FINAL EXAMINATION

CONTRACTS

PROFESSOR RUSSELL

EXAM NO.:_____

INSTRUCTIONS:

1. This examination consists of three (3) sections on nineteen (19) pages. Please make sure that you have all nineteen (19) pages. For grading purposes, the sections are weighted equally. You have three hours

to spend on the examination. You should divide your time with these weights in mind, that is, take one hour (60 minutes) to answer each section. Please note that part of reason for the page-length of this exam is that, at the request of a student, some sections are double-spaced.

2. The first section consists of twelve (12) short-answer questions of equal weight. You should spend no more than one hour on this section. You should answer each question and offer a brief explanation of your answer. You should write your answers in the space provided after each question.

Typists may disassemble their exams and type their answers in the spaces provided, or they may write by hand. No one may write short answers in blue books. You should not write long answers, and you will be penalized if your answers are needlessly long.

3. The second and third sections are both one-hour essay questions. You should write your answers to these questions into bluebooks. You should begin a new bluebook when you begin the third section. Please note that the fact pattern for the third section is quite lengthy. You may want to take this into

account as you budget your time.

4. Please be sure to put your examination number on each bluebook that you use and also on the examination itself. Do not write on both sides of the page If you write by hand, you should double-space and you must write legibly. Do not use pencils that are not sharp or pens that are nearly out of ink. If you type, double space.

5. Professor Russell, as a historian, is able to decipher very poor handwriting. However, if your handwriting is so poor that Professor Russell cannot read it, then you will not get

an opportunity to translate your illegible prose. Professor Russell will simply ignore what he cannot read.

6. This examination is open book. You may refer to any written material that you wish, although your answer must be of your own composition.

7. In answering each question, use judgment and common sense. Emphasize the issues that are most important. Do not spend too much time on easy or trivial issues at the expense of harder ones. If you do not know relevant facts or relevant

legal doctrine, indicate what you do not know and why you need to know it. You must connect your knowledge of contract law with the facts before you. Avoid lengthy and abstract summaries of general legal doctrine. Discuss all plausible lines of analysis. Do not ignore lines of analysis simply because you think that, clearly, a court would resolve an ambiguous question one way rather than another.

8. You should assume that you are in a common law jurisdiction that has adopted the Uniform Commercial Code.

9. Quality, not quantity is desired. Think through your answer before you begin to write. Keep in mind that some professors do not distribute bluebooks until twenty minutes after the examination has begun.

10. You may not keep your copy of the exam questions.

11. If, in preparing for this examination you have violated the Honor Code, or if, during this examination, you violate the Honor Code, the best course of action is for you to report to the Assistant Dean of

Student Affairs immediately after this examination ends.

12. The full text of the Honor Code is as follows:

HONOR CODE: The study of law is an integral part of the legal profession. Students engaged in legal studies should learn the proper ethical standards as part of their education. All members of the legal profession recognize the need to maintain a high level of professional competence and integrity. A student at The University of Texas at Austin School of Law is expected to adhere to the highest standard of personal integrity. Each student is

expected to compete honestly and fairly with his or her peers. All law students are harmed by unethical behavior by any student. A student who deals dishonestly with fellow law students may be dishonest in the future and harm both future clients and the legal profession. Under the honor system, the students must not tolerate unethical behavior by their fellow students. A student who knows of unethical behavior of another student is under an obligation to take the steps necessary to expose this behavior. Students in The University of Texas at Austin School of Law are governed by the Institutional Rules on Student Services and Activities. Students may be

subject to discipline for cheating, plagiarism, and misrepresentation.

13. Good luck. You have been a terrific class. Thank you, enjoy the summer, and please keep in touch with me next year.

(Section One Begins on Next Page.)

