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522

Contracts
Semester I, Fall, 2003

UNM School of Law
Final Examination
Three Credits
Professors Martin and Hart

Monday, Dec.15, 2003
1:30 PM to 4:30 PM

INSTRUCTIONS

1. You have a total of 3 hours to answer this examination. There are four questions on this examination. You should spend about an **hour on each of the first two questions**, your answers to which will constitute 2/3 of your grade and **about 30 minutes on each of the last two question**, your answers to which will each constitute 1/6 of your grade.
2. This is a **MODIFIED OPEN BOOK EXAMINATION**. You may bring to the examination a copy of any materials that we have distributed in class, and any notes or outlines that you have prepared yourself or in conjunction with others in the class.
YOU MAY NOT USE ANY OTHER MATERIALS DURING THE EXAMINATION SUCH AS BOOKS FROM THE LIBRARY, BOOKS THAT YOU HAVE PURCHASED, COMMERCIAL OUTLINES OR OUTLINES PREPARED BY OTHERS.
3. We will not answer any questions about the examination while you are taking it. Hence, if there are typographical or substantive errors, you must work with them. Simply point them out and write your answer in the context of the error.
4. Your answers should be based on the material we studied during the course.

GOOD LUCK!

QUESTION :(1 hour)

Joanna Noslrac is an opera singer of some note in the southwest and rocky mountain area. She is a regular guest performer for opera companies in New Mexico, Colorado, Texas, Arizona and Utah, and has more offers to perform than she wishes to accept.

Ignatius Trah (generally known as Iggy) is a wealthy man, having inherited a sizeable fortune from his parents. He does not have a regular job, but as a hobby he promotes musical events in Albuquerque. In spite of his wealth, he is adamant about making a profit on each event.

On June 1, Iggy and Joanna were at a social gathering following her performance in the Merry Widow. Iggy told Joanna that he was considering staging his first opera that fall, and that he had tentatively decided that it would be La Boheme. She told him that she had always wanted to play Mimi, the female lead in that opera. Iggy asked her if she would be interested in singing in his opera that fall and she said that she would. He asked her what her normal fee was and she said \$5,000 per performance. He said that he was thinking of having three performances and she said, "Well, my fee would be a total of \$15,000." He said "That seems high, but I will try to work it into the numbers."

On July 1, Iggy called Joanna and asked if she would be available to sing during the weekend of December 5 with rehearsals to start on November 15. After consulting her schedule, she said that she was available. He said, "Good. Let me see if I can get Popejoy Hall for that weekend. Would it be OK if we rehearsed at the Sunshine Theater?" She said that would be fine. He also asked whether it would be all right with her if they did the opera in English rather than the original French. She said, "Yes, but you will have to get me the musical score in English, and I also would like to have a recording of the English performance that was done by the Philadelphia Opera Company last November." He said that he would get her both.

Iggy obtained the musical score at a cost of \$250. There was no recording of the Philadelphia Opera Company performance for sale, but they had privately recorded it. The Philadelphia Company was reluctant to share the recording with him, but finally agreed to do it for \$3,000. He delivered the score and recording to Joanna on August 2. At that time, he told her that he had figured the costs of producing the opera and that he was worried that he would not make a profit if he paid her \$15,000. She told him that was too bad, but that she would not reduce her fee. He said, "What about a guarantee of \$5,000 plus 1% of the gross. I expect to sell a total of 6000 tickets for the three performances at \$20 a piece. That's a gross

of \$120,000. At 1% you would make an additional \$12,000, or a total of \$17,000 which would give you more than the \$15,000 you want.”

Joanna said, “That sounds fair, but I want to think about it. I’ve always just gotten a flat fee in the past. I really want to play the part of Mimi, but I don’t know about gambling on your selling that many tickets. Actually, I think I’ll take it, I’ll call you if there is any problem.” The next day, unknown to Iggy, Joanna left for Europe where she was going to spend two months singing in a few operas and vacationing.

