Caroline Bradley October 17, 2014

Memo on Contracts Midterm Fall 2014

In this memo Barry Basalt is BB, Hibiscus is H, Violet is V and Rose is R. CB refers to the Casebook.

General Comments.

Before the midterm when we discussed hypothetical questions in class we did so in a context where it was pretty clear what legal issues were raised by the facts we were considering. This midterm question is different from the questions we have thought about so far in that you have to figure out which of the different legal questions we have been learning about are implicated by the facts you are given. The question is designed to be a bit different from the facts of the cases we have studied. We will have more opportunities as the semester progresses to think about this type of hypothetical question.

I try to write questions which allow you to discuss the material we have studied. If you find that you want to answer the questions with material we have not studied in class then you are probably not getting the point of my question. And the point of a test like this is for you to show me that you can apply the cases we study to the facts in the question. If you find yourself answering the question by just giving me your conclusions your answer is incomplete. I want to see the analysis rather than the conclusions.

Try to write clearly. Good legal writing is boring. Use short sentences. Don't try to impress with long words and extraneous adjectives. Be sure you know what the words you use mean: for example a contract that is formed as a result of a conversation between two people is an oral contract (not a verbal contract - verbal means in words).[1] Short declarative sentences that are clear are much better than long unclear sentences. You can get lost in a long sentence and if you get lost your reader will get lost too. If you have time it is a good idea to read over your answers before submitting them to check that what you have written is clear and can be understood by the person who reads your answer. Remember that when I am grading your final exam I cannot give you credit for ideas that were in your head but didn't make it into your answer. And if you only tell me about your conclusions I don't know if you got there based on knowledge or guesswork unless you spell out the steps in your analysis. Show your work.

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[1] It may be that in regular conversation "verbal" is often used to mean "oral" but in the sphere of contract law the distinction we care about is between written and oral contracts.

Reading the questions carefully is important. If you rely on language in the question it is a good idea to get it right. The question states that BB " thought he would like [H] to sing at his son's birthday party." Many people wrote that BB said he would like H to sing at the party. But the language in the question "he thought he would like" (implying he said "I think I would like you to sing") is even less of a promise than if he had said "I would like you to sing". Using the specific language in the question may help your argument.

You should answer the questions asked. So if a question asks what legal arguments a person can make it would be a good idea for you to write your answer focusing on this rather than seeming to be a general discussion of the issues.

Don't check your common sense at the door to the exam room. If you find that the answers to two separate questions overlap to a large extent check to make sure that I am really asking you to do that, because I am probably going to ask you questions that require different answers rather than the same answer.

Relevance

Whether you can figure out what is and is not relevant to the discussion of the legal issues raised by a given set of facts is one of the main things a hypothetical exam question is testing. In an exam you likely won't have much spare time. Therefore you should focus your effort on the most relevant issues. For now there are three points I want to make about relevance (note that I characterize the problem of focusing on irrelevant material/issues as one of time management in that you reduce the time you spend on the relevant material/issues, but focusing on irrelevant/less relevant material/issues also suggests a lack of understanding):

1. In an exam you are being tested on the material you were expected to study for the test. Generally it will not make sense for you to spend time discussing torts cases in a contracts exam. I limited the material to which this midterm exam related by date - material we covered after the class on September 23 was not part of the test, and the question spelled this out. A number of people wrote about promissory estoppel in their answer to question 1. There are some promissory estoppel possibilities in the facts but that was not part of what I was asking about so writing about promissory estoppel was not answering the question I asked. Also focusing on promissory estoppel meant that the treatment of the consideration issues was probably less detailed than what I was looking for. This also means that it makes sense for your review of material for the final exam to focus on the material we are studying rather than on cases you read about in commercial outlines or outlines produced for other contracts classes.

2. Write about the legal issues raised by the facts you are given. Conversely, don't

write about legal issues which are clearly not raised by the facts given. For example, if there are no facts suggesting that the UCC might be relevant you don't need to tell me that the UCC does not apply. If the facts of a question involved an ambiguity as to whether a contract related to movable goods or not then it would make sense to consider the issue. If you spend a lot of time writing about legal issues which are not raised by the facts then you won't have enough time to write about the issues which are raised by the facts.

3. Spend more time on the more significant issues than on the less significant issues (we will think about this more later).

Be precise about terminology

There's some confusion about the terms promisor and promisee. In a bilateral contract each party makes promises and receives the benefit of the other party's promise. Each party is both promisor and promisee. But in the context of litigation where one party is seeking to enforce the other's promise or get a remedy for breach of the promise we are going to characterize the person suing as the promisee and the person being sued as the promisor.

We did spend some time thinking about unilateral contracts where a promisor offers payment for performance (e.g. Hamer v Sidway). In the context of cases like this we are concerned only with one promisor.

