

Fall Semester 1998
Professor Turack

CONTRACTS
Day Division, Section A

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. 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 assumptions.
4. Write legibly in pen. Number each of the questions in your blue book. Answer the questions in any order. Do NOT use a separate blue book for each question.
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. 2-612(1) and paraphrase or describe only the portion of the 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 three (3) hours to answer these questions.
8. You may use the back of your examination questionnaire to plan your answers. Keep the questionnaire, and bring it to the first Contracts class of the Spring Semester.

GOOD LUCK!

1. Both Ben and Cloe are operators of chicken hatcheries. In the spring of 1996, Ben told Cloe that he might be interested in selling his hatchery. Cloe expressed interest and inspected Ben's physical facility and operation. No decision was made at that time since Ben would not make financial statements available to Cloe. During June 1996, Ben and Cloe entered negotiations, which were directed at allowing Ben's hatchery to become the chick supplier for Cloe's hatchery during the 1997 hatching season. Ben believed that the parties had reached an agreement calling for Ben's hatchery to provide substantially all of Cloe's chick requirements for 1997. The precise number of chicks in

question was never specified, apparently because the market could not be determined much in advance.

Cloe made various estimates to Ben of the number of chicks that she would want. Initial estimates were that Cloe would purchase over 400,000 chicks from Ben's hatchery. Ben prepared to produce chicks in accordance with those estimates. Ben's preparations included an increase in his egg orders from his suppliers, and securing space at Igor's hatchery, Ben's adjacent neighbor, to accommodate the volume of Cloe's order.

Correspondence from Cloe to Ben in December 1996, indicated that Cloe would be purchasing only 270,000 from Ben. Cloe provided Ben with a revised plan to accommodate this decrease. Subsequent, revised plans were sent, by Cloe to Ben in February and April 1997. When the 1997 hatching season actually arrived, Cloe took far fewer chicks from Ben than any of the estimates had contemplated. In addition, Cloe produced in her own hatchery a very substantial number of chicks that she wanted for the 1997 season, this was contrary to Ben's understanding of the agreement.

Because Cloe ordered far fewer chicks from Ben than Ben expected, Ben found himself with hundreds of thousands of chicks on hand, which he could not readily sell. Some of the chicks were sold, by Ben at distress prices, and Ben had to kill about 248,000 chicks to cut losses.

Following these events, Cloe made new inquiries about purchasing Ben's hatchery. Ben believes that Cloe deliberately misled him about the number of chicks that she would order from him, thereby causing Ben to overstock and incur consequent losses. Ben believes that Cloe's actions were done to drive down the purchase price of Ben's hatchery.

Ben wants to sue Cloe since his hatchery has suffered losses totaling \$70,529. Both Ben and Cloe reside in the same county and it seems that this suit if it goes to trial would be one of first impression for the courts. What theories would Ben's attorney pursue? Why? What will Cloe contend? Why?

BEST ANSWER

We are going to apply the U.C.C. to this argument because the parties fall under the definition of merchants UCC 2-104(1) those dealing in the sale of goods with an expertise in chicken hatcheries. By an objective standard it is apparent that there was an intent to enter into a requirements contract where Cloe would buy her chick requirements from Ben for the 1997 season. Prior to Cloe's order the parties entered into preliminary negotiation which may have confused Ben. Cloe's first estimate was for 400,000 chicks. However, estimates are part of the preliminary negotiations and do not constitute an offer. Then she sent correspondence indicating numerous revised plans, as to the number of chicks she would need. This term of the contract never appeared to be clear but the intent was there and UCC 2-204(3) say that the contract will not fail for indefiniteness. Ben accepted when he delivered the chicks although he did put a considerable amount of effort into the preparations which was in compliance with UCC 2-206 to use his best efforts. There was a benefit received by Cloe receipt of the chicks and a detriment by Ben's investment. With the exception of the indefinite term, there was still a contract. Also because according to 2-207, we don't need to know the

exact moment that it was formed. Ben is going to argue that Cloe did not enter into the agreement in good faith as required by UCC 1-203, that there was overreaching in her fraud and misrepresentation of various orders and that she breached the requirements contract by producing her own chicks. He will rely on promissory estoppel to recover where promisor should realize and foresee that it will incite action or forbearance of a third party, that the party did rely on the promise and if the third party did not recover there would be unjust enrichment. Ben relied on her desire to order the chicks, she received them, and based on his claim of her misleading him, he ended up with a tremendous loss. Cloe will certainly claim that there was nothing misleading and misunderstanding of the terms was due to Ben's own negligence of failing to understand the terms. She will argue that based on the contract she agreed to fill in the quantity term later and that their continued negotiations weren't finalized until she gave and took the desired amount. She will also say that they agreed that Ben would provide a "substantial" amount of chicks not all. Therefore, she was okay to produce some of her own. Cloe will be sorry for his investment in preparations, but securing his space at Igor's hatchery could have helped with his other customers as well. I think the court will find a contract but the two issues in conflict is the fact that they are reluctant to use gap fillers for determining quantity, but there will be an unjust enrichment if monetary damages are not awarded to Ben. I don't think reliance damages will be awarded for his out of pocket expenses. More than likely restitution will be awarded in the amount of loss he suffered from her last order vs. what she actually took.

