

CONTRACTS

Professor Turack
Fall 1989

INSTRUCTIONS

1. You are NOT to use any notes or books including a copy of the U.C.C. during the course of the examination.
2. Study and analyze each question with care before you write. A long answer is not necessarily the best answer: irrelevant prolixity is undesirable.
3. If additional facts appear to be necessary in answering a question, state your assumptions and answer the question both with and without the assumption.
4. Write legibly in pen. Number each of the questions in your blue book. Answer the questions in any order.
5. The value of each question is in the left-hand margin.
6. When you are giving a reference to the U.C.C. state the section by number, e.g., 2-207 (1) and paraphrase or describe only the portion of that section which you think is relevant. Do not give me a section number alone. Do not write out the entire section unless you intend to describe it entirely as being relevant.
7. Time: You have 3 hours to answer these questions.

GOOD LUCK

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- #1. Hertz Penske Truck Leasing, Inc. rents trucks of various sizes and capacities to retail and commercial customers. Fred Scuttle rented a truck from Hertz Penske on or about August 28, 1989, on behalf of United Van Lines, in order to transport x-ray equipment for Coastal Medical Systems, Inc. Scuttle was given an opportunity to inspect the vehicle and did so. Scuttle signed a form rental agreement, which contained, among other provisions, a disclaimer in bold type and capital letters about an inch above the customer signature line:

“LESSOR MAKES NO WARRANTIES, EXPRESS, IMPLIED OR
STATUTORY INCLUDING, BUT NOT LIMITED TO THE IMPLIED

WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. CUSTOMER REPRESENTS THAT HE/SHE HAS FULLY INSPECTED THE VEHICLE DESCRIBED HEREIN AND THAT SAME IS IN GOOD CONDITION AND REPAIR.”

Hertz Penske also limited its liability. Immediately above the signature line is the statement:

“The vehicle described herein is rented pursuant to and in accordance with the terms and conditions set out above and on reverse side of this Agreement. Customer represents that he/she has read and agrees to same....See reverse side.”

- 15 The reverse side is entitled “Truck Rental Agreement.” The agreement is Comprised of 16 numbered paragraphs. Each paragraph has a title printed in all capitals on a separate line. Paragraphs 11 and 12, respectively, are entitled “NO LIABILITY FOR PROPERTY” and “LIABILITY OF LESSOR.”

While the x-ray equipment was being transported, the rings securing one of the pieces of equipment pulled loose from the walls of the truck allowing the x-ray machine to fall and be damaged in the amount of \$39,140 that United Van Lines paid to Coastal Medical Systems, Inc. United Van Lines feels that Hertz Penske was aware that the retainer rings in the walls of the truck were to be used to secure the x-ray machines.

Fred Scuttle, who rented the truck from Hertz Penske for United Van Lines, states in his affidavit, “I requested a truck with a lift gate to handle moving heavy electronic equipment.” Mr. Herb of Hertz Penske said that the truck presented to me had “circular rings,” and “Hertz Penske never instructed me to not tie heavy objects to the circular rings. It is normal practice to use the rings to secure objects during transport.” Scuttle also states:

“I inspected the physical condition of the truck, not its accessories (e.g., the circular rings). I always inspect rental trucks for cracked windshields, dents, etc. before I rent them. Hertz Penske did not specifically request that I inspect the quality of the circular rings. Tie-downs such as the circular rings have to be of high quality to secure heavy objects. I had no reason to doubt their quality. A reasonable inspection of the circular rings would not have revealed that they were not adequate for securing heavy objects. I couldn’t tell just by looking at the rings that they would not function properly during a transport. I had never had any trouble with circular rings before that move.”

Additionally, it is undisputed that there were also previous dealings between Hertz Penske and United Van Lines. Mr. Herb, District Manager for Hertz Penske, states in his affidavit that:

“Hertz Penske has rented vehicles to Unived Van Lines prior to the above referenced agreement utilizing the same contract form as the one at issue so they have had more than one opportunity to review our contract. We have had no previous complaints or claims from them.”

