

COPY (2)

pt. 2

Contracts Exam, Fall 1994 -- Professor Oedel

This three-hour exam consists of three questions that will be weighed equally. You should expect to spend one hour on each. The exam is closed-book, except that you may bring with you a copy of the Restatement (Second) of Contracts (as previously distributed by the professor) plus any outline written thereon that you have prepared yourself. In addressing the problems, please articulate your logic as fully as time allows, especially on issues of major significance. On genuinely close questions, any conclusion that you reach will be much less important than explaining why the question is close to begin with. If you would like to know additional information, explain why, and what difference it would make.

Good luck, and happy holidays! See you in January.

Question One: Frank v. McBagels

Frank was interested in opening a McBagels, Inc., bagel shop in Columbus, Georgia. McBagels, a company with national aspirations, was likewise interested in having Frank open a McBagels store there. Mae, Regional Franchise Marketing Manager at McBagels, met with Frank on numerous occasions about Frank's desire to open a McBagels franchise in Columbus.

Mae wanted to close the deal with Frank by the end of the year to improve her own performance statistics as a McBagels employee. In attempting to press Frank to commit, Mae warned Frank that, if Frank did not sign a contract now to open a franchise, Frank was "in danger of losing the exclusive right to open McBagels franchises in Columbus." In fact, Mae knew of no real threat to Frank's prospects for securing the exclusive right to open McBagels franchises in the Columbus area. Although Mae had recently spoken with Bob, another person from the Columbus area who had inquired about opening a McBagels franchise there, Mae honestly doubted that Bob would either apply or qualify.

Feeling pressured to act, but not wanting to commit in the absence of financing, Frank asked if there was any way that he could "lock in" the exclusive right to the Columbus territory. Mae said that she wasn't a lawyer, but that she thought their standard "Letter of Intent" should do the trick. The "Letter of Intent" read in its entirety:

"In consideration of \$1 and other good and valuable consideration tendered by the Franchise Applicant [Frank] to McBagels, the parties hereby agree that the Franchise Applicant will file within 90 days an application for a McBagels franchise to be located in [Columbus, Georgia]. After the application is filed, the parties understand that McBagels will agree to act on the application within 90 days of its receipt, and that McBagels will take no action inconsistent with granting the application until reviewing the application on its merits. The parties understand that McBagels otherwise makes no representations regarding the ultimate success of such application, and that McBagels will seek no remedy against Franchise Applicant if for any reason the Franchise Applicant makes no application within 90 days. This is the full extent of any existing agreement between the parties."

Prior to and again at the signing of the Letter of Intent (at which \$1 changed hands), Mae assured Frank that the Letter of Intent would prevent McBagels from granting an exclusive franchise to anyone else before considering Frank's application. Frank signed the Letter of

Intent on October 1, as did Mae on McBagels' behalf.

On December 1, before Frank filed his formal application with McBagels, Bob filed an application with McBagels for the exclusive right to open a McBagels franchise in Columbus. Unbeknownst to Mae, Bob was related to one of the principal owners of McBagels, and his application was processed speedily by Mae's boss. Mae's boss was aware of Frank's possible application. McBagels granted Bob the exclusive right to the Columbus territory on December 15.

Meanwhile, Frank sent his application to McBagels by mail on December 14. McBagels received Frank's application on December 16.

When Frank sues McBagels, what result, and why?

Question Two: Pam v. MD

Pam served as a management consultant for a company in Macon, Georgia, called Magna Dental, Inc. ("MD"). Magna Dental operated a chain of dental clinics in the Southeast. Pam had previously worked as a full-time employee of Magna Dental, but had quit work when her first child was born. Magna Dental later invited Pam to return, but Pam didn't want to work full time. Instead, Pam proposed a consulting arrangement, pursuant to which Pam would not be a regular employee of the company, but would receive a "reasonable fee for those services," as Pam put it, that she "might provide to Magna Dental on its behalf, on the condition that Magna Dental recognizes those services to be of substantial value."

Magna Dental's representative said, "Sounds fine, but let's get more specific. How about \$50 per hour for time actually worked?" Pam smiled, said, "Okay," and shook hands with the Magna Dental representative. Over the next 13 months, Magna Dental began paying Pam at a rate of \$50 per hour, and Pam cashed her checks without comment.

Pam's expertise lay in the area of dental hygiene. When Pam first began at Magna Dental as an employee, well before her consulting arrangement began, dental hygiene was seen as a dead-end career at Magna Dental. However, with the advent of AIDS, dental hygiene grew increasingly important to Magna Dental's operations.

In her consulting work, Pam became acutely aware that Magna Dental was in a position either to be substantially harmed, or substantially helped, as a result of the general public's fear of contracting AIDS at the dentist's office. In short, Magna needed to qualify as a clean, low-risk provider of dental service, or else risk failure.

Pam heard of the phenomenal success of Religious Dentists of America ("RDA"), a new chain of dental clinics operating in the Midwest. Pam attributed RDA's success to the public perception that religious dentists would be less likely to catch and transmit AIDS. She believed that RDA would perform well in the Southeast, especially if RDA could buy an established chain of dental clinics to facilitate quick growth before the AIDS scare died down. Magna Dental seemed to fit the bill, and Pam proposed to senior officials at Magna Dental that Magna Dental consider merging with, or being acquired by, RDA.