On September 1, Iggy called Joanna. He got her answering machine and left the following message: “Hi Joanna. We’re all set. I rented the Sunshine Theater from November 15th through November 30th. We have Popejoy for December 1st for a dress rehearsal, and for the weekend. I’ve also hired an artist to prepare a brochure that we will be sending out. I think that I have to promote the opera widely because there aren’t many opera performance in Albuquerque and we have to get a good crowd to pay the expenses. We will, of course, feature you as your name will be the primary draw. By the way, the Albuquerque Opera Company will be producing the show, and they will be choosing the other performers. Give me a call if you have any questions.”

When Joanna returned to Albuquerque on October, Iggy’s message was on her machine along with three others from him asking that she call. There was also a contract in her stack of mail signed by Iggy and with a place for her signature. It was the usual form contract used when a guest performer was being hired, except that Iggy had crossed out a provision that payment was to be made within a week after the performance and written in “within 60 days.” Joanna signed the agreement after changing the 60 days to 15 days and put it on her desk intending to send it to Iggy.

That afternoon, she received a call from the casting director of the New York Metropolitan Opera asking if she would take a minor role in a new opera being put on by the Met during the weekend of December 5th. It was only a small part, and the pay was only \$6,000 for three performances. However, since it would give her exposure on the East coast and enhance her career, she accepted. She then called Iggy and told him that she was unavailable to sign the Mimi role. He was incensed, and told her that they had a contract and that he would ruin her professionally. He also said that he would sue her.

Iggy attempted to obtain a replacement for Joanna, but none of the women he called would agree to perform. After exhausting his list of potential replacements, he decided to cancel the opera. By that time, Iggy had paid the artist who designed the brochure \$5,000, had printed brochures at a cost of \$10,000,

owed Popejoy Hall \$5,000 and the Sunshine theater \$2,000 for canceling, and the Albuquerque Opera Company \$7,000 for not using their services.

Advance sales of the tickets had gone very well, better than he expected. Since he had sold 1500 tickets at an average price of \$20, he had to refund \$30,000. In addition, Intel Corporation had agreed to sponsor the Friday night performance and to contribute \$5,000.

Iggy comes to you and asks that you represent him. He wants to know how much, if any, money he is likely to recover if he sues Joanna. Advise him, stating in detail your reasoning.

5,000	brochure artist
10,000	brochure print
5,000	Popejoy
2,000	Sunshine
7,000	ABQ Op
<hr/>	
29,000	
250	- 5000
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32,250	

II. QUESTION 2: (1 hour)

In September of 2003, after graduating from Wisconsin Law School and taking the Wisconsin Bar, Hillary Edmundshire fulfilled a lifelong dream and set off on a three-month mountaineering trip to Tanzania. Her goal was to climb Mount Kilimanjaro, which is 19,100 feet tall and the highest mountain in Africa. After flying into Dar es Salaam airport and traveling by bus to Arusha in Northern Tanzania, David Kamanga, the local manager of Tropical Mountain Treks, met her at the Serengeti Hotel, a tour company she had found on the Internet. Hillary and David had corresponded by email over the previous month about the possibility of his organizing a hiking trip for her in Kilimanjaro National Park.

Over a cup of Kenyan tea, they agree on the terms of an agreement whereby Hillary will pay David for a week-long trek, including one night in a hotel in Moshi (near the outskirts of the park) on either end of the journey, and four or five days of hiking and climbing. The price includes the services of a guide, park entrance fees and essential cold-weather gear, including a tent, a sleeping bag, hat and mittens, all suitable for sub-zero nighttime temperatures. The only details remaining are the exact cost, the route to take and the number of nights en route. Most of David's customers take the Marangu Trail, which approaches the famous Uhuru Peak more gradually from the western Shia Plateau, and takes five days. David normally charges \$1000 for a four to five day trek.

Hillary makes it very clear that she wants to summit Mount Kilimanjaro. "It's worth paying more money for me to reach the top of Uhuru Peak," she declares. "I've hiked ten mountains over 13,000 feet in the United States, and I want to get to the top of that mountain." "No problem," responds David. "You are an experienced climber. I'll still charge my regular price of \$1000. But if you take five days to summit instead of four, your body can adjust to the altitude and you should have no problem. That's why I recommend the Marangu Route," concluded David. "That sounds good, but maybe I should take six days," she says. "I think that's more time than you need," David reassures her. "If you take Marangu with my best guide Bonaventure Peter, I guarantee you'll reach the top of Uhuru Peak," he concludes. "We have a deal!" Hillary exclaims, vigorously shaking David's hand.

