

UNIVERSITY OF CALIFORNIA

HASTINGS COLLEGE OF THE LAW

FINAL EXAMINATION: CONTRACTS

(COURSE #11045)

PROFESSOR THOMAS D. RUSSELL

SPRING SEMESTER 1996

WEDNESDAY, 15 MAY 1996

TIME: 180 MINUTES

OPEN-BOOK EXAMINATION

INSTRUCTIONS

1. This examination consists of three (3) parts on _____ pages. Please make sure that you have all _____ pages. You have three hours (180 minutes) to spend on the examination. For grading purposes, the questions are weighted according to the number of minutes recommended for each question. You should divide your time with these weights in mind. Please note that part of the reason for the page-length of this exam is that, at the request of a student, some parts are double-spaced.

2. Part One consists of twelve short answer questions. These questions are weighted equally, with a recommended time for completion of five minutes per question.

3. You should spend no more than 60 minutes on Part One. You should answer each question and offer a brief explanation of your answer. You should write your answers in the space provided after each question. Typists may disassemble their exams and type their answers in the spaces provided, or they may write by hand. Computer users should write their answers by hand in the spaces provided in the exam. No one may write short

answers in blue books. Do not feel that you need to write long answers; you will be penalized if your answers are needlessly long.

4. Parts Two and Three are each 60-minute essays question. For purposes of grading the weight of each question is proportional to this recommended time. You should write your answers to this question in a bluebook. **Please do not include your scratch paper with your bluebooks when you are done with your exam.**

Professor Russell will not read scratch paper. Please be sure to put your examination number on each bluebook that you use and also on the examination itself. Do not write on both sides of the page. If you write by hand, you should double-space and you must write legibly. If you type, double space.

5. Professor Russell is able to decipher very poor handwriting. However, if your handwriting is so poor that Professor Russell cannot read it, then you will not get an opportunity to translate your illegible prose. Professor Russell will simply ignore what he cannot read.

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

7. 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.

8. Keep in mind that Professor Russell sometimes awards a raw point or two for following the directions in his questions.

9. Quality, not quantity, is desired. Think through your answer before you begin to write.

10. You may **not** keep your copy of the exam questions.

11. If, in preparing for this examination you have violated the Student Conduct Code, or if, during this examination, you violate the Student Conduct Code, the best course of action is for you to report to Associate Dean Gray immediately after this examination ends.

12. You are a splendid group of students. Have a good summer and please keep in touch with me by e-mail.

Part 1 - 60 Minutes. Each of the 12 questions in this section is weighted equally. Recommended time per question - 5 minutes.

1. If Sherwood v. Walker (the cow case) were litigated today, what would be the likely basis for a judge's decision and what would be the likely outcome?

2. It is 100 years ago, the year 1896. Buyer send Form1. Seller responds with Form2. The forms differ. Seller ships goods, which the Buyer accepts and uses. A dispute arises. They litigate. What are the terms of the contract?

3. General Contractor has just submitted a bid for the construction of a new library to the City of San Willie. Subcontractor's bid to supply drinking fountains contained an airtight merger clause. This bid made no explicit reference to the library contract, and the fountains were of a sort that General Contractor might use in other projects. After submitting its bid, General Contractor's president wrote "I accept" on Subcontractor's bid and hand-delivered it to Subcontractor's president. Just after handing it over, General

Contractor's president said, "Just so we are clear; you understand that this acceptance takes effect only if we get the library contract?" "But of course," said Subcontractor's president. General Contractor did not get the library contract, and Subcontractor has sued for its Expectation Interest on the drinking fountain deal. What are the two strongest arguments that General Contractor can make to overcome the bar of the Parole Evidence Rule?

4. What is the difference between the defense of undue influence and the defense of duress?

5. NetCo manufactures and sells nets used for ocean fishing. NetCo has a contract with FisherCo to supply FisherCo with nets to use during the salmon fishing season. Just when the fishing season is about to begin, NetCo calls FisherCo and says that because of an increase in their costs, they must raise the contract price by 50 percent and that they will not be able to deliver the nets otherwise. FisherCo agrees to this modification but later refuses to pay. Is the modification enforceable?

6. Some commentators have argued that the UCC sets up a "totem pole" of interpretive authority in which express terms trump course of performance which trumps course of dealing which trumps usage of trade. What section of the UCC or Official Comments would you use to argue that no such "totem pole" exists?

