

Dickinson
Contracts II
Spring 1992

CONTRACTS II

Question 1 (20 minutes)

On July 1st, Fishman contracted with Benton Farms, of Blackwater, Georgia, for the purchase of "20,000 pounds of fresh, U.S. No. 1, white, baking potatoes, to be packed in 100-pound sacks, price to be \$25.00 per 100 pounds (\$.25/pound or \$5,000 in all) ." Delivery was set for Fishman's warehouse in Cincinnati between August 1st and 4th. When potatoes are in season, Fishman Produce purchases a similar quantity for delivery every 5 days.

On July 29th, Benton Farms dispatched a truck loaded 20,000 pounds of potatoes. While laying-over in Duncan's Corner, Virginia, however, an unknown person opened the trailer and removed 2 bags. The shortage went unnoticed until the truck was unloaded in Cincinnati on August 3rd, when there was no time for Benton to ship additional potatoes. At that time, Fishman could have purchased 200 pounds of similar potatoes from another Cincinnati wholesale grocer for \$200.00 (\$1.00/pound). But, since Fishman had a stock of potatoes on hand, it did not do so, and, in fact, did not run out of potatoes before receiving its next delivery of 20,000 pounds on August 9th.

A. Benton Farms has offered to resolve the shortage by deducting \$50.00 of its bill, the price of 200 pounds of potatoes at the contract rate. Fishman Produce is demanding \$200.00 (\$1.00/pound), the wholesale price for such potatoes by the bag. Fishman sues for breach of contract, who will win and why?

B. If Fishman Produce can show that at the time of the short

delivery, it was actually selling potatoes for \$1.15/pound, yielding a gross profit of \$.90/pound (\$180 for 200#), would that make a difference in its damages? If so, why? If not, why not?

Question 2 (60 minutes)

On April 1st, Willis, the salesman for Ketchmer Canning Company, called on Fishman and offered to sell a large variety of canned goods. By the end of their conversation, Willis and Fishman had agreed that Fishman Produce would buy 500 cases each of green beans, corn and peas for \$12.00 per case, or \$18,000 in all.

When Willis returned to Ketchmer's plant, he learned that the season's supply of peas had been sold out, and, thus, Ketchmer could not fulfill that part of the order. So Willis prepared and mailed the following form:

"Date: April 3, 1991

"Sold to: Fishman Produce
Cincinnati, Ohio 45559

"We acknowledge your order for:

500 cases of #6 cans - green beans

500 cases of #6 cans - corn

Price: \$12.00 per case

"Sale subject to the following terms and conditions:

1. Seller reserves the right to vary quantity by +/- 10%.

2. Delivery to be at Buyer's facility as soon as possible.

3. Payment to be within 30 days of delivery. We do not give discounts for prompt payment, but balances unpaid by the due date will be assessed a finance charge equal to 1-1/2% of the unpaid balance per month.

/s/ Herman P. Willis

By: _____

For: Ketchmer Canning
Company"

When Fishman Produce received this form, they noted the omission of peas and responded as follows:

"Date: April 7, 1991

"To: Ketchmer Canning Co.
Lexington, KY 55760

"This will confirm our order for:

500 cs. (#6) green beans @ \$12

500 cs. (#6) corn @ \$12

500 cs. (#6) peas @ \$12

/s/ Wilma Fishman

By: _____

For: Fishman Produce Company

"P.S. As our requirements are constant, we cannot accept either overages or underages in quantities purchased from you. - F.P.C."

When this form arrived, Willis was leaving for a big sales convention in Peoria, so he laid it aside intending to work out the details with Fishman later. Unfortunately, Willis never got back to the problem.

On April 25th, Ketchmer delivered 500 cases of green beans and 450 cases of corn, but no peas. When the invoice arrived on May 1st, for \$11,400, Fishman refused to pay until it received the balance of the order - 50 cases of corn and 500 cases of peas.

