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Exam Name: Contracts1_LS1_(Kosel)_Final_F08

Instructor: Janice Kosel

Grade: _____

1)

Dear Ted,

I am very sorry to hear about your recent personal troubles. I hope that you will find some measure of comfort in this advice.

Breach by North Press

Once again, I am saddened to hear that North Press has breached their contract with you by deciding not to publish your text book. As you know, a contract consists of an exchange of bargained for promises, and you surrendered your future freedom of choice in devoting time to writing a textbook for North, and that constituted consideration on your part.

The damages for breach must be compensatory in nature and not punitive, because we do not wish to punish breach. In the world of contract law, we think of breach as morally neutral; it is neither good nor bad, it just is. In the case that North's surveys are correct, and there is no market for new Contracts textbooks, then this was an economically efficient breach.

The normal measure for damages in a breach of contract case is the expectation measure, which will place you in the position you would have been in if the contract had been fulfilled. Certainly, this will entitle you to some monetary damages. I am unsure of what specifically the contract called for in terms of compensation, but I imagine it had something to do with future sales. In calculating damages based on loss of future sales, the court may look to comparable sales in order to achieve a reasonable measure of damages commensurate with your actual loss. In U.S. Naval Institute v. Charter Communications, the court looked to past sales of the hardcover edition of Tom Clancy's novel to estimate the lost sales when the paperback was published prematurely. In your case, the court might look at the possible sales of other Contracts textbooks to determine your future sales, but it is likely that they will encounter some certainty problems.

In awarding damages, the court must be able to estimate damages with reasonable certainty. Again, the courts will do so by looking at similar publications and seeing how they sell, as in the case of Contemporary Mission v. Famous Music where the court measured the groups probable musical future by looking at the future performance of other groups who had reached the same spot on the Billboard charts.

Again, I will need to know the specifics of your contract, but if you had contracted to pay by the page, then you would receive the agreed upon price per page, like another textbook writer I know ;)

I'm sure you would like to receive restitution damages that would compensate you for the reasonable value of your work, or as we say, quantum meruit. Unfortunately,

this measure of damages is not available to you as you have completed your part of the contract, much like that attorney who wished to receive the reasonable value of his 29-day trial, but was limited to the contract price, as he had already completed his performance. Sorry.

Specific performance is also an unrealistic measure, as I think a court will find that damages are an adequate remedy. Courts are generally loathe to enforce employment contracts, and I think this applies to your case. Imagine, after you sue this publisher you will actually have to work with them on editing and what not, probably not a good idea.

I think your biggest concern, however, is the damages that resulted from the loss of your tenure bid. I think you will have quite a difficult time proving that North Press is responsible for the failure of your tenure bid. In contracts, we generally only award damages based on reasonably foreseeable loss (Hadley v. Baxendale). I think you will have problems in demonstrating that North's failure to publish your text book resulted in the loss of your professorship. This is a fairly attenuated cause, and further, I see no evidence that you put the publisher on special warning that you were relying on the publication of your textbook to secure your position at the University. Defendants are liable for foreseeable loss, but not for specifically lucrative contracts or special conditions of which they have no prior knowledge (Victoria Laundry).

Ted, if you would have consulted me before the formation of your contract with North I think I would have ensured a better outcome for you.

First of all, I would definitely have asserted a liquidated damages clause. Though these are not enforceable if they are deemed to be punitive, I think that North would have thought twice about breaching if they knew that they would have to enter litigation to minimize some substantial liquidated damages. Furthermore, I think such a clause might have been appropriate in this case, particularly if your contract was based on future sales, as if we had written the clause with reasonably foreseeable damages in mind and stressed the difficulty of calculating the damages, it is likely that a court would have agreed with our assessment that the damages for future sales are difficult to calculate. Then you would have had some clearcut money in your pocket.

