

STETSON UNIVERSITY COLLEGE OF LAW
Gulfport, Florida

GENERAL INSTRUCTIONS

THE ATTENTION OF ALL STUDENTS IS CALLED TO THE FOLLOWING INSTRUCTIONS:

1. The answers and the pledge are to be identified by examination number only. DO NOT WRITE OR TYPE YOUR NAME ON ANY BLUEBOOKS, SCANTRON SHEETS, OR ANYWHERE ON THE EXAMINATION; USE YOUR EXAMINATION NUMBER INSTEAD.
2. During the course of the examination, ABSOLUTELY NO EXAMINATION MATERIALS MAY BE REMOVED FROM THE EXAM ROOM. This includes the exam, any Scantron sheets, bluebooks, or examination answers.
3. This examination ends at the expiration of the time indicated, or when the examination is turned in, whichever comes first.
4. The professor will be permitted to grade only answers that have been submitted during the examination, in the method indicated by the professor.
5. At the conclusion of the time prescribed for the examination, students are forbidden from communicating with the professor with reference to the final examination until the grades have been turned in to the Registrar's Office except that students may communicate with the professor at any time concerning matters related to the Code of Student Professionalism and Conduct or the Academic Honor Code.

BLUE BOOK INSTRUCTIONS

For those of you using blue books for exam answers, there are six (6) allotted for writing your examination answers in the front of the classroom. You may use additional blue books only as scratch paper. **Clearly mark which blue books are being used for scratch and which you are using for exam answers.** If you exceed the allotted number of blue books for a particular exam, the professor has the right to reject, and not grade, the use of any excess blue books.

TIME: 4 HRS.

SPECIAL INSTRUCTIONS

You will be taking a portion of your examination using ScanTron technology. Be certain to put your identification number on the ScanTron sheet. Each student will receive *one* ScanTron sheet. Please mark only with a # 2 pencil, and erase any extra marks thoroughly and carefully. To ensure examination security, no extra ScanTron sheets are provided. If you need an additional ScanTron sheet, you must go to the Registrar's office with the sheet given to you in the examination envelope to obtain a new sheet (you will not be credited time at the end of the exam).

1. You have been given an envelope containing a copy of the examination, one Scan Tron sheet, and 5 pieces scratch paper. Extra blue books and scratch paper are available at the front of the room.

Each student must turn in everything (including scratch paper, but especially the exam) in the envelope I have provided, at the end of the examination. **BEFORE YOU DO ANYTHING ELSE, PLEASE WRITE YOUR EXAMINATION NUMBER ON EVERYTHING – THE EXAMINATION, THE ENVELOPE, THE BLUE BOOKS, AND THE SCRATCH PAPER.**

2. This is an open-book examination. You may use the assigned texts, your notes, any handouts distributed in class or through TWEN, and any outline(s) you prepared either alone or in conjunction with others. You may not use any commercial outlines, hornbooks, or treatises.
3. This examination consists of eleven (11) pages consisting of 10 multiple choice questions (worth 10% of your grade), two essay questions based on fact patterns (worth 50% and 25% of your grade, respectively), and one conceptual essay question (worth 15% of your grade). Please use your time accordingly. You should also check at this time to make sure you have all eleven (11) pages of the exam.

INSTRUCTIONS FOR THE MULTIPLE CHOICE QUESTIONS ONLY

4. **READ THE QUESTIONS AND ANSWERS CAREFULLY.** Some multiple choice questions will include partly correct answers along with better, more complete answers. Make sure you separate the good responses from the best response, and select the **BEST** answer on your answer sheet. Partial credit will not be given for selecting a partially correct answer. You may want to reread the question carefully when choosing between several potentially correct answers.
5. There are no penalties for guessing on the multiple choice questions.

INSTRUCTIONS FOR THE ESSAY QUESTIONS ONLY

6. If you are writing the exam by hand, legibility is crucial. Skipping lines and writing on only one side of the paper will help me to read your work.
7. Please do not spend time simply re-stating the facts as an introduction to your answer. The only facts that should appear in your answer are the ones you use and apply in your analysis. If you believe that you require any additional facts or need to make any assumptions, make sure that you identify such matters in your answer.
8. You should address **ALL** of the issues presented by each essay question, even if you believe that the resolution of a particular issue is dispositive.
9. Citing code sections and case names is preferred but optional – just make sure I can understand what you are talking about.
10. Please **ORGANIZE** your answers. To this effect, I strongly recommend that you spend some time outlining your answers before you begin to write.
11. If you are about to run out of time, do your best to outline the rest of your answer so I can see where you were planning to go with the part you were unable to complete.

