

# Contracts

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## Fall 1994 Contracts Final

Contracts Fall 1994 - Exam and Outline of Answer

CONTRACTS A Sects. 1,2, &3

Professor Janet Flaccus

FINAL EXAMINATION

Fall 1994

You are not allowed to bring any written information into this exam. It is a closed book exam. No mechanical devices can be used except a pen or pencil. If a typewriter is to be used, it cannot have any memory. This is a three hour exam. There are four essay questions. The approximate time marked at the top of each question is a guide as to how much time you should spent on each question. Use your time wisely.

THIS IS A THREE HOUR EXAM

Be sure to place your exam number on each of your bluebooks as well as the test itself. DO NOT put your name anywhere. Identify on the front of each bluebook the questions answered in each. Note on your first bluebook that the exam is for contracts.

ALL test copies must be turned in with your bluebooks. Any failure to do so will be an Honor Code violation. All bluebooks must be turned in within the time specified. Any answer or portion thereof not turned in on time will not be graded.

QUESTION ONE

(APPROXIMATE TIME 50 MINUTES)

The Sames have a house in Memphis they advertised for sale. The Sames bought the house 1 year before from Tom who had built the house. The Brines were on a house hunting trip from Minnesota wherethey were living. Mr. Brines' job demanded a move to LittleRock. It was their first day in Memphis when the Brines saw theSames' house. The Brines made an offer of \$200,000 for the house and the Sames accepted the Brines offer. The two parties sat down in the living room and wrote out a contract by copying paragraphs from a real estate form as amended by them. The written contract covered all terms of the transaction with the exception of a claim by the Brines that the Sames agreed to make the Brines' purchase conditional on, Mr. Brines' mother selling her house. (-The mother was then to move into the Brines' old home.) The Sames say that they never made such an agreement. The parties did agreed that the Brines could move into the home a month before closing on the house purchase June 1. At closing, the Sames were to give to the Brines the deed to the house and the Brines were to pay the purchase price.

After the Brines moved into the house they learned, by talking to one of the neighbors, that two houses away is a house that puts on an enormous Christmas light display that paralyzes traffic for one square mile for more

than a month. The light from the millions of lights in the display turns night into day and makes sleeping very difficult. The display and the complaints of the neighbors has made the local paper. Two days after hearing the above, Mrs. Brines notices some cracking in the ceilings of two of the downstairs rooms. These cracks are barely visible. Mr. Brines, an engineer, had one of his friends look at the cracks and the friend said that the foundation of the house will need repair because it was not built correctly. The next day Mrs. Brines noticed that the Sames took all of the upholstered window seats (there were eight of these). The Brines looked at the contract they signed with the Sames and they found the following language:

"The following personal property will be transferred to the Brines along with the house:

1. All window treatments;
2. The furniture in the sun room and
3. The outside furniture"

The Brines do not want to buy the house. They tell you that they thought the window seats were part of the "window treatments". But they know that the Sames will testify that in their minds only the window draperies were the "window treatments" not the window seats. Moreover, the Sames truthfully say that they had never seen the ceiling cracks. The Brines come to you to see what rights if any they have to redress their problems. Discuss.

#### QUESTION TWO

(APPROXIMATE TIME 50 MINUTES)

Joe and Don are cousins and were very good friends. Joe told Don that Joe was looking at a used XXZ motorcycle and it was the best looking bike that Joe had ever seen. Joe explained that the XXZ motorcycles were not made anymore and they were rapidly becoming collector bikes. He told Don that the only problem was that the seller, Sam, was asking too much for the bike. Joe explained that he had offered \$10,000 for the bike but the seller was asking \$12,000. Joe was convinced that if the seller received an offer substantially lower than Joe's offer that the seller would come down in price. Joe asked Don to make an \$8,000 offer for the bike. Joe was very reluctant to do so. To make Don change his mind, Joe emphasized how helpful Joe had been for Don. Joe mentioned just how helpful it had been for Joe not to mention to Don's wife the fact that Don was having an extra-marital affair. Feeling that he had little choice, Don agreed to make the offer after getting assurances from Joe that Joe would be the one buying the bike.

Don put in the mail the following signed writing addressed to Sam:

I hereby agree to buy the XXZ motorcycle you have for sale. I will pay no more than \$8,000.

While viewing the bike several days later, Joe noticed transmission fluid leaking from the bike. Knowing that the bike was being sold with out any warranties because it was being sold "as is" as declared by a large sign on the bike, Joe told Sam that Joe was no longer interested in buying the bike. Disturbed by the loss of a potential buyer, Sam placed in the mail an "acceptance" of Don's \$8,000 "offer". The next day, Joe told Don about the bike's problem and that he, Joe, was not going to buy the bike. Don immediately called up Sam and told Sam that Don was revoking his offer.

Don comes to you and asks you to solve his problems. Discuss who has what rights against whom and why.

#### QUESTION THREE

(APPROXIMATE TIME 50 MINUTES)

Abe, a plant wholesaler, and Bill, an owner of a retail plant store called "The Greenery", had been doing business for the past 10 years. Over that time they had 30 different contracts in which Abe sold plants to Bill. In the contract in question, Bill sold his plant store to Abe. The parties signed a written contract that contained all the terms they had agreed upon. One of the paragraphs said:

"In addition to the real estate being transferred as described above, Bill agrees to transfer to Abe the following pieces of personal property as part of the sale:

1. all plants and plant materials listed on schedule A;
2. all non-plant inventory located on the store premises at the time of the transfer of possession;
3. all equipment located on the store premises at the time of the transfer of possession;
4. all accounts receivables outstanding at the time of the transfer of possession."

Four months after Abe paid for and took possession of the store, Bill opened up a plant store called "The Greenery" within two miles of Abe's store. This store attracted many customers that used to shop at the store now owned by Abe. To make matters worse Abe has discovered that Alice, Bill's bookkeeper, inflated the profit of the store for the previous three years by 20% per year. Alice, at the request of Bill, showed these figures to Abe several weeks before Abe and Bill reached an agreement. Abe thinks he can prove that Alice intentionally changed the profit figures but is not at all sure that Bill had anything to do with the change and thinks that Bill knew nothing about it. Abe relied on the profit figures Alice gave him in deciding to buy the business and would not have purchased the store if the profit picture had been truthfully given.

