

## 2005 Contracts Sample Answer

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### Overview

All of you should be happy with your performance on the exam, regardless of your final grade. All of you grasped the basic points I wanted to communicate, although (as I discuss below) some of you may have underperformed through procedural errors.

Some of you may be understandably disappointed with your grade after you read this sample answer. You'll think—"I covered these basic points!" In particular, if you got a B, you'd be right. The B answers generally did exactly what I wanted on this exam. Although I was happy about this, it also led to some tough grading choices. If you got a B and wonder why you didn't do better, all I can offer is that generally the honors grade exams did a little *more* of what I wanted students to do on the exam.

There were 4 As, 5 ABs, 23 Bs, 3 BCs and 3 below BCs. 35 of you used the computer; only 3 of you used bluebooks.

### Question 1

Average word count: 1196. Max: 1783 words. Min: 605 words.

This question is based on a real-life website called [SaveToby.com](http://SaveToby.com). The operators of SaveToby.com said that if they did not get \$50,000 in PayPal payments by June 30, 2005, they would kill and eat cute little Toby. To make their threat seem more real, they showed pictures of Toby in a [frying pan](#) and on a [cutting board](#). I [blogged](#) on the story last Spring.

The SaveToby operators got kicked out of PayPal, which they claimed prevented them from reaching their \$50,000 target. As a result, they unilaterally changed the deal before June 30: now, they will spare Toby's life if they sell 100,000 copies of their [book](#) by November 2006. I [blogged](#) on their [change of the deal](#).

Two predictions: (1) the charlatans won't sell 100,000 copies of their book, and (2) Toby will not be eaten in November 2006. See my [penultimate blog post](#) on this topic. Meanwhile, if you think these guys are sick, note that this "joke" is [hardly original](#).

Now, the question on *my* mind—how many of you have had rabbit since the exam???

### Introductory Comments

I think this relationship is squarely governed by the common law, not the UCC Article 2. The core promise—not to kill Buffy—isn't a sale of goods. The June 28 post might be governed by the UCC (sale of cookbooks) but it's outside the question's scope.

To answer the most specific question I asked—what are Rachel’s rights and remedies?—we need to know if she is acting on the contract or seeking extra-contract remedies. So, the first order of business is to determine if we have a contract and figure out its terms.

## Contract Formation

### *The May 15 Posting*

There are three ways to characterize the May 15 posting:

- 1) Invitation to make an offer. The general rule is that advertisements are invitations to make an offer, not an offer. We might style the posting as an advertisement.
- 2) Offer. An advertisement can be an offer when it is sufficiently clear, definite and explicit and leave nothing open for negotiation. This ad is fairly specific. It doesn’t contain words like “first come, first served,” but there is also nothing open to negotiation. For example, there’s no risk of stockouts or intervening price changes. Instead, if a single person wrote Joe a \$15,000 check as instructed, this should conclude the deal, and Buffy should live. Therefore, this particular advertisement might be sufficiently definite that it is an offer, not an invitation.
- 3) Neither an offer nor an invitation to make an offer, such as preliminary negotiations or a gift solicitation.

Joe can counterargue that his posting doesn’t manifest assent because it was a joke. First, the entire concept (pay me not to eat a bunny) is silly. Meat-eating is a celebrated American tradition. Consider how many social rituals revolve around eating meat. So the gag is that someone would pay another person not to eat meat. See my first blog post for more on this.

Second, the text may not be uproariously funny, but it could be read as a joke. Third, the text used the language “donation” (more on this below). Finally, Joe subjectively didn’t intend to form a contract.

However, the applicable legal test is whether the text objectively manifests assent. Would a reader reasonably believe that Joe intended to be bound? He used the term “offer” (although this isn’t dispositive). He didn’t make any outrageously hyperbolic statements like Pepsi’s harrier jet ad. And even if Joe thought he was joking, others may reasonably not get the joke (*Lucy v. Zehmer*).

I think this posting isn’t a joke because an extortion threat must be threatening to work. In this case, if Joe’s posting is too obviously a joke, then it’s not that funny. Instead, it has to look just credible enough that Joe might actually kill Buffy for the gag to work. As a result, this particular threat, by definition, must skirt close enough to the line that a reasonable person might think Joe will actually do it. As a result, like *Lucy v. Zehmer*, the joke may look too credible to outside observers.

