

CONTRACTS

Professor Terry S. Kogan

Fall Semester, 2003

Final Examination

Monday, December 15, 2003

1:00 p.m. to 5:45 p.m.

Examination Number: _____

This Final Examination is entirely open book. You may use the *Problems in Contract Law* casebook, the *Contract Law: Selected Source Materials* book, notes, outlines, and/or any other materials. The use of other human beings or data in the hard drive of your computer is **not** permitted.

This examination consists of three essay questions of equal weight. The recommended time allotment for each question is one hour and 15 minutes.

You have **four hours and forty-five minutes** to complete this examination. **The first one hour is to be used exclusively for reading the questions carefully and outlining your answers.** You should outline on scrap paper that will be supplied by the exam proctor. If you are word-processing this exam, you are **not** allowed to type during the first forty-five minutes. If you are handwriting this exam, Blue Books will **not** be handed until forty-five minutes into the exam. You then will have **three hours and forty-five minutes** to write your answers.

Please **double-space** your answers if you are writing this exam on a computer. Please write on **every other line** if you are handwriting this exam in a Blue Book.

Please put your examination number in the space provided above, on the outside of all Blue Books, and **on all typewritten pages.**

Do not write your name anywhere on this examination.

You **must** turn in with your answers these examination questions and any scrap paper on which you have taken notes.

You must sign the College of Law Honor Code Statement on the last page of this examination. [This sheet will be removed prior to the professor's receiving the exams for grading.]

Good Luck.