On June 1st, Ketchmer sent another invoice, this time for \$11,571 (\$11,400 + 1-1/2 %) with the note: "Your account is in arrears. Please remit at once or we may be forced to consult out attorney." Fishman ignored this invoice and sent a demand for immediate delivery of all back-ordered canned goods "or we shall be forced to purchase elsewhere and charge your account." When Ketchmer didn't respond, Fishman purchased 50 cases of corn for \$18.00 per case and 500 cases of peas for \$20.00 per case, from another canning company.

Cross-complaints have been filed, Ketchmer's for \$11,400 plus interest, and Fishman Produce's for \$2,650, the additional costs it incurred in buying the 50 cases of corn and 500 cases of peas elsewhere. Who will win? How much? And why?

Question 3 (60 minutes)

Back in July, 1977, Fishman signed a contract with Harvey Trucking Company to provide certain services. Under the contract, Harvey was to maintain Fishman's trucks and provide drivers for \$8.50 per operating hour. Fishman was obligated to furnish one or more trucks "in good working order and in compliance with all federal, state and local regulations then in effect." Harvey agreed to keep the trucks

running, and manned by drivers, "no less than 36 working hours per week." The loading and scheduling of the trucks was entirely up to Fishman, however. Fishman also agreed to pay all operating expenses, and 80% of the retail price of all parts and lubricants required to maintain the trucks. Harvey agreed to perform all labor necessary to maintain them. The contract did not specify a term, but was terminable by either party on six months notice to the other.

Over the years the parties prospered. Fishman Produce, which had only 2 trucks in 1977, had 17 trucks by 1991, each serving a separate route. By 1991, Harvey, who started out with himself, two drivers and a mechanic in 1977, had eighteen drivers, six mechanics, two foreman and a parts manager assigned just to work on Fishman's trucks, and over a hundred other employees working on similar contracts with other businesses. By mutual agreement, the contract rate had risen to \$32.50 per operating hour.

Since the stores with which Fishman dealt did not accept deliveries during their busy times, the trucks were generally dispatched at 5 a. m., so they were finished between noon and 2 p.m., Monday through Friday. Harvey and his mechanics performed scheduled maintenance in the afternoons. Unscheduled breakdowns, and repairs that took more than one afternoon to complete, were made as needed. But, since the contract only required the trucks to be available for 36 hours per week, each truck could spend (on average) one day every two weeks in the garage without violating the agreement. When circumstances conspired to create a shortage of trucks, Harvey's drivers would work a night shift to make the necessary deliveries.

During the Fall of 1991 the grocery business in southwestern Ohio changed. Cub Foods, Meijer, and Kroger got into a price war that drove many independent grocers into bankruptcy. Fishman's customers began to demand price cuts to permit them to compete with the big grocery companies. Fishman responded, of course, but soon was forced to look at cost cutting measures of its own in order to remain profitable.

Fishman approached Harvey, who was willing to agree to hold the line on pricing for another year at least, but was not willing to cut the contract rate below \$32.50. In the meantime, Fishman learned that many wholesalers had been cutting costs by hiring independent contractors, each of whom furnished his or her own truck as well as driving and maintaining it, to service a specific route. Fishman estimated that she could save about \$9,000 per year per route by converting to this system. On March 1, 1992, she sold three of her trucks that were ready for retirement, and signed contracts with Winkin, Blinkin, and Nodd under which each promised to furnish a truck and driver on a specific route for one year, five days per week, for a flat rate of \$1200 per week (which is equal to about \$33.33 per hour). The routes subcontracted to Winkin, Blinkin and Nodd were the shortest and easiest to serve.