If the posting isn't a joke, Joe can still argue that it wasn't a manifestation of assent but instead a request for gifts. On its face, we could interpret the posting as a request for "donations," in which case Rachel's payment might be just that (DeLeo). Joe could say this post was just like an Amazon.com wish-list.

However, unlike a wish list, this posting had an express quid-pro-quo from Joe. Unlike the DeLeo case, where the promise was never bargained-for, here Joe is bargaining for Rachel's money. Joe can call it a donation if he wants, but the substance of the transaction looks like a bilateral exchange (cash for not eating Buffy). I think there is bilateral consideration to support the contract.

Therefore, I think the May 15 posting isn't a joke or gift request. Most likely, it's an offer. I think this offer could be characterized as either unilateral or bilateral. As with ads generally, I think a unilateral offer is the more natural characterization.

### *Rachel's June 1 Letter/Check*

Ways to characterize the letter/check:

- Acceptance of Bilateral Offer. Rachel's letter is a mirror-image acceptance. However, she sends only \$100 (not \$15,000), and the letter is irrelevant if the May 15 posting was a unilateral offer.
- Counteroffer. We could read the letter as a counteroffer to Joe's unilateral offer, where Rachel offers \$100 for Joe to "honor his promise."
- Offer. If the May 15 posting was an invitation to make an offer, Rachel's letter could be a bilateral offer. She appears to manifest assent—she wants Joe to honor his promise. The terms of the promise are effectively incorporated by reference from the web posting.
- Offer for Options Contract. Instead of addressing the main promise, the letter could be an offer for an options contract to keep Joe's promise open until June 30 (see discussion about revocation below).
- Performance. Rachel's check could be partial performance of Joe's unilateral offer. It could be that Rachel then intends to complete performance before June 30, or that other people will complete performance to satisfy Joe's condition.
- Cover letter for a gift. If Joe's posting was a gift request, this could be Rachel's gift with a cover letter making a non-binding request.

I previously took the position that the May 15 was a unilateral offer. As a result, I think Rachel's letter/check constitute partial performance.

### *Joe's June 6 Check Cashing*

If Rachel's letter was an offer, Joe's cashing of the check probably accepts that offer. Some of you mischaracterized this as acceptance by silence. Joe would be accepting by conduct—the conduct of cashing the check manifests his intent to be bound.

### *Joe's June 28 Posting*

If a contract formed based on Rachel's letter/check, then Joe must "honor his promise" for \$100. We didn't discuss anticipatory repudiation this semester, but threatening Buffy's life again might constitute an anticipatory breach.

Otherwise, the ordinary common law rule is that Joe may revoke an offer any time prior to acceptance, even if the offer stated that it would be held open. We might construe this announcement as a revocation of the old offer and announcement of a new offer.

However, if the initial offer was a bilateral offer, then Joe must actually communicate the revocation to the offeree. I'm not sure how he can do that given that every web visitor prior to June 28 was an initial offeree, and announcing the new offer on the web page may not actually reach those offerees.

Alternatively, if Rachel's \$100 represented consideration for an options contract, then Joe cannot revoke the offer on June 28 but must wait until June 30. At minimum, Rachel (and perhaps others?) could still accept the pending offer.

If Joe's initial offer was a unilateral offer, then it became irrevocable, at least with respect to Rachel, when Rachel commenced performance. In this case, Joe cannot revoke the offer prior to June 30.

### Rachel's Rights and Remedies

#### *Force Offer to Remain Open*

If Joe's offer was irrevocable (either because of an options contract or because Rachel had commenced performance), then Rachel can force Joe to keep the option open through June 30. However, the offer must be accepted by June 30 or it will lapse by its terms.

