

Contracts II
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Sample Exam Question #4 - Model Answer

On March 1, 2003, Whit and Suzy Sample placed a “For Sale” sign in the front yard of the house in Paradise that they bought two years earlier from its builder, Thomas Homes. The very same day, the Burgers, who were on a house hunting trip from Tennessee where they were then living, saw the “For Sale” sign and offered the Samples \$150,000 for the house, which the Samples accepted. No realtor represented either party. The Burgers and the Samples sat down in the living room and prepared a contract by copying paragraphs from a standard-form real estate contract that Suzy borrowed from the local library, making certain changes and additions agreed to by both the Samples and the Burgers. The contract that the Burgers and the Samples signed contains the following language:

1. Hamilton (“Ham”) and Patty Burger (collectively “Buyers”) agree to purchase from Whitman (“Whit”) and Suzy Sample (collectively “Sellers”), and Sellers agree to sell to Buyers, all right and title to Sellers’ house and real property located at 425 Mesquite Lane, Paradise City, Paradise, for the purchase price of \$150,000, to be paid by Buyers to Sellers on May 31, 2003 (the “closing date”), at which time Sellers will convey to Buyers an unencumbered deed and clear title to said house and real property.

....

8. Sellers agree to transfer the following personal property to Buyers along with the house: (1) all window treatments; (2) all appliances, including the oven, stove, refrigerator/freezer, and dishwasher; (3) the furniture in the upstairs game room; and (4) all lawn and patio furniture.

....

16. Sellers make no warranty, other than those required by law, about the condition of the house. Buyers agree to assume responsibility for any defects not discovered by Buyers prior to the closing date. Sellers agree to make the house available for one or more inspection(s), arranged and paid for by Buyers, prior to the closing date.

....

20. This contract constitutes the entire agreement between the Buyers and the Sellers with respect to the purchase and sale of the aforementioned house and related real and personal property, and the parties hereby agree that any prior drafts of, or discussions relating to, this contract will have no legal effect.

Notwithstanding paragraph 20, the Burgers claim the Samples agreed to make the Burgers' obligation to complete the purchase conditional on Ham's mother selling her house in Tennessee. (His mother was then to move into Ham and Patty's old home in Tennessee and assume the mortgage payments on it.) When asked, the Samples say they never agreed to such a condition. When the Burgers moved into the house on May 1st, Patty noticed that the Samples had taken the eight exterior solar window screens that Whit had told Patty he had custom-made for the house, as well as the washer and dryer that Suzy told Patty were only a few months old.

A. Based solely on the portions of the contract reproduced above, to what extent does this written contract appear on its face to be integrated? Please explain.

The fact that the Samples agreed to let the Burgers occupy the house prior to closing, plus the inclusion of paragraph 8, conveying particular items of personal property, strongly suggest that this writing was the product of the parties' negotiation, and not simply some boilerplate form (although it may have started as one). Paragraph 20, while no more than evidence of integration, is still that: evidence of integration. Taken together, the length of the contract, the non-standard terms, and the merger clause all suggest some degree of integration. However, the references in paragraph 8 to matters outside the four corners of the document – "furniture in the upstairs game room," "lawn and patio furniture," and, to a lesser extent, "window treatments" and "appliances" – point away from full integration and toward partial integration. While, applying the "modified objectivist" approach of the *Restatement (Second)*, a writing cannot prove its own integration, there seems to be ample evidence on the face of the writing to presume partial integration, subject to proof to the contrary from sources outside the four corners of the contract of conveyance.

B. Assuming, for present purposes, that the Samples agreed to make the Burgers' obligation to purchase the Samples' house contingent on Mrs. Burger selling her house in Tennessee, should the trial judge permit the Burgers to testify about that condition? Please explain.

Yes. If such a condition existed, and if the Burgers can prove it, they will be excused from performing the contract to purchase the Samples' house due to failure of a condition precedent. R2 § 225(1). The parol evidence rule will not exclude extrinsic evidence of the condition precedent – despite it not being mentioned in the written contract – even if the writing is fully integrated (and here the explicit reference to facts outside the agreement, *i.e.*, "the furniture in the upstairs game room," belies the meaningfulness of the integration clause in paragraph 20), because the parol evidence rule does not exclude extrinsic evidence of a condition precedent even to an otherwise fully integrated, unambiguous agreement. *See* R2 § 217.

C. Assuming that the Samples and the Burgers formed an enforceable contract, did that contract obligate the Samples to convey the washer and dryer to the Burgers with the house? Please explain.

Whether the solar screens were part of the sale will depend on how the court construes the phrase “all appliances, including the oven, stove, refrigerator/freezer, and dishwasher” in paragraph 8 of the contract. The facts do not indicate whether the Burgers and Samples shared a common understanding of this phrase at the time they signed the contract. If the Burgers and the Samples attributed different meanings to the phrase, R2 § 201(1) is inapplicable. If there is no evidence that the Samples knew or had reason to know that the Burgers meant “all appliances” to include the washer and dryer or that the Burgers knew or had reason to know that the Samples meant “all appliances” to exclude the washer and dryer, R2 § 201(2) would, likewise, be inapplicable. Lacking a common understanding between the parties or evidence that the Samples knew what the Burgers meant and the Burgers did not know or have reason to know that the Samples meant otherwise (or that the Burgers knew what the Samples meant and the Samples did not know or have reason to know that the Burgers meant otherwise), the court should apply the rules of construction and interpretation to determine whether “all appliances” includes the washer and dryer.