Section One

(One Hour)

1. On 1 January 1995, Seller enters into a written contract with Buyer under which Seller will deliver 10,000 reams of paper to Buyer on 1 April 1995 at a cost of $3.00 per ream. (One ream of paper equals 500 sheets.) On 31 March, Buyer informed seller that it would not be taking the paper. Below is a graph of the price for which paper could be sold between 1 January and 1 May 1995. What are Seller's damages?

[Graph could not be reproduced. Try variations on changing prices, with the market price of paper moving up and down.]

2. A printed contract for the sale of 500 lightbulbs contains a printed clause that says, in conspicuous type, "No Express or Implied Warranties." On the face of the contract, the seller has written by hand: "Guaranteed for one year." The buyer, a Las Vegas casino, installs the 500 lightbulbs and within one week of their installation, 200 of the bulbs are burned out. Does the buyer have a valid warranty claim?

3. Same facts as previous question, except that the printed term is "Guaranteed for

one year" and the handwritten term is "No Express or Implied Warranties." Does the buyer have a valid warranty claim?

4. Alice bought an old lapel pin at an antique store for $5.00. Her uncle, a jewelry dealer glanced at it and said: "This pin might be very valuable -- I'd have to check it out." Alice, in need of money, sold the pin to a friend for $10.00. The friend did not know if the pin was valuable. The friend soon thereafter found it to be worth $5,000. Alice has tendered $10.00 back to the friend and demanded the brooch. Is she entitled to rescind?

5. Ann owned a hotel. Bill owned a nearby athletic club. Ann wanted to offer aerobics and swimming to her hotel guests. Ann and Bill agreed to a five year contract whereby she would pay $2,000 a month to Bill and Bill would provide free aerobics and swimming to Ann's hotel guests. To do this, Bill enlarged his pool at a cost of $20,000. In the second of the five years, Ann's hotel burned down and she left the hotel business. Can Bill enforce the contract against Ann?

6. Sandra Seller and Ben Buyer

sign a printed sale form in use in Sandra's office by which Sam promises to sell and Ben to buy 100 steel valves at $90 each. The form included a number of blank spaces, most of which the parties filled in. One of the printed terms provided that "Delivery shall be made within thirty days." Delivery would require two days by rail. Before the parties signed, Sandra said: "This deal of ours can't take effect unless within ten days our local railroad has a flatbed available for shipping these valves." Ben Buyer says he did not hear this, but a reliable witness did overhear it. Twelve days went by, no flatbeds became available, and the market price of valves went up. Sandra sold

the valves to Third Party at an advanced price. Ben then read the form and for the first time noted the delivery term in it. Ben has come to you. He wants to sue Sandra, but first wants to know whether the alleged statement regarding the availability of the railroad cars will be admissible at trial. What do you advise regarding this oral statement?

7. If Boone v. Coe were litigated today, would the transaction be within the Statute of Frauds?

8. Aaron offered eight

truckloads of heavy surplus furniture to Irene for $70,000, delivery to be "at Seller's plant within six weeks," with a further clause stating: "Buyer to pay loading costs." Loading would require two days. The offer was on a printed form, with various blanks filled in. The above terms were written into two of the blanks. Irene sent her own signed purchase order form back to Aaron. This form also included blanks in which Irene had written the words: "Seller must provide a loading crew to help my men load."

(a) Is there a contract?

(b) Assuming a contract, what would be its terms with regard to loading?

9. Buyer was a rap musician who had never previously recorded a record. Seller made a Compact Disc (CD) of Buyer's songs for Buyer, who had in advance advertised their forthcoming availability. The advertising costs were $20,000. Buyer said he expected to make $50,000 net out of the whole deal after deducting all costs, including the $10,000 paid in advance to Seller. Seller delivered the CD's to Buyer promptly and Buyer sought to sell them. After the first few sales he found the CD's to be

defectively made and sued Seller. On the above facts, what could Buyer recover, if anything?

