CALIFORNIA BAR PAST EXAMS

カリフォルニア州司法試験過去問

④ CONTRACTS

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California Bar Examination

Essay Questions and Selected Answers

February 2002

Question 2

Berelli Co., the largest single buyer of tomatoes in the area, manufactures several varieties of tomato-based pasta sauces. Berelli entered into a written contract with Grower to supply Berelli its requirements of the Tabor, the only type of tomato Berelli uses in its pasta sauces. The Tabor tomato is known for its distinctive flavor and color, and it is particularly desirable for making sauces. The parties agreed to a price of $100 per ton.

The contract, which was on Berelli's standard form, specified that Grower was to deliver to Berelli at the end of the growing season in August all Tabor tomatoes that Berelli might require. The contract also prohibited Grower from selling any excess Tabor tomatoes to a third party without Berelli's consent. At the time the contract was executed, Grower objected to that provision. A Berelli representative assured him that although the provision was standard in Berelli's contracts with its growers, Berelli had never attempted to enforce the provision. In fact, however, Berelli routinely sought to prevent growers from selling their surplus crop to third parties. The contract also stated that Berelli could reject Grower's tomatoes for any reason, even if they conformed to the contract.

On August 1, Berelli told Grower that it would need 40 tons of Tabor tomatoes at the end of August. Grower anticipated that he would harvest 65 tons of Tabor tomatoes commencing on August 30. Because of the generally poor growing season, Tabor tomatoes were in short supply. Another manufacturer, Tosca Co., offered Grower $250 per ton for his entire crop of Tabor tomatoes. On August 15, Grower accepted the Tosca offer and informed Berelli that he was repudiating the Berelli/Grower contract.

After Grower's repudiation, Berelli was able to contract for only 10 tons of Tabor tomatoes on the spot market at $200 per ton, but has been unable to procure any more. Other varieties of tomatoes are readily available at prices of $100 per ton or less on the open market, but Berelli is reluctant to switch to these other varieties. Berelli believes that Tabor tomatoes give its sauces a unique color, texture, and flavor. It is now August 20. Berelli demands that Grower fulfill their contract in all respects.

1. What remedies are available to Berelli to enforce the terms of its contract with Grower, what defenses might Grower reasonably assert, and what is the likely outcome on each remedy sought by Berelli? Discuss.

2. If Berelli elects to forgo enforcement of the contract and elects instead to sue for damages, what defenses might Grower reasonably assert, and what damages, if any, is Berelli likely to recover? Discuss.

ANSWER A TO ESSAY QUESTION 2

1. The contract between Berelli and Grower is a contract for the sale of goods, tomatoes. Accordingly, it is governed by Article 2 of the UCC. Because Berelli is a pasta sauce manufacturer and Grower is a commercial farmer, both parties are merchants and the UCC's special rules for merchants will apply. Additionally, because the contract calls for Grower to provide Berelli with all of the tomatoes it requires, the agreement is a requirements contract and the rules applicable to those particular types of agreements will also apply.

The parties appear to have made a valid contract, as it was in writing and reflected both the type of goods specified (Tabor tomatoes) and the price ($100/ton). Although the UCC ordinarily requires contracts to specify the quantity of goods to be provided, in a requirements contract it is sufficient that the buyer (Berelli) agrees to buy all its requirements from the Seller (Grower), to the limit of Seller's ability to provide goods of that type. That renders the contract sufficiently definite to be enforced under the UCC, as the Buyer's good faith in using Seller as its sole supplier, and its actual after-the-fact use of the goods contracted for, define the quantity of goods to be delivered. Here, Berelli's actual need for 40 tons of Tabor tomatoes supplies the requisite quantity under the contract.

While in this case Grower may have defenses to contract formation based on the doctrines of failure of consideration, unconscionability, misrepresentation and fraud, these will be discussed later.

If Berelli seeks to enforce the terms of the agreement with Grower, it may do so under the doctrines of replevin and specific performance, or seek an injunction prohibiting Grower from selling the tomatoes to Tosca.

Anticipatory Repudiation. The time for performance under the contract has not yet arisen, and won't arise for 10 more days. A party can ordinarily not sue under a contract until the time for performance has arisen. Where, however, a party unambiguously states to the other, before the time for performance has arisen, that it will not perform, the other party is entitled to treat that as an anticipatory repudiation that gives rise to an immediate right to sue for total breach of the contract, including the right to seek to cover its losses by purchasing replacement goods. Because Grower informed Berelli that it was repudiating the contract, Berelli is entitled to sue immediately and seek replevin or specific performance, or damages.

Replevin

Replevin. Replevin provides a remedy for a plaintiff to recover its goods prior to determination of a dispute, upon a judicial hearing to determine whether the plaintiff has title to the goods, and upon plaintiff's posting of a bond to secure any damages that may be owed to the defendant if the replevin is wrongful. Under the common law, to obtain

replevin a plaintiff must show that the defendant has possession of personal property that is owned by the plaintiff. Under the UCC, however, where goods have been "specifically identified" under a contract and the buyer is unable to cover by purchasing other goods, it has a right to replevy the goods in seller's possession, even though title to those goods has not yet passed. Here, the requirements for replevy are met. Because Berelli agreed to buy all of Grower's Tabor tomatoes, all the tomatoes actually grown by Grower have been specifically identified under the contract. And because Berelli has only been able to cover 10 of the 40 tons it needs, the second requirement is met. Accordingly, Berelli is entitled to replevy 30 tons of the Tabor tomatoes in Grower's possession, as well as recover damages for the excess price it paid for the 10 tons it was able to cover (as discussed in the next section).

While Grower does not have any defenses to Berelli's claim for replevin (because all elements of that claim are met), Grower will defend on grounds that the contract is invalid for failure of consideration and lack of mutuality, or voidable for fraud and unconscionability.

Failure of Consideration/Mutuality: A contract must be supported by consideration, which is a bargained for exchange of something of value. In addition, the promises must be mutual, with both parties required to perform a detriment in exchange for receiving a benefit. Here, Grower will contend that because Berelli had the right to reject conforming goods under the contract, it was not bound to purchase anything from Grower and, as a result, there is a failure of consideration under the contract.

Consideration is found in a requirements contract from the fact that the buyer is required to meet all its requirements from seller, despite the fact that, as stated above, the contract itself does not expressly require the buyer to buy any fixed quantity of goods. While a requirements contract will not fail for lack of consideration if the buyer in good faith has no requirement for the goods and therefore orders none on that basis, it will fail if the buyer has no real obligation to buy goods it needs, and can accept or reject without regard to its actual requirements for the goods. Here, that is precisely the case. As a result, there is no mutuality of obligation under the contract -- Berelli can buy if it pleases, whereas Grower is required to sell all its Tabor tomatoes only to Berelli. Accordingly, the contract is void for failure of consideration and Grower should succeed in defending against all of Berelli's claims on this basis.

Fraud/Misrepresentation. Where a party is induced to enter into a contract based upon the fraud or misrepresentation of another party, the contract may be voidable in whole or in part at the election of the defrauded party. Here, Berelli's standard form provided that Grower could not sell Tabor tomatoes to third parties without Berelli's consent. When Grower objected, Berelli's representative falsely stated that Berelli never enforced this provision, when in fact it regularly did. In reliance thereon, Grower went forward and signed the agreement. While Grower might argue that this provided it grounds for voiding the entire contract, this argument will likely be rejected because the term was not material to the bargain (as evidenced by the fact that it was just a clause in Berelli's standard form), and because Berelli had made no attempt to enforce it. Rather (as we shall see in the discussion of Berelli's right to injunctive relief), the

remedy will be to void the term, rather than the entire contract. This is also the result under the doctrine of estoppel and under the UCC battle of the forms rules. Having induced Grower not to formally object to the term based on the representation that it will not be enforced, Berelli will be estopped to do so. Moreover, under the UCC battle of forms rules pertaining to contracts between merchants, additional terms do not become part of the bargain when the other party objects within 10 days of receipt of the form, as Grower did here. Hence, the contract is not void for fraud.

Unconscionability. Grower will also argue that the contract is unconscionable because (i) Berelli is not bound to purchase anything, as explained above, while (ii) Berelli is prohibited from selling to third parties.

Changed Circumstances. Grower may also seek to challenge the validity of the contract under the doctrine of changed circumstances, contending that the poor growing season coupled with the unprecedented demand for scarce Tabor tomatoes was not foreseen by the parties such that performance should be excused on grounds of commercial impracticability. This defense will be rejected, however, because uncertain weather is always foreseeable at the time of contracting, and unanticipated market conditions will never support a challenge to the validity of a contract based upon commercial impracticability.

Specific Performance

Berelli will also seek to enforce the contract through a decree of specific performance. Specific performance is an equitable remedy that will be granted where: (1) the contract is valid, definite and certain; (2) mutuality is present; (3) the legal remedy is inadequate; and (4) the plaintiff has fully performed all of its obligations under the contract. A request for specific performance is subject to equitable defenses, including the defense of unclean hands.

Here, the contract is sufficiently definite and certain, as stated above, but could be found invalid for lack of consideration or mutuality, also as explained above. If these defenses are accepted, specific performance will not be granted. If the promises are found to be mutual and the consideration sufficient, however, then Berelli would be able to meet the elements required for specific performance. The legal remedy is inadequate because the subject matter of the contract is unique. Here, we are told that Tabor tomatoes are in short supply, they have a distinctive flavor that is critical to the Berelli sauce recipe, and the use of other types of tomatoes is inadequate. Hence, this would provide sufficient uniqueness to support a request for specific performance. In addition, Berelli performed all of its current obligations under the contract when it placed the order with Grower for all of its requirements, and stands ready and willing to perform its remaining obligation to pay for the goods when received. Hence, assuming the mutuality/consideration issues could be overcome, the other requirements necessary for specific performance would be met.

However, Grower could defend against such a decree on the doctrine of unclean hands. Equity will deny relief to a party with unclean hands, that is, one that has engaged in wrongful conduct with respect to the case at hand. Here, Berelli's fraud in inducing Grower to sign the contract based on its false assertion that the prohibition on third party sales was never enforced by Berelli, coupled with its insistence on terms that allowed it to reject Grower's goods without reason, could support such a defense.

Injunction

Berelli could also seek the Court's immediate assistance through the issuance of a Temporary Restraining Order, followed by a preliminary injunction and a permanent injunction. This relief will likely be denied, however, unless Berelli can show a right to replevin.

A TRO may be granted ex parte based on a showing of immediate and substantial hardship. Here, the fact that Tabor tomatoes are scarce and Grower is about to sell them to Tosca would be sufficient to support entry of a TRO. Berelli would have to make a good faith effort to provide Grower with notice of the hearing, but if it could not the TRO could be entered on an ex parte basis. The TRO would last for only 10 days, however, and then be automatically dissolved.

Berelli would thus have to seek a preliminary injunction before the 10 days expired. A preliminary injunction will be granted in order to preserve the status quo pending trial or otherwise avoid extreme hardship to a party, where the plaintiff can

demonstrate the likelihood of success on the merits and the balance of hardships favors entry of injunctive relief. Here, Berelli can meet the hardship test but will have difficulty establishing the likelihood that it will succeed on the merits, due to the failure of consideration/mutuality argument described above. Additionally, the fact that the tomatoes are perishable goods will make it impossible for the Court to preserve the status quo -- the tomatoes simply cannot be preserved in any useable form pending the outcome of a trial on the merits. If Berelli can overcome the problems described above and establish its immediate right to replevy the goods, this hardship could be avoided because the tomatoes would be immediately sent to Berelli. Hence, a preliminary injunction could be entered. If it cannot do so, an injunction would be denied on grounds that Berelli has not demonstrated it is likely to succeed on the merits, or the balance of hardships (spoiled rotten worthless tomatoes) favors Grower, or both.

While a permanent injunction is theoretically possible, it would be of no practical use because the tomatoes would spoil long before the injunction would be entered. However, to obtain such an injunction, Berelli would have to show that its legal remedy is inadequate, it has a property interest to protect, the injunction would be feasible to enforce, and the balance of hardships favors entry of the injunction. Here, the remedy is inadequate for the reasons explained above; Berelli has property interest in both the contract and, if specifically identified, the tomatoes; the injunction would be simple to enforce because it countenances just a single act, delivery of the goods; and (assuming, arguendo, the contract was enforceable) the balance of hardships would favor Berelli because it has an immediate need for and contractual right to the

tomatoes, whereas the hardship to Grower -- a lower contract price -- was entirely of its own making.

2. If Berelli elects to sue for damages, it can seek to recover compensatory damages, nominal damages, and restitutionary damages. Punitive damages would not be allowed because this is a breach of contract action. The defenses to contract enforcement described above would pertain to these claims as well. However, Berelli might be able to recover these damages under a theory of promissory estoppel, which provides that a party is estopped to deny the existence of an agreement where their promise can reasonably be expected to induce reliance in the other party, and the other party so relies to their detriment. Here, Berelli elected not to enter into a contract with other growers of Tabor tomatoes in reliance on Grower's promise to meet all its requirements. Hence, if the contract is invalid, Berelli may be able to claim damages under this alternate theory of relief.

To be recoverable, contract damages must be foreseeable at the time the contract was entered into, they must have been caused by the other parties (sic) breach, and the amount must be provable with certainty.

Compensatory damages aim to give each party the benefit of their bargain. The amount is the amount necessary to put them in the place they would have been in had the contract been performed. Here, Berelli can claim the right to recover the difference between the $200/ton it paid for the 10 tons of tomatoes it purchased on the open market, and the $100/ton contract price, or $1,000. Berelli will also be entitled to recover any incidental expenses it incurred in purchasing these goods, that it would not have incurred had the contract been performed. These damages were all foreseeable,

the amount is certain, and they were caused by the breach. Hence, Grower would have no defense (other than the defenses to contract validity described above).

With respect to the other 30 tons, Berelli could seek to recover the lost profits it would have realized on the pasta sauce made from these tomatoes, or may seek to recover restitutionary damages in the amount by which Grower was enriched by refusing to perform its contract with Berelli. Lost profits would be defended by Grower on grounds that they are speculative and uncertain. However, here, Berelli's past sales and manufacturing records could be adequate to demonstrate how much sauce could be made from 30 tons of tomatoes, how much would be sold, and what the anticipated profit would have been. On the restitutionary side, Berelli would simply argue that Grower has been unjustly enriched by being allowed to sell the tomatoes to Tosca for $250/ton, and therefore should be liable to return the excess $150/ton to Berelli.

Both claims would be subject to Berelli's duty to mitigate; and Grower could successfully argue that Berelli must try to make sauce with other tomatoes to mitigate its damages, and then be limited to recovering the amount by which its sales were lowered due to using worse types of tomatoes.

ANSWER B TO ESSAY QUESTION 2

I. VALIDITY OF THE CONTRACT

This is a requirements contract for a sale of goods of over $500. The UCC applies, and the writing requirement appears to be satisfied.

CONSIDERATION: Grower will argue that there was no consideration for its promise to supply Berelli's tomato requirements because Berelli could reject the tomatoes for any reason, even if they conformed to the contract. Thus, Grower would argue, Berelli's promise is illusory. This is probably not a good argument because Berelli still has an obligation to try in good faith to be satisfied with the shipment. Although the terms are harsh, there probably is consideration here.

II. CONTRACT TERMS

Grower would argue that the contract terms should reflect the oral "agreement" from the Berelli's representative that the prohibition on sales to third parties would not be enforced. Berelli would successfully raise the PAROLE EVIDENCE RULE which states that where the parties have reduced their agreement to final written for form (sic), evidence of prior or contemporaneous agreements varying the contract are inadmissible. Here, the supposed promise by Berelli that a part of the contract would not be enforced clearly varies the agreement, so this evidence would not be admitted. The terms of the writing will be applied.

Grower might argue that the parole evidence rule does not ban evidence that the agreement was induced by FRAUD. Grower would argue that Berelli committed fraud by knowingly misrepresenting Berelli's practices regarding enforcement of the clause forbidding sales to 3rd parties.

III. GROWER'S BREACH

Anticipatory Breach: When Grower informed Berelli on August 15 that it would not perform, this was a breach of the contract. Berelli could either sue for damages immediately or choose to treat the contract as still in force.

Frustration of Purpose: Grower would argue (unsuccessfully) that its duty to perform was excused by frustration of purpose because of the unexpected rise in tomato prices. This is not a valid argument because a change in market price is generally a foreseeable risk allocated by the parties under the terms of the contract.

1. BERELLI'S REMEDIES IF HE CHOOSES TO ENFORCE THE CONTRACT.

A. SPECIFIC PERFORMANCE: Specific performance is an equitable remedy which will be allowed only if money damages are inadequate (typically because the goods are unique), if the terms of the contract are clear and definite and if no equitable defenses apply.

Here, Berelli will argue that money damages are inadequate because the Tabor tomatoes are very distinctive and that using inferior tomatoes would cause irreparable harm to Berelli's high reputation. The facts also state that Berelli is unable to get Tabor tomatoes elsewhere, and this indicates that money damages would be inadequate because there is no opportunity to cover. The written terms of the contract terms are also clear and definite, so the court would likely grant specific performance if no defenses apply.

B. BERELLI WOULD ALSO SEEK A PRELIMINARY INJUNCTION TO STOP GROWER FROM SELLING THE CROP TO TOSCA.

The purpose of the preliminary injunction is to maintain the status quo between the parties pending outcome of the merits of the suit. Berelli must show irreparable harm, likelihood of success on the merits, and that a balancing of interests favors Berelli.

Here, Berelli appears to have a valid claim on the merits or the breach of contract. Moreover, Berelli would suffer irreparable harm if Grower were to sell the Tabor tomatoes elsewhere because these are the only tomatoes Berelli uses and they are not available elsewhere. The balancing of interests is a fairly close case here. A court of equity might be influenced by the very harsh terms of the contract and look to the hardship suffered by Grower in being unable to sell his tomatoes elsewhere. On the other hand the hardship to Berelli would be very great because there are no other tomatoes available and use of inferior tomatoes would damage Berelli's trade reputation. Moreover, if the court grants specific performance, clearly the sale of the entire tomato crop to Tosca must be halted, or performance of the contract will no longer be possible.

C. GROWER'S DEFENSES

Specific Performance and Preliminary Injunction are both equitable remedies. Thus Grower would raise several equitable defenses.

UNCLEAN HANDS: Grower would assert that Berelli acted wrongfully in relation to the very contract which Berelli seeks to enforce because Berelli's representative made misrepresentation to Grower during contract negotiations. Also, the generally harsh terms of the contract indicate possible overreaching by Berelli. This argument probably will not prevail because there is nothing wrong with hard bargaining. There appears to be no outright wrongdoing here, hence, the defense of unclean hands does not apply.

ESTOPPEL: Grower will argue that he relied to his detriment on Berelli's oral promise that Grower would be allowed to sell his excess tomatoes elsewhere. The reliance was Grower's act of entering into the contract. This is probably a good argument, so Berelli

would be estopped from preventing Grower from selling the excess tomatoes to Tosca. Thus, if this defense applies, Grower will still have to sell 40 tons to Berelli but may sell the excess 15,000 tons to another buyer.

UNCONSCIONABILITY: Grower would argue that the terms of the contract are unconscionable: the writing was Berelli's standard form contract. The terms themselves are oppressive (preventing Grower from selling elsewhere) and Berelli is the largest single buyer of tomatoes, so there may be a great difference in bargaining power. This is probably a convincing argument, given all these factors.

Under the UCC the court may refuse to enforce the contract or limit the effect of the unconscionable terms. Thus the prohibition on selling elsewhere probably would not be enforced.

2. Berelli's Legal Damages.

As the aggrieved buyer, Berelli may seek either the difference between the contract price and the market price at the time he learned of the breach, or he may make a reasonable "cover" of substitute goods and sue for the difference between the cover price and the contract price plus incidental and consequential damages.

Here, Berelli can partially cover on the spot market per ton. The difference in price is ten tons times 100, so $1,000. Berelli is entitled to damages for the remaining 30 tons which it is entitled to under the contract. The damages there would be the difference in market price and contract price at the time of the breach. Berelli will argue that the market price is 250, since that is what Tosca was willing to pay. Grower would argue that the cover price is only 200 per ton because that is the price on the "spot market."

Berelli would also seek incidental and consequential damages such as damage to its reputation and customer goodwill because of being forced to use inferior tomatoes. Any possible delay might also result in consequential damages to Berelli.

B. BERELLI'S DEFENSES

UNFORESEEABILITY: Contract Damages will only be awarded if they were foreseeable at the time the parties entered into the contract, (Hadley v. Baxendale). Here, the money damages are clearly foreseeable, but Grower would argue that damage to reputation was not foreseeable, and thus should not be awarded. However, damage to trade reputation is probably foreseeable here because both parties appear to be aware of the uniquely excellent qualities of the Tabor tomatoes.

FAILURE TO MITIGATE: Grower will also argue that Berelli cannot collect damage it failed to mitigate. Here, Berelli could have mitigated its damages by buying inferior tomatoes, and this would at least allow Berelli to continue production. This argument is probably not convincing because Berelli has no obligation to "cover" with inferior tomatoes.

Berelli probably can obtain money damages for Grower's breach.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2002 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2002 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

QUESTION 4

Travelco ran a promotional advertisement which included a contest, promising to fly the contest winner to Scotland for a one-week vacation. Travelco's advertisement stated: "The winner's name will be picked at random from the telephone book for this trip to 'Golfer's Heaven.' If you're in the book, you will be eligible for this dream vacation!"

After reading Travelco's advertisement, Polly had the telephone company change her unlisted number to a listed one just in time for it to appear in the telephone book that Travelco used to select the winner. Luckily for Polly, her name was picked, and Travelco notified her. That night Polly celebrated her good fortune by buying and drinking an expensive bottle of champagne.

The next day Polly bought new luggage and costly new golfing clothes for the trip. When her boss refused to give her a week's unpaid leave so she could take the trip, she quit, thinking that she could look for a new job when she returned from Scotland.

After it was too late for Polly to retract her job resignation, Travelco advised her that it was no longer financially able to award the free trip that it had promised.

Polly sues for breach of contract and seeks to recover damages for the following: (1) cost of listing her telephone number; (2) the champagne; (3) the luggage and clothing; (4) loss of her job; and (5) the value of the trip to Scotland.

1. What defenses should Travelco assert on the merits of Polly's breach of contract claim, and what is the likely outcome? Discuss.

2. Which items of damages, if any, is Polly likely to recover? Discuss.

ANSWER A TO ESSAY QUESTION 4

1. What defenses should Travelco assert on the merits of P's breach of contract claim, and what is the likely outcome?

First, Travelco should defend on the grounds that no valid contract was formed.

Formation – Offer, acceptance, consideration.

First, Travelco ("T") will argue that the promotional ad was not an offer at all. Usually, ads are a mere invitation to deal; an offer requires, on the other hand, a manifestation of an intent to commit, communication, and definite terms—ads don't usually show an intent to commit. However, this ad could be construed as an offer to enter into a unilateral contract ("K")—it is like a "first come, first served" ad—where even if the offeree is not named, there can still be a binding offer; here, the language you will be eligible if you're in the book expresses enough intent to be bound for the ad to constitute an offer.

Next, T should argue that even if they made an offer, offers are generally revocable until accepted and that T validly revoked. Offers are revocable before acceptance unless supported by consideration; also, in a unilateral K, which is an offer that can only be accepted by performance, once performance is begun the offer is to be held open for a reasonable time. T's argument here will probably fail, because T notified Polly ("P") before revoking the offer, so P probably had already accepted.

Consideration

T should argue that there was no contract because there was no consideration. Contracts require some mutuality of obligation, a bargained for exchange, to be enforceable. Some courts require a bargained for legal detriment, and others allow a bargained for benefit. T will argue that the ad was a gratuitous promise, and that P cannot enforce against T because P was not mutually bound—P did not give up anything. P may argue that getting listed in the phone book was consideration, but this is not a good argument because that did not confer any benefit on Travelco (unless Travelco owns the phone book company…). In fact, there is no consideration supporting this agreement because P is not bound to do or give up anything.

Promissory Estoppel/Detrimental Reliance

If T defends on the grounds of no enforceable contract, T will have to defend against P's claim of detrimental reliance. Even when an agreement also lacks consideration, it may still be enforceable if P foreseeable and reasonably detrimentally relied on the agreement. Here, P did detrimentally rely — she spent money by buying new luggage and clothes, and quitting her job, after being notified by T she had won.

T will argue that P's reliance was unforeseeable and unreasonable. However, things like buying luggage and clothes, for a vacation you have won, is reasonable, and T should have foreseen P's change in position in reliance on T's notification she had won the trip.

T will correctly argue that P's quitting her job was not foreseeable (see below); but because the luggage, clothes, champagne were foreseeable, P can enforce the contracts, and T will raise this in the damages phase.

Statute of Frauds

The facts don't indicate whether the contract was in writing; but regardless, SOF is not a good defense to formation because this agreement, (not for the sale of goods, can be performed within one year…) is not required to be in writing. Also, P's reliance would wipe out this defense.

Impossibility

T will argue that they are excused from performance by impossibility. This is judged from an objective standard, and applies when because of unforeseen events judged at formation, there is truly no way at all that T could perform. T is nolonger financially able to perform. However, mere difficulty in paying is unlikely to rise to the level of impossibility so this defense is unlikely to work.

Impracticability

This defense applies where circumstances unforeseeable at formation would cause T severe economic hardship if T had to perform. Here, there is no indication how severe the hardship would be to T; also, the short time between the ad and breach make it look like T should have foreseen financial difficulty.

Frustration of Purpose

This applies where changed circumstances unforeseeable at formation completely wipe out the purpose, known to both parties, of the contract. This defense will not work for T, because P still wants a trip; it has merely become financially difficult/impossible for T to pay.

Mistake

T may try to argue their unilateral mistake in their solvency should void the contract. However, unilateral mistake is not a good defense unless P knew of T's mistake, where here, P did not.

Good Faith

Because it appears that T's breach may be in bad faith—that they placed the ad to drum up business, never expecting to award the trip—they may have to defend on good faith—this will not relieve them of their underlying of obligations, however.

Therefore, T is liable because their K became enforceable on P's foreseeable detrimental reliance; or because there was a valid unilateral contract supported by P's putting her name in the telephone book.

2. Damages

Generally, for breach of K, P will be entitled to her expectancy—the benefit of the bargain—plus any consequentials not unduly speculative reasonably foreseeable to T. Punitive damages are generally disallowed in breach of K.

(1) The cost of listing her phone number:

This took place before any K was formed, and may even be viewed as P's consideration for the deal. There was no K until P actually won the trip, so she won't collect this.

(2) The champagne:

P will argue that the cost of the champagne is recoverable as a consequential—it was not part of the K, but it was foreseeable that some one would buy champagne after winning—basically, she will argue reliance damages.

T will argue that buying costly champagne was unforeseeable, thus not recoverable.

P will recover if the court takes a reliance view, but possibly not on a benefit-of-the bargain view.

Probably she will recover because champagne is foreseeable.

(3) Luggage and Clothing

P and T will make the same arguments as above; the luggage was probably a foreseeable consequential, but the clothes may not have been, if they were too "costly".

(4) Loss of her Job

T will not be liable for the loss of P's job, because under either a reliance or expectancy theory, it was unreasonable and unforeseeable that P would quit her job just to take a vacation. Also, P would have a duty to mitigate, by searching for comparable employment, which she probably will be able to find, since she thought she could look for a new job when she returned.

(5) Value of Trip

If the court takes a pure reliance approach, based on promissory estoppel, P will not be awarded the cost of the trip.

But under the standard breech of K expectancy, which is the standard measure of K damages, P is entitled to what she would have gotten absent T's breach, which is the value of the trip.

Note that restitutionary damages are not available, because T has not been unjustly enriched.

ANSWER B TO ESSAY QUESTION 4

TRAVELCO'S DEFENSES

No Valid Contract was Formed: Lack of Consideration, Promissory Estoppel

The first defense that Travelco will assert is that there is no valid contract for them to breach. The issue is whether there was consideration for Travelco's promised prize. For a valid contract to form, there must be a bargained for exchange. The court will not look into the sufficiency of the consideration, whether it was a fair exchange, only if there was some legal detriment exchanged by the parties. Here, Travelco will assert that they made a gratuitous promise to award a travel prize at random to someone listed in the phone book. The winner did not have to give anything in exchange for the promise, therefore there was no consideration given by the winner for the promised prize. Without consideration, Travelco will assert that there was not valid contract, and therefore they could not be in breach of the contract.

Polly will respond with two arguments. First, she will try to assert that being listed in the phone book was the consideration required. The Travelco prize stated that a person must be listed in the phone book to be eligible. Polly took the step of changing her unlisted number to a listed one in order to qualify for the contest. While this is not a significant legal detriment on Polly's part, she was not required to list her number, and therefore it would qualify as consideration. As mentioned, the court will not examine the amount of consideration. Travelco will respond that there was no bargained for exchange because the advertisement was not asking for persons to be listed in the phone book in exchange for the prize. Had the advertisement been run by the phone company, the situation may be characterized as an exchange. However, here the advertisement was run by what appears to be a travel agency. Therefore, it appears that Travelco has the better argument, and there was no bargained for exchange. Without the exchange, lack of consideration means that no valid contract was formed unless there is a consideration substitute.

Polly's second argument is that even though there was no consideration for the promise, she can claim contract rights by promissory estoppel. Here, the issue is whether Polly detrimentally relied on Travelco's promise to award a trip in a reasonable matter that would make it unjust for Travelco not to honor their promise. Polly can assert that she detrimentally relied on the promise in several ways. First, she listed her number in the phone book. Polly will claim that

changing her number from unlisted to listed was a detrimental reliance. The detriment is that she will now be more likely to receive unwanted phone calls. Her second claim is that purchase of champagne. Her reliance will be the cost of the champagne. Third, she purchased golf clothes and luggage. Again, the lost purchase price is her reliance. Finally, she quit her job. Clearly this is a detrimental reliance.

Travelco will respond that the changing of the phone number is not sufficient because it was done before the awarding of the prize, not in response to it. And even if it was in response to their ad it was not a foreseeable result of running the ad and it is not a sufficient detriment to require equity to award a week long trip. They will assert the same argument concerning the bottle of champagne, clothes, luggage and quitting the job: not a foreseeable response, and/or it is not sufficient to warrant requiring that they comply with their promise.

The court should find that there was sufficient foreseeable detrimental reliance to warrant enforcement of the promise by promissory estoppel. While Travelco may be right concerning the listing of the phone number, the actions taken by Polly after the prize was awarded are sufficient. It is clearly foreseeable that someone would celebrate winning a prize as well as purchase clothing and luggage for the trip. Whether this is sufficient to warrant equitable enforcement of the promise depends on the cost of the trip and the price of the purchased items. It appears to be sufficient. The quitting of the job will not be considered because it is not a foreseeable response to winning a 1 week trip. However, given Polly's other actions, the promise should be enforced by promissory estoppel.

Impossibility

Travelco's next defense will be that they no longer able to perform their promise because they are not financially able to do so. Whether this excuse will be accepted depends on whether there is true impossibility, or if it is simply financially difficult. If in fact Travelco has gone broke or will be forced into bankruptcy in awarding the trip, they may be excused. However, this seems unlikely, and the court will probably reject this claim.

POLLY'S DAMAGES RECOVERY

The purpose of damages is to put the plaintiff in the position they would have been in had the other party not breached. Damages include the compensatory,

as well as incidental and consequential damages. Consequential damages must be foreseeable by the party at the time the contract was formed. Punitive damages are not typically awarded in contract cases unless the breach can be characterized as a tort (e.g. fraud or misrepresentation) and then punitive damages may be appropriate if the breach was intentional.

Phone Listing

Polly wishes to claim the cost of listing her number in the phone book. The question is whether this cost is something that Polly would have had to bear had Travelco performed as promised, because listing her number was not in response to the promised prize, but was instead a cost that Polly had to incur to be eligible, she should not recover this cost. If the court awards this cost, Travelco will argue that this is a cost Polly would have borne, and should not be recovered if she is awarded the value of the trip. (See below).

Champagne

Here, the question is whether that purchase of an expensive bottle of champagne is a foreseeable respond to the awarding of the prize. It appears to be a reasonable response, since it could be expected that a person would celebrate. Therefore, Polly should recover this cost. Travelco will argue that this is a cost Polly would have borne, and should not be recovered if she is awarded the value of the trip. (See below).

Luggage, Clothing

As with the champagne, this is a foreseeable cost that would be incurred in response to the awarding of the prize, and therefore will be recovered as a consequential damage. Travelco will argue that this is a cost Polly would have borne, and should not be recovered if she is awarded the value of trip. (See below).

Loss of Job

Travelco will argue that this is not reasonable cost in response to the awarding of a 1 week vacation. They will claim that at the time they awarded the prize, they could not have foreseen that someone would quit their job to take a one week vacation. Polly will respond that it is a foreseeable response, and therefore she should recover as a consequential damage. The court is likely to agree with

Travelco, that this is not a foreseeable result of the promise of the vacation. Therefore, Polly should not be able to recover damages for the loss of her job.

The Price of the Vacation

Here, Polly will argue that she should be awarded the cost of the promised vacation. This is the purpose of compensatory damages, to put Polly in the position she would have been in had Travelco not breached. The court will therefore award Polly the value of the vacation. Because money damages are sufficient in this case, and there is no indication that Polly sought specific performance anyway, the court will not force Travelco to actually award the trip.

Travelco will try to argue that because Polly is being awarded the value of the trip, she should not be awarded damages for the phone, champagne, clothes, or luggage. To award these damages and the trip would put Polly in a better position than she would have been had Travelco performed. Had Travelco awarded the trip as promised, the cost of these items would have been borne by Polly, not Travelco. Therefore, Polly should either be able to recover the value of the trip and not these other damages, or alternatively, Polly should recover these damages and not the trip. The latter solution would put Polly in the position she would have been in before the promise was made (except for the job, which is not recoverable because it was not reasonable or foreseeable).

The court should find Travelco's argument persuasive. Therefore it will award Polly only the value of the trip, or alternatively, it will award Polly damages for the champagne, luggage, clothing, and possibly the phone listing.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2005 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2005 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

Question 2

PC manufactures computers. Mart operates electronics stores.

On August 1, after some preliminary discussions, PC sent a fax on PC letterhead to Mart stating:

> We agree to fill any orders during the next six months for our Model X computer (maximum of 4,000 units) at $1,500 each.

On August 10, Mart responded with a fax stating:

> We're pleased to accept your proposal. Our stores will conduct an advertising campaign to introduce the Model X computer to our customers.

On September 10, Mart mailed an order to PC for 1,000 Model X computers. PC subsequently delivered them. Mart arranged with local newspapers for advertisements touting the Model X. The advertising was effective, and the 1,000 units were sold by the end of October.

On November 2, Mart mailed a letter to PC stating:

> Business is excellent. Pursuant to our agreement, we order 2,000 more units.

On November 3, before receiving Mart's November 2 letter, PC sent the following fax to Mart:

> We have named Wholesaler as our exclusive distributor. All orders must now be negotiated through Wholesaler.

After Mart received the fax from PC, it contacted Wholesaler to determine the status of its order. Wholesaler responded that it would supply Mart with all the Model X computers that Mart wanted, but at a price of $1,700 each.

On November 15, Mart sent a fax to PC stating:

> We insist on delivery of our November 2 order for 2,000 units of Model X at the contract price of $1,500 each. We also hereby exercise our right to purchase the remaining 1,000 units of Model X at that contract price.

PC continues to insist that all orders must be negotiated through Wholesaler, which still refuses to sell the Model X computers for less than $1,700 each.

1. If Mart buys the 2,000 Model X computers ordered on November 2 from Wholesaler for $1,700 each, can it recover the $200 per unit price differential from PC? Discuss.

2. Is Mart entitled to buy the 1,000 Model X computers ordered on November 15 for $1,500 each? Discuss.

Answer A to Question 2

2)

Uniform Commercial Code

All contracts for the sale of goods, defined by 2-105 as those things identifiable at the time of contract, are governed by the UCC.

This is a contract for the sale of computers, goods movable and identifiable at the time of contract, and it is therefore governed by UCC rather than the Common Law.

Merchants

Merchants, defined by 2-104 as those who deal in goods of that kind sold, are held to a higher standard of good faith.

PC manufactures computers, and Mart retails those computers, so both deal in the computers and are therefore merchants as that term is used in the UCC.

If a contract exists, it is a contract for goods under the UCC, and both parties are merchants.

Offer

An outward manifestation of present contractual intent, communicated to the offeree in such a way as to make the offeree reasonably believe that the offeror is willing to enter into a contract.

The facts state that PC and Mart had been engaged [in] "preliminary discussions" prior to August 1. Because of these preliminary negotiations, PC's fax was probably not a general advertisement sent out to possible retailers (advertisements are generally not offers). The August 1 fax on letterhead from PC to Mart, based on those discussions, was probably an offer. Although it did not state a specific quantity (up to 4000), it did indicate the identity of the parties, subject matter of the contract, and price, and the time of performance would be implied as a reasonable time. The limitation that no more than 4000 computers could be ordered makes the offer sufficiently definite to be enforced. Although the specific quantity of goods is required by 2-201, the statute of frauds, it is not necessary for formation, so this is apparently a valid offer.

Although PC would argue that there was no intent to be bound, in which case Mart would have made the offer on September 10, the court would probably disagree. Because PC delivered the goods without further communication, the court would probably conclude that it was not receiving offers, but had made an offer, to which it was bound.

PC's fax to Mart was probably a valid offer.

Merchant's Firm Offer Rule

Under 2-205, a merchant who promises to hold an offer open with "words of firmness" will not be permitted to revoke the offer for the time stated, but in no case will the offer be irrevocable for longer than three months.

PC's fax was a firm offer from one merchant to another. PC specifically stated that they "agreed to fill any offers during the next six months." Although this offer would only remain irrevocable during the next three months (through November 1), it would remain in effect unless revoked until the end of the six months.

PC's fax was a merchants' [sic] firm offer, irrevocable prior to November 1, and though revocable at that time, in the absence of revocation it was valid under the six months expired.

Acceptance

An outward manifestation of assent to the terms of the offer.

Mart's fax of August 10 was not an acceptance. Although it manifested some assent, it did not indicate a quantity of computers accepted, but only a general agreement to sell computers, and this alone was not sufficient to form a contract.

On September 10, Mart mailed an order for 1,000 computers to PC. This was sufficiently definite in quantity and indicated an intent to be bound. It was therefore a valid acceptance.

Similarly, Mart's November 2 letter was an appropriate acceptance. Though sent by letter rather than by fax, it was effective, since under the UCC an offer may be accepted by any reasonable means. The letter communicated assent to the proposed terms, and specified a quantity (200). This was therefore a valid acceptance of PC's offer. Under the Mailbox Rule, an acceptance if [sic] effective upon dispatch, though a revocation is only effective upon receipt. Mart's letter was sent before PC's revocation was receive[d], and it is therefore effective.

Although the November 15th fax similarly stated an intent to be bound on 1000 more computers, the offer had been properly revoked prior to that time, as discussed below, and Mart therefore could not accept it. This attempted acceptance would be invalid as an acceptance, and would instead be merely an offer, which PC summarily declined to accept.

Mart's November 2 letter was a valid acceptance.

Revocation

A revocation is a statement that an offer may no longer be accepted. It is effective upon receipt by the offeree.

Mart received PC's fax on November 3, and it was therefore effective from that date forward. However, it would have no effect prior to that date, and therefore would not affect the validity of Mart's purported November 2 acceptance of the offer.

Because a revocation is not effective until received, PC's letter would not accept Mart's ability to accept the contract until November 3, and thus would not affect the outcome of this case, although it would prevent any further acceptance.

Consideration

Bargained[-]for exchange of legal detriment

PC promised to sell and Mart promised to buy 2000 computers at $1500 each. This was valid and sufficient consideration.

Because there was a valid offer, accepted and supported by consideration, PC and Mart have a contract.

Statute of Frauds - Defense to Enforcement

The statute of Frauds (2-201) requires that all contracts for the sale of goods be in writing.

Although PC[']s original offer was on letterhead, they did not respond to the acceptance and no integrated contract was signed. The court would probably find, though, and Mart's letter of November 2, was a valid written confirmation, which would allow the contract to be enforced against both parties, although it might find that PC's refusal to agree that there was a contract was sufficient objection within ten days.

The court will probably find that the Statute of Frauds was satisfied by Mart's acceptance under the exception for a written confirmation, unless PC properly objected within ten days.

Material Breach

A refusal to perform under the contract which goes to the heart of the promised performance.

PC refused to tender the 1000 computers ordered by Mart. This was material breach of the contract, since the purpose of the contract was the delivery of those computers. If PC and Mart had an enforceable contract, PC's refusal to tender them was an anticipatory

material breach, and Mart could immediately consider the contract breached (rather than waiting to see if PC would actually perform), and pursue remedies.

PC's refusal to deliver the computers to Mart was probably a material breach.

Remedies

Cover

Under the UCC, a buyer can purchase replacement goods on the market at the time of the breach and recover the difference between the contract price and the price of cover, plus incidental costs.

Mart has a duty to mitigate its damages, which probably means they should buy computers, even at a higher price, rather than completely lose the business. Although generally a party may wait until performance is due, where there is a complete repudiation of the contract by the other party prior to that time, there is probably a duty to mitigate damages. If Mart did purchase replacement computers, from Wholesaler or any other seller, they would [be] entitled to recover the difference between the price they were forced to pay and the price they had agreed on with PC as the cost of cover from PC. Any attempt to cover, however, must be exercised in good faith.

Mart will be able to recover the cost of Cover from PC.

I. Whether Mart will be able to recover the extra $200 purchase if it buys the computers from Wholesaler?

Because PC and Mart apparently had a valid contract, and it was probably enforceable under the Statute of Frauds because of Mart's written confirmation, Mart can probably recover the cost of cover from PC, so long as it acts in good faith. For 2000 computers with an additional cost of $200 each, Mart would probably recover $400,000, plus costs incidental to cover.

If the cover found that the Statute of Frauds was not satisfied, Mart would not be able to enforce the contract, and would recover nothing.

II. Whether Mart can enforce a contract based on the Nov. 15 fax for 1000 final computers?

Because PC properly revoked its offer to Mart on November 3, Mart no longer had the power to accept that offer on November 15, and it has no enforceable rights against PC for the 1000 computers offered on that date.

Answer B to Question 2

Mart vs. PC

UCC Applies

The UCC applies to all contracts for the sale of goods. Here, the agreement between Mart and PC relates to the Model X computer, a good, so the UCC applies.

In addition, under the UCC, there are sometimes special rules governing agreements between merchants. Merchants are entities that regularly buy, sell and/or trade on the good at issue. Here, both PC and Mart are merchants under the UCC because PC manufactures and sells computers and Mart operates electronics stores that buy and sell computers.

Contract Formation

In order for the agreement between PC and Mart to be enforceable, there must be ①an offer, ②a valid acceptance[,] and ③ consideration.

Offer

An offer must demonstrate a present intent to be bound and must recite the necessary terms with appropriate specificity.

PC's August 1 Fax

PC'S August 1 Fax to Mart likely satisfies the requirements of an offer. In that fax, PC "agree[s] to fill any orders", thereby demonstrating the requisite present intent to be bound. The August 1 Fax also recites the subject matter (the Model X computer), the price ($1,500 each) and the parties (PC and Mart). While the August 1 Fax does not recite a specific quantity of Model X computers to be purchased, it specifies any quantity ordered by Mart within the next six months up to a maximum of 4,000 units. This is an offer for a kind of requirements contract, wherein PC would be obligated to sell Mart however many Model X computers Mart requires up to a maximum of 4,000. Therefore, the August 1 Fax constitutes a valid offer.

Acceptance

An acceptance must be an acceptance of the terms in the offer before termination of the offer.

August 10 Fax from Mart

Here, the August 10 fax from Mart is a valid acceptance. While the August 1 Faxed offer from PC was still open, Mart responded that Mart "accept[ed] [PC's] proposal". Mart did not seek to change the terms of the offer or add any conditions or additional terms. Thus, the August 10 fax from Mart is a valid acceptance.

Consideration

To be enforceable, a contract must include valid consideration. Consideration is a promise with value or detriment.

Here, PC provided consideration in that PC promised to sell up to 4,000 Model X computers to Mart over the next six months. However, the issue is whether Mart provided sufficient consideration. Mart promised to pay $1,500 for any Model X computers it purchased, but Mart was not obligated to purchase any Model X computers. While Mart stated that it was going to conduct an advertising campaign, it is not clear whether that was a promise by Mart or simply a gratuitous statement of a present intent to place ads that is [sic] was not bound to place. It the statement about advertising were found to bind Mart, the contract would be effective as of Mart's August 10 fax.

However, the better result is that there was not a binding contract until September 10, when Mart placed its first order for 1,000 Model Xs. As of September 10, Mart's consideration was its promise to buy 1,000 Model X computers at $1,500 each and PC's consideration was its promise to sell those computers to Mart.

Defense to Formation/the Statute of Frauds

The Statute of Frauds requires that any agreement for the sale of goods exceeding $500 must be in writing to be enforceable. Here, the August 1 fax, the August 10 fax[,] and the September 10 order would likely constitute a sufficient writing to satisfy the Statute of Frauds.

There do not appear to be any other applicable defenses to formation (such as duress, illegality, fraud[,] etc.).

① Can Mart recover $200 per unit from PC if Mart buys 2,000 Model X computers from Wholesaler?

The primary issue here is whether PC's November 3 fax to Mart purporting to terminate its agreement with Mart excuses or discharges PC's obligation to sell Mart up to 4,000 Model X computers before the six month period expires. The issue is also whether Mart's November 2 order for 2,000 Model X's, that was sent without knowledge of PC's November 3 purported revocation [sic].

Thus, the ultimate issue is whether Mart's November 2 letter ordering 2,000 more

units is effective when mailed (Nov. 2) or when received by PC. I believe the Mailbox Rule applies and provides that the acceptance/order of Nov. 2 was effective when mailed or sent. In other words, Mart's November 2 order is effective as of November 2 - the day before PC's purported revocation. Thus, PC is obligated to sell Mart the 2,000 Model Xs ordered on November 2.

Because PC is in breach of the contract by refusing to perform - i.e., to sell Mart the 2,000 Model X's ordered Nov. 2, PC is liable to Mart for damages.

Mart's Remedies

As noted in the question, one of Mart's available remedies is to buy the 2,000 Model X computers from Wholesaler for $1,700 each and then sue PC for damages. In that situation, Mart would be entitled to expectation damages. Expectation damages are those damages sufficient to put Mart in the position they would have been in if PC had not breached – namely, Mart would have purchased 2,000 Model X computers for $1,500 each. Thus, PC is liable to Mart for $200 per unit ($1,700 - $1,500) multiplied by 2,000 units. Mart could also recover any incidental damages it incurred in procuring the computers from Wholesaler. For example, if Wholesaler was further away and therefore shipping costs were more expensive then [sic] when Mart bought from PC, PC would be liable for the incremental increase in the shipping costs.

2. Is Mart entitled to buy the 1,000 Model X Computers Ordered on November 15 for 1,500 each?

By November 15, when Mart ordered the additional 1,000 computers, Mart knew that PC had revoked its offer to sell up to 4,000 units in that 6 month period or, in other words, had anticipatorily repudiated its obligation to sell Mart the full 4,000 units. Thus, Mart is not entitled to by [sic] the 1,000 Model X's under a contract theory.

Quasi-Contract/Unjust Enrichment

Rather, if Mart is found to be entitled to by [sic] the 1,000 computers it will be because Mart told PC (as far back as August 10 & September 10) that, in reliance on their contract, Mart was going to spend money to place ads for the Model X. Thus, Mart relied to its detriment on PC's promise to sell 4,000 units, so Mart may be able to buy the final 1,000 units under a theory of quasi-contract based upon detrimental reliance.

Even if Model X [sic] is not entitled to actually buy the 1,000 computers from PC, Mart should be able to recover restitutionary damages from PC because PC has been unjustly enriched by Mart's advertising efforts.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2005 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2005 California Bar Examination and two selected answers to each question.

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Question 2

Developer acquired a large tract of undeveloped land, subdivided the tract into ten lots, and advertised the lots for sale as "Secure, Gated Luxury Home Sites." Developer then entered into a ten-year, written contract with Ace Security, Inc. ("ASI") to provide security for the subdivision in return for an annual fee of $6,000.

Developer sold the first lot to Cora and quickly sold the remaining nine. Developer had inserted the following clause in each deed:

> Purchaser(s) hereby covenant and agree on their own behalf and on behalf of their heirs, successors, and assigns to pay an annual fee of $600 for 10 years to Ace Security, Inc. for the maintenance of security within the subdivision.

Developer promptly and properly recorded all ten deeds.

One year later, ASI assigned all its rights and obligations under the security contract with Developer to Modern Protection, Inc. ("MPI"), another security service. About the same time, Cora's next-door neighbor, Seller, sold the property to Buyer. Seller's deed to Buyer did not contain the above-quoted clause. Buyer steadfastly refuses to pay any fee to MPI.

MPI threatens to suspend its security services to the entire subdivision unless it receives assurance that it will be paid the full $6,000 each year for the balance of the contract. Cora wants to ensure that she will not be required to pay more than $600 a year.

On what theories might Cora reasonably sue Buyer for his refusal to pay the annual $600 fee to MPI, what defenses might Buyer reasonably assert, and what is the likely outcome on each of Cora's theories and Buyer's defenses? Discuss.

Answer A to Question 2

2)

Question 2

Cora (C) will assert three different theories: (1) that there was a covenant, the burden of which ran to Buyer (B), and the benefit of which runs to C, (2) that there was an equitable servitude, the burden of which runs to B, and the benefit of which runs to C, and (3) that a negative reciprocal servitude can be implied from a common scheme initiated by Developer (D). C will sue under a covenant theory to obtain damages in the form of the series of $600 payments, or will sue under an equitable servitude theory to require B to pay the $600.

C will assert that he had no notice of either the covenant, equitable servitude or common scheme, and therefore should not have to pay. He will also allege that even if he did have notice, that the assignment of the contractual rights from Ace Security (ASI) to Modern Protection[,] Inc. (MPI) extinguished any obligation he had or notice of an obligation to pay for maintenance of security services.

Cora's Theories of Recovery

1. Covenant

Cora will assert that the original deed between Developer and Seller created a covenant, the burden of which ran to B, and the benefit of which ran to C. A covenant is a non-possessory interest in land, that obligates the holder to either do something or refrain from doing something related to his land. For the burden of the covenant to run, there must be (1) a writing that satisfies the statute of frauds, (2) intent of the original contrac[t]ing parties that the covenant bind successors, (3) Horizontal privity between the original parties, (4) Vertical privity between the succeeding parties, (5) the covenant must touch and concern the burdened land [,] 5 [sic] Notice to the burdened party. For the benefit of the covenant to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties, (3) the benefit must touch and concern the benefitted land, and (4) there must be vertical privity between the parties.

Running of the burden

Writing

For the burden to run to B, there must be a writing that satisfies the statute of frauds. Here, the original deed was properly written and recorded. Developer inserted the clause covenanting payment in all of the deeds given to the original 10 purchasers. Therefore, there is a writing satisfying the statute of frauds.

Intent

For the burden to run, the original contracting parties must have intended that the benefit run to successor in interest to the land. Here, the deed on its face evidences an intent that the burden run. It specifically says that the "heirs, successors and assigns" of the deed will be bound to pay the security fees. Therefore the[re] is an intent that the successors– such as B – be bound by the covenant.

Horizon[t]al Privity

For the burden of a covenant to run, there must be horizontal privity between the parties. This requires that the parties be successors in interest – typically this is satisfied by a landlord-tenant, grantor-grantee, or devisor-devisee relationship. Here, the relationship is one of seller-buyer. D was the original seller of the land, and S was the purchaser. S was a successor in interest in the land of D. Therefore there was horizontal privity between the original contracting parties.

Vertical Privity

Vertical privity requires that there be a non-hostile nexus between the original covenanting party and a later purchaser. It is not satisfied in cases in which title is acquired by adverse possession or in some other hostile way. Here, however, S sold the property to B. A sale relationship is a non-hostile nexus, and therefore the requirement of vertical privity is met.

Touch and Concern

Defense by C: B may argue that the covenant here does not touch and concern the land. For the burden to run to a party, the covenant must touch and concern the land, that is, it must burden the holder, and benefit another party in the use and enjoyment of their own land. C will argue that this is not the case here.

B will argue that personal safety of house occupants is not necessarily related to the land. Contracts for security services often are used in matters outside of the home. However, this argument will likely fail. C can argue that the safety services are needed to keep the neighborhood safe. In fact, C and others specifically bought homes in the community because of representations that there would be security services available to keep the land safe. The use an[d] enjoyment of the land would be difficult, if not impossible, without the knowledge that the parties will be safe in their homes. Therefore, C can show that the covenant does in fact touch and concern the land.

Notice

Defense by C: B's primary defense will be that he was not given notice of the covenant. The burden of a covenant may not run unless the party to be burdened has notice of the

covenant. Notice may be (1) Actual, (2) by inquiry, or (3) By Record. The latter two types of notice are types of constructive notice.

–Actual Notice

B will argue that he did not have actual notice of the covenant. Actual notice occurs where the substance of the covenant is actually communicated to the party to be burdened, either by words or in writing. Here, there is no indication that B was told of the covenant in the deed. Therefore, he did not have actual notice.

–Inquiry Notice

A party may be held to be on inquiry notice, if it would be apparent from a reasonable inspection of the community that a covenant applies. C will argue that B was on inquiry notice of the covenant. However, this argument will likely fail.

A reasonable inspection of the community would not have revealed the covenant to pay $600. B might have discovered that the community was protected. There were advertisements claiming that the community was gated and secure. There were probably fences or other signage. However, this notice would be inadequate to tell B that the homeowners themselves were obligated to pay for the security service. The payments for security services may have simply been imputed to the home price, or the funds may have come from elsewhere. Either way, a reasonable inquiry would not have informed B of the existence of the covenant.

–Record Notice

C will argue that B was on record notice of the covenant. Record notice applies where a deed is recorded containing covenants. The burdened party is said to have constructive notice of the covenant that is recorded in his chain of title.

B will argue that he is not on record notice because the covenant was not in his specific deed. This argument will probably fail. A party taking an interest in land, or an agent of theirs, will typically perform a title search. Therefore, they will be held to be on constructive notice of any covenants, easements or other obligations. A simple title search by B would have revealed that the deed from P to S contained a covenant binding successors to pay for the security services.

Therefore, B was on record notice of the existence of the easement.

Running of the Benefit

For the benefit of the covenant to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties, (3) the benefit must touch and concern the benefitted land, and (4) there must be vertical privity between the parties.

The analysis here will be the same as for the running of the burden, except that horizontal privity will not be required (even though it is present). The original agreement was in writing. The original contracting parties intended that the benefit run. The benefit arguably touches and concerns the land. Furthermore, D and C were in a non-hostile nexus, therefore the requirement of vertical privity is satisfied.

Conclusion: Because the requirements for running of the burden and running of the benefit are present, C can enforce the covenant against B, and will be entitled to damages for B's failure to pay for the security services.

2. Equitable Servitude

C may also attempt to enforce the requirement in the deed as an equitable servitude against B. The requirements for an equitable servitude are less stringent than those required for a covenant – for the burden of an equitable servitude to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties to bind successors, (3) the servitude must touch and concern the land, and (4) notice to the party to whom the covenant is being enforced. If the equitable servitude is enforced, it will allow the party enforcing it to obtain a mandatory injunction. In this case, enforcement of the servitude would require B to make the $600 payments to MPI.

The analysis for an equitable servitude will be the same as that for the running of the burden of a covenant. There was a writing, there was intent by the original parties, the servitude touches and concerns the land, and arguably, there was notice to B. Therefore, given the forgoing [sic] analysis, C will be able to enforce an equitable servitude against B, and obtain a court order compelling him to pay the fees (subject to any defenses: see below).

3. Reciprocal Servitude Implied from Common Scheme

C may also attempt to enforce the payment of the security fees as a reciprocal servitude based on the original common scheme. A reciprocal negative servitude can be implied from a developer's actions where a developer develops a number of plots of land with a common scheme apparent from the development, and where the development party is on notice of the requirement.

C can argue that there was a common scheme to create a secure and gated community. There were advertisements at the time that the land was developed indicating that a major selling point of the development was that the development would be secure. To that end, the developer entered into a contract with ASI. It is apparent from developer's actions that a common scheme, including maintenance of security in the development, was intended.

The analysis for notice of the common scheme is the same as above – it may have been predicated on actual or constructive notice. Here, B was on record notice of the scheme. Therefore, C can successfully hold B to payment of the security fees on an implied

reciprocal servitude theory as well.

Buyer's Defenses

Notice

As noted above, one of B's primary defenses will be that he was not given notice of any covenant or servitude. This argument will fail in most courts, because of the fact that B was on record notice of the covenant, based on a deed in his chain of title.

Touch and Concern

As noted above, B may argue that the covenant at issue does not touch and concern that land. This argument will fail, because the security arrangement will clearly benefit the homeowners in their use and "peace of mind" concerning their homes and personal safety.

Assignment of the Contract from ASI to MPI

B will allege that even if he was obligated to pay ASI based on notice in his deed, he was under no obligation to pay MPI, because of the assignment of the contract. This argument will fail.

Here, ASI has engaged in both an assignment of rights and a delegation of duties. All contract duties are delegable, if they do not change the nature of the services to be received by the benefitted party (here, B). Unless B can show that the security services received from MPI will be materially different from those he would receive from ASI, then he cannot allege that the delegation and assignment excuses his duty to pay. There is no reason to think that MPI is any less capable of performing security services than MPI.

Furthermore, once contract rights are assigned and delegated, a party must pay the new party to the contract once he receives notice of the assignment. B knows that he has to pay MPI, therefore he cannot allege that he is not making payments because he doesn't know who to pay.

Answer B to Question 2

2)

What theories might Cora sue Buyer for his refusal to pay the annual $600 fee to MPI, what defenses could Buyer raise, and what is the likely outcome on each theory?

