

**Welcome to Rigos Bar Review's Free Book Titled**  
**CONTRACTS AND UCC SALES**



Rigos Bar Review  
230 Skinner Building  
1326 Fifth Avenue  
Seattle, WA 98101  
(206) 624-0716

[www.BarReviewCourse.com](http://www.BarReviewCourse.com)

Email: [Bar@rigos.net](mailto:Bar@rigos.net)

**PRIMER SERIES REVIEW**

**CHAPTER 1**

**CONTRACT AND UCC SALES ARTICLE 2**

**Table of Contents**

MAGIC MEMORY OUTLINES®	4
ISSUE FREQUENCY DISTRIBUTION	13
I. INTRODUCTION – OACLLS VIPR TAD	15
II. OFFER	18
III. ACCEPTANCE	20
IV. CONSIDERATION	24
V. LEGAL CAPACITY – 3 Is	26
VI. LEGAL SUBJECT MATTER	27
VII. STATUTE OF FRAUDS – MOULS	28
VIII. VOID OR VOIDABLE CIRCUMSTANCES – MUFFED	31
IX. INTERPRETATION OF CONTRACT – II PACC	34
X. UCC SALES OF GOODS PROVISIONS	36
XI. LIABILITY OF A UCC GOODS SELLER	39
XII. PERFORMANCE AND BREACH	41
XIII. REMEDIES – MRS DAISI	46
XIV. THIRD PARTY BENEFICIARIES	53
XV. ASSIGNMENT OF RIGHTS	54
XVI. DELEGATION OF DUTIES	56
XVII. OVERALL MEMORY LADDER – OACLLS VIPR TAD	57
QUESTIONS – MULTIPLE CHOICE	58
QUESTIONS – ESSAYS	71
ANSWERS – MULTIPLE CHOICE	78
ANSWERS – ESSAYS	88

## **COURSE LEARNING FOCUS**

The Primer Series<sup>®</sup> features a “seamless learning process.” The substantive text has built-in exam tips, acronyms, solution approaches, and learning questions. Students are advised to read and study the text and work the referenced learning questions in order. After working the question set, immediately refer to the answer rationale to review the reason you were right. If you answered incorrectly, review the respective rationale to ensure you learn from your mistake.

## **COMMITMENT TO EXCELLENCE**

- How successful is the Rigos approach to the bar exam? For the years 1996 through Winter 2005, over 90% of the Rigos students graduating in good standing from the program (attending all the classes, doing all the essays, and completing the Magic Memory Outlines<sup>®</sup>) passed the bar (100% Winter 2005). With Rigos you do it right the first time and never do it again.
- Our focused, concise materials are designed specifically for the unique Washington Bar Exam with acronyms, tips, and past issue distributions. We do not use any materials written for a national audience. With Rigos, you only study material that is directly tested in Washington. Less is more in law school and on the bar exam.
- Issue distribution charts pinpoint frequency and depth of testing by topic. This allows a more focused text coverage and makes your learning and memorization more efficient and effective.
- We provide you with free Magic Memory Outline<sup>®</sup> software CD ROM templates to facilitate creating your own final condensed outlines. This is invaluable to 1Ls trying to summarize their first year contract course.
- You must write well to survive the first year of law school and the bar exam. The Rigos writing program is integrated into the bar review course. You will write answers to 24 essay questions just like the ones you will see on the bar exam. We grade your answers for issue-spotting ability, approach, and organization, and suggest ways to improve.

## **ABOUT THE EDITOR**

Jim Rigos, JD, LLM, is the lead editor of the Primer Series Bar Review. He is an attorney-CPA who has made a career out of helping young professionals pass their professional entrance licensing and certification examinations. During the last 25 years, over 75,000 professionals have completed these courses, including 8,000 in Washington State. These courses are now offered in over 30 cities internationally.

## **COPYRIGHT PROTECTION**

All text, questions and answers in this course are copyrighted as to substantive and compilation originality. Unauthorized mechanical, digital, or electronic reproduction, transcription, or republication is a violation of federal law. Parties desiring to make such use should contact the copyright owner prior to such use and receive written permission at 230 Skinner Building, 1326 Fifth Avenue, Seattle, WA 98101, Telephone: 206-624-0716, Fax: 206-624-0731, e-mail: [jim@rigos.net](mailto:jim@rigos.net).

## **Forward and Preface**

### **Rigos Professional Education Programs**

#### **Presents**

#### **Rigos Bar Review**

### **CONTRACT AND UCC SALES ARTICLE 2 for Law Students**

Welcome. This is a chapter from our Multi-State Bar Review which contains the substantive black letter law taught and tested in most American law schools. Following the Magic Memory Outline<sup>®</sup> you will find a frequency distribution of 1996 to 2004 Washington bar exam essays by issue. This is quite useful to spotlight the black letter law rules which professors and examiners tend to favor for exam testing.

Sprinkled throughout the text are helpful acronyms (memory ladders) and MBE Tips that highlight important and frequent exam areas. Law school professors tend to test the general rules which are tested on the multi-state bar exam. The text also references learning questions which are intended to reinforce the substantive rules of the text.

Following the chapter there are 76 learning questions and 15 essay questions. The multiple-choice questions should be completed in 3 minutes on average; the essays are to be completed in 45 minutes on the bar exam. Included are full explanatory answers to both types of questions. These questions are designed for practice and intended to reinforce the concepts covered in the chapter.

This contract material in this Primer Series hornbook is concise yet comprehensive. It is not intended to replace your detailed law school study of case law or participation and class discussion. Rather this hornbook is designed as a summary that will tie the course details together and provide a focus on the usual law school multiple choice and essay exam questions. Of special import are the Magic Memory Outlines<sup>®</sup> which you will find very useful at the end of your contract courses in preparing your own summary of the substantive topic.

Rigos Professional Education Programs  
Bar Review Division  
230 Skinner Building  
1326 Fifth Avenue  
Seattle, WA 98101  
Tel: 206-624-0716  
Fax: 206-624-0731  
e-mail: [jim@rigos.net](mailto:jim@rigos.net)  
[www.BarReviewCourse.com](http://www.BarReviewCourse.com)

We know you will find this Primer Series Contract hornbook for Law Students very helpful. Good luck in your law school career. We hope to see you in our bar review course after you graduate.

James J. Rigos  
January 1, 2011  
Seattle, Washington

CHAPTER 2

PART I: CONTRACT FORMATION

Magic Memory Outlines®

I. INTRODUCTION – OACCLS VIPR TAD 1-2-1

- A. Contract Questions’ Scope .....
- B. Overall Memory Ladder Acronym .....
- C. Privity of Contract .....
- D. Common Law v. UCC Distinction.....
  - 1. UCC Intention of Reasonableness .....
  - 2. Application.....
    - a. Common Law – SIR.....
    - b. Goods .....
    - c. Distinction.....
    - d. Mixed Contract .....
  - 3. Fill in Blanks and Conflict Functions .....
  - 4. Duty to Communicate.....
  - 5. Merchant v. Casual Party .....
  - 6. Application by Analogy .....
- E. Express or Implied.....
  - 1. Express Contract .....
  - 2. Implied Contract.....
    - a. Implied in Fact .....
    - b. Implied in Law .....
- F. Acceptance by Promise or Act .....

