

*Dr. Clive*

**CONTRACTS FINAL EXAMINATION  
&  
ANSWER KEY**

**FALL 1997**

**PROFESSOR ANDRE' HAMPTON**

**Contracts Final Examination**

**Fall Semester 1997**

**Section B**

**Professor Andre' Hampton**

**Contracts Final Examination**  
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**Instructions**

1. This examination consists of nine (9) pages, including this page as the second, and three (3) problems and one bonus question.
2. You will have three (3) hours in which to complete the examination.
3. St. Mary's Law School prohibits the disclosure of information that might aid a professor in identifying the author of an examination. Any attempt by a student to identify himself or herself in an examination is a violation of this policy and of the Code of Student Conduct.
4. A student should not remove a copy of the examination from the room during the exam time.
5. You may use either the textbook, the supplement, the study guides, and any notes or outlines that you prepared in connection with the course in your completion of this examination.
6. At the end of the examination, you must surrender this copy of the examination and the Blue Book in which you have answered the questions.
7. After reading the oath, place your exam number in the space below. If you are prevented by the oath from placing your exam number in the space below, notify the student proctor of your reason when you turn in the examination.

**I HAVE NEITHER GIVEN NOR RECEIVED UNAUTHORIZED AID IN TAKING THIS EXAMINATION, NOR HAVE I SEEN ANYONE ELSE DO SO.**

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**EXAM NUMBER**

**Contracts Final Examination**  
**Fall Semester 1997**  
**Section B**  
**Professor Hampton**

**QUESTION ONE (30 points):**

Your client is Bobbie Jo Gentry. She wants to rescind a plea bargain agreement that she entered into with Jack McCoy, an assistant prosecutor with the District Attorney's Office. The plea agreement involves a homicide charge that was brought against her for the murder of her former husband's wife, Pinky. (For our purposes you may assume that a plea bargain agreement is a form of contract.)

Bobbie Jo is Caucasian. Her former husband, Billy Joe McAlister, is African American, however, he looks Caucasian. Bobbie Jo divorced Billy Joe after finding out the truth about his racial identity. During their marriage they produced a child, Matthew, who also looks Caucasian. Bobbie Jo did not want custody of Matthew because of his racial identity. During the course of negotiating the terms of their divorce, Bobbie Jo held out for substantially more alimony as a condition of accepting custody of Matthew.

Billy Joe subsequently married Pinky, who is also Caucasian. Billy Joe and Pinky subsequently had a child, Hephaestas. Hephaestas looks African American. Billy Joe and Pinky agreed to put Hephaestas up for adoption and had placed her with an adoptive family. However, Pinky subsequently had misgivings about the adoption and indicated to Billy Joe that she was going to exercise her right to revoke the adoption. Billy Joe decided that it was time to go public with his racial identity. He contacted Bobbie Jo in order to inform her about Pinky's intention to revoke the adoption and his decision to go public.

Pinky was subsequently found dead. She had been pushed over the balcony of her 5th floor apartment. Bobbie Jo admitted to McCoy that she pushed Pinky over the balcony. However, she claimed that it was an accident that occurred after she and Pinky exchanged hostilities and struggled. She told McCoy she was concerned about how Billy Joe's

revelations about his race would affect Matthew. As a mother concerned for her child, she had gone to Pinky's apartment to plead with her to change her mind about revoking Hephaestas' adoption. Bobbie Jo told McCoy that Pinky got upset with her and took a swing at her with an empty gin bottle. Bobbie Jo indicated that in her effort to defend herself she knocked Pinky over the balcony (Oops!).

In McCoy's view Bobbie Jo's actions vis-a-vis Matthew indicated that she really didn't care about Matthew. He thought she was probably more interested in keeping facts about her liaison with Billy Joe secret from the country club crowd. McCoy's theory was that Bobbie Jo went to Pinky's apartment with the premeditated intention of killing her in order to prevent Pinky from revoking Hephaestas' adoption. He believed that letting the jury know about her actions vis-a-vis Matthew would help convince them about the premeditated nature of her acts against Pinky.

