Contracts, Section Three
Midterm Examination, Fall 1991
Professor Russell

This exam counts for 25% of the yearly grade. For purposes of calculation of the final grade, the raw score, not the Mid-Term letter grade, will be used.

The distribution of raw scores and grades is as follows:

Raw Scores	Grade	Number
>40	A+	2
35.5-39.5	A	12
32.5-35	A-	11
30-32	B+	15
25.5-29.5	B	22
23.5-25	B-	15
21.5-23	C+	9
17.5-21	C	12
≤ 17	D	4
	F	0

No student failed the exam.

Attached you will find two answers to each question. For each question there is a sample answer written by a student and a model answer written by Professor Russell. The sample student answers were high-scoring, though imperfect. The model answers would have been much higher scoring and are less imperfect.

QUESTION ONE

Student's Sample Answer.

This Student Answer received a raw score of 29 points. The highest raw score on this question was 32 points.

Both contracts are for sale of goods to the Buttoneers (B). There could be an argument that the manufacture involves a service, but this is not really plausible. Because it is a sale of goods the UCC applies to both contracts according to § 2-102. Also, both contracts are for over $500, so they must be written or meet the other tests of § 2-201 to be enforceable. They are both written so they are both enforceable.

I'll deal 1st with the contract with Cellular (C). Everything was OK until the phone call on 11/15 between B and C. The key issue with the phone call is whether it amounted to an anticipatory repudiation by either B or C. § 2-609(1) allows for either party who is reasonably insecure about whether the other party will perform to demand an assurance in writing. Here, the demand was only over the phone, and was not in writing. So, 2-609(1) doesn't) apply here. § 2-610 discusses anticipatory repudiation. If C repudiated in the conversation, then B has a right to proceed under his damages for breach allowances.

Repudiation centers on an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination to continue with performance. Here B can argue that C repudiated by saying the buttons would be ready on 12/4 or 12/5 because that was a communication that they would not be ready by 12/1. The repudiation must substantially impair B's use of the buttons for B to proceed under the damages for breach. A material inconvenience or injustice will suffice for this. Being 4 or 5 days late out of a 2-month life is maybe not a material inconvenience. It is close. We must also consider that B doesn't believe what C said. I think the Court will find it to be a substantial impassment. But, it could go either way. Thus, I think court will say C repudiated. B did not repudiate if C repudiated first because B had a right under 2-610 to tell C it didn't want C's buttons. C will argue they didn't repudiate and that B must accept the buttons or pay damages.

If the court rules that C repudiated then B's covering was allowable and B can recover damages for breach. § 2-711 allows buyer to get back his deposit ($3,000 here) and also to cover by buying replacements or to recover damages for non-delivery. Buyer could also demand specific performance, but did not do this here. In this case, B covered for 200,000 buttons with Elephant (E) and could also recover damages for the 300,000 not covered under § 2-713. Interior Elevator court said this can be done. The

damages B would get for cover are cover price - contract price + incedential & consequential damages--expenses saved. Here that would be $12,000-$6,000 + inc. + consq. - expenses saved. Incidentials would include costs associated with the purchase of cover. Here, B can argue for consequential damages of the lower rating of the democratic mayor, but this seems quite nebullous and they aren't likely to recover it. Expenses saved could be costs of distributing buttons for 15 days. For the 300,000 not covered, 2-713 says B can recover market price at time B learned of breach (11/15) = contract price + inc. + cons. - expenses saved. Here, market price would seem to be best represented by the price paid for the 200,000 covered. Incidental, consq., & expenses saved should be the same except that these costs are considered for whole 2 months not just 15 days. However, the court might instead of allowing 2-713 costs the could court make B accept 300,000 of the 500,000 buttons delivered and still allow any incidental and consequential damages, because the provisions are to be liberally administered (1-106) and courts won't enforce unconscionable clauses of contracts and generally won't allow unconscionability (2-302). If the court rules C didn't repudiate, B will have to accept the buttons or pay damages. C's damages could be resale (2-706), non-acceptance damages based on market price (2-708), or an action on price (2-709) if resale is not reasonably possible. Here resale is probably not possible because the buttons would probably be worthless to someone

else, and thus B could be forced to pay the full price under 2-709. Even if they aren't, the damages will probably approximate full price the resale won't earn much and market price is probably very low (we weren't given this date, but this is a logical assumption dealing with political buttons). On the contract with E, B can claim that the contract is unconscionable because of the exorbitant price. But the court won't likely allow that. This leaves B in exactly the same situation he is in with C if the court finds C didn't repudiate.

My advice to B: He has a close call on whether or not C repudiated the contract for 500,000 buttons. If C repudiated he should accept the 200,000 buttons from E and as many as he can u use from C (although he probably didn't have to accept any from C to collect damages- In fact, he could maybe get full damages leaving C stranded with the 500,000 buttons but this case won't likely go through court fast enough for him to recover damages and cut a deal with C to buy the extras at a low price and distribute them. Then he should sue C for damages as I've described. But, if he accepts any from C he should be sure to get in writing from C that this doesn't affect his claim against C for cover or those that can't be used because he doesn't have time to distribute 500,000 anymore (i.e., he can still get damages for 200,000 (2-712) and any amt less than 500,000 (2-713)) If C didn't repudiate B is going to have to pay for all of the 700,000 buttons anyway (or just

about all b/c if C can resell some for anything above incidental costs that would reduce what B has to pay).