END OF INSTRUCTIONS – GOOD LUCK!

FACT-PATTERN ESSAY QUESTION # 1 (50% of your grade)

NOTE: In answering the question below, do not discuss the CISG, Torts, Civil Procedure, Criminal Law, or issues covered in Contracts I. Please limit your discussion to issues covered in Contracts II.

Defendant Dave, a real estate developer, entered into a written contract with Plaintiff Paul, a homebuyer, in which Dave agreed to build a house with an attached garage for Paul on one of Dave's lots, for a consideration of \$500,000, with an estimated completion time of three months. During their negotiations, at the bottom of the contract, Paul hand-wrote the following: "All lumber used in the construction of said house must come from the Illinois Lumber Company, and no substitutes whatsoever shall be used," and required Dave to separately initial this clause. For as long as Dave had been in business, he had always purchased his lumber from the Illinois Lumber Company, and, seeing no harm in agreeing to this provision, initialed next to this clause as requested by Paul. Per the contract, Paul then wrote out a check for \$400,000, withholding the remaining \$100,000, which was due "upon completion of the project." The parties then shook hands on the deal and went their separate ways. When Dave got back to his office, however, he realized that he had mistakenly used an old form contract that did not include a no-oral-modifications clause, which was standard. Dave immediately telephoned Paul and explained to him that his secretary gave him the wrong form contract, that he had intended to use an otherwise identical form contract that included language to the effect that all changes to the contract must be in writing, and wanted to know whether Paul agreed to such changes. Paul was reluctant to agree to a clause over the telephone, but Dave urged him to do so, telling him that it was really no big deal, that the clause was rather simple and could be understood by simply listening carefully, and then proceeded to read the following clause to Paul over the phone: "All modifications to this contract must be in writing to be valid." Dave assured Paul that this was the only change to the contract, and simply wanted Paul to say "I agree" over the telephone. Paul was still reluctant to do so, but when Dave became belligerent and threatened to withhold performance and tear up the contract unless Paul agreed to this change, Paul finally agreed.

As scheduled, the next day Dave and his construction company began construction on Paul's new home. Paul, a little worried that his business relationship with Dave might have been damaged on account of the telephone conversation they had the day before, decided that it would be best to be on site to monitor Dave's work, which he did faithfully every day for two straight months. During this time, Dave played the part of the consummate professional, exhibiting great care in his workmanship, and taking great pride in his work. In fact, after two months, the exterior of the house was completed and exceeded Paul's expectations in every way, and only the garage and the interior of the house remained to be built. Paul was very pleased with Dave's work and, deciding that there was no longer any need to monitor the project on a day-to-day basis, Paul decided to take a vacation during the last month of construction, and booked a flight to the French Riviera.

The day Paul left to Europe, Dave and his construction company began excavating the ground where the attached garage was to be built, and discovered, much to their surprise, that there was a very large rock close to the surface, which would require special equipment to remove, but would only cost \$3,000 to do so. Because Paul was on a flight to Europe, Dave was unable to contact him to see whether Paul would agree to pay the additional \$3,000 required to remove the rock, and decided that, rather than excavating it, he would just build the garage on top of the rock.

As a result, the driveway to the garage would have to be built at a grade of over 22 percent.¹ Such a grade would make the driveway both inconvenient and unsafe – the maximum permissible grade was 12 percent – and would also made the garage look rather awkward and out of place in the neighborhood, but would not otherwise substantially impair the value of the house. Also, to maintain the structural integrity of a garage built on such a steep grade, it would be necessary to use a certain type of reinforced synthetic wood only manufactured by the Ohio Lumber Company, at about the same cost as the lumber manufactured by the Illinois Lumber Company.

Dave ordered the synthetic wood from the Ohio Lumber Company, and began construction of the garage. About a week later, Paul called Dave from Europe to see how the project was going, and Dave explained to Paul that the project was going well, except for the large, unexpected rock he had encountered. According to Paul, their conversation then proceeded as follows:

Paul: “Well, naturally, you removed the rock, didn’t you?”

