

Contracts Final Examination

Fall Semester 1994

Section A

Professor Andre' Hampton

A campaign
promise
is one thing.
A signed contract
is quite another.

Bill Melnick
John A. Boehner
Jeff Vanick
Jennifer B. Dunn
Chris Cox
Dave Latta
Charles W. Stenholm
Joan Melinara
Nestor Cerden
Peter Hoebatos
Mark Puffer
James H. Lisch
Devin Spertus
David Dreier

Republican House
candidates have
signed a contract
with America.
If we break
this contract,
throw us out.
We mean it.

That's why Republican House candidates have pledged, in writing, to vote on these 10 common-sense reforms.

Keep this page to hold us accountable.

Contract with America

We've listened to your concerns, and we hear you loud and clear.

On the first day of Congress, a **Republican House** will:

- Force Congress to live under the same laws as every other American
- Cut one out of every three congressional committee staffers
- Cut the congressional budget

Then, in the first 100 days, we will vote on the following 10 bills:

Done ☐

1. Balanced budget amendment and line-item veto: It's time to force the government to live within its means and to restore accountability to the budget in Washington.

Done ☐

2. Stop violent criminals: Let's get tough with an effective, believable and timely death penalty for violent offenders. Let's also reduce crime by building more prisons, making sentences longer and putting more police on the streets.

Done ☐

3. Welfare reform: The government should encourage people to work, not to have children out of wedlock.

Done ☐

4. Protect our kids: We must strengthen families by giving parents greater control over education, enforcing child support payments and getting tough on child pornography.

Done ☐

5. Tax cuts for families: Let's make it easier to achieve the American Dream, save money, buy a home and send the kids to college.

Done ☐

6. Strong national defense: We need to ensure a strong national defense by restoring the essential parts of our national security funding.

Done ☐

7. Raise the senior citizens' earning limit: We can put an end to government age discrimination that discourages seniors from working if they choose.

Done ☐

8. Roll back government regulations: Let's slash regulations that strangle small businesses, and let's make it easier for people to invest in order to create jobs and increase wages.