10. If the German law of contract remedies applied to Peevyhouse v. Garland Coal & Mining Co., what would be the result?

11. Betsy contracts on 1 January to sell widgets to Edgar for $5,000, delivery 1 May. On 1 April, Betsy repudiates the contract in a written letter in which she announces that she is closing her business for good. On 1

April, the spot market price for widgets is $3,500. On 1 April, the futures price for widgets to be delivered on 1 May is $4,000. This means that if Edgar wants to pay for and accept delivery of widgets on 1 April, he can do this for $3,500. On the other hand, he can also enter into a forward contract under which he will receive the widgets on 1 May; but under this futures contract, the widgets cost $4,000. If Edgar does not cover, which price should be used to determine his damages?

12. On 1 May, Buyer phoned Seller: "Please send your advertising brochure on

restaurant equipment." Seller mailed the requested brochure to Buyer. The brochure included a printed order that Seller ripped out, filled out (for $15,000 worth of equipment) and mailed to Seller with a delivery date of 1 April. The brochure included descriptions of items made by Seller along with prices and possible delivery dates. The earliest delivery date listed is 15 May. Seller, on receiving the above, wrote Buyer and said: "We cannot fill your order. We can't fill any order before 15 May." When 15 May came, Buyer did not send any tools to Seller. Seller bought the tools elsewhere for a price of $23,000 and sued Seller for $8,000. What result and why?

END OF SECTION ONE

Section Two

(One Hour)

Professor Beier signed a contract for the purchase of his new $4,500 XPS laptop computer on 1 April 1994. The one-page sales contract included the following provisions:

LIMITED WARRANTY

Compu-Seller warrants this equipment to be free of defects for a period of one-year. Compu-Seller shall not be liable for any special, indirect, incidental, economic, or consequential damages arising from or related to the equipment, even if Compu-Seller has been advised of the possibility of such damages. Buyer's sole remedy will be repair or replacement of the equipment.

DISCLAIMER OF WARRANTY

The foregoing limited warranty of the equipment is in lieu of all other warranties, express or implied, including, without limitation, the implied warranties of merchantability and fitness for a particular purpose.

MERGER CLAUSE

Oral modification of this agreement is not permitted; any changes must be written and signed by buyer and seller.

Before signing the sales contract, Beier had a long discussion with the salesperson. The salesperson said: "This computer is the latest thing. You'll love it. Keep in mind that if you have any problems within the first 30 days, you can return the computer for a full refund, no questions asked." When asked whether the computer would run special MacroCode software that Beier used for his research, the salesperson answered

"Certainly." Satisfied with these replies, Beier signed the contract.

Beier started to leave the store with his new computer, but on the way out, he stopped to ask the salesperson one more question. Beier noted that he was concerned about Repetitive Strain Injury (RSI). RSI is a family of disorders that afflict computer users; Carpal Tunnel Syndrome is one such disorder. Beier noted that he believed he might be sensitive to injury from the repetitive motions used in typing at a keyboard and operating a computer's mouse. The Salesperson said, "Don't worry. If you ever have a problem, come back and see me and I'll take care of you."

Thirteen months later, Beier returned to the store. In April 1994, he had discovered that the computer would not run MacroCode software at all, but he had kept the machine anyway, because he liked its other features. In May 1995, Beier's doctor diagnosed him as suffering from RSI, and the doctor determined that the XPS's built-in mouse was to blame for the injury. The doctor has told Beier that he may not work at a computer for six months, which means that Beier will not be able work on three grant applications totalling $500,000, one of which Beier believes he would have been sure to win.

After examining the computer, the head of Compu-Seller's customer support staff informs Beier that he is too late to make a warranty claim and that in any case, the machine is not defective. The customer support person admits that the machine will not run MacroCode programs, but she says that MacroCode programs require specialized equipment. She also tells him that she is sorry that he is injured, but that there is nothing that Compu-Seller can do for him. She tells him to "Have a Nice Day."

