Optional HW Assignment #2 - Model Answers (Final Cut)

1. [10 Points] Review Beall v. Beall (EMP 88) and Eastern Michigan University v. Burgess (EMP 93). Now, suppose Epstein offers Markell a job at Epstein’s law firm, telling Markell “this offer is good for one week.” The next day, Markell resigns his current job, and then calls Epstein to accept. Before he can say “I accept,” Epstein revokes the offer.

A. Does Markell have a claim under Beall and Burgess? Please explain.

No. Markell did not give Epstein any consideration to bind Epstein to the option.

B. Does Markell have a claim under R2 § 87(1)? Please explain.

No. Markell did not get Epstein to sign a writing reciting consideration for the option.

C. How about R2 § 87(2)? Please explain.

Perhaps. The question will boil down to whether Markell’s actions in reliance on Epstein’s offer were reasonably foreseeable.

2. [10 Points] Review Davis v. Jacoby (EMP 109), and then answer the following:

A. What effect, if any, should the court have given to Rupert’s February 28th will? Please explain.

None. Because the will was made before Rupert’s April 12th offer, the will did not affect Rupert’s promise to make/amend his and Blanche’s wills, as necessary, to leave everything to Caro.

B. What if Rupert had made the will in question between April 15th and April 22nd? Please explain.

It depends. If this was, as the California Supreme Court saw it, an offer that the Davises could accept by promise, then they did so by Frank’s April 14th letter, and Rupert’s actions thereafter would not alter the contract already formed. On the other hand, if this was, as the trial court saw it, an offer that the Davises could accept only by performance, Rupert’s subsequent making of a will contrary to the terms of his offer would evince his intent to revoke the offer.
C. Suppose that Rupert’s letter had said “Caro and you can only accept this offer by moving to California.” How would that change you answer to or analyses of subparts “A” and “B”? Please explain.

It doesn’t change the answer to “A.” However, if Rupert had expressed his offer in such a way that it made clear that the Davises could only accept when and if they actually moved to California, it would almost certainly have been construed as an offer for a unilateral contract and Frank’s April 14th letter would not have concluded the contract. Therefore, if Rupert changed his will between April 15th and April 22nd, doing do would evince his intent to revoke the not-yet-accepted offer. As Davis pre-dates the first Restatement of Contracts, it is possible that, even if the Davises had begun to accept Rupert’s offer before Rupert changed his will, Rupert would have been permitted to revoke at any time before the Davises fully performed his offer to leave everything to Caro – in which case the answer to “B” would change. And, in any event, because Rupert died before the Davises arrived in California, the offer would have lapsed on Rupert’s death, making it impossible for the Davises to accept.

3. [5 Points] On February 1st, Epstein mails Markell an offer that includes a provision that, for $100, he will grant Markell an exclusive 60-day option (ending April 2nd) to purchase Epstein’s house for $150,000. Markell promptly sends Epstein the $100. The parties do not communicate further until Markell mails Epstein a letter informing Epstein that Markell is exercising his option. Epstein receives Markell’s letter on April 3rd. Epstein calls Markell to tell him he is “too late” and that Epstein has already arranged to sell his house to Ponoroff for $155,000. Does Markell have a claim against Epstein?

No. Both R2 § 63(b) and Smith v. Hervo Realty indicate that acceptances under option contracts must be received before the option expires in order to be effective – the rationale being that, in the case of irrevocable offers, the offeree does not need the protection of the mailbox rule. Thus, M has no claim against E.

4. [20 Points] Mercury Rising (“Mercury”) is an Illinois manufacturer of indoor and outdoor thermometers. Tubular Glass (“Tubular”) is a Michigan manufacturer of precision glass tubing. On March 14, 2004, following telephone negotiations between the two, Will Bruce, Mercury’s purchasing agent, faxed a purchase order to Tubular for 5,000 one-foot lengths of glass tubing, at a price of $5.00 per foot, to be delivered to Mercury’s plant no later than May 1st. Later that same day, Tubular faxed a written acknowledgment, agreeing to manufacture and deliver 5,000 one-foot lengths of glass tubing, at a price of $5.00 per foot, to Mercury’s plant no later than May 1st. The terms of Tubular’s acknowledgment also (1) disclaimed of all implied warranties, and (2) required Mercury to pay the full contract price, including the cost of shipping the tubing from Tubular’s plant to Mercury’s plant, when Mercury received the tubing. The parties did not correspond further. Mercury received the goods on May 1st and paid the carrier in full, including transportation costs.
A. Did Mercury and Tubular form a contract by their exchange of correspondence, their actions, or both? Please explain. How would your answer, your explanation, or both change if this transaction was governed by the 2003 Amendments to UCC Article 2? Please explain.

