

To: Contracts Students
Fr: Amy Kastely
Re: Examination answers on Reserve in the Library

As you review these examinations in comparison to your answer, look especially at the organization of these answers and the number of issues and sub-issues identified with or in statements of applicable doctrine and arguments. This is the significant difference among answers.

Note: the fact that three of these 4 are typed is irrelevant. Over the past five years, the number of "A" papers written by those students who type and those who handwrite their answers is almost equal. Before that, most "A"s were handwritten, but that is just because at that time, most students handwrote their answers.

Each of you can write an "A" answer. I recommend writing an "A" answer out, even if you must have another person's answer in front of you as you write. The process of writing will give you a sense of the thoroughness with which you should study each week of the semester and the detail you should write in your examination answer.

Dare to do well!!

ID:



Contracts Section B

Kastely

ID:



Instructor:

Kastely

Exam Name:

Contracts Section B

Grade:

Short Answer:

- 1) The doctrine regarding nominal consideration is an exception to the general rule that courts will not look into the adequacy of consideration. If the consideration seems to be of a nature that the parties are trying to make something appear as consideration when in fact it is not (e.g. exchanging \$1 for several thousand dollars worth of a product), then a court will hold that consideration did not exist. ✓
- 2) The doctrine of misunderstanding may hold that a contract does not exist if both parties' interpretation of a material term is either objectively correct or incorrect, hence it is giving deference to what the parties actually thought a term meant (i.e. their subjective understanding). ✓
- 3) A promises B to reduce the amount of a mortgage, knowing that C will give B a second loan in reliance on this promise. A has a binding promise with C because he reasonably relied on A's promise in deciding whether or not to approve the loan to B. ✓
- 4) No, because advertisements or prices listed in a catalogue or price quotes are generally not held to be an offer unless the party clearly intended it to be so, here Pepsi clearly did not intend it to be an offer and it was clearly made in jest. ✓
- 5) If somebody cares for another person's child without that person requesting so, and the person later promises to person who had his child cared for later promises to pay for the services rendered. In such a situation the consideration was not "bargained for" but may still be enforceable under Section 86. ✓
- 6) In an implied in fact contract there is an actual contract between the parties that can be implied by the parties' actions, e.g. if someone's son contracts with a mechanic to have his parent's car fixed, then there is an implied in fact contract between the mechanic and the parent. With an implied in law contract the court is doing the implying, these types of contracts typically deal with the idea of restitution and concept of unjust enrichment in which a contract does not exist but a court finds that one party has been unjustly enriched and so the other party should be compensated, e.g. if someone finds another person's horse and takes care of it for a certain amount of time then the other party may be required to provide reasonable compensation even though a promise did not actually exist. ✓
- 7) Employer has made an offer for employment, and can revoke that offer at any time despite the employee beginning the performance. ✓
- 8) Possibly, if it can be found that the lawyer has knowledge or skill in the dealings of such goods, but likely the lawyer will not be held to be a merchant. ✓
- 9) Some courts have held that this indicates an exclusive mode of acceptance, but the recent trend has been to allow any reasonable expression of acceptance to constitute a valid acceptance in such a case, unless if the writing unambiguously says that it must be signed. ✓
- 10) An offer can be terminated through lapse of time, the death of the offeror, a rejection/counteroffer of the offeree, or a revocation by the offeror. ✓
- 11) The rule of Section 45 contemplates a situation where the contract can only be accepted through performance and the offeree has begun performance, hence a subordinate contract is said to exist where the offeror promises not to revoke if the offeree promises to try; while the ✓

rule in Drennen deals with a situation where the offeror may not revoke an offer if he should reasonably expect that the offeree will rely upon and does not necessarily require that the offeree have entered into any sort of unilateral contract as in section 45.