Unbeknownst to Bobbie Jo, McCoy had asked Billy Joe to testify about Bobbie Jo's alimony negotiations. However, Billy Joe told McCoy that he wouldn't testify to that because he didn't want Matthew to realize how his mother had acted. McCoy truthfully advised Billy Joe that he could legally force him to testify by obtaining a subpoena and placing him under threat of contempt of court. Billy Joe responded, "I don't care, Mr. McCoy. You can do what you want with me. I'm not going to testify about that. I'd rather jump off the Tallahatchy Bridge!"

During the plea bargaining negotiation with Bobbie Jo and her criminal defense attorney, McCoy told them that Billy Joe was going to testify about her behavior vis-a-vis Matthew in the divorce negotiations. He told them that he was convinced that this would sway a jury to find Bobbie Jo guilty of premeditated 1st degree murder. Bobbie Jo responded that Billy Joe would never testify about that. McCoy stated in response: "Oh yes he will testify. I guarantee you he's going to testify."

McCoy and Bobby Jo's attorney probably had not paid a lot of attention when they were taught the Rules of Evidence in law school. If they had paid attention, both of them would have realized that no court would allow Billy Joe's testimony because its relevance was outweighed by the prejudice that it was likely to instill in a jury.

Bobby Jo's attorney advised her that if she got convicted for 1st degree murder, she could get the gas chamber. Unfortunately, Bobby Jo's attorney had not been watching the news lately. The State Supreme Court had abolished the death penalty the night before the plea negotiations. The most that Bobbie Jo would have received for murdering Pinky was life in prison without possibility of parole. Fearful of the impact of Billy Joe's testimony and the prospect of going to the gas chamber, Bobbie Jo agreed to plead guilty to second degree murder. The penalty for second degree murder was 10 years in prison.

Now that she has found out what Billy Joe actually told McCoy, boned up on the Rules of Evidence and heard about the Supreme Court's decision on the death penalty, she wants you to contest the plea bargain. **Does contract law provide any basis for overturning the plea bargain? (You may assume that a plea bargain agreement is a contract.)**

**QUESTION TWO (25 points):**

You are approached by Angry Amalgamated, Inc. ("AA"), the buyer of thermostats, to represent it in an appeal of a ruling dismissing its lawsuit against Without Warranty, Inc. ("WW") involving a breach of warranty. AA manufactures hot and cold water dispensers. It incorporates thermostats in its dispensers that it sells to the public. The cause of action arose out of alleged defects in the thermostats sold by WW to AA. According to AA, the thermostats failed to regulate the temperature in hot water dispensers. AA's clients suffered scalding burns as a result of the defective thermostats. AA paid out \$10 million to settle litigation arising from the defective thermostats. AA sued WW for indemnification for the damages suffered by AA as a result of the breach of warranty by WW. It is clear that if the state law applies, WW would be responsible to AA for breach of warranty and would be required to indemnify AA. However, the lower court ruled against AA by stating that provisions in the contract between AA and WW barred application of the state laws rules on warranties and remedies.

AA purchased thermostats from WW on three separate occasions. Every time that AA made a purchase of thermostats from WW, AA sent WW a purchase order form which contained various "conditions." Of the 20 conditions on the order form, two are of particular relevance:

18. REMEDIES. The remedies provided to AA herein shall be cumulative, and in addition to any other remedies provided by law or equity. The laws of the state shown in AA's address printed on the masthead of this order shall apply in the construction hereof.
19. ACCEPTANCE. Acceptance by the Seller of this order shall be upon the terms and conditions set forth in items 1 to 20 inclusive and elsewhere in this order. Said order can be so accepted only on the exact terms herein and set forth. No terms which are in any manner additional to or different from those herein set forth shall become a part of, alter or in any way control the terms and conditions herein set forth.

Near the time that AA placed its first order with WW, AA sent WW a letter that it sends to all of its new suppliers. The letter states, in part:

The information preprinted, written and/or typed on our purchase order is especially important to us. Should you take exception to this information, please clearly express any reservations to us in writing. If you do not, we will assume that you have agreed to the specified terms and that you will fulfill your obligations according to our purchase order.