Abe has come to you to see if there is anything he can do about his situation. He tells you that the two times he and Bill had disputes in their previous contracts that they could not resolve, they submitted the issue to a local arbitration firm. He does not want to go to arbitration for this dispute because the local arbitration firm specializes in inventory-purchase disputes. Moreover, their earlier contracts had called for arbitration and this business sale contract is silent on the issue.

#### QUESTION FOUR

(APPROXIMATE TIME 30 MINUTES)

RRW sent to ABC a preprinted purchase order for 400 picture frames. It asked ABC whether the frames were available at \$5.00 per frame. RRW's purchase order said in paragraph 17 "The price shall be paid 90 days after delivery. If the price is paid on delivery, RRW shall be entitled to a 20% discount." In paragraph 25 the purchase order stated "The terms in this contract shall be the terms specified herein. Any terms suggested by the other party shall be mere proposals that are ineffective unless assented to by RRW in writing". ABC sent to RRW a preprinted acknowledgment noting the receipt of RRW's purchase order and responding that the picture frames were \$5.00 each and that 400 of them could be shipped immediately. The acknowledgment stated in paragraph 15 "The total price shall be paid by the buyer before the goods are delivered to the buyer or simultaneously therewith." - ABC then promptly shipped the frames and RRW accepted them. RRW, however, only paid \$1,600 (the purchase price of \$2,000 minus the 20% discount). When ABC learned of the payment it called RRW and complained. If ABC sued RRW for the \$400, who would likely win and why?

#### OUTLINE OF ANSWERS TO ABOVE TEST

#### QUESTION 1

I. Condition that mother sell her house.

A. If in fact there was such an agreement (a real question here) the Parole Evidence Rule would not block evidence of the agreement even if the writing is fully integrated.

1. Since this writing contained their complete agreement it is likely to be integrated.

a. This was not a standardized contract. Both parties participated in drawing it up. The fact that they took much of their language from some other form would not matter.

2. But evidence that the contract is conditional on the happening of something can always be introduced.

3. If the parties made such an agreement and Mom did not sell her house the Brines would not have to perform.

II. Ceiling Cracks

A. Since the Sames' did not know of their existence, they have no obligation to disclose the cracks to the Brines.

B. The warranty of habitability may help them. Tom would have made such a warranty, as the builder, to the initial purchasers, the Sames. State courts split over whether this warranty runs to subsequent purchasers. Since the purchase by the Brines is only one year after the house was built, the Brines may be able to sue Tom.

1. Foundation problems, like potable water, affect the habitability of the house.

III. Christmas lights - obligation to disclose.

A. Here the Sames knew of this since they had lived in the house one year which means they were there for one Christmas.

B. Prof. Keeton's factors indicate when a court will hold that there must be disclosure.

1. Here the seller is the disclosing party.

2. The Sames did nothing to hide the problem. They were not involved in a half truth.

3. The problem was extrinsic to the house being caused by the neighbors. In most disclosure cases, like the termite cases, there is something wrong in or on the property.

a. The local paper had carried stories about the problem. This adds to its extrinsic nature.

b. But the Brines came from Minn. and were visiting-Memphis for the first time when they bought the house, therefore they would likely not know of the problem.

4. There was no disparity in the bargaining position of the parties. If anything, since Mr. Brine is an engineer, the buyers have the upper hand.

C. If the Sames were obligated to disclose, the Brines could rescind the transaction for a misrepresentation. But they probably were not obligated here.

IV. Window seats and whether they were part of the sale.

A. Even if the window seats were part of the sale, this would not allow the Brines to get out of the contract.

B. Whether they were part of the sale will depend on how the court construes the phrase "window treatments."

1. Since the phrase is ambiguous, the court will let in extrinsic evidence to shed light on its meaning.

2. Such extrinsic evidence here shows that the parties attached different meanings to the phrase - as was the case in the *Frigalment* and *Joyner v. Adams* cases.

a. In such cases, the court will inquire whether the buyers or sellers had reason to know of the other party's interpretation. We do not have enough facts to answer this question. Further investigation is needed.

b. If one party had reason to know of the other's interpretation then this is the interpretation that the court will give to the phrase.

c. If, however, neither party had reason to know of the other's interpretation, then whoever is the litigant (and that would be the Brines here) would lose.

d. This alone would not be worth suit. Maybe the parties can work something out themselves about the seats.

C. No maxims of interpretation apply here. There is no application of *contra proferentum* since both parties drafted the contract and the language does not give rise to one of the other maxims.

## QUESTION 2

I. Is there a contract between Sam and Don, i.e., must Don buy the bike or be in breach.

A. Don will argue he never made an offer because he said that he would not pay more than \$8,000 (analogizing to *Scolnick* "my rock bottom price is \$2,000").

1. Most courts would find that he made an offer since this is a letter to Sam, specifying the item being purchased and saying (probably) that he will pay \$8,000.

2. If this is not an offer, then Don has no contract to buy the bike.

B. If it is an offer, then Sam accepted the offer under the Deposit Acceptance Rule before Don revoked his offer since Sam put his acceptance into the mail the day before Don called up to revoke his offer.

C. It is no defense that Don never intended to buy the bike. Under the objective theory of contract formation Don's undisclosed intention is irrelevant if to a reasonable person it looks as if he is making an offer. This was the case here.

II. Joe is not obligated to buy the bike from Sam since he revoked his offer and Sam has never accepted his offer.

A. Saying that he is no longer interested in buying the bike is probably sufficient to revoke the offer.

B. Even if it is seen to be equivocating, Sam has never accepted Joe's offer.

III. Don and Joe have no contract.

A. If Don has to buy the bike he cannot sue Don for breach of contract.

B. There is no bargain for exchange here. Don is doing a favor for his cousin. Don is getting nothing out of the transaction.

C. Nor does the fact that he is being pressured to do the favor turn it into a bargain for exchange. It might create a cause of action for the tort of duress.

D. Since there is no contract between Don and Joe the fact that Joe may have engaged in duress does not help Don unless it rises to a tort.

1. True, this threat to tell the wife of Don about Don's extramarital affair may be improper as being in bad faith but both parties have engaged in culpable conduct and will not draw on the court's sympathies. Moreover, Joe did not say he would tell the wife, he just implied it.