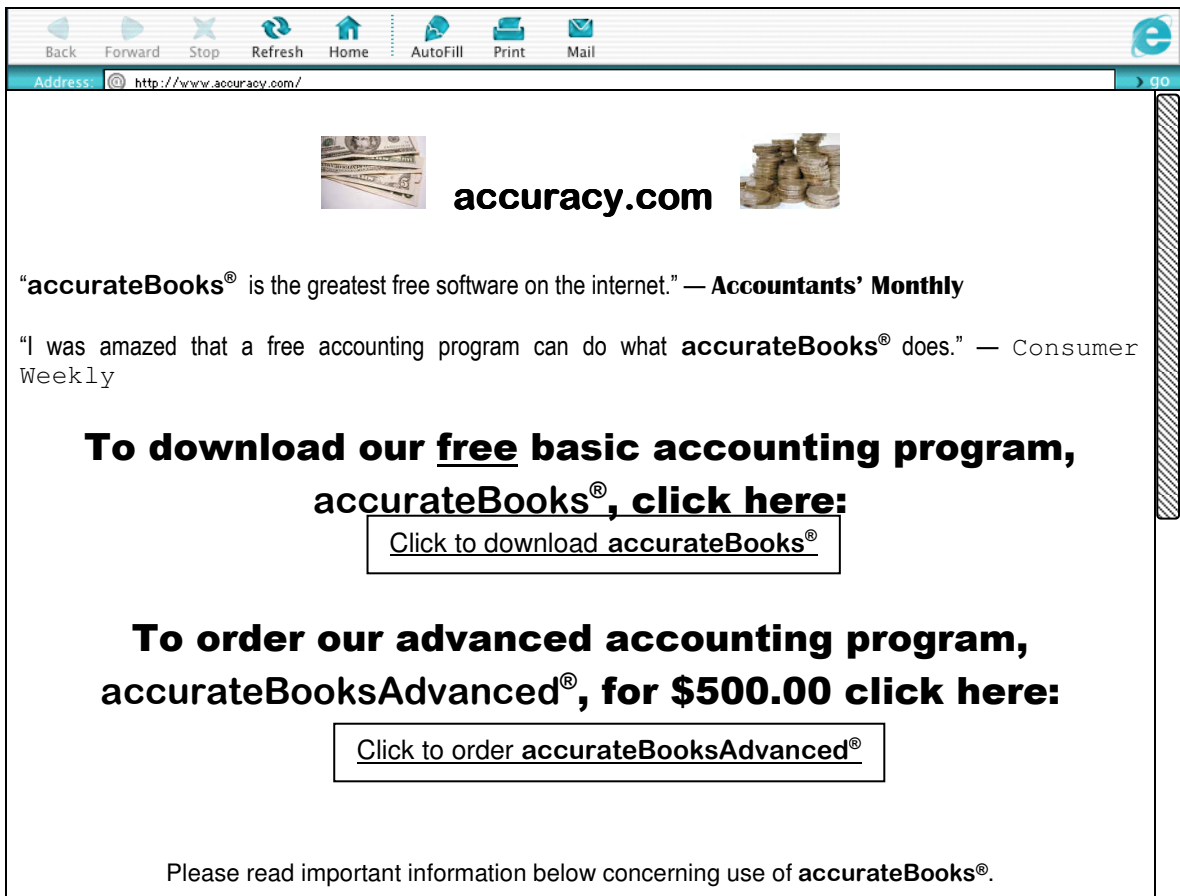
Question One

[Question One will count 1/3 of the total examination grade. You should devote approximately 1 hour and 15 minutes to it.]

Fred Fodder [hereinafter “Fodder”] runs a feed store in Ogden, Utah. His business has grown considerably in the past several years, and accordingly, Fodder decided in early January, 2001 to purchase a computer to keep track of his accounts. While purchasing a computer, he inquired of the sales clerk about accounting software to organize his financial records. The clerk informed Fodder that there was accounting software available for free download on the Internet from a company known as **accuracy.com**.

accuracy.com was a software company incorporated in New York state, with a major European office located in Paris, France. Its basic accounting software, **accurateBooks[®]**, was available for free download on its website. The company made its money from selling an advanced accounting software package known as **accurateBooksAdvanced[®]**, which was available for purchase on its website for \$500.00.

When a user accessed the **accuracy.com** website, here is what appeared:

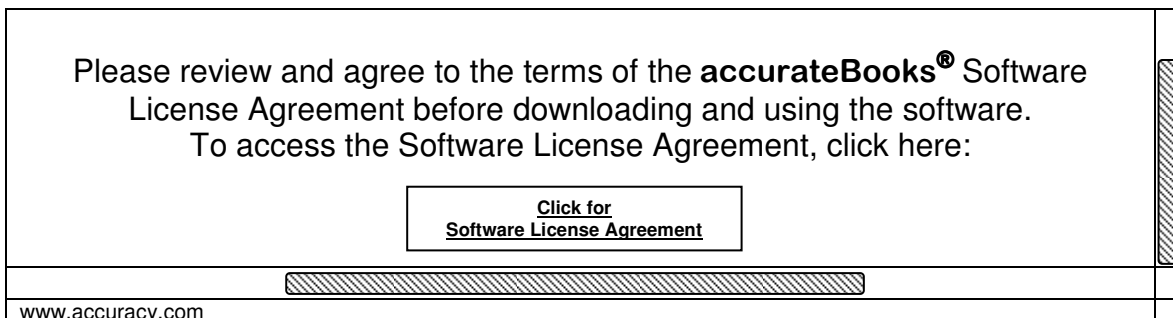


The screenshot shows a web browser window with the following elements:

