M E M O R A N D U M

TO: Contracts Students, Section Three

FROM: Thomas D. Russell
DATE: 7 August 1992
SUBJECT: Final Grades

The distribution of raw scores and grades in the course was as follows:

Raw Score	Grade	Number
>210	A+	2
176-210	A	10
168.5-175.5	A-	12
160-168	B+	14
149.5-159.5	B	20
140-149	B-	15
129-139.5	C+	9
105.5-128.5	C	10
61.5-105	D	4
≤ 61	F	1

Final grades are based on the sum of the midterm and final exam raw scores. The point totals for the four final exam questions appear on the front of the bluebook. The final raw score for the course equals the sum of the the final exam question scores plus the midterm raw score.

Raw scores on the final examination questions ranged as follows:

Question	Low	High
1	21	68
2	7	63
3	2	31
4	9	50

Total scores on the final ranged from 66 to 172, with a mean of 124.1 and a median of 125.

Attached are student answers to each of the four final exam questions. Each student answer was high-scoring, though not always the highest scoring answer in the class.

Thank you and good luck.

STUDENT ANSWER
QUESTION ONE

[This answer received 68 points.]

The predominant thing bargained for between Carp and Plummer was the installation of plumbing. Application of the Bonebrake balancing test depicts this deal as an arrangement for services while the goods--here pipe--is secondary to the need for professional installation. Principles derived from the common law as presented in the Restatements apply, however, a court may also choose to apply the principles set forth in the UCC.

Under the common law statute of frauds, this contract may be performed within a year which is sufficient to satisfy a liberal statute. There is evidence of writing which would also satisfy the UCC statute of frauds, 2-201.
(1) The bid that Plummer submitted on Nov. 20 presented terms sufficient to constitute an offer that limited Plummer's capability of being bound to it only by a formal acceptance. R, §30(2) allows Plummer (P) to choose the form of acceptance of his offer and under a traditional common law approach P is the master of his offer and may revoke at any time before acceptance. At one time, P may have been able to revoke his offer without further liability based on a concept of lack of consideration on behalf of Carp (C) and hence, no mutuality.

The principles of contract law have changed, however, and adapted themselves more readily to such real world situations. R, §87(2) affects this type of deal, and construction bids in particular, by creating an option K where the offeror should reasonably expect action or forebearance on the part of the offeree and which actually does, limited as justice requires. The customary practice of collecting bids from sub-contractors before a general contractor bids on the proposal has converted the traditional master-of-the-offer' rule into a type of firm offer that may be accepted within a reasonable time, but without obligation to do so.

Carp is hindered somewhat because he must show that he actually relied on the P bid. C may show that through the course of dealing between the two, P should reasonably expect that C likes P's work and thinks the price is right. Because C has dealt with P numerous previous times P may suspect that C is likely to award the job to P or maybe even that P's silence,through the course of dealing, may be an acceptance, §69. C did forego the opportunity to solicit other bids once he received P's bid which may, in certain circumstances, lead to reliance under §87(2) regardless of the offer's express requirement of formal acceptance.

C, however, never mentioned, apparently, anything to P, nor did give P the opportunity to do the work as offered. C may have to protest, as in U.S. for Crane, then continue with his obligations because his secret intentions to correct the situation later may be too late. UCC 1-207 requires good faith in such dealings.

C's ongoing and continuing relationship w/P may be more important than a damage remedy, but C may first seek expectation which would award C the additional cost of the second subcontractor ($135,000-$126,700) to put him in the position if a breach had not occurred. 87(2) requires limits as justice requires, and if C were awarded a remedy, although unlikely, he may receive reliance damages which would be very nearly equivalent to the damages just mentioned.

(2) As before in (1), P is the master of his offer and may revoke before acceptance, however, reliance on an offer under 87(2) may limit that ability. Carp must still show reliance on the offer to recover, however, several conditions present some difficulty.

First, P may argue that it was not foreseeable that C would suffer such a large profit loss merely because P pulled their bid before the deadline. P may have suspected that C solicited and received other bids some of which could have been lower than P's. P was not assured of receiving the job. However, the course of dealing between the two may have created a type of partnership in which P should expect acceptance from C whenever P's bid is fair. C certainly thought that way since he did not seek other bids for the plumbing work. Still, P may not have foreseen the losses.

