Caroline Bradley Fall Semester 2019

Memo on the Contracts Midterm

My Analysis of the hypo:

1. What rules apply? This is the first question. Plastic waste is a moveable good (it's not stuck to the ground (i.e. it is moveable) and is required to be packaged in bundles which are transferred from PP to GM). The contracts in the hypo involve transfers (for payment) of the plastic waste to GM and then transfers (for payment) of the recycled plastic to GM's customers including AF. Both contracts are contracts for the sale of a moveable good and governed by UCC Art. 2 (UCC § 2-102, § 2-105).

2. Contract between PP and GM

The contract whereby PP agrees to provide plastic waste for recycling to GM is one in which, for a period of 3 years:

- PP commits to provide all of GM's needs for plastic to process using its existing 10 machines ("as much plastic waste as GM could process using GM's existing machines") (a requirements contract under UCC § 2-306(we discussed these in the context of Copylease));
- PP will receive remuneration based on GM's sales (with complicated arrangements for PP to receive fixed payments each month subject to later adjustments) (thus sales of recycled plastic by GM are included as a component of the contract between PP and GM);
- the plastic will be clean and not include single use plastic bags (a warranty); and
- the plastic will be bundled according to contract specifications to fit GM's machines (a warranty).

Breaches of contract by PP:

The bundles do not all fit in the GM machines (suggesting they do not conform to contract specifications);

GM believes some bundles may have included single use plastic bags (because they clogged the machines).

Remedies GM would like to claim:

With respect to non-conforming products GM would have a right to reject under UCC § 2-601 and § 2-602. To the extent that GM has non-conforming plastic waste that it has not yet used, GM may reject it, or, if it is to be treated as having accepted the waste should be able to revoke acceptance on the basis that the defect substantially impairs

its value to GM (UCC §2-608, Colonial Dodge v Miller).
As to the waste that GM has used, it is entitled to a remedy for damages for the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable (UCC §2-714). This should include the cost of any extra work GM incurred in fitting the waste into its machines because the bundles were the wrong size, and (if the PP waste included non-permitted waste such as single use plastic bags) damages with respect to the delay on the basis that the machines were broken for two months. (You might note the differences between the facts here and those in Hadley v Baxendale, even though UCC Art. 2 applies here —(there's a clear connection here between the contract to supply plastic and the impact on GM's machines which is very different from the situation in Hadley v Baxendale, so there's no foreseeability issue, and PP is involved in GM's recycling activities because it stands to make money from them; and there doesn't seem to be the sort of dramatic difference between the contractual benefit to PP and possible contract damages that existed in Hadley v Baxendale).
Note that the language of UCC s 2-714 does not include consequential damages, but it does provide for damages for loss resulting in the ordinary course of events from the seller's breach, which is a similar idea. PP had notice that the characteristics of the waste were important, and the whole point of the contract was to produce recycled plastic so PP and GM could both make money on the sale of that recycled plastic. There's a good argument here that GM's damages with respect to delay are direct damages or damages resulting in the ordinary course of events (cf. Biotronik v Conor Medsystems, noted in the class blog for week 5) and not damages that PP should be able to avoid paying.
These damages should include any amounts GM has to pay with respect to its own breaches of contract to firms that contracted to buy recycled plastic (such as AF) if GM was not able to avoid such damages by acquiring replacement plastic waste, and some compensation for the loss of existing customers (if GM can establish these losses with reasonable certainty, cf. Chung v Kaonohi).
However, the loss of potential customers is speculative (we don't know if GM would have been able to attract other customers without PP's breaches).

3. Contract between GM and AF

GM contracts to supply AF with a specific quantity of plastic pellets each month at a specified price for a period of 2 years for use in manufacturing AF's recycled shoes.

Breach of contract by GM:

Failure to supply AF with plastic pellets.

Damages AF would like to claim:

As AF is having difficulty selling its recycled shoes it is not clear what AF has lost through GM's failure to deliver recycled plastic. AF can invoke its buyer's remedies under UCC § 2-712 (cover) or §2-713 (market price). We don't know whether there is in fact a possibility of cover or what the market price of plastic pellets might be. In either case, AF can recover incidental or consequential damages but must deduct any expenses saved in consequence of GM's breach. It is not clear whether there are any such damages here.

AF's advertising expenses are expenses AF may want to argue it incurred in reliance on the contract and should be able to recover as consequential damages under UCC § 2-715 (2) (any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise). We don't now whether cover is possible. And it is not clear whether GM had reason to know of the advertising (especially expensive advertising). In addition, the facts suggest that AF's difficulties are not caused by GM's failure to deliver the recycled plastic but by the fact that AF has a lot of competition. The advertising did not create demand that AF is unable to meet because of GM's breach, rather the advertising did not work the way AF hoped (cf. Albert v Armstrong Rubber).

Comments on Answers

● **IF YOU DECIDE THAT UCC ART. 2 APPLIES, THEN ANALYZE THE ISSUES USING THE UCC. For example, don't tell me that GM is entitled to expectation damages. Tell me instead what provisions of the UCC might give GM a remedy and how those provisions apply to the facts of the hypothetical.** Many answers I read either did not notice that UCC Art. 2 applies here or did notice that and then went on to tell me about expectation damages.