2. Don may well be able to show he had no reasonable alternative since he did not want his wife to find out.

3. But even if this were duress, duress can only be used defensively (as a shield) and is not a basis of liability unless it was tortious.

4. Besides to sue in tort will make public the affair, something Don may want to avoid.

IV. Promissory Estoppel liability of Joe.

A. This can be used to substitute for consideration.

B. Joe has not made the promise "I will buy the bike if you make the offer" but he gave assurances to Don that he, Joe, would be the one buying the bike. This will be enough for promissory estoppel which is equitable in nature.

C. Joe intended Don to rely on Joe's buying of the bike to influence Don in making the \$8,000 offer.

D. Don did rely on Joe's promise "reasonably" since it seemed that Joe was in love with the bike. Moreover, Joe is his cousin and best friend and Don would not even think his best friend would be lying.

E. Lastly, Don relied on Joe's promise by making the offer. It works to his detriment if he has bought a motorcycle which is worth less than \$8,000. We do not know the fair market value of the bike. If it is worth at least \$8,000 Don can sell the bike and not sue. If it is worth less than \$8,000 then he has a case under promissory estoppel and would not need to get into the arm twisting Joe engaged in over his extramarital affair.

### QUESTION 3

I. Competing store by Bill the seller is not a basis for rescission or breach.

A. Under the maxim *expressis unius exclusio alterius* the contract contained the personal property being sold and did not include language such as "and the like" or "including but not limited to" which would broaden the list to include additional personal property. So no additional personal property will be included.

B. Abe could have bought "goodwill" which would include the name of the business "and this would have

prevented Bill from opening up another store using the name. But Abe's contract did not buy "goodwill." This is a bad bargain on Abe's part but not a basis for breach of the contract or rescission.

## II. Profit misrepresentations by Alice.

A. Misrepresentations can be a basis for rescission of the contract.

B. Nor would an integrated contract and the parole evidence rule bar evidence of the fraudulent statements. The PER never keeps out evidence of defenses.

C. The big question is whether Bill will be liable for the misrepresentations of his agent-bookkeeper.

1. Alice has express authority to show the books to Abe since Bill asked Alice to show Abe the books. This would make Bill responsible under agency law for the actions of the agent - Alice. So Bill would be liable for the misrepresentations of Alice.

2. This is especially the case with misrepresentations that involve scienter. If Abe can show that Alice intentionally showed him false profit figures then Bill will be liable for those misrepresentations.

3. Abe should be able to show reliance. It is easier to show reliance when the misrepresentation is intentional as it was here. Even though relying on profit statements is often not reasonable reliance Abe has a good argument here, that, since Bill told Alice to show the figures to Abe that Bill intended to encourage Abe to rely on the figures.

a. Abe, in fact, relied since he would not have purchased the business if the profit picture had been accurately stated.

## III. Arbitration or no arbitration.

A. Whether Abe must resolve this dispute in arbitration will depend on whether the parties' course of dealing from their previous contracts will place an arbitration term in this contract.

1. Even though this is a common law contract probably, the concept of course of dealing exists in most states in the common law.

2. Whether it falls under the UCC depends on what predominated. Here goods are sold. These include the personal property sold, the inventory and equipment. But real estate was also sold and no price breakdown is given so do not know which predominated. The only difference is that under the UCC there is a stronger likelihood that any of course of dealing, usage of trade or course of performance will be part of the contract since 1-201(3) includes them as part of the parties' agreement.

B. Here, however, even if the contract is under the Code there are good reasons why the course of dealing did not come into the parties' contract.

1. First, there were only two times the parties went to arbitration. These, however, were the only two times they had a dispute they could not resolve. Like *Nanakuli* this suggests a contractual term course of dealing.

2. More importantly, the prior contracts called on the parties to arbitrate, so when they did so they were merely following their contract.

3. The business-sale contract has no arbitration term in it. This makes it quite different from the previous contracts.

4. The earlier contracts involved a sale of goods by Abe to Bill whereas the contract in question involves a sale of a business by Bill to Abe.

5. Lastly and related to the above, the arbitration under the previous contracts was to a firm that specializes in inventory purchase disputes. The sale of a business is a different type of contract.

C. Abe has a good argument that the current dispute should not be handled in arbitration.

#### QUESTION 4

I. This contract is under the UCC. Picture frames are "goods." They are moveable at the time of identification of the contract of sale.

II. If RRW's purchase order is an offer then they were probably entitled to take a 20% discount for prompt payment.

A. Since they were inquiring about the price, the P.O. may not be an offer.

1. Offer is defined as: "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it," Rest. 2nd 24. It is certainly questionable whether ABC had power under this purchase order to conclude the deal. (Fitz shoe problem on p. 279).

B. If the P.O. is an offer then ABC's acknowledgment accepted RRW's offer even though it had a clause that directly contradicted the credit term in the P.O. 2207 rejects the mirror image rule and allows the "acceptance" with a different term to act as an acceptance if it looks like the parties intended a contract and it does here since goods were sent and accepted.

C. The different term would not come in, even though both parties are clearly merchants, because clause 25 in the P.O. gives advance notice that the offeror will not accept into the deal additional or different terms. Courts would probably give the clause effect.

D. However, there are three approaches the courts take to different terms:

1. The first two are very similar and under them RRW would get the discount. First, courts apply 2207(2) even though it just covers additional terms. Under this approach, RRW's clause objects under 2-207 (2) (a).

2. Some courts say different terms never come in.

3. The majority of courts use the "knock out" rule. This knocks out both terms and goes into the Code and takes a gap filler-which is payment on delivery - no credit term. Under this approach no discount for cash payment will be in the contract.

III. If, however, the P.O. is merely asking for an offer then ABC's acknowledgment is the offer and it calls for full payment at delivery and contains no credit term.

A. If the acknowledgment is the offer then RRW accepted the offer when it accepted delivery of the picture frames and breached the contract when it paid \$1,600 instead of \$2,000.

IV. Even though the price of the picture frames is more than \$500, the Statute of Frauds should not be a problem.

A. First, both the purchase order and the acknowledgment should be signed, they contain the quantity term and should indicate that a contract for the sale of goods exists.

B. Moreover, there has been acceptance and payment. Although the payment is only part on readily dividable picture frames, this will make it more likely that a court will find the writings sufficient.

