1)

Conceptual essay:

Memorandum

There are five main ways that judges currently choose default rules:

1. ex-ante intent (general and specific)
2. who cares (flip a coin approach)
3. rule of contruction (asks, do we want to find a K)
4. penalty default rules (setting them against a party so they will make sure to put things in the K)
5. construe against the drafting party

Recommendation for singe type of default rule to use in every incomplete contract:
My recommendation, out of these five choices, would be to use ex ante intent as a default rule in contructing incomplete contracts. I believe the most important goal in contracts in that the contract should serve the interests of both parties intentions. In entering into a contract, the parties have come together with an agreement. The contract serves as a way of making this agreement legally enforceable. I think the most important thing is that the agreement that the parties came to when the contract was created is what should bind the parties.

If we use an ex ante approach, the court will examine what the parties intended when they entered into the agreement. The courts would examine parties actions before the K. This could include negociations and prior dealings. These are important tools that allow the courts to

come to a better understanding of what the parties intended when the entered into the contract.

Some people might argue that this approach focuses on the parties, and that instead we should look at what term would be reasonable. Although this might make it easier for the courts, the court has a duty to protect the parties interests. This should be the primary goal. If the courts look at ex ante intent, this protects the essential rights of freedom to contract and especially freedom from contract. We dont want to bind parties to contracts that they didnt intend to enter. It would be a mistake to create a default rule that doesnt look at the parties intent. If we do this, parties may be bound to contracts, agreements, and terms that they had no intention of entering. This is also a reason why the "who cares, flip a coin approach" is wrong. Who cares is a terrible approach when you are talking about completing a contract that will bind parties.

Default rules against the drafting parties or penalty default rules may work in certain cases, but is not an all encompassing solution. The basic idea of these approaches is deterence, which doesn't work. The theory is that if the rules are drafted this way, parties will be more careful when creating contracts and if not they will be punished. While this may work against large corportions in big deals because they have teams of attorneys drafting their contracts, this rule is impractical on a more grass roots scale. The average person wouldn't even know that this default rule exists. If two parties enter into a basic contract, it would be unfair to assume that the drafting party knows they better make a solid, contrete, complete contract or they will be penalized for their mistakes. Again, I stress the importance of the intentions of the parties and that we should look at what these parties were trying to do.

The approach of looking at the rules of contruction and the courts asking if they want to find a contract is another bad idea for a default rule to apply in every case. It is not the courts job to pick and choose sides and if they want to find a contract. Ex ante intent puts less power in the court to decide if there is a contract and forces them to look at the evidence and make a decision as to what the parties were trying to accomplish by entering into the contract.

Likely consequences from this default rule:

I don't suggest that this approach is flawless. There is not one default rule that would be fair in every case of incomplete contracts and there are going to be consequences. The greatest likely consequence is that the court's may have a significant increase in the number of cases they hear. If we allow examination of ex ante intent in examining the contract, the courts will have more work. The other default approaches are rules and approaches that take most of the work out of the hands of the court. Creating penalty rules, etc, make the job easier for the courts.

Another problem with the ex ante approach is that the party's ex ante intent may not be all that clear. There may be a lack of showing of intent and some parties may fraudulently try to prove an intent that wasn't really manifested at the time the contract was created.

Essay #1:

The first possible lawsuit to discuss is Buck Williams (B), who says he will bring suit against Randi (R).

The offer was for "$1 million to anyone who could correctly divine (*define?) the contents of the safe from a remote location." This is the offer that B claims he responded to. First, it is important to determine if this is actually an offer. Starting with Embry, interpreting contracts is about the intention of the words or acts of the paties indicated. If what R said could be taken by a reasonable man to be an offer and B understood it as an offer, it constitutes a valid contract. The subjective intent of R isn't what important. As in Lucy v. Zehmer, the court must look at the outward expression of a person as manifesting intent rather than the unexpressed intention. The offer says to *anyone* who could correctly identify the contents. It doesn't say it only goes to the first person to indentify it. B was not the first person to identify it, since he got the information from Matt and Judda at the meeting. Strictly looking at the words of the offer, it could be argued that the offer meant anyone, and not just the first person to say it. If this is the case, B would be entitled to the money because he did define the contents of the property.