Following receipt of each order, WW prepared and sent AA an "Acknowledgment" form containing the following language:

NOTICE OF RECEIPT OF ORDER. THIS WILL ACKNOWLEDGE RECEIPT OF BUYER'S ORDER AND STATE SELLER'S WILLINGNESS TO SELL THE GOODS ORDERED BUT ONLY UPON THE TERMS AND CONDITIONS SET FORTH HEREIN AND ON THE REVERSE SIDE HEREOF AS A COUNTEROFFER. BUYER SHALL BE DEEMED TO HAVE ACCEPTED SUCH COUNTEROFFER UNLESS IT IS REJECTED IN WRITING WITHIN TEN (10) DAYS OF THE RECEIPT HEREOF, AND ALL SUBSEQUENT ACTION SHALL BE PURSUANT TO THE TERMS AND CONDITIONS OF THIS COUNTEROFFER ONLY; ANY ADDITIONAL OR DIFFERENT TERMS ARE HEREBY OBJECTED TO AND SHALL NOT BE BINDING UPON THE PARTIES UNLESS SPECIFICALLY AGREED TO IN WRITING BY SELLER.

Among the terms and conditions listed on the back of the Acknowledgment form was the following:

9. WARRANTY. All goods manufactured by WW are guaranteed to be free of defects in material and workmanship for a period of ninety (90) days after receipt of such goods by Buyer or 18 months from the date of manufacture (as evidenced by the manufacturer's date code), whichever shall be longer. THERE IS NO IMPLIED WARRANTY OF MERCHANTABILITY AND NO OTHER WARRANTY, EXPRESS OR IMPLIED, EXCEPT SUCH AS IS EXPRESSLY SET FORTH HEREIN. SELLER WILL NOT BE LIABLE FOR ANY GENERAL CONSEQUENTIAL OR INCIDENTAL DAMAGES, INCLUDING WITHOUT LIMITATION ANY DAMAGES FROM LOSS OF PROFITS, FROM ANY BREACH OF WARRANTY OR FOR NEGLIGENCE, SELLER'S LIABILITY AND BUYER'S EXCLUSIVE REMEDY BEING EXPRESSLY LIMITED TO THE REPAIR OF DEFECTIVE GOODS OR THE REPAYMENT OF THE PURCHASE PRICE UPON THE RETURN OF THE GOODS.

It is undisputed that AA received the Acknowledgment prior to the arrival of each shipment of thermostats. However, each time AA utilized the thermostats in its water dispensers and sold them to its customers without objecting to the terms in WW's acknowledgment form.

To further complicate matters, the lower court ruled against AA by following *Bakke v. Hopwood*, a 1964 case in your jurisdiction. In *Bakke* a buyer sent a purchase order to a seller. The purchase order was silent as to remedies or warranties. The seller responded with an acknowledgment that included language purporting to limit the seller's liability. In *Bakke*, the court held that "a response which states a condition materially altering the obligation solely to the disadvantage of the offeror is an acceptance expressly conditional on assent to the additional terms." In the view of the *Bakke* court, this meant that the common law rule applied and that the buyer accepted the goods with knowledge of the conditions specified in the acknowledgment and thereby became bound by the limitations of liability stated in the acknowledgment. Following the precedent established in *Bakke*, the lower court ruled that AA was bound by the limitations of liability provisions in WW's acknowledgment form.

Your appeal will be to the court which issued the *Bakke* ruling. **What arguments will you make to attempt to overturn the lower court's decision. Hint: This court will not entertain arguments based on unconscionability.**

### QUESTION THREE (45 points):

Your client is Frank Lee. He believes that he has a contractual entitlement to one of Chad Evers' kidneys. Unfortunately Chad is dead and the hospital which has possession of Chad's body refuses to conduct the organ transplant. Frank wants you to obtain a court order directing the hospital to conduct the transplant.

According to Frank, he met Ivana, Chad's sister, at a dinner in 1996 at a cabin owned by his good friend Marv Albert. Frank is a Harvard educated, handsome and affable self made millionaire who is also a well known football commentator. Ivana was a love starved 56 year old divorcee. Within a week, Ivana and Frank were inseparable. Within six months, Frank had surprised her with a 3.5 carat diamond engagement ring.