Long Question 1:

Will Martin have a claim under Annie's first letter:

In order for Annie's offer in her first letter to be a bargain contract there must be an agreement (mutual assent) and bargained for consideration. An agreement would require that Annie made an offer and Martin accepted the offer. ✓

The court will look at the words of the letter, the details in the letter, the number of people it was sent to, and any sort of custom between the parties to determine if this was an offer. Annie's letter offered to allow Martin to live in the house if he would do some chores and keep her company. The letter also stated that Martin would be cared for after her death, but did not provide any further details as to this matter. In this case it seems that Annie's letter would be considered an offer to Martin to come live with her if he would help her out, but it does not seem to be an offer to take care of Martin after her death if he does go out to live with her. An argument for the two brothers would be that the details were not spelled out as to what exactly she meant by taking care of Martin after her death. Martin would be able to respond that there was a clear intent that he would be taken care of after Annie's death as shown by the words of he would "of course" be well provided for.

The brothers could respond by saying that the offer was too indefinite, and did not say exactly what was meant by providing for Martin after her death. Courts traditionally have held that the contract would be invalid for such a reason, but the modern trend has been that courts will fashion a remedy for the parties if they are able to do so and if the parties intended to be bound by the contract. In this case the parties clearly intended that Annie would provide for Martin after his death if he would perform her requests, and the subsequent letter written by Annie may be used by the court to fashion a remedy. ✓

In order for the acceptance to be valid it must be made in a reasonable manner and the content must also be made according to the request of the promisor. The acceptance by sending a letter was made in a reasonable manner, but there may be an issue regarding whether he actually accepted her offer to care for him after her death if he went to live with her. However, Martin could say that by subsequently performing the duties in the offer by Annie (i.e. caring for her and doing the chores), that he clearly intended to accept the offer on the terms. A court would likely hold that Martin accepted Annie's offer to live with her.

The second main issue in dispute is if there is a bargained for consideration present here. Consideration is present if there is a return promise or performance made by the promisee. If the court decides that there was not a mutual agreement saying that Martin would be cared for in exchange for his coming to live with her then the consideration point will be irrelevant because a bargained for exchange would not exist. However, assuming that the court finds that there was a mutual agreement the court will need to decide if consideration existed. Courts will often distinguish consideration from a gift with a condition attached to it, but as a general rule something will look more like consideration if it benefits the promisor, though a benefit is not absolutely necessary. In order for the consideration to be bargained for the return promise or performance must be sought by the promisor in exchange for his promise and must be given by the promisee in exchange for that promise. In the Kirksey case a woman's brother in law offered some land to her if she decided to move out there, and the court held that this was simply a gratuitous exchange and was not supported by consideration because the woman did not have to refrain from doing anything she was entitled to do or to benefit the promisor in any ✓ ✓

way. The case at hand seems slightly different from the Kirksey case because Annie is promising to care for Martin after his death, but she is also seeking that he provide her with companionship and that he perform certain chores around the house in exchange for her promise to provide for him after his death. At first glance the gift to care for Martin after his death does not seem to be supported by any consideration, but it may be argued that Annie was indeed seeking a companion for the remaining years of her life and did in fact receive this benefit when Martin went to live with her, and that to induce Martin to agree to come live with her she said she would care for him after his death. However, an argument for the brothers would be whether Martin assisted Annie in order to receive the inheritance or whether he did it out of love and affection is a different issue, and if a court finds that Martin's return promise was not made in contemplation of receiving the inheritance then consideration will likely be found not to exist. The brother's will also point out that Martin was never actually obligated to care for her, and this seems to reinforce the argument that he went to live with his aunt out of affection rather than as an inducement to receive the inheritance. The correct decision for this issue does not seem to be clear for either side. ✓

If the court does not find that a bargained for exchange existed with regard to the first letter then Martin may have a claim under Section 90. Martin could argue that Annie should reasonably have expected that her offer to provide him with housing would induce him to quit his job, which he could have retired from with a good pension, and then to subsequently go live with her. Martin would argue that his actions in reliance on this promise were reasonable because he could not have complied with her request without actually quitting his job. A counter argument for the brothers would be that even though Annie did promise to care for him after his death if he promised to live with her that his actions to quit his job with only a few years left to retirement were unreasonable. They would argue that a reliance did not exist, but rather Martin's actions were done out of a sense of what he thought was the moral thing to do. The second argument the brothers could use would be to say that the promissory estoppel claim is too indefinite to be enforced because once again the letter only provided that he would be cared for and did not state exactly what was meant by this. Courts are split over this issue, but the modern trend has been to hold that a promissory estoppel claim will not fail for lack of indefiniteness. Additionally, in this case the court has the subsequent letter written by Annie to use as a guide as to her intentions. ✓