Professor Flaccus Spring 1986

## FINAL EXAM

You have been allowed to bring your Farnsworth Supplement to the exam (or other version of the UCC) but no other materials. This is a three (3) hour exam. There are three (3) essay questions. The time marked at the top of the essay questions is a rough guide as to how much time you should spend on each question. Use your time wisely.

## THIS IS A THREE HOUR EXAM

All exams must be turned in Room 113. Be sure to place your exam number on all of your blue books as well as your exam. Number your blue books as well. You are required to turn in the copy of the exam itself as well as your answer.

## QUESTION I

John Brown is an engineer who specializes in designing water treatment plants. He entered into a 5 year employment contract with RC Engineering, a firm in Bronson, Nevada. The contract provided that Brown would design Bronson's sewage treatment plant. The contract provided that Brown's work was "to be satisfactory to the management," "that all modification hereto must be in writing" and "that if Brown leaves RC's employment for any reason, Brown promises not to use his design skills in Bronson or any community within a radius of 180 miles from the courthouse steps in the City of Bronson." The design work was to be done under a set time schedule. Brown timely completed the first three stages of a fifteen stage project. His performance on the fourth and fifth stages took more time than the contract allotted., in part, because RC delayed in getting to him important data. John, up to this point, always got favorable reviews from RC for his work. The total time delay for these two stages was a total of thirty days. Brown then successfully completed the sixth stage, but while he was working on the seventh stage, the President of RC said he was dissatisfied with the time it took Brown on the third and fourth stages and was thinking of firing him. Brown told him that such was not justified and would be hard on him because of financial pressures in his life right at that moment. The President then said he would have to fire Brown anyway. Brown packed up his things and left the office. Brown has had his car taken and his credit rating lowered because of his financial troubles. He says this was caused by RC's firing of him. Two weeks later the President of RC calls Brown and offers Brown a job at RC designing two banks downtown. Under this contract Brown would be paid the remaining amounts under his sewage treatment contract but the benefits would be slightly reduced. Brown refuses to take the job.

Brown comes to you for advice. He tells you that the contract was supposed to have said "reasonable satisfaction" and that this is what the parties agreed. He also notes that the son of the President of RC has been hired in his place. There are three other towns within 150 miles of Bronson which need sewage treatment

plants in the near future and only Brown and the president's son have the design skills.

Please discuss who has what rights against whom. At the time Brown left RC there were 2@ years remaining on his contract. He was to be paid \$30,000 per year and is still owed \$12,000 for work he had already completed. Brown notes that this work for which he has not been paid, is worth more than the \$12,000 RC agreed to pay for it. If any facts not stated are needed to fully discuss the problem state what they are and proceed with your answer.

## QUESTION II

RC Construction Co. is a general contractor on two different construction projects. One project is the erection of a school building and the other is the erection of a warehouse building. On the school project, RC is having contract difficulties with the electrical subcontractor JM Electric. Their contract states that JM "shall install the electrical wiring as soon as RC finishes the plastering work." JM is refusing to install the wiring until the plastering work is completed. RC has been demanding that they begin the electrical work for the past 3 weeks. JM has refused. Last week RC told them that if they did not begin the electrical work in one week he would give the work to another subcontractor. They did not begin and another subcontractor was hired. JM was to be paid \$10,000 for its work. It has already been paid \$5,000. JM had spent \$5,000 so far on its work. RC had to pay \$6,000 more to the other subcontractor to do the job. RC says that JM is known to be bribing electrical inspectors but it had not done any bribing on this job. RC also says the contract clause in question was inserted at JM's request in order to give JM a rough guideline as to when its work would be needed. The contract between RC and the school does not require the job to be done in any length of time. Discuss who will be liable to whom, for how much and why.

RC is also in litigation over the warehouse job. This time it is with the owner, Ted Brown. This dispute arose when RC placed the outside stone being used on the sides of the warehouse vertically not horizontally. RC admits that the contract calls for horizontal placement. The building was nearly complete when Brown saw it. He was so mad he ordered RC off the job site. The work remaining to be done included landscaping, the driveway and the parking lot. These three items cost \$30,000 to finish. The total contract price was \$400,000. The owner has refused to pay RC the remaining \$50,000 on the contract. The contract specifies that no payment from the owner is due until the architect approves the work by issuing his certificate. No certificate has been issued to RC. RC has, however, been paid all but the \$50,000. The contract also calls for liquidated damages of \$300 per day for every day the warehouse is unfinished past September 1, 1986. The warehouse was not finished until October 1, 1986. RC has sued Mr. Brown and he has counterclaimed. Brown claims that RC breached the contract and he suffered many damages including the fact that he had to sell the warehouse quickly because it was so ugly, given the vertical rock, and he sustained a \$30,000 loss on it. Brown also claims the flooring in the warehouse was sloping and needed to be corrected.

This cost \$15,000. You learn that the fair market value of the warehouse was not diminished by the placement of the rock and the reason the liquidated damages clause was inserted was because Mr. Brown did not want to pay another months rent for the warehouse he was currently using. This rental was \$4,000 per month. There is implied in all construction contracts in this jurisdiction an obligation on the contractor to do work in a workmanlike manner which would pass without objection in the trade. RC tells you that he agreed orally with Brown to skimp on materials and labor so Brown could get a better price and that this is why the floor sloped.

Who will be liable to whom, for how much and why.

### QUESTION III

ABC, Inc. and XYZ, Inc., both dealers in cryptolite (a granular fertilizer), have two separate contracts each providing that ABC agrees to sell 1,000 bags of cryptolite per month for five months, delivery to be made by the end of the month. XYZ agreed to pay \$5.00 per bag for the cryptolite. Payment was to be made by paying \$2,500 on the 15th of each month with the balance due upon delivery. Each contract specified that "all modifications to the contract must be in writing, signed by both parties" and that "this contract includes the complete agreement of the parties". Unknown to XYZ, cryptolite is sold in sacks that contain 40 lbs of cryptolite while bags would carry 50 lbs. of cryptolite. ABC delivered in sacks. After the first shipment was made, XYZ asked if it could pay the remaining \$2,500 10 days after delivery and ABC agreed. The next two shipments were handled this way, so XYZ arranged its financing on this time schedule. When the fourth shipment under the first contract is delivered ABC refuses to deliver unless XYZ pays the \$2,500 owing. XYZ protests. ABC refuses to deliver and cables XYZ that ABC will deliver no more cryptolite under either contract unless XYZ pays pursuant to the contract terms. XYZ responds that it is ABC who has breached the contract. ABC gives notice to XYZ of ABC's intent to sell the cryptolite to another buyer which it does for \$6.00 a sack. Its costs to procure each sack are \$4.00 and its building rental and insurance costs are \$1,000 per month, \$.50 per sack sold. It paid a sales person a \$500 commission for making the XYZ sale. ABC sued XYZ for damages and XYZ counterclaims.