At this point, mild-mannered Professor Beier contemplates litigation. He has already consulted a torts lawyer, who will handle any tort claim that might exist. You should evaluate the

strength, if any, of his contract claims.

END OF SECTION TWO

SECTION THREE

(One Hour)

Sally Subber is a carpenter who specializes in outdoor decking for residences and business. She has a well-deserved reputation for doing extremely high-quality work and for being utterly dependable. On about half of her jobs, she contracts directly with the owner of the property; on the other half, she serves as a subcontractor.

George General was a general contractor who specialized in the construction of homes. General bid on a large project to build 50 new homes as part of a Ralph Realestate housing development. As part of the process of assembling his bid, General sent Requests For Proposals (RFP's) to a number of businesses that might serve as subcontractors on the Realestate job, including an RFP to Subber for the construction of outdoor decks on each of the 50 homes in the Realestate development.

General's RFP for decking was very specific in detail. The decks on the 50 different homes would be identical. The proposal gave the exact dimensions and design specifications for the decks. In the first part of the RFP, which was entitled SPECIFICATIONS and was two pages long, the RFP noted that:

> **All lumber used in the construction of the decks will be WOLMANIZED® (see DEFINITIONS below).**

The section of the RFP entitled DEFINITIONS, which began on page 3 of the RFP and continued for another 5 pages, contained the following paragraph:

> **WOLMANIZED® lumber means treated lumber manufactured by the Koppers company of Pittsburgh, PA. WOLMANIZED® is not a generic term and is not intended as merely a standard. WOLMANIZED® means WOLMANIZED® and no other type of treated lumber is acceptable.**

After receiving the RFP from General, Subber read through the SPECIFICATIONS and decided that she would like to bid on the

job. Subber never read the section entitled DEFINITIONS. In figuring her bid, she estimated that she could buy treated lumber for the project for a total of $100,000 or $2,000 per deck. She estimated that the labor costs would total $300,000 or $6,000 per deck. Her usual profit margin on jobs on which she served as a subcontractor was 20 percent, which on this job amounted to $2,000 per deck or $100,000 total. She totalled her costs and profit and submitted a bid to General. Her entire bid consisted of the following language, laser-printed onto her business letterhead.

> Subber will build fifty (50) decks on fifty (50) homes in the Realestate development using treated lumber. Total price: $500,000. $200,000 to be paid when construction of the decks begins; $250,000 to be paid when construction is complete on 1 February 1995; and the balance of $50,000 to be paid within 30 days of the completion of the project. All work guaranteed.

After Ralph Realestate informed General that he had won the bid to build the homes, General wrote "I accept" on Subber's bid, signed his name, and mailed the bid back to her, after making a copy for his files.

Subber commenced the job on time and completed each of the 50 decks by 1 February 1995. On that date, General made the second installment payment of $250,000, leaving a balance of $50,000 yet to be paid. When he gave her the check, he made sure to tell her how pleased he was with her work, because he was genuinely pleased. He found the quality of her work to be exceptionally high. He also felt that her performance--in

particular her management of her laborers and carpenters and her maintenance of the work sites--met or perhaps exceeded his very high professional standards. He also knew that the closest bid for the decking had been for $550,000, and he doubted that he would have been able to find any contractor who could have done the work for the amount of Subber's bid. Pleased with himself and with Subber, General inwardly resolved to make an effort to do more business with women contractors in the future.

On 2 February 1995, a careless contractor on another work site injured George General, and General died the following day.

David Defendant has taken over the management of George General's company, including all debts that existed at the time of General's death. He has inspected the decks that Subber built and concedes that the quality of her carpentry is high and that the decks meet the construction SPECIFICATIONS exactly, except in one regard. Defendant noticed during his inspection that Subber built the decks using Cuyahoga® treated lumber, which a Cleveland, Ohio company called the Wrong® Corporation manufactured.