Second, C will not have a decent claim of duress since C put themself in the position of having only one plumbing bid, but C may have a remote chance of claiming bad faith on behalf of P. The previous deals between the two, in a very weak sense may have created a type of implied requirements contract in which C gave all his plumbing work to P and P must use best efforts and good faith to fulfill C's needs, 2-306. However, such a claim is very weak and the argument might not cut both ways, i.e., P's claim of breach of best efforts if C had awarded the plumbing contract to someone else.

Finally, as meager as it may be, C's best claim might lie in a §90 reliance argument. Here, as in Hoffman v. RedOwl an agreement was never reached, but a breach of good faith may justify an award of reliance damages to C. C's biggest problem, however, is that he did not propose a bid on the school project and did not subject himself to any liability or losses. §90 is very reluctant in allowing expectation damages and C cannot show any substantial out-of-pocket expenses in reliance on P's bid.

(3)(a) UCC 2-209 allows a liberal modification of contracts and C may have several claims of varying plausibility:

First, C may argue that P had a pre-existing duty to complete the work at $126,700. Such a claim had substantial merit in days when pirates extorted extra pay from the ships's captain, however, the modern trend accepted by both the UCC and Rsts is to allow renegotiation of deals and KS. The element of duress is hardly as existent between respectable business persons and liberal modification is allowed, §89. This argument may be unpersuasive.

Second, the offer proposed a merger clause of the deal. The parol evidence rule would bar some prior negotiations, however, subsequent modifications are permitted regardless of whether the agreement is partially or completely integrated.

Third, P made a clerical error which may be corrected if done promptly, Elsinore. However, there is little difficulty in fulfilling the higher standard of showing it was an honest or harmless error because the contract was modified regardless.

Fourth, C could have performed under protest, but did not. The agreement to an additional $1000 should stand. The previous writing, as noted before, satisfies the statute of frauds.

(3)(b) Here, P may show that the mistake was an honest clerical error and may be entitled to correct it if done promptly, Elsinore. If, however, Carp can

show that the original price, should stand and that P breached by not performing he will be entitled to some expectation damages. These damages will be limited, however, if Carp cannot show that the $131K was a reasonable price for 'cover.' Obviously, P was willing to do the job for $127,700 and will claim that they shouldn't have to pay the difference. Carp must show a reasonable mitigation of the damages to recover the additional cost from P only after C has shown breach as stated above.
(4) Carp must pass two hurdles to recover any money. Carp must show that he didn't orally relieve P of his time obligation and C may also show the liquidated damages were punitive.

First, the offer contained a merger clause. If the agreement is found to be completely integrated it will bar any dealings within its scope, if partially integrated it bar any inconsistent terms (UCC 2-202 provides escape to common law under 1-103: mistake, duress, . . .)

P will focus on the oral extention as a collateral agreement--something that would not be in the writing which is an unlikely event. Time might normally be in the agreement. The modification was made before the k, presenting great difficulty. Evidence of fraud is always permitted regardless of the strictness of the PER (determined by jurisdiction and may be strict-williston for liberal (anything allowed) Corbin approach. P will claim fraud as an exception to the PER to admit evidence of the oral arrangement.

Second, liquidated damages clauses are unenforceable if thought to be punitive and if no actual damages are shown (eg racetrack unfinished but hasn't gotten operating license so no real damages--12, 2, §356) they may be excused. C could try to recover money from state, UCC 2-718(3).

STUDENT ANSWER
QUESTION TWO

[This answer received 63 points.]
This K is within the UCC plants are goods. This K is NOT void by statute of Fraud because there is written forms (maybe NOT O.K. though).
First Form analyzed letter in catalog:

The rules of offer and accept make clear that an ad is NOT an offer. There are exceptions (for ex. 200 daiseys for $1 ea) BUT the Bremeliad ad does NOT meet such exception and ... is NOT the offer.
F's Mar 1 order:

F's order is likely to be found to be an offer. It is a "manifestation of willingness to enter into a bargain." (§24) The offer is complete in that it gives price, quantity, date of delivery. A real problem with F's form, and this is where our Battle of the Forms" begins, is that it requires B's acceptance to be "expressly conditional on F's assent to [all terms on back, etc]." This includes ¶6. Such a statement requires F to agree to all additions and differing terms within B's acceptance. If there is no such assent given, NO K will result and the only possibility of an enforceable K is performance (2-207(3)) by the parties, and as we will see, this is not clearly

done either.