#### *Remedies Under a Contract*

Based on the discussion above, there is only one way Rachel and Joe have formed a contract—if her June 1 letter was an offer and Joe accepted it by cashing the check. This seems like an unlikely scenario. Furthermore, for Rachel to have remedies, Joe must have breached. Arguably, he has breached (or will soon breach) in one of two ways: (1) by threatening Buffy's life when he promised she would live a long and happy life, or (2) by failing to kill and eat Buffy if he doesn't get the \$15,000 by June 30. If neither of these constitute a breach, Rachel has no contract remedies.

Alternatively, if Joe has received \$15,000 by June 28, then any offer Joe made has been accepted, and he is required to let Buffy live a long and happy life. In this case, he is arguably anticipatorily breaching the promise by threatening her life again.

If Joe has breached a contract, then Rachel has the following remedies:

Damages. Rachel has a tough time getting expectation damages. She cannot recover any emotional distress damages without suffering physical harm (Keltner). Otherwise, I don't know how to value her damages here—what is the value of the prospect of Buffy's untimely death (especially when Joe has said he doesn't intend to kill her)? Or, if Joe is obligated to kill Buffy because he didn't raise the requisite money, then how do we value Joe's failure to eat Buffy? In each case, I think these damages are incalculable. However, Rachel should be able to get back \$100 under either reliance or restitution damages.

As contract remedies, Rachel cannot get punitive damages or attorneys' fees. As a practical matter, if the best Rachel can do is \$100 in damages, her enforcement costs exceed the value of her successful payoff. Therefore, the smartest thing for her to do is cut her losses and not chase the \$100. This suggests that contract law is a poor enforcement vehicle for these types of breaches, but perhaps other legal mechanisms (such as consumer protection agencies, or maybe even criminal enforcement) may be availing if she doesn't bear have to enforcement costs.

Equitable Remedies. Rachel could also seek specific performance. If Joe breaches by threatening Buffy's life, she could try to force Joe to give Buffy a long, happy life. This is an awkward order for a judge to make because (1) it would require long-term judicial oversight, and (2) there is another "person's" interests to consider (Buffy's). I suspect a judge would not want to get involved in such an order.

Alternatively, if Joe is in breach by not eating Buffy when he promised to do so, Rachel could seek an order forcing Joe to chow down. Again, I suspect a judge would be extremely reluctant to make such an order—judges are used to issuing harsh sentences for criminals, but not for cute bunnies.

In either case, specific performance is an unusual remedy. The fact that Rachel didn't have a personal relationship with Buffy—indeed, she probably couldn't even pick Buffy out of a bunny lineup—would undercut the moral compulsion for specific performance.

### *Remedies Without a Contract*

If Rachel made a bona fide gift, I doubt she has any remedies. Otherwise, she may be able to seek some remedies even in the absence of an enforceable contract.

Rachel could claim Joe committed the tort of fraudulent misrepresentation. In this case, the misrepresentation may be that he planned to kill and eat Buffy when he had no such plan. To establish the tort, Rachel will have to establish the requisite scienter (intent to defraud). If Joe can legitimately claim that he was joking, this may be hard to do. If Rachel can establish the tort, she can seek punitive damages and damages for her emotional distress.

Even if Rachel can't establish fraudulent scienter, she may still be able to claim a material misrepresentation. This would give her rescission rights (Stambovsky), which would include restitution (\$100).

Rachel could get restitution if she can void the contract other ways. She could try to void the contract by arguing duress. There is a threat here—Buffy’s life—but is the threat improper? It’s not like Rachel, or any human, is being threatened with physical violence, and we socially sanction people to kill bunnies all the time. While the extortionist subtext would surely not please any judge, this should not be duress.

Rachel could also try to void the contract by claiming that the contract was illegal or violated public policy. She could argue that killing Buffy is governed by animal cruelty laws or laws restricting the killing or eating of bunnies (such as laws specifying requiring the humane killing of animals for meat). But the transaction itself (paying someone not to kill an animal) is probably not illegal—compare ticket scalping, where the sale of the tickets *is* illegal. However, the court could use public policy to condemn the extortionist nature of Joe’s threat. I think a lot of judges would do so.

Rachel could also try to void the contract by arguing that it was fatally vague because the words “long, happy life” are indeterminate. I think this is a weaker argument.