Two days later, a Sunday, Hillary takes a taxi to Moshi, stays at the Shadow of Kili Hotel, and arises in the morning Monday to meet Bonaventure for breakfast in the hotel dining room. The night before, Hillary was reading her mountaineering guidebook, and learned that there is an alternate route that diverges from Marangu before the summit, which takes an extra day of climbing, and adds a 3000 foot descent and ascent to an otherwise more gradual climb. She has read that the extra day of climbing can help the body to acclimatize and guard

against headaches associated with altitude sickness. After meeting Bonaventure, Hillary proposes the alternate route, but Bon objects, "David and I agreed on Marangu, and he's paying me \$300 for the five night trek." Undeterred, Hillary bargains, "I'll pay you an extra \$200 if you take me up Mweka Trail." Painfully aware that the \$200 will cover his daughter's unpaid school fees for the current term, Bonaventure reluctantly agrees.

The trek begins on a bright sunny Monday morning, and Hillary and Bonaventure's climb proceeds without incident through rainforest, savannah, and high desert terrains until the third day. On Wednesday afternoon, just as the porters are making camp, snow flurries begin to fall. By Thursday morning there are ten inches of snow on the 15,000-foot plateau, with precipitation continuing to come down. This was the day Bonaventure and Hillary planned to diverge from Marangu to the Mweka Trail. The route should take them down to 12,000 feet by Thursday night, up to 15,000 again by Friday and then an early morning summit of Uhuru peak on Saturday, followed by a quick descent to the park gate, with only one remaining night en route.

Hillary and Bonaventure and their porters make slow progress along Mweka Trail toward their next campsite in the falling snow, and arrive barely before dusk on Thursday evening. Bonaventure is worried about continuing, given the poor weather, and Hillary's increasing complaints of headaches, despite their having descended to a lower altitude since the morning. Also worrisome, their food supply is dwindling. The stock provided by David was calculated to last six nights, but Hillary's appetite is voracious.

On Friday morning, the snow has stopped falling, but the trail is icy. Bonaventure radios David for advice, and David tells him not to attempt the summit. Hillary is furious, and threatens not to pay Bonaventure his \$200 premium. Bon calmly replies, "We're descending today." Hillary is angry, but not foolish. As they descend, her headaches abate, and they arrive at the park gate on Saturday afternoon, the date Hillary had originally scheduled with David.

Hillary skips town without paying David his \$1000 or Bonaventure the \$200 premium. When David learns that Bon took Hillary on the Mweka diversion route without permission, he withholds his \$300 salary for the trek, although he retains him as a guide for prospective trips. Nevertheless, Bon's daughter Katia is disenrolled from secondary school – just as she is about to take her "A level" entrance exams for public university – for nonpayment of outstanding fees.

Hillary returns to the United States and begins her first law job with the Madison Legal Aid Society in October. Unbeknownst to her, at about the same time, Bonaventure and David, fly to Milwaukee to attend a management-training

seminar for TMT's worldwide field staff. They pursue Hillary to Madison, and sue her in state court for breach of contract and related claims. (Assume no problems with jurisdiction, given that the business losses suffered have a connection to Wisconsin. Apply U.S. common law contract rules as if the trek had taken place in Wisconsin.)

1. David sues Hillary for breach of contract. What is the basis for his claim? What defenses or counterclaims can Hillary raise? What damages is David likely to seek and receive? What offset could Hillary seek, if any?
2. Bonaventure sues Hillary for breach of contract. What is the basis for his claim? What defenses or counterclaims can Hillary raise? What damages is Bon likely to seek and receive, if any?

Bon sues David for breach of contract. Describe his claim, and any defenses David can raise, as well as the damages Bon is likely to seek and win, if any.

These last two are short answer questions. Please just answer the questions and briefly explain your rationale.

