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Course **6080-3 Contracts -Rinehart**

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Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	609	2800	3419
Section 2	592	2660	3269
Section 3	182	837	1023
Section 4	459	2147	2608
Section 5	438	2111	2559
Section 6	575	2751	3337
Section 7	328	1626	1958
Section 8	343	1751	2101
Section 9	354	1727	2086
Section 10	238	1115	1357
Section 11	90	417	508
Section 12	13	39	49
Section 13	33	148	178
Total	4254	20129	24452

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72
+13
135

Answer-to-Question-_1_A

1) A)

Whose Form governs?

The first issue raise is if the disclaimer of liability in Wirehouse's acknowledgement form is binding. This is a deal for a sale of goods, so the UCC governs the transaction. (Note, if this was a common law problem we would use the last shot rule, and Wirehouse's form would govern because it was the last one on the table once the parties performed.)

This contract won't be voided by the statute of frauds even if it is for more than $500, becuase there seems to be sufficeint momorandum to support it (UCC 2-201).

UCC 2-207 tells us what to do with new or additional terms. The UCC does not require that an acceptance be the mirror image of the offer in order to be counted as an acceptance. However, an acceptance that is expressly conditioned on the acceptance of its own terms may not form a contract unless the other party accepts those terms. Here however, GE did continue to buy circuits from Wirehouse, so presumably that would function as a valid acceptance. maybe — needs to be specific & unequivocal acceptance.

How & why does 2-207(2) apply here? The form expressly conditions acceptance on its terms? 2-207(2) applies only if we can somehow argue acceptance by WH not expressly conditional — hard argument to make here

2-207 (2) says that between merchants (and I am assuming that both parties are merchants here, since they both deal in circuits or circuit containing devices), additional terms are part of the contract unless:

a) offer limits acceptance to its terms (we have no evidence of this here)

b) terms materially alter the offer

c) notification of objection to them has been given, of is given within a reasonable time.

GE has workable theories under b) and c).

b) For this, we will have to ask if a court would find that a disclaimer of liability materially alters the terms of the offer. This seems to be pretty material, since it would give Wirehouse carte blanche to manufacture shoddy materials without fear of liability. So if the court does find that this is a material term, this clause would be seen as a mere proposal, and wouldn't be part of the contract. Any gaps would be filled by a UCC gap filler, and GE should be able to sue for faulty workmanship.

c) GE did notify Wirehouse that they objected to the terms. The question is if they did so within a reasonable time. The facts of the case don't tell us. They could have notified Wirehouse at the beggining of their dealings, or just a week ago. In the first case that probably is within a reasonable time. In the second, I wouldn't think it would be. However, I will assume that GE did notify Wirehouse soon after they first saw the disclaimer in the acknowledgment form. In this case, they have a pretty good case. They acted as though there was a contract, so the contract terms would be those agreed upon as well as any gap fillers.

There is a question of if the objection would be barred under the parol evidence rule. But it probably wouln't, because it would be needed to clarify the contract terms, and to see if UCC 2-207 (c) was met.

In conclusion, GE can probably still sue Wirehouse because the disclaimer of liability wouldn't be included under the UCC either because the term materially alters the contract, or because GE notified Wirehouse of their objections.

if 2-207(2) does not come into play, need to discuss whether GE accepted WH's counteroffer under 2-207(1) and if not, application of 2-207(3)

Implied Warranty of Merchantability

If GE can sue (as we have seen they can), then they should be able to do so under the implied warranty of

merchantability (UCC 2-314). Under this, a good is merchantable if it passes without exception in the trade. It is unlikely that exploding circuits would pass without exception, so GE should have a good claim. (Also see *Crow v. Bayliner*)

need more analysis

9

fitness for particular purpose?
any disclaimers of either warranty?

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Answer-to-Question-_1 B)__

Prelude to parts B) and C). It seems that we have a valid contract here. There may be some problem with a lack of definiteness in the terms of the contract. However, since the price and largest terms were in the contract, and there was a mechanism for seeing if Jeff performed (J. Lo's envy), this does look like a valid contract with offer, acceptance, consideration, and reasoanbly certain terms to be able to determine if there was a breach, and to give a remedy in case of breach.

