

Contracts

Professor Terry S. Kogan

Spring Semester, 1999

Final Examination

Monday, May 10, 1999

1:00 p.m. to 5:15 p.m.

Examination Number: _____

This Final Examination is entirely open book. You may use the casebook, the Rules of Contract Law book, notes, outlines, and/or any other materials. The use of other human beings (or computers) is not permitted.

This examination consists of four questions. The questions are of equal weight.

If the facts of a question pose a remedy issue, discuss the issue of remedy even if you conclude that the party seeking the remedy may not succeed in establishing a breach of contract or other basis for relief.

You have four hours and fifteen minutes to complete this examination. **The first forty-five minutes is to be used exclusively for reading the questions carefully and outlining your answers. Blue Books will not be handed until forty-five minutes into the exam.** (If you are typing this exam, **you are not allowed to type during the first forty-five minutes.**) You then will have three and one-half hours to write your answers to the exam.

Please write on every other line of the Blue Books.

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** return these examination questions with your answers.

Good Luck.

Question One

[This question will count 25% of the total examination grade. You should devote approximately 50 minutes to it.]

In Fall 1998, the Catholic Church sold Allhallows Hospital to Humanta Co., a corporation operating numerous for-profit hospitals throughout the United States. After the purchase, Humanta's management decided to downsize Allhallows in order to make the hospital profitable. Prior to the purchase, the professional staff at Allhallows worked on three-year contracts, which provided that they could not be fired except for good cause and that they were entitled to six-month's notice before the end of the three-year contract term if their contract was not going to be renewed. Employees who wanted to leave were also required to give six-month's notice. To reinforce this six-month notice requirement, the Allhallows contract contained a provision whereby an employee promised not to work for a competing employer for six months from the date on which the employee gave notice that she was leaving.

[Note: As a matter of law, upon the hospital's purchase, Humanta became a successor party to Allhallows' rights under each employment contract, and could enforce each contract in its own right.]

To accomplish its downsizing, Humanta negotiated termination agreements with certain employees it chose not to retain by offering to pay them six months of salary, irrespective of how many months remained under their three-year contracts. Many employees were angered by this offer, but most accepted the settlement rather than resort to litigation.

Among the programs that Humanta selected to eliminate entirely was the Speech Pathology/Brain Stroke program. Humanta decided not only to discharge the program's staff, but also to sell off all equipment that could not be modified for use by other departments at the hospital. Included among the "equipment" sold off were three chimpanzees used in experiments by Dr. Jane Goodwin, a biologist and speech pathologist. Dr. Goodwin herself was discharged by Humanta, which negotiated a settlement with her whereby the hospital agreed to pay her six-month's salary in lieu of the two years remaining on her contract. As part of its settlement with Dr. Goodwin, Humanta agreed to sell the three chimpanzees to her for \$1000 each, the amount each chimpanzee would fetch in the market for experimental animals.

Angry at the downsizing, during their negotiations over her discharge Dr. Goodwin did not disclose to Humanta information concerning imminent breakthroughs in her chimpanzee research, nor did Humanta executives inquire about the progress of her research.

One month after leaving Humanta, Dr. Goodwin took a job with Duke University Medical School. Three months later, the Duke University Medical School held a press conference to announce a major scientific breakthrough — talking chimpanzees. A medical school spokesperson explained that Dr. Goodwin had taught American Sign Language to two of the chimpanzees. To everyone's amazement, the third chimpanzee, who had received no such instruction from Dr. Goodwin, had also learned to communicate in American Sign Language. The conclusion was irrefutable: the third chimpanzee had learned from the other two chimpanzees. Dr. Goodwin claimed that each chimpanzee's "verbal" ability approximated that of an average four-year-old human child. Under questioning by the press, Dr. Goodwin explained that she had been working with the chimps for almost two years, but she graciously credited her co-workers at Duke and at the former Allhallows hospital for their assistance. She pointedly made no reference to Humanta Co.

Upon reviewing videotapes of the press conference, officials at Humanta were furious. You are General Counsel to the hospital. The President of Humanta Co. approaches you to see if Humanta can get back its talking chimpanzees and whether the hospital can compel Dr. Goodwin to return to work for Humanta Co., perhaps by getting a court order prohibiting her from working for someone else.

Write a memorandum setting forth Humanta's rights.