2. J.C. Goma, a Metropolis realtor, was contacted by Tom O'Toole relative to finding a buyer for certain commercial property in the city. On July 1, they executed a "listing agreement," which provided, among other things: "You (Goma) are hereby appointed exclusive agent to secure a purchaser for (here a description of the property and the price were inserted) 90 days. In case of sale by the undersigned owner before expiration of this agreement, you are to receive full cash commission." The stated commission for finding someone willing and able to buy was 7% of the selling price.

Despite strenuous efforts during the late summer and early fall, Goma was unable to locate any real prospect. He had virtually given up hope when he happened to run into Paula Tripe at a football tailgate party (November 4). He learned from Paula of her interest in finding a commercial property in Metropolis. Knowing that Paula and Tom were friends, he suggested that Paula give Tom a call. Paula did so, and in a matter of days the two of them had put together a deal at the listed price. Deed and payment were exchanged on November 22.

On November 24, Goma, after learning that Tom and Paula had closed the deal, called Tom to his office and had Tom sign a new listing agreement, which was, in effect, a renewal of the old agreement for an additional 90 days.

A problem has come up. Tom died of a stroke on December 1, and an associate in Goma's office has warned him that he may not be able to collect the commission. J.C. Goma consults the law firm where you have just interviewed for a summer position. The head of the firm hands you the problem to test your capability. Analyze the problem and advise the head of the firm whether or not Goma has a valid claim against Tom O'Toole's estate. Why?

BEST ANSWER

In this question, Goma is working as an agent for O'Toole in selling a property. As part of the agreement stipulates Goma is given a 90 day period in which to find a buyer. If Goma is successful in that period he will receive a 7% commission. There was intent by both of the parties to enter into the contract. An offer was made by O'Toole to Goma. This would be a unilateral offer, because while Goma could make a promise to attempt to find a buyer, the contract would only be complete upon Goma finding a willing and able buyer before the 90 day period expired. O'Toole was giving an option contract to Goma. Normally when dealing with an option contract the contract is revocable by the offeror at any point. But if consideration is given to the offeree then it is irrevocable for that period of time. Consideration consists of any sort of forbearance, detriment or payment by the offeree. It could be said that the consideration to keep the option open in this case is that Goma worked strenuously during that period to find a buyer. The Restatement 2d sec.45 of Contracts states that once a person begins performance on a unilateral contract it is irrevocable. Under the UCC 2-205 (1) an option between merchants is irrevocable even without consideration for the stated time. UCC 2-205 (2) states that an offer between merchants will be held open for a reasonable time but if no time is given the period is 90 days. A court will most likely find in favor of the common law view because according to UCC 2-104, O'Toole probably will not be considered a merchant. Goma spoke with Paula on Nov. 4th. This was after the 90 day period which Goma had to secure a buyer. Goma suggested that Paula give O'Toole a call regarding the property. The deal was completed on Nov. 22nd. Goma and Tom signed a new agreement on Nov. 24th. This was two days after the deal was completed. This new agreement was a renewal of the old agreement for an additional 90 days. In a pre-existing duty, parties are agreeing to a contract where one party already has an obligation to do something. In an accord and satisfaction, the accord is the new contract and the satisfaction is new consideration given for the new agreement. For example, if A owes B \$1,000, and A must pay in three months, if B says you can pay me in six months but you must pay \$1,200. The Accord is the extra three months and the satisfaction is the extra \$200. In the case between Goma and O'Toole, there is an accord, but there is not a satisfaction. Goma did not give any sort of consideration to O'Toole to make the accord possible. Next in the scenerio Tom dies on Dec. 1st. Normally when a person dies an offer expires. In this type of situation though the deceased's estate (O'Toole) would have to pay any outstanding debts or payments that were owed by O'Toole. I believe that Goma will have a difficult time trying to recover the 7% commission. First, he failed to find a buyer within the stated 90 day period. Second, if the new 90 day agreement was to run consecutively from the end of the first as a renewal then the actions of Nov. 4th and 22nd would be valid. But because the contract to the 90 renewal period is void because there is no satisfaction and because it is signed after the Nov. 22nd deal, Goma is most likely going to be out of luck. There may be some scenerios in which Goma may attempt to recover the 7% commission. Goma may argue that there was a contract implied in law (quasi contract). There was an unjust enrichment, a benefit conferred, a request by a party and a relationship between the parties. Goma may argue that O'Toole or his estate was unjustly enriched by his services. Goma conferred the benefit of locating a buyer, there