<u>Jeff's arguments in support of his breach of contract claim:</u>

Jeff could argue that Paula interfered with Jeff's ability to perform his end of the bargain. Paula had exclusive control of the house, and refused to allow Jeff and his workers access to the home after the worked entered without her permission. Jeff would ahve a good claim that this behavior by Paula was a breach of an implied in fact promissory condition that Paula would permit Jeff and his workers access to the home to complete the work on the house.

Anticipatory repudiation?

[illegible]

Paula would respond that Jeff breached first when one of his worker's entered the home without her permission. She would say this was a breach of Jeff's duties.

Jeff would respond that he didn't even know the worker was entering the home, and that he shouldn't be responsible for what his worker did. However, if the worker is Jeff's employee Jeff may have a problem of agency. If the worker is an independent contractor, Jeff would have a better claim that he can't be held responsible for the worker's action.

need to be clearer of rule + analysis

Jeff would also argue that Paula breached the agreement by refusing to pay what was due to him. The court would probably see the refusal to pay the remaining $30,000 that is due as a total breach, since Paula steadfastly refuses to pay Jeff any of it. It seems very unlikely that she will ever pay unless she is forced to do so.

Paula would contend that Jeff breached first. The court would have to see if Jeff did. Since he was performing the contract and evinced a desire to finish it, this is unlikely to be an effective argument by Paula.

OK

Bad Faith by Paula

The last claim Jeff might make is that Paula acted in bad faith in rejecting the work he did, after the contract stipulated that the only criteria was that the remodel must make J. Lo green with envy. Under that criteria, Paula can't reject the work just based on her own taste (becuase that wasn't the express condition in the contract). She can only reject the work if it would make J. Lo green with envy. So theoretically she would need to invite J over to see how envious they are.

This begs the question of what standard J's opionion will be held to. If the satisfaction of a person is a condition on the performance, than the person needs to be satisfied if a reasoanble person would be and it

Was this an express condition? Maybe Paula's just breaching an implied duty to act in good faith.

is a commercial setting (see Morin v. Baystone). However, in an aesthetic setting such as this, the person's satisfaction is more subjective, and will not be questioned by the court. Therefore, we may actually need to bring in J. Lo to see how envious they are.

Jeff's unjust enrichment claim - Jeff could also claim unjust enrichment. If he could prove that, the court might force Paula to disgorge the value of any work or materials that she received but never paid for.

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Answer-to-Question-_1) C)

Paula would argue many of the things she already said above:

That Jeff breached first (unlikely to be successful, but see *Sackett v. Spindler*). If she can prove that Jeff was the first one to breach (and that it was a total breach), she won't be found to be in breach herself. However, this is unlikely. At best she could show that Jeff was in material breach, which does not warrant her suing him. Likely she could only show him to be in partial breach, which would mean she would be obligated to continue her perfromance.

That Jeff failed to keep the contract because the remodel wasn't to her taste (which wasn't a condition in the contract, so that probably wouldn't work either.) She may have a claim that the contract didn't make J Lo sufficiently envious, but since she failed to let Jeff finish the project that probably

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woulnd't be a fair contention. Paula prevented or hindered his ability to finish

So Jeff's best defenses are that Paula materially breached by not letting him finish the work, and then completely breached when she refused to ever pay him. Ok

still need more clarity in your answers 10

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Answer-to-Question-_1) D

The most likely outcome at trial is that the court finds that Paula was in breach of a binding contract. In this case they would award Jeff his expectation damages, which are calculated by the formula found in R.2d 347:

Loss in value + other loss - cost avoided - loss avoided

The tricky thing about this will be seeing what to do with the cost for the extra electrical work and the extra flooring.

The extra flooring would probably be between Jeff and the flooring sub contractor. Jeff could sue the sub-contractor under the *Drennan* line of cases, based on a promissory estoppel theory. (But not if this is a *Baird* jurisdiction, because in that case the bid doesn't form a binding contract, so assuming Jeff didn't formally accept the bid he is out of luck). So the extra flooring wouldn't be a part of the breach action between Paula and Jeff. OK

The extra electrical work might be recoverable on a unilateral mistake theory. If this is a restatment jurisdiction this theory only works if

(R.2d 153) a) the effect of the mistake makes enforcement of contract unconscionable.

or b) the other party had reason to know of the mistake, or caused the mistake.

Niether of these works, because it doesn't seem unconscionable necessarily to enforce the contract. Jeff is a sophisticated remodeler, and should have been alert to wiring problems when he was bidding the project. Also, Paula is not a builder, and had no reason to know of the mistake. She certainly didn't cause the mistake, so this wouldn't work.

