Institution **Harvard Law School**
Course **S15 Brewer - Contracts 2**

Event **NA**

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Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	**2074**	**9633**	**11693**
Section 2	**885**	**4201**	**5080**
Total	**2959**	**13834**	**16773**

Answer-to-Question-_1_

Buyer ("B") and Seller ("S") have entered into an agreement for the sale of goods in Dravrah ("DH") which has, like every other state, adopted the UCC. Because of it is a sale of goods and not an agreement about services, common law rules of "mirror image" and "last shot" are inapplicable and the UCC, most especially UCC § 2-207, governs this transaction. All of the following analysis in this question will be done with that understanding.

~Classical~

B should win under a classical interpretation. A classical judge is going to try to adhere to the written agreement and enforce it under the assumption that the parties are autonomous self-insurers and protector. This agreement was for a bilateral contract. The Purchase Order ("PO") acted as the offer (a promise to buy plastic bottles from S). S and B sent letters confirming changes to PO on June 30 as they discussed on the phone June 28. This is an acceptance of the terms and is further evidenced by S beginning production the next day (July 1) (R2d § 50(2) acceptance by performance of part of what the offer requested may act as a return promise itself). Under UCC § 2-207(1) a written confirmation which is sent in a reasonable time (here it was 10 days which is likely a reasonable under UCC § 1-205(b)), even with conflicting terms is an acceptance. In bilateral contracts the promise is the consideration for the contract and courts usually do not concern themselves with the sufficiency of consideration (*Berryman*). Yet, even if this was not the case, under UCC § 2-205 consideration is not required for firm offers.

PO is not signed by both parties but as B is the party to be charged and UCC 2-201 requires only the signature of the party against whom enforcement is sought.

The additional term at issue here is the change to the escape clause. The default is that additional terms become proposals, however, if the parties are merchants (as here) they become part of the contract unless, the offer expressly limits acceptance to the terms of the offer, it materially alters the offer or notification of objection to the additional terms has already been given or is given in a reasonable time (UCC § 2-207(2)).

B will try to win on all three of these claim to avoid having to remain in the contract for an entire year. It is important to note that clause that limits the terms of the contract limits them to the terms on the reverse side and unless i am mistaken in my assumption, the escape clause was on the front of PO. So, a change to the escape clause will not violate this express limitation on the acceptance.

Terms that materially alter the contract are also not included. *Dale Horning* claimed that if the additional terms cause surprise or hardship then they materially alter. *Dale Horning* was not only a romantic court (that this classical judge would be unlikely to follow) but mis-read cmt 4 of UCC § 2-207. Judge Posner in *Union Carbide* spotted and corrected that error. The better reading of cmt 4 is taken from the examples. A term materially alters if it goes against standard industry practices. It is unclear whether the escape clause, changed to annual renewal instead of 90 days notice, would go against industry standards. It seems unlikely that the norm would be annual renewal so would likely materially alter.

Notice of objection can be obtained explicitly or through cmt 6 of 2-207. If clauses on affirming forms (like the forms sent on June 30) sent by both parties conflict, then each party must be assumed to object to the others conflicting term. The terms in the June 30 change orders conflicted. B's claims that the escape clause remained the same while S' purported to change it.

Here a classical judge is not going to allow these terms to displace PO because it was restricted to the four-corners of the contract.

S will claim that it has a claim under a reliance formation doctrine. In order to know the chance of success under this claim, it is important to understand when S took out the loan. If S took out the loan before the PO or even before affirming and accepting the PO it may have been unreasonable to rely on a promise before it was given. This would invoke either *Berryman* or *Pop's Cones* as pre-promissory reliance rules. As *Berryman* is the more classical, this court would be more likely to be persuaded by it. To win S would need to show that B reasonably expected S to rely on the promise, that the promisee reasonably relied on the promise and that a failure to enforce the promise would result in the perpetration of fraud or result in other injustice (*Marker* Rule). As mentioned, to rely before the promise was given would likely be considered unreasonable and this fail the second element. If the loan was taken out after the PO and this after the promise the problem could be the same. In Berryman the court held that it was unreasonable to rely on a option contract that was not support by consideration. By analogy, this classical court would likely find that it was unreasonable to rely on an

agreement that allowed for termination with only 90 days notice to the tune of $800,000 (as this court would likely understand the contract as the UCC analysis laid it out above). So, the reliance claim for s would likely fail.

