CONTRACTS EXAMINATION, SECTION B Take Home Portion of Exam

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May 8-9, 2001

INSTRUCTIONS FOR TAKE HOME PORTION OF EXAM - TWO ESSAYS

- 1. This is the essay portion of your final examination. There are two equally weighted essay questions in this part of your examination. There are a total of 4 pages to this portion of the examination not including this page of instructions. PLEASE CHECK NOW to be sure that you have all of the pages before leaving the Registrar's office when you pick up the exam.
- 2. As a "take-home," this portion of your exam is entirely open book. You may consult any materials you wish and should have nearby your paperback text, <u>Selections for Contracts</u>. While the range of written materials you may consult is unlimited, you may **NOT** consult any other person with regard to this exam. Your signature on the honor code sheet upon completion of this exam constitutes your certification that you have complied with this fundamental requirement of academic integrity.
- 3. Your answers to the 2 essay questions must be typed on standard 8 ½ by 11 inch paper that you supply from home. Be sure to type or write your anonymous number on each typed response page (outside the margins is fine for this purpose). Also be sure to start both essays on separate pages and label each answer at the top of the first page as "Essay 1" or "Essay 2." Please staple both essays separately as they will be placed in different envelopes when turned in.

NOTE WELL THE FOLLOWING LIMITATIONS:

- *** Page limits 4 typed doubled-spaced pages per essay: your answer for each essay CANNOT exceed 4 typed pages. Typed pages must be DOUBLE spaced and 12 point font or larger with one inch margins all the way around. I will not read any material beyond 4 pages.
- 4. Do not assume facts not stated in the questions.
- 5. Turning in your exam: You must turn in your exam questions and typed answers to the Registrar's office on May 9, 2001 between 10 a.m. and 12 noon. Late exams will receive point reductions as appropriate. Place Essay 1 and this exam questions booklet into one envelope supplied by the Registrar and Essay 2 into a second envelope. Be sure to write your anonymous number on the outside of both envelopes and label the outside of each envelope as Essay 1 or Essay 2.
- 6. Weighting: Essay 1 and Essay 2 are both worth one third of your grade for a combined weight of two thirds. The multiple choice portion of the exam counts for the remaining one third.
 - 7. Best wishes for success on the exam.

PART I - TAKE HOME PORTION OF EXAMINATION - Essays - 2 Questions

This Part I consists of two essay questions of relative equal weight. For <u>both</u> essay questions, assume that all relevant jurisdictions have adopted the Restatement (Second) of Contracts and the Uniform Commercial Code. You must type your answers on 8 ½ by 11 inch paper, 12 point font or larger, with 1 inch margins minimum all the way around (top, bottom, left and right margins). As noted in the instructions to this exam, <u>you are limited in your answers to 4 typed pages per question</u> (double spaced and on only <u>one</u> side of each typed page). Think and organize before beginning to write.

ESSAY OUESTION ONE

Pine Wallace ("PW") is a prestigious 40 lawyer litigation firm in Capital City, State Red. PW typically hires 3 or 4 new full-time associates each year. As Capital City's legal newspaper ("The Capital Times") has accurately reported in the past, PW pays a salary of \$60,000 to its first year associates and \$65,000 to second year associates. PW's 10 partners have been concerned in recent years by the increasing rate of turnover among first and second year associates. Prominent among the partners' concerns is the fact that PW has been incurring substantial costs for training new associates only to lose these associates within their first 1 to 2 years of practice.

Admittedly, the atmosphere at PW is not exactly "warm and fuzzy." Nevertheless, the PW partners believe the firm has been treated unfairly by associates who took job offers for the principal purpose of getting training and resume building opportunities and then moved on to greener pastures. The partners discussed these concerns at a regular monthly meeting of the partnership held on September 1, 1999. As a proposed solution to the junior associate turnover problem, the PW partners unanimously resolved to offer new full-time associate positions only to those associates who would explicitly commit to at least 2 years of service to the firm upon graduation from law school. The minutes of this meeting, signed by PW hiring partner Rona Rosen, reflect the PW partners' understanding that this commitment would be mutual, i.e. the firm would likewise commit to employ each newly hired associate for at least 2 years.

