**School of Law**

**University of Miami**

**Contracts**

Professor Rosen

Spring 2019

 This is a three and one-quarter hour open book exam. You may refer to all written materials you have brought to the exam.

 You will be given 15 extra minutes in order to read the exam and organize yourself. Bluebooks are not to be distributed until 15 minutes into the exam. During these 15 minutes, you may write only in this booklet. Then you have 3 hours to write in Bluebooks or on the computer. Thus, the total time allotted is 195 minutes.

 There are three questions of equal value. Budget your time accordingly. Plan your answers before writing. Be clear and brief. Credit will be given for organized and concise answers. Avoid repeating yourself. You may incorporate by reference answers previously given.

 **If you are writing, please write legibly, on only one side of the page, skipping lines.**

 You may refer to named parties by initials. If you feel you need to assume any additional facts, state them explicitly. You may assume without notice that all the transactions occur within the State of Euphoria, which has adopted the UCC, without revisions.

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I. (33%, 1 hour)

Pete was a first-year student at Euphoria Law School. In October 2018, he went snorkeling for his first time on a boat arranged by the Cheapo Shop in Happy Key. As he planned to snorkel throughout his law school career, which is why he chose Euphoria Law, he bought a used mask and fins at the Shop. The Shop knew that he was planning to use this equipment on the trip that he purchased at the same time. He paid $60 (+ 7% tax) for the equipment and $60 for a three-hour boat trip to the coral reef. It took a half-hour to get to the reef and he was promised that he would have about 2-hours to snorkel at the reef.

He got in line for the boat at 1:30pm for a 2 pm departure. At 1:55, the gangway was lowered for the passengers to board. On the dock, at the gangway, there was a table with a document that had to be signed before one could board. Desiring to get a good seat on the boat, Pete signed it without reading it. He was given a copy of the document. The boat left the dock at 2:15pm.

The boat’s engine emitted a dark cloud that Pete thinks made him nauseous. Pete had been on many boat trips before and was a good sailor. It took over an hour to get to the reef, even though the ocean was flat, probably because the engine was not working very well. Before they went snorkeling, the dive master told them that they would only have an hour to snorkel because of the delay in getting to the reef.

While snorkeling, Pete discovered that the mask leaked, even though it was adjusted properly. One of his fin’s heel strap broke and it slipped off his foot. As a result of these equipment mishaps, Pete cut himself on the coral and returned to the boat only 15 minutes after entering the water. Pete was bleeding when he got back to the boat. The dive master gave him iodine and bandages that stopped the flow of blood and protected the wounds. Incredibly thirsty, Pete bought 5 eight-ounce bottles of water, for $3 each.

Pete went to the emergency room in Happy Key. He incurred medical expenses of $200.

When he got back to Euphoria City, Pete found the 1-page document that he had signed before boarding the boat. The front page lists the rules of the boat, including “Boats are inherently dangerous places and the passengers agree to bring no food or drink on board. In particular, alcoholic beverages are prohibited and will be confiscated.” It also provides “Coral Reefs are delicate and dangerous places and passengers are prohibited by law from touching or otherwise damaging any part of the coral reef. Coral is SHARP! Do not touch it.”

Under the signature line, there was a sentence which read: “IMPORTANT TERMS ON BACK. Please read the entire document.”

On the back, there was the following language: “This contract is the final and complete statement of our agreement .. . . There are no warranties, EXPRESS OR IMPLIED, other than those stated in this agreement. . . . Check equipment before renting or buying it. No returns. All sales final. All items sold as is. . . . Cheapo Shop makes no promises concerning the quality or duration of the snorkeling which is incidental to the purchased boat trip . . . SNORKELING IS DANGEROUS and all passengers agree to assume the risk and liabilities for any injuries occurring to you which are (1) not the fault of Cheapo Shop, or (2) due to our negligence, but not gross negligence.”