Jeff could also try under the *Wil-Fred* formulation, however this probably wouldn't work because Paula could argue that Jeff didnt' use reasoanble care in checking for mistakes, and that she relied on his lower bid and would suffer forfeiture if the mistake were to be excused.

Therefore, Jeff will probably not be able to recover from Paula for either the extra cost of the electrical work or the flooring.

good

This leaves:

$30,000 still due - $8,000 Jeff didn't spend on cabinet work and $6,000 he didn't spend on getting the flooring right. The hutch is just included in the contract price as originally stipulated. (And Paula will have to pay for it if J.Lo likes it, as I said above, and I am assuming that J.Lo loves it).

Therefore Paula will need to pay Jeff $16,000 for him to get his expectation damages. 8

If Jeff were to win on an unjust enrichment claim, he would get restitution damages which are anything he spent on the work in reliance. This would be

$9,500 + $3,000 + value of un-reimbursed work. The court could alternatively award Jeff the value of the goods that Paula received (R.2d 371)

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Answer-to-Question-_1) E)

Material misrepresentation?

Paula might have a claim for material misrepresentation. In order to make out this claim, she would have to show that the Freeling's failure to disclose the paranormal activity was equivalent to an assertion that it didn't exist (R.2d 161). This would be a difficult argument for Paula to make out. The Freelings would have to tell Paula about the ghosts only if they had reason to know how afraid she is of ghosts. They would have to know that it one of Paula's basic assumptions was the absence of ghosts. Sadly for Paula, there is no evidence that they did know that Paula was afraid of ghosts.

Even if the Freelings did make a deliberate misrepresentation that there were no ghosts, it would have to be about a material fact. So the court would ask if not thinking there were any ghosts would induce a reasonable person to assent to the bargain, or if the Freelings knew that Paula wouldn't buy a house that was haunted. This will be a difficult case for Paula, since courts aren't generally sympathetic to claims that paranormal activity constitutes a material fact.

Another consideration is the fact the house was featured on several TV shows as being haunted. This could make out a stronger case for Paula because it shows the Freelings probably certainly knew about the hauntings. Also, it might make the hauntings seem more material. On the other hand, it would also let the Freelings argue that since it was such a well known fact, Paula should have known about the hauntings herself, which cuts against her claim for recission.
(See Hill v. Jones)

As is clause?

The as-is clause could also present a problem for Paula. She had a chance to see the shows that said the house was haunted, and to inspect the property. This is also an integration clause, so if the Freelings did say there weren't any ghosts, it might be hard to present that evidence under the parol evidence rule. However, we don't need to look at that too hard since we have no evidence of any oral warranties.

This clause is likley to stand against Paula, since she was representaed by counsel in making the purchase agreement.

good

In conclusion, Paula probably won't be able to rescind her contract with the Freelings, becuase they didn't know she cared about paranormal activity, didn't lie about there being such activity, and the courts usually don't look on paranormal happening as material facts in any case. Also, the as-is clause supports the Freelings, particularly since Paula was capable of discovering the paranormal activity herslef.

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Answer-to-Question-_2 A)__

Breach of contract claim:

First we need to see if there was a valid offer. I will assume that all the conversations between marshall and Hewitt were preliminary negotiations. However, there is a possibility that a contract was formed then, and its terms will bind the parties (see *Harlos v. Advance*).

If the conversations were preliminary negotiations, than the offer happened when Hewwit put his approval on the e-mail Marshall sent him, and if was accepted once Marshall said he accepted.

Was the offer supported by consideration? Hewitt agreed to pay Marshall a higher salary, and push his case to become a partner, and Marshall agreed to stay with the firm, so the promise was supported by consideration. There may be some problem that Marshall was only promising to do what he was obligated to do under his employment contract in any case. However, since it seems that he was free to quit the firm, he did give up a legal right.

Marshall fulfilled his contractual obligations under the contract. it seems clear that Hewitt did not fully perform. Marshall did get a salary increase, but Hewitt didn't reccomend him for partnership.

The problem Marshall might have under this claim is getting damages. He didn't lose any money by staying with the firm, since he did receive a salary increase. All he lost was the prestige of being a partner in the firm. There is a certainty problem here, (R. 2d 352) that may make damages unrecoverable for the lost partnership.