B's Mar 3 form:

B transferred all the "relevant" data to her own form upon receipt of F's offer. F added her own clause which also required F's acceptance to comply with B's assent. B also included a clause on the back about "bloom" on a warranty disclaimer [covered below]. She then sent this "acceptance" to F.

B's performance:

B performed by sending the plants BUT F has not yet accepted.

Was ¶6 part of the K?

¶6 was not agreed to by B. In fact, it appears that B did NOT even read ¶6. But since F's form required B's acceptance of all F's terms unless assented to by F, it would appear that not only was ¶6 not part of the K, BUT that no K even was formed.

At CL, the last form would rule, and ¶6 would NOT be part of K. BUT since our jurisdiction uses the UCC and my boss is probably related to the UCC's writer, we turn to §2-207 for guidance. UCC rejects the "mirror image rule" and instead looks at each form. Any of B's terms which were additional or different from those contained in F's offer would be seen as proposals under normal circumstances. BUT in our situation, F clearly reserved right to assent to such "different or additional" terms and clearly she has NOT at this point. UCC lets "first form" rule in that it is the basis of the K, and the proposals of 2nd form are either incorporated or thrown out according to 2-207(2) and Comm. 4. The Offer limited acceptance to the offer's terms and 2-207(2)(a) would suggest that none of B's "proposals" are part of the K.

Did a K exist?

Since the acceptance by B would fail under §2-207(2) we have 2 options: 1 F could assent to B's terms, BUT as her attorney I would suggest she NOT do such since we may collect damages later or 2 we could see if 2-207(3) turns out forms into a K due to performance. B clearly performed by shipping the plants BUT F has not accepted them NOR paid for them yet. While the plants were shipped, full performance would require F's acceptance and this has NOT been given. 2-207(3) requires "conduct by both parties which recognzies the existence of a K."

F's rights at this point:

F could just reject and be free of any obligation since no K exists BUT since Mother's Day is almost here, I would tell F to go ahead and accept the part of the plants that are in bloom and reject the rest. 2-601 gives F the right to reject the nonconforming plants (vestage of Perfect Tender Rule) and accept the ones that do conform. B could cure under 2-508. If B can't cure, and this may be a problem since Mother's Day is close at hand, B could resort to remedies under 2-711. F should probably choose to cover and get: cover price - K price & incidentals & consequences = expenses saved.

Warranty disclaimed

Since my analysis suggests that a K did NOT exist, this disclaimer does

NOT need attention, BUT in case my boss determines a K does exist, analysis here may be later necessary.

Warranties are disclaimed under 3-316. The warranty disclaimed is most likely an "express warrant" since the catalog gave a description. It may also disclaim implied Warrant of Merchant. This disclaimer is likely to be found inoperative since:

Express Warrant we don't want merchants to later disclaim "truths" earlier told. Parol Evidence Rule may not solve our problems, BUT a court is likely to go with our first argument "illogical" to disclaim truths told.

1 WM disclaimer was NOT conspicuous and did NOT mention "merchantability."

B's Defenses

B may argue that ¶6 was on the back of F's form and she did NOT see it. She may also argue that her performance was complete performance and 2-207(3) makes form a valid K.STUDENT ANSWER

QUESTION THREE

[This answer received 20 points.]

Buyer may be incorrect. S has five arguments that the K should not be binding. Intent: Statute of Fraud, and unilateral mistake. Note that this is UCC §2-105--movable goods.

Intent. A lot depends, again (§1-103, mistake, intent allowed in) on the outlook of the court. Willisham/Holmes outlook would find a K because of the objective manifestations of assent between B & S. S clearly said what any objective person interpret as an offer to sell his entire academic library, and B accepted. A Corbin-like court might allow S's intent as to determine what he truly meant. In this argument §20(2)(b) comes into play. In this case, S may attach a different meaning to "academic library" than B is asserting--then "academic library" doesn't include the Smith book. Also B had reason to know this since he knews that S has a valuable collection of books, and here reason to know S wouldn't sell them. This question comes down to how the jury decides. --note that S may cause sympathy. Interpretation issues--about the same as intent.

Statute of Frauds. Under §2-201(1) an agreement for greater than $500.00 is not enforceable unless a signed writing listing at least the quantity exists. There is no writing here, only an oral K. S could get out of the K unless he admits the existence of the contract in court by pleading or otherwise 2-201(3)(b).