Also, do not know the particulars of your contract, but I hope that it was in writing. This always makes litigation easier, and it is required by the statute of frauds that all contracts for services to be performed outside the scope of a year must be in writing. I don't know how long it takes to write a textbook, but I can imagine that it might be longer than a year. I would have definitely advised you to get it in writing, nonetheless.

Another thing I would have advised you to do is to put a lot of flowery language in the contract describing how personally important it was for you to have the book published. This would be a good place to put in something about your tenure bid, for instance. In the Elmira case, the attorney put in a lot of language about how these particular wooden beams were very important for the aesthetics of the pool, and the court awarded them performance damages, even though the diminution in value was minimal.

My current advice, however, is that you make an attempt to shop the book around to some other publishers. The victims of breach have a responsibility to reasonably mitigate their damages, so long as it does not involve risk, humiliation, or burden. You are not required to accept a substantially inferior offer, but I suggest you do your best, as North may use your failure to do so against you, and, frankly, Ted, you ain't no Shirley MacLaine.

Your Claim Against Peerless

Unfortunately, Ted, I think your claim against Peerless is a lot less assured. You

concede that you failed to return the signed contract, and therefore there was no mutuality. You did nothing to indicate your surrender of future freedom of choice. You would like to sue for breach, but the fact is there was never a contract. This is similar to the Orange Crush case, where the court found that there was no mutuality as the soda company had an at will clause, meaning they could quit at any time. Like you, they failed to surrender freedom of choice, and there was no contract.

If you had signed the contract, it would have been a different story, like in the Guerfin(?) case where there was a cancellation clause, but mutuality was present, as the seller could have shipped the goods, thus binding the contract. I think you missed the boat on this one, Ted (yes, it's a pun).

Just because there was no contract between you and Peerless does not mean that you are entirely barred from collecting damages. You still might be able to prevail on a theory of reliance, as set forth in section 90 of the Restatement. Restatement section 90 provides that a promisee may recover where a promise induces reasonably foreseeable forbearance, and justice requires the court's intervention. Personally, I believe that it may have been unreasonable to buy a non-refundable ticket to New Orleans and \$500 on luggage before you even return the signed contract, and I think a court might see it the same way. In Kirksey v. Kirksey, the court found that Mrs. Kirksey was unreasonable in abandoning her house and all her possessions based on her brother-in-law's promise to care for her and her kids. I see comparable circumstances in your case. As I stated, I don't think that your forbearance on this unsigned contract was particularly reasonable, and so it will be tough for you to recover based on a theory of promissory estoppel. In any event, I would advise that you at least attempt to return the \$500 worth of luggage, as you have a responsibility to reasonably mitigate your damages.

One thing I would like to know is whether or not you gave up any future or (at the time) present business opportunities in expectation of your job aboard the peerless. In a case called Grouse v. Group Health Care an at-will employee received damages after an employer reneged on an employment offer. Although the employee was at-will, because he had given up his current job to take the new one, the court found that he was entitled to reliance damages. If you gave up some other offer in reliance on this job, we might have found a workable angle for you.

An additional piece of information that I would like to have at my disposal are specific terms in your contract regarding your professorship. I would like to look into whether this was a material term of your unexecuted contract, and if so, how "professor" is defined. In cases related to a specific industry, a term is defined by standard usage within the industry. I'm not sure how the contract defines professor, but I think that it is a pretty loose term, and does not necessarily indicate tenure. We will need to look at the terminology that the industry dictates, and perhaps call in some experts. In the Frigalimnt case, the court found that stewing chickens were still regarded as chickens, even though the buyer believed that they were contracting for young fryers.

On the other hand, things would be different if you can demonstrate that you offered a mutual assent to the contract. There is nothing in the statute of frauds that prohibits this kind of contract from being oral, though I see no evidence that you offered an oral assent.

In conclusion, I think your chances of prevailing against Peerless are pretty thin. I recommend that you take the one way ticket to New Orleans and have yourself a shrimp po-boy and a strawberry daiquiri.

Very truly yours,

Lawyer

END OF EXAM