However, to further examine whether this was really an offer it is helpful to look at requirements for advertisements as offers. There is a rule that if the number of offers is obviously sent to more poeple than there is a supply of things to be sold, then the offereor who sent the offer cant be indicating a manifestation to be bound upon acceptance. This may apply to this case, especially since the offer was published in R's newsletter. Although there are no limitations in the offer itself, it is obvious that R doesn't have $1 million for everyone who can identify the contents. If that were the case, then R would be liable to anyone that identified the contents of the safe. If this were the case, then everyone in the meeting in Alaska could have called R and he would have been obligated to pay each of them $1 million. Another possibility is that the courts may do some gap filling and say that it was implied that there coud only be one person to receive the million dollars.

Leonard v. Pepsico ruled that it was not an offer because there must be some language of commitment of invitation to take action without further communication. The court further reasoned that ads create no power of acceptance in the recipient. The only exception is when the ad is clear, definate, and explicit, adn leaves nothing open for negotiation. In this case, the court would have to decide if the ad was clear, definate, and explicit enough to constitute an offer. The facts say that R published a clue to the contents "to provide assurance" to the psychics that the contents would not be changed if they got it correct. It would probably be a jury question to answer whether of not this made it an offer. Leonard v. Pepsico also raised the important question of whether an objective, reasonable person would have considered it an offer. If Pepsico, the ad was obvisouly in jest and so it was not an offer. The reasonable person question of whether this was really an offer could be argued either way. On one side, "one million dollars" is an expression frequently used in jest and may be interpretted as such. Also, the entire scenario and the context beg the argument that it was not to be taken literally. The other side of the argument is that it was clearly not in jest. The context was that it was in a newsletter to be read by psychics and R meant it as an offer. Further, looking back at the situation and performance, it is clear that R did mean it as an offer since he really did have a CD in the safe along with $1 million. If it wasnt to be taken literally, he wouldnt of have the money in the safe.

The words, to provide assurance, somewhat reflect the case of the Carbolic Smoke Ball. The advertiser said that they put money ($1000) in a bank to provide assurance that the offer was real. In this case the court ruled that the terms of the offer as stated constituted an offer and held the advertiser responsible to pay the $100 as advertised. In this case, the words used (to provide assurance) make it probably that they would be interpreted as in the Carbolic Smoke Ball. Carbolic also raised the issue of whether the offeree was required to notify the offeror that

they were accepting the terms of the K. The court ruled that the offeree didnt have to take any further action because of the context of the offer. As with the court in Carbolic, I dont think it would be necessary for the offeree to notify the offeror that he/she was attempting to figure out what was in the safe.

When Buck arrived at R's house he attemped to collect the money. The facts say that B was holding out his hands and R screamed, "I retract my offer to you and the world". I dont think this retraction has any relevance between B and R. Restatement 42 says offerees power of acceptance is terminated when he receives communication of intention not to enter into teh propsed K. However, retraction must be done before the performance has taken place. If the promisee has fully performed, than he is entitled to his expectancy. According to terms, performance required defining the contents of the safe. B had already done this when he called R the night before and correctly identified what was in the safe. There was no further performance requried by B, he had already performed.

B spent money in reliance of the contract. The airfare, car, etc, all cost him money. However, I dont think that he is entitled to recover these costs. In Bush v. Canfield, the non breaching party had not yet fully performed and so they were entitle to restitution damages, and not locked into expectancy. There is a line of full performance. Once a party has fully performed, they are locked into expectancy.

B may also bring a suit in replevin against Matt and Jutta. They have the money that he claims he has a right to, so he may bring a suit against them for recovery of the million dollars.

Randi says he will bring a suit against Matt and Judda for recovery of the money. Randi argues

that the money was intended to those who could apply their psychic powers, not their crypographical skills. This is not a very strong argument. It relies on his subjective intent in making the offer, which has no effect on the determination of the offer. As explained, it is a question of whether a reasonable person would see it as an offer and whether Matt and Judda saw it as an offer. Applying this standard, there is not much objectively that shows R's suit to make the offer exclusively for psychics. One argument in his favor could be that he published the offer in a newsletter that was read exclusively by psychics. However, this is a hard argument to make since the offer was read by others as well. Also, even though Matt and Julla said that they were not pyschics at R's house, they were at the psychic meeting and were obviously involved with that class of people.

