

**CONTRACTS FINAL EXAM**  
**Santa Barbara College of Law**  
**Instructor: Craig Smith**  
**Spring 2004**

QUESTION 1

Uncle Huey was the sole owner of the Duckworth Farm. Huey had two brothers, Donald and Daffy, and a sister Daisy. In 1994, a crop failure financially devastated Huey. Donald and his family gave generously of their money, milk, eggs and labor to help Huey reestablish himself. In 1995, Huey told Donald that if Donald and his two sons Dewey and Louis would help him work the farm, Huey would leave the farm to Donald's two sons, then ages 15 and 16, upon his death. Thereafter, Donald and his sons worked long hours on Huey's farm without remuneration. Dewey and Louis worked for their uncle on the farm both before and after school. High school sports had to be neglected because farm chores came first. When Dewey told Huey that he wanted to go to college Huey told him to stay on the farm, as the farm would be his and Louis' when he died. Huey had told others how close he was to his nephews, Dewey and Louis, and how the farm would be theirs after he died. Donald, Dewey and Louis worked the farm until Huey died in 2004. Huey died without ever executing a deed or any other document or writing conveying title to the farm to Dewey or Louis. He also died without leaving a will.

Daffy and Daisy are claiming that they, along with Donald, as Huey's closest next of kin, are the sole owners of the farm. (Assume that the laws of intestate succession will not give the two nephews any interest in the farm.)

The nephews have come to you for legal advice. Advise them as to the existence of any legal rules, remedies or theories under which they would be entitled to compel the transfer and ownership of the farm to them instead of their father and aunt and uncle. Discuss fully.

## QUESTION 2

Stooge Computer, Inc., is a manufacturer and retailer of personal computers. Moe went to a Stooge Computer retail store in Los Angeles, California and purchased a personal computer for \$1,000.00, for use in his newly established shaving cream pie business. The entirety of the sale transaction consisted of Moe stating to the clerk "I'll take one of those \$1,000.00 models." Moe paid the price in cash and took the computer back to his shop. When he opened the computer box he found in a plastic bag, which contained the computer battery power cables and instruction manuals, a 5" by 7" inch card that stated:

This document contains Stooge Computer's Standard Terms and Conditions. By keeping your Stooge computer system beyond five (5) days after the date of delivery, you accept these Terms and Conditions. DISPUTE RESOLUTION. Any dispute or controversy arising out of or relating to this Agreement or its interpretation shall be settled exclusively and finally by arbitration. The arbitration shall be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The arbitration shall be conducted in Chicago, Illinois, U.S.A. before a sole arbitrator. Any award rendered in any such arbitration proceeding shall be final and binding on each of the parties, and judgment may be entered thereon in a court of competent jurisdiction.

Moe read the card. He did not have time to get around to setting up the computer and using it until a full week had passed after he opened the box and read the card. As you might guess once he set it up he discovered that the Stooge Computer was a lemon. It constantly crashed. Stooge's Technical Support lines were constantly busy and Moe could never get through. He was never able to use the computer and estimated that he lost over \$5,000.00 in pie sales as a direct result of his inability to use it. Moe then went out and purchased an Acme Computer which has comparable features to the \$1,000.00 Stooge computer but costs \$1,250.00. Moe then sues Stooge Computer in court. Stooge asks the court to dismiss Moe's suit citing the arbitration clause that was included in the box.

Discuss fully the following:

Is the arbitration clause a part of the contract of sale between Moe and Stooge Computer?

Assuming that Moe can prove that Stooge breached the contract what is he entitled to recover by way of damages?

### QUESTION 3

Bert was an artist who traveled from place to place painting portraits for money. While traveling Bert took ill and was incapacitated for six weeks. He was befriended by Ernie who took him into his home, provided him with shelter and food and basically nursed him back to health. Once Bert regained his health he resumed his travels. As he parted ways with Ernie, Bert told him that he would someday repay Ernie for his kindness. Soon thereafter, Bert met Oscar who was a patron of the arts. Oscar loved Bert's work and commissioned Bert to paint a portrait of Oscar's family for the price of \$10,000.00. Bert immediately commenced work on the portrait. Simultaneous with the commencement of painting Bert wrote the following note and mailed it to Ernie. "In gratitude for nursing me back to health, I hereby give to Ernie the \$10,000.00 I am due from Oscar for painting the portrait of his family. (Signed) Bert." Ernie received the note in the mail, read it, and filed it with his other important papers. It took Bert three months to complete the family portrait. Bert's job was made more difficult by the fact that Oscar was "too busy" to sit for the portrait along with the other members of his family. Bert had to paint in Oscar's likeness based on a photograph. Once the portrait was finished he showed it to Oscar. Although it was certainly workmanlike Oscar was dissatisfied with it, as there was no continuity between his likeness and that of the other members of his family. Therefore, he informed Bert that he did not want the portrait and would not pay Bert the \$10,000.00. Bert wrote to Ernie and informed him of this fact. He said that as an artist, he had no time or use for lawyers or courts and that if Ernie wanted to pursue Oscar for the \$10,000.00 that had been promised, Ernie was on his own.