Will Martin be have a claim under Annie's second letter:

Also at issue is the nature of the note that Annie wrote to Martin. Martin likely would not have an argument under a theory of a bargained for exchange or of promissory estoppel regarding the second note. However, Martin may have an argument regarding the promise made in the second letter under Section 86 of the Restatement which will enforce a promise if it is made in recognition of a part benefit. In this case Martin was the companion of Annie for several years while also performing several chores for her, essentially taking care of all her needs. The brother's may attempt to argue that its value is disproportionate to its benefit. They would say that a house and hundred thousand dollars is not equal to benefits that Martin provided to Annie over the years. Martin may then argue that it is not possible to put a value on the companionship that he provided to Annie, and that the house and hundred thousand were made not only in recognition of the chores he performed while living with her but also for the company he provided to her, and could point to the second letter expressing the gratitude by Annie for all he had done for her. The brothers would once again that the house and the money were simply a gift, and are outside the scope of Section 86 because Annie has in no way been unjustly enriched by Martin's services. ✓

It seems close if a court will hold that the court will hold that Martin should not be entitled to the full amount that Annie gave to him under the theory of a promise made in recognition of a past benefit. ✓

Long Question 2:

A contract will exist between the Suzanna and Ben if there was an agreement (mutual assent) and bargained for consideration. The main issue seems to be if there was an agreement, which would require an offer and acceptance to be present.

Is Suzanna's first letter an offer:

In order to determine if Suzanna's first letter is an offer a court will look to see if there was a present willingness on the part of the offeror to enter in to a contract. Suzanna would point to several items in the letter. First, the wording clearly indicates that Suzanna is willing to enter into a contract as indicated by the words "we are making...." Second, the letter clearly states what are the material terms of the introductory offer, i.e. the price and the quantity, and the shipping responsibility. Ben would then argue that the mailing was sent to several different retailers, making it look more like an advertisement and less like an offer. Suzanna would argue that although it was made to 650 stores, that this was not a mass ad campaign but rather was only made to a select group of carefully chosen retailers. Suzanna could also point to the fact that the letter said that it would only be open for thirty days, hence making it look more like an offer. All of these arguments will have to be examined from the perspective of a reasonable person in the position of the offeree, i.e. how would a reasonable person interpret the communications contained in the letter. This issue is close, and the decision of the court may turn on the fact that it was sent to several hundred retailers. ✓

If Suzanna's first letter is found to be an offer then the next issue will be if Ben's letter mailed on June 12 was an acceptance. Suzanna did not specify an exclusive means of accepting the offer, so any reasonable means will be sufficient. The main issue is if the content of the letter sent by Ben is acceptable. Courts have traditionally required that the acceptance be a "mirror image" of the offer made. However, courts have recently found ways to get around this by holding certain additional terms insignificant or finding that they are implied in the contract. Additionally, this case deals with a situation for the sale of goods between merchants so it is likely to fall under the provisions of the UCC. Section 2-207 of the UCC holds that a contract will not fail if additional terms are added that do not materially alter the contract. In this case Ben would argue that the acceptance is not valid because it requests 400 sets, while the original offer was for only 100 sets. Suzanna would respond that her offer did not limit the amount to 100, but rather that any quantity consistent with the price would have been acceptable. Additionally, Ben would argue that the terms of his letter stated that Suzanna would pay for the shipping costs. Suzanna would argue that under Section 207 courts have dealt with different terms by employing the "knock out" rule, and thus the term regarding shipping will be removed if the court believes that both parties intended to contract. Finally, Ben would say that the acceptance was made conditional on assent to the additional term, namely the request that they be delivered by mid-July. Suzanna would counter argue that it was not unambiguously made conditional on acceptance to this term, and that this term really was not a material issue relating to the completion of the contract. ✓

Not
"exp of
accept."