On November 1, 1999, Melissa Sharp, then a third year Widener law student (and soon to be member of the graduating class of 2000), interviewed with PW. At that time Melissa already had a job offer (at a starting salary of \$56,000) from PW's rival firm, Bantry and Bandon ("B&B"). Melissa skillfully exploited her advantage in the PW interview by diplomatically mentioning her B&B offer to every PW partner she met. Two days later on November 3, 1999, Rona (with full authority from the firm's hiring committee) telephoned Melissa and, on behalf of the firm, offered Melissa a full-time associate position for a two-year term commencing September 1, 2000. Rona explained the firm's 2 year commitment rule and the salary schedule for first and second year associates (in Rona's words: "\$60,000 year one and \$65,000 year two"). Melissa told Rona she would respond within the week.

After carefully considering her options, Melissa decided to go with PW. On November 5,

1999 Melissa telephoned Rona at PW and accepted the offer. Rona expressed enthusiasm over Melissa's decision. Melissa then called B&B's hiring partner, Liam Bandon, and rejected the B&B offer. Ever the courteous one, Melissa also sent confirming letters that day: one to Rona (expressing pleasure and confirming her acceptance of the PW offer) and another to Liam (expressing regrets but politely confirming her rejection of the B&B offer).

Melissa started with PW on September 1, 2000 and did fine work. Six months later, on March 1, 2001, Melissa's position with PW was terminated. Rona personally delivered this bad news in a visit to Melissa's office. Rona explained that PW had decided to streamline the firm's operations with lower associate overhead. Numb with disbelief, Melissa protested that she and the firm had made a 2 year commitment to each other. "Look," said Rona, "I acknowledge the commitment but it's no longer viable in this changing economic environment."

The next day, an unemployed Melissa called Liam at B&B only to discover that all of B&B's hiring needs had been met for the foreseeable future. Contacts with other firms failed to yield a single interview. Melissa sues PW for breach of contract.

Question: Assume that (1) Rona's telephone call to Melissa on November 3, 1999 constituted an offer by PW to Melissa and (2) Melissa's telephone call to Rona on November 5, 1999 was an acceptance of that offer. Please discuss the rights and liabilities of the parties as between Melissa and PW.

ESSAY QUESTION TWO

Flexible Fasteners, Inc. ("Flexible") manufactures various types of fasteners and latches for use in commercial and military aircraft. Some of its fasteners are used to secure overhead bins and compartments while others have more critical applications, like securing engines to the wings of aircraft. Flexible supplies a modest volume of fasteners to commercial airline manufacturers, but most of its business is with the United States Navy. Flexible's business has grown steadily during the last five years.

On February 10, 2001 Flexible entered into a signed, written contract with Haynes & Boone Construction Company ("H&B") under the terms of which Flexible agreed to pay H&B \$8 million to construct an additional manufacturing plant on Flexible's property pursuant to specifications supplied by Flexible's architects and engineers. The contract obligated H&B to commence performance on March 1, 2001 and complete the project by September 1, 2001. The Flexible project was by far the largest contract H&B had ever undertaken and compliance with the contract completion deadline of September 1, 2001 would require the full time work of every H&B employee for the duration of the job.

On March 1, 2001 H&B properly commenced performance under the contract by delivering to the construction site, among other things, earth-moving equipment, two cranes, construction trailers, fencing for the site and related supplies. H&B personnel thus spent the first week of March coordinating the arrival of equipment and supplies, assigning teams of its employees to various tasks and meeting with Flexible's architects and engineers to organize a plan of attack.

On March 10, 2001, H&B's President, Kathleen Haynes, received a most unwelcome letter from Flexible's Executive Vice-President, Dale Foust. Foust explained in the March 10 letter that Flexible had decided to abandon the construction project because certain top Navy officials had just alerted Flexible to expect a major reduction in the volume of Flexible's work with the Navy. Foust explained further that this newly expected reduction in volume was the result of a congressional committee's recommendation not to continue funding the F-16 fighter aircraft for which Flexible typically has supplied fasteners in the past.

Having allocated all H&B personnel and resources for the six months covered by the contract with Flexible, H&B executives suddenly faced the prospect of a company-wide six month shut-down. Accordingly, upon receipt of Foust's March 10 letter, H&B officials scrambled to find alternative construction work for H&B for this intervening period but they were not immediately successful. Meanwhile, during the week of March 10, H&B reluctantly removed its construction equipment and supplies from the Flexible construction site. This removal effort cost H&B approximately \$35,000 in expenses (mostly in the form of wages to H&B employees).

