is then divided by the standard deviation for that question. So, the standard score would equal:

Q1 Standard Score = (raw score - 27) / 7.7
Q2 Standard Score = (raw score - 29) / 8.4

Calculation of the standard scores yielded a set of numbers ranging from around -2 to 2, with a mean of 0 and a standard deviation of 1. I then converted the standard scores into adjusted scores by multiplying the standard score by 10 and adding 50 to that product:

Adjusted Score = (Standard Score x 10) + 50

This conversion generated standard scores with a mean of 50 and standard deviation of 10. Both the raw scores and the adjusted scores for each question appear on the label attached to each exam.

Finally, I added the two adjusted scores together and distributed grades according to the recommended curve, as follows:

Total Adjusted Score		Number
> 127.4	A+	4
120.0 - 127.3	A	11
113.1 - 119.9	A-	11
106.1 - 113.0	B+	17
93.5 - 106.0	B	19
87.3 - 93.4	B-	16
80.9 - 87.2	C+	10
73.7 - 80.8	C	10
61.5 - 73.6	D	4
< 61.5	F	1

In the calculation of the final grades, I will use the raw scores and not the midterm grades. All students will receive one grade for the year-long Contracts course.

Student Sample Answers

Following are two answers to each of the two questions on the midterm. Each answer was high-scoring and well-organized. Each answer was also imperfect.

Please note that I have not corrected any errors that may appear in the answers, nor indeed have I even proofread them.

STUDENT SAMPLE ANSWER TO QUESTION #1

[This answer received a raw score of 45 points.]

This is a contract for the sale of goods (in general movable property § 2-105). Thus, the UCC applies. Dealer may give services but predominant factor would appear to be the minivan. (Bonebrake).

This is a K for over $500 and the S of F applies and would appear to be met since they have a written contract.

The primary issue is whether Bob's stop-payment on March 5 was a valid rejection/revocation or if he was breaching the K.

A buyer accepts goods after reasonable opportunity to inspect & signifies goods conforming § 2-606. The UCC rejects the "acceptance of title" theory § 2-606 comm. 2. Thus, his application for title should not have effect on whether accepted. The fact that he paid for minivan is circumstances indicating acceptance but not conclusive (§ 2-606 comm. 3). Since the spare tire was concealed it would be w/in a reasonable time for him to discover it 4 days later. Thus, if he has not accepted, he could reject the goods under the perfect tender rule § 2-601. If rejected Bob has a duty to hold minivan with reasonable care to permit seller to remove. Leaving it out on the street may or may not have been reasonable care depending on neighborhood. Once Sue didn't pick up, Bob probably owned no other duty § 2-602(b). If this is the case, the seller would have a right to case under § 2-508, but Sue did not exercise this option.

A court may find that Bob had accepted the goods since he arguably had a reasonable time to inspect. This is probably the better view.

Once goods are accepted, Bob can revoke acceptance under § 2-608. However, § 2-608 require that the goods be substantially impaired. It is unlikely that a missing spare tire would be found to have substantially impaired the minivan. If this is the case, then Bob has wrongfully rejected against the seller and Sue can seek remedies under § 2-703.

Breach by Bob

Sue can get resale damages under § 2-706. Damages = 19,000(K) - 17,500 (Resale) = 1,500. It appears the sale was reasonable and in good faith, although don't know for sure. However, she could get more if lost volume seller - see later.

Sue would also be entitled to incidental damages under § 2-710. This would include the $100 fine + $50 towing charge. It would also include any other expenses in reselling to Jane and picking up the minivan.

§ 2-706(3) requires seller to give buyer reasonable notice of sale. This is not clear if Sue did this. If not would be relegated to market damages under § 2-708(1) (which may be same amount, but resale price is not conclusive of market price).

Sue would probably argue that she is a lost volume seller. Under § 2-708(2) her damages would be her expected profit 3,000 (19K-16K) and overhead. She would get incidental damages as well (the $100 + $50 + any other expenses).

Bob may argue that w/price of van going up to $17,000, her profit is less than $3,000. Not sure if retail price went up.

Also Bob may try to argue that lost profits should be a marginal profit and thus would be small.

Sue does not appear to have any consequential damages. UCC does not allow for. If she did she would have to dress them as incidentals or argue the "escape" batch to common law. §§ 1-103, 1-106, Restmt. § 347(b).

Breach by Sue

This would be if Bob rightfully rejected.

Bob could get market damages under § 2-713. This may be difference in price of new minivan over his $19,000 purchase price.

He would also be entitled to incidentals.

He stated his occupation was traveling salesperson, so Sue "had reason to know" of consequential damages if any. However, he could not get these if they could have been prevented by cover.

Would probably advise Bob that good possibility he is party in breach + may should try to settle w/Sue--possibly buying another minivan. This may minimize his overall losses.

STUDENT SAMPLE ANSWER TO QUESTION #1

[This answer received a raw score of 46 points.]

