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CONTRACTS: NOTES ON FALL 2017 EXAM

General Comments

A couple of introductory comments about use of language and how to make legal arguments. First, a number of people used the word "therefore" in a strange way. If you use the word "therefore" the statement that comes after the word should be a consequence of the prior statement. For example: "It was cold this morning, therefore I wore a coat." Second, if you say a case is similar to the facts in the problem you should be sure that it really is similar and explain why it is similar (and also how the facts in the question are different from the facts in the case (e.g. with respect to question A1 and Plante v Jacobs). Making a statement about similarity is not legal analysis. It is conclusory and you want to aim for reasoned analysis.

Some people clearly prepared for the exam using an outline of the class from an earlier semester, If you find yourself referring to a case in the exam which we did not study during the semester you should think about whether that is likely to make sense. What that does is signal to me that you tried to take the easy way out.

SECTION A (60% of the exam grade)

1. What contract remedies do Meghan and Harry have against RCC? Does RCC have any claim against Meghan and Harry? (25 points)

The facts in the hypo relating to the relationship between Meghan and Harry (M&H) and RCC raise questions we have considered during the semester (liquidated damages/penalty provisions; possibility of non-conformity of performance to contractual obligations (Plante v Jacobs); waiver; remedies relating to construction contracts). But the context is different because here the contract specifies a schedule for completion of the work and payments. The facts given do not allow us to know whether M&H's assertion of the inadequacy of the work is justified and allows them legitimately to rescind the contract or is merely an excuse to get out of the contract even though they have no right to do so (thus breaching the contract themselves). There have clearly been some delays by RCC but the contract has a mechanism to deal with delays (the delay payments) suggesting that M&H should not be able to terminate the contract merely for RCC's breach based solely on any delay.

When we discussed Plante v Jacobs we noted that there is a difference between substantial completion of the contractual performance and a lack of such substantial completion (the facts here are different from those in Plante v Jacobs in this way and also because here the construction is based on an architect's plans rather than stock plans suggesting greater specificity about what is promised).

If M&H have the right in the circumstances to treat the contract as breached by RCC, can they behave as they say they will? ("They said that they would not pay RCC for the third portion of the work because the work was not in conformity with the plans,

and that RCC owed them delay payments for the three weeks of delay and that if the new contractor they found was more expensive than the price they had agreed to pay RCC then RCC would have to pay them the difference in price.")

M&H will have to compensate RCC for the work RCC has done. They can either claim remedies under the contract (delay payments, compensation for defective performance if appropriate and the difference between the contract price and what they would have to pay someone else to complete the work) or they can treat the contract as terminated and pay RCC for the work done based on a restitutionary measure of damages (quantum meruit or accretion of value and, if quantum meruit perhaps taking into account the fact that this was a losing contract (see, e.g., Restitution Restatement §38, although this is not the majority rule). If M&H do not have the right to terminate the contract (i.e. doing so is a breach of contract by them) they will have to compensate RCC for its work. RCC could claim damages under the contract or a restitutionary measure of damages, which might be useful as this seems to have been a losing contract for RCC.

Remedies under the contract: the delay payments may be invalid as a penalty (Lake River). In the circumstances it makes sense to see a need for a liquidated damages provision with respect to delay as it could be hard to quantify damages in these circumstances (cf. Boone Coleman Construction, inc. v. Village of Piketon noted on the blog). But there could be an issue as to reasonableness of the amount. The question gives no information to allow us to assess this issue. Even if the delay payments are a valid liquidated damages provision it seems that Harry may have waived ths provision of the contract (cf. dicta in DK Arena). If waiver occurred it applies not just to the first set of delay payments but also to subsequent delay payment claims by M&H.

With respect to the 3rd contractual payment for work done: if RCC's work does not conform to the contractual requirements then M&H may be entitled to damages with respect to the non-conformity. The facts would not seem to involve the Plante v Jacobs substantial performance rule (though we do not know whether the 5 contractual stages of work are equal).

With respect to any difference in price because of the hiring of a new contractor, if RCC has breached the contract because of the defective construction then M&H could claim from RCC the difference between the original contract price and what they will have to pay to have another contractor complete the work (note that a claim for the cost of remediating any defects would involve compensation for the defective construction and that this compensation could not be recovered twice (i.e. either a deduction from the 3rd payment or the additional cost but not both).

A number of answers cited Hadley v Baxendale and discussed consequential damages with respect to the cost of hiring a new contractor. These are direct rather than consequential damages as they are directly caused by any breach by RCC. Some answers cited De Leon v Aldrete, without explaining quite how the case applies to the facts of the question (it does not)

2. What contract claims can Meghan and Harry bring against SGC? (25 points)

The agreement between M&H and SGC appears to be an oral agreement. Although it seems that the contract will operate for more than 12 months (the garden construction work is estimated to take 12 months and then there is maintenance) it is not the sort of contract required to be in writing under the Statute of Frauds as the contract could be completed in under 12 months. If the cost of the plants is over $500 it is possible that the UCC statute of frauds requirement would come into play, although this is a mixed agreement including services as well as the plants which are moveable goods (cf. Bonebrake v Cox, predominant purpose, gravamen of the action). It is possible that there could be two contracts: one relating to the services and the other relating to moveable goods. If there is a Statute of Frauds issue here (which is likely not the case) we do know that in some states promissory estoppel can be the basis of a claim to a remedy (McIntosh v Murphy, but for a different view see DK Arena).

