

Contracts II
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Sample Exam Question #5 - Model Answer

In the words of renowned contracts scholar Pete Townshend, “A promise is a promise, a handshake will seal it; no amount of discussion can ever repeal it.” Comparing and contrasting Townshend’s theorem with what you (should) have learned this year in Contracts I & II thus far, answer each of the following. Please give at least one example to illustrate your answers.

A. While a promise may be a promise, is a promise a contract? If so, what makes it so? If not, what can transform a promise into a contract?

A promise, standing alone, is not a contract, because a contract requires agreement between two (or more) parties, supported by some form of consideration. *See* R2 § 17(1). If two parties exchange promises, or one party offers a promise for the other party’s performance, then we have an agreement. *See id.* § 3. And, assuming that no exchanged promise is illegal or illusory, that any performance offered in exchange for a promise occurs, and that any promise or performance offered for another party’s promise or performance was bargained for, then we have an agreement supported by consideration. *See id.* §§ 71, 72, 77 & 81.

If Farmer Pickles told Bob the Builder that he would pay \$500 to anyone who could fix his tractor, Travis, that statement would be a promise, but there would be no contract without Bob’s assent and consideration. If Bob responded, “I’ll fix Travis for you for \$500,” then we might have an agreement, though there would be a question whether Bob could accept Farmer Pickles’s offer by promising to fix Travis (bilateral contract), when Farmer Pickles wants Bob or someone else to actually fix Travis (unilateral contract). If Bob fixes Travis, his performance in exchange for Farmer Pickles’s offer would be both an acceptance of the offer and consideration to make the offer binding (provided that Farmer Pickles did not revoke the offer before Bob substantially began fixing Travis).

B. Even if a promise is not and cannot be made into a contract, under what conditions will contract law enforce the promise?

There are at least two types of cases where contract law will enforce a promise despite the lack of a contract: (1) cases where the promisee foreseeably relied to his detriment on the promise and not enforcing the promise would be unjust, *see id.* §§ 90(1) & 139; and (2) cases where a promise made in recognition of a benefit previously received must be enforced to prevent injustice, *see id.* § 86(1). There are also the pre-acceptance reliance cases, epitomized by *Hoffman v. Red Owl Stores* (discussed in EMP at p. 465), which EMP treat as a subset of

promissory estoppel and others treat as a separate class of cases. For our purposes, we'll include them in the discussion of R2 § 90.

Promissory Estoppel. “A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee ... and which does induce such action ... is binding if injustice¹ can be avoided only by enforcement of the promise.” R2 § 90(1); *see also* R2 § 139(1) (tracking the language of § 90, but addressing itself to promises that are unenforceable as contracts because they fail to satisfy the statute of frauds). Section 90 affords a cause of action when there is offer and acceptance but no consideration (either because there never was any or because the intended consideration failed to materialized or was prevented by some outside agency), as well as when there is an act or statement that might not rise to the level of an offer or an acceptance, but the other party nonetheless detrimentally justifiably relies on the act or statement. So, if (1) Bob called Wendy and asked her to reschedule his afternoon appointments and began working in earnest on fixing Travis, (2) Farmer Pickles expected or should have expected that Bob would do so, and (3) not enforcing Farmer Pickles’s promise to pay \$500 to have Travis repaired would result in injustice, then Farmer Pickles should be estopped from refusing to pay Bob on the grounds that they did not have a contract.

Promissory Restitution. “A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.” R2 § 86(1). No such promise is binding if the promisee acted gratuitously or if the promisor would not be unjustly enriched if the promise wasn’t enforced, and the value of promise must not be disproportionate to the benefit conferred on the promisor. *See id.* § 86(2).