If the contract never formed at all—such as Joe didn’t reach the \$15,000 threshold—or if the contract is void, Rachel could seek out-of-contract unjust enrichment. She would argue that she conferred a benefit on Joe (\$100) and it would be unjust for him to keep it (because he’s not obliged to do anything for her). If so, she can get restitution of \$100.

Finally, if the contract failed for consideration, Rachel still might be able to claim promissory estoppel. However, I don’t think this contract fails for lack of consideration.

### Conclusion

Based on Joe’s behavior, Rachel should be able to get her \$100 back if she takes this matter to court claiming breach of contract, a void contract or no contract forming at all.

However, I think getting any other remedies—damages in excess of \$100 or specific performance—is difficult and very unlikely. About the only way to get extra damages would be through the tort of fraudulent inducement. Further, in virtually all situations, the enforcement costs would exceed Rachel’s damages. So, Rachel’s *real* remedies here are effectively unavailable.

### Comments on Student Answers

Some of you wrote on the general topic but failed to answer the specific question asked—what are Rachel’s rights and remedies? If you are unhappy with your course grade, you should consider if you did an incomplete job of answering the question actually asked (or, in rare cases, you didn’t answer it at all). Exams that didn’t answer the question I asked were usually downgraded, even if the other analysis was accurate and thoughtful.

Some of you were very quick to kibosh the contract for fatal ambiguity. As we know, every contract contains ambiguity, but that doesn’t mean the contracts always fail. In this regard, I

think the Drayage case illustrates how courts will overlook a contract ambiguity to keep the parties in contract.

If you concluded that Rachel relied on Joe's promise, her reliance damages include the money spent in reliance of the promise—the \$100 she sent in response to his promise.

Some of you equated duress and unconscionability. The threat behind duress could also qualify as part of procedural unconscionability, so the doctrines are related. However, unconscionability requires substantive unconscionability as well.

I was surprised by how few of you addressed the scenario that Joe breached by *not* eating the bunny. Recall the domain name—"buffywilldie.com."

## Question 2

Average word count: 923 words. Max: 1200 words. Min: 456 words.

I can't make this stuff up. I've written a comprehensive blog post on the state of [tattoo advertising](#). Check out this human billboard—would you do this to your forehead for \$10,000?



## Introduction

This is a surprisingly easy question. There is only one way Mark can lose the tattoo and keep the \$10,000: if the contract is valid and Mark completed performance. In all other circumstances, Mark will not get what he wants (as I explain below).

Some of you explained how *Mark* could invalidate the contract. This is completely misdirected. If the contract is void, Acme should get most or all of its \$10,000 back. Mark needs the contract to be valid. If your answer focused on how Mark could destroy the contract, usually I downgraded your score because you missed the essential point of the question.

## Performance and Remedies

Mark promised to: (1) get a tattoo, and (2) wear tank tops in public, weather permitting. He has already performed the first promise. We don't have any data about the second promise, but we do know that there were only 5 days he could have possibly displayed the tattoo, and in cold-weather locales like Wisconsin, there were probably no weather-permitting days.

Therefore, Mark can argue that he completely performed the contract by merely getting the tattoo. Alternatively, he can argue that he completely performed either because he wore tank tops in public in the 5 day intervening period, or there was no good opportunity to do so.

However, the contract is missing some obvious details: how long he has to keep the tattoo, and what efforts he has to make to display the tattoo in public (i.e., can he turn into a recluse and never go out into public again?). If the contract is not integrated or partially integrated, either party could introduce evidence of agreement to establish that the parties reached agreement on these topics.

Even if the contract is fully integrated, some of these promises could be added into the contract.

First, the word tattoo is ambiguous because tattoos can be permanent or temporary. Parol evidence could be introduced to clarify the parties' intent, but in this case there appears to be no dispute about the parties' intent—Mark already got the tattoo and Acme already paid for it.

As a result, I think the contract contains a duration implicit in the word “tattoo.” Because tattoos last for a certain amount of time, Mark's obligations should last that long (in the absence of clarifying provisions to the contrary). Thus, if Mark got a temporary tattoo, a court will likely expect the tattoo to remain on Mark for the ordinary duration of the tattoo. However, if Mark got a “permanent” tattoo, then the court will assume that everyone (including Mark) intended the tattoo to be permanent. [We have reason to believe the tattoo is permanent because it requires laser surgery to be removed.]