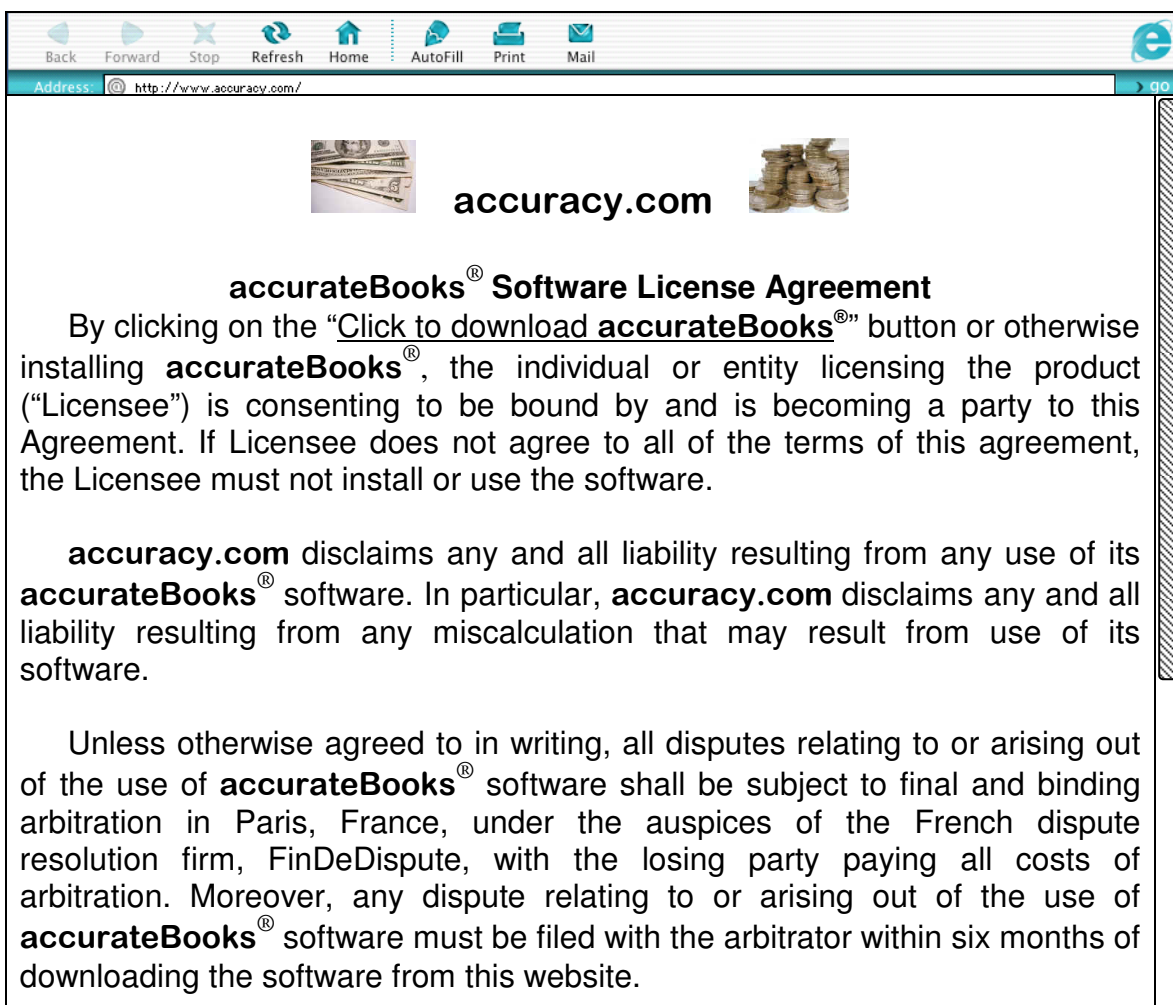
- Navigation buttons: Back, Forward, Stop, Refresh, Home, AutoFill, Print, Mail.
- Address bar: <http://www.accuracy.com/>
- Logo: **accuracy.com** with images of money.
- Testimonial 1: “**accurateBooks[®]** is the greatest free software on the internet.” — **Accountants’ Monthly**
- Testimonial 2: “I was amazed that a free accounting program can do what **accurateBooks[®]** does.” — Consumer Weekly
- Call to Action 1: **To download our free basic accounting program, accurateBooks[®], click here:**
[Click to download accurateBooks[®]](#)
- Call to Action 2: **To order our advanced accounting program, accurateBooksAdvanced[®], for \$500.00 click here:**
[Click to order accurateBooksAdvanced[®]](#)
- Footer: Please read important information below concerning use of **accurateBooks[®]**.

If the user clicked on the button labeled “[Click to download accurateBooks®](#),” the software immediately began downloading into the user’s computer. Upon completing the download, the user could use the software with no further delay.

If instead of clicking on either button in the first window, the user scrolled down the webpage using the scroll bar on the right-hand side of the website window, the remaining portion of the first webpage came into view as follows:



Clicking on the “[Click for Software License Agreement](#)” button would link to the following webpage:



(The Software Licensing Agreement related to use of the **accurateBooksAdvanced**[®] software was printed on the shrinkwrap packaging covering the box containing the software and could be read by the consumer upon receipt of the software in the mail.)

After setting up his computer on January 15, 2001, Fodder accessed the **accuracy.com** website, looked only at the first window, and clicked the “Click to download accurateBooks[®]” button. Immediately the software began downloading into Fodder’s computer. Fodder never bothered scrolling down the page, and accordingly, failed to see any direct reference to the Software Licensing Agreement nor the button linking him to that agreement. Accordingly, he never read the Software Licensing Agreement before downloading or using the software.