The complaints M&H have are that the secret garden was not secret (not in conformity with the privacy guarantee), that the plants are not all in accordance with the contractual specifications, and that SGC delayed the completion of the work to benefit from the higher construction rate rather than the lower maintenance rate. If all of these complaints were to be pursued in the context of one lawsuit it would make sense to see the overall contract as a contract for services rather than for the sale of moveable goods. We are not told anything about the price of the bean plants, however. If they were extraordinarily expensive perhaps it might make sense to see the services component as incidental. Analyzing the bean plants issue as a UCC Colonial Dodge issue only makes sense if there is a separate contract for the plants or if the sale of plants is the predominant feature of the contract. Otherwise it makes sense to see the bean plants issue as merely one of the difference between the price paid for the plants and the value given that they did not meet contractual specifications.

The first two complaints (secrecy and magic beans) relate to breaches of contractual warranties (cf Hawkins v McGee, Sullivan v O'Connor). The secrecy promises seem to be more specific than the promises relating to the beans, and the question says there is a privacy guarantee spelled out on the website. With respect to the beans, if all there is is the "magic beans" description this might not give rise to a claim at all (i.e. puffery). So comparing the facts here to those in Hawkins v McGee makes sense.

Quantifying damages could be complicated here. We know that contract damages must be able to be established with reasonable certainty and they are typically objectively quantified rather than reflecting subjective views (e.g. Plante v Jacobs, Peevyhouse). With respect to the lack of privacy one way of thinking about the damages could be the cost of remediation. This could be a more appropriate remedy here than it was in Peevyhouse. Some answers discussed specific performance, which makes sense if Colin has privacy strategies that are not known by others, although there's a problem with specific performance relating to personal services contracts (cf. Copylease for specific performance although not discussing this issue).

The third complaint, that Colin did not work quickly enough because maintenance doesn't pay as well as construction would (if there is no specific applicable contractual agreement) be a claim that he breached the implied duty of good faith and

fair dealing (cf,. Market Street Associates).

There could be a reliance damages issue here relating to the cost of the party, but M&H did hold the party- they got some of the contractual benefit (even though performance was not perfect). Even if reliance damages were possible here they would need to elect between expectation and reliance damages.

A number of answers wanted to discuss misrepresentation (which we did not cover in the course, although it may well have been included in an outline circulating from a prior year's course) or fraud. Given that what M&H want here is really what they were promised rather than to get out of the whole transaction and get their money back claims based on contractual warranties are better suited to their needs. And if they did try to use fraud/misrepresentation they would need to compensate SGC for the work on a restitution basis anyway.

3. If Colin had bought the magic bean plants from Jack rather than growing them himself, and he discovered that the bean plants did not meet the contract description after he had planted the bean plants in Meghan and Harry's garden is there any basis for thinking he could then require Jack to take back the plants and refund his money? (10 points)

This is the Colonial Dodge question and invites comparisons with the facts of the case. The beans are a moveable good and so UCC Art. 2 applies to their sale. Questions to ask are whether Colin accepted the beans and, if so, whether he later revoked his acceptance. The circumstances are different from those in Colonial Dodge: the defects in the beans are less apparent, raising questions about acceptance. There's also an issue about whether the defect in the beans substantially impairs their value to Colin. If he has incurred liability to M&H because the bean plants don't work as advertised this might be an indication of substantial impairment of value. Colonial Dodge did not help us to understand what sort of impairment of value should be treated as substantial except that it is not merely an objective financial matter, but a question of what matters to the customer. Some people noted the language in UCC s2-608 that states: "Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects." The delays suggested by the facts are quite different from the situation in Colonial Dodge and raise a question as to whether the appropriate remedy should be based on the difference between the price of the plants and their actual value rather than allowing Colin to return the plants and obtain a refund.

SECTION B (40% of the exam grade)

1. Do the materials you have read for this class suggest that contract law has any coherent view of how to deal with inequalities in bargaining position? Explain your answer with examples.

This was a new question and some people had clearly thought about it . I read some very interesting answers. There's a lot that can be said about how contract law accounts for power and inequalities of bargaining position and the cases we read offer a rather mixed view. Some cases seem to be more focused on addressing inequalities of bargaining position than others. Some people used the non-case law material effectively in their answers, either from the Casebook or, for example, the Radin article.

There's the example of duress, where the use of pressure to force someone to enter into a contract can be used to invalidate the contract. Clearly sometimes it is possible to persuade a court to recognize that a person's consent to a contract was coerced rather than free. But we read other cases where it did not seem to matter much whether a contracting party really agreed to all of the terms of a contract, or whether they had any real opportunity to negotiate the terms of a contract (e.g., Meyer v Kalanick, ProCD, Hill v Gateway, cases relating to arbitration).