Done ☐

9. Common-sense legal reform: We can finally stop excessive legal claims, frivolous lawsuits and overzealous lawyers.

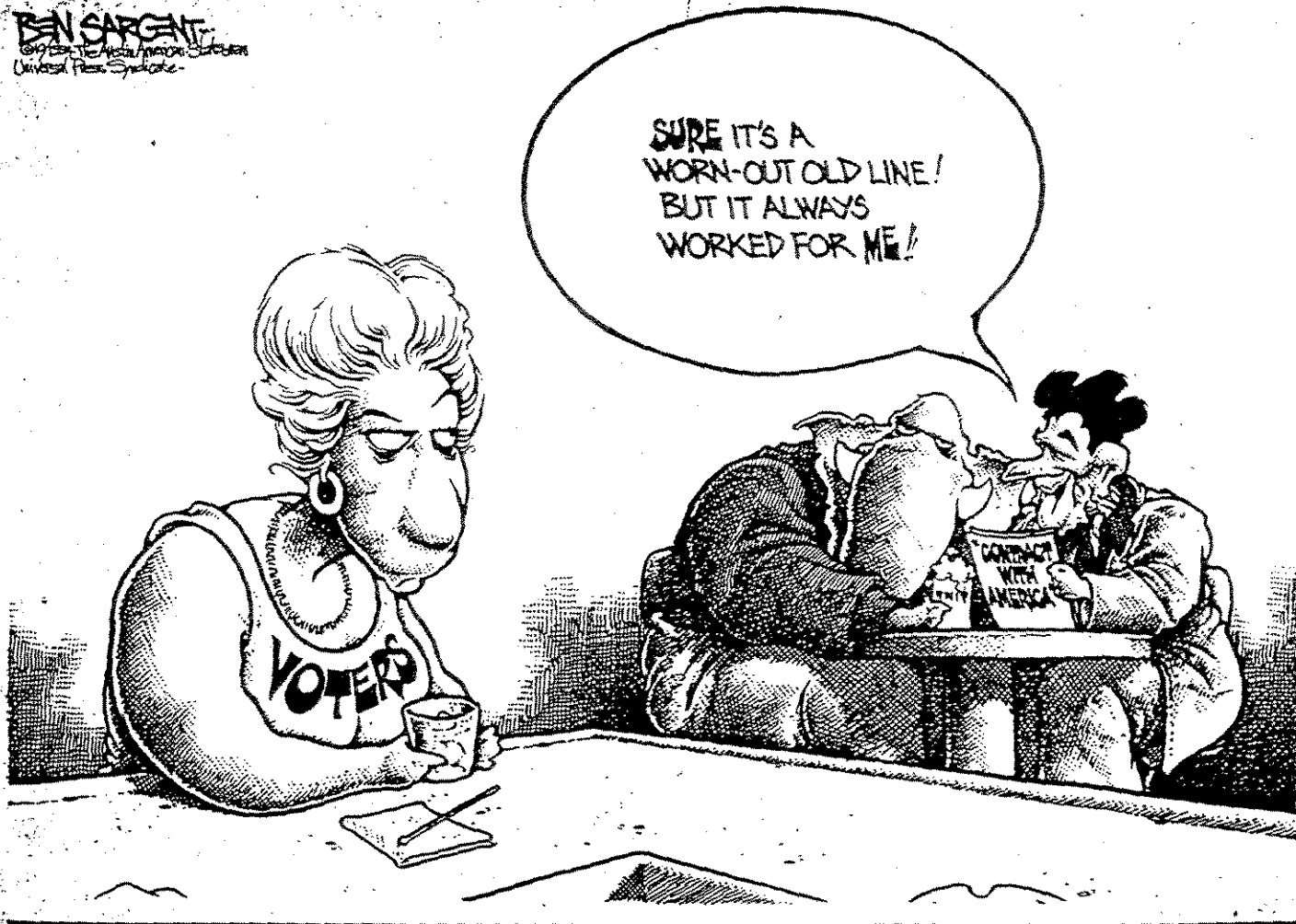
Done ☐

10. Congressional term limits: Let's replace career politicians with citizen legislators. After all, politics shouldn't be a lifetime job.

After these 10 bills, we'll tackle issues such as common-sense health care reform, tax rate reductions and improvements in our children's education.

BEN SARGENT

BEN SARGENT
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LETTERS

**Contracts Final Examination
Fall Semester 1994
Section A
Professor Hampton**

Instructions

1. This examination consists of five (5) pages, including this page as the first, and four (4) problems. There are also two attachments.
2. You will have two (2) 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 any notes or outlines 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.**

EXAM NUMBER

Contracts Final Examination
Fall 1994
Section A
Professor Andre' Hampton

QUESTION #1

Rachim Ofadacoles, a senior partner in the law firm where you are currently employed, has given you a rush assignment. It seems that one of the firm's clients, Mr. Bill E. Solestes, wants to sue Newt Gingrich and all of the newly elected Republican Members of the United States House of Representatives for breach of contract. The alleged breach of contract arises from the attached advertisement that the Republican Party ran in the October 23rd through 29th edition of T.V. Guide. Mr. Solestes, a long standing Democrat, claims that he voted for the Republican candidate for his Congressional district because of the "Contract with America."

You may recall that the Republicans assumed control of the House of Representatives in a landslide victory in the election of November 1994. After the election and before the new Congress adjourned, there was a lot of attention focused on the "Contract with America" and its chief architect, Newt Gingrich. During one post election news conference, Mr. Gingrich reaffirmed his commitment to the "Contract with America" by stating:

"As the Speaker of the House, I fully intend to see that we fulfill the obligations in our contract with the American people. I think a lot of folks here in Washington are going to be surprised to find that what many may have believed was merely typical pre-election hyperbole was actually intended as a binding contractual commitment."