III. QUESTION 3:(30 minutes)

Johnny Carson and his friend Jay were up watching the shopping network one night when a great idea occurred to them. They decided to create an elaborate hoax in which they would make a funny infomercial to pop into their friend David's VCR as a joke. They made the commercial, which purported to sell an elaborate toy, as real as they possibly could. The commercial featured an enormous toy house in which children could sit and play. Once assembled, toys from every manufacturer imaginable got up and danced, sang and interacted with one another. The infomercial was funny and entertaining. Hundreds of popular toys hung from the walls, more than any one child would ever have. The infomercial featured David's own business 1-888 number and urged shoppers to "call now."

When Johnny and Jay slipped the tape in at David's house, David watched and became hysterical. All three thought it was so funny that they decided to sell the infomercial to a late-night shopping channel, for a single run.

Alice, a late-night T.V, watch, was up one night with her sick 5-year-old, Meg. They saw the ad together and Meg insisted on having the toy. It did seem like a pretty good deal, at \$69.99 so Alice called the next day with her credit card number. David was taken back by the call, having forgotten about the infomercial weeks before. He started to tell her it was a joke, but was getting such a kick out of her interest that he let her give him her credit card number. He then hung up. He did not write down the credit card number, get her card expiration date, or ask for her address.

When Alice didn't receive the toy house in the mail, she became panicked about giving out her credit card number. Her daughter has also been crying her eyes out. Alice has traced the call to David, Jay and Johnny, and is suing them for breach of contract. Do you think they have made an enforceable promise? Did Alice ever accept the promise or offer? Did she give any consideration for the promise, thus forming an enforceable contract? If so, are there any recoverable damages?

IV. QUESTION 4: (30 minutes)

The UNM School of Law recently hired Jose's Electrical Connection to lay and rework 200,000 square feet of wiring in the old part of the law school. The contract was drafted by one of the Contracts professors, and provided "assuming that existing electrical systems are in good and working order, Jose's shall be paid \$100,000 for the approximately 200,000 square feet of wiring to be completed under this contract." Jose's normally charges around \$1.00 per square foot of wiring when working on old buildings, but this job looked easier than usual. Additionally, Jose's knew the law school was doing a lot of work and hoped to get more of it in the future.

Early in the job Jose's noticed that mice had chewed away much of the existing system. Moreover, huge amounts of disintegrated insulation in between the roof and the ceiling made it almost impossible for the workers to work. Three months in to the contract, having expended almost all of the \$80,000 in materials and labor that Jose's thought it would take to complete the job, Jose's had completed only one-half of the contract work.

Jose's tried to renegotiate the contract. When the law school refused, Jose's walked off the job. Jose's had been paid nothing. It cost the law school \$100,000 to finish the job through another contractor.

Based on the little you know, who breached the contract? To what damages might that party be entitled, under a contracts analysis as well as an unjust enrichment analysis, if applicable?

Now assume that the other party breached. To what damages might that party be entitled, under a contracts analysis as well as an unjust enrichment analysis, if applicable?

A

148
140
138
72

498

1.

The primary issue in this case is whether Iggy had a contract with Joanna for her to perform in his opera. A contract is a promise that the law will enforce, and a promise is a manifestation of intent to act or refrain from acting, so made as to justify the promisee to understand that a commitment has been made.

There are different ways to establish whether a promise was made. We can consider first by objective and subjective test. Using the objective test, would a reasonable person considering the facts believe that Iggy made a promise to Joanna? Using the subjective test, did the parties involved believe that Iggy made such a promise? The answer to both of these is probably yes. Iggy inquired about Joanna's fee, set up a place to rehearse, spent money toward the end of producing the opera, etc., all facts which would lead Iggy, Joanna, or a reasonable third person to conclude that Iggy made a promise to produce La Boheme with Joanna in the lead. Alternatively, we can apply the Bargain Principle to determine whether a promise was made. This involves finding that there was an agreement plus consideration. The facts seem to indicate that Iggy agreed to produce Joanna's opera, and there is definitely consideration, in the form of Iggy's outlays of money in the furtherance of that goal. Either way, it seems there was a promise by Iggy to produce the opera.

Next we must determine whether the communication between Iggy and Joanna constitutes a contract. A contract is offer, acceptance, and consideration. Let's look at each.