I

This is K for goods so UCC Sec 2 applies; Bonebrake test says also predominantly goods.

UCC statute of Frauds § 2-201 is satisfied b/c this is a K>500 but there is a writing.

II

Did Bob accept the minivan?

The first question is whether Bob had accepted the minivan. § 2-606. Bob had the van for 4 days, + used it in a manner inconsistent w/Dealer's ownership. § 2-606(2)

However, Bob can argue that the spare tire location was such that it was reasonable for him not to notice until 4 days after delivery.

However, I think Bob has accepted this minivan--he had this minivan--he had a reasonable time to inspect, and indicated by his actions that he had inspected.

If Bob had not accepted, he can reject under the perfect tender rule § 1-106 & § 2-601. Since his rejection comes after delivery it is unclear whether seller has a right to case, but given the code's mitigation of the perfect tender rule and the reasonableness of letting the seller, say, call for a spare tire, the seller might still have had a right to case.

Revocation

Assuming Bob has accepted the goods, he can revoke acceptance under § 2-608 if the non-conformity substantially impairs the value of the good to Bob, and if the discovery of the non-conformity is difficult.

Here, this is a close call. Bob made clear in advance the importance of extra wide tires to his business, but he did not mention the spare tire, and the spare tire was only supposed to be "normal", not one of the extra wides Bob talked about.

On the other hand, in making clear the importance of extra-wide tires, Bob must have implied the importance of a spare--driving 200 miles/day, etc. Bob's actions when he found out about the defect may be evidence of this importance (although Sue could argue his actions were evidence of bad faith, not allowed under § 2-203).

It is not clear whether Sue has a right to case in this situation. Sue has two things against her: this is a revocation, not a rejection, and we have passed the time of performance.

If Bob has rightfully revoked the minivan, he can get back the money he has paid. § 2-711. Bob also has available other buyer's remedies--he can counter-claim for I+C expenses saved in "covering" under § 2-712 for example.

If Bob has not rightfully rejected, Sue has available seller's remedies. Another ex saved issue--the 1,000 increase in

cost. But this is not truly an expense saved, because Jan never paid the money.

Under § 2-706, Sue's damages are 19,000 - 17,500 + I-Ex saved. Or $1,500 + I--I here would be the cost of transportation, case and custody in the form of the fine from the police. (Given the costs of storage + on lot insurance, fine is probably reasonable). Expenses saved are costs of on lot insurance etc., plus the cost of the title application fee. So $1,500 + I - Ex.

All of this assumes a reasonable sale. If this is considered a private sale, Bob should have been notified. If this is an unreasonable sale, Sue can get market based damages, using § 2-708 (and § 2-723).

Sue, however, is a car dealer, and can argue she is a lost volume seller, and should get § 2-708(2) damages. In which case her damages are her lost profit of 3K, + I - E.

Bob can try to argue that the special specifications of this van are such that there is a limited market, but that is a tough sell.

This question brings on Bob's rightful revocation, a fuzzy question: my advice to him would be that he may well be somewhat liable to Sue.

STUDENT SAMPLE ANSWER TO QUESTION #2

[This answer received a raw score of 44 points.]

Does the UCC apply? No, the transaction between John and P-H was not a transaction in goods because the predominant purpose was the rendition of services (authoring the book) with goods (books) incidentally involved.

The statute of frauds does not apply since there is a possibility that John could've finished the book in under a year--however, there was an adequate written K--§ 131.

P-H will argue that the liquidated damage clause of John keeping $4,000 advance if they don't publish is adequate. However, John must argue that the $4,000 is not reasonable in light of the anticipated or actual loss caused by the breach and that the amount is not difficult to prove. § 356.

This case is very similar to Freund v. Washington Square Press and in analyzing this the results of Freund will be taken into account.

Expectation Interest

First, the expectation interest of John is equal to the advance and royalties he was to receive. John did get the $4,000 royalty and will keep that amount. But, the amount for royalties is too speculative & awarding damages based on that fails for uncertainty John can try to argue that his acquaintance in the business is an expert and that the 2000 number of first books is accurate so that the royalties based on 10% of net selling price is not speculative and should be recovered. But if John tries to argue this, P-H will say that the advance took care of these 1st 2000 books. 2000 X $20 X 10% = 4000.

John will also claim that part of his expectation interest is that at the end of the publishing of his book he would be a tenured professor since he had published 4 articles already. First, the criteria for choosing who is tenured is based on recent experience--the department could still deny tenure even if John met the criteria. Also, the book company may not have been aware that John might possibly be tenured if the book was published. His expectation interest if further limited by this unforeseeability. The publisher would've had to have known about the tenure. Hadley and § 351.

Therefore, John will not be able to recover for his expectation interest and should look to recover either restitution or reliance.