Question Two

[This question will count 25% of the total examination grade. You should devote approximately 50 minutes to it.]

Amy Agent and Pete Promoter co-own an entertainment agency known as Agent & Promoter, Inc. (hereinafter "A & P") in which they represent professional actors and athletes first by helping to locate bookings for their clients, and then by negotiating contracts on their clients' behalf.

In 1995, A & P entered into an agreement (hereinafter the "Agreement") with Kip Kool, an aspiring, young screen actor, which stated in its entirety:



Agent & Promoter, Inc.

Agreement

This Agreement is entered into between Agent and Promoter, Inc. (hereinafter "A & P") and Kip Kool (hereinafter "Kool") on this 25th day of May 1995.

Clause 1. A & P and Kool hereby agree that A & P will have the exclusive right to locate bookings for Kool in the movie industry and to negotiate contracts on Kool's behalf with respect to said bookings.

Clause 2. Kool will have the authority to approve or disapprove any proposed booking that A & P may locate and present to him for approval.

Clause 3. In exchange for A & P's services in locating bookings and negotiating contracts on Kool's behalf, A & P shall be paid a fee of ten percent of the contract salary that A & P negotiates on Kool's behalf.

Clause 4. This agreement shall continue for a period of three years, unless A & P's services no longer prove reasonably satisfactory to Kool.

On behalf of Agent & Promoter, Inc.:

On behalf of Kip Kool:

Amy Agent

Pete Promoter

Kip Kool

Date: May 25, 1995

Shortly after Kool signed with A & P, he achieved great popularity in a film role obtained for him by his new agents. By early 1997, A & P was devoting approximately 15% of its professional time to Kool's account, promoting his career with various studios, arranging tryouts for him, and negotiating contracts on his behalf. Nonetheless, they regularly took in other clients during this period, though no other single client generated as much business as Kool did. As Kool's popularity and celebrity status grew, he became an increasingly demanding client. Kool was especially sensitive and demanding about having instant access to Amy or Pete. He hated it if they

did not immediately return his phone calls or if he was put on “hold” when he phoned his agents.

During the first year that A & P served as Kip Kool’s agent (June 1995 through May 1996), Kool brought in contracts totaling \$500,000, yielding A & P commissions of \$50,000. A & P’s overhead totaled approximately one-half of the commissions the agency received, resulting in profit for that year of \$25,000 from Kool’s contracts. During the second year that A & P served as Kip Kool’s agent (June 1996 through May 1997), he brought in contracts totaling \$1,000,000.

On June 1, 1997, Kool telephoned Amy and Pete to discuss with them a film script that he was considering. A new receptionist at A & P mistakenly put Kool on hold for about a minute. When Amy finally picked up the phone, Kool yelled at her for a couple of minutes, telling her that putting their star client on hold was not satisfactory service. He then abruptly fired A & P. A & P later learned that, a week after firing A & P as his agent, Kool signed a contract with his recently affianced girlfriend to serve as his new agent.

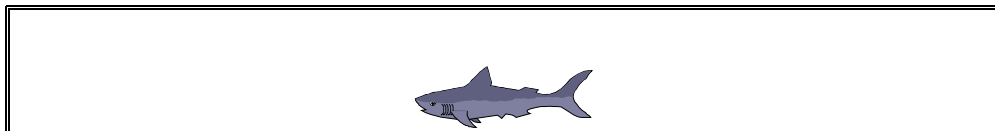
To A & P’s great relief, Ned Neat entered A & P’s offices on June 2, 1997, to engage the firm to serve as his agent. (Having just gained a major film contract, over the next few months Ned Neat would in fact prove to take up approximately 20% of the firm’s professional time.) During the year *prior* to A & P’s assuming responsibility as Ned Neat’s agent, Ned Neat had contracts totaling \$1,200,000.

On June 3, 1997, Amy Agent and Pete Promoter come to your law firm to seek advice with respect to their rights against Kip Kool. The senior partner requests that you write a memorandum discussing the respective rights of A & P and Kip Kool.

Question Three

[This question will count 25% of the total examination grade. You should devote approximately 50 minutes to it.]

In January, 1989, Alaska Salmon, Inc. entered into contracts with 200 fishermen in California with respect to their fishing in Prince William Sound, Alaska during salmon fishing season in March, April, and May, 1989. The contract provided in pertinent part:



**Alaska Salmon, Inc.
Prince William Sound
Alaska**

Contract

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Clause 8. You will be given a round trip airline ticket from your place of departure in California to Prince William Sound, Alaska, departure to take place on February 27, 1989.