After discovering that Subber had used the Wrong® lumber, Defendant called Subber. He asked her to pull the original RFP from her files, which she did, and then he drew her attention to the part of the DEFINITIONS section that concerned WOLMANIZED® lumber. After reading this section for the first time, Subber said to Defendant: "I guess that I made a mistake. I never imagined that the type of treated lumber might be important to anyone." Defendant then said to her, "Yes, you did make a mistake, but instead of forcing you to replace all of the decking with the correct lumber, I am willing to liquidate the damages right now for $50,000. In other words, you keep the money that General gave you, I won't give you any more, and we will call this a done deal." Subber agrees to think about his offer overnight, and before calling him back, she calls you and asks for advice.

What will you tell her?

END OF SECTION THREE

END OF EXAM

M E M O R A N D U M

[Note OCR errors due to scanning]

TO: 1994-95 Contracts Students (Section 4)

FROM: Thomas D. Russell

DATE: 21 June 1995

SUBJECT: Final Examination and Course Grades

This memo has two parts. The first part describes the grading of the final examination. The second part includes model answers for the short answer questions of Section One, model outlines for Sections Two and Three, and student sample answers for Section Two and Section Three.

GRADING

Each of the final examination's three parts was worth 25 percent of the yearly grade. The midterm also

counted for 25
percent of the yearly grade.

As always, I graded the examinations by first separating them into sections, that is, I graded all of the first section before going on to the second and third. I thus graded each section without reference to how individual students did on other sections. Once I had determined raw scores for each section, I then assembled these raw scores into a spreadsheet and computed adjusted scores and point totals.

For each section of the examination, I converted the raw scores into adjusted scores. These adjusted scores are on the same scale as the midterm adjusted scores. Having the three final examination sections and the midterm on the same scale made it possible to add the scores together in order to determine the point total for the course.

I computed adjusted scores by first turning the raw score for each section into what statisticians call a z-score. A z-score is the difference between the raw score and the average for that section divided by the standard deviation for that question. I then converted each raw score into an adjusted score with the same mean (100.5~ and standard deviation (14.6) as the midterm. The point total for the course equals the sum of the adjusted scores for each section

plus the adjusted score for the midterm.

Here are data that describe each section.

Section One

Raw Adjusted
Highest 58 128.2
Lowest 9 38.4
Average 42.9 100 5
Std. Dev. 8 14 6

Section Two

Raw Adjusted
Highest 30 131.4
Lowest 6 70.2
Average 17.9 100.5
Std. Dev. 5.7 14.6

Section Three

Raw Adjusted
Highest 35 146.5
Lowest 3 72.1
Average 15.2 100 5
Std. Dev. 6.3 14 6

For the final examination and course, the adjusted point totals were:

Final Course
Highest 402.5 541.3
Lowest 194.7 276.6

Average 301.4 401.9
Std. Dev. 32.2 41.2

The distribution of grades was as follows:

Total	Grade	Number
->463.6	A+	4
444.6-462.5	A	13
431.0-444.5	A-	12
414.5-430.9	B+	16
393.1-414.4	B	23
376.1-393.0	B-	18
365.6-376.0	C+	10
331.7-365.4	C	12
300.0-331.7	D	5
<300.0	F	

MODEL ANSWERS

Section One

1. Because the market price has risen, the seller's damages are zero.

2. Express warranty: when the disclaimer and warranty can't be construed together reasonably, the warranty prevails, 2-316(1); also the handwritten term should trump the printed disclaimer.

Implied warranty of merchantability: because the disclaimer fails to mention merchantability, this implied warranty still exists. Light bulbs that burn out after a week are not merchantable.

3. 2-316(1) favors the warranty, but because the disclaimer is handwritten, the buyer has a weak claim of surprise and this term has a stronger possibility of trumping the warranty. Perhaps the buyer bargained away the warranty.

Also, the buyer still has the implied warranty of merchantability, because the disclaimer does not mention merchantability.