It has almost been a year since the Republicans assumed control of the House of Representatives and they have not brought any of the items in the "Contract with America" up for a vote. The reasons for this appear to be that:

- (1) a majority of the Republicans who signed the "Contract with America" actually believed that it was merely an effective campaign gimmick which was no more binding than any other campaign pledge (as indicated by the editorial cartoon preceding this examination this view may have been shared by many others);

- (2) according to the Heritage Foundation, an unbiased (but conservative) think tank, adoption of the economic provisions in the "Contract With America" would actually lead the country to "starvation, ruination and damnation." (Apparently the Heritage Foundation's original research which lead to the formulation of the "Contract with America" was based on an economic forecasting model which contained a substantial flaw due to a glitch in the Pentium computer chip. Newt Gingrich has publicly admitted that had he known about the flaw in the economic model some of the economic provisions in the "Contract with America" would have been softened.); and
- (3) on reflection, term limits didn't sound like such a good idea.

Mr. Ofadales tells you that his legal opinion is that Mr. Solestes' breach of contract claim is frivolous and/or futile. He wants you to draft a memorandum for him to use in a meeting that he is going to have with Mr. Solestes in order to persuade him to drop the matter. Is it possible to draft such a memo relying on basic contract concepts or does Mr. Ofadales need adjust his thinking?

QUESTION #2

Your friend from the practice examination, William Story, has approached you regarding your possible representation of the estate of his late uncle, Henry Cisneros. Henry's former mistress, Lorena Bobbitt has filed a breach of contract claim against the estate. It appears that prior to his untimely demise, Uncle Henry had told Lorena that he would pay her \$1 million if her daughter, Athena, graduated from Harvard University. At the time that Henry made the statement, which Lorena apparently has on tape, Athena was a 12 year old child prodigy (listed in the Guinness Book of World Records under "Highest Recorded I.Q.") who was entering her freshman year of study at Harvard University on a full academic scholarship. Lorena alleges that she gave up a lucrative acting career and moved to Boston so that Athena could attend Harvard. She fully expected that the money from Henry would be forthcoming because Henry had won \$45 million in the Texas lottery.

Athena is not Henry's child and Lorena has never made any claims that he is the father. Henry and Lorena's affair was a matter of public knowledge. However, when he allegedly made the promise, Lorena and Henry's affair had already fizzled out. At the time Henry was being considered for an appointment to the position of Secretary of Housing & Urban Development. This was also shortly after the scandal caused by Jennifer Flowers' accusations that she was Bill Clinton's former lover.

When Henry passed away the estate refused to make the payments to Lorena. The estate took this position because it has in its possession a copy of a letter that Henry apparently sent to Lorena subsequent to her move to Boston and his appointment as Secretary of Housing & Urban Development. The letter states:

Dear Lorena:

It seems that in the anxiety surrounding my anticipation of being appointed to a high position in the Federal government, I may have inadvertently created certain false expectations on your part with respect to your financial well-being. I truly don't know what came over me, but my head is clear now. I hope that my comments did not cause you any inconvenience. Give Athena my love and tell her that I wish her the greatest success in her academic endeavors.

Will you be able to defeat Lorena's breach of contract claim against Henry's estate?

QUESTION #3

Mr. Don Frick is seeking your counsel in regard to a contract dispute that he is having with his friend, Bill Frack. Frick operates a factory which produces golf balls that have a unique design that will allow them to be hit further than ordinary golf balls. Frack is in advertising. Frick explains that he and Frack were playing golf one day in September 1993 when Frack began to express an interest in using the gold balls in some advertising scheme. Frick indicated that he would be willing to supply Frack with all of his needs for the golf balls for the right price. On May 25, 1994 Frick received a letter from Frack which read as follows:

"This letter is written to confirm our conversation relating to my purchase from you of all of my requirements for golf balls. The price is to be \$25.00 per gross, all balls to be of first class quality and delivered as per my specifications to follow. I hereby object in advance to any changes that you attempt to make to the terms of this purchase order."

Frick indicates that he sent Frack a letter dated June 6th, which stated:

"Sorry cannot deliver at \$25.00. I will need \$35.00 per gross for orders of 50 gross or more and additional amounts for orders of less than 50 gross. I do not make any warranty with respect to the golf balls in any way, and specifically disclaim any warranty of fitness for a particular use. This form is not an 'acceptance' unless you expressly agree to all changes that I have proposed."