Clause 9. You will begin fishing on March 1, 1989, will fish for eight hours a day, six days a week (not Sunday), and will fish through and including the last day of May 1989.

Clause 10. In exchange for your fishing services, you will be paid at the rate of twenty-five cents per fish caught and brought to the cannery.

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The 200 fishermen arrived in Prince William Sound at the end of February and began fishing on March 1st as scheduled. By March 24th, each fisherman had averaged a catch of 400 fish per day for the six days of fishing a week, or had earned approximately \$100 per day for 20 days of fishing.

On March 24, 1989, the T/V Exxon Valdez ran aground on Bligh Reef, spilling an estimated 11 million gallons of North Slope crude oil into Prince William Sound, Alaska. The oil spread rapidly and, over the next two months, oiled parts of more than 1,500 miles of shoreline. There were both immediate and lingering impacts on fish and wildlife resources and the lives of people in coastal communities.

As a result of the oil spill, the ability to fish for salmon was tremendously curtailed. For the next week, each fisherman averaged a catch of approximately 100 fish per day, earning a mere \$25.00 for **[should have read "each day of that" [the] week**. At that rate, each fisherman could earn more fishing off the coast of California, and had little reason to remain in Alaska for the months of April and May.

A representative for the fisherman approached the President of Alaska Salmon, Inc. on March 31, 1989, and explained that because of the oil spill and the diminution of the catch, Alaska Salmon, Inc. would have to agree to increase the amount paid to each fishermen from 25 cents to \$1.00 per fish.

The representative further stated that, in the event that the company refused to increase their pay, the 200 fishermen would depart en masse and return to California.

There were many other fishermen available in the Prince William Sound area, since other fisheries area had laid off entire fishing crews as a result of the oil spill. Nonetheless, the President of Alaska Salmon, Inc. believed that it was unlikely that his fishery would be able to recruit fisherman at any better rate than the \$1.00 per fish now proposed by its own fishermen. Accordingly, feeling she was over a barrel (of fish?), Alaska Salmon, Inc.'s President agreed to pay the 200 fishermen at the new rate of \$1.00 per fish. At the end of May when the salmon-fishing season drew to a close, each fisherman had in fact caught only 1/4 of the expected catch.

At the end of the fishing season, the President of Alaska Salmon, Inc. decided that she had been treated unfairly by the fishermen, and she refused to pay them the newly agreed rate of \$1.00 per fish. Instead she paid each at the original rate of 25 cents per fish for the entire period of the contract.

You are the lawyer for the fishermen. Advise them in a written memorandum of their rights against Alaska Salmon, Inc.

Question Four

[This question will count 25% of the total examination grade. You should devote approximately 50 minutes to it.]

Pharmaco is a national drug chain that sells Pharmaco[®]-branded drug products through retail drugstores that are operated by independent owners as franchisees. Every person in Pharmaco's top management has both a pharmacy degree and pharmacy management experience. Moreover, its company policies require that every franchise store be owned and operated by a registered pharmacist. The fact that every Pharmaco store is pharmacist-owned and operated is central to Pharmaco's marketing strategy as well as the sound operation of the chain.

Accordingly, Pharmaco's legal staff has drafted a franchise contract (hereinafter the "Contract") that emphasizes the fact that the company is pharmacist-run. The Contract, which is submitted to each potential franchisee on a take it or leave it basis, contains the following pertinent terms:



Pharmaco®

"Your Reliable Drug Store Run by a Registered Pharmacist"

Franchise Contract

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Clause 45. As a condition to receiving a franchise and continuing to have rights as a franchisee under this Franchise Contract, each Pharmaco® franchise must include a registered pharmacist as owner or as a majority stockholder if the franchise is owned as a corporation. Each such registered pharmacist serving as owner or majority stockholder must be approved by the franchisor.

