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Memo on Contracts Midterm Fall 2011

General Comments

The Comment Code at the end of this document lists a number of areas which commonly need improvement. I have tried to separate them out to make it clear which are the areas which seem to need most work or focus. But there are some overlaps. For example often an answer will generally need more specificity - this may show up in the context of issue identification, rule identification and analysis or may seem a more prominent issue with respect to one of these areas.

Reading the question carefully is important - don't discuss consequential damages for Anna with respect to a failure to deliver Pearl's picture if the question states that she did deliver this picture.

If you try to describe the rules ambiguously (for example referring to incidental and consequential damages and then referring to possible items of damages without specifying which type of damages they are) in the hope I will think you understand, be aware that I will not necessarily give you the benefit of the doubt.

Spell out the details of your analysis - it needs to be on the paper, not in your head. I can read what you put down on the paper but not what is in your head. Don't be afraid of spelling out the analytical steps in great detail. But you don't need to describe the facts of cases in great detail unless the details of the facts are important for your analysis.

Specific Comments

1. What remedies should Anna be able to obtain against Bob (explain your reasoning)?

Anna expected to receive from Bob enough Luminesse to meet her needs. With respect to the contract between Anna and Bob the question states that: "At the beginning of August 2011 Anna ordered 10 gallons of Luminesse to be delivered on September 1, 2011 at a price of \$100 per gallon. Bob agreed to supply the 10 gallons of Luminesse for \$100 per gallon. Anna agreed to pay (and did pay) half of the price at the time of making the order, and she agreed to pay the rest of the price on delivery. Anna told Bob that by the end of August she would have almost exhausted her supply of Luminesse." Bob has breached the contract. Anna should be able to obtain a remedy, but the question raises some issues about what she can claim.

The Luminesse is a movable good for the purposes of UCC Art. 2 (UCC § 2-105(1)). Therefore Anna's remedies are governed by UCC §2-711 (buyer's remedies): she gets repayment of the \$500 she prepaid and she may cover under UCC §2-712, or she may recover damages for non-delivery under UCC §2-713. We are told that Anna has been able to achieve only partial cover: Bob was to deliver to her 10 gallons of Luminesse for \$100 per gallon or \$1000 (of which Anna prepaid \$500) and she bought

one gallon from Frank for \$300. The difficulty of obtaining substitute Luminesse raises the question whether Anna should be able to claim specific performance under UCC § 2-716, although this is complicated by the fact that Bob sold the Luminesse to someone else - the remedy is discretionary.

Under UCC §2-712 or UCC §2-713 Anna would get damages based on the difference between the contract price and the cost of cover or the market price at the time when she learned of the breach plus incidental and/or consequential damages less expenses saved. Article 2 seems to assume the disappointed buyer either covers or seeks damages for non-delivery and not that the disappointed buyer combines these remedies. So it is not clear whether Anna can claim the difference between the contract price (\$100) and the cover price (\$300) with respect to the one gallon and the difference between the contract price and the market price with respect to the other 9 gallons. And we do not know what the market price is, although we do know that Bob sold the Luminesse to someone else for \$200 per gallon. With respect to cover it is only possible to use the cover price where the cover purchase is a reasonable purchase made in good faith and without unreasonable delay (UCC § 2-712(1)).

Incidental damages here (UCC § 2-715) would be Anna's search costs (e.g. gas for the 100 mile trip). Consequential damages (UCC § 2-715) include "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise". Possibilities relate to the work time lost because of the need to search for an alternate supply and the work time lost through stress. These are both claims for lost profits and, in addition to the question of what Bob had reason to know (cite Hadley v Baxendale perhaps here) Anna may have difficulties in establishing the amount of lost profits with reasonable certainty (e.g. Evergreen Amusement v Milstead, Chung v Kaonohi Center). Anna may be able to argue that she made the importance of having sufficient Luminesse very clear to Bob, but it seems she is less able to argue he understood that a lack would result in lost profits and Anna's ability to quantify all of her lost profits is uncertain.

2. What difference would it make to your answer to question 1 if Cleo responded to Anna's failure to deliver the two paintings by saying she would never show any of Anna's paintings in future because she was so unreliable?