If Suzanna's first letter is not an offer:

In this situation Ben's letter mailed on June 12 would likely be found to be an offer because it contains sufficient detail, is sent to one person, and the wording indicates Ben's willingness to enter into the contract. Ben would argue that if it is found to be an offer then the acceptance mailed by Suzanna on June 17 is not valid for several reasons. Ben could first argue that the offer expressly says that they are only willing to agree if they could be received

by mid-July. He would say that Suzanna's subsequent letter was a rejection and a counteroffer because it said that she would not be able to make the entire shipment by the requested deadline. Suzanna would argue that under the UCC section 2-207 an expression of acceptance will not fail even though it states different terms from the offer. Under the modern trend, she would say that a court will likely knock out the different terms regarding the shipping times and that a reasonable time would then be allowed. Ben would counter argue that he gave a notification of the objection to the different terms on July 2. Suzanna would say that the fax was not sent within a reasonable time, and that therefore the contract would still be valid. In addition, Ben may have an argument regarding the additional costs for shipping included in Suzanna's letter, but these would likely be held to not be material to the contract and Ben did not give notification of the objection to the shipping costs within a reasonable; these additional terms would therefore become part of the contract. ✓

Ben would also argue that Suzanna knew or should have known that there was a misunderstanding as to a material terms. If a court finds that Macanudo cigars refers to those made in Jamaica but that it could also refer to those made in the Dominican Republic then both understandings would be found to be objectively correct and a contract would not exist. However, in this case a court would likely find that Suzanna knew or should have known that Ben was referring to the cigars made in Jamaica because he was clear about this in his letter, and if a court finds this then the "snatch-up" will come into effect. This will require Suzanna to meet the terms of the contract under Ben's understanding, and if she is not able to she may be liable to Ben for breach of the contract. A court seems likely to hold Suzanna's acceptance was not valid.

Another issue is regarding the shipment of the 100 Gold Box sets sent by Suzanna. This would be considered a shipment of nonconforming goods because they were not the type nor the quantity that Ben had requested. As such, they would be considered an acceptance of Ben's offer and a breach of the contract. However, if Suzanna's letter sent to Ben on June 17 is found not to be a valid acceptance, and is instead held to be a rejection and a counteroffer, then a contract would never have existed and the 100 Gold Box sets would simply be considered an offer. Suzanna may then have an argument that Ben accepted the 100 Box Sets through his subsequent fax on July 2. Of course, once again the idea that there was a mutual misunderstanding between the parties and that at this point Suzanna should have known of this due to the letter sent by Ben on June 12 would be taken into consideration, and hence Ben could will likely be able to return the additional 100 Box Sets as well. Taking all this into consideration, Ben will likely not be bound to any terms of the contract, and Suzanna will likely not be able to recover from Ben.

END OF EXAM

Short Answer

1.) Doctrine regarding nominal consideration says that nominal consideration is not sufficient for there to be consideration.

✓ As in *Re Greene* (§ 1 Consideration), the court explained that you can "shout consideration" to the heavens, but if it doesn't exist, there's no consideration. The rationale is that it is a sham on the court and nominal consideration involves name/form only. Judges don't appreciate when parties attempt to establish consideration by "calling" it consideration.

✓ 2.) Because the doctrine of misunderstanding (which involves a situation where parties either both got it wrong or right (mutual) or one got it right and the other got it wrong (unilateral)) is one in which the judge must put himself in the positions of both actual persons to determine how that person did or should have understood the communication. ^{The} Subjective approach exists when the judge attempts to understand how the actual person understood the communication.

3.) Third party reliance would be if I promise to pay for your college, you accept, and relying

solely on my promise, your parents spend all of your college money they had saved for you. If I then back out of the deal, your parents still relied and my promise to pay for your college could be enforced under § 90.