Reliance

Because P-H called him and expressed strong interest in John's work, he made a trip to ($700) Englewood Bluffs. Before the meeting he spent $2,000 on books to use for research. To recover these "reliance" costs, John will have to use the argument presented in Anglia TV that pre-K expenses are recoverable because these expenses P-H could reasonably be in contemplation of as likely to be wasted is the K was broker. Also, under Security Stove John will say that the goal of the pre-K expenses was to secure a successful K. P-H will use Dempsey and say that the expenses would've been incurred whether or not the K was completed. This could be said for the $2,000 since he would still use that but not the $700 trip expenses.

After the K was signed, John bought computers for $2,500 which as a post-signing expenditure should be recoverable. Because since John was working on a book he felt it was time to get a computer and he would've continued using what he had if he planned to just write more articles.

So, John should be able to claim damages in reliance equal to either $5,200 or $2,500 depending on whether pre-K expenses are awarded.

Restitution

Restitution looks at giving back to the plaintiff (John) any benefit received by the defendant (P-H). This will not work in this case as P-H has received no benefit. Also, to do this at law court John would have to give back any benefits he had received.

Specific Performance

The damages at law are adequate and so reason to move to court of equity--also the subject is not unique and the valuation is not uncertain. Van Wagne. Further, the certainty of the K is good (Laclede) and to administer receiving reliance is not difficult. Also, specific performance is less likely to be awarded when personal services are an issue. ABC v. Wolf.

John should recover reliance costs if any. The K specifically said that the publisher could terminate if it was not suitable for publication and John did get $4,000.

As to the expenses spent after learning that it wasn't going to be published John cannot recover for--unless he establishes that P-H wrongfully decided not to publish and that he had to cover by seeking another publisher.

If this were the case, John could be awarded the costs for trying to find another publisher $500 and then the difference in any if he found one. However, he didn't find a publisher and was denied tenure--but as previously discussed he can't recover for this because it wasn't foreseeable--so the $500 less per month is an amount John will have to live with.

John might ask to be awarded the cost of publishing the book but this would be an unjust enrichment to John.

The goal is to put John in as good a position as he would have been put by full performance of the contract at the least cost to the defendant and without charging P-H w/any harms that they had no sufficient reason to foresee when making the K. Freund.

STUDENT SAMPLE ANSWER TO QUESTION #2

[This answer received a raw score of 47 points.]

While it is debatable whether or not this is a sale of goods. Publishing a book is a service, the paper and bindings etc., are incidental to the contract. This K would not fall under the UCC

The K was likely to take place in over a year but could have been done in under a year so is not within the statute of Frauds. Even if it was, the contract is in writing and therefore enforceable.

P-H rejected his manuscript more than 60 days after they got it. This is a violation of the contract. P-H breached. What are possible damages?

Liquidated Damages

J can keep the $4,000 as laid out in the K, but if he can get more from another type of remedy then he should do that. $4,000 will be the minimum he gets. K does not say this is an exclusive remedy so he has other options.

Specific Performance

While an option, SP would be unreasonable in this situation. There are many services involved with publishing a book (marketing) which cannot be forced and could not be properly administered by the court. There is also the argument that publishing is not unique and therefore SP is not an available remedy.

Expectation Interest

This is an option as well but an unsatisfactory one. Courts are likely to determine that royalties are too speculative to be awarded (See Freund). His loss of job and tenure is also very uncertain, courts would be tentative to award them as well. The court may chose to award these damages though. He could get expected royalties: 10% of the net profit of the 2,000 copies sold. That is 10% ($1,000) of revenue ($40,000) - costs (at $20) = ($30,000). But he probably won't get that. The value of his lost job is unforeseeable (publisher had no reason to know--not communicated), uncertain, and even if he had been published it might not have met faculty approval. When expectation is too uncertain we look to reliance. (He could probably get the $500 spent on mailing and copies as incidentals in attempting to

mitigate. The substitute job would & the damages on expected tenure and keeping his job, he would get the $500 a month if court chose to award it.)

Reliance

In reliance damages courts look to put the aggrieved party back in the position he was before the K. He could get expenses incurred after signing the K. $2,500 for the computers. It is debatable on whether he could get the $700 for plane and cab far and the $2,000 he spent on the set of Greek classics, which are both pre-K expenditures. The $700 spent on plane and taxi fares are foreseeable to P-H. His gamble on going to see the publisher paid off when he signed the contract. The $2,000 are less secure. P-H can argue that they are not responsible for these unforeseeable expenses (if they are expenses) that are not part of the contract. P-H can also argue that he spent this money before the 60 days had passed and there was still uncertainty as to whether his book would be published. But once the 60 days had passed it is arguable that "his gamble paid off." If the court decided to award all of these expenses the damages $5,000 > $4,000 liquidated damages, so J should try and get reliance.

Restitution

An option but a bad one. J would have to give back his $4,000 and only get the value of what he gave P-H, the exclusive rights to his book for the period. Very speculative amount which courts would likely discount to zero.

I would suggest either keeping the liquidated damages or going for reliance.