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Memo on Contracts Midterm Fall 2013

Reading the questions carefully is important. Answer the questions asked. If the question asks what claims HM can bring against FFF do not write about what claims FFF might bring against HM. Try to identify the issue specifically (e.g., "the issue is whether the document whereby Anna would be obliged to pay $1000 to FFF is a binding contract" rather than "the issue is whether Anna must pay $1000 to FFF). If you try to describe rules ambiguously in the hope I will think you understand, be aware that I will not necessarily give you the benefit of the doubt. Spell out the details of your analysis - it needs to be on the paper, not in your head. I can read what you put down on the paper but not what is in your head. Don't be afraid of spelling out the analytical steps in great detail. But you don't need to describe the facts of cases in great detail unless the details of the facts are important for your analysis. The facts in the question about Anna's ill close relative are somewhat similar to the facts of *Kirksey v Kirksey*, although there looks to be more of a contractual promise than was the case there. However, I did not ask you to discuss this issue.

1. Will Anna have to pay the amount of $1000 to FFF? What arguments can Anna make that she should not be required to make this payment to FFF?

In contrast to most of FFF's employees (who are at-will employees), Anna has a written contract of employment "(signed the day before Anna began to work for FFF) which specifies that either Anna or FFF can terminate her employment on three months' notice." The question states that the document which requires employees to refund training costs of $1000 if they leave FFF during their first six months of employment is presented to employees during their first week of work. The document therefore raises a similar issue to that in *Lake Land Employment Group v Columber*, (CB p 62: in employment at will either employee or employer may propose to change the terms of their employment relationship at any time). We do not know whether Arcadia follows this approach (Texas has a different approach, which we discussed briefly in the context of the problem based on Vanegas v American Energy Services, CB p. 67-8) but in any case, Anna's situation may be different as she is not an at-will employee. FFF's forbearance from terminating her cannot be consideration for her promise to repay training costs (and the facts give no indication that FFF might have given Anna three months' notice had she not signed the document, which would be an act analogous to termination of an at will employee).

The facts in the question do not suggest any consideration given by Anna for this new obligation. If there were new consideration the obligation to repay training costs could be binding on Anna and if there were not it should not be binding on her. As well as identifying any lack of consideration Anna could also argue that the notice requirement adequately protects FFF because it gives FFF time to look for a replacement for her, that the $1000 undermines the value to her of her right to leave on giving 3 months' notice, that she did not in fact receive any training, and that trying to recover the $1000 from her in these circumstances is a breach of FFF's duty of good faith and not a good example of Joe's motto about them all being family and looking after each other. This motto probably isn't definite enough to constitute a contractual warranty (*cf. Hawkins v McGee*, *Sullivan v O'Connor*), and is different from the sort of provisions in employee handbooks that can be the basis for implied-in-fact contract rights, such as rights to disciplinary procedures.

So, even if the document is treated as a valid contract, Anna has some arguments that she should not have to pay the $1000. If it is not a valid contract because of the lack of consideration and FFF seeks to argue that it should have a remedy against Anna under a promissory estoppel theory (Restatement 2d. § 90) these factors would help Anna to argue that a remedy for FFF would not be necessary to prevent injustice.

Some answers stated that the promise to repay the $1000 was not supported by consideration because FFF did not provide any training. But it seems as though FFF must have promised to provide training - at least by implication from the idea of repayment of training costs. The failure to provide promised training would therefore be a <u>breach</u> of the contract.

2. Joe decides that the arrangement with HM is so good that he would like to sell even more produce to HM and he arranges with his brother, Dennis, who has an organic farm in the neighboring US state of Ruritania that Dennis will supply FFF with additional produce that FFF can supply to HM. HM discovers that the produce FFF is supplying is not all Arcadian produce. What claims can HM bring against FFF?

Questions 2 and 3 are both based on FFF's relationship with HM, although the two questions focus on different aspects of this relationship. FFF has been selling produce to HM, initially under a five year contract which has now expired, although FFF has continued to sell the produce to HM and they have been negotiating a new contract. Even if there is no new long term contract in effect each sale of produce from FFF to HM involves a contract (sale of produce for money), and these contracts are subject to the UCC as sales of movable goods (UCC § 2-105).

If HM is dissatisfied with the produce from Ruritania, HM might want to sue FFF for damages (as to damages we read *US Naval Institute v Charter Communications*, CB p. 10). What HM has lost because of FFF's behavior could be the difference between what HM paid for the produce it received and the price it would have paid for FFF's output (a remedy focusing on the quantity of goods bought and sold). Alternatively it could focus on the idea that it agreed to buy FFF's Arcadian produce and received non-FFF Ruritanian produce and seek a remedy based on the difference in value between what it thought it was getting and what it actually got (a remedy focusing on the quality of goods bought and sold). I don't think that we have read enough about remedies for me to expect you to identify the possibilities for damages in any detail, but the two provisions of the UCC provided with the question suggest two different claims HM could bring based on these facts. The facts might make one or other of these options more attractive. We know that FFF and HM have continued to deal with each other but are not told on exactly what terms they have been dealing.

As to the quantity issue, the original contract between FFF and HM was an output contract under UCC § 2-306 (a " term which measures the quantity by the output of the seller ... means such actual output ... as may occur in good faith"). HM thought that it was buying FFF produce grown in Arcadia, but some of the produce it was buying was in fact Ruritanian produce, and not grown by FFF: this was not FFF's output and supplying it to HM as if it were does not seem to be in good faith - FFF is supplying more produce to HM than it is growing, therefore the quantity of the supply is larger than it should have been.

As to the issue of quality, HM thought it was buying FFF's Arcadian produce but it received non-FFF Ruritanian produce. We know that the original contract was for FFF produce, and also that Joe has a motto that "Fresher Family Farms grow perfect Arcadian produce." These facts suggest that there could be an issue as to whether FFF is in breach of a warranty. UCC §2-313 provides that

> "[e]xpress warranties by the seller are created as follows:
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

The produce seems to have been described as FFF produce and as Arcadian, and some of it does not conform to these descriptions or promises.

3. For the purposes of this question the facts in question 2 did not occur. If, after his conversation with Dan, Joe learns that another health food store would be willing to pay FFF higher prices for its produce than HM has been paying, can Joe enter into a contract with the new store? What claims could HM bring against FFF if FFF enters into this new contract with a different store? Is HM entitled to a remedy?

Under the facts in this question Joe would like to get out of the relationship with HM and sell to a different store for higher prices. It seems that FFF and HM have been involved in an at-will relationship since the expiry of the original contract. This would suggest that FFF could enter into the new contract with a different store. However we are told that Joe and Dan have agreed they would enter into a new contract and HM planned a new expensive advertising campaign to showcase FFF produce. If HM has incurred these advertising expenses already it would want to claim them back from FFF. In order to do so it would rely on a promissory estoppel theory under Restatement 2d. § 90, arguing that Joe made a promise which he reasonably expected would induce action or forbearance by Dan/HM and that HM's advertising expenses were the action or forbearance induced by the promise and that injustice could be avoided only by enforcement of the promise. The situation is similar to that in *D&G Stout v Bacardi*, CB p 106. Although the facts in the question address the reliance damages issue it is worth noting that courts can and do award expectation damages in promissory estoppel cases.

Some answers stated that FFF would be unable to contract with a new distributor because of this promissory estoppel possibility. But that is not correct. FFF would be able to enter into a new contract with a new distributor but it might have to pay damages to HM with respect to its promissory estoppel claim.