4.) The ad was not an offer for several reasons: first, under the general rules that courts use to determine offers, ads generally aren't offers. The rationale is that the ad is designed to entice as many people as possible, and a reasonable person in the position of the offeree would not think the ad was designed as an offer just for him/her. Even though the ad specified price (Pepsi points) a reasonable person in the position of a recipient of the ad would know that Pepsi's use of the Harrier Jet was designed to be a joke. It was unreasonable for the kid to assume the ad was an offer.

5.) The doctrine of Webb explains that a past benefit, even if not bargained for, can be enforceable under the idea of restitution. An example would be: I save you from drowning in a lake and we didn't bargain for me to save you. I ruin my silk shirt in the process and you

promise to pay for it. Even though we never bargained, you received a benefit. That promise to pay for my shirt could be enforceable under § 86 or Webb.

6.) If two people bargain for a contract (and there is offer/acceptance + consideration) we could say the contract is "implied in fact" (we could examine the facts and establish the existence of a contract).

A contract is "implied in law" when there isn't a bargained for contract, but the courts imply one b/c one party has been unjustly enriched. The idea of restitution supports an "implied in law" contract.

7.) In contract law terms, we would say that at an "at will" job, I contract w/ you by showing up to work every day. For every day that I show up, you pay me for my work. The day I am fired, you rejected my offer to work for you that day.

8.) I wouldn't think so. While lawyers

are skilled at paperwork and negotiating, it wouldn't be accurate to say that a lawyer holds herself out as an expert in furniture negotiation. The lawyer's knowledge of the business practices of furniture dealers/buyers could be totally non-existent. Therefore, a lawyer would be a layman, not a merchant.

9.) No, not generally. While the offeror is the "master of the offer" and can specify an exclusive mode of acceptance (such as a signature), usually a seasonable expression of acceptance will be adequate unless the offeror explicitly and unambiguously specifies an exclusive mode (2-206, Panhandle) (Beard is out of step w/ the general doctrine here)

10.) Offers can be terminated by rejection (or counteroffer, Normile v. Miller), revocation (direct or indirect, Dickenson), death of the offeror (before offeree accepts), and lapse (reasonable time has passed).

11.) Drennan & § 87(2) apply to situations in which an offer has been made and the other party reasonably and actually relied on the offer. The party could have not relied and then the cause of action disappears. In contrast, § 45 applies to Unilateral contracts where performance has begun. If you offer me money to climb a flagpole, and I start climbing, you can't later revoke your offer. The situation becomes an option contract (not true option K).

Long Question 1

✓ The first issue raised is whether or not a contract existed between Martin and Annie. Annie's brothers do not want Martin to have any portion of the estate.

First, a contract exists when there is an agreement and bargained for consideration.

An agreement consists of an offer and acceptance.

The issue here is one of consideration. There is no doubt that Annie opened her home to Martin and he accepted.

← Consideration is said to have 2 elements:

Generally, a promise is not enforceable unless it has been given in exchange for consideration or unless it should be enforced on some other basis, like reliance or past benefit.

1) a return promise/performance that is,

2) bargained-for

Annie's estate ^{the brothers} would argue that the ^{initial} letter did not involve consideration. They would say that, as in Kirksey, Annie was merely promising a conditional gift to Martin. Under Kirksey, the court held that Ms. Kirksey packing and moving to her brother-in-law's house involved no consideration. The brothers would say that it was not bargained-for because Martin was benefited (quit his job and lived for free), while Annie was merely "being nice" to her nephew who had just lost his parents.

As Williston reminds us, the bargained-for element of consideration can be particularly difficult to unravel. When one party is benefited (as in Langer v. Superior Steel), it looks more like there was bargained-for consideration. If, on the other hand, there was no benefit (as in Kirksey), it looks less like there was bargained-for consideration.