Cora will argue that the Buyer is bound by a covenant that runs with the land. Cora will further argue that this covenant requires Buyer to pay MCI the $600 per year.

Covenants

A covenant is a promise relating to land that will be enforce[d] at law. Enforcement at law usually gives rise to money damages. Equitable servitudes, which will be discussed later, are enforceable in equity, which often means with an injunction.

Cora will argue that a valid covenant was created when each lot owner signed the deed with Developer that contained the clause that each purchaser, including heirs, successors, and assigns, will have to pay an annual fee of $600 to Ace Security. This covenant was in writing[;] Developer recorded all the deeds.

Will the burden of the covenant run?

Cora will argue that even though Seller was the person who initially signed the deed containing the covenant, the burden of the covenant should run to Buyer. The burden of a covenant will run to a successor in interest if 1) the initial covenant was in writing, 2) there was intent from the initial people creating the covenant that it would run to successors, 3) the covenant touches and concerns land, 4) there exists horizontal and vertical privity, and 5) the successor in interest had notice of the existence of the covenant.

Writing:

The initial covenant was in writing because it was included in the deed that each lot purchaser signed in the contract with Developer. Therefor, this requirement has been met.

Intent:

There also appears to be intent that the covenant bind successors in interest. This is because the deed which Developer and Seller signed contained the phrase “hereby agree on their own behalf and on behalf of their heirs, successors, and assigns.” This is clear evidence that the original parties intended the burden to run.

Touch and Concern:

A covenant will be considered to touch and concern land if it relates to the land and affects each covenant holder as landowners. Here, the covenant was to provide security and maintenance within the subdivision. This probably will be considered to touch and concern land because the safety and maintenance of the subdivision has a clear impact on each landowner's use and enjoyment of his or her lot. The covenant was not to provide personal security to the landowners, but rather to secure the land that was conveyed in the deed. Therefore, the covenant likely will be considered to touch and concern land.

Horizontal and Vertical Privity:

There must also be horizontal and vertical privity in order for a successor in interest to be bound by the burden of a covenant. Horizontal equity deals with the relationship between the original parties. Here, the original parties are Developer and Seller. There must be some connection in this relationship, such as landlord-tenant, grantor-grantee, etc. Here, Developer owned the large tract of undeveloped land that was eventually turned into the ten lots. Then, Developer conveyed one of the lots that it owned to Seller. This will satisfy the requirement of horizontal privity.

Vertical privity relates to the relationship between the original party and the successor who may be bound by the covenant. Vertical privity will usually be satisfied so long as the relationship between the two parties is not hostile, such as when the new owner has acquired ownership by adverse possession. Here, Seller sold the property to Buyer. Therefore, this will satisfy the vertical privity requirement.

Notice:

The final requirement for the burden of a covenant to run to successors is notice to the successor in interest. A successor will be deemed to be on notice of the covenant if there is 1) actual, 2) inquiry, or 3) record notice of the covenant. Actual notice is if the successor was actually aware of the covenant. Inquiry notice is where the successor would have discovered the existence of the covenant had she inspected the land as a reasonable person would have. Record notice occurs when the successor would have discovered the covenant if an inspection of the records had taken place.

Here, there is no evidence that Buyer had actual notice of the covenant at the time that she bought the land from Seller. Also, it is unclear whether Buyer was on inquiry notice. If Buyer had inspected the land prior to purchase, Buyer may have noticed that the land was being maintained and secured by a company. If Buyer had seen this, she should have also probably concluded that each landowner was partially paying for this maintenance and security service. Therefore, Buyer may be deemed to be on inquiry notice.

Even if Buyer did not have actual or inquiry notice, Buyer clearly had record notice of the covenant. This is because the covenant was in writing and was included in the deed of

each of the original purchasers from Developer. Furthermore, Developer promptly recorded all of these deeds. Therefore, if [B]uyer had went [sic] to the record office and looked up the land that she was buying, she would have discovered the covenant.

Therefore, Buyer will be considered to be on notice of the covenant.

Buyer's possible defenses to enforcement of the covenant:

Buyer may argue that [s]he should not be bound by the covenant because the covenant does not touch and concern land, she was not on notice of the covenant, and that she should be excused from performing under the covenant because of Ace Security's assignment to MPI.

Touch and concern:

As discussed earlier, the covenant will likely be considered to touch and concern land. Buyer may argue that the duty to provide security to the landowners is primarily there to protect the landowners personally rather than to protect the actual land. Buyer will further argue that because the covenant relates to personal protection of the landowners, it does not relate to land and therefore should not be deemed to touch and concern land. If the covenant is deemed not to touch and concern land, the covenant will not bind successors in interest.

However, because the contract with Ace Security was for the security and maintenance of the subdivision, Buyer's claim will likely be rejected. Even if Buyer can convince the court that the Ace Security had promised to protect the individual landowners rather than the land, Ace Security's promise to maintain the property clearly related to land. It would not make sense for Buyer to argue that Ace Security's duty to maintain relates to maintenance of the landowners rather than maintenance of the land.

Therefore, Buyer's argument that the covenant does not touch and concern land will be rejected.

No Notice:

As discussed earlier, Buyer may argue that she did not have notice of the covenant and, therefore, should not be bound by the covenant. Buyer will point to the fact that the deed between Seller and Buyer did not mention the covenant to pay for security services. However, this argument will fail because Devel[o]per properly recorded each of the deeds which contained the covenants. As a result, if Buyer would have checked the records she would have discovered the covenant.

Thus, this argument by Buyer will also fail.

Contract Defenses:

Buyer may also make some contract arguments.

What law governs?

The contract between Developer and Ace Security will be governed by the common law because it is a contract for services, not goods. Even though the contract cannot be performed within 1 year (because the contract is for 10 years) the statue of frauds has been satisfied because the contract was in writing between Developer and Ace Security.

Third Party Beneficiary

Cora can claim that he [sic] is a third party beneficiary of the original contract between Devel[o]per and Ace Security. Cora will point out that in the initial contract between Devel[o]per and Ace Security, it was clearly Developer's intent that performance of the security services go to the purchasers of the land rather than to Developer. He will also claim that his rights under the contract has [sic] vested because he has sued to enforce the contract. Because Cora can show that all of the landowners are third party beneficiaries, Cora will have the ability to use under the contract.

Invalid Assignment to MPI:

Buyer may also argue that even if the original covenant runs to her, she should no longer be bound by the covenant because of Ace Security's assignment of the contract to MPI.

An assignment can include all of the rights and obligations of the original contracting party. In general, an assignment and/or delegation will be valid unless 1) the original contract specifically says that all attempted assignments or delegations will be void, or 2) the assignment or delegation materially changes the risks or benefits associated with the original contract.

Here, there is nothing in the original contract between Developer and Ace Security that states that assignments will be void. Furthermore, there is nothing in the covenant that Seller signed with Developer that limits the covenant only to performance by Ace Security. Therefore, this will not be a valid reason for invalidating the assignment and excusing Buyer's need for performance.

Also, it does not appear that Ace Security's assignment to MPI will in any way impact that obligations [sic] to Buyer or the benefits that Buyer will receive. Ace Security was originally required to provide security and maintenance for the subdivision. This is not a personal service that only Ace Security can effectively provide. Rather, security service is a task that any competent security company can handle. Therefore, the fact that performance will now be coming from MPI rather than Ace Security will not negatively impact Buyer's benefits from the contract.

Moreover, the assignment will not effect [sic] Buyer's obligations under the contract either. Under the initial contract with Ace Security, Buyer was required to pay $600 per year. After the assignment to MPI, Buyer is still required to pay only $600 per year. Therefore, Buyer's obligations after the assignment will not be changed in any way. Therefore, the assignment from Ace to MPI will be considered valid and Buyer will not be excused from performing as a result of this assignment.

MPI's threat to suspect [sic] service unless it receives assurances that it will be paid the full $6,000 each year for the balance of the contract

Buyer may also argue that even if they are bound by the covenant, MPI is not entitled to assurances that it will be paid the entire value of the contract for the remainder of the contract term. As common law, a suit for breach of contract could not be brought until the date for performance has passed. Cora will argue, on behalf of MPI, that they are entitled to assurances of future performance because of Buyer's anticipatory repudiation.

Anticipatory Repudiation

Generally, a suit for breach of contract can only be brought when the date for performance has passed. However, is [sic] a party to a contract unambiguously states that he cannot or will not perform under the contract, a suit may be brought immediately for breach of contract.

Here, Buyer has steadfastly refused to pay any fee to MPI. It is unclear whether the time has passed in which Buyer was required to pay MPI. Regardless, Buyer's clear statement that it will not pay MPI will be considered an anticipatory repudiation. Thus, Buyer will be able to immediately bring suit.

Also, because of the anticipatory repudiation, Cora or MPI would be entitled to immediately bring suit. Because they could immediately sue Buyer if they so chose, it only makes sense to allow MPI to seek assurances that Buyer and the other landowners will continue to perform under the contract.

Equitable servitude

An equitable servitude is much like a covenant except that an equitable servitude is enforceable in equity, rather than at law. Here, Cora may prefer to have the court declare an equitable servitude, so that the court will enjoin Buyer to pay the $600 each year for the 10 year length of the contract. This will ensure that Cora will not have to pay more than $600 in any year.

In order for the burden of an equitable servitude to run with the land, there must be 1) a writing, 2) intent, 3) touch and convern[sic], and 4) notice to the successor in interest. All of these have been discussed earlier and have been satisfied. Therefore, this could be

considered to be an equitable servitude.

Cora may wish to get an injunction requiring Buyer to pay $600 per year for the 10 year length of the contract. Cora will first need to show that Buyer has breached his obligations under the contract.

Under an equitable servitude, the court may require Buyer to pay $600 per year for the remainder of the contract.

Buyer's defenses

Buyer could make the same defenses as in the covenant situation. As stated earlier, all of these defenses will likely be rejected.

Common Scheme Doctrine

Even if Cora's other attempts to enforce a covenant or equitable servitude fail, Cora may be able to show that Buyer should be bound by the common scheme doctrine. Cora would need to show that the original developer had a common scheme for the entire subdivision and that this scheme was clear to anyone who inspected the area and the records. Cora's argument may succeed because of the fact that Developer recorded the covenant between all of the original purchases from Developer.

Conclusion/Likely Outcome:

Cora will likely succeed in showing that there was a covenant between all of the original landowners. Cora will also be able to show that the burden of this covenant should run to Buyer. Cora will also be likely able to show the existence of an equitable servitude.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2006 CALIFORNIA BAR EXAMINATION

This web publication contains the six essay questions from the February 2006 California Bar Examination and two selected answers to each question.

The answers received high grades and were written by applicants who passed the examination. Minor corrections were made for ease in reading. The answers are reproduced here with the consent of their authors.

Conclusion

Since offensive collateral estoppel is allowed under these circumstances, the court incorrectly denied Pat's motion for summary judgment on her contract claim.

Tort claim

Res judicata

For the same reasons as the breach of contract claim, res judicata will not apply to the tort claim.

Collateral estoppel

The issue of Busco's tort liability for the accident when the bus hit a tree was not actually litigated in Ed's action, which was solely for breach of contract because Ed was not hurt. Accordingly, collateral estoppel will not apply to Pat's tort action.

Conclusion

The court correctly denied Pat's motion for summary judgment on the tort claim.

Question 5

Marla is a manufacturer of widgets. Larry is a lawyer who regularly represents Marla in legal matters relating to her manufacturing business. Larry is also the sole owner and

operator of a business called Supply Source ("SS"), in which he acts as an independent broker of surplus goods. SS is operated independently from Larry's law practice and from a separate office.

At a time when the market for widgets was suffering from over-supply, Marla called Larry at his SS office. During their telephone conversation, Marla told Larry that, if he could find a buyer for her excess inventory of 100,000 widgets, Larry could keep anything he obtained over $1.00 per widget. Although Marla thought it unlikely that Larry would be able to sell them for more than $1.25 per widget, she said, ". . . and, if you get more than $1.25 each, we'll talk about how to split the excess." Larry replied, "Okay," and undertook to market the widgets.

During a brief period when market demand for widgets increased, Larry found a buyer, Ben. In a written agreement with Larry, Ben agreed to purchase all 100,000 widgets for $2.50 each. Ben paid Larry $250,000. Larry then sent Marla a check for $100,000 with a cover letter stating, "I have sold all of the 100,000 widgets to Ben. Here is your $100,000 as we agreed."

When Marla learned that Ben had paid $2.50 per widget, she called Larry and said, "You lied to me about what you got for the widgets. I don't think the deal we made over the telephone is enforceable. I want you to send me the other $150,000 you received from Ben, and then we'll talk about a reasonable commission for you. But right now, we don't have a deal." Larry refused to remit any part of the $150,000 to Marla.

1. To what extent, if any, is the agreement between Larry and Marla enforceable? Discuss.

2. In his conduct toward Marla, what ethical violations, if any, has Larry committed? Discuss.

Answer A to Question 5

5)

The Agreement Between Larry and Marla is enforceable because it was a unilateral contract fully performed by Larry and it was not subject to the Statute of Frauds[.]

Offer, Acceptance and Consideration:

The agreement between Larry and Marla is a unilateral contract. In order for there to be a unilateral contract there must be mutual assent (and offer and acceptance) and bargained for exchange (consideration). An offer is a communication between two persons or entities, and it is made where reasonable people would believe that acceptance of the offer would lead the participants to be bound by its terms. The terms of the offer must also be sufficiently definite. In our case, an offer was made by Marla to Larry to find a buyer for her widgets. As a finder, Larry would be entitled to the portion of the proceeds between $1.00 per widget and $1.25, and then a portion of the proceeds above $1.25. In this case the terms of the contract were sufficiently definite even though the portion of proceeds above [$]1.25 had not been definitively determined. Given their preexisting, ongoing relationship, and that both are merchants it is fair to assume that they could finalize the contract terms at a later date, after the sale of the widgets. A reasonable person would believe that Marla was inviting acceptance and wanted to be bound by the terms of her offer.

In this case, Larry accepted Marla's contract by performing. Marla's offer was for a unilateral contract. A unilateral contract is a contract that can be accepted only by full performance. It is clear from its terms that Larry could only accept Marla's offer by actual performance because her offer was conditional. He would only get a percentage of the proceeds "IF" he found a buyer. In this case, Larry accepted the contract when Ben agreed to purchase all 100,000 widgets for $2.50 each and the widgets were actually sold.

Consideration is present in a contract where the promissee incurs a detriment. That is, he does something that he does not have to do, or refrains from doing something that he does not have to do, or refrains from doing something that he is entitled to do. In this case, there is consideration because Larry, the promissee[,] incurs a detriment when he enters the market to look for a buyer. He is not required to look for a buyer in this case, but does so anyway. He incurs a detriment because it takes time away f[ro]m his other business pursuits (including his law practice).

Because there has been a definite offer made by Marla, Larry fully accepted through his performance, and consideration is present, a contract has been formed so long as no defenses can be raised.

Defenses

The agreement between Larry and Marla is enforceable because no defenses to formation can be raised. The Statute [of] Frauds is a requirement that certain contracts be in writing.

The writing must include the material terms of the contract and be signed. Contracts that are subject to the statute of frauds are contracts in consideration of marriage, surety contracts, contracts that cannot be formed in one year, and land sale contracts. None of these are relevant here. In addition, contracts for goods in amount greater than $500 are also subject to the statute of frauds. If a contract for goods in an amount greater than $500 is not in a signed writing, it generally is not enforceable.

In this case, the contract between Larry and Marla was not subject to the "goods prong" of the statute of frauds because Larry did not purchase the goods directly from Marla. Larry's role was that of a finder or marketer whose responsibility it was to find a buyer for Marla's widgets. He was incented [sic] to find a high price because he was entitled to keep anything over $1.00 per widget, and then a portion of the proceeds above $1.25 per widget. The arrangement would also benefit Marla because a high price for the widgets would benefit her as well, and she could rely on Larry's expertise as a broker. Marla would also not have to worry about the hassle of setting [sic] the goods and could concentrate on the core aspect of her business, manufacturing. One could argue that Larry purchased the goods from Mary because he received the purchase price from Ben directly and his business was as a broker of surplus goods. In this case he did not act as a broker, because he did not buy the goods from Marla directly. There is no indication that the goods were ever in his possession. Further, in a typical sales contract, a manufactu[r]er is not entitled to a percentage of the middleman's purchase price. Thus, the contract is more akin to that of finder who never "owned" the goods.

Ethical Violations

Operating a Business:

Larry did not commit an ethical violation when he formed and operated a business called Supply Source. A lawyer may own and operate a business that is separate and apart from the practice of law. For example, a lawyer may own a restaurant or a gas station. Lawyers may also operate a law firm that offers services related and incidental to the practice of law, but that are no[t] actually the practice of law. For example, a law firm may offer services relating to money management and accounting. In this case, we know that Larry was the sole owner and operator of a business called Supply Source, and that it operated independently from Larry's law practice and from a separate office. Because the business was run separately and apart from his legal practice, and it did not involve anything remotely related to the practice of law, it is permissible for Larry to own and operate the business. However, a lawyer who runs a business must be careful not to engage in business that would pose conflicts of interests with its clients. We will see below that Larry did not operate his business in a way to minimize conflicts.

Entering into a Business Relationship:

Larry committed an ethical violation when he did not follow proper procedures when he entered into a business arrangement. When a lawyer enters into a business arrangement

with a non-lawyer (and especially a client!), the lawyer must abide by a set of procedures. First, the lawyer should advise the other party to consult another lawyer and give him or her time to do so. Second, the lawyer must disclose and explain all the relevant terms of the contract in a way that the other party can understand. Last, the terms of the contract must be fair and not one-sided to the lawyer's benefit. In this case the terms of the contract seem to be fair. We can presume that they are fair because Marla set the terms of the contract and the contract was not negotiated by Larry. Second[,] there was no need for Larry to explain the relevant terms of the contract because they were self-explanatory and a lay person could understand them. However, Larry did not give Marla an opportunity to consult with a lawyer before entering into the contract. While Marla could have waived the right to consult a lawyer, Larry must still advice [sic] her that it may be beneficial. In this case, a lawyer may have been helpful. He may have advised Marla not to enter into a contract with Larry where all the terms have not been finalized. The fact that the terms have not been finalized is what caused the problem in the first place.

Duty to be an honest, upright member of the community

Larry should have been honest in his dealings with Marla. A lawyer had a duty to act in upright, honest manner in all aspects of his or her life. In this case, Larry should have disclosed to Marla the amount of money he received from Ben and made a good faith attempt to resolve the open issue in their contract. By ignoring that aspect of the contract and no[t] disclosing the amount he received, he seems to be acting in a deceitful manner. Not only [should] a lawyer abide by ethical considerations in the course of his practice, he must also abide by them in other aspects of his or [her] life.

Answer B to Question 5

5)

(1) Enforceability of the contract between Larry and Marla

Applicable Law: If this case involves the sale of goods (tangible personal property), widgets, Article 2 of the Uniform Commercial Code applies to the transaction. However, while the case does involve the sale of widgets, the contract is really for Larry's service in selling the widgets, therefore common law would likely apply. Indeed, the payment to Larry was for the sale of the widgets. He never purchased the widgets himself, but merely acted as a broker to Ben.

The issue is whether the agreement between Larry and Marla is legally enforceable, and therefore a contract exists. In order to form a contract there must have been an offer by Marla, acceptance by Larry, and some form of consideration for the agreement.

Offer: The first issue is whether Marla ever made an offer to Larry. An offer is made when a party manifests an intent to enter into contract and communicates such intent to an offeree. Here, Marla did call Larry at his Supply Source ("SS") office and stated that she wanted Larry to sell her excess inventory. Under common law, an offer must state a price term and the material terms of the contract. The material terms, the sale of widgets up to 100,000, were certainly state[d].

The issue is thus whether there was a price term. Marla did agree to give Larry all profits over $1.00, up to $1.25. However, there was no certain price term since Marla stated that any excess over $1.25 would have to be negotiated as to the amount Larry would receive. Therefore, the lack of a certain price term negates the enforceability of the contract. The parties did not have a meeting of the minds as to what Larry would be paid for the profits he received on the widgets over $1.25. Thus, the facts probably indicate that Marla intended to contract and not to continue to negotiate.

Under the UCC, however, the court only looks at the intention of the parties to determine if there has been an offer. The UCC does not require a price term and will imply a reasonable price term if one is not stated. However, if the parties are negotiating the price term there is no intention to contract under the UCC. There was likely an intend [sic] by Marla to enter into contract since she believed it unlikely that Larry could sell the widgets for more than $1.25 per widget. Although the price term is not certain, the court could infer a "reasonable" price term for any sale over $1.25.

If there is not offer[sic], the agreement would not be enforceable under contract law. However, if there was an offer, all the other elements for a valid contract (as discussed below) were satisfied and therefore there was an enforceable agreement.

Acceptance: Marla's offer to Larry was probably a unilateral contract, that is, one

that states a specific (and only) form of acceptance. Here, Larry could only accept Marla's offer by selling the widgets for at least $1.00 per widget and giving Marla $1.00 for each widget sold. His acceptance was only upon completion of his performance.

If the contract was a bilateral contract, Larry would have promised Marla he would sell the widgets. Failure to sell the widgets would have meant Larry could have incurred liability for breach of contract for failure to perform. There is no such liability under a unilateral contract, since there is only acceptance upon completed performance.

Consideration: Consideration is a bargained for legal detriment. The only issue as to consideration in this case is whether Larry's promise was illusory. However, this was not a bilateral contract, but a unilateral contract in which Larry could only accept by performance. His performance therefore would be consideration.

Statute of Frauds: The statute of frauds requires that some contracts be in the form of a signed writing (statute of frauds may be satisfied in other ways). The statute of frauds does not apply to this case however because it is for a service, Larry's sale of widgets, which can be completed within 1 year.

If this was a contract for a sale of goods of at least $500, the statute of frauds would apply. There was no writing. However, the statute of frauds can also be satisfied by full performance, which Larry did provide, by selling the widgets and turning payment over to Marla.

Again, as discussed above, this is a services contract, not a sale of goods contract and therefore not under the statute of frauds.

Quasi-Contract

Larry could still recover damages from Marla even if there was no contract, under quasi-contract principles. Quasi-contract is a principle used in contract law to prevent the unjust enrichment of a party. Here, Marla would be unjustly enriched if there was no formal contract and Larry expended his time and energy to find a purchaser for the widgets and was not compensated for his efforts. Therefore, the courts will allow Larry to recover for the fair market value of the services he rendered to Marla. The likely determination of the amount Marla benefited would likely be $25,000, but could include a reasonable amount for the remaining $125,000 over the agreement terms.

Conclusion:

There probably is an enforceable contract under which Larry can keep $25,000 and a reasonable amount of the additional $125,000 he received from the widget sales. Even if Larry cannot recover under contract, he can still recover under quasi-contract principles.

(2) Possible ethical violations committed by Larry

Attorneys owe several duties to many different parties, including their clients, adversaries, the court, and the public at large. Here, Larry regularly represents Marla in legal matters relating to her manufacturing business. Although Larry was not representing Marla in a deal for the sale of widgets, he still may have violated some of his duties to the profession.

Duty of Loyalty - business transactions with clients:

A lawyer owes his or her clients a duty of loyalty. The lawyer must act in a way they believe is for the best interest of the clients at all times (unless other ethical rules prohibit such, like placing a client on the stand who intends to perjur[e] herself.) Included in the duty of loyalty is fair dealing in business transactions with a client.

Both California and the ABA have rules regulating business transactions between lawyers and their clients. These rules require that for any transaction between a lawyer and a client, the lawyer should make sure the deal is fair to the client, express the deal in an understandable writing, allow the client to meet with independent counsel, and the client should consent to the deal in writing. Here, there is no evidence the deal entered into between Larry and Marla was not fair. The great increase in widget price occurred after the deal between the two was struck[.] However, there was no writing or opportunity for Marla (or suggestion by Larry) to consult independent counsel.

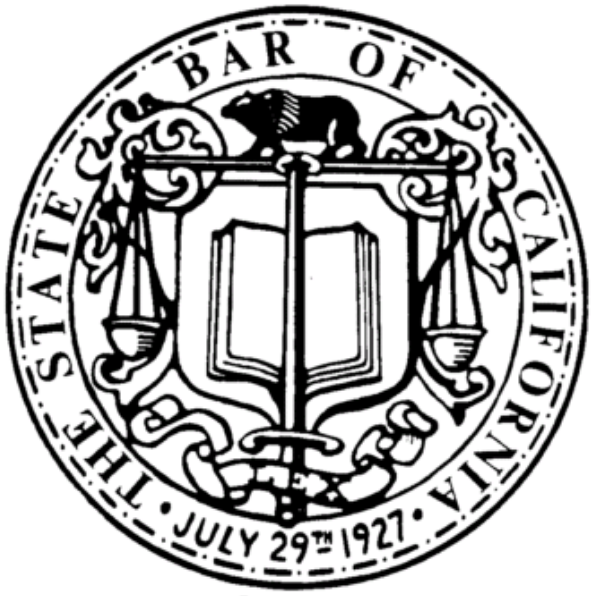
This rule may not apply here because Larry was not representing Marla at the time of the business transaction, at least as far as the limited facts [are] known. Furthermore, Larry did properly separate his law practice and his SS business. It is in a separate office and [there is] no indication the two endeavors are mixed in any manner by Larry.

However, since Larry has a regular and ongoing (at least prior to this incident) relationship with Marla, he should have satisfied the elements stated above and in failing to do so violated his duty of loyalty to his client Marla.

Duty to act honestly, without deceit or misrepresentation: A lawyer owes a duty to the public at large in all of his or her dealings to act honestly, without deceit or fraud and not to misrepresent. Violations of this rule harm the integrity of the profession. Here, it is unknown whether Larry truly believed he simply owed Martha the $100,000 dollars [sic] for the transaction for the widgets or if he attempted to deceive her as to the price he received in an attempt to keep the additional profits to himself. If Larry violated the agreement knowingly, he would have also violated his duty to the profession by acting in a dishonest manner. This is a clear violation and compounded by the fact that Larry represents Marla on a regular basis in legal matters.

Conclusion:

Larry likely violated his duty of loyalty and his duty to act honestly to the public at large in his dealing with Marla. Although he was not acting as her attorney at the time of the deal to sell the widgets and Marla was likely aware of such since she contacted him at his SS office, Larry still violated his professional duties. However, Larry probably did not violate his duties of confidentiality or loyalty if he revealed any information received during his representation of Marla in finding Ben, the buyer of the widgets.



California
Bar
Examination

Essay Questions and Selected Answers

July 2006

Question 3

On Monday, Resi-Clean (RC) advertised its house cleaning services by hanging paper handbills on doorknobs in residential areas. The handbills listed the services available, gave RC's address and phone number, and contained a coupon that stated, "This coupon is worth $20 off the price if you call within 24 hours and order a top-to-bottom house-cleaning for $500."

Maria, a homeowner, responding to the handbill, phoned RC on the same day, spoke to a manager, and said she wanted a top-to-bottom house cleaning as described in the handbill. Maria said, "I assume that means $480 because of your $20-off coupon, right?" The RC manager said, "That's right. We can be at your house on Friday." Maria said, "Great! Just give me a call before your crew comes so I can be sure to have someone let you in."

Within minutes after the phone conversation ended, the RC manager deposited in the mail a "Confirmation of Order" form to Maria. The form stated, "We hereby confirm your top-to-bottom house cleaning for $500. Our crew will arrive at your house before noon on Friday. You agree to give at least 48 hours advance notice of any cancellation. If you fail to give 48 hours notice, you agree to pay the full contract price of $500."

About an hour later, Maria sent RC an e-mail, which RC received, stating, "I just want to explain that it's important that your cleaning crew do a good job because my house is up for sale and I want it to look exceptionally good."

On Thursday evening before RC's cleaning crew was to show up, Maria accepted an offer for the sale of her house. The next morning, Friday, at 10:00 a.m., Maria sent RC another e-mail stating, "No need to send your crew. I sold my house last night, and I no longer need your services." By that time, however, RC's crew was en route to Maria's house.

At 10:30 a.m. on Friday, Maria received RC's Confirmation of Order form in the mail. At 11:00 a.m., RC's crew arrived, prepared to clean Maria's house. Maria explained that she no longer needed to have the house cleaned and sent the crew away.

RC's loss of profit was $100, but RC billed Maria for $500.

Maria refused to pay.

Has Maria breached a contract with RC, and, if so, how much, if anything, does Maria owe RC? Discuss.

Answer A to Question 3

3)

Applicable Law

The common law applies to all sales of service contracts and the UCC applies to sale of goods. Here, the contract is for cleaning services (a service) so that it clearly falls within the ambit of the common law. As such, none of the rules under the UCC will be applicable.

Valid Contract Formed

Before addressing whether Maria breached her contract with Resi-Clean ("RC"), it must first be determined whether she had a valid contract to begin with. A valid contract requires: (1) an offer; (2) an acceptance of the aforementioned offer; (3) consideration from each party; and (4) no defenses to formation. Each will be discussed below.

Offer

For an offer to be valid there must be an intent to be bound, communicated to the offeree, with sufficient and definite material terms. Here, there are several points at which the parties may argue an offer was made. Whether or not a valid offer is made (i.e. whether above factors are met) is determined by looking at whether a reasonable person receiving the communication would feel that their acceptance of the offer would create a binding obligation.

First, it may be argued that the handbills placed on the doorknobs of the houses created an offer from RC to all of the houses. However, this argument is likely to fail. An advertisement that merely states the cost of services, a phone number, and possible coupons would not be construed by a reasonable person to evidence the intent of advertising to be bound to a contract upon acceptance.

Thus, this would not likely be construed as a valid offer. However, a court may accept an argument by Maria that the coupon attached that specified that the party would get $20 off if they called within 24 hours and ordered a top-to-bottom cleaning was a valid offer because it was specific with the terms of how it could be accepted, when it had to be accepted by, and a reasonable person would feel that the party giving the coupon would be bound by the offer. The effect of the binding effect of the coupon will be discussed further with respec[t] to the damages that Maria receives below.

A second possibility for the offer could be the phone call that Maria made to RC to order to the top-to-bottom cleaning service. She requested that they come and clean her house, as described on the handbill, and specified the $480 price ($500 less the $20 coupon). This would be construed by a reasonable person in RC's shoes to be [an] offer than [sic]

they could accept to form a binding contract so that it likely would be deemed to be an offer. Moreover, even if this offer was deemed rejected by RC's manager indicating that "they would be there Friday" because this was an additional term, that statement would be an [sic] counteroffer to Maria on the same terms but including the Friday cleaning provision.

If, for some reason, the court determines that the above was not an offer, then the confirmation order may also be deemed to be an offer to Maria. Thus, Maria would be free to accept that order at any point after receiving it. This is very unlikely to be the case, however, as Maria's phone call would almost certainly be construed to be the offer in this case.

Acceptance

A valid acceptance requires that a party who is able to accept the contract unequivocally accepts the offer and communicates that acceptance to the offeror. Of course, if and when a valid acceptance occurred would depend on when the offer occurred. Because the advertisement described above was not an offer (except to the extent of the coupon which was incorporated into Maria's offer) it will not be discussed here with respect to acceptance.

Assuming that Maria's phone call is deemed to be the offer then RC likely accepted the offer when its manager stated "[t]hat's right. We can be at your house on Friday." While Maria may argue that the statement "we can be at your house on Friday" was an additional term that did not create a valid contract but, rather, was a rejection and counteroffer, this argument would have little effect given that Maria promptly said "Great[,]" thereby accepting the counteroffer with the additional Friday term. Maria may also argue that by telling them to call her before they come [sic] so that someone is there to let them in she did not unequivocally accept their offer. However, this statement was not intended to modify the terms of the contract but, rather, just told [sic] them that they should call in advance to ensure someone would be home. Whether or not this amounted to a condition precedent will be discussed below. Thus, Maria's offer was accepted by RC (or Maria accepted RC's counteroffer on the same terms with the Friday provision) upon their phone call and a binding contract was completed at the time.

If the phone call was not deemed to be a valid offer so that the offer was the confirmatory memo, then Maria did not accept it and there would be no valid contract. Maria only received the memo on Friday morning and from that point on tried to send RC away. Thus, there would be no acceptance. However, this argument would be unlikely given that they almost certainly formed a valid contract during the phone call as described above.

Consideration

Here, Maria agreed to pay RC $480 and they agreed to clean her house from top-to-

bottom. This exchange of promises provides the required bargained[-]for exchange and legal detriment to each party for there to be valid consideration.

Thus, this element is met.

Defenses

Statute of Frauds

The Statue of Frauds does not apply to services contracts that will be completed in less than one year. Here, the contract was to be completed in its entirety by Friday so that the statute of frauds was inapplicable.

As no other defenses are applicable, a valid contract was likely formed at the time of the phone conversation between Maria and the manager of RC.

Terms of the Contract Formed

Once it is determined that a valid contract was formed between the parties, the next step is determin[in]g the terms of that contract. In this case, Maria called RC and stated that she wanted a "top-to-bottom" house cleaning "as described in the handbill." Moreover, she indicated (and the manager of RC agreed) that the price would be $480 once the coupon from the handbill was taken into consideration. The contract likely also contains the provision that RC will complete the work on Friday as that was agreed upon by the parties during the course of the phone conversation. Thus, the contract will certainly be for a top-to-bottom house cleaning at Maria's house on Friday for $480.

A question exists as to whether Maria's statement that they had to call her before their crew comes in order to be sure that someone was there to let them in. It is unlikely that this would become part of the contract given that the parties had already agreed on the contract before Maria made that statement. Moreover, the statement does not affect the performance of the obligation but was merely intended to ensure that the contract would move forward with no hassles. Thus, this is not likely to be considered part of the contract.

The provision in the "Confirmation of Order" memo sent by RC also does not likely become part of the contract. The contract was completed over the telephone and RC may not unilaterally make modifications to that contract (i.e. the 48 hour notice provision) without additional consideration provided by the other party. Here, RC gave no additional consideration to Maria for requiring the 48 hour notice provision). This does not mean, however, that Maria was free to cancel the contract at will[;] because the contract became enforceable over the phone, she is bound by the contract unless she has some excuse or defense to its enforcement or unless she is for some reason relieved of her duties under the contract.

Finally, for the same reasons as the 48-hour provision above, Maria's subsequent e-mail regarding the "exceptionally good job" would not become part of the contract. There was no additional consideration for the this [sic] provision and to require RC to do an "exceptionally good job" would deprive them of the benefit of the bargain their [sic] received when they negotiated for the $480 price. Thus, this would not become part of the bargain and RC would be required to do a reasonable job in good faith.

Thus, the contract was for a full house cleaning on Friday for $480 and it did not include the 48-hour notification provision or the "exception[al] job" provision.

Did Maria Breach or Does She Have Any Excuses/Defenses For Her Breach?

Because a valid and enforceable contract existed, Maria is liable to RC if she breached the contracted [sic] as [she] is not excused from performance.

Maria's Breach

Under the terms of the contract, Maria was required to pay RC $480 and allow them into her house in order to complete the cleaning to which she agreed. Here, rather than allowing RC to come and clean her house, she sent them an e-mail at 10 a.m. on the morning of performance indicating that she was repudiating the contract and, when they showed up to perform, she turned their workers away. Thus, Maria anticipatorily repudiated the contract which would allow RC to: (1) treat it as an offer to rescind the contract and rescind; (2) treat the contract as materially breached and sue for damages immediately; (3) suspend their performance and sue once the contract becomes due; or (4) do nothing and encourage performance.

Here, Maria breached the contract the morning of performance so that suspending their performance or encouraging Maria's performance would be infeasible. Moreover, RC would not want to rescind the contract because that is exactly what Maria wanted to do and it would cost them $100 in lost profits. Thus, RC would treat the contract as materially breached and Maria would be liable for damages unless she had a valid excuse for her breach.

Possible Defense/Excuses of Performance

Condition Precedent Not Met

Maria may argue that she had a valid excuse for not performing because in the course of their telephone call she indicated that the crew should call her before they come so that someone may be there. However, this argument would fail for a few reasons. First, as I indicated above, the provision that they call on Friday before they come was not likely part of the contract because they had already agreed on the terms of the agreement at that point and Maria's statement was only intended to make sure she could make arrangement

to let them into her house. Second, the purpose of the covenant was not breached because they showed up to clean her house when she was there (because she turned them away). Third, she repudiated the contract before they could make the phone call by sending them her repudiating e-mail that morning so that they could treat the contract as breached immediately without adhering to the condition precedent. Thus, this argument would fail to excuse Maria's material breach.

House sold (Impossibility, Impracticability, Frustration of Purpose)

Maria may also a[r]gue that the fact that she no longer owned the house at the time the contract came due excused her performance by way of: (1) impossibility; (2) impracticability; or (3) frustration of purpose. As will be shown below, all of these arguments would fail.

Impossibility - For performance to be excused by way of impossibility an unforeseeable and supervening event must render performance impossible for any person to perform. Here, Maria's sale of her house was not unforeseeable because she knew that [she] was trying to sell her house and it was not a supervening outside factor because it was entirely within Maria's control. Moreover, it was still possible for RC to complete performance – it just would not be as valuable to Maria now that she no longer owned the home that she contracted with them to clean. Thus, this argument would fail.

Impracticability - For performance to be excused by way of impracticability an unforeseeable and supervening event must render performance by one party inordinately difficult so as to create an injustice if the contract was enforced. Here, as noted immediately above, Maria controlled the event and it was foreseeable so this did not excuse her performance. Morever, paying $480 to have a house that you have just sold cleaned does not seem unduly difficult on Maria. Thus, this defense would fail as well.

Frustration of Purpose - For performance to be excused by way of frustration of purpose an unforeseeable and supervening event must intervene to render the entire purpose of the contract – known by both parties to the contract at the time the contract was formed – a nullity. Like the two arguments above, this would fail because the supervening event was in Maria's control and was entirely foreseeable so that Maria assumed the risk that her house would be sold by Friday. Moreover, at the time the contract was formed RC had no idea that she was selling her house so that the purpose was to fix the house up for its sale. Thus, the fact that this purpose was frustrated would not excuse Maria's performance because RC had no idea of that purpose at the time the the [sic] contract was formed.

Potential Damages that Maria Owes RC For Her Breach

In a contracts case where one party materially breaches the other party is entitled to damages to compensate them for their expectancy under the contract. They may also receive consequential and incidental damages as appropriate. However punitive damages

are typically unavailable in contract actions.

Expectancy Damages

For expectancy damages to be provided to a party they must be causal, foreseeable, certain, and unavoidable. In this case, providing RC with the full $500 for Maria's breach as is claimed in their bill to Maria would unjustly enrich them given that they only lost $100 in profit as a result of her breach. Their expectancy under the contract was to make $100 in profit so they should be entitled to the $100 from Maria. Note, however, that the "loss of profit" provided in the facts does not indicate whether this includes the $20 coupon or not[;] it it[sic] does not then [sic] they should only get $80 because their expectancy was only $80 profit but if it does then they should get the full $100. This $100 is causal because they lost the money as a result of her breach, certain because they clean places like this all the time and can likely show what they typically make, and foreseeable because Maria knew that by breaching they would not be able to find another customer right away. So long as RC made reasonable efforts to find another house to clean to make up for the lost profits so as to mitigate their damages the damages would also be unavoidable. Thus, RC would be able to recover their $100 (or $80) of expectancy damages.

Consequential Damages

Consequential damages are those damages that are causal, foreseeable, certain, and unavoidable but that do not stem directly from the breach. There is no evidence of such damages in this question.

Incidental Damages

In the course of finding a new customer to mitigate their damages if RC was forced to expend resources, they would be entitled to those reasonable costs as incidental damages. There is no evidence of such damages here.

Specific Performance

Here, because the $100 (or $80) lost profit damages are adequate to compensate RC for its losses, specific performance (i.e. by forcing Maria to allow them to complete the contract) would be unavailable.

Thus, RC would be entitled to $100 (or $80 if the $100 lost profit does not take the coupon into account because the coupon was enforceable as described above) for their lost profits as a result of the contract so long as they took adequate reasonable steps to mitigate their

losses.

Answer B to Question 3

Maria v. Resi Clean

1. Applicable Law: The transaction between Maria and RC involved the purchase and sale of services. Accordingly, even though RC may have used tangible items (detergent, etc.) while performing services, the predominant aspect of the transaction involved services. Thus the common law (not the U.C.C.) controls.

2. The handbill constitutes an Offer: Many advertisements are merely invitations to negotiate. Here, under the objective theory of contract formation, the handbill would induce a reasonable person to conclude that RC had manifested an intention to perform the services at the stated price if Maria called "within 24 hours." By giving Maria the power to accept the offer with[in] 24 hours by calling, the handbill was not merely an invitation to negotiate – at least not with respect to a "top-to-bottom housecleaning." If someone had called with respect to some other service or bundle of services, the handbill might not be deemed an offer. Here, RC gave Maria the power of acceptance.

3.Maria's acceptance was a mirror image of the offer. First, Maria noted that she wanted a top-to-bottom cleaning as offered in the coupon. Accordingly, the subject matter of the offer and the acceptance was the same. Second, Maria did not attempt to negotiate or make a counterproposal that would have served as a rejection. Her request for clarification did not reject the offer. Having received clarification, her utterance "Great!" was an objective manifestation of her willingness to be bound to the terms of the offer, including the time for performance.

4.The Offer and Acceptance Created a Contract:
4.A. Consideration
Upon Maria's acceptance, both Maria and RC suffered a legal detriment. Both had exchanged promises to do something they were not otherwise legally obligated to do.

4.B. Essential Terms
Maria and RC agreed to all essential terms. RC agreed to perform a top-to-bottom cleaning consistent with the standards in its handbill. Maria agreed to pay $480 upon completion of the service. Although performance of the services within a reasonable time would have been a concurrent condition, RC agreed to perform the services on Friday and Maria agreed. RC's obligation to perform the services prior to payment would be a concurrent condition, filling in any gap concerning order of performance. All essential terms were established even though the term "top-to-bottom housecleaning" was not defined with specificity.

4.C. No writing required: A contract to perform $480 of services on Friday is not covered by any aspect of the statute of frauds. The oral agreement is enforceable without a writing.

5. There were no valid modifications to the Contract[.]
5.A. RC's confirmatory memorandum stated one inconsistent term and one additional term. Neither would be incorporated into the contract; both would be a unilateral attempt to modify the contract. Maria did not agree to the higher price, and she did not agree to the cancellation terms. Because the UCC does not apply, the consistent additional term between a merchant and consumer does not become part of the contract. Likewise, the inconsistent term regarding price is merely an offer for a modification that Maria did not accept. Maria had no duty to make a reasonable objection to the letter. She may have, but was not required to, request assurances of performances.

5.B. Maria's e[-]mail did not modify the contract. Maria's statement of the importance to her of RC's crew doing a good job does not alter, or purport to alter, RC's obligation to perform or her obligation to pay. Had RC performed, Maria would not have been justified in refusing to pay unless she was satisfied that RC did an exceptionally good job. Nor did it create an agreement about a basic assumption of the K.

6. Maria's cancellation was not excused: Maria will argue that the sale of her house on Thursday gave rise to a frustration of purpose. That "purpose", however, was not known to RC when the contract was formed. (Nor was it expressed as a condition: "I will pay you to clean my house if services are rendered before I sell it".) Maria's undisclosed purpose was not a basic assumption of the contract known to both parties. Further, a clean house between sale and closing is still valuable. Although under the UETA, Maria's e[-]mail is a proper mode of communication, it occurred after formation and does not relate back to formation.

7. Maria cancelled the contract after RC commenced performance. Although, as stated above, Maria did not accept RC's cancellation clause, Maria would still have the power, although not the right, to cancel before RC tendered performance. By dispatching the crew in accordance with the contract (i.e., before noon), RC commenced performance. [That would be a form of acceptance, were that needed.] Accordingly, Maria sent the crew away after RC partially performed.

8.Maria's cancellation excused RC's performance. Maria cannot defend her refusal to pay on the grounds that RC never performed. RC's performance was discharged by her breach.

9.Maria is liable to RC for damages caused by her breach: Given the late cancellation RC had no opportunity to mitigiate and thus sustained $100 in lost profits due to the breach.

RC would not be able to recover $480, the contract price[,] because it did not perform (although excused). It could only recover $100 plus incidental damages (cost of fuel, wages paid to the crew, supplies, etc.).

RC could not recover $500 because (a) Maria never agreed to the cancellation clause and

(b) $500 would be either an improper penalty or unjustified liquidated damages (in that the damages for lost profit would not be difficult to determine and $500 is not a reasonable amount).

Maria owes $100 plus incidental damages[.]

THURSDAY MORNING
JULY 27, 2006

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2008
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2008 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 3

On May 1, Owner asked Builder to give her an estimate for the cost of building a wooden fence around her back yard. Builder gave Owner signed written estimates of $4,000, consisting of $2,500 for labor and $1,500 for materials for a cedar fence, and of $7,000, consisting of $2,500 for labor and $4,500 for materials for a redwood fence. He said, however, that he would have to verify that the redwood was available.

Owner said she liked the idea of a redwood fence but wanted to think about it before making a decision. In any case, she said she wanted the fence completed by June 1 because she was planning an important event in her back yard for a local charity. Builder said he would check with redwood suppliers and get back to her within two days.

On May 2, Builder telephoned Owner. Owner's phone was answered by her voice-message machine, which informed callers that she had been called away until about May 25 but would be checking her messages daily and would return calls as soon as she could. Builder left a message stating, "I've found the redwood, and I can build the redwood fence for $7,000, as we agreed. Please give me a call, as I will otherwise buy the redwood, which is in short supply, and start the work within a few days." Owner heard the message, but because the charity event she had planned had been cancelled and there was no longer any urgency about getting the fence erected, she decided to wait until she returned to speak to Builder.

By May 14, Builder had still not heard from Owner. He was concerned that the supply of redwood might not hold and that if he did not start work immediately he would not be able to finish by June 1. Thus, he bought the redwood and completed construction of the fence on May 24.

When Owner returned on May 25, she saw the completed fence and sent Builder a letter stating, "You did a great job, but I never agreed to go ahead with the fence, and I certainly hadn't decided on redwood. Besides, the charity event that I had planned got cancelled. You should have waited until I got back. But, to avoid a dispute with you, I'll offer to split the difference – I'll pay you $5,500."

Builder received the letter on May 26. He telephoned Owner and said, "When I first read your letter, I was going to get a lawyer and sue you, but I decided to let it go and I do accept your offer of $5,500." Owner replied, "Well, you're too late. I've changed my mind. I don't think I owe you anything."

May Builder recover all or any part of $7,000 from Owner on a contractual or other basis? Discuss.

Answer A to Question 3

Applicable Law

This contract will be governed by general common law contract principles. Contracts for the sale of goods are governed by Article 2 of the Uniform Commercial Code. All other contracts are governed by general common law contract principles. The contract at issue, assuming there is one, involves personal services: building a fence. Although Builder may also supply materials such as the wood, that does not convert it into a contract for the sale of goods because the materials are collateral to the primary purpose of the agreement, which is to provide the service of fence building.

Formation

There was no enforceable contract between the parties, because they never had a meeting of the minds. For a contract to come into formation, there must be an offer, followed by a manifestation of assent to the offer. The parties must objectively agree to a bargained-for exchange.

Offer - May 1 Estimates

Builder (B) may argue that the estimates he provided on May 1, were offers. An offer is a communication of definite terms of the agreement which creates a power of acceptance in the offeree. The estimate for the redwood fence was not an offer, however, because B did not objectively manifest an intent to be bound if Owner (O) accepted right there. B said that he would have to verify that redwood was available. This suggests that he did not intend to be bound to the terms of these estimates until he verified the supply of the redwood. The estimate for the cedar fence was not similarly conditioned, and so it may be construed as an offer. Since he withheld the power to accept with regard to the redwood fence, that estimate was a mere invitation to make an offer.

Offer – May 2 Message

The May 2 voicemail message from B does qualify as an offer for the redwood fence. In the message he referred to their earlier discussion, and said that he would be willing to build the redwood fence for $7,000. Furthermore, he expressly granted O the power to accept by calling him back or that he would start the work in a few days if he did not hear from her. Since he created power of acceptance, this message was an offer to build the redwood fence for $7,000.

Offers have no effect, however, unless actually communicated. B reasonably expected that his message would be heard by O since her message said that she would be checking her messages daily. Owner did in fact hear the message. Once she heard the message, the offer was effective.

Acceptance by Silence

The general rule is that the offeree must objectively manifest assent to the offer to be bound. As a corollary, silence on the part of the offeree is not generally an objective

manifestation of assent. There are exceptions to this general rule where the parties have a prior history of dealing on such a basis. There is no indication that B and O have any such history. Although B attempted to create a power of acceptance by O's silence, she will not be bound by silence unless it is objectively assent.

B would argue that under the circumstances, O's silence should be construed as assent. O had already told him that she needed the fence to be completed by June 1. She had not informed him that the charity event scheduled for June 1 had been cancelled. B was under the impression that O need[ed] the fence done on time. Furthermore, her message said that she would be checking her messages daily, but would return calls as soon as she could. Given this, B was reasonable in believing that she heard the message but was too busy to respond. Since he told her he would start in a few days unless he heard back from her, it may have been objectively reasonable to believe that her silence meant that she wanted him to start but was too busy to respond.

On the other hand, O would argue that it would be unfair to hold her to an agreement that she had not assented to. After all, at the time, there were two outstanding offers: one for the cedar fence, and another for the redwood fence. Moreover, on their last communication, O had told B that she liked the idea of a redwood fence, but wanted to think about it before making a decision. Given that she could have decided on either, it was not objectively reasonable to interpret her silence as assent to the building of the redwood fence. O has the better argument here, particularly because courts are loathe to enforce an agreement where one party has not affirmatively manifested assent. Thus, O is not bound to the contract by her silence.

Consideration

There are no issues of consideration here. For a contract to be binding, there must be a bargained-for exchange whereby each party incurs some legal detriment. In this case, B would be obligated to build a fence, and O would be obligated to pay.

Remedies

Compensatory Damages

If there is no enforceable contract then B may not recover the $7,000 from Owner. If there is a contract, however, then B would be entitled to recover the entire $7,000. In California, the measure of compensatory damages is the expectancy interest. In other words, the law seeks to place the parties in the monetary position they would have been in had the contract been fully performed by both parties. Here, B fully performed by obtaining the materials and building the fence. When O refused to pay, she was in breach of her obligation to pay. Had the contract been fully performed, B would have expected to be paid the contract price of $7,000. Thus, if there is an enforceable contract, B would be entitled to $7,000.

Quasi-Contract

If there was no enforceable contract, B may still be able to obtain some of the money under the theory of quasi-contract. A quasi-contract is an equitable doctrine used to

prevent the unjust enrichment of one party. A quasi-contract arises where one party confers a benefit upon the other with the reasonable expectation that they will receive payment for the benefit. Unlike contract damages, however, the measure of damages under quasi-contract are restitution, or the prevention of unjust enrichment. In other words, the law will require O to pay B for the reasonable value of the services to prevent her unjust enrichment.

In this case, a quasi-contract likely arose. B certainly conferred a benefit on O. She has a brand new redwood fence. The issue is whether it was reasonable for B to expect that he would be compensated for his services. As discussed above, it is a close call as to whether B was reasonable in interpreting O's silence as consent. While it was probably not sufficient to bind O to the contract terms, it may have been sufficient under the circumstances to create a reasonable expectation in B that he would be compensated for his services.

If B prevails on a quasi-contract theory, he would at a minimum be entitled to recover the value of the materials, or $4,500. If the new fence has increased the value of O's property, he may also be entitled to recover that increased value because to allow O to benefit from the increased value to her property would also unjustly enrich her. If this measure is applied, however, it would be limited to a maximum of $7,000 representing the effective contract price. Furthermore, O may oppose this measure of damages as being too speculative.

Accord and Satisfaction

O will be required to pay B $5,500 on the accord and satisfaction contract. When O returned and discovered the fence, she sent B a letter. In this letter, she agreed that B did a "great job" but asserted that she had never agreed to the contract. O then offered that in order to "avoid a dispute" she would "split the difference" and pay B $5,500. This may be interpreted as an offer of accord. The offer was effective on May 26, when B received it.

There is sufficient consideration to bind the parties to this agreement because O has agreed to pay $5,500 in exchange for B agreeing not to waive any claim to the original contract. As discussed, although her claim that she never agreed is stronger, B still had a viable contract claim against her. B reinforced his reasonable belief that he had a non-frivolous claim when he called her and told her that his first instinct was to get a lawyer and sue her. By forgoing his right to sue her on the contract theory, B has incurred a legal detriment sufficient for consideration.

O became bound to the offer when B called her and accepted it. In general, an offer may be revoked at any time by the offeror, but a revocation is not effective until communicated. Here, B called O and immediately accepted her offer of accord. Although O may have decided to revoke the offer before B called (which she suggests by saying "You're too late. I've changed my mind"), her subjective intent does not legally revoke the offer until she communicates the revocation to B. Here, since B

accepted before she could revoke, and there is sufficient consideration, O will be bound to the accord and satisfaction contract. B may recover $5,500 from her on that theory.

Answer B to Question 3

Builder v. Owner

Builder may wish to proceed on three theories: 1) that Owner is in breach of contract formed on May 2, and thus, he should recover the full contract price; 2) that Owner is in breach of contract formed on May 25; and 3) that Builder should be entitled to restitutionary remedies under an unjust enrichment or quasi-contract theory.

Controlling Law

The first issue is whether the agreement between Builder and Owner is controlled by the UCC or the common law of contracts. The agreement was for the construction of a fence. In general, constructions are contracts for the personal services of the builder, with the cost of materials being incidental to the contract. However, the contract also involves the sale of goods, since the fence was being built out of wood. The UCC controls contracts for the sale of goods, which are defined as movable, tangible personal property. Thus, whether the UCC or the common law controls the contract depends on which part of the contract was the most important part.

If the agreement were for a cedar fence, the labor was valued at $2,500 and material valued at $1,500. Thus, such a contract would be governed by the common law of contracts. If the agreement were for a redwood fence, the labor was again valued at $2,500 but instead the materials were valued at $4,500. This contract could be governed by the UCC, since the primary part of the contract was the sale of the redwood, with the labor constructing the fence being incidental to the sale of the expensive wood.

Here, Builder is asserting a contract for the construction of a redwood fence. This is a close issue, because while there is a disparity between the value of the labor and the goods, the entire purpose of the contract was not to buy and sell wood, but rather to construct a fence. A pile of redwood would not be of use to Owner. Rather, Owner contacted Builder for the purpose of the construction of a fence. Thus, the court could also hold that the contract should be controlled not by the UCC, but rather by the common law.

1. Contract Formation on May 2

K Formation

In order to form a valid contract, there must be 1) offer, 2) acceptance, and 3) consideration.

Offer

An offer is the manifestation of a present intent to contract, definitely communicated to the offeree, inviting acceptance. Whether a statement constitutes an offer will be judged by a reasonable person standard. If a reasonable person in the offeree's shoes would understand the commitment to be a contract, then the statement is an offer.

Builder may argue that he made an offer to build the redwood fence on May 1. However, this argument will likely fail because Builder stated on May 1 that he would have to verify that the redwood was available. Thus, Builder's equivocation regarding the availability of redwood made his statement too indefinite to be considered an offer. Builder may also argue that he made an offer to build a cedar fence, but his argument would also likely [fail] because he was simply responding to an inquiry by Owner for an estimate regarding the cost of completion.

Builder will also argue that his May 2 telephone message constituted an offer. Owner stated in her phone message that she would be checking her messages daily. His message stated a price term, was definitely communicated to Owner, and manifested a present intent to contract. Thus, Builder's May 2 message would very likely be considered an offer because, judged by a reasonable person standard, it was clear that he was inviting acceptance of his promise to build a fence for $7,000, and it was clearly directed at her based on their prior conversation.

Acceptance

Acceptance is words or conduct manifesting an assent to the terms of the offer. At common law, acceptance had to be a "mirror image" of the offer. Any deviation from the terms of the offer constituted a rejection of the offer, and instead formed a counteroffer. Under the UCC, acceptance may be made on different terms, and whether such terms become part of the contract depends on whether the parties are merchants.

Builder may argue that Owner accepted his offer on May 1. This argument will fail because, as noted above, Builder did not make an offer on that date. Thus, there could be no acceptance. Builder's better argument is that Owner accepted his May 2 offer by her silence.

Silence ordinarily does not manifest an assent to the terms of the offer. Silence can only indicate acceptance when the circumstances would clearly indicate to the offeror that his offer had been accepted. In this case, Builder will argue that he knew Owner was checking her phone messages daily. Thus, he would understand that Owner would receive his message if not on May 2, then certainly soon thereafter.

However, this argument should also fail because Builder himself requested that Owner "give him a call" soon, since redwood was in short supply and he wanted to get to work right away. Twelve days elapsed between May 2 and May 14, when Builder – who still had not heard from Owner – commenced building the fence. Based on their past conversations, Builder was aware that Owner wanted to think about building the fence before coming to a decision. Thus, it was unreasonable for Builder to assume that Owner's silence manifested an assent to his offer.

Moreover, Builder may argue that Owner had made time of the essence of the contract, since she stated in their May 1 conversation that she wanted the fence completed by June 1 in any event. Builder was concerned on May 14 that he would not be able to complete the fence by June 1 and therefore he commenced building in order to comply

with this condition set by Owner. This argument would also likely fail, because while a time of the essence clause makes late performance a material breach of contract, no contract had yet been formed between Owner and Builder. Thus, Builder cannot state that Owner's silence was acceptance even if time was of the essence.

Consideration

Consideration is the bargained-for exchange between the parties. Consideration is present any time promises or performances are exchanged. Any legal detriment or forbearance, as well as actual benefits and performance, can constitute consideration.

If there was a valid offer and acceptance on May 2, consideration would be present because Owner would have promised to pay $7,000 in exchange for Builder's promise to construct the fence. This would be a bargained-for exchange of promises, and thus consideration would be satisfied.

However, as noted above, Owner did not accept Builder's offer on May 2 through any action or through silence. Therefore, no valid contract could have been formed on May 2.