XYZ wants to be reimbursed for the \$2,500 advance payment it made for cryptolite not delivered and for damages. XYZ had a contract to sell the cryptolite to MNO. When it went out on to the market, three months after ABC refused to deliver, to buy the cryptolite for the MNO contract It could not find any for sale. One week before, the dictator of the only country that supplies cryptolite shut off supplies to hurt the countries in the capitalist world. This forced XYZ to default on its MNO contract for which it paid damages of \$20,000. XYZ says ABC breached the contract. ABC says XYZ breached the contract. If XYZ had tried to buy cryptolite before this action by the dictator, it could have procured such for \$5.50 per sack.

Who has breached the contract and who is liable to whom and for how much. If any facts not stated are needed to fully discuss

the problem state what they are and proceed with your answer.

HAVE A GOOD SUMMER!

ANSWER OUTLINE  
CONTRACTS  
Spring 1986  
Question 1

I. What are contract terms?

A. Satisfaction - Objective or Subjective

1. Some courts imply reasonable satisfaction except in non-commercial setting - but not clear with employment contract.

2. PER - can Brown introduce evidence that parties agreed it would be reas. (obj.) - is it consistent additional info.

a. diff. tests (Gianni) k covers so can't come in.

b. (Masterson, Seagrams) looser test (□216 Rest.) Naturally omitted from writing.

1. May not come in under either.

C. argue reformation mutual mistake (Bolinger).

B. Covenant Not To Complete

1. must be reas. both as to time an geographical area - here 180 radius - maybe too large geographical area.

a. Population need of skills is important This would influence court.

b. blue pencil strike down only in part. Some states will not use blue pencil doctrine. - Arkansas for example

C. Some courts refuse to enforce when employee is fired.

II. Who Breached k

A. Employer (RC) - depends on satisfaction ruling. But even if subjective - the real reason Brown fired may be to get President's son a job. Rating of performance up to this time was good - so violate good faith (Devonne)

1. Prevention of Performance - RC slow in getting data - this caused delay in part so may excuse failure to perform by Brown.

B. But were RC's statements clear statement of firing or only indications he might be thinking of such.

1. If actually only equivocal then when Brown walked off he breached k by refusal to perform.

2. If job performance was not satisfactory then Brown breached.

### III. Damages

A. If RC breached can sue for 2 1/2 years of salary \$75,000.

1. But duty to mitigate - was he looking for other jobs?
2. Refusal to take job offered by RC to design banks. Same pay, diff. benefits and different design skills. (Parker)
  - a. Discuss fact that the job was offered by the breaching party.
3. Credit injury and car repossession - Hadley & Baxendale - here statement to Pres. may suffice.
4. \$12,000 owing for work already done.
  - a. restitution if ask for value of benefit conferred must sue in quantum meruit on whole k - would not want to do this.

B. If Brown breached RC damages incurred in getting someone else - not much here - son.

1. But can Brown sue in restitution for \$12,000 (more since benefit conferred worth more).
    - a. depends on whether breach is willful prob. not so can get restitution here even if in breach.
  2. Discussion should include a short discussion of materiality of breach.
- 48 pts

### Question 2

#### Part A Construction of School RC vs. JM

I. Contract term unclear "as soon as" seems to create a condition that JM's work was not to begin until plastering complete.

A. JC extrinsic evidence that term put in to give JM rough idea of time not and to create a condition of performance.

1. must there be an ambiguity before extrinsic evidence can come in. Courts split Masterson liberal rule.
2. Besides argue ambiguous since "as soon as" seems to create a condition but it does not make any sense to have electrical work done after plastering.

B. If it creates a condition JM did not breach by refusing to work so RC would be in breach - and the breach would clearly be material.

1. But if not a condition then did JM breach by delay? 3 weeks and demand by JM (no 2-609 demand) delay can give rise to material breach but k does not require job to be done in particular time frame.

2. Even if JM breached had it substantially performed and thus unable to sue on k. Here had done approx. 1/2 of job - prob. a material breach - no substantial performance.

II. Illegality - can RC use as defense against JM's suit on k

A. too remote - no evidence linking bribe to this project. Thus this would even be an extension of McConnel - few courts would be willing to extend doctrine this far.

III. Damages form A & B

1. If RC breached then JM entitled to \$5,000 amount remaining to be paid on job (mitigation not an issue since a business) - cost avoided (don't know this).

2. If JM breached RC can get \$11,000 - \$5,000 (cost avoided) = \$6,000 - value already received \$5,000 = D = \$1,000. This assumes the value of performance would equal \$11,000 paid for performance.

Part B Construction of Warehouse, RC vs. Brown

I. Here a clear breach but did RC substantially perform. If RC did then RC could sue on the contract despite the fact that it breached.

a. Here landscaping driveway and parking lot remain. Cost \$30,000 out of \$400,000 - a small part. Rock was misplaced and floor was sloping - unclear whether court would find that this constitutes substantial performance - cases vary considerably.

b. Was sloping floor a breach? Depends on admission of extrinsic evidence (PER). RC wants to introduce oral agreement that he would give a lower price if Brown allowed a lower standard of workmanship.

a. Was this agreement consistent or inconsistent. Here it is inconsistent with an implied term. Masterson said this is not "inconsistent" since implied terms are not agreed upon by parties.

b. Implied nature of term is also relevant if court is applying more restrictive PER rule discussed in Gianni.

C. If evidence comes in floor may not be a breach so Brown not entitled to \$15,000 in damages to fix. If it is a breach Brown entitled to \$15,000 in damages to fix.

II. Architect's Certificate condition of payment - gen. can only get around by showing bad faith. But some courts allow waiver. Here \$350,000 had already been paid despite no architect's certificate so may have been waived.