Under UCC § 2-207(1), a contract is formed, even though the acceptance contains additional or different terms, if the offeree definitely expresses its intent to accept the offer and does not expressly condition its acceptance on the offeror’s assent to the additional or different terms. Mercury’s purchase order was an offer. Tubular’s acknowledgment was an acceptance, despite the additional terms, because it was not made expressly conditional on Mercury’s agreement to the additional terms.

If the 2003 amendments were in effect, the answer and analysis would be essentially the same. Under UCC § 2-206(3) a contract is formed, even though the acceptance contains additional or different terms, if the offeree definitely expresses its intent to accept the offer. Mercury’s purchase order was an offer. Tubular’s acknowledgment was an acceptance, despite the additional terms.

B. Suppose that Tubular’s acknowledgment clearly stated that it would accept Mercury’s purchase order only on the condition that Mercury agrees to the terms set forth in Tubular’s acknowledgment. Would Mercury and Tubular have formed a contract by their exchange of correspondence, their actions, or both? Please explain. How would your answer, your explanation, or both change if this transaction was governed by the 2003 Amendments to UCC Article 2? Please explain.

While Article 2 permits an acceptance to contain additional terms without transforming it into a counteroffer, because Tubular expressly conditioned its acceptance of Mercury’s offer on Mercury’s assent to the additional terms, Tubular’s acknowledgment would be a counteroffer, UCC § 2-207(1), to which Mercury never expressly assented; therefore, Mercury and Tubular would not have a contract under § 2-207(1).

Section 2-207(3) further provides that, despite Tubular expressly conditioning its acceptance on Mercury’s assent to Tubular’s additional terms, Tubular and Mercury could still form a contract by their actions, rather than their correspondence. Tubular shipped the tubing without having received either an assent or objection from Mercury, and Mercury took delivery of and paid for the tubing, including the shipping costs and despite being aware of Tubular’s warranty disclaimer. These actions are “[c]onduct by both parties which recognizes the existence of a contract … although the writings of the parties do not otherwise establish a contract.” UCC § 2-207(3). Therefore, the parties did form a contract – not because Mercury accepted Tubular’s additional terms, rather because Mercury took delivery of and paid for Tubular’s goods. The contract so formed will be made up of the terms on which the parties’ writings agreed, plus any UCC “gap fillers” needed to perform or enforce the contract. The additional terms contained in Tubular’s acknowledgment do not become part of the contract.
The 2003 amendments eliminate the “expressly conditioned” language from current § 2-207(1) in the process of relocating current § 2-207(1) to amended § R2-206(3). Consequently, there is no express language in the 2003 amended version that would, as a matter of law, treat Tubular’s expressly conditional acknowledgement as a counteroffer. The key would be whether Tubular’s expressly conditional acknowledgement would be a “definite and seasonable expression of acceptance” under § R2-206(3). If so, the parties would have a contract under § R2-206(3). Comment 3 to § R2-206 counsels that an expressly conditional acknowledgement is not an acceptance. If not, the parties might still have a contract under §§ R2-204(1) & R2-207(i).

C. Using the same facts as subpart “A,” and assuming that Mercury and Tubular formed a contract by their exchange of correspondence, their actions, or both, would that contract satisfy the applicable statute of frauds? Please explain. How would your answer, your explanation, or both change if this transaction was governed by the 2003 Amendments to UCC Article 2? Please explain.

Because this contract was for the sale of goods in an amount greater than $500, there must have been one or more writings, signed by the party against whom enforcement is sought, evidencing the contract, identifying the goods, and stating the quantity to be sold. UCC § 2-201. Here, Mercury’s purchase order and Tubular’s acknowledgement should collectively satisfy the requirements of § 2-201(1). Each identified the goods to be sold as one foot lengths of glass tubing and stated a quantity of 5,000 and a price of $5.00 per foot. Collectively, they evidence the parties’ agreement. “Signed” for purposes of UCC § 2-201 includes most things that identify the sender. Therefore, if Mercury’s purchase order had its name and address on it, or was on Mercury’s letterhead or a Mercury form, or was accompanied by a fax cover sheet with Mercury’s name on it, or it displayed Mercury’s name on the “banner” at the top or bottom of each faxed page, it should satisfy UCC § 2-201(1). Similarly, if Tubular’s acknowledgment had its name and address on it, or was on Tubular’s letterhead or a Tubular form, or was accompanied by a fax cover sheet with Tubular’s name on it, or it displayed Tubular’s name on the “banner” at the top or bottom of each faxed page, it should satisfy UCC § 2-201(1). Even if Mercury’s purchase order itself was unsigned (highly unlikely), Tubular’s acknowledgement would be deemed constructively signed by Mercury because both parties are merchants and Mercury failed to object in writing within ten days to Tubular’s acknowledgement. § 2-201(2).