Unilateral v. Bilateral

A unilateral contract is one whose acceptance is expressly conditioned on performance. That is to say, the offer can only be accepted by the demanded performance. All other contracts are bilateral. Builder may attempt to argue that, on May 1, Owner made an offer to pay $7,000 if the fence were completed by June 1, and that a unilateral contract was formed by his full performance of building the fence. However, for the same reasons noted above, Owner did not make any offer on that date, and thus a unilateral contract argument will be rejected.

Statute of Frauds

Even assuming a contract was formed between Owner and Builder, Owner may attempt to assert a statute of frauds defense if the contract is governed by the UCC. Under the UCC, contracts for the sale of goods in excess of $500 must be in writing. If the court finds that the UCC governs this contract, it would be in violation of the Statute of Frauds because all communications made between the parties were oral. In order to satisfy the Statute of Frauds, there must be a writing evidencing the contract, signed by the party to be charged (unless the parties are merchants).

Builders may argue that the signed written estimates he sent to Owner should satisfy the statute of frauds. Under the UCC, a Merchant's Firm Offer will take a contract out of the statue of frauds, even if the party to be charged does not sign a writing evidencing the contract. The merchant's firm offer rule will apply if 1) the sender is a merchant, 2) the recipient has reason to know its contents, and 3) does not respond to the writing. Here, Builder is likely a merchant under the UCC's broad definition of a merchant, since he probably frequently deals in construction contracts. Owner received the estimates and knew their contents, since she expressed that she liked the idea of the redwood fence. However, Owner did respond to the estimate, indicating that she wanted time to

think about it. Thus, the merchant's firm offers rule here cannot apply. Any subsequent agreement must still be evidenced by a signed writing, which here is absent under these facts.

It should also be noted that if the contract is governed by the common law, there would be no Statute of Frauds issue because the contract did not fall within the types of contract normally governed by the Statute.

Frustration of Purpose

Additionally, assuming a contract was formed, Owner may attempt to assert a defense based on frustration of purpose since the whole purpose for which she wanted to build the fence – the charity event in her backyard – was cancelled. However, this argument would fail because the purpose of the contract was not to perform a charity event, but rather to build a fence, which was still possible even after the event had been cancelled.

Conclusion

Thus, on May 2, no contract was formed between Owner and Builder. As such, Owner is not in breach of contract for refusing to pay $7,000 and Builder has no contract remedy to recover any part of that money.

2. Formation of Contract on May 25

Builder may alternatively argue that a new contract was formed on May 25, when Owner returned home. Builder will assert that Owner's letter to him was an offer to pay $5,500 in exchange for the fence, which Builder accepted by his phone call on May 26. Again, every contract must contain both offer, acceptance, and consideration. Offer and acceptance are likely satisfied, but Owner will assert that no consideration was present.

Owner will argue that the consideration for her promise to pay $5,500 was Builder's completion of the fence. That would be past consideration, which cannot constitute a bargained-for exchange, since there was no promise to support Builder's performance at the time he rendered it. In other words, Owner will argue that she did not bargain for the fence, and thus there was no return promise or performance in exchange for her offer to pay Builder $5,500. Owner will very likely prevail on this point, and therefore since no consideration was present, a new contract to build the fence could not have been formed on May 25.

Good Faith Settlement of a Dispute

Alternatively, Builder may argue that Owner's promise to pay $5,500 constituted a good faith settlement of a dispute, which Builder then accepted. Here, the exchange was not money for the construction of the fence, but rather money in exchange for Builder's release of any legal claim he might assert against Owner.

In this case, Owner stated that she never agreed to the fence, and that Builder should have waited until she returned – but that to avoid a dispute, she will offer Builder $5,500. Builder stated that he was going to get a lawyer and sue Owner, but agreed to accept the money instead. Thus, there is a good faith dispute between these parties as

to the existence of the debt and as to the amount owed. Owner made an offer via her letter on May 25, and Builder accepted it on May 26. Consideration is present because there was a bargained-for exchange: in this case, Owner promised to pay money in exchange for Builder's legal forbearance (doing something he had a right to do, in this case, sue Owner).

Accord and Satisfaction

An accord is an agreement which rests on top of an underlying contract. An accord occurs when one party agrees to accept a different performance in lieu of the performance promised in the underlying agreement. An accord suspends performance of the underlying agreement. Satisfaction is the performance of the accord agreement. When a satisfaction occurs, the accord merges with the underlying agreement, which is extinguished.

Here, Builder will argue that the settlement of their dispute constituted an accord but not a satisfaction. As analyzed above, the good faith dispute contained an offer, acceptance and consideration. Thus, there is an overlying agreement resting on top of an underlying agreement. However, the accord was never performed. Owner did not pay the $5,500 in lieu of her original performance. Thus, Builder could seek damages for breach of the accord agreement – but not damages for breach of the underlying contract since, as noted above, no actual contract was formed to build the fence. Builder's damages would be measured by the loss he incurred as a result of the breach of the accord agreement, which here would be $5,500.

Revocation of Offer

Owner will argue that she revoked the offer on May 26 when she told Builder that she had changed her mind. In a bilateral contract, an offer may be revoked at any time before acceptance is made. Once acceptance is given, the contract is formed and an offer cannot be revoked. Here, Owner's argument will fail because Builder accepted the offer by calling her immediately. Thus, Owner could not revoke her offer.

Therefore, if Builder proceeds on this theory, he could likely recover the $5,500.

3. Quasi-K Remedies

If Builder decides that he cannot succeed on a contract theory, he may proceed on a quasi-contract theory, which will avoid unjust enrichment on the part of the defendant. In this case, Owner has a new redwood fence in her backyard. Builder will argue that if she were permitted to keep it without paying any sort of damages to Builder, she would be unjustly enriched.

Builder could likely prevail on this argument. Owner would argue that she should not have to pay any amount of damages because she did not actually request that Builder construct the fence. However, Owner heard Builder's message on May 2 and decided not to reply, because the event had been cancelled. Owner knew that she would not be returning until May 25, and that she had told Builder she wanted the fence built by June 1. Additionally, Builder had asked her to call him back as soon as possible, because

the redwood was in short supply. Thus, based on Builder's message on May 2, Owner should have at least communicated to Builder that she was no longer interested in having the fence constructed.

Fairness would therefore require that Owner make restitution for the benefit conferred upon her by Builder. Builder will be able to recover the fair market value of the work he did in order to build the fence. It should be noted that restitutionary remedies can sometimes even exceed the contract price, if that is the fair market value of services rendered. Thus, Owner can recover all, part, or more of the $7,000 depending on the fair market value of the benefit conferred upon Owner.

THURSDAY MORNING
JULY 31, 2008

California
Bar
Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2009
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2009 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 5

Developer had an option to purchase a five-acre parcel named The Highlands in City from Owner, and was planning to build a residential development there. Developer could not proceed with the project until City approved the extension of utilities to The Highlands parcel. In order to encourage development, City had a well-known and long-standing policy of reimbursing developers for the cost of installing utilities in new areas.

Developer signed a contract with Builder for the construction of ten single-family homes on The Highlands parcel. The contract provided in section 14(d), "All obligations under this agreement are conditioned on approval by City of all necessary utility extensions." During precontract negotiations, Developer specifically informed Builder that he could not proceed with the project unless City followed its usual policy of reimbursing the developer for the installation of utilities, and Builder acknowledged that he understood such a condition to be implicit in section 14(d). The contract also provided, "This written contract is a complete and final statement of the agreement between the parties hereto."

In a change of policy, City approved "necessary utility extensions to The Highlands parcel," but only on the condition that Developer bear the entire cost, which was substantial, without reimbursement by City. Because this additional cost made the project unprofitable, Developer abandoned plans for the development and did not exercise his option to purchase The Highlands parcel from Owner.

Builder, claiming breach of contract, sued Developer for the $700,000 profit he would have made on the project. In the meantime, Architect purchased The Highlands parcel from Owner and contracted with Builder to construct a business park there. Builder's expected profit under this new contract with Architect is $500,000.

What arguments can Developer make, and what is the likely outcome, on each of the following points?

1. Developer did not breach the contract with Builder.
2. Developer's performance was excused.
3. In any event, Builder did not suffer $700,000 in damages.

Discuss.

Answer A to Question 5

This contract is for construction services. As a result, it will be governed by the common law.

Valid Contract

In order to proceed, Builder must establish a valid contract, which requires (1) offer, (2) acceptance, and (3) consideration. The facts state that Builder and Developer reached an agreement and signed a contract. Therefore, there is likely the required offer, acceptance and consideration. The contract does not fall under the Statute of Frauds because it is not: in consideration of marriage, suretyship, contract for real property, sale of goods $500 or more, or unable to be performed within one year. In any event, the contract was signed, which indicates that it would satisfy the Statute of Frauds anyway. There is a valid enforceable contract.

1. **Developer did not breach**

A breach of contract occurs when a party to the contract does not perform after performance comes due. Therefore, if performance has not come due, there can not be a breach. Likewise, if the party substantially performs his obligations under the contract, there is no breach. Performance only comes due after the occurrence of all conditions precedent to performance. This contract contained such a condition. The contract contained the condition that obligations were only due once the City approved "necessary utility extensions." Therefore, unless the City approved these extensions, performance is not due.

Builder will argue that the City did approve the extensions, and that performance is due. The fact that the City approved the extensions is true; however, it still may not give rise to performance. Developer will rebut this argument with a claim that Developer and Builder agreed that this condition impliedly included the condition that City reimburse Developer for the cost of the extensions.

Merger and Parol Evidence: A merger clause in a contract indicates that the contract is a final integration of the agreement between the parties. This clause causes the Parol Evidence rule to apply. This rule states that no prior or contemporaneous oral statements are admissible that contradict the final integration between the parties. Builder will argue that the statements by Developer that the condition means that the City must approve and reimburse for the extensions is barred as parol evidence. However, the parol evidence rule does not outlaw all statements. Developer can still admit statements that prove the existence of a condition precedent to the formation of the contract or statements that explain the meaning of a clause in the contract. Both of these rules apply here.

The statements in question represent the agreement by Developer and Builder that the condition in 14(d) means that the agreement is conditioned on reimbursement by the City for the cost of the extensions. This means that there was an additional condition precedent: the contract is conditioned upon reimbursement by the City. This also means that statements that Developer seeks to admit will explain the language of 14(d). Therefore, the statements Developer seeks to admit will [be] admissible by the Parol Evidence Rule.

Because Developer can admit the statement pertaining to reimbursement, he will be able to establish that performance is not due. As a result, his failure to perform is not a breach.

2. **Performance was excused**

Performance can be excused by the occurrence of a number of events. These include frustration of purpose, impracticability, impossibility, and failure of a condition precedent. Failure of a condition precedent is discussed above.

Frustration of Purpose

Frustration of purpose excuses performance under a contract when performance is still technically possible, but the purpose of the contract no longer exists. In order to prevail, the defendant must show (1) the purpose of the contract was known by the plaintiff at the time of contracting, (2) circumstances that are out of the defendant's control changed, and (3) the change of circumstances caused the original purpose to be unavailable.

Here, the purpose of the contract was to make money on the development of a residential community. Builder, who knew that he was expected to build single family homes, was aware of the purpose of the contract. Circumstances did change pertaining to the development. The City had a long-standing policy of reimbursing the cost of extensions to new areas. After this contract was entered into, the City changed this policy. Therefore, the second element is met. Lastly, Developer must show that the change in circumstances made the purpose of the contract unavailable. City's change in policy made Developer bear the cost of the extensions. However, Developer could still build the extensions, and therefore, build the residential development. It would cost Developer more money; however, the purpose of the contract was still available. Therefore, the purpose of the contract was not frustrated. It may have been less appealing to Developer, but it was not frustrated.

Impracticability

Performance of a contractual obligation is impracticable when (1) circumstances affecting the contract have changed, (2) the change is not due to any act by the defendant, and (3) the change of circumstances causes undue hardship on the defendant. Here, as discussed above, circumstances did change: City changed a long-standing policy. This was out of Developer's control. Therefore, Developer need only demonstrate undue hardship to prevail with this claim. The change of the policy meant that Developer would bear the burden of financing the extensions required to build the community. This cost was "substantial," and

made the project unprofitable for Developer. Making a project unprofitable is probably inadequate for a court to find impracticability. Developer would have to establish more than simple unprofitability. If Developer could show that the cost is so burdensome that he would be forced out of business, that would establish impracticability. However, simply unprofitability is probably inadequate. Therefore, this element is not met. The court will probably not find that performance was excused by impracticability.

Impossibility

Impossibility occurs when (1) circumstances affecting the contract have changed, (2) the change is not due to any act by the defendant, and (3) the change of circumstances causes performance to be impossible for the defendant. As discussed above, the change in circumstances makes performance unappealing, but not impossible. Impossibility will not excuse performance.

Developer should be able to successfully argue that performance should be excused by failure of a condition precedent.

3. **Builder did not suffer $700,000 in damages**

A plaintiff in breach of contract claim can pursue damages that put the plaintiff in the position he would have been in had the defendant fully performed. This is generally established by expectation damages, incidental damages, and consequential damages, minus any mitigation available to the plaintiff. These damages are not available to the plaintiff if there is a valid liquidated damages clause. This contract fid not have a liquidated damages clause, so that will not apply. Punitive damages are not available in a contract cause of action.

Expectation Damages

For a seller or provider of services, these damages typically equal the amount of profit the plaintiff expected to make. Here, that is clearly established as $700,000.

Incidental Damages

These damages are the damages that the plaintiff incurred as incidental to the defendant's breach. They typically include the cost of finding a replacement buyer and administrative costs incurred because of the breach. Here, the facts do not indicate any incidental damages. However, if Builder incurred any costs in contracting with Architect to construct a business park, such as lawyer's fees, etc., these would be covered as incidental damages.

Consequential damages

These are the damages that occurred as a foreseeable result of the breach. In order to recover these damages, the plaintiff must establish that the parties contemplated these damages at the time the contract was formed. Builder does not appear to have incurred any consequential damages.

Mitigation

Generally, a plaintiff is required to mitigate damages. He is not allowed to sit by after a breach and allow himself to incur more damage than is necessary. Here, the original contract required Builder to build residences for Developer on The Highlands. After the alleged breach by Developer, Architect hired Builder to build a business park on the Highlands. This contract would not be available to Builder had he performed for Developer. If it would have been possible for Builder to perform both contracts, then this would not be mitigation. However, that would be impossible. Therefore, this is proper mitigation of damages. The other issue involved with mitigation is time. If the work for Developer would have taken 9 months, and the work for Architect takes 12 months, Builder could argue that the entire $500,000 profit should not be considered for mitigation. However, no facts indicate the time required for either job, so the court will assume equal performance for both contracts.

Builder's damages for the alleged breach are $700,000. However, because Builder is required to mitigate his damages, the $500,000 from the contract with

Architect will be applied to the damages. Therefore, Builder's total damages due to the alleged breach are $200,000.

Answer B to Question 5

1. Developer did not breach the contract with Builder.

Parol Evidence Rule

Although Developer will assert that he was not obligated to perform under the contract with Builder unless the City followed its usual policy of reimbursing for installation costs, Builder will argue that this condition precedent is not part of the agreement between the parties and therefore Developer has breached the contract by failing to perform. Builder's argument will rest on the parol evidence rule.

The parol evidence rule provides that the terms of a written agreement cannot be varied by prior or contemporaneous oral terms where the writing represents the party's final agreement. Consistent additional terms may supplement the writing if the contract is not complete, and extrinsic evidence may also be introduced to interpret ambiguous terms as long as the terms are reasonably susceptible to the proffered meaning.

Here, the agreement between Developer and Builder has been reduced to writing. Under the Williston rule, a court will look at the contract and determine whether the parties likely intended it to be the final and/or complete expression of the agreement given the detailed or specific nature of the terms. In this case, the contract provides for the construction of 10 single family homes and has several sections (including section 14(d)) describing aspects of the venture. Importantly, the writing contains a merger clause which states that "This written contract is a complete and final agreement between the parties hereto." Courts typically find that the parol evidence bar to extrinsic evidence presumptively applies where the writing contains a merger clause.

Accordingly, a court will likely find that the parol evidence rule applies. Developer's best arguments, therefore, are exceptions to the parol evidence rule. These exceptions include where extrinsic evidence show (1) fraud, (2) subsequent modification of the contract, (3) absence of consideration and other formation defects, (4) to interpret ambiguities, (5) to show a collateral agreement, (6) to show the existence of a condition precedent.

Exception to Parol Evidence Rule – Conditions Precedent

One exception to the parol evidence rule's bar on extrinsic evidence that may be helpful to Developer is the exception permitting a showing of conditions precedent. A condition precedent modifies a promise to perform; the promise to perform will not mature until the condition is satisfied, and accordingly a party cannot be in breach of said promise unless the condition precedent occurs.

Developer can argue that the City's following of its ordinary policy of reimbursing utility installation was a condition precedent to the obligations under the contract, and therefore the parol evidence rule does not bar him from presenting evidence on the existence of this condition.

However, Builder will have a good argument in response; specifically, Builder will point to section 14(d), which provides "All obligations under this agreement are conditioned on approval by City of all necessary extensions." Section 14(d) clearly is a condition precedent to Developer's performance, but it is expressly provided for in the written contract. Under the Williston Rule of contract interpretation, Builder will argue that since the contract included written terms covering conditions precedent, it is reasonable to presume that the parties would include all such agreed upon conditions precedent in the writing.

Accordingly, in light of these arguments, the "condition precedent" exception to the parol evidence rule is probably not Developer's best argument, although a

court that mechanically applies the exceptions to the parol evidence rule could be sympathetic. Developer should raise it and hope for the best.

Exception to Parol Evidence Rule – Explaining Ambiguity

Another exception to the parol evidence rule is extrinsic evidence admitted to explain an ambiguity in the written contract. Some jurisdictions, such as California, permit a party to also introduce extrinsic evidence to first demonstrate the existence of the ambiguity. This exception will be helpful to Developer in light of the difficulties presented by section 14(d) above.

Under this exception, Developer will argue that the term "conditioned on approval by City of all necessary utility extensions" implicitly included the City's willingness to pay for utility installation. To support his argument, Developer will utilize the general commercial construction customs and understandings in the community, which may likely include the fact that any reasonable builder or developer operating in City would interpret "approval by the city of necessary utility extensions" to include, as a matter of course, funding to install the utility extensions. Developer will particularly be likely to avail this exception to the parol evidence rule in jurisdictions like California, since this ambiguity is not clear from the face of the contract.

Builder, however, will argue that section 14(d) is not reasonably susceptible to the meaning proffered by Developer. Availing the Williston Rule, Builder will likely harp on the fact that the sophisticated, commercial parties would insert such a material condition if it was in fact part of the agreement, especially where the writing contains a merger clause.

Ultimately, Developer's arguments supporting the introduction of the prior negotiations will likely be successful; courts are loath to ignore clear, understood commercial patterns in an industry in contracts between sophisticated parties. Merger clauses are typically inadequate in such circumstances unless they

explicitly except course of dealing, course of performance, usage of trade from being permissible interpretive tools for the contract.

Exception to Parol Evidence Rule – Collateral Agreement

Developer may also argue that he did not breach the contract because it was controlled by a separate, collateral agreement. However, this argument will likely fail. Although collateral agreements are exceptions to the parol evidence rule, a court must conclude that the parties would reasonably have made the proffered collateral agreement separate from the primary contract.

Here, interpreting the condition of receiving installation funding from the City as a collateral agreement would be unreasonable. First, it is intimately related with the primary contract, and it is unlikely that Builder and Developer would fashion it separately from the main agreement. Second, it is unclear whether the proffered "collateral agreement" could even be an enforceable contract, as there would not be any consideration—i.e., bargained-for-legal detriment—flowing to support the agreement.

Accordingly, although the "collateral agreement" arguments is available to Developer to argue that the failure of a condition precedent did not mature his obligation to perform, it is one of his weakest arguments.

Mistake Due to Ambiguity

Mistake due to ambiguity is a contract formation defect. Developer could foreseeably argue that no contract was formed because of his mistake as to the meaning of a material term in the contract. Mistake due to ambiguity usually does not obtain relief for a party (typically the form of rescission or reformation) unless the other party was aware of the ambiguity.

Here, under these facts, Developer might argue that Builder was aware that section 14(d) was ambiguous and would not necessarily be interpreted to have

the meaning that Developer intended. Further, Developer would argue that the term was material to the contract, as the failure of the city to pay for the utility installation would drastically alter the expected benefits he would receive. If Developer can demonstrate these facts persuasively, he may be able to argue that there was either no "meeting of the minds" or that the contract should be reformed to match the "innocent party's" interpretation of the contract. Under either scenario, Developer would not be in breach.

Unconscionability

Unconscionability is another contract formation defect, which is determined at the time of formation. There are two types, procedural and substantive. No facts suggest that the terms of the contract were so prolix as to amount to procedural unconscionability, but Developer may argue that the absence of a condition requiring reimbursement from the City makes the bargain so one-sided as to "shock the conscience" of the court.

Such an argument will likely not succeed in this case; the parties are sophisticated, commercial parties who are able to fend for themselves. Developer's unfortunate circumstances are not of the type that would raise to unconscionability.

2. **Developer's performance was excused.**

Impossibility

Developer may try to argue that his performance under the contract, even if matured because the court does not recognize his proffered condition precedent, was excused under the doctrine of impossibility.

Impossibility excuses performance of the contract where performance would be objectively impossible, i.e., not only can the party asserting the defense not perform, but no one could perform the contract under the unforeseeable circumstances that have arisen.

Here, impossibility will not be a helpful argument because not only could other developers potentially execute the agreement Developer has with Builder, Developer himself could do so, but simply at a large loss because he would have to pay for the utility installations.

According, the Developer's performance is unlikely to be excused by impossibility.

Nonetheless, Developer could successfully argue impossibility in that the subject matter of the contract can no longer be obtained by him because it was sold by Owner to Architect.

Impracticability

Developer may be better suited to prevail under the argument that performance was excused under the doctrine of impracticability. Impracticability is a subjective test that examines whether performance would be commercially unreasonable due to subsequent circumstances unforeseeable at the time of contract formation.

Here, Developer will argue that City's long-standing policy of paying for utility installation was a reasonable assumption by both parties. Further, the policy had been so ingrained in the community and understood by commercial developers and builders that a change in the policy was practically beyond the realm of possibility. Builder will respond that Developer's reliance on the permanence of the policy was misplaced, and he assumed the risk that the City could easily change its discretionary policy if economic requirements warranted. Ultimately, if Developer is able to persuasively argue his position, he may ultimately prevail on his argument of impracticability.

Frustration of Purpose

Developer may try to argue that the failure of the City to reimburse for construction costs constituted frustration of purpose. Frustration of purpose arises where circumstances unforeseeable at the time of contract formation arise that destroy the purpose of the contract, and that this purpose was known by both parties involved.

Here, Developer is unlikely to prevail on his frustration of purpose argument. Although, both Developer and Builder were aware of the purpose of the contract, the purpose of the contract—namely to construct ten single-family homes on the Highlands—was not "destroyed" by the City's decision not to reimburse for utility installation. Accordingly, whether or not the City's decision was foreseeable, it would not constitute frustration of purpose. Accordingly, this argument by Developer would fail.

3. **Builder did not suffer $700,000 in damages.**

The purpose of compensatory damages is to place a non-breaching party in as good a condition as he would have been had the breach not occurred. The requisite showing in order to obtain compensatory damages is (1) breach, (2) causation, (3) foreseeability, (4) certainty, and (5) unavoidability.

Applicability of "Lost Volume Seller" Rule

Builder may try to argue that he is a "lost volume seller," and accordingly the fact that he was hired by Architect should not reduce his damages in the slightest because, had the contract with Developer been performed, he would have made both $700,000 and $500,000 in profits.

Builder's argument is unlikely to succeed. Lost volume sellers must, in effect, have "unlimited supply" of whatever good or service they provide. Builder is not properly viewed as a car or TV salesman; he builds structures, and therefore his

services are in limited supply. Accordingly, a lost-volume seller type argument by Builder will be unavailing.

Certainty Requirement

In order to recover compensatory damages, such damages must be relatively certain. If the contract provided that Builder's payment was in any way contingent on the ultimate sale of the homes, his damage may well be too uncertain to permit recovery.

Unavoidability / Mitigation Requirement

A non-breaching party is required to mitigate his damages. Although failure to mitigate will not eliminate one's damages, it can reduce them to the amount that would have been incurred had proper mitigation been pursued.

Here, Builder did not fail to mitigate his damages; rather, he sought employment by Architect to construct a business park for $500, 000. By mitigating, Builder was only damaged by the alleged breach to the extent of $200,000, because only $200,000 is needed for Builder to obtain the "benefit of his bargain" with Developer.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2010
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2010 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 1

On April 1, Pat, a computer software consultant, entered into a written services contract with Danco, Inc. to write four computer programs for use by Danco in controlling its automated manufacturing machines. The contract provided that Danco would pay Pat $25,000 on completion of the work and that the programs were to be delivered to Danco no later than May 1. The contract stated, "This is the complete and entire contract between the parties, and no modification of this contract shall be valid unless it is in writing and signed by both parties."

Pat entered into the contract in anticipation that it would lead to significant work from Danco in the future, and he consequently turned away opportunities to take on more lucrative work.

On April 15, Pat called Chelsea, the President of Danco, who had executed the contract on behalf of Danco, and told her, "I'm having some problems with program number 3, and I won't have it ready to deliver to you until at least May 8 – maybe closer to May 15. Also, I have some doubt about whether I can even write program number 4 at all because your computer hardware is nearly obsolete. But I'll get programs numbers 1 and 2 to you by May 1."

Chelsea said in response, "I'm sorry to hear that. We really need all four programs. If you can't deliver until May 15, I guess I'll have to live with that."

On April 28, Pat called Chelsea and said, "I've worked out the problems with programs numbers 3 and 4. I'll deliver them to you on May 12."

Chelsea responded, "I've been meaning to call you. I'm going to start looking around for another consultant to do the work because I consider what you said in our April 15 telephone discussion to be a repudiation of our contract. My lawyer tells me that, because of the language in the contract, nothing I said to you in that conversation matters. You repudiated the contract, so we don't owe you anything."

Can Pat prevail in a suit against Danco for breach of contract, and, if so, what is the measure of his damages? Discuss.

Answer A to Question 1

The issue is whether Pat has a valid contract with Danco and whether Danco has breached such contract, and what damages Pat is entitled to as a result.

Service Contract

Contracts for services are governed by the common law. Although a computer program could be considered a good, the UCC only applies to tangible, movable goods. Therefore, the UCC does not apply and the contract, if any, is governed by the common law.

Elements of a Contract

In order to have a valid contract, there must be mutual consent and consideration. There was mutual consent here, because Pat offered to write four computer programs for use by Danco, and Danco accepted the terms of Pat's offer in a written agreement between the two. The consideration requirement is satisfied because there was a bargained-for exchange: four computer programs in exchange for $25,000. Thus, there was an offer, acceptance and valid consideration; a valid contract exists between Pat and Danco.

Statute of Frauds does not apply

The Statute of Frauds requires that any contract for goods greater than $500, or services which may take longer than one year to be performed, must be in writing, and signed by the party to be charged. Here, the contract is for services, and was to only take one month to perform. Thus, the Statute of Frauds does not apply. Although the agreement is in writing this was not necessary.

Time of the essence

The contract stated that the work was to be completed and delivered to Danco "no later than May 1." Thus, if this is considered to mean that time is of the essence, then performance after such time could be considered a material breach of the contract. However, contracts are generally given a reasonable time for performance under the

common law, and if time was not of the essence then Pat has a reasonable time to finish his work. In any case, this condition was waived as discussed below.

April 15th call form Pat

Danco claims that Pat anticipatorily repudiated the contract when he called on the 15th of April saying, "I won't have it ready to deliver to you until at least May 8th—maybe closer to May 15." A contract is anticipatorily repudiated when a party unequivocally manifests an intention to not perform the agreement by words or conduct. Here, although the contract specified performance by the 1st of May, Pat indicated that he would perform at least half of the services by that time, and indicated he would complete the other two within a couple weeks. Thus, he did not unequivocally manifest an intention to not perform the contract, but merely requested an extension of time, or modification of the contract. Thus, Danco could not treat the contract as breached but could ask for assurances that the contract would be performed.

Attempted Modification of the Contract

Chelsea, who has authority to bind Danco because of her implied apparent authority as President, manifested assent to the modification when she said "I guess I'll have to live with that." A modification under the common law, however, requires additional consideration to be valid. Here, there was no change in the form of consideration, or any additional consideration by Pat to be given extra time; therefore, the modification attempt was invalid. The oral nature of the modification was not a problem, because this is a services contract and the modification did not bring the services to beyond one year, as required for the Statute of Frauds to apply.

Waiver of condition to perform on May 1st

Danco may claim that its duty to pay Pat was expressly conditioned on performance by May 1st; therefore no payment is due. As a condition precedent, no duty to pay would arise until it is met. However, Pat will counter that Chelsea, as President, waived the condition by saying "I guess I'll have to live with that." Even if a condition is not met, it may be waived by the party benefited by the condition. Thus, Danco must pay Pat as promised under the agreement because the condition was orally waived by the

president of the company. Since the Statute of Frauds does not apply, this oral waiver was valid.

April 24th call: Anticipatory Repudiation

On April 24th, when Pat made assurances that the contract would be performed by the 12th of May, Chelsea responded by saying that she was "going to start looking around for another consultant" and that the company did not owe Pat anything. Pat may treat this as an anticipatory repudiation of the contract, because it manifests an unequivocal intention not to perform. He may thus, at this point, stop performance and sue for breach of contract. In the alternative, he may wait to sue for breach of contract on the date when performance is due, or ignore the repudiation and encourage Danco to pay for the programs.

Integration Clause and Parol Evidence Rule

Danco claims that no evidence of oral agreements will be allowed because the writing was intended to be a final expression of the agreement, and therefore fully integrated. The parol evidence rule, however, only bars oral evidence prior to or during negotiations leading to the writing. Any subsequent oral modifications or agreements are admissible; thus, Pat may validly admit evidence of waiver of condition and anticipatory repudiation in the conversations on May 1st and April 24th.

Expectation damages

Because Pat had a valid contract, which Danco breached by anticipatory repudiation, he is entitled to compensatory damages to put him in the position had this wrong and resulting damage not occurred. Such damages must be caused by the breach, [be] foreseeable, and certain. Pat must also have mitigated any unnecessary damages. Here, the damages are certain ($25K) and foreseeable as a result of Danco's breach, because this is what the parties expressly agreed to as payment.

Consequential damages

Pat will also claim right to consequential damages, because he turned away opportunities to take on more lucrative work in anticipation that the job would lead to future work. These damages lack certainty, however, and were not foreseeable at the time of contract formation. Danco was not aware of Pat's other opportunities to take on more lucrative work. Therefore, they will not be awarded.

Restitutionary Damages

In the alternative, Pat may seek return of any unjust enrichment of Danco should the court find fault with the contract, or that Pat breached. He would be entitled to the amount that Danco unfairly benefited: if Danco was given the two programs in the case at hand, Pat may seek recovery for the value of the benefit to Danco.

Answer B to Question 1

Can Pat Prevail Against Danco for Breach of K?

Applicable Law

Pat has entered into a services contract ("K") to perform work for Danco between April 1 and May 1 or, alternatively, May 15. Thus, this K will be governed by common law rules.

Formation

For Pat to win on a breach of K claim, he must first show there was a valid contract. A valid contract requires an offer, acceptance and consideration. In this case, the first line of the facts state that Pat entered into a written services K with Danco, to write software programs in exchange for $25,000. The facts imply a valid offer was made and properly accepted. Both parties have provided consideration, a bargained-for legal detriment, when Pat agreed to perform services he was not legally required to do and Danco agreed to pay Pat without having a legal obligation to do so. Thus, a contract was likely made.

Terms

A contract at common law must also state material terms with definiteness. In an employment services contract, the primary term needed is duration. Here, the K calls for services to be provided for one month and then the K will end. Thus, duration has been provided and the contract will not fail for lack of material terms.

Statute of Frauds

This is a services K which will end, by its terms, [and/or] can be finished within one year of its inception. Thus, the Statute of Frauds will not apply. The Statute of Frauds, if applicable, requires a K to be in writing and its subsequent modifications to be in writing as well, pursuant of the Equal Dignitaries doctrine.

Modification Clause (generally not valid in CL outside SOF)

The facts state that the written K has a clause in it, however, stating that the initial written services contract signed by Pat and executed by Danco's President, Chelsea, "is the complete and entire contract between the parties and no modification of this contract shall be valid unless written and signed by both parties." Generally, at common law, clauses which seek to invalidate modifications that are not in writing are themselves not valid. Thus, though the contract states as much, a court will still allow evidence of oral modifications, particularly in light of the Parol Evidence Rule. This is important because the facts state that the contract was later sought to be modified orally by Pat, which I will discuss two sections below.

Parol Evidence

Parol Evidence Rule ("PER") states that generally, where a written contract is intended to be a complete and final integration of a K, that no evidence may be admitted outside of the four corners of the contract to establish whether a breach has occurred. However, an exception exists for subsequent modifications. In this case, as noted above, the K states that it is intended to be the "complete and entire contract," language sufficiently similar to that required under the PER. However, to the extent that the contract was later modified, the court will allow at common law for evidence, whether oral or written, to be admitted to establish any subsequent modification agreed to by the parties.

Modification without Consideration

Pat, after signing the K, called Danco and told them that he wasn't sure he could complete the K on time and would need 8 to 15 extra days to finish the project, as well has voicing concerns of his ability to finish it at all. Chelsea replied, "if you can't deliver until May 15, I guess I'll have to live with that."

Danco will want to argue that Pat's failure to provide for the four programs he agreed to write by the stated date of May 1 will constitute a material breach, thus entitling them to avoid their obligation to perform on the contract. However, Pat will want to introduce this evidence as showing a modification to the original agreement. While the PER will

not bar this evidence, the modification Pat seeks to establish occurred without any subsequent consideration. Generally, at common law, consideration is required for a subsequent modification to be considered valid. However, courts have generally been willing to find that consideration when both parties limit their right to assert their rights and sue on the original contract. Here, Danco's President, likely authorized to negotiate and make contractual agreements on behalf of Danco, appears to have agreed to the modification by stating, "I guess I'll have to live with that." Thus, Pat will argue Danco agreed to limit its rights to sue based on the original May 1 deadline, constituting consideration. However, Chelsea did not explicitly agree. Danco would likely argue that she was simply stating that, at that time, she could not legally compel Pat to finish and was thus simply stating her acknowledgment that she would have to wait until May 8 or 15 for the programs, but not that she would be willing to ignore Pat's failure to abide by the K. Further, Pat does not appear to have limited his own consideration in this modification. He still appears to have the full right to demand $25,000. Thus, Danco will likely succeed in asserting that this modification, even if admissible, is not valid.

Waiver to Time is of the Essence Clause

Generally, a "time is of the essence" clause is a clause in a K that asserts a necessity for the contract to be finished, or one party to perform fully, by an established date. Here, Pat is faced with a deadline of May 1, though the contract does not explicitly state that time is of the essence, but merely provides for the deadline. If Danco wishes to assert that Pat's failure to finish by May 1 constitutes a material breach pursuant to the terms of the contract, Pat should then argue that Danco waived its right to that deadline and the time is of the essence clause when Chelsea said she would have to live with Pat's tardiness. Again, Danco will argue this does not constitute an explicit waiver. This is a close situation because of the vagueness of the statement, but a court will likely side with Pat that the deadline was waived by Chelsea, who as President of Danco is authorized to alter the K with Pat.

However, waiver usually occurs once a time is of the essence clause has passed. Thus, a court may deem the waiver argument is not as sufficient as an estoppel argument.

Estoppel

Even if Pat cannot assert a waiver claim, which usually occurs after a term has not been agreed to, Pat can assert an estoppel argument. Estoppel occurs when one party makes assurances that the other party can be reasonably, objectively expected to rely on, and the other party does so to their detriment. In this case, Chelsea's claims are vague and imply her acceptance of Pat's tardiness. A reasonable person, when told that the other person expecting earlier delivery, will "live with" later delivery would assume that statement to imply acceptance. Pat indeed relied on that assertion and continued to perform his services, which is to his detriment. If he were in material breach and were told so and that he would be sued in such a manner, he would not be required to continue to perform fully. Pat continued to work for 13 days after his April 15 discussion of his problems with Chelsea and announced he would finish the services he was expected to perform on May 12. Thus, Pat's estoppel claim should succeed, and the modification will thus be included in the K.

Anticipatory Repudiation

Danco will alternatively argue that Pat gave Danco an anticipatory repudiation when he announced he could not perform his services by May 1. When a party asserts it will not perform its contractual obligations prior to deadlines stated in a K, giving the other party his reasonable grounds to believe the K will not be performed, the party notified will have the right to cease its own performance and sue for breach of K unless it has already performed fully. Alternatively, the party has the right to seek assurances from the party concerned about its potential failure to perform before continuing on the contract. In this case, Danco has not yet paid Pat so it has not fully performed. Danco will assert that Pat's statements constitute an anticipatory repudiation because he not only told Danco he was worried about the deadline, but also that their hardware was so obsolete that he may not even be able to finish 50% of the contract at all. Pat will assert that Danco made assertions in response that it would live with Pat's tardiness. However, Danco will argue that it only discussed the tardiness and not the potential failure to provide two of the software programs at all. Danco has a strong argument. However, Pat was told Danco would live with his tardiness and Danco never requested any further assurances of Pat's work. In addition, Danco never discussed concerns

about Pat's inability to finish the 3rd and 4th software programs. Finally, Pat told Danco it would deliver programs 1 and 2 by May 1. Danco told Pat prior to that date, on April 28, that it would not accept his work and was going to look for an alternative software consultant because of Pat's April 15 phone call. Thus, they did not even wait until May 1 to determine if Pat could deliver. While Danco will argue that it was not required to wait because of Pat's anticipatory repudiation, without any discussion to Pat implying that they would not allow him to miss the May 1 deadline, a court will not accept Danco's argument of anticipatory repudiation.

In fact, because Danco announced it would not pay him for his services prior to even the May 1 deadline, Pat himself will use the anticipatory repudiation claim to be able to assert his right to sue on the contract prior to the modified deadline date of May 15 (or May 12, which he claimed would now be his end date). He will be able to sue prior to that date as he has not fully finished performance and they have anticipatorily repudiated.

Thus, Pat's claim of estoppel will hold on the modification during his April 15 phone call. Based on this modification, Pat will have a valid claim for breach of K because he appeared to be able to finish the contract by the modified deadline and, prior to doing so, Danco repudiated its agreement. Thus, Danco breached its K obligations and Pat is entitled to damages.

If so, what are Pat's Remedies?

Pat's likely remedies are legal remedies, or money damages.

Compensatory Damages

Pat should be entitled to compensatory damages, which are designed to place the plaintiff in the position they expected to be in had the contract been properly performed by the defendant. To obtain them, he must show that Danco caused the damages, that they were foreseeable, that the damages are certain and that they were unavoidable. Causation, particularly but-for causation, requires that, but for Danco's actions, Pat would not have been injured. If it is clear Danco breached the K, then but-for causation follows that but for the breach, Pat would not be injured, as he would have been fully

paid. Further, it is foreseeable that Pat would be injured by Danco failing to pay him for his services. Pat will be suing for the contract price of $25,000 likely, and these are certain given the terms of his contract. Finally, Pat must show the damages were unavoidable, meaning he must seek to mitigate these damages if at all possible. Usually, in an employment K case, this requires the employee to seek other employment. However, based on the unique services he provided Danco and the relatively short time left on his contract, he will be able to show his damages were unavoidable. The court may, however wish to determine that Pat did not destroy his work for Danco or stop working prior to Danco's breach. Also, to the extent that Pat's failure to meet his original deadline injured Danco, his damages will be reduced. The facts give no mention of any specific injury caused by Pat's tardiness.

Consequential Damages

In addition to the contract price, Pat may wish to claim additional consequential damages, which are damages that do not arise specifically from the breach but are foreseeable by the defendant at the time the contract was made that the plaintiff would likely suffer if it were to breach. In this case, Pat will argue that he turned down other opportunities to finish this contract in the relatively short amount of time he was given. It would be reasonably foreseeable that, were Pat to not be paid on the contract, Pat will argue, he would not only lose that contract price but also the value of the work he turned down to perform that work. Danco will likely argue that these are merely opportunity costs which Pat gave up and were reflected in the contract price which he accepted. While Pat did likely lose out on additional work, Danco will probably win this argument unless Pat can show with specificity and certainty that he had contracts offered to him in excess of his contract price that were only turned down as a result of his agreement to work for Danco, and that he could not have taken those contracts once his work with Danco was finished.

Punitive Damages

Punitive damages are designed to punish the defendant and are based on the notion that the defendant maliciously violated its agreement. In this case, Chelsea consulted with her attorney, who told her that Danco was not liable to execute the contract. The

facts thus do not imply that Chelsea or Danco acted in any way other than negligently in breaching its contractual duties, and thus punitive will not be available.

Restitutionary Damages

If Pat for some reason could not succeed in his breach of K, he could likely obtain restitutionary damages so long as he delivers his completed software to Danco. Restitution, or "quasi-K," allows for a plaintiff to recover if a K (or modification in this case) is not deemed valid, by showing that he conferred a benefit upon the defendant, that a reasonable person would expect to be paid, and that it would be unjust to allow the defendant to be enriched freely for the plaintiff's efforts. In this case, so long as Pat delivers the software to Danco, he will be able to show he conferred the benefit of the software, and a reasonable person would expect to be paid for writing computer software for a company. It would be unjust to allow a company to obtain these services freely when it told the writer they would be paid, and thus Pat will be able to assert his quasi-K claim if he for some reason could not assert his breach claim. The damages will be the value of the work he provided them, not the contract price.

Specific Performance (not available)

Specific Performance is not applicable here because Pat's claim is primarily for money damages and, even if it were not, there is an adequate legal remedy (money) which will suffice.

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Question 4

In 2001, Lou was the managing partner of Law Firm in State X and Chris was his paralegal. Realizing that Chris intended to go to law school, Lou invited Chris and his father to dinner to discuss Chris's legal career. Aware of Chris's naive understanding of such matters, Lou, with the authority of Law Firm, made the following written offer, which Chris accepted orally:

1) After graduation from law school and admission to the Bar, Law Firm will reimburse Chris for his law school expenses;

2) Chris will work exclusively for Law Firm for four years at his paralegal rate of pay, commencing immediately upon his graduation and admission to the Bar;

3) Chris will be offered a junior partnership at the end of his fourth year if his performance reviews are superior.

In 2005, Chris graduated from law school and was admitted to the Bar, at which time Law Firm reimbursed him $120,000 for his law school expenses. Chris and his father invited Lou to dinner to thank him and Law Firm for their support. During dinner, however, Chris advised Lou that it was his decision to accept employment with a nonprofit victims' rights advocacy center. Lou responded that, although Law Firm would miss his contributions, he and Law Firm would nonetheless support his choice of employment, stating that such a choice reflected well on his integrity and social consciousness. Nothing was said about Law Firm's payment of $120,000 for Chris's law school expenses.

In 2008, Chris's father died. Chris then completed his third year of employment at the advocacy center. Not long thereafter, Law Firm filed a breach-of-contract action against Chris seeking specific performance of the agreement or, alternatively, recovery of the $120,000. In State X, the statute of limitations for breach-of-contract actions is five years from breach of the contract in question.

What legal and equitable defenses can Chris reasonably present to defeat the relief sought by Law Firm, and are they likely to prevail? Discuss.

Answer A to Question 4

I. Controlling Law

The Uniform Commercial Code governs the sale of goods.

Here, the contract is one for services, mainly an employment contract. No goods are involved.

Therefore, the contract is governed by the common law of contracts.

II. Valid Contract?

Chris may defend by claiming that there was no valid contract. For there to be a valid contract, there must be an offer, acceptance, and consideration.

Offer

An offer invites the offeree to enter into a contract and creates the power of acceptance in the offeree.

Here, Lou made a written offer to Chris on behalf of Law Firm, which is probably an LLP or general partnership. As stated, Lou as managing partner has the authority to bind the firm.

Therefore, a valid offer has been made by the Law Firm.

Acceptance

An acceptance is the manifestation of assent to be bound by the terms of the contract.

Here, Chris accepted the offer because he "accepted orally."

Therefore, there was an acceptance, subject to Statute of Frauds considerations discussed below.

Consideration

A contract will fail for lack of consideration if there is no bargained-for exchange of legal detriment. Each party must be bound to do something he is not otherwise obligated to do, or to refrain from doing something he otherwise has a legal right to do.

Here, Law Firm is to reimburse Chris for his law school expenses if Chris graduates from law school and is admitted to the Bar. Law Firm is also to hire Chris thereafter for four years and pay Chris his paralegal rate of pay, while Chris is to work for Law Firm at such rate immediately upon admission to the Bar.

Further, Chris is to be offered a junior partnership at the end of his fourth year if his performance reviews are superior. This may be an illusory promise. Analysis follows.

Illusory Promise?

A promise is illusory even if there appears to be legal detriment if one party is not bound to do anything at all. An illusory promise included in a contract containing other legal detriment will not void the contract, and can become part of the contract.

Here, Law Firm can control Chris's performance reviews, and appears to give Law Firm complete discretion. However, performance at law firms can be objectively evaluated with client reviews, revenues raised, cases handled, successful litigation, and other factors. The court is likely to read in a reasonableness requirement on the part of Law Firm in making the review.

Therefore, item 3 on the contract is not illusory, and, in either case, the contract appears to be valid on its face.

III. Statute of Frauds

Under the Statute of Frauds, certain contracts must be in writing, contain a description of the parties thereto and subject matter thereof, and be signed by both parties. A contract must satisfy the Statute of Frauds if it is one in contemplation of marriage, one which cannot be completed in one year, a contract relating to land or executors, or for the sale of goods of $500 or more.

Here, the contract calls for at least 4 years of work at the paralegal rate of pay. There is no way this contract can be completed in one year; it would not be deemed "completed" if Chris dies or Law Firm goes under. Therefore, the Statute of Frauds applies.

Law Firm's offer was in writing, but Chris accepted orally. There is no indication that the agreement was memorialized or signed by Chris. Therefore, Chris may assert that the contract fails due to the Statute of Frauds.

Part Performance

Law Firm will counter, saying it has partly performed on the contract. The Statute of Frauds can also be satisfied by part performance.

Here, Law Firm already reimbursed Christ $120,000 for his law school expenses. Therefore, Chris cannot void the contract for failure to meet the Statute of Frauds.

IV. Minor?

Contracts entered into by minors are voidable upon reaching majority. I will assume that Chris is not a minor as of 2001, as he graduated from law school in 2005. I assume he graduated from college in 2002 at the latest, and that he is not a prodigy who graduated from college while still a minor.

V. Undue Influence?

Chris may attempt to void and contract for undue influence. Although not rising [to] the level of duress, undue influence arises when someone with a confidential relationship exerts pressure and steers one into the influencer's desired course of action.

Here, Lou was already Chris's boss at the time of the offer. There was a vast difference in knowledge concerning employment practices between the two. Lou was also aware of "Chris's naïve understanding of such matters" when he made the offer. However, Lou did invite Chris's father to dinner with Chris, and the partner-paralegal relationship probably does not rise to a level which can be considered a confidential relationship for purposes of undue influence.

Therefore, Chris is not likely to succeed on this theory.

VI. Unconscionable?

Chris may also raise unconscionability as a defense to the contract. A contract may be unconscionable when a party with superior bargaining power imposes a contract of adhesion or otherwise imposes terms which cannot reasonably be seen as fair.

Here, hiring a lawyer at the price of a paralegal appears unconscionable. However, Lou can logically argue that Law Firm has "prepaid" some of Chris's compensation by paying for law school. Further, the terms do not appear boilerplate or as adhesive.

Therefore, Chris is not likely to succeed on the theory of unconscionability. Thus the contract is valid.

VII. Defenses to Specific Performance

Specific performance is an equitable remedy which may be granted by the court where 1) legal remedies are inadequate, 2) the terms are definite and certain, 3) there is

mutuality of remedies, 4) the remedy is feasible for the court to monitor, and 5) there are no defenses.

Here, Law Firm will argue that legal remedies are inadequate because they are seeking to employ the one and only Chris. Christ knows the firm from his paralegal work and Law Firm trusts him. The terms of the contract are certain, as the term and salary are stated on Lou's offer. Mutuality of remedies, recently not very important and leans more towards mutuality of performance, is also met because Law Firm is ready, willing, and able to meet their side of the bargain. The remaining issues to consider are feasibility and defenses.

Feasibility

It is very difficult for the court to monitor a service contract, especially an employment contract. Further, forcing someone to work violates the 13th Amendment of the Constitution banning involuntary servitude. Here, we are concerned with an employment contract, and the court will find it infeasible to enforce.

Laches

Chris can also assert the defense of laches. One can defend on the theory of laches regardless of the statute of limitations because they are completely different theories. Laches operates when a party has 1) unreasonably delayed assertion of their rights so that 2) there is prejudice to the other party.

Here, Law Firm said they would nonetheless support his choice of employment, and commended Chris on his integrity and social consciousness. Chris reasonably took this to mean that he was not bound by the contract to work for Law Firm, and that the law school expenses would be paid for regardless of his decision. Further, Law Firm waited 3 years to file a breach of contract action. Chris had worked for the advocacy center for 3 years at this time, and for Chris to go back to a law firm at paralegal wages would constitute severe prejudice.
Thus, Chris can successfully assert the defense of laches.

Unclean hands

Equity does not help those who do not come to the court with clean hands. If there was foul play on the part of Law Firm, equity will not help it pursue its goals.

Here, Law Firm made the offer knowing of Chris's naïveté. Further, Law Firm took Chris's father's death as an opportunity to file their claim. The father had been there at the two dinners with Lou and could offer support as well as testimony.

Therefore, Chris will most likely succeed on this defense as well.

Note, however, that the court has discretion in granting equitable defenses.

VIII. Defenses to recovery of law school expenses

Gift

Chris will argue that Law Firm made an irrevocable gift of the law school expenses. An oral gift is revocable, but a gift is finalized and cannot be revoked when there is delivery with the intent to give and the gift is accepted.

At the second dinner, Lou supported Chris's decision but mentioned nothing about the law school expenses. Lou also commended Chris on his decision. Therefore, Chris will assert that Law Firm made a gift. Here, there was delivery of the $120,000 and the money was accepted. The problem is the question of intent. Law Firm will assert that is [an] obvious, common practice to repay someone on a prepayment when a contract is not fulfilled. This is a question of fact but, on balance, Chris will probably not succeed on this theory.

Waiver

Chris will argue that Law Firm waived its rights to take back the reimbursement.

At the second dinner, Lou supported Chris's decision but mentioned nothing about the law school expenses. Therefore, Chris will assert that he interpreted this to be a waiver. However, a waiver must be knowingly made, not assumed from silence. Further, a waiver of a significant debt must generally be in writing, and there was no such writing.

Therefore, Chris will not succeed on this defense.

Promissory Estoppel

Chris will next assert that he relied to his detriment on the gift or waiver, so that Law Firm is estopped from claiming the $120,000 back. Promissory estoppel arises when reliance is induced and the other party in fact justifiably relies.

Here, Law Firm will argue that it induced no such reliance. Chris will argue that waiting 3 years is enough for reliance. While this is another question of fact, the court will most likely hold for Law Firm.

Therefore, Chris will most likely have no defense concerning the recovery of the $120,000.

Answer B to Question 4

Law Firm (LF) v. Chris (C)

Contract Formation

A contract is formed if there is mutual assent and consideration. Mutual assent is found if there's an offer and an acceptance of the offer. An offer is the manifestation of willingness to enter into a bargain so as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Acceptance is the manifestation to accept the terms of the offer. Consideration is the bargained-for exchange of legal detriment – which is the doing of something one has no legal obligation to do or forbearing on doing something one has a right to do.

Here, we have Lou of LF making a written offer to C for C to work for LF. The offer has certain terms and it was communicated to C properly. C accepted orally. Thus, mutual assent is found.

Consideration is likewise found here because LF was offering to reimburse C for law school expenses and C in return promised to work exclusively for LF for four years. Each party does not need to do what it promised to do absent a contract; thus, each has legal detriment involved in the bargain.

Thus, there is a contract formed here.

Defenses to Formation

Statute of Frauds

The law of contracts requires that certain contracts have to be in writing in order to be enforceable. The writing must identify the parties, must contain the critical terms of the agreement, and must be signed by the party to be charged. One of these types of contracts falling under the statute is contract which performance takes over a year.

Here, we have a four-year contract so if falls under the statute. Although there's an offer in writing, the acceptance of C wan not in writing – i.e., he did not sign the offer so there is no writing evidencing a contract was formed between the parties. Thus, there is no writing that meets the requirements of the statute. This being so, LF cannot enforce C's promise.

However, a promise may be taken out of the Statute if the parties have already performed. Here, LF can argue that even if there's no qualifying writing, LF performed by reimbursing C the money – a clear evidence of the presence of a contract. On this issue, LF has the better of the argument.

Unconscionability/Public Policy

The law frowns upon and does not sanction unconscionable contracts where one party, because of its superior bargaining position, takes advantage of the other party either procedurally (i.e., during the negotiation phase where a party) or substantively (i.e., where the terms of the contract are unreasonably favorable to the party who drafted it and who has the superior position).

Procedurally, here, LF was the one in the superior bargaining position because it is the employer of C. C can argue that through its agent, LF took advantage of C's "naive understanding" of matters relevant to the contract. Additionally, LF, aware of C's naiveté, did not advise C to seek independent advice about the contract.

LF can argue that C has other choices, however, and was not coerced into accepting the contract. Besides, LF can argue that C had his father with him when the contract was being negotiated. Further, LF may argue that C has several reasonable alternatives, including not accepting the contract itself. LF has the better argument here.

Substantively, C has a stronger argument because the contract states that he would work for LF for four years at his paralegal rate of pay. The law will see this as an unreasonable term given the duration and low rate of pay even where C is already a lawyer. Further, Ca can argue that the promised junior partnership at the end of the 4

years is illusory because the firm retains the unrestricted right to say C's performance reviews are "not superior," unless LF can point to specific and objective standards by which C's performance can be measured.

Misrepresentation

Misrepresentation is the intentional making of false statements of material fact. It can [be] affirmative or it can be through silence. Silent misrepresentation is typically found where one party, who enjoys a fiduciary or special relationship with the other, stays mum about pertinent facts that the other party should know about in order to make a knowing and intelligent decision.

C may claim LF, through Lou, misrepresented by keeping silent about the pertinent aspects of the contract when he had the responsibility to apprise C of his rights and obligations. C can argue that Lou has a special relationship with him as he is his employer and also the managing partner of a law firm.

The court, however, will likely side with LF on this issue unless C can point to specific acts by which LF affirmatively or negatively, through silence, "misrepresented" facts because each party is allowed to drive as hard a bargain as possible in an arms-length transaction.

Specific Performance (SP)

SP is an action where a party goes to a court of equity seeking relief and asking the court to ask the breaching party in a contract to perform as promised. SP is granted where the following elements are met: there is inadequate remedy at law; the contract has definite and certain terms and all conditional terms precedent to formation have been met; performance is feasible for the parties; the court does not need to actively monitor performance; and there are no equitable defenses that the breaching party can raise.

Here, LF will argue that there are definite and certain terms because the offer specifies the relevant provisions of what the contract entails. It will also point out that all the conditional terms precedent to contract formation – i.e., C's graduation from law school and admittance of the Bar – have been met.

However, C will be able to argue that there are adequate remedies available for LF to pursue at law. For instance, it can ask for damages, measured by the cost of hiring another lawyer.

C will also argue that performance is not feasible because to require him to serve as LF's new lawyer against his will is unconstitutional – it is violative of the law against involuntary servitude. This is a huge argument in favor of C because it is well-established that courts are loathe to enjoin parties to perform personal services contracts against the wishes of the performing party. Additionally, the court does not want to actively monitor individual performances of this nature because of the impossibility of having measurable standards by which the party can be judged.

Moreover, C can raise two equitable defenses: (1) the doctrine of Unclean Hands and (2) Laches.

"Unclean Hands" provides that one must do equity in order to seek equity; in other words, a party cannot seek relief form a court of equity when the court's "hands" will be sullied because of the unethical, unlawful or otherwise improper conduct of the party seeking relief. Here, C will point out that Lou's conduct in taking advantage of his "naiveté" and of inserting those unconscionable provisions render LF unworthy of relief from the court of equity because these actions were unethical and improper, if not unlawful.

Laches is another equitable defense by which the defending party can raise the issue that the plaintiff slept on its rights, thus prejudicing his defense. Here, C will be able to point out that LF should have immediately sought relief and not waited three years. C will argue that the long waited prejudiced him because the only witness to the contract negotiations was his father, who died in 2008. While LF can point to the statute of

limitations of 5 years, this argument will be unavailing for the firm because a court of equity looks at the statute of limitations as just one factor in determining whether the doctrine of laches should apply. Because SP is an equitable remedy, the court will look at the totality of the circumstances and render a decision in favor of C here, whose ability to defend himself has been compromised by the unexpected death of his father.

Restitution of $120K

Restitutionary remedies are proper where there is a promise which the defending/promising party made which the party made which the party should have reasonably expected will induce reliance on the other; the other actually relied on it and conferred a benefit on the breaching party; and unjust enrichment will result if the promising party is allowed to retain the benefit without reimbursing the other.

Here, LF will argue that C made a promise which C should have reasonably expected would induce LF to rely, and LF did rely, on his promise; that C benefited by receiving the $120K reimbursement of his law school expenses; and that allowing C to retain the money will result in C's unjust enrichment.

This is a strong argument on the part of LF, and C really does not have much in the form of argument to rebut it, except possibly to say that C's receipt of the money was a reward for working as a paralegal for the firm and that the reward is part of employment benefits and not conditioned on his working for the firm even after passing the bar. It's a weak argument and C will be asked to return the money absent a stronger defense.