How to begin an answer to a hypothetical question

Do not waste time describing the facts in the question. Use the facts in your analysis but avoid merely rewriting the facts in the question. Whereas I do not know that you remember the facts of cases unless you write them down (although describing the facts of a case won't necessarily be required to answer the question) I do know that you had the facts in the question with you in the exam. Don't make assumptions about the facts. Do tell me what facts you might need to be able to answer the question properly.

Don't begin an answer to specific questions like the ones on the midterm by making sweeping generalizations about contract law. In fact it is probably a good idea to avoid sweeping generalizations altogether even in an answer to a more open ended essay question. Instead, plan to make specific arguments backed up by authority (cases, the Restatement, the UCC). This point about generalization also relates to the relevance issue. Telling me about the evidentiary, cautionary and channelling importance of formalities is not relevant to an answer to question 1. Writing about material that is not relevant to the question you are answering is not a good idea. It

distracts you from writing about what is relevant and it suggests that you do not know what is relevant.

Formalities

Many people made a lot of the fact that the circumstances in the question involved oral statements rather than a written document. We have not yet studied the Statute of Frauds or any cases involving requirements of writing so the idea of writing as being significant was really beyond the scope of the test.

Comments on Specific Questions

1. Does Barry Basalt have a contractual obligation to pay the $500 to Hibiscus? What legal arguments can he make that he should not be required to make the payment?

The question asks what legal arguments BB can make that he should not have to pay the money. In what follows I first analyze the facts and then identify the arguments BB can make based on the analysis.

BB said he would pay $500 to H. This seems to be a promise, but we need to consider whether it is merely a gratuitous promise which does not create a binding obligation to pay or a binding contract? One could consider the situation from the perspective of moral obligation (comparing the cases, like Mills v Wyman, in which the court treats a moral obligation as not constituting consideration with cases where it may be enough to be consideration, such as Webb v McGowin and Restatement §86).

But the facts of the question are a bit differnt from the moral obligation cases in that BB had not previously received a benefit from H (unless we think that her promise to be available for the party is a benefit). The context in which BB makes the promise to pay is one in which H has said to BB that she thinks that she has a legal right to be reimbursed for expenses she incurred in reliance on his invitation for her to sing at his son's birthday party. A promisee's forbearance from doing something she has a legal right to do (e.g. enforcing her legal rights) is capable of being consideration to support a valid contract (e.g. Hamer v Sidway, CB p. 35).

If BB agreed to pay H $500 for her agreement not to sue him for breach of contract this situation would be similar to the facts of Dyer v National By-products (CB p. 43 forbearance from bringing an invalid claim can be consideration for a settlement agreement where the person seeking to enforce the agreement had a good faith belief that the claim was valid; the validity or invalidity of the claim is relevant to the question

of whether there was a good faith belief). It does seem from the facts presented in the question that this may be what happened.

H does seem to have behaved as if she thought that BB had invited her to play at the party, but it is not clear that they had a binding contract for her to play. The reason for this is not that there is no consideration but that there appears to be no promise. The question says that when H was playing music outside a café BB "approached her and said that he thought he would like her to sing at his son's birthday party on Saturday 23rd August." The language ("thought he would like her to sing") is not a definite promise that she will be able to play. There is no mention of any payment, although this is not crucial - one can imagine a contract involving mutual promises to allow her to play at the party and to play at the party. Each party would benefit (BB would have entertainment for the party, she would have a new audience of rich people for her music). But it is not at all clear that there was the sort of bargain that would justify a conclusion that there was a binding contract. So H's claim for breach of contract may not be valid. However, under Dyer v National By-products the claim doesn't need to be valid if H has a good faith belief that it is valid (though the invalidity of the claim is relevant to how we think about good faith here).

Because you are answering this question based on the material we covered up to the end of class on September 23 I did not expect any discussion of whether H would have had a valid claim against BB based on a promissory estoppel theory. It would not have been wrong to include a discussion of this issue, but it was not required in the circumstances. [Promissory estoppel requires a promise the promisor should reasonably expect to induce action or forbearance, plus detrimental reliance, and the need for a remedy to prevent injustice. Here it is not clear that there was a promise, or that it was reasonable for H to think there was a promise.]

The question asks what BB would want to argue. If you did not address this aspect of the question you did not really answer the question properly. BB wants to argue that his agreement to pay $500 to H is a gratuitous promise with no consideration from H: there was no benefit to BB and no forbearance from H that would constitute consideration.

2. If Hibiscus and Barry Basalt had a binding contract for Hibiscus to sing at the party what damages do you think Hibiscus should be able to recover for Barry Basalt's breach of the contract?

H is interested in singing at the concert because she wants publicity and future paid work as a singer. We know that contract damages can reflect the expectation, reliance or restitution interest of a contracting party (Restatement § 344). H's

expectation interest (the value to her of the contract being performed) is difficult to calculate based on these facts. Although in US Naval Institute v Charter Communications Inc. the court was able to resolve uncertainties about the amount of expectation damages, H's situation is different. In that case there were data about the hardback sales before the sales of the paperbacks began from which the court felt it was appropriate to make deductions about the amount of lost profits. In the circumstances described in the hypothetical any argument about what profits H lost from BB's breach would be entirely speculative.

