

Monterey College of Law

HYBRID

CONTRACTS – SEC. 2

Final Examination

SPRING 2024

Professor P. Stirling

General Instructions:

Answer Three (3) Essay Questions.

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

Question 1

Clara wins the California lottery. All her life she has loved paintings by James Whistler. She sees one of his “Nocturnes” for sale in a gallery and decides to spend her winnings of \$50 million on the painting. The dealer (a very evil person, quite unbeknownst to Clara) says he can sell it to her, but it is scheduled to be on display at the Getty Museum for the month of May. As such, he cannot deliver it until June 1. She signs the sales contract, pays a \$50,000 deposit and goes home. Meanwhile, the evil dealer receives and accepts an offer from Taylor Swift for \$60 million for the Whistler. On June 1, he delivers a painting to Clara. It is not the Whistler, but rather a large Jackson Pollack which is also worth \$50 million. She refuses to pay the remaining amount. The evil dealer sues her, claiming the painting is comparable and she is obligated to accept it as mitigation.

How will this turn out for Clara?

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Question 2

Francois is a dress designer. Just before the Grammy awards, Taylor Swift calls him and asks him to design a dress for her performance that will be “absolutely unique and unlike any dress he has ever designed for anyone.” They sign a contract for a dress to be delivered the morning of the show. It will be covered in silver bugle beads and have a 2”x2”x2” plexiglass compartment in the bodice that will be filled with water and hold a live goldfish, as a tribute to her new hit song “I Love Goldfish”. She agrees to two fittings but cancels the second due to rehearsals. He delivers the dress in the morning with the fish swimming happily in its compartment. She puts on the dress backstage five minutes before her performance. One minute before she is to go onstage she notices the fish is dead and floating upside down. The emcee announces her and she goes on stage mortified and starts to sing. Immediately she notices that Beyonce is in the front row wearing an identical dress, but in gold bugle beads and three live swimming guppies.

She wants to sue Francois for breach of contract. What grounds does she have?

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Question 3

Taylor Swift needs a vegan chef for one year while she is living in California recording her new album and starring in a movie. She meets with Agnes who has written vegan cookbooks and formerly ran two well-known vegan restaurants. Taylor and Agnes get along very well and Agnes agrees to work for Taylor. Taylor tells Agnes the lawyer will send her contract the following day. When she reads the contract, Agnes is very happy with the salary and the working hours and is ready to sign when she sees the last clause. It reads that after Agnes leaves Taylor's employment, Agnes agrees not to work for any other celebrity ever again anywhere in the state of California. She is thinking about retiring after this contract, so she doesn't really care. She also sees a stipulated damages clause that says if her contract is terminated before the full 12 months for any reason, she will receive the salary for the remaining months. She signs the contract and returns it to Taylor. She begins working the next day.

Two days later, Taylor has a severe allergic reaction from mushrooms in a dish Agnes made (Taylor did not disclose any allergies to Agnes). Taylor angrily fires Agnes and threatens to sue her, and also refuses to pay the stipulated damages.

Agnes comes to you for help. She wants to know if she can get the stipulated damages. She has also been offered another job and wants to know if she can accept it. She thinks Taylor is bluffing about suing her, but wants your opinion whether she should be worried.

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ANSWER OUTLINE

Question 1

ANSWER 1 (OUTLINE)

20% Organization (Similar headings – boldfaced below)

20% Issue (Spot all issues)

20% Rules (Name all rules – underlined below)

20% Analysis (Apply law to facts – all non-underlined, non-italicized font below)

20% Conclusions (Provide correct conclusions – as *italicized* below)

Introduction

Nature of the transaction: Sale of goods, mitigation, specific performance alternatives, damages

Is there a valid contract?

- A valid contract requires an offer, acceptance, consideration.
- Clara offers to buy and Dealer offers to sell. Clara provides a down payment which would be partial consideration, pending the final delivery.
- *Accordingly, Clara and Dealer have a valid contract.*

Does the UCC article 2 apply to this contract?

