

PRACTICE EXAMINATION

CONTRACTS

PROFESSOR RUSSELL

INSTRUCTIONS:

1. **DEADLINE:** This is a four-hour practice examination that starts at 9:00 a.m. on 27 April 2001 and is due by 1:00 pm on 27 April 2001. **If you return the exam after 1:00 pm, you get zero points for the exam. NO EXCUSES.**

2. **TURNING IN YOUR ANSWERS:** This is not a real exam, so keep your answers to yourself! If this were a real exam, then you would your answers by delivering a printed copy to Janet Dowling-Best in F-148, or you would deliver your answers via E-MAIL to jdowling@law.du.edu . If you return your answers using e-mail, please send e-mail to jdowling@law.du.edu with your answers attached as either a Word or WordPerfect attachment. Send your answers to all of the questions as one document; **DO NOT SEND A DIFFERENT ATTACHMENT FOR EACH ANSWER.**

3. **OPEN-BOOK:** This is an open-book, take-home, practice 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 show or distribute this examination to anyone at all before you turn in your answers, and you violate the Honor Code if you discuss this examination with anyone before you turn in your answer.

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.

5. **LENGTH:** This examination consists of seven questions. Your job is to produce printed--that is, **not hand-written**—answers of no more than 1,600 words. There are six short-answer questions for which you will provide answers of no more than 50 words apiece. There is a sixth question for which you will provide an answer of no more than 1,300 words. The grading of questions is weighted according to the number of words available to answer each question.

6. **SPACING:** Please try to double-space your answer. *Avoid miniature fonts, okay?*

7. **HOW TO ANSWER:** 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 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 a court would resolve an ambiguous question one way rather than another.

8. **CONCISION:** Quality, not quantity is desired. Think through your answer before you begin to write. You have a lot of time to write your answers. Concision will win you points. Good organization will win you points as well.

9. **YOURS TO KEEP:** You may keep your copy of the exam questions.

10. **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.

11. **GOOD LUCK:** Good luck and congratulations on nearly finishing the first year of law school.

Short Answer Questions:

Respond to the following six questions using not more than 50 words in your response.

1. A printed contract for the sale of 500 lightbulbs contains a printed clause that says, in conspicuous type, "No Express or Implied Warranties." On the face of the contract, the seller has written by hand: "Guaranteed for one year." The buyer, a Las Vegas casino, installs the 500 lightbulbs and within one week of their installation, 200 of the bulbs are burned out. Does the buyer have a valid warranty claim?

2. Same facts as previous question, except that the printed term is "Guaranteed for one year" and the handwritten term is "No Express or Implied Warranties." Does the buyer have a valid warranty claim?

3. Alice bought an old lapel pin at an antique store for \$5.00. Her uncle, a jewelry dealer glanced at it and said: "This pin might be very valuable -- I'd have to check it out." Alice, in need of money, sold the pin to a friend for \$10.00. The friend did not know if the pin was valuable. The friend soon thereafter found it to be worth \$5,000. Alice has tendered \$10.00 back to the friend and demanded the brooch. Is she entitled to rescind?

4. Sandra Seller and Ben Buyer sign a printed sale form in use in Sandra's office by which Sam promises to sell and Ben to buy 100 steel valves at \$90 each. The form included a number of blank spaces, most of which the parties filled in. One of the printed terms provided that "Delivery shall be made within thirty days." Delivery would require two days by rail. Before the parties signed, Sandra said: "This deal of ours can't take effect unless within ten days our local railroad has a flatbed available for shipping these valves." Ben Buyer says he did not hear this, but a reliable witness did overhear it. Twelve days went by, no flatbeds became available, and

the market price of valves went up. Sandra sold the valves to Third Party at an advanced price. Ben then read the form and for the first time noted the delivery term in it. Ben has come to you. He wants to sue Sandra, but first wants to know whether the alleged statement regarding the availability of the railroad cars will be admissible at trial. What do you advise regarding this oral statement?

5. Aaron offered eight truckloads of heavy surplus furniture to Irene for \$70,000, delivery to be "at Seller's plant within six weeks," with a further clause stating: "Buyer to pay loading costs." Loading would require two days. The offer was on a printed form, with various blanks filled in. The above terms were written into two of the blanks. Irene sent her own signed purchase order form back to Aaron. This form also included blanks in which Irene had written the words: "Seller must provide a loading crew to help my men load."