On March 20, 2001, Flexible received good news from the Navy. Congressional funding for the F-16 would continue in full after all and the Navy planned to rely heavily on Flexible for all forthcoming projects. To meet the Navy's requirements in this regard, Flexible would need to

END OF TAKE HOME PORTION OF EXAMINATION

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PROF. REGAN CONTRACTS EXAM

SPRING DOUL

OUTLINE OF

ESSAY ANSWERS

ESSAY QUESTION ONE [Melissa's claim against PW for breach of 2 yr. commitment]

Key Issue: Does the statute frauds bar Melissa from enforcing PW's agree't to employ M. for 2 yrs.?

Within the Statute? Threshold issue to address is whether M.-PW agree't for 2 year association is "within the statute?"

- 1. Rule: Statute of Frauds declares unenforceable any oral agreement "that is not to be performed within the space of one year from the making thereof."
- -- refinement: judicial gloss finds agree't outside statute if possible for agree't to be performed w/in 1 yr.
- 2. <u>Policy:</u> to protect people against the "<u>risks and costs</u> of being hauled into court and accused of owing money \$ on basis of unacknowledged promise."
 - 3. "W/IN STATUTE" RULE APPLIED:
- (a). <u>Perf. bey/ 1 yr.</u>; oral K made on 11/5/97 [M's t/call to RR accepting offer] for 2 yr. term of employ't, 9/1/98 to 9/1/00. Thus, perf. of K would occur bey/ "the space of 1 yr." from 11/5/97 date K formed.
 - (b). Refine't not applicable. Not possible for 2 yr. employ't K to be perf. w/in 1 yr.
 - 4. <u>Conclusion re "within statute"</u>: M's deal with PW is w/in statute and thus statute must be satisfied to make deal enforceable.

Compliance with Statute?

- 1. Basic Rule: Need a writing signed by the party to be charged.
- [- Restatement 131 clarifies further that signed writing must also (a) reas. identify s/matter of K; (b) is suff. to indicate K made betw/ parties; and O states with reas. certainty ess. terms of unperformed promises.]

BASIC RULE APPLIED:

- -- No writing re this K signed by party to be charged:
 - * RR's 11/3 offer oral [t/call]
 - * M's 11/5 acceptance oral
 - * M's confirm. letter of 11/5 is signed by M., not by party to be charged
 - * No evid. of later writing signed by RR/PW
 - * 9/1 minutes s/ by RR re policy but non-specific as to Melissa and this K
- BUT.
- * 9/1 minutes (s/ by RR) corrob. deal
- * newsp. verifies salary terms
- * link up re Crabtree case to enforce
- -- <u>UCC analogy:</u> 2-201 lets signed, confirming letter of <u>Pltff.</u>, is not objected to in writing by recipient who has reason to know of letter's contents, to satisfy writing req't "betw/ merchants"
 - * M's 11/5 confirm. letter satisfies
 - * Letter to RR/sophist, who had reas, to know

Admission Exception to Writing Requirement

1. Rule. Per c/law and analogy to UCC 2-201(3)(b), an oral deal otherwise w/in statute is enfble if deft. admits in COURT proceeding -- "in his pleading, testimony or otherwise in court" -- that K was made.

2. APPLIED:

- -- No judicial admissions by RR or other PW partners, so M. has nothing under this rule based on RR's acknowledge't of commit't in office on lay-off day.
- -- M. could factually plead RR's admission in complaint and hope to force admission at pleading stage.

Promissory Estoppel/Reliance

- 1. Issue. M. could seek to enforce oral deal via P/E notwithstanding the SOF.
- 2. <u>Basic Rule.</u> Rest. 139(1) permits sec. 90-type elements, if met, to enforce oral deal n/wstg. SOF if injustice can be avoided only by enforce't of promise. **ELEMENTS**:
 - -- A promise;
 - -- which promisor [S&F] <u>reas. should expect to induce</u> action or forbearance by p'ee; AND
 - -- which does so action or forbearance;
 - -- is enfble if injustice can be avoided only via enforce promise