Subsequently, Frick received a letter from Frack which indicated: "Per our previous correspondences, please forward 10 gross to arrive before July 4th."

Frick shipped 10 gross and a bill for \$470.00 (10 gross @ \$47.00 per gross).

Frack forwarded a check to Frick for \$250.00 with a notation: "This check constitutes payment in full." His cover letter indicated that he believed that they had an agreement at \$25.00 per gross as per his original letter and that due to the fact that the golf balls that had been forwarded were defective he was reducing the price in lieu of filing a claim for breach of an implied warranty of fitness for a particular use.

Frick wants to know how to respond and whether he can safely cash the check.

QUESTION #4.

Your client is Toulouse LeTrec, M.D. a primary care physician practicing in San Antonio. Dr. LeTrec has come to you because he is concerned about a letter that he received from a local HMO in which he is a participating provider. The letter is a transmittal of an amendment to the contract between the HMO and Dr. LeTrec. The letter states that unless Dr. LeTrec executes the amendment and returns it to the HMO, the HMO will exercise its right to terminate the contract upon thirty (30) days notice without cause. The current contract provides that it cannot be amended without mutual agreement of the parties.

The provisions that concern Dr. LeTrec are the following:

- (1) The amendment requires that Dr. LeTrec reduce his per patient costs by
(a) reducing the number of days that his patients spend in the hospital
and (b) reducing his consultations with and referrals to specialists;
- (2) The amendment reduces Dr. LeTrec's existing fee schedule by 20%; and
- (3) The amendment requires Dr. Letrec to defend and indemnify the HMO against any claims brought by any patient arising from the services rendered by Dr. LeTrec whether such claims arise solely from actions of Dr. Letrec or joint actions of the HMO and Dr. Letrec. (Dr. LeTrec indicates that his insurance carrier has informed him that it will not be able to cover his obligations under this provision to the extent that it requires him to defend and indemnify the HMO from claims based on the HMO's negligence.)

HMOs have become dominant in the health care market in San Antonio. They now cover 75% of the insured patients in the city. In addition, Dr. LeTrec indicates that he only knows about two other HMOs in the city that are currently accepting applications for primary care physicians. He indicates that their contracts contain provisions similar to the provisions in the amendment proposed by his HMO. He believes that the HMOs are generally attempting to reduce the number of primary care physicians participating in the HMO programs in order to lower their administrative costs and extort price concessions from primary care physicians.

Dr. LeTrec indicates that if his HMO contract is terminated, he stands to lose 55% of his business. This will probably require him to give up his practice and join a large group practice or leave San Antonio (a city where he has practiced medicine for 20 years). In addition, he believes that his termination would be detrimental to his patients because they would need to seek services from another HMO physician. (The HMOs typically do not provide coverage for services rendered by a non-HMO physicians.) He doesn't want to sign the amendment but he is concerned about being terminated. How do you advise him?

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Model Answer

Question # 1. The viability of Mr. Solestes' claim depends on whether there was a valid and enforceable contract. In order for there to be a valid contract, there must be an offer, acceptance in the manner invited by the offer, and the offer must be supported by consideration.

An offer must manifest a present contractual intent, it must have certainty and definiteness of terms and must be communicated to the offeree. Mr. Solestes could argue that these conditions were met in the Contract with America. The language used in the ad clearly states to whom the offer is being made (voters), it lists definite terms (we will bring to a vote the following 10 items in the first 100 days). Given the context in which the ad was placed (within a week before the election) it was a clear manifestation of a present intent. It was also communicated to the offerees by inclusion in the magazine.

However, Mr. Solestes' claim faces several challenges. First of all the offer appears in a magazine as an advertisement. Advertisements are not offers but merely invitations to deal or solicitations of offers. In order for an advertisement to constitute an offer it must be explicit, clear and definite. In essence, there must not be anything left to negotiate. Notwithstanding this general rule, the Contract with America seems to fall within the exception. There is nothing left to negotiate.