III. Brown's damages

A. \$15,000 floor (questionable)

B. \$30,000 due to rock placement. Even if allowed damages for

this - not \$30,000 but cost to put rock horizontal.

a. Grove/Peevhouse FMU is the same despite breach. Court may say cost to repair greatly exceeds loss in value and limit recovery to this.

1. Brown will argue aesthetic value.

C. \$300/day lig. damages - \$9,000 or is it a penalty.

a. Were actual damages difficult to ascertain at time k entered into - not here - knew what warehouse charge was \$4,000 a month.

b. Amount fixed 9,000 must bear a reas. relation to actual or anticipated damages - here \$4,000 so prob. will be struck down as penalty and Brown will be limited to \$4,000 delay damages.  
50 pts.

### Question 3

I. As to Ist k the issue of who breached depends on whether oral modification will be given effect despite k lang. requiring a writing.

A. Under 2-209 consideration is not needed but k clauses requiring a writing are allowed by the Code.

1. But such k clauses can be waived - courts differ as to their view on waiver.

a. a few require waiver of k clause requiring a writing.

b. many find waiver if one party has relied to its detriment on the modified k.

1. only reliance here was XYZ arranging its financing to pay \$2,500 10 days after delivery.

2. But even if k required writing and this can be waived, the waiver can be retracted as to an executive portion of the contract as long as the other party has not relied to their detriment. Once again this issue turns on whether financing arrangement is such reliance.

II. If k was modified and ABC could not retract, than ABC has committed a breach. This is an installment k 2-612 and before a party can treat a breach as a total breach it must be shown value of k as a whole has been substantially impaired.

1. Since ABC refused to deliver any more cryptolite the value of whole is substantially impaired.

### III. Damages for XYZ

A. Cover 2-712 - but unable to do so - perhaps because 3 month is an unreas. length of time to wait 2-716 inability to cover ground for specific performance.

1. 2-723 market damages - price of market fixed when buyer learned of the breach - amount not given here market price - k price.

IV. If the k clause was not waived then XYZ has breached by refusing to pay upon delivery. But even if XYZ breached the 1st k for 5,000 sacks does this breach justify cancellation of the second k - probably not.

A. In general breaches under one k have no effect on separate k's between the parties.

1. ABC could have used 2-609 since breach would create reasonable grounds for insecurity as to performance on the 2nd k - but not done here.

B. So even if XYZ breach 1st k ABC breached 2nd k.

V. Consequential damages - k breach with MNO 2-715

A. Must consequential damages be foreseeable? - here caused by inability to cover - not just that XYZ had a contract with MNO.

1. If ABC knew of k with MNO is this enough to make it liable or must it know of inability to cover. Here actions by dictator - so probably was not foreseeable - cases don't raise the issue.

VI. Restitution by Buyer

A. Even if buyer is in default on 1st k 2-718 allows a defaulting buyer to get restitution (here \$2,500)

1. This is subject to an offset to the Seller for damages.

Vii. Seller's damages

1. 2-706 (gave notice) k price - resale price.

a. Under this formula ABC gets nothing (\$5.00 \$6.00).

2. 2-708(2) is ABC a lost volume seller (resi) maybe - maybe not - here depends how long supply's cut off - otherwise unlimited supply.

a. If can get damages under 2-708(2) resale price does not need to be subtracted.

Statutory language refers only to salvage sale.

b. Overhead 500/sack - under 2-718(2) overhead is part of profit so it is subtracted from costs avoided here \$4.00. So profit is \$5.00 - \$3.50 or \$1.50. (vitex).

3. Incidental damage to Seller - commission on sale \$500.

Viii. If Seller did not breach 1st k by refusing to deliver did it breach by delivering in sacks and not bags? k called for bags and Seller delivered sacks.

A. ABC would want to introduce usage of trade to show that while parties used the word bag they meant sacks since in the trade cryptolite is always sold in sacks.

Both parties were in the trade

2. need regularity of observance in trade

3. It is irrelevant that XYZ was unfamiliar with the trade usage (1-205(3)) since both worked in the cryptolite trade.

B. Usage of trade comes in under 2-202 despite the merger clause in the contract.

1. If it is inconsistent with written terms may be excluded a close here. It seems inconsistent but courts allow similar usages in

C. Course of performance 2-208 - here repeated occasions for performance and no objection by XYZ to delivery in sacks.

## Fall 1985 Contracts Final

Professor Flaccus  
Fall 1985

FINAL EXAM

You have been allowed to bring your Farnsworth Supplement to the exam but no other materials. This is a three hour exam. There are (4) questions. The time marked at the top of each question is a rough guide as to how much time you should spend on each question. Use your time wisely.

THIS IS A THREE HOUR EXAM

All exams must be turned in at 4:30 p.m. in Room 113. Be sure to place your exam number on all your bluebooks as well as your exam. Number your bluebooks as well. You are required to turn in the copy of the exam itself as well as your answer.

QUESTION I  
(Approximate Time: 1 hour, 20 minutes)

Bob Black owns a 1,500 acre farm. He is interested in acquiring six metal storage bins, so on April 15 he contacts by phone Sam Smith, a silo maker, concerning the selling of the silos. Sam tells him that he can provide prefabricated sections that Sam can put together on Bob's land. They agree on a price and Sam promises that the bins will be defect free for one year but that he will not be responsible for damages to anything other than to the bin itself and that this would be Bob's only remedy. They also agree that one bin will be provided in the following two weeks, and that the remaining bins will be provided upon Bob's request and that Bob will request all six no later than a year and a half from the date of their conversation. On April 17, Sam sends a letter to

Bob confirming their conversation concerning the sale of six bins for the agreed upon price. Bob notes in his farm ledger the following, "agreement with Sam Smith re storage bins \$40,000.<sup>11</sup> He also sends a letter to his son Jay noting that "I have finally solved the storage problem by buying some storage bins from Sam".

