**Alternate Case Problems**

*Chapter 8*

**Agreement and Consideration in Contracts**

**8–1. Bilateral versus Unilateral Contracts.** D.L. Peoples Group (D.L.) placed an ad in a Missouri newspaper to recruit admissions representatives, who were hired to recruit Missouri residents to attend D.L.’s college in Florida. Donald Hawley responded to the ad, his interviewer recommended him for the job, and he signed, in Missouri, an “Admissions Representative Agreement,” which was mailed to D.L.’s president, who signed it in his office in Florida. The agreement provided in part that Hawley would devote exclusive time and effort to the business in his assigned territory in Missouri and that D.L. would pay Hawley a commission if he successfully recruited students for the school. While attempting to make one of his first calls on his new job, Hawley was accidentally shot and killed. On the basis of his death, a claim was filed in Florida for workers’ compensation. (Under Florida law, when an accident occurs outside Florida, workers’ compensation benefits are payable only if the employment contract was made in Florida.) Is this admissions representative agreement a bilateral or a unilateral contract? What are the consequences of the distinction in this case? Explain. [*D.L. Peoples Group, Inc. v. Hawley,* 804 So.2d 561 (Fla.App. 1 Dist. 2002)]

**8–2. Agreement.** The Pittsburgh Board of Public Education in Pittsburgh, Pennsylvania, as required by state law, keeps lists of eligible teachers in order of their rank or standing. According to an “Eligibility List” form made available to applicants, no one may be hired to teach whose name is not within the top 10 percent of the names on the list. In 1996, Anna Reed was in the top 10 percent. She was not hired that year, although four other applicants who placed lower on the list—and not within the top 10 percent—were hired. In 1997 and 1998, Reed was again in the top 10 percent, but she was not hired until 1999. Reed filed a suit in a federal district court against the board and others. She argued in part that the state’s requirement that the board keep a list constituted an offer, which she accepted by participating in the process to be placed on that list. She claimed that the board breached this contract by hiring applicants who ranked lower than she did. The case was transferred to a Pennsylvania state court. What are the requirements of an offer? Do the circumstances in this case meet those requirements? Why or why not? [*Reed v. Pittsburgh Board of Public Education,* 862 A.2d 131 (Pa.Cmwlth. 2004)]

**8–3. Intention.** Music that is distributed on compact discs and similar media generates income in the form of “mechanical” royalties. Music that is publicly performed, such as when a song is played on a radio, in a movie or commercial, or sampled in another song, produces “performance” royalties. Each of these types of royalties is divided between the songwriter and the song’s publisher. Vincent Cusano is a musician and songwriter who performed under the name “Vinnie Vincent” as a guitarist with the group KISS in the early 1980s. Cusano co-wrote three songs entitled “Killer,” “I Love It Loud,” and “I Still Love You” that KISS recorded and released in 1982 on an album titled *Creatures of the Night.* Cusano left KISS in 1984. Eight years later, Cusano sold to Horipro Entertainment Group “one hundred (100%) percent undivided interest” of his rights in the songs “other than Songwriter’s share of performance income.” Later, Cusano filed a suit in a federal district court against Horipro, claiming in part that he never intended to sell the writer’s share of the mechanical royalties. Horipro filed a motion for summary judgment. Should the court grant the motion? Explain. [*Cusano v. Horipro Entertainment Group,* 301 F.Supp.2d 272 (S.D.N.Y. 2004)]

**8–4. Click-On Agreements.** America Online, Inc. (AOL), provided e-mail service to Walter Hughes and other members under a click-on agreement titled “Terms of Service.” This agreement consisted of three parts: a “Member Agreement,” “Community Guidelines,” and a “Privacy Policy.” The Member Agreement included a forum-selection clause that read, “You expressly agree that exclusive jurisdiction for any claim or dispute with AOL or relating in any way to your membership or your use of AOL resides in the courts of Virginia.” When Officer Thomas McMenamon of the Methuen, Massachusetts, Police Department received threatening e-mail sent from an AOL account, he requested and obtained from AOL Hughes’s name and other personal information. Hughes filed a suit in a federal district court against AOL, which filed a motion to dismiss on the basis of the forum-selection clause. Considering that the clause was a click-on provision, is it enforceable? Explain. [*Hughes v. McMenamon,* 204 F.Supp.2d 178 (D.Mass. 2002)]

**8–5. Shrink-Wrap Agreements and Browse-Wrap Terms.** Mary DeFontes bought a computer and a service contract from Dell Computers Corp. DeFontes was charged $950.51, of which $13.51 was identified on the invoice as “tax.” This amount was paid to the state of Rhode Island. DeFontes and other Dell customers filed a suit in a Rhode Island state court against Dell, claiming that Dell was overcharging its customers by collecting a tax on service contracts and transportation costs. Dell asked the court to order DeFontes to submit the dispute to arbitration. Dell cited its “Terms and Conditions Agreement,” which provides in part that by accepting delivery of Dell’s products or services, a customer agrees to submit any dispute to arbitration. Customers can view this agreement through an *inconspicuous* link at the bottom of Dell’s Web site, and Dell encloses a copy with each order when it is shipped. Dell argued that DeFontes accepted these terms by failing to return her purchase within thirty days, although the agreement did not state this. Is DeFontes bound to the “Terms and Conditions Agreement”? Should the court grant Dell’s request? Why or why not? [*DeFontes v. Dell Computers Corp.,* \_\_ A.2d \_\_,2004 WL 253560 (R.I. 2004)]