One possibility for C is the doctrine of waiver. Waiver is the voluntary relinquishment of a known right. C can argue that Lou knew about his decision and said that "although LF would miss his contributions, he and LF would nonetheless support his choice of employment," which is a noble one – i.e., working for an advocacy center. C can argue that by LF's conduct, it waived its right to restitution of the money, or otherwise indicated that indeed, the money was an employment benefit to reward [him] for his loyal and worthy employment as paralegal in the prior years.

Additionally, C can raise again the equitable doctrine of laches, as discussed supra, because LF “slept on its rights” when it waited 3 years to seek restitution. C will be able to again argue that the sole witness as to the real characteristics of that money is dead, thus prejudicing his ability to defend himself.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2011
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2011 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

The selected answers were assigned good grades and were transcribed for publication as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 3

Betty is a physician. One of her patients was an elderly man named Al. Betty treated Al for Alzheimer's disease, but since she believed he was destitute, she never charged him for her services.
One day Al said to Betty, "I want to pay you back for all you have done over the years. If you will care for me for the rest of my life, I will give you my office building. I'm frightened because I have no heirs and you are the only one who cares for me. I need to know now that I can depend on you." Betty doubted that Al owned any office building, but said nothing in response and just completed her examination of Al and gave him some medication.

Two years passed. Al's health worsened and Betty continued to treat him. Betty forgot about Al's statement regarding the office building.

One day Betty learned that Al was indeed the owner of the office building. Betty immediately wrote a note to Al stating, "I accept your offer and promise to provide you with medical services for the rest of your life." Betty signed the note, put it into a stamped envelope addressed to Al, and placed the envelope outside her front door to be picked up by her mail carrier when he arrived to deliver the next day's mail.

Al died in his sleep that night. The mail carrier picked up Betty's letter the following morning and it was delivered to Al's home a day later. The services rendered by Betty to Al over the last two years were worth several thousand dollars; the office building is worth millions of dollars.

Does Betty have an enforceable contract for the transfer of the office building? Discuss.

Answer A to Question 3

Applicable law

The common law governs all types of contracts except those for the sale of goods. Here, the contract between Al and Betty was for services of medical care in exchange for an office building thus it will be governed by the common law.

Valid contract

A valid contract must have been formed by an offer, acceptance, be supported by consideration and no subject to any defenses. If Betty can show that these all existed she will have an enforceable contract. This is decided by the objective manifestations of the parties, thus Betty's subjective thoughts in believing that Al did not have the office building or in forgetting about the offer do not impact the formation of the contract.

Offer

An offer is a manifestation of intent to enter into a contract that is certain and definite and communicated to the offeree. Here, Al stated that he would give Betty his office building in exchange for her to continue to give him medical care until his death. This shows intent to be bound to the offer on those terms and was stated to Betty. Thus, his statement is an offer. On the other hand, the offeree did not think there was an offer because she did not think he owned a building and his statement was phrased in such a way as to suggest that he was merely expressing gratitude for Betty's work, by saying she was the only one who cared for him and that he did not have any other heirs. Overall, although couched in language that would not be an offer, there is a clear intent to give Betty his building in exchange for her caring for him for the rest of his life.

Bilateral or unilateral contract.

The issue is whether Al's offer was an offer to enter into a unilateral or bilateral contract. A unilateral contract is one that can only be accepted by performance. Here, Al said he would give Betty the office if she cared for him for the rest of his life. He was not seeking her promise to care for him for the rest of her life, but rather that she actually care for him for the rest of his life.

On the other hand, most contracts are construed as bilateral, that is are formed by the promises to perform. And here the offer could be accepted by Betty's promise to provide medical services.

Termination of an offer

An offer may be terminated. Here, there is no indication that Al terminated his offer in the two years after the conversation.

Lapse of time

An offer will terminate if it is not accepted after a reasonable period of time, if none is suggested by the contract. There is usually a reasonable time limit on offers. Here, Betty did not accept the offer until two years later when she learned that Al actually owned the building. It should be argued that the offer has lapsed. However, since it was an offer to care for him for the rest of his life, two years may not be an unreasonable period of time, depending on his age and need for care.

Death

Death of the offeree will terminate the offer. Here, Al died before receiving the acceptance. However, Betty may have accepted the offer before her death, see acceptance, and thus his death would not be an issue, since death only terminates an offer, not necessarily a contract.

Irrevocable offer for unilateral K

Betty will argue that the offer was unrevocable because she had started performance of the unilateral contract by continuing to care for Al through the next two years.

Acceptance

Acceptance is the unequivocal manifestation of assent to the offer by one with power of acceptance. Here, the offer was made to Betty so she had power of acceptance. There are several arguments Betty will make to show acceptance.

Silence

Here, Betty was silent when the offer was first made. Thus she made no manifestation of assent. However, she did continue to treat him for the remainder of his life and thus her silence could be deemed acceptance since she continued to perform the contract by providing medical care.

Mailing Acceptance

Normally an acceptance is effective upon mailing. Here, the effectiveness of Betty's actions depend on whether properly addressing and stamping the envelope and putting it outside is an effective mailing of the acceptance. On one hand, she completed all actions required for mailing and putting it outside her door to be picked up by a mailman is no different than walking to the post office and dropping it in the mailbox. All that remains is the actual mailing of the envelope. On the other hand, when one goes to a post office or hands mail to the mailman one cannot thereafter get that mail back. Betty could easily have gone outside and retrieved the envelope from her own mailbox at any time before the mailman arrived and thus the letter was not posted. Overall, it is likely that this is not proper dispatch of the mail since she could so easily retrieve it. As such it was not an effective acceptance until the mailman picked up the letter the next morning. As discussed above, once Al had died the acceptance could no longer be effective since the offer was terminated. Thus she did not accept the offer by mailing.

Acceptance by Performance of a unilateral Contract

Betty will also argue that she accepted the contract by performing the terms of the unilateral contract. She continued to provide Al with medical care until his death. Thus upon Al's death she had fully performed and had the makings of an enforceable contract.

Consideration

A valid contract must have consideration. Consideration is the bargained for exchange of something of legal value. Here, Al is offering Betty his office building in exchange for

her medical care, these are both of legal value or detriment because they are giving up an office building and Betty is giving up payment for her services.

Bargained for exchange: The promise must induce the detriment and the detriment induce the promise. Here, Al's offer to give the building was to induce Betty to give him medical care. However, Betty did not think he had the building and continued to give him medical care anyhow for two years before "accepting" the offer. This suggests that she was not induced to give medical care for the rest of his life by the promise of the building.

Past Consideration

Al's heirs should also argue that Al's promise was really for past consideration. That is the work Betty had done before. This is evidenced by Al's statement I want to pay you for all the "work you have done over the years." Consideration is not present where the work has already been done. However, this argument will fail because Al not only offers for the previous work done by Betty but also by the remaining work that he will do.

Illusory

The heirs should argue that the promise is illusory because Betty may only have to do work for Al for one day or even one hour. However, this argument will fail because she will be bound to compete the medical work until he dies, which could be in twenty years or in 2 minutes.

Overall, it does not seem like there is consideration since the promise of the building did not induce the medical work.

Promissory Estoppel

Betty will argue that while there is no consideration she should be able to enforce under a promissory estoppel doctrine. There, a person must have relied upon a promise, to their detriment, and done so justifiably. Betty will argue that in providing free medical care to Al for two years she was relying on his promise. However, she had forgotten about the statement regarding the building and thus her actions were not a result of reliance on the promise, but rather her own good work.

Defenses

Assuming there is consideration there are several defenses to contract formation that can be raised and prevent the enforcement of the contract.

Statute of frauds

The statute of frauds requires that certain contracts be in writing in order to be enforceable. The sale of land is one such contract. Here, although Al is not obtaining the typical purchase money in his conveyance he is nonetheless receiving a service of value in exchange for his land. Thus, it could properly be considered a sale of land. Additionally Betty could argue that it is a contract that cannot be performed in under a year, however this will fail since Al could die at any time and the contract would be performed.

Additionally, since this is a contract to give something at death it could be considered an executory contract, but this does not fit either since it is not relating to the executor giving a promise to pay the debts of the estate.

The statute of frauds is satisfied by a writing signed by the party to be charged or by part performance or detrimental reliance. Here, Al orally offered the building to Betty and thus there is no writing that evidences the contract. The letter from Betty to Al will not satisfy the writing requirements because although it contains the material terms (building for medical care) as required to satisfy the statute of frauds it does not contain the signature of the party to be charged, here, Al.

Further, the statute is not satisfied by the performance because in the sale of land this is satisfied by two of three things: possession, improvement or payment. Here, Betty's "payment" of medical services would satisfy one, but she did not take possession and did not make any improvements to the land thus it would not be removed from the statute of frauds.

A contract that cannot be performed in under a year would be satisfied by full performance, as here where Betty provided care until Al's death, but as discussed

above this has no merit since this was not a contract that could not be performed in under a year.

Finally, there is no detrimental reliance on the contract since she forgot about while giving care for the two years until she found out he actually owned the building. She was not relying on the contract. Thus she will not remove the contract from the statute of frauds through detrimental reliance.

Betty could argue that this agreement is not within the statute of frauds since it is not for the conveyance of property for money. She will likely fail as the substance of the agreement is the office building for an amount of service.

Incapacity

A contract is voidable at the option of a person who does not have the capacity to contract. Here, the facts state that Al has Alzheimer's disease. Thus he may not have been able to understand the contract or enter into it. If Al did not understand what he was doing when he offered the building due to his mental disease and could not properly contract a contract will not be enforced. Here, Betty was his doctor and should have known that he was incapable of contracting. She knew he had a mental disease and thus even if he showed no outward signs of incapacity at the time he entered into the contract, she was aware. However, incapacity does not depend on the awareness of the other party. A party that does not have capacity due to mental disease cannot be found to have entered into an enforceable contract regardless of whether the other party knows of this.

Undue influence

A contract will be voidable if it is a result of undue influence. Here, Betty was in a position of power - giving him medical care. Al was clearly frightened by the prospect of not having medical care in the future as evidence by his statements that he needed to be able to depend on her. This suggests that the contract for the building is a result of her power over him as a physician and not freely contracting to give her the building. The fact that she had previously provided medical care buttresses the argument since Al had come to rely on her and she could use her influence to her advantage. However,

this argument is likely to fail since she did not say anything in response to his offer and simply continued her exam and gave him the medication he needed.

Conclusion

Betty probably does not have an enforceable contract for the transfer of the building because it is not supported by consideration or a consideration substitute and it is barred by the statute of frauds.

Answer B to Question 3

Applicable Law

This is a contract for Betty's personal services as a physician. Therefore, the common law applies.

Contract Formation

To form a contract, there must be offer, acceptance, and consideration. Betty will argue a contract exists based on theories that (a) an implied contract was created when Betty accepted the offer as implied by her conduct; (b) an express contract was created when Betty sent the letter; and (c) a contract was formed when Al made the offer in payment for past services. Each theory will be examined below. Also, a number of defenses exist, which are discussed at the end.

Implied Contract

Betty will argue that Al made an offer, and her acceptance can be implied by her conduct.

Offer

An offer is a manifestation of a present intent to enter into a contract. It must be definite and clear, and it must be communicated to the offeree. Here, Al offered to enter into a contract when he offered to give her the office building in exchange for continued care. His statement shows that he intended, at that moment, to enter into this relationship with Betty. His statement was unambiguous and on precise terms, hence it was definite and clear. Al said it to Betty, thus it was communicated to the intended offeree. Therefore, Al's statement is a valid offer.

Acceptance

An acceptance must be an unambiguous communication from the offeree to the offeror showing acceptance of the offer on its terms. The acceptance can be through words or conduct, and is judged by an objective standard. Here, Betty will argue that her conduct should reasonably be understood to show acceptance, because right after Al offered to

give her a building in exchange for treatment, Betty completed her examination and gave him medication. Therefore, Betty will argue that her conduct shows an unambiguous intent to be bound by the offer's terms.

However, in the context of their past dealings, Betty's conduct does not show an intention to accept the offer. Betty had long treated Al without charge. After Al made the offer, Betty said nothing and proceeded with business as usual. If this had been their first meeting, then her subsequent performance (by treating Al) would be indicative of an acceptance of the offer. However, given their past dealings, Betty's subsequent performance was perfectly in line with what would be expected if she rejected the offer. In other words, it could be argued that Betty did not intend to be obligated to Al for the rest of his life, and her conduct was merely consistent with how she had acted in the past.

Therefore, Betty's conduct was ambiguous, in that it is unclear whether she intended to accept the offer, or reject the offer and continue their relationship as it existed before the offer. Thus, Betty most likely did not accept the offer by her conduct.

Acceptance by silence

Courts have sometimes found acceptance by silence, if the parties' past dealings would create a reasonable expectation that silence equals acceptance. However, the rule will not apply here. Betty and Al do not have a history of previous contracts. Betty's treatment of Al has been purely gratuitous, therefore there is no history of prior dealings on which to base an expectation of the form of acceptance. Thus, Betty will not be able to establish silence by acceptance.

Consideration

Consideration is the bargained-for exchange of legal detriments. Each party must suffer a detriment, and the detriments must induce each other. Here, Betty will argue that she suffered a detriment in the obligation to care for Al for the rest of his life, and Al suffered a detriment by giving up his office building.

However, the detriments must induce each other. Here, Al was induced into giving his office to Betty in exchange for medical care. However, Betty was not induced into providing services to Al for his office building. In fact, Betty "doubted" whether Al even owned an office building. She even forgot about Al's statement, which by itself does not have legal significance, but it does serve as evidence that the office was not something Betty considered important. Most people, even rich Doctors, would not forget that they are due an office building, if they really expected to receive one.

Furthermore, once Betty learned about the office building, she responded immediately and enthusiastically with an acceptance letter. This shows that Betty did not provide her earlier services in exchange for Al's promise to give her an office building. It also shows that she did not believe she had accepted the offer with her prior conduct. Therefore, even if a court were to imply that Betty's conduct constituted an acceptance, there arguably would not be mutually-induced consideration.

Express Contract

Betty will argue that Al made an offer that she expressly accepted with her written letter.

Offer

Al's statement is a valid offer. See above.

Acceptance

See rule above. Betty will argue that she expressly accepted the offer with her letter. The letter was unambiguous. It will be a valid acceptance.

Consideration

See rule above. Al suffers a detriment (giving up his office building) in a mutually-induced exchange for Betty's promise to care for him the rest of his life. Even if that life were short, it would still be valid consideration, because courts do not generally question the sufficiency of the amount of consideration. Courts may choose not to enforce some contracts with an imbalance of consideration on duress or unconscionability grounds, discussed below.

Expiration

Unless stated otherwise, an offer stays open for a reasonable amount of time. Here, Betty attempted to accept Al's offer after 2 years. It was so long that she had even forgotten about Al's offer. Two years is most likely longer than a reasonable amount of time. Therefore, the offer expired, and Betty's attempt to accept it will not be valid.

Revocation

Offers are revoked on the death of the offeror, even if the offeree is not aware of that death. Here, Al died at night after Betty placed the letter in her mailbox, but before the mail carrier picked up Betty's letter. Therefore, Betty's letter will only be valid if it fits in the mailbox rule and thus accepted the offer before Al died. Note, even though Al's life was only for a few hours after acceptance, consideration is still valid for the reasons discussed above.

Mailbox Rule

If sent by mail, acceptances are valid when sent. A letter will be sent when it is placed in the mailbox or location where the mail is collected. Here, Betty's mail was usually picked up from a location outside her front door. Therefore, Betty's acceptance was valid once she placed the letter outside her front door, and thus the mailbox rule applies. Betty accepted Al's offer, and a contract was formed.

Contract formed by past services

Betty could argue that Al's statement was an offer to pay for past services rendered. Betty had treated him for years for free. She will argue his statement is an offer to pay the moral debt he owes to her.

Consideration

See rule above. Here, Al is offering to give his office to Betty, but there is no bargained-for exchange. Betty provided her past medical services gratuitously, and she was not induced by to do so by Al's subsequent promise to give her an office building. Therefore, there is no consideration to support this contract.

Past Moral Obligations

Courts will enforce offers to pay for past moral obligations. Typically, this is the situation where a debtor offers to pay his unenforceable debts. Here, Al does not owe Betty any debt. While she offered him free medical care, that did not create a moral obligation to pay. Indeed, many doctors are motivated by a dedication to their patients, as evidenced by their socratic oath. Therefore, Betty's motives were likely altruistic, and thus were gifts. Al's promise to pay her back for all she has done cannot be construed as an offer to pay for past debt.

Defenses

Statutes of Frauds

A contract for the sale or transfer of land cannot be enforced without a writing, signed by the party to be enforced against, evidencing the existence of a contract, i.e. showing the material terms. Here, Al's offer to Betty was an oral attempt to transfer ownership of land. The only signed writing appears to be Betty's letter. While it shows the material terms, and is signed by Betty, it was not signed by Al. Therefore, even if Betty formed a contract with Al, it cannot be enforced against him.

Duress

Al's estate could argue that the contract was formed under duress. Here, they can point to Al's statement that he has no heirs or anyone who cares for him. He needs someone to help him, and he appears to be in a state of loneliness and fear. Therefore, the estate could make an argument that Al was pressured into forming a contract out of duress, and he had no real choice but to form the contract.

However, this argument would most likely be rejected, since Al was the one who made the offer, and Betty gave no sign that she would withhold medical care if Al did not give her an office building.

Unconscionability

Similarly, Al's estate could argue that the deal was unconscionable, in that Betty took advantage of her superior position to extract a payment out of Al. Al's dependence on her created an element of unfair bargaining power, which Betty used to her advantage. It was improper for a doctor to make such a contract with a dying patient.

However, this argument will be rejected. The facts show no evidence that Betty in any way exerted pressure on Al. Indeed, Al's statement appears to be spontaneous.

Capacity

Al's estate can argue that Al lacked the capacity to enter into a contract. Al was an Alzheimer's patient. He most likely did not have the mental faculties necessary to enter into a contract.

Betty will counter that the statement was perfectly clear, and that it was made during one of Al's moments of lucidity. Therefore, at that moment, he did have the capacity to enter into a contract.

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The selected answers were assigned good grades and were transcribed for publication as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 4

Peter responded to an advertisement placed by Della, a dentist, seeking a dental hygienist. After an interview, Della offered Peter the job and said she would either: (1) pay him $50,000 per year; or (2) pay him $40,000 per year and agree to convey to him a parcel of land, worth about $50,000, if he would agree to work for her for three consecutive years. Peter accepted the offer and said, "I'd like to go with the second option, but I would like a commitment for an additional three years after the first three." Della said, "Good, I'd like you to start next week."

After Peter started work, Della handed him a letter she had signed which stated only that he had agreed to work as a dental hygienist at a salary of $40,000 per year.

After Peter had worked for two years and nine months, Della decided that she would sell the parcel of land and not convey it to him. Even though she had always been satisfied with his work, she fired him.

What rights does Peter have and what remedies might he obtain as to employment and the parcel of land? Discuss.

ANSWER A TO QUESTION 4

What rights does Peter have?

The first issue is what law should apply. The UCC applies if the contract is for sale of goods. The common law applies if in all other circumstances, including a contract for services or land. In this case, there is an employment contract that contemplates the payment of a salary and a land conveyance in exchange for services. Thus, the common law applies to this contract.

The second issue is whether there is a valid contract. A valid contract requires offer, acceptance, and consideration. An offer exists if the offeror offers the offeree a deal and signals that acceptance will conclude the deal. An acceptance occurs if the offeree agrees to the terms of the offeror and gives the offeree notice of his assent. Consideration exists if there is a bargained-for exchange and legal detriment (which involves perform [SIC] in a way that one is not legally required to perform). Acceptance only exists if the offeree consents to the exact terms of the offeror, also known as the mirror image rule. If the offeree attempts to change any terms of the offer, then there is an effective rejection and counteroffer. Della advertised for a dental hygienist. Advertisements are not usually considered offers and Della's advertisement did not indicate that anyone who responded would be hired. The need to conduct an interview suggests that Della's advertisement was an invitation to make an offer, not an actually offer. Della interviewed Peter and offered him a job. She gave him a choice of being paid $50,000 per year, or being paid $40,000 per year and the conveyance of a $50,000 parcel of land at the completion of three years of work. This might have been an offer because it signaled to Peter that the deal would be complete if he chose either option. However, it would more likely be considered preliminary negotiations since Peter could still choose which option he preferred. Peter said, "I'd like to go with the second option..." If there was an offer, and he had left his statement at this, then this would constitute acceptance because it gave Della notice that he was accepting her offer. However, Peter attempted to modify the terms of the deal by adding a commitment for

an additional three years after the first three years. Thus, Peter's attempted acceptance was ineffective because it altered the terms of Della's offer and does not meet the mirror image rule. Rather, Peter effectively made a counteroffer to Della (or an offer if Della's original options were considered preliminary negotiations). Della accepted Peter's counteroffer when she said, "Good, I'd like you to start next week." The exchange of six years of dental hygienist services for a $50,000 parcel of land and a $40,000 per year salary constitutes consideration. Because there was an offer, an acceptance, and consideration, there is a valid contract.

The third issue is whether the statute of frauds makes the service or land contract unenforceable. The statute of frauds requires some contracts to be in a writing signed by the party against whom enforcement is sought. Contracts for land and contracts that cannot be completed within a year are both included within the statute of frauds. Contracts for land must adequately identify the parties and the parcel of land to be conveyed. The contract between Della and Peter was for six years of employment. Peter could not complete his performance of six years of services within one year, thus this contract falls within the statute of frauds. The contract between Della and Peter also contemplated the conveyance of an interest in land. Della did sign a contract with Peter, but the contract only specified that Peter agreed to work as a dental hygienist for a salary of $40,000 per year. The conveyance of land was not considered within the signed contract, nor was the length of the term of employment. Thus, the contract Della signed cannot be used to overcome the statute of frauds. The employment contract for a term of years and the land conveyance are both unenforceable under the statute of frauds.

The fourth issue is whether Peter can overcome the Statute of Frauds defense via the doctrine of part performance or equitable estoppel. Part performance in a land conveyance requires that the party who seeks to enforce the contract must have engaged in partial performance, which is usually evidenced by possession or payment of the purchase price. Equitable estoppel requires that the party who seeks to enforce the contract show that there was a promise and that the party reasonably relied upon

that promise to their detriment. It will probably be difficult for Peter to show partial performance since he has not taken possession of the land or paid the full purchase price. He might be able to argue that he has "paid" a substantial portion of the purchase price since he worked for two years and nine months, which is the equivalent of 75% of the service he was to perform before receiving the land. However, equitable estoppel is probably a better argument for him to make. The fact that Della offered Peter two options suggests that $40,000 was less than the market rate for dental hygienists. Peter chose the option that gave him less yearly salary in reliance on Della's promise that he would be employed for six years and would receive a $50,000 parcel of land. He received less salary than he otherwise would have, so his reliance was detrimental. Peter may be able to overcome Della's Statute of Frauds defense under the doctrine of equitable estoppel.

The fifth issue is whether there was a breach of contract. A breach occurs when one party fails to perform as obligated under the express and implied conditions in the contract. Assuming that the court finds a valid and enforceable contract, then Della committed a breach when she fired Peter before the six years were complete. She also committed an anticipatory repudiation when she decided to sell the land instead of convey the land to him. She also potentially breached her implied duty of good faith by firing Peter when she was satisfied with his work.

What remedies might Peter obtain?

The first issue is whether Peter can receive expectation damages. The general measure of damages in a contracts case attempts to put the plaintiff into the position he would have been in if the contract had been fully performed. A plaintiff does have a duty to mitigate, which requires that he make a reasonable effort to find similar employment. He does not have to settle for lesser employment or move to a distant location to find employment. Assuming that the court finds there was an employment contract for six years, the court would award three years and three months worth of the $40,000 per year salary if Peter cannot find similar employment. If Peter can find similar

employment, the reward will be reduced based on whatever his new salary is. Assuming that the court finds there was a contract to convey land, Peter could sue for the value of the land, which was $50,000. If the court finds that there was an employment contract, but no contract to convey land, then Peter might be able to receive more than the $40,000 per year salary award if he can show that he took a reduced salary in reliance on the promise that he would receive a land conveyance.

The second issue is whether Peter can receive restitutionary damages. Restitutionary damages are only awarded when a benefit has been bestowed and it would unjustly enrich the other party if they are not required to pay for that benefit. A plaintiff cannot receive restitutionary remedies if they receive expectation damages. Restitutionary damages would probably not be Peter's best option. However, Peter might be able to receive the difference between his salary and the market rate salary for a dental hygienist if he can show that he took the lower salary in reliance on the promise to receive land.

The third issue is whether Peter can receive specific performance. Specific performance is awarded when there is a definite and certain contract, an inadequate legal remedy, enforcement of specific performance is feasible for the court, and there is mutuality. The party attempting to avoid specific performance can do so by raising various defenses, such as laches or unclean hands. Assuming Peter overcomes the statute of fraud objections, Peter will not be able to seek specific performance for the employment contract. Attempting to enforce an employment contract, which is a contract for personal services, is not feasible for the court. Personal service and employment contracts require individuals to work together in a cooperative environment; it is not feasible for the court to monitor the relationship between the parties. Peter probably will not be able to seek specific performance for the land contract. There was a definite and certain contract to convey a parcel of land worth $50,000, though there may be some issues with this element if it is not clear which parcel of land Della intended to convey. Land is considered unique, so a legal remedy of $50,000 would be inadequate. It would be feasible for the court to enforce the specific performance. Under the common law

doctrine of mutuality, both parties must have been able to request specific performance. In this case, Della could not have sought specific performance if Peter breached. However, under the modern theory, the requirement for mutuality is met if one party can sufficiently assure performance. The court would have to decide if the two years and nine months was enough to constitute full performance, but this is only 75% of the total performance required. Peter may be willing to work the remaining three months, but the court cannot require him to do it. Thus, there is no mutuality and Peter cannot successfully obtain specific performance.

ANSWER B TO QUESTION 4

What Rights Does Peter Have as to Employment and the Parcel of Land

I. The Contract, if Valid, Is Governed By Common Law

The issue is what law governs the contract, if valid, between Peter (P) and Della (D). The UCC governs contracts involving the sale of goods. Contracts which are for services or are land contracts are governed by the common law. Here, P and D are contracting for employment and possibly land. This is a contract for services and land and therefore the contract is governed by common law principles.

II. There is Likely a Valid Contract Between Peter and Della

The issue is whether Peter and Della actually entered into a valid contract. For a contract to be valid, it must contain offer, acceptance, and consideration. An offer is an outward manifestation by the offeror that creates the power of acceptance in the offeree. An advertisement can be a valid offer is it is made to a particular person, outlines the specific details of the offer, and presents the recipient of the advertisement with instructions as to how acceptance can be made. Acceptance is an outward manifestation by the offeree that he accepts the terms of the offeror. Acceptance must mirror the terms of the offer. If acceptance does not mirror the terms of the offer or, in itself, alters the terms of the offer, it is a counteroffer and effectively rejects the original offer. However, a mere inquiry is not a counteroffer. Consideration is a bargained-for legal detriment. (i.e., A works for B in exchange for a salary).

Here, P responded to an advertisement from D, a dentist, who was seeking a dental hygienist. The advertisement was not a valid offer because there are no facts that it was sent directly to P, there are no facts that it contained the details of any potential employment contract, and there are not facts that it told P how he could accept. However, when D interviewed P, she presented him with a valid offer to be her hygienist for three years in exchange for either (1) working for $50,000 per year; or (2) working for $40,000 per year and she would agree to convey to him a parcel of land,

worth about $50,000. When P accepted, he said "I'd like to go with the second option, but I would like a commitment for an additional three years after the first three." This acceptance by P does not mirror the terms of the offer by D and therefore acts as both a rejection of the offer and a counteroffer. Della said, "Good, I'd like you to start next week."

Peter will argue that Della's comment of "Good, I'd like you to start next week," is her acceptance of his counteroffer. He will argue that the terms of the deal are that he works for Della for 6 years at $40,000 per year and is conveyed the parcel of land after the first three years. When P started to work and D handed him the letter stating only that he had agreed to work as a hygienist for $40,000 per year, P will argue that this letter is merely a documentation of the salary he is to receive and nothing more.

In conclusion, Peter's counteroffer is the controlling offer and D accepted it by saying, "Good, I'd like you to start next week." The consideration is that Peter work for 6 years at $40,000 and will receive the parcel of land at the completion of the first three years. The consideration is valid. There is likely a valid contract between P and D.

III. The Letter D Presented to P Is An Invalid Modification

The issue is whether the letter D presented to P is an invalid modification. Under the Common Law, a modification to a contract must be supported by consideration. The pre-existing duty rule prohibits the modification of any contractual duties which have been agreed to absent consideration because the party is attempting to modify something that he/she is currently obligated to do.

Here, D attempted to modify the existing when she presented P with a letter, which she signed, documenting P would work as a dental hygienist for $40,000 and no other elements of the deal between P and D were documented. There was no consideration paid by D to P to enforce this modification and it is invalid.

In conclusion, the modification is invalid because D is obligated to have P work for 6 years at $40,000 and convey a piece of land to him after 3 years of work. To reduce her obligations to only paying him $40,000 per year without consideration is in violation of the pre-existing duty rule.

IV. Della Can Assert the Defense of Statute of Frauds (SOF)

The issue is whether D can assert a SOF defense. The SOF requires that certain contracts be in writing. The categories are contracts regarding marriage, contracts which cannot be performed within one year, land sale contracts, executor agreements, guarantees or suretyships, and contracts for the sale of goods for over $500. A contract which cannot be performed within one year is determined at the time of the contract execution and is measured by whether there is any possibility performance can be completed within one year. The writing that will satisfy the SOF must contain the essential terms of the contract and be signed by the party to be charged.

Here, P's contract is for 6 years, or, at the least, 3 years, and is clearly not performable within one year. This contract is subject to the statute of frauds. The parties did not sign a written contract for P's services to D. Further, part of the deal is a land conveyance which is also subject to the SOF. Neither of those terms were ever written down and D can assert that the contract fails under the SOF. Peter will argue that the letter D gave to him after he started working is a writing confirming their contract because it says he gets paid $40,000 and it is signed by D. However, this is not the same contract to which they agreed.

In conclusion, it is likely that D can assert a valid SOF defense because the ` contract was not in a writing which comports with the requirements of the SOF.

V. P Can Assert The Defense of Estoppel and Likely Partial Performance to the SOF Requirements.

The issue is whether P can assert the defenses of estoppel or part performance to the SOF requirements. As stated above certain writings are subject to the SOF. There are four defenses to the enforcement of the SOF: (1) Partial or Full Performance, (2) Estoppel, (3) Judicial Acknowledgement of Contract, and (4) Merchant's Confirmation Memo. There has been no acknowledgement in a judicial proceeding and the merchant's confirmatory memo is only for UCC contracts with a merchant, so neither apply. However, Partial or Full Performance and Estoppel may apply.

Partial or Full Performance

A party may not comply with the requirements of the SOF if he partially or fully performs his contract and the other party accepts the benefits of the performance. Here, P worked for D for 2 years and 9 months. At the very least, D was under the impression that P was going to be working for her for 3 years, even though the final accepted offer was likely for 6. There are no facts which say she failed to pay him so she very likely was performing her obligations under the contract. She was accepting his benefit of being a hygienist in exchange for her payment. Therefore, under the doctrine of part performance, P has a meritorious defense to the requirments of the SOF.

Equitable Estoppel

A party may not comply with the requirements of the SOF if he can assert a defense of estoppel. Equitable estoppel occurs when a party says or does something that foreseeably creates action in another person, the other person relies on the party's previous statement or action, and it would be unjustly prejudicial to the relying party. Here, P has fully relied on Ds statement of acceptance to his counteroffer. He began working for her and has been working for her for almost 3 years. D has reason to know that he was working for her based on their discussions of the $40,000 and land conveyance. P may not have started working for D without the provisions agreed to in his counteroffer and therefore it would be unfairly prejudicial not to enforce his contract.

In conclusion, P has a likely defense of partial or full performance ot the SOF and may have a mertitorious defense of Estoppel.

VI. If A Valid Contract Exists, It is A Contract For Term and Not an At-Will Contract

The issue is whether the contract is a contract for term or an at-will contract. In a contract for term, an employee has a property right in the job and may not be terminated without cause. Conversely, an at-will contract allows the employer or employee to terminate employment for good cause, bad cause, or no cause.

Here, P will argue that this is a contract for terms because the terms of his counteroffer were that he worked for D for 6 years. Further, he will argue that even if her original job offer is controlling, that offer was for a 3 year term. Either way, it is not an at-will employment. Since it was not at will, she was not able to fire him because she had always been happy with his work. Della will argue that her letter modifying the contract has no language regarding term and therefore it is an at-will employment and she can fire him for any reason.

In conclusion, this is a contract for term and P may not be fired absent cause.

In conclusion, P and D have a valid contract for 6 years at $40,000 per year. Further, D is obligated by the contract to convey P the parcel of land upon completion of his 3rd year. Peter has a right to seek remedies for breach of contract.

What Remedies Can Peter Seek

VII. Peter May Seek Expectation Damages and Reliance Damages

The issue is whether Peter may seek expectation damages and reliance damages for his contract with Della. Legal remedies are available if the plaintiff can clearly estimate the damages incurred with specificity. Legal damages are in three categories, expectation, reliance, and restitution. Expectation damages place the

plaintiff in the position he would have been in had the breaching party performed the contract in full. Reliance damages place the plaintiff in the place he would have been had the contract not existed. Restitution damages reimburse the plaintiff for any benefit conferred on the defendant. A plaintiff always has the duty to mitigate damages and, in the employment context, the duty to to find other employment. The plaintiff is not required to find any job, but rather a job comparable to the job that has been taken. If a plaintiff cannot find replacement employment, a good faith effort must take place to find employment.

Here, P will argue that he should get his expectation, or benefit of the bargain damages, from the contract including any incidental and consequential damages that are reasonably foreseeable from D's breach.. He can easily estimate them because he was due 3 years and 3 months salary and the parcel of land. He had a right to those damages because he was under a contract for which he was improperly fired. These damages will place him in the position he would have been in had he not been fired and the contract been performed. However, he has a duty to find alternative employment and there are no facts which say he has looked for or obtained any further employment. Also, there are no facts that say he has acted in bad faith which would negate the award of damages. If and when he does, his salary from that employment can be applied against his damages from D. There are no facts indicating any incidental and consequential damages.

Also, if P spent any money in reliance on his contract with D, he may recover those costs that are reasonable and foreseeable. Any money that he spent in reliance on the contract with D is obtainable.

In conclusion, he can obtain expectation and reliance damages from D less his duty to mitigate by finding other, comparable employment.

VIII. <u>Peter May Seek Specific Performance of the Land Contract, But Not the Services Contract</u>

The issue is whether Peter can seek specific performance of the land contract. Specific performance is available when the contract has definite and certain terms, there is an inadequate legal remedy, the court can correctly adjudicate, there is mutuality between the parties and there are no defenses. Inadequate legal remedy applies when you are dealing with land or unique items. Mutuality has been relaxed and no longer requires that the parties must each be able to get specific performance. Just that the party is ready and willing to perform. Specific performance will not be applied to a services contract because it is difficult to enforce and can abridge certain constitutional provisions against servitude.

Here, the land at issue is unique and is a definite term of the contract. Money damages will not suffice. Peter contracted and performed for the piece of land. The judge can properly adjudicate the matter. However, Peter likely may not seek specific performance of the services contract.

In conclusion, P may seek specific performance of the land contract but not the services contract.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2013

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2013 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility
2.	Constitutional Law
3.	Community Property
4.	Contracts
5.	Wills/Trusts
6.	Remedies

Question 4

On March 1, Ben, a property owner, and Carl, a licensed contractor, executed a written agreement containing the following provisions:

1. Carl agrees to construct a residence using solar panels and related electrical equipment manufactured by Sun Company ("Sun") and to complete construction before Thanksgiving.

2. Ben agrees to pay Carl $200,000 upon completion of construction.

3. Ben and Carl agree that this written agreement contains the full statement of their agreement.

4. Ben and Carl agree that this written agreement may not be modified except upon written consent of both of them.

Prior to execution of the written agreement, Ben told Carl that Carl had to use Sun solar panels and related electrical equipment because Sun was owned by Ben's brother, and that Carl had to complete construction prior to Thanksgiving. Carl assured Ben that he would comply.

In August, Ben began to doubt whether Carl would complete construction prior to Thanksgiving; Ben offered Carl a $25,000 bonus if Carl would assure completion, and Carl accepted and gave his assurance.

To complete construction prior to Thanksgiving, Carl had to use solar panels and related electrical equipment of equal grade manufactured by one of Sun's competitors because Sun was temporarily out of stock.

Carl completed construction prior to Thanksgiving. Ben, however, has refused to pay Carl anything.

What are Carl's rights and remedies against Ben? Discuss.

SELECTED ANSWER A

Governing Law

Contracts are governed by either the UCC or Common Law. The UCC relates only to contracts for the sale of goods. Here, the contract is for the construction of a residence, using certain products manufactured by Sun. Although this involves the goods manufactured by Sun, it is primarily for the purpose of having Carl build a residence for Ben. Therefore, common law controls.

Valid Contract

To have a valid and enforceable contract there needs to be (1) an offer, (2) acceptance, and (3) consideration. Here, the facts indicate that Ben and Carl reached an agreement related to the terms. Thus, the first two elements are present. Additionally, the contract calls for Carl to construct a residence to Ben's specifications and for Ben to pay Carl $200,000 in return. Thus, there is a bargained-for exchange of legal detriment by the parties because they are both doing something that they have no legal obligation to do, in exchange for a benefit.

Therefore, there is a valid contract formed between Ben and Carl.

Terms of the Contract

Generally, the terms of the contract are determined by the written agreement itself. Here, the written agreement indicates certain terms, including that Carl will construct a residence using solar panels and related electrical equipment manufactured by Sun and that Ben will pay Carl the $200,000 upon completion.

However, these promises contained in the agreement are not the only terms that the parties may claim exist.

Parol Evidence Rule

The parol evidence rule bars the introduction of an oral or written agreement which was made prior or contemporaneous to the execution of the contract and which contradicts or varies the terms of the integrated contract.

Here, Ben may argue that prior to the execution, Ben and Carl agreed that the use of Sun products and completion prior to Thanksgiving were conditions, not promises. A condition precedent to performance is a term in the agreement that must be satisfied strictly in order for the party's performance to be due. If the condition never occurs, the party never has a duty to perform. A promise, on the other hand, only needs to be substantially performed under the common law in order for the other party's performance to become due. In the contract, the use of Sun products and completion by Thanksgiving are merely promises because they do not indicate any mandatory language or language to show that Ben's performance is not due unless they are strictly followed.

Carl will argue that introducing the evidence of Ben and Carl's oral agreement prior to the execution of the contract regarding the mandatory nature of the Sun product and completion terms is barred by the parol evidence rule.

Although this does constitute a prior oral agreement, the parol evidence rule does not bar the introduction of evidence to show that there was a condition precedent to performance. This is one of the rule's exceptions. Therefore, if this agreement did make those terms conditions, rather than promises, then the argument can be used to show that.

Here, the agreement between Carl and Ben does show that Ben told Carl that he "had to use Sun" products and that he "had to complete construction prior to Thanksgiving." Although these do indicate more definiteness, there is no express language stating that unless Carl does so, Ben will not have to perform. Thus, Carl will argue that this agreement only enforced the terms of the written agreement, not changed them into conditions.

Ultimately, because there is no express language and because the courts do favor promises over conditions because of the strict compliance requirement of conditions, this will likely be found to be an enforcement of the promise in the agreement and therefore not parol evidence to contradict the terms.

Bonus Agreement

Ben began to doubt whether Carl would complete construction prior to Thanksgiving, so he offered Carl a $25,000 bonus if Carl would assure completion. Carl accepted and gave such assurances. Carl will argue that this was a new contract or a modification to their existing contract.

Modification in Writing

If Carl argues that this agreement modified the written agreement that Carl and Ben had, Ben will point to the term in the agreement which states that "this written agreement may not be modified except upon written consent of both of them." These modifications in writing terms are generally not enforced under common law.

Statute of Frauds

A writing is only required to modify an existing agreement under common law if the modification places the contract within the statute of frauds. The statute of frauds generally does not apply to services contracts unless they are not capable of being performed within one year. Here, the agreement that attempts to modify the existing agreement states that performance must be completed by Thanksgiving (late November). The original contract was made on March 1, and the modification in August. Therefore, this is requiring that performance be completed under a year from the time of the contract or the modification. Therefore, the statute of frauds does not require a writing.

Therefore, Ben cannot challenge this modification on the basis of a lack of a writing.

Enforceable Agreement

Although it is permissible for the parties to orally modify their agreement, a modification or subsequent contract requires the three elements required in every contract: (1) offer, (2) acceptance, (3) consideration. Here, there was an offer from Ben to Carl for $25,000 extra if Carl finished construction prior to Thanksgiving. There was an acceptance because Carl accepted these terms as they were, without condition. There also must be, however, consideration.

Pre-Existing Duty Rule

The pre-existing duty rule holds that a promise to do what a party is already contractually or otherwise obligated to do is not consideration for a new agreement. The exceptions to this agreement are for (1) if a third party will perform the obligation, (2) if unforeseen circumstances have made it such that the performance would otherwise be excused, or (3) there is a change in the amount or type of performance.

Here, the performance between Ben and Carl was set in the agreement to be completed before Thanksgiving. Thus, Carl was under a pre-existing contractual duty to perform by Thanksgiving. As such, there is no consideration given by Carl in the agreement, only by Ben in offering to pay more money.

Carl might argue that because Ben began to doubt Carl's ability to perform, this rule is excused. However, that is not the law. Common law, unlike the UCC, strictly requires adequate consideration for a modification or a creation of a new agreement. Here, there was not an excuse of Carl's performance under the circumstances, nor did he promise to do more than he was already obligated to do under the agreement, and he did not assign his duties to a third party.

Therefore, there is no consideration to support the agreement between Ben and Carl made in August. Thus, Ben has no obligation to pay Carl $25,000.

Thus, the terms of the agreement are unmodified and remain just as they were in the original written integration.

Performance of the Contract Terms

Carl's Performance

Under common law, a breach of contract occurs if a party fails to fully perform its obligations under an existing contract. However, in order to discharge the other party's obligation to perform its obligations, there must be a material breach. Therefore, in order for Carl to have sufficiently performed to give Ben an obligation to perform, Carl must have substantially performed his obligations under the contract.

Under this contract, Carl constructed a house for Ben. That was his primary obligation and he completed it. Additionally, he completed it on time: by Thanksgiving. Therefore, Carl fully and completely performed two of his three obligations under the contract.

Carl did not, however, perform his obligation to use Sun manufactured solar panels and related electrical equipment in constructing the house. Carl knew he was supposed to do this, but he failed in this because in order to get it done on time, he had to use solar panels manufactured by one of Sun's competitors. Therefore, by not complying with the contract terms as to this requirement, Carl did commit a breach of contract.

This breach, however, is minor. Carl substantially performed his obligation under the contract because he built an entire house for Ben and got done on time. Therefore, the failure to use Sun products was a minor breach for which Carl is liable, but it does not discharge Ben's obligation to perform.

Ben's Performance

Ben flatly refused to perform at the time that his performance was due: upon completion of the construction. Therefore, because his performance was due, he is in material breach of the contract.

Excuses for Non-Performance

Carl's Non-Performance

Waiver of Promise

Carl will argue that his performance was discharged by Ben's waiver of the promise to use material made by Sun when he mandated and offered more money for Carl to complete performance by Thanksgiving.

Generally, a party may waive a condition precedent to performance if the condition is in the contract to protect them, but it is not permissible to waive performance of a promise under a contract unless there has been a modification of the agreement.

Here, as shown above, the offer to give Carl an extra $25,000 was not supported by consideration. Therefore, it is not enforceable as a modification. Further, even if it was enforceable as a modification, it does not indicate that Ben "waived" the right to have Sun products used in his home. Carl never informed him that it would not be possible to use those products and perform on time.

Therefore, the promise is not waived.

Impossibility/Impracticability

Carl will also argue that impossibility or impracticability discharged him of the obligation to use Sun products. Impossibility discharges performance if it would be objectively impossible to perform due to unforeseen circumstances. Impracticability discharges a party's performance if the performance has become extremely and unreasonably difficult and expensive as a result of unforeseen circumstances.

Here, although Carl may claim that it was objectively impossible to get Sun products in time to construct the house before Thanksgiving, Ben will counter that difficulty in obtaining Sun products was not an "unforeseen circumstance."
To be unforeseen, the circumstance must be one that the parties did not, or could not, contemplate at the time of the agreement. Here, the possibility that it would be

challenging to get Sun products specifically, is a condition that the parties, particularly Carl, should have contemplated at the time of the agreement since the agreement was specific as to their use. Further, it is unknown exactly what the hardship or difficulty was in obtaining those products on time. If it was a totally unforeseen circumstance which led to the hardship, then Carl would have a stronger argument.

However, in the absence of information showing that an unforeseen event caused the inability to obtain these products on time, Carl's performance on that term will not be excused.

Ben's Non-Performance

Non-Occurrence of a Condition Precedent

Ben will argue that the condition precedent that the house be built using Sun products discharges him of any liability for payment. However, as discussed above, it is most likely that the court will construe the written term and the oral agreement as creating a promise, not a condition.

Therefore, his obligation is not discharged since Carl substantially performed his obligation under the contract (see above).

Conclusion

Therefore, Ben is liable to Carl for a material breach of the agreement. Ben is not responsible to pay the extra $25,000. But Carl is responsible for the damages caused by his minor breach of the agreement.

Carl's Remedies

Compensatory Damages

Compensatory damages in contract are aimed to place the plaintiff in the position that he expected to be in but for the breach. This is the general measure of contract compensatory damages.

In order to recover compensatory damages, the damages must be shown to be (1) caused by the defendant, (2) foreseeable, (3) unavoidable, and (4) certain.

Here, the damages were caused by Ben's refusal to pay. They were foreseeable because it was foreseeable that Ben would simply refuse to pay; this is not an attenuated or unexpected event. The damages were unavoidable to the extent that Carl could not have done anything else to mitigate his loss. He built the house and has not received payment; he is not in the type of contract where he can seek cover or performance from another.

Finally, the damages must be certain. In a construction contract, the damages for a party who completes a performance but is not paid is the contract price. Here, the contract price is $200,000. Therefore, Carl's damages are certain in sum based on the contract.

Therefore, he can recover $200,000 in compensatory damages from Ben.

Offsetting Damages

Carl's compensatory damages award will be offset by the damages that he caused Ben as a result of his failure to use Sun products. Since the products used by Carl were of equal grade to those used by Sun, the damages will be fairly nominal.

Ben will try to retrieve consequential damages arising from his brother's lost profits. However, although Ben's brother owns Sun and would have benefitted from the contract, it was only incidentally. Thus, Ben's brother is not entitled to anything on a third party beneficiary theory since only intended beneficiaries have such rights.

Consequential damages here would not be available for loss to the brother's business unless Ben can show that those are his own personal damages. However, if he can show a personal loss stemming from this failure, he can recover consequential damages since the ownership of Sun was known to Carl at the time of making the contract.

Therefore, Ben's $200,000 will be offset by Ben's damages.

Specific Performance

Specific performance is an equitable remedy which requires the contract to be performed. To be granted, it must be shown that (1) there is a valid, certain, and definite contract, (2) the plaintiff's conditions for performance were met, (3) there is not an adequate remedy at law, (4) enforcement is feasible, and (5) there are no defenses.

Here, the contract is valid, and definite in the terms of the integrated writing (see above). Carl (the plaintiff's) conditions for performance were met. But there is an adequate remedy at law. Since the payment of money is not unique, unless there is an indication that Ben is insolvent, there is a perfectly adequate legal remedy in compensatory damages. Finally, feasibility would be enforceable.

Unclean Hands

Further, even if there was not an adequate remedy at law, Ben might raise the defense of unclean hands. Unclean hands is an equitable defense which says that the contract should not be enforced in equity if the plaintiff committed wrongdoing in the transaction. Here, Ben will argue that Carl breached the agreement by not using Sun products and therefore comes to the court with unclean hands. This will likely not prevail since Carl's breach was minor.

Regardless, Carl's best remedy is legal. Specific performance will not be granted.

SELECTED ANSWER B

Carl's rights and remedies against Ben will be determined by principles of contract law.

Applicable Law

The common law of contracts will govern the contract that Carl and Ben made. The common law governs all contracts except for contracts regarding the sale of goods, which are governed by the UCC. The common law governs services contracts, and therefore covers construction contracts. Here, Carl is a licensed contractor, and he has agreed to construct a residence for Ben. Therefore, Carl has entered into a services contract, which will be governed by the common law. One may argue that Carl has agreed to provide a house, which is a good, but this argument will fail. Carl was hired for his services in constructing a house.

Formation

The facts show that a validly executed contract was formed. A contract requires mutual assent and consideration. Here, Ben and Carl entered into a written agreement, whereby both manifested consent to be bound by the terms of the contract.

Moreover, there is adequate consideration. Consideration is a bargained-for legal detriment. Here, Carl agreed to build a house and Ben agreed to pay $200,000 in consideration.

Terms of the Contract and Ben's Alleged Breach

The written contract states that Carl agreed to construct a residence using solar panels and related electrical equipment manufactured by Sun Company. In addition, Carl agreed to complete construction before Thanksgiving. Ben agreed to pay Carl $200,000 upon completion of the contract.

Carl constructed the home before Thanksgiving. Now, Ben refuses to pay Carl anything. Carl's rights and remedies under the contract will be determined by the court's interpretation of the contractual terms and whether the parties modified the terms of the contract.

Promise or Condition to Use Panels from Sun Company

A condition precedent is a condition that must be fulfilled in order to require the party with the benefit of the condition to render full performance under the contract. If a condition precedent is not fulfilled, the party with the benefit of the condition is not required to perform. Here, Ben will argue that the contract includes a condition precedent that Carl had to use Sun Company solar panels in construction of the house. Ben will argue that Carl did not use Sun Company solar panels and related electrical equipment, and that Carl therefore did not satisfy the condition. Therefore, Ben will argue that he was not required to render performance under the contract and pay Carl the $200,000 for the house.

In contrast, the non-occurrence of a promise or the failure to fully satisfy a promise contained in a contract does not relieve the other party of liability. If a party promises to render performance of a contract, the other party will not be relieved of performance unless the party who made the promise materially breached the contract. A material breach occurs when the party does not render substantial performance. A minor breach does not relieve the non-breaching party of their duty to perform, although they can sue for damages. In order to determine whether a breach is minor or material, a court will consider the extent of performance, the hardship to the breaching party, the adequacy of compensation, and the additional work needed to fulfill the promise.

A court will consider the intent of the parties in order to determine whether a clause at issue is a condition or a promise. As explained above, Ben will argue that the use of Sun Company products in construction of the house was a condition while Carl will argue that he merely promised to use the products. Here, the court will likely hold that, under the terms of the written contract, the agreement to use Sun Company products was a promise. The language of the contract does not expressly condition Ben's

performance on the use of Sun Company products. In a large construction project like this, a court will likely require unambiguous language that the parties intended to create a condition and not a promise. Solar panels and electrical equipment are relatively minor elements of an overall house. Therefore, based on the terms of the contract, the court likely will not find that the clause requiring Sun Company products was so important that the parties intended for it to be a condition. Here, Carl used solar panels of equal grade and otherwise constructed the house per the terms of the contract.

Parol Evidence

However, Ben will argue that the court should consider the parties' discussions prior to entering into the contract when interpreting the terms of the contract. Ben will argue that he explicitly told Carl that he had to use Sun Solar panels and related electrical equipment, because Sun was owned by Ben's brother. Therefore, Ben will argue that the use of the Sun Company products was a very important part of the contract. Ben will argue that he would not have made the contract with Carl unless Carl agreed to use Ben's brother's products.

Carl will argue that the Parol Evidence rule bars the court from considering evidence of these discussions. The parol evidence rule applies when a contract has been fully integrated. Integration occurs when the parties intend the contract to integrate all prior discussions and that all terms be included in the final written agreement. A merger clause in a contract is probative of the parties' intent to integrate but it is not conclusive.

If a contract is integrated, prior communications between the parties cannot be used to contradict the terms of the contract. However, the parol evidence rule does not bar the use of prior communications to show the non-occurrence of a condition, to challenge the validity of the contract, or to construe ambiguous terms.

Here, the court will likely find that the contract was integrated. The contract contains a merger clause, which shows that it is likely that the parties intended to reduce their agreement to a final written agreement. Moreover, the written contract is complete and includes all material terms.

Therefore, the use of parol evidence to contradict the terms of the contract will be prohibited. Carl will argue that Ben's statement that Carl "had to use Sun Solar Panels . . . because Sun was owned by Ben's brother" cannot be considered by the court, because it contradicts the terms of the written contract. Carl will argue that the contract language is clear, and it does not state that the use of Sun Company products was a condition. Carl will argue that such an important provision of the contract would have been included in the final written agreement. However, Ben will likely prevail in arguing that this statement can be used by the court to consider whether clause 1 of the contract is condition. As explained above, prior communications can be used to show the non-occurrence of a condition. Moreover, the parol evidence does not directly contradict clause 1 of the contract. Instead, whether clause 1 is a condition or promise is unambiguous and will need to be determined by the court. Therefore, the court will likely consider this evidence in order to determine the parties' intent. Here, the oral communication shows that Ben told Carl that he "had to use" Sun Company products and Carl assured him that he would comply. However, even if the court does use the parol evidence, it still may not conclude that the parties intended the use of Sun Company products to be a condition. As explained above, a court usually will presume that a clause is a promise and not a condition.

Material v. Minor Breach

If the court determines that the clause was a promise and not a condition, then Carl will argue that Ben must pay him for constructing the house. However, Ben will argue that Carl still breached the promise by not using Sun Company products. Therefore, Carl will be liable for some damages. Whether Ben will be required to pay Carl for the house will be determined by whether Carl committed a material or minor breach.

As explained above, the court will consider several factors in determining whether a breach is minor or material. Here, the court will likely conclude that the breach was minor. Carl substantially performed under the contract. He built a house for Ben and he did so within the time limit that Ben wanted. Moreover, solar panels are a minor component of the house, and not a very important part of the overall construction. Finally, the solar panels and products used were similar in quality and design to the Sun

Company products. Therefore, the hardship to Ben here is minimal. Carl has provided Ben with a sufficient home, and Ben should not be allowed to escape payment by arguing that Carl materially breached for the mere failure to use Sun Company products.

Impossibility

Even if Ben is successful in arguing that Carl materially breached, Carl will argue that his breach is excused by impossibility. Impossibility occurs where the nonoccurrence of an event was a basic assumption of the parties, and neither party assumed the risk of the occurrence of the event. Impossibility must be objective. Here, Carl will argue that Sun was temporarily out of stock of solar panels and products. Therefore, it was impossible for him to use Sun Company products in the home.

Carl will likely succeed in this argument. Ben will argue that the impossibility was not objective, because Sun Company was only out of stock temporarily.

However, Carl was limited by the term in the contract requiring construction to be finished by Thanksgiving. Therefore, under the terms of the contract it was impossible for him to use both Sun Company products and complete the construction prior to Thanksgiving.

Frustration of Purpose

Carl may also argue that the purpose of the contract was frustrated. This occurs when an event occurs that was not foreseeable, the non-occurrence of which was a basic assumption of the contract, and the occurrence of which frustrates a purpose of the contract that both parties intended. Carl will argue that Sun Company's inability to provide product was a supervening event which frustrated the purpose of his contract with Ben. Therefore, he will argue that his performance of his promise to use Sun Company products was excused.

Carl's Liability and Damages

Therefore, Carl likely committed a minor breach of the contract. Ben can sue Carl for damages caused by the breach. But, Ben must perform under the contract and pay Carl for his work. Therefore, Ben will be required to pay the $200,000 less any damages caused by Carl's breach. Here, the damages are likely minimal. The purpose of damages is to compensate the damaged party. Carl may ask for expectation damages, which is measured by the damaged party's expectations. The purpose is to put the party in a position they would have been in but for the breach. Here, Ben expected a home constructed with Sun Company products. However, he received a home constructed with products of equal grade. Therefore, he has not suffered any economic damages, for which he can be compensated. He may argue that he is personally dissatisfied with the home, but the court will be unlikely to recognize these damages as legitimate or be able to quantify these damages.

Ben may also argue for specific performance. Here, the court will be unwilling to grant specific performance. Requiring Carl to deconstruct and then reconstruct the home using Sun Company products would place an extreme hardship on him and be difficult to supervise by the court.

Even if Carl is found to have materially breached the contract or failed to perform a condition under the contract, he will likely be compensated under a quasi-contract restitution theory. Ben will not be allowed to be unjustly enriched by Carl's work. Under this theory, Ben will have to pay Carl for the value of the benefit that Ben received less any damages that Ben suffered.

Modification

Carl will argue that he is also owed the $25,000 bonus that Ben offered him in order to complete the home by Thanksgiving. A modification to a contract under the common law must be supported by consideration. Under the UCC, modifications in good faith without consideration are permitted. Here, Ben will argue that the modification is not valid or binding, because it was not supported by any consideration. Consideration is a bargained-for legal detriment. Ben offered to pay $25,000; however, Carl merely

agreed to assure completion by Thanksgiving. Ben will argue that under the terms of the contract, Carl was already required to complete the construction by Thanksgiving. Therefore, consideration does not exist.

Carl may argue that the contract pre-modification was not a “time is of the essence” contract. Therefore, pre-modification Carl did not agree to forfeit his pay if the contract was not fully performed by the specific date (Thanksgiving). He may argue that the modification made performance by Thanksgiving mandatory, because time is of the essence. Therefore, Carl will argue that there was consideration. This argument will likely fail. Regardless, under the terms of the contract Carl agreed to perform by Thanksgiving. Even though he might not have committed a material breach by performing later, his agreement to perform an obligation he already has is not consideration.