was a past request by O'Toole to do this act and the parties also had a fiduciary relationship. Goma will attempt to recover restitution damages, while O'Toole's estate will most likely argue there was not a new valid contract. In addition to the prior arguments Goma may attempt to argue that his consideration to the accord and satisfaction was that he found the buyer. Under the common law past services can not be a consideration. Under the UCC 2-209 (1) a contract modifying an agreement does not need consideration to be binding. The decision on whether there is a valid accord and satisfaction will rest on whether the court finds that Goma provided a service (following the common law, no recovery for Goma, or that Goma sold a good (the house, in which case a court would adhere to the common law rule and Goma could then recover). Moral obligation as consideration!

3. For years, Paula Purchaser has sought to buy a lot on Lake Wobegon owned by Vincent Vendor. Last week, Paula make yet another attempt to purchase the land, a one acre lot with lake frontage and the only property owned by Vince, and this time the latter was agreeable. While discussing the matter at Vince's house, they agreed upon all the essential terms, including the cash price of \$20,000. After "shaking on it," Paul wrote a check for \$2,000, down payment on the purchase. The check was made out to Vincent Vendor and contained the following legend: "\$2,000 down on lot on Lake Wobegon, balance due \$18,000." The following week, however, Vince changed his mind about selling and tendered the check back to Paula.

- a) Does Paula have legal recourse? Why? What if Paula, in the meantime, had made a commitment to a bank to borrow funds to complete the purchase?
- b) Assume, instead, that after agreeing upon the essential terms, including the cash price of \$20,000, Paula wrote out the \$2,000 check as down payment (but without the legend as above) and gave it to Vince. Vince immediately cashed the check. Thereafter, Paula determined not to go through with the deal and wants her down payment returned. Vince, however, is willing to complete the transaction whenever agreeable to Paula. Is Paula entitled to a return of the \$2,000?

BEST ANSWER

A. Paula may or may not have legal recourse. Paula can show that there was an intent to contract because she wanted to buy and Vincent wanted to sell. They had negotiated over the offer and the offer had specific and definite terms. The offer was accepted by a handshake and the consideration of the contract was that Paula agreed to pay \$20,000 in exchange for the property. This was then a bilateral contract, a promise for a promise. It was not a unilateral contract because 2 promises were exchanged. Vincent will argue next that there really is no contract under the statute of frauds common law rule that dealings involving land were required to be in writing. Paula will argue if the sale of land means that this is the sale of goods the UCC may apply here. UCC 2-204 states that if 2 parties have an intent and take the actions to have a contract and there is no writing there may be a contract based on their actions. Paula

may also argue that when she gave Vincent the check, it was like having an option contract. However, an option contract to be valid must have consideration that is separate from the original contract. Vincent will argue that she did not give anything in consideration to leave the contract open. A down payment is money towards the balance remaining not consideration for an option. If Paula went to the bank to secure financing she may be able to recover reliance damages based on promissory estoppel. She could argue that she suffered a detriment because she relied on his promise to sell the property. She might then be able to get whatever out of pocket expenses she incurred (reliance remedy). However, since this deals with land, Paula will first attempt to get specific performance, which is the property itself. She may get the court to enforce the contract. Under UCC 2-716 specific performance can be given when the situation deals with land. Money will not make Paula happy because she's been trying to get this land for some time. Thus, there is no equitable remedy. Additionally, Vince will argue there was no option or no contract because he never cashed her check. Thus, since he was never given the \$20,000, there could be no deal. Paula could also use UCC 2-205 if Paula and Vince were both merchants. This would allow an offer to remain open for 90 days if no specific time limitation is given.

- B. Paula could have a difficult time of getting her money back, however it could be possible. Vince could argue that Paula gave him the money as an option to keep the offer open. However, Paula did write that it was a down payment on the check, but she did not specifically state what the down payment was for. If Vince can show that this was a consideration for an option clause, Paula may not get her money back. Additionally, if Paula attempts to revoke, Vince could argue promissory estoppel. He relied on her promise to purchase the property. Promissory Estoppel can be used when someone attempts revocation. Again, the Statute of Frauds would be an argument for Paula that the agreement had to be in writing.