4. Alice's claim is weaker than that of the plaintiff in Wood v. Boynton. She had notice that the lapel pin might be valuable, and the buyer--her friend--had none. She cannot rescind because she bore the risk of loss.

5. If the burning of the hotel was not Ann's fault, then Bill should not be able to enforce the contract against her. However, she was in the best position to insure against this loss, and if she has taken her insurance money and voluntaril left the hotel business, then she may be liable to Bill.

6. The oral term regarding the availability of a flatbed is admissible as a condition precedent.

7. The transaction would not be within the statute of frauds. In most states, an oral lease for a year to begin in the future is not within the statute, Hamilton, Rau, & Weintraub, p. 905.

8. a) Yes, there was a definite and seasonable expression of acceptance.

b) If the term regarding the seller's providing a loading crew materially alters the contract, then it's out. If the loading term in Form 2 is construed as a different term than the loading term in Form 1 (rather than as an additional term) and the jurisdiction follows the knock-out rule for different terms, then both terms will be knocked out and the UCC defaults will prevail. The best construction is probably that the seller will provide a crew for two days, but Irene will pay for that crew.

9. Buyer should be able to get restitution of the $10K. He may claim reliance damages of $30K, but the advertising costs might not be recoverable depending upon their foreseeability and, if they were pre-contract expenditures, depending upon whether the jurisdiction allows the award of these expenses, Dempsey or Anglia. Buyer won't get the 50K because of the new business these profits are too speculative and uncertain.

10. Specific Performance.

11. $5,000 should have been $3,000. As it was written, the best answer was that neither price should be used, because the drop in price means that Edgar has suffered no damage.

Disregarding the error, the best answer was:]

Both the futures and spot market prices are market prices at the time that Edgar learned of the breach. The

best price
 to use would be $4,000, because this futures price replicates
 what Edgar would have received under the
contract--delivery of
 widgets on 1 May.

12. [Most students saw that this question also had some
 typos. I took each student's understanding of the problem
 into account as I graded.]

There is no contract and no damages. The brochure
was an
 invitation to deal. Buyer offered to buy certain
goods with a
 delivery date of 1 April. Seller rejected that
offer when it
 indicated that it could not deliver before 15 May.

SECTION TWO

Model Outline

This outline organizes the answer according to the Professor's
 contract claims.

Goods--Article 2 applies.
 SoF satisfied.

1. MacroCode won't run.
 Creation of express warranty
 Disclaimer
 Parol Evidence Rule
 Defective merger clause
 Length of Warranty
 Damages

2. RSI.
 Creation of warranty
 Damage/causation

PER-no problem, post-K.
NOM - no problem. Initialing of clause.
Modification/Waiver.
Disclaimer. Unconscionable per se.
Damages:
Foreseeability-OK.

3. Lost Grants.
Consequentials.
Not foreseeable and too uncertain.
Disclaimer.

Section Two

Model Outline

This outline first looks at the formation of the contract to see what Sally Subber promised, interprets that promise, and concludes that she did not breach. The answer then says that even if she has breached, there are little or no damages.

Common law applies.
Not within SoF, and it's written.

Settlement offer of $50K, not liquidated damages.

1. Formation.
RFP not an offer.
Her bid was offer.
- He accepted--mirror image.

2. Meaning of "Treated Lumber"
Trade usage
RFP via Parol Evidence Rule

Misunderstanding/Mistake
Burden
She should have read RFP but he should have read offer.

3. Substantial Performance
Jacobs & Youngs
Similarities
Differences

Student Sample Answers

The following answers are very strong but not perfect.

Section Two

Under Bonebrake, this is a sale of goods, so Beier's claim is governed by the UCC. There is no question that there is an enforceable K--only whether it includes warranties, and what type of warranty remedies.