Clause 46. If as a result of death, disability, or retirement, franchisee shall lose its registered pharmacist as owner or majority stockholder, the heirs, estate or designated representative of the registered pharmacist owner or majority stockholder may continue to operate the pharmacy under the Pharmaco® franchise for a one-year grace period from the death, disability, or retirement of such registered pharmacist. If, after one year from the death, disability, or retirement of the registered pharmacist owner or majority stockholder, the Pharmaco® franchise has not been transferred to a registered pharmacist as owner or as majority stockholder, franchisee shall have no further rights under this Franchise Contract to use the Pharmaco® name or to operate as a Pharmaco® franchisee. In the event the franchise is terminated as herein provided, Pharmaco® agrees to purchase the entire inventory of the former franchisee then in marketable condition at 75 per cent of its retail price.

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Clause 61. The period of this Franchise Contract shall be seven years from the date of execution, unless renewed by agreement of both parties six months before the franchise expiration date.

Clause 62. Pharmaco® may terminate this Franchise Contract for good cause on seven days notice. Breaches of the Franchise Contract by the franchisee

which remain uncorrected for seven days after notice of the breach by the franchisor shall constitute good cause for termination.

Clause 49. The franchisor will not grant a franchise to another pharmacy located within two miles of an existing Pharmaco® franchise without a written waiver of objection to such new Pharmaco® store from the existing franchisee.

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Robert Pill became a Pharmaco franchisee in Draper, Utah in 1967, operating under the name of Pill Pharmacy. Pill's franchise was last renewed for an additional seven-year term on April 15, 1995. In June 1997, Robert Pill suffered a fatal heart attack leaving his wife and one daughter surviving. His daughter, Polly Pill, served as executor of her father's estate and as his primary heir. Polly is a registered nurse, who in recent years has worked in her father's pharmacy part time while pursuing a second undergraduate degree at the University of Utah School of Pharmacy. At the time of Robert Pill's death, Polly was two years away from completing her pharmacy degree.

Following Robert Pill's death, the lawyer for the Pill estate phoned the President of Pharmaco and informed him of Robert Pill's death. The lawyer then informed Pharmaco's President of the Pill family's plan that Polly succeed as majority shareholder and manager of the pharmacy once she obtained her degree and state license. When informed that Polly was still two years away from qualifying for licensing, Pharmaco's President stated, "We try to be cooperative with our franchisee families in cases like this, so that should not be a problem." The Pharmaco President then suggested that Polly hire a qualified registered pharmacist to manage the store until Polly could assume full responsibility after obtaining her pharmacy license in two years. In accord with that suggestion, Polly hired a registered pharmacist to manage the store.

In late Fall 1997, Pharmaco received a proposal from a potential franchisee to build a large Pharmaco pharmacy in a new strip mall under construction in Draper. Pharmaco was very interested but, unfortunately, the new location was less than a mile away from the Pill Pharmacy. When Polly learned of the proposed new pharmacy within a mile of the Pill Pharmacy, she had her lawyer send Pharmaco written objection to the proposal by registered mail.

In December 1997 Polly Pill received written notice from Pharmaco's President that the franchisor would insist on strict compliance with the registered pharmacist ownership clause of the Franchise Contract. Pill

consulted with her lawyer, who suggested that she explore the possibility of selling the Pill Pharmacy to a buyer who could qualify as a registered pharmacist, perhaps with a buy back option once Polly was licensed. Over the next months, several potential buyers expressed initial interest, but Pharmaco would not approve any potential buyer unless the potential buyer would agree to waive objection to the contractual right not to have a new Pharmaco store located within two miles of the Pill Pharmacy. Since this would have greatly reduced the value of the Pill Pharmacy, the prospective buyers each refused to agree to the waiver, and in turn, Pharmaco refused to give its approval to any of the potential buyers.

With little more than two months left before the first anniversary of Robert Pill's death (and the expiration of the related one-year grace period written into the Franchise Contract), Polly Pill's lawyer requested that Pharmaco issue a formal written consent to extending the Franchise Contract for one additional year beyond the one-year grace period. Pharmaco responded to the request by sending a written refusal, and stated therein its intention to treat the franchise as terminated if all terms of the Franchise Contract were not met. Two days after the one-year grace period expired, Pharmaco notified Polly Pill that the Pill Pharmacy franchise had terminated and that the company was ready to purchase the Pill Pharmacy inventory pursuant to the Franchise Contract.

Polly approaches your law firm, seeking representation against Pharmaco with respect to its terminating the Pill Pharmacy franchise. Prepare a memorandum for the firm's senior partner discussing the respective rights of Polly Pill and Pharmaco.