

Contracts  
Professor Omri Ben-Shahar

Final Examination  
April 30, 2001

1. This is an take-home examination. You may use any material that you like. **Important:** Do not plagiarize; Do not cut and paste from computer files written or compiled before the exam.
2. There are two sections to the exam. The first is an Issue spotting question, which consists of 40% of the grade. The second is a set of six short essay questions, **of which you need to answer five**, each consisting 12% of the grade. (If you answer all six questions, I will grade only the first five.) It is recommended that you spend approximately 2 hours on the first question and 30-40 minutes on each of the short essay questions.
3. The recommended length of the answer is 3-4 pages (double space) for Question 1, and 1-1.5 page (double space) for each of the short questions. Excessive length that is not justified by the content of the answer (e.g., repetition, irrelevance) will lead to grade reduction.
4. The exam must be typed. Do not write anything by hand on the exam. Do not worry about typos or spelling.
5. Please write your exam number on each page of the exam. Please provide page numbers. Please start each question, including each of the short essays, on a new page, and indicate the question you are answering at the top of the page.
6. You should address all the issues fairly raised by the problems. Should you find it necessary in addressing a particular issue to assume a fact not given in the problem as stated, or to assume a particular legal resolution of prior issues in order to advance the discussion of another issue, you may do so; but you should clearly indicate that you are making an assumption, and should briefly explain why you consider it a reasonable assumption to make. Assuming away features that make an issue problematic might hurt your answer.

Good Luck!

## Question 1

In November of 2000, Café Hutchins ("Hutchins") decided to close its 626 S. State St. store in Ann Arbor ("the store"). At that time, Hutchins' lease of the store still had more than three years remaining at a rental price of \$60,000 a year. Hutchins approached a local business, Sandy's Sandwich ("Sandy"), about assuming Hutchins' lease for its final three years. Sandy was interested because she already leased space nearby and was seeking to expand her operations. They met at the store and after agreeing on the sublease price and date and that Sandy would purchase the store furniture from Hutchins for \$25,000, the parties shook hands and agreed to sign a written contract. Sandy then stated that she would only go ahead with the deal if Hutchins secures the approval of the Landlord.

On December 15, 2000, Hutchins faxed Sandy a "Sublease and Purchase Agreement" that provided in part:

"Sandy agrees to assume all duties of Hutchins, including the full payment of rent, under the lease to Hutchins of the store by the 626 S. State St. Property, Inc. (hereinafter referred to as 'Landlord'), beginning on February 1, 2001, and *provided* that no later than December 31, 2000, Hutchins receives the approval by the Landlord of Sandy as a subtenant.

Sandy agrees to purchase the "store furniture" for a price of \$25,000."

(The agreement went on to specify the items included within the "store furniture".)

On the same day, after receiving Hutchins' fax, Sandy called Hutchins by phone and left a voice mail message saying that she was happy to accept Hutchins' offer and that she will sign the document and fax it back to him. She further stated that she would require that the Landlord's approval be in writing and signed by the Landlord, and submitted to her no later than December 31, 2000. She concluded by saying, "I'm glad we are able to reach an understanding so promptly." Then, she signed the Agreement Form without making any changes and sent it back to Hutchins.

On December 31, 2000, Hutchins faxed Sandy a letter stating that the Landlord had orally approved Sandy as a subtenant, but that Hutchins had not yet received the written and signed consent. Hutchins promised to deliver the written consent "in the next few days." On January 8, 2001, Sandy contacted Hutchins by phone and left a voice mail message in Hutchins' office inquiring about the written consent. Hutchins did not respond until January 15.

On January 15, 2001, immediately after receiving the written consent from the Landlord, Hutchins delivered it to Sandy. By this time Sandy had decided that 626 S. State St. location was losing its luster as a sandwich store because of a shut down of the nearby ΣΣΣ fraternity house which accounted for a large portion of her potential clientele. Thus, when Hutchins delivered the Landlord's written consent on

January 15, Sandy informed Hutchins that the Sublease Agreement was invalid because of Hutchins' failure to deliver the Landlord's consent by the deadline specified in the Sublease Agreement. No other communications occurred between Hutchins and Sandy until they met in court.

Hutchins then brought an action against Sandy for damages for breach of contract. Sandy counter-sued. The following facts were discovered during the trial:

- On March 1, 2001, in a renewed attempt to expand her business, Sandy signed a three-year lease for a different store, of identical size as the 626 S. State St. store. The rental price under this lease was \$80,000. Sandy has documents to prove that this location was offered to her three months earlier, on December 2000, for \$60,000 and that the rental price has risen because a competing business made a bid for this location in mid-February. Sandy claims that she declined to take this lease in December because she expected the deal with Hutchins to go through.
- Sometime in December 2000, while delivering donuts to the ΣΣΣ Fraternity House, Hutchins overheard one resident mentioning to another that "within days" a decision should be reached in the University's central administration whether to order a shut down of the House. Hutchins, however, never found out what the decision was, and did not know that the University *did* decide to close down the fraternity house.
- Based on data available at the trial concerning the sandwich market, Sandy would not have been able to sustain profitable business in the 626 S. State St. store site. It is projected that, at the agreed rental price, she would have lost approximately \$10,000 per year.
- In February of 2001 Hutchins received an offer from a local entrepreneur to sublease the store for \$40,000 a year, leaving Hutchins responsible for paying \$20,000 of the rent annually for the remainder of the lease term. Hutchins declined and continued to operate the café. Since then, in the 6 months until the trial, Hutchins has suffered an overall loss \$15,000. Accordingly, he is projecting his 3-year loss to be \$90,000. He is seeking this amount as a recovery at trial.