Dave: “Actually, we did not. It would have cost \$3000, and because of the no-oral-modifications clause you agreed to, we could not have removed it without your express, prior, written consent.”

Paul: “What!??? That’s absurd! I never –”

Dave (interrupting): “What is done is done. The –”

Paul (interrupting): “I don’t care. I want you to take out that rock!”

Dave: “Sir, with all due respect, as I was saying, the garage is nearly complete, and it would cost about \$25,000 to tear down what we’ve done so far, remove the rock, and rebuild your garage. It just doesn’t make financial sense at this point in time.”

Paul: “Excuse me! Are you telling me – are you saying you built my garage on top of a giant rock!? How is that even possible!?”

Dave: “Well, let’s just say there is a bit of a – how shall I say – a bit of a ‘slope’ to your driveway.”

Paul: “Don’t tell me this! C’mon! I’m not hearing this! Don’t tell me I’m going to come home and have to drive up some 10% incline just to park my car!”

Dave: “Oh no, sir. You won’t have to drive up, as you say, ‘some 10% incline’ just to park your car. You’ll be quite happy, you’ll see.”

Paul: “So we’re talking about a small grade then?”

Dave: “Well –”

Paul: “Well, we’re not talking about a 10% grade, are we?”

Dave: “Oh no sir, definitely not. You will not have ‘a 10% grade,’ I promise you that. You’ll be happy, trust me.”

Paul: “Well listen, I don’t have time to deal with this right now. I really wish you would have just excavated that rock!”

Dave: “Well, listen sir, we’re terribly sorry for all this trouble, but if it will make things better, we can throw in granite countertops in the kitchen.”

Paul: “That’d be great. Yes, please do so! Well listen, I’m gonna get back to my vacation. I suppose – as long as its not 10% – that doesn’t sound too bad – I suppose it is okay to proceed. Is everything else okay?”

Dave: “Just fine.”

¹ It should be noted that there was nothing in the contract about the grade of the driveway, but the land on which the house was being built (and all surrounding land as far as the eye could see) was flat.

And with that, Paul says that they ended their conversation. Dave denies that this conversation ever took place, but Paul's cell phone records indicate that such a call was made, although the content of the conversation cannot, of course, be verified. In any event, both parties agree that, whether or not such a conversation took place, Dave never mentioned to Paul that Dave purchased wood from the Ohio Lumber Company to maintain the structural integrity of the garage.

Paul and Dave did not speak again until three weeks later, when Paul returned from his vacation in Europe to examine his now completed home. Upon arriving at his new home, where Dave was waiting, Paul drove his old beat-up car up the inclined driveway, took one look at the garage, and became outraged. According to a neighbor, who witnessed the entire event, Paul jumped out of his car – forgetting to put on the emergency brake – and started screaming at Dave, telling him that the garage looked “like a hideous fortress on top of a hill,” that “the entire house isn't worth \$500,000 to me anymore, but more like \$200,000,” that Dave would never see the \$100,000 owed on the house until the garage was “torn down and fixed,” and that he – and everyone he knew – would never do business with Dave again. At that very moment, Paul's car, which had been rolling down the 22 percent grade that was now his driveway, smashed into Dave's brand new, \$100,000, fully-loaded BMW M5. Paul looked Dave in the eye and said: “see what you get!” Dave, now visibly upset himself, began screaming back at Paul. “You're such an idiot! I can buy another car with all the money I made ripping off a sucker like you, selling you what is essentially a \$200,000 home for half a million dollars! Ha! I built the exact same home for your neighbor for only \$250,000! And did you really think you were getting granite countertops? Ha! I hope you like linoleum countertops,² sucker! Enjoy your house, you sap!” At this, Dave threw the keys to Paul and walked away, leaving Paul dumbfounded. The two would not see each other again for several months, when the case was finally brought to court.

Discuss all relevant issues, including who will sue whom for what, what damages will be sought, what defenses will be asserted, who will be likely to prevail on each issue, and why. Please organize your answer by lawsuit (e.g., “A v. B”), and then by issue within each lawsuit.

² When Paul finally got around to inspecting his home, he learned that the countertops installed in the kitchen were indeed linoleum.