Several months later, Magna Dental approached RDA about merging their two companies together, in part because of Pam's suggestion.

Indeed, Magna Dental and RDA soon announced plans to merge their respective companies together. However, in part because of the announcement, a third company named Dental World offered to buy Magna Dental at a price that appeared to exceed the value of the proposed merger between Magna Dental and RDA. Magna Dental eventually was bought by Dental World. The price of Magna Dental stock went up 200 percent from the time Pam first made her suggestion until the final sale of Magna Dental to Dental World. The net increase in the market value of Magna Dental was about \$300 million.

Pam claimed that she was entitled to a substantial fee in connection with her suggestion to merge Magna Dental with another company. Indeed, everyone agrees that Pam's suggestion played some part (although not the only part, nor the largest part) in dramatically raising the price of Magna Dental's stock. Magna Dental and its shareholders greatly appreciated the substantial increase in price, and didn't balk at paying two investment bankers who, like Pam, helped facilitate the deal, about \$3 million each, in accordance with their contracts. On the other hand, Magna Dental only paid Pam her regular \$50 per hour rate in connection with her proposal.

After the deal was done, Magna Dental's president said to Pam, "We owe you a lot, Pam. This whole deal wouldn't have happened without you. What can we do to make it up to you?"

Pam replied, "Well, a Porsche would be nice for starters." To Pam's surprise, Magna Dental promptly went out and bought a \$75,000 Porsche, and gave it to Pam. For tax purposes, the Porsche would be considered income to Pam, so Magna Dental also paid Pam an additional amount to cover the taxes on the Porsche. But when Pam asked for additional compensation commensurate with the pay received by the investment bankers, Magna Dental's president said, "Heck no! We already paid you what was due, plus we gave you the car!"

Pam has filed suit seeking an amount similar to those amounts received by the investment bankers in the Magna Dental/RDA/Dental World takeover battle (that is, about 3 million dollars). Will Pam prevail? Why or why not?

Question Three: Contract With America

Most of the sitting Republican members of the U.S. House of Representatives, plus most of the Republican members of the House who were newly elected in 1994, signed a "Contract With America" prior to the November, 1994 election.

The Contract had several forms. A shortened version was printed in TV Guide. Other versions of varying lengths and with varying degrees of specificity issued from such places as the Republican party's headquarters and each individual candidate's office. One four-page version was actually signed by each candidate. Naturally, the individual candidates stressed and elaborated on the particular features that they most enthusiastically supported.

However, many of the Republicans' promises were consistent and at least somewhat specific -- a characteristic that the Republicans pointed out distinguished their promises from other political promises: "[I]n this era of official evasion and posturing, we offer instead a detailed agenda for national renewal, a written commitment with no fine print."

Among the promises made on the four-page signed version of the Contract With America was the promise to change the rules by which the House does its own business. For instance, the Republicans promised "immediately" to "ban the casting of proxy votes in committee."

The Contract also indicated that, "within the first 100 days of the 104th Congress, we shall bring to the House Floor the following [10] bills," which were then named and briefly described. In Washington, this was understood not to guarantee passage of the bills, but a recent poll suggested that a slight majority of the public generally had the impression that it meant the bills would pass.

Finally, the Republicans promised to "restore the bonds of trust between the people and their elected representatives."

The Republican party's national ads proclaimed that the Republicans intended the signers of the Contract to be fully accountable to the American public if a "new Republican majority" were to be elected.

The TV Guide ad differed from most ads by being removable from the magazine (it read, "Keep this page to hold us accountable"), by including little boxes next to the promises by which members of the public were asked to record whether the promises in the ad had been

fulfilled, and by stating at the end, "If we break this contract, throw us out. We mean it."

In the November, 1994 election, the voters elected enough Republicans to constitute a majority in the House.

Assume that, within the first 100 days, the Republican-led House failed to bring two of the 10 promised bills to the floor of the House for a vote because of Democratic filibusters (that is, a traditional procedural tactic that has occasionally been used by both parties to thwart legislation). Also assume that the Republicans brought two other bills to the House floor as promised, but did not push for their passage, and even worked to defeat them. The six remaining bills were passed.

Also assume that, in February of 1995, about five weeks into the new Congress, a defense contractor (Raytheon) lost a close House committee vote on a provision of tax law that would have favored Raytheon by reducing its tax burden by \$100 million. The only two committee members who voted by proxy voted against Raytheon's interest. If they had not been allowed to vote, the vote would have been in Raytheon's favor. Later the tax bill was passed into law exactly as recommended by the committee. One week after the disputed committee vote, the House outlawed voting by proxy in committee.

(a) (30 minutes) In general, what are the arguments for and against recognizing the "Contract With America" as a legally enforceable contract?

(b) (20 minutes) Assuming for the sake of argument that the "Contract with America" might be legally enforceable, what special contractual argument(s) would the Republican lawmakers probably make in response to a lawsuit filed by a class of disgruntled Americans solely for failure to fulfill the Republican pledge to vote on the 10 proposed bills? And what special contractual argument(s) would the plaintiff class be expected to make in such a case?

(c) (10 minutes) Assuming for the sake of argument that the "Contract With America" might be legally enforceable, what special defense(s) would the Republican lawmakers have to a lawsuit filed by Raytheon?