4. In 1996, Springer contacted Aretha Franklin, as he had in the previous six months to see if she would appear in the lead role of a Broadway production that he hoped to mount about the life and music of Mahalia Jackson. Finally, Ms. Franklin said that she was very interested if they could agree on the financial terms, rehearsal and performance dates. Ms. Franklin, who lives in Detroit, telephoned Springer at his office in New York the following week to tell him to make the necessary contracts, and forward them to her attorney, J.C. Smithers, in Detroit. From that point and during the next few months, Springer was in frequent consultation with Ms. Franklin.

Ms. Franklin sent Springer a list of her open dates so that there would be no conflicting engagements. After consulting with Ms. Franklin, Springer hired George Faison as director-choreographer. They both flew to Detroit in March to discuss various aspects of the production. Ms. Franklin agreed to a tentative schedule to begin rehearsals in April and performances to begin in May. On his return to New York, Springer entered into partnership agreements with various investors to finance the "Mahalia" production. He also began calling promoters and theaters in various cities in an effort to reserve dates for performances.

Springer contacted J.C. Smithers and arranged to meet with him on March 23 in Detroit, and on that date Springer and his attorney, Hector Lopez, met with Smithers to confirm the financial terms: Franklin would be paid \$40,000 per week in salary, plus a weekly amount for expenses (\$5,000 per week while in New York; \$4,000 per week outside of New York). In addition she would receive 15% of the show's gross weekly revenues exceeding \$225,000, and 20% of the show's weekly profits. In return, she would commit herself to 12 weeks of performances. Lopez and Springer asked Smithers to call her and obtain her approval of these terms. Smithers left the meeting room, and upon his return shortly thereafter, he indicated that she had agreed to the terms. The only major issue left unresolved at the close of the meeting was the location for the rehearsals. Smithers requested that they be held in Detroit, but Faison subsequently vetoed this proposal, stressing that lighting and costume designers that were to be engaged, were all in New York. Ms. Franklin ultimately learned about the rehearsal site from Smithers.

Lopez began to draft the contract, but when each draft was presented to Smithers, it began, "This agreement when countersigned by you, shall constitute our understanding until a more formal agreement is prepared." Each draft contained at least one change. One issue involved the schedule of rehearsals to begin in June; another was for Smithers to have physical access to the box office, but these major issues were resolved, and a final draft of the contract was ready for signature on June 7, the date that Ms. Franklin was scheduled to come to New York to begin rehearsals.

During the interim, Springer hired sets, lighting, costume designers, stage and technical crew, reserved dance studios. Springer was also in frequent communications with Ms. Franklin during this period as was Faison with respect to the backup singing chorus. At one point, Ms. Franklin sang one of the production songs to Springer over the telephone. June 7 passed without Aretha Franklin arriving in New York for rehearsals. When Springer and Lopez contacted Smithers, his answer was "sorry boys, she would not fly or travel to New York."

Springer paid the cast through the week and suspended the production. He attempted to secure some other well-known performer to fill the title roll, but none of the ladies that he contacted would step into the role at the juncture. Springer had to pay off Faison and the potential investors. When Lopez and/or Springer tried to contact Smithers the response was always the same, "to bad boys, no contract." What advice would you offer Springer? Why? In your answer, anticipate what J.C. Smithers would argue.

BEST ANSWER

I would advise Springer that since the negotiations were so detailed and almost completed, he could have reasonably relied on a contract being forthcoming. This reliance would constitute a suit in Promissory Estoppel. First you would have to show that Franklin had represented herself as intending to do the show and had also intended Springer to rely on this. This is shown by the almost completed negotiations that had only minor adjustments to be made. Next, you need to show that Springer relied on her representation that she would perform. He did this. It is shown by his acts of hiring sets, lighting, costume designers, stage and technical crew, and reserved dance studios and finally Springer needs to show it would be an injustice to allow Franklin to back out. There is an injustice, her representing that she would perform caused Springer to rely to

his detriment. He spent much money by his acts of hiring sets etc. Springer should be rewarded his reliance interest which is out of pocket expenses Springer has incurred as a result of Franklin's representation. Those reliance costs would be Springer's costs of hiring sets, lighting, costume designers, stage and technical crew and reserve dance studio. Smithers will argue that negotiations are just that, negotiations. No contract was ever formed. Smithers would further argue that while still in the negotiation stage one runs the risk of a contract not being formed. Again, I would advise Springer that he negotiations were at such a stage of completedness that Springer's reliance is justified.