In the employment context the doctrine of employment at will seems to be about not constraining employers or employees, but it does tend to benefit employers in practice, although we know that there are limits (e.g. Wagenseller). And whereas non-competes are enforceable they are subject to limits (e.g. Fullerton Lumber). Franchising is a bit like employment at will (power imbalances, sometimes redressed by courts (Hoffmann v Red Owl) sometimes not. The family cases we read sometimes seemed to address issues of power (Marvin v Marvin) sometimes not (Hewitt v Hewitt).

Anyway, there are lots of examples to be drawn from the materials. I think it makes sense though to unpack the question a bit and tackle this idea of coherence. As some people point out the cases we read were decided in different states and at different times. Why would contract law in California be the same as contract law in Illinois? The idea of a coherent view would seem to suggest an overarching idea or a particular response to facts of particular cases. There do seem to be some themes we see repeated in the cases: similar concerns surface in different state or federal courts. But the details of the rules vary. We might ask whether it is reasonable to expect any sort of coherent view, or whether it would be better if contract law were more uniform.

We did come across two examples of uniform (or somewhat uniform) approaches to contract law, in statutes rather than in case law: the UCC and the Federal Arbitration Act. Commerce seems to be seen as requiring more uniformity in the law than non-commercail contracting. But both of these examples don't really seem to deal with the issue of inequality of bargaining position very well, at least in terms of the material we studied (UCC Art. 2 does contain different rules for merchant to merchant contracting than for merchant to non-merchant contracting, for example.)

2. When courts invalidate contract provisions such as liquidated damages clauses or non-compete clauses they change the substance of the agreement between the parties in ways that undermine the idea of freedom of contract. Do you agree with this statement? With examples, explain why or why not.

This was a question much more like questions I have asked in the past than the first section B question.

Some people agreed with the statement in the prompt, and some disagreed. I think there could be arguments on both sides, and what makes a difference is how we understand the idea of freedom of contract. When we talk about freedoms we typically don't talk about freedoms as being absolute but as being subject to limits. So the question is what sort of limits are inherent in an idea of freedom of contract and what limits are not.

A remarkable (to me) number of answers to this question argued that courts should be able to evaluate contracts by reference to a criterion of fairness, and that ensuring fairness is consistent with an idea of freedom of contract, and that ensuring that contracts are fair will encourage more contracting. This is an interesting argument which contrasts, I think, with much of the material that we read during the semester. Contract law in the US has no over-arching doctrine of fairness, although fairness does come to be an issue in some cases: for example there are circumstances where the courts pay attention to ideas of justice (although justice and fairness are perhaps not quite the same) (discretionary remedies, promissory estoppel). If contract law was really concerned with fairness I think we'd see different approaches to the sort of contract formation issues raised in Meyer v Kalanick (i.e. more like Judge Rakoff and less like the 2nd Circuit).

The general idea of contract law in the US is that courts should not second guess the parties to a contract and create terms for the relationship that are different from those the parties chose. Generally, courts in the US claim to be enforcing contracts rather than rewriting them according to ideas of fairness.

I think the question asks for an assessment of the idea that the sort of invalidation of contract provisions reflected in cases relating to liquidated damages and non-compete clauses undermines freedom of contract. How can we say, as courts tend to do, that contract law respects freedom of contract when there are clearly limits on what provisions contracts may contain?

Although the question refers to liquidated damages and non-competes a good staring point might be the issue of illegality. A promise to refrain from doing an illegal act does not constitute consideration, and courts generally will be uncomfortable enforcing contracts where there is an illegality (although the casebook shows that there are some cases where the impact of the illegality is reduced). Freedom of contract does not include the freedom to enforce illegal contracts.

What we see in the cases is something between allowing all contracts (even illegal ones) and evaluating all contracts by reference to a criterion of fairness). There is some freedom of contract but it is limited. Contracting parties make contracts in the shadow of contract law. So, trying to include in contracts provisions that are inconsistent with statutes or prior case law would be problematic. My own opinion is that

when courts enforce well understood limits on contracting they are not interfering with freedom of contract in any way that is meaningful. Applying the law in surprising ways, however, is problematic (e.g. Peevyhouse; Fullerton Lumber).

I think one issue that the question raises, and that some answers addressed, is whether the terms in question are central to the contract or not. So, perhaps, if the provisions the court is invalidating are peripheral or boilerplate provisions rather than being essential terms of the deal we do not care so much. And that idea clearly is suggested by the changing the terms of the deal language in the question. But here we might think about Easterbrook in ProCD where he refers to contract provisions as being part of what is being sold to the consumer in the same way as features of the database are: it is all part of the same package. And although contracting parties may not consciously price boilerplate terms into their deals, the boilerplate, and an understanding of whether it is enforceable or not is part of the background against which pricing is determined. Liquidated damages provisions and non-competes might be boilerplate or might not. For example, in Lake River the liquidated damages provision was specifically bargained for (in contrast perhaps to examples in franchise agreements which are just imposed by the party with greater bargaining power).