An offer is a communication that reasonably leads another to believe that he can conclude a contract. Some of the communications Iggy made to Joanna were probably

just invitations to deal, such as asking her if she would be interested in performing in his opera, how much she charged, and the like. Communications that would lead Joanna to believe that Iggy was offering a contract might include haggling over the price of her performance, and it would definitely include the contract that he mailed to her house. Where the offer actually took place is not clear, however an offer definitely took place between the time Iggy and Joanna met at the party and the time she received the contract in the mail from him.

Acceptance is an offeree's assent to the terms of the offer in the manner required by the offeror. In this case, some of the communications that were possibly offers came in the form of oral communication and one came in the form of a contract sent by mail. In regard to the oral communications

1. If Iggy's dickering over the price and presenting her with a fee + percentage is considered an offer, and her response was "I don't know..." and then "Actually, I think I'll take it. I'll call you if there is any problem." *If* Iggy's proposal was an offer, Joanna's response sounds like acceptance. Iggy's proposal might not be an offer however because it is indefinite, that is, there are still a lot of details to be worked out. Furthermore, his proposal is erroneous; 1% of \$120,000 is \$1,200, not \$12,000. This misrepresentation only adds to the lack of clarity of his proposal.
2. If Iggy's contract is an offer, and it certainly seems to be, her response was to change the terms and sign it, but not mail it back to Iggy. First, changing the terms of an offer while responding to that offer is a

counter-offer, which generally is a rejection of the original offer, which is replaced by this new counter-offer. (See Ardente) Even if this new offer *was* a response, she delivered it to her desk, not via the mail, which would be the standard method required by Iggy's method of issuing the original offer. By looking at these facts, it appears there was no acceptance.

If such facts *did* indicate acceptance, there would have to be consideration.

Consideration is legal detriment that is suffered by the promisee in regard to the promise and that is bargained for. If there was offer/acceptance in Iggy and Joanna's phone conversation, it was a bilateral agreement, meaning that Iggy promised in return for Joanna's promise. In a bilateral agreement, a promise in return is generally considered sufficient consideration for an original promise. Therefore Joanna's statements are probably sufficient to find consideration.

Taken in the aggregate, it looks bleak for Iggy to find that he had a contract with Joanna. However, his prospects look more promising if he were to sue her off the contract in Promissory Estoppel (PE).

In PE, the promisor essentially acknowledges the dearth of a contract but seeks damages on the basis that she made a promise that he reasonably expected to induce reliance, the other party reasonably relies on that promise, and the only means of avoiding injustice is to enforce the promise. We established above that Joanna's statement to the effect that she would "take it" was sufficient as a promise. In making this promise to Iggy, an events promoter, she should have reasonably expected to induce Iggy to rely on that promise. And Iggy did rely on that promise, as illustrated by the \$32,250

Exam ID: 522
Course: Contracts
Professor Name: Fred Hart
Exam Date: Monday, December 15, 2003

he spent on promotion and requested materials by Joanna. Alternatively, it could be argued that Joanna's words did *not* amount to a promise, in which case Iggy would have difficulty collecting on a PE claim

If Iggy were successful in his PE claim, he would be due some sort of damages. Courts are given discretion when assigning damages in PE cases, but they generally restrict a PE plaintiff to reliance damages. In this regard, Iggy spent \$29,000 in getting brochures designed and printed, getting performance and rehearsal spaces, and getting the opera company on board, all in reliance on Joanna's promise to "take it." He could also get the \$3,250 spent on the score and the Philly Opera recording. If a court were to allow expectancy damages, the burden would be on Iggy to prove that he was sure to get a certain amount of profit on his venture. He would be allowed to recover profit on the venture, less the \$32,250 spent in preparation and materials

2.

David sues Hillary for breach of contract..

David would first want to establish that he and Hillary had a contract. A contract is a promise that the law will enforce, and a promise is a manifestation of intent to act or refrain from acting, so made as to justify the promisee to understand that a commitment has been made. By the objective test, a reasonable person would conclude that Hillary made a promise to pay David \$1,000 for guide services and equipment for her trip. By the subjective test, David, and probably Hillary, too, would conclude a promise, also.

A contract is made up of offer, acceptance and consideration.