While the Burgers can certainly make a “plain language” argument that a washer and a dryer are “appliances,” the Samples can counter that the “plain language of the contract expressly indicates which items are included in ‘appliances,’” and that the washer and dryer are not. Similarly, while the Samples can argue that their performance – their “practical construction” – clearly indicates that they did not consider the washer and dryer to be included in the items to be conveyed under paragraph 8, that assumes too much. Such an argument would essentially mean that any breach could be explained away as one party’s practical construction of the contract.

That leaves us with two “secondary” rules of construction: *ejusdem generis* and *expressio unius est exclusio alterius*. When an enumeration of specific things is followed by some more general word or phrase, then the general word or phrase will usually be construed to refer only to things of the same general nature or class as those specifically enumerated. On the other hand, when some more general word or phrase does not follow or accompany an enumeration of specific things, then things of the same kind or species as those specifically enumerated are deemed to be excluded. Here, the list of specified items – “oven, stove, refrigerator/freezer, and dishwasher” – is accompanied by a more general word or phrase – “all appliances, including...” Therefore, the court should apply *ejusdem generis* and find that the Samples were contractually obligated to convey the washer and dryer with the house if, but only if, a washer and dryer belong to the same “genus” as an oven, stove, refrigerator/freezer, and dishwasher.

D. Assuming that the Samples and the Burgers formed an enforceable contract, did that contract obligate the Samples to convey the custom-made solar screens to the Burgers with the house? Please explain.

Whether the solar screens were part of the sale will depend on how the court construes the phrase “window treatments” in paragraph 8 of the contract. The facts do not indicate that the

parties defined the term in their written agreement, and it is easy enough to see that “window treatments” can mean more than one thing: exterior screens, storm windows, awnings, canopies, glazing, UV film, blinds, drapes, shutters, roller shades, etc. If the Burgers and the Samples attributed different meanings to the phrase, R2 § 201(1) is inapplicable. If there is no evidence that the Samples knew or had reason to know that the Burgers meant “window treatments” to include the solar screens or that the Burgers knew or had reason to know that the Samples meant “window treatments” to exclude the solar screens, R2 § 201(2) would, likewise, be inapplicable. Lacking a common understanding between the parties or evidence that the Samples knew what the Burgers meant and the Burgers did not know or have reason to know that the Samples meant otherwise (or that the Burgers knew what the Samples meant and the Samples did not know or have reason to know that the Burgers meant otherwise), the court should apply the rules of construction and interpretation to determine whether “window treatments” includes the solar screens.

Unlike subpart “C” (or subparts “E” and “F” which follow), there is no rule of construction and interpretation which yields a definitive answer on these facts. Therefore, the court should permit extrinsic evidence to explain, at a minimum, the meaning of “window treatments.” The problem is that there is no extrinsic evidence in the facts that will help the Burgers. So, absent a shared understanding of the parties that will bring R2 § 201(1) back into play, or knowledge on the Samples’ part that the Burgers considered “window treatments” to include the solar screens and no knowledge on the Burgers’ part that the Samples thought otherwise, bringing R2 § 201(2) back into play, or a trade usage, a deed restriction requiring solar screens, or some other evidence beyond that presented in the facts, the Samples ought not be bound to the Burgers’ definition of “window treatments.”

E. Suppose that, at all relevant times up to and including when the parties executed their written agreement, the Samples had no awnings, blinds, curtains, drapes, shades, UV film, valences, or other interior or exterior window treatments except the custom-made exterior solar screens. How might that fact aid the Burgers in convincing the court to resolve any ambiguity regarding the solar screens against the Samples? Please explain.

The fact that the custom-made exterior solar screens were the only interior or exterior window treatment the Burgers ever saw on or in the Samples’ house should figure into a court’s attempt to consider the circumstances surrounding the contract’s formation. *See* R2 §§ 202(1) & 209. In accounting for the circumstances surrounding the contract’s formation, the court should place itself, as near as possible, in the exact situation of the parties when they executed the instrument, so as to determine their intentions, the objects to be accomplished, obligations created, time of performance, duration, mutuality, and other essential features. *See* R2 § 202 cmt. b (“When the parties have adopted a writing as a final expression of their agreement, interpretation is directed to the meaning of that writing in the light of the circumstances. The circumstances for this purpose *include the entire situation, as it appeared to the parties*, and in appropriate cases may include facts known to one party of which the other had reason to know.” (emphasis added)).

Moreover, courts should construe contractual provisions, if possible, in such a way as to give each provision meaning and purpose – or, in other words, so that no provision is rendered meaningless or moot. *See* R2 § 203(a). Because the custom-made exterior solar screens were the only interior or exterior window treatment the Burgers ever saw on or in the Samples’ house, the term “window treatments” in paragraph 8 either meant the custom-made exterior solar screens or nothing. If a contract or contractual provision is susceptible to two reasonable constructions, one of which would render it meaningful and the other moot, the construction making the contract or provision meaningful should prevail.

F. Suppose, instead, that the Samples drafted the entire written agreement, and the Burgers simply read and signed the agreement the Samples provided. How might that fact aid the Burgers in convincing the court to resolve any ambiguity regarding the solar screens against the Samples? Please explain.

When applying the primary rules of construction and interpretation fails to resolve an ambiguity, the court should construe the ambiguous term against the party responsible for drafting it. *See* R2 § 206. The presumption against the drafter should be less pronounced when the other party has taken an active role in the drafting process or is particularly knowledgeable, and should be nonexistent when both parties actively participate in drafting the contract. Thus, *contra proferentem* would have no place given the original facts, where the Samples and Burgers drafted the contract together. But this subpart says the Samples were solely responsible for drafting the agreement; therefore, *contra proferentem* would be available to the trial court to resolve an otherwise unresolved ambiguity.