

CONTRACTS
Santa Barbara College of Law
Mid-Term Examination
Fall 1995
Instructor: Craig Smith

Time Allotted - Two Hours (Essay Portion)

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

On July 4, 1990, Moe mailed to Larry a written offer to sell ten shares of an unlisted stock at \$60.00 per share. Larry was given four days from the date of the letter to accept. The offer was received on July 6 at 2 p.m. At 3 p.m. on July 6, Larry mailed a letter to Moe which stated in part: "will purchase ten shares at \$55.00 per share. . . ." At 11 a.m. on July 6, however, Moe had sold the ten shares to Curly for \$65.00 and at 1 p.m. of the same day had mailed a letter to Larry revoking the offer. Larry who was blissfully unaware of Moe's activity, learned at 4 p.m. on July 6 that the market price of the shares might increase and, at 5 p.m. on the same day, telegraphed Moe to "disregard letter . . . will take offered stock for \$60.00 per share." Larry's telegram of July 6 was received by Moe at 9 a.m. on July 7. Larry's letter of July 6 was received by Moe at 2 p.m. on July 8. Moe's letter of July 6 was received by Larry at 2 p.m. on July 8.

Larry claims that he has a contract with Moe for the purchase of the stock. Is this contention correct? discuss fully and in your answer deal with the following:

- (a) The legal right of Moe to revoke his offer before it is accepted.
- (b) The legal effect, if any, of Larry's letter of July 6.
- (c) The legal effect, if any, of Moe's sale of the stock to Curly.
- (d) The legal effect, if any, of Moe's letter of July 6.
- (e) The legal effect, if any of Larry's telegram of July 6.

QUESTION 2

Kathleen MacKay, age 79, visited a number of retirement facilities in the Santa Fe and Albuquerque area. She liked La Vida Llena the best. She took several weeks to study the Residence Agreement which the facility used. She discussed the proposed agreement with her friends, but not with an attorney. On March 2, 1993 she signed the agreement and made a deposit toward the entry fee; on June 16, upon payment of the remainder of the \$36,950 entry fee, she moved in. She became sick on December 29th of that year, and two days later she died.

Under the Residence Agreement, the entry fee entitled Mrs. MacKay to occupy a one-bedroom unit for the rest of her life, and guaranteed her admission to the La Vida Llena Nursing Care Center whenever required. She was also obliged to pay a monthly service fee of \$537.00 to cover meals, laundry, etc. She had the right to terminate the agreement upon 30 days notice if she were unable to live alone and if monthly payments were current. La Vida Llena would then refund the entrance fee less "10% plus 1% for each month of residency." There was no refund of entry fee upon a resident's death.

Mrs. MacKay's personal representative sought a refund of the entrance fee on the ground that the agreement was an unconscionable adhesion contract. What should the result be? Discuss fully.

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QUESTION 1

Larry's contention that he has a contract to purchase the stock is correct.

The legal right of Moe to revoke his offer before it is accepted.

An offer may be revoked anytime prior to acceptance. The only exceptions to this rule are situations of option contracts or detrimental reliance. An option contract is an offer that is irrevocable for a stated period of time. However, an option contract must be supported by separate consideration. Otherwise, the promise to keep the offer open, in this case for four days from the date of the letter, is merely gratuitous. This offer is subject to the usual rule that it may be withdrawn any time prior to acceptance.

An offeror may lose the power to revoke the offer prior to acceptance where it is foreseeable that the making of the offer will result in substantial action or forbearance on the part of the offeree, such action or forbearance actually results, and injustice can only be avoided by enforcing the promise. None of these conditions exist. This was not an offer which invited acceptance by performance (a unilateral contract) but rather invited acceptance by the making of a promise. No substantial action or forbearance was foreseeable on the part of the promisee as a result of the promisor merely making the offer.

The legal effect, if any, of Larry's letter of July 6.

Larry's letter of July 6 was a counteroffer. At common law an acceptance had to be the mirror image of the offer. If it varied from the terms of the original offer in any manner, no matter how trivial or insignificant, it operated as a counteroffer or rejection. I.e., a counteroffer has the same effect as an outright rejection. It terminates the power of acceptance. The offeree cannot revive the negotiations by later attempting to accept the original offer. Since a counteroffer is a rejection it is governed by the rule that a rejection is effective upon receipt. (Rest.2d §40.) Hence, it was effective at 2 p.m. July 8.

The legal effect, if any, of Moe's sale of the stock to Curly.

The power of acceptance is terminated when the offeror takes any action inconsistent with keeping the offer open and the offeree receives reliable information to that effect. (Rest.2d §43.) This is sometimes called "indirect revocation."

Here, Moe certainly took action inconsistent with keeping the offer open (he sold the stock to someone else). The problem is there are no facts to indicate that Larry learned of this fact from any reliable source (or from any source at all for that matter.)

The legal effect, if any, of Moe's letter of July 6.

The power of acceptance is terminated by express notice of revocation. Moe's July 6 letter was certainly such express notice. However, a revocation is not effective until it is received. If this were the only circumstance then the revocation did not take effect until 2 p.m. July 8 when it was received. Coincidentally, this is the same time that Larry's counteroffer and rejection was received.

The legal effect, if any of Larry's telegram of July 6.

An acceptance is an unequivocal assent to the terms of the offer made in the manner or mode invited or required by the offeror. Acceptance results in a contract with the consequence that neither party can withdraw from the bargain without incurring liability to the other.

The acceptance in this case is unequivocal. ("Will take offered stock for \$60.00 per share." No manner or mode of acceptance was suggested or required therefore any reasonable manner or mode under the circumstances is effective. Considering that the offer was made by mail, telegram is at least as expedient if not a more efficient mode of communication and hence is reasonable. Under the "mailbox rule" of Adams v. Lindsell acceptance is effective upon dispatch. I.e., when it is put out of the control of the offeree. Hence acceptance was effective at 5 p.m. July 6th. This was prior to the rejection by counteroffer becoming effective (2 p.m. July 8) and prior to the express revocation becoming effective (2 p.m. July 8). And as stated before Larry never received reliable information that Moe had already sold the stock so there was never an effective indirect revocation.

There is an enforceable contract for the sale of the stock between Moe and Larry.

QUESTION 2

The argument that may be advanced here is that as things turned out, the consideration Mrs. MacKay gave was worth far less than the value of the "lifetime contract" that she received.

To be enforceable a promise must be supported by consideration. If consideration is present, courts ordinarily do not consider the adequacy of it. I.e., if what was exchanged was equal in value for what was given for it in the market place. Only if a contract is determined to be unconscionable will a court step in and reform the bargain of the parties.

Viewing the transaction here prospectively and not retrospectively, La Vida's promise to house and care for MacKay "for life" was an obligation of unknown and uncertain duration. Viewed in that light, the agreement was fair, not unconscionable and supported by adequate consideration.

An "adhesion" contract is an agreement that is presented on a "take it or leave it" basis. The terms of which are dictated by the party of superior bargaining power to the party of inferior bargaining power with no opportunity to negotiate or dicker over the terms. Additionally, the subject matter of the contract must concern a matter of public interest. e.g., food, shelter, health services as opposed to a non-necessary, e.g., skydiving, bicycle racing.

Although an argument can be made that MacKay's contract involved and essential of life (shelter and health care) there is no evidence that it was presented on a take it or leave it basis or that there was no opportunity to negotiate the terms.

The court should uphold the validity of the contract.