This relates to Anna's consequential damages claim. Can Anna claim damages with respect to the lost business with Chloe as consequential damages? Again this would depend on what Bob had reason to know about the circumstances and on the need to establish the amount of loss with reasonable certainty. The question says that "Anna has explained to Bob that a regular supply of Luminesse is critical to her work, and that without an adequate supply she will be unable to create her pictures (Luminesse works best when it is freshly produced - if kept for a long time it loses its magic)." Also "Anna told Bob that by the end of August she would have almost exhausted her supply of Luminesse." But the question does not suggest that Bob knows about the commission from Pearl or about Anna's arrangement with Chloe.

The arrangement whereby Anna agreed to supply two new pictures per month to Chloe may help with the reasonable specificity issue if it can be established that this is

the quantity Chloe expected to be able to sell. But if Bob had no way of knowing about this Anna may not be able to take advantage of the arrangement to increase her damages award.

3. Do you have enough information to decide whether Professor Dumble will be able to return the painting of Hamlet and get his money back? Why or why not? Explain what arguments Professor Dumble will need to make. Do you think Cleo will be able to counter his arguments?

The painting is a movable good. We discussed whether paintings are goods under the UCC or involve services. See for example Casebook page 47 excerpting from the decision in *Bonebrake v Cox* where the court suggests that a contract with an artist for a painting involves a service. Anna produces two types of picture. One where she interacts with the real people who are the subjects of her work and the other which involves fictional characters. I think that the pictures of the fictional characters are goods for the purposes of the UCC (especially where they are pictures that Anna chooses to produce rather than being commissioned to produce them).

So, this question raises the issues in *Colonial Dodge v Miller* of the intersection between UCC § 2-606 and § 2-608. It would be a good idea to discuss the similarities and differences between this situation and the one in the *Colonial Dodge* case.

Professor Dumble will want to argue that he did not accept the picture because UCC § 2-606 gives him the right to a reasonable opportunity to inspect and he returned the picture as soon as he had had this reasonable opportunity. We do not know if two weeks would be considered to be a reasonable opportunity. Usual practice of sellers of art would be relevant here. If Professor Dumble cannot succeed in his claim that he did not accept the picture he will need to argue that he had the right to revoke his acceptance because the picture suffers from a “non-conformity” which “substantially impairs its value to him”.

Professor Dumble’s problem with the picture is rather different from the problem in the *Colonial Dodge* case. In that case the buyer ordered a vehicle and here it may be that Professor Dumble just bought something he saw in a shop (note that the question does not actually say this - if he asked Chloe to find him a picture of Hamlet that might be more like the *Colonial Dodge* case than if he saw the picture in the shop and bought it). If there is no contractual description of something promised to measure the actual item delivered against the idea of conformity to the contract is more complicated. Professor Dumble’s quarrel with the painting is much more subtle than the missing tire. That may help with the issue of how long he is allowed to make up his mind. If he had spent a lot of time going in and out of the store to look at the picture before buying it that would also make a difference. So the entire circumstances surrounding the transaction would seem to be important here. And *Colonial Dodge* is a useful illustration of the importance of all of the facts to the outcome of a dispute such as this.

Comment Code: Areas for Improvement

1. Issues/Facts

- 1.1 Not reading the question carefully enough.
- 1.2 Inventing (making up) facts.
- 1.3 Making assumptions about facts.
- 1.4 Describing issues with insufficient specificity.
- 1.5 Emphasizing facts not relevant.

2. Rules/Law

- 2.1 Describing legal rules with insufficient specificity.
- 2.2 Not identifying sources of rules (statutes/cases/restatement).
- 2.3 Not giving examples of sources of rules (not citing cases etc).
- 2.4 Errors in describing rules.
- 2.5 Applying rules which are not relevant.
- 2.6 Insufficient confidence about what the relevant rules are (e.g. inconsistent arguments).

3. Analysis

- 3.1 Conclusory reasoning rather than analysis (e.g. no analysis: here is the issue, here is the rule, this is the answer).
- 3.2 Analysis not sufficiently detailed (explanation of the relationship between the facts and the rules could be explained more thoroughly).

4. Conclusions

Conclusions not supported by analysis.

5. General

- 5.1 Failure to follow specific exam instructions (e.g. abbreviations).
- 5.2 Answer poorly organized.
- 5.3. Answer not clearly written.
- 5.4. Answer illegible (where handwritten)
- 5.5 Incorrect use of words.
- 5.6 Answer too informal for the context.