  - 1. Bilateral.....
  - 2. Unilateral.....

- G. Executory Contracts .....
- H. Divisible Contracts .....
- I. Retail Installment Contract.....

II. OFFER 1-2-3

- A. Definiteness .....

  - 1. Objective Test .....
  - 2. Examples .....

- B. Open Items .....

  - 1. Common Law .....
  - 2. UCC Missing Term Treatment.....

- C. Revocability.....
  - 1. Common Law .....
  - 2. Option With Consideration (Option Contract) .....
  - 3. UCC Firm Offer .....
    - a. Irrevocability.....
    - b. Rejection and Subsequent Acceptance.....

- D. Termination. ....
- 1. Usual Situations.....
- 2. Refusal or Rejection.....
- E. Contractor and Subcontractor Rules.....
- 1. Bids by Subcontractors.....
- 2. Contract Formation. ....
- 3. Low or Suspect Bids .....

III. ACCEPTANCE 1-2-5

- A. In General.....
  - 1. Intended Offeree.....
  - 2. Stipulated Terms .....
  - 3. Knowledge Necessary .....

4.	Objective Standard .....	
5.	Silence .....	
a.	Exception.....	
b.	Unsolicited Items.....	
6.	Auction Acceptance.....	
7.	Retail Installment Contract.....	
8.	Counteroffer .....	
B.	Unilateral Contract.....	
1.	Offer Revocation – Common Law.....	
2.	UCC Bilateral Acceptance.....	
3.	UCC Notification Necessary .....	
C.	Conditional or Additional Items .....	
1.	Common Law .....	
2.	Mere Inquiry.....	
3.	Request for Additional Terms .....	
4.	Acceptance With a Demand for Different Terms .....	
5.	UCC Treatment .....	
a.	Minor Additional Terms.....	
b.	Merchant to Merchant .....	
D.	Conflicting Terms .....	
1.	Common Law .....	
2.	UCC.....	
E.	Effective Date.....	
1.	Revocation by Offeror.....	
2.	Mailbox Rule.....	
a.	Acceptance is Effective on Dispatch .....	
b.	Offeror’s Revocation or Unawareness.....	
c.	Unauthorized Means/Options .....	
3.	Rejection Exception.....	
4.	UCC Treatment .....	
F.	Approach to Offer-Acceptance Cross Problem.....	
1.	Skeleton for Analysis.....	
2.	Example.....	
G.	Formation Checklist.....	

IV. CONSIDERATION 1-2-9

A.	In General .....	
1.	Legal Sufficiency.....	
2.	Mutuality and Illusory Promises .....	
B.	Pre-Existing Duty Rule .....	
1.	Exam Questions.....	
2.	Exceptions .....	
C.	Partial Payment Rule .....	
D.	Surrendering a Legal Claim.....	
E.	Promissory Estoppel .....	
1.	Foreseeable Reliance Required.....	
2.	Examples .....	
F.	UCC Modifications.....	
1.	Additional Amount Promise .....	
2.	In Good Faith Required .....	
G.	Third Party Beneficiaries .....	

V. LEGAL CAPACITY – 3 Is 1-2-10

A.	In General .....	
1.	Incapacity as a Defense .....	
2.	Voidable Unless Ratified.....	
B.	Infants .....	
1.	Basic Rule.....	
2.	Election.....	

	3. Possible Recoveries.....	
C.	Insanity.....	
D.	Intoxication.....	
E.	Agency Liability.....	
	1. Agency Authority.....	
	2. Agent Personal Liability.....	
VI.	LEGAL SUBJECT MATTER.....	1-2-11
A.	Violation of Law.....	
	1. Exception for Beneficiaries.....	
	2. Usury.....	
	a. Exclusions.....	
	b. Damages.....	
	3. Not “In Pari Delicto”.....	
	4. Divisible Contract.....	
	5. Subsequent Illegality.....	
B.	Violation of Public Policy.....	
	1. Consumer Protection Act Violations.....	
	2. Restraint of Trade.....	
	3. Non-Competition Employment Agreement.....	
	a. Consideration Required.....	
	b. SAT – Reasonable Subject, Area and Time.....	
	4. Business Sale.....	
	5. Tortious Interference.....	
	6. Exculpatory Clauses.....	
	7. Defense Waiver Clause.....	
VII.	STATUTE OF FRAUDS (SOF) – MOULS.....	1-2-13
A.	Marriage Including Property Transfer Promise.....	
B.	Over One Year.....	
	1. Immediate Beginning.....	
	2. Later Beginning.....	
	3. Indefinite Term.....	
	4. Executed Portion Enforceable.....	
C.	UCC If \$500 US or More – PAWS Exceptions.....	
	1. Part Performance.....	
	2. Admission.....	
	3. Written Merchant-to-Merchant Confirmations.....	
	4. Specially Manufactured Goods.....	
	5. Quantity Required.....	
	6. “Some” Writing Sufficient.....	
	7. Party to be Charged.....	
D.	Land or Lease.....	
	1. Included Agreements.....	
	2. Land Possessor Exception.....	
E.	Suretyship Promises.....	
	1. Contract Issues.....	
	a. Consideration – Promise to Creditor.....	
	b. Consideration – Promise to Debtor.....	
	2. SOF Exception.....	
	a. Main Purpose Rule.....	
	b. Examples.....	
F.	Private SOF.....	
G.	Other SOF Exceptions.....	
	1. Divisibility.....	
	2. Estoppel.....	
H.	Alternative Remedies.....	
VIII.	FORMATION ELEMENTS CONCLUSION – OACLLS.....	1-2-15

**PART II: CONTRACT PERFORMANCE**

**Magic Memory Outlines®**

I. INTRODUCTION 1-2-16

II. VOID OR VOIDABLE CONTRACTS – MUFFED

- A. Mistakes.....
  - 1. Unilateral.....
    - a. General Rule is Enforceable.....
    - b. Exception Excusing Performance.....
      - (1) Knowledge.....
      - (2) Aided in Mistake.....
  - 2. Mutual.....
    - a. Mutual Mistake of Value.....
    - b. Mutual Mistake of Fact.....
    - c. Mixed Value and Fact.....
- B. Unconscionability.....
  - 1. Characteristics.....
  - 2. UCC Treatment.....
- C. Fraud.....
  - 1. Fraud In The Execution.....
  - 2. Fraud In The Inducement – FIRD.....
    - a. False Statement of Material Fact.....
    - b. Intention to Deceive the P.....
    - c. Reliance by P on the D’s False Statement.....
    - d. Damages Suffered by P.....
  - 3. Fraudulent Concealment.....
- D. Fiduciary’s Undue Influence.....
  - 1. Undivided Loyalty Required.....
  - 2. Unfair Persuasion.....
  - 3. Constructive Trust.....
- E. Equitable Estoppel.....
  - 1. Equitable Estoppel.....
  - 2. Judicial Estoppel.....
- F. Duress.....