One problem with the whole issue, however, is whether the Contract with America could reasonably be interpreted as an offer to enter into a contract or whether it was merely an elaborate campaign pledge. Note that many of the Republicans indicated after the fact that they believed that it was merely a campaign gimmick. On the other hand, Mr. Gingrich certainly appeared to believe that the contract with American was more of a commitment than "pre-election campaign hyperbole."

Of course, under the objective theory of contract formation, what Gingrich and the other Republicans believed does not matter if a reasonable person could have believed that they intended to enter into a binding contract. A court will probably find that it is not reasonable for a person to believe that candidates for public office actually intend to contractually bind themselves to vote in certain ways.

If the ad constituted an offer, Mr. Solestes must prove that he accepted the offer in the manner invited by the offer. This offer appears to be an offer that can only be accepted by performance (i.e., voting for the Republican candidates). Mr. Solestes (a long time democrat) would need to prove to the fact finder (a judge or jury) that he accepted the offer by voting Republican.

The next issue would be whether Solestes supplied any consideration. In this case Mr. Solestes indicates that he forbore from voting Democate. This forbearance from voting Democrat could constitute consideration, if it was in fact bargained for. Is there any other conclusion that could be reached by the ad other than that the Republicans were bargaining for the vote of Mr. Solestes as well as others?

If it is found that there was an offer and acceptance, the Republicans will probably argue that the contract is voidable due to a mutual mistake or unilateral mistake. The public, the Republicans and Mr. Gingrich appear to have made a basic mistake about the merits of the items in the Contract with America. This has made a material effect on the agreed exchange of performances. In the event that the mistake was unilateral, the Republicans will argue that they did not bear the risk of mistake and that, given the results of performance, enforcement would be unconscionable.

What remedy is available for Mr. Solestes' claim? Monetary damages are probably out of the question as being too speculative (he would need to show some damages resulting from the failure to bring the items in the Contract to a vote or he would need to show the value of his vote). Specific performance would also be difficult to impose. The courts will not require specific performance of personal services (voting would arguably fall within that category.) This remedy would also seem to entangle the judiciary in the affairs of the legislature.

A court will find some way to invalidate this contract claim, either on the basis of some deficiency in the technical requirements for formation of a binding contract or for policy reasons. Note that the court does not enforce each and every situation in which there is an offer, acceptance and consideration. A court will refuse to become involved in resolving disputes under social contracts (e.g., agreements regarding dating and attendance at social engagements). Campaign rhetoric, no matter how convincing, would probably also fall under this category. A court simply does not have the time to become entangled in these political matters.

Question #2. In order to attempt to defeat Lorena's claim, you will probably want to argue: (1) lack of consideration; (2) statute of frauds; (3) termination of the offer by Henry's death; and (4) Henry's incapacity. Lorena is going to argue that (1) there was consideration for Henry's promise; (2) that even if there was no consideration, she relied on the promise to her detriment; (3) statute of frauds does not apply or alternatively, Henry is estopped from asserting the statute of frauds; (4) the contract did not die with Henry because it invited acceptance by performance, which thereby created an option contract which was to be held open for a reasonable time; and (5) Henry was not mentally incapacitated at the time he made the promise.

You will argue that there was no consideration for Henry's promise. He would not receive any benefit from Athena graduating from Harvard, therefore his promise to pay the money was merely gratuitous. In addition, because Athena had already entered Harvard at the time he made the promise, she could not have attended Harvard in response to his promise. Therefore, there was no bargained for exchange.

Lorena will argue that the issue of whether Henry would receive a benefit or not is irrelevant to the determination of whether he received any consideration, all that is necessary is that there be a bargained for exchange. Although Athena had already entered Harvard, she had a right to change schools (e.g., she could transfer to Yale) and that she forbore from attending another school on the basis of Henry's promise. For whatever reasons, he was bargaining for her graduation from Harvard and Athena continued at Harvard in order to fulfill the bargain.