1. The Macrocode problem

The salesperson expressly warranted the XPS to run Macrocode. She made an affirmation of fact (2-313(1)) that this computer was compatible with Beier's software. Since this warranty was individually dickered, it is presumed to be part of the basis of the bargain--B got the promise before he signed the K--so it is an express warranty.

The parol evidence rule will not exclude the oral warranty, at least not on the grounds of complete integration

The "merger clause" is mislabeled (it's really a "no oral modifications" clause, forbidding changes after the writing), so there's nothing in the writing to say that this writing is the exclusive statement of the terms of the K. (Since we're not in NY, we're willing to look beyond the 4 corners of the i writing, & don't presume a complete-looking writing is a complete integration.)

Even though the writing is only a partial integration, the P.E. rule (2-202) says we can only introduce evidence of consistent additional terms, not contradictory terms. The seller's statement about Macrocode conflicts with the warranty disclaimers (which cover only "defects," & we are told the failure to run Macrocode is not a defect).

2-316 says that when express warranty & the disclaimer collide, the warranty prevails, but subject to 2-202. Since 2-316 is supposed to prevent unexpected & unbargained language, we would probably be stretching it to allow the conflicting evidence in here, since the disclaimer was not unexpected (visible type on one-page contract buyer is well-educated). However, if there is evidence of fraud (if salesperson knew Macrocode wouldn't run without the specialized equipment, but hid this so B would buy anyway), the evidence will be allowed.

The salesperson also created an implied warranty of fitness for a particular purpose (use of Macrocode) when she told B it would work during their "long discussion" where B was relying on her expertise to choose a suitable computer. The parol evidence considerations for the implied warranty will be similar to those discussed above.

However, even if parol evidence is allowed & these warranties about Macrocode were created, B can get no remedy because he did not revoke acceptance in a reasonable time. Back in April '94 he could have revoked (assuming a warranty) because the no-Macrocode substantially impaired the XPS's value to him & he accepted it unaware of its nonconformity to the warranty because of the seller's oral assurances (2-608(1)). However, B didn't revoke within a reasonable time of discovering the problem. That (non-revocation) would still leave him with his 2-714 warranty remedies, but since he didn't timely notify seller of the breach after discovering it, he loses all remedies for the Macrocode problem. (2-607(3)). [TDR note: The student might have said that although the warranty period has ended, the statute of limitations on bringing a claim may not have. We would want to research this.]

2. The Repetitive Stress Injury

Beier's injury would be due to a breach of the implied warranty of merchantability, if any. Under 2-316(2) this warranty was successfully disclaimed by specific & visible language. However, the Magnuson-Moss consumer protection act (if still in force) says that when a written warranty is given, such as the 1-yr warranty here, the Seller cannot disclaim implied warranties, but only limit them to the reasonable time period of the written warranty. (see HRW p. - 729). [TDR note: This-was very flashy.] Thus there was a warranty of merchantability, at least through April '95. Although B was not diagnosed until May '95, since this is a repetitive injury the failure of warranty was already having its effects within the 1-year limit, it should be covered. (using an equitable excuse like the 'discovery rule' for why he didn't notify within the warranty period.)

The seller also orally told B not to worry about RSI, but this will not function as an express warranty because (1) it was said after the K was signed, so it's excluded by the 'no oral modifications' clause (although it could operate as a waiver--but B's reliance was not reasonable since the Seller is not a medical expert), and more importantly, (?) the statement was too vague to be a warranty--a few words are not a health insurance policy. [TDR note: The student

gets this wrong. Seller is a computer expert and her words may operate as an express RSI warranty. The uninitiated NOM clause is no obstacle.] In particular, they don't create liability for the $500K grants (1) Hadley-unforseeable; (2) too uncertain; (3) mitigation; maybe B should hire someone to type for him rather than forego the grants).

Given that we have an implied w (but not an express w against RSI), it is unconscionable to exclude damages to B's person. Although with any type of warranty, it's ok to exclude consequentials other than personal injury, so no recovery for the $500K grants. 2-719. This is the rule under 2-179(3), and under the traditional idea that if no reasonable person would agree to give up all remedies for personal injury, the term is unconscionable.

