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Fact Pattern Essay Question #1

Memorandum

Privileged

To: Senior Partner at Big Law Firm

Re: Plaintiff Plutarch (P) vs Defendant Dante (D)

Issues

1. Considering the nature of the dispute between P and D, which laws will govern, the UCC or Restatement 2nd of Contracts?

2. Was a valid contract formed between P and D when they each signed mirroring agreements, except for a difference in the final price?

3. What of the following remedies, if any, are available to either P or D:

   A. Compensatory damages of either restitution, reliance, or expectation interests?

   B. Liquidated damages pursuant to the agreement?

Analysis

Issue # 1 - What laws should govern the dispute, the UCC or the Restatement (Second) of

Contracts?

The dispute between P and D involves both the sale of goods and services. Because of this, the present dispute is a "mixed transaction" case. P promised to contstruct a Turkish bath house for D. Therefore, the bathhouse itself as well as any materials needed for construction represent the sale of goods, and the labor needed to construct the bath house represents services. Two tests exist which can be used to determine the applicable law in a mixed transaction case: (A) the Gravamen test, and (B) the Predominant Factor test. Just as in the *JO Hooker*, and application of both tests shows that the present dispute is predominantly a dispute over the sale of goods and therefore the UCC should apply. Consider the following applications of the two tests:

(A) - Gravamen test

The gravamen test looks ex-post to determine what part of the transaction gave rise to the dispute. Because the nature of the dispute essentially arose out of the difference between the two prices of the final contract for the bathhouse, it is likely a court would rule that the gravamen test suggests that the UCC should apply. UCC 2-102 states that the UCC applies to transactions in goods.

(B) - Predominant factor test

The predominant factor test looks ex-ante to determine whether the nature of the contract essentially involved the sale of goods or services. Just as in *Hooker*, it is likely that the Court will decide that the predominant factor in the present dispute is one for the sale of goods. In Hooker, the contract was for the installation of cabinets, and the court held that the cabinets were the predominant factor and not the installation labor. Because of this, it is also likely that the bath house would be the predominant factor and not the installation labor.

All in all, because of the application of both the gravamen and predominant factor tests,

it is likely that the court would decide to apply the UCC to the present dispute. It is also likely that this determination would not be questioned or disupted by D considering the application of the tests.

Issue #2 - Was a valid contract formed between P and D?

UCC 2-206 notes that a contract for the sale of goods may be made in any manner sufficient to show agreement. Importantly, section (3) states that even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. Because both parties signed duplicate contracts concerning the construction of the bathhouse, it is evident that both P and D intended to make a contract. The most pertinent issue, however, is whether a valid contract exists because the final price for the bathhouse was different on the copies of the contract signed by P and D. P signed the contract which had a final price of $35,000; whereas, D's signed contract contained a final price of $25,000. Both P and D signed the contract in good faith. Fraudulent behavior of a third party agent caused the discrepancy.

Common law suggests that the more the parties leave open, the less likely it is that they have intended to conclude a binding agreement. However, the final contracts signed by both parties were mirror images of eachother, except for the final price. Therefore, how does an application of the UCC apply to this issue? First, it can be argued that due to the good faith of both P and D, the difference in price between the two contracts is analagous to an open price term. Both signed the contract intending to be bound. The nature of the UCC is fairly liberal in its determination of contract formation. This is due to the public policy of economic efficiency and an efficient allocation of goods in the market place. Specifically, UCC 2-305 (1) notes that

parties can conclude a contract for sale even though the price is not settled. In such a case, the price is a reasonable price at the time of delivery (or in this case, time of completion). Section (1)(c) notes that a reasonable price can be applied if the price was to be set by a third party or agent (and in the dispute between P and D, the third party agent was the fraudulently acting architect). Furthermore, section (3) notes that when a price to be fixed fails to be fixed due to the fault of one party, then the other party may treat the contract as cancelled. Because neither P or D were at fault over the discrepancy of the price, it is likely that the court would rule that a contract existed and the final price would be one reasonably set.

A further consideration ofwhether a valid contract was formed can be seen by an application of the Embry test, which has essentially been codified into the UCC. The Embry test is an objective test with a subjective twist. An objective reasonable third person would most likely agree that both parties, as promisors, intended to enter into a K. Given both of their actions and the fact that they eached signed a contract, a reasonable person would most likely agree that a contract was formed. Likewise, the subjective twist is also satisfied in this dispute. Again, because neither party technically breached, one can view both P and Ds subjective intent as promisees. Because both parties signed the contracts, it is evident that each subjectively intended to create a binding agreement.

It is important to note that it is likely that both P and D will argue that a valid contract did, in fact, exist, and rather, they will each dispute the final price. Therefore, the determination of whether a valid contract existed, as noted above, will most likely not be contested at trial.