Around the time Frank met Ivana he also met Chad. Frank and Chad hit it off almost immediately. Ivana informed Frank that Chad was having some problems with the IRS involving payment of back taxes. The IRS was threatening to confiscate Chad's emu ranch if he didn't come up with \$225,000 immediately. Without Chad's knowledge but believing that Chad would be grateful and pay him back, Frank intervened with the IRS on Chad's behalf and negotiated a deal where the IRS accepted \$150,000 from Frank in full settlement of its claims against Chad.

Subsequently, Frank learned that his kidneys were failing due to the heavy partying lifestyle that he had enjoyed with Wilt "the Stilt" Chamberlain and Thomas "Hollywood" Henderson during the 70s. Soon, he was weary, weak and tethered three times a week to a dialysis machine. Like tens of thousands of people in a nation in which organ donors are scarce, he was desperate for a transplant. He made plans to put his name on the national registry of persons awaiting kidney



donations. The registry has a long waiting list. His chances of getting a kidney through this system were about 1 in 5.

After Ivana found out about Frank's condition she offered him one of her kidneys, but the doctors ruled her out as a donor. She told Chad about it and how Frank had intervened with the IRS on Chad's behalf. Given this information and the fact that Chad wanted his sister Ivana to have a long and happy marriage (this time around), Chad indicated that he would donate a kidney to Frank. In exchange, he asked Frank for three things: a life insurance policy, \$5,000 to cover the pay he'd lose while recovering from surgery, and that Frank "always keep Ivana happy." Chad expressed this request in a handwritten letter to Frank.

Chad knew about a federal law that makes it a crime to accept money or "other valuable consideration" for an organ. The law does not prohibit the acceptance of payments or other consideration to defray the costs and dangers associated with making a donation of an organ. Frank did not know anything about this law when you informed him about it in your meeting with him.

Frank did take out the life insurance policy for and remit the \$5,000 to Chad as requested. He also told Chad: "I promise to do my best to make Ivana happy for as long as I can afford it." Frank also decided not to place his name on the registry for persons needing kidneys.

Frank and Ivana continued with their wedding plans. However, on August 18, 1997 (a day of infamy) several months before the scheduled wedding date, the National Enquirer published a story in which it alleged that Frank was engaged in a tryst with Morgana the Kissing Bandit in a hotel room in New York. The story included pictures that purported to depict Frank *au' naturel* in the shower (*ala' Dennis Franz*) with Morgana.

Ivana was very upset and called off the wedding. Frank vehemently denied the allegations in the National Enquirer. After a series of late night phone calls, he convinced Ivana that the photographs were actually doctored up photos of events that transpired back in his partying days long before he met and fell in love with Ivana. (He admits to you that he lied to Ivana. But he says he isn't going to ever hurt her again.)

Ivana agreed to continue with the wedding plans. However, she warned Frank: "You had better watch out for my brother. He's really upset. He has made some rather disparaging remarks regarding the nature of your maternal ancestry and he told me that the next time he sees you he's going to tear you a new one. And I don't think he was referring to a sheet of paper either!"

The wedding was scheduled for today. However, tragic circumstances at the wedding rehearsal dinner last night have caused the wedding to be postponed indefinitely. Chad showed up at the rehearsal dinner drunk and mad. He charged at Frank and started swiping at him wildly with a 12 inch Bowie knife that had been designed for cutting the wedding cake. Frank had a 357 Magnum at his disposal for just such occasions. He shot the gun in the air in order to bring Chad to his

senses. Unfortunately, the report from Frank's weapon scared Chad so badly that he toppled head first into a Texas sized punch bowl filled with EverClear and Lime Gatorade. Chad drowned on the spot.

Frank is in your office because there is an urgent need to move quickly. The hospital is doing what it can to preserve Chad's kidneys, however unless the court issues an order today, Chad's kidneys will become unusable. Your ability to obtain the court order will depend on whether there was a contract formed between Chad and Frank and whether the relief requested by Frank is appropriate. Will you be able to obtain the court order?

**BONUS QUESTION (3 points):** Who was first to record a song which included the statement: The Revolution will not be televised? (Hint: It wasn't Public Enemy and it wasn't Professor Kessler)

**Question One (30 points)**

Contract law provide several possible arguments for overturning the plea agreement between Bobbie Jo Gentry ("BG") and Jack McCoy. However, there are problems which each of these theories.