Promissory Estoppel claim:

Marshall could also bring a promissory estoppel claim (in most jurisdictions, note that some allow either a breach claim or a promissory estoppel claim, but not both). Under this he would argue that he relied on Hewitt's promises and assurances that he had a great future witht the firm. Hewitt made a lot of assurances that Marshall had a great future at the firm, was likely to become a partner in the near future, and that he wanted Marshall to keep on working there. This looks a lot like a *Pop's Cones* situation, where there was no promise made, but the assurances may be so strong that we think Marshall should be compensated for his reliance damages.

If Marshall makes out this claim, he may be able to get reliance damages for the purchase of the new apartment. His biggest barier to these damages may be that buying such an expensive apartment was not reaonable reliance. If Hewitt can prove that buying that apartment was unreasoanble, Marshall may not be able to recover these damages. However, given the assurances Marshall was given and his high salary, he may be able to show that the nice apartment was a reasonable form of reliance on the assurances of a stable job.

Fraud claim:

Marshall may be able to argue that Hewitt's claims amounted to fraud. A misrepresentation is material, and fruadulent if the party making it knows it isn't true, and it would be likely to induce a reasonable person to assnet. Hewitt presumably knew he was lying to Marshall, and he also knew that Marshall would be likely to assent if told he could get a partnership if he wanted one.
Under this claim the contract would be voidable (which isn't really waht Marshall wants), and Marshall would be entitled to restitution damages (which would be hard to prove). Therefore, this probably isn't a

good legal theory for Marshall to pursue. OK 20

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Answer-to-Question-_2 B)__

(By the way, this increase in salary when M becomes partner changes what I said about damages above, he may be able to claim damages for a loss in higher partner's salary if it is certian he would have been made a promise if Hewwit had kept his promise.)

If Marshall succeeds, he would have 2 problems in recovering damages:
The 2.5 million might be barred by uncertainty, and might be reduced by mitigation, and the $500,000 might be barred as being unforseeable.

First, the 2.5 million - Marshall would expect to get this if he was awarded a partnership. However, it was never certain that he would get a partnership. Hewitt said it was likely he would, and promised to plead his cause, but the partners could well have chosen someone else. However, if Marshall can show that when Hewitt reccomends someone they are almost always made partners, he might have a really good case. But he would have to bring evidence about Hewitt's reccomendations.
Marshall's recovery of the 2.5 million would also probably be reduced by any mitigation he did. So since he continued to work first for NHW, and then for Goliath his actual salary would be deducted from his projected partner's salary. which itself may be hard to prove w/ certainty

Now, the $500,000 apartment cost. Marshall probably couldn't recover this, because under *Hadley v. Baxendale* only foreseeable losses are recoverable. Foreseeable losses fall into 2 categories: losses that stem directly from the breach (a loss in a new apartment does not stem directly from the breach), and losses the breaching party had notice of at the time of contracting. At the time the contract was made Marshall hadn't even thought about moving yet, as far as we can tell. Therefore he proably can't recover the $500,000, becuase it wasn't a foreseeable loss.

In conclusion, Marshall should recover his expected partner's salary (assuming he can prove it with reasoanble certainty), minus his actual salary. He shouldn't recover the $500,000 in apartment costs.

OK

15

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Answer-to-Question-_2 C)__

Barney does have a case against Goliath. Barney can show that Goliath offered the performance bonus, Barney accepted if by executing the confirmation, and that consideration was furnished by Barney meeting the highest performance standard. Goliath might argue that the bonus was a gratuity, but Barney can probalby show that his efforts that went beyond the minimum of his employment contract did furnish consideration for the offer.

As defenses against the contract, Goliath would probably argue that it was impracticable due to the financial meltdown and the probable ill-will of the public. Under R.2d 261 Goliath would have to show

that the financial meltdown and the necessity of accepting TARP funds was an event the non-occurence of which was a basic assumption of the contract. They would have difficulty getting a court to go along with this, sense economic downturns are usually not enough to make out a case of impracticability (*See Karl Wendt v. IH*). Generally contracts are drawn up to assign the risk between the parties in the case of changes in the economy. Goliath may be able to make the argument that performance is impracticable however, because the basic assumption behind awarding bonuses is that employees might othersiwse seek work elsewhere (thus the name "Employee Retention Plan"), and in a financial downturn it is much less likely that employees would leave a stable job if they weren't paid bonuses. So Goliath would have a claim for impracticability, but it might be a little weak.