Pete has contacted your law firm. He is emotionally devastated and takes his experience as an omen that he should never again snorkel in Euphoria. He is even contemplating never swimming at the beach, as he has become frightened of sharks attacking him. He thought he saw sharks circling him when he was bleeding while snorkeling. You are asked to write a memo on the contract issues. You are told another intern will write a memo on the tort issues.

II. (33%, 1 hour)

MommaMia Pizza placed an advertisement on Facebook that said “New Contest. Tattoo our logo in a prominent place on your body, send us a photo of it to before January 1, 2019, and you will get free pizza for life.” This ad appeared on October 1, 2018. On October 5, Mamma Mia issued a press release saying, “Due to the unprecedented response to our offer, we are cancelling it. Instead, we will offer 100 free pizzas to the first 500 people who send us the requested photo.” On October 6, having gotten over 500 pictures, MommaMia took down the webpage named in the original ad. On October 7, they posted on Facebook an ad that said “MammaMia Contest a tremendous success. Follow the link and see 550 tattoos of our logo. We gave away for free 55,000 pizzas. Enjoy! Contest over.”

Adam saw the ad and even though he thought it cool, he didn’t want a tattoo. On October 7, he told his friend Zonk about the ad. Zonk immediately got a tattoo on his upper thigh and sent to MommaMia a photo of him in underpants that showed the logo. He couldn’t find the webpage that Adam told him about, so he sent an email to “Customer Relations” at MommaMia Pizza. The subject line read: “TATTOO.”

MommaMia’s customer relations replied that he was too late. They directed Zonk to the Euphoria Herald’s website, where there was an article about the retraction that appeared on p. 12 of the print edition of October 7. They also directed him to the Facebook post about the end of the contest, which appeared 1 hour before Zonk’s email, but which Zonk hadn’t seen. Neither Adam nor Zonk read newspapers. There was some discussion in the blogoverse of the retraction, but it didn’t explode until after numerous people had gotten tattoos and then were denied MommaMia’s promised gift. Adam and Zonk saw these posts after Zonk had gotten the tattoo. Zonk will testify that he did see a few of them before he sent his photo to MommaMia. He didn’t know whether to take them seriously and only suspected that they may be true when he didn’t find the webpage from the ad, which he went to after he had a photo taken of his new tattoo.

MommaMia communicated with everyone (after the first 550) who had sent it a photo, praising them for their interest, expressing sympathy with their incorrect presumption that they would get “free pizza for life,” and offered each of them 5 free pizzas instead. On January 1, 2019, they had given away these 5-pizza offers to about 1000 people. Zonk cashed in the voucher that he had received and he, Adam and a few friends enjoyed 5-free MommaMia pizzas.

Zonk gets jeered about the MommaMia pizza tattoo in the locker room. He has lost count of the number of people who rib him for believing ads or not checking whether the offer was still valid before he got the tattoo. Fortunately, when he wears pants or shorts, the tattoo is not visible. He wants the tattoo removed and he want MommaMia to pay for it. It will cost him $500 to get it removed, although it only cost $75 to get the tattoo.

You are to write a memo regarding Zonk’s contract rights.

III. (33%, 1 hour)

Rachel is the Euphoria representative of Lloyd’s Register. Part of her job is to sell Lloyd’s service to prevent and respond to data breaches. Olive is the Chief Data Protection Officer of Euphoria Bank. Olive is looking for a contractor to help her protect the bank and schedules a meeting with Rachel.

Rachel tells Olive that her company will assess the bank’s cyber risks, advise on how to reduce the risk, and introduce blockers into the computer system of the bank to minimize damage in case of a data-breach. She tells Olive that Lloyd’s Register employs “state-of-the-art” techniques but also emphasizes that there are no fail-proof means to prevent data-breaches. Maximum feasible protection is the only rational defense, but in the current environment this defense will not always prevent offensive measures. Olive doesn’t ask if there are any better systems than those employed by Lloyd’s and Rachel doesn’t tell her about other companies whose approaches may work better for the Bank than Lloyd’s. Rachel does emphasize, repeatedly and accurately, that Lloyd’s employs at least 5 former Russian hackers.