Issue #3 - What remedies, if any, will be available to P or D?

The hallmark of a contract is that a promise or set of promises has been made for the breach of which the law is able to reasonably ascertain a remedy. In the present dispute between P and D, a contract has been made, and in order to determine an available remedy, a court would most likely apply a reasonable price in order to calculate damages. Because neither P or D technically breached the contract, the court would most likely determine the reasonable price as follows: the reasonable market value of the bath house + the reasonable market value of the costs of labor and construction. The import of market price in the UCC is embodied in sections 2-712 and 2-713. In order to ascertain this reasonable price, is likely that the court would allow the introduction of parol evidence from the independent author because the UCC generally allows for the introduction of parol evidence through a combination of sections 1-205 and 2-208. Because an independent auditor found that the market value of the labor and materials furnished by P was $34,000, it is likely that the court will use this as the most reasonable measure of the value of the bathhouse conferred to D. Using $34,000 as the reasonable price, the court can then determine the most reasonable remedy to apply.

A: As Fuller and Purdue note, there are three major damages which courts award in contracts cases. They are expectation, reliance, and restitution. First of all, restitution is only available if the contract has not been fully performed or if unjust enrichment has occurred, so restitution would most likely not be awarded in this dispute. Second, because the court would most likely set the reasonable price at $34,000, and because P has only been paid $25,000 so far, P would seek to make up for this difference. As noted, P is seeking $10,000 to recover the balance of what is due to him, but it is likely that once the court determines $34,000 is the appropriate price, then P would be seeking $9,000.

Once the court determines $34,000 as the reasonable price, it is useful to look at P as the promisee to which he is entitled to damages to recover the difference between what P has been paid and the K price. Expectation damages seek to put the promisee in the position as if

the contract had been fully performed. Because the cost to P of the labor and materials was $32,000 and the K price - $34,000, P expected profits of $2000 above the cose of materials and labor. Therefore, using expectancy damages, the court would most likely award P an additional $9,000 (The difference between the K price and what has been paid already).

Reliance damages are calculated as to put the promisee back in the position he was before he entered into the K (ex ante). If such damages are calculated, then the court would most likely award P reliance damages of $7,000 (the differene between P's costs and the amount already paid).

It is likely that D will argue that reliance damages are the most reasonable damages which should be awarded; whereas, P will most likely seek expectation damages. As Kelly notes in the PCL, reliance damages are generally used as justificaiton for damages in contract law, and for business transactions, expectancy interests should generally be awarded. If the expenditure measure of reliance would be awarded in this case (the $7000 noted above) then the risk is unjustifiably shifts to P. And because D entered into the contract after making a bad judgment as the value of the bathhouse, the risk most likely should be assumed by D. Therefore, it is likely that the court will award expectation damages of $9000 to D.

B: Once the court most likely decides to award the $9000 in expectation damages to P, D will most likely argue that the liquidated damage clause in the contract, signed and agreed to by both parties, should kick in because the bath house was completed 160 days after the agreed completion date. If this is the case, then the liquidated damage clause would award $160,000 to D - the $9000 expectation damages. However, it is likely that the court will rule that the liquidated damage clause in the contract is void as against public policy as it is a penalty clause. In *Kemble,* the court ruled that a liquidated damage clause was void because it was a penalty. in *Kemble* the value of the damage clause was too high in relation to the value of the

employment contract. Because the damage of the clause in the contract between P and D would be so far above the value of the bath houe, it is likely the court would strike the clause as void against public policy. UCC 2-718 states that liquidation damage terms fixing unreasonably large liquidation damages are void.

Conclusion

It is likely that because of the application of the gravamen and predominant factor tests, the court will most likely rule that the UCC applies to the dispure between P and D. In addition, because of the good faith of both P and D, and the UCC's relatively liberal approach to open terms in contract formation, it is likely the court would hold that a valid contract existed between P and D. Finally, once the court reasonably set the contract price, it is likely they would award $9000 in expectation interests to P.

Question #1 Final Word Count = 2033

Question #1 Final Character Count = 11762

Question #1 Final Character Count (No Spaces, No Returns) = 9623

2)

Fact Pattern Essay Question #2

The following lawsuits are likely to occur due to the present dispute:

Lawsuit #1

Seller Seneca (S) v. Buyer Brutus (B) for breach of contract

Lawsuit #2

Buyer Brutus v. Nefarious Nero (N) seeking indemnity due to tortious interference

Lawsuit #3

Clever Claudius (C) v. Brutus for breach of contract.

Lawsuit #1

The following issues are embodied in lawsuit #1 between S and B

1. Was there a valid offer?
2. Was there acceptance, or was the offer revoked?
3. Was there revocation?
4. What remedies, if any, are available?