The circumstances surrounding BG's decision to plead guilty to 2d degree murder indicates that she was coerced into making the plea by McCoy's threat to put damaging testimony on about her actions in the previous divorce negotiations. It was the fear of the impact of such testimony that caused BG to plea guilty. Contract law allows rescission of an agreement when assent is procured by duress. Duress applies when a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative. The problem with this duress theory is the fact that McCoy's threat to have Billie Joe McAlister ("BM") testify against BG may not have been improper. His threat does not fit into any of the definitions given in the Restatement section 176 for "improper threats." He was not threatening criminal prosecution -- she was already under prosecution.

The circumstances surrounding BG's plea also indicate that BG acted on the basis of misrepresentations by McCoy. A party can void an agreement that is procured by either a material or a fraudulent misrepresentation upon which the party is entitled to rely. It is possible that McCoy committed acts of material or fraudulent misrepresentation, both by the things that he said to BG and her lawyer and by the things that he left out in his statements to her and her lawyer.

First McCoy indicated that BM would testify. This was a fraudulent misrepresentation because of BM's prior statement that he wouldn't testify even under penalty of criminal contempt. This means that McCoy either (1) knew that his statement to the contrary was either not in accord with the facts or (2) that he did not have the confidence in the statement that he stated or implied he had. The fact that the statement is fraudulent would mean that it would not have to be material in order to provide a basis for overturning the agreement if BG and her attorney were justified in their reliance on the statements made by McCoy. There is a strong possibility that their reliance was not justified. They could have questioned BM about his intentions before entering into the plea bargain.

McCoy may argue that his statement was an opinion only and that he felt that he would be able compel BM's testimony. When he represented that he would make BM testify, McCoy was unaware of or had forgotten that the Rules of Evidence would prevent BM's testimony. Thus this statement was a misrepresentation although not fraudulent. This misrepresentation would need to be material. A misrepresentation is material if it would induce the average person or if the speaker knows that it would induce the recipient of the information. The statement was probably material in that it might induce the average person and McCoy knew that it would induce BG. However, there is again a problem with BG's reliance on the statement given the fact that she

did have legal counsel, who arguably should have consulted the Rules of Evidence before acting on McCoy's representation...

McCoy may have committed a misrepresentation by things that he failed to say to BG and her attorney. Ordinarily a party is not obligated to tell everything they know. However, under certain circumstances, the failure to state a known fact can amount to an assertion. We don't know from the facts whether McCoy knew that the Supreme Court had abolished the death penalty and we also don't know if he knew that BG's attorney didn't know about it. If he did know each of these, his failure to inform BG and her attorney, could amount to an assertion. Restatement 161 treats as an assertion: the failure to disclose information that would correct a mistake of the other party as to a basic assumption on which that party is making the contract if nondisclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standard of fair dealing. Also McCoy's assertion that BM would testify may make his failure to disclose BM's contrary statement ("I'd rather jump off the Tallahatchy Bridge") the same as an assertion. Under Restatement section 161 a person is required to disclose information if the disclosure is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material. Having told a half truth, McCoy may have been obligated to make a full disclosure. Again, the issue of justifiable reliance on BG and her attorney's part may operate to bar application of this theory in order to void the plea agreement.

BG and her attorney may want to argue mistake as a basis for voiding the plea agreement. A party may void an agreement if that party makes a mistake about a basic assumption on which he made the contract which has a material effect on the agreed exchange of performances. In order to utilize the mistake, the party claiming mistake must not bear the risk of the mistake and either enforcement of the agreement would be unconscionable or the other party must have reason to know about the mistake. It is clear that BG and her attorney were mistaken about (1) the death penalty and (2) the Rules of Evidence which would have precluded BM's testimony. These seem to be pretty basic assumptions. However, it is possible that a court would find that under the circumstances it would be reasonable for BG and her attorney to bear the risk of these mistakes, because it was in their power to do something about them (keep up with pending cases bearing on your specialty and consult the Rules of Evidence.).