Discuss the issues likely to arise in this litigation. Explore the types of damage claims that each party might have and assess their strength. Where relevant, you should draw guidance from the Uniform Commercial Code. In case of ambiguity concerning the applicable doctrine, you are specifically asked to highlight policy considerations.

## Question 2

Answer five of the six questions. Please remember to begin each of the answers on a new page.

- 2.1 Abe call the Reliable Camping Equipment Co. and asks to purchase the “warmest” sleeping bag available. Mr. Reliable tells Abe about the company’s top of the line item, priced at \$600 and reads the catalog description of the item. Abe agrees to buy the sleeping bag and gives Mr. Reliable the credit card information. After they finish the transaction but before they hang up, Mr. Reliable states: “You sure got yourself an excellent sleeping bag. From the experience of our previous customers, we are told that it is completely waterproof!” In his first backpacking trip thereafter, in stormy weather, Abe—recalling Mr. Reliable’s statement—decides to leave behind his tent and takes only the sleeping bag with him. It rained at night, and—as you can expect—Abe got soaking wet. The sleeping bag did not prevent water from penetrating. Discuss the claims that Abe can bring against Reliable and evaluate their strength.
- 2.2 Eisenberg, an architect, entered a contract with Fuller Bros., a construction company, to design a new building. The architect’s fee was set at \$30,000. The contract stipulated that one-third of the fee would be paid upfront, one-third upon completion of the design work by Eisenberg, and the remaining one-third “to be paid upon the completion of the construction project.” Eisenberg delivered the complete design and receive the first and the second payments on time. Fuller Bros. never managed to secure financing for the project and eventually abandoned it, refusing to pay Eisenberg the last one-third of his fee. Can Eisenberg recover?
- 2.3 White Oil, Inc., sent off the usual company purchase order to the Summers Shipbuilding firm for the purchase of a \$500,000 tugboat. It contained a clause stating “buyer objects in advance to any changes Seller attempts to make to the terms of the purchase order.” On receiving this, the sales agent for Summers sent off the usual company sales confirmation slip, which included the following clause: “Seller does not warrant its goods in any way and specifically disclaim any warranty of MERCHANTABILITY or of fitness. This form is not an ‘acceptance’ unless Buyer agrees to all changes proposed by Seller.” Prior to the delivery date, but after White had already made the initial payment and Summers had begun assembling the boat, the market changed and White wanted to get out of the deal. Is there a contract? What are its terms? If the parties had fully performed without any further discussion of their differences, would the deal include a warranty?
- 2.4. Linda saw a classified advertisement in the newspaper: “Able gardener, affordable, call 662-6622.” She phoned and invited Gardener to do the seasonal work in her garden. They agreed on a date for the work to be done, but did not discuss a fee. Gardener arrived on that date, and since no one was home, entered the garden as he was instructed to do and performed the

requested work. He then sent a bill for 6 hours at \$75 per hour, totaling \$450. Linda was horrified: she knew the standard fee charged by gardeners was approximately \$20 per hour. She called Gardener and offered to pay \$120. Gardener can show, however, that his normal fee is \$75, and that he has a reputation of being expensive. What amount can Gardener recover? Does it matter whether, when receiving the bill, Linda originally called Gardener, promised orally to pay the requested \$450 sum, and later decided that she was willing to pay only \$120?

- 2.5. CellularPower Co., an operator of a cellular phone network, conducted a promotional campaign in which customers could earn “Power Points” every time they used their cellular phone to make calls. Points could be used to redeem prizes. A TV commercial advertising the promotion showed various prizes (Palm Pilot, sunglasses, etc.) with the number of points required to win them. The commercial ended with a man sitting in a private jet talking in his cellphone, and the words “Whirlwind Private Jet, 1 million points” appeared on the screen. The commercial also referred to a prize catalog that listed the prizes and contained instructions for redeeming the points. The catalog did not include the private jet among the prizes. In fact, the best prize was a Palm Pilot VII for 4000 points. To obtain any prize, a customer must earn at least 50 points by making cellular phone calls, and then can purchase the balance of the points for 10¢ a point.

Leo, a CellularPower customer, submitted a redemption form claiming the jet and included the 50 phone call points and a check for approximately \$100,000 to buy the rest of the 1 million points needed. CellularPower refused to deliver the jet to him, pointing out that it was not part of the collection in the catalog and was only part of the commercial’s humor and entertainment. Analyze.

- 2.6. Professor Slacker hates grading exams. When he saw an advertisement by Magic Software, Inc., claiming that it could design software to meet any educational need, Slacker contacted Magic and asked if it could devise a program that grades exams. Magic took full details of what Slacker needed and said it would consider the matter. A few weeks later, Magic sent a written proposal to create a program that scans exams, identifies key words and phrases, compares them to a model answer entered into the computer by the professor, and grades them on a curve. Because the program was so innovative, Magic wanted \$100,000 for writing it. Slacker hated grading so much that he decided it was worth it. To afford it, he took a mortgage on his house and the parties entered a contract, with the delivery date of the software set within six months. After struggling for four months, Magic realized that it is not clear whether the program could be created at all, and if it could, it would need considerable expansion such that its cost would be prohibitive. It told the Professor that it could not produce the program, cancelled the contract, and sent back a check for the sum already paid. Slacker would like to contract with another programmer and hold Magic liable for any difference in price. Would Magic be liable?