III. INTERPRETATION OF CONTRACT – II PACC 1-2-18

- A. Intentions of Parties Control.....
- B. Incorporation by Reference.....
- C. Parol Evidence Rule – DUCAS Exceptions.....
  - 1. Defect in Formation – Context Rule.....
  - 2. UCC Performance, Dealings, and Trade Terms – CPU.....
    - a. Course of Performance.....
    - b. Past Course of Dealings.....
    - c. Usage of Trade.....
    - d. Expression of Intent Priority Ladder.....
  - 3. Condition Precedent.....
  - 4. Ambiguity Clarification.....
  - 5. Subsequent Modifications.....
- D. Ambiguity.....
  - 1. Construction.....
  - 2. Contradictory Terms.....
    - a. Narrative-Time Conflict.....
    - b. Amount Designation Conflict.....
- E. Controlling Statute.....
- F. Conflict of Laws.....
  - 1. Substantial Relationship Required.....
  - 2. Most Significant Relationship.....

3. Examples .....	
4. Forum Selection Designation .....	
<b>IV. PERFORMANCE AND BREACH</b>	<b>1-2-20</b>
A. Full Satisfactory Performance .....	
1. Condition Precedent .....	
a. Objective Standard .....	
b. Subjective Standard .....	
c. Time of the Essence .....	
2. Condition Concurrent .....	
3. Condition Subsequent .....	
B. Substantial Performance .....	
1. Basic Test .....	
2. Damage Reduction .....	
3. In Quasi-Contract .....	
C. Excusable Nonperformance – CISSU .....	
1. Cooperation or Hindrance .....	
2. Illegality After Formation .....	
3. Incapacity .....	
4. Source of Supply Destroyed .....	
5. Subject Matter Destroyed .....	
6. UCC Failure of a Presupposed Condition .....	
a. Examples .....	
b. Part Performance .....	
D. Nonperformance – But .....	
1. Accord and Satisfaction .....	
2. Novation .....	
3. Cancellation .....	
4. Waiver .....	
5. Release or Promise Not to Sue .....	
a. Joint Obligor .....	
b. Mere Negative Covenant .....	
E. Breach .....	
1. Performance Presently Due .....	
2. Anticipatory Repudiation .....	
a. Retraction Before Position Change .....	
b. UCC Assurance of Performance .....	
3. Divisibility of Contract .....	
a. Common Law .....	
b. UCC Contracts .....	
4. Minor (Nonmaterial) Breach .....	
<b>V. REMEDIES – MRS DAISI</b>	<b>1-2-23</b>
A. Money Damages .....	
1. Liquidated Damages .....	
a. Sole Remedy .....	
b. Penalty Interpretation .....	
2. Compensatory Damages .....	
a. Benefit of Bargain .....	
b. Construction Contracts .....	
c. Interest Award .....	
3. Reliance Interest .....	
4. Punitive Damages .....	
5. Recovery Limitations .....	
a. Foreseeability .....	
b. Certainty .....	
6. UCC Remedies .....	
7. Damage Mitigation .....	
8. Litigation Expenses .....	

B.	Rescission/Reformation/Replevin/Restitution .....	
1.	Rescission or a Complete Undoing.....	
2.	Reformation or Changing the Contract.....	
3.	Replevin of Stolen Goods.....	
4.	Restitution.....	
C.	Specific Performance.....	
1.	Performance Order .....	
2.	Remedy Availability .....	
3.	Non-Availability.....	
D.	Declaratory Judgment.....	
E.	Accounting.....	
F.	Injunctions .....	
1.	Temporary Restraining Order.....	
2.	Preliminary Injunction.....	
3.	Permanent Injunction.....	
G.	Statute of Limitations.....	
1.	Common Law .....	
2.	Contract Rule.....	
3.	Tort Rule .....	
a.	3 Years .....	
b.	2 Years .....	
c.	Trigger Date .....	
d.	Discovery Rule.....	
4.	UCC Treatment .....	
5.	Tolled (Suspended) Time Period.....	
6.	Laches.....	
H.	In Quasi-Contract.....	
1.	Purpose .....	
2.	Recovery Amount.....	
3.	Examples .....	
4.	Laches.....	
VI.	<b>THIRD PARTY BENEFICIARIES</b>	<b>1-2-27</b>
A.	General Concepts.....	
1.	Intention to Bestow Rights .....	
2.	Legal Rights.....	
3.	Rights “Vest”.....	
B.	Creditor Beneficiary .....	
C.	Donee Beneficiary .....	
D.	Incidental Beneficiary.....	
VII.	<b>ASSIGNMENT OF RIGHTS</b>	<b>1-2-28</b>
A.	General Concept .....	
1.	Time Created .....	
2.	Limitations on Assignability.....	
a.	Common Law .....	
b.	UCC.....	
3.	Oral Assignment .....	
4.	Revocability.....	
5.	Effect of Notice .....	
6.	Promisor’s Defenses .....	
B.	Holder In Due Course.....	
C.	Prohibition on Assignment .....	
1.	Common Law .....	
a.	Modern View.....	
b.	Assignee’s Rights .....	
2.	Legal Prohibition and Future Rights.....	
3.	UCC Exception.....	

D. Multiple Assignee Priority.....  
1. Common Law Rule.....  
2. UCC Treatment .....  
3. Waiver of Defense Clause .....

VIII. DELEGATION OF DUTIES 1-2-30  
A. General Concept.....  
B. Prohibition on Delegation.....  
C. Personal Skill of Obligor.....  
D. Material Risk or Burden Imposed .....

## CHAPTER 2

### PART I: CONTRACT FORMATION

#### I. INTRODUCTION – OACCLS VIPR TAD

A contract is a present agreement to do some future action; it involves an enforceable set of promises.

##### A. Contract Questions' Scope

Contract questions can arise on the Washington bar exam under the common law or code statutes, such as the Uniform Commercial Code (UCC Article 2). Contract issues are also potentially present in non-contract topics, such as property transactions, corporations, partnership agreements, and other expressions of agreement. Contract law principles may also be used to “beef up” an inadequate essay answer in other topics and thus provide the candidate additional discretionary exam grading points.

Contracts is one of the three most heavily tested areas on the Washington bar exam. There is at least one and usually two complete questions devoted to common law contracts with a third devoted to UCC Article 2. Although there may be cross-over on any one question, a breakdown of the total percentage of contract points allocated is usually as follows: one third contract formation (OACCLS), one third contract performance and breach plus damages (VIPR TAD), and one third UCC Article 2 (covering the entire contract acronym often testing where the treatment of issues under the UCC differs from the common law). Typically there are either two or three contracts in a question or the original contract is modified.

**Rigos Tip:** Community property (CP) issues are combined with many substantive topics in the Washington bar questions. For contracts, this includes (1) either spouse may bind the community unless joinder is required, (2) community not liable for premarital contracts, and (3) presumption that both spouses are liable for CP obligations.