- UCC article two applies to contracts for sales of goods.
- Further, UCC' statute of frauds provision requires sales for more than \$500 to be in writing.
- Clara and Dealer signed the contract for the sale of a painting for more than \$500.
- *Accordingly, UCC article 2 would apply. Further, the statute of frauds provision would be satisfied.*

Can the dealer claim that Clara breached the contract by failing to accept a comparable painting (in value)?

- UCC 2-708 provides a damages to a seller for the buyer's non-acceptance of the goods.
- Under this section, the measure of damages is the difference between market price at the time of tender and the unpaid contract price, but less expenses saved by the buyer's breach.
- Here, the seller breached the contract by delivering a different painting. While comparable in price, it was not the unique item in the contract.
- *Accordingly, the dealer would not be able to argue for damages as the item delivered was not what was in the contract. He has no damages as he has sold the actual item for a higher price.*

What can Clara claim?

- Failure to perform as contracted is a breach of contract.
- Under UCC 2-711, when a seller fails to deliver the agreed upon goods, the buyer may revoke acceptance and cancel the contract.
- Under the same section, the buyer may recover damages for non-delivery, or obtain specific performance.
- In this case, the painting was not what Clara contracted to buy, so upon delivery she may revoke acceptance and rescind the contract.

- She may also recover damages in the amount she paid (\$50,000) for breach of contract.
- She may also pursue specific performance under UCC 2-716, particularly as the painting was unique, however it has been sold so this option may not be possible.
- *Accordingly, Clara may rescind the contract and recover the amount she paid to the dealer.*

ANSWER 2 (OUTLINE)

20% Organization (Similar headings – boldfaced below)

20% Issue (Spot all issues)

20% Rules (Name all rules – underlined below)

20% Analysis (Apply law to facts – all non-underlined, non-italicized font below)

20% Conclusions (Provide correct conclusions – as *italicized* below)

Introduction

Nature of the contract: services and sale, promise of uniqueness, non-conforming goods

Was there a valid contract?

- A contract requires offer and acceptance.
- Further, if the contract involves the sale of goods, it must be in writing if the price exceeds \$500 under UCC 2-201.
- In this case, the facts indicate that they signed a contract. While the facts do not indicate the price, we can assume that such an item would exceed \$500, and the writing ensures the contract is in compliance with the statute.
- *Accordingly, there is a valid contract between the parties.*

Does the UCC article 2 apply to this contract?

- UCC article two applies to contracts for sales of goods.
- If the contract includes additional items such as services, courts look to the predominant factor.
- In this case, the facts do not indicate a separation between the value of the item and the value of the service (designing).
- However, as this is ultimately for the delivery of an item, it can be argued that the UCC would apply. Further, the facts do not provide details of the price, i.e., no delineation in the contract between services and sales.
- *Accordingly, as this would be a sale, the UCC would apply.*

Did the product delivered to Taylor conform to the contract requirements?

- Under the UCC, if the seller is aware of a particular purpose upon which the buyer is relying on the seller's skills, there is an implied warranty that the goods will comply.
- Parole evidence is permitted only if the terms are not set out fully in the contract
- The facts indicate that she wanted a unique dress in which there would be a live fish. We do not know, however, if the contract contained these details.
- In addition, she accepted the dress upon delivery as in compliance.
- *Upon delivery, the dress was in conformity with the contract, at the time of acceptance, she would have no grounds for claiming Francois was in breach.*
- *With regard to the uniqueness, if not clarified in the contract such that Francois was aware of the requirement, parole evidence may be permissible to show she required that there be no other dress like this.*

- *There may be a question of fact for the jury as to whether the dress was indeed unique. Her dress differed from Beyonce's in that it was a different color and had different fish. It would be up to a jury to determine whether his interpretation (assuming he argues hers was unique and he complied with her requirements) was reasonable.*

What damages might she claim?

- The UCC provides that a buyer may receive damages after acceptance of non-conforming goods.
- The amount of damages is the value of what was accepted and the value the item would have been if delivered as warranted.
- In this case, the facts do not indicate that she paid for the dress when it was delivered, but we can presume that she did. If so, she can argue for the difference in what she received and what was promised (one of a kind). As stated above, however, whether the dress was unique is a question of fact.
- If she did not pay, she may be required to pay damages in the amount of the dress's agreed upon price and/or quantum meruit to the designer for his work.