He used the software over the next months and was quite pleased with it. Moreover, at the end of the year, the software calculated the business to have earned a far greater profit than in any previous year. In April, 2002 Fodder used the software to calculate his feed store’s taxes and, to his great joy, the amount he owed the Internal Revenue Service was far less than he had estimated.

In September, 2002 Fodder received notice from the IRS stating that he had underpaid the feed store’s taxes by \$25,000. In addition, the IRS assessed an additional \$10,000 underpayment penalty against Fodder’s business. He immediately went to an accountant, who recalculated the taxes and confirmed the IRS’s claim. When Fodder told the accountant that he had used the **accurateBooks**[®] software, the accountant immediately pulled out an article from a recent Wall Street Journal documenting mistakes that the software was discovered to make.

Fodder filed an action against **accuracy.com** in the United States District Court for the District of Utah setting forth contract and tort claims with respect to the faulty accounting software. In response, **accuracy.com** filed a Motion to Stay the Action Pending Arbitration and a Motion to Dismiss asserting that the action had not been filed in a timely manner.

You are the law clerk to the judge to whom the case has been assigned. Write a memorandum of law discussing the merits of **accuracy.com**’s motions.

Question Two


[Question Two will count 1/3 of the total examination grade. You should devote approximately 1 hour and 15 minutes to it.]

Carl Cook and Sally Sauté run a catering company in Salt Lake City known as the Tasteful Twosome Caterers [hereinafter the “Caterers”]. In early September, 2000 they were approached by Daniel Deep [hereinafter “Deep”], owner of Deep Valley Ski Resort, who was interested in hiring a company to cater all private events held at the ski resort. Deep wanted to enter into a three-year contract with the Caterers, guaranteeing them payment of \$2 million per year to cater no more than fifty events per year of 100 people per event.


Deep had his attorney prepare a draft "Catering Agreement," which was sent to the Caterers for review. In general the agreement appeared satisfactory to them, with one important exception. Cook and Sauté were concerned about the "Term" provision, which read as follows:

Term: The term of this Catering Agreement shall commence on October 1, 2000, and shall continue for a period of three (3) years; provided, however, that either party may terminate this Catering Agreement upon sixty (60) days prior written notice.

The Caterers sent the following letter to Deep:

	Tasteful Twosome Caterers 1111 Gourmet Street Salt Lake City, Utah 84119
September 15, 2000	
Dear Mr. Deep:	
We have now reviewed the draft Catering Agreement. Generally, it meets with our approval. However, we are concerned about the "Term" provision, which seems to allow either party to terminate the agreement without cause on sixty days written notice. Given that Tasteful Twosome Caterers will have to invest significant funds to upgrade our facilities in order to meet the demands of the Catering Agreement, we would request that you substitute the following language in the "Term" provision:	
<p><i>Term:</i> The term of this Catering Agreement shall commence on October 1, 2000, and shall continue for a period of three (3) years; provided, however, that either party may terminate this Catering Agreement for good cause shown upon sixty (60) days prior written notice.</p>	
We hope that this proposed change is acceptable to you.	
Sincerely, Sally Sauté Tasteful Twosome Caterers	

Deep responded as follows:

	Deep Valley Ski Resort Deep Valley, Utah
September 25, 2000	
Dear Ms. Sauté and Mr. Cook:	
I have reviewed your request for a change in the "Term" provision of the Catering Agreement. Unfortunately, Deep Valley Ski Resort must insist on retaining the language proposed in our initial draft. This language has been included in every long-term contract previously entered into by Deep Valley Ski Resort, and we have yet to invoke that clause to terminate a contract. We believe that such language is necessary in the proposed Catering Agreement in the event that Deep Valley Ski Resort were to decide to stop providing catering services	

entirely. We hope that this allays your concerns.

Sincerely,

Daniel Deep, President

Deep Valley Ski Resort

Though they still had reservations about the disputed language, the Caterers accepted the "Term" provision as originally proposed and signed the Catering Agreement on October 1, 2000. In order to fulfill their obligations under the Catering Agreement, by the end of December, 2000 the Caterers had invested \$1 million to upgrade their kitchen facilities in Salt Lake City. During the remainder of the first year of the Catering Agreement, things went fine.