As to the question of what B would win: Assuming B's belief that S could not longer supply bottles for the remainder of the 90 days was correct, B met its duty to mitigate the damage by getting a new supplier. B can fulfill the duty to mitigate even if the alternative was more expensive (*Lukaszewski*). The thing is, B isn't suing S so really B would get nothing if it won. If B did counter-sue, following R2d § 347, the court would award B expectation damages; the difference between what it cost B to finish out the contract with S and what it cost to finish it out with the new supplier for the remainder of the 90 days.

~Romantic~

S would win in a romantic court. A romantic judge is going to act a little more paternalistic and likely going to understand the contract in consideration of the Corbin's approach: "a writing cannot prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties."

The romantic court can do this in various ways. First, considering UCC 2-207, this court could merely rule (assuming the facts are not to strong to the contrary) that the altering of the escape clause to annual renewal was in line with standard industry practices and thus did not materially alter the contract. It could go even further and adopt

the *Dale Horning* rule of surprise/hardship. The change to the escape clause would not have surprised B because the parties negotiated about and discussed it. Hardship is a little more tricky. B's plant was losing money and to require that it not shutdown on 90 day notice but only on the anniversary may have caused substantial hardship but it is unclear whether S knew or had reason to know about this liability. If the industry standard is annual renew it is almost surely the case that S should not have know.

If the court got past materially alter it would also have to contend with the objection but under *Brown Machine* it could rule that the offer was not explicit enough in its limitation on acceptance to the stated terms (though I don't know how it could have been more explicit). The court could also get around the objection prong by allowing parol evidence ("PE"). Under R2d § 214(d) evidence of fraud is permitted. As a romantic court this court could narrow *Sherrod's* narrowing of R2d § 214(d) and allow evidence of fraud to relate directly to the subject of the contract. It could try to apply the romantic Park 100 test for the misrepresentation in the Change order which alleged that it was confirming the oral agreement of June 28 but conveniently left out any mention of the modification to the escape clause. It is hard to see this as meeting the *Park 100* rule. The court would have to find B left out the modification of the escape clause not because that was how B understood the oral agreement but knew or was reckless as to the falsity of the claim. It is possible in this case to imagine a romantic court, with these facts before it considering the objections that S raised to PO in writing that B acted with knowledge or at least recklessness as to the falsity of the fact that confirming the oral agreement did not include a change to the escape clause. If the court can find that the rest should come easily. The misrepresentation was very likely material (90 days notice verses annual

renewal makes a big difference), the fact misrepresented was false as presented, the complaining party relied on the misrepresentation (that it was confirming the oral agreement), and that it cause the parties injury. This last one may be tricky but it wasn't included in the rule as it was applied and this court would favor that construction of the rule because it is more romantic, less restricted.

Of course the court could also get around the objection by simply finding that the two confirmations of the oral argument do not conflict and thus to not invoke cmt 6. It could find that by stating that it was confirming the oral argument and saying what had changed it had simply given examples. The court would avoid applying *expressio unius* at all costs and state that the confirmation of the oral argument should be understood by taking the two confirmations (by S and B) together. This would allow for a change to the escape clause to S' advantage.

If all of that doesn't work, a romantic court could apply *Pop's Cones* as a reliance doctrine. Unlike *Berryman*, *Pop's Cones* removed the requirement of a clear and definite promise did not inquire into whether reliance was reasonable. It seemed satisfied with the idea that a negotiation for or assurance that a promise was forthcoming was enough for a party to rely on in making changes to its business (it terminated its lease with the other building). By analogy, S took out a loan so that it could make the necessary changes to get the contract with B. It making the changes for this business it relied on the assurances that the contract would be forth coming. The one hiccup here is that S relied on getting the contract in taking out the loan not necessarily the terms or the length of the contract. But, given the heavy romanticism inherent in *Pop's Cones*, this court could probably find

that with the exclusivity agreement and the requirement under 2-306 of best effort by both parties and the only out requiring the closing of a plant, that S relied on a long term contract.