However, B's personal injuries may not be covered because he proximately caused them by using the machine on the mere assurance of a salesperson when he knew he might be sensitive to RSI--but probably the cts would not put the burden on the consumer.

Section Three

If S agrees to D's terms and lets the $50K go, it will enforceable because each will be giving up a

potential lawsuit
of certain outcome against the other, creating consideration for modifying the K price (still required in non-UCC deals).

This is a non-UCC deal since its predominant purpose (and cost) involves labor, not goods.

Under the UCC, this might be a battle of forms situation between the RFP Sally's fax. [TDR note: What fax?] However, with the common law mirror image rule, there is only on e K text here: Sally's. We can't treat her fax as an acceptance since the RFP wasn't an offer (see its name: just a request for "feeler"; subs couldn't bind G by accepting it). Rather, S's fax was the (it counts as signed b/c it's on her letterhead) offer & G accepted it making a K.

However, the question remains of what "treated lumber" means in the K. The RFP counts as 'Parol Evidence' even though it's in writing, because it came before the--written K. But it can get past the P.E. rule here to show the meaning of the writing. (Even Williston might admit that the fax didn't look like a complete integration because there were so few details. He might feel 'treated lumber' was facially unambiguous,, but we no longer feel restricted to the 4 corners of the writing; 214(c) allows evidence of meaning, so we will look at the totality of the circumstances.)

Sally and David say she made a "mistake," but that's

not
 the right term. Sally did not install wrong lumber thinking
 it was Wolmanized (like buying a pregnant cow
thinking it's
 sterile); there was no factual misapprehension
here. Instead,
 it's a situation of misunderstanding, where the 2 parties
 (S&G) attached different meanings to the words "treated
 lumber" in the K.

It is undisputed that neither S nor G knew subjectively
 of the meaning the other attached to 'treated lumber.'
 However, Sally had reason to know of the meaning George
 intended, since she had constructive knowledge of the
 'definitions' section of the RFP. It is arguable,
though less
 certain, that G had reason to know S wasn't
thinking of
 Wolmanized lumber, since she used the general term "treated"
 in her fax when he had made a big deal of
Wolmanization in his
 specs. On the other hand, her fax was so brief that
maybe its
 omission of "Wolmanized" should not have given rise
to any
 suspicion on G's part.

If we determine G had no reason _3 know of S's meaning,
 the K would be binding on his terms are S would be
in breach.
 But following Cardozo in Jacob & Youngs, we are
going to put
 the burden on the party with the idiosyncrasy here.
Even
 though G emphasized the need for Wolmanized lumber
in his RFP
 (and tried to foreclose the Cardozo approach of
saying "brand
 name = standard"), we won't vindicate his strange wishes
 unless he makes (manifests them) them clear to S at
every step

of the way--including when she sent back a fax that was vague about the type of lumber. In other words, for policy reasons of enforcing normative dominance, a court would probably say G had reason to know of S's non-Wolmanized meaning when he saw her fax. [TDR note: Student should have used the magic words "substantial performance."]

Thus, each party had reason to know the other attached a different meaning to "treated." Under 20, however, this does not void the K under the parties' subjective meanings are "materially different," (e.g. the 2 Peerlesses, or 2 types of chicken), which a court would probably say they are not. At any rate, materially different or not, a court will be reluctant to undo a K that has already been performed.

A further note on subjectivity: G's personal preference for Wolmanized lumber might have been enforceable by him with strong enough language in the RFP, b/c we allow people to K for what they care about even if it's stupid. But when D tries to enforce the clause, he's acting in bad faith, since he doesn't even care about the lumber & he knows the decks are good.

Sally already has $50K of profit, and she wants to avoid litigation costs, so she should negotiate w/D as far as she

can.