By December 1, 2001, however, it had not snowed in or around Deep Valley Ski Resort, and the weather remained unseasonably warm (making the prospect of creating artificial snow not cost-effective). Moreover, weather experts did not forecast any snow in the foreseeable future. Because of the lack of snow, the resort did not open for skiing. Nonetheless, private parties continued to be held at the resort for which the Caterers provided food services (though the number of such parties was down significantly from the previous year). It was clear, however, that without snow Deep Valley Ski Resort would end up losing money on the Catering Agreement with its guaranteed \$2 million fee.

On December 5, 2001 the Caterers received the following letter:



Deep Valley Ski Resort
Deep Valley, Utah

December 4, 2001

Dear Ms. Sauté and Mr. Cook:

Pursuant to the "Term" provision, I am hereby providing the required sixty days notice that Deep Valley Ski Resort is terminating the Catering Agreement as of February 6, 2002. This has been necessitated in part by the lack of snow this season. I have enjoyed working with you during this past year.

Sincerely,

Daniel Deep, President

Deep Valley Ski Resort

The Caterers attempted to contact Deep to discuss the matter, but he refused to take their calls.

Early in January, 2002 the Caterers learned through the grapevine that Deep's sister, Knee, had recently started a catering business and on December 1, 2001 had signed a three-year catering contract with Deep Valley Ski Resort to commence on February 7, 2002.

On January 15, 2002, Carl Cook and Sally Sauté come to your law firm for legal advice. The senior partner requests that you prepare a legal memorandum setting forth the legal claims that might be available to the Caterers, and discussing the strengths and weaknesses of each such claim.

Question Three

[Question Three will count 1/3 of the total examination grade. You should devote approximately 1 hour and 15 minutes to it.]

On June 1, 2002, Christopher Cranky [hereinafter "Cranky"] entered into a Construction Agreement with Harriette Hammer [hereinafter "Hammer"] to build an addition onto Cranky's home in Salt Lake City. Cranky's home was located about a mile off the main highway up a dirt road in a forested area.

The agreement provided in pertinent part:

<u>Construction Agreement</u>	
This Agreement is entered into between Christopher Cranky ["Owner"] and Harriette Hammer ["Builder"] this 1 st day of June 2002. Builder agrees to construct an addition to Owner's home located at 345 Disaster Street, Salt Lake City, Utah [hereinafter "the Construction"] in consideration for Owner's paying Builder the sum of \$150,000.	
The Construction shall proceed in accordance with the attached Specifications dated May 1, 2002, Pages 1 through 5.	
Owner shall pay builder \$10,000 upon the signing of this Construction Agreement. Owner shall pay Builder an additional \$65,000 upon satisfactory completion of 1/2 of the Construction. Owner shall pay builder the remaining \$75,000 upon satisfactory completion of the entire Construction.	
Builder shall complete 1/2 of the Construction on or before January 15, 2003. Builder shall complete the entire Construction on or before June 1, 2003. Time is of the essence of this Agreement.	
The Construction shall be completed to the Owner's satisfaction.	
<i>Christopher Cranky</i>	<i>Harriette Hammer</i>
Owner	Builder

On page two of the Specifications dated May 1, 2002, the following appeared:

Builder shall install Pittsburgh Corning Glass Block[®] windows, ARGUS[®] Parallel Fluted Pattern, into the window openings around the entrance door to the addition.

The parties signed the Agreement on June 1, 2002, and Cranky gave Hammer a check for \$10,000. Construction began immediately.


Because of a major snowstorm early in December 2002, Hammer was unable to access the construction site as the dirt road leading to the site was impassable. Hammer telephoned Cranky to explain that she could not proceed with construction work unless

Cranky had the dirt road plowed. Cranky refused to do so, saying that it was Hammer's responsibility to maintain access to the jobsite. Construction was delayed for two weeks.

In mid-January, Hammer was ready to install the glass blocks into the window openings around the entrance door to the addition. When she telephoned the local building supplier to order the glass block, she was informed that the specified "ARGUS[®] Parallel Fluted" pattern had been discontinued by Pittsburgh Corning several months earlier. However, glass blocks were available in the "ARGUS[®] Regular" pattern. The only difference between the two patterns was that, in the "Regular" pattern, the lines on one side of the glass block were perpendicular to those on the other side; in the "Parallel Fluted" pattern, the lines on both sides were parallel to one another. Accordingly, Hammer ordered and installed the "ARGUS[®] Regular" pattern blocks. (Purchase and installation of the glass blocks represented about \$1,000 of the \$150,000 contract amount.)