Second, Ben will argue that the modification was invalid, because it was not made in writing. The parties’ contract in clause 4 states that the agreement may not be modified except upon written consent of the parties. This argument will fail. Under the common law, a clause requiring modifications to be in writing is not enforceable, although such a clause is enforceable under the UCC.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2014

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2014 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Contracts/Remedies
2.	Evidence
3.	Business Associations / Professional Responsibility
4.	Criminal Law and Procedure
5.	Trusts / Community Property
6.	Torts

Question 1

Percy and Daria entered into a valid written contract for Percy to design and install landscaping for an exclusive housing development that Daria owned. Percy agreed to perform the work for $15,000, payable upon completion. Percy estimated that he would work approximately 100 hours a month on the project and would complete the project in three months. His usual hourly fee was $100, but he agreed to reduce his fee because Daria agreed to let him photograph the entire landscaping project for an article he planned to propose to *Beautiful Yards and Gardens* magazine. He anticipated that publicity from the article would more than compensate him for his reduced fee.

Percy completed two months' work on the project when Daria unjustifiably repudiated the contract. He secured a different project with Stuart in the third month, which paid him $1,500 and took 15 hours to complete. He could have completed Daria's project at the same time.

At the time Daria unjustifiably repudiated the contract, Percy was negotiating with Tammy to landscape her property for $30,000. Once Tammy learned what had happened, she stopped negotiation.

Percy has sued Daria. Ideally, he would like to finish the project with her.

What remedy or remedies may Percy reasonably seek and what is the likely outcome? Discuss.

QUESTION 1: SELECTED ANSWER A

Contract Law - Common Law

In contract law, the common law governs service contracts or land sale contracts, and the UCC governs the sale of goods. This is relevant because there are certain differences in remedies between the two areas of law, and certain remedies that are specific to the UCC.

This was a service contract, because Percy was to perform the service of landscaping the yard. Therefore, the common law and its remedies apply, which will be discussed below.

Breach Of Contract and a Valid Contract

A breach of contract claim requires there be 1) a valid contract, 2) a breach, and 3) damages. The problem says they entered a valid written contract, so there is no issue there.

Breach - Anticipatory Repudiation

Anticipatory repudiation occurs when a party clearly and unequivocally communicates or manifests that it will not perform its duties on the contract. When there is an anticipatory repudiation, the other party may treat the repudiation as a breach or ignore it and demand performance until the original performance was due. When one party has entirely performed before the agreed upon date, and the other party repudiates by refusing to pay - i.e. the only duty remaining is for one party to pay - the non-breaching party may not sue for damages until the original agreed upon date.

Here, Daria clearly manifested that she would not pay, and the problem says it was unjustifiable. Percy can take this as a breach of the contract. Also, Percy had not completed performance and so there are more duties due than simply one party paying.

Therefore, Percy may bring a breach of contract claim for any resulting damages, discussed below.

Monetary Damages

The general and presumed damages in contract law are monetary damages, with seek to compensate the non-breaching party with money. In certain situations, which will be discussed below, equitable remedies such as specific performance will be granted. But the default is damages, so these will be discussed first.

Expectation Damages

The default contract remedy is expectations damages. Expectation damages seek to place the non-breaching party in the same position he or she would have been in had the breaching party performed. Said another way, expectation damages seek to give the non-breaching party the benefit of its initial bargain. The general formula for expectation damages is the difference amount of price or the amount to be paid for a service or good under the contract and the amount of replacing (the market price) it, plus any incidental damages, plus any foreseeable consequential damages, less any amount saved by the non-breaching party.

Here, the general damages to which Percy would be entitled include the amount of money he stood to earn under the contract ($15,000) less the amount he could get paid for replacement work. There is a tricky issue regarding the magazine spread in Beautiful Yards and Gardens, because Percy can possibly argue that the value of that was at least $15,000, and so his total expectation was $30,000, and therefore if the court does not grant specific performance (see below), it should award him expectation damages of $30,000 minus any replacement services he provides and any amount he saves. This is because Percy would have completed 300 total hours of work (100 hours a month X 3 months) and he would normally charge $100 for each hour (300 X 100 = $30,000). Daria might argue that he only expected to make $15,000 and so that should be the amount from which to measure Percy's expectation damages.

Because the initial contract amount was only for $15,000, Daria has a strong argument that that amount was the only amount Percy could reasonably have expected to make. In the event the specific performance is not granted, and therefore Percy does not get the added publicity, it will be difficult for him to claim he expected to earn more than $15,000 and so arguing for his traditional hourly rate will probably fail. If he wants to collect more in the absence of specific performance, he could possibly argue under a restitution theory.

Consequential Damages: Lost Contract with Tammy

Consequential damages are damages that are unique to an individual party (i.e. they are not those that are clearly within the contract, such as the contract price) but that are the natural and foreseeable consequences of a contract breach or are contemplated by the parties when contracting. Importantly, to collect consequential damages, the damages must be proven with reasonable certainty and they must be foreseeable.

Here, Percy will argue that his lost contract with Tammy was a consequence of Daria repudiating their contract, and therefore the consequential damages of that $30,000 contract should be included in his damages with Daria. He will point to the timing, and that he and Tammy were negotiating a deal but Tammy stopped upon learning that Percy's contract with Daria ended. Percy might argue that Tammy stopped negotiating because the broken contract with Daria gave Tammy reservations about contracting with Percy.

Percy's consequential damages argument is subject to many counter-arguments by Daria, which will probably win out.

Causation of Breach

First, there is a causation issue. Daria can convincingly argue there is no proof that her repudiation even caused Tammy to stop negotiating. Therefore, it might not even be a "consequence" of her repudiation and should not be included in Percy's damages claim.

Certainty

Tammy can argue that there is no certain amount of the consequential damages with Tammy. They were negotiating over a price of $30,000, but that was not the final, agreed upon price, which could have been less. Further, there might not have been a contract at all. Therefore, there is no reasonable certainty that but for Daria's repudiation, Percy would have earned $30,000 from Tammy.

Foreseeability

Lastly, even if Daria's repudiation caused Tammy to cease negotiating, Daria can argue it was not a natural and foreseeable consequence of her repudiation, nor did Daria contemplate such a consequence when entering the contract. Daria repudiated the contract unilaterally. She never alleged that Percy was doing a bad job, and she has done nothing further to impugn his business reputation. While it is arguably foreseeable that someone canceling a contract might make the other party look bad, it is likely not a natural consequence of one individual's repudiation to cause another party to back out of a contract.

Disposition

Percy should not be able to collect consequential damages from the lost deal with Tammy in his claims against Daria.

<u>Incidental Damages</u>

Incidental damages are naturally arising damages that a party occurs when trying to fix the situation after another party breaches. Incidental damages include costs such as trying to renegotiate other deals. Here, it is unclear any specific incidental damages Percy may collect, but he will be able to collect any that do exist.

Mitigation and contract with Stuart

A non-breaching party has a duty to mitigate damages by seeking reasonable replacements or substitutes for goods or services. Thus, in his third month on the job, Percy had a duty to mitigate by finding replacement work. Any damages Percy collects

from Daria must be reduced by what Percy earns from these mitigating contracts, and if he does not mitigate, the law will treat Percy as if he did and not allow him to collect if there were reasonable replacements for his contract with Daria.

Here, Percy entered into a contract with Stuart to complete 15 hours of work for $1500 in the third month. Daria will argue that this was mitigation and therefore that any damages he collects from her should be reduced by this amount as adequate cover.

Lost-Volume Seller

A party does not need to reduce expectation damages by the cost of cover or replacement performance if the party is a lost-volume seller. Generally, this applies to sellers of goods who have enough supplies to meet the demands of their customers, such that the other party breaching does not just allow the seller to sell to a new party, but the breaching party merely constitutes a lost sale the seller could have met anyways. If a party is a lost volume seller, cover or replacement service will not reduce its damages.

Here, Percy was not a seller of goods, but he could have performed the contract for Daria and the contract for Stuart. Thus, the contract for Stuart makes Percy look like a lost volume seller because he could've performed both and thus could've made the $15,000 from Daria and the $1500 from Stuart. Therefore, the $1500 from Stuart should not count as mitigation and should not reduce any damages he collects from Daria.

Other Mitigation

There are no specific facts about seeking cover, but the fact he negotiated a deal with Stuart and was attempting to enter a deal with Tammy suggests he was looking for adequate replacements. Thus, Percy has met his duty to mitigate and his damages from Daria should not be reduced.

Disposition of Expectation Damages

He is entitled to the $15,000 regardless of specific performance (see below) because he expected to make that, but not the lost contract with Tammy and not reduced by the contract with Stuart. This should be increased by incidental damages and decreased by any amount he saves by not having to further perform. If he does not get specific performance, he might recover extra in restitutionary damages for the benefit conferred on Daria (See below).

Reliance

Reliance damages seek to place the non-breaching party in the position he or she would have been in if the party had never entered into a contract. Thus, reliance damages generally consist of reasonable expenses the non-breaching party has incurred in preparing and partially performing the contract.

Here, there are no clear reliance damages amounts, but Percy could collect any amounts he's spent on tools specifically for Daria or other related expenses.

However, these are likely to be less than the $15,000 expectation damages, and a party may not collect both expectation and reliance damages, so Percy will likely not try and collect these damages.

Restitution

Restitutionary damages seek to compensate the non-breaching party for benefits he has conferred on the breaching party in order to prevent unjust enrichment by the breaching party. In some circumstances a breaching party may even be able to collect restitutionary damages if he has substantially performed and thus conferred a substantial benefit on the other party. Restitutionary damages may take the form of either the amount of improvement the breaching party has enjoyed, or the value of the services provided by the non-breaching party. Courts have equitable power to choose one or the other, and will consider factors such as the blameworthiness of the parties.

Here, Percy has performed 2 months of work at 200 hours total and thus the market value of his benefit conferred upon Daria was $20,000. Percy will argue he should at least get paid this if he cannot finish the contract. This is more than the $15,000 in expectation damages, but it is arguably fairer if he doesn't get specific performance because this is the value he conferred on her. Daria might argue that he did not substantially perform because he only completed 2/3 of the work, but Percy was not a breaching party, and so he is not blameworthy and therefore he needn't substantially perform to seek restitution.

If the amount of increased value of her land is even higher, Percy might argue for that, but such a number is unclear from these facts. Because he's conferred $20,000 worth of services and thus benefited Daria to that amount, Percy can argue for this amount as well instead of expectation damages if he wants. If he gets specific performance and finishes and the original contract is enforced, he would not get restitution damages because the other remedies would suffice.

No Punitive Damages

Even though Daria's breach was intentional and without justification, punitive damages are not award for breach of contract claims, and therefore Percy may not collect any.

Specific Performance

It is within a court's equitable powers to grant specific performance as a remedy in certain circumstances. Specific performance requires that both parties actually complete the contract, rather than compensate each other in money for any breach. Specific performance requires 1) a valid contract, 2) with clear provisions that can be enforced, 3) an inadequate legal remedy (i.e. money damages are insufficient for some reason, such as the good or service is unique), 4) balancing the hardships, performance is equitable, and 5) enforcing the performance is feasible.

Valid contract with clear terms

The contract was valid and the terms were clear as the payment and services were unambiguous.

Inadequate legal remedies

Percy will claim that mere expectation or restitutionary damages are insufficient because he entered the contract thinking he would be able to photograph it and get more publicity to further his business. Specifically, he will claim that it is difficult to value the worth of this increased publicity and therefore it cannot be remedied with mere dollars and can only be remedied by allowing him to finish performance.

Daria can argue that he can be compensated for his time adequately by paying him his normal hourly rate, and that he can always just photograph another project of his. This is a close issue. If Daria's yard would've been particularly nice or a particularly good display of Percy's work, then maybe this performance was unique. If it was any ordinary yard, then absent a showing that Percy needed to place the advertisement now, legal remedies should suffice and Percy could just photograph another project.

Equitable

In terms of balancing the hardships, it is unclear why Daria repudiated the contract or if she has any sort of reason for not wanting performance complete. The question says it was unjustified and so there likely is not. On the other side, Percy has done nothing wrong and appears to have performed adequately. Daria arguably could have to pay more under a restitutionary theory if there is no specific performance (the $20,000 in received benefit as opposed to the initial $15,000 under the contract), so it would not be harder to enforce. However, it may be difficult because of their soured relationship, but that should not be a strong equitable argument considering Daria caused this potential issue.

Feasibility

Lastly, specific performance must be feasible to enforce. Courts consider how long the contract will last, the amount of supervision required, and other related factors. Here, the contract would only take one more month and 100 more hours. This is relatively short for a contract, and the parties could just come back in a month or so to a court to show it was enforced. Daria might argue the court would not want to spend this time, but that could apply to almost any specific performance remedy, and if a 1-month service contract with clear plans/designs already made by Percy is not feasible, then almost any specific performance would not be.

Disposition

While feasibility is not a clear issue, performance would likely be feasible. The biggest issue is whether a court thinks a legal remedy is inadequate. If there is something special about Percy completing this project, then a court will likely order specific performance. If it is just any other landscaping project, it will likely hold that damages (discussed above) will suffice.

QUESTION 1: SELECTED ANSWER B

Applicable Law

It must first be determined what applicable law applies to the contract involved in this dispute between Percy (P) and Daria (D).

Rule: The Uniform Commercial Code applies to contracts for the sale of goods. All other contracts are governed by the common law, such as services contracts and contracts for the sale of land.

The contract between P and D involved the design and installation of landscaping for an exclusive housing development that D owned. As such, this is a contract for services, which makes the common law applicable and governing.

Conclusion: The common law applies.

Contract Formation

A contract is an agreement that is legally enforceable. A valid contract requires an offer, acceptance, and consideration.

The facts state P and D entered into a valid written contract, thus there was a valid contract between them.

Conclusion: There was a valid contract formed between P and D for the design and installation of landscaping.

Anticipatory Repudiation

Did Daria breach the contract by anticipatorily repudiating?

Rule: When one party unequivocally and unambiguously indicates to the other contracting party before the time for performance arrives that they are not going to perform on the contract, this is considered an anticipatory repudiation and a total breach of the contract. The non-breaching party is entitled to all remedies at this time so long as the non-breaching party has not already fully performed their part. If the non-breaching party has in fact fully performed their duties under the contract when the anticipatory repudiation is made, they must then wait until the time for performance to seek remedies.

Two months into the project, Daria "unjustifiably repudiated the contract." This will be regarded as a material and total breach, and at that time P was entitled to all remedies available.

Conclusion: D breached the contract by anticipatorily repudiating, and P is entitled to all remedies at this time.

Remedies

What remedies may P seek from D?

A party may seek legal, restitutionary, and equitable remedies depending on the facts and circumstances of the case.

Legal Remedies

What legal remedies is P entitled to?

Rule: Legal remedies take the form of monetary damages.

Compensatory Damages

Compensatory damages are a common legal remedy in contracts disputes. They can be in the form of expectation damages, consequential damages, and incidental damages, as well as reliance damages.

Expectation damages seek to place the non-breaching party in the position he would have been in had there been no breach. They seek to provide the non-breaching party with his expectations under the contract.

Consequential damages are a form of compensatory damages that are more special in nature and result from the non-breaching party's particular circumstances. These must be known to both parties at the time of contract formation in order for the non-breaching party to be able to recover them.

Reliance damages are used when expectation damages and consequential damages are too speculative and uncertain. They provide the non-breaching party with damages in the amount of how much that party spent in performance and reliance on the contract.

All contract damages must be causal (but for causation), foreseeable at the time of contracting, certain, and unavoidable (non-breaching party's duty to mitigate).

Expectation Damages for the Contract Price

The contract payment price was $15,000. Expectation damages for P would be $15,000 because this is what he expected to receive had the contract been fully performed by both parties.

Consequential Damages for the Photographs

P will also argue that he is owed consequential damages for the loss he incurred due to not being able to photograph the completed gardens and landscaping which he planned to include in his project for an article he planned to propose to Beautiful Yards

and Gardens. Since this loss is not a direct expectation damage, P will have to show that the damages are causal, foreseeable, certain, and unavoidable. He will argue that they are causal because D breached the contract only two months into the deal when the work was not yet completely done; he is no longer able to photograph the entire landscaping project and use it in his article which he plans to propose to the magazine. But for the breach, P would be able to have taken the pictures and included them in his article to propose to the magazine. However P will have a hard time arguing that the damages were foreseeable and certain. He may try and argue that these damages were foreseeable to both him and D because he agreed to a reduced fee only because D agreed to let him take the pictures of the completed landscaping project. If P can show that D was aware of the fact that he wanted to use the pictures in a proposal to magazine, he may have an argument this loss was foreseeable to both him and D. Also the fact that he accepted a significantly lower fee might suggest that D was in fact aware that that the photographs were an important "payment" for P. P normally charged $100 per hour for his work and planned to work 100 hours on this project a month for three months. Thus, his normal fee for such a project would have been $30,000, but instead he charged D only $15,000 because she agreed to allow him to photograph the landscaping. He anticipated "that publicity from the article would more than compensate him for his reduced fee." P will argue further that his damages are certain because they amount to $15,000 (the difference between his usual fee of $30,000 for this type of project and what he agreed to with D, $15,000). D will counter that these damages are not certain because they are too speculative. It would be hard to determine and set a monetary amount for how much P would have received in publicity from the article. D can also argue that P only planned to use the pictures in a proposal to propose to the magazine, and that P was not even definitely given an article spot in the magazine.

Regarding the factor of unavoidable, a party is under a duty to mitigate damages. P did in fact mitigate damages by securing a different project with Stuart in the third month that paid him $1, 5000 and took 15 hours to complete. However P will argue that he could have completed this project at the same time as D's, thus is this is

in fact the case, then P's damages would not be offset by the $1,500 he earned from the other job because he could have done both projects at the same time, thus he still lost out on the profits from D's breach.

Conclusion: P may have a claim that he is entitled to $15,000 for the loss in being able to photograph the completed project, but there are issues as to the foreseeability and certainty of these damages.

Consequential Damages for the $30,000 Tammy deal

P will also argue that he is owed consequential damages for the $30,000 deal with Tammy. P was negotiating with tammy to landscape her property for $30,000 but once Tammy learned of the unjustifiable repudiation by D she stopped negotiating. P will have to argue that but for D's breach, he would have secured the landscaping job with Tammy for $30,000. The facts do state that "once Tammy learned what happened" she immediately stopped negotiation which suggests that this news caused her to stop negotiating with P. However, P may have some trouble arguing that these damages are foreseeable because D may not have known at all that P was also negotiating with other individuals at the time for similar projects. P will try and make the argument that he is entitled to these damages because D should have known or even did in fact know that by breaching a major landscaping deal for an exclusive housing development news of this would spread and could affect P's reputation in the industry and lead others to refrain from doing business with him under the assumption that he was not an ideal business man since a previous client backed out of a contract with him. This could appear to others to be that P is not skilled and qualified to do landscaping jobs. These damages are likely certain because they were negotiating for an amount of $30,000 for the project and P can also rely on his past business deals to show this amount was accurate. There is no issue as to unavoidability here because there was no way P could have mitigate the loss from the Tammy deal.

Conclusion: P may have a claim for the $30,000 in lost profits from the deal with Tammy, but again these damages likely may be considered too speculative since the parties were only in the negotiations stage.

Incidental Damages

In addition to compensatory and consequential damages a party is always entitled to incidental damages which cover costs directly associated and incidental to the breach. In a contracts case this is usually expenses in negotiating with other parties for completion of the contracted for work.

If P incurred any costs or expenses in finding new work such as with Stuart as well as if he spent any more or time looking for other work to mitigate his losses from D's breach he would be entitled to such damages as well.

Conclusion: If P incurred any damages incidental to D's breach he can recover these in addition to receiving compensatory, expectation, and consequential damages.

Reliance Damages

P has a strong case for expectation damages amounting to $15,000, but he may have some trouble proving lost profits from the photographs and also the deal with Tammy. Instead of recovering such damages, P could elect to recover reliance damages, which would amount to all the costs P incurred thus far in reliance on the contract. Such expenses would include money spent on landscaping tools and items such as bushes and plants and flowers. It seems likely that this amount would be less than the $15,000 and potentially the consequential damages, so P likely would elect to recover those since they would be more money for him.

Conclusion: P could receive reliance damages and incidental damages in lieu of expectation and consequential damages.

Restitutionary Remedies

Restitutionary Remedies can be legal and equitable. Legal restitutionary remedies are applicable here. If a contract is breached or in fact no contract was formed or if a contract later fails for some reason and is no longer enforceable a party can still recover for the value of their services so that the other party will not be unjustly enriched. The value of this is based on the value of the party's services even if this amount is more than they were entitled to under the contract. Restitutionary remedies would be in lieu of legal remedies.

P could also elect to recover restitutionary damages instead of the above legal damages. These would be based on the fact that he completed two months' worth of work on the project at the time of breach. P estimated spending 100 hours of work on the project each month, thus he likely spent 200 hours on the project at the time of breach. P can argue that the value of his services was $100 an hours since this is what he normally charged for his work. As such P would be entitled to $20,000 in restitutionary remedies since D has received the benefits of P's work over the past two months. This would prevent D from being unjustly enriched. The fact that P's hourly rate under the contract was only $50 per hour would not stop P from being able to recover for $100 per hour of work so long as P can demonstrate that the value of his services was $100 an hour, which as discussed above, he likely can do.

Conclusion: P could seek the restitutionary remedy of restitutionary legal damages for $20,000 for the value of his work conferred upon D to prevent unjust enrichment.

Equitable Remedies

Specific Performance

Since P ideally would like to finish the project with D he would most likely argue for the equitable remedy of specific performance. Specific performance is a court order which mandates that a party perform their duties and obligations under the contract. A plaintiff is entitled to specific performance if they can show the following elements:

1. There is a valid and enforceable contract between the parties with terms certain and definite;

2. The non-breaching party has fully performed on the contract, is ready, willing, and able to perform, or their performance has been excused.

3. The legal remedy is in adequate;

4. The remedy is feasible; and

4. There are no defenses to the contract.

Valid, Enforceable Contract with Terms Certain and Definite

P can easily show there was a valid enforceable contract between P and D with terms certain and definite because the parties entered into a "valid written contract." The terms are certain and definite because P was to design and install landscaping for an exclusive housing development for an amount of $15,000 which was to be payable upon completion. He estimated work would take approximately 100 hours a month over the course of three months. All the essential elements such as payment, performance, duration of the contract, and the parties are specified.

Conclusion: P will be able to show there was a valid, enforceable contract with terms certain and definite between the parties.

Fully Performed

P can show he has performed two months' worth of work under the contract, and that he is ready willing and able to finish the project and continue performance if allowed by D. He has also taken other jobs which further indicate his abilities to perform landscaping work and his willingness to do so. Also P has said he ideally would like to finish the project.

Conclusion: P has fully performed.

Inadequate Legal Remedy

An inadequate legal remedy is involved when the sale is for a piece of land since all land is unique or for goods that are unique because they are rare or one of a kind. Also goods may be unique when the circumstances make them so. When the item of the contract is unique then legal damages remedies are inadequate.

P likely will have a hard time arguing that he cannot be compensated by legal damages. Money would be able to make P whole again and compensate him for his losses that resulted from the breach. P may try and argue that he has lost out on a $30,000 contract with Tammy and also much publicity from a proposal and article in magazine and that these damages may be considered too speculative and uncertain as consequential damages for him to prove in court, and thus he cannot be legally compensated by monetary damages for these losses. However, it seems likely this argument would fail.

Conclusion: Legal remedy is likely adequate.

Feasible Remedy

Negative injunctions where a party is prohibited from doing something are easy for a court to enforce. Affirmative mandates are harder to monitor and supervise, thus they pose a problem for the feasibility of ordering specific performance. Also parties are not usually entitled to specific performance when the contract is for personal services.

Here, the contract is for personal services but P seeks to be able to do these services. Usually when the plaintiff seeks for the breaching party to perform services under the contract by specific performance the court will deny this remedy. Because P only has one month left to finish work on the landscaping there is the possibility that the court may make D allow P to finish his project since D only has to pay D.

Conclusion: There may be a feasibility issue.

No Defenses

If there is a defense to the enforcement of a contract, the court will not award specific performance. Such defenses include statute of frauds, statute of limitations as well as equitable defense including unclean hands and laches.

The facts do not implicate any defenses to this contract. The contract was in writing thus there is no statute of frauds issue. Additionally the contract need not be in writing and signed by the party charged since it is not required to be under the Statute of Frauds.

Conclusion: There are likely no defenses to the contract.

Overall Conclusion on Specific Performance: P may be entitled to specific performance, but a court likely would find legal damages to be adequate and also for the remedy to be not feasible, and thus deny this remedy.

Overall Conclusion: As discussed above, P is entitled to the legal remedies of compensatory damages in the form of expectation damages and possibly consequential damages in addition to incidental damages. P could instead elect to recover reliance damages or restitutionary damages.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2015

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2015 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Contracts
2.	Real Property
3.	Civil Procedure
4.	Remedies
5.	Business Associations
6.	Wills/Trusts

QUESTION 1

Marta operated a successful fishing shop. She needed a new bait cooler, which had to be in place by May 1 for the first day of fishing season.

On February 1, Marta entered into a valid written contract with Don to purchase a Bait Mate cooler for $5,500 to be delivered no later than April 15.

On February 15, Don called Marta and told her that he was having trouble procuring a Bait Mate cooler. Marta reminded Don that meeting the April 15 deadline was imperative. "I'll see what's possible," Don responded in a somewhat doubtful tone. Concerned that Don might be unable to perform under the contract, Marta immediately sent him the following fax: "I am worried that you will not deliver a Bait Mate cooler by April 15. Please provide your supplier's guarantee that the unit will be available by our contract deadline. I want to have plenty of time to set it up." Believing that Marta's worries were overblown and not wanting to reveal his supplier's identity, Don did not respond to her fax.

When Don attempted to deliver a Bait Mate cooler on April 16, Marta refused delivery. Marta had purchased a Bait Mate cooler from another seller on April 14, paying $7,500, which included a $2,000 premium for one-day delivery by April 15.

Have Marta and/or Don breached the contract? If so, what damages might be recovered, if any, by each of them? Discuss.

QUESTION 1: SELECTED ANSWER A

I. Governing Law

The UCC governs contracts for goods. The common law governs all other contracts, including contracts for services and real estate. The UCC has additional rules that apply when both parties are merchants.

Marta and Don entered into a contract to purchase a bait cooler. Because the bait cooler is a good, the UCC rules will govern this contract. Further, Marta is the owner of a successful fishing shop, and Don sells bait coolers. They can both be considered merchants and the UCC's merchant rules should also apply.

II. Contract Formation

A valid contract requires an offer, acceptance, and bargained for consideration. Under the UCC, goods that cost over $500 require that the contract be in writing to satisfy the Statute of Frauds.

The facts state that Marta and Don entered into a “valid written contract" to purchase the Bait Mate cooler. Marta and Don mutually assented for Marta to purchase a Bait Mate cooler for $5,500 to be delivered no later than April 15. Because the contract was for over $500 for a purchase of a good, the contract needed to be in writing to satisfy the Statute of Frauds, which Marta and Don satisfied.

III. Breach of Contract

A. Anticipatory Repudiation

A person who unequivocally states that they will not perform the contract before the time performance is required will have been considered to anticipatorily repudiate the

contract. The other party who has not repudiated can treat this as a total breach and sue on the contract prior to the time of performance.

Two weeks after Marta and Don entered into their contract, Don called Marta and expressed his concerns in procuring a Bait Mate cooler. Marta told Don that meeting the April 15 deadline "was imperative" and Don merely responded that he would "see what's possible."

Marta may argue that Don anticipatorily repudiated the contract by telling Marta that he may not be able to perform on the contract before the contract was due. However, his statements were not unequivocal as to his inability to perform. Rather, Don only expressed doubt as to his ability to procure and deliver.

Because Don did not unequivocally state that he would not be able to deliver the Bait Mate cooler, he will not have been considered to have anticipatorily repudiated the contract.

B. Reasonable Assurances for Insecurity

Under the UCC, a buyer who has reasonable concerns or insecurity about the seller's ability to tender a good can request assurances that the seller will tender a good. The seller must offer the assurances within a reasonable period of time (generally no more than 30 days) or else the buyer who requested the assurances can treat the lack of assurances as a contract breach. The buyer has no duty to inform the seller that she is seeking to cover through the breach.

Here, Marta had reasonable concerns that Don would not be able to tender the Bait Mate cooler. Don himself raised his concerns about his possible inability to procure and deliver the good, and when Marta reminded him that she needed the cooler by April 15, Don did not assuage her concerns by stating that he would absolutely perform. Instead,

he merely responded that he would see what was possible. Thus, Marta had reasonable concerns and was within her right to ask Don for further assurances.
Don, however, might point out that Marta demanded that he provide the supplier's guarantee that the unit would be made available by the delivery deadline. He did not want to reveal the identity of his cooler supplier and he believed that Marta's demand was unjustified. However, as discussed above, it was reasonable for Marta to have the concerns about Don's inability to deliver the contracted good. Accordingly, Don should have provided assurances and communicated his ability to tender the goods as contracted within a reasonable period of time. Don not only failed to respond to Marta in a reasonable time, he wholly failed to respond to her.

Don may counter that Marta should have informed him that she was treating his failure to respond as a breach of contract. However, Marta is not under any obligation to do so after not receiving assurances for her reasonable insecurity.

Because Marta had reasonable grounds to be insecure about Don's delivery of the bait cooler, Don should have replied to Marta within a reasonable period of time. Don failed to provide Marta any sort of assurance. Accordingly, Marta was justified in treating Don's lack of assurances as a breach.

However, if Marta did not have reasonable grounds to be insecure, and should not have treated the lack of assurances as a breach, then she can point out that Don breached the contract when he failed to deliver on April 15 (discussed below).

C. Failure to Tender the Good on the Contracted Date

The UCC requires that goods be perfectly tendered. This requires that the products have no defects and that they are delivered by the date required.

Marta can argue that even if she couldn't treat Don's failure to provide assurances as a breach, that Don breached the contract because he failed to deliver the cooler on the

contracted date. Marta and Don's contract stated that Don would deliver *no later than April 15*. However, Don delivered on the 16th. By failing to tender delivery of the good by the contracted date, Marta can argue that Don breached and she isn't required to accept the good.

Don may argue that he substantially performed by delivering the day after, and in any case, the contract did not specify that time was of the essence. Further, he might argue that Marta was not harmed by the delay, because he still delivered the cooler before the first day of fishing season on May 1. However, Marta can correctly point out that those defenses such as substantial performance and delivery within a reasonable time frame after the contracted date where time is not of the essence is not applicable to UCC contracts. Perfect tender requires delivery on the contracted date. In any case, Marta may further counter that the contract was specific about the date the cooler needed to have been delivered. Additionally, she had made known through her fax communication in February that she needed the cooler on April 15 because she needed sufficient time to set up the cooler.

Because Don failed to perfectly tender the good, by not delivering the good on the contracted date, Don breached the contract.

D. Purchase of the Replacement Good Prior to Date of Delivery

Don might argue that it was Marta who breached the contract by purchasing a replacement cooler before the affected delivery date. However, as discussed above, if he failed to provide assurances for her reasonable insecurity, then Don was in breach and Marta was entitled to cover. If Don breached on April 15, Marta's cover purchase on the 14th should not be considered a breach of contract because Marta may still have been able to perform had Don delivered on April 15. However, Don did not deliver nor was Don aware of Marta's cover purchase.

IV. Damages for Contract Breach

A. Expectation

Where a contract has been breached, and the buyer is without the good and the seller has the good, the UCC provides that the buyer can receive expectation damages for the breach. This would place the non-breaching party in the position it would have been in had the contract been fulfilled. This can include the cost to cover and purchase the replacement good.

Here, Marta expended $7,500 to purchase a replacement Bait Mate cooler on April 14th. This included a $2,000 premium for the one-day delivery of the cooler by April 15. Marta paid $5,500 for the cooler itself, which is the same price she would have paid to Don for the same cooler. Marta then paid an additional $2,000 to have this cooler delivered within one day.

As to the cooler itself, Marta did not pay additional costs to actually cover for the replacement Bait Mate cooler. Thus, as to the cost of covering for the replacement cooler, Don would not be liable for any additional costs to cover the purchase of the replacement cooler.

Marta might argue that Don should be liable for the additional $2,000 it cost to deliver the Bait Mate cooler because this is the additional cost it required to have the cooler delivered by April 15, and place her in the position she would have been in had Don performed on the contract. Don will counter (as discussed below) that Marta did not mitigate her damages.

Consequential damages

A breaching party can also liable for the foreseeable indirect harm that results from the breach of contract. This might include, for example, economic harm that Marta's shop faced when she didn't have the Bait Mate cooler on the date contracted.

Here, it does not appear that Marta is alleging such losses that relate to Don's breach.

Incidental damages

A breaching party can also be liable for incidental damages, which cover the ordinary expenses the non-breaching party may have incurred in responding to the breach of contract. This includes the costs of inspection, the costs to return the non-conforming good, or the costs of negotiating with a new vendor to cover a good.

Marta does not appear to have additional incidental costs related to negotiating with the new supplier for the replacement cooler.

B. Duty to Mitigate Damages

The non-breaching party still has a duty to mitigate damages and minimize the costs that the breaching party will be liable for.

Here, Don might point out Marta breached her duty to mitigate the damages.

If Marta is correct in arguing that Don breached the contract by failing to provide assurances for her insecurity, Don will point out that the breach would have occurred when he failed to provide the assurances in a reasonable period of time. Marta demanded assurances in mid-February and Don never responded. Don will point out that if Marta is correct that he failed to provide necessary assurances, then he would have breached after that reasonable time period expired. We can assume that 30 days would be a reasonable response period. Accordingly, Don would have breached the

contract in mid-March. However, Don can point out that Marta did not seek to replace the Bait Mate cooler until April 14.

Marta may argue that she had been looking for a replacement cooler and it wasn't until April 14 that she was able to enter into the contract. However, the facts do not indicate that Marta took those steps to replace the cooler. If Marta breached her duty to mitigate because she failed to try and cover earlier, then Don has a strong argument as to why he should not be liable for the $2000 premium Marta paid.

Further, Don might argue that if it wasn't reasonable that Marta demanded assurances, then his breach of contract did not occur until April 15, but Marta purchased the cooler on April 14. He might argue that he shouldn't be liable for Marta's premium purchase prior to the breaching date, but he could be liable had she purchased after the breach and paid a premium for the speedy delivery.

Don has a strong argument that Marta breached her duty to mitigate. Accordingly, Don may not be liable for the $2,000 premium Marta paid on her replacement cooler.

QUESTION 1: SELECTED ANSWER B

Governing Law

The UCC governs contracts for the sale of goods. Goods are tangible and moveable items. The common law governs all other contracts. If the UCC governs, certain rules will apply if the parties are merchants. Merchants are those who deal in the type of goods or have specialized knowledge or skill regarding the goods. Implied in every UCC contract is a covenant of good faith and fair dealing.

Here, there is a contract for a bait cooler. A bait cooler is a tangible good, and therefore, the UCC will govern this contract. Marta owns a fishing shop, which means she has specialized knowledge and skill and deals in the type of goods here (fish and fishing supplies), so she is a merchant. It is unclear is Don is a merchant. Marta has contracted with Don to purchase a bait cooler, but nothing in the facts indicate if Don is a commercial seller of bait coolers, or anything else to indicate his status as a merchant. However, because this is a very expensive cooler ($5,500), it is very likely that Don is a merchant seller of bait coolers. Also, because Don is procuring it for Marta, as opposed to having one personally and selling it online or by advertisement, that tends to show he is a merchant seller. Certain rules may apply relating to the parties as merchants. Also, because this is a UCC contract, there is an implied covenant of good faith and fair dealing.

Contract Formation

To have a valid contract, there must be mutual assent and consideration. Mutual assent is an offer and acceptance. An offer is a manifestation to presently have the intent to contract, with the terms clearly specified, communicated to the offeree. An acceptance is a manifestation to assent to the terms of the offer. Consideration is a bargained-for exchange, consisting of a legal value to one party and a legal detriment to the other. Consideration usually comes in the form of performance, forbearance, or a promise to perform or forbear.

Here, the facts indicate that a valid written contract was formed on February 1st; therefore, it can be inferred that there was a valid offer and acceptance. The consideration for the contract was the promise by Marta to pay the $5,500, and for Don to procure and sell to Marta a bait cooler.

Statute Of Frauds

Certain contracts must be in writing to be enforceable, signed by the party against who enforcement is sought. One such type of contract is a contract for the sale of goods over $500.

Here, the contract is for a good (cooler) for $5,500, which is over $500. The facts indicate that a valid written contract was entered into. Therefore, it is assumed that the statute of frauds is satisfied.

Anticipatory Repudiation

When one party gives a clear and unequivocal indication that he will not perform his end of the contract, the other party can treat that as an anticipatory repudiation, which is an instant breach of the contract. When this occurs, the non-breaching party may elect to not perform and immediately sue for damages, or to wait until performance is due and then sue for damages.

Here, On Feb 15, Don called Marta and told her that he was having trouble procuring the cooler. Marta reminded Don that there was a strict deadline of April 15, and Tom told her he would "see what is possible", using a doubtful tone. Because these words are not a clear and unequivocal indication that Don would not perform, there is not an anticipatory repudiation. To have an anticipatory repudiation, Don would have had to say something more along the lines of "I will not be able to procure the cooler by April 15". Because Don's words did not amount to an anticipatory repudiation, Marta cannot treat the contract as breached as of Feb 15. However, she can demand assurances.

Reasonable Grounds For Insecurity and Demand for Assurances

When a party has reason to believe the other party may not be able to perform, typically actions by the other party that fall short of an anticipatory repudiation, the party may, in writing, demand assurances of performance by the other party. If commercially reasonable, the demanding party may suspend performance. Additionally, if the party who has given reasonable grounds for insecurity does not provide assurances within 30 days, the other party may treat that as an anticipatory repudiation and immediately treat the contract as breached, even if the time for performance has not come.

Here, Don's words to Marta on the phone did not amount to an anticipatory repudiation (above), but, they certainly gave Marta reasonable grounds for insecurity. At the time the contract was formed, Marta and Don agreed that the cooler would be delivered no later than April 15. On the Feb 15 phone call, Marta again reminded Tom of the strict deadline. When Tom, using a doubtful tone, said he will see what is possible, this gave Marta reasonable grounds for insecurity. Marta was worried that he would miss the deadline and she would not have time to set the cooler up and ready for the first day of the fishing season. Marta faxed Don, which meets the writing requirement, asking him to provide assurances of performance by providing his supplier's guarantee that the unit will be available. Don believed that this was overblown and did not respond. Marta will argue that Don needed to provide assurances within 30 days. Because Don did not respond, Marta can treat the contract as repudiated as of 30 days after the fax, which would be March 15. Don did not want to give up his supplier's identity, and may argue that although Marta's grounds for insecurity are reasonable, that her demanding his suppliers guarantee was unreasonable. Don is assumingly in the business of procuring items for fishing shops, and he will argue that if he gave up his suppliers identity, Martha may go straight to the supplier in the future for her needs and circumvent Don. A court could go either way on deciding this issue. A court will surely find that Marta had reasonable grounds for insecurity, but may find that her demand for assurances (providing the supplier) was not reasonable. However, the court would likely find that Don doing nothing, and not responding at all, was also reasonable and not in good faith.

If Don did not want to give up his supplier, he still could have replied and given Marta assurance that he would perform by the deadline.
It is most likely that a court would find that Don failing to respond to Marta's insecurity within 30 days amounted to an anticipatory repudiation. In that case, Marta could treat the contract as breached immediately and find other options for her cooler, and sue Don for damages. However, even if the court finds that it did not amount to a repudiation, Don will still be in breach of the contract for delivering late.

UCC Perfect Tender

In UCC contracts, there must be a perfect tender of goods; otherwise there is a breach. A perfect tender means every item is delivered as promised, and at the correct time. When there is not a perfect tender, the non-breaching party may take the non-conforming goods and sue for damages, reject some goods and keep some, or reject all the goods and sue for damages. The non-breaching party must notify the seller of the breach and if they are going to accept or reject the goods, and if they reject, must timely return the goods, arrange for the goods to be shipped back, hold the goods for pickup, or re-sell on the breaching party's account.

Here, Don attempted to deliver the cooler on April 16th, one day late of the strict deadline. Because Don did not deliver on the agreed deadline (April 15), he did not make a perfect tender. Therefore, Don has breached, and Marta is under no obligation to accept the cooler. The facts indicate that Marta promptly notified Don that she was refusing delivery, as required by the rules.

Damages

Marta's Damages Claims

When a UCC contract has been breached, the non-breaching party may sue for and receive compensatory damages. The most common compensatory damages are expectation damages, incidental damages, and consequential damages.

Expectation Damages

Expectation Damages put the non-breaching party in the position they would be had the contract not been breached. Expectation damages must be foreseeable, certain, and mitigated. When the seller has breached, the expectation damages would normally be the fair market value of the good minus the contract price, or the cost to cover minus the contract price.

Here, Don and Marta contracted for the sale of the cooler for $5,500. Because Don did not perform by the deadline of April 15, and because he likely repudiated when he did not respond to Marta's request for assurances, Marta was entitled to either sue for the difference in the fair market value of the cooler and the contract price, or to cover and sue for the difference between the cost of cover and the contract price. Here, Marta covered and purchased a different cooler for $7,500. Marta will argue that Don is liable to her for the difference of $2,000. Don may argue that he should not be liable for this difference, because the fair market value (and the price it appears Marta paid) of the cooler was actually only $5,500; the $2000 extra was a one day rush delivery fee. Marta will argue, however, that she had no choice but to pay the $2,000 delivery fee, since she needed it by April 15th. Don may also argue that if the court does find he repudiated as of March 15th, that Marta did not mitigate, because she could have found another cooler between March 15 and April 15th, but instead, she waited until April 14th to purchase the cooler with 1 day rush. Marta may respond that when there is a repudiation, she has the option to wait until performance is due to treat the contract as breached. However, Don will then argue that because she bought the new cooler on April 14, not April 15th, that she was not waiting for performance. Also, Don will likely successfully argue that Marta MUST have been relying on the anticipatory repudiation, and not on the perfect tender breach, since she did not wait until his performance was due on the 15th to purchase the new cooler.

A court could go either way. Don may have to pay Marta the $2000 difference for what she paid and the contract price, but, the court also might find that Marta did not mitigate, and therefore the $2000 rush fee was avoidable. However, if Marta did in fact look

around for coolers between March 15 and April 15 and just could not find one until April 14, then she will have met her duty to mitigate and could recover the $2,000.

Incidental Damages

Incidental damages are those damages that are incidental to the breach, and are always expected, such as costs to return or store the goods.

If Marta incurred any incidental costs, such as advertising that she was looking for a cooler, or long distance calls to other suppliers, etc., then she will be able to recover these costs also.

Consequential Damages

Consequential damages are special damages that are unique to the non-breaching party, such as lost profits, and they must be foreseeable at the time of contracting to the breaching party to be recoverable.

It does not appear that Marta suffered any consequential damages as a result of the breach, but if she did, and they were foreseeable, then she could recover these too.

Punitive Damages

Punitive damages in contract cases are not recoverable. Marta will not be able to recover any punitive damages, because they are not available in breach of contract actions.

Don's Damages Claims - Restitution

Restitution is an equitable remedy meant to prevent unjust enrichment. Typically, this type of remedy is used when a contract is unenforceable, and one party received a benefit but did not have to pay for it. In such a circumstance, the other party can usually receive the reasonable value of their services. At common law, the breaching party could not receive restitution. But, modernly, many courts will provide reasonable value of services even to the breaching party to prevent unjust enrichment by the non-breaching party.

Here, Don may argue that he is entitled to something from Marta, since he procured the cooler, and likely had to pay for the cooler from his supplier to get it for Marta. However, Marta will successfully argue that she was not unjustly enriched in any way, because she did not get anything from Don. She did not keep the cooler. Don may then try to argue that the services he provided in spending the last few months procuring the cooler were valuable services, and that he should be compensated for the procurement services. However, a court will likely find this a very weak argument, as Don breached the contract, and Marta received absolutely no benefit from Don.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2015

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2015 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Contracts
2.	Real Property
3.	Civil Procedure
4.	Remedies
5.	Business Associations
6.	Wills/Trusts

QUESTION 1

Marta operated a successful fishing shop. She needed a new bait cooler, which had to be in place by May 1 for the first day of fishing season.

On February 1, Marta entered into a valid written contract with Don to purchase a Bait Mate cooler for $5,500 to be delivered no later than April 15.

On February 15, Don called Marta and told her that he was having trouble procuring a Bait Mate cooler. Marta reminded Don that meeting the April 15 deadline was imperative. "I'll see what's possible," Don responded in a somewhat doubtful tone. Concerned that Don might be unable to perform under the contract, Marta immediately sent him the following fax: "I am worried that you will not deliver a Bait Mate cooler by April 15. Please provide your supplier's guarantee that the unit will be available by our contract deadline. I want to have plenty of time to set it up." Believing that Marta's worries were overblown and not wanting to reveal his supplier's identity, Don did not respond to her fax.

When Don attempted to deliver a Bait Mate cooler on April 16, Marta refused delivery. Marta had purchased a Bait Mate cooler from another seller on April 14, paying $7,500, which included a $2,000 premium for one-day delivery by April 15.

Have Marta and/or Don breached the contract? If so, what damages might be recovered, if any, by each of them? Discuss.

QUESTION 1: SELECTED ANSWER A

I. Governing Law

The UCC governs contracts for goods. The common law governs all other contracts, including contracts for services and real estate. The UCC has additional rules that apply when both parties are merchants.

Marta and Don entered into a contract to purchase a bait cooler. Because the bait cooler is a good, the UCC rules will govern this contract. Further, Marta is the owner of a successful fishing shop, and Don sells bait coolers. They can both be considered merchants and the UCC's merchant rules should also apply.

II. Contract Formation

A valid contract requires an offer, acceptance, and bargained for consideration. Under the UCC, goods that cost over $500 require that the contract be in writing to satisfy the Statute of Frauds.

The facts state that Marta and Don entered into a “valid written contract" to purchase the Bait Mate cooler. Marta and Don mutually assented for Marta to purchase a Bait Mate cooler for $5,500 to be delivered no later than April 15. Because the contract was for over $500 for a purchase of a good, the contract needed to be in writing to satisfy the Statute of Frauds, which Marta and Don satisfied.

III. Breach of Contract

A. Anticipatory Repudiation

A person who unequivocally states that they will not perform the contract before the time performance is required will have been considered to anticipatorily repudiate the

contract. The other party who has not repudiated can treat this as a total breach and sue on the contract prior to the time of performance.

Two weeks after Marta and Don entered into their contract, Don called Marta and expressed his concerns in procuring a Bait Mate cooler. Marta told Don that meeting the April 15 deadline "was imperative" and Don merely responded that he would "see what's possible."

Marta may argue that Don anticipatorily repudiated the contract by telling Marta that he may not be able to perform on the contract before the contract was due. However, his statements were not unequivocal as to his inability to perform. Rather, Don only expressed doubt as to his ability to procure and deliver.

Because Don did not unequivocally state that he would not be able to deliver the Bait Mate cooler, he will not have been considered to have anticipatorily repudiated the contract.

B. Reasonable Assurances for Insecurity

Under the UCC, a buyer who has reasonable concerns or insecurity about the seller's ability to tender a good can request assurances that the seller will tender a good. The seller must offer the assurances within a reasonable period of time (generally no more than 30 days) or else the buyer who requested the assurances can treat the lack of assurances as a contract breach. The buyer has no duty to inform the seller that she is seeking to cover through the breach.

Here, Marta had reasonable concerns that Don would not be able to tender the Bait Mate cooler. Don himself raised his concerns about his possible inability to procure and deliver the good, and when Marta reminded him that she needed the cooler by April 15, Don did not assuage her concerns by stating that he would absolutely perform. Instead,

he merely responded that he would see what was possible. Thus, Marta had reasonable concerns and was within her right to ask Don for further assurances.
Don, however, might point out that Marta demanded that he provide the supplier's guarantee that the unit would be made available by the delivery deadline. He did not want to reveal the identity of his cooler supplier and he believed that Marta's demand was unjustified. However, as discussed above, it was reasonable for Marta to have the concerns about Don's inability to deliver the contracted good. Accordingly, Don should have provided assurances and communicated his ability to tender the goods as contracted within a reasonable period of time. Don not only failed to respond to Marta in a reasonable time, he wholly failed to respond to her.

Don may counter that Marta should have informed him that she was treating his failure to respond as a breach of contract. However, Marta is not under any obligation to do so after not receiving assurances for her reasonable insecurity.

Because Marta had reasonable grounds to be insecure about Don's delivery of the bait cooler, Don should have replied to Marta within a reasonable period of time. Don failed to provide Marta any sort of assurance. Accordingly, Marta was justified in treating Don's lack of assurances as a breach.

However, if Marta did not have reasonable grounds to be insecure, and should not have treated the lack of assurances as a breach, then she can point out that Don breached the contract when he failed to deliver on April 15 (discussed below).

C. Failure to Tender the Good on the Contracted Date

The UCC requires that goods be perfectly tendered. This requires that the products have no defects and that they are delivered by the date required.

Marta can argue that even if she couldn't treat Don's failure to provide assurances as a breach, that Don breached the contract because he failed to deliver the cooler on the

contracted date. Marta and Don's contract stated that Don would deliver *no later than April 15*. However, Don delivered on the 16th. By failing to tender delivery of the good by the contracted date, Marta can argue that Don breached and she isn't required to accept the good.

Don may argue that he substantially performed by delivering the day after, and in any case, the contract did not specify that time was of the essence. Further, he might argue that Marta was not harmed by the delay, because he still delivered the cooler before the first day of fishing season on May 1. However, Marta can correctly point out that those defenses such as substantial performance and delivery within a reasonable time frame after the contracted date where time is not of the essence is not applicable to UCC contracts. Perfect tender requires delivery on the contracted date. In any case, Marta may further counter that the contract was specific about the date the cooler needed to have been delivered. Additionally, she had made known through her fax communication in February that she needed the cooler on April 15 because she needed sufficient time to set up the cooler.

Because Don failed to perfectly tender the good, by not delivering the good on the contracted date, Don breached the contract.

D. Purchase of the Replacement Good Prior to Date of Delivery

Don might argue that it was Marta who breached the contract by purchasing a replacement cooler before the affected delivery date. However, as discussed above, if he failed to provide assurances for her reasonable insecurity, then Don was in breach and Marta was entitled to cover. If Don breached on April 15, Marta's cover purchase on the 14th should not be considered a breach of contract because Marta may still have been able to perform had Don delivered on April 15. However, Don did not deliver nor was Don aware of Marta's cover purchase.

IV. Damages for Contract Breach

A. Expectation

Where a contract has been breached, and the buyer is without the good and the seller has the good, the UCC provides that the buyer can receive expectation damages for the breach. This would place the non-breaching party in the position it would have been in had the contract been fulfilled. This can include the cost to cover and purchase the replacement good.

Here, Marta expended $7,500 to purchase a replacement Bait Mate cooler on April 14th. This included a $2,000 premium for the one-day delivery of the cooler by April 15. Marta paid $5,500 for the cooler itself, which is the same price she would have paid to Don for the same cooler. Marta then paid an additional $2,000 to have this cooler delivered within one day.

As to the cooler itself, Marta did not pay additional costs to actually cover for the replacement Bait Mate cooler. Thus, as to the cost of covering for the replacement cooler, Don would not be liable for any additional costs to cover the purchase of the replacement cooler.

Marta might argue that Don should be liable for the additional $2,000 it cost to deliver the Bait Mate cooler because this is the additional cost it required to have the cooler delivered by April 15, and place her in the position she would have been in had Don performed on the contract. Don will counter (as discussed below) that Marta did not mitigate her damages.

Consequential damages

A breaching party can also liable for the foreseeable indirect harm that results from the breach of contract. This might include, for example, economic harm that Marta's shop faced when she didn't have the Bait Mate cooler on the date contracted.

Here, it does not appear that Marta is alleging such losses that relate to Don's breach.

Incidental damages

A breaching party can also be liable for incidental damages, which cover the ordinary expenses the non-breaching party may have incurred in responding to the breach of contract. This includes the costs of inspection, the costs to return the non-conforming good, or the costs of negotiating with a new vendor to cover a good.

Marta does not appear to have additional incidental costs related to negotiating with the new supplier for the replacement cooler.

B. Duty to Mitigate Damages

The non-breaching party still has a duty to mitigate damages and minimize the costs that the breaching party will be liable for.

Here, Don might point out Marta breached her duty to mitigate the damages.

If Marta is correct in arguing that Don breached the contract by failing to provide assurances for her insecurity, Don will point out that the breach would have occurred when he failed to provide the assurances in a reasonable period of time. Marta demanded assurances in mid-February and Don never responded. Don will point out that if Marta is correct that he failed to provide necessary assurances, then he would have breached after that reasonable time period expired. We can assume that 30 days would be a reasonable response period. Accordingly, Don would have breached the

contract in mid-March. However, Don can point out that Marta did not seek to replace the Bait Mate cooler until April 14.

Marta may argue that she had been looking for a replacement cooler and it wasn't until April 14 that she was able to enter into the contract. However, the facts do not indicate that Marta took those steps to replace the cooler. If Marta breached her duty to mitigate because she failed to try and cover earlier, then Don has a strong argument as to why he should not be liable for the $2000 premium Marta paid.

Further, Don might argue that if it wasn't reasonable that Marta demanded assurances, then his breach of contract did not occur until April 15, but Marta purchased the cooler on April 14. He might argue that he shouldn't be liable for Marta's premium purchase prior to the breaching date, but he could be liable had she purchased after the breach and paid a premium for the speedy delivery.

Don has a strong argument that Marta breached her duty to mitigate. Accordingly, Don may not be liable for the $2,000 premium Marta paid on her replacement cooler.

QUESTION 1: SELECTED ANSWER B

Governing Law

The UCC governs contracts for the sale of goods. Goods are tangible and moveable items. The common law governs all other contracts. If the UCC governs, certain rules will apply if the parties are merchants. Merchants are those who deal in the type of goods or have specialized knowledge or skill regarding the goods. Implied in every UCC contract is a covenant of good faith and fair dealing.

Here, there is a contract for a bait cooler. A bait cooler is a tangible good, and therefore, the UCC will govern this contract. Marta owns a fishing shop, which means she has specialized knowledge and skill and deals in the type of goods here (fish and fishing supplies), so she is a merchant. It is unclear is Don is a merchant. Marta has contracted with Don to purchase a bait cooler, but nothing in the facts indicate if Don is a commercial seller of bait coolers, or anything else to indicate his status as a merchant. However, because this is a very expensive cooler ($5,500), it is very likely that Don is a merchant seller of bait coolers. Also, because Don is procuring it for Marta, as opposed to having one personally and selling it online or by advertisement, that tends to show he is a merchant seller. Certain rules may apply relating to the parties as merchants. Also, because this is a UCC contract, there is an implied covenant of good faith and fair dealing.

Contract Formation

To have a valid contract, there must be mutual assent and consideration. Mutual assent is an offer and acceptance. An offer is a manifestation to presently have the intent to contract, with the terms clearly specified, communicated to the offeree. An acceptance is a manifestation to assent to the terms of the offer. Consideration is a bargained-for exchange, consisting of a legal value to one party and a legal detriment to the other. Consideration usually comes in the form of performance, forbearance, or a promise to perform or forbear.

Here, the facts indicate that a valid written contract was formed on February 1st; therefore, it can be inferred that there was a valid offer and acceptance. The consideration for the contract was the promise by Marta to pay the $5,500, and for Don to procure and sell to Marta a bait cooler.

Statute Of Frauds

Certain contracts must be in writing to be enforceable, signed by the party against who enforcement is sought. One such type of contract is a contract for the sale of goods over $500.

Here, the contract is for a good (cooler) for $5,500, which is over $500. The facts indicate that a valid written contract was entered into. Therefore, it is assumed that the statute of frauds is satisfied.

Anticipatory Repudiation

When one party gives a clear and unequivocal indication that he will not perform his end of the contract, the other party can treat that as an anticipatory repudiation, which is an instant breach of the contract. When this occurs, the non-breaching party may elect to not perform and immediately sue for damages, or to wait until performance is due and then sue for damages.

Here, On Feb 15, Don called Marta and told her that he was having trouble procuring the cooler. Marta reminded Don that there was a strict deadline of April 15, and Tom told her he would "see what is possible", using a doubtful tone. Because these words are not a clear and unequivocal indication that Don would not perform, there is not an anticipatory repudiation. To have an anticipatory repudiation, Don would have had to say something more along the lines of "I will not be able to procure the cooler by April 15". Because Don's words did not amount to an anticipatory repudiation, Marta cannot treat the contract as breached as of Feb 15. However, she can demand assurances.

Reasonable Grounds For Insecurity and Demand for Assurances

When a party has reason to believe the other party may not be able to perform, typically actions by the other party that fall short of an anticipatory repudiation, the party may, in writing, demand assurances of performance by the other party. If commercially reasonable, the demanding party may suspend performance. Additionally, if the party who has given reasonable grounds for insecurity does not provide assurances within 30 days, the other party may treat that as an anticipatory repudiation and immediately treat the contract as breached, even if the time for performance has not come.

Here, Don's words to Marta on the phone did not amount to an anticipatory repudiation (above), but, they certainly gave Marta reasonable grounds for insecurity. At the time the contract was formed, Marta and Don agreed that the cooler would be delivered no later than April 15. On the Feb 15 phone call, Marta again reminded Tom of the strict deadline. When Tom, using a doubtful tone, said he will see what is possible, this gave Marta reasonable grounds for insecurity. Marta was worried that he would miss the deadline and she would not have time to set the cooler up and ready for the first day of the fishing season. Marta faxed Don, which meets the writing requirement, asking him to provide assurances of performance by providing his supplier's guarantee that the unit will be available. Don believed that this was overblown and did not respond. Marta will argue that Don needed to provide assurances within 30 days. Because Don did not respond, Marta can treat the contract as repudiated as of 30 days after the fax, which would be March 15. Don did not want to give up his supplier's identity, and may argue that although Marta's grounds for insecurity are reasonable, that her demanding his suppliers guarantee was unreasonable. Don is assumingly in the business of procuring items for fishing shops, and he will argue that if he gave up his suppliers identity, Martha may go straight to the supplier in the future for her needs and circumvent Don. A court could go either way on deciding this issue. A court will surely find that Marta had reasonable grounds for insecurity, but may find that her demand for assurances (providing the supplier) was not reasonable. However, the court would likely find that Don doing nothing, and not responding at all, was also reasonable and not in good faith.