Ernie then brings a lawsuit against Oscar over the \$10,000.00. Discuss fully who should prevail and why.

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**MODEL ANSWER TO QUESTION 1**

**Statute of Frauds**

Was the promise to convey the farm within the statute of frauds?

The general rule is that oral contracts are valid and enforceable. An exception to that rule is contained in the statute of frauds. The statute of frauds is a collective term that describes the various types of contracts that must be evidenced by some sort of note or memorandum thereof signed by the party to be charged. Among the types of contracts that are within the statute of frauds are contracts to convey or transfer real estate or any interest therein as well as promises not to be enforced within the lifetime of the promisor. As the promise to convey the farm fell within both of these categories, there must be either compliance with the writing requirement of the statute of frauds or there must be an exception which excuses the writing requirement.

Although there was no compliance with the writing requirement, Uncle Huey's executor may be estopped from asserting the statute of frauds as the nephews relied to their detriment on the making of the oral promise. This is similar to the case of *Monarco v. LoGreco* where the plaintiff who worked a farm in reliance on an oral promise to convey it to him upon the owner's death was enforced by the court.

**Third Party Beneficiaries**

Is the fact that the nephews were not in privity of contract fatal to their claim?

Normally, in order to be able to enforce a contract one must be a party to it. This is what is known as "privity of contract." Dewey and Louis were not parties to the contract, in fact as minors they lacked capacity to contract and would incur only voidable contractual duties. However, they may nevertheless be able to enforce the contract as third-party beneficiaries. A person, not in

privity, may have enforceable contract rights if they can show that they were intended beneficiaries of the contract, i.e., that recognition of a right to performance in the beneficiary either satisfied a debt or obligation owed by the promisee to the third party or that the promisee wished to confer a benefit on the third-party in the form of a gift and the promisor reasonably understood that intention. Here, Huey bargained with Donald to confer the farm upon his nephews in exchange for their help in working the farm. He intended to convey the farm in order to exchange that promise for their help, hence they are intended beneficiaries with enforceable rights.

As intended beneficiaries they would be able to seek *specific performance* of the promise to convey the farm. Real estate is deemed unique and monetary damages would be inadequate to put the nephews in the position they would have been in had the promise been completely performed.

## MODEL ANSWER TO QUESTION 2

### Acceptance Varying Offer

This sale of goods, that is, things that are moveable at time of identification to the contract of sale, is governed by Article 2 of the UCC. At common law, a purported acceptance which varied in any way from the terms of the original offer, no matter how trivial or insignificant, operated as a rejection or counter offer. This was known as the "*mirror image rule*." At common law, the additional terms contained in the card on the plastic bag would not have become part of the contract because they violate the mirror image rule. However, the UCC has relaxed the mirror image rule. Under section 2-207, a definite and seasonable expression of acceptance operates as such, even though it contains additional or different terms. Additional terms become proposals for addition to the contract. Between merchants, additional terms become part of the contract unless they materially alter it or unless objection to the additional terms is timely made or unless the original offer limited acceptance to the original terms. Here, the additional terms could only become part of the contract if both Moe and Stooze are "merchants." "Merchants" are defined by the Code as those who deal regularly in goods of the kind or hold themselves out as having special expertise with respect to the subject goods. Only Stooze meets this definition. Although Moe may have been a businessman he was not a "merchant" with respect to computers because he did not deal regularly in computers or hold himself out as having special expertise. Although a contract of sale was formed, the additional term providing for arbitration did not become part of the contract.

