

# CONTRACTS

Professor Terry S. Kogan

Fall Semester, 2005

## Final Examination

Friday, December 9, 2005

8:30 a.m. to 12:15 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 writing the answer to each question is one hour.

You have **three hours and forty-five minutes** to complete this examination. **The first forty-five minute period 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** 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** 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 one hour to writing the answer.]

Veray Clever was a law student at the University of Utah College of Law itching to try out her newly acquired knowledge of contract law. On September 1, 2000, Veray Clever and Buggy's Pest Control entered into a one-year, renewable "Termite Control Agreement" [hereinafter "the Agreement"]. The Agreement was a standard form contract regularly used by Buggy's Pest Control. Pursuant to the Agreement, Buggy's Pest Control was obligated to inspect and treat Veray Clever's home for termites during the term of the Agreement, which continued so long as Veray paid the annual renewal fee. The Agreement contained a mandatory, binding arbitration provision with respect to any dispute arising thereunder.

In October 2000, Veray Clever discovered what she believed to be termite infestation in her home. Buggy's Pest Control sent out an inspector to spray the affected area. Though admitting that there was damage, Buggy's Pest Control claimed that the damage occurred before the initial term of the Agreement and thus that it wasn't liable for repairs to Veray Clever's home.

On August 1, 2001, when the initial term of the Agreement was about to expire, Buggy's Pest Control sent Veray Clever a bill for the annual renewal fee, payment for which was due on August 31, 2001. On August 16, 2001, Veray Clever sent a payment check to Buggy's Pest Control. On the back of the check was written the following: "Subject to the attached Addendum to Customer Agreement." Stapled to the check was the following document:

### Addendum to Customer Agreement

To: Buggy's Pest Control

From: Veray Clever [hereinafter "Customer"]

Date: August 16, 2001

Please read this Addendum to Customer Agreement carefully as it sets forth changes to the terms of the Termite Control Agreement, dated 9/1/2000.

ARBITRATION. Buggy's Pest Control hereby agrees that, hereafter, written consent of both parties to this agreement shall be required for arbitration of any dispute. In the event that a dispute arises between Buggy's Pest Control and Customer, either party may propose arbitration if desired, including in the proposal an estimate of the cost thereof and a description of the process (venue, selection of arbitrator, etc.). Notwithstanding any prior agreement, nothing herein shall limit Customer's right to seek court enforcement of any claim nor shall anything herein abrogate Customer's right to trial by jury. Arbitration shall not be required with respect to any prior or future dealings between Buggy's Pest Control and Customer.

**ACCEPTANCE BY CONTINUED USE.** By cashing the renewal-payment check for continued service beginning 9/1/2001 and by continuing to honor this account, Buggy's Pest Control acknowledges its agreement to the terms of this Addendum to Customer Agreement. If Buggy's does not agree to all terms of this Addendum to Customer Service Agreement, Buggy's must immediately notify Customer prior to cashing the renewal-payment check.

The envelope containing the check and revised agreement was opened on August 20, 2001 by a clerical worker in Buggy's Pest Control's accounting department, who endorsed the check by rubber stamp and deposited it in the bank. The clerical worker placed the document in Veray Clever's file. On September 1, 2001, Buggy's Pest Control sent an inspector to perform the annual routine termite inspection at Veray Clever's home.

On September 5, 2001, Veray Clever filed an action in the Utah trial court against Buggy's Pest Control with respect to the company's failure to treat and control a termite infestation in her home and to repair the damage caused thereby. In response, Buggy's Pest Control filed a Motion to Compel Arbitration, relying upon the arbitration provision contained in the Agreement dated 9/1/2000. Veray Clever opposed the motion to compel arbitration asserting that a binding, mandatory arbitration agreement no longer existed. Attached to her filings were a copy of the Addendum to Customer Agreement, a copy of the canceled check for the renewal fee, and an affidavit stating that Buggy's Pest Control had inspected Veray Clever's home after receiving the addendum and depositing the check.

You are the law clerk to Judge Vermin, to whom the case has been assigned. Judge Vermin has asked you to draft a legal memorandum discussing the merits of Buggy's Pest Control's Motion to Compel Arbitration.

## **Question Two**

[Question Two will count 1/3 of the total examination grade. You should devote approximately one hour to writing the answer.]

Ekeka Kona [hereinafter "Kona"] was a successful Hawaiian chef who lived on Maui. He worked in his father's restaurant, where he earned \$100,000 a year.

Catherine Cook [hereinafter "Cook"] owned "The Island Restaurant" in San Bernardino, California which specialized in Hawaiian food. The restaurant was moderately successful, but Cook decided that she needed to hire a well-known Hawaiian chef to enhance the restaurant's reputation. Accordingly, in June 2005 she contacted Kona concerning his taking over The Island Restaurant's kitchen.

In order to induce Kona to leave Hawaii and move to California, Cook offered Kona a 10% interest in the restaurant (in addition to salary) to take charge of the restaurant's kitchen. After negotiations, Cook and Kona orally agreed that Kona would move to California to run The Island Restaurant's kitchen for a term of five years in exchange for 10% of the restaurant's stock and an annual salary of \$100,000. Cook further agreed to assume the costs of Kona's relocating his family to California. At the

time of this agreement, the value of the restaurant's stock was \$1 million. At the end of the meeting, Cook stated that she would have her attorney memorialize their understanding. No written document was ever given to Kona for his review.