Second, the court can imply some obligations through the implied obligation of good faith and fair dealing. Recall that the implied obligation kicks in to protect obvious but unexpressed assumptions/expectations of the parties. Here, particularly with Paragraph 2, the parties clearly assumed that Mark will promote Acme's brand. Therefore, I think most courts would imply a promotion obligation into the contract (see *Wood v. Lucy*) and govern it by the implied obligation of good faith and fair dealing.

Alternatively, the court might use the implied obligation of good faith and fair dealing to curtail any premature removal of a “permanent” tattoo. If Mark wore the tattoo for many years, a court might say that Mark has satisfied that obligation and not hold him in breach for removing a permanent tattoo. In contrast, 5 days seems just too short.

Mark could counterargue that the court should not reach to create implied obligations that were not expressed. I'm personally sympathetic to this argument; if some assumption is critical to the contract, say so! Alternatively, he could argue that Acme should have known that tattoos could be removed, so Acme's failure to restrict the behavior should be held against Acme. Some courts might be sympathetic to these arguments; others will seek Mark as a cheat for taking the money and vitiating the deal. This is a great example of how a judge's emotional reaction may shape the outcome.

Mark could also counterargue that the real value of the tattoo might be any press coverage generated by him merely getting the tattoo. If Acme has already gotten lots of press and the press coverage was Acme's principal goal, the court should not obligate Mark to do more. However, I think this argument is tough to make in light of Paragraph 2.



If the contract is valid and Mark breaches it by removing the tattoo, Acme can get damages. Under reliance and restitution damages, Acme can get its \$10,000 back. Under expectation damages, Acme could recover the lost value of advertising or perhaps the cost of procuring replacement advertising. Lost revenue from advertising might be speculative, so it's possible that the reliance or restitution metrics will be more favorable to Acme. In those cases, Mark cannot get what he wants (remove the tattoo and keep the full \$10,000).

If Mark removes the tattoo, Acme could also try to void the contract by claiming, for example, that the contract is fatally ambiguous (due to ambiguous words like "tattoo," "weather permitting," "public," etc.). Given that the tattoo is already on Mark's shoulder (giving us some performance data and making it very hard to restore the status quo ante), I think most courts would likely try to interpret the words rather than strike down the contract.

If Acme voids the contract, Acme could recover quantum meruit—the \$10,000. Mark would have an offsetting claim for quantum meruit for any advertising delivered prior to the tattoo's removal. In theory, Mark's claim for quantum meruit could exceed \$10,000, but it's more likely that it will be less (and it could be zero). If Mark's claim for quantum meruit is less than \$10,000, he cannot get what he wants (remove the tattoo and keep the full \$10,000).

Mark also cannot get what he wants if Acme can force Mark to keep the tattoo. Specific performance may be theoretically appropriate if Mark's shoulder is so unique that it cannot be replaced. For example, imagine that Mark is the #1 left-handed outdoor volleyball in the world, and every time he lays down a spike, the camera focuses in on his left shoulder. Or Mark could be a world-class billiards player with close-ups on his left shoulder when he leans over for a shot. However, I suspect most courts would refuse to order a negative injunction preventing Mark from removing the tattoo in any circumstance—forcing someone to do something unwanted with their skin may be just too personal for courts to intervene comfortably.

### Conclusion on Performance and Remedies

Mark has only one way to get exactly what he wants—show that he completely performed. Or, he might be able to get to the same place if the contract is void and Mark's quantum meruit claim is worth \$10,000 or more. However, I think both situations are unlikely. Mark changed his mind. However, under efficient breach doctrines, there is a cost of changing his mind—he must return some or all of the money he received.

I don't think it matters if Paragraph 2 is in the contract or not. Its presence in the contract is helpful in shedding some light on the parties' expectations about promotions and negating any argument that Mark completely performed simply by getting the tattoo. However, I think a court would use the implied obligation of good faith and fair dealing (as Cardozo did in *Wood v. Lucy*) to would imply promotional obligations even in the paragraph's absence.

