

CONTRACTS  
Santa Barbara College of Law  
Mid-Term Examination  
Fall 1992  
Instructor: Craig Smith

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Time Allotted - Two Hours (Essay Portion)

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An answer should demonstrate your ability to analyze the facts presented by the question, to select the material from the immaterial facts, and to discern the points upon which the case turns. It should show your knowledge and understanding of the pertinent principles and theories of law, their relationship to each other, and their qualifications and limitations. It should evidence your ability to apply the law to the facts given, and to reason logically in a lawyer-like manner to a sound conclusion from the premises adopted. Try to demonstrate your proficiency in using and applying legal principles rather than a mere memory of them.

An answer containing only a statement of your conclusions will receive little credit. State fully the reasons that support them. All points should be thoroughly discussed. Although your answer should be complete, you should not volunteer information or discuss legal doctrines that are not necessary or pertinent to the solution of the problem.

Unless a question expressly asks for California law, it should be answered according to legal theories and principles of general application.

## QUESTION 1

Employer and Employee orally agreed to the terms of a three-year employment of the latter as a salesperson in Hawaii. Employer agreed to pay \$1,000 per month plus specified commissions on sales. Pursuant to this agreement Employee resigned an advantageous position on the mainland and moved to Hawaii with his family. After six months on the job there, he was fired without cause, Employer insisting he had no contractual obligation. Discuss the following:

(A) Does Employee have any legal remedy against Employer?

Would your answer be different if,

(B) the term of employment was for Employee's lifetime, rather than for three years?

(C) The term of employment was for three-years or until Employee dies, whichever occurs first?

## QUESTION 2

After preliminary negotiations, Buyer mailed a purchase order (PO) to Seller to purchase steel tubing to be used in the manufacture of bicycles. The PO specified price, quantity, and shipping instructions but was silent as to warranties and remedies. After receiving the PO, Seller mails a written acknowledgment, which accepts the order and contains a disclaimer of implied warranties and a clause excluding liability for consequential damages, and ships the goods. Discuss fully each of the following questions:

- (1) Before the acknowledgment is received, Seller terminates the order because a better price has been offered by a third party. Buyer sues for damages.
- (2) Same facts, except Seller does not terminate the order. Rather, the acknowledgement is received and the goods are accepted and used by Buyer. Later, the goods are found to be unmerchantable and Buyer sues.
- (3) Same facts as (2), except Buyer states in the PO that if Seller breaches consequential damages shall be paid. Seller states in the acknowledgement that consequential damages are excluded. Buyer accepts and uses the goods without objection. The goods are unmerchantable, Buyer suffers consequential damages and sues.
- (4) Same facts as (2), except Buyer's PO insists upon consequential damages and Seller's acknowledgment excludes them. Either the PO states that Buyer will not be bound unless Seller agrees to its terms, or the acknowledgement states that Seller's acceptance is "expressly conditional" on Buyer's assent to its terms, or both standard forms contain the clauses. The goods are shipped and used by Buyer, who sues for consequential damages caused by defects.

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QUESTION 1

(A) An agreement that by its terms is not to be performed within a year from the making thereof comes within the statute of frauds. The contract is not to be performed within the space of one year from the making thereof and must be evidenced by a written memorandum signed by the party to be charged. Perhaps Rest.2d §139 could be resorted to for relief.

(B) The important words are "by its terms"; i.e., only those contracts which expressly preclude performance within a year are unenforceable. If it is merely unlikely that it will be so performed, or the period of performance is indefinite, the statute does not apply.

Since the one year clause only applies to contracts which by their terms cannot be performed within one year, a lifetime contract would not be within the statute.

(C) Is this a three-year contract with performance excused if the employee should die before then?

The courts recognize a distinct difference between a contingency which fulfills the terms of a contract & one which prevents fulfillment. If the contingency which fulfills & completes the terms of the contract happens or could possibly happen within 1 year, the contract is not within the statute. On the other hand, if the contingency prevents or discharges the parties from performing their obligations under the contract within a year then the contract is within the statute.

QUESTION 2

(1) The issue here is whether there was any contract, not what the terms of the agreement were.

At common law, an acceptance which added qualifications or conditions or which in any way varied the terms of the original offer was treated as a rejection & counter offer.

2-207 was intended to alter the "mirror image" rule of the common law. Under 2-207(1), a contract is recognized notwithstanding the fact that an acceptance or confirmation contains additional or different terms from those of the offer or prior agreement, provided that the offeree's intent to accept the offer is definitely expressed & provided that the offeree's acceptance is not expressly conditioned on the offeror's assent to the additional or different terms.

There was a contract despite the additional, material terms, and Seller's termination is a breach. There was a "definite" acceptance and acceptance was not "expressly made conditional" on

assent to the additional terms. There were written manifestations of an "intention to be bound to an agreement" and there is a "reasonable basis for giving a remedy."

(2) The additional or different terms of the contract are treated as "proposals" for addition to the contract. If both parties are "merchants" as they are here, and the additional terms are more or less harmless, the "proposed" additional terms become part of the contract. If the additional terms are not "harmless" i.e., they materially alter the contract, they do not become a part of it.

The response was a "definite" acceptance that created some contract and proposed terms for addition to that contract. If the additional terms were material, they did not automatically become part of the agreement under §2-207(2). Rather, the buyer must expressly agree to them and this means assent (through conduct or otherwise) with express awareness of them. Without evidence that there was no surprise, the buyer was bound.

(3) What about conflicting terms? The better view is that conflicting terms cancel out, & the contract consists of the terms upon which both parties have expressly agreed together with terms supplied from relevant provisions of the UCC. This has come to be known as the "knockout" doctrine. I.e. when a contract is formed under 2-207 by documents with conflicting terms, those terms cancel each other out leaving the court to supply the contested term. If conflicting terms "cancel out" then what are the actual terms of the contract? The terms which the parties have expressly agreed upon together with terms supplied from relevant portions of the UCC.

Here there are "different" rather than additional terms in the writings. This would not prevent contract formation under §2-207(1), but it would complicate which terms became part of the agreement under §2-207(2). Under the so-called "knockout" rule, both terms drop out and the standard terms of the UCC apply, i.e., the buyer gets consequential damages under §2-715(2)(a).

(4) A seller must accept the potential risk under 2-207(3) of not getting his additional terms when he elects to proceed with performance without first obtaining buyer's assent to those terms. Since the purchase order & counter offer did not in themselves create a contract, 2-207(3) would operate to create one because the subsequent performance by both parties constituted "conduct by both parties which recognizes the existence of a contract." The terms of the contract will be the terms on which the writings of the parties agree, together with any supplementary terms incorporated under other provisions of the code.

The express conditions arguably prevent contract formation under §2-207(1), yet some contract is formed by the conduct of both parties. §2-207(3) determines what terms are included in the agreement. Since the writings don't agree (and there was conduct by both) the gap is filled by §2-715(2)(a): Buyer can claim consequential damages.