

QUESTION 1

Sesame School was preparing to move its school to a new campus. At its old campus, Sesame School operated its school out of portable classrooms. Bert is exclusively engaged in the business of buying, selling and leasing modular portable buildings. Bert had heard that Sesame School intended to sell its portable classrooms. Bert telephoned Ernie, the principal of Sesame School to express his interest in purchasing the classrooms. During the initial telephone call, Ernie told Bert that the classrooms had been purchased for \$400,000. Bert said that he would not pay anywhere near that amount. Ernie asked how much he would pay. Bert said he would have to think about it. Three days later Bert phoned Ernie and said he would pay \$55,000 for the classrooms. Ernie said that he would pass that figure on to the school's board of directors. Ernie told Bert that no sale could be accomplished without approval from the board of directors. Two days later Ernie phoned Bert and told him that the board of directors had approved the sale of the classrooms for \$55,000. Ernie said he would prepare a "Letter of Agreement." The next day Ernie faxed to Bert a draft "Letter of Agreement." The Letter of Agreement contained the essential terms of the sale including the price and the fact that three portable classrooms were being sold. It had two signature blocks. Ernie did not sign the signature block on the Letter of Agreement. Bert received the Letter of Agreement, signed it and faxed it back. Nothing happened for 10 days. On the 11th day Bert phoned Ernie. Ernie said that he had signed the Letter of Agreement but that the signed letter was at the new school location and that he would send it to Bert the next day. Another five days went by without Bert hearing from Ernie or receiving the signed copy of the Letter of Agreement. Bert called Ernie again. This time Ernie told him that the school had been approached by another buyer for the classrooms and that the classrooms were not for sale. Bert then immediately went to Ernie's office and tried to personally deliver a cashier's check for \$55,000. Ernie refused to accept it.

Bert brings a lawsuit against Sesame School for breach of contract.

Discuss fully the following:

CONTRACTS MID-TERM EXAM
SANTA BARBARA/VENTURA COLLEGES OF LAW
C. SMITH
PAGE 2

1. In the lawsuit between Bert and Sesame School, who should prevail?
2. Assuming that Bert prevails what should he be entitled to by way of remedies for breach of contract?

QUESTION 2

Janie DeBergerac was a young lady of means who was 17 years old had a very prominent nose. Although it was very noble looking, she decided that she wanted a smaller turned-up nose. She decided she would give herself a present for her upcoming 18th birthday she would get a nose job. She called the best plastic surgeon in town, Dr. Beverly Hills, and made an appointment to have the procedure done on her 18th birthday. Two weeks prior to the day of the operation, she went to Dr Hills' office for the preoperative visit. Janie was given some papers to sign. One of the documents she was given was entitled "Consent and Release of All Claims." Among other things the document states that plastic surgery is a difficult process and that the patient's satisfaction is not guaranteed. It went on to state that "patient now and forever irrevocably releases Dr. Hills from any and all claims patient may have against her including, but not limited to, failure to achieve the appearance desired by patient and medical malpractice." Without reading the document Janie signed it and paid the doctor's \$7,500.00 fee for the operation. She had the operation on her 18th birthday. A month goes by and as the surgical scars heal it is apparent that Janie has not gotten the cute turned up nose that she had hoped for. The nostrils are quite wide and pronounced giving her a look not unlike that of Miss Piggy. Janie demands her money back and Dr. Hills refuses to refund it citing the language of the "Consent and Release of All Claims" that Janie signed.

In the inevitable lawsuit that will follow, who will prevail and why? Discuss fully.

MODEL ANSWER TO QUESTION 1

Bert's ability to get the classrooms from Sesame School for the price of \$55,000 will depend upon whether he had an enforceable contract with them.

Was a contract formed at \$55,000?

Contract Formation

Contracts are formed through a process of offer and acceptance.

An **offer** is a manifestation of willingness to enter into a bargain which creates in the offeree the power of acceptance.

The initial negotiations between Bert and Ernie indicate that although the school was the seller of the goods, the initial offer to buy them was to come from Bert. When Bert said he would pay \$55,000 for the classrooms he made an operative offer because a manifestation of assent by the school to accept at that price would have concluded a contract. Ernie indicated that no bargain could be concluded unless and until the board of directors approved the price.

An **acceptance** is a manifestation of assent to the terms of the offer made in the manner required or invited by the offeror.

When Bert got back to Ernie two days later and told him that the board had approved the sale, this was a sufficient manifestation of assent to the sale price. There is nothing in the facts to indicate that the power of acceptance had terminated through lapse, revocation, rejection or counteroffer. The timely acceptance resulted in the formation of a contract with the result that both parties were bound to the agreement and neither could withdraw from the bargain without incurring liability to the other.

Statute of Frauds

Since the classrooms in question are portable they qualify as "goods" under the UCC. Goods are defined as those things which are moveable at time of identification to the

contract of sale. Hence, the contract is governed by Article 2 of the UCC. UCC 2-201 provides that contracts for the sale of goods for a price of \$500 or more are not enforceable by way of action or defense unless there is some note or memorandum sufficient to indicate that a contract has been made, states a quantity term and is signed by the party to be charged. This is the UCC version of the **statute of frauds**.