The “partial performance” exception of § 2-201(3)(c) clearly applies against Tubular, given that Mercury made and Tubular accepted payment for the tubing, and probably applies against Mercury, given that Tubular delivered the goods and Mercury paid for them (although, as we will discuss later in the semester, payment does not necessarily equate to acceptance, which is what § 2-201(3)(c) requires viz. Mercury).

The fact that Tubular told Mercury it had to specially manufacture the glass tubing to meet Mercury’s specs might seem to trigger the “specially-manufactured goods” exception to the Article 2 statute of frauds. UCC § 2-201(3)(a). It probably does not. The question is not whether Mercury’s specifications were different from those typically adhered to by Tubular. The question is whether glass tubing made to Mercury’s specifications was “not suitable for sale to
others in the ordinary course of [Tubular]’s business.” Tubular had obviously made “a substantial beginning of [the tubing’s] manufacture,” given that it delivered the tubing to Mercury. However, there is nothing in the facts indicating that Tubular could not find another purchaser for the tubing.

The only two changes of any import the 2003 amendments make to current § 2-201 are to increase the minimum contract price to trigger the statute of frauds from $500 to $5,000, § R2-201(1), and clarify that § R2-201 trumps the common law “one-year” statute of frauds, § R2-201(4). The latter does not come into play here, and the $25,000 purchase price puts this contract squarely within the scope of both the current and amended statutes of frauds.

5. [10 Points] Read the attached version of Batsakis v. Demotsis, 226 S.W.2d 673 (Tex. Civ. App. 1949). Compare and contrast the Batsakis decision with that portion of Schnell v. Nell (EMP 359) in which the court holds that one cent ($0.01) was inadequate consideration for Schnell’s promise to pay Nell and the Lorenzes $200 each over three years.

“Remember the Peppercorn!” Schnell is an exceptional case, where the court is willing to weigh the sufficiency of consideration because both the offered performance and the consideration to bind the offeror were in relatively contemporaneous dollars. (That is, it wasn’t a promise to pay today in exchange for repayment 25 years from now. It was a promise to pay the offerees over the next three years in exchange for the offerees’ payment right now.) Without mentioning any evidence of extenuating circumstances, the court found (though not every court would have agreed then or now) that $0.01 today was insufficient consideration for a promise to repay $200 over three years. In Batsakis, Demotsis was stuck in Axis-occupied Greece during WWII and needed drachmae – paying in dollars probably gets her arrested at a minimum, assuming she can find someone to accept dollars (talk about your extenuating circumstances). Demotsis borrowed 500,000 drachmae from Batsakis, and gave Batsakis a promissory note to repay Batsakis $2,000 plus interest. At some time after Greece – or, at least, Ms. Demotsis – was liberated, Demotsis tendered $25 to Batsakis. When Batsakis sued Demotsis for $2,000 plus interest, Demotsis answered that 500,000 drachmae were only worth $25. Unlike Schnell, there appears to be genuine disagreement about the dollar value of 500,000 drachmae. Unlike Schnell, the repayment date was uncertain. Unlike Schnell, the liberation of Greece doubtless changed both the “par” and actual value of drachmae to dollars. (What is a gallon of gas worth? What is it worth in the presence of rationing to someone who has no local currency?)

6. [15 Points] Recall Plowman v. Indian Refining Co., 20 F. Supp. 1 (E.D. Ill. 1937). Which, if any, of the following changed facts should have enabled the trial court to find that the defendant’s promise to pay the forced retirees was supported by consideration? Please explain with regard to each subpart.

A. Defendant agreed to pay the Plaintiffs in exchange for their agreement to retire.

The plaintiffs’ promise to retire in exchange for the defendant’s promise to pay would be consideration, even though defendant had the ability to fire the plaintiffs at will.
B. Even though Defendant terminated the Plaintiffs, it required them to submit
written resignations “waiving all right to future employment with the
Defendant and any claim to wages or payments other than the promised
‘pension.’”

