UNIVERSITY OF MIAMI LAW SCHOOL

**CONTRACTS**

Professor Rosen

**MID-TERM EXAMINATION**

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**An Answer**

W knew, or ought to have known, that "reality shows" interview thousands and keep on narrowing that number down. She surely knew that the narrowing down process requires various acts by the contestants (and by their families). Even after the announcement of 1/7, W ought to have known that TV shows get cancelled by the network. Because W knew that the producers had no guarantee that the show would continue, it was unreasonable for W to believe that she could conclude the deal by promising to undergo the surgery. At no point was W justified in believing that she had the power of acceptance: At no point was W reasonable in believing that she could say "I agree, put me on," and we would be obligated to put her on. Consequently, there was no offer for her to accept.

W might claim that she was making an offer to our clients. She was saying, "Please accept my offer of being on your show." She kept on sweetening her offer (her family's trash talk, etc.), and we accepted her offer by announcing her selection on 1/7.

W also knew, or should have known, that if she had a prolonged recovery time, the show could not use her. This and the above facts about the business, W knew or should have known are implied in any the offer regarding the makeover. Thus, they are part of the contract and when her recovery was found to be longer than reasonably expected, we had no further obligations under the contract.

W will respond that she knew none of these things, nor should have known such things because only an industry insider would be aware of them. She also might argue that even if her recovery time was longer than the producers expected, from her perspective, it wasn’t unreasonable long and that is the implied term in the offer. And, if E&M accepted her offer, they were not justified in believing that these conditions were included in an offer by an industry outsider.

W also ought to have known that had she have gotten cold feet and decided not to go ahead, we would have had no action against her for breach of contract: She ought to have known that her promise would not conclude the deal because a patient can change her mind and refuse medical treatment at any time. Consequently, if we made her an offer, it was an offer of a unilateral contract – she was not bound by her promise and could “chicken-out” of the performance.

W would argue that the offer of a unilateral contract was irrevocable and we breached the option contract when we prevented her from continuing her performance. W will argue that she had begun the invited performance, for example. by allowing her family to be filmed.

We will argue that an option contract was not created because the performance that we sought had not begun. All that she and her family had done was part of the contestant process. (The more her family trashed her, the more likely she was to be selected).' The contestant process is not the invited performance. If it were, all the contestants whom we interviewed or whose family we interviewed could force us to put them on television by exercising their power of acceptance.

W will argue that the contestant process ended on 1/7/04. Since then, she has begun the invited performance. She is in L.A. reading pre-op instructions and hasn’t begun the dare?

We will respond that only going under the surgeon’s knife while being filmed is the beginning of the invited performance. After all, she could still back out. But that would not be a breach of the option contract, which is what we are alleged to have done. After the beginning of the invited performance, we can’t chicken-out without breaching the option k.

E & M would argue that the conditions implied in the offer of a bilateral contract also are implied in this offer of a unilateral contract and in the option contract.

We will argue that what was involved here was the promise to make a gift. We understand that we led her to dream of a new life. But the law does not protect the expectation interests created by a promise to make a gift.

W will argue that in exchange for her promises to encourage her family to cooperate with the producers, undergo surgery, allowing it to be filmed, and be shown on TV - all acts that she was not legally obligated to perform - we promised to perform the makeover.

We would respond that all actions prior to the offer of 1/7 are past consideration. Furthermore, the premise of the show are free transformative experiences. That the contestants are transformed not by their money but by the munificence of the show is the theme. We give our gifts especially to those who can’t afford it. Her coming to L.A. and reading the pre­op instructions were conditions to her receiving the gift, like the tramp walking to the store.

W would respond that intent and motive are not relevant. The parties treated the surgery and the filming/airing as an exchange. In exchange for her forbearing from her rights not to filmed during surgery, the show promises her a makeover. The fact that she doesn’t suffer a detriment (paying out $$) is irrelevant.

W will argue that even if there was only the promise of a gift or only an offer of a unilateral contract that was properly revoked, that W relied to her detriment on our promise. W will argue that our 1/7/04 announcement was a promise on which she relied.

But courts require that the promisor foresaw or should have foreseen the detrimental reliance. After 1/7, what did W do in reliance that we foresaw?

She came to L.A. This is certainly foreseeable by E&M, we paid for the trip.

But the promise is enforceable only to the extent necessary to prevent injustice. Unless we knew of other ways in which W detrimentally relied, we probably owe her the trip back from L.A., something we could foresee and on which W may have detrimentally relied (round-trip tickets are the norm).

The injustice that occurs here is to Kelly’s two children. Should E&M have foreseen this? We are not told when the interview with Kelly took place. If it was before 1/7, should E&M have foreseen from it that these children would need to be supported by D or that Kellie would suicide if her sister was not transformed? If not, then this injustice is not a reason to enforce our promise.

For this to be foreseeable, it may be the result of E & M knowing specific facts about W’s family. Or from more general knowledge. Our standard practice is to coax families to do interviews. Encouraging trash talk is not uncommon in “reality tv.” Are there other examples of consequences that E&M should have known?

The court may not order specific performance because money damages are adequate to realize W's expectations: we could pay for the surgery. Paying for the surgery protects her expectation interests.

We could argue that W's expectation interests ought to be measured by the difference in her earning capacity if she looked as we promised as compared to her earning capacity as she currently looks (cf. Peevyhouse). Then, if W couldn't prove with reasonable certainty that she would get better jobs if she were prettier, she is not entitled to any expectation damages.

W would reply this is not Sullivan where the parties understood that the cosmetic surgery was done to get her better acting jobs. This is reconstructive surgery (to jaw, teeth and eyes). E & M understood that getting better jobs was not the point. (After all, the point of Cinderella’s transformation is for her to stop working). W’s expectation interests are protected only by paying her the amount necessary for her to undergo reconstructive surgery.

She could sue for her reliance damages (costs of return from LA trip, lost wages, and similar gains and losses made in reliance on the contract), returning her to where she was before the contract.

As consequences of what W claims is our breach, horrible things occurred. E&M is not liable for these consequential damages unless they were foreseeable by both parties at the time of contract making. I’ve discussed this above regarding foreseeability and sec 90.

The risk of emotional hurt to W and her family may have been in the contemplation of the parties at the time the contract was made. But all contractual breaches cause disappointments. The Black Letter law is that emotional damages from breach are not recoverable under contract law, although we have seen courts making exceptions.

We must be careful about our uses of the films that we have of D and her family. Without a contract between us and D, our being enriched by them would be unjust because the invasion of their privacy would be without their consent, and D would be entitled to restitution of our benefits.

W, as the non-breaching party, has a duty to act reasonably to mitigate her damages. This duty would require her to offer herself to other available free sources of reconstructive surgery, To mitigate her damages, W must leave the hotel and return home asap.