ANSWER 3 (OUTLINE)

20% Organization (Similar headings – boldfaced below)

20% Issue (Spot all issues)

20% Rules (Name all rules – underlined below)

20% Analysis (Apply law to facts – all non-underlined, non-italicized font below)

20% Conclusions (Provide correct conclusions – as *italicized* below)

Introduction

Nature of the contract: services, stipulated damages, non-compete clause, question of fact re definition in contract.

Was there a valid contract?

- A contract requires offer and acceptance.
- In addition, a contract that cannot be performed within one year must be in writing per the statute of frauds as codified in California.
- In this case, the facts indicate that they signed a contract. The facts indicate the contract to be for one year of employment.
- *Accordingly, there is a valid contract between the parties.*

May Agnes obtain damages for early termination under the stipulated damages clause?

- The Restatement 2d of Contracts section 356 states that damages for breach may be liquidated in the agreement if the amount is reasonable in light of anticipated losses, and the difficulties in proof of loss.
- The section also states that the damages cannot be so large as to be a penalty.
- Validity is a question of law. If the employer set the damages, it has the burden of proving it is unenforceable.
- When a party is wrongfully discharged, the damages are the salary she would have received.
- In this case, the damages reflect the salary Agnes would have received for the remaining months, and were set by her employer.
- While there is no evidence of the difficulty Agnes would have in finding other employment, the facts do state that she was thinking of retiring.
- *Accordingly, the stipulated damages amount is reasonable as it reflects her salary and both parties agreed to the terms.*
- *The amount is not a penalty as it is a reasonable reflection of her salary*

Did Agnes breach the contract by cooking with mushrooms?

1)

How will things turn out for Clara due to her "Cruel Summer" with the evil art dealer?

What is the Governing Law?

The Uniform Commercial Code Section 2 (UCC) governs the sales of goods, which are movable and tangible items and at least one party involved must be a merchant. ✓

The Common Law governs other contracts such as service and real estate contracts.

In this case Clara has contracted with an art dealer for a Whistler Nocturne which is a "good" and an art dealer is generally considered a "merchant." Therefore the UCC applies. ✓

Is there a valid contract?

A valid contract involves mutual assent between two parties and includes a valid offer, acceptance, and consideration. The facts tell us she signs the sales contract and pays a \$50,000 deposit. For the sake of this analysis we will assume the contract is valid because it was written instead of oral (and thereby complying with the Statute of Frauds which requires a written contract for any good over \$500.) While the art dealer is evil and underhanded in selling the painting to Taylor that happened after the contract was formed so there are no applicable defenses to formation. The deposit serves as her consideration. ✓
The contract is valid.

Perfect Tender

Under the UCC a single delivery for a sale of goods must conform exactly to the terms of the contract. Delivering a Jackson Pollack instead of a Whistler "Nocturne" is very much a delivery of non-conforming goods. The buyer has the option of accepting the non-conforming goods, rejecting the non-conforming goods or (and this isn't the case here because it's just one painting) either accepting a commercial unit and rejecting the rest.

Clara has refused to pay the remaining amount. She has rejected the Pollack. She has clearly rejected the non-conforming goods. If the time for performance is not due, the seller can give notice to the buyer they intend to cure by issuing new tender, and the buyer must allow the seller to do so. It is even possible that the seller can deliver conforming goods past the due date of performance if they believe the buyer will allow them to do so. The dealer delivered the Pollack on the due date. Even if Clara seemed amenable to a delay in delivery, in this case, the "evil" dealer clearly is not giving her notice of intent to cure by delivering conforming goods. He is trying to convince her the Jackson Pollack is comparable because it's the same 50 million and she should take the trade. He is trying to sue her for the \$50 million (minus her deposit). He isn't trying to cure his non-conforming goods, in otherwords he is not perfecting his tender.

Cover

When the seller is in breach by submitting non-conforming goods, and they have no intention of curing the problem by tendering conforming goods, the buyer has the option of cover. Which is to say that they can go out and find conforming goods and the seller is responsible for the cost difference between the original price of the goods and the cover.