If Don did not want to give up his supplier, he still could have replied and given Marta assurance that he would perform by the deadline.
It is most likely that a court would find that Don failing to respond to Marta's insecurity within 30 days amounted to an anticipatory repudiation. In that case, Marta could treat the contract as breached immediately and find other options for her cooler, and sue Don for damages. However, even if the court finds that it did not amount to a repudiation, Don will still be in breach of the contract for delivering late.

UCC Perfect Tender

In UCC contracts, there must be a perfect tender of goods; otherwise there is a breach. A perfect tender means every item is delivered as promised, and at the correct time. When there is not a perfect tender, the non-breaching party may take the non-conforming goods and sue for damages, reject some goods and keep some, or reject all the goods and sue for damages. The non-breaching party must notify the seller of the breach and if they are going to accept or reject the goods, and if they reject, must timely return the goods, arrange for the goods to be shipped back, hold the goods for pickup, or re-sell on the breaching party's account.

Here, Don attempted to deliver the cooler on April 16th, one day late of the strict deadline. Because Don did not deliver on the agreed deadline (April 15), he did not make a perfect tender. Therefore, Don has breached, and Marta is under no obligation to accept the cooler. The facts indicate that Marta promptly notified Don that she was refusing delivery, as required by the rules.

Damages

Marta's Damages Claims

When a UCC contract has been breached, the non-breaching party may sue for and receive compensatory damages. The most common compensatory damages are expectation damages, incidental damages, and consequential damages.

Expectation Damages

Expectation Damages put the non-breaching party in the position they would be had the contract not been breached. Expectation damages must be foreseeable, certain, and mitigated. When the seller has breached, the expectation damages would normally be the fair market value of the good minus the contract price, or the cost to cover minus the contract price.

Here, Don and Marta contracted for the sale of the cooler for $5,500. Because Don did not perform by the deadline of April 15, and because he likely repudiated when he did not respond to Marta's request for assurances, Marta was entitled to either sue for the difference in the fair market value of the cooler and the contract price, or to cover and sue for the difference between the cost of cover and the contract price. Here, Marta covered and purchased a different cooler for $7,500. Marta will argue that Don is liable to her for the difference of $2,000. Don may argue that he should not be liable for this difference, because the fair market value (and the price it appears Marta paid) of the cooler was actually only $5,500; the $2000 extra was a one day rush delivery fee. Marta will argue, however, that she had no choice but to pay the $2,000 delivery fee, since she needed it by April 15th. Don may also argue that if the court does find he repudiated as of March 15th, that Marta did not mitigate, because she could have found another cooler between March 15 and April 15th, but instead, she waited until April 14th to purchase the cooler with 1 day rush. Marta may respond that when there is a repudiation, she has the option to wait until performance is due to treat the contract as breached. However, Don will then argue that because she bought the new cooler on April 14, not April 15th, that she was not waiting for performance. Also, Don will likely successfully argue that Marta MUST have been relying on the anticipatory repudiation, and not on the perfect tender breach, since she did not wait until his performance was due on the 15th to purchase the new cooler.

A court could go either way. Don may have to pay Marta the $2000 difference for what she paid and the contract price, but, the court also might find that Marta did not mitigate, and therefore the $2000 rush fee was avoidable. However, if Marta did in fact look

around for coolers between March 15 and April 15 and just could not find one until April 14, then she will have met her duty to mitigate and could recover the $2,000.

Incidental Damages

Incidental damages are those damages that are incidental to the breach, and are always expected, such as costs to return or store the goods.

If Marta incurred any incidental costs, such as advertising that she was looking for a cooler, or long distance calls to other suppliers, etc., then she will be able to recover these costs also.

Consequential Damages

Consequential damages are special damages that are unique to the non-breaching party, such as lost profits, and they must be foreseeable at the time of contracting to the breaching party to be recoverable.

It does not appear that Marta suffered any consequential damages as a result of the breach, but if she did, and they were foreseeable, then she could recover these too.

Punitive Damages

Punitive damages in contract cases are not recoverable. Marta will not be able to recover any punitive damages, because they are not available in breach of contract actions.

Don's Damages Claims - Restitution

Restitution is an equitable remedy meant to prevent unjust enrichment. Typically, this type of remedy is used when a contract is unenforceable, and one party received a benefit but did not have to pay for it. In such a circumstance, the other party can usually receive the reasonable value of their services. At common law, the breaching party could not receive restitution. But, modernly, many courts will provide reasonable value of services even to the breaching party to prevent unjust enrichment by the non-breaching party.

Here, Don may argue that he is entitled to something from Marta, since he procured the cooler, and likely had to pay for the cooler from his supplier to get it for Marta. However, Marta will successfully argue that she was not unjustly enriched in any way, because she did not get anything from Don. She did not keep the cooler. Don may then try to argue that the services he provided in spending the last few months procuring the cooler were valuable services, and that he should be compensated for the procurement services. However, a court will likely find this a very weak argument, as Don breached the contract, and Marta received absolutely no benefit from Don.

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Question Number	Subject
1.	Trusts
2.	Torts
3.	Professional Responsibility
4.	Remedies
5.	Evidence
6.	Contracts

QUESTION 6

On February 1, Bing Surfboards ("Bing") ordered 400 gallons of epoxy from Super Chemicals ("Super") using its standard purchase order. Bing's purchase order provided that delivery would be no later than February 20, but stated nothing about warranties, disclaimers, or remedies. Super responded with its standard acknowledgment, which purported to accept the order and confirmed that delivery would be no later than February 20. It also provided: (1) "Seller disclaims all warranties of merchantability and fitness." (2) "In no event shall Seller be liable for consequential damages." (3) "This acceptance is expressly made conditional on your assent to the terms of this acceptance."

On February 15, Bing received the epoxy.

On February 20, Bing tested the epoxy by manufacturing 50 surfboards. The epoxy did not harden properly, leaving the surfboards useless.

On February 23, Bing emailed Super stating that the epoxy had failed to harden properly and that it was returning the remaining epoxy.

On February 25, not having heard from Super, Bing bought 400 gallons of epoxy from one of Super's competitors, paying a substantially higher price for quick delivery, which was necessary to avoid a shutdown of Bing's production line.

On February 26, Super informed Bing that it was shipping replacement epoxy to arrive the following day. The original epoxy had failed to harden because of manufacturing defects of which Super was unaware. Although the replacement epoxy was not defective, Bing rejected delivery and refused to pay.

Bing has sued Super for the increased price of epoxy it had to pay to Super's competitor, and for loss due to 50 defective surfboards.

Super has sued Bing for rejecting its replacement shipment and for not paying under the contract.

1. Is Bing likely to prevail in its suit? Discuss.

2. Is Super likely to prevail in its suit? Discuss.

QUESTION 6: SELECTED ANSWER A

Bing's suit against Super

Governing law

The contract in question concerns epoxy, a good. Thus, UCC Article 2 applies to the contract.

Both Bing and Super are merchants, since Bing deals usually in surfboards and Super deals usually in epoxy and other chemicals. Thus, the rules applicable are those where both parties to the contract are merchants.

Contract formation

An initial question is whether a contract was formed by Super's standard acknowledgment.

In order for a valid contract to be formed, there must be offer, acceptance and consideration. Under the UCC, conditional acceptance is not treated as an acceptance; rather it is treated as a rejection. Here, Super's response to Bing was clearly conditional. Thus, it functioned as a rejection of Bing's offer, and no contract was formed.

Although no contract was formed, a subsequent implied contract may nevertheless have been formed by the performance of the parties. Here, Super did indeed send epoxy to Bing, which accepted it and, at least initially, did not object. All of the subsequent conduct and communications of Bing and Super are also in line with the existence of a contract. Thus, it is possible that the court will find an implied contract between the parties. Such a contract, implied purely from conduct, would not contain

any of the disclaimers in Super's acknowledgment form. Thus, default warranties and damages rules would apply.

Terms of the contract

Even if the court instead finds that a contract was formed by Super's acknowledgment, it is likely Bing can show that the terms regarding disclaimer of warranties and consequential damages have not been integrated into the contract.

Under UCC, for a contract between two merchants, offer does not have to mirror acceptance. However, any terms in the acceptance that vary the offer will not become a part of the contract unless (1) both parties are merchants, (2) the terms are not material, and (3) no objection is raised to them within a reasonable time.

Here, both the disclaimer or warranties and the limitation of damages are material terms, since the warranties go to the heart of the quality of goods being delivered and the limitation of damages speak directly to the economic interests of the parties. Since one of the elements is not met, these terms are not part of the contract, and the default warranties and damages rules apply.

Perfect Tender

Bing is likely able to demonstrate that a perfect tender was not made by Super, entitling it to reject the goods and cease performance (also relevant to Super's suit, later) and seek alternative goods.

Under the UCC, failure to make a perfect tender of goods ordered is a breach of the contract that allows the non-breaching party to reject goods and cease performance. Also, a warranty of merchantability is implied if the seller is a merchant, stating that the goods are fit for their ordinary purpose, and a warranty of fitness is implied if the seller knows the buyer is buying the goods for a particular purpose and relying on seller to

provide conforming goods. (As noted above, these warranties have not been properly disclaimed.)

Here, it would appear likely that both warranties are breached. The warranty of merchantability is breached since the epoxy was defective due to a manufacturing problem - unless it can be shown that the defect affects surfboards but not the usual uses of epoxy, the warranty is breached. The warranty of fitness is breached since Super knew Bing needed the epoxy for surfboards (because Bing's name is Bing Surfboards) and was relying on Super to deliver the epoxy fit for the manufacturing of surfboards, and failed to deliver that kind of epoxy.

Since the epoxy delivered was nonconforming goods that did not satisfy the implied warranties, perfect tender was not made.

(Note: If the warranties were in fact properly disclaimed from the contract, then perfect tender was made, since Bing would have taken the epoxy "as is" and the defect would breach no contractual term. In that case, Bing would not have been entitled to reject the goods; it would not recover any of the damages noted below; and it would be liable to Super for rejecting the goods and will need to pay the full contract price.)

Cover / consequential damages

Bing is likely able to recover that part of the increased price of epoxy reflecting a higher market price (if any), but will have a harder time recovering the increased price of epoxy reflecting quick delivery.

In general, where a seller breaches by delivering non-conforming goods, a buyer is entitled to seek cover by procuring the same goods on the market, and recover the difference between the cover price and the contract price. Thus, to the extent Bing's cover price is higher because the same goods now cost more on the market, it is able to get that difference from Super.

However, consequential damages (damages particular to a particular non breaching party) are generally not recoverable unless the breaching party could reasonably foresee such damages at the time of contract. Here, to the extent Bing's cover price is higher because it needed the goods faster, such difference would instead be consequential damages. Bing would have to show that Super could foresee that Bing would have incurred these costs to avoid a shutdown of its production line. It would probably be difficult for Bing to show with sufficient certainty what level of damages would have been foreseeable to Super at the time the contract was made on February 1. Thus, Bing will have a harder time getting that portion of damages from Super.

Incidental damages

Loss due to the 50 defective surfboards is incidental damages which Bing may recover from Super.

When a contract is breached, the non-breaching party may always recover incidental damages, which are damages relating directly to the handling of the nonconforming goods. Since Super has breached and Bing has incurred incidental damages relating to the defective surfboards, it can get damages for that from Super.

Super's suit against Bing

The analyses regarding governing law, contract formation, terms of the contract and perfect tender are all the same as above.

Rejecting cure

Super likely will not prevail on the point of Bing rejecting the replacement shipment.

Under the UCC and the perfect tender rule, once the time for performance has passed, seller is not entitled to cure by shipping conforming goods unless it knows it is

reasonable for it to do so at that time. Here, the time for performance had passed by six days by the time Super told Bing it was shipping replacement epoxy, during which time Bing had already told Super about the issue and that Bing was returning the defective epoxy. As an industrial merchant, Super should probably be familiar with the manufacturing processes of its clients and should probably be aware that there is at least a good probability that a six day delay is too long for a manufacturing customer, which would probably have made cover arrangements during that period. Thus, Super probably can't show that it was reasonable to provide conforming goods six days late.

In short, Super will fail on this claim.

Not paying

Super likely will also fail on its claim to get Bing to pay under the contract.

Once perfect tender is not made, the buyer is entitled to reject the goods, cease performance and not pay. Here, Bing has properly rejected the goods, and it is therefore entitled to not pay.

If Bing had, instead, kept the defective epoxy, Super would probably be able to recover under a restitutionary theory for Bing's enrichment (in that case, though, Super's recovery would have been based on the value of the defective epoxy, not the contract price). But since Bing rejected, it was not enriched, and Super would not be able to recover under that theory either.

In short, Super will fail on this claim as well.

QUESTION 6: SELECTED ANSWER B

Governing Law

All contracts except for contracts for the sale of goods are governed by the common law. Contracts for the sale of goods are governed by Article 2 of the UCC. Article 2 of the UCC provides special rules for contracts between merchants. Here, the contract was for the sale of a movable good, epoxy. A merchant is an entity that regularly deals in goods of the kind in question. Here, Bing regularly ordered epoxy as part of its manufacturing and Super regularly sold epoxy. Therefore, both parties were merchants and the special rules for merchants applied.

Formation of Contract

Offer and Acceptance

To be valid a contract must contain an offer and acceptance as well as mutual assent. An offer is an expression of intent to enter into a contract, communicated to the offeree, as by making a promise, undertaking, or commitment. The terms of the offer must be sufficiently definite to enable a court to enforce the resulting contract. For a contract for the sale of goods, an offer must indicate the subject matter of the contract and contain a quantity term. An offer is accepted by an expression of assent to the terms of the offer communicated to the offeror.

Here, Bing made a valid offer to Super, indicating the subject matter, epoxy, and the quantity, 400 gallons. Further, Bing indicated an intent to enter into a contract. Super's acknowledgment, however, did not constitute an acceptance. Under the UCC, the "battle of the forms" provision controls the terms of a contract when the terms of the acceptance vary from the offer. Here, Super's acceptance contained additional terms to the contract. Ordinarily, additional terms to the contract will become a part of the

contract, unless 1) the terms materially modify the contract, 2) the offer expressly limits acceptance to its terms, or 3) the offeror has objected or objects to the additional terms within a reasonable time. If an acceptance indicates that it is conditional on assent to additional terms, it is not construed as an acceptance, but as a rejection and a counteroffer. Therefore, Super's acknowledgment was not an acceptance of Bing's offer, but rather a rejection and counteroffer. Because Bing did not accept the counteroffer, a contract could only be formed by conduct.

Additionally, even if the acknowledgment had not been conditional on assent to additional terms, the additional terms would likely not have become part of the contract. This is because the terms were material alterations of the contract. A term is considered to be material where it alters or in some way limits the available remedies. Here, the additional terms disclaimed warranties of fitness and merchantability, and disclaimed liability for consequential damages. This would severely limit the remedies available to Bing in the event of breach. Because these were material alterations, they would not become part of the contract under the UCC.

Consideration

To be valid, a contract must have consideration, which is a bargained-for legal detriment by both parties or a consideration substitute. A legal detriment may consist of promises exchanged for each other. Here, if a contract was formed between the parties, there would be consideration. Super promised to provide 400 gallons of epoxy. If Bing accepted the contract by conduct, it would become obligated to pay the stated purchase price. Therefore there was an exchange of promises. Alternatively, if the offer and acknowledgment formed no contract, a consideration substitute might be found through promissory estoppel. Promissory estoppel results when a party makes a promise, intending to induce the reliance of the other party, and the other party foreseeably relies on that promise to its detriment.

Bing's Suit Against Super

Breach of Contract

The first issue is whether Super breached its contract with Bing. Because Super's acknowledgment form constituted a counteroffer, which was not accepted by Bing, a contract could only have been formed by conduct. A court would find an implied in fact contract from the shipment of the goods and payment for the goods. However, the terms of Super's acknowledgment would not become part of the contract unless accepted by Bing, which they were not. As a result, Super's disclaimer of warranty and consequential damages was ineffective. Because the disclaimers were ineffective, Super's goods would include an implied warranty of merchantability. The implied warranty of merchantability provides that when a seller of a particular type of goods sells that good, that the goods will be commercially reasonable and will be fit for the ordinary purpose for which such goods are used. Here, Super's epoxy failed to harden properly because of a manufacturing defect. As a result, Super breached the implied warranty of merchantability.

Under the UCC, shipments of goods are governed by the perfect tender rule. Under the perfect tender rule, goods must completely conform to the buyer's specifications or they may be rejected. Any deviation from the buyer's specifications or from commercial suitability is a material breach allowing the buyer to reject the goods. A breach of the implied warranty of merchantability would be a material breach of contract under the perfect tender rule entitling the buyer to reject the shipment. Because the epoxy did not harden properly and was defective, Bing was entitled to reject the shipment. Further, there would be no contract until Bing paid for the goods. Because Bing did not pay for the goods, there was no enforceable contract except to the extent one was created by conduct or promissory estoppel. Super's shipment of epoxy would then be construed as an offer which could be rejected at Bing's discretion.

Super may have also breached the implied warranty of fitness for a particular purpose. The implied warranty of fitness provides that when a seller of goods knows of the particular purpose for which the buyer is using the goods, and the buyer is relying on the seller's skill and judgment in selecting the goods, that the goods must be fit for the particular purpose for which they are used. If Bing had informed Super that it was using the epoxy to make surfboards, and was relying on Super's skill and judgment to furnish epoxy which would be suitable for the purpose, then Super would breach this contract when the epoxy was not suitable for use in making surfboards.

Rejection

The next issue is whether Bing properly rejected the shipment of epoxy. A buyer has a right to inspect the goods before acceptance. Therefore, it was appropriate for Bing to test the epoxy before determining whether to accept the shipment. A buyer of goods may reject a shipment of goods by notifying the seller within a reasonable time of the defect and of intention to reject the goods and returning them. The buyer may accept all the units, or accept some commercial units and reject the rest. Here, Bing tested the epoxy and notified Super a little over a week after the shipment. This would probably constitute a reasonable time after receiving the shipment. Bing returned the defective goods to Super. Therefore, Bing's rejection of the shipment was proper.

Implied in Law or Implied in Fact Contract

A court might find that there was no contract because Bing rejected the offer created by Super's shipment of the goods and never paid for them. A court might also find that a contract existed on the basis of promissory estoppel. Here, Bing notified Super of its requirements and requested shipment by February 20. Super confirmed that it would ship the goods by February 20. Super was aware and would be deemed to know that Bing was using the epoxy in its manufacturing process and might suffer lost profits if the epoxy was defective. Bing relied on this promise to its detriment by not procuring alternative goods in sufficient time to avoid paying a premium and to avoid shutting

down its production line. Therefore, a court could likely find that a contract was implied in law by Bing's justifiable reliance on Super's promise to ship the goods by February 20.

On the basis of an implied in law contract, Bing could likely prevail in its suit against Super because it justifiably relied to its detriment on Super's representation that it would ship the epoxy by February 20. If, however, a court found that there was no contract, Bing would not be able to recover any contractual damages.

Damages

Bing would be able to recover compensatory expectation damages from Super for the breach if there was indeed a contract. Expectation damages are designed to put the nonbreaching party in the position it would have been in had the other party properly performed. In a contract for the sale of goods, where the buyer is forced to cover, the buyer must make a good faith effort to obtain a reasonable replacement within a reasonable time. The buyer can recover the difference between the cover price and the contract price. Here, Bing could recover the difference between the price it agreed to with Super and the cover price.

Bing might also be able to recover consequential damages in the form of lost profits, as well as incidental damages. To be recoverable, consequential damages must be certain, foreseeable, and unavoidable. Consequential damages are damages over and above expectation damages resulting from special circumstances of which the seller knows at the time of the contract formation. Here, Super was aware that Bing was using the epoxy in its manufacturing process, and could foresee that Bing might suffer lost profits if the epoxy was defective. Super was aware of Bing's special circumstances. Therefore, it would have been foreseeable to Super that Bing might lose money if the epoxy shipment was defective. Moreover, a supplier is deemed to know of a manufacturer's requirements if it knows that the manufacturer is using the goods as part of the manufacturing process. Here, consequential damages would be

measured by the costs expended in manufacturing the 50 defective surfboards, and lost profits resulting from the inability to sell those surfboards, if Bing could sell as many surfboards as it could produce and was a lost volume seller. This would be a sufficiently certain measure of damages because it would be measured by the quantity and cost of defective surfboards produced, as well as any additional surfboards that might have been sold but for the breach. Moreover, Bing made every effort to mitigate its damages and avoid the loss to the extent possible by covering immediately at a reasonable price and reasonable time. Bing might also have incidental damages in locating an alternative supplier of epoxy. Therefore Bing could probably obtain lost profits and incidental damages.

Super's Lawsuit Against Bing

Rejection of Replacement Shipment

Ordinarily when a seller breaches a contract by providing nonconforming goods, the seller has within the time for performance of the contract to cure the breach. Here, Super can argue that because Bing was delayed in notifying Super of the breach, it was not notified within a reasonable time and therefore could not cure within the time for performance. However, likely a court would find that Super was notified within a reasonable time. Because the time for performance of the contract had lapsed, Super had no right to cure the defective shipment. Ordinarily if the seller had reason to believe that the goods would be acceptable with a reasonable allowance, a reasonable additional time might be allowed for the seller to cure. But this is not the case here. Additionally, the fact that Seller was unaware of the manufacturing defects would not grant it additional time to cure. Therefore, Seller had no right to cure.

Paying Under Contract

Because any contract between Bing and Super would be implied rather than actual, Bing would not be liable for payment for the goods if it rejected the goods. Even in a

contract formed by mutual assent the buyer would have a right to reject. Further, Super's disclaimers of warranty would not be effective because Super's counteroffer was not accepted. Super's disclaimer might be found to be unconscionable as a contract of adhesion even if it were deemed to have been accepted by Bing. A buyer is deemed to accept those units of the good that he or she actually uses. Further, in an implied in fact contract, there is a contract only to the extent of the goods actually accepted. Therefore, Bing would only be liable for those gallons of epoxy that it used in testing to manufacture the 50 surfboards. Bing would be deemed to accept that quantity of epoxy and would have to pay for it. Otherwise, Bing would not be liable under the contract.

Super is unlikely to prevail in its suit against Bing because there was no mutual assent to terms of a contract. The contract would be implied in law or implied in fact. Further, Super could not disclaim its implied warranty of merchantability in an implied contract. Therefore, Buyer had the right to reject nonconforming shipments, and Super did not cure within the time for performance. Therefore, Bing will not be liable to Super.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2016

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2016 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Civil Procedure
2.	Real Property
3.	Contracts
4.	Constitutional Law
5.	Community Property
6.	Professional Responsibility

QUESTION 3

Dirt, a large excavating company, recently replaced all of its gas-powered equipment with more efficient diesel-powered equipment. It placed the old gas-powered equipment in storage until it could sell it.

On May 1, Builder, a general contractor for a large office development, and Dirt signed a valid written contract under which Dirt agreed to perform all the site preparation work for a fee of $1,500,000. Dirt estimated its total cost for the job at $1,300,000. The contract states: "Dirt hereby agrees to commence site work on or before June 1 and to complete all site work on or before September 1." Because no other work could begin until completion of the site preparation, Builder was anxious to avoid delays. To ensure that Dirt would give the job top priority, the contract also states: "Dirt agrees to have all of its equipment available as needed to perform this contract and shall refrain from undertaking all other jobs for the duration of the contract."

On May 29, an unusual high pressure weather system settled over the state.

As a result, on May 30, in an effort to reduce air pollution, the state banned use of all diesel-powered equipment.

On June 2, Dirt told Builder about the ban and stated that it had no way of knowing when it would be lifted. Builder told Dirt to switch to its gas-powered equipment. Dirt replied that using its old gas-powered equipment would add $500,000 to its costs and asked Builder to pay the increased expense. Builder refused.

On June 4, seeing that no site work had begun, Builder emailed Dirt stating that their contract was "terminated."

On June 8, Builder hired another excavating company, which performed the work for $1,800,000.

Dirt has sued Builder for terminating the contract. Builder has countersued Dirt for the $300,000 difference between the original contract price and what it paid the new contractor.

1. Is Dirt likely to prevail in its suit? Discuss.

2. Is Builder likely to prevail in its countersuit? Discuss.

QUESTION 3: SELECTED ANSWER A

Governing Law

The contract involves excavation related to the construction of a large office development. Common law principles, rather than the UCC, will apply as the sale of goods is not implicated.

Dirt's Suit Against Builder for Termination of Contract

Builder's termination of the contract will be wrongful unless one of the relevant grounds for rescission is satisfied. Builder can argue, alternatively, that: 1) Dirt's breach was material; 2) Dirt's comment regarding costs constituted an anticipatory repudiation; 3) Frustration of purpose, or impossibility, gave provided grounds to discharge the K.

Minor versus Material Breach

Breaches of the promises or covenants contained in a contract provide grounds for the non-breaching party to sue for damages. The ability to treat the contract as discharged on the grounds of a breach, however, depends on the nature and extent of the breach itself. A material breach *does* provide the non-breaching party with grounds to discharge the contract. A minor (non-material) breach does not. Whether a breach is material or minor depends on a determination as to whether the non-breaching party received the "benefit of the bargain" sought under the contract. Courts will address an assortment of factors in seeking to arrive at such a determination, including the hardship to the defendant, the reason for the breach, whether the breach was willful or inadvertent, the cost of remedying the breach, the ability of damages to remedy the breach, and the overall degree of completion at the time of the breach.

If a promise or covenant is *implied* into a contract, courts will generally accept substantial performance (as to avoid a breach). If a promise or covenant is *express* in the contract, generally literal compliance is required. However, even when dates are included in a contract, including construction contracts, courts do not construe time to

be of the essence *unless otherwise clearly stated*.

Was Time of the Essence

Here, the contract itself reads "Dirt hereby agrees to commence site work on or before June 1 and to complete all site work on or before September 1." It additionally contains a promise from Dirt to have all equipment ready and to refrain from undertaking other jobs during the duration of the contract. Each party will seek to argue in the affirmative/contrary that time is/is not of the essence. Builder will argue that multiple contractual provisions outlining the importance of expediency and availability of supplies mandate a finding that time is of the essence in the contract. However, Dirt can argue that time of the essence was never explicitly stated in the contract, and that any such reading of such a promise would be implied only. Dirt will additionally argue that, if time is not of the essence, then not having started by June 4 -- three days after the intended start date -- would not constitute a material breach and thus Builder could not treat the contract as discharged. Builder will argue the opposite -- time was of the essence; three days late was therefore a material breach, and therefore the contract can be discharged.

Conclusion

A court is more likely to find in Dirt's favor based on these facts. Firstly, the contract did not explicitly state time is of the essence, despite multiple references to the timeliness of performance. Secondly, if time was of the essence, it would likely be in regard to the *completion* rather than the *starting* date. Starting three days late would not constitute a material breach; therefore, even if time was deemed of the essence. The conjunctive power of these two arguments likely means Dirt would prevail and would not have deemed to have been in material breach of the contract by failing to start performance by June 4. This would, therefore, make Builder's termination of the contract improper and Dirt would prevail in his suit, subject to the analysis below.

"Having All Equipment Available"

An explicit term of the contract between Dirt and Builder was that Dirt "agrees to have

all of its equipment available as needed to perform this contract..." When Dirt and Builder communicated on June 2, Dirt communicated to Builder that using its old gas-powered equipment would cost an additional $500,000 and asked for the increased payment. The parties will contest what was meant by the term of the contract, and whether Dirt breached the term of the contract by not having gas-powered equipment ready. Dirt will contest that "all of its equipment" refers to the equipment its business employs in carrying out excavation contracts, which, at present, is diesel-powered equipment. Builder will argue the equipment provision mandated for Dirt to have any and all necessary equipment ready to perform.

Builder *likely* has the stronger argument on these facts. Builder can likely demonstrate that the failure to have the necessary equipment to perform the excavation -- the very purpose for which Dirt was hired -- is a material breach of the contract. It is material, Builder will assert, because it deprives Builder of the entirety of the benefit of its bargain; without proper equipment, the contract cannot even begin to be performed. Therefore, as a material breach, Builder has grounds to terminate the contract. Dirt's counter-argument that it had the *reasonably foreseeable necessary* equipment to begin likely won't succeed -- Dirt did still have gas-powered equipment, although it was in storage; when Builder contracted with Dirt, it could expect that Dirt would employ all equipment that it owned in performing the contract. Therefore, Builder likely has a stronger argument that by not having gas-powered equipment ready Dirt was not able to meet the requirement of the contract to have "all of its equipment available as needed to perform this contract." Such a material breach would give proper grounds to terminate the contract on Builder's part, but Builder's argument is by no means a clear and certain winner.

<u>Anticipatory Repudiation Versus Perspective Inability to Perform</u>

An anticipatory repudiation occurs when one party, in a fully bilateral executory contract, communicates explicitly and unequivocally that it will not be able to perform its duties or obligations under the contract. An anticipatory repudiation discharges the non-repudiating party's duty to perform and that party can 1) treat the contract as discharged

2) sue immediately, 3) wait and sue on the contract date, 4) attempt to urge performance by the other party. A perspective inability to perform is a statement by one party to the other expressing doubts or reservations about a potential ability to perform an obligation or duty under the contract. It differs from an anticipatory repudiation in its explicitness and unambiguousness.

Here, Dirt told Builder that using its old gas-powered equipment would add $500,000 to its costs and asked Builder to pay the increased expense. Builder refused the request. Nothing in Dirt's language would rise to the level of an anticipatory repudiation -- it made no representation that it absolutely could not perform under the contract or that it would not, despite an increased cost. It merely requested a greater sum of money due to the elevated cost of performance. Builder could not justifiably have treated Dirt's comment as an anticipatory repudiation. Dirt's comment may have constituted a prospective inability to perform, but analysis as to whether it did or not is largely superfluous derivative of the fact that, even if it was, Builder's duties under the contract would only have been suspended. Builder could not treat the contract as discharged via a perspective inability to perform.

Concluding, Builder could not treat the contract as discharged on grounds of an anticipatory repudiation or perspective inability to perform based on Dirt's comments regarding the increased cost of performance.

Frustration of Purpose

Builder can seek to advance the argument that frustration of purpose provided grounds to discharge its contract with Dirt. Frustration of purpose occurs when a supervening event, which was unforeseeable to the parties, and which neither party expressly assumed the risk of, frustrates the purpose of the contract (i.e., deprives the contract of value and benefit.) Builder will seek to argue that the state's banning of diesel-powered equipment frustrated the purpose of its contract with Dirt, as state regulation due to the unusual weather system was unforeseeable, and that the value and purpose of the contract have been frustrated via this unforeseeable event. Builder will seek to argue

neither party assumed the risk, and the change was not foreseeable to the parties at the time the contract was entered into.

Dirt will likely have a winning counter-argument to Builder's claim of frustration of purpose. While the state regulation has changed the cost of the contract -- and has changed the cost of the contract *to Dirt alone* -- the underlying value and benefit of the contract has remained. The purpose for which the parties contracted is still achievable, and increased cost alone does not frustrate the entire purpose of a construction contract.

A court is more likely to favor Dirt's argument, especially because Builder, in seeking to advance an argument of frustration of purpose, is not in fact the party enduring hardship in this contract from increased cost. While the cost of performance has changed via the state regulation, the basic purpose and value of the contract remains -- the land can be excavated for the purpose of constructing a building subsequently.

Impossibility

Builder could seek to argue, ultimately unsuccessfully, that impossibility and impracticability should allow the contract to be terminated. Impossibility refers to the situation where a subsequent event, which was unforeseeable, which undermined a material element of the contract (or a basic assumption upon which it was formed), and which neither party assumed the risk of, has rendered performance of the contract (by one or both parties) illegal. One form of impossibility is illegality, occurring where the subject matter of the contract has subsequently become illegal after the contract was entered into.

Builder's arguments are likely to fail because, despite the intervening illegality of the use of diesel-powered equipment, the contract itself, and the purpose for which it was formed, has not been rendered illegal. A required-by-law change in the instrumentality used to carry out the contract would not render the contract itself dischargeable on grounds of impossibility. Impossibility would therefore not serve as a viable grounds for

discharge of the contract on the part of Builder.

Damages

If Dirt successfully prevails in its suit against Builder on the grounds that Builder impermissibly breached the contract, Dirt can recover its lost profits under the contract. As a general rule in construction contracts, Builder can recover lost profits if the owner breaches prior to commencement of the construction; if the owner breaches during construction, the builder can recover the contract price - the cost of completion. Here, Dirt would receive lost profits -- that is the $1,500,000 - $1,300,000 = $200,000.

Overall Conclusion

Builder's strongest argument to justify terminating the contract was that Dirt's breach of the material term of the contract to have all equipment available needed to perform the contract constituted a material breach by Dirt, and therefore provided grounds for discharge. This is not a clear-cut certainty, however. Impossibility, impracticability, frustration of purpose, and breach of the time for performance clause all would not be winning arguments to justify termination of the contract *for Builder*. However, even if Builder can show Dirt was in material breach of the contract, Dirt likely has some persuasive counter-arguments to avoid liability, found below.

Builder's Countersuit

Much of the analysis regarding potential avenues for Builder to seek to have the contract discharged (rescission) apply to excuse Dirt's performance under the contract. Frustration of purpose, impossibility, and impracticability all provide grounds by which a party's performance under a contract is excused, in addition to providing potential grounds by which a contract can be discharged between the parties. However, as we established above, the contract was likely rightfully discharged because Dirt breached a material term regarding having "all supplies available." That being said, if Dirt's performance was *excused* for a valid reason, Dirt will not be held liable for damages (amount discussed below) under the contract.

Impracticability

Dirt likely has a strong argument for impracticability. Impracticability encompasses the situation where a subsequent event, which was unforeseeable, and has a material effect on an element of the contract or a basic assumption upon which the contract was formed, and which neither party assumed the risk of, has rendered one party's performance extremely or unreasonably difficult or expensive. Here, Dirt will argue that the subsequent enactment of law was unforeseeable because it was the result of an unusual weather system, and that it was inherently unforeseeable. Furthermore, it has had a material effect on the contract (Dirt's cost of performance), and neither party expressly assumed the risk of the event. Builder can counter that Dirt assumed the risk of increased cost of performance via restrictions on the use of certain types of machines by law, but Builder's argument is not overly persuasive. Rather, the cost of increase in Dirt's performance will likely be determinative in the eyes of the court.

The subsequent enactment of new law has increased the cost of Dirt's performance by $500,000, out of an initial cost of $1,300,000 -- a cost increase of less than 50%. Courts, historically, have generally been unwilling to excuse performance under a contract due to the increased cost in performance unless such an increase is excessive and extreme. Here, a less than 50% increase in cost may not meet that standard; although the increase does make the performance on the contract a profit-negative transaction for Dirt, the increase in cost may not be so unreasonable as to excuse performance, a court may find. Nevertheless, Dirt can and should advance the argument -- likely, however, it will be a losing one.

Impossibility

As discussed in detail above, impossibility -- via illegality -- will not serve as a valid excuse to Dirt's performance because the contract itself did not become illegal, rather merely one means by which the contract could be performed became illegal. A court is unlikely to extend the reasoning so far as to entirely excuse Dirt's performance because diesel-powered equipment has been subject to regulation, especially considering the fact that Dirt has gas-powered equipment available. Dirt's arguments will fail on

impossibility grounds.

Frustration of Purpose

Dirt's arguments regarding frustration of purpose will similarly fail for the reasons outlined above -- the value, benefit, and purpose of the contract remains despite an increased cost to Dirt. The essence of the contract and its purpose was the excavation, not what type of machine Dirt used in the process. Dirt's arguments will fail on frustration of purpose grounds.

Mutual Mistake

Dirt could seek to argue that his performance is excused via mutual mistake. Mutual mistake applies when both parties are mistaken as to a basic assumption, material to the contract, upon which the contract was formed. Here, Dirt would argue mutual mistake occurred in regards to "equipment available." Dirt could seek to argue there is ambiguity in the term, as Dirt meant diesel-powered equipment while Builder expected the use of all of Dirt's equipment. Dirt's argument will likely not fail -- the term is plain on its face -- "all of its equipment" -- and would be interpreted to require of Dirt to employ all the equipment it owns, which includes gas-powered equipment. While Dirt may have intended a different meaning for the term, because the term is plain on its face and there was not an actual "mistake" regarding the meaning of the term, Dirt's argument will fail. Dirt's subjective belief will not constitute a mutual "mistake" in the eyes of the court.

Damages

An owner's countersuit in a construction contract which has not been fully performed by the breaching party can recover damages in the amount of the difference between the contract price (with the breaching party) and the cost of completion (obtained via the hiring of a third party.) Here, that would provide Builder with the $300,000 damages outlined as the amount of its lawsuit.

Conclusion

If Builder succeeds in showing that failure to have all equipment available was a material breach by Dirt, it can rightfully treat the contract as discharged. Furthermore, it can recover damages from Dirt *if* a court determines that the difficult to Dirt did not rise to the level of impracticability (the most likely finding). Alternatively, if no grounds existed to discharge the contract because the court does not find Dirt has breached a material term, then Dirt can recover the profits it would be entitled to from the contract. If the contract was rightfully discharged but Dirt's performance *did* rise to the level of impracticability, then Dirt would not be paid to force damages. Builder prevailing in regard to both breach and damages is the most likely outcome.

QUESTION 3: SELECTED ANSWER B

Introduction

Applicable law

The issue is whether the UCC applies. The UCC applies to the sale of goods. Goods are things movable and identifiable at the time of contracting. Here, the contract is for the performance of construction services. Construction services are not goods. Therefore, the UCC does not apply. Therefore, the common law governs.

1. Is Dirt likely to prevail in its suit?

Anticipatory repudiation by Builder

The issue is whether Builder anticipatorily repudiated the contract. Anticipatory repudiation occurs when one party unambiguously and clearly states that it will not perform the contract. An anticipatory repudiation counts as a breach. The non-breaching party can either find someone else to do the performance, sue the breaching party, or do nothing. Anticipatory repudiation generally applies to executory contracts. In the event that the contract is wholly executory, then the non-repudiating party can immediately sue for damages, regardless of the date of performance. If the non-breaching party has already performed, then it cannot sue until the time for the other party's performance is due. For anticipatory repudiation in construction contracts before anything has begun, the general measure of damages is the non-breaching party's expected lost profits.

Here, the parties made a valid contract on May 1st. The contract provided that construction would begin on June 1 and that performance was due on September 1. On June 4, Builder stated that the contract was terminated. Saying that a contract is terminated is an anticipatory repudiation--is unambiguous and clear. Builder had no

intention of following through on the contract at that point. Moreover, the contract was still executory. Dirt had not commenced any sort of performance, and Builder had not paid anything. As a result, Dirt would have the option of suing for breach of contract at the time of breach. Because the contract was completely executory, Dirt would be entitled to its lost expected profits. In this case, the total fee was expected to be $1,500,000 and the expected cost was $1,300,000. As a result, the expected profits would be $200,000. Thus, Dirt would be likely to win $200,000 if there are no applicable defenses to enforcement.

Mitigating damages-defense

In order for a party to recover damages, they must be certain, causally related to the breach, foreseeable, and unavoidable. Here, the damages are foreseeable and caused by Builder's breach. Had Builder not breached, Dirt would have been paid, and non-payment is a foreseeable consequence of breach. Moreover, the damages here are certain--$200,000. We generally use expectation damages in contract law, which puts the party in as good of a position as they would have been had the contract been performed. Generally, the non-breaching party is required to mitigate damages, which means that they must try to reduce damages as much as possible. In the context of construction contracts that are anticipatorily repudiated, mitigating damages might involve taking other work during the time in which the party was expecting to work for the breaching party. Thus, Builder might claim that Dirt has failed to mitigate damages. However, the fact that Builder made Dirt refrain from entering into any other contracts during this time might hurt the mitigation argument -- Dirt would probably be able to show that it was unable to mitigate due to this clause in the contract. Had the clause not been present, perhaps Dirt would have been out finding other business.

Anticipatory Repudiation by Dirt-defense

The issue is whether Builder might be able to defend on the basis that Dirt actually repudiated first. However, this argument is likely to fail. On June 2, Dirt merely told Builder about the ban and asked Builder to shoulder the increased expenses, after

which Builder declined. However, this is not sufficiently unambiguous to constitute an anticipatory repudiation. If a party is uneasy about whether the other party can perform (due to an ambiguous situation like we have here), then the party can demand further assurances from the other party, and may temporarily suspend performance for a commercially reasonable time until it receives those assurances. Here, Dirt did not actually say that it was not going to be able to perform. Had Dirt been unambiguous, then perhaps Builder could have deemed it an anticipatory repudiation and hired another party (one of the options when there is an anticipatory repudiation). However, the June 2 conversation was not clear enough. It is perfectly possible that Dirt may perform the contract regardless. Therefore, this defense would be unlikely to be effective.

Breach of Promise/Condition by Dirt-defense

The issue is whether Dirt breached a condition of the contract such that Builder's obligation to perform was discharged. A promise is something that a party is supposed to do under a contract. A condition is an event that, if it does not occur, means the entire contract does not come into effect. Courts generally construe terms as promises as opposed to conditions, because they do not want an entire forfeiture of the contract.

Builder may argue that the June 1 start date was a condition precedent to the contract taking effect. Essentially, they would say that, because Dirt had yet to commence construction by June 1 (indeed, even by June 4), that the condition was not satisfied and the contract did not take effect. However, a court would probably not buy this argument. There are two types of conditions--express and implied. An express condition must be in the contract explicitly in conditional language ("on condition that"), which was not present here. An implied condition may arise from the intent of the parties. Here, Builder was worried about timing, but there is insufficient evidence to infer that the start date was a condition to Builder's entire performance. Thus, a court would likely construe the start date as a mere promise. Indeed, the courts abhor a forfeiture.

In the event that the start date is considered a promise, then the common law doctrine of substantial performance applies. Substantial performance holds that a non-breaching party has a duty to perform if the breaching party has still substantially performed her end of the bargain. There must be a "material breach" in order for the non-breaching party to be completely discharged. When determining whether there has been substantial performance, the courts take into account (i) prejudice to breaching party; (ii) prejudice to breaching party; (iii) amount of performance rendered; (iv) whether the breach was willful; (v) cost of fixing the problem; and (vi) a variety of similar factors.

In service contracts, time for completion is generally not considered a material breach if performance is completed slightly late. The only time when a complete breach and forfeiture might be found is when there is a "time of the essence" clause, which must be very explicit. There was no such clause in this contract, and the breach only applied to the *start* of performance, so it would be very unlikely for a court to find that Dirt materially breached to the extent that Builder will be completely discharged form performance.

Conclusion

Overall, it appears that Dirt would have a good case against Builder for breach of contract for the amount of $200,000.

Is Builder likely to prevail in its countersuit?

Anticipatory repudiation by Dirt

This is the same argument as has been described above. Essentially, Dirt's statements over the course of the June 4 conversation are unlikely to constitute a full-blown anticipatory repudiation. Builder should have first demanded further assurances before terminating the contract and hiring someone else.

Breach of promise/condition by Dirt

This is the same argument as has been described above. Essentially, it is unlikely that a court would find the start date to be a condition precedent to effectiveness of the contract. Moreover, it is unlikely that Dirt's failure to start completely on time would count as a material breach justifying Builder's non-performance.

Impossibility-defense

Dirt might argue in defense that it would be unable to perform its end of the contract due to supervening impossibility. Indeed, in many cases, a subsequent law or regulation may render a party's performance illegal or impossible. In such case, that party may be excused from performing. Generally, the party claiming excuse must have not expressly borne the risk.

Here, the government banned all diesel-powered equipment two days before Dirt was supposed to commence performance. This was certainly unexpected, and was the result of the May 29 high-pressure weather system. However, performance is definitely not impossible. Dirt still has its gas-powered equipment, which it could use to complete the project. It might be more expensive to do so, but mere increase in expense is insufficient for an impossibility defense. Therefore, impossibility would not be an effective defense.

Impracticability-defense

Dirt might argue in defense that it should be excused from performance due to supervening impracticability. Impracticability is a defense where the occurrence of an unforeseeable event happens, which renders performance impracticable. The unforeseeable event must affect an underlying assumption of the agreement. The party claiming excuse must not have borne the risk. Generally, the mere inability to make a profit is not sufficient for a claim of impracticability.

Here, the high pressure system was characterized as unusual. Builder might argue that strange weather systems are foreseeable, and that Dirt should have known that this was a possibility. On the other hand, Dirt would claim that a weather system resulting in the banning of all diesel-powered equipment is not foreseeable at all. Overall, it would probably be seen as unforeseeable. Moreover, the ban had an effect on an underlying assumption of the contract. Dirt was expecting to use its diesel equipment--it had put all of its old equipment in storage. Moreover, if Dirt knew that it would have to spend an additional $500,000, it would not have accepted a $1,500,000 contract price. There is no evidence that either party expressly assumed the risk (though sellers generally bear the risk in sale of goods contracts, and a court could, by analogy, deem that Dirt was allocated the risk). The key question is whether the ban makes performance impracticable. Dirt is a large excavation company, which presumably has a lot of contracts. If Dirt had to use its gas equipment, it would expect to see a $300,000 loss on this job. It is unclear the effect that such a loss would have on Dirt, but a court would probably find that such a loss is insufficient to make performance of the contract wholly impracticable. It is possible that a court could find that performance is impracticable, but it is rather unlikely.

Mistake-defense

Dirt might try to argue that there was a mutual mistake, which should lead to discharge of contractual duties. Mutual mistake occurs when both parties were mistaken about a fundamental aspect of the contract. Dirt could argue that both parties mistakenly assumed that Dirt would be able to use its diesel-powered machines. The fact that a basic assumption has been violated (by Dirt having to use gas-powered equipment) could perhaps render the contract unenforceable and both parties would be excused. This is somewhat of a stretch of an argument. It depends on whether Builder actually had diesel as a basic assumption of the contract, and whether either side assumed the risk.

Damages

$300,000 would be the proper expectation damages. Builder would get the difference between the contract price and the reasonable cover price.

Conclusion

For the reasons mentioned, Builder would be unlikely to win its countersuit.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2018

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2018 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility / Contracts
2.	Constitutional Law
3.	Real Property
4.	Criminal Law and Procedure
5.	Wills / Community Property

QUESTION 1

Austin recently sold a warehouse to Beverly. The warehouse roof is made of a synthetic material called "Top-Tile." During negotiations, Beverly asked if the roof was in good condition, and Austin replied, "I've never had a problem with it." In fact, the manufacturer of Top-Tile notified Austin last year that the warehouse roof would soon develop leaks. The valid written contract to sell the warehouse specified that the property was being sold "as is, with no warranties as to the condition of the structure."

After Beverly bought the warehouse, the roof immediately started leaking. Beverly hired Lou, an experienced trial lawyer, and executed a valid retainer agreement. Beverly then sued Austin for rescission of the warehouse sale contract, on the bases of misrepresentation and non-disclosure.

At trial, Lou offered the expert testimony of Dr. Crest, a chemical engineer who had testified in other litigation concerning Top-Tile roofs. Lou knew that Dr. Crest had previously testified that, "Top-Tile roofs always last at least five years." Lou also knew from the manufacturer's specifications that Top-Tile roofs seem to last indefinitely, but not in some climates. On cross-examination, Dr. Crest testified that, "Top-Tile roofs never last five years," and that, "Climate is not a factor; Top-Tile roofs fail within five years everywhere in the world." During closing argument, Lou repeated Dr. Crest's statements and also said that Lou's own inspection of the roof confirmed Dr. Crest's testimony.

1. Will Beverly be able to rescind the contract with Austin on the basis of misrepresentation and/or non-disclosure? Discuss.

2. What, if any, ethical violations has Lou committed? Discuss. Answer according to California and ABA authorities.

QUESTION 1: SELECTED ANSWER A

I. Contract dispute

The first issue is whether Beverly will be able to rescind the contract with Austin based upon misrepresentation.

A valid contract requires mutual assent (offer and acceptance) and consideration. Mutual assent means that there is a meeting of the minds as to the basis of the contract or bargain and the terms of the contract. Consideration requires a bargained-for exchange of legal detriment. Where the parties to a contract do not have a meeting of the minds, that is, there is no mutual assent, then the validity of the contract can be challenged. Put another way, if the parties do not have mutual assent then no contract was formed.

Rescission is a contract remedy available where one party seeks to void a contract. Lack of mutual assent is a basis for rescission of a contract where one party shows misrepresentation, mutual mistake or non-disclosure. The result is though the contract did not exist. A misrepresentation may make a contract unenforceable where one party makes a material misrepresentation, that was a basic assumption of the contract and the other party relies on that statement and was damaged. Non-disclosure arises where a party fails to disclose a material fact of the contract which forms the basis of the contract and the other party has no reason to know of the failure to disclose.

Generally, courts look to the terms contract in determining the terms of the contract. Moreover, parol evidence is generally not available to supplement or contradict the terms of a contract. However, the parol evidence rule against extrinsic evidence does not apply to evidence regarding the formation of a contract. Thus, oral

statements made at the time of entering into a contract may be admissible to show a condition on performance or misrepresentation.

Here, the facts state that Austin and Beverly entered into a valid written contract to sell the warehouse. Thus, there is a valid contract that can be the subject of a rescission claim. We are told that during negotiations, Beverly asked if the roof was in good condition and Austin responded that he had never had a problem with it, despite having been notified a year earlier by the manufacturer of the roof tiles, Top-Tile, that the roof would soon develop leaks. Thus, Austin made a misrepresentation of fact regarding the condition of the roof in response to Beverly's inquiry on that exact topic. Finally, the parties agreement included an "as is" clause which stated that Beverly was buying the warehouse in its current condition. Austin will argue that Beverly did not rely on his misrepresentation, and that Beverly did not make it clear in her comments to Austin that the condition of the roof was a material fact of the contract, and that had the roof been in poor condition Beverly would not have purchased the warehouse. Beverly will argue that Austin's misrepresentation as to the condition of the roof certainly formed the basis of the bargain because the condition of a roof is quite important in the purchase of a warehouse, or any structure. It is likely that Beverly would succeed on this point that the misrepresentation was a basic assumption of the contract. Moreover, as Beverly is challenging the formation of the contract itself, parol evidence of Austin's oral statement to her is admissible.

If the court believes that Beverly should have inspected the roof independently of Austin's representations, then Beverly will be hard pressed to survive a claim by Austin that the contract stated the property was sold "as is". Where a contract states that property is purchased "as is" at common law, this was strictly construed. However, the modern trend is to relax the enforcement of "as is" clauses where one party misrepresented or committed fraud. That is the case here given that Austin was informed the prior year by the manufacturer that the roof would soon leak, though it does not appear from the facts that Beverly made her own independent inquiry into the

condition of the roof. Again, Austin will argue that the "as is" clause is controlling and that it would be prudent for a purchaser of property to have an inspection done to inform the buyer of any potential defects in the property, including those that even the seller was unaware of. Finally, had the roof been of such a concern to Beverly, she could have made the condition of the roof a term of the contract and not executed an "as is" provision. Yet, given his misrepresentation of fact, which he clearly knew to be false as we know from the facts, a court may find that the misrepresentation was significant enough to void any mutual assent despite the "as is" provision in the interests of justice. Finally, Beverly can show damages in that immediately after she bought the warehouse, the roof started leaking.

Thus, Beverly may be able to rescind the contract based upon misrepresentation.

With respect to the defense of non-disclosure, Beverly will be required to show that Austin did not disclose a material fact that formed the basic assumption of the agreement and that Beverly relied on his statement. Non-disclosure is different from misrepresentation in that with non-disclosure, the party makes no comment or disclosure with respect to a material fact that is known to be material to the other party. Moreover, Austin must not have any defenses.

Here, as stated above, Austin failed to disclose the actual condition of the roof in addition to misrepresenting the condition of the roof. Austin will make the same arguments as above that Beverly did not make it known - in words or actions - that the condition of the roof was a material fact of the contract that formed a basic assumption of the contract. Moreover, Austin will argue that the "as is" clause bars Beverly from recovery and that Beverly had a duty to do her own inspection of the property to discover the condition of the roof.

However, given the facts presented, and a court's ability to relax the strict construction of an "as is" clause where a party has misrepresented, or failed to disclose a material

fact, or committed fraud, a court may rescind the contract. Thus, Beverly may have a successful claim of rescission based upon misrepresentation.

II. The next issue is what, if any, ethical violations Lou committed.

Under both the ABA and California ethics code (CA rules), a lawyer, as an officer of the court, has a duty of candor. Under both the ABA and CA rules, a lawyer also has a duty to disclose law that is contrary to the client's position. However, a lawyer is not required to disclose facts that are not helpful to the client. Moreover, a lawyer must not offer evidence that he knows to be false or misleading and must seek to rectify any false evidence presented. If a lawyer reasonably believes that a witness will testify falsely, the lawyer must try to convince the witness or client not to testify falsely. If that fails, the lawyer must not allow the witness or client to testify. Under ABA and CA rules, a lawyer may then seek to withdraw. If a witness or client does testify falsely, in addition to seeking to rectify the false evidence, under the ABA rules the lawyer may notify the court or appropriate tribunal.

Here, Lou was an experienced trial lawyer who entered into a valid retainer agreement with Beverly. Lou hired an expert who he knew had previously testified regarding Top-Tile roofs. Lou apparently knew that the expert, Dr. Crest, had previously testified that the roofs last at least 5 years. Lou also knew, based upon review of Top-Tile's specifications, that Top-Tile stated that their tiles do not last indefinitely in some climates. However, at trial Dr. Crest testified differently, testifying on Beverly's behalf, that Top-Tile never lasted five years. If Lou knew that Dr. Crest was going to testify falsely, Lou must not have permitted him to testify. If Lou reasonably believed that Dr. Crest intended to testify falsely he should have tried to convince him to testify truthfully. Finally, if Lou knew that Dr. Crest had indeed testified falsely he must rectify the false testimony. This is particularly the case here, which is a civil case and one in which Lou retained Dr. Crest as an expert. Lou likely could have found an expert who would testify in support of Beverly's claim. Thus, under both ABA and CA rules, if Lou

knew that Dr. Crest was going to testify falsely and did nothing about it, then Lou is subject to discipline. Moreover, once Dr. Crest testified that Top-Tile roofs "never last five years", if Lou knew this to be false testimony, he had an obligation to neutralize the testimony.

This is also the case with respect to Dr. Crest's statement that "climate is not a factor." The fact that Lou was aware of Top-Tile's manufacturer's specifications that climate did affect the condition of the roofs does not mean under the ABA and CA rules that Lou was obligated to disclose that fact. This is a fact that is not in his client's favor, and under the ethical rules Lou was not obligated to disclose that. The obligation under ABA and CA rules is to disclose legal principles that are not in your client's favor. Thus, there is no ethical violation for failing to disclose that fact. However, if Lou knew that Dr. Crest's statement was false based upon the available data and his expert opinion, he had an ethical duty to clarify.

Thus, based on the facts presented, if Lou knew that Dr. Crest testified falsely, he has an ethical violation to clarify and rectify any false evidence, which he appears not to have done. Thus, he is subject to discipline.

Finally, with respect to Lou's closing argument. Lou would also be subject to discipline because he essentially ratified testimony which he likely knew was false. Thus, he did the opposite of what he is ethically obligated to do under ABA and CA rules. Moreover, Lou offered personal opinion and observation which was not the subject of evidence in the case. This was also unethical. Here, Lou inserted his own opinion and "evidence" that his inspection of the warehouse roof confirmed Dr. Crest's testimony. Lou was essentially giving testimony during his closing examination, based upon his own observations. A closing argument is not considered evidence and a lawyer is not permitted to raise issues, facts or evidence that were not presented at trial. Lou clearly violated this rule and is subject to discipline.

Finally, under both ABA and CA rules, when retaining an expert, a lawyer is required to get the client's informed consent (which must be in writing under the CA rules) which includes a clear statement of how the expert is going to be paid. The client is to be fully informed as to the terms of the retainer of an expert, before the expert is, in fact, retained. It does not appear from the facts that Lou did this. Thus, he is subject to discipline.

QUESTION 1: SELECTED ANSWER B

1.) Applicable Law

There are two general bodies of law which apply to cases involving a breach of contract: The Common law, and the Uniform Commercial Code (UCC). The UCC applies to all contracts with respect to the sale of goods, and the common law generally applies to all other contracts. "Goods" for the purpose of this determination are movable objects.

Here, Austin sold a warehouse to Beverly. A warehouse is real property, not a "movable good." Thus, the Common Law would apply to this transaction.

2.) Will Beverly be able to Rescind the Contract with Austin on the Basis of Misrepresentation and/or Non-Disclosure

As a result of the alleged misrepresentation, Beverly seeks to rescind her contract with Austin. Rescission is an equitable remedy which a court may grant under certain circumstances where a valid, enforceable contract has been created, but monetary damages would be inadequate, and equity requires a different remedy. If a court grants rescission as a form of relief, the contract is effectively cancelled, and parties are returned to the position they were prior to the formation of the contract (with possibly some form of incidental damages recovered).

A.) Mutual Mistake

The first ground on which Beverly may seek to rescind this contract is the grounds of mutual mistake. Generally, under the common law, a contract cannot be rescinded due to the mistakes of the forming parties. However, a court may grant the remedy if rescission if it can be shown that (1) there was a mistake as to a material fact, and (2) neither party bore the risk of that mistake.

Here, Austin told Beverly that he had "never had a problem" with Top Tile, indicating that the roof was in good condition. However, the roof ultimately leaked. Thus, there

was a mistake as to whether the roof would leak. Moreover, this is a material fact as it substantially affects the value of the property. Thus, a court would likely find a mistake of material fact.

