

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., 2-209(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

1. Moneybags was a mortgagee who had given a loan of \$20,000 to I.M. Pecunious on the latter's house on October 19, 1987. The mortgage gave Moneybags security on the Pecunious residence under very favorable terms, that is, twenty years with monthly installment payments of \$250 principal and interest but with an additional payment of \$2,000 as the final mortgage payment in the year 2007 A.D. On October 17, 1990, Moneybags wrote to I.M. Pecunious as follows:

I hereby agree to accept cash for the mortgage which I hold against your premises. It is understood and agreed that as a consideration, I will allow you \$2,000 off the indebtedness of said mortgage providing said mortgage is paid on or before October 19, 1990, and the regular monthly payment due on October 19th, is paid when due.

I.M. Pecunious checked with all of his relatives, the lending institutions and finally came up with the total amount necessary to pay Moneybags. Pecunious took all the money to the Reliable National Bank and received a bag full of \$100 bills. With the bag of money in hand, Pecunious went to the home of Moneybags and arrived at the front gate on October 19th at 2:00 p.m.

Pecunious knocked at the door and from inside Moneybags demanded the name of the caller. Pecunious responded "It is I.M. Pecunious." There is some dispute as to what happened next. Pecunious says that he immediately said: "I've come to pay off the mortgage." Moneybags says that when Pecunious identified himself, he Moneybags said "Sorry, you are too late, I sold the mortgage to someone else." Pecunious further stated that he wanted to talk with Moneybags so that Moneybags partly opened the door. Thereupon Pecunious exhibited the cash, and said that he was ready to pay off the mortgage according to the agreement. Moneybags refused to take the money. Pecunious took the money back to the bank. What will each party argue if Pecunious brings suit. What, result? Why?

2. George Hojo and Jose Bravo were hired in the Spring of 1989 by the Zorba Pickle company which is a corporation engaged in the business of raising and selling cucumbers for the pickling industry. Both men were given important jobs. Hojo was employed as the supervisor of the planting and growing operations, while Bravo functioned as the labor recruiter.

In order to encourage them to work with zeal and not to leave the company's employ, Zorba offered contracts with profit sharing bonus provisions to both Hojo and Bravo. Prior to the written contracts, Zorba responded to its employees demands for more compensation by orally agreeing to pay them a salary plus a bonus of 10% of the company's annual profits. Bravo told the company president that he wanted the agreement in writing, and the president replied "I will prepare one and send you an offer in writing."

The contractual documents were sent to both Hojo and Bravo as promised along with their next pay envelopes. Both Hojo and Bravo signed the contracts but as no instructions in the documents indicated anything further, each man kept the signed document at home. In the signed document each man agreed to return half of his bonus to the company as an investment in company stock. The fiscal year corresponded with the calendar year.

During 1989, the Zorba Pickle Company had no profit. In November 1990, despite a profit of \$1 million the company decided to close its operations in the state and move to Texas. It offered all of its employees continuous employment in Texas but Hojo and Bravo decided not to go. When Hojo and Bravo asked for their 1990 bonus, the company president, one Niki Spiros, said they had no record of any written agreement with the-man calling for any bonus. Advise Hojo, Bravo and the company of their legal arguments. What outcome? Why?

3. Pettifog Printing Company (Pettifog) buys and sells used printing machinery. On April 18, 1990, the president of Pettifog, Jeeves Pettifog, went to the B.F. Goodrich Company's surplus machinery department in Akron, Ohio, to look at some used printing machinery which was for sale. Jeeves Pettifog discussed the sale terms, including a price of \$19,000, with Goodrich's surplus equipment manager, Hendrik Meijers. Three days later, on April 21, 1990, Jeeves Pettifog sent to Goodrich in Akron a purchase order for the equipment and a check for \$1,000 in part payment.

The purchaser order contained the Pettifog name, address, telephone and FAX numbers and certain information about the machinery purchase. The check that Jeeves Pettifog sent to

Goodrich also had the Pettifog name and address and notations that connected the check with the purchase order. B.F. Goodrich is a very large company. The purchase order and check arrived without any specific person's designation on the envelope, check or purchase order, to indicate that the items were for Hendrik Meijers or the surplus equipment department. It is company practice to have a secretary open such mail that is "unable to find a home" amongst its 2,000 employees, and send copies of the documents to several of its various divisions.

It was not until Pettifog telephoned to Hendrik Maijers on June 13th to arrange for removal of the machines that Pettifog learned that the machines had long been sold to someone else, and Hendrik Meijers learned of the Pettifog purchase order and check. Despite the B.F. Goodrich Company's efforts to locate the purchase order and check, it did not turn up until early July. Pettifog seeks either the equipment or the damages that flow from non-performance. Outline the legal arguments and law that each party will raise. Who will prevail? Why?

