

**Contracts II**  
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**Sample Exam Question #11 - Model Answer**

In early July 2001, the Dean of Missy's College of Law, located in the state of Magnolia, telephoned Hilda Rodriguez, a resident of Mesquite (several hundred miles away from Magnolia), and offered her a two-year appointment as a visiting professor of law, commencing September 1, 2001 at an annual salary of \$60,000 plus certain expenses. One necessary condition of Rodriguez's employment with Missy's was that Rodriguez move to Magnolia in time to begin the Fall semester. Rodriguez (who had long desired to try her hand at law teaching) accepted, quit her lucrative private practice in South Mesquite, sold her home in South Mesquite, and moved herself, her hubby, Biff, and their adorable child, Lars, to Magnolia.

At the time she left private practice, Rodriguez was earning an annual salary of \$120,000 plus certain expenses. She and her husband sold their house for \$175,000. They had paid \$150,000 for the house three years earlier. Immediately before its sale, the house appraised for \$200,000. However, due to the urgency of the move to Magnolia, the Rodriguezes accepted the best offer they received within the time available. At the time they sold the house, the Rodriguezes owed \$125,000 on the mortgage loan. After realtors' commissions, closing costs, etc., the Rodriguezes received \$160,000 on the sale which, after paying off their mortgage loan, "netted" them \$35,000. Concerned about a negative tax outcome if they did not roll the \$35,000 into the purchase of a new home within 12 months (alas, she's not too solid on her tax law either), the Rodriguezes purchased a home in Magnolia for \$135,000 (\$35,000 cash down + \$100,000 mortgage loan). And, while Missy's did contribute \$2,500 to their moving expenses, the Rodriguezes paid another \$5,000 out of their own pockets.

During the Spring 2002 semester, the Dean informed Rodriguez that the Spring semester would be her last at Missy's. The Dean had been approached by former Supreme Court Justice Brilliant Foote about teaching at Missy's, and the school decided to use the funds set aside for Rodriguez's salary to pay Foote.

Despite the fact that her appointment from the Dean is for two years, Hilda's written employment agreement with Missy's is for the current academic year only. The employment agreement provide, in its entirety:

**Subject to the approval of the Board of Trustees, Missy's College of Law hereby agrees to employ Hilda Rodriguez as a Visiting Assistant Professor of Law, for the nine-month academic year beginning on or about September 1, 2001 and ending on or about May 31, 2002, at a salary of \$60,000 for said**

nine-month term. Said person shall be afforded all of the benefits and privileges of a permanent faculty member of the same rank (Assistant Professor of Law), and will be expected to perform his/her teaching, administrative, and other job functions in accordance with the Policy & Procedures Manual in effect at all relevant times.

The written agreement is signed by both Hilda and by the Dean, on behalf of Missy's. The written agreement says nothing, one way or the other, about whether it will, will not, may, or may not be renewed for the next academic year. The only apparently applicable provision of the Policy & Procedures Manual states:

**15.5. Reappointment of Visiting Faculty.** Reappointment of visiting faculty for an additional academic semester or year, up to a total appointment of two full academic years, shall be at the discretion of the Dean of the Law School, subject to approval by the School's Board of Trustees. If the Dean wishes to reappoint a visiting faculty member for an academic semester or year, the completion of which would give the visiting faculty member more than two full academic years of service at the Law School, the Dean must first seek and receive consent from a two-thirds majority of the tenured and tenure-track faculty.

That notwithstanding, Hilda reemphasizes that the Dean offered her a two-year appointment when he called, and states that she would never have quit her practice, sold her house, and moved her family to Magnolia had she known it would only be for a one-year visitorship.

Immediately upon learning of her impending termination, Hilda began searching for a new job. She has uncovered three prospects.