Restament (Second) of contracts (R2d) Section 24 defines an offer as the manisfestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. This is the R2d's codification of the Embry test. The letter of intent between S and B dated September 1 was a valid offer as it would pass the Embry test. However, acceptance of that offer did not occur as S changed a fundamental term of the agreement - he changed the price from $10,000 to $15,000. This letter of intent is analagous to the letter of intent *Empro* because it left terms to be negotiated further. After further negotiations, both B and S agreed to the final price of $15,000 and S sent the offer to B. B received a copy as altered, decided the terms were fair, stated he would fully perfom, enclosed a check for $10K and signed the document. This was done on Sept.10th. At this time, there was a valid offer for the sale of the mobile home as objectively from the point of the S a reasonable person would find that he intended to make the contract, and the subjective intent of B is evident from his signing of the letter. In addition, as *Lefkowitz* and R2d section 33note, offers require clear, definite, explicit, and certain language, which were all evident from the offer between S and B.

However, it is likely that S will argue that there was not valid acceptance of the offer, because the offer was for a bilateral contract which requires express consent and promise by both parties and not just partial performance (such as an option K under R2d45 or *Carlill* which invited acceptance by performance). Because B never actually mailed the acceptance to S before S agreed to sell the mobile home to N, S will argue that he revoked the offer before B's acceptance. Although notice of acceptance is not required, dispatch is, as developed by the mailbox rule and evidenced in *Ardente*. Before the letter was mailed, S acted inconsistently with an intent to sell to B, and therefore, according to R2d Section 36 S will argue that, B's power of acceptance was revoked.

B will likely argue that notice of revocation was never received, because notice of revocation is generally required under the common law and restatement. R2d Section 42 requires that recovation is communicated to the offeree either by the offeror or other reasonable indirect means. As is evident from the facts of the dispute, B never received notice of the revocation before he mailed his acceptance. Even though S tried to notify by leaving a note and having his agent send a letter, B did not receive the revocation before he dispatched his acceptance. As is shown from the mailbox rule developed in *Ardente*, acceptance becomes valid at the time of dispatch.

Because of an application of the Embry test to the dispute between S and B, the court will most likely agree that a valid contract was formed. An objective view of the promisor's actions reveals the intention to enter into a K with B. B's subjective intent to enter into the contract is evident from his dispatch of his agreement to the offer. And because the revocation of the offer after S took steps to sell to N was never actually received by B, then a valid contract existed. On the other hand, S may argue that a pure subjective test should be applied and therefore there was no "meeting of the minds". However, the Embry test is the dominant test in most jurisdictions, so the court would most likely reject this argument.

Once the court decides that a valid K existed, they would look to what remedies are available to B. If the mobile home is attached to a plot of land, then the default rule would be special performance. However, because the home is, in fact, mobile, then the court would most likely award expectation damages to B. Kelly in the PCL notes that expectation damages are generally awarded in business transactions. In this case, expectancy interests would be determined by putting B in an ex post position as if the K had occurred. This is gleaned from R2d 347. Because B was going to proift $3000 from the purchase of the mobile home, the court would most likely award B $3000.

Lawsuit #2

The following issues are embodied in lawsuit #2 between B and N

1. Did N tortiously interefore with the contract between S and B
2. If so, what remedy is available to B?

Once the court awards damages to B in lawsuit #1, S may seek to indemnify himself from N, because S will argue that N tortiously interefered with the K between S and B. In *Lumley v.Gye*, the court noted that damages are available to a party if a person tortiously interefers with a contract. In *lumley*, the court did not award damages because they did not believe malice was involved and could not ascertain whether Gye's intereference actually caused the breach. The present facts are distinguishable from *Lumley*, because it is evident that N tortously interfered with the K between S and B because of his dislike of B, and this interference was the direct cause of the breach between S and B. The court also notes in Lumley that as a result of the tory, there must be an injury and a loss from the injury. The injury

was the breach of K, and the loss are the expectation damages awarded to B in lawsuit #1. The court noted that tortious interference "allows an individual who had in interest in the services of another to sue anyone who interfered with the services by enticing the employee away from his or her contract." Therefore, it is likely that the court would agree that tortious interference occurred.

As stated above, tortious intereference occurs when there is an inury and a loss resulting from that injury. Because the loss is the $3000 awarded to B from S, the court will most likely award $3000 to S as a result of lawsuit #2.

Lawsuit #3

The following issues are embodied in the lawsuit between C and B

1. Was there a valid offer?
2. Was there acceptance
3. What remedies, if any, are available?

As stated above, an offer is defined by R2d as the manisfestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. An application of the Embry test shows that a valid offer most likely existed between B and C. A reasonable objective person would most likely agree that an offer existed as B signed the agreement on a napkin and gave it to C. This situation is analagout to *Lucy v. Zehmer* because, in that case, the court ruled that the contract on the napkin was a valid offer between the two parties, even in spite of each having a few drinks as is the case in the present situation.