The final argument in favor of overturning the plea agreement would be unconscionability. Unconscionability has been generally defined to include the absence of meaningful choice on the part of one party to a bargain together with contract terms that are unreasonably favorable to the other party. In reviewing claims of unconscionability the courts look at several factors: relative bargaining power between the parties, notice, lack of understanding, lack of choice, and whether the item in question necessary for survival or merely a luxury. However, in the final analysis the court probably would respond on the basis of whether the resulting bargain leaves the court with a queasy feeling. Some of the factors that would weigh in favor of a consumer against a large manufacturer are alleviated here because BG was represented by counsel at the time the bargain was concluded. It is not possible to argue that she had no notice of the resulting bargain or no ability to understand the bargain because of fine print or legalese. It is true that she lacked choice and hence may have lacked bargaining power, because she couldn't go to another district attorney for a different deal. It is also true that the item in question (her

liberty) is important. For the most part however, it appears that BG was victimized by her own counsel's shoddy representation of her. We do not know the circumstances under which she got saddled with this incompetent lawyer. That may have a bearing on the court's decision.

One question that will cause a real fight is whether the resulting bargain is really unreasonably favorable to one side (the district attorneys office). BG traded in the prospect of life without parole (which a jury may have found even without BM's testimony) for a ten year prison sentence. Given her confession, the least she would have gotten was a manslaughter charge. This would probably have gotten her some jail time, even if not ten years.

## Question Two (25 points)

Because this dispute involves the sale of goods, the UCC applies. Because each party is insisting on the application of boilerplate terms from standard forms and the forms are in conflict this is a classic Battle of the Forms problem. 2-207 clearly applies. Under 2-207 our client Almighty Amalgamated ("AA") should have prevailed because of the application of the "Knockout Doctrine" and paragraph 3 of 2-207 would have made the warranties available under the UCC applicable to our case. AA form limited acceptance to AA's terms. Under subparagraph 2 (2) of 2-207 this prevents any additional or different terms proposed by Without Warranty ("WW") from becoming part of any contract.

On the other hand, WW sent a form which invoked the proviso language of paragraph 1 of 2-207. Even though WW purported to be a counteroffer, it was not a counter-offer because it did not alter the dickered terms of the bargain (price, quantity, time of delivery, etc.) but only the boilerplate. 2-207 governs the effect of acceptances which vary the terms of the non-dickered terms of an offer. Such acceptances are valid unless, the acceptance is expressly made conditional upon assent to the varying or different terms. WW invoked this proviso language.

The result of the corresponding forms is that the written documents do not establish the existence of a contract. The fact that the parties performed indicates that a contract was formed under paragraph 3 of 2-207. Under paragraph 3, the contract would include the terms on which the parties forms agreed and any supplemental "gap filler" provisions supplied by the article 2 of UCC. In the absence of language about warranties, article 2 of the UCC indicates that there are implied warranties that would apply to the transaction between AA and WW. The defects in WW's goods amounted to a breach of such implied warranties and hence AA should prevail in an action brought on the basis of such breach.

The problem is that the lower court followed *Bakke v. Hopwood* and our appeal is to the court which issued *Bakke v. Hopwood*. It is also clear that when the court issued its *Bakke* ruling, it did so with a conscious disregard for article 2-207. In making its ruling the *Bakke* court used specific language from 2-207 when it stated "a response which states a condition materially altering the obligation solely to the disadvantage of the offeror is *an acceptance expressly conditional on assent to the additional terms.*" Furthermore the *Bakke* court, notwithstanding the existence of 2-20, reached a result that basically was an application of the common law Last

Shot Doctrine when it said that the offeror's silence amount to an acceptance when the parties performed..

In order to argue the case, I would remind the court about the legislative intent behind 2-207 which was to alleviate some of the arbitrariness resulting from the common law Mirror Image Rule. Under the Mirror Image Rule an acceptance that varied the terms of the offer was treated as a counter-offer and a rejection of the original offer. If the parties walked away at that time, there was no contract. However, if the parties conducted themselves as if there was a contract by performance, the contract was governed by the last form sent before the parties began performance. Hence the "last shot" governed the contract. 2-207 was passed with a view towards alleviating the effect of the last shot doctrine. It made no sense that the last document sent would govern the transaction, just because it was the last document sent. This is especially true because in the commercial world, parties conducted business on the basis of standard form contracts. Under such contracts the differing terms typically related to boilerplate in the standard terms. This boilerplate were provisions that the parties probably didn't read anyway. The court's ruling in *Bakke* basically undermines the legislative intent behind 2-207 by perpetuating the Last Shot Doctrine.