* estoppel in Rest. 139 case is deft. barred from assert SOF defense

3. R. 139 APPLIED:

- (a). Promise. Yes. PW promised to employ M. for 2 yr. term.
- (b). Reas. exp. induce? Yes. PW reas. should have exp. their promise to induce action/forbear. by M:
 - -- PW knew M had \$56k offer from B&B (M told every partner she met). By defn, accepting PW offer meant forbearing from B&B opp'y
 - Foreseeable an offeree would regard a <u>mutual</u> 2 yr. commit't as a <u>plus</u> in uncertain legal mrktplace and induce acceptance as here.
- (c). Does induce. Yes. M rejected competitive B&B opp'y for PW offer.
- (d). Injustice avoidance? see pt. 4 below
- 4. Rule re injustice avoided: Rest. 139(2) cites several factors as signif. re injustice issue:
 - a. avail. other remedies, espec. cancel or rest.
 - b. def. & subst'l character of action/forbearance
 - c. act/forbear corroborates deal <u>or</u> terms estab. by clear & conv. evid.
 - d. reas'ness of act/forbear
 - e. extent to which act/forb. by M was foreseeable by p'or S&F

5. INJUSTICE AVOIDANCE RULE APPLIED:

- (a). Other remedies? None. To "cancel" helps PW. Restitution no help as M was paid already for 6 mos. She wants \$ for the next 18 mos. Nod to M here.
- (b). Subst'l act/forb.? Yes. M gave up signif. job offer w/ B&B. M not c/o small time grievance. Again, nod to M on this factor.
 - (c) Corrob/clear & convincing.
- -- corrob.? Yes. People don't give up signif. job offers in favor of imaginary promises. M sent rejection letter to B&B same day she accepted and sent confirm. letter to PW.

- c&c evid. of PW promise? Arguably yes.
- * 9/1 minutes of partners' mtg. S/ by RR, (albeit non-specific as to M.), proves S&F 2 yr. commit't rule.
- * See if any h/w notes of PW's partners from 9/1 partners' mtg (estab. 2 yr. rule as response to concern re assoc. turnover).
- (d). M's Reas. reliance? Yes. PW is "prestigious" firm. No evid. to suggest PW had unsavory rep. re broken promises or was in fin'l trouble (losing big clients) when K made.
- (e). <u>Foreseeable reliance?</u> Yes. M told everyone at PW of B&B offer. Obviously, M's choice was either/or.
 - 6. Remedy. Rest. 139(1) says can limit as justice requires.
 - (a). Reliance. Tradit'l rem. for p/estoppel-consid. substitute cases.
 - -- Here, M would win \$ meas. by B&B offer (\$56k), not PW promise (\$60k,65k).
- (b). Expectation. Even some tradit'l Sec. 90 cases (i.e., consid'n substitute cases) have awarded full exp. dmges. Arguably stronger case for exp. dmges. where Sec 139 P/E is not a consid. substitute (as we have consid. here), but an injustice avoidance device on the other side of the SOF.
 - -- Here, award M. dmges. as if PW kept promise (\$60k rate for 6 mos. and \$65k for yr. 2).
- (c). <u>Incidental/conseq.</u> M's costs of seeking new job also recoverable as foreseeable and flowing naturally from PW's breach.
- (d). Mitigate? Sure, M has duty to mitigate and facts show she tried w/out success to do so (contacted B&B and tired other firms etc.).

ESSAY OUESTION TWO [Flexible's \$8 mill. construction project]

ISSUE: Whether Flexible effectively (timely) <u>nullified</u> its March 10 <u>repudiation</u> -- i.e., its anticipatory breach -- of the unperformed construction contract with HB?

RULES AND APPLICATIONS:

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- RULE: <u>Anticip. breach/Repudiation per REST. 250 (a)</u> is statement by obligor to obligee that he will breach re future perf
- * Hochster: look for "utter renunciation," not mere "passing intention"

APPLICATION:

- Flexible's 3/8 letter (rec'd 3/10) is "statement" under 250(a)
- that Flexible will breach, i.e., will not pay \$\$ to HB as has

abandoned project, ie, it repudiates K

- Navy change does not excuse (no such thing as innocent breach)

unless get to frustration/purpose

II. RULE: Antic breach/repudiation per RESTATEMENT 253 [EFFECTS]

- * offensive: a repudiation of K by obligor before his perf. due gives rise to claim by other party for damages for total breach [253(1)]
- * <u>defensive</u>: "breacher's" repud. also entitles victim to <u>suspend</u> own perf. as repud. <u>discharges</u> victim's K duties
- * <u>Policies per Hochster (p. 816)</u>; econ. <u>efficiency/resources</u>; encourage mitig. of damages re immed. rt. to sue and suspend and cover

APPLICATION:

Offensive: -- HB had immed. rt. to sue Flex. for dmges for antic. breach per 253(a) but chose not to

Defensive: -- HB acted legitimately in suspend and cover w/ mall K

III. RULE: Retraction/Nullification of Repudiation per 256(1)

- * effect of repud. statement (offensive/def. per 253) is <u>nullified</u> by retraction of repud. statement IF:
 - -- notification of retraction comes to the attention of the injured party before he materially changes position in reliance on repudiation; or
 - -- victim says repud. is "final"

APPLICATION:

A. Final? HB could have prevented retraction by stating repud. was "final" per last line of 256(1) but no facts to support so case turns on "race" between notice and reliance

B. Retraction? Yes, per Flexible's March 20 letter and e-mail unequivocally retracting earlier repudiation ("disregard entirely" 3/8 letter) and affirming commitment to K ("We stand ready to perform fully...")