R then says that he has already retracted the offer before Matt and Judda arrived. Matt and Judda respond to the above by saying they dont know anything about that.This retraction was not said until after M and J had already performed. They went up to the door and R handed them the money. If R believed he had retracted, he would need to show this since the retraction of the offer was before they arrived, and was only communicated to B. Instead, he carried out the performance by handing them the money. This seems to take away from any retraction. Also, as with B, the retraction must take place before the offeree accepts. The offeree accepted by performance, which has already taken place when R saw on the news (was was a reasonable means of communicating their acceptance) that they knew what was in the safe. R's retraction to "B and the rest of the world" is not valid since performance by the terms of the offer were already met.

The offer itself raises the important functions of the court's abililty to interpret terms and fill in the gaps. This offer is very vague, and there are a lot of gaps. One huge gap I already

discussed is whether the $1 million only goes to the first person to perform or anyone who can define the contents of the safe. This is a very important term that is not even touched on in the "offer". Restatement 33 says that an offer with uncertain terms can't be accepted. It says that the terms must be reasonable certain, which means they must prrovide a bases for determining the existence of a breach and for giving an appropriate remedy. Uncertain terms should be interpreted as showing manifestation of intention is not intended to be understood as an offer or acceptance. The court could say that the K fails for indefinateness or they could fill in the gaps with what would be a reasonable term in the circumstances. An example of a reasonable term that I think the courts would likely use is that the K was only good for the first person to respond.

The facts say that the footage of the incident boosted their collective bottom lines b yabout $5 million. Although this raises the idea of unjust enrichment because the news is making money off of the story, there is no contractual duty apparent by any of the parties and so this doesn't raise any issues.

Essay #2-

a- the subjective theory of assent

The subjective theory of assent is an older concept that was more relevant in early common law than it does today. This looks at the subjective intentions of the parties. Subjectively speaking, each of the parties made a contract for a different thing. The seller made a K to deliver in Dec and the buyer to receive delivery in Oct. An agreement is a manifestation of mutual assent of the part of 2 or more parties. RS2D 17 says the formation of a K requires a

bargain in which there is mutual assent and a consideration. The issue with this is that each parties did not have mutual assent since they each subjectively assented to different terms. There is clearly a lack of mutual assent.

The other issue is that each party suspected that the other party subjectivly meant a different month. Since both parties thought this, there is no way to know which party should be given favor. Both party's subjective assent were different from the other party, from the trade usage, from the actual terms as interpreted in the K, and different from the objective standard of reasonableness. If the court was to impose the trade usage of interpreting the K or the objective standard, they would be binding both parties to terms that they didnt agree on. For these reasons the K would probably fail for indefinateness.

b- the objective theory of assent

the objective theory of assent is an objective view. This is the view that courts use to look at mutual assent. The court looks at the objective view, what a reasonable person would think. Attention is given to what the outward expression of the parties was. In this case, the outward expression of the parties would be what is actually in the contract. The facts say that the pre-printed form contract was always interpreted in the past to refer to the ship in September. However, the facts say that the objective standard of reasonableness suggests that the term Peerless refers to the Nov. ship. This creates a conflict between the two dates. Although it is odd that the trade usage would be different than the objective standard of reasonableness, the court would be faced with deciding whether to interpret the K as 1. how the contract was interpreted in the past or 2. the objective standard of reasonableness. The court could say that the common intrepretation is to interpret this form K as meaning Sept and they will follow that and bind the parties to Sept. However, I believe that under the objective theory of assent, the courts would put more emphasis on the objective standard of reasonableness. Under the

objective approach, I think more weight would go to the reasonable objective interpretation of the terms.

c- the Embry test

Embry said that interpreting K is about the intention of the words or acts of the parties indicated. It is an objective view with a subjective twist. This test of mutual assent has 2 prongs. The first is the objective view (how a reasobbable person would interpret the words) and the second is the subjective view (what the actual parties understood the words to mean). The Embry test applies at the moment the K was made.

As applied in Zehmer, the 2nd prong of the Embry test applies to the promisee. In this case, the promissee would likely be the buyer. The test would go as follows:

1. objective view- someone in the buyers shoes would see the K as a K for October.