Because the plaintiffs were not otherwise obligated to submit a written resignation and
might be waiving valuable rights (e.g., Indian is found later to have asbestos), their doing so
should be consideration.

C. In order to receive their checks, the Plaintiffs were required to agree not to work for any of the Defendant’s competitors for one year.

The plaintiffs’ agreement not to work for a competitor for one year following their
termination would clearly be consideration to support the defendant’s promise to pay.

D. In order to receive their checks, the Plaintiffs were required to agree to assist the Defendant in training new employees as needed.

Likewise, the plaintiffs’ agreement to provide such training assistance (whether used or not) as the defendant required would clearly be consideration to support the defendant’s promise to pay.

E. The Plaintiffs passed up other employment opportunities in reliance on the Defendant’s promise to pay.

The plaintiffs’ detrimental reliance on the defendant’s promise is not consideration, but
may give rise to promissory estoppel if the plaintiffs’ reliance was reasonably foreseeable and
enforcing the defendant’s promise was necessary to avoid injustice (more on this in Contracts II).

7. [5 Points] Suppose Markell buys a painting from Ponoroff for $50,000. Both believe
that it is a major work by Andy Warhol. Markell later learns it is a minor work
and worth no more than $5,000. Must Ponoroff agree to rescind the contract and
refund Markell’s money? Please explain.

_Sherwood v. Walker_ sets forth a three-pronged test for rescinding a contract based on
mutual mistake: the mistake must be (1) one of fact, (2) held by both parties, and (3) going to
“the substance of the whole contract.” The trick here is the third prong. Both parties understood
the painting to be a Warhol, which it was. Thus, this is not a bull mistaken to be a cow. The
mistake is as to value only, which Justice Sherwood (in dissent) says is insufficient grounds for
rescission. The majority suggests otherwise, emphasizing the vast difference in value between a
fertile cow and a barren one. If the _Sherwood_ majority is right, then Markell can rescind the
contract without Ponoroff’s assent. If the dissent is right, Markell will need Ponoroff’s assent to
rescind the contract. Comment b to R2 § 152 (“mistakes as to market conditions … do not
justify avoidance under the rules governing mistake”) seems to favor the _Sherwood_ dissent.
Moreover, Markell likely bears the risk of mistake under R2 § 154(b) because he agreed to pay
$50,000 for a painting with getting an independent appraisal.
8. [15 Points] If Hill-Shafer (EMP 229) had turned on mistake, rather than mutual assent:

A. Would the mistake as to the subject property have been mutual or unilateral; and, if unilateral, who was mistaken? Please explain.

It appears to have been a unilateral mistake on the part of the Chilson Family Trust. The Trust thought it was counteroffering to convey the Butler North and Triangle properties, but was, in fact, counteroffering to convey the Butler North and Butler South properties. Hill-Shafer accepted the counteroffer.

B. Did either party contractually assume the risk of mistake? Please explain.

Nothing in the record suggests that the Trust’s written counteroffer, Hill-Shafer’s acceptance, or the subsequent contract or escrow instructions allocated the risk of mistake to either party in the manner contemplated by R2 § 154(a). See R2 § 154 cmt. b & illus. 1.

C. Did either party assume the risk of mistake by signing the contract “aware, at the time the contract [wa]s made, that he ha[d] only limited knowledge with respect to the facts ... but treat[ed] his limited knowledge as sufficient”? R2 § 154(b). Please explain.

This is trickier. The Trust obviously signed the contract of conveyance with only limited knowledge: “Seller borrowed the description from one of the earlier deeds on the mistaken assumption that is described the Triangle and Butler North.” EMP 231. The question, for purposes of R2 § 154(b) is whether the Trust knew that it was signing the contract of conveyance with only limited knowledge of the facts. Nothing in the court’s opinion suggests that it did.

D. If the Trust made a unilateral mistake, would it be entitled to rescind the contract under R2 § 153? Please explain.

A party who has entered into a contract based on a unilateral mistake of fact may avoid the contract if the other party (Hill-Shafer) “had reason to know” of the mistaken party’s (the Trust’s) mistake and the mistake had “a material effect on the agreed exchange of performances that [wa]s adverse to” the Trust. R2 § 153(b). Whether Hill-Shafer knew of the Trust’s mistake before the Trust sought to reform the contract of conveyance, Hill-Shafer had reason to know.

