Optional HW Assignment #1 - Model Answers

1. Read the attached version of *Coakley & Williams, Inc. v. Shatterproof Glass Corp.*, 706 F.2d 456 (4th Cir. 1983).

A. Based on the facts set forth in the Fourth Circuit’s opinion, make your best argument(s) that the predominant purpose of the contract was the sale of goods.

(5 Points) The *Coakley & Williams* court identified three factors relevant to determining the predominant purpose of a transaction: (1) the contract language, (2) the nature of seller’s business, and (3) the intrinsic value of the goods involved.

Both aluminum and glass are goods under § 2-105. The contract required Washington Plate Glass (WPG) to “furnish” the purchaser, Coakley & Williams (C&W), with an aluminum and glass curtain wall. “Furnish” implies supplying the goods as much as, if not more so than, installing the goods. Moreover, WPG’s contract with the defendant glass manufacturer, Shatterproof Glass Corp. (“Shatterproof”), required that Shatterproof “properly mark[]” each glass panel “for field installation.” If WPG’s expertise was installing, rather than selecting and providing goods to meet its customer’s needs, why would WPG need Shatterproof to mark the glass for a “paint-by-numbers” installation? Finally, while the glass alone cost WPG nearly one-third of the total contract price (which surely would have included some mark-up for WPG, raising), and the court takes as given C&W’s argument that the cost to it of the glass and other materials was at least $130,000 – nearly one-half of the total $271,350 it agreed to pay WPG to “furnish” and install the glass and other materials.

B. Based on the facts set forth in the Fourth Circuit’s opinion, make your best argument(s) that the predominant purpose of the contract was the provision of services.

(5 Points) C&W was purchasing an *installed* aluminum and glass curtain wall – not just aluminum and glass – from WPG. WPG did not make the glass or aluminum for the curtain wall, it purchased them from third parties – Shatterproof, in the case of the glass. C&W knew or should have known that WPG would not manufacture the glass and aluminum required for the project; therefore, C&W must have been contracting for WPG’s expertise in installing the glass and aluminum curtain wall. The glass cost WPG only $87,715 – less than one-third the total contract price of $271,250.
C. If the Fourth Circuit applied the gravamen of the action test, would common law or UCC Article 2 have governed this transaction? Please explain.

(5 Points) By definition, the gravamen of the action test only decides what law governs a particular dispute. Therefore, ascertaining the gravamen of this dispute would not reveal the law governing the transaction as a whole.

D. If the Fourth Circuit applied the gravamen of the action test, would common law or UCC Article 2 have governed this dispute? Please explain.

(5 Points) The gravamen of C&W’s dispute with Shatterproof goes to the quality of the glass. Glass is a good. Therefore, this dispute would be governed by Article 2.

E. Following remand by the Fourth Circuit, what did the district court decide was the predominant purpose of this transaction? Did the Fourth Circuit agree? Please explain and show your work.

(5 Points) Following a trial on the merits, the trial court held that services, rather than goods, predominated; therefore, P was not entitled to enforce Article 2 warranties against D. See Coakley & Williams, Inc. v. Shatterproof Glass Corp., 778 F.2d 196, 198 (4th Cir. 1985). The 4th Circuit affirmed. 778 F.2d 196 (4th Cir. 1985).

2. Answer Problem 2 on pages 43 and 44 of your Epstein, Markell & Ponoroff casebook.

(10 Points) This problem is based on Embry v. Hargadine, McKittrick Dry Goods Co., 105 S.E. 777 (Mo. App. 1907), which I discuss in the “Toy Yoda” article. The keys are (1) whether a reasonable person in Markell’s position would have understood Epstein to have been offering to renew Markell’s contract when Epstein said “Go ahead, you’re all right ...” and, if so, (2) whether Markell knew or had reason to know that Epstein meant otherwise. See id.; Lucy v. Zehmer; R2 § 20(2). If we can answer the first prong is “yes” and the second prong “no,” then Epstein is bound. Otherwise, Epstein is not bound unless he knew or had reason to know Markell’s meaning and knew or had reason to know that Markell did not know or have reason to know that Epstein meant something else. R2 § 20(2).