Mr. Herb also states:

“It is customary and usual for truck rental businesses to exclude any liability for property as set forth in paragraph 11 of the contract and to limit the types of liability as set forth in paragraph 12. These provisions are an economic necessity for truck rental businesses because they have no control over the property conveyed in their vehicle, the way the vehicles are loaded or the way the vehicles are driven. Under these circumstances, insuring against such risks or self-insuring would be prohibitively expensive. To try and pass the cost on to our customers would result in a significant rise in our rental fees.”

The Supreme Court of the state having jurisdiction in the case had held that the Uniform Commercial Code applies to leases of chattels. Poof v. One Bird, 837 N.E. 3rd. 10004 (1989).

Outline the legal arguments of both parties and predict the outcome.

- #2. On September 28, 1989, Dinwitty directed a letter to Little, Brown and Company, Inc. in which he advised the addressee that portions of its paperback publication entitled “How to Buy Stocks” had been plagiarized by the authors of a later book entitled “Planning Your Financial Future.” Dinwitty offered to provide a copy of the book in which he had highlighted the plagiarized passages, with marginal references to the pages and paragraphs of the book from which the passage had been copied. By letter dated Oct. 21, 1989, and signed by Red Robin, Editorial Assistant, Little, Brown and Company, Inc., invited Dinwitty to send his copy of “Planning Your Financial Future” to him. Dinwitty complied and Red Robin, in turn, acknowledged receipt thereof in writing.

Thereafter, Dinwitty made inquiries about Little, Brown and Company’s investigation but received no response. Dinwitty was persistent, however, and upon learning that had agreed with his assertions and was pursuing a claim of copyright infringement, he demanded compensation for his services. Little, Brown and Company sent Dinwitty a thank you note with a check for \$200

containing the notation "honorarium." Dinwitty has kept but not cashed the check. When he subsequently read The Wall Street Journal, he learned that Little, Brown settled the infringement of copyright claim against Bantam Books, Inc., publisher of "Planning Your Financial Future," for \$60,000.

15 After discussing the matter with his attorney I.A. Fink, Dinwitty thought that he should get one-third of Little, Brown's recovery.

If Dinwitty decides to sue what legal arguments do you envisage from I.A. Fink? What can you expect from Little, Brown's response? Predict the outcome. Why?

#3. S. Claus was employed as an elementary school teacher by the Bloomfield School District for the 1988-89 academic year and was under contract with the District to continue to teach school for 1989-90 as a permanent employee. On June 10, he was present in the Blue Oyster, a nightclub known to be frequented by homosexuals. A police raid on the Blue Oyster that evening following a tip from an unknown source that there was illegal gambling on the premises brought the arrest of Claus on criminal charges of illegal gambling.

At the police station, Claus was questioned for six hours, before being released on bail. Claus had never been arrested previously so that the entire process of arrest, booking, intense interrogation and bail process was foreign to him. The police just did not believe his story that he was in The Blue Oyster to have a few beers and watch the female impersonator's act.

By the time that Claus reached his apartment, he had been without sleep for some forty hours and was exhausted physically and mentally. Ten minutes after he got to his apartment, he was visited by the superintendent of Bloomfield District and the principal of his school. Both women told him that they were there to help him and that they had his best interests at heart. They asked him to take their advice and resign his position immediately with the District. When Claus told them that he wanted to consult an attorney, they responded that there was not enough time as the matter would reach the student's parents, and that if he did not resign immediately the District would suspend him from his position and publicize the proceedings, his "aforedescribed arrest" and cause him "to suffer extreme embarrassment and humiliation." They said that if he resigned at once the incident would not be publicized and would not jeopardize his chances of securing employment as a teacher elsewhere.

It was now 1:00am, Claus was emotionally and physically exhausted. He did not have the Education Code shown to him or have his attention drawn to the provisions compelling him to take a leave of absence and authorizing his suspension on the filing of written criminal charges. The discussion lasted over

an hour, the principal and the superintendent took turns telling him of his lack of options if he did not resign. Finally, he signed the resignation form. The superintendent handed him a check for his final pay, a stuffed bear (the school mascot) and they left.

Two weeks later all criminal charges against S. Claus were dismissed under the Penal Code, section 451 which directs “dismissal of charges brought without reasonable of probable cause.” S. Claus was unable to get another teaching position elsewhere for 1989-90.