##### B. Overall Memory Ladder Acronym

Your overall memory ladder acronym for contract law is OACCLS VIPR TAD.

- Offer by offeror expressing intent to be bound which is not yet revoked or rejected
- Acceptance by offeree through a return promise or performance
- Consideration – benefit to promisor or detriment to promisee
- Legal capacity of contracting parties not 3 Is of infancy, insanity, and intoxication
- Legal subject matter and not against public policy
- SOF compliance if a “MOULS” contract
  
- Void or voidable circumstances – MUFFED
- Interpretation of contract – II PACC
- Performance and breach
- Remedies – MRS DAISI
  
- Third party beneficiary – creditor or donee
- Assignment of Rights by promisee
- Delegation of Duties by obligor

OACCLS represents the formation elements which are necessary for an enforceable contract. Although there is a separate chapter in your review books covering UCC Article 2 (Sales), this section includes many of the formation elements for both the common law and UCC. It is easier to point out and remember the differences in law when they are presented together. The same OACCLS VIPR TAD acronym applies to a UCC question.

##### C. Privity of Contract

Privity of contract is necessary to provide standing to sue under a contract theory of recovery; the P must usually be one of the parties to the contract.

## **D. Common Law v. UCC Distinction**

Contract questions frequently require a distinction between the Washington state common law and the UCC. Begin your essay answer by identifying which law governs. The exam heavily tests issues where there is an expanded or different result under the UCC than under the common law. If the UCC is silent on an issue, the common law rules apply. It is not necessary to memorize the UCC section numbers.

**1. UCC Intention of Reasonableness:** The UCC was created to provide a more practical way for buyers and sellers of goods to regulate transactions. It alleviates some of the rigidity and harshness of the common law by requiring less precision in contracting. [UCC 1.203] The UCC imposes a general standard of reasonableness and good faith on the contracting parties. For merchants, this standard is raised to honesty in fact and adherence to reasonable commercial standards of fair dealing in the trade. [UCC 2.103]

### **2. Application:**

**a. Common Law – SIR:** The common law rules apply to contracts involving services, intangibles, and rreal estate. Services include personnel (employee’s work), professional (attorney’s advice), and construction (builder’s construction). Intangibles include software, patents, trademarks, copyrights, accounts receivable, legal claims, and money. Rreal estate includes contracts for the sale, purchase, or encumbrance of land.

**b. Goods:** Article 2 of the UCC rules apply to contracts for the sale of new or used “goods” which are movable. Goods also include fruit, crops, and timber that can be severed from real property without harm. [UCC 2.105] The common law supplements a goods contract where the UCC does not displace it.

**c. Distinction:** This distinction can be quite subtle: a contract for the sale of a book is a UCC contract. In comparison, a contract to bind or repair the same book is a personal service contract and thus classified under the common law.

**d. Mixed Contract:** If both “goods” and “services” are involved in the same contract, the UCC applies if the “predominant purpose” for which the parties contracted was the sale of goods. A contract to purchase both a computer and a service contract is likely under the UCC. A construction contract is also heavily tested. An agreement to lay a foundation for a building would include the cement, the re-bars and the labor (both goods and services). The common law of contracts would control both the inadequate performance of the contractor and a defect in materials under the “predominant purpose” test.

**3. Fill In Blanks and Conflict Functions:** The UCC controls and, if in conflict, supersedes the common law. A UCC default provision also fills in the blanks with “gap filling” terms where the contracting parties have not specified the treatment of an item or term. If the parties have not addressed the particular term in their agreement, the UCC rule controls. The court can fill in all open items, except quantity.

**4. Duty to Communicate:** The UCC may impose an affirmative duty on one or both of the parties to communicate under certain circumstances.

**5. Merchant v. Casual Party:** The UCC has special provisions that may apply if one or both of the parties is a “merchant.” A merchant is one who deals in goods of that type or holds himself out as an expert having specialized knowledge and skill in those goods. Wholesalers and retailers are usually merchants. A merchant is to be distinguished from a casual party or collector. A merchant, such as a car dealer, is to be held to a higher standard of conduct than would a casual, private party selling the same automobile. [UCC 2.104]

**6. Application by Analogy:** The court may always apply the UCC by analogy to a common law topic. UCC authorized matters such as requiring good faith, reasonableness, and a duty to mitigate damages may therefore be imposed by a court upon the parties in a common law SIR contract.

**Rigos Tip:** Start your answer by specifying which law – the common or UCC – governs the question. If the conclusion is the common law, specify that the court may apply an appropriate UCC rule or treatment by analogy.

## **E. Express or Implied**

1. **Express Contract:** An express contract is formed by written or oral language.

2. **Implied Contract:** An implied contract is exhibited by the actions of the parties even if assent is not explicitly given. An example is the inspection and acceptance of delivery of goods without objection.

a. **Implied in Fact:** An implied in fact contract is made by circumstantial implication showing mutual intention (patient accepts a doctor's services without objection, but did not agree on the exact fee).

b. **Implied in Law:** An implied in law contract arises from implied obligations. It is a method to impose justice and avoid unjust enrichment (plumber fixes a burst or a leaking pipe without the homeowner's knowledge). This doctrine is also called "in quasi-contract" or "quantum meruit" and allows recovery of the reasonable value of the services performed.

#### F. Acceptance by Promise or Act

1. **Bilateral:** If the original promisor's offer is seeking a return promise for acceptance (I promise to pay you \$1,000 if you promise me you will prepare my will), the contract is bilateral. Both parties are both a promisor of an obligation and a promisee of a right. Breach of either obligation can be the basis of a lawsuit.

2. **Unilateral:** If acceptance is in the form of a requested act (I promise to pay you \$1,000 if you prepare my will), the contract is unilateral. If it is uncertain whether the contract is bilateral or unilateral, the objective intent of the parties controls. Reward offers always seek performance and thus are a unilateral contract.

**Rigos Tip:** Vague wording in the offer – as to whether the requested acceptance may be rendered by a promise or only by performance – usually merits a discussion of a unilateral contract.

#### G. Executory Contracts

An executory contract is where there is not yet full performance. If wholly executory, only promises have been given, and there has been no performance by either contracting party. Partial executory means one side has performed (at least in part) while the other party has only promised. The contract is fully executed when both parties have completely performed and no obligations remain.

#### H. Divisible Contracts

A divisible contract is divided into multiple portions, performance of each being independently enforceable. This interpretation may validate performance for part performance thus requiring the other party to pay an amount equivalent to the performed portion. Divisibility may apply even though performance of a subsequent portion does not conform to the contract's specification.

**Rigos Tip:** Interpretation of a contract as divisible is a way a court can avoid a total contractual forfeiture.

#### I. Retail Installment Contract

This is a series of Washington sales agreement rules applying to goods (of any use) or services (limited to personal, family, or household use) sold by a retail seller under which the buyer agrees to pay the unpaid balance in installments. Credit cards are excluded. [RCW 63.14 *et seq.*]

### II. OFFER

A person who makes an offer is the offeror, and the person to whom it is addressed is the offeree. An offer is usually in the form of a promise. A valid offer must include a present contractual willingness and intent to be bound, certainty and definitiveness of all essential terms, and communication to the offeree. Upon receipt of the offer, a power of acceptance is created in the offeree. If the offeree exercises this power, a contract is formed.