3. Suppose that Carlill v. Carbolic Smoke Ball Co., Lonergan v. Scolnick, Lefkowitz v. Great Minneapolis Supply Store, and Donovan v. RRL Corp. were governed by the U.N. Convention on Contracts for the International Sale of Goods. Would the newspaper advertisements in each case be considered offers under Article 14 of the CISG? Please explain your answer for each case separately.

(20 Points) CISG Article 14 provides that “[a] proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance”; whereas, “[a] proposal other than one addressed to one or more specific persons is to be considered merely as an
invitation to make offers, *unless the contrary is clearly indicated by the person making the proposal*” (emphasis added).

The reward offer in *Carlill* should be an offer under Article 14. While it was not addressed to one or more specific persons, it clearly did not seek offers from the advertisement’s readers; rather, it sought performance. Nowhere did the advertisement ask readers to notify Carbolic that they propose to use the smoke ball in hopes of accepting the reward offer.

The advertisement in *Lonergan*, on the other hand, is almost certainly not an offer under Article 14. (Nor, for that matter, is it an offer under the more expansive definition of “offer” in R2 § 24.) It was not addressed to one or more specific persons, nor did it state a price or give enough particulars so that a reader could conclude a contract by signifying his or her assent. R2 § 24. Indeed, nothing in the advertisement indicated that Scolnick sought anything other than an offer from one or more reader(s).

The advertisement in *Donovan* most likely does not qualify as an offer under Article 14 (although it almost certainly is an offer under R2 § 24). The advertisement in *Donovan* was not addressed to one or more specific persons; and, while it was far more specific than the advertisement in *Lonergan* – including asking price, the unique vehicle identification number (VIN), and the precise location of the dealership – RRL did not, in the absence of the applicable California Vehicle Code provision, “clearly indicate” that the advertisement was not merely an invitation to offer. There was no indication that the price was only good for an hour, a day, or a week. Moreover, it is customary for car buyers and car sellers to dicker over the price and perhaps other terms before concluding the sale.

*Lefkowitz* is more problematic. Ultimately, I do not believe either advertisement in *Lefkowitz* qualifies as an offer under Article 14 (although both are clearly offers under R2 § 24). The advertisements in *Lefkowitz* were not addressed to one or more specific persons; and, while the advertisements were far more specific than the one in *Lonergan* – including, as they did, price, quantity, times and dates available for sale, and location – GMSS did not “clearly indicate” that the advertisements were not merely invitations to offer. Moreover, it is customary in the retail trade to treat the customer as the offeror and the store as the offeree – otherwise, the customer would risk a claim for breach of contract if he or she placed an item in the shopping cart, then later chose not to purchase it, meanwhile depriving the store of the opportunity to sell the item to another customer. That said, the advertised prices were so low and the method of acceptance so specific that *Lefkowitz* is clearly distinguishable from *Lonergan* – and, in the absence of trade custom to dicker over even “rock bottom” prices, *Donovan*. (Ultimately, *viz.* *Lefkowitz*, I was looking for sound reasoning more than the “correct” answer.)

4. Explain why Pepsi wins on its “only joking” defense in *Leonard v. Pepsico*, while the Zehmers lose despite their “only joking” defense in *Lucy v. Zehmer*.

(10 Points) Contrast Lucy and Zehmer’s face-to-face negotiations, their length, the drafting and redrafting of a written memorandum, and the discussion of what personal property would be included – all of which would have led a disinterested third party to believe that Lucy and Zehmer were acting in earnest – with the completely whimsical, broadly disseminated TV
ad, which referred the viewer to a separate writing for contest details – all of which would have led a disinterested third party to believe that Pepsi was not earnestly offering a Harrier jet to an unlimited number of participants capable of accumulating sufficient Pepsi Points. In the latter case, Pepsi made no offer; in the former, the parties objectively formed a contract unless Lucy knew or had reason to know that Zehmer did not intend to accept. R2 § 20(2).