The only other law teaching job she has been able to find on such short notice is at the Mickey Mouse Night Law School and Barber Shop ("MMNLS"), located in the state of Orange. MMNLS is a start-up law school, not yet accredited by the American Bar Association. The Dean of MMNLS offered Hilda a one-year contract, teaching the same courses she is currently teaching at Missy's, at a salary of \$65,000 per year. The cost of living in Orange is approximately 10 percent higher than in Magnolia, so the salary is roughly comparable. Because they are offering her only a one-year contract, MMNLS will only pay \$1,000 toward Hilda's relocation expenses. She estimates that it will cost another \$8,000 to pack up her, Biff, Lars, and all their stuff and move it to Orange. She also anticipates that she would lose about \$10,000 on the sale of the house in Magnolia once all commissions, fees, etc. are paid. Given the relatively higher cost of living, Hilda suspects that a house comparable to the one she now owns in Magnolia will cost about \$150,000 in Orange.

Hilda has also received an offer from the Valet Rain law firm in Magnolia to pay her \$70,000 per year to serve as "of counsel" to the firm. (Because Hilda is not (yet)

licensed in Magnolia, the firm will not hire her as a partner, despite her experience and presumed expertise.)

Finally, Hilda has been invited to return to South Mesquite and join a newly-formed firm, Spit & Polish, L.L.P. (“S&P”) that split from her old firm, Lock, Stock, Block & Barrell, P.C. (“LSBB”). The new firm (S&P) would pay her an annual salary of \$90,000, with the understanding that, as the firm got on better financial footing, and she reestablished herself with clients, her salary would be adjusted accordingly. S&P is not in a position to pay Hilda’s relocation expenses. Hilda’s old firm (LSBB) is unable to offer her a position at this time.

While the offers from both law firms are more financially lucrative than either her current teaching position or the offered position at MMNLS, Hilda derives tremendous satisfaction from teaching. Moreover, she obviously did not accept the job at Missy’s for financial reasons, given that she took a 50% gross pay cut to enter the teaching profession. Hilda, Biff, and Lars have made many new friends in Magnolia and enjoy the somewhat slower pace of life here, and their “quality of life” would suffer some if they had to move either to Orange or back to South Mesquite.

Hilda has come to talk to you shortly before the end of the Spring semester. As far as Hilda knows, Missy’s has not yet finalized any employment agreement with Justice Foote, and there still exists the possibility that he will not join the faculty. The Vice Dean, concerned that, if the Foote appointment falls through, there will be no one to teach first-year Civil Procedure, has hinted to other faculty members, some of whom have relayed it to Hilda, that it wouldn’t be a terrible thing for the School if Hilda didn’t take a job elsewhere just yet. Other than her initial expression of surprise and disappointment when the Dean first notified her of her impending termination, Hilda has not spoken with either the Dean or the Vice Dean about her future plans.

Does Hilda have one or more viable claim(s) against Missy’s? If so, under what theory or theories? And, assuming she does have one or more viable claim(s) against Missy’s, to what remedy or remedies might she be entitled? Please explain your answer as completely and precisely as possible. Also, be sure to discuss any obligation Hilda might have to mitigate her damages in any way.

(1) Possible Claims or Causes of Action

With respect to the one-year written contract, there has been no apparent breach; therefore, there does not appear to be any cause of action. As to the second year, arising from the Dean’s oral representations to Hilda prior to her accepting the job, Hilda appears to have two options: breach of contract and promissory estoppel.

(a) Breach of Contract

Her contract claim appears to founder on the rocks of the statute of frauds. Because it is a contract for services that could not be fully performed in one year or less, there must have been

some writing, signed by Missy's, evidencing Missy's promise to employ Hilda for two years. R2 § 110. The only writing is the written contract, which clearly states the term of employment to be nine months. The majority of courts would find this writing insufficient to evidence anything more than a contract for nine months. However, you could make an argument that, because the statute does not require that the contract itself be in writing, but only that there be a writing sufficient to establish its existence, that the nine-month contract satisfies the statute of frauds but does not end the inquiry as to whether the agreement was for more than nine months.