Two storage bins are put together by May 15 at which time Sam approaches Bob and asks for a price increase since the cost of the bin parts had gone up substantially. Sam, after protesting, agrees to pay the additional amount since he knows he cannot get the bins when he needs them from someone else. The following December, after four of the bins have been constructed one explodes. It is determined that a crack in the bin wall caused the explosion. A farmworker of Bob's is injured by the blast and Bob's house is damaged. Since Bob is not at home his neighbor Tom gives the farmworker emergency medical treatment and then drives the worker 150 miles to the nearest hospital. When Bob learns of Tom's kindness he promises to pay for any costs incurred including gas and cleaning the car's back seat which had become covered with blood, but Bob never does pay. The farmworker dies. Bob also calls Sam and tells him he will not buy any more bins and will not pay the increased price on the first four bins which he had not yet paid. Sam says that it is Bob who is breaching the contract.

Who is liable to whom? Limit your answer to contractual issues. If any fact, important to your answer, is not provided, state what it is before proceeding. Be sure to discuss any remedies available.

## QUESTION II

Approximate Time: 45 minutes)

Joe Brown is a millionaire who collects antique autos. He is interested in having two 1935 sports cars built. He contacts four expert antique car builders and asks them to submit an overall list of costs they would charge to do the job, supplying all parts. Bob Smith is one of the four antique carbuilders and he calls Joe and asks how unusual these cars will be once built. Joe says they will be 2 out of 4 in existence in the U.S. This is important to Bob since he can use this fact in his advertising. Actually there will be 4 such cars in the U.S. but 200 of the 1934 version of the auto are in the U.S. thus making the 1935 auto not very unusual. Bob submits a written proposal on January 25th to do the work for \$15,000 per car for a total price of \$30,000. The next lowest proposal is \$40,000 total price for two cars.

In drawing up his proposal, Bob asked four expert antique motorbuilders to submit proposals to him to do the work on the motors for the two cars. Jane Star, one of the motorbuilders submits a written proposal on January 20th, agreeing to do the work for \$10,000. Jane's proposal is \$5,000 lower than the lowest of the three other proposals. These 3 other proposals are within \$1,000 of one another. On January 26th, Joe Brown sends a letter to Bob accepting his offer to do the job. On January 27, Bob dictates a letter of acceptance to Jane Star which his secretary types and puts in the company mailbox for the postman. Also on January 27th, Jane Star, realizing she had made an error in tabulating the amount of copper and platinum to be used in making the motors, calls Bob Smith and says she will have to withdraw

her proposal since the actual cost will be \$5,000 more. It would cost Bob \$7,000 more to get someone else to build the motors. Bob does not want to do the job if it will cost him \$7,000 more.

Who has what rights against whom? Limit your answer to contractual issues. If there is any important fact not stated in the problem, state what it is before proceeding with your answer.

### QUESTION III

(Approximate Time: 45 minutes)

Tom Bison was talking to his niece Jane one day on the phone. Tom indicated how much he respected businessmen and said that he would give Jane \$10,000 if she got a MBA and became a businessman. Jane who was a local disc jockey said she would like to think over the proposal. Tom lives in New York and Jane in Pittsburgh, Pennsylvania. After considering the proposal for a week Jane quit her job, applied to business school, and enrolled in a GMAT (like LSAT but for business school) cram course. Tom who listens to KDKA, the Pittsburgh radio station on which Jane worked., realizes that Jane is no longer a disc jockey. Worried about some financial reverses he has had, Tom calls Jane and says "Jane, I have had some bad financial problems so I am thinking that I might not be able to give you the \$10,000.11 Jane is saddened by this conversation and indicates that she has already begun. When she does get into business school, 2 weeks later, she attends, graduates with honors after 2 years of studying, and starts to work for Heinz Co. in Pittsburgh. Tom does not pay her the \$10,000. Assume that he can prove that at the time of his conversation with Jane he intended to give \$10,000 to all his neices and nephews.

What rights does Jane have against Tom? If she has any, discuss what her remedy would be. Limit your answers to contractual issues. If there is any important fact not stated in the problem, state what it is before proceeding with your answer.

### SHORT ANSWER QUESTON

(Approximate Time: 10 minutes)

Allied sends an offer to Grummond to buy coiled steel. Its offer is silent on the issue of arbitration. Grummond sends back an acceptance form which includes an arbitration provision. The steel is sent to Allied and Allied pays for the steel. Two months later, Allied learns that the steel is defective. This breaches a warranty included in the contract. Must the parties resolve their differences in arbitration?

If instead of steel coils, a football team was sold, would your answer change in any way, assuming there was a contract breach?

CONTRACTS EXAM OUTLINE  
FALL 1985

### QUESTION I

Art. 2 or common law mixed goods and services (putting bins together) which one predominates? Not clear - prefab so not specially mfg. goods.

Assume coverage under Art. 2 - St. of Frauds - \$500 coverage

a) St. of Frauds 2-201 - any writing by Bob? No indication farm ledger signed. Letter does not state quantity so will not be enforced above one bin.

1. Unclear whether under the code court will use common law doctrine (1-103) allowing joinder of signed and unsigned writings. Moreover courts split on how to apply

b) But here exception 2-201(2) letter written in confirmation of oral contract - here sent and good as against Sam, received by Bob and Bob failed to object within 10 days.

1. but are both parties merchants? Sam is a bin dealer, Bob - 2 definitions - prob. under broader def. - farmer, is farmer tougher issue.

C) also analyze as k which cannot be performed within one year.

d) Rest. 2d § 139 - if exception not met - note problem bringing into code.

Any breach of contract by Sam and remedies if there were a breach.

a) promise that bin will be defect free - here a defect within time of warranty.

b) but contract remedy limitation 2-719 is it unconscionable? 2-719(3)

1. not consumer product

2. Moreover no personal injury to Bob so prob. can't get damages for damages to his house or farm worker, but can get costs for damage to the bin.

3. has no right to cancel the contract since the contract limits Sam's remedy to damages for breach.

IV. Will Bob have to pay the modified price for the bins?

a) 2-209 no consideration needed - pre-existing duty rule does not apply

b) But was modification made in good faith? Here Sam a merchant so must follow commercial reasonableness - fair dealing. So Sam will be able to sue for his expectation interest and Bob can set off damages to the bin.

C) Economic duress - Doral - is it relevant under the Code with good faith requirement?

V. Analysis under the Common Law

a) St. of Frauds - can contract be performed within one year (this is relevant for Art. 2 analysis as well) good argument can possibly be performed so no St. of Frauds coverage but if it does cover

b) any writings? - neither writing alone has all of the needed contract terms. So can court piece two together

1. 2 views 1st - only if two papers specifically refer to one another - not done here.