(a) Is there a contract?

(b) Assuming a contract, what would be its terms with regard to loading?

6. Buyer was a rap musician who had never previously recorded a record. Seller made a Compact Disc (CD) of Buyer's songs for Buyer, who had in advance advertised their forthcoming availability. The advertising costs were \$20,000. Buyer said he expected to make \$50,000 net out of the whole deal after deducting all costs, including the \$10,000 paid in advance to Seller. Seller delivered the CD's to Buyer promptly and Buyer sought to sell them. After the first few sales he found the CD's to be defectively made and sued Seller. On the above facts, what could Buyer recover, if anything?

Part II. You may use up to 1,300 words to answer the following question.

PrintScan and Bravo Computers (Bravo) entered a contract in 2001. PrintScan specializes in the design and manufacture of printers designed for use with personal computers. Bravo Computers is a large computer retail chain, which specializes in distributing computers to small businesses. In 2001 PrintScan had just finished designing, and was beginning to manufacture, a new printer that would incorporate not just a printer, but a FAX machine, a photocopier, and an image scanner. The new printer was to be called the OmniPrinter. Under the contract, Bravo became the exclusive U.S. distributor of OmniPrinter machines for five years. In return for exclusive distributorship rights, Bravo paid \$500,000 to PrintScan and agreed to make specified annual minimum purchases of the machines. PrintScan was to supply Bravo's requirements up to a stated annual limit; Bravo could order more machines, but PrintScan was not required to accept such orders.

The elaborate contract contained the following provisions that may be relevant to this problem:

Section 8.02 provided that, upon a material breach, the non-breaching party could give notice of its intention to terminate the Agreement. The breaching party then had 30 days to cure the breach. Failing a timely cure, the Agreement would terminate.

Section 10.01 provided that Bravo would be granted a license to self-manufacture the OmniPrinter **if** PrintScan failed to make a timely delivery of products to Bravo **and** failed to cure such a default within 90 days after receiving notice from Bravo. ("Self-manufacture" was defined in the agreement to include the manufacture of the equipment by Bravo, or its manufacture by a specified electronic equipment manufacturer located in the city in which Bravo had its corporate offices.) Under **Section 10.02**, Bravo would pay PrintScan specified royalties for any self-manufactured products produced under Section 10.01. However, these royalties were much less than PrintScan would earn from Bravo's distribution of machines manufactured by PrintScan.

Bravo complained, in a letter dated **April 15, 2001**, that PrintScan had fallen behind on its deliveries of OmniPrinters. As a result, Bravo was unable to fill orders from its customers. The letter said that, under Section 10.01 of the contract, PrintScan had 90 days within which to cure its default.

PrintScan responded in a letter dated **May 14**. The letter said that PrintScan was "in a backorder situation with OmniPrinters, being behind 800 units." It stated that it would be able to work off the entire backlog within three months. PrintScan annexed to its letter a table indicated a shortfall of 180 units out of 600 ordered by Bravo for delivery during the fourth quarter of 2001 and 200 out of 350 units ordered for delivery during the first quarter of 2001.

Between **May 14** and **October 23**, PrintScan and Bravo conferred and exchanged memoranda about whether PrintScan had cured its default within the 90-day period. Bravo continued to assert that PrintScan had not cured its default within that period. PrintScan asserted that it had. There was a fair amount of confusion, partly attributable to the fact that there were changes in personnel at both PrintScan and Bravo during this period.

An **October 13** Bravo internal memorandum, which surfaced during discovery in the lawsuit that ultimately arose, indicated that Bravo was experiencing problems in selling its existing stock of PrintScan products; the customer enthusiasm of the spring had dissipated by mid-summer. Bravo had over 200 OmniPrinters in stock on October 13. Sales seemed to be declining and retail prices for competitive multi-purpose printers were also declining. The memorandum suggested that it would be nice if a way could be found to terminate the contract. On **October 15**, Bravo began a crash sales program to reduce its inventories of OmniPrinters. It discounted its prices for these units by as much as 40 percent and succeeded in selling enough units to reduce its inventories to an acceptable level.