Alternatively, Lorena will argue that even if there was no consideration for Henry's promise, she relied upon that promise to her detriment and would therefore be entitled to damages under Restatement 2d, section 90. Her reliance was reasonable (based on her relationship with Henry and the fact that he had won the lottery). It was reasonably foreseeable that she would rely on this promise. Enforcement of the promise is necessary to prevent an injustice (she gave up her acting career and incurred moving and other expenses associated with moving to Boston).

You of course will vehemently oppose her promissory estoppel claim. It was not reasonable for her to rely on Henry's promise because their relationship was over. It was not foreseeable that she would move to Boston to be with Athena, because Athena was a child prodigy who could take care of herself. Enforcement is not necessary to prevent an injustice because (a) her loss of earnings and other expenses do not add up to \$1 million and (b) if Athena

graduates from Harvard, Lorena and Athena both benefit.

You will assert the statute of frauds defense because Athena could not graduate from Harvard in one year. Therefore, the alleged contract cannot be enforced against Henry because there is no writing.

Lorena will argue that the statute of frauds does not apply because it is possible for Athena to complete Harvard in one year (child prodigy with highest recorded IQ). She will note that courts like to find ways around the statute of frauds defense. Therefore, that if it is at all probable that Athena could graduate in one year the court will not apply the statute of frauds. Lorena will also argue, that even if the statute of frauds does apply: (1) Henry's letter is a memorandum sufficient to bind Henry to the contract because he acknowledges making statements regarding their financial well-being; (2) under the circumstances, Henry would be estopped from asserting the statute of frauds under Restatement 2d, section 139; and (3) if Athena has completed performance, this takes the contract out of the scope of the statute of frauds. If all else fails, Lorena will argue that the reasons for having a statute of frauds are met in this case because she has something as reliable as a writing. She has Henry's promise on tape.

You will argue that the offer died with Henry. Lorena will argue that the offer invited acceptance by performance only and therefore when Athena began performance, this created an option contract under Restatement 2d, section 45. Therefore, the offer was kept open for a reasonable time and did not die with Henry. Alternatively, she will argue that she relied on the offer to her detriment and therefore pursuant to Restatement 2d, section 87 she is entitled to enforcement of the offer as an option contract.

You will argue that Henry's mental condition was such that at the time he made the promise he did not have capacity to enter into a contract. Lorena will argue that there is no evidence that Henry was suffering from any clinically established mental illness and furthermore, she had no reason to know about his mental condition.

Question #3. Frick should not deposit the check. He should return it to Frack unless he is willing to accept the check as payment in full. His acceptance of the check would constitute accord and satisfaction because, there is a genuine dispute over the amount owed and Frack has tendered a payment with the intention of that acceptance would resolve the dispute. Under UCC 1-207, Frick cannot accept

the check with reservation, because UCC 1-207 does not cover accord and satisfaction.

How Frick should respond to Frack depends on whether the parties had a binding contract on the basis of the conversation on the golf course. If this was a contract, Frack's letter of May 25th would constitute a written confirmation. This written confirmation would supply a writing sufficient to bind Frick under UCC 2-201 unless Frick objected to it in ten (10) days. It would be binding to the extent of the quantities listed in the writing. Note that Frack's letter refers to "all of his requirements." Under UCC 2-306 such a term is definite enough for a requirements contract. Therefore, if the golf course conversation resulted in a valid contract, Frick may be bound to the terms of the May 25th letter from Frack because he did not object within (10) days. He would therefore have received the agreed upon contract price (\$25.00 per gross as per the May 25th letter) and he would have exposure for breach of warranty. In this case he would want to accept Frack's offer of accord and satisfaction.

However, even if the golf course conversation constituted a valid contract, Frick has several arguments to avoid application of UCC 2-201. Frack's letter in confirmation was sent eight months after the conversation on the golf course. UCC 2-201(2) requires that the writing in confirmation be sent within a reasonable time. Frick would argue that eight months is not a reasonable time.

In addition, Frick would also want to argue that UCC 2-201 does not apply to this situation at all because UCC 2-201 applies to transactions for a price of \$500.00 or more. There was never any transaction that equalled \$500.00, therefore, notwithstanding the conversation on the golf course, UCC 2-201 does not apply to Frack's May 25th letter. (In other words this letter is not binding on Frick unless it deals with goods in excess of \$500.00 and because it didn't, Frick was not obligated to respond to it within 10 days.)