#### A. Definiteness

The common law requires an offer to be clear, unambiguous, certain and definite on all material terms. The offeror's manifest actions must be sufficiently definite so as to indicate a clear present intention to contract. The more detailed the communication is as to price, quantity, and terms, the better. Compare "I am thinking about selling for \$1,000" or "Would you paint my house for \$5,000" which are only pre-offer forms of negotiation.

**1. Objective Test:** Washington courts apply an objective test (how would a reasonable person in the position of the recipient of the communication have interpreted the offeror's expressions of apparent intention?). The more definite the expression, the better. Still under the Berg case and Washington's Context rule, all evidence may be introduced to show the intentions of the parties and circumstances of the contract execution.

**2. Examples:** The offer must rise above mere puffing, jest, or an invitation/solicitation to a potential buyer to submit offers such as a "I am looking for a buyer willing to pay \$1,000." A general advertisement, price list, or availability quote does not rise to the level of an offer unless quite specific as to price and quantity.

**Rigos Tip:** The offer must qualify to create the power of acceptance in the offeree. If the offer is too indefinite, even a definite acceptance is not effective, so there can be no contract.

## **B. Open Items**

The treatment of terms not addressed in an offer depends upon whether the court can determine what the parties intended.

**1. Common Law:** Under the common law, essential terms include the parties, subject matter, price, quantity, and time of performance. A contract to purchase land must contain a description and the price.

**2. UCC Missing Term Treatment:** The UCC tolerates more uncertainty before voiding a contract for indefiniteness if there is a reasonable basis for the court to determine the terms and give an appropriate remedy. If the price is missing, a reasonable market price may be imposed. The parties' "course of performance," "past course of dealing," and industry "usage of trade" will guide the Judge in determining what is a reasonable term to be imposed under the circumstances. The UCC's "gap filling" function thus fosters the formation of a greater number of sales contracts than would be the result under the common law. [UCC 2.204]

**Rigos Tip:** Wherever you spot a UCC missing term in a question, look for a dual issue involving open items and the Parol Evidence Rule. The CPU's "course of performance," "past course of dealings," and "usage of trade," are exceptions to the Parol Evidence Rule and are the evidence to which the Judge will look to determine what is a "reasonable" term to impose in the circumstances.

## **C. Revocability**

Offers are generally revocable (can be withdrawn) at will by the offeror prior to acceptance. Revocations are effective when received by the offeree. If a public offer (such as a reward), an effective revocation must be made with a comparable degree of publicity.

**1. Common Law:** A naked promise to hold open an offer is not enforceable under the common law; the offer is revocable at will. Revocation may be effective by the offeree learning of any act or statement that is inconsistent with a continuing intent to enter into a contract.

**2. Option With Consideration (Option Contract):** An exception applies in the case of an option contract. An option is an irrevocable promise supported by independent consideration flowing to the offeror. For example, the buyer of land offers to pay \$10 if the seller will hold open the land's offered price for a week period of time. The consideration creates a separate option contract which is irrevocable for the specified period of time. Rejections and/or counteroffers on the underlying contract do not terminate an option contract.

**3. UCC Firm Offer:** A "firm offer" is a signed writing by a merchant which gives explicit assurances that the offer will be held open. [UCC 2.205] This does not apply to casual sellers (or collectors).

**a. Irrevocability:** A firm offer may not be revoked or withdrawn for the stated period of time up to 3 months. This rule applies even if consideration is lacking. If no particular time period is specified, a firm

offer is irrevocable for a reasonable period of time. If the firm offer is for four months, the offeror regains the power to revoke during the final month.

**b. Rejection and Subsequent Acceptance:** An offeree's rejection of a "firm offer" does not terminate the offer, unlike the common law. Thus, under the UCC "firm offer" rule, an offeree's subsequent acceptance after an earlier rejection may result in a valid contract.

#### **D. Termination**

Open offers are terminated after a reasonable time period has passed. The offeror may also terminate an offer prior to an acceptance by the offeree.

**1. Usual Situations:** Termination will be effected by an express revocation or expiration of the time period stated in the offer. Implied revocation may apply if the offeree learns the item was sold to another or the offeror acts in a manner inconsistent with maintaining an open offer. Termination is by operation of law if there is death or insanity of the offeror, the subject matter of the offer becomes illegal, or the subject matter is destroyed.

**2. Refusal or Rejection:** The receipt of an offeree's unequivocal refusal or rejection will also terminate an offer such as "I refuse to accept" or "I reject your offer." Depending on the language, such a communication may create a counteroffer which proposes a different substitute bargain that can be accepted by the original offeror. For example, "I accept your offer if you agree to pay in advance." The parties change position.

#### **E. Contractor and Subcontractor Rules**

Special rules apply to a general contractor's solicitation of bids from subcontractors.

**1. Bids by Subcontractors:** Bids by subcontractors are usually treated as irrevocable offers for a reasonable time until the general contractor's prime bid is awarded or rejected by the project's owner.

**2. Contract Formation:** A contract does not exist until the general contractor accepts the subcontractor's bid or offer.

**3. Low or Suspect Bids:** The general contractor may not rely on a low subcontractor bid if the offered price is unreasonably below the other bids. Similarly, the subcontractor may not be required to perform if the general contractor has reason to believe that there might have been a mistake in the submitted bid. (See Mistakes under Void or Voidable section below.)

### **III. ACCEPTANCE**

**Rigos Tip:** Regardless of how strong the responsive communication appears to be, a contract can only result if the acceptance is made in response to a valid offer.

#### **A. In General**

The intended offeree has the power to accept the terms of an open offer that has not been revoked or terminated and thereby create a contract. Acceptance may be a return promise in a bilateral contract. Acceptance of a unilateral contract requires satisfactory performance of the act requested. On the bar exam, performance often constitutes implied acceptance such as the goods being delivered, inspected, and accepted without objection.

**1. Intended Offeree:** Offers are not assignable and the power of acceptance is thus personal to the offeree. Acceptance must be made by the party to whom the offer was directed. Reward offers are intended to be accepted by any member of the public.

**2. Stipulated Terms:** If the offer stipulates the method, manner, means of communication, or timeliness of acceptance, such terms are binding on the offeree. If the offer does not stipulate a particular term or method of acceptance, the analysis shifts to the acceptance if it contains the same particular term in question. If so, the original offeree becomes the new offeror of a counteroffer under the common law.

**Rigos Tip:** The offeror is the master of her bargain; her terms are generally binding on the offeree.

**3. Knowledge Necessary:** Acceptance by the offeree must be made with knowledge of the offer. Crossing offers or performance without knowledge of an offer does not create a contract.

**4. Objective Standard:** Whether an offeree's actions constitutes acceptance intention is measured by a reasonable person standard. This is the outward manifestation of assent. An acknowledgement by the offeree that the offer was made or "thank you" is insufficient. "I would like to do business with you" is less certain.

