

Sales

Eric E. Johnson
Associate Professor of Law
University of North Dakota School of Law

FINAL EXAMINATION - MODEL ANSWER

The MegaMall of Minnesconsin

NOTE:

This model answer was made from amalgamating the work of multiple students. Because of the cherry-picking involved, what you have here is a composite that is better than any real response that was received. So, in many ways, this answer is better than the best. Yet this model answer is not perfect. Student-drafted work done under deadline pressure, of course, never would be perfect. And I have intentionally shied away from trying to make this answer perfect in the compositing process. All things considered, however, this is extremely good.

What this all means for you is that you should be wary of comparing your own response to this one as a way of gauging your preparedness for the exam. This is a beyond-the-top-grade response. So don't worry if you can't do as well. Yet at the same time, if you see issues not represented here, it may not be because you are mistaken; it may be because you are perceptive.

What are good lessons to draw from this model? One thing this response does very well is the way in which the law is applied to the facts. Rather than copy-and-pasted blackletter law or needlessly reiterated facts, this exam response focuses on providing analysis. That's excellent, because the analysis is the key to doing well on the exam. Also laudable is the sense of judgment this exam response frequently displays with regard to conclusions: Close calls and toss-ups are presented as such. Rock-solid conclusions are made without hedging.

Note that the responses from which this model response was composited used various abbreviations. But for this model answer, I have standardized references to names and not used abbreviations. I have also aimed for cohesive writing with cleaned up grammar, spelling, and punctuation. Real exams are not so tidy.

QUESTION

Analyze the parties' claims, duties, and liabilities, clearly labeling the subparts of your answer, as follows:

Subpart A: Discuss claims, duties and liabilities related to the Orange Orange.

Subpart B: Discuss claims, duties and liabilities related to UKEA.

Subpart C: Discuss claims, duties and liabilities related to Svenson Ski Shop.

Subpart D: Discuss claims, duties and liabilities related to Duckworth-Dunn Demolition.

For some transactions, it may make sense to address whether the UCC governs. But regardless of how you come out on the question, make sure you at least analyze each transaction according to how it would play out under UCC law. Thus, you may choose to assume, *arguendo*, the UCC applies.

[various admonitions omitted; see the exam booklet]

RESPONSE

SUBPART A -- ORANGE ORANGE

This is a mixed goods/services contract -- installation and floor tile -- so it make sense to analyze whether UCC or common law will apply. The predominant purpose test favors the UCC, because the flooring itself is the main purpose of the contract -- it's 3/4ths of the price. The gravamen test may favor the UCC since much of the dispute will be about the flooring itself and its inappropriateness to the store. The dispute will also be about the delay, and the delay was both about a delay of installation (a service) and delivery of the tile (goods), so this does not seem to strongly weigh in favor of the common law. Per instructions, I'll continue the analysis under the UCC.

A contract was formed by the purchase order, as offer, and the order acknowledgement, as acceptance. They don't perfectly match, but the fundamental terms (dicker terms) are in agreement, so this is a contract under 2-207(1). Because of the mismatch, however, we have a battle of the forms situation.

The remedies and warranties provisions of the PO and OA contradict one another -- they are differing terms. Applying the knock-out rule means gap-fillers come in, which essentially means Orange Orange wins this issue, retaining warranties and getting the UCC remedies they wanted in the PO, which includes consequential damages (important below).

An express warranty exists: When Gareth told Lilly he needed linoleum that would stand up to heavy traffic and would work despite spills, and Lilly replied "I've got the linoleum for you," Lilly provided an express warranty, since it was an affirmation of fact or promise with respect to the goods, constituting an express warranty under 2-313.

An implied fitness warranty exists: At the same time, an implied warranty of fitness for a particular purpose was created because Lilly knew of the particular purpose for which the goods were required, and given Gareth's questions and actions, as well as the fact that Flammer held itself out as "flooring experts" and Lilly was general sales manager, it can be inferred that Gareth relied upon that expertise to create an implied warranty under 2-315.

An implied warranty of merchantability exists: An implied warranty of merchantability arose with respect to the flooring because Flammer Flooring is a merchant with respect to flooring. They're a merchant because they deal in flooring, and also because they also hold themselves out as having special skill flooring as indicated by their slogan. The implied warranty of merchantability has not be disclaimed, as discussed above in the battle-of-the-forms analysis.