The conveyance gave the proper legal description for a different piece of property than the Trust had offered to sell to Hill-Shafer. The only “out” for Hill-Shafer is to argue that it reasonably thought that the Trust had purposefully decided to offer a different configuration of property for the price that Hill-Shafer had offered (and ultimately agreed to pay). This seems fairly lame, unless the market value of the Triangle and Butler South were roughly the same. If they were, then not only does Hill-Shafer have some grounds (pun intended) on which to argue it was unaware that the Trust’s mistake was a mistake, Hill-Shafer can also argue that, in any event, the effect of the mistake was not “materially adverse” to the Trust. However, assuming the Trust – or, at least, its counsel – was/were rational actors, the Trust would not have forced Hill-Shafer to sue if the market value of the Triangle and Butler South were roughly the same.
9. [5 Points] Rising celtic-techno-goth sensation Wallace Williams, having decided it was time to spend some of his hardly earned (that’s a pun, not a typo) riches and wanting to stay on the East Coast, began hunting for housing befitting a music star. After some searching, he found an apartment on the Upper East Side with a nice view of Central Park. Anticipating an increasing flow of income, Wallace was not worried about living beyond his present means. Having agreed with the seller, Sam Sharman, on a price of $2.5 million, Wallace paid $250,000 cash and signed a five-year real estate installment purchase contract for the balance. The contract required Wallace to make 60 principal payments of $37,500 per month, plus interest, upon full satisfaction of which Sharman would deliver title to the apartment, free of any liens or encumbrances (other than those in favor of the apartment building owner or cooperative).

After moving into the apartment, Wallace was awakened one morning by a knock at the door. When he answered the door, he was greeted by an attorney, who introduced himself as a representative of Otis Owen, the owner of the apartment that Wallace was presently occupying. Owen, who had been abroad for several months, was preparing to return to the city, and had sent the attorney to notify Sharman, who was subletting from Owen, that he had fourteen days to vacate the premises. When Wallace told the attorney he must be mistaken because Wallace had purchased the apartment from Sharman, the attorney responded, “I’m sorry, sir, but you’re the one who is mistaken. Mr. Sharman has never owned this apartment, and had no right to sell it to you. You have fourteen days to vacate.” When Wallace received a payment due notice from Sharman a day or two later, he returned it unpaid with a note stating that Wallace would not pay Sharman one cent more and that he would see Sharman in court. Sharman sued Wallace for breach of the installment purchase contract. Wallace countersued for fraud and conversion, seeking judicial rescission of the installment purchase contract, the return of his $250,000 down payment, and damages to compensate him for the cost of locating and moving into new digs.

Was Wallace obligated to pay Sharman the remainder of the installments as promised, despite the fact that Sharman did not have the right to sell Wallace the apartment? Please explain.

No. Wallace’s obligation to Sharman boils down to whether Sharman could lie about being able to convey good title without ever actually saying that he could convey good title. The Restatement treats Sharman’s non-disclosure of a fact known to him as the equivalent of an affirmative misrepresentation if it concerns a material fact, the disclosure of which would correct a mistaken belief Wallace had about a basic assumption on which he was making the contract. See R2 §§ 159, 161-162. Whether or not a buyer of realty will receive clean title to the realty after satisfying the purchase contract is certainly a material fact, and Wallace’s assumption that Sharman could convey good title was a basic assumption on which Wallace made the contract. As such, Wallace was entitled, inter alia, to avoid his contract with Sharman, cease making
payments under the contract, and recover any monies paid to Sharman (although he may owe Owen for the use of the apartment during the time he occupied it).

10. [5 Points] Suppose, instead, that Sharman did have good title or the right to convey good title on Owen’s behalf, and that Wallace has been comfortably ensconced in the apartment since moving in several months ago. Suppose, further, that the contract included a provision for interest on the unpaid balance at 18% per year, and that the maximum interest rate permitted by applicable New York law is 16% per year. Would Wallace have grounds to avoid the contract with Sharman under these circumstances? Please explain.

Yes. The interest rate provided in the contract was usurious – and, therefore, illegal. A contract made illegally, or for an illegal purpose, is void. R2 § 178.

Note: Under applicable New York law, any rate of interest over 16% is usurious, see N.Y. Banking Law § 14-a (McKinney 2001), and any loan charging a usurious rate of interest is void, regardless of whether the lender knew or intended that the interest rate was usurious, see, e.g., Babcock v. Berlin, 475 N.Y.S.2d 212 (N.Y. Sup. Ct. 1984). If, however, the 18% were only a “penalty” rate – applicable to past due amounts – and the base rate was less than 16%, the loan would not be usurious. See, e.g., Hicki v. Choice Capital Corp., 694 N.Y.S.2d 750 (N.Y. App. Div. 1999).