C. Retraction Timely/Effective? [battleground for case]

YES (asserts Flexible)

-- \$35k removal exp. immaterial: HB's only "reliance" before 3/20 retraction was immaterial \$35k expense of removing equipment; small potatoes in \$8mill. deal and recoverable in dmges from Flex. in any event

-- Mall K was "material" change for HB but came AFTER notice: HB's early legit. efforts to "cover" became illegit. breach when HB signed mall K AFTER notice of retraction nullifies "effects" of Flexible's prior antic. breach

* argue <u>MBRule for 3/20 retraction letter</u> constituting a renewed "acceptance" of obligations under abandoned K; ie. effective upon mailing on 3/20 <u>before</u> HB signed mall K on 3/21

* e-mail instantaneous on 3/20 and thus effective "notification" under 256(1)

- * "comes to the attention of" in 256(1) should be read as "available" in the ordinary course of business
 - -- e-mail clearly satisfies
 - -- HB's Haynes at fault for admittedly ignoring her e-mail messages for 2 days

NO (asserts HB)

- -- immediate reliance (\$35k equip. removal) cut off retraction opp'y per 256(1); \$35k is a lot (i.e., material) to smaller firm like HB
- -- mall K VERY material and PRIOR to any attempted retraction by Flexible; i.e., HB signed mall K before any retraction by Flex. came to HB's "attention"
 - * No MBRule for retractions:
 - -- 256(1)'s language "comes to the attention of" makes plain that notice of retraction can only be effective upon receipt
 - -- <u>policy</u>: fairness in this context requires protection of victim of antic. breach against the precipitous retraction of repud.

-- e-mail instant but unread:

- * 256 does NOT say "give notice of" which otherwise might support a constructive notice argument
- * fault for unread e-mail was not HB's but that of the breaching Flexible given HB's understandable panic with threat of 6 mos shutdown and urgent need to cover; entirely foreseeable HB might miss an e-mail retraction
 - * Phone? Flex. in best position to avoid problem here as breacher and retracter by simply calling HB on phone (and documenting call with followup letter)
- * Policy: Favor efforts to mitigate (Hochster efficiency) by permitting victim of antic. breach to ink new deals wout checking breacher at each step; should be entirely up to breacher to get notice to victim's actual attention to save abandoned deal

CONCLUSION (re effectiveness of retraction.; ok either way if well R:); plr favors HB here; 35k immaterial change but mall K was material; no MBRule on statute; unread e-mail problematic for HB but not insurmountable

IV. CONSEQUENCES

A. IF Flexible's retraction ineffective (untimely):

- -- "effects" of 253 remain; both offensive and defensive
 - * HB's Mall K was legit. defensive response to F's breach re (suspend and cover)
 - * HB's counterclaim v. Flex. is sound but there appear to be no damages as HB lands Mall K in cover that makes HB more profitable WITHOUT Flex. K than with it
 - * Reliance damages perhaps (re 2 x \$35k) for equip. on/off site

B. IF Flexible's retraction was effective:

- initial "effects" of 253 (off./def.) in favor of HB are nullified via 256(1)
- -- HB thus NOT free to "cover" re mall K on 3/21;
 - * HB's conduct in sign all hands K with mall developer constituted HB's repudiation by conduct per 250(b)
 - * HB's letter of 3/23 was repudiation by statement per 250(a)

- -- HB liable to Flex. for dmges for anticip. breach of 2/10 K; all "effects" of 253 (off./def/) now favor Flexible
 - * Flex. must mitigate and cover per 253(1)
 - * Flex. can sue ASAP for dmges.;
 - expectation re "spread" betw. \$8mill deal with HB and cost of replace't K w/ t/party
 - consequentials: poss'y re lost profits w. Navy as foreseeable consequence of HB's breach if replace't K holds up Flex's work with Navy