Martin will argue that despite the general fact similarities to Kirksey, the

Martin is seeking the house and the
money promised. The brothers are
seeking to disinherit Martin and to
claim all of Annie's money and
her house

when the
the promised
is begeth

good ✓

exchange was bargained for because Annie was, in fact, benefited. Martin cooked, cleaned, chauffeured, grocery shopped for 10 years.

In Kirksey, the sister-in-law did not do those things. Plus, in the letter, Annie suggested that he help with the house right after she offered to let him move in.

The brothers would argue that she was merely giving Martin a gift because he would have had to cook, clean, etc. for himself anyway and so there was no real consideration.

In determining consideration, courts frequently rely on corollary rules for instruction: the consideration must be the inducement for the promise, courts won't evaluate the "motive" for consideration, courts won't inquire into the adequacy of consideration, nominal consideration is not sufficient, illusory promises are not consideration, and past consideration is not bargained for.

In applying those corollary rules, the brothers would say that the inducement

the promise was not Martin's return promise or performance, but that the inducement was Annie's own altruistic gift. They would argue that Annie was a nice person who was merely trying to give Martin a break.

Martin would argue the opposite and say that the inducement for Annie's promises was Martin's return promise to come live there.

The next argument Martin could make under the corollary rules is that courts will not inquire into the adequacy of consideration. This can benefit him because here, there was no obvious commercial exchange. Courts should not impose their views on individuals, but should practice a laissez-faire policy. Martin would say this case resembles *Hamer v. Sidway*, in which the court refused to evaluate the nephew's actual detriment or uncle's benefit. In this case, Annie had a long-time companion and constant help around the house. The court would not evaluate

whether that was adequate consideration.

The brothers could not argue this point very easily.

The second major issue this situation raises is whether or not Annie's note/holographic will was a contract. The note again raises the issue of consideration.

The brothers will argue that the note is not consideration because it was not bargained-for. They will argue that no contractual relationship existed between Martin and Annie in the first letter and that this note and agreement does not have consideration.

The consideration doctrine says that a promise is not enforceable unless given in exchange for consideration, which is a return promise that is bargained for, or unless the enforcement of the promise is warranted on other grounds such as reliance and past benefit.

In the note situation, it would be more difficult for Martin to argue

Finally, if the court found no contract formed between Martin & Annie regarding him living there, then Martin could argue that he relied on the letter. As in *Ricketts v. Scothorn*, the court held that if one party relies on another's promise, the promise can be enforced. This idea is embodied in the Rest. 2d § 90, which is well established. Martin quit his job and moved in with Annie. He relied and it would be difficult to argue that her letter did not embody the foreseeability of him moving out there and quitting his job.

that there was consideration. Because she was dying, his return promise/performance could not be the reason for the agreement. The brothers have a strong argument that there was no bargained for consideration in this case.

✓ Martin could still argue reliance and promises made in recognition of a past benefit. On the issue of reliance, Martin would argue that he relied on inheriting part of her estate, based on her initial letter (which promised him an inheritance) and based on their relationship. Martin quit his job and took care of Annie. Under the Rest. 2d § 90, he relied on her letter's promise of inheritance. He could further argue that their ongoing relationship (e.g. Annie paying the bills) caused ongoing reliance on Martin's part (ongoing because he didn't seek future employment).

The brothers would argue that although Annie's initial letter may have caused reliance (if they concede that point), the will/note caused no future reliance because

✓ Antie right after their agreement, the brothers could argue that there couldn't have been reliance because she died and there wasn't time for him to rely.

If the court holds he relied on the promise of inheritance, the note is enforceable and the brothers don't have a strong argument left. If the court finds no reliance, Martin can still argue that this promise is enforceable under promises made in recognition of a past benefit. In traditional moral consideration, there had to be an obligation or contract that was unenforceable b/c of the statute of limitations, infancy, etc, ^{and} a future promise to pay for the initial obligation. The future promise to pay for the initial obligation was enforceable. In this case, the brothers will argue that there was no obligation in the first place (as in *Mills v. Wyman*) and enforcing the promise in the note without consideration would be wrong.