If the court found that the writing satisfies the statute of frauds, but does not necessarily resolve the duration issue, then the question would be: What evidence may Hilda present to the judge to convince the judge that the writing is not fully integrated and/or unambiguous? While it is true that the writing does specifically state the term of employment, it does not address whether that duration is subject to extension or renewal. Therefore, Hilda may argue that the "renewal/extension" term is missing; and, therefore, the contract is not fully integrated. This argument would be bolstered tremendously by evidence that Missy's contracts with all of its faculty - including tenured and tenure-track faculty - are done on a nine-month academic year basis with the understanding that they will be renewed (in the case of tenured faculty) or will be renewed but for cause to not renew them (in the case of tenure-track faculty). Also, the phrase "afforded all of the benefits and privileges of a permanent faculty member of the same rank" is ambiguous, unless the phrase "in accordance with the Policy & Procedures Manual in effect at all relevant times" modifies it and limits its meaning to the policies and procedures set forth in the Manual. If that's the case, then the phrase is probably not ambiguous, but now it is arguably not integrated (recall our discussion of Problem 6.1 and the "moving-target" policy manual). Moreover, neither the contract nor the Manual includes a merger clause. The combination of these factors suggests that, if Hilda can get over the threshold statute of frauds hump, she can present the trial judge with several arguments against full integration, which may then allow her to (1) convince the court that the nine-month term in the writing is not conclusive as to the parties' agreement, but merely evidence of a longer-term understanding; and (2) present evidence to the jury about the Dean's prior oral representation regarding a two-year term of employment.

(b) Promissory Estoppel

In any event, her promissory estoppel claim does not depend on the existence of a signed writing to prove the Dean's promise. Under R2 § 139, Hilda must establish that (1) Missy's should reasonably have expected Hilda to act or forbear based on Missy's promise of employment; (2) Hilda did, in fact, act or forbear based on the promise; (3) Hilda suffered a detriment because of her reliance on Missy's promise; and (4) injustice can be prevented only by enforcing Missy's promise. It appears that Hilda can do so fairly easily. Missy's made moving to Magnolia a precondition to accepting the job; therefore, it was reasonable to expect Hilda to quit her job and move to Magnolia in order to accept Missy's promise of a teaching position which, in fact, Hilda did. By quitting her job, selling her house, and moving herself and her family to Magnolia, Hilda gave up about \$60,000/year in salary, sold her house for \$25,000 less than its appraised value, and incurred unreimbursed moving expenses of \$5,000 – none of which she would have done but for the promise of a two-year appointment. Surely, she has suffered a detriment in reliance on Missy's promise. Finally, injustice can be prevented only by enforcing

Missy's promise, notwithstanding the statute of frauds, because (a) Hilda has no other remedy; (b) Hilda's actions – quitting her job, selling her home, moving her family, etc. – were “definite and substantial”; (c) Hilda's actions were reasonable responses to Missy's promise; and (d) Hilda's actions were reasonably foreseeable to Missy's.

## (2) Possible Remedies

A plaintiff who successfully claims promissory estoppel is entitled to recover the greater of (a) reliance damages, representing the expenses and opportunity costs incurred by the plaintiff in performing or preparing to perform in reliance on the defendant's promise, less the value of any loss that the breaching party can prove with reasonable certainty that the plaintiff would have suffered even without the breach, R2 § 349, or (b) restitutionary damages, representing the value of any benefit conferred on the defendant by the plaintiff, R2 § 371. Expectations damages are unavailable unless Hilda can overcome the statute of frauds and state a claim for breach of contract. Specific performance is probably unavailable because the combination of a substitute job and damages are adequate to make Hilda whole. (Hilda might convince the court that she could only be made whole by teaching, and, in the absence of another teaching job, that ordering Missy's to employ her as promised might be the only viable remedy.) Rescission is useless to Hilda. Her whole focus is enforcing the contract, not undoing it.