We could also attempt to distinguish our case from *Bakke* by pointing out that in *Bakke*, the court was faced with a term that *added* terms to the original offer. In our situation, WW's terms actually *vary* the terms of the additional offer. Whereas, under 2-207 it might make sense to say that silence in the face of additional terms could equal consent, it is much harder to argue that silence equals consent when the offeree's form actually varies the terms of the offeror's form. Under the first scenario, which existed in *Bakke*, it may be assumed that the offeror covered everything that was important to the offeror in its offer. The fact that it did not address a remedy or a warranty, might be an indication that it was in fact indifferent as to these matters. However, in our case AA specifically addressed these issues and brought attention to the fact that the terms are important to it. It would seem under such circumstances, something more than mere silence should be necessary to find consent to different (as opposed to additional terms).

### **Question Three (45 points).**

The issues here are (1) whether there was a contract formed between Frank and Chad and (2) assuming there was a valid contract, is Frank's request for specific performance appropriate. In answering the question we need to determine that there was consideration for Chad's promise to donate the kidney, whether there was a mutual assent to be bound by contract, whether there was an offer that was accepted in the manner invited prior to termination of the offer. In order to determine whether Frank would be entitled to specific performance we would need to determine that he has no adequate remedy at law and that there are no other factors barring a request for equitable relief.

Was there consideration for Chad's promise? On the surface of this it appears like a bargained for exchange. However we need to examine the situation to determine if there are any arguable problems with consideration.

The first problem would be that Chad made the promise because Ivana told him about how Frank had intervened on his behalf with the IRS. Frank's actions with the IRS constitute past action and past action is not consideration. However, we could argue that Chad made a promise to Frank in light of a material benefit conferred on Chad (payment to IRS), the benefit had not been intended as a gift (Frank believed that Chad would pay him back) and the value of Chad's promise was not disproportionate to the benefit he received (relief from the IRS).

The second problem is that Chad indicates that he is going to "donate" the kidney and it is obvious that this is being done out of affection for his sister Ivana. In this light, the things that he appears to be bargaining for -- insurance policy, payment for lost wages may have only been conditions placed a gratuitous promise and not consideration at all. These are items that make it possible for Chad to donate a kidney to Frank.

A third problem is that if Chad was bargaining for Frank's promise to always keep Ivana happy, when Frank responded "I'll keep her as happy as I can for as long as I can afford it." This may have been an illusory promise. Illusory promises are not consideration.

Was there mutual assent to be bound?

Chad knew that he could not ask for "valuable consideration" in exchange for his kidney because such would be illegal. This may have provided evidence that he was not thinking in terms of entering into a contract, but only had an intention to make a gift to Frank. It could be argued that he made no objective manifestation of an intent to be bound by contract when he stopped short of requesting anything that could have been determined to be "valuable consideration" under the statute. It could also be argued that, even if his objective manifestations indicated a willingness to be bound by contract, his subjective intention was not to be bound. If Frank knew or should have known about Chad's subjective intention, there is no mutual assent to be bound. One could argue that Frank should have known about Chad's subjective intention because of the law making it illegal to charge a valuable consideration of an organ. In addition, even if Frank is not charged with knowledge of the law, this means that each party has a different subjective meaning. If each party has a different subjective meaning, there is no mutual assent to be bound, unless Chad knows or should know Frank's intention to be contractually bound.

Was there an offer? It is pretty clear that, if there was an offer Chad made it (at least initially). However, it is possible that some courts might quibble with the fact that "Always keep Ivana happy" is not reasonably certain.

Was there an acceptance in the manner invited by the offer prior to termination of the offer?

If Chad made the offer what form of acceptance was invited? It appears that he may have invited acceptance by a performance (life policy + \$5,000 + "keep Ivana happy"). If such is the case, Frank may have failed to perform by having the tryst with Morgana. It is also possible that with respect to Ivana, Chad was inviting acceptance by a promise. If so, Frank's return promise ("I'll keep her as happy as long as I can afford it") was not an acceptance in the manner invited by the performance.