→ Martin will argue that there was an obligation based on a past benefit

The brothers could also argue that \leftarrow past consideration is not bargained-for. They will argue that Martin's initial move may have involved consideration (if they concede this point) but the note/agreement regarding the inheritance cannot be based on past consideration. If the court decides that there was past consideration but no bargained-for consideration, then the brothers win on this point and Martin will have to argue past ^{consideration}.

✓ and not a contract. He could cite Webb v. McGowin, in which the court held that if a promise is made in recognition of a past benefit, there need not have been contractual obligations. This case, and § 86, embody this idea of restitution. Martin would argue that the past benefit (Annie's 10 years of companionship/help) is overwhelming and it would be unfair to not enforce their agreement. Annie intended Martin to inherit money and the house. She made a serious promise and wrote it in a note to him. The idea of restitution is strong here because if the court does not enforce their agreement, they are in essence telling Annie that her promise didn't mean anything when she clearly thought it did. Martin would use the § 86 argument as a last resort because it is not well established and would have to argue that "gift" in subsection (2) doesn't apply. He would have to hope the court agrees with and

✓

← Courts are concerned with this particular tension in the doctrine. Why should the court be able to tell Annie she did not mean what she said she meant? § 86 would remedy this tension if the court would adopt it (and the court would either have to say that the past benefit wasn't a gift or disregard section 2 of § 86 altogether)

understands Webb v. McGowin. Even if Martin's agreement w/ Annie wasn't enforcement, he could claim reliance on the initial letter to the inheritance.

Question 2

The first issue this fact set raises is was there a contract between S and Ben. A contract consists of offer and acceptance (agreement) + bargained for consideration. The issue in this case is the agreement.

First we must analyze whether the June 1st communication was an offer. S could argue that it was an offer which is the manifestation of a present willingness to enter into an agreement, condition upon acceptance. Courts use 3 guideposts to determine whether a communication was an offer: 1) the objective theory of interpretation (Embry v. McKittick); 2) the 4 factors (that words/conduct which indicate a present willingness to commit, the detail of the communication, the number of people it's sent to, and the community practices); and 3) Courts employ general rules (including ads aren't offer, price lists, catalogues, and putting item on shelf is not

an offer. S would argue that the June 1st communication was an offer. She would say that it was detailed, including the price, length of time and description of the product.

✓ B would argue there was no offer for several reasons. He would say this was an ad and generally ads are not offers. (Pepsi-co). He would also argue that because it says "Dear Store Owner," that it was intended to entice as many people as possible and could not be an offer. He would continue that price-lists are not offers, so the fact that it contained a price was not significant. He has a strong argument that the June 1st communication was not an offer.

✓ S would say it was b/c in Southworth, ads, price-lists, and number of people sent to, were not the determining factors. Instead the court used an objective theory of interpretation to say that a reasonable person in Southworth's position would think Oliver's letter was an offer. S's arguments, are weaker

...the offer was made to a large number of people ...
...the offer was made to a large number of people ...
...the offer was made to a large number of people ...

✓ S could also say that B did not know ← ✓
how many people she sent the offer to. She
would also argue that because the offer was only good
for 30-days, it was similar to a "first-come,
first-serve" offer. In a first-come, first
serve offer, the ad can be an offer because it is
limited as supplies last and has a known number
of acceptors (Leftkowitz, \$1 for coats).

on this point, if there was an offer, did B agree?

B would argue he did not agree because he was just making preliminary negotiations. B would also argue that if this was agreement, under 2-207, he put in different terms than those used by S. In S's June 1st letter, she offered 100 boxes. B's return

letter states 400 boxes, and states that she will pay for shipping costs. Under 2-207, terms that are different from those stated in the offer can be treated in 1 of 3

✓ ways: the court can construe them as additional terms, they can be treated as different, and therefore not in the contract, or the court can "knock out" the different terms and find a reasonable alternative. B would say that either way, his agreement was for only 100 boxes.

S would argue that they are both merchants so B can't use the rules of 2-207 to say that the 400 was not part of the contract.