This is a bit like being in a situation where I ask you to tell me about the offside rule in soccer and you tell me about general principles that apply to team games instead. It's not irrelevant but it is not responsive. If you do this you are not in fact answering the question.

● **In answering a hypothetical, do not fall into the temptation to rewrite the question.** It may be that describing for yourself what is going on in the problem helps you figure out how to think about it but I will give you no credit for merely rewriting the facts in the question. Using the facts in the question as a component of your analysis is a different thing entirely — this is what I would like to see you do, and you will get credit for this.

● **Try to write carefully and appropriately for the context.** Writing in an exam situation should be relatively formal, and you should try to use words as accurately as possible. A number of answers said that GM might be able to make one type of remedy claim and might "also" make another type of claim (e.g. expectation and also restitution). The word "also" suggests that the second remedy claim might be additional rather than in substitution for the first. And this is not correct. In the example given restitution might be an alternative remedy, not an additional one.

● **Avoid conclusory reasoning** (e.g. "the UCC does not apply here"). Instead, explain to me how you reach your conclusions. The applicability of UCC Art 2 here is not a complicated issue. And this is not a mixed goods/services situation so don't tell me about the predominant purpose and gravamen of the action tests.

● **If you are applying the UCC try to use the specific language of the statute.** Do not paraphrase.

● **Use your common sense.** If you are tempted to make a doctrinal argument think about whether it fits with the facts. So, if a question raises issues about remedies a buyer may seek do not tell me that the buyer is a lost volume seller. The LVS argument is an argument a seller makes to avoid a duty to mitigate damages. Just because the hypo involves recycling machines does not mean that you need to discuss Armstrong Rubber in the context of claims the recycler may make.

● **Avoid the word "assume."** Instead, write - if X is the case then ...., if X is not the

cases, then....

- If a question asks you to identify the arguments a party would or should make to achieve a particular result you should write about the question from the perspective of arguments. But sometimes, even where the question does not invite this sort of answer people like to write in terms of arguments (A will argue this, and B will argue that). I am not a fan of this style of answer, and prefer a more disciplined style of analysis (e.g. in order to succeed in a claim for damages A would have to establish X and Y; from the facts of the question it is not clear that X is the case: fact p might support X but fact q would not). If your answer is written in terms of arguments it may not be as well organized as it could be and you may end up making up "facts".
- Some people suggested GM might want to claim specific performance from PP. It's not clear to me why damages wouldn't be an adequate remedy here, and, in addition, it seems unlikely that GM would want to trust PP to provide plastic waste conforming to contract specifications when it hasn't been able to do so in the past. This is a very different type of situation from Copylease.
- Sometimes in an answer to a hypo it makes sense to refer to a case to support a proposition: The rule is A (see case B). But sometimes you want to refer to a case as an example of application of a rule. If you are doing that you should try to show how the application of the rule in the case may be affected by the facts and how the facts of the hypo may be different. In answering this question many people referred to Chung and Hadley v Baxendale. But the facts here aren't quite like the facts of either of those cases so it makes sense to point out the differences and suggest whether they might make a difference to the result.

The Question [ONE HOUR]

Green Machine (GM) has developed a new system for recycling plastics, and has built 10 recycling machines at its facility. The machines are designed to produce plastic pellets that can be used to manufacture recycled plastic products.

Peter Plastics (PP) agreed to provide GM with as much plastic waste as GM could process using GM's existing machines for a period of 3 years. In return for the supply of plastic waste, GM would pay to PP a fee of 25% of the value of GM's sales of plastic pellets. The contract provided for GM to pay a fixed dollar amount to PP each month, based on the parties' predictions about likely sales. At the end of each year GM would provide PP with a statement of its sales so that a final adjusting payment could be made. If the amount of payments PP had received during the year exceeded 25% of GM's sales, PP would refund the excess to GM. If 25% of GM's sales exceeded the payments to PP during the year then GM would make an additional payment to PP.

The contract specified that the plastic waste PP would supply to GM would be clean, and would not include single use plastic bags (because these would clog GM's machines). The plastic waste would be supplied to GM in bundles that could easily be fed in to the GM machines (the contract defined the size and other characteristics of the acceptable bundles).

For the first 6 months everything went smoothly. GM identified a number of customers for the plastic pellets, including Allfish (AF), which started to use the pellets in its new recycled shoes line. GM and AF entered into a contract for GM to supply AF with a specific quantity of plastic pellets each month at a specified price for a period of 2 years. AF discovered that sales of its shoes were really slow because there was a lot of competition in the market for shoes using recycled materials. AF therefore decided to spend a lot of money on advertising to improve its sales.

It turned out that some of the plastic waste PP supplied to GM was defective. Some of the bundles did not fit easily in the GM machines. Some other bundles clogged 5 of the GM machines (GM thinks they must have included single use plastic bags). GM's own engineers were unable to fix the machines quickly because some of the parts that were broken were hard to find. It took 2 months for GM to fix these machines, and GM breached some of its own contractual obligations to its customers as a result, including its contractual obligations to AF. Some existing customers switched to new suppliers of recycled plastic. GM is sure that it also lost potential customers as a result of the breakdown in the machines.

By the time GM failed to supply the plastic pellets to AF (in breach of contract) AF was losing money, as its advertising campaign had failed to generate enough new customers for it to cover the costs of running its factory.

Discuss the contracts law issues raised by these facts, on the basis of the course materials we have studied so far.