Thus we have warranties of the express, implied fitness, and implied merchantability types.

Even if Orange Orange did not win the battle of the forms issue with regard to warranties, perhaps because this jurisdiction does not follow the knock-out rule, Flammer Flooring's attempted disclaimers are still likely invalid.

With regard to the express warranty, that is not disclaimed because a seller cannot disclaim express warranties. (It's possible to achieve the practical effect of a disclaimer with the parol evidence rule, but Flammer Flooring can't do that here because there isn't an integrated contract.) So the express warranty persists.

Moreover, the disclaimer of warranties on the OA is not valid. To validly disclaim the implied warranty of merchantability under 2-316(2), the word "merchantability" must be used (which it is in the OA), and if in writing, it must be conspicuous. The OA's disclaimer has nothing to draw attention to it, no bold type or all caps. I think it fails the 1-201(b)(10) test that a reasonable person ought to have noticed it. To validly disclaim the implied warranty of fitness for a particular purpose under 2-316(2), the disclaimer must be in writing (which this is) and it must be conspicuous (which this is not for the same reason as for merchantability). There is an alternative "easy way" to disclaim under 2-316(3) with "AS IS" or similar language, but Flammer doesn't do that either. Thus, the warranty disclaimers appear invalid and the implied warranties will persist.

Now I will discuss warranty breach.

The implied warranty of merchantability arguably has not been breached. The linoleum was merchantable at the time of sale because it was fit for the ordinary purpose of being residential-grade linoleum (per the OA); it's just that it wasn't fit for a yogurt store. Although, since we found out that linoleum with MNB has been discontinued for being too slippery, it's possible one could argue that it is not fit for ordinary purposes.

But the express warranty and the warranty of fitness for a particular purpose have clearly been breached, since the linoleum was not fit for being in a spill-prone yogurt store. Orange Orange will thus be able to get cost of defect 2-714 damages. That's value of conforming goods (over 12,000, according to estimates Gareth got) less the value of the non-conforming goods (apparently zero, since the linoleum appears worthless) plus incidental damages (not seeing any here) and plus consequential damages (that will include the \$25,000 in tort liability occasioned by Celinda Caltrell's fall).

Orange Orange may also be able to get consequential damages from the delay of delivery/installation and the loss of revenue from Black Friday shoppers. This would be Hadley foreseeable since Gareth told Lilly he needed the flooring in time for Black

Friday. The question is whether Flammer Flooring can be excused on the basis of 2-615 commercial impracticability because of the floods. The rainstorm was likely not foreseeable, and it caused the flooding of Flammer's warehouse, frustrating performance of the contract. The needed notification was supplied when Lilly notified Gareth about this by calling him late in the day. Arguably this was not done "seasonably" as required under 2-615 since it was late in the day, but I think it is likely a court would consider it sufficient given the flash flooding everywhere. The bigger problem for Flammer Flooring is that it's not clear performance was impracticable. Lilly could have rented a forklift and paid workers over the holiday at double the regular cost to have gotten the flooring installed before Black Friday. Even though she wouldn't have made a profit then, I don't think this rises to the point of impracticability.

SUBPART B -- UKEA

The first issue is the Sløseri bookcases.

The written price guarantee signed by the UKEA agent was, under 2-205, a binding firm offer to sell up to three Sløseri bookcases at \$170 each for three months. UKEA is a clearly a merchant of the bookcase as they deal in home furnishings, the guarantee is in writing, it says it will be held open, and it's signed, so it is binding under 2-205. It's good for the full term since it doesn't go beyond three months.

The second issue is the Verdiløs lamp.

UKEA is liable for Beckah Beaulac's injuries. The lamp was covered by the implied warranty of merchantability because UKEA is a merchant with regard to lamps. And they're a merchant because they deal in goods of this kind (and, in fact, sell millions worth of home furnishings a year). Although UKEA tried to disclaim the implied warranty of merchantability, it persists under Magnuson-Moss because the lamp is a consumer product and because UKEA issued a written warranty with the lamp. The warranty was breached because a lamp that shocks people isn't fit for the ordinary purpose of being able to be turned on to provide light.