Rachel then tells Olive that Lloyd’s Register also responds to attacks that breach the bank’s defenses. She tells Olive that Lloyd’s stands behind its work and will repair all computers damaged in a breach and will compensate the Bank for all damages caused by successful breaches. Olive asks if there are any limits to the liability that Lloyd’s assumes in case there is a successful breach. Rachel responds, correctly, that to the best of her knowledge, Lloyd’s does not insure consequential damages and the absolute amount of liability is negotiated when the final price is determined. Rachel emphasizes that an important part of Lloyd’s service is that they will quickly lock the Bank’s data “doors” that have been opened.

During the next week, Rachel sends Olive numerous stories about current cyber-attacks. The subject line for each is “Can you afford to wait?” Despairing, Olive calls up Rachel, asking her what would be the annual cost if the Bank buys both the preventive services and guarantee of up to $100 million to repair damages caused by a cyber-attack. Rachel asks if the bank wants coverage for 1 data-breach/year, or for all data-breaches. Olive says that it was her understanding that the preventive services would reduce the number of successful attacks and that the bank wanted protection of $100 million/attack. Rachel says that she will check on the cost.

Over the next week Rachel and Olive negotiate about the cost. They arrive at a number on which they agree. Olive gets Rachel to reduce the price by 12% and Rachel asks if the bank agrees at that number. Olive replies, “It’s dope.” Rachel tells Olive to expect experts to arrive at the bank in 10 days to improve their system. Rachel also attaches to her email the “Data Breach Prevention and Protection Plan” that Lloyd’s Register is offering Euphoria Bank. Olive replies, “I look forward to working with your experts. I’ll send your plan to our Legal Department.”

Lisa in the Bank’s Legal Department looks at the plan and calls Olive. Lisa says, “I can’t evaluate the details of what they are offering, so you should read it. The contract is an integration so you should only expect to receive exactly what they promise in the document. They propose to repair and replace computer equipment damaged by data-breaches. Do we have $100 million dollars of equipment that would be so damaged? They repeatedly emphasize that they cannot prevent data-breaches and disclaim any liability for consequential damages caused by data breaches. Do you understand that?”

Olive emails Lisa, “I don’t think that is what was promised.” Lisa doesn’t reply.

Lloyd’s Register does excellent work at Euphoria Bank, reducing the risks of data-breaches, but Euphoria Bank is one of the targets of the Not-Petya II cyber-attacks. The Bank wants to replace all infected machines, but Lloyd’s says that they will repair the machines, because the risk of an undiscovered infection after the repair is less than 1%. The Bank also wants Lloyd’s to compensate them for the $50 million they had to pay in fines for the breach and to customers injured by the revealed data.

Lloyd’s points out that the “Data Breach Prevention and Protection Plan” said that “repair” was “the exclusive remedy” where it was possible. It also says that it was preparing to deny all liability because these damages were the result of “war,” a cyber-attack. The Plan specifically excludes liability for “any and all acts of war, civil insurrection, strike, or other organized malicious acts.” You are to assume that a senior official at the Department of Homeland Security will testify that “The modern war includes data-breaches caused by cyber-attacks. Our enemies want to undermine confidence in our banking system. Today, that is important as any war over territory.” He will also testify that the Not Petya II attacks were launched by entities connected to Russian intelligence.

Rachel calls up Olive and tells her that Lloyd’s will not even pay to repair the infected computers (at an estimated cost of $15 million) unless the Bank agrees to drop these “indefensible claims.” Rachel tells Lisa that Lloyd’s “clean-up crew” is ready to arrive in Euphoria, but their departure is being delayed because of the Bank’s claims. She asks, “Can you afford to wait?”

 You work for Lisa in the Bank’s Legal Department. Advise her.