**5. Silence:** Silence may not usually be unilaterally imposed under the common law on the other contracting party as constituting acceptance.

**a. Exception:** An exception exists if the parties expressly or through their past course of dealings intend silence to constitute acceptance of an open offer. The custom of a trade or industry may also recognize silence as acceptance. In these situations, there may be a duty to speak to avoid contract formation.

**b. Unsolicited Items:** Unordered newspapers, periodicals, and other unsolicited goods or services provided are deemed gifts in Washington. The receiver has no duty to return or pay for such items received. [RCW 19.56.010, .020, and .030]

**6. Auction Acceptance:** In an auction, the bid is the offer and the falling hammer is acceptance. A bid may be withdrawn until the fall of the hammer. If the assets are put "without reserve," the auctioneer must accept the highest bid. (See UCC Sales in Chapter 7 for extended treatment.)

**7. Retail Installment Contract:** A buyer may cancel (revoke acceptance) up to midnight of the third day if the sale was solicited in person or at a place other than the seller's place of business. [RCW 63.040]

**8. Counteroffer:** A response to an offer which specifies different terms is known as a counteroffer. Such a response is a rejection of the original offer and the extension of a new offer in its place. For example, one party offers to buy a good at \$40. If the other party responds, "I will sell it for \$50." This is not an acceptance but rather a rejection and a counteroffer. The original offeror could then accept at \$50.

## **B. Unilateral Contract**

A unilateral offer requires acceptance in the form of performance of the act requested within the specified time limit. A promise to perform is not acceptance. The classic example is an advertisement offering a reward; the offeree must be aware of the reward offer at the time of performance. In theory, acceptance of a unilateral offer requires complete performance by the offeree unless other terms are agreed. Even the shipment of nonconforming goods may constitute a seller's acceptance (and a simultaneous breach), thereby allowing the other party a contractual claim for damages.

**1. Offer Revocation – Common Law:** It would be inequitable to allow the offeror to revoke after the offeree has made a substantial beginning of performance. Substantial part performance by the offeree is considered sufficient under Washington's common law to prohibit an offeror's revocation.

**2. UCC Bilateral Acceptance:** An ambiguous UCC offer looking to (but not expressly demanding) the current shipment of the goods may be accepted by either an actual shipment or a promise to ship. This provision may convert an intended unilateral offer into a bilateral contract. To eliminate this possibility the offeror should explicitly states that a mere promise to ship is not acceptable to constitute acceptance. [UCC 2.206(1)]

**3. UCC Notification Necessary:** The offeree must notify the offeror she is beginning performance to bar the offeror's right to revoke. The beginning of performance without notification is ineffective to create acceptance under the UCC. [UCC 2.206(2)]

**Rigos Tip:** Multiple aspects of a unilateral contract may be combined in a question. The offeree's performance is required to create the required acceptance, while bilateral only requires a promise indicating an intent to be bound. A court may find a contract by interpreting the offeree's action of performance as an acceptance.

## **C. Conditional or Additional Items**

**1. Common Law:** A valid acceptance must be unequivocal, unconditional, and a “mirror-image” of the offer under the common law. A reply that adds qualifications, conditions, or additional terms is not an acceptance. Such a communication is usually treated as a rejection and counteroffer which vests in the offeror the power to accept the counteroffer.

**2. Mere Inquiry:** A mere inquiry about further or different terms or a request for clarification is neither acceptance nor rejection. This may be treated as crossing offers. Examples include “Interesting, will you accept \$X” or “I would be willing to pay \$X.” The original offer stays open and a second offer may be created.

**3. Request for Additional Terms:** A grumbling acceptance that “requests” minor additional terms can still be a valid acceptance unless the additional terms are an express condition of the acceptance. “I accept; will you please pay an extra \$2,000?” There is a contract at the original price and the \$2,000 is treated as a proposal for an addition to the contract.

**4. Acceptance With a Demand for Different Terms:** A common law response which affirmatively accepts the offer but specifies different terms is known as an acceptance with a demand for different terms. For example, one party offers to repair a car for \$50 and the other party responds, “I accept but will only pay \$40.” This is to be treated as a rejection which terminates the original offer and a counteroffer may be created.

**Rigos Tip:** The exact wording of the acceptance is quite important. Almost any response by the offeree creates a counter-offer. If there is a subsequent communication by the offeror, it may be deemed an acceptance. At this point, your answer may have to branch and explore multiple possibilities as to who is the final controlling offeror.

**5. UCC Treatment:** The UCC rejects the literal “mirror image” acceptance rule. Unless the offer specifies to the contrary, acceptance in any manner and by any medium is adequate. [UCC 2.206(2)]

**a. Minor Additional Terms:** An acceptance with proposed consistent minor additional terms is allowed under the UCC. Look for “add-on” terms not specified in the offer. Acceptable new minor terms include setting reasonable delivery dates, imposing credit terms and interest on overdue invoices, or limiting the right to reject defective goods within trade tolerance. Unless both parties are merchants, these additional terms are treated as mere proposals that the offeror must expressly approve. [UCC 2.207]

**b. Merchant to Merchant:** Between merchants, the minor additional terms become a part of the contract unless the offer expressly precluded any new terms. To avoid the additional terms, the original merchant offeror must notify the offeree of their objections to their inclusion within a reasonable period of time. If the additional terms materially alter the original bargain, explicit assent by the offeror is required. The UCC comments give examples of materially altering terms, including a new provision negating standard warranties, an arbitration requirement in the event of a dispute, or reserving to the seller the unilateral right to cancel.

**Rigos Tip:** Additional terms in an acceptance are heavily tested on the bar. Determine first if there are “add-on” terms in the acceptance. Second, are both parties merchants? If so, any minor additional terms added by the offeree are binding unless **MOP**, they materially change the bargain, objected to by the offeror within a reasonable period, or such additional terms were precluded in the offer. If either party is not a merchant, there may still be a contract created, but the offeror must agree to the additional terms.

#### **D. Conflicting Terms**

**1. Common Law:** Where the offer and acceptance differ on a particular term, the common law rule is that a non-conforming acceptance is deemed to be a counteroffer. This leads to a “battle of the forms” as the parties’ roles change. Acceptance of the last counteroffer may be by performance of the other party. The terms of the last communication usually prevail under the “master of the bargain” – “last shot” rule.

**2. UCC:** The UCC addresses the “battle of the forms” by assuming both parties object to the other’s treatment of the term. The conflicting terms in both the offer and acceptance are to be disregarded (or “knocked out”) and do not become part of the contract. The contract to be imposed consists of the terms upon which both parties have expressly agreed plus any applicable UCC “gap filling” provisions. [UCC 2.207]

**Rigos Tip:** Conflicting terms are heavily tested especially where neither party explicitly accepted the other's term, but there was performance. Unlike additional terms, both parties do not have to be merchants.

### **E. Effective Date**

The effective date of all communications is usually upon receipt by the other party.