However, Austin appears to have known about the issue. The Manufacturer of Top Tile had recently reached out to him and informed him that the warehouse roof would soon develop leaks. Thus, Austin knew about the problem, so this would not be considered a "mutual mistake."

B.) Unilateral Mistake

While there is no "mutual mistake" which could have formed a basis for rescinding the contract, there has been a "unilateral mistake." A court allows rescission based on a unilateral mistake as long as (1) the mistaken party did not bear the risk of that mistake, (2) the mistake was as to something material, and (3) the other party had reason to know of that mistake.

Here, Beverly was mistaken about the quality of the roof. She believed that it was in good condition and would not break soon. As discussed above, whether or not it would break is a material fact. Thus, she was mistaken as to a material fact.

Moreover, Beverly likely did not bear the risk of that mistake. A court generally will find a party to have born the risk of the mistake only if they have some superior knowledge. Here, it was in fact the seller, Austin, who had better knowledge because he owned the property and had spoken with the Top-Tile manufacturer. Thus, Austin would have been the party to bear the risk of the mistake here.

Moreover, Austin had reason to know of Beverly's mistake. Beverly specifically asked if the roof was in good condition, and Austin induced that mistake by informing her that he had "never had a problem with it" while being fully aware that the manufacturer had warned him that it would start leaking soon.

Thus, a court would likely find that Beverly may rescind the contract on the grounds of a mutual mistake because (1) she was mistaken as to the condition of the roof, (2) she did not bear the risk as to that mistake, and (3) Austin had reason to know of that mistake.

C.) Misrepresentation

Courts may also grant rescission when a contract was formed based on a material misrepresentation. Under this rule, a court will rescind a contract if they can show that one party (1) intentionally, (2) made a misrepresentation of material fact, (3) intending that the other party rely on that misstatement, (4) the other party did in fact rely on that misstatement, and (5) damages were suffered as a result.

i. *Intentional Misrepresentation*

Here, a court would likely find that there was an intentional misrepresentation. As discussed above, Beverly specifically asked whether the roof was in "good condition." Despite knowing that Top-Tile, the manufacturer of the roof tiles, believed that the roof would soon develop leaks, Austin responded that he "never had a problem with it." While this was not a direct misstatement of fact, it was an omission.

While a seller of property generally has no duty to disclose issue on the property due to the common law doctrine of Caveat Emptor, a seller may not omit a material fact upon inquiry of the buyer. Thus, while he technically did not lie, he committed an intentional misrepresentation for these purposes.

ii. Material Fact

This omission was also material. A fact is "material" if a reasonable person would consider that information when deciding whether or not to enter into a contract.

Here, the omitted fact related to the quality of the roof. Because repairing roofs is expensive, a reasonable person would want to know that information when deciding whether or not to enter into a contract. Thus, this term would be deemed material.

iii. Intending That the Other Party Rely

Austin likely made this statement knowing or intending that Beverly would rely on it. He wanted to sell the property (possibly because it would soon start leaking). Thus, he would likely have intended that Beverly rely on that statement.

iv. Other Party Did In Fact Rely

It also appears that Beverly did rely on that misstatement. She ultimately purchased

the property. The fact that she asked about the roof's condition prior to the purchase indicates that it was an important fact to her. Thus, she likely relied on that statement. Moreover, there is no evidence that she made an independent inspection, further lending credence to the idea that she relied on this misrepresentation.

v. Damages

Beverly was also damaged. She now has to pay for the repairs.

Because all of these elements are satisfied, a court would likely find that Beverly can rescind the contract on the grounds of a misrepresentation.

D.) Rescission Based on Non-Disclosure

A contract may also be rescinded on the grounds of non-disclosure if (1) there was a duty to disclose information, and (2) the seller failed to disclose.

As discussed above, there generally is no duty to disclose conditions on the premises due to the doctrine of caveat emptor. However, if a buyer makes an inquiry, a seller is not permitted to omit and fail to disclose a material fact related to that question.

Here, Austin would not have had a general duty to disclose the statement made by Top-Tile regarding the impending leak on the premises. However, Beverly asked if the roof was in good condition. This question created a duty for Austin to disclose known conditions in the roofing, which he failed to do when he deflected the question by stating "I've never had a problem with it."

Thus, Austin had a duty to disclose, and failed to do so. Thus, Beverly may properly seek rescission on the grounds of non-disclosure.

E.) The "As Is Warranty."

Generally, when property is sold, certain warranties are contained within the sale contract. These include warranties of habitability (in a residential property), covenants of quiet enjoyment, and warranties related to the condition of the property. However, parties are free to waive such provisions in the contract.

Here, Beverly purchased a warehouse from Austin. Thus, generally she would be granted certain warranties which would have protected against things such as a leaky roof. However, the parties waived those warranties. The written contract explicitly stated that the property was being sold "as is, with no warranties as to the condition of the structure." Thus, there appears to have been a valid waiver of warranties with regards to the condition of the structure. Such a waiver would be applicable even to express conditions.

Arguably, Austin gave an express warranty to Beverly when he implied that there were no conditions with the roof. Thus, generally, this would protect against Beverly's contemplated rescission claims. However, warranties cannot overcome explicit misstatements, omissions, and fraud used to induce into the contract.

As discussed above, Austin made a material omission. Thus, while the waiver generally would be considered valid, the waiver cannot be applied to the condition of the roof.

F.) Parol Evidence

Austin may argue that evidence of his Statements are inadmissible under the "parol evidence rule." This rule state that, when there is a written, "integrated" contract, statements not contained within the writing cannot be used to contradict terms in the writing.

Here, there is a written contract. Assuming there was a proper merger clause, the parol evidence rule would apply to this contract. Moreover, Beverly would be attempting to introduce Austin's statements regarding the roof. This would contradict the "no warranty" provision." Thus, it is being introduced to alter the terms of the writing.

However, this is being introduced not to change the terms, but to show that the contract is invalid. Thus, the parol evidence rule would not bar introduction of this evidence.

III.) What Ethical Violations has Lou Committed

Lou has committed multiple ethical violations related to this representation.

1.) Duty of Candor to the Court & Opposing Counsel

Under both the ABA and CA ethics rules, attorneys own a duty of candor and truthfulness to both the court and to opposing counsel. This means that, while an attorney is required to zealously advocate for the interests of their clients, they may not introduce testimony which they know to be false.

Here, Lou offered the expert testimony of Dr. Crest. Lou knew that Dr. Crest had previously testified that "Top-Tile roofs always last at least five years" and that the manufacturer's specifications indicated that Top-Tile roofs last indefinitely, except in certain climates. However, during cross examination, Dr. Crest testified that "Top-Tile Roofs never last five years" and that "climate is not a factor." Thus, Lou's witness introduced testimony which Lou knew to be false. Moreover, Lou chose to repeat those statements in his closing argument.

By doing this, Lou introduced facts known to be inaccurate to the court and to opposing counsel. This is impermissible. Thus, he violated his duties of candor under both the CA and ABA Rules.

Lou may argue, in his defense, that the testimony was elicited on cross-examination, not in the direct. This means that Lou did not directly induce the fraudulent testimony. However, his duties would require him to communicate this fact to the judge, and would prohibit him from referencing those facts in his closing arguments (which he did.) Thus, even though he did not personally elicit the fraudulent testimony, he will have been found to have violated this ethical obligation.

2.) Attorney as a Witness

Lou also violated his ethical duties when he effectively served as a witness in this case. Under the ABA rules, an attorney is not permitted to act as a witness in a case which they are litigating unless their testimony (1) relates to a non-disputed issue, or (2) the attorney is so critical to the case, that they cannot be removed as counsel, and their testimony is critical. Under the CA rules, an attorney may only testify if

Here, during his closing arguments, Lou testified that his "own inspection of the roof confirmed Dr. Crest's testimony." This is opinion testimony. Thus, while he was not

technically called as a witness, he did serve as one. Therefore, this testimony is only permissible if one of the exceptions apply.

It is unclear if this is a disputed issue. The central issue in the case was the nature of the representation about the leaky roof. However, it does not seem to be in dispute whether the roof was leaking, just whether there was a warranty. Lou's testimony only seems to state that he confirmed there were leaks. It is unlikely that he was testifying about the chemical makeup of the roof, or its propensity to leak. Thus, arguably he was not testifying regarding a disputed issue. However, because what he is talking about comes so dangerously close to the central issue in the case, it is likely impermissible. Thus, by stating that he did his own inspection and confirmed the results, he violated the rule prohibiting attorneys from acting as witnesses.

1. Duty of Competence

Lou also may have violated his duty of competence. Under the ABA rules, an attorney must carry out a representation in a competent manner. Under the CA rules, an attorney must not repeatedly carry out a representation in a negligent, reckless, or incompetent manner.

Here, Lou hired an attorney who had regularly testified about the opposite of the position he sought to assert. This information would almost certainly come out in a proper cross examination. Thus, his witness would have been thoroughly discredited. A competent attorney does not hire an expert witness who will easily be discredited and impeached. Thus, under the ABA rules, he violated his duty of competence.

Under the CA rules, he likely violated no duties. There is no evidence that this was a repeated pattern. Thus, under the CA rules, he likely would not be found to have violated his duty of competence.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2018

CALIFORNIA BAR EXAMINATION

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Question Number	Subject
1.	Contracts
2.	Evidence
3.	Professional Responsibility
4.	Community Property
5.	Constitutional Law

QUESTION 1

In January, Stan, a farmer, agreed in a valid written contract to sell to Best Sauce-Maker Company (Best), 5,000 bushels of tomatoes on July 1, at $100 per bushel, payable upon delivery. On May 15, Stan sent Best the following e-mail:

"Heavy rains in March-May slowed tomato ripening. Delivery will be two weeks late."

Best replied:

"Okay."

On May 22, an employee of Delta Bank (Delta), where Best and Stan banked, told Best that rains had damaged Stan's tomato crops and that Stan would be unable to fulfill all his contracts. Best called Stan and asked about the banker's comment. Stan said:

"Won't know until June 10 whether I'll have enough tomatoes for all my contracts."

Best replied:

"We need a firm commitment by May 27, or we'll buy the tomatoes elsewhere."

Stan did not contact Best by May 27. On June 3, Best contracted to buy the 5,000 bushels it needed from Agro-Farm for $110 per bushel.

On June 6, Stan told Best:

"Worry was for nothing. I'll be able to deliver all 5,000 bushels."

Best replied:

"Too late. We made other arrangements. You owe us $50,000."

Concerned about quickly finding another buyer, Stan sold the 5,000 bushels to a vegetable wholesaler for $95 per bushel.

Stan sued Best for breach of contract. Best countersued Stan for breach of contract.

Has Stan and/or Best breached the contract? If so, what damages might be recovered, if any, by each of them? Discuss.

QUESTION 1: SELECTED ANSWER A

Applicable Law

Contracts for goods are governed by Title 2 of the Uniform Commercial Code. All other contracts are governed by common law.

Goods

Goods are qualified as movable, tangible objects. As this contract is for bushels of tomatoes, which are movable, tangible objects, this contract will **be governed by the UCC.**

Merchants

The UCC additionally has special rules for merchants. A merchant is someone who regularly deals with the types of goods that are the subject matter of the contract, someone who has special knowledge of such subject matter, or a business person involved in the transaction.

This contract is a contract between Best, a sauce making corporation, and Stan, a farmer, who appears to be a commercial farmer, but even if he is not, he would have special knowledge of the goods involved, and therefore both parties **qualify as merchants,** and the UCC rules for Merchants will apply.

Possible Breaches of Contract

Valid Contract

In order to have a valid contract there must be an offer with clear and definite terms, acceptance, consideration, and no defenses to contract. Here, the facts indicate, that Stan and Best have entered into a valid contract. There appears to have clearly been an offer and acceptance. The only essential terms under the UCC are *parties, subject matter, and quantity*, but this contract also included price and timing. Both have exchanged valuable consideration, tomatoes for money, and as it's a valid contract, there should be no defenses to formation.

Anticipatory Repudiation

Anticipatory Repudiation is when one party to a contract clearly and unambiguously informs the other that they will not or cannot perform the performance required by the contract. Upon an anticipatory repudiation, the non-repudiating party may either (i) treat the repudiation as a breach and sue immediately, (ii) treat the contract as rescinded, (iii) suspend performance until the repudiating party indeed performs, (iii) or wait and sue when a breach occurs.

Best will argue that Stan repudiated his contract when he sent Best the May 15th email saying Delivery will be two weeks late. While under the common law, a **time is of the essence** clause is not typically enforced as a material breach of contract unless this has been specified when the contract was formed, the UCC requires **Perfect Tender**, which applies to goods, quantity *and time of delivery*. The UCC does not allow for substantial performance unless under an installment contract, which this is not. Therefore, Best will argue, by saying that there was going to be a 2-week delay in the delivery of Stan's tomatoes, Stan had anticipatorily repudiated the contract, and Best was allowed to treat such anticipatory repudiation as a breach.

Contract Modifications

While under the Common Law, a modification to a contract must be supported by consideration, the UCC only requires good faith to modify the contract.
Stan will argue, therefore, that the initial May 15th communications between Best and Stan were not a repudiation of the contract, but instead a good faith modification. Stan will argue that the only reason he was delayed in delivering the tomatoes was due to the heavy rains, a condition completely out of his control, and that therefore his attempt to change the delivery date will be a good faith effort to modify the contract. He will point to Best's response, an "Okay", as further proof that Best also viewed this communication as a modification of contract.

Because Best did not treat Stan's informing them of the delay as a breach of contract, or as a rescission, but instead answered in the affirmative, “Okay”, a court will most likely treat this as a modification rather than a repudiation as of May 15.

Request for Assurances

Under the UCC, when a party has a reasonable suspicion that the other party may not perform, they may make a request for assurances *in writing* from the other party that they will indeed be able to perform as promised under the contract. Upon receiving a request for assurances, the other party must respond within a reasonable period of time (typically not to exceed 30 days), also in writing, with assurances that they will be able to complete their portion of the agreement. If a party fails to respond to a request for assurances, the requesting party may treat this failure as an anticipatory repudiation and take any of the options discussed above.

Best will argue that the phone call on May 22nd was a request for assurances. Best will argue that due to the information shared with them by their and Stan's bank, they had a reasonable suspicion that Stan may be unable to perform and were therefore within their right under the contract and the UCC to make such a request. Best will argue that Stan's

further uncertainty, about not knowing until June 10, would be even more support for their request for assurances. Best will argue that because Stan failed to respond to their request, he breached the contract by implicitly repudiating the contract, and Best was therefore within their rights to search elsewhere for their tomatoes to cover any losses. Stan will argue that he did not breach the contract through the May 22nd conversation. First, Stan will argue that because the request for a "firm commitment" was in a phone call rather in writing, that this was not an enforceable request for assurances. Stan will also argue that as Best only gave him 5 days, from May 22nd to May 27th, to respond to such assurances, with the date of performance still a month away, that this was not a reasonable time for him to respond in. Stan will further point out that even if this was a viable request for assurances, Stan gave the assurances on June 6th. Stan will argue that despite the fact that Best had demanded assurances be given by May 27th, as mentioned above, this was an unreasonable amount of time, and Stan did give them assurances within a reasonable amount of time. June 6, 2 weeks later, is well within 30 days, and still well before the date of performance. Stan will further argue that the fact that he had told Best that he wouldn't know until June 10th is even more evidence that the required date of May 27th was unreasonable.

Because Best's request was not in writing, and because they gave Stan less than a week to respond, most likely a court will not find that Sam breached his contract by failing to respond by May 27th.

Revocation of Repudiation

In the event of an anticipatory repudiation, the breaching party may revoke their repudiation any time before the date of performance agreed upon on the contract provided (i) the other party has not rescinded the contract already, (ii) the other party has not materially changed their position in reliance of this repudiation, or (iii) the other party has not already filed suit for breach of contract.

Stan will argue that even if it were found that he repudiated the contract either on May

15th, or the May 22nd through May 27th communications, that he revoked that repudiation on June 6th when he said there was nothing to worry about, and he would deliver as promised.

Best will argue that by that point in time, they had already materially changed their position and contracted with Agro-Farm in order to ensure they were able to obtain the necessary tomatoes, and that therefore Sam's revocation came too late. Stan will argue that as there was not a proper request for assurances, and that despite this, Stan was still able to give assurances well before the July 1st date, that Best itself was breaching the contract by entering into the agreement with Agro-Farm and refusing to honor the contract.

Impracticability

A contract becomes unenforceable if the subject matter of the contract is destroyed, the performing party dies, or the performance becomes illegal; also if performance becomes impracticable due to an **unforeseen occurrence,** (i) the nonoccurrence of which was an essential assumption of the contract, (ii) that makes performance impracticable, and (iii) the other party was not at fault.

Finally Stan might argue that he was not repudiating the contract, that the rain made his performance impracticable. However, this would have been a foreseeable occurrence, the risk of which Stan would have assumed.

Possible Damages

Best's Damages Compensatory Damages

Compensatory Damages are damages meant to put the non-breaching party into the position they would have been in had the contract been fully performed. Typically these

are determined by the difference of the market price and that of the contract, or the difference between price of goods purchased in the non-breaching party's attempt to cover and the contract price. A party only needs to put in an objectively reasonable effort in finding a reasonably priced product to cover.
Should it be found that Stan did indeed breach the contract, Best will be able to claim compensatory damages. These would be the difference between the price they paid to Agro-Farm, $110 per bushel for 5,000 equaling $550,000 minus the agreed upon price with Stan of $500,000, or $50,000.

Consequential Damages

Consequential Damages are any damages that rise naturally out of the breach of contract that are not compensatory damages. These damages must be (i) actually **caused** by the breach, but for the breach, these damages would not have been suffered, (ii) **foreseeable**, and (iii) relatively **certain** as to the amount.

As Best only requested $50,000 dollars from Stan, it does not seem that they suffered any consequential damages, but if for some reason production were stopped as a result of having to go through Agro-Farm or something of this nature, they would be able to recover such consequential damages.

Incidental Damages

Incidental Damages are damages suffered by the non-breaching party in trying to remedy the breach.

Again, it is unclear wither Best suffered any such damages, but if they did in their attempts to locate and contract with Agro-Farm, these damages too could be recovered from Stan.

Stan's Damages

Compensatory Damages

See Rule Above.

If Best is found to be in breach of contract, Stan also could recover compensatory damages. These would be the difference in the agreed upon price with Best with what he was able to sell them for to the vegetable wholesaler. As such, Stan's compensatory damages would be the $500,000 agreed upon price, minus the $475,000 he received from the wholesaler or $25,000.

Consequential Damages

See Rule Above.

If Stan suffered any consequential damages, such as costs in having to transport the vegetables further, or storage fees, lost profits if he couldn't replant soon enough, etc, so long as these were caused by the breach, foreseeable, and a relatively certain dollar amount, these damages too could be recovered.

Incidental Damages

See Rule Above.

If Stan suffered any incidental damages, like Best, he too could recover these.

Reliance Damages

Reliance damages are recoverable as the costs suffered by the party upon reliance of the contract and reliance that the other party would perform. Reliance damages and

compensatory damages cannot both be obtained and as such a party must choose between reliance and compensatory damages.

Stan, therefore, could choose to take reliance damages that he suffered instead of compensatory damages

Duty to Mitigate

A non-breaching party must do all that is reasonably possible to mitigate damages and eliminate costs. The damages recoverable will be reduced by what has actually been mitigated, or what could have, should the non-breaching party fail to take steps.

Therefore, if Stan were to take reliance damages, they would be mitigated by his sale to the vegetable wholesaler and the costs such a sale would normally cost Stan.

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QUESTION 1: SELECTED ANSWER B

The main issue in this case is whether there was a breach of the contract when Stan did not reply to a request for assurance of performance. This is a case governed by the UCC since it deals with delivery between merchants.

Waiver of Delivery Date

It is likely a court will find that the May 15 email from Stan to Best is a proposed modification of the contract.

At common law, a modification requires consideration. However, as this concerns movable goods (i.e. tomatoes), the UCC allows for modification as long as it was in good faith. Here, the modification of the delivery was due to the heavy rains, which was not, arguably, the fault of Stan. As such, the assent of Best, although without consideration, was binding.

Moreover, considering that the contract dealt in goods with a value in excess of $500, the modification had to be in writing. Here, the modification was by email and constitutes a writing in accordance with the Statute of Frauds. As such, the proposed modification is binding.

Alternatively, this is construed as an express waiver of the delivery date. A waiver need not be supported by consideration, and the mere fact Best replied "okay" is sufficient for the waiver to be provided. As such, the delay in delivery is valid.

Anticipatory Repudiation on May 22

According to the facts, Best was informed by a bank employee (Delta) that rains had

damaged Stan's crops, and that Stan would be unable to fulfill all of his contracts. Best in turn called Stan, who commented that he will not know until June 10 whether there will be enough tomatoes.

An anticipatory repudiation allows the other contracting party to treat the contract as breached when the other party unequivocally states he will not perform. It is likely that a court will find that the admission by Stan that he would not know until June 10 whether there will be enough tomatoes is not, by itself, a breach of contract as there is no such unequivocal assurance by Seller that he will be unable to perform. All he said is he will not know by June 10 whether there will be enough tomatoes for all of his contracts. There is a probability he will breach the contract, but it is not unequivocal amounting to a refusal to perform under the contract. As such, this statement alone is not sufficient to constitute anticipatory repudiation and therefore, at this point, there has been no breach by Best.

Assurance of Performance on May 22

As per the same facts, while it did not constitute an anticipatory repudiation, which would have allowed Stan to treat the contract as breached, Stan had reasonable grounds to require assurance of performance. If there are reasonable grounds for a party to doubt performance of the contract by the other party, a party may require the other party to provide reasonable assurance of performance. Until receipt of the reasonable assurance, the party is allowed to suspend performance.

Here, it was a Delta employee who told Best about the crops. There is no indication here of its reliability, although it may be reasonable for Best to rely on it since it came from a bank, and presumably came from a reasonable source. However, even if this fact alone was not sufficient, Stan himself admitted to Best that he will not know until June 10 whether there will be enough tomatoes. The information, coupled with the admission, allows Best to require the assurance of performance from Stan.

The main issue here is whether there was a reasonable request for assurance of performance.

It is arguable whether the telephone call by Best demanding a firm commitment by May 27 would be considered by the court as reasonable since it was not in writing. Moreover, as Best is aware, Stan would not know until June 10 whether there were enough tomatoes to comply with the contract. A court may find that it was unreasonable to make Best wait. However, Stan did secure, as discussed earlier, a valid waiver, of two weeks, which would move the delivery date from July 1 to say July 14. As such, demanding an earlier time for Stan to commit may be held as unreasonable since the delivery date has been delayed for two weeks anyway and therefore, waiting from May 22 to June 10 would not be unreasonable.

On the other hand, it may be argued that by Best that all Best wanted was for Stan to assure him by May 27 that he will deliver the tomatoes, failing which, he will buy tomatoes elsewhere. Best will also argue that he was not asking for anything else, other than an assurance that Stan will comply. It is likely that a court will agree that a firm commitment in this case is reasonable since all that Best is asking is that he will receive assurances that Stan will perform the contract. Considering that Stan did not reply, Best was entitled to treat the contract as breached.

The attempt on June 6 by Best to provide assurance may be treated by the court as being too late. In this case, Stan was aware on May 22 that Best intended to buy tomatoes from another supplier without adequate assurance of performance. As such, the failure by Stan to reply by May 27 would allow Best to contract for the tomatoes from Agro- Farm. At best, Best may argue that Stan's failure to commit led Best to reply on the assumption that performance is not forthcoming and therefore, Best may treat the contract as breached.

Moreover, even if the court found earlier that Stan anticipatory repudiated the contract, Stan is not permitted to retract his repudiation if Best has already detrimentally relied on

the reputation. This is the likely result here since Stan is aware that Best will make other arrangements if Stan did not contact Best by May 27. As such, Stan took the risk that Best actually went through, as is here, with securing an alternative supply of tomatoes.

As such, it is likely that a court will find that this was reasonable and as such, the failure by the Stan to reply would be considered a breach. If a court finds that this was a breach, then Best was permitted to buy the other tomatoes from Agro-Farm. On the other hand, if the court finds that this was not a reasonable request, then Best is liable for the breach of contract.

Impossibility

It is possible that Stan will argue impossibility. Impossibility of performance will only be excused if it is not objectively possible for Stan to perform. However, it is likely this argument will fail because even if Stan's farm could not have produced the tomatoes, Stan could have easily performed by buying tomatoes from a different supplier, of equal quality. There is no indication here that Best only wanted Stan's tomatoes, or that Stan's tomatoes were of a unique quality that only Stan could provide. In fact, Best simply went to Agro-Farm for the other tomatoes, indicating that this was a generic purchase.

Impracticability

It is possible that Best will argue impracticability. Impracticability of performance will only be excused if its performance will be highly impractical. The mere fact it has become more expensive does not by itself make performance impractical. As stated earlier, even if Stan's farm could not have produced the tomatoes, Stan could have easily performed by buying tomatoes from a different supplier, of equal quality. As such, if he was not sure if he could deliver, Stan should have committed to delivering the tomatoes anyhow.

Damages

Applying the aforementioned, it is likely that a court will find that Stan had breached the contract, and as such, Best is entitled to damages.

As a preliminary matter, both parties had a duty to mitigate damages. Regardless of which party was at fault, both Stan and Best fulfilled their duty to mitigate damages by finding another customer, and supplier, respectively.

Best Damages

The general rule for damages here are expectation damages, which would put the non-beaching party at the same place as though the breach did not occur. Here, the contract price was 5,000 bushels at $100 per bushel (or total of $500,000). On the other hand, Best contracted to buy additional tomatoes at $110 a bushel. As such, the expectation damages here would be the difference between the original contract price and the new contract price, or 5,000 x ($110-$100) = $50,000.

Moreover, the non-breaching party is allowed to recover incidental expenses incurred by the breach. Here, there is no showing of incidental expenses.

Best is also entitled to recover special damages in the form of lost-profits if this was specifically pleaded and was a foreseeable loss due to the breach of the contract. Here however Best did not suffer any such damages.

As such, Best would only be entitled to recover the $50,000 from Stan, since Best did not make any down payment. Stan would not be entitled to recover any damages.

Stan Damages

On the other hand, if the court finds that Best breached the contract, then it will be liable to Stan for expectation damages and incidental damages as well. The same formula would be applied to compute the expectation damages, which would be the difference between the original contract price and the new contract price, or 5,000 x ($100-$95) = $25,000. As said earlier, the non-breaching party is allowed to recover incidental expenses incurred by the breach. Here, there is no showing of incidental expenses by Stan.

As such Stan would only be entitled to recover $25,000, as Best did not make any down payment.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2019

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2019 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Civil Procedure
2.	Remedies / Constitutional Law
3.	Criminal Law and Procedure
4.	Professional Responsibility
5.	Contracts

QUESTION 5

Sam owned a classic 1965 Eris automobile. Only 500 such cars were made and they are considered highly valuable.

Sam and Art, a classic car specialist, signed a valid written contract. The contract stated in its entirety:

> Art will serve as Sam's exclusive agent in selling his Eris car. Upon successful sale, Art will earn a commission equal to 10% of the sale price.

A few days later, Sam showed his Eris to Bob, who had learned of the car when he saw a "For Sale" sign Sam had decided to place on it while parked in his driveway. Bob, wanting to add the Eris to his personal collection, mailed Sam a signed letter later that day offering to pay $250,000 for the car. When Sam received the letter, he telephoned Bob and said he accepted the offer. They agreed to meet the following week for payment and exchange of title. Sam then called Art and said he was terminating their agreement.

The next day, Charlie saw an advertisement for Sam's Eris in a classic car trade publication. Art had placed the ad prior to Sam terminating their agreement. Charlie drove to Sam's house and offered $300,000 for the car and said he would mail a written contract to Sam that day. Sam said he would "think about it." He did not inform Charlie of his agreement with Bob. When Charlie's contract arrived, Sam signed it, placed it in a stamped envelope addressed to Charlie, and dropped it in the mailbox.

Sam died in his sleep that night. His will left all his property to his only relative, a nephew named Ned.

Ned wants to keep the Eris. As a result, Bob and Charlie filed timely claims against Sam's estate seeking title to the car. Art filed a timely claim seeking a 10% sales commission.

What contract rights and remedies, if any, do each of the following parties have against Sam's estate:

1. Bob? Discuss.

2. Charlie? Discuss.

3. Art? Discuss.

QUESTION 5: SELECTED ANSWER A

Bob's Rights and Remedies

Applicable Law

Contracts for the sale of goods are governed by the Uniform Commercial Code (UCC). Goods are defined as movable, tangible things identifiable at the time of delivery. All other contracts are governed by the common law. Here, B attempted to contract for the sale of a 1965 Eris automobile (the car). The car is a tangible movable thing and so the UCC governs this contract.

Formation

This raises the issue of whether Bob (B) and Sam (S) entered into a contract. The formation of a contract requires mutual assent and consideration.

Mutual Assent

Mutual assent requires offer and acceptance. An offer must evince an objective intent to enter into an agreement, lay out sufficiently certain and definite terms such that the contract is capable of being enforced, and must be communicated to the offeree. Under the UCC, the key term for an offer to be sufficiently definite is the quantity term, and all other terms may usually be filled in by the court. Advertisements are not typically treated as offers.

Here, S had posted a sign on the car stating it was for sale. This was not an offer but rather an invitation to deal, that is a solicitation for offers. B responded to this solicitation

by mailing a signed letter "offering" to pay $250,000 for the car. We do not know if "the car" was the language used, so it is possible the offer does not describe the subject of the agreement with sufficient definiteness. However, it probably does in context, since all that is required is a sufficiently clear intent to agree. Since S was not selling any other cars this language would probably suffice. The letter was actually received by Sam, so this constitutes a valid offer.

An acceptance of an offer may be made by any means reasonable prior to the offer's termination. Here, after receiving B's offer, S called B and accepted the offer orally over the phone. The parties then agreed on the location where the final exchange would occur. This oral acceptance was sufficient to create a contract, even though the initial offer was in writing (but see the statute of frauds discussion below).

Consideration, the final element of contract formation, requires that there be (1) a bargained for exchange (2) of legally valuable detriment. A bargained for exchange requires the promise induce the detriment and the detriment the promise. To be of sufficient value, the detriment need not be economic, or even very large. Here, S agreed to relinquish title to his car and B agreed to pay $250,000. It was sufficiently bargained for in that each promise induced the other. Therefore, there was sufficient consideration.

B and S entered into a contract for the sale of S's car for $ 250,000.

Defenses to Formation

This next raises the issue of whether the contract is enforceable, and particularly whether it satisfies the Statute of Frauds.

Statute of Frauds

Even where a contract is formed, it may not be enforceable if it falls within the Statute of Frauds and no exception applies. Among the contracts covered by the Statute of Frauds are goods sale contracts where the price paid is $500 or more. Here, the contract was for the sale of a car at a price of $250,000, well in excess of the minimum to be covered. Therefore, to be enforceable the Statute of Frauds must be satisfied or some exception must apply.

To satisfy the Statute of Frauds, there must be some writing evidencing the existence of a contract and its essential terms, which is signed by the party against whom it is being enforced. Here, B sent a signed letter to S offering to purchase the car at a stated price. Had S sued B for breach of contract this would have satisfied the statute, however S never signed the letter, nor any other document. Rather, he accepted the contract over the phone. The "For Sale" sign is insufficient, both because it does not suggest a contract between S and B and was not signed. B might argue that S's contract with A shows he intends to sell the car, but that contract does not prove that S had a contract to sell the car to B (indeed it probably shows the opposite). Therefore, there is no writing which appears to satisfy the Statute of frauds and make the agreement enforceable against S.

The UCC contains certain exceptions to the Statute of Frauds which B may argue make the agreement enforceable. These exceptions include (1) where one party has partially performed on the agreement (but only to the extent of that partial performance) (2) where promissory estoppel applies (3) where the contract is for specially manufactured goods, after substantial performance has begun and the goods cannot

reasonably be resold and (4) a merchants' confirmatory memo.

Here, the first three exceptions clearly do not apply. The part performance exception only applies to the extent goods have already been either paid for or delivered, and only for the goods actually paid for and delivered. Here, there was an agreement but no delivery of goods or payment, so the exception does not apply. The facts do not suggest any detrimental reliance has taken place, so estoppel will not save the agreement. Finally, the contract was for the sale of unique goods, not for the manufacturer of such goods. Additionally, even if this did apply, it would protect S, not B.

The only possible exception is the merchants' confirmatory memo. Under the UCC, where one party sends a signed writing memorializing their oral agreement, and the counterparty does not object within 10 days, the counterparty will be deemed to have accepted and the writing may be used to satisfy the Statute of Frauds. If the party orally accepts, this will also satisfy the statute. Here, the memo was sent and S replied by accepting over the phone, so the confirmatory memo exception might apply.

However, the exception only applies where both parties to the agreement are merchants. The UCC defines as one who deals in goods of the kind sold, or otherwise holds himself out as possessing specialized knowledge, skill or expertise in such goods. Here, B might be a merchant, but there are no facts to suggest S is. B has some expertise in classic cars, since he has a personal collection. However even this might not suffice since it is personal, and he does not deal in the goods of the kind (here classic cars). Nor did he appear to hold himself out as having specialized knowledge, and he may not have such knowledge simply by owning a classic car collection. S is even less likely to be a merchant. There are no facts suggesting he knew more than

most about cars. The fact he hired an agent to sell his car affirmatively suggests he is not a merchant. Therefore, the confirmatory memo exception does not apply

Because the contract falls within the Statute of Frauds and cannot satisfy it, the agreement between S and B is unenforceable.

Dead Man Act

The facts do not state if the jurisdiction in question has a Dead Man Act. This kind of act generally precludes the use of oral statements of a deceased against the descendant's estate to prove the existence of an agreement. Here, the only evidence of B's contract with S was S's oral statement over the phone. Therefore, if the jurisdiction had such an act, B would be further barred from proving the existence of his contract with S in a subsequent suit against Ned (N).

2. Charlie's Rights and Remedies

Applicable Law

For the same reasons discussed above, the UCC is applicable to Charlie's (C's) contract with S.

Formation

The threshold issue is whether S and C formed a contract. The rules governing formation are discussed above.

Mutual Assent

Here, the advertisement placed by Art (A) was merely an ad, and did not constitute an offer. However C's subsequent oral statement to S offering to buy the car for $300,000 would constitute an offer. It specifies the quantity (the car) and was communicated to S.

S did not immediately accept, but said he would "think about it." Later, he received a contract from C. He signed the contract and placed it in the mailbox.

Under the mail box rule, an acceptance is deemed effective when it is mailed. At this point, a valid contract is formed even if the offeror has not yet received the acceptance. By placing the contract in the mail box, S has accepted the offer and it became effective when he did so.

N might try to argue no contract was formed because S's initial response, that he would think about it, terminated the initial offer, because it constituted a rejection. However, this was not a rejection but rather a deferral of a response. Even if it were, the subsequent written contract would constitute a new revived offer that S accepted.

N might next argue that the offer terminated prior to acceptance. An offer is assumed to be valid for a reasonable time if it does not specify a particular date on which it terminates. An offer terminates by operation of law upon the death of either the offeror or offeree. Here, S died immediately after mailing his acceptance. Had he not mailed his acceptance his death would have terminated the offer, but by mailing the acceptance a contract was formed.

A contract, unlike an offer, does not terminate at the death of one of the contracting parties unless the contract is for specialized services. A sale of goods contract certainly does not. Here, the death of S did not terminate the acceptance or the formation of S's contract with C.

For the same reasons stated above, consideration exists for the agreement between S and C. Therefore, a contract was formed between them.

Defenses to Formation

Statute of Frauds and Dead Man's Acts

The Statute of Frauds is equally applicable to the contract between C and S. However, unlike the contract between B and S, this contract likely satisfies the statute. S signed the written agreement and accepted. Assuming the contract C sent contained all the essential terms (quantity, a description of the subject matter, the parties), which there is every reason to think it did, this writing will satisfy the statute and the agreement will be enforceable.

Because the agreement is in writing and signed by S, any Dead Man's Act would not preclude enforcement of the obligation.

There are no other defenses to either formation or performance which appear in the facts, therefore, C will be entitled to some remedy should N refuse to deliver the car.

Remedies

This raises the issue of what remedies C may be entitled to.

Replevin

Replevin is a legal restitutionary which allows a party to obtain a court order (even before trial in certain circumstances) allowing the party to retake chattels to which he has a lawful right. To be available under the UCC, the chattels must have been identified in the contract, the amount of time between contracting and the order being sought must not have been too great, and damages must be an inadequate remedy. Damages are inadequate where the subject matter of the contract is unique. The order must also be able to be enforced by the Sheriff.

Here, the car is an identifiable good to which C has a contractual right. The contract was formed mere days before, so the amount of time which has elapsed is not too great. The car is also unique, since there are only 500 in the world. Therefore, C will likely be able to replevin the car from N should N refuse to perform.

C may be able to do this even before a full trial on the merits is had. If N is given notice and a hearing before the order is issued (and potentially even if not), and C posts a bond ensuring against losses incurred by N if the taking is wrongful, C may obtain the order before the case is decided. However, N may post a bond in response ensuring against the disappearance or loss of the car and may then keep the car until the merits are resolved.

Specific Performance

Specific performance is a court order requiring a party to perform on a contract or face contempt proceedings. To obtain specific performance on a contract, the party must show (1) certain and definite terms (2) that legal remedies are inadequate (3) that enforcement would be feasible and (4) that the party has, or is willing to, fully perform its obligations under the contract. Here, the contract is, presumably sufficiently clear, as discussed above. If C tendered the purchase price he has performed. The remedy would be enforceable, since it would simply require transfer of the car. The only question is whether legal remedies are inadequate. If the court were willing to make replevin available as a remedy, then legal remedies would not be inadequate. If replevin was unavailable for some reason, for instance the sheriff could not locate the car, then the car would be considered sufficiently unique to award specific performance.

Damages

C might alternately seek damages. Expectation damages are intended to place the non-breaching party in as good a place as they would have been had the contract been performed. Here, assuming C could not cover, the damages would be equal to the difference between the contract price and the market price of the car, plus incidental damages and consequential damages, less expenses saved. There is no evidence in the facts of what the market price would be, or of any incidental or consequential damages, however C would be able to recover whatever was avoidable and foreseeable at the time of contracting.

3. Art's Rights and Remedies

Applicable Law

Unlike the above contracts, the agreement with A is governed by the common law. The contract is for the service of selling a car. While the underlying object is a good, the agreement's primary focus is the services rendered, especially since A is not the one actually buying the car. Therefore, the common law applies.

Formation and Defenses

The facts state that a valid contract was formed between S, so presumably mutual assent was present. The agreement was in writing so the Statute of Frauds would be satisfied (and is not applicable in any event because it could be complete in less than a year). There are also no obvious other defenses to formation, save consideration.

Consideration

N will argue that he is not obligated to pay A because the contract is illusory. For

consideration to exist, each party must have obligations under the agreement. Future contingencies are sufficient to support consideration.

Here, A agreed to serve as S's exclusive agent in selling the car. He would receive a 10% commission for his services. S clearly incurred legal detriments, both by making A his exclusive agent and offering to pay him if there was a successful sale. N will argue that A was not obligated to do anything under the agreement.

Where parties enter into an agreement where one will act as the selling agent of another, courts typically do not find them illusory. Instead, they imply a term that the agent must use their best reasonable efforts in carrying out the agency to save the contract. Here, a court would likely reach a similar conclusion regarding the contract between S and A, and find it enforceable.

Breach

Length of Employment

This raises the issue of whether A was an at will employee or was to work for S until the car was sold. The key term in an employment or services contract is duration. Without such a term a contract is created, but will be deemed an at will employment relationship terminable by either party at any time. Here, the agreement did not state a specific term. N will argue this means S did not breach by ending the relationship. A will respond that the term was for the completion of a particular task, and that he was employed until that task was complete. He will point to the fact that the relationship was exclusive to support this conclusion. It is unclear how a court would rule on this point. Given how short the contract is, the court would likely permit parol evidence concerning prior performance to assess, and may also look to industry custom.

If the court found it was an at will employment arrangement, S, by terminating A, ended it and is not entitled to payment because a "successful sale" had not occurred. However, even if this is the result, A will still probably be able to recover under a quantum meruit theory for the amount of time and money he has already put into selling the car.

Anticipatory Repudiation

If the court instead found that the contract lasted until the task was completed, S would have anticipatorily repudiated the contract and would be in total breach. A party materially breaches a contract when they unambiguously give notice to the other party that they will not perform, and the agreement is executory. If this happens the counterparty need not perform further and may sue. Here, S told A that he was not going to honor the contract. Neither party had completed performance and the repudiation was unambiguous, therefore S likely breached the contract.

A might alternately not accept the repudiation and instead seek his portion of the compensation for the sale to C. A party may elect not to accept the repudiation but instead keep performing under the contract and wait until performance is due. Here, C came to S because of A's efforts (through an ad A placed). A will argue that he acquired a buyer for the car and so, under the terms of the contract, even absent a repudiation, S's duty to perform (now N's) became absolute upon signing the enforceable contract with C.

N might argue that no "successful sale" occurs until the car is actually transferred. Even if this is true, N cannot wrongfully prevent the occurrence of a condition precedent.

Remedy

Damages

As discussed above, expectation damages, which are the default, place the party in as good of a position as they would have been in had the breach not occurred. To be recoverable damages must be sufficiently certain and calculable. Finally, a party must take reasonable steps to mitigate damages, although in a services contract they need not accept substantial.

Here, A will be entitled to whatever 10% of what the sales price would have been equal to, assuming he can prove with sufficient certainty both that amount and that a sale would have occurred. A's costs saved after the repudiation would be deducted from this, but if he received the 10% he is entitled, past advertising expenses would not be recoverable.

He may also seek to recover on a reliance measure of damages if expectation damages are too uncertain. Reliance damages seek to place the party in as good of a position as they would have been in had the contract not been made. Here, A would be entitled to the expenses he has incurred up to this point in trying to find a buyer. This includes the cost of the advertisement he placed in the newspaper, as well as any similar efforts, and the reasonable value of the time he has worked on the project.

QUESTION 5: SELECTED ANSWER B

Applicable Law

In contracts, contracts that are for the sale of goods are governed by the UCC, while contracts for anything else (i.e. services) are governed by the common law. Only one of these can be applied (all or nothing rule) and when the contract is mixed, the one that is applied is determined by the primary purpose test.

1. BOB v. SAM'S ESTATE

Applicable Law

See rule above. Here, Bob is asking for a claim based upon an alleged contract for the purchase of a car from Sam. A car is a tangible good, thus this contract is governed by the UCC.

Contract Formation

In order to form a valid contract, there must be the following: mutual assent (offer and acceptance), consideration, and no defenses.

Offer - Sam's Sign

An offer requires that the offeror objectively manifest terms that indicate to a third party the intent to be bound by the contract, such that the offer creates in the offeree the power of acceptance. Under the UCC all essential terms must exist, which would only be the quantity. A court will gap fill the rest of the provisions.

Advertisements are typically not considered offers, but are usually considered offers to deal.

Here, the ad was a for sale sign that had been placed in the car when parked on the driveway. This is not going to be considered an offer, but is instead an invitation to deal. This is clear because Bob understood it as such as demonstrated by the fact that he actually went to speak with Sam and sent Sam an acceptance. As such, this was not an offer, but simply an invitation to deal.

Offer - Bob's Letter

See above for offer rule. Further, the type of offer matters as to the type of contract that exists. A bilateral contract is the exchange of promises, while a unilateral contract is asking for the other party to perform

Here, Bob sent Sam a signed letter that offered to pay $250k for the car. This is clearly a valid offer under the UCC as it contains the subject matter of the deal (the car) and even includes the price and the parties. Therefore, there is nothing left even for the UCC to gap fill. One could argue that simply offering for the "car" may not make the quantity term specific enough, but based on the prior interactions that the parties had between each other, this was a clear term and thus this was a proper offer.

In addition, this was an offer for a bilateral contract as Bob was asking for a promise from Sam to give him the car, in exchange for a promise from Bob to give Sam money.

Acceptance - Sam's Phone Call

An acceptance requires an intent by the offeree to be bound by the terms of the offer. There must be a clear manifestation of assent to properly accept an offer. In the case of a bilateral contract, the offer can be accepted by either a return promise or by beginning performance.

Here, Sam accepted the contract over the phone by saying "he accepted the offer" and promising to perform, which is a proper way to accept a contract.

Therefore, this was a proper acceptance.

Consideration

Consideration is evidenced by a bargained-for exchange between two parties. It is usually evidenced by a detriment to the promisee or a benefit to the promisor.

Here, there was clearly bargained for consideration between these two parties as Sam (offeree) was incurring a legal detriment by giving his car to Bob and Bob (offeror) was getting a benefit by receiving Sam's car.

Therefore, there was consideration.

Defenses

However, in order to be a valid contract, there must be no defenses to the formation of the contract. Here, there might not have been a proper contract because it may need to satisfy the Statute of Frauds.

Statute of Frauds

When the Statute of Frauds applies, it requires that the contract be in writing, signed by the party to be charged and contain the terms of the deal. The Statute of Frauds applies in several situations, including in the UCC for sales of goods that exceed $500.

Here, the contract was for the sale of goods, and was for $250k, which far exceeds the amount required to apply the Statute of Frauds. Therefore, the Statute of Frauds

applies.

Next, the Statute of Frauds requires that the contract be in writing, signed by the party to be charged and contain the essential terms of the deal. Here, this is not satisfied because the only writing that exists between Bob and Sam was Bob's offer to Sam. While this certainly contained the essential elements of the deal, it fails because it doesn't have the other requirements.

First, it is not signed by Sam. It is necessary that Sam be the one to sign it as Bob is trying to enforce this contract. Thus, Sam is the one to be charged under the contract. Sam could argue that his letter offer to Bob was signed, but that doesn't help him as 1) that was just an offer, not the contract, and 2) Bob is not the party to be charged here. In fact, there is no writing at all other than the offer that would be the contract between these parties.

Therefore, this contract violates the Statute of Frauds and should fail.

Statute of Frauds Exceptions

The Statute of Frauds can be overcome in limited circumstances where perhaps this was an order for specialty goods, one party has already performed, or there was promissory estoppel.

Here, however, none of those things occur here as there is no indication that the car was ever delivered to Bob and while this is certainly a special car, this was not a specialty ordered good, but one that was already in existence when the order was placed. Finally, promissory estoppel doesn't apply as there is no evidence that Bob did anything in terms of relying on the promise (i.e. setting up a person to get the car,

finding a storage space, etc.).

Therefore, because the Statue of Frauds exceptions don't exist, this will not be an enforceable contract.

Conclusion

In sum, Bob and Sam did not enter into an enforceable contract because it did not conform with the Statute of Frauds and no Statute of Frauds exceptions exist.

2. CHARLIE v. SAM'S ESTATE

Applicable Law

See rule above. Here, Charlie is asking for a claim based upon an alleged contract for the purchase of a car from Sam. A car is a tangible good, thus this contract is governed by the UCC.

Contract Formation

See rule above.

Offer - Ad in Publication

See rule above on ads and offers. Here, this was still clearly not an offer as it was just an invitation to deal with an indication that the car was for sale. Further, this is shown by the evidence that Charlie simply saw the ad and went over to Sam's house in order to see the car and make an offer. Therefore, this was not an offer (note that it doesn't matter that Art put the ad in the paper as that was done by Art while he was Sam's agent).

Offer - In Person

See rule above for offers.

Here, we clearly have an offer that satisfies the UCC requirements as the car is clearly identified (quantity term). In addition, the offer indicated a willingness by Charlie to enter into a deal and even contained a money term. Therefore, this was a proper offer.

Offer - Written Contract

Note that this written contract actually just restated the oral offer that Charlie had made earlier and therefore, it is also a continuation of the same offer.

UCC Firm Offer?

In the UCC world, a merchant can have an irrevocable offer held open for a stated number of days (not to exceed 90) if they send the offer in writing and sign it. A merchant is one who deals in the goods at issue regularly. Here, there is no evidence that Charlie is a merchant. Rather, it appears that Charlie is just a collector who wanted to buy this particular car. Therefore, this was not a firm offer that could be held open.

However, that does not mean that the offer lapsed or anything by the time acceptance became an issue. Rather, the offer was still good and was in the power of Sam to accept.

Acceptance - Think About It

See rule above for acceptance. When Sam said that he would "think about it," this was not an acceptance. Rather, this was an indication that he was open to the offer and that he would like to think more about it. Further, this was not a rejection that would terminate the offer, but rather was just an expression that he needed more time to think

about whether or not to accept. Therefore, no contract had formed at that point.

Acceptance - Mailbox

See rule above for acceptance. Under the mailbox rule, an offer is accepted when placed in the mailbox by the offeree. The actual receipt of the acceptance by the offeror does not make a difference under this rule.

Here, Sam received the contract from Charlie and decided to accept it. He accepted it by signing it, placing it in an envelope, and then putting it in the mail to send back to Charlie. The offer was therefore accepted when Sam placed the offer into the mail and the receipt of the acceptance is of no consequence.

Further, it does not matter that Sam died in his sleep that night. The offer was accepted when he placed it in the mail and that is when the contract came into existence. A good contract is not terminated imply because one of the parties dies (this is of course subject to various exceptions).

In sum, when Sam placed the signed letter in the mailbox, a valid acceptance was sent and his death does not impact that.

Consideration

See above for consideration. Here, the analysis is the same. Sam (offeree) is incurring a detriment by sending his car to Charlie, while Charlie is incurring a benefit by receiving the car. There was clearly a bargained for exchanged here as evidence by the fact that Sam even indicated that he wanted to think about whether or not to accept the offer.

In sum, there was consideration for the contract.

Defenses

See rule above. Again, here, there is a Statue of Frauds question as this applies here.

Statue of Frauds

See rule above. Here, contract again is subject to the Statute of Frauds as this is a UCC contract with a price of $300k, which far exceeds the $500 minimum. Therefore, SOF applies.

Further, here, the requirements are met. First, we have a writing as we know that Charlie mailed a copy of the contract to Sam which contained the essential terms of the deal (car, price, parties, etc.). In addition, as the party to be charged, Sam needed to sign it and, here, Sam did sign it before sending it out. Therefore, this is a contract in writing with the essential terms and the party to be charged signed it.

Therefore, this does not violate the Statute of Frauds.

Conclusion

In sum, Charlie and Art entered into a valid contract for the sale of Sam's Car. However, the remedies are now an issue provided that Sam's estate does not honor the sale.

Remedies

Specific Performance

Charlie may want to sue for specific performance of this contract in order to receive the car provided that S's estate does not follow through with the contract. Specific performance is an equitable remedy that allows a court to force that the contract be

performed.

Specific performance requires: (1) a valid contract; (2) no defenses; (3) clear/definite terms; (4) all conditions precedent are satisfied; (5) it is possible for the court to enforce; and (6) legal remedy inadequate.

Valid Contract

Here, this exists as discussed above.

No Defenses

This is satisfied as no valid contract defenses exist. See above.

Clear/Definite Terms

This is satisfied as the contract concerns a specific car that exists and which we know where it is. Therefore, this will be found to exist.

Conditions Precedent

This will be found to exist provided that Charlie pays Sam's estate the amount that he owes. That is likely considered a concurrent condition (C gets the car and pays at the same time). Therefore, no condition precedent exists.

Enforcement

This is feasible as the court will simply need to oversee the transfer of the car from S's estate to C. This is entirely possible and easy as it only needs to happen once.

Inadequate Legal Remedy

In order to grant specific performance, the legal remedy (money damages) needs to be inadequate. This will most often be granted in situations in which the subject matter is

rare or unique.

Here, C will argue that simply getting money will not be enough as what he really wants is this car. Further, this is a rare/unique car as there were only 500 of these particular cars made and they are extremely valuable to collectors. Further, C can point out that it is rare that these cars even come on the market, therefore, the odds of this coming on the market again may be unlikely and this may be C's only chance to get this particular car. S could try to argue that 500 cars means that they aren't all that rare and that C can just be compensated with expectation damages, but this is likely to fail due to the unique nature of the car and that fact that it is so rare and may not come on the market again.

Conclusion

In sum, the court should grant specific performance to C.

3. ART v. SAM'S ESTATE

Applicable Law

See rule above. Here, this contract is for a service (i.e. Art will help Sam to sell his car), thus this contract is governed by the Common Law.

Contract Formation

See rule above. Here, the facts state that there was a valid agent contract between Art and Sam. Therefore, that contract is good.

Revocation

A contract can be revoked by a party and that means their relationship ends and the non-breaching party can sue for damages. However, a revocation is only good going

forward and can't be revoked in a services contract for services already provided.

Here, since Art had already placed the ad in the paper before S terminated the contract, and Art's ad led to the sale of the car, a court will likely find that the contract was not properly revoked at that time and that therefore, the contract is in existence.

Performance - Condition Precedent

Generally, under the common law, a party performed by providing "substantial performance." However, a condition precedent to a contract means that it must be strictly met in order for performance on the contract to be required. Courts typically construe provisions in a contract as promises rather than express conditions. However, an express condition can exist if it is clear that is what the parties intended per the contract language.

Here, the contract between Art and Sam contained an express condition -- "upon successful sale" that triggered Sam's duties to Art. Therefore, this condition needed to be strictly met before S owed anything on the contract to Art.

Here, the successful sale occurred (as discussed above) between C and S. Therefore, this condition has been properly met and this triggers S's duty to perform on his end of the contract. Therefore, S will have to pay the 10% of the sale price to Art.

S's estate should pay Art 10% of the $300k purchase price - $30k.

Damages

If S's estate refuses to pay the 10%, Art will be able to request expectation damages that would give him the benefit of the bargain. Here, Art expected to get per the terms of the damage 10% of the purchase price - $30k. This means that Art could properly sue S's estate for that amount.

The State Bar of California

COMMITTEE OF BAR EXAMINERS
OFFICE OF ADMISSIONS

CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS
February 2020

This publication contains the five essay questions from the February 2020 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Torts
2.	Professional Responsibility
3.	Contracts
4.	Evidence
5.	Business Associations

QUESTION 3

Barn Exports hired Sam, an up-and-coming artist whose work was recently covered in Modern Buildings Magazine, to paint a one-of-a-kind artistic design along the border of the ceiling in its newly renovated lobby. After discussing the work, Ed, the president of Barn, and Sam signed a mutually drafted handwritten contract, which states in its entirety:

> Sam shall paint a unique design along the entire ceiling border of all public areas of the first-floor lobby. Barn shall pay $75,000 upon completion of the work.

When Sam began work, he was surprised that the new plaster ceiling in the lobby had not been sanded and sealed. Sam complained, but was told by Ed that preparation was part of his responsibilities. Although Sam disagreed, he spent four days sanding and sealing the ceiling. When Sam finished painting, he submitted a bill for $78,000, having added $3,000 for labor and supplies used in preparing the ceiling. In response, Barn sent a letter to Sam stating that, because he had not painted the borders in the two public restrooms in the lobby, no payment was yet due. Barn's letter also stated that it had recently spoken to several artists who perform similar work and learned that "surface preparation" was typically the responsibility of the artist.

According to Sam, before the contract was signed, he told Ed that the restrooms could not be included because his paints were not suitable for the high humidity in those locations.

Sam sued Barn for breach of contract in the amount of $78,000.

Barn countersued for specific performance to have the borders in the bathrooms painted.

1. Is Sam likely to prevail in his breach of contract lawsuit against Barn and if so, what damages will he likely recover? Discuss.

2. Is Barn likely to prevail in its lawsuit seeking specific performance against Sam? Discuss.

QUESTION 3: SELECTED ANSWER A

I. Applicable Law

Contracts for the sale of tangible goods are governed by Article II of the Uniform Commercial Code. All other contracts, such as those for services or real property, are governed by the common law. Here, the contract between Barn and Sam (S) is to "paint a one-of-a-kind artistic design," Hence, this is a services contract. Accordingly, it will be governed by the common law.

II. Sam's Breach of Contract Claim

Valid Contract

In order to bring a successful breach of contract claim, there must first be a showing of a valid contract. To form a valid contract, there must be an offer, acceptance, and consideration. Additionally, there must be no grounds for a valid defense to formation.

(1) Mutual Assent

Parties to a contract must manifest mutual assent to be parties to the contract. This is typically shown through offer and acceptance. Here, there are no facts regarding a traditional offer and acceptance between Barn (through its president, Ed) and S. Instead, after discussing the terms, the parties entered into a "mutually drafted" handwritten contract that states "Sam shall paint a unique design along the entire ceiling border of all public areas of the first-floor lobby. Barn shall pay $75,000 upon completion of the work." This is likely enough to show mutual assent between the parties and, thus, this element is satisfied.

(2) Consideration

Consideration is necessary for there to be a valid contract. Typically, a showing of consideration is done by facts evidencing the parties have obtained a legal benefit or detriment through the contract. Some states, however, only look to legal detriment. In either regime, the consideration requirement is satisfied here: Barn's legal detriment is having to pay $75,000 when the work is completed; meanwhile, S's detriment is having to do the work.

(3) Mutual Mistake

A mutual mistake occurs when both parties have a belief not in accord with the facts as to a material fact underlying the contract which causes a material change in performance of the contract and for which neither party held the risk of mistake. Here, Barn may argue that S cannot recover because there was a mutual mistake as to what "all public areas" meant in their contract. Barn claims it includes the public restrooms, while S claims it does not. Because this outlines S's only obligations under the contract, this would have a material effect on performance. As such, under Barn's theory, no valid contract was formed.

This argument is likely to fail, however. There was no indication that parties had different understandings as to facts that exist out in the world. Instead, there is a dispute as to the obligations required under the contract. There is still a basis for a court to find the terms of the contract and can afford the parties the performance they anticipated under their original agreement.

Hence, because there is an agreement, consideration, and likely no valid defense to formation, S can show that a valid contract was formed.