On **October 23**, Bravo sent a letter to PrintScan stating that Bravo was discharged from its duty to purchase products from PrintScan because PrintScan had failed to cure its default in shipping products on time. Bravo invoked its right to self-manufacture the OmniPrinter. The letter stated that Bravo planned to continue to sell OmniPrinters throughout its exclusive territory "under the provisions of the Agreement." Other internal Bravo memoranda indicated that Bravo

was not at all sure it wanted to follow through on the self-manufacturing option, and in fact continued to be doubtful of the long-term potential of the OmniPrinter.

At a **November 2** meeting with Bravo, PrintScan again asserted that it had timely cured its default. A **November 3** letter from PrintScan's general counsel repeated this assertion and said that the Agreement remained in full force "except insofar as Bravo has repudiated it." PrintScan asserted that Bravo's refusal to purchase products from PrintScan "constitutes an anticipatory breach and repudiation of the Agreement." The letter continued, arguing that Bravo's repudiation occurred only one week before an important trade show, a "critical selling period" for PrintScan products. PrintScan needed, and expected, Bravo to have a booth at the trade show both to demonstrate the OmniPrinter and to solicit orders. Bravo's repudiation made it necessary for PrintScan to make alternate arrangements for a booth. The letter said that Bravo's decision "to advise us, one week before the Computer Trade Show, of your repudiation of your obligations does not afford us the luxury of waiting 30 days while you reconsider your ill-advised decision." PrintScan's counsel demanded that Bravo provide "assurance of your willingness to live up to all the terms of the Agreement by notifying us of your retraction of your October 23rd letter no later than 1:00 p.m., Friday, November 6." This meant that Bravo had 48 hours, after its receipt of the letter from the PrintScan general counsel, in which to retract its October 23rd letter.

Experts are available to testify that manufacturers or their distributors regularly exhibit machines at trade shows. It is an unusually valuable opportunity to demonstrate products and interest potential customers in these products. It would be difficult to value this opportunity. While customers sometimes order machines at the conference, usually interest generated there begins a process of selling the machines that takes time. Moreover, there are other ways to contact customers and provoke their interest.

Bravo did **not** respond to the November 3 letter by November 6. On **November 9**, PrintScan served Bravo with a copy of a complaint in a breach of contract action. Thereafter Bravo conducted a comprehensive inventory and review of its records concerning purchase orders and deliveries of PrintScan products. Bravo found that, due to the incompetence of one of its employees, its inventory records were in disarray, and it would be very difficult to establish that PrintScan had failed to cure its default. Fifty machines that had been returned to PrintScan because they were damaged during shipment had been recorded by the Bravo employee as "undelivered," whereas the contract, and industry practice, provided that delivery of equipment damaged by the carrier should be treated as timely delivery. On **November 17**, Bravo by letter and by telephone call, said that it "withdrew its **October 23** letter." Bravo's officials said in these communications that Bravo intended to resume purchases of products from PrintScan. On **November 19**, PrintScan responded by letter to Bravo. PrintScan refused to accept Bravo's withdrawal of the October 23 letter. PrintScan said: "the time for retraction of a repudiation has passed. It ended at 1:00 p.m., on November 6 when you failed to respond to our November 3 letter." PrintScan further declared that Bravo's failure to withdraw the October 23 letter within the two-day period terminated the distributorship agreement. PrintScan said that it intended to market the OmmiPrinter itself within what had been Bravo's exclusive territory, until it could find "a more reliable and trustworthy distributor."

PrintScan's President represented her firm in the original negotiations establishing the Bravo distributorship. She will testify that she talked about Section 8.02 with Bravo's representatives. They agreed that the clause allowing a 30-day period to cure breaches (Section 8.02) would not apply to repudiations of the contract; the repudiating party didn't have 30 days to change its mind. The "30 days to cure" provision, it seems, was to apply only to failures to order, fill orders or pay for products delivered. PrintScan's President drafted a memorandum detailing her understanding of Section 8.02, and Bravo's officials initialed this memorandum under the word "okay!" This took place a month before the final contract was signed.

You work for the law firm that represents PrintScan. The senior partner in charge of the case calls you to her office and asks for a short, direct memorandum about the legal position of the parties. She wants to understand all the issues involved, the arguments that both parties are likely to make, and your view of the likely outcome. Write the memorandum.

End of Question 7
End of Examination