A Pollack is not an acceptable cover option as it is a completely different genre and furthermore we know Clara refuses to accept it. In this case, Clara has the option of trying to find another Whistler "Nocturne" which could potentially be an acceptable substitute as long as Clara is ok with that. The facts tell us "one of Whistler's Nocturnes" so that implies there are more than one of his Nocturnes potentially available. It is true that the painting is unique, but this might be an acceptable substitute. The issue is if she

can find one. Let's say she finds one for 60 Million dollars. She could turn around and sue the evil art dealer for the return of her \$50,000 deposit and the \$10 million that it took to find an appropriate cover.

Specific Performance

Another avenue available to Clara would be to try and pursue specific performance on the contract. Which is to say that she would take the evil art dealer to court and try to get the actual Nocturne she wanted. There are several factors to look at to see if specific performance is available:

Valid Contract: we have assumed there is one in place

Conditions met by plaintiff: Clara has done her part in tendering her consideration, signing the contract, and agreeing to the terms.

Inadequacy of monetary damages: This applies when the item in question is unique and this painting certainly is. This is the strongest case for specific performance. However, the facts also tell us this was "one" of his paintings so the case could be made that it isn't unique. *(it was a series but each was unique)*

Mutuality of Performance: are both parties capable of performing their part of the bargain. Clara certainly is, however, the art dealer has a problem because he has already sold the Whistler to Taylor Swift. Furthermore, he's pretty evil and doesn't seem to be interested in performing.

Feasibility of Ensuring Performance: how difficult will it be for the court to monitor specific performance in this case? It's just one painting so it wouldn't be difficult for the court to monitor and this doesn't involve personal services so there is no issue with indentured servitude.

No Existing Defenses to Formation or Enforcement: Taylor was a bona fide purchaser and was not aware that the evil art dealer had already sold the painting to Clara. As such it is most likely not possible to get the painting for Clara. There could also be a claim of Impracticability because performance due to the painting being sold would be extremely and unreasonably difficult.

In short, Specific Performance is most likely not an avenue for Clara to pursue because the painting was already sold to Taylor who, while the facts don't explicitly tell us she knew, we can assume that she is a bona fide purchaser.

Duty to Mitigate

In regards to the dealer's claim that Clara is obligated to accept the Pollack as mitigation, while the non-breaching party does have the duty to mitigate what the law means is when they have notice of a breach from the other party they are to take steps to reduce the damages. This is not the case here. The evil art dealer is not using the Doctrine of Avoidable Consequences here correctly. Clara doesn't have to mitigate the damages by accepting a painting that, while the same price, is clearly not nearly an apples to apples comparison. This is similar to the case when Shirley MacLaine was able to prove she didn't have to take a role in a Western when the role that she had contract for in a Musical was no longer available. Clara does not have to accept the Pollack under a duty to mitigate.

This does bring up one more idea however.

Incidental Damages

Compensatory damages must be foreseeable, caused by the defendant, certain, and unavoidable. Clara will no doubt have certain incidental damages if she has to travel to find an acceptable cover for the Whistler "Nocturne." This would be foreseeable because Whistler paintings are spread out throughout the world and she would need to search to

find one for sale, it would be caused the the defendant because he refused to complete his portion of the bargain in selling her the painting, the incidental costs would be certain instead of speculative, and while she might be able to avoid them by using internet searches instead of actual travel chances are if she does incur additional expenses in her search for a cover Whistler she can pursue the evil art dealer for those, too. The dealer might try to claim that these are unreasonable, however, the basis of damages is an attempt to put the non-breaching party in a position they would have been in if they had received the benefit of the bargain.

Conclusion: Clara does not have to worry about the evil art dealer suing her for the \$50 million minus her deposit. Rather, because he tried to deliver non-conforming goods, did not cure the issue by perfecting the tender and delivering the painting, and Clara did not accept the non-conforming Pollack, Clara can find another Whistler and pursue the art dealer for cover which are any expenses above the original \$50 million contract price that are reasonable in her pursuit of a replacement "Nocturne."

O 10
F 10
R 15
A 15
C 15

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very good! It is unlikely she would try to cover as these paintings are unique. Her option is to recover the deposit. might there be any other damages?