When terms are different b/n merchants, the court construes additional terms to be included in the contract, unless the merchants fall into an exception. S would argue that the court should construe the "different" terms as "additional" terms so that they become part of the K. The court could go either way here, ~~if~~ If the court finds the June 1st communication was not an offer, then there is no contract and we then analyze whether the June 12th communication was an offer.

B could argue that this wasn't an offer but just preliminary negotiations. However this argument is weak as he says, "We would like to buy."

S will argue this was an offer because it was a manifestation of a present willingness to commit, subject only to acceptance. The next issue becomes, if the June 12th letter was an offer, was it accepted?

— next bluebook! ↗

The exceptions are when additional terms materially alter the contract, the offer expressly limits acceptance to the terms, or notification of objection to them has already been given.

S would argue that she did accept. An acceptance is a definite and seasonable expression of acceptance.

She would argue that the June 17th letter was an acceptance.

B would argue that this wasn't an acceptance because it didn't mirror his offer. Under the mirror image rule, there is no contract if the acceptance changes the terms. B would also argue that S's "we can't promise anything" could not be an acceptance and even if it was, under 2-206 (b) this would operate as a counter-offer because S is really implying "I will try to accommodate you, but no promises." B would also argue that her changing the price and number of boxes sent at one time was a counter-offer (Normile). He would say she was re-negotiating by making so many changes to his offer.

S would argue it was an acceptance and that B should

not apply the mirror image rule (b/c it is outdated) but should instead apply 2-207. Under 2-207, S would argue that she did not really change the number of boxes. She would say she only changed the shipment date and so that is not a significantly different term. He should still be bound to the 400. She would argue that because they are both merchants, he agreed to the shipment costs because they weren't really a different term, just an addition to the price.

He would argue that the shipment cost is a different term, and not an additional term, so as a merchant, he is not bound to different terms. B would also argue that the change in number of boxes to be shipped by June 15th was a different term which did not become part of the contract. Courts could go either way.

The next issue is if the June 17th

communication was not an agreement, could B revoke his June 12th in the fax? This is a weak argument b/c under 2-207, it certainly looks as though B and S have a contract, but if the courts find there wasn't one, B could argue he revoked. Normally, revocation can be any time before acceptance (*Dickenson v. Dodds*).

S would argue B couldn't revoke because she had already shipped. Under 2-206(b), when a merchant ships a good, this can be acceptance of the offer. Because she shipped on July 1st and he faxed her the note on July 2nd she would say she already accepted. She could also argue that by shipping the goods, she had relied. (under § 87(2) and *Drennan*).

B would argue that she hadn't shipped the 300 requested cigar boxes, but had instead shipped 100. Although he may concede that she accepted, he can argue breach of contract for the non-conforming goods.

The fax says that B will accept the first offer of 100 boxes of June 1st. In order not to be liable for the 300, the court would have to say that the June 1st communication was an offer, which it probably was not.

In this case B would be liable for the costs of redirecting and storing the other 300.

Finally, B could argue misunderstanding. Under mutual misunderstanding, both parties are either objectively right or wrong and there is no contract. (Konic, Raffles, Oswald) He would argue that he thought Macanudo cigars were made in Jamaica.

S would argue there was a unilateral misunderstanding. A unilateral misunderstanding occurs when 1 party is objectively correct and the other is wrong. She would argue that B is an expert in dealing in cigars, and had a responsibility to find out if there was more than 1 kind of Macanudo cigar.

B would argue that if there was

a unilateral misunderstanding, she was the party that "knew or should have known" of B's misunderstanding. In *Sq J's* trucking, the court held the contract was enforceable under Jay's understanding of it because *Sq J* should have known of Jay's misunderstanding. B would argue that he used the words "Jamaica" and "Cuban cigar families" and so S was under a duty to tell him he had the wrong understanding. The Court could say mutual misunderstanding, in which there would be no contract, or they could say unilateral misunderstanding, which normally would not be used to invalidate the contract, unless they found S to have attempted to "snatch up" B's misunderstanding. This issue is fairly close.