Suppose that Bob was installing new rain gutters on Farmer Pickles’s garage when he heard a loud crash and looked to see that a large tree limb had fallen on the roof of Farmer Pickles’s house, caving in part of the roof. Knowing that heavy rain was predicted later that day, and having spare roofing materials with him, in case he noticed any repairs were needed to the garage’s roof, Bob quickly set about removing the limb and repairing the roof. When Farmer Pickles returned from town to find the limb and a pile of damaged roofing materials piled in front of his house, a newly patched roof, Bob climbing down the ladder from the house’s roof, and the rain beginning to fall, Farmer Pickles said “Thanks, Bob, for fixing my roof. If you hadn’t, I can only imagine how much damage the rain would have done. What would you have charged me for the repairs if I had asked you to do them?” Bob replied, “\$750.” Farmer Pickles said, “\$750 it is. Thanks again. I’ll bring you a check tomorrow.” Farmer Pickles promised to pay Bob after the fact; and, therefore, Bob cannot argue that he justifiably relied on the promise when he repaired the roof, in order to bind Farmer Pickles under R2 § 90. However, not holding Farmer Pickles to his after-the-fact promise would be unjust because Bob did not perform the work as a gift, Farmer Pickles would be unjustly enriched if he didn’t have to pay for the work, and the amount Farmer Pickles promised to pay Bob is not disproportionate to the benefit Farmer Pickles received. Therefore, while Bob and Farmer Pickles did not have a contract for the roof repair, Farmer Pickles should have to pay Bob as he promised.

¹ “Injustice” is a tricky issue in many cases, and § 90 offers no real insights in what courts should consider. Fortunately, § 90’s counterpart, § 139 provides some guidance. *See* R2 § 139(2).

C. Will a handshake “seal” (i.e., make enforceable) a contract? If not, what more will be needed to make it enforceable? Answer using the following examples:

- 1. Suppose it is a contract in which A promises to lend B \$5,000, in return for which B promises to repay A the \$5,000 plus 5% interest per year.**

A handshake can “seal” this contract, because it is not a contract (1) by an executor or administrator to answer for a duty of the decedent, (2) to answer for the duty of another, (3) made upon consideration of marriage, (4) for the sale of an interest in land, (5) that cannot, on its terms, be fully performed within one year, or (6) for the sale of goods at a price of \$500 or more. Therefore, neither the common law statute of frauds, *see* R2 § 110, nor the UCC Article 2 statute of frauds, *see* UCC § 2-201, require a writing evidencing the contract and signed by the party against whom enforcement is sought.

- 2. Suppose, instead, it is a contract in which C promises to sell D, and D promises to buy from C, computer software for \$5,000.**

Assuming the software is “goods,” governed by UCC Article 2, and the contract is predominantly for the provision of goods and not services, a handshake cannot “seal” this contract because it is a contract for the sale of goods at a price of \$500 or more. As such, § 2-201 requires a writing evidencing the contract and signed by the party against whom enforcement is sought, unless (1) both parties are merchants, in which case a written confirmation of the contract signed by the party seeking to enforce the contract will suffice if the other party received the written confirmation and failed to timely object to it in writing, § 2-201(2), or (2) the software constitutes specially manufactured goods not suitable for sale to others in the ordinary course of the seller’s business, and the seller substantially began manufacture before learning that the buyer wanted to avoid the contract, § 2-201(3)(a).

If the software is not goods, and the contract is predominantly for the provision of personal property and not services, then unless the case arises in Virginia or Maryland (and is, therefore, subject to those states’ versions of the Uniform Computer Information Transactions Act, or “UCITA”), it will be subject to the \$5,000 statute of frauds of current UCC § 1-106 – in which case no writing will be required to make the contract enforceable. If the contract is predominantly for the provision of services, rather than goods or other personal property, then no writing will be required because it does not fall within any of R2 § 110’s categories of contracts requiring a writing.

D. Assuming that the parties have formed a valid, written contract,

- 1. Will no amount of discussion ever repeal it prior to both parties’ complete performance? If so, why? If not, why not?**

The parties are free to agree to rescind their contract prior to the date of performance (subject, perhaps, to the rights of some third party about whom we did not get the chance to discuss). *See* R2 § 89. One party to a contract can also effectively “repeal” the contract, prior to the other party’s complete performance, by anticipatory repudiation. *See* R2 § 250.