So, accept the 200,000 from E and as much of the 500,000 from C as you can use, but get in writing from C that you can still get damages. If C won't do that you've got to take a chance and not accept from C because you expect that court will rule C repudiated.

Model Answer

This answer would have received a raw score of 52 points.

There were two different transactions here, one between the Buttoneers and Cellar and one between Buttoneers and Elephant Buttons.

Article 2 of the UCC applied to both contracts, because this was a sale of Goods, Bonebrake. As well, the two contracts, both for the sale of goods over $500, meet the writing requirements of the Statute of Frauds, 2-201.

Buttoneer - Elephant contract

I think it is useful to deal with the Elephant contract first. Two issues: First, duress. Knowing that the Buttoneers were in a tough spot, Jack M. Upp deliberately jacked up

his already high price another $3,000; the B's did not feel that they had another chance so they agreed. This is a tough bargaining situation, but Mr. Upp did not put them there and the B's had other opportunities, so arguments about duress and unconscionability will not avail the B's.

But, more importantly, the contract is already complete. The B's paid the $15K and E delivered the buttons. Even if the duress argument would have worked, it won't work where the contract is complete. [Almost everyone omitted this.]

Next issue is whether B has accepted the Elephant Buttons. The Buttons were late, so under the perfect tender rule, B might have rejected them. But B inspected them and found them to be satisfactory, and so has probably accepted them. If B has accepted, then B can revoke acceptance only is there is a defect that substantially impairs the value of the buttons. If B has not accepted, then B can reject the lot under the perfect tender rule.

Looks like there is no way out of this contract; it will be enforced. B may, however, get damages from C for the cover price.

<u>Buttoneer - Cellar contract</u>

The heart of the analysis of the contract with Cellar Buttons is the effect of the

conversation that the parties had on 15 November.

B, having heard second-hand that C was behind with production, called C. C said that they had not yet done anything on the contract, but they would be able to get the buttons to B by the 4th or 5th of December. This, of course, would be a few days late. B's president then says, "That won't work for us. We have a very limited window of opportunity. We will have to look elsewhere for our production needs."

Clearly, this is a problem of anticipatory repudiation, 2-609 and 2-610. B had a right to assurance of performance, and could have demanded that assurance in writing. B did not do this, however, and what we need to do is consider the possibilities at this point.

There are three possibilities. First, breach by Cellar; second, breach by Buttoneer; and third, no breach at all. [Essential here to take each line of analysis in turn and stick with each line of analysis to the end. Almost no one organized this answer well.]

Cellar Breach

If by saying that the buttons would be a few days late, Cellar has breached, then B had available buyers' remedies under the UCC. First, B can recover his deposit, 2-711(1). B has covered with a substitute transaction made

with Elephant Buttons. Although the cover was for differently sized buttons, it was for goods in substitution and appears to have been reasonable, 2-706. But there is only a partial cover here. B covered 200,000 buttons, at a cost that was 3 cents more per button, so B can recover the $6,000 difference in price. As with Interior Elevator, B can recover for the other 300,000, uncovered buttons using 2-713. Just what the market price is, we really don't know. But we do know that we measure it at the time and place of the breach, which would have been 15 November. The price that B paid E may be the market price or not, we'll do some research, 2-723.

B is of course entitled to incidental damages as well. These would include the cost of finding the cover and arranging the substitute transaction.

B is also entitled to consequential damages. Here these damages may include the loss of the election, and the loss of the mayor's office to the Republicans. Though this loss might be foreseeable, proof would certainly fail the test of certainty.

That's not the end of the problem. If C breached, and they went ahead and produced the buttons and delivered them, then what do we do with the buttons? Are they a gift? We can apply the Restatement analysis and consider, as with the Shakespeare example, whether B has

exercised dominion over the buttons and therefore whether a claim in Quasi-Contract exists for the value of the buttons. But, we also know that unsolicited gifts that come by U.S. mail, may, according to federal statute, be kept by the recipient as a gift.

B as Breacher

What if C did not breach, but in fact B was the breacher? Did they jump the gun in the situation of anticipatory repudiation and become the breachers themselves?

If B breached, then C had available the seller's remedies. In the absence of a liquidated damages provision, C could keep up to $500 of the $3,000 deposit. They could keep more if their damages were more.

Although C had done no work on the contract, they are entitled to their profits on the contract, 2-708(2). They are not a lost volume seller; they are simply entitled to their profits on the breached contract. That is the nature of expectation damages.

If B breached, then C should not have continued work, Luten Bridge. To continue the manufacture of the buttons was not reasonable, 2-704. So, they get nothing extra for piled-up damages.

The arrival of the buttons, after a breach by B, poses the same problems of analysis as above. B may want to make a deal on the price of the remaining buttons, as they shoulder no liability for their manufacture after the breach.

No breach

The third line of analysis considers the possibility that there was no breach in the 15 November conversation.

In this case, B is not entitled to damages for the substitute transaction, that is, they do not recover for their "cover" with E.

If there was no breach on 15 November, then the late arrival of the buttons is a breach under the original contract. B is therefore entitled to reject the buttons under the perfect tender rule, 2-601.

B can also accept a partial shipment of the buttons, 2-601. As with the section above, B is in a good position to attempt to make some kind of deal on the price.

C may wish to pursue sellers' remedies, such as resale or market based damages, 2-706, 2-708. However, it is likely that they will be unable to resell the buttons, so they may wish to pursue an action for the price, 2-709. With

this, they will run into problems with the perfect tender rule.