### (a) Restitutionary Damages

The *Restatement* specifically provides for restitution in cases where an otherwise enforceable contract is unenforceable because of the statute of frauds. R2 § 375. R2 § 371(a) provides that restitutionary damages equal “the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the [plaintiff]'s position.” R2 § 370 further provides that “[a] party is entitled to restitution ... only to the extent that he has conferred a benefit on the other party by way of part performance or reliance” for which the party has not already been compensated.

The problem here is as follows: First, Hilda has been paid for her services under the written contract; the only services for which she has not been compensated are those she has not yet performed. Second, at least under the facts known to us, she has not conferred and would not confer any benefit on Missy's by agreeing to teach for the second year until she actually did teach the classes. (This might be different if her presence induced some students to go to Missy's and/or some donors to give money to Missy's who would not have otherwise done so, but we have no facts to support such a claim.) As a consequence, while legally Hilda may be entitled to seek restitution, factually there does not seem to be any grounds to award restitution.

### (b) Reliance Damages

An injured party has the right to recover expenditures incurred preparing to perform or in performing, less any loss the breaching party can prove with reasonable certainty the nonbreaching party would have suffered had the breaching party fully perform. R2 § 349. Hilda certainly incurred actual and opportunity costs in preparing to perform and performing her agreement to teach at Missy's. She quit her lucrative job at LSBB, she sold her house in South

Mesquite for \$25,000 less than its appraised value (but \$25,000 more than she paid for it), she incurred \$5,000 in unreimbursed moving expenses, and she spent \$135,000 on a house in Magnolia. Of those, what can she recover? The purpose of reliance damages is to reimburse the plaintiff by putting her in “as good a position as [s]he would have been in had the contract not been made.” R2 § 344. But for the Dean’s promise of a two-year appointment, Missy would not have quit her job at LSSB (\$120,000/yr.) to take the job at Missy’s (\$60,000/yr.). Nor would she have sold her house in South Mesquite, bought a new house in Magnolia, or incurred the unreimbursed moving expenses. The salary part is tricky; because she obviously chose to take a pay cut in order to teach. That seems to fall within the ambit of R2 § 349, which offsets losses that would have been incurred with full performance against reliance damages. The other expenses, though would seem to fit within the definition of “reliance damages.”

(c) Expectations Damages

In the event that Hilda can overcome the statute of frauds and state a claim for breach of contract, she may be able to recover the difference between the value to her of the performance that she expected from Missy’s - \$120,000 for two years’ worth of teaching - and the value of the performance actually tendered by Missy’s - \$60,000 for one years’ worth of teaching - or \$60,000. Hilda would also be entitled to recover incidental damages for any costs she incurred in attempting to mitigate her damages (see below); but, because Missy’s only partially breached the contract, Hilda would not be entitled to recover consequential damages. Hilda is also obligated to mitigate her damages (see below), and so will have an offset against her expectations damages in the amount she earns by taking another job.

(3) Mitigation

Hilda is required to take reasonable steps to mitigate her damages in the event of a breach of contract or promise by Missy’s. R2 § 350. However, she is not required to choose the mitigation option that most reduces her economic losses, if another reasonable choice is available that is more comparable to the performance of which Missy’s breach of promise and/or contract is depriving her. In this case, she may reasonably mitigate her damages by accepting the teaching job at MMNLS, despite the fact that it pays less than the job at Valet Rain and involves moving costs and higher housing costs than staying in Magnolia and working for Valet Rain, because the job at MMNLS is the closest substitute for another year teaching at Missy’s. Likewise, if Hilda decides to return to practice, she may choose to take the lower-paying job at Valet Rain, in order to avoid the expense and hassle of moving again, or the higher-paying job at S&P, despite the expense and hassle of moving again, because she is fully licensed in Mesquite and not Magnolia.