Harvey was upset for three reasons: first, his contract had been profitable in part because of the efficiencies realized as the number of trucks grew; second, the routes that remain are the longest and least profitable for him; and, third, he believes that as Fishman's other trucks approach retirement, they, too, may be replaced by independent contractors, so that over the next five or six years his business with Fishman could be reduced to virtually nothing. When he talked to Fishman in an attempt to work out their problems, Fishman was adamant that her actions were entirely appropriate under the contract. She refused to negotiate or even to consider an increase in the contract rate. She pointed out that she was only obligated to furnish one truck to Harvey under the agreement but, in fact, still furnishes 14. Fishman also pointed out that Harvey is probably in breach of contract because the contract calls for the trucks to be available 36 "working hours" per week, although in fact they are only available 5 hours per day (25 hours per week) between the hours of 8 a.m. and 5 p.m. The meeting between Fishman and Harvey ended on a sour note, although no ultimatums passed between them.

Harvey consults you for advice. Specifically, does he really have a contract with Fishman? Assuming so, is either he or Fishman in breach of that contract? In light of what has transpired, what would you

recommend that he do? (As in real life, Harvey expects that you will recommend the best course of action, not a bewildering maze of alternatives.)

Question 4 (40 minutes)

Ever since she was a little girl, Wilma Fishman wanted a red Corvette. She checked all of the Chevrolet dealers in Cincinnati but was unable to locate one. In checking with more distant outlets, Fishman discovered that a Dayton dealer, Ozzie Frank, had just the car she was looking for.

Fishman traveled to Dayton to see the car, and talked with Smith, one of Ozzie Frank's salesman. He told Fishman that "this car is special; it's one of a kind; it's hot; it's hard to get." Smith then quoted the price as \$35,750, but confided in her that he "could get it for her this afternoon" for a mere \$32,000. Fishman agreed happily and signed the contract that very day. Under the contract, Ozzie Frank agreed to sell, and Fishman agreed to buy "one, new 1992 Chevrolet Corvette ZR—l, fully equipped with turbocharged V-8, Positraction, air conditioning, and custom leather trim package." The terms were \$10,000 down and monthly installments of \$635 per month for five years. The buyer was also required to execute a note and maintain both liability and collision insurance on the car with a loss payable clause in favor of the financing agency, GMAC. It also contained the following:

"Seller promises that it, its agents, successors, and assigns, will repair or replace any damaged or defective parts, equipment, and assemblies on the vehicle for a period of 36 months after the date of sale, provided such repairs or replacement are not the fault of the Buyer. Buyer agrees that in return for seller's promise, he or she will relinquish, surrender, and cancel any other rights Buyer may have to damages for breach of contract. THERE ARE NO WARRANTIES

EITHER EXPRESS OR IMPLIED, INCLUDING SPECIFICALLY THE IMPLIED WARRANTIES OF FITNESS AND MERCHANTABILITY."

Fishman returned home and arranged for the requisite insurance through her regular broker. The annual premium for the policy was \$4,200, which Fishman paid by check. The next day she gave Smith a check for \$10,000, signed a note for the balance of the purchase price, and drove off in her brand new red Corvette.

NOTE: IN ANSWERING THE FOLLOWING QUESTIONS, YOU ARE TO IGNORE THE POSSIBILITY THAT FISHMAN MAY HAVE AN ACTION UNDER THE OHIO "LEMON LAW."

- A. While Fishman is driving the car three months later, the rough end of a spring comes up through her beautiful leather seat, tearing a large hole in the skirt of her \$800 tailor-made suit. What are her rights against Ozzie Frank? Why?
- B. Three months after that, Fishman notices that the right side tires are wearing badly. She takes the car to Ozzie Frank who tells her that the car's frame has been bent, so that the tires will always wear on that side. Fishman has not been in an accident. What are her rights against Ozzie Frank? Why?
- C. Upon further investigation, Fishman learns that her car was pulled off the assembly-line and put through road tests as part of General Motors' program of random, product testing to assure quality. During one of these tests, it was struck by another vehicle, causing the damage to the frame. The car was repaired and shipped to Ozzie Frank with a full disclosure of the crash and subsequent repairs. Although Smith was fully aware of this information before he talked to Fishman, he did not volunteer it, and Fishman had never thought to ask. What are her rights against the Ozzie Frank? Why?

THIS CONCLUDES THE EXAMINATION