2)

What grounds does Taylor have to sue Francois for breach of contract in the Goldfish Dress Debacle?

What is the Governing Law?

The Uniform Commercial Code Section 2 governs the sales of goods, which are movable and tangible items and at least one party involved must be a merchant.

The Common Law governs other contracts such as service and real estate contracts.

The preponderance test helps determine which law will be used when the contract involves a mix of goods and services.

Francois is a dress designer and he is well enough known that Taylor Swift is calling him to design a dress for the Grammys, so Francois would likely qualify as a merchant. And Taylor is contracting with him to create a dress and a dress is a movable and tangible item. Therefore, the UCC will govern.

Is there a valid contract?

A valid contract involves mutual assent between two parties and includes a valid offer, acceptance, and consideration. The facts tell us they sign a contract for a dress so it will be assumed there is valid contract in place. There do not appear to be defenses to formation such as illegality or Statute of Frauds (because they mention signing the contract so it's not oral). Because there is a valid contract in place Taylor can proceed with looking at what grounds there are for breach of contract.

Conditions

Conditions set the order and time of performance between the parties in a valid contract. Conditions can be categorized by time: precedent, concurrent, and subsequent. Conditions can also be categorized by type: express, constructive, and implied. Conditions can also be conditions of satisfaction which are personal/subjective involving matters of taste and fancy, non-personal/objective which are evaluated using utility, fitness, and value, and third party which means an expert opinion is involved in determining if the condition has been met. Sometimes there is a gray area between subjective and objective conditions of satisfaction and in those cases the concept of good faith must be used to determine whether the condition was complied with.

In this contract there are several express conditions. Express conditions must be complied with strictly. We know the dress needs to be absolutely unique and unlike any dress Francois has ever designed for anyone. It has to be covered in silver bugle beads and have a plexiglass compartment filled with water holding a live goldfish as a tribute to Taylor's new song. However, Beyonce shows up at the Grammys wearing an identical dress but with gold bugle beads and three guppies. Francois will state that he believes Taylor's dress is unique because it's got silver bugle beads and a goldfish compared to Beyonce's dress that has the gold bugle beads and guppies: different colors and different fish. Taylor will state that the dress needed to be absolutely unique and unlike any dress Francois has designed for everyone. Having a fish swimming around in a dress is certainly unique but there are two dresses that showed up with this feature so she will state that he did not strictly comply with this express condition. Taylor has the stronger argument and Francois failed to comply with the condition.

In every contract there is an implied condition of good faith and fair dealing. In designing similar dresses for Beyonce and Taylor Francois did not comply with this implied condition.

There are also conditions of satisfaction at play in this scenario. In this case, they appear to be both subjective and objective because they can be measured against fitness, utility

and value (objective) as well as Taylor's personal taste and fancy (subjective). Taylor wants a unique dress that has a live goldfish swimming around in it. It turns out that the goldfish is dead when the time comes for her to step up on stage and shimmer and Beyonce has a very similar dress that's she's wearing in the front row. It is very upsetting to Taylor. Clearly the conditions of satisfaction both objective and subjective has not been met. Francois may try to state that he was operating under good faith because he got the dress to her in time and up until five minutes before the performance the goldfish was alive. It was only discovered dead one minute before she is to go on stage. However, he clearly was not exhibiting good faith in designing similar dresses for Taylor and Beyonce.

Another condition in the contract is that Taylor will sit for two fittings. Francois will state that Taylor did not comply with this condition by only sitting for one. Taylor will state that missing a fitting wasn't particularly material because Francois still managed to create the dress.

Material Breach vs. Minor Breach

To determine whether there has been a material or a minor breach the substantial performance test must be applied. If a breach is material, then it excuses the subsequent performance of the non-breaching party. If it is a minor breach, the performance of the non-breaching party is not excused but they may sue for damages caused by the minor breach.

Several factors are involved in the substantial performance test. These include looking at the how willful the breach was, evaluating how substantial this breach was to the basis of the bargain of the contract, and whether there was full or partial performance on the parts of the parties. Generally delay is not part of the test unless the contract states it is of the essence.