### Unconscionable Contract of Adhesion

Even if the arbitration clause became part of the contract under 2-207 it may still be objectionable because it is a contract of *adhesion* and *unconscionable*. An adhesion contract results when a party of superior bargaining power drafts contract language to deal with many people, as opposed to an individual, and imposes the language on the party of lesser bargaining power on a "take-it-or-leave-it" basis. Adhesion contracts are not per se unenforceable. When the contract deals with the necessities of life or otherwise involves matters of public policy the adhesion clause will not be enforced. Here, the subject matter of the contract dealt with neither. However, it may

nevertheless have been unconscionable. Unconscionability takes two forms. Procedural unconscionability and substantive unconscionability. Procedural unconscionability relates to the manner in which the terms became part of the contract. Substantive unconscionability refers to terms which are unduly harsh or oppressive. Here the clause in question was procedurally unconscionable because by being "snuck into" the contract after the purchase was consummated it resulted in surprise. Furthermore the result was to meddle with the consumer's remedies by forcing him to forego the courts in favor of arbitration in the event of any dispute. For these reasons Moe would not be bound to the arbitration clause.

### **Damages for Breach**

For the seller's breach of a contract for sale the buyer is entitled to the difference between the contract price and the market price of the goods at the time the buyer learned of the breach plus any incidental or consequential damages. This measure of damages protects the buyer's expectancy interest which seeks to put the buyer in the position he or she would have been in had the contract been fully performed. The loss of profits in the amount of \$5,000 are consequential or special damages. Consequential or special damages, i.e., those that do not typically flow from the breach and result from the injured party's peculiar situation, are limited to those damages which were in the contemplation of both parties at the time that they entered into the contract. Unless Stooze was advised or put on notice that a faulty computer would result in lost profits to Moe's business, the \$5,000.00 cannot be recovered. Moe's damages therefore will be limited to the \$250 difference between the cost of Stooze's computer and the one he bought in substitution to replace it.

### MODEL ANSWER TO QUESTION 3

#### Assignment

Ernie's ability to recover will depend upon whether Bert validly assigned to him his right to receive \$10,000 from Oscar and whether Oscar has any valid defenses against Bert.

An *assignment* is a transfer of rights. Once an effective assignment is made the assignor has no further interest in the right being assigned. Bert apparently felt he had earned the right to receive \$10,000.00 for the painting of a portrait from Oscar. He purported to assign that right to Ernie by writing the note reciting his gratitude and designating the money he was to receive from Oscar to go to Ernie. An assignment need not be in any particular form and need only sufficiently identify the right being assigned. Also, the right being assigned must presently exist. A right expected to arise in the future is not assignable. Although Bert was not yet entitled to receive the \$10,000 at the time he made the assignment he was nevertheless a party to an enforceable bilateral contract to paint the portrait. That is, if either party to the contract breached their promise, they were liable to the other. Bert could assign his contractual rights to Ernie. The fact that the assignment was motivated by "*past consideration*" or feelings of *moral obligation* and hence was not the product of a bargained for exchange, is not fatal to the validity of the assignment. Gratuitous or gift assignments are valid. As opposed to assignments for value, gift assignments are revocable by death or incapacity of the assignor, by subsequent assignment of the same right or by express revocation by the assignor. None of those circumstances are present here.

#### Assignee's Rights Derivative of Those of Assignor

As an assignee, Ernie will stand in the shoes of Bert the assignor. That is to say, any defense the obligor, Oscar, could assert against the assignor, he can assert against the assignee. If Oscar could assert Bert's breach of the underlying contract against Bert, he can also assert it as a defense against Ernie. However, it does not appear that Bert breached the contract.

## **Conditions**

The facts indicate that the portrait was "workmanlike." There is no indication that Oscar's personal satisfaction was an express condition to his duty to pay. A condition is an act or event not certain to occur the occurrence or nonoccurrence of which affects a duty of performance. If personal satisfaction had been stipulated in the contract then Oscar could reject the portrait if not satisfied, as express conditions must be literally performed and cannot be satisfied by the doctrine of substantial performance. Substantial performance means a performance that meets the essential purpose of the contract and a "workmanlike" job would certainly satisfy that standard. In any event, Oscar could only withhold his satisfaction in good faith, that is, if he were actually dissatisfied and not as a pretext for some other reason.

Oscar himself may have breached the contract by failing to be able to sit for the portrait. An implied in fact condition, that is a condition although not expressed or stated in the contract but rather would be implied by the surrounding circumstances, that is, (if the parties themselves had considered the matter) is that Oscar would cooperate in the painting by being able to sit. Oscar's failure to cooperate made Bert's performance more difficult or burdensome. When a party to a contract prevents or frustrates the occurrence of a condition, they cannot cite the failure of the condition as excusing their own duty to perform. If Bert was dissatisfied with the outcome of the portrait he contributed to that dissatisfaction by not making himself available to sit for it. There is no breach by Bert that Oscar could assert against Ernie.