Here there is a written note or memorandum evidencing the existence of a contract and that states a quantity term, but it is not signed by the party to be charged, the agent for the school. The party to be charged is the party that is denying the existence of a contract. Is there a way to get around the writing requirement?

One way of possibly getting around the writing requirement is the "**non-objecting merchant**" rule. (UCC 2-201(2).) That rule provides that between merchants, a confirmatory memorandum sent by a party that would be sufficient as a writing against the sender, is sufficient as a writing against the recipient if the recipient receives it, has reason to know of its contents, and fails to object to it within 10 days. That indeed occurred here when Bert signed the "Letter of Agreement" and then returned it to Ernie. The problem is though that only one party, Bert, meets the definition of a "merchant." A "merchant" is someone who deals regularly in goods of the kind, or holds himself out as having expertise with respect to the goods. Only Bert who is engaged in the business of buying, selling and leasing modular portable buildings, satisfies this requirement. Although the school is the owner of portable classrooms it does not appear to deal regularly in them.

To satisfy the statute of frauds it is not necessary that the memorandum presently exist. If the memorandum once existed, the writing requirement has been satisfied, even if the note or memorandum has been lost or destroyed. Here, Ernie said that he had signed the Letter of Intent, but that it was at the new campus. This would be an admission that a signed writing once existed and satisfies the writing requirement of the statute of frauds.

Damages

When a seller breaches a contract for the sale of goods the buyer has the choice of electing between two remedies. He may go out in the open market and within a reasonable time make a purchase of goods in substitution for those that were due under the contract. In this case his remedy will be the difference between the contract price and the price of the goods bought in substitution, plus any incidental or consequential damages. This is known as "**cover.**" (UCC 2-712) Alternatively the disappointed buyer may be awarded by the difference between the contract price and the market price, plus any incidental or consequential damages to the extent that they could not have been avoided by cover. (UCC 2-713) Finally, if the goods are unique, or in other proper circumstances, (such as inability to cover) the disappointed buyer may be able to get **specific performance** from the seller. (UCC 2-716) If Bert is unable to cover by finding other portable classrooms, and he was not going to turn around and resell them, which would make monetary damages an adequate remedy, he may be entitled to specific performance from the school.

MODEL ANSWER TO QUESTION 2

Contractual Capacity

Since Janie, is a minor there is an issue of her **capacity to enter into a contract**. The general rule is that the contract of a minor, other than for the necessities of life, is voidable at the minor's option. The ability to avoid the contract is solely with the minor. The adult party to the contract cannot avoid the transaction on the ground of the other party's infancy. Once a minor reaches the age of majority they may ratify any contracts they entered into as a minor. Ratification may be express or by conduct. Failure to timely disaffirm may result in ratification by inaction. This can occur when the minor fails to disaffirm within a reasonable time. The 30 days within which it took to see how the operation turned out seems not to be an unreasonable period of time. On these bare facts it would appear that Janie could avoid her contractual obligations and get her money back and even sue Dr. Hills for medical malpractice.

Dr. Hills could argue that the contract is a "necessary" and hence not subject to disaffirmance. What is a "necessary" is a question of fact and will depend upon the minor's station in life and circumstances. Food, clothing, shelter and medical services are necessities but the quality and extent to which they are necessary may vary from minor to minor. The facts indicate that Janie is a "minor of means" suggesting that perhaps she has been accustomed to the luxuries of life such as plastic surgery. That would be the best argument the Dr. could make because it is clearly an elective procedure and not needed to preserve the minor's life or health.

Unconscionability

Janie may argue that the terms of the contract were **unconscionable**. Unconscionability is of two types, substantive and procedural. Procedural unconscionability refers to the process of contract formation. I.e., did the clause in question find its way into the contract in a manner that was fair and square? Substantive unconscionability refers to contract terms that are unduly harsh or oppressive. Unconscionability boils down to lack of meaningful choice coupled with contract terms that are

harsh or oppressive. Both types of unconscionability must be present, but not in equal quantities, before a contract will be invalidated on the ground of unconscionability.

Procedurally, there seems to be nothing unfair about the process of contract formation. The terms in question were not hidden and Janie had an opportunity to read them. Janie could not avoid the contract on the ground that she failed to read it. The general rule is that one who knowingly and voluntarily signs a contract is bound to its terms, even if she did not read the contract. This is known as the "**duty to read.**" The only way around this is to show that the terms in question were hidden, were unconscionable, or that the party was induced to sign the contract by means of fraud.

Substantively, the only term that is questionable is the waiver of the patient's right to sue for malpractice. Contract clauses which excuse a party from the consequences of their own negligence are contrary to public policy and are hence void. Otherwise, there is no evidence that Janie would have been confronted with similar terms regardless of what plastic surgeon she chose. Plastic surgery, being one of life's options rather than a necessity, is less likely to result in the underlying contract being deemed to be an unconscionable "take-it-or-leave-it" adhesion contract.

Janie should prevail on the ground of her infancy.