Francois may try to state that Taylor agreed to two fittings and only showed up to one. However, Taylor will point out her breach was only minor because Francois was able to create the dress and deliver it on time and in this case Taylor has the stronger argument. ✓ Taylor's missing a fitting did not appear to impair Francois's ability to perform.

Taylor will state Francois created a major breach by delivering a dress that was not unique and had a dead goldfish floating around in it. She will state that by designing a very similar dress for Beyonce his breach was willful. She will also state that he did not substantially comply to the conditions of the contract particularly the one about the dress needing to be absolutely unique unlike any dress he has designed for anyone. This condition was one that formed the basis of the bargain. Francois will try to claim that his performance was complete because he delivered the dress on time to the Grammys. He will state that Beyonce's dress had multiple guppies in it and was a different colors. ✓

will this be a question of fact?
In this case, Francois's breach will be considered material and Taylor's minor. Taylor will be able to sue for damages unless Francois is able to claim a defense to enforcement. Francois would need to show whether Taylor's breach caused him any damages but it would not excuse his performance. The facts do not tell us that Francois sustained any damages from Taylor's performance.

Impossibility/Impracticability/Frustration of Purpose

These defenses involve the occurrence of a supervening, unforeseeable event. In the case of impossibility performance must literally be impossible and neither party must have assumed the risk. Francois will state you can't fix dead and a dead goldfish one minute before performance makes it literally impossible for Taylor to sing with a live one on stage. Taylor will state that a dead goldfish could be foreseeable as anyone who has tried to keep them for pets will tell you, they die all the time and the term "seven flush salute" is a common phrase for goldfish burials down the toilet because of it. Because it was

foreseeable that a goldfish could die suddenly, Francois cannot claim this defense. ✓
Furthermore neither party assumed the risk of the goldfish dying.

Impracticability is a defense in which due to a supervening, unforeseeable event performance is extremely and unreasonably difficult. The party trying to claim this defense must not have assumed the risk of this happening. However, once again a live goldfish turning into a dead one is not an unforeseeable event and Francois cannot claim this defense.

Frustration of Purpose is a change in circumstances due to the supervening event in which the primary purpose of entering into the contract and which both parties knew was the primary purpose is thwarted and frustration is total. Taylor wanted a live goldfish to celebrate her hit song "I Love Goldfish." Francois knew this. With the goldfish turning up dead the purpose of Taylor entering into the contract was completely and totally frustrated. Francois cannot claim this defense.

In short, it was extremely unfortunate that the goldfish turned up dead but it was not an unforeseeable event and so Francois cannot claim these defenses to enforcement and can she sue him for breach of contract and can pursue damages.

Damages: The general measure of damages are expectation/compensatory damages which seek to place the injured party into the position they would have been in if they had enjoyed the benefit of the bargain. In determining expectation damages the court will look at whether the damages were foreseeable, unavoidable, caused by the defendant, and if they have certainty vs. being speculative.

It would be foreseeable there would be damages if Taylor ended up with a dress that was not unique and also had a dead instead of a live goldfish in it. The damages were not able to be mitigated because she got the dress the morning of the concert and the goldfish died one minute before she stepped on stage. The lack of a unique dress was because of ✓

Francois's fault in also designing a similar dress for Beyonce and while the facts don't tell us, generally the price tag of a dress is part of a bargain so we can assume the cost was certain for the purchase of the dress instead of speculative. In short, Taylor has a case for compensatory/expectation damages. ✓

Conclusion: Taylor can sue Francois for breach of contract because he did not comply with the express condition of an absolutely unique dress unlike any dress he has ever designed for anyone. He also did not comply with both subjective and objective conditions of satisfaction as she was absolutely mortified during her performance not only having a dead goldfish floating around in her dress but also that Beyonce was in the front row with a similar dress of her own. He also didn't follow the implied condition of good faith and fair dealing. His breaches were material whereas Taylor's were minor and had no bearing on his ability to perform his portion of the bargain in producing a dress. ✓
Francois also cannot claim any defenses to enforcement, and Taylor can pursue him for expectation damages. ✓

D 15
I 14
R 15
A 15
C 14

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well done!