7. Erik owned a small dog and a large cat, which he wanted to sell. The two animals were about equal in value. Fritz and Irene were Erik's friends. Erik did not know that Fritz was interested in buying the cat. Fritz knew that Erik had been negotiating to sell the cat to Irene, and Fritz knew that Erik did not want to sell the cat to Fritz but that Erik hoped to sell the dog to Fritz. One day, Erik, intending to offer his dog to Fritz, said: "I'll sell you my cat for \$175," a slip of the tongue. Several friends overheard what Erik said. Fritz immediately said: "I Accept." Can Fritz enforce a contract to purchase the cat?

8. If the plaintiff in Hawkins v. McGee won the case today, what would the measure of damages be? Be specific about mentioning different elements of the damages.

9. Because of an increase in the cost of pork by-products due to a sudden surge in demand for the Hormel company product SPAM, HotDog Co.'s expected profit on a one-year contract to supply Baseball Park with Hot Dogs will be reduced by at least 90 percent, with some chance that they will take a loss on the contract. Is HotDog Co. likely to be successful if it raises the defense of impracticability under the UCC?

10. Builder agrees to build a house for Owner for a contract price of \$250,000. Builder can build the house to him at a total cost of \$210,000. The only other contractor available to build the house bid \$255,000. No work has yet begun.

a. Builder breaches. What are Owner's damages?

b. Owner breaches. What are Builder's damages?

11. Give two examples of situations in which there is offer and acceptance but no consideration.

a.

b.

12. Consider C. Itoh v. Jordan. Accepting that Jordan's form did not form a contract and therefore, that the terms of Jordan's acknowledgment form were not part of the deal, what argument might Jordan have used to show that arbitration was one of the terms of its contract with C. Itoh?

Part 2 - 60 Minutes

J. Seller is a dealer in used airplanes of modest size. Her normal method of business operation is to obtain a request for a particular type of plane from a potential buyer. She then she looks for a used plane of that type to buy and resells it at a 25% markup over her cost. In this way, Seller avoids the expense of maintaining an inventory.

In July 1995, Seller received a request from K. Buyer, Inc., for a RAEL plane, model STX, no more than 5 years old. Model STX RAEL planes of recent vintage are popular corporate jets for executive travel. After receiving Buyer's request, Seller looked for and found a 1992 model available for purchase for \$2,000,000. Seller purchased this plane from its previous owner only after first signing a contract with Buyer for the sale of the same plane for \$2,500,000. The plane was delivered to Buyer on 1 September 1995. As required by the contract, Buyer paid \$1,000,000 cash on delivery. The balance was due on 1 December 1995.

The contract between Seller and Buyer was a standard form contract prepared by Seller. Both parties signed this contract, which was all on the single side of one page. One of the terms provided that for a period of three months Seller warranted the airplane against "any malfunction not attributable to normal depreciation or to the owner's negligence." The contract also provided that:

"The exclusive remedy for any breach of this warranty shall be repair or replacement of any malfunctioning part, at Seller's option. In

no circumstance shall Seller be liable for consequential damages. ALL IMPLIED WARRANTIES, INCLUDING THE IMPLIED WARRANTY OF MERCHANTABILITY, ARE DISCLAIMED."

On 1 October 1995, the starter engine on Buyer's plane failed. Seller replaced the starter engine within 2 days, as requested by Buyer.

Three days later the internal lighting system in the plane failed. Buyer then became concerned about the mechanical condition of the plane and hired an independent engineer to inspect the plane.

The engineer reported to Buyer that the plane had not been properly maintained over the past two years. Consequently, the engineer anticipated many repairs during the next year. The

engineer was particularly concerned that sometime within the next few years a control mechanism in the tail assembly would have to be replaced. That is a very expensive repair.

Buyer then contacted Seller and informed her of the failure of the lighting system. Buyer also gave Seller a written copy of the engineer's report. Buyer asked Seller to extend the warranty to a period of 2 years. When Seller refused, Buyer delivered the plane to Seller. Buyer stated that it was rescinding the contract and demanded return of the \$1,000,000 it had paid. Seller refused refund of the payment and accepted delivery of the plane only after carefully reserving all rights to claim that Buyer was breaching the contract by returning the plane.

Buyer has consulted you and wants your opinion about whether Buyer can recover all or part of the \$1,000,000. In giving your answer, please consider all legal arguments that either Buyer or Seller could advance, including Seller's arguments that Buyer is the breaching party.

The following additional facts may be relevant to your answer.

(1) After Buyer had delivered the plane to Seller, Raymond Olson contacted Seller and expressed an interest in buying a corporate jet. Seller was able to interest Olson in the returned plane. Seller provided Olson with a copy of the engineer's report and agreed to sell the plane to Olson at Seller's cost (\$2,000,000). Before the sale to Olson, Seller gave Buyer notice of the pending purchase of the plane by Olson.