FACT-PATTERN ESSAY QUESTION # 2 (25% of your grade)

You are Heracles, a trial judge of the state of Utopia, a common law jurisdiction in the U.S. where case law, the Restatement, and the UCC apply. A dispute has come before you, and, per your instructions, your law clerk has already drafted the facts for you as they have been developed during a bench trial (a trial before you, the judge, and not a jury). It is your task to complete the opinion below. This opinion, as completed, should discuss each position you would expect counsel for either side to argue on the facts stated, even if the point is, in relation to your ultimate holding, mere dictum.

Uncle v. Nephew
In the District Court of Utopia
Civil Action # 5-5-2008

The opinion of the court was delivered by HERACLES, J.

The facts as developed at trial are as follows. At the end of his first year in law school, Nephew had earned a grade point average of 3.5. Upon learning of Nephew's accomplishment, Uncle promised Nephew that, if Nephew graduated with a cumulative grade point average of 3.5 or above, Uncle would pay off all of the debt Nephew incurred while attending law school, and would further give him "\$10,000 to go to Europe." Uncle, who was a practicing lawyer himself, told Nephew, "Now Nephew, this is not a gift, and I will only perform my end of the bargain if, in exchange, you give me a nice, crisp, \$1." Nephew pulled out a nice, crisp \$1 bill from his wallet, and handed it to Uncle.

After two more years of hard work, Nephew graduated from law school with a 3.7 grade point average, and immediately wrote to Uncle, informing Uncle of his accomplishment, and asking Uncle for a check in the amount of \$120,000 to cover his law school debt. Nephew attached his loan statements to the letter showing that he had, in fact, incurred \$120,000 in debt in law school loans, having incurred \$40,000 of debt during each of his three years in law school. At the end of the letter, Nephew wrote: "By the time you receive this, I will in Europe per the agreement we have, so please add \$10,000 to the amount that you already owe me, bringing the grand total to \$130,000."

When Uncle received Nephew's letter, he was shocked that law school was so expensive, and refused to pay. He called his Nephew in Europe and told him that law school had only cost \$10,000 when he attended back in the 1960s, and that, had he known what law school cost these days, he would have never agreed to such a deal. The Nephew told him, "Now Uncle, a deal is a deal. I'll expect that check to be in my mailbox by the time I return from Europe sometime next week." The Uncle was irate, and began screaming: "Why, you ungrateful little - you won't get a single cent from me for your law school loans, no sir, and as for your Europe trip, I'll pay you whatever you've incurred so far, but that's it. The rest of your trip is on you!" With this, the Uncle hung up the phone. Up to this time, Nephew had incurred \$3,000 in expenses during his three-week trip, and incurred an additional \$1,000 during the last week before he returned home. When he got home, Nephew once again demanded that Uncle pay him \$130,000, and, when Uncle refused, Nephew threatened to bring suit against Uncle.

In response, Uncle apologized, and asked Nephew if he would be willing to renegotiate their agreement. Nephew said "I'm listening," to which Uncle replied, "Well, I recognize my moral obligation to you, so, if you promise not to bring suit, I will pay for your Europe trip and," swallowing hard, "your law school loans." Nephew agreed, promising not to sue. Several years passed, and whenever Nephew asked for the money, Uncle refused, saying "Can't you wait just a little longer?" Suspecting his Uncle of trying to delay performance until the Statute of Limitations ran, Nephew brought the instant action.

The first issue to be addressed is ...

CONCEPTUAL ESSAY QUESTION (15% of your grade). Per Section IX of the syllabus, if you have elected to write the optional paper, this portion of the exam will only be factored into your grade if it is higher than the grade you receive on the optional paper.

In class, we discussed Professor Cohen's *The Basis of Contract*, in which he discussed several competing theories as to which promises should be enforced, and why. Please answer the following questions:

- (1) Of the numerous justifications offered by Professor Cohen in favor of enforcing promises, which theory provides the best normative justification for enforcing promises, and why?
- (2) Of the numerous justifications offered by Professor Cohen in favor of enforcing promises, which theory provides the worst normative justification for enforcing promises, and why?
- (3) Of the numerous justifications offered by Professor Cohen in favor of enforcing promises, which theory best explains how our common-law courts actually enforce promises? What three cases have we discussed this semester that support your claim, and how?

END OF EXAMINATION

**Congratulations on a great year!
Have a wonderful summer break and keep in touch!**

**ON MY HONOR, I HAVE NEITHER
GIVEN NOR RECEIVED AID ON
THIS EXAMINATION.**