The facts aren't clear on whether Allan Aalbers or Beckah was the buyer of the lamp. Assuming Beckah bought the lamp, she can recover for her personal injuries as consequential damages from the warranty breach. UKEA tried to disclaim consequential damages, which would include Beckah's personal injuries, but 2-719(3) makes such a disclaimer prima facie unconscionable for personal injury (which an electrical burn is) in the case of a consumer good (which the lamp is).

On the other hand, if we assume Allan is the buyer of the lamp, Beckah is still covered. Under Alternative A of 2-318, Beckah is a third-party beneficiary of the warranty because she is a natural person who is a guest in Allan's home and it's reasonable to expect she would use the lamp. Because Alternative A is the most

restrictive, Beckah would also qualify under Alternatives B and C. So it is irrelevant that Minnesconsin has adopted all three -- she qualifies regardless.

SUBPART C -- SVENSEN'S SKI SHOP

The first issue is Retha Rohaley's purchase of the X-ium skis.

Svensen's has a good fraud claim against Retha. By providing a fake check, she was making a material misrepresentation to Svensen's. There is scienter because the check was a carefully constructed counterfeit for a non-existent bank. It's manifest that she intended to induce reliance by presenting it to Niko, and Niko actually relied on the check. His reliance seems justifiable under the circumstances, although arguably he shouldn't have been duped because he knew to be careful with personal checks. Finally, Svensen's suffered damages -- losing the skis that were worth \$550.

Unfortunately for Niko, Svensen's won't succeed in getting the skis back from Willa's Wintersport. Retha had voidable title to the skis since Svensen's voluntarily parted with possession of them, despite the fraudulent circumstances. Thus, Retha was capable of passing good title to Willa's Wintersport, since the store purchased the skis in good faith (they didn't know about the swindle of Svensen's) and paid value (\$400) for them.

The second issue is Hallgeir Hirkholt's skis.

The skis belong to Tristan Tindarsson, and there are no valid claims against him. Under 2-403(2) Hallgeir's entrusting of the skis to a merchant of goods of the kind (which Svensen's is, since it's a ski shop), gave Svensen's the power to pass all of Hallgeir's rights to a buyer in the ordinary course of business. Tristan was such a buyer as he was a regular customer making a normal purchase. Thus, Tristan now has the title to the skis that Hallgeir had formerly.

SUBPART D -- JIMMY JIMJAM'S JUNGLE JUMP

This deal is governed by the UCC. It's arguably a mixed goods/real-estate contract, but to the extent copper is fixed to the realty, it's nonetheless within the scope of the UCC per 2-107(1) because copper in fixtures is to be severed by the seller, the MegaMall, per the contract.

We need to figure out what the contract means by "all the copper in the old Jimmy JimJam's Jungle Jump." We start by looking within the four corners of the document to discern the parties' intent. Ingrid Itenfeldt's preferred interpretation that this does not include brass and does not include copper in the walls, stairwells, and elevator shafts. Elmer Ervin at Duckworth-Dunn's preferred interpretation is that it does include these. Both are reasonable interpretations -- therefore, the provision is ambiguous. Nothing else in the writing suggests an answer. Therefore, we look

outside the writing and look to oral testimony. The contract has a merger clause and is likely a fully integrated document, but the parol evidence rule doesn't bar the testimony because neither party is seeking to add to or modify the terms -- only to interpret them.

I would conclude that the copper in the walls, stairwells, and elevator shafts should be excluded from the contract. The best evidence of intent in this regard comes from the parties. Ingrid will testify on behalf of the MegaMall that she never intended to include this copper. Based on what Elmer said, neither did he on behalf of Duckworth-Dunn. Thus, Ingrid's interpretation should prevail.

As for the brass, I would conclude that the brass should be included. Ingrid subjectively intended not to include the brass. Elmer did. But objectively manifested intent controls over subjective intent. Since "copper" in the usage of the relevant trade appears to include brass, I would say the objectively expressed intent is best understood to include the brass.

While MegaMall could attempt to avoid delivery based on commercial impracticability, that claim should fail. While regulatory changes may be a valid basis for impracticality, MegaMall's ability to deliver on their promise has not been affected -- it's just that it's turned out to be a bad deal. Commercial impracticability is not intended to avoid contracts made unprofitable by the rise and fall of the market.