**1. Revocation by Offeror:** If the offeror revokes or withdraws the offer prior to acceptance, there is no contract since the offer is no longer open. Under the common law, revocability is generally at will, unless consideration was paid to the offeror. Revocations are effective on receipt by the offeree.

**2. Mailbox Rule:** The common law "mailbox rule" applies where parties are communicating their negotiations at a distance. If the terms of the offer require that acceptance is effective only on receipt, the mailbox rule is not available to the offeree. Acceptance would then only be effective on receipt by the offeror.

**a. Acceptance is Effective On Dispatch:** The rule allows acceptance upon dispatch as long as the offeree uses authorized means of communicating the acceptance. This includes the same means as the offeror used or faster. (Letter offer authorizes acceptance by letter, telegraph, fax, e-mail, or messenger.)

**b. Offeror's Revocation or Unawareness:** The mailbox rule might result in a valid acceptance (and thus a contract) even if the offeror had sent a previous revocation or was unaware of the acceptance. Because there is a contract on dispatch, the parties are theoretically bound even if the acceptance is lost in transmission to the offeror. However, if the acceptance was mis-addressed, the mailbox rule does not apply.

**c. Unauthorized Means/Options:** If an unauthorized slower medium of communication is used, the acceptance is only effective upon receipt. Also, the exercise of an option (irrevocable offer supported by consideration) is only effective when received by the offeror.

**3. Rejection Exception:** An exception to the mailbox rule applies if the offeree first rejects and then subsequently accepts. In such a case, the effective date of acceptance goes back to the general rule which is the date of receipt by the offeror. The effectiveness of the acceptance would depend on which arrived first, the rejection or the subsequent acceptance.

**Rigos Tip:** For there to be a valid subsequent acceptance there must be an open offer. If the prior rejection reaches the offeror, it terminates the offer. A signal that this subsequent acceptance provision is being tested is that the rejection was delayed or lost in transmission to the offeror. This is necessary so that the subsequent acceptance reaches the offeror before the rejection.

**4. UCC Treatment:** The mailbox rule also applies to acceptances under the UCC. The statute liberalizes the common law treatment by requiring that acceptance must only be made in a reasonable manner and by any reasonable medium. Under the UCC, this may be slower than the offer such as a letter acceptance in response to an offer made by e-mail, telegraph, or telephone. [UCC 2.206]

### **F. Approach to Offer-Acceptance Cross Problem**

**1. Skeleton for Analysis:** Offer/acceptance cross-problems are often tested. To sort out the various communications and keep the relevant dates straight, you might want to consider the following skeleton:

<u>PARTY</u>	<u>COMMUNICATION</u>	<u>SENT</u>	<u>RECEIVED</u>	<u>EFFECTIVE</u>
--------------	----------------------	-------------	-----------------	------------------

**2. Example:** In a June 1 letter, A offered to sell land to B without dictating any required details about effective acceptance. On June 2, B received the offer. On June 2, B sent a rejection by mail, but A never received it. On June 3, A revoked her offer by letter. On June 4, B sent an acceptance letter which was received by A on June 6. On June 5, A's revocation letter was received by B. Did a contract result?

<u>PARTY</u>	<u>COMMUNICATION</u>	<u>SENT</u>	<u>RECEIVED</u>	<u>EFFECTIVE</u>
--------------	----------------------	-------------	-----------------	------------------

A	Offer	6/1	6/2	6/2
---	-------	-----	-----	-----

B	Rejection	6/2		
B	Acceptance	6/4	6/6	6/6
A	Revocation	6/3	6/5	6/5

**Answer:** No. B's attempted rejection of 6/2 operated to terminate the use of the mailbox rule. If the rejection had been received by A, the offer would terminate. Therefore, a subsequent acceptance can only be effective upon receipt by the offeror. Acceptance on 6/6 is too late because A's revocation was effective on 6/5.

**Rigos Tip:** Every bar exam has contract formation questions containing various offer and acceptance issues. You must understand every detail of the topics we have just covered.

## **G. Formation Checklist**

A good overall contract formation checklist has three analytical steps. First, look to the offer – were any acceptance terms specifically dictated by the offeror? If so, such terms are binding on the offeree. Second, analyze the wording of the purported acceptance. Was this communication an acceptance, a mere inquiry, an acceptance requesting changes, or an effective rejection (and perhaps a counteroffer) such as an acceptance with a demand for different terms? If a counteroffer, was there performance under the “last shot rule”? Third, if an acceptance, what was the effective date? Look for the mailbox rule.

## **IV. CONSIDERATION**

At least half of the Washington bar contract questions include consideration. The general rule is that the legal obligation of a promise is not enforceable unless it is made in a bargained-for exchange. Consideration provides the “quid pro quo” (something for something) to bind the parties to their naked promises.

### **A. In General**

**1. Legal Sufficiency:** “Bargained for” is satisfied if the act, forbearance, or return promise results in a benefit to the promisor or a detriment to the promisee. The promisee may incur a detriment such as something one is not legally obliged to do. An example is agreeing to quit smoking or forbear to sue. Being hired for a new job, a pay raise, or a promotion given to an existing employee may provide the consideration for an employee’s non-compete promise. In a unilateral contract, the detriment consideration may be the offeree’s performance.

**2. Mutuality and Illusory Promises:** The parties’ exchange does not have to be of equal value, but there must be mutuality of consideration such as mutual promises. A promise to make a voluntary gift lacks consideration. Be alert for an illusory promise, such as an expression of a “moral commitment” or a statement, “I will perform if it suits me.” Another example is where the requested act has already been performed such as “In consideration of your past act, I promise to pay;” past consideration is no consideration.

### **B. Pre-Existing Duty Rule**

The pre-existing duty rule is a defense to a contractual recovery where a new promise (or modification of the old) is given for the same act a party has already promised to perform.

**1. Exam Questions:** Typical questions include a contractor extracting a homeowner’s promise to pay an additional amount for completion of the same original contract. Also tested is a new promise demanded by a seller if the buyer wants to avoid the seller’s threat to breach.

**2. Exceptions:** If there is an honest dispute (the dispute is “unliquidated”) or the contractor agrees to complete the job a month early, there is consideration (detriment to the promisee). This consideration will support enforceability of the homeowner’s promise to pay the extra sum to the contractor.

### **C. Partial Payment Rule**

This rule applies where a partial payment of a debt is tendered with “payment in full” is conspicuously written on the check and the claimant is aware of the condition of the tender. If a good faith dispute exists about the amount due, the debt is “unliquidated.” The tendered sum must represent a genuine compromise – not merely a token offer. If the payee accepts the tendered amount as full payment, this acceptance discharges the balance of the debt and the check maker is also barred from suing on the claim. If the payee crosses-out a “paid in full” notation or adds “all rights reserved” and deposits the check, the debt is still discharged and the payee will be deemed to have accepted the partial payment as payment in full. [UCC 3.311]

### **D. Surrendering a Legal Claim**

If a party promises not to pursue a legal claim that he/she believes is valid in return for the other party’s promise to pay money, there is a detriment to the promisee. Even if the claim is actually invalid, consideration is still present if the holder of the claim reasonably believed the claim was well founded and enforceable.