The golf course conversation came very close to being a requirements contract under UCC 2-306. Frack will probably argue that pursuant to UCC 2-305, Frick and Frack intended to enter into a contract and to agree upon "the right price" at a later date. You would probably counter by arguing that the evidence does not support any argument that Frick wanted to enter into a requirements contract without agreeing upon "the right price." His statement on the golf course most likely did not constitute a contract (or even an offer) but only an invitation to negotiate. Frick's statement means "make me an offer."

Judged in light of the above, the May 25th letter and the subsequent correspondence take on a different significance. The exchange of varying terms invokes UCC 2-207. By "objecting in advance to any changes," Frack is triggering paragraph (2) (a) of UCC 2-207, by limiting any acceptance to the terms of his offer. This would prevent Frick from including any additional or different terms. On the other hand, Frick responds by indicating that "this is not an acceptance unless you expressly agree to all changes that I propose." His letter, therefore, is not a seasonable acceptance under paragraph 1 of UCC 2-207 or, if it is a seasonable acceptance, it is expressly made conditional on assent to Frick's additional terms.

At this point the parties do not have a contract. However, pursuant to a subsequent letter from Frack, Frick forwards 10 gross of the golf balls. Under UCC 2-207, paragraph 3, if the parties conduct indicates the existence of a contract even though the writings do not, the court will enforce such a contract. This contract will include the terms agreed upon and gap filler provisions supplied by the UCC.

The court would supply a reasonable price for the golf balls under UCC 2-305. Whether the warranties would apply would depend on whether Frack has complied with the requirements for excluding the warranty.

Question #4. Your instincts (if not your heart) tell you that this is an adhesion contract, the amendment is unconscionable or the doctor is being subjected to economic duress. However, there may be problems with each of these. You may be able to argue that the proposed amendments are not supported by consideration and that the HMO is attempting to force the amendment in bad faith.

The situation has the indicia of an adhesion contract -- (1) unequal bargaining power and a (2) contract proposed on a take it leave it basis; (3) the contract has terms that are very favorable to one side and unfavorable to the other; and (4) no meaningful alternatives exist because the other HMOs have the same provisions. However, the HMO is likely to point out that the doctor does have reasonable alternatives to contracting with an HMO (what is so bad about joining a group practice). In addition, the contract concerns the doctor's livelihood. This is not a contract for necessities like food or shelter. Therefore this situation may not merit judicial scrutiny.

The contract amendments may appear unconscionable because they (1) allow the HMO to avoid liability for negligence by invoking an exculpatory clause; (2) the terms are unfair to

the doctor and (3) the terms may have an adverse impact on the provision of health care. These may provide viable grounds depending on the surrounding circumstances. The public policy implications of the contractual provisions relating to patient care appear particularly helpful to your client's claim. However, you should be prepared for the court to indicate that this is a matter requiring legislative intervention and not judicial intervention.

It may appear that the doctor is being subjected to economic duress. However, under *Austin Instruments*, the threatened act must be a breach of contract. Here the HMO is not threatening to breach the contract but is rather threatening to exercise a right given under the contract. In addition, even if the HMO's threat to terminate the contract did constitute a breach of contract, you would also need to show that the doctor could not obtain the needed goods elsewhere and that his remedy for damages would be inadequate. Neither of these seem to be applicable here.

You could argue duress under Restatement 2d, section 175. This requires a wrongful threat that leaves the doctor with no viable alternatives. The HMO's threat to terminate the existing contract would be wrongful if this threat is a breach of the duty of good faith and fair dealing imposed by Restatement 2d, section 205. However, reliance on duress pursuant to the Restatement also requires you to convince the court that the doctor has no reasonable alternatives to contracting with the HMO.

You could argue that the amendments are without consideration. In such case, the amendments can not be binding unless the modifications are fair and equitable in view of circumstances not anticipated by the parties when the contract was made. The HMO would probably argue that unanticipated changes in the marketplace require modification of the contract.