5. Consider the facts of Agnew v. Great Atlantic & Pacific Tea Co. set forth on page 69 of the Epstein, Markell & Ponoroff casebook. Could Agnew successfully argue that the store breached its contract when it refused to sell him the items he desired to purchase? Please explain.

(10 Points) No. The sign was an invitation to offer. When Agnew appeared with the items in hand at the cashier’s counter prepared to pay, this was an offer. He was informed, before he tendered the price, that the 2-for-1 promotion did not apply to the items he sought to purchase. Thus, there is no claim for breach of contract. Even if the sign were construed as an offer, Agnew did not accept until he tendered payment, by which point, again, he knew the deal was off.

N.B.: Sometimes students argue that the sign was an offer that Agnew accepted when he selected the items from the shelf. However, as discussed in the answer to Question 3, the problem with that approach is that it means, once you put items in your cart, you lose the privilege to change your mind and return them to the shelf.

6. How does one go about revoking an offer made to the general public by, e.g., a radio or newspaper advertisement? Please explain.

(10 Points) It would be both onerous and pointless to require direct communication to each member of the public who might have heard/seen/read the advertisement. Therefore, the offeror must publish its intent to revoke by the same means and to an equal extent through which it communicated the original offer, presuming no better method of communication is available. See R2 § 46. This is consistent with the Supreme Court’s holding in Shuey (cited in Note 3 on EMP 76) that an offer made by newspaper advertisement,

[i]ike any other offer of a contract, ... might, therefore, be withdrawn before rights had accrued under it; and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given by the claimant, or that he did any thing to entitle him to the reward offered, until five months after the offer had been withdrawn. True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made.

7. Read the following (slightly edited) excerpt from *Sashti, Inc. v. Glunt Industries, Inc.*, 140 F. Supp. 2d 813 (N.D. Ohio 2001), and then answer the questions that follow:

The facts show that the Defendant made a “firm offer” to the Plaintiff for the sale of goods in connection with the Plaintiff’s contract with Indian Railways. Initially, the Defendant submitted a written, signed bid to the Plaintiff on June 1, 2000. The Plaintiff asserts in its complaint that this bid was, by its own terms, irrevocable for one-hundred and twenty (120) days from the date of bid closing which was June 10, 2000. Subsequently, the Plaintiff requested more technical information from the Defendant. On September 7, 2000, the Defendant responded with that information and offered to extend its bid to January 31, 2001. Consequently, the Defendant’s extension of its bid resulted in a firm offer which it was required to keep open until January 31, 2001. The Defendant, however, withdrew its firm offer on September 28, 2000, before the Plaintiff could accept. Plaintiff now seeks to recover from Defendant based on the Defendant’s untimely revocation of its firm offer.

A. What must be true about the Defendant (Glunt Industries) in order for UCC § 2-205 to apply to its written, signed offer? Please explain.

(5 Points) Glunt must be a merchant. Otherwise, while Article 2 would govern this offer to sell goods, Section 2-205 would not transform Glunt’s purportedly irrevocable offer, unsupported by separate consideration, into a firm offer.

B. Without knowing any more facts than those stated or alleged in the foregoing excerpt, what obvious mistake did the district court make regarding the length of time during which Defendant’s firm offer was irrevocable? Please explain.

(5 Points) Assuming Glunt is a merchant, Section 2-205 makes a firm offer irrevocable for no more than three months from the date of its making. Thereafter, the firm offer, unless supported by separate consideration, simply becomes an offer that Glunt can revoke at will. The court’s obvious error, absent unmentioned evidence of a binding option supported by separate consideration, is that it treated Glunt’s offer as irrevocable for the 120 days stated, rather than for the statutory-maximum three months.

C. What additional fact would the Plaintiff have to establish in order to support its claim that it had until January 31, 2001 to accept the Defendant’s bid? Please explain.

(5 Points) Sashti would have to prove that it gave Glunt separate consideration to bind Glunt to keep the offer open for 120 days.