## What Should Acme Have Done Differently?

*Draft the Contract Better.* Acme should have been more explicit about its intent. It should have required Mark to display the ads in specific ways and it should have banned laser removal. This would have made Mark's desired removal more obviously a contract breach.

*Use carrots to induce performance.* Acme could induce Mark to perform by keeping money at risk if he doesn't perform. Acme paid the cash upfront in exchange for Mark's promise of a lifetime of performance. But because Mark has the cash already in his possession, Acme has a lot less leverage over Mark. In theory, expectation damages should make Acme whole, but they don't in practice. Acme has some risk that it will lose its case, and even if it wins, Acme doesn't get coverage for its enforcement costs (including the hassle factor). Instead, Acme pay Mark cash over time only as Mark performs, like paying Mark on a monthly, quarterly or annual payment schedule. This way, Acme's continued possession of the cash gives them better leverage over Mark.

*Use sticks to induce performance.* Acme could also get Mark to perform by deterring breach. Acme can use liquidated damages to make his breach costly. For example, because expectation damages are speculative (i.e., how much profit the advertising would have generated for Acme), Acme might be able to support a big-ticket liquidated damages clause. If the number is large enough, it might be able to dissuade Mark from breaching in the first place. Of course, the number cannot be so large that the clause represents a penalty, so any liquidated damage number must be reasonably supportable. However, a liquidated damages clause might have a better deterrent effect than the default damages available to Acme.

*Watch out for sole sourcing.* Acme can hedge its bets by relying on multiple vendors rather than a sole source vendor. This may not be possible if Mark's shoulder is truly unique, but in other cases the multiple-vendor approach may be an effective counterbalance against any hold-up games Mark might play (e.g., *Austin v. Loral*).

## Comments on Student Answers

A number of you consulted dictionaries to define terms like "tattoo." I thought that was great! We saw courts use dictionaries (*Guilford*, *Frigalment*), so this methodology was appropriate (and, I hope, helpful to you).

Some of you took the position that any liquidated damages amount could not exceed \$10,000. This is not correct. For example, if Acme's expected profit from the contract exceeds \$10,000 (and it should be, or else Acme entered into a losing contract), then Acme can provide justification for a liquidated damages clause greater than \$10,000.

If Acme seeks expectation damages, it cannot get both the \$10,000 back *plus* lost profits. It has to choose one or the other. Otherwise, Acme ends up in a better position than if Mark performed—it spends zero to get the lost profits, where it was willing to spend \$10,000 to get the lost profits.

Some of you suggested that Acme should make the contract for a fixed duration. This is OK, but there's no way technically for a permanent tattoo to be contracted for a fixed duration. Instead, Mark could get a temporary tattoo and, when that tattoo is done, negotiate a new deal with new consideration for a subsequent tattoo.

Some of you suggested that Acme should seek performance as its sole and exclusive remedy. However, as the buyer, Acme does not want to limit any of its remedies against Mark. It wants the full suite of remedies so that it can choose the most effective remedy if Mark breaches. The only exception is that Acme may be willing to liquidate damages (thus choosing its remedy in advance) if the liquidated damage clause sufficiently accomplishes its deterrence or compensation goals.

There is no such thing as an "efficient breach" defense. Efficient breach is a theoretical construct that explains the basis of contract doctrines (like why we do not allow punitive damages or penalty clauses, and why we disfavor specific performance).

I got an above-average number of statements that made me laugh out loud. Look over my shoulders for a couple of actual comments from your peers:

- "Don't rely on 1 Mark to provide all your advertising. Get an army of 20-30 Marks...If he's just a buff, replaceable dude, make sure there are other Marks in the hopper."
- "Acme should also likely put in a termination for convenience clause. Assuming Mark has the rock hard body that all the chicks want right now is no guarantee that he will have that in 5 years. Acme's intent is likely to show off its product to chicks that like Mark, and guys that want to be like Mark. If Mark lets himself go, stops going to the gym, and stops eating tofu-dogs, then it is likely that the girls will no longer want to look [at] him and the guys won't aspire to be like him any more (because they are already flabby)."