Kona relocated his family to California at a cost of \$25,000. Having sold his 1990 Pontiac for \$5,000 before he left Hawaii, Kona purchased a new Audi for \$45,000 upon arriving in California. (Cook owned an Audi and recommended the car highly to Kona.). In addition, Kona paid the first installment of \$10,000 for his children's tuition at San Bernardino Prep School. (They had attended the Maui Prep School, the tuition for which was half that of the California school.)

Kona began work at The Island Restaurant on September 1, 2005. At that time, he still had not been given any stock certificates by Cook. Though Kona asked weekly about when Cook was going to transfer the stock certificates, she always evaded his questions. Cook did pay Kona the salary he was promised on a timely basis each week.

After eight weeks, relations between Kona and Cook seriously deteriorated, in large part due to Kona's resentment over Cook's failure to transfer the stock certificates. Finally, Kona told Cook that if the certificates were not handed over on the morning of November 1<sup>st</sup>, he would simply stop working. When no stock certificates were forthcoming on that day, Kona walked out of the restaurant. That was about four weeks ago. In the interim, Kona has not bothered seeking employment elsewhere since there is no other Hawaiian restaurant within 50 miles of San Bernardino.

Two days ago on December 1, 2005, Cook telephoned Kona to say that the stock transfer was "in progress," and she encouraged him to come back to work. Words got heated and Cook threatened to sue Kona if he did not return to work immediately. Kona slammed down the phone. The next morning Kona was served with a Complaint and Summons in *The Island Restaurant v. Ekeka Kona*. In addition to seeking damages, the Complaint sought an injunction to force Kona to return to work and to forbid Kona from accepting employment elsewhere in San Bernardino.

Kona immediately comes to your law firm for legal advice. The senior partner has requested that you draft a legal memorandum discussing Kona's legal rights and liabilities with respect to Cook and The Island Restaurant. Among other things that she wants you to consider are the potential damages and other remedies that Kona might recover or be subject to in the lawsuit.

### Question Three

[Question Three will count 1/3 of the total examination grade. You should devote approximately one hour to writing the answer.]

Joe Seedy recently purchased four new Apple computers for his travel agency, Seedy Vacations, Inc. Given the cost of the computers, Seedy decided that he needed a surge protector to guard the computers against electrical spikes that sometimes occur during storms. Not being particularly tech savvy, he went to a local computer supply chain, Computers USA, to seek advice. He looked at several surge protectors in the forty dollar range. However, the salesman warned him that those devices could not be relied upon to protect four high-powered computers at the same time. The salesman suggested that Seedy contact a local company, Superior Surge Protection, which specialized in high-end surge protectors. When Seedy asked the salesman to guess how much a high quality surge protector might cost, the salesman replied that he really didn't know but imagined one would cost much more than those sold at Computers USA.

Seedy telephoned Superior Surge Protection and spoke to its owner, Zelda Zap. The following conversation took place:

**Joe Seedy:** Hello. My name is Joe Seedy and I own a travel agency, Seedy Vacations, Inc. I am interested in purchasing a surge protector for four computers that were recently purchased for the company.

**Zelda Zap:** Are you aware that we manufacture very specialized products designed for high tech companies to protect entire computer systems?

**Joe Seedy:** Yeah, the salesman who recommended your company said you're the best in town. But I need a very good surge protector. How much for a protector that can take care of my four new, top-of-the-line Apple G5 desktop computers?

**Zelda Zap:** The least expensive protector we make is the XX400, and that will cost you eighty-five fifty.

**Joe Seedy:** Wow . . . that's over twice the cost of surge protectors I've seen elsewhere.

**Zelda Zap:** Well, I'll be honest with you . . . we make a much better . . . and more expensive . . . product than you'll find at any other local computer supply store.

**Joe Seedy:** I understand, but I want to protect my computers. I'll take the XX400.

**Zelda Zap:** You're sure this is what you're looking for? I think you probably could find something cheaper that would serve your needs.

**Joe Seedy: Yeah . . . I might as well get the best protection I can find. Send it out and bill my company.**

The price that Zelda Zap intended to convey was \$8,550.00. The price that Joe Seedy understood her to quote was \$85.50.

The surge protector was delivered the next day. Unlike the device at the Computer USA (a multi-outlet power strip) that Seedy had looked at, the XX400 was similar in appearance to a small floor-model computer, with blinking lights and several switches. Seedy plugged it in, connected the four computers to it, and began using it.

A week later an invoice from Superior Surge Protection for \$8,550.00 showed up on Joe Seedy's desk. He returned it with a check for \$85.50. A week later, Seedy Vacations was served with a Complaint and Summons in a lawsuit seeking the balance of \$8,464.50 on the surge protector.

Both parties filed opposing motions for Summary Judgment, each relying on an affidavit that set forth very similar descriptions of the above-described phone conversation. You are the law clerk to the judge to whom the case has been assigned. You have been asked by the judge to draft a memorandum of law discussing the merits of the case. In addition to discussing the law, the judge has requested that you ultimately consider the following issues:

1. Assuming that summary judgment is appropriate in this action, to whom would you award summary judgment and why?
2. If you determine that summary judgment is inappropriate in this case, set forth the "genuine issues of material fact" concerning the evidence that is relevant to a determination of the case at trial.