(2) Before the contract between Seller and Buyer was signed, Seller had asked Buyer if it wanted to inspect the aircraft. Buyer declined, because its aviation mechanic was on vacation. Buyer had owned RAEL planes before and was generally familiar with them. Buyer asked Seller if it was a "good deal" and Seller replied "clearly," because it was a "terrific price" for that particular plane. The standard form contract that the parties signed described the goods to be sold as "One 1992 used RAEL plane, model STX, serial number R2593ZT814".

(3) There is no reason to believe that Seller was aware of the poor upkeep of the plane by its previous owner before it received the engineer's report from Buyer. The previous owner of the plane has just died, and his estate is insolvent.

Part 3 - 60 Minutes

The Amalgamated Schrundulator Company (ASC) manufactures Schrundulators. [Schrundulators are entirely fictitious mechanical devices, made up for use in this exam question. Because they are fictitious, neither you nor anyone else taking the exam has specialized knowledge regarding schrundulators. They are mechanical devices; that's all you need to know.]

In November 1994, Small Engine Inc. (SEI) indicated an interest in buying large quantities of schrundulators from ASC. SEI engineers visited the ASC plant and learned about the process ASC used, and they analyzed representative samples of the ASC product.

On 10 February 1995, SEI submitted a purchase order using a standard SEI Order Form. The form was quite simple and contained no provisions dealing with the extent of any liability for failure to timely deliver conforming merchandise.

The order was for 6,000 ASC Model B2A Schrundulators (\$12 each), to be delivered no later than 1 July 1995. On 15 February 1995, ASC sent SEI an Acknowledgment of Order form. The ASC Acknowledgment of Order form contained the following paragraph, just above the signature line:

Thank you for your order. We will fill the order within 45 days ON THE TERMS SET OUT ON THE REVERSE SIDE OF THIS CONFIRMATION unless we hear from you in writing within 10 days. It is your responsibility to verify that the goods shipped to you conform to your order -- if they do not you may refuse to accept them when they arrive at your receiving station. If you do not promptly inspect the goods upon delivery to you, then you waive any claim that the order is short, or defective.

The other side of the Acknowledgment of Order form contained eight numbered paragraphs, preceded by the following statement:

The following TERMS AND CONDITIONS govern the transaction documented herein between ABC and buyer. Modifications in this agreement are effective only if in writing and signed by a designated Sales Agent of ABC.

Paragraph 7 of the numbered paragraphs read as follows:

ABC assumes no responsibility or liability with respect to the suitability of its product for any general or particular purpose, whether such use or purpose is disclosed to ABC or not disclosed. ABC has no liability for any damage, whether direct, indirect, or consequential, arising from any defect in ABC products, or delay in their delivery, beyond the obligation to repay to the buyer the price of defective parts or to replace them with non-defective parts if the buyer so elects.

The schrundulators were delivered to SEI on 1 June 1995. Two hundred schrundulators were installed in new, highly fuel efficient and quiet lawnmower engines manufactured by SEI. Forty of the engines failed during testing. The engines failed because the schrundulators failed. SEI discontinued use of the ASC schrundulators. The SEI timetable for introduction of its new product was set back two months as they tested and analyzed substitute schrundulators.

SEI believes that the coating on the ASC schrundulators down due to the high temperature at which the SEI engine works, something that ASC should have known. SEI, which is not an expert in the schrundulator business, would have had no reason to suspect the possibility of this problem.

SEI sued ASC for damages caused by the delay (\$60,000), and for repayment of the purchase price of the schrundulators (\$72,000). ASC has denied liability on both claims, asserting that SEI had accepted the schrundulators, that they conformed to the specifications, and that it is entitled to the benefit of the disclaimers of liability on its Acknowledgment of Order form.

SEI has asserted, in turn, that its purchasing agent asked, before submitting the order, whether SEI had a right to return the schrundulators if they failed during the test period and was told return was possible. SEI further asserts that the same purchasing agent spoke on the phone to a vice-president of ABC just before testing began in July and confirmed that SEI could return the schrundulators if they failed to hold up during the testing period. It is possible that both SEI assertion might be true; at least it is clear that SEI would plan to offer testimony to such effect if the matter went to litigation.

Your Assignment: Your task is to write a memorandum analyzing the SEI claim. You should answer as many of the questions

raised by the facts as you can, and you should also identify those questions which cannot be answered without either a more complete factual investigation, or which will require substantial additional legal research.

END OF PART II

END OF EXAMINATION