**8–6. Online Acceptance.** Stewart Lamle invented “Farook,” a board game similar to “Tic Tac Toe.” In May 1996, Lamle began negotiating with Mattel, Inc., to license “Farook” for distribution outside the United States. On June 11, 1997, the parties met and agreed on many terms, including a three-year duration, the geographic scope of the agreement, a schedule for payment, and a royalty percentage. On June 26, Mike Bucher, a Mattel employee, sent Lamle an e-mail titled “Farook Deal” that repeated these terms and added that they “ha[ve] been agreed [to] .  .  . by .  .  . Mattel subject to contract. .  .  . Best regards Mike Bucher.” Lamle faxed Mattel a more formal draft of the terms, but Mattel did not sign it. Mattel displayed Farook at its Pre-Toy Fair in August. After the fair, Mattel sent Lamle a fax saying that it no longer wished to license his game. Lamle filed a suit in a federal district court against Mattel, asserting, in part, breach of contract. One of the issues was whether the parties had entered into a contract. Could Bucher’s name on the June 26 e-mail be considered a valid signature under the Uniform Electronic Transactions Act (UETA)? Could it be considered a valid signature outside the UETA? Why or why not? [*Lamle v. Mattel, Inc.,* 394 F.3d 1355 (Fed.Cir. 2005)]

**8–7. Agreement.** In 2000, David and Sandra Harless leased 2.3 acres of real property at 2801 River Road S.E. in Winnabow, North Carolina, to Tony and Jeanie Connor. The Connors planned to operate a “general store/variety store” on the premises. They agreed to lease the property for sixty months with an option to renew for an additional sixty months. The lease included an option to buy the property for “fair market value at the time of such purchase (based on at least two appraisals).” In March 2003, Tony told David that the Connors wanted to buy the property. In May, Tony gave David an appraisal that estimated the property’s value at $140,000. In July, the Connors presented a second appraisal that determined the value to be $160,000. The Connors offered $150,000. The Harlesses replied that “under no circumstances would they ever agree to sell their old store building and approximately 2.5 acres to their daughter .  .  . and their son-in-law.” The Connors filed a suit in a North Carolina state court against the Harlesses, alleging breach of contract. Did these parties have a contract to sell the property? If so, what were its terms? If not, why not? [*Connor v. Harless,* 176 N.C.App. 402, 626 S.E.2d 755 (2006)]

**8–8**. **Past Consideration.** Access Organics, Inc., hired Andy Hernandez to sell organic produce. Later, Hernandez signed an agreement not to compete with Access for two years following the termination of his employment. He did not receive a pay increase or any other new benefits in return for signing the agreement. When Access encountered financial trouble, Hernandez left and began to compete with his former employer. Access filed a lawsuit against Hernandez. Is the noncompete agreement enforceable? Discuss. [*Access Organics, Inc. v. Hernandez,* 341 Mont. 73, 175 P.3d 899 (2008)]

**8–9.** **Acceptance.** Troy Blackford smashed a slot machine while he was gambling at Prairie Meadows Casino. He was banned from the premises. Despite the ban, he later gambled at the casino and won $9,387. When he tried to collect his winnings, the casino refused to pay. He filed a suit for breach of contract, arguing that he and the casino had a contract because he had accepted its offer to gamble. Is there a contract between the casino and Blackford? Discuss. [*Blackford v. Prairie Meadows Racetrack and Casino,* 778 N.W.2d 184 (Iowa 2010)]

**8–10. A Question of Ethics**

Kenneth McMillan was a participant in a dental practice when, in 1980, he and his associate obtained life insurance policies that designated each the beneficiary of the other. They set up automatic withdrawals from their bank accounts to pay the premiums. Later, Laurence Hibbard joined the practice, which was renamed Bentley, McMillan and Hibbard, P.C. (professional corporation) (BMH). When the three terminated their business relationship in 2003, McMillan sold his BMH stock to Hibbard. But Hibbard did not pay and McMillan obtained a judgment against him for $52,972.74. When Hibbard did not pay it, McMillan offered him a choice. In lieu of paying the judgment, Hibbard could take over the premiums on Bentley’s insurance policy or “cash” it in. In either case, the policy’s proceeds would be used to pay off loans against the policy—which McMillan had arranged—and Hibbard would accept responsibility for any unpaid amount. Hibbard signed the agreement, but did not make a choice between the two options. McMillan filed a suit in a Georgia state court against Hibbard, seeking reimbursement for the premiums paid since their agreement. [*Hibbard v. McMillan*, 284 Ga.App. 753, 645 S.E.2d 356 (2007)]

**1.** McMillan asked the court to award him attorney’s fees because Hibbard had been “stubbornly litigious,” forcing McMillan to litigate to enforce their agreement. Should the court grant this request? Are there any circumstances in which Hibbard’s failure to choose between McMillan’s options would be justified? Explain.

**2.** Generally, parties are entitled to contract on their own terms without the courts’ intervention. Under the principles discussed in this chapter, what are some of the limits to this freedom? Do any of these limits apply to the agreement between McMillan and Hibbard? Why or why not?