Damages are a little tricker here. If reliance is the basis of contract then courts have discretion whether to give exception or reliance damages (*Walser*). If damages are based on reliance interests or if proof of those damages are difficult to ascertain then reliance damages should be given (*Wartzman*; R2d 349). It makes more sense to do reliance damages here because if expectation damages could be taken to mean both parties fulfilled the contract until the 5 years was up or only for the first year. Though, it is not clear that this makes much difference as to put the parties in the same position they were in before the contract would still require someone to pay off the $800,000 loan. Using the equation from R2d 349, B would have to pay for any expenditures made in preparation for or in performance of the contract less any lost that S would have suffered had B not breached (that can be proven with reasonable certainty) unless full performance would have resulted in net loss. B is going to fight for expectation damages so as not to get the full $800,000 loan on its plate.

Answer-to-Question-_2_

While I can see much to admire in the Romantic Approach and I agree with many of the outcomes the ideal of judicial restraint, separation of powers and in the interest of consistency and the welfare of society as a whole over that of the individual, I believe the Classical approach to contact law to be superior. I will use *Howard*, *James Baird*, *Berryman*, *Mills v. Wyman* to demonstrate my views.

Howard, as the second case we read this semester has been, to me an example both of valuing consistency and upholding judicial restraint. It may seem somewhat contradictory to say that *Howard* values consistency when it changes the rule as laid out in *Monge* but it does. It narrowed Monge's romantic rule to give a bright(er) line rule as to what the bad faith malice or retaliation had to do with. The idea of contract law is not to root out any conduct that isn't publicly favored (these are, after all agreement between private parties) but behavior that damages the individual on a level that the public can agree about (this of course was muddied up by *Cloutier*). After the Howard ruling employers knew were they stood, they could contract appropriately to deal with the problem. Honoring the autonomy of agreement is absolutely necessary if private agreement are to mean anything. Additionally, *Howard* demonstrated judicial restraint by reigning in the ruling in *Monge* which usurped the role of the legislature.

James Baird is the paradigmatic classical case and Judge Hand should be give, well, a hand. He upheld contracts over the benefit of the individual so that it would be a viable tool for society to use in a meaningful way. "[I]n commercial transactions, [where we are dealing with sophisticated parties,] it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves." Judge Hand seemed to understand that when we are dealing with equal bargaining power, or at least putatively equal bargaining power, the courts should not interfere. This one party's loss is societies gain in a system that can be relied on because contracts themselves and not the will of judges will be honored.

Berryman takes on what I like to call classical skepticism. Not only does it avoid enforcing an option contract that has no consideration but looks at the parties involved and determines that it would be unreasonable to rely on a contract that is missing a fundamental aspect of formation, in other words, to rely on non-contract as if it were a contract. In addition to simply upholding the law, it narrows the reliance doctrines which lend themselves to some of the inconsistency and unpredictability that are part of contract law today. When a contract can be formed independent of what is written and memories and states of mind are used as the contract it is difficult to predict or even rely on contract. Instead, parties will act in reliance on a romantic court to save them (the next thing you know, a party will bring claim against a classical judge claiming that after reading other cases in the jurisdiction it had entered into a contract relying on the judiciary to get her out of it).

Mills v. Wyman is the best separation of powers/judicial restraint case of the lot. The bottom line is that even if we find it despicable it is not the place of a judge to rectify the problem, this is for the legislature. Even if one receives, say a $50 benefit from ones neighbor and doesn't reimburse him, the courts should not bend or adapt the law to their moral preferences. I love the candor of the Mills judge when he denounces the defendant's actions. It is clear that this is not something that we want to occur in our society but unlike Charles Fried, the legislature does not believe, or at least has not codified such a belief, that all promises should be enforced on moral consideration alone. The judge is to be a neutral referee, not a lawmaker. Naturally, but writing an opinion some law is made by laying down a precedent but this is not the role of the judge to adapt the law to her preferred outcome.

There is no question that there are problems of unequal bargaining power/capacities and that some of these inequalities and even the injustices that result from them can be taken care of by proactive judges but the only way to preserve autonomy and create system of contract law that will perpetuate itself (meaning that people will continue to use contracts) and limit these inequalities/injustices is for the legislatures to make the law and for judges to apply it. There are dramatic differences in how opinions state the rule and how they apply them. How can any one enter into a contract with any sense of security when that kind of activism is going on? As I said, I don't think the romantic approach is bad (though i think it has negative consequences) I firmly believe that if the classical approach is applied over time the political process can be more effective in creating contract law that will work and can be consistently applied (even if morally preferable outcomes as we see them aren't final result).

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