An offer is a communication that reasonably leads another to believe that he can conclude a contract. Here, the terms of the agreement were all agreed to beforehand, except price. The offer was David's, that he would extend his services to Hillary for \$1,000, and that Hillary could conclude that a contract existed.

Acceptance is an offeree's assent to the terms of the offer in the manner required by the offeror. Here, Hillary seems to have accepted David's offer. She exclaims "We have a deal" and shakes his hand. The substance of the offer she accepted may be a little bit vague, but the general idea is that he would give her the use of his guide and all the equipment for a trip up Mount Kilimanjaro (Marangu trail). Her acceptance of this offer seems clear.

Consideration, generally, is legal detriment that is suffered by the promisee in regard to the promise and that is bargained for. Alternatively, however, a promise in return for a promise, in a bilateral agreement, is considered to be sufficient or consideration. Here we have David's promise to perform in return for Hillary's promise to pay.

David, having established that he and Hillary had a contract, will contend that he performed and she breached. He would seek expectancy damages which would include

Exam ID: 522
Course: Contracts
Professor Name: Fred Hart
Exam Date: Monday, December 15, 2003

loss of the \$1,000 (restitution) plus any further profit loss from the breach and any incidental and consequential damages, such as tracking Hillary down in Wisconsin to sue her.

Hillary could counter-sue for breach of contract. Using the same analysis, *supra*, to determine that the two had a contract, she would contend that David's language ("guarantee") indicated that he would get her to the top of the mountain. Thus, she would contend, he breached before her alleged breach. David would counter that the guarantee in question had her going up Marangu trail, and she chose to deviate and persuaded the guide to aid her.

Hillary might have a secondary breach of contract claim, in that David is supposed to be an expert at organizing ascents up the mountain, that she told him she wanted to take as long as six days, and she had to find a suitable six-day route on her own.

2. Bon sues Hillary for breach of contract.

(See analysis of promise and contract, *supra*.) Bon would argue that Hillary offered to pay him \$200 to lead her up Mweka trail. He accepted, and promised to do so, establishing consideration on a bilateral agreement. He performed, insofar as taking her up the trail, and she breached by not paying him.

If Hillary contends that there was no contract, as she might, Bon could sue her under a theory of promissory estoppel (PE). In PE, the promisor essentially acknowledges the dearth of a contract but seeks damages on the basis that he made a promise that he reasonably expected to induce reliance, the other party reasonably relies on that promise, and the only means of avoiding injustice is to enforce the promise. Applied to the facts,

Exam ID: 522
Course: Contracts
Professor Name: Fred Hart
Exam Date: Monday, December 15, 2003

Hillary made a promise of \$200 if Bon took her up the trail she wanted, Bon reasonably relied on that promise by deviating from their planned route, and her paying him the \$200 is the only way to avoid injustice.

Hillary might contend that there is some sort of frustration of purpose brought on by the inclement weather. To successfully make such a claim, she would have to show that the change in the weather was unforeseeable. It is doubtful that such an argument would be very strong, however. She might also contend that her promise to pay Bon \$200 was for the full ascent that she sought. There is nothing in the facts to support this, however, and she should not assume that any agreement she had with *David* to get to the top of the mountain should be transferred onto Bon; David and Bon are separate parties in separate contracts

Under PE claim, if successful, Bon would likely get restitution damages, \$200. If he were successful under breach of contract, however, he might also get to recover the \$300 that he was not paid by David. Other possible damages might include costs incurred in getting his daughter back into school or lost future income on her behalf (as a third-party), but these would likely be considered too remote for recovery.

3. Bon sues David for breach of contract.

(See promise/contract rules, *supra*.) Bon and David had an agreement whereby Bon would guide Hillary up the mountain and David would pay Bon \$300. David would likely claim that Bon breached before David's alleged breach, in that the agreement included a provision that Bon guide Hillary up Marangu, and Bon deviated, therefore David owes him nothing. David might also raise a divisibility partial defense, whereby he

contends that Hillary took on some of the cost of Bon's services to take an alternate route; under this argument, Hillary paid \$200 of Bon's fee, so David would owe just \$100.