What legal advice can you give him and anticipate what the Bloomfield School District will counter!

#4. On August 19, 1989, Hester Hornsby sent the following printed letter to Pylon Inc.:

“Gentlemen:

Will ship you as many as 300 compressors, model T, at \$385 per unit, shipment only on Sept. 4th. F.O.B. Columbus on Conrail. Credit for 60 days.”

This letter constitutes the only offer to enter into a contract with you. In the event that the terms printed on the back of this letter differ from any response from you, the contract formed by us with you is expressly conditional upon your assent to our terms contained herein.”

On the back of the letter the following terms appear:

Payment:

Payments made after the period set forth on the other side hereof shall bear interest at the rate of 18% per annum until paid in full.

Warranties:

Seller hereby expressly disclaims all warranties, express or implied, including, but not limited to the warranty of merchantability. Seller shall be permitted a period of 10 days after notice to cure any non-conformity of the goods. Buyer shall be limited to the remedy of return and replacement of any defective or non-conforming goods.

Risk:

Buyer shall bear all risk of loss to the goods during shipment.

Acceptance:

Acceptance of delivery of the goods described herein shall constitute acceptance of the offer to sell contained herein.

Shipment:

Shipments made within 5 days of the shipment date set forth on the other side hereof shall be deemed in conformity with the parties' agreement.

Please Note:

Any additional or different terms contained in any form of Buyer shall not be construed as part of the contract of the parties.

The printed form letter reached Pylon Inc. on August 22nd. The president of Pylon Inc. one U.A. Crumb had no prior dealings with Hester Hornsby but knew that seller's products were top quality. That afternoon U.A. Crumb sent the following letter to Hester Hornsby:

Purchase Order

Gentlemen:

Please send 200 of your compressors, Model P., Sept. 4th, F.O.B. Columbus via Conrail. Enclosed deposit check \$1000 dated August 22nd.

This order constitutes an offer to purchase the goods described. This offer may only be accepted on the terms stated, including those found on the reverse hereof. Any variance from these terms contained in your acknowledgement will constitute a counter-offer, and will not bind the purchaser unless such terms are accepted in writing.

On the reverse side the following appear:

1. All goods supplied pursuant to this purchase order shall be subject to the warranty of merchantability, which may not be disclaimed.
2. Seller may not limit remedies available to Buyer for breach.
3. Time is of the essence in the performance of this contract. Failure to ship the goods by the date set forth shall constitute a substantial breach and excuse performance by Buyer.
4. Seller shall bear all risk of loss prior to deliver of goods to Buyer.
5. Buyer may reject the goods for any non-conformity in the goods or tender, and Seller expressly waives any right to cure such non-conformity.

6. This writing constitutes the entire agreement between the parties. The offer embodied herein can be accepted only by the signature hereon of Hester Hornsby, and the return of a copy of this offer bearing such signature to Buyer within seven days of receipt, or by shipment of conforming or non-conforming goods.

When Hester Hornsby received the Pylon Inc. purchase order, he cashed the check and shipped the model T. compressors on September 4th.

This was a very busy time for Pylon Inc., and on receipt of the compressors Crumb merely had them put into the warehouse where the crates remained unopened for two weeks. Upon opening the crates, Crumb discovered the model T instead of the model P compressors. Crumb immediately called the Finch Corporation and ordered 200 model P compressors at a cost of \$500 per unit.

U.A. Crumb contacted Hester Hornsby by FAX in which he said that the wrong model compressor had been sent and that as the model P was needed at once, it would purchase these from a third party (Finch Corporation). Finally the FAX message stated that the model T compressors were being returned at Hornsby's expense.

On receipt of the Pylon Inc. FAX message, Hornsby immediately sent a FAX message to Pylon Inc. that it would send the model P compressors that day at Hornsby's expense.

On receipt of the Hornsby message, U.A. Crumb sent a simple FAX message on behalf of Pylon Inc., it read:

Refuse delivery. You are too late.

U.A. Crumb
President, Pylon, Inc.

Litigation is certain to follow. Without considering the damage amounts, what will each party argue in their brief? Explain fully.