Performance Due

Next, S will need to show establish the performance due under the contract so that a court may determine whether a breach has occurred. Barn's performance due under the contract is simple. It must pay S upon completion of the artwork. S's performance due, however, is less certain. There are two main disputes: whether S was obligated to perform surface preparation and whether S was obligated to paint the bathrooms.

(1) Surface Preparation

(A) Plain Meaning

Generally, when a court examines what is required under the contract, it looks to the plain meaning of the words therein. Traditionally, a court could not examine any extrinsic evidence to give meaning to those terms unless they were ambiguous. Here, the contract indicates simply that S "shall paint a unique design." On its' face there is nothing ambiguous about this statement. Barn will argue that the ambiguity arises when you consider that "several artists who perform similar work" stated that "'surface preparation' was typically the responsibility of the artist." The court will need to decide whether it really believes that the words as found in the contract are uncertain enough to consider this extrinsic evidence of trade usage. On balance, a court could find that the word "paint" could contain multiple obligations and so extrinsic evidence is required. Thus, a court could consider this trade usage in determining the scope of S's obligations. Because there is no evidence of course of performance or course of dealings between S and Barn, this would be the most dispositive evidence as to S's obligations.

(B) Modification

Under the common law, a good faith modification requires consideration to be valid. Here, Barn may argue that even if "paint" is not deemed to include surface preparation, the parties modified the contract after it was formed. Here, the modification would have placed an additional burden on S's performance and, thus, to be valid requires an additional burden on Barn. However, there is no indication that Barn took on that additional performance. Although S did submit a bill which included $3,000.00, Barn is claiming that it need only pay the originally agreed $75,000. Hence, there was likely no consideration for this modification to be valid.

On balance, however, because "paint" is likely to be found sufficiently ambiguous, S's

obligations included the surface preparation.

(2) The Bathrooms

(A) Parol Evidence

See above rule. Here, the parties argue that "all public areas of the first-floor lobby" include the two public restrooms. However, S states that "before the contract was signed, he told Ed that the restrooms could not be included because his paints were not suitable for the high humidity in those locations."

Under the parol evidence rule, when there is a written contract, the parties may generally not present evidence of prior or contemporaneous agreements made before the writing. If the writing is meant to be a the full and final expression of the parties' agreement, then no extrinsic evidence is permitted absent a finding that the term would have been "naturally omitted." The contract is said to be a complete integration. If, instead, the writing is simply part of the full agreement, then only extrinsic evidence that does not contradict the written terms may be admitted. Such a writing is said to be a partial integration.

Here, the parties' agreement is likely to be a partial integration. Firstly, there is no merger clause, which indicates that the agreement is the final and complete expression of the parties' contract. Although the existence or lack of a merger clause is not the sole factor in this analysis, it is a substantial one. Additionally, the brevity and lack of formality of the agreement (being handwritten) also support that this is merely a partial integration.

If the court finds a partial integration, then it must ask whether S's conversation with Ed before the contract was signed contradicts the written terms of the contract and should be excluded. Barn may argue that it does because the contract covers "all public areas" of the lobby, of which the bathrooms would be included. On the other hand, S will argue that the term does not contradict but merely delineates the meaning of "all public areas." S may also argue that "all public areas of the first-floor lobby" generally mean just the lobby area itself and not any rooms or hallways attached to it. Weighing the two, a court is likely to side with S and find that the term does not conflict with the contract.

Accordingly, S's performance likely did not include the bathrooms.

Breach

When a party fails to perform as contemplated by the contract there has been a breach. However, a breach does not necessarily excuse the other party's obligation to perform. When there has been substantial performance, i.e., the nonbreaching party has received the substantial benefit of its bargain, the nonbreaching party must still perform its obligations under the contract. Only when there has not been substantial performance, will the obligations of the nonbreaching party be suspended.

(1) S's Obligations

As noted above, S's obligations likely included the surface preparation but not the bathrooms. Because of this he has not breached his duties under the contract. However, even if he was required to paint the bathrooms, he has likely substantially performed. According to Barn's letter, S has painted everything in the lobby except "two public restrooms." This is likely to be a very small part of the overall size of the lobby and so Barn is likely to have received the substantial benefit of the bargain. Thus, under either interpretation, S has substantially performed.

(2) Barn's Obligations

Based on the constructive condition of exchange, once one party's obligations under a contract become due or are excused, the other party's obligations also become due (or must be excused). Here, because S likely completed his obligations under the contract, Barn's obligation to pay was incurred. Because he refused to do so, he breached the contract.

Damages

(1) Expectation Damages

Expectation damages are the default damages in contract. They are meant to place the nonbreaching party in the same position it would be in had the breaching party performed. Here, if Barn had performed under the contract, it would have owed S $75,000.00. S's injury here–the lack of payment–is caused solely due to Barn's breach. Thus, S is entitled to $75,000 in expectation damages under the contract.

(2) Consequential Damages

Consequential damages are those that arise as a result of the breach that are foreseeable to the parties (either expressly or when the parties contemplated the contract), caused by the breach, and reasonably certain. Here, S is not claiming anything that could be considered consequential damages; so he will not recover for these.

(3) Incidental Damages

Incidental damages are those damages that flow from the breach. This includes damages for expenses incurred to inspect goods, ship back nonconforming goods, or to warehouse nonconforming goods. Here, S is not claiming anything that could be considered incidental damages, so he will not recover those.

(4) Restitution

If the court finds that the surface preparation was not originally part of the contract, then S may be able to recover damages related to that under a unjust enrichment theory. Restitution is available when a plaintiff confers a benefit to the defendant, without gratuitous intent, and it would be unjust to allow the defendant to keep that benefit without compensation. Here, if S

did not have to prepare the surface of the lobby under the contract, then Barn benefited in not having to find another worker to do that for it. There is no indication that S intended to do this gratuitously, particularly because S charged Barn $3,000 for the labor and supplies used.

Restitution can be calculated either by the value of the benefit conferred on the defendant or the cost to the plaintiff in conferring that benefit. Here, there are no facts as to how much it would have cost Barn to hire someone else to do the surface preparation. Yet, we do know that Sam submitted a bill of $3,000 for labor and supply. Assuming this is a reasonable estimate of the labor involved with the surface preparation, S will likely be able to recover this amount.

(5) Duty to Mitigate

When a plaintiff suffers a breach, they have a duty to mitigate their damages. Here, there was no indication that S could mitigate his damages so this does not apply.

(6) Saved Costs

If the court does find that the bathrooms were part of the deal, then the court should offset S's damages award for any costs he saved by not painting the bathrooms as well.

(7) Conclusion

In total, S will likely be entitled to $75,000 in compensatory damages under the contract. If the court finds that he did not need to do the surface preparation, then he will also be entitled to $3,000 for restitution. Finally, S's compensatory damages should be reduced by any costs saved in not painting the bathrooms if the court finds that he was obligated to do so.

II. Barn's Claim for Specific Performance

To obtain specific performance, a claimant must show (1) a valid contract, (2) the contracts terms are certain, (3) there are no conditions precedent, (4) inadequacy of the legal remedy, (5) practicality of legal enforcement, and (6) the lack of equitable defenses.

Valid Contract

As analyzed above, there is likely a valid contract between S and Barn. Thus this element is satisfied.

Certainty of Terms

Although there is some ambiguity as to what "paint" and "all public areas" mean in the contract, the ambiguities are not so great as to make it impossible for the court to discover what performance was due under the contract, as analyzed above. Hence, this element is likely satisfied as well.

Condition Precedent

Here, Barn will need to show that it is willing and ready to pay the $75,000 required under the contract for S's performance. There is no indication in the facts that it is not able to do so; thus there are likely no outstanding conditions for performance.

Inadequacy of Legal Remedy

Specific performance is typically a rare remedy in contract. For most contracts, damages will be sufficient. S may argue that there is no inadequacy of legal remedy because Barn could simply obtain damages for the left over performance and hire another artists to do it. Barn will counter that it hired S because he is "an up-and coming artist" and he was hired to paint a "one-of-a-kind artistic design." These factors weigh in favor of Barn's argument.

That being said, Barn will still likely fail in its quest for specific performance because courts are loathe to award such relief in services contracts. Such a remedy would likely amount to indentured servitude in violation of the Thirteenth Amendment. Thus, even though S is an up and coming artist, Barn will likely be unable to require him to perform.

Practicality of Enforcement

Generally, practicality of enforcement in services contracts is another issue. The court does not want to be in charge of determining if performance is adequate. In this case, however, that is not likely to be an issue because the court can just match the work done on the lobby to that done in the bathrooms. Thus, this element will likely be met.

Defenses

(1) Laches

Laches occurs when the defendant unreasonably delays bringing suit and that delay prejudices the plaintiff. Here, there is no indication that Barn delayed in its request. It filed the countersuit as soon as S sued it for nonperformance, so this will not apply.

(2) Unclean Hands

Unclean hands occurs when the plaintiff has engaged in immoral or otherwise inappropriate behavior in relation to the contract. That again is not present here. S may argue that Barn's failure to perform constitutes "unclean hands" but generally more is required, such as intentionally making performance more difficult. Thus, that is not an element here.

Conclusion

Although most elements are found, because this is a service contract, Barn will not be successful in its countersuit.

QUESTION 3: SELECTED ANSWER B

Governing Law

Common law generally governs contacts. The Uniform Commercial Code (UCC) however, governs contracts for the sale of goods, and has special rules for merchants. Goods are movable, tangible objects and merchants are those who deal regularly in the goods of the kind or hold themselves out as having special knowledge or skill regarding the goods.

Here, the contract (K) is a service K that requires Sam, an artist, to paint designs on Barn Exports' ceilings. As a service K, common law will govern.

Sam v Barn Exports

Formation

A K is a legally enforceable agreement between two or more parties. There must be a valid showing of offer, acceptance, and consideration for a K to be valid. Here, the facts state they entered into a mutually drafted handwritten K. The issue revolves not around whether a K was formed, but rather its exact terms and the respective parties' performance.

Breach of Contract

A breach of contract occurs when one fails to perform their obligation under the K. A breach can be material or minor. A minor breach is one where a party has substantially performed and the nonbreaching party gained a substantial benefit of the bargain, but the breaching party did not fully perform every obligation under the K. A minor breach does not dismiss the nonbreaching party from performing, but the nonbreaching party may recover damages caused by the minor breach, including cost to finish the performance. A material breach occurs where a party to a K does not substantially perform, and the nonbreaching party does not substantially gain the benefit of the bargain. A material breach dismisses the nonbreaching party from performing and the nonbreaching party can sue for damages, and specific performance in some instances.

Here, according to the written K, Sam was supposed to paint a unique design along the entire ceiling border of all public areas of the first-floor lobby. Barn shall pay $75k upon completion of the work. Sam finished the work, but Barn refused to pay, claiming Sam did not paint the border in two public restrooms in the lobby, so payment was not due. Barn's payment of $75k was conditional on Sam performing his end of the K, and whether Barn is excused from performing depends on whether Sam's alleged breach was a breach, and if so, if it was material or minor. Whether Sam breached the K depends on if the bathrooms were part of the K or not.

Parol Evidence

The parol evidence rule makes evidence of oral or written communications between K parties, made prior or contemporaneous to the written K, inadmissible if they contradict the K and the K was meant to be a complete integration of the K. Typically, to show a complete integration, the parties to the K will include a merger clause or specifically state in the K that the K is meant to encompass the entirety of their agreement.

Exceptions to the Parol Evidence rule include prior or contemporaneous statements that clarify terms of the K or show that conditions precedent exist. Statements made after the written K are also admissible.

Here, the written K does not include any mention of Sam painting the public restrooms in the lobby. Rather, it states that he will paint a unique design along the entire ceiling of all public areas of the first-floor lobby. Sam tries to introduce evidence that, before the K was signed, he told Ed the president of Barn, that the restrooms could not be included because his paints were not suitable for the high humidity in those locations. Because evidence of that conversation between Sam and Ed is offered to clarify or explain what is meant by "all public areas of the first-floor lobby" it may be admissible despite parol evidence.

Vague/Ambiguous Terms

Courts typically construe terms in the K in their plain and simple meaning. When there are multiple ways to construe a certain term, then the courts will look first to the prior history between the contracting parties, if any, to define how they treated the meaning of those vague and ambiguous terms in the past. If there is no contractual history between them, the courts will look to custom and usage in the industry to determine what was meant by the terms in questions.

Here, there are two parts of the agreement that are in dispute between the parties–whether or not the restrooms were included in the "all public areas of the first-floor lobby" and whether or not surface preparation is the responsibility of the artist or an extra that increases the K price.

Meaning of "all public areas of the first-floor lobby"

As mentioned above, Barn claims that the two public restrooms on the first floor were part of the public areas of the first-floor lobby, and Sam's failure to paint them constituted a breach of K. Strictly construed, there is some ambiguity or question regarding whether all public areas of the first floor lobby include bathrooms. Are bathrooms part of the lobby? Sam will argue they are not, and further, the conversation between he and Ed evidenced that the bathrooms were not intended to be part of the K. There is no prior history between Sam and Barn, so the courts cannot look to how they construed the meaning in the past. If Barn can introduce evidence showing that it is custom in the industry for all public areas of the lobby to include bathrooms connected to the lobby, he has a good argument that the bathrooms were part of the painting agreement.

Who has the responsibility of surface preparation?

Another issue with the terms/nonexistence of terms of the K include whether the added cost of surface preparation–$3k–was part of the contract or an unforeseen extra that Sam should be reimbursed for. In Barn's letter to Sam after they refused to pay on the K, they claimed that they had recently spoken to several artists who perform similar work and learned that surface preparation was typically the responsibility of the artist. As discussed above, there is no history between Sam and Barn to reference to see how they handled surface preparation in the past–this is the first time Sam has worked for Barn. As such, evidence of how the situation is traditionally and customarily handled in the industry will probably govern. The courts will look to the validity of Barn's claim that other artists shoulder the responsibility of surface preparation, and unless Sam has evidence to the contrary, he will likely not be reimbursed for the $3k he spent preparing the surface. It will come from the money he makes on the K.

Substantial Performance/Minor Breach

As discussed above, a minor breach does not excuse the nonbreaching party from performance. If Sam fails in his assertion that the bathrooms were not part of the K, and the court determines they were, then his breach is likely a minor one. He completed painting the rest of the ceiling of the lobby, conferring a substantial benefit of the bargain on Barn. The two bathrooms are likely small in comparison to the rest of the lobby that was painted, and not everyone who enters the building is guaranteed to go into the bathrooms. Everyone who enters will, however, enter the lobby and see the one-of-a-kind artistic design along the border of the ceiling of the newly renovated lobby. Sam has a good argument that failure to paint the bathrooms is minor compared to the work done in the lobby and Barn is not excused from performance–they owe him for the work he did in the lobby.

Barn's Breach

A party must perform their obligations under a K, and failure to do so is a breach. Here, as discussed above, the bathrooms likely were not part of the K, which would render Sam's performance complete. As such, Barn breaches by failing to pay the $75k K price.

If however, the restrooms were included, Sam breached by not painting them, but his breach was minor and Barn is not excused from performance. Barn will still be required to pay for the work done, minus the cost of having the bathroom painting completed by someone else.

Sam's Expectation Damages

Expectation damages are money damages awarded to the nonbreaching party that would put the nonbreaching party in the position they expected to be in had the breach. Here, if the bathrooms are not part of the agreement, then Sam is entitled to the full $75k from Barn. He will likely not get an additional $3k he spent on surface prep because evidence shows custom in the industry is for the artists to shoulder responsibility for surface prep.

Conclusion

Sam should be allowed to introduce evidence of his conversation with Ed prior to the K, where he told Ed the bathrooms were not part of the K. As such, his painting of the lobby is full performance and he is entitled to $75k, the K price, from Barn. He will likely not get an additional $3k.

If the courts conclude the bathrooms were part of the agreements, Barn still received the substantial benefit of the bargain and, to avoid unjust enrichment, the court should award Sam the fair market value of the work rendered.

Barn v Sam

Specific Performance

Specific Performance is an equitable remedy available to a nonbreaching party that would order the breaching party to perform on the K. Specific performance is only appropriate where there is an inadequacy of legal remedies, the nonbreaching party complied with any conditions to performance they were required to and were ready to perform, and enforcement of specific performance is feasible. Specific performance is only available on contracts for the sale of land, or for the sale of goods that are rare or unique. Specific performance is never an available remedy on a services contract.

Here, we have a services contract, so specific performance is not a remedy available to Barn. The courts will not force Sam to finish painting, even though his skills may be rare or unique. Barn will argue that he cannot find another up-and-coming artist whose work was recently covered in Modern Buildings Magazine to paint a one-of-a-kind artistic design along the border of the ceiling in the bathrooms in the lobby, but Barn's argument will be in vain. Again, courts will not specifically enforce a services K, nor should Barn want a begrudging Sam to complete the work, as there is a high likelihood he would not do his best work if forced to work against his will.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2021 CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2021 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Evidence
2.	Contracts/Remedies
3.	Community Property
4.	Professional Responsibility

QUESTION 2

Bright Earth Solutions ("Bright"), an agricultural services business that employed 10 people and had over 100 clients, purchased a new commercial tractor mower (not suitable for personal, family or household purposes) from Stercutus Mowers ("SM") for $15,000. In concluding the sale, SM presented a one-page contract that contained the following language:

> SM undertakes, affirms and agrees that this mower is free of defects in material and workmanship at the time of its delivery to the buyer. If the mower or one of its component parts fails within one year of delivery to the buyer because the mower or its component part was defective when installed, SM shall repair or replace at its sole option any such mower or component part at its own cost or expense. Other remedies are excluded.

The contract also stated in bold, 12-point font:

> **THERE ARE NO WARRANTIES EXPRESSED OR IMPLIED AND PARTICULARLY, THERE ARE NO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE MADE BY SM IN CONNECTION WITH THE SALE OF THIS MOWER.**

Authorized representatives of Bright and SM signed the contract and Bright took delivery of the mower.

Over the next six months, Bright experienced numerous problems with the mower. The bolt holding the mower blade in place broke five times under normal usage. The steering system was faulty, causing unsightly and uneven lines in mowing jobs. The gas tank installation was defective, causing intermittent gas leaks. Several times the mower would not start due to various electrical faults and Bright had to cancel planned jobs. As a result, Bright lost clients and $5,000 in profits.

Bright took the mower to SM each time it malfunctioned. SM effected repairs and the mower would work for a while and then malfunction again. Sometimes the replacement part would fail, other times a different part would fail. The mower was returned to SM for repairs 12 times in the first six months after purchase.

At the beginning of the seventh month after purchase, the mower's steering wheel came off during a job. At that point, Bright communicated to SM that it wished to return the mower and be refunded the purchase price. SM refused, pointing to the clauses above in the original contract. Bright then sued SM for breach of contract and warranty.

1. Is Bright likely to prevail in its suit against SM? Discuss.

2. If Bright prevails, what remedies, if any, would likely be available? Discuss.

QUESTION 2: SELECTED ANSWER A

1. Success of Bright in its suit against SM

Governing Law

Contracts for the sale of goods are governed by Article 2 of the UCC. All other contracts are governed by the common law. Goods are things moveable when identified in the contract. Here, we have a contract for the sale of a commercial tractor mower, which is moveable. Because the tractor is a good, the contract is governed by Article 2.

Statute of Frauds

While contracts generally need not be evidenced by a writing, some contracts require a writing if they fall within the Statute of Frauds. A contract for the sale of a good over $500 falls within the Statute of Frauds and requires a writing signed by the party against whom enforcement is sought, and expressing the quantity involved.

Here, the contract is for the sale of one $15,000 commercial tractor mower. The contract is in writing and signed by both parties, so it complies with the formalities of the Statute of Frauds.

Breach of Contract

A contract for the sale of goods (governed by Article 2) requires that the seller of goods tender perfect goods. This means that goods have to be exactly what the buyer contracted to purchase under the terms of the contract. If the seller fails to tender perfect goods, the buyer is entitled to not accept delivery of the defective goods. However, once acceptance is made, a buyer cannot revoke the acceptance unless

there is a latent defect later arising (whereby the defect was not easily identified, but with subsequent use becomes clear).

Here, the contract is for a commercial mower, and the mower has to run perfectly and like an ordinary good of that type operates. After the contract was signed, Bright took delivery of the mower. The assumption would be that the mower, at first glance, seemed to conform to the good that was purchased and as such it was accepted. However, over the next six months, Bright experienced numerous problems with it. The bolt holding the mower blade broke five times under normal usage, the steering system was faulty, the gas tank installation was defective, and on several occasions the mower failed to start due to electrical faults.

Because these defects were latent and could not have easily been discovered the buyer, Bright, is entitled to revoke its acceptance of this nonconforming good by stating that the defect was a breach of the contract.

With this type of defect and breach, Bright would be entitled to a refund of the full contract price of the mower - $15,000.

Express Warranty and its Disclaimer

Moreover, Bright will be able to argue that the contract included an express warranty which stated, "this mower is free of defects in material and workmanship at the time of its delivery to the buyer." An express warranty is one which sits on the face of the contract and entitles the buyer to rely on such warranty. Express warranties cannot be disclaimed by a subsequent statement in the contract saying that there "are no warranties expressed or implied."

Here, SM made an express warranty in promising that it would be free of defects at the time of delivery and failure to abide by such warranty will subject SM to damages. There is no direct evidence that mower was defective at its delivery but it is unlikely that all the problems that arose were a result of negligence on the part of Bright (especially given that it malfunctioned under "normal usage"). Rather the logical inference is that the mower was defective at delivery and SM will be liable for violating the express warranty - the disclaimer will be irrelevant.

SM might argue that the express warranty was specific to defects in material and workmanship and not related to defects in the component parts or in installation. However, where there are vague terms in express warranties, they will be read in favor of the non-breaching party and as such, Bright will win in arguing that the types of defects that occurred were a result of defects in material and workmanship - in breach of the express warranty.

** Note: SM's disclaimer of an implied warranty of merchantability or fitness for a particular purpose was likely proper. It was in bold and on the same page as other contractual terms.

Limits to Relief

While disclaiming express warranties is improper, SM was able to limit the relief that could be sought if the mower was not defective upon delivery. Here, a term of the contract stated that in bold 12 point font that "If the mower or one of its parts fails within one year of delivery to the buyer because the mower or its component part was defective when installed, **SM shall repair or replace at its sole option any such**

mower or component at its own cost or expense. Other remedies excluded."

Accordingly, SM properly limited Bright's relief to repairs or replacement at its sole discretion.

The facts state that Bright took the mower to SM each time it malfunctioned and SM effected repairs. Thus, SM would argue that it was abiding by its contractual duty to repair the mower and was under no obligation to replace the mower or offer a refund. Further, SM would argue that the fact that the mower would work for a while and then malfunction again is of no relevance, because SM was willing to repair each time as evidenced by the fact that the mower was returned to SM for repairs 12 times in the first six months after purchase and repairs were made each time.

Note: If the suit was for personal injuries sustained by the defective condition, then the limit to relief would not be abided by and the plaintiff would be entitled to damages for his/her injuries. Here, the suit is not for personal injuries so the limit to relief would have been proper but for the express warranty saying the mower would be free from defects.

Conclusion

Bright will be successful in its suit against SM both on a contractual and express warranty suit. Contractually, SM breached by failing to tender perfect goods, and under the express warranty by failing to deliver a mower free of defects in material and workmanship.

2. Remedies available for Bright

Damages

Compensatory Damages

Bright is entitled to recover the purchase price of the defective mower. The mower was purchased for $15,000 and based on the breach of contract, Bright will argue that he is entitled to a full refund of the purchase price. Assuming the court finds that SM did in fact breach by providing a defective product, then the breach will entitle Bright to a refund of the purchase price plus any other damages sustained as a result of the breach.

Incidental Damages

Bright will also be able to recover any incidental damages that resulted from SM's breach. Incidental damages are those that arise in dealing with the breach. Here, Bright took the mower to get repaired a total of 12 times. He will be able to recover any costs associated with taking the mower to get repaired such as the cost of the salary for the employee who had to go take it in or the gas money spent, etc.

Consequential

Bright will also argue he is entitled to consequential damages for the lost profits he sustained as a result of the breach. Consequential damages will be awarded if both parties (especially the breaching party) was aware of the lost profits that would be incurred as a result of a breach and that those losses were foreseeable.

Here, as a result of the mower being so defective (that sometimes it wouldn't even start), Bright had to cancel planned jobs and lost both clients and $5,000 in profits. Bright has a good claim here because SM knew that Bright was an agricultural services provider and that if the mower failed consistently it would cause Bright to lose both

clients and profits. As such, the court should award the consequential damages. SM will argue that it was not foreseeable that the losses would be incurred as a result of the breach because it was not foreseeable that Bright would not have other mowers it could use while the mower they purchased was being repaired. Assuming it was clear that this is the only mower Bright owned, the consequential damages will be awarded at least in the amount of $5,000.

Conclusion

Bright will likely be able to recover the initial purchase price, anything expended as incidental damages, and at least the $5,000 in consequential damages.

Defenses

SM might argue that Bright is not entitled to the tender of perfect good because it was a contract for goods not suitable for personal, family or household purposes. However, this argument will fail because nothing indicates that the goods were made specifically for Bright.

Additionally, SM might say that Bright consented to the repairs or took too long to demand refund. Also fails.

QUESTION 2: SELECTED ANSWER B

Governing law is UCC Art. 2

Where a contract is for a sale of goods, Article 2 of the UCC applies. For all other types of contracts, the common law applies. Here, the contract was for Bright Earth Solutions (B) to purchase a commercial tractor mower from SM. This is a contract for a sale of goods, therefore Art. 2 of the UCC applies to the contractual analysis set out below.

1. Is B likely to prevail in its suit against SM?

The issue here is whether B has a claim against SM for breach of contract and breach of warranty.

Valid contract

The Statute of Frauds requires that any contract for the sale of goods worth more than $500 be in writing and signed by the party against whom it is sought to be enforced, and UCC Article 2 requires that the essential term of quantity be included. This is not an issue here as a contract was entered into in writing and signed by both representatives of B and SM and it referenced "this mower", being the particular mower that B purchased from SM. There is, thus, a valid written contract for SOF and UCC purposes.

Breach of contract

Article 2 of the UCC requires a perfect tender where sale of goods is concerned; this means that the seller must tender the right number of conforming goods as required

under the contract. The standard for determining "conforming goods" is that they are fit for their ordinary purposes. Failure to delivery conforming goods entitles the buyer to reject all the goods, accept some and reject the rest, or accept all and sue for damages. However, Article 2 also permits a buyer to reject a good *after acceptance*, where there are defects that are subsequently discovered. Acceptance of defective goods does not preclude a buyer from subsequent rejection where (i) the defect could not have been discovered at the time of delivery and the buyer relied on the seller's assurance that there were no defects; or (ii) the defect was apparent but the buyer accepted in reliance on seller's assurance that the defect would be cured.

Here, B took delivery of the mower upon signing the contract and there is nothing on the facts to suggest that the mower was not conforming at the time of delivery. However, B can argue that it was not possible to detect any defects at the time of delivery because of the nature of the good (i.e. that any defects could be discovered only after operating the mower for some time) and additionally that B relied on SM's undertaking that the mower was "free of defects in material and workmanship at the time of its delivery". In addition, B could argue that SM's undertaking to repair or replace any mower or component part that failed within 1 year of delivery constituted an assurance to cure a defect discovered after delivery. As such, B will be able to argue that the subsequent defect constituted a breach of the perfect tender rule thereby allowing it to remedies (discussed in part 2 below).

<u>Breach of warranties</u>

B may also argue that SM breached the express warranty set out in the contract.

Express warranty

An express warranty is a statement of fact, description of a good, or a sample or model relating to the quality of the product, where such statement, description, sample or model formed as part of the bargain into and made at such time that the buyer could have relied on the same when entering into the bargain. Here, B will argue that the statement in the contract where SM affirmed that the mower was "free of defects in material and workmanship at the time of its delivery" constituted an express warranty, that was breached when the mower subsequently broke down multiple times over the next 6 months. It is clear that this statement constituted an express warranty. On the other hand, SM will argue that the contract also contained a disclaimer that "there are no warranties express or implied...in connection with the sale of this mower", which precluded B from being able to sue on the express warranty. However, SM's argument is likely to fail. The general rule is that it is very difficult to disclaim express warranties because of the nature of the inconsistency between the disclaimer clause and the express warranty, and the court is likely to construe the interpretation of both in favor of B, the consumer who acted in reliance on the express warranty by entering into the agreement.

As such, B will be able to sue for breach of the warranty if it can be shown that the numerous problems experienced were a result of a defect in material and workmanship at the time of delivery. On the facts, it is stated that the bolt holding the blade in place broke 5 times under normal usage, the steering system was faulty, and that the gas tank installation was defective. It will be for a trier of fact to determine if this evidence shows that the defects existed at delivery, but on balance it seems like this is the case

here such.

Implied warranties

B may also sue for breach of implied warranties of merchantability and fitness for particular purpose. A warranty of merchantability is provided by a commercial seller of the goods in question and warrants that the goods are fit for their ordinary purpose. A warranty of fitness for particular purpose can be provided by any seller and provides that the goods are fit for the particular purpose of the buyer, where the seller knew of the buyer's purpose and that buyer was relying on the seller to help select a suitable good. Here, SM is a commercial seller of mowers and thus can provide both types of implied warranties. B will argue that on the facts, the mower was not fit for ordinary purpose (given that the blade broke down 5 times on normal use, as well as the gas leaks and steering issues). B will also argue that it was not fit for the particular purpose which was for B to use on customers' lawns which required that the mowing lines be satisfactory, since the steering system was faulty and caused unsightly and uneven lines in mowing jobs) and that SM knew of B's particular purpose as B was an agricultural services business.

However, SM will likely be able to succeed that the implied warranties were validly disclaimed by the language. The rule is that a disclaimer must be fair and in conspicuous font and writing so that it is clear to the buyer. Here, the disclaimer clause was stated in bold and 12- point font and will likely meet this requirement. As such, B is unlikely to succeed in arguing breach of implied warranty.

2. B's remedies

If B prevails, it might be entitled to damages or rescission, provided it can argue against the validity of the disclaimer clause.

Validity of limitation of remedies clause:

A commercial contract may include a clause limiting the remedies available, provided that such clause is not unconscionable. A limitation clause may not purport to limit remedies for personal injury or operate in such a way where it limits the remedy to a one that is essentially unworkable under the circumstances. Here, the contract seeks to limit B's remedies to repair or replacement by SM, at its sole option, any mower or component part. However, B can show that the mower simply could not be repaired; on the facts, the mower was returned to SM for repairs 12 times in the first 6 months after purchase and finally that at the beginning of the 7th month, the steering wheel came off during a job, As such, B can argue that the limitation of remedies clause was unfair and should not be enforceable to limit the types of remedies available to B.

Damages

As B can demonstrate breach of contract and express warranty (discussed above), B can sue for damages, namely expectation damages, consequential damages, and any incidental damages. The expectation damages are to place B in a place it would be in had the contract been properly performed (i.e. receiving a mower that functions for ordinary purposes) and would be the cost of cover or market cost of a functioning mower. In addition, B can sue for any consequential damages (the lost $5000 in profits) as it was reasonably foreseeable to SM that any defect in its mower would cause a loss

in business to B (being an agricultural services company) and lost profits. Finally, B can sue for any incidental damages such as the cost of sending the mower back and forth to SM for repair.

Rescission

B may also look to sue for rescission and obtain its money back. To succeed, B will need to show grounds for rescission such as mistake, misrepresentation, undue influence, duress and further that SM has no valid defenses such as laches, unclean hands etc. Here, B may argue that there was a misrepresentation of statement by SM as to the mower being free of defects. Misrepresentation is an untrue statement of fact regarding the product, that the buyer was objectively justified in relying on and actually relied on. If the statement was made intentionally to induce the buyer's reliance, then it is intentional misrepresentation. Here, B can show that it was justified in relying on SM's statement regarding the defect free nature of the mower and did actually do so. This serves as grounds for rescission. In addition, SM has no valid defenses in equity such as laches (e.g. that B did not sue within a reasonable time thereby causing prejudice to SM) or that B had unclean hands (i.e. acted wrongfully in relation to the matter at hand). As such, B can sue for rescission of the contract, which would entitle it to unwind the contract as if it had not been entered into, and to obtain a refund of the purchase price paid.

The State Bar of California

OFFICE OF ADMISSIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2022

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2022 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

Question Number	Subject
1.	Contracts
2.	Constitutional Law
3.	Professional Responsibility
4.	Business Associations
5.	Wills / Community Property

QUESTION 1

Bath Stuff (Bath), a retailer located in Betaville, sent Neat Scents (Scents), an importer located in Sunville, a signed offer to purchase 1,000 individually wrapped candles at a price of $10,000, free on board ("FOB") Betaville. Scents promptly sent Bath a signed acknowledgment accepting the offer, which also included the following language: "Some shipping boxes have external water damage. Contents of shipping boxes guaranteed to have no damage." Bath did not respond to the acknowledgment. No other express warranties or disclaimers were stated in the offer or acknowledgment.

Scents timely shipped the order to Bath's warehouse using TruckCo, a third-party common carrier, at a freight cost of $400. One-quarter of the shipping boxes showed signs of water damage. Each shipping box contained candles that were individually wrapped for retail sale. All candles and individual wrapping were undamaged. When the shipment arrived, Bath's employees noticed the water damage on some shipping boxes. They immediately rejected the shipment without opening any boxes, promptly notified Scents of the rejection, and refused to pay any amount.

Scents paid TruckCo $500 to ship the candles back to Sunville and notified Bath that Scents intended to resell the candles. Scents promptly solicited bids from all of its customers and received the best offer, which it accepted, from Redemption Candles (Redemption) of $9,000, FOB Sunville.

Bath promptly entered into a valid written contract with Hot Candles (Hot), an importer in Hatville, to purchase 1,000 replacement candles for $12,000, FOB Hatville. TruckCo was engaged to transport the candles from Hatville to Betaville. In transit, TruckCo's truck was struck by lightning in a storm and all of the candles melted. TruckCo's shipping contract disavows liability from acts of God, including lightning. Bath refused to pay for the candles and Hot refused to send replacement candles.

Bath sued Scents for breach of contract and Scents countersued Bath. Bath sued Hot for breach of contract and Hot countersued Bath.

1. Did Bath and Scents have a binding contract and, if so, did either party breach the contract? If there was a breach of contract, what damages are likely to be recovered, if any? Discuss.

2. Has Bath or Hot breached their contract? If so, what damages are likely to be recovered, if any? Discuss.

QUESTION 1: SELECTED ANSWER A

Applicable law

Contracts for the sale of goods (movable items of property) are governed by the UCC. Because the contracts at issue here involve candles, a movable good, the UCC applies.

Additionally, under the UCC, certain provisions apply only to merchants. A merchant is one who deals in goods of the kind involved in the contract, or who otherwise by virtue of his profession holds himself out as having peculiar knowledge in the goods involved. Here, all parties are likely merchants. Bath is a retailer that appears to deal in candles. Neat Scents is an importer that likewise appears to deal in candles. Further, Hot Candles appears to be an importer that also deals in candles. Accordingly, all parties to the relevant contracts are merchants, and the UCC's provisions pertaining to merchants will apply.

1.

Whether B&S had a binding contract

A binding contract requires mutual assent, consideration, and no defenses to enforcement or formation.

Mutual assent

For a contract to be valid, it requires mutual assent. Mutual assent involves a "meeting of the minds," and is ordinarily shown by offer and acceptance (though under the UCC, if the parties conduct indicates that there is a contract, there may be a contract even if offer and acceptance cannot be specifically identified).

Offer

An offer is an assent of willingness to be bound, made so that the offeree could reasonably expect that the offeror intended to enter into a binding agreement / make a commitment or promise. An offer must have certain and definite terms and must be made to an identifiable offeree so that he could understand that his assent would conclude the bargain.

Here, Bath sent a signed "offer" to purchase 1,000 individually wrapped candles for $10,000. It also included a "FOB" term (with FOB being Betaville, Bath's location of business), which indicates that Bath sought to enterinto a shipping contract whereby the goods would be shipped by common carrier and the risk of loss would pass to Bath once the goods reached Betaville. The facts indicate this was an offer, and it likewise meets the definition. It indicates a willingness to be bound / enter into a binding agreement for the purchase of candles. Further, it has certain and definite terms. Under the UCC, generally, an offer need only include a quantity term--all other terms can be supplied by UCC default terms. Here, the offer included the quantity (1,000) of candles while also specifying other terms, including the price ($10,000), that they be individually wrapped, and the shipment method. Accordingly, this was likely an offer, as its terms were certain and definite such that it is capable of enforcement; it was also made to Neat Scents, an identifiable offeree.

Acceptance

Acceptance is a manifestation of assent to the terms of the offer, made so as to conclude the bargain. The offer creates the power of acceptance in the offeree, and by accepting, he binds the parties to the contract. Here, the facts indicate that Scents

promptly sent a signed acknowledgment accepting the offer. In so doing, Scents appeared to assent to the terms of the offer. Under the UCC, an offer to buy goods may be accepted by prompt shipment, or by a promise to ship (the latter of which was the case here).

Under the common law, an acceptance had to be a “mirror image” of the offer; that is, it must not include any different or additional terms. However, under the UCC, the fact that an acceptance includes additional terms will *not* preclude a binding contract. Rather, a contract is formed by the manifestation of assent to be bound, and whether the different terms become part of the contract depends on if the parties are both merchants. Accordingly, when Scents sent the signed acceptance, a bargain was concluded and the parties had a binding contract.

UCC 2-207 (battle of the forms)

As referenced, Scents’ acknowledgment included additional terms. Particularly, it included language relating to the fact that the boxes would have external water damage, as well as the guarantee that the contents would have no damage.

As mentioned above, it appears that both Bath and Scents are merchants, as they both appear to deal in goods of this kind or otherwise by their profession hold themselves out as having knowledge/skill particular to candles. Accordingly, the contract was concluded with the acceptance and, under UCC 2-207, the additional terms included in the acceptance will become part of the contract unless the offeror’s offer was expressly conditioned on only the terms included, it rejects the additional terms in a reasonable time, or the terms materially change the bargain.

Here, Bath did not respond to the acknowledgment, nor did Bath’s offer appear to

include any language indicating that the offer was expressly conditioned on only being accepted on the particular terms stated without any additions. Accordingly, the only issue is whether the terms included in Scents' acknowledgment materially altered the bargain.

Scents will argue that the fact that *some of the shipping boxes* would have external water damage hardly alters the bargain. After all, it also included that express warranty that the contents would have no damage. It does not appear that Bath was entering into the bargain with any particular expectancy or desire to have the shipping boxes be in a certain condition. While they did specify the candles' condition--that they be individually wrapped--no reference whatsoever was made to the external boxes. Moreover, damage to the external boxes which does not affect the contents (which are the things being bargained for) likely cannot be said to materially alter the terms of the bargain. Further, the express guarantee that the contents would not be damaged, if anything, is a desirable term for Bath, so cannot be said to materially alter the bargain. In other words, the terms included in Scents' acknowledgment did not significantly change Bath's expectancy under the contract, nor materially alter its potential damages or liabilities. As such, since both parties are merchants, these terms likely became part of the contract.

Accordingly, a contract was formed when Scents sent the acknowledgment form, and the terms included therein--that some of the boxes would have external water damage and the express warranty (i.e., the explicit promise as to the condition of the goods) that the contents would have no damage became part of the contract.

Note that, even if the explicit promise that the candles would not be damaged had not been included as an express warranty, it likely would have been implied anyway (which

further supports the notion that it did not materially alter the contract), as--discussed below--the UCC requires perfect tender of goods. Moreover, the fact that the contract included an FOB term for Betaville (Bath's location) indicates that Scents would bear the risk of loss if the goods were damaged until they reached Betaville, thus implying that they should be undamaged.

Consideration

Consideration is the bargained-for exchange of legal value. Each promise must induce the detriment, and vice versa. Here, Bath promised to pay $10,000 if Scents promised to ship the 1,000 candles, and vice versa. Accordingly, there was consideration.

Thus, there is mutual assent and consideration here and there was a binding contract.

Defenses

There do not appear to be any viable defenses to formation. Scents could try to argue there was no mutual assent based on the additional terms included in the acceptance, but as discussed above, that argument will fail.

Statute of frauds

Some contracts require a signed writing to be enforceable. One such contract is a contract for the purchase of goods over $500. Here, Bath was to buy $10,000 worth of candles, and thus, this contract must be evidenced by a signed writing.

The writing and signature requirements, however, are liberally construed. There need not be a single writing embodying the entire contract; multiple writings can be put together, so long as they evidence that a valid contract was formed. Moreover, under the UCC, the writing(s) must indicate the quantity term.

Here, putting together both the offer--which was signed by Baths--and the acceptance--which was signed by Scents--there is likely sufficient written evidence to evidence both a contract and its essential terms (including, most importantly, quantity--1,000 candles). Moreover, the writing(s) is signed by both parties, and thus, both parties to be charged.

Also note that since both parties sued under the contract, they have effectively affirmed its existence in court.

Merchant confirmatory memo

Bath may argue that it only signed the *offer* and not the acceptance, and thus, that it cannot be charged with the contract because the only writing signed by it is the offer. However, this is likely not a good argument. Under the UCC merchant's confirmatory memo rule, where both parties are merchants, so long as there is a signed writing--*even if signed by the party bringing suit*--that was sent memorializing the terms' of the parties agreement, and the other party received it and had reason to know of it and did not object in a reasonable time, it can serve to bind the parties / satisfy the SOF, even if only signed by one.

Here, Scents signed the acknowledgment form and Bath received it but did not respond at all. As both parties are merchants, the acknowledgment form is likely enough to bind both Bath and Scents, even though it was only signed by Scents, under the merchant confirmatory memo rule.

Since there do not appear to be any other defenses to formation, and since there was mutual assent and consideration, the parties had a binding contract.

Whether either party breached & likely damages

Perfect tender rule

The UCC requires "perfect tender." This means that if a shipment of goods fails to conform in any way to the terms of the contract, then it is considered a breach and the buyer is entitled to reject all, reject some, or accept all.

Here, Scents shipped the goods timely to Bath's warehouse using TruckCo, a third-party common carrier. Though the contract did not specify the common carrier that should be used, there are no facts indicating that using TruckCo was unreasonable and, since this contract involved an FOB term, it was very likely a shipment contract requiring goods to be sent by common carrier (which is the presumption if a contract is silent, anyway). Accordingly, sending the goods in a reasonable time and via TruckCo appears to be compliant with the contract.

Moreover, though one-quarter of the boxes were water damaged, as discussed above, that term very likely became part of the contract. Though the contract indicates that "some" boxes would be damaged--which is not necessarily precise--the fact that only one-quarter of the boxes were damages is likely compliant with that term. Moreover, all the candles inside were individually wrapped (as required) and undamaged (as compliant with the express warranty provided by Scents which, as discussed, was likely part of the contract).

As such, it appears that Scents completely complied and did not breach any terms of the contract. Accordingly, it appears that tender was indeed perfect, and thus, that Scents did not breach.

Bath's rejection

Even though Bath's employees rejected the shipment because of the water damage, they were not entitled to do so, as that was a part of the contract, per the above discussion. Moreover, they immediately rejected the shipment without even taking time to inspect the goods to determine whether they complied. Though a buyer is entitled to reject a shipment where there has been imperfect tender--and though Bath did so immediately (which thus does not raise any issues re: revoking an already given acceptance) --since there was no breach by Scents, Bath was not entitled to reject the shipment. Thus, by rejecting the shipment and *refusing to pay* as they were obligated to do under the contract, Bath breached.

Scents' damages

Since Bath was in breach, Scents is likely entitled to damages.

Expectation damages

The standard measure of damages when a buyer wrongfully breaches under a contract is expectation damages, which are intended to give the non-breaching party the benefit of the bargain and to put them in a position as if the contract had not been breached. Damages can only be collected where they are certain and where they could not be mitigated.

As part of mitigating damages, a seller is entitled to engage in a commercially reasonable resale of goods wrongfully rejected. Here, Scents sold the goods to Redemption for $9,000. It apparently solicited bids--and did so promptly--from all its customers and selected the highest bid from Redemption. As such, the resale appears to be commercially reasonable (done timely and for a reasonable amount--indeed, it was fairly close to the original amount that Bath was to pay and Scents appears to have

considered multiple offers before accepting Hot's). Since it was $1,000 less than Scents was supposed to get under the Bath contract, Scents is entitled to $1,000 for Bath's wrongful breach. Additionally, since Scents notified Bath that it would resell the candles, it was entitled to do so.

Incidental damages

Under the UCC, a non-breaching party is also entitled to incidental damages (i.e., commercially reasonable costs associated with dealing with the breach including shipping, storing goods, and other such costs). Here, Scents paid $500 to ship the candles back from Sunville. This appears to be a reasonable cost of reshipping the goods; though, originally, it only cost $400 to ship to Bath--perhaps it costs more to collect them from a buyer, or perhaps the fees were different since it was likely a few days later. Since the charge to ship them back was only $100 more, this was likely commercially reasonable and Scents is entitled to $500 as incidental damages. Bath may try to argue that it was not commercially reasonable to include the FOB Sunville term, but that argument will bear no weight since Scents' original contract with Bath also included an FOB term for the buyer's city of business.

Note that Scents cannot collect the $400 it originally spent on shipping the goods to Bath, because that was always going to be an expense under the shipping contract that Scents would be required to spend.

As such, Scents is entitled to $1,500 total.

Bath

Though Bath may try to argue that it is entitled to $2,000--the difference it had to pay for

replacement candles--it will not succeed because, as discussed above, it breached and was not entitled to reject the shipment. As such, it will be unable to collect any damages from Scents, but rather will be required to pay $1,500 as discussed above. Though it has sued Scents, it will be unable to recover anything and Scents will instead win its countersuit.

2.

Here, the facts indicate that the parties had a valid contract. The contract included an FOB Hatville term. As mentioned above, an "FOB" term in a shipping contract indicates that the goods will be shipped by common carrier, and that the risk of loss will pass to the buyer when the goods reached the identified location. Here, Bath and Hot's contract indicated Hatville as the FOB location. Hatville is Hot's place of business. Accordingly, Hot was responsible for getting the goods to Hatville. Once the candles arrived in Hatville, the risk of loss passed to Bath. Accordingly, even though the goods were to be shipped by common carrier (which, again, is the presumption in light of silence, but is also assumed when an FOB term is included), Bath would bear the risk of loss from the time the goods were in Hatville until they arrived with them.

Breach by Hot

Bath will argue that Hot breached by not delivering the candles. As such, it will argue that it was relieved of its liability to pay given the imperfect tender. As mentioned above, the UCC requires perfect tender. Obviously, failing entirely to deliver the candles is not perfectly compliant with the terms of the contract. Moreover, melted candles obviously are not a perfect tender of the ordered candles. However, as discussed below, Hot very likely bore the risk of loss when the goods were destroyed, and thus is liable for the

contract amount.

Breach by Bath

As mentioned, an FOB term indicates that the buyer will bear the risk of loss from the time the good arrive at the specified location. Here, TruckCo was engaged to transport the candles from Hatville to Betaville. The goods were destroyed in transit, i.e., they had already left Hatville by the time they were destroyed. As such, Bath bore the risk of loss when the goods were struck by lightning. When the risk of loss has passed to the buyer, and when the goods are destroyed after--through no fault of the seller--the buyer will be liable for the full contract price.

Here, Hot will argue that the goods were destroyed by a lightning storm that struck the truck after the risk of loss passed, i.e., after the goods had been in / left Hatville. Moreover, Hot will note that this was not their fault in any way. They will also likely point out that TruckCo's shipping contract disavows liability from acts of God, including lightning. It should be noted, though, that this is not especially relevant here because, as discussed, under the FOB term, the risk of loss passed to the buyer after the goods were in Hatville.

Bath may try to argue that the risk of loss did not pass because it would have been entitled to reject the goods. It is true that the risk of loss will not pass if nonconforming goods are the ones that are destroyed--i.e., if the buyer would have a right to reject the goods, the ROL will not pass. Bath may try to argue that the candles were melted, and thus, that it would have had a right to reject them and should not be liable for the ROL. However, this would be bootstrapping the very thing that *destroyed the goods* as an attempt to argue that it had a right to revoke the goods. In other words, there is no

indication that the goods--when sent--did not conform, or that Bath would have had a right to reject the candles had they not been melted by the lightning storm. As such, it cannot argue that the risk of loss did not pass. Accordingly, the goods were destroyed when Bath bore the risk of loss. Thus, Hot did not breach the contract. Rather, Bath did when it refused to pay for the goods.

Refusal to send substitutes

Bath may argue that Hot breached by refusing to send substitute candles after they were destroyed. However, the seller is under no obligation to send replacement goods if they are destroyed after the ROL passes. As such, this was not a breach.

Damages

Hot's damages

When goods are destroyed after the ROL passes, the seller is entitled to the full contract price, provided that they had no fault in destroying the goods. This is effectively expectation damages--i.e., gives the seller the benefit of the bargain. As such, Hot will be entitled to $12,000 from Bath and will win its countersuit.

Bath's damages

As discussed above, since Bath breached by refusing to pay after the risk of loss passed, it was incorrect to refuse to pay Hot. Thus, it will be liable for the full contract price and will lose its suit and be entitled to no damages from Hot.

QUESTION 1: SELECTED ANSWER B

The UCC will apply because this is a sale of goods.

Bath and Scents Contract

Bath and Scents had a valid contract, which Bath breached. To have a valid contract, there must be mutual assent and consideration. Mutual assent is defined as an offer plus acceptance. A valid contract is breached when one party, or both, breaks a promise in the contract and there are no defenses to the contract or excuses for non-performance. The UCC requires "perfect tender," and thus even a minor breach constitutes a total breach, allowing the buyer to reject goods or the seller to seek full damages. A court will award damages based on the type of harm suffered.

Mutual Assent

Mutual assent consists of an offer and acceptance. An offer is a manifestation of the intent to be bound. An offer must be relatively certain and definite. It should identify the parties and subject matter of the contract with reasonable certainty. An offer can be revoked at any time unless it is an irrevocable option contract, merchant firm offer, or one party reasonably incurs detrimental reliance. An advertisement is generally not an offer.

Here, Bath made an offer to Scents when they sent a signed offer to purchase 1,000 candles for $10,000. The quantity and price terms (note: price terms are not required by the UCC, only quantity terms are required) are sufficiently definite, and Bath has identified the parties.

An offer is accepted when the offeree accepts the terms of the offeror's offer. An offer

must be accepted in a reasonable amount of time. Under the UCC, the offeree's acceptance does not need to mirror the offeror's terms. Additional terms will become part of the contract if: (1) both parties are merchants; (2) the terms are not material; and (3) the offeror does not object to the terms. A merchant is an individual who: (1) regularly deals in the type of goods sold; or (2) holds themself out as having special knowledge or skills regarding the goods sold. Terms are material if they have a tendency to cause surprise or hardship to the other party. Disclaimers of warranties are always material. A person is thought to accept additional terms when they do not object in a reasonable amount of time.

Here, Scents responded "promptly," accepting Bath's offer for 1,000 individually wrapped candles for $10,000, FOB Betaville. However, Scents' response included some additional terms. Scents stated that the boxes the candles would be sent in had external damage and added an express warranty that the contents (candles and wrapping) would have no damage. As stated above, these terms will become part of the contract if the two sellers are merchants, the terms are not material, and the offeror does not object. Here, both parties are merchants. Bath is a retailer that typically sells candles. Scents is a candle importer and that regularly deals in candles.

The terms will not become part of the contract if they are material. It is likely that the state of the shipping boxes and whether or not the shipping boxes themselves are damaged is not a material term. Water damage on the shipping boxes has no bearing on the state of the candles inside (it is stated they showed up undamaged). Shipping boxes with water damage would not cause surprise or hardship to a reasonable party. Most parties likely throw the boxes out. Still, Bath might argue that they intended

to keep the shipping boxes to use when they sell candles to their own customers, and that the damage makes this more difficult. Scents will respond that they did not have knowledge of this purpose and that the damaged boxes still have no material impact on their contract, which was simply to purchase individually wrapped candles. Scents also expressly stated a guarantee that the candles themselves will have no damage. While the disclaimer of warranties is considered material, an express warranty from a seller will become part of the contract.

Last, Bath did not object to Scents additional terms. They did not respond at all, and this will be deemed an acceptance of the additional terms. Thus, Scents' terms likely became part of their contract, and the contract was for: 1,000 candles at $10,000 shipped FOB Betaville; some shipping boxes with water damage; and the express warranty the candles would have no damages.

Consideration

Consideration is bargained-for exchange. A court will typically not second guess the value of any agreed consideration. Here, this is easily met. Bath paid $10,000 for 1,000 candles. That is a bargained-for exchange.

Defenses to the Contract

Even if there is mutual assent and consideration, a party can still seek to get out of performance if there is a valid defense to the contract, including: lack of contractual capacity, mistake, ambiguity or misunderstanding, unconscionability, and violation of the statute of frauds. If the subject matter of a contract falls under the statute of frauds, the contract must be in a signed writing. The statute of frauds includes: (1) any promise in which the consideration is marriage; (2) contracts in which performance cannot happen

in less than a year; (3) land sale contracts; (4) executorships; (5) sale of goods $500 or more; and (6) sureties.

Here, the statute of frauds is applicable. This is a sale of goods over $500. However, this is easily met. Both parties sent signed documents stating the quantity and price terms of the transaction. No other defenses apply, so neither party will be able to have the contract declared unenforceable.

Excuses for Non-Performance

Excuses for non-performance include impracticability and frustration of purpose. Impracticability is when an unforeseeable event has caused the performance of a contract to be rendered impossible or highly impractical. Frustration of purpose occurs when both parties are aware of the contract's purpose and an unforeseeable event has occurred that renders this purpose void.

Here, none of these excuses apply so, as stated above, there is a valid contract between Bath and Scents to which no excuses or defenses apply.

Breach

Under the UCC, there is the perfect tender rule. The perfect tender rule states that a contract has been breached when performance does not occur perfectly. When a seller breaches, the buyer may either: (1) accept all goods; (2) reject all goods; or (3) accept and reject some of the goods.

Here, it appears that Scents has met the perfect tender rule. Scents shipped the order to Bath's FOB Betaville. As Scents had stated, some of the boxes showed water damage and all of the candles and wrapping were undamaged. Thus, Bath did not have

a right to reject the shipment and refuse to pay. Bath should have opened the boxes and inspected the contents before deciding if the shipment was not up to their standards. Because the terms of their contract included the term that some of the boxes would have water damage, Bath does not have the right to now say that the contract is breached. As stated above, this term became part of the contract when Bath did not object to the additional terms.

Thus, Bath is in breach of this contract and Scents can pursue damages.

Damages

A court will most likely award Scents expectation damages. Expectation damages are damages intended to put the non-breaching party in the position they would have been had the contract been performed as stated. Here, the contract was for $10,000. Still, sellers are obligated to use good faith and seek to resell any items rejected by the buyer. The buyer will be responsible for the difference between the original contract price and the new contract price.

Here, Scents was able to resell the candles to Redemption for $9,000. It appears that Scents attempted to cover in good faith, solicited bids from many customers, and indeed chose the best / highest offer. Thus, Bath will not be able to argue that Scents did not resell in good faith and that the damages should be reduced accordingly.

A non-breaching party will also be able to recover incidental damages. Incidental damages are damages that result from seeking to remedy the breach. Here, this would likely include any cost Scents had to pay to solicit bids from new customers and the $500 shipping cost they had to pay to ship the candles back to Sunville.

Scents will not be able to recover the initial $400 shipping fee as expectation damages, because, had the contract been performed fully and Bath paid the $10,000, Scents would have always been out the $400.

Last, Scents might try to argue they are entitled to lost profits damages. Lost profits damages are awarded when a seller is able to sell an infinite number of the goods in question and thus should be able to recover the lost profits from the sale. Here, the sale of candles likely qualifies as a lost profits situation. There is not a limit on the number of candles to be sold, and presumably Scents could order and sell as many candles as wanted. Thus, they may try to seek lost profits damages. However, I do not have enough facts to determine what the profit would have been on the 1,000 candles sale.

Bath might try to argue that any damages they owe Scents should be reduced by $2,000, because they had to purchase candles from Hot for $12,000. However, this argument is likely to fail because, as stated above, Bath is the breaching party and thus cannot recover any damages from Hot.

In conclusion, it is likely that a court will award Scents the $1,000 difference in contract prices, the $500 cost to ship the candles back to Sunville, and any expense they had to make to find a new buyer for the candles.

Bath and Hot Contract

As stated in the fact pattern, Bath and Hot had a valid written contract, so I will assume that mutual assent and consideration is satisfied.

Defenses and Excuses for Non-Performance

The defenses and excuses stated above do not apply here. Bath might try to argue that

it is unconscionable for them to have to pay $12,000 when the goods were damaged and lost in transit. However, unconscionability of contract enforcement is determined at the time the contract was formed. Here, there is no indication the contract for 1,000 candles at $12,000 is unconscionable.

Breach

Hot has not breached the contract. Bath has breached the contract by refusing to pay. Bath and Hot had a shipment contract. A shipment contract is a contract in which the seller disclaims all liability for damage or accident to the items once the seller has delivered the goods to the third-party common carrier and notified the buyer. A shipment contract is formed when the seller is a merchant, and the contract states: FOB [seller's city].

Here, the seller is a merchant. Hot regularly deals in the type of goods sold (candles). The contract stated "FOB Hatville." Hot is located in Hatville; thus, this is the seller's city and the parties had a shipment contract. TruckCo is a third-party common carrier and it appears that Hot properly delivered the items to TruckCo. Thus, the cost of any accident or damage that occurs in transit or delivery of the items lies with the buyer, and Bath has no right to refuse to pay Hot. In addition, Hot is not required to send replacement candles. Hot has fulfilled their duty under this contract, i.e., deliver 1,000 candles to TruckCo.

Damages

Because Bath is in breach, a court will likely award Hot expectation damages as well. Here, the contract was for $12,000, so to put Hot in the position it would have been had the contract been performed, Bath must pay Hot $12,000.