A contract seems to have certainly to have existed between Bon and David. If Bon is successful in a breach of contract claim, he will likely sue for expectancy damages, which would be the \$300 from reliance damages plus any damages he could claim by missing his daughter's school payment when he was not paid. Such damages regarding Bon's daughter as a third party might be more foreseeable and less remote for David as a defendant.

3.

A contract is a promise that the law will enforce, and a promise is offer, acceptance, and consideration. For Alice to sue under breach of contract, she would first have to find promise. In this situation, it might be something like: the manufacturers promise to send

you this toy house for \$69.99. Maybe this is a promise, but likely not. Assuming that it is, Alice would also have to determine that there was offer, acceptance and consideration for any contract by her to buy the toy house. Advertisements are generally not promises, but invitations to bargain. But courts have determined that some ads in certain situations are limited enough to be considered promises (see Lefkowitz). This ad doesn't seem to stack up to the Lefkowitz standard, but if a court decided that it was an offer, Alice seems to have accepted by calling the number and ordering the toy. There may have been consideration, if Alice's calling a stranger and giving him her credit card information can be considered a legal detriment that she bargained for.

If she were successful up until this point, it's not likely that she would recover anything. If she seeks expectation damages, she would want the fair market value of a magic house with dancing, interacting toys. (I don't know of any precedent on this point, but putting a fair value on a fictitious object is probably impossible.) She could seek reliance damages, but she would have to show that she somehow relied on the delivery of the toy house and suffered damages as a result. It would be fruitless to seek any restitution, because she wasn't out any money toward the purchase of the toy house.

But probably her claim would not ever make it that far because there was no mutuality of assent. If a promise is a manifestation of intent, and the ad was a promise, what was the promise for? The producers of the ad did not intend to do anything but give their friend a chuckle.

If I were representing Alice, I would probably recommend a tort claim instead.

Exam ID: 522
Course: Contracts
Professor Name: Fred Hart
Exam Date: Monday, December 15, 2003

4.

The lack of clarity in the contract presents a difficulty in determining which party breached the contract. If the wording “assuming that existing electrical systems are in good and working order” constitutes a provision for the contractor to increase his cost according to the condition of the wiring in the old wing, it seems that the law school

Exam ID: 522
Course: Contracts
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Exam Date: Monday, December 15, 2003

breached the contract. However, if this wording does not indicate such a provision – and my faith in the law school’s wise Contracts professors is such that I don’t believe they would blithely contract away the school’s prerogative to set a price on a contract – it seems that Jose’s breached.

If Jose’s breached: Jose’s would not be able to make any breach of contract claim, since it was the breaching party. The company could sue under an Unjust Enrichment (UE) claim, however. UE establishes that there was a benefit from the defendant conferred to the plaintiff and that it would be unjust for the defendant to retain the benefit. Here, Jose’s would claim that it conferred \$80,000 worth of labor and materials to the law school, and it is unjust for the law school to keep that benefit. The law school had to pay another contractor \$100,000 to finish the job, but the school’s lawyers could not claim as a defense that this amount was paid as a result of a breach, because Jose’s is suing off the contract under UE.

The law school would probably not want to pursue a breach of contract claim against Jose’s because it could recover no damages. It contracted to have the work done for \$100,000; the work was performed by another contractor for \$100,000; the expectancy damages are zero. The only way a breach of contract claim could be fortuitous would be to show that the school suffered some sort of recoverable loss based on the fact that it had to change contractors (late finishing of the work, for example).

If the law school breached: As mentioned above, the law school’s breach would have to be based on a notion that the cost of the wiring job was to remain flexible, based on the condition of the wiring in the old wing. Jose’s could sue for expectancy damages, which would be the profit (Jose’s bears the burden of proof) from the job plus the fair market

Exam ID: 522
Course: Contracts
Professor Name: Fred Hart
Exam Date: Monday, December 15, 2003

value of the labor and materials put into the job already. The profit would probably include some indication of the condition of the wiring in the law school, and the fair market value to replace it. If there was no economic waste in switching contractors, the fair market value of the replacement of the wiring in the law school would be \$180,000. Jose's, in seeking expectancy damages, could include the profit it expected to gain from such a job.

Since the law school breached and since it paid nothing more to the second contractor than it would have under the original contract with Jose's, the school does not seem to have any cause of action under which recovery could be granted.