4. In early 1990, Brown Machine had sold Hercules a T-100 trim press. The trim press was a piece of equipment used in manufacturing Cool Whip bowls. The initial sales negotiations between the two companies for the trim press began in October 1989. Bruce, an engineer at Hercules, asked Ryan, Brown Machine's district sales manager, to send Hercules a quote for a trim press. On November 7, 1989, Brown Machine submitted its original proposal No. 1 to Hercules for the model T-100 trim press. The proposal set out sixteen numbered paragraphs describing the machine to be sold. Attached to the proposal was a printed form of fifteen paragraphs in boilerplate style captioned "TERMS AND CONDITIONS OF SALE". The eighth paragraph provided as follows:

18. LIABILITY: The purchaser agrees to pay on behalf of BROWN all sums which BROWN becomes legally obligated to pay because of bodily injury or property damage caused by or resulting from the use or misuse of the IOS [item of sale], including reasonable attorneys fees and legal expenses. The purchaser agrees to indemnify and hold BROWN harmless from all actions, claims, or demands arising out of or in any way connected with the IOS, its operation, use or misuse, or the design construction or composition of any product made or handled by the IOS, including all such actions, claims, or demands based in whole or in part on the default or negligence of BROWN."

20. Bruce reviewed the proposal submitted by Brown Machine. On January 7, 1990, he telephoned Ryan at Brown Machine. Ryan's call report reflected that Hercules had prepared its purchase order in response to Brown Machine's proposal No. 1 but that Hercules objected to the payment term requiring a 20% deposit to be paid with the order. Ryan told Bruce that Brown Machine could not waive the deposit and that an invoice for payment would be forwarded to Hercules. That day, Ryan issued work order for the trim press equipment. The work order noted that "customer gave a verbal purchase order for this stock machine. Will issue revision when formal purchase order received."

On January 19, 1990, Brown Machine received Hercules' written purchase order dated January 6, 1990 in a blue box on the bottom left of the purchase order form in bold print appeared "THIS ORDER EXPRESSLY LIMITS ACCEPTANCE TO THE TERMS STATED HEREIN INCLUDING THOSE PRINTED ON THE REVERSE SIDE. ANY ADDITIONAL OR DIFFERENT TERMS PROPOSED BY THE SELLER ARE REJECTED UNLESS EXPRESSLY AGREED TO IN WRITING."

The reverse side of Hercules' purchase order, captioned "TERMS AND CONDITIONS" contained sixteen boilerplate paragraphs, the last of which provided:

"16. OTHER TERMS: No oral agreement or other understanding shall in any way modify this order, or the terms or the conditions hereof. Seller's action in (a) accepting this order, (b) delivering material; or (c) performing services called for hereunder shall constitute an acceptance of the above terms and conditions."

The purchase order contained no indemnity provision. Brown Machine received two copies of the purchase order. One had been stamped "Vendor's Copy" at the bottom; the other was marked "ACKNOWLEDGMENT", with a space labeled "accepted by" for signature by Brown Machine. Brown Machine did not return this prepared acknowledgment to Hercules.

The next day, on January 20, 1990, Brown Machine sent Hercules an invoice requesting payment of \$4,882, the 20% deposit for the trim preps. Rather than returning the acknowledgment of the purchase order prepared by Hercules, Ryan sent Hercules an "ORDER ACKNOWLEDGMENT" dated February 5, 1990. This letter stated as follows:

"Below in detail are the specifications covering the equipment ordered, and the equipment ordered, and the equipment will be manufactured to meet the specifications. If these specifications and terms and conditions of Sale are not in accordance with your understanding, please, ADVISE US WITHIN SEVEN (7) DAYS OF RECEIPT OF THIS ACKNOWLEDGMENT. If we do not hear from you within this period of time, we are proceeding with the construction of the equipment as per these specifications and terms a being agreed; and any change occurring later may result in additional charges.

ONE T-100 TRIM PRESS AS FOLLOWS

The paragraphs following set out the same sixteen specifications contained in Brown Machine is an original proposal No. 1. Page four of the acknowledgment contained the same "TERMS AND CONDITIONS OF SALE" which had accompanied Brown Machine's earlier proposal, including paragraph eight on liability and indemnity. Hercules never paid the twenty percent deposit. Brown Machine sent Hercules an invoice dated April 14, 1990, requesting final payment of the total purchase price. Brown eventually shipped the trim press to Hercules and Hercules paid the agreed-upon purchase price. Sometime later, James Miller, an employee of Hercules, and his wife sued Brown Machine because of injuries he sustained while operating the trim press at Hercules' plant. Brown Machine demanded that Hercules defend the Miller lawsuit but, Hercules refused. Brown machine eventually settled the Millers' lawsuit.

Brown Machine seeks indemnification of the settlement amount paid to the Millers. Outline Brown Machine's legal arguments and Hercules' legal arguments. In your response take into consideration who will prevail and why?