Suppose Bob and Farmer Pickles agreed in writing on Tuesday that Bob would come to Farmer Pickles's farm on Friday to fix Travis, for which Farmer Pickles would pay Bob \$500, and on Wednesday an itinerant tractor mechanic stopped by the farm looking for work and fixed Travis. Farmer Pickles could call Bob before Friday morning to tell him that Travis no longer needed repairs. If Bob was agreeable, then the parties could dissolve their contract. If Bob chose to treat Farmer Pickles call as a repudiation of his obligation to pay Bob \$500 for fixing Travis on Friday, Bob could cancel the contract and sue Farmer Pickles (though Bob would be unlikely to recover more than nominal damages unless he refused other paying work because of his prior commitment to Farmer Pickles – but that was something we hadn't yet fully explored when this homework was due).

2. Can any amount of discussion modify the contract after the parties have signed it and before both parties have fully performed? Please explain.

The parties are free to agree to modify their contract prior to the date of performance (again, perhaps subject to the rights of some third party about whom we did not get the chance to discuss). *See* R2 § 89. If the modification involved imposing some additional obligation on one or both parties, the modification would generally require separate consideration to be binding. Moreover, if the written contract required that any subsequent modification be in writing, then the parties would have to honor that requirement. In the absence of separate consideration or any required writing, any failure by a party to perform under the terms of the unmodified contract would be a breach, *see* R2 § 235(2), though the nonbreaching party might be promissory estopped from using the breach as an excuse for performing its own obligations or as grounds for a breach of contract claim, *see id.* §§ 90 & 139. A proposal to modify the contract is not, in and of itself, a repudiation of the contract, unless the party proposing the modification refuses to perform otherwise. *Truman L. Flatt & Sons v. Schupf* (EMP pp. 758-66).

Suppose Bob and Farmer Pickles agreed in writing on Tuesday that Bob would come to Farmer Pickles's farm on Friday to fix Travis, for which Farmer Pickles would pay Bob \$500, but on his arrival at the farm Bob saw that the repairs would be more extensive than he or Farmer Pickles expected and he told Farmer Pickles that he could only fix Travis for \$1,000, because the parts alone would cost \$750 and the job would take all day. If Farmer Pickles agreed to the higher price, the modification would be binding, because Bob would be expending more labor and replacing more parts than originally anticipated, and Farmer Pickles would be paying Bob more money than originally anticipated. If the written agreement between Bob and Farmer Pickles contained a "no oral modification" clause, then they would have to put the modification in writing to make it binding. If Farmer Pickles refused to pay the higher price, Bob could choose to (1) do \$500 worth of work on Travis, and put the onus on Farmer Pickles to sue Bob for not performing as promised, (2) walk away from the job, and put the onus on Farmer Pickles to sue Bob for breach, or (3) fix Travis as promised and eat the loss.

- 3. Assuming the parties formed a valid, written contract about which a dispute has arisen, can either party introduce evidence of discussions between the parties about changing the terms of the contract? Why or why not; and, if so, under what constraints, if any?**

The answer to this would depend, in part, on when the discussion took place. Read in sequence, one would expect that the discussions took place after the parties formed their valid, written contract. If that is the case, there is no bar to presenting evidence of oral or written discussions or modifications that occurred after the contract was formed. Even if the writing was fully integrated and unambiguous, the parol evidence rule only works to bar evidence of prior or contemporaneous oral discussions or agreements and prior written discussions or agreements. *See* R2 §§ 213-14. On the other hand, if the discussions took place prior to or contemporaneous with the parties' execution of the written agreement, then the parol evidence rule will bar their admissibility if the court finds the written agreement to be fully integrated and unambiguous in light of the circumstances surrounding its formation and other relevant considerations.

So, if Bob and Farmer Pickles put their agreement in writing and then later discussed modifying its terms to account for the additional repairs needed, Bob would be able to introduce evidence of those subsequent discussions in his suit against Farmer Pickles for the difference between the pre-modification and post-modification contract price. On the other hand, if their discussions were in the form of "what ifs," and took place before they executed their written agreement, and if the court finds that the written agreement is fully integrated and unambiguous (despite getting to consider Bob's proffered testimony before reaching those conclusions), then the parol evidence rule would bar Bob's testimony absent some applicable exception.