Barney might also have a promissory estoppel claim. However, this si weak because his buying a suit made out of diamonds, and promising $100,000 to a charity probably wasn't reasonable reliance, or foreseeable.

Therefore Barney would probably have a claim agianst Goliath for breach of contract, but it depends. In a trial on the merits, Barney is slightly more likely than not to prevail. However, he isn't a very sympathetic plaintiff since most judges won't see losing a 2 million dollar bonus in such a sympathetic light as Karl Wendt suddenly losing their entire livelihood.

good 25

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Answer-to-Question-_2 D)__

First we need to see if there was a binding contract which ROBOTV violated. Since they offered the service, Ted accepted and there was consideration (money for TV service), there was a binding offer. The terms of the offer included a guarantee for at least 20% robots v. wrestlers, which didn't happen. ROBOTV also failed to send a written notice of the change in programming, so they are in breach.

terms

This just leaves the question of if Ted must submit to arbitration.

Was the change in terms binding? This looks a lot like a shrinkwrap issue, because Ted didn't have a chance to read the new terms until after he purchased the product. The analysis of this issue depends on if this is a jurisdiction that follows *Brower* or that follows *Klocek*.

Under *Brower* Ted's failure to reject the terms would only make them binding if the terms were seen as the offer, and Ted's silence was seen as an acceptance. However, we already had an offer and acceptance. We could read these terms as a new offer, which Ted accepted by silence, but in that case this offer was not supported by consideration, since it doesn't seem that Ted gets any benefit from an arbitration clause.

Under *Klocek* there is the same result, by a differnt means. Under *Klocek* the offer was Ted calling ROBOTV, and the acceptance was when they received his money. So again, this term is just another offer, which Ted may have accepted by silence but isn't supported by consideration and so is unenforceable.

Assuming arguendo the term is enforceable, Ted could still claim unconscionability. However, he probably couldn't make out this claim since the terms seems to not be unduly favorable to either party (so no substantive unconscioanbility), and also the term doesn't seem to have been buried in the notice. (So no procedural unconscioanbility). (See *Williams v. Walker-Thomas furniture*, where the confusing term

was procedurally unconscioanble, and the clause was seen as shockingly one-sided in favor of the store).

In conclusion, Ted can probably stay in court since the arbitration clause is not binding on him.

OK 7

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Answer-to-Question-_2 E)

There was a contract here because Trump offered certain benefits to people who got Apprentice club memberships, and Robin accepted the offer. Consideration: Robin got a free chance at the grand prize, and ease in gambling. Trump got to monitor her gambling habits.

Part of the contract was an implied possiblity of winning the grand prize at the casino when they spin the wheel. If robin can get enough evidence that Trump really cheeted (which might be difficult since it is her word against that of the attendant), she would have a couple of different theories:

Fraud: since Trump misrepresented that there was a chance that Robin could win the grand prize, if she can prove that the misrepresentation was material to her choice to come to the casino or sign up for the Apprentice's club, she can make out a case of misrepresntation. (R.2d 162, 164) But this would only let Robin get out of the contract, which is basically meaningless to her.

Bad Faith: not giving Robin even a chance to win the grand prize certainly does look like bad faith. The court may give Robin damages based on this breach of the implied obligation of good faith and fair

& breach of contract by not giving her the possibility of the grand prize

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dealing (R.2d 205).

So Robin's best bet is a claim of bad faith, which the court would ahve to evaluate based on her credibility, Trump's credibility, and any other witness either party could bring in.

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Answer-to-Question-_ Bonus question A

When W promised to shovel the driveway, she was making a unilateral contract. When I tried to pay her for it, I was beggining performance. Under the restatment my part performance (bringing her the money) formed a binding option to keep the unilateral promise open. Under the Cook formulation my performance was substantail performance, also obliging her to keep the offer open. so yes, I can force her to shovel my driveway. (And I plan to post a video of in on YouTube, for Prof. Rinehart's enjoyment)

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Answer-to-Question-__Bonus question B

8 went with her, but I think she actually had 12.

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Answer-to-Question-_Bonus question C__

When there is a case for promissory estoppel, when they imply consideration in law (like in Lucy v. Wood), when there is a claim for promissory restitution (like Webb v. McGowin)

+3

Options under Restatement + UCC
modifications under Restatement + UCC

+13