This may be where morality and law diverge --S may have to deny the whole K on basis of SoF to get his Smith book. B may be able to plead reliance if there is any, but it only applies to specially manufactured goods §2-201(3)(a). B may try a CL escape hatch §1-103 to allow the "essential reliance" rule in, but he would have to 1 prove such reliance--none is given in the facts--and 2 get the court to buy it in the face of the [illegible] §2-201. S has a good

chance of success on §2-201 if he pleads SoF.

Finally, S can plead mistake--that he was mistaken and that enforcement would be unconscionable. Under §1-103, CL mistake rules supplement the UCC. S could argue §153, that he made a mistake as to the nature of the "academic library" and that enforcing it would be uncconscionable. Again S might cause sympathy with the jury on the "unconscionable" idea. A lot may depend on whether the court requires strict unconscionability or a lower "[illegible]" standard as in Elsinore. Alternatively, S could plead §161(d)--that the relationship between B & S created a duty upon B to inform him of the Smith book (Feist) B may also argue §161(b)--duty to disclose about a basic assumption, the assumption being that the academic library only contains office books, not books from home.

B would have a hard time enforcing the promise at all, and if he could enforce it generally, what interpretation would probably allow exclusion of the Smith book. Finally, note the strategic choice: to plead intent and mistake, S would have to forego his SoF clause, because he would be admitting the existence of the K and vice versa.

STUDENT ANSWER
QUESTION FOUR

[This answer received 50 points.]

A

This case involves a service and not a good. Therefore, UCC doesn't apply, but if it did 2-306 would impose a best efforts requirement on each party in an exclusive dealings K. Defendant may not assert Statute of Frauds since there is a writing, and there appears to be no defenses to formation under offer and acceptance as under consideration.

Defendant may assert many defenses, with varying degrees of anticipated success. First, defendant may assert that orders were down and that he is not required to perform if due to circumstances outside his control and unrelated to the K. This is in line with Posner's good faith analysis of requirements K's in Empire Gas. Plaintiff will assert that the written K allocated the risk of that loss to defendant, regardless of its cause as source. Defendant will also argue that plaintiff wants merely to avoid paying its obligations and is acting in bad faith. The court will probably give great weight to the writing in this point and find against defendant.

Defendant may argue that the K provision services as a penalty clause. Defendant will argue that the liquidation damages were not a reasonable estimate of the damages that have resulted and that the damages could have been subject to calculation (limited primarily to reliance damages). Defendant will counter that the liquidated damage amount was a good estimate of value at the time the K was made and that the assurance of minimum payments is what induced defendant to enter the K. Thus the liquidation damages clause was reasonable. Defendant may have more success with this defense if he can convince the court that the estimate was unreasonable, especially given its large amount after the

breach. (Defendant may try to get the court to do UCC analysis (2-718) of reasonableness at time of K as with respect to actual damages).

Defendant may also assert a defense of impossibility. He may argue, as outlined in Transatlantic, that an unforeseen contingency (foreign competition) occurred, that the risk had not been allocated by agreement and custom, and that the contingency made performance commercially unreasonable. Plaintiff will have strong counter arguments. Plaintiff will argue that defendant is in the business and should have foreseen foreign competition. Further, defendant got the risk of loss in the written K, and, while performance may be commercially unreasonable, the standard to judge is insolvency. Defendant will likely fail on this claim in the face of plaintiff's arguments.

Defendant may argue that he used best efforts to comply but could not. Plaintiff will argue that Feld requires that mere financial difficulty is insufficient to establish breach and that defendant must go to the brink of insolvency. Defendant may counter that enforcement would be unconscionable (using UCC 2-302 as reference) because the amount is so large and he could be financially ruined. Depending on how the court views the size of defendant, the relationship between plaintiff and defendant, and the importance of maximizing efficiency, the court may go with defendant on this argument.

Overall, however, defendant's defenses are weak.

B

Defendant - The absence of K enforcement, plaintiff may argue for

1 expectation damages

The cost of the bag machine and the 20% of anticipated volume profit they expected plus any profits from other jobs they couldn't perform (if foreseeable and in contemplation of parties at time of K--Hadly)

2

Reliance damages -- $89,000 and I they spent in reliance on the K.

3

Plaintiff probably can't get restitution since no value seemed to pass to defendant.

4

Plaintiff can't get specific performance because of court difficulty in enforcement and adequacy of legal remedies.