Acceptance of the offer is evident as well considering the actions of C. C expressly agreed to the offer, re-iterated that B was serious, and signed the agreement as well. It is clear than an objective view of these actions would ascertain that an offer ocurred. An application of the Embry test overall also shows that a valid contract existed between B and C. An objective view of B's actions coupled with C's subjective reaction suggests a contract existed.

Considering the court would most likely agree that a valid contract existed betwen B and C, once again as Kelly suggests and R2d 347, the court would most likely award expectation damages to C. In this case, the expectation damages are the same $3000 as C would have ex-post profited $3000 from his purchase of the mobile home from B.

Question #2 Final Word Count = 1433

Question #2 Final Character Count = 8125

Question #2 Final Character Count (No Spaces, No Returns) = 6613

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Conceptual Essay Question

Holmes' statement about the confusion between legal and moral ideas strikes at the heart of the debate between whether or not efficient breachs should occur and be upheld by courts in contract law. Holmes notion that the duty to keep a contract at common law suggests that one must pay damages if the contract is not kept. He further contends that the damages should be calculated as a compensatory measure which places the non-breacher in the same position as if the K was fully performed. However, Holmes notes that this situation "stinks" in the nostrils of those who seek to get as much ethics into the law as they can. In other words, the proponents of the ethical view argue that strict compensation is not enough, or rather, that it could encourage efficient breaches which is unethical.

Holmes statement embodies the debate between Posner and Friedmann in the PCL. Posner, through an ecomomic analysis, notes that society is better off, economically, and efficiently, because the breacher makes enough of a difference to pay compensatory damages to the non-breacher, and goods end up in their most valued place in the market. Therefore, the breacher is better off, the non-breacher is in the same position, and the 3rd party is better off as well. This incentvizes sellers to make wealth-enhancing moves, markets are more predictable and efficient as commodities flow to where they are most valued, and transaction costs are lower because damages are easily calculated between the original seller and original buyer (the compensatory sum).

However, opponents of this view argue that, not only are efficient breaches unethical, but there are economic disadvantages, and Friedmann in the PCL notes that the same logic could also be used to promote efficient conversions. The ethical theorists (the stink in the nostril theorists from Holmes' statement) argue that once the original K has been formed, the goods actually belong to the original buyer. The seller should have no right to any of the higher profits. This view is similar to Fuller and Purdue's psychological and will theory justifications for upholding contract law by awarding damages becasue there is a sense that the original buyer

will experience a psychological loss and the two original parties essentially created a law between themselves. Also, similar to Von Mises argument, the true value of a good can not be simply calculted. The cardinal value may, and in fact, probably is always higher than the ordinary calculation of value.

Furthermore, as Friendmann, notes, the same logic could be applied to efficient conversions, where one could justify theft because society would be better as a whole if a party could "steal" goods, sell them to a third party, and have enough profit to expectancy-compensate all parties involve while making himself better off. Surely such actions, Friedmann would argue, can not be allowed ur upheld simply because goods end up in the highest-valued place. In essence, Friedmann goes as far as to say that efficient breaches are, themselves, efficient conversions, and those perpetrating them should be held accountable for theft.

As example of this debate in action is *Tongish* vs. Thomas. Tongish agreed to sell to a distributor COOP, but once the price of the seeds increased dramatically. Tongish then breached in order to sell the goods on the market for the higher price. COOP sought damages because COOP was going to re-sell the goods and recover a nominal profit. The court, in discouraging efficient breaches, awarded to COOP the difference in the new higher market price of the seeds and not just the nominal expectancy damages they suffered. This highlights most court's reluctancy to encourage and/or uphold efficient breaches. The difference in the debate is also embodied in the UCC between 1-106 and 2-712(or 2-713 depending on the breaching party). In *Tongish,* the court awarded damages based on UCC 2-713 - the difference between the market price and the K price. Therefore, COOP reaped the benefits of the higher market price and not the attempted efficient-breacher Tongish.

I agree with Holmes and Posner. I believe that law, and in particular, contract law, should not force ethical issues into legal debates (especially legal debates over business efficiency). I believe that our free-market systems works most efficiently when goods and

commodities reach their highest-valued places. I would not go as far to say that the same logic should be applied to efficient conversions, because the public policy of discouraging theft, in my opinion, outweighs the interests of efficiency.

Question #3 Final Word Count = 749

Question #3 Final Character Count = 4655

Question #3 Final Character Count (No Spaces, No Returns) = 3894

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