2nd view - will piece together if both clearly cover same subject matter. This can prob. be shown here. But still quantity prob.

C) Any breach by Sam - Same warranty prob.

1. but can't use 2-719(3) - but unconscionability doctrine exists at common law - court unlikely to hold remedy limitation unconscionable.

d) modification under common law - here preexisting duty problems and no consideration for the modification as to price - so modification will not be given effect. It is important to note that Bob has not yet paid the modified amount. Unforeseen circumstances exception - Watkins & Son.

Neighbor's suit against Bob

I. No consideration - no bargained for exchange.

a) nor can promissory estoppel be used

b) will court enforce as a moral obligation? - weaker case than when son is taken care of or the promise is made because person saved promisor's life. McGowan did allow. Mills did not allow

II. Neighbor's suit against farm worker's estate

a. no contract - no detrimental reliance

b) restitution for value of benefit conferred?

1. prob. with presumption neighbor was acting as a volunteer.

2. fact that he drove 150 miles may be considered unusual and this will rebut presumption of volunteer.

56 Total Points

QUESTION II

Bob vs. Jane - is Jane bound in contract to Bob

a) Has there been an offer and an acceptance - this depends on whether Bob accepted Jane's offer before Jane revoked it.

1. mailbox rule accep. acts as acceptance once it is put out of offeree's control? Here since in Co. Mailbox. N.H. case - court

said accep. when put in out box for outgoing mail. N.H. unusual

a. Rhode Island Tool - accep. jot effective until received - distinct minority

2. Rev. not effective until brought to offeree's attention so ? whether this came before acceptance.

b) If revocation before accep. can Bob use promissory estoppel to bind Jane (Drennen) Rest. 2d 87(2)

1. elements - did Jane reas. expect to induce reliance - yes knew it was for bid by Bob

2. was there reliance? Yes Bob submitted his bid on Jan. 25th and Joe accepts on 27th.

3. note Baird - not all courts are willing to use prom. estoppel in this type of case.

C) If Jane is bound by rev. too late can she rescind

contract due to unilateral mistake

1. Is mistake as to amount of copper and platinum a clerical mistake

2. If it is, two ways of getting rescission

a. was \$10,000 - \$15,000 discrepancy enough to put Bob on notice of a mistake - prob. not. Jane would argue however similarity of other bids (within \$1,000 of one another). This fact makes her \$5,000 lower bid much more unusual

b. would enforcement be unconscionable

1) many courts require that there be no harm to the other party by rescission. Yet there would be harm to Bob here so prob. won't use

2) Moreover \$5,000 loss is prob. not unconscionable.

3. If Jane is bound by promissory estoppel (Drennen) will court use mistake analysis to rescind? probably

Joe vs. Bob - If Jane can get out of contract with Bob can Bob get out of contract with Joe since will cost him \$7,000 more?

a) misrep. - Bob would ask for rescission and courts more likely to allow rescission based on misrep.

1. here a mere half truth. What Joe said was true but gave a misleading picture - so has a duty to disclose in most states. Did Joe know facts about 1934 case?

2. Was this a misrep. of a material fact?

b) here acceptance of Bob's offer on 26th day when Joe put acceptance in the mail.

28 Total Points

### QUESTION III

Did Tom make an offer or a mere offer to make a gift? Hamer v. Sidway - there too Uncle had planned to make gift and court said it still was an offer not a gift.

a) Nor is argument that Uncle would not get any benefit from Jane's becoming a businesswomen persuasive. The issue is whether there is a bargain for exchange not whether Uncle received a benefit - Rest. 2d § 79 & 71

1. Unusual facts that lend court to measure benefit (New-man & Snell's State Bank) are not present here.

b) overt manifestation imp. (Lucy v. Zimmer) - not what he was thinking, i.e. gift

II. Has there been revocation of offer before acceptance?

a) here offer bargained for performance not a promise to perf.

b) But ? whether Jane had begun performance before revocation of the offer. Here enrolled in GMAT cram course and quit job - is this mere preparation to perform - (Evertite)

1. Issue is what is offer bargaining for - here getting an MBA & becoming a businesswomen.

C) Was call by Tom "thinking I might not be able to" sufficient to be a revocation? Probably (Hoover v. Clenents) even though equivocating.

d) If perf. begun before revocation - beg. of perf. where only perf. is bargained for, makes offer irrevocable (§ 45 option contract)

III. If there is an option contract - did Jane have to give notice of acceptance

1. § 54 says not normally, unless offeror is not likely to get notice of perf. within a reas. time.

a. here might have to give notice since two diff. locations and nothing about study of business which would give Tom notice

b. was notice that she had quit her job notice that she had begun performance? Maybe, maybe not

C. if no notice offer lapses

d. Note Jane did fully perform so if an option created then she has accepted.

IV. If no perf. begun before revocation § 87(2) promissory estoppel may make the offer binding.

a) Tom should reas. expect that his offer would induce detrimental reliance before performance was actually begun (like quitting a job)

b) Under 87(2) must show reliance of a substantial character.

V. Promissory Estoppel principles can also be used if Tom did not bargaining for exchange but mere gift.

1.  90 relevant here - must show promise which Tom would reas. expect to induce detrimental reliance and actual reliance.

VI. Oral transaction - any St. of Frauds prob.

a) Maybe contract which cannot be performed within one year

1. actual perf. - 2 years not relevant

2. issue is whether it could be perf. within one year. If bus. school degree can be earned in one year many not fall within the statute.

b) If does come within St. of Frauds - no writing

1.  139 of Rest. could be used since estoppel facts here

Vii. If Jane gets an enforceable contract either having to use  87(2) to create an option contract or  90 to substitute for a bargained for exchange a court may limit her remedy to her reliance cost to her for quitting her job and taking the GMAT exam Note a contract is created so many courts award expectation damages - here \$10,000.

41 Total Points

#### QUESTION IV

Coiled steel - goods Art. 2

(1) arb. term in acceptance - add. term - does not preclude accep. operating as acceptance - 2-207(1) as long as intent to make a contract 2-204

(2) Are B & S merchants? If not only proposal for addition to the contract. If are merchants then term comes in unless one of 3 in 2-207(2).