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Answer-to-Question- \_\_4\_\_

It is human nature that there will always be some uncertainty. The law must be flexible enough to deal with the inevitable uncertainty of society, especially in field of contract law where the level of knowledge and sophistication varies greatly. Formality is the keystone of contract law. It promotes certainty, clarity, and stability in markets. However, while the goal of formalities is to promote fairness, its rigid nature often seems to prevent justice from being served. The emphasis on fairness is necessary to balance the sometimes overly rigid notions of formality in contract law. We focus on three contexts of contracts: family, employment, and business. We have seen in each that fairness and formalities play an integral role in finding contracts where contracts were intended, and finding a remedy for aggrieved parties where injustice has been done. A particular focus has been placed on promissory estoppel, and how this subjective approach has impacted the objective foundation of contract law.

In the family context, the courts must rely less on formality because the parties entering into agreement are generally not sophisticated, and do not know what actions must be taken to ensure their promises are binding. Here, the courts look more to the intent of the parties to be bound than the formal nature of the agreement. In *Ricketts v. Scothorn*, the grandfather meant to be bound to the promise to pay his granddaughter. He didn't make the promise conditional on her quitting, and he never repudiated the contract even after she went back to work. She could have reasonably relied on the promise, and the court agreed even though the promise was for no consideration. In *Hamer v. Sidway*, the uncle clearly meant to bind himself to the promise to his nephew. The executor's attempt to invoke formality was seen and ignored by the court. One of the most important aspects of contracts is that the parties intend to be bound. The courts are not destroying the interest in formality by enforcing agreements that were intended to be binding in the family context simply by adhering to a subjective approach to finding a contract.

The employment context provides a more problematic set of issues as the sophistication of the parties increases. However, business people are not always aware of the formal requirements of contracts either, but yet may still intend to bind themselves to agreement. In *Feinberg*, the president of the company meant to promise to pay Feinberg her pension. It was not until his successors that the promise was repudiated. The court found that the intent to be bound was strong, and therefore the pension should be awarded. However, benefits of fairness over formalities become more blurred in the employment context. In *Lakeland*, the court invoked the formality of consideration where it seemed like it should not have in order to enforce a non compete agreement. However, this decision turned out to be an employee friendly decision. Had there been an agreement to give Cumber a raise, then his forbearance from leaving could have acted as consideration for the raise. If the court had used Resnick's dissent, which focused on the fact that nothing changed in the at-will relationship, the employee would lose the leverage in the raise situation. In addition, the court uses fairness to find mutuality of obligation where the other party could reasonably expect there to be a binding agreement. In *Lady Duff Gordon*, the Cardozo found that the exclusivity contract implied a duty to make reasonable efforts to find endorsements. However, formalities can help in this situation, particularly with the channeling function, because Wood may have left out the good faith clause on purpose in order to get out of the agreement if he wanted to. Instead, he was able to use convince the court that he had a mutual obligation to perform. Nevertheless, once that mutuality idea with regards to exclusivity contracts was enshrined in contract doctrine, others cannot leave out good faith clauses in the way Wood may have intended. Most importantly, this is a use of fairness to help promote formality in future dealings. This is a concept that we see increasingly relevant in the business context.

Finally, the business context presents the most interesting interaction between fairness and formality in contracts. Businesses have an interest in formality because of the certainty it provides and the stability it offers markets. Because of the sophistication of the parties, the notion of fairness is often met with skepticism. However, fairness can help prevent opportunism and even help promote formality in future contracts.

Courts have a strong interest in preventing opportunism, and do so by invoking fairness where injustice would otherwise prevail. In *Mattei v. Hopper*, the landowner was trying to get out of the contract for sale of land by claiming there was no mutuality of obligation because the developer had no duty to find satisfactory leases. The court concluded that the developer had a duty to act in good faith even though the satisfaction was subjective. There is an underlying notion that you should not be able to use formalities in order to get out of deals that you intended to be bound by. In the series of cases involving promissory estoppel resulting from negotiations, we saw that a formal duty to negotiate in good faith is not necessary to provide a remedy for unconscionable injury to the aggrieved party. In addition, the resulting remedy could actually promote the improvement of formalities forcing companies to be more careful about their negotiations and dealings. *Red Owl* would likely increase their oversight of agents during negotiations, make standard negotiation forms, scripts, and other documents to reduce reliance by the parties in negotiation.

The UCC is another business context that shows the importance of fairness in contracts. It is designed around the idea of promoting formality and uniformity through applying reasonable (fair) solutions for parties that have conflicting or indefinite terms but still want to contract. The 2-207 cases provide a good example of parties that abide with the traditional notions of formality, but require the help of a fair middle ground that is the UCC to get them to contract.

Indeed, fairness comes to the rescue as well in areas where society has changed demands a change in traditional definition of offer and acceptance. In *ProCD*, we saw Easterbrook change the conception of offer and acceptance. In *Wood*, we saw Cardozo change the definition of consideration. And in the UCC we see a response to a rigid contract architecture that poses a barrier to parties that intend to enter into agreement.

Formalities play a prominent role in contract law, but uncertainty, difference levels of sophistication, and changes in technology and society require us to allow courts to have some subjective flexibility in order to maintain a stable society that can be bound to agreements when intended. In the area where formality plays the most important role--

business--fairness often serves to promote formality in future contracts.