2. subjective view- buyer actually understood seller's words to constitute a K for October.

(*evaluation of prong 1*)The facts tell us that an objective person would see it as a K for Nov, possibly for Sept. if they were objectively looking at interpretation of the K in light of trade usage. This prong is not satisfied in favor of the buyer's interpretation.

(*evaluation of prong 2*) The facts also say that while buyer meant Oct. according to his journal, he suspected that the seller might actually mean Dec. This suspicion would mean that he likely didnt understand the seller's words to mean Oct.

It this test was reversed with an analysis of the seller's view, the result would be the same.

According to the Embry Test there is no mutual assent. The likely outcome by the Embry Test is that there is no K for failure of mutal assent.

d- the Restatement's approach-

UCC 2-204 states that gap fillers or default terms should not be used to create a K. In this case there is no clear contract between the parties and to establish a K would require gap fillers or default terms. RS2D 17 says the formation of a K requires a bargain in which there is mutual assent and a consideration.

The UCC spells out an order for aid to interpreting meaning which is combined with the ruling in Frigaliment and says the courts process is to look at express terms, negotiations, course of performance, course of dealing, and usage of trade.

The express terms of this contracts don't seem to settle the dispute since there is more than one Peerless.

The next step is to look at the negotiations. There is not really helpful either since there isn't much negotiations that go into the K. The only documentation other than the K is the journal entries of the buyer and seller which tell what they subjectively meant and that they each suspected the other meant another Peerless.

There is no course of performance to examine. For this, the court looks at how the parties performed after the K was formed.

Course of dealings is hwo they behaved before the K in regard to different transactions. This may provide the court help in interpretation since facts say that the pre-printed form contract had always been interpreted in the past to refer to the Sept. ship. However, this doesnt resolve the issue because the facts then state that teh buyer and seller did not know this. If they had used this K in the past and interpreted it to mean Sept. in the past, then it would likely be interpreted that way in this transaction.

Usage of Trade- This means how the trade generally considers it and is where the court may probably stop going through the process since this gives an answer. The facts say that it was

common among shippers that the form K meant the Sept. ship. As with Frigaliment and Raffles, when the trade usage is the same as a party's interpretation, that interpreation is given favor.

If non of these solved the issue, the K may fail for indefinateness.

e- the CISG

The CISG article 8 would be used in this case. Although the CISG looks different, it is actually the same as Embry. The reason for this is that once subjective intent is communicated, it is no longer subjective. Each party subjectively meant something different and they both suspected the other.

Which is the better approach and why:

I think most favorably of the Restatement approach. First, the restatement tries very hard to interpret the meaning of the parties before binding them to something they didnt intend for. The restatement's process is a good attempt at trying to be fair to all parties while at the same time, attempting to preserve the enforceability of the K. Where two parties have intended to enter a K, the restatement will do whatever possible to find a K before letting the K fail for indefinateness. At the same time, I dont think it goes too far and protects a parties right to freedom from K. I find the order that the court goes through the process is effective and creates fair boundaries. The first thing that should be examined is the express terms. That is what the parties actually included and should be given the highest degree of scrutiny. However, there are clearly times when terms are left out and negotitions are and should be the next place to look. The negotiations are where the parties intent can usually be found (if not in the express terms) and allow the court to come to a better understanding of what the parties intended. Course of performance and course of dealings are the next place to look and I think

that is also a good idea. If the express terms and negotiations arent dispositive, the course of performance and course of dealings are likely to reveiil the party's intentions.

The one problem I have with the restatement's handling of this is how it turns to trade usage. If at this point it is still not clear how to interpret, I think the K should fail for indefinateness. The reason for this is to protect a party's freedom from K. If it is so unclear that the above process doesnt answer the point of contention, than I dont think a party should be held to trade usage when they clearly didnt intend to do so. Just because a trade usage interprets a term a certain way, I dont think this should bind a party that didnt know or have reason to know that they would be bound to do a certain thing because of the trade usage.

If this process fails, the restatement fails the K. I agree with this and think it is a good policy. If a K is that unclear, there is no way it should bind a party.

Question #1 Final Word Count = 4097

Question #1 Final Character Count = 23034

Question #1 Final Character Count (No Spaces, No Returns) = 18750