Some answers suggested that expectation damages would allow H to recover the money BB would have paid her for performing. But the question does not suggest there was any agreement as to payment. If there were then she could recover the payment, but it is also possible they could have a valid contract whereby she would perform for no remuneration. This question does not say what we are expected to do with the $500. One possibility is that the $500 could be treated as reflecting the value of the expectation interest.

Some answers treated the expenses incurred by H (the money to be paid to the co-performers, cost of the dress etc.) as elements in an expectation claim. But they are not. These are amounts H was willing to spend in order to achieve the benefit of the contract and are wasted if BB does not perform his part of the bargain. They can be recovered on a reliance theory but not on an expectation theory. Think about the US Naval Institute case - the publisher there wants to get damages with respect to the profits it lost from not being able to sell as many hardback copies of the book as it might have done without the paperback competition. The cost of producing the hardback copies is not an element of the damages because these were expenses incurred in order to make the profits that were lost because of the contract breach. If the contract had not been breached they would have been incurred.

In terms of reliance damages H did incur expenses in reliance on the contract which are wasted if BB does not perform (e.g. Sullivan v O'Connor). These could include the $300 she offered to pay her friends to perform with her (if she is legally obliged to pay them when the concert does not happen and if BB might expect that she would incur such expenses - if she has always before performed alone she might not be able to recover this expense). Perhaps she could claim the cost of the dress (this isn't clear: reliance damages should be reasonable, and in any case the dress could likely be worn to other events or returned to the store). Turning down the opportunity to be paid on the Friday isn't obviously in reliance on the opportunity to play the concert on Saturday unless the Friday event is far enough away that it would be impossible to play both. We don't have enough information to assess this. The value of the lost

opportunity to pay, unpaid, at the Saturday event, which could be recovered as reliance damages, is probably as complicated to calculate as the expectation damages.

There do not seem to be any damages that could be recovered on a restitution theory.

3. If Violet and Hibiscus use Rose's photographs do you think they should be able to refuse to pay her for them on the basis that they do not think the photographs are amazing? If Rose fails to produce any photographs do Violet and Hibiscus have any claims for damages for breach of contract they can bring against her?

Photographs are movable goods, so UCC Art. 2 applies to a contract for their sale.

The facts described show that R said “I guarantee you will be amazed by my work” and that V said “If we think your photographs are amazing we will pay you at your usual rate.”

As to the first question whether V and H must pay for the photographs they use, V’s statement looks like an illusory promise (if we like the photographs we will pay you for them) like the uncle’s statement about forbearance in Strong v Sheffield. However we also read a number of cases in which the courts used an idea of good faith to give substance to a promise which would otherwise seem to be illusory. The facts in the question are not exactly like those in any of the cases we read (Mattei v Hopper, Structural Polymer v Zoltek, Wood v Lucy, Lady Duff Gordon). Mattei v Hopper is perhaps the closest - the determination that the photographs are amazing is not unlike a determination as to whether the leases were satisfactory, especially as the court decided that the criterion of satisfaction was subjective rather than objective. And the use of the photographs without payment seems contrary to good faith. [Plus there is an argument based on unjust enrichment although that would relate to material we had not covered at the time you wrote your answers.]

Many answers to this question argued that R’s statement ("I guarantee you will be amazed by my work") should be seen as a contractual warranty (as in Hawkins v McGee and Bayliner (UCC §2-313) (the answers cited Hawkins v McGee rather than Bayliner even though Bayliner was the UCC case we read and this question is a UCC question because photographs are moveable goods)). This is true, but it doesn’t seem to me really to be what the question is about. V and H do not seem to be interested in suing Rose for her supply of photographs which are not amazing (for the difference in value between the promised amazing photographs and photographs which are not amazing). The provision of photographs which are not amazing might justify V and H

rejecting the photographs or arguing that they shouldn't have to pay full price for the photographs but if they are in fact using them (i.e. haven't rejected them) they should pay something. The breach of warranty argument could be used to reduce the price they should pay to R.

As to the question whether R's failure to supply photographs gives rise to any claim for damages, the facts in the question do not specify that R actually promised to supply any photographs. A statement that people will be amazed by work is not quite the same as a promise to do the work. Is this also an illusory promise that can be saved by good faith? Do they have a requirements contract (R agreed to supply V and H's requirements for photographs for the web page)(e.g.. Structural Polymer v Zoltek). I think we don't have enough facts to know. It would be possible to argue by analogy with Wood v Lucy, Lady Duff Gordon that the promise about the quality of the photographs only makes sense if some photographs will be provided such that there is an implied promise to supply photographs. If this is the case V and H could obtain photographs elsewhere (cover under UCC §2-712) and if they had to pay more than they would have had to pay R they can recover the difference in price from R.