On January 15, 2003, because of the delay caused by the snow, Hammer was two weeks behind schedule.

The construction was 1/2 complete at the end of January, 2003. At that time, Hammer sent the following letter to Cranky:



Harriette Hammer, Master Builder
567 Joist Road
Salt Lake City, Utah 84188

January 31, 2003

Dear Mr. Cranky:

I have now completed 50% of the construction work on the addition. Accordingly, I hereby request a progress payment of \$65,000 pursuant to the Construction Agreement, dated June 1, 2002.

As you are aware, the severe snowstorms during the month of December, 2002 resulted in a two-week delay in construction. Nonetheless, by working overtime (at no additional cost to you) I have no doubt that I will be able to complete the entire project and satisfy the final completion date of June 1, 2003.

Sincerely,
Harriette Hammer

On February 7, 2003 Hammer received the following letter from Cranky:

Christopher Cranky
325 Disaster Street
Salt Lake City, Utah 84189

February 6, 2003

Dear Ms. Hammer:

This is to inform you that you have breached the Construction Agreement dated June 1, 2002 in the following ways:

1. You did not satisfactorily complete 1/2 of the construction by January 15, 2003 as required by the Construction Agreement.
2. You failed to follow the specification set forth on page 2 of the Specifications dated May 1, 2002 in that you did not install the specified glass blocks into the window openings around the entrance door to the addition. Accordingly, you have not completed that requirement of the Construction Agreement to my satisfaction.

Based on these failures, I am completely dissatisfied with your performance and consider you to have breached the Construction Agreement. Accordingly, please remove any remaining equipment and materials from my property immediately and do not return. You will receive no further payment.

Sincerely,

Christopher Cranky

On February 15, 2003 Cranky entered into a contract with Roseanne Riveter to complete the second half of the addition. The contract price for completing construction was \$100,000. Included in that price was \$10,000 to have "ARGUS[®] Parallel Fluted" pattern glass block shipped from Germany, where several remaining pieces were located in a warehouse. Also included was a charge of \$5,000 to remove the existing glass block installed by Hammer and to reinstall the new glass block.

On March 1, 2003 Hammer received a Summons and Complaint in a lawsuit filed by Christopher Cranky seeking damages with respect to the added cost of completing the addition to Cranky's house.

Hammer comes to your law firm to discuss the situation. She documents the following losses as a result of Cranky's action:

1. She expected to earn a profit of 20% on the Construction Agreement.
2. Though she had completed 1/2 of the construction, thus far she had received only the upfront payment of \$10,000.
3. She expended \$55,000 for labor and materials in completing the first half of the construction. (The cost of labor and materials for the second half was projected to be greater than that for the first half, as it would have included expensive finish hardware and cabinets.)
4. While driving her backhoe away from the construction site, its axle broke and the repair costs were \$5,000.
5. She had already purchased \$20,000 worth of materials to begin construction on the second half of the project. She believed that she could salvage that material for \$15,000.
6. In the meantime, she was forced to rent a storage facility for a fee of \$2,000 to store the materials removed from the construction site pending salvage.

Draft a memorandum discussing Harriette Hammer's rights and liabilities with respect to the Construction Agreement. Include in your discussion potential damages for which she might be liable as well as potential damages that she might recover in a counterclaim.

College of Law Honor Code Statement

I, _____, Exam Number #_____,
certify that I have not used any unauthorized assistance or materials in the taking of this
examination.

I have not used any communication device and have not accessed any electronic
files or materials by computer, including but not limited to, any materials on the hard
drive, in directories, on floppy disks, or via the Internet or email. If this examination is
answered on computer, I further understand that I assume the risk of any technical
difficulties and that I will not be given additional time or consideration in the event of
technical difficulties.

Taking of this examination is governed by the Code of Student Rights and
Responsibilities (PPM 8-10) regarding academic honesty. I understand that failure to
comply with that Code will result in my being subjected to academic sanctions, including
but not limited to possible grade reduction, failing grade, suspension or dismissal from
the law school.

Student Signature

Date