**Rigos Tip:** Watch for a settlement of an invalid claim. Did the holder reasonably believe it was enforceable?

### **E. Promissory Estoppel**

The doctrine of promissory estoppel may validate a donative promise in the absence of a bargained for exchange supported by contemporaneous consideration. The lack of consideration is not fatal if the promisee has reasonably changed her position in reliance upon the promise. The necessary consideration is implied by law to avoid injustice resulting from detrimental reliance as evidenced by the promisee's action or forbearance.

**1. Foreseeable Reliance Required:** Detrimental reliance (either action or forbearance) by the promisee must be reasonably foreseeable by the promisor to induce action or forbearance.

**2. Examples:** This includes pledges made to a charity or church. Another example is where an employee stays on the job because a pension is promised or moves across the country to accept a promised job promotion. The employee could enforce the employer's promise if the resulting reliance was reasonable.

### **F. UCC Modifications**

UCC contract modifications sought in good faith do not require consideration to be binding. [UCC 2.209]

**1. Additional Amount Promise:** A modification occurs where a buyer has promised to pay a higher price for the same goods. The seller may have incurred extra costs and the contract is still executory.

**2. In Good Faith Required:** In the case of a merchant, "in good faith" is defined as "honesty in fact in the transaction and the observance of reasonable commercial standards of fair dealing in the trade." An example is where a manufacturer's input and/or production costs have increased and the buyer agrees to pay the increase. The UCC does not define "good faith" for a casual seller. [UCC 2.103(1)(b)]

**Rigos Tip:** Contract modifications are a frequent exam topic. Under the UCC, a modification does not require consideration. The common law's pre-existing duty rule would normally preclude recovery for such modifications.

### **G. Third Party Beneficiaries**

Third party beneficiaries are non-contracting parties who may receive enforceable rights even though they lack privity of contract. If they meet certain legal requirements, they are allowed to "boot strap" onto the consideration provided by the promisee. (See discussion of the third party beneficiaries below.)

The trilogy of Offer, Acceptance, and Consideration are collectively referred to as "mutual assent" or a "bargained for exchange." All three are necessary to form a contract.

## **V. LEGAL CAPACITY – 3 Is**

### **A. In General**

The contracting parties must have full legal capacity. Three groups – infants, the insane, and the intoxicated – generally lack capacity.

**1. Incapacity as a Defense:** These groups may assert incapacity as a defense to a contract enforcement action.

**2. Voidable Unless Ratified:** With the exception of certain past contracts by infants (minors), contracts made by such parties are voidable unless ratified. Incapacitated parties may enforce the contract or escape from it. The creditor may not unilaterally escape their contract obligation.

### **B. Infants**

**1. Basic Rule:** Infants' (under 18 years old) contracts for luxuries (past, present or future) may be disaffirmed by infants at their option. An infant remains liable for the fair value of past "necessaries" not provided by his parents. Examples of necessaries include agreements to purchase food, shelter, clothing, medical aid, 22 Course 5309 Copyright 2011. The Rigos programs have educated over 100,000 professionals since 1980.

insurance, and similar basic items. Cars and motorcycles are not “necessaries.” [RCW 26.28.015] Marriage to a spouse of majority age usually provides capacity for a minor at least as it relates to community property contracts.

**2. Election:** After reaching the age of majority, the infant has a reasonable time period to make an election to avoid/disaffirm or to ratify/affirm the entire contract. Ratification will be implied by conduct if the infant does not disaffirm within a reasonably prompt period of time after reaching majority. Where the infant chooses to disaffirm the contract, he must return the remainder of the luxury item(s) to the other contractual party.

**3. Possible Recoveries:** If the child is over 14, it may be possible to recover against an infant who misrepresents his age through a tort action for fraud, restitution or in quasi-contract. (See remedies section below.) Parents are not usually liable for their infant’s contracts or torts.

**Rigos Tip:** Infancy of one of the contracting parties is a favorite twist to throw into a question. The defense applies to all types of contracts, but excludes past necessities. Only the infant has the election at majority (not the creditor) and the creditor has potential equitable recovery theories as an alternative to a contract recovery.

### **C. Insanity**

Insanity, senility, or extreme mental retardation are capacity defenses only if a controlling court has determined the party was legally incapacitated on the contract date. This usually involves a competency hearing in which there is a detailed evaluation of the party’s mental capacity. Unadjudicated incompetents, informal capacity opinions and showings of mental imbalance, neurosis, or similar conditions without a judicial determination are usually insufficient unless the other contracting party had knowledge or reason to know of the mental incapacity.

### **D. Intoxication**

Intoxicated individuals may lack formation capacity if so intoxicated that they were not aware of the legal consequences of their act. Cognitive capacity requires a reasonable understanding of the nature, terms, and legal consequences of the transaction at the time of contract execution. This is more than “I never would have agreed if I had been sober.” An intoxication defense is only successful in extreme cases.

### **E. Agency Liability**

**1. Agency Authority:** Liability for contracts entered into by an agent is imputed to the principal if the agent had express, implied, or apparent authority to enter into the legal agreement creating the responsibility.

**2. Agent Personal Liability:** The agent may also be personally liable if she fails to disclose that the principal lacks capacity (infant or insane principal), misrepresents the scope of her authority, represented that she was dealing for her own account, affirmatively stated that there is no undisclosed principal, or she guaranteed the contract. Examples include a del credere sales agent who guarantees payment of her customer’s accounts.

## **VI. LEGAL SUBJECT MATTER**

The subject matter of the contract must not be illegal or violate public policy. If illegal, the contract is unenforceable and void. The court will leave the parties as it finds them.

### **A. Violation of Law**

Violation of statutory laws includes a contract to commit a crime or tort. Performing professional (legal, accounting, architecture, real estate broker, and similar) services without a state license is also illegal. No fee is collectable even if the service was satisfactory.

**1. Exception for Beneficiaries:** If the licensing statute violated was regulatory in nature and intended to protect the public, including one of the contracting parties, the contract would be enforceable by that party. An example is a contractor required to register and obtain a state license. The customer can recover damages for breach of contract even though the contractor failed to comply with registration law.

**2. Usury:** RCW 19.52 et seq. limits interest charges in consumer loans primarily for personal, family, or household purposes to a 12% annual rate.

**a. Exclusions:** Businesses, agricultural or investment use, and mobile home transactions are excluded. Retail installment transactions, consumer leases, and credit card transactions are also excluded.

**b. Damages:** A lender charging more is liable for the interest paid and attorney fees. The principal sum is still collectable, but the interest is to be deducted. If the interest has already been charged, there is a double deduction.

**3. Not “In Pari Delicto”:** If the parties are not “in pari delicto” (equally culpable) because one has much more fault, the contract may be enforced by the more innocent party.

**4. Divisible Contract:** This may apply if the contract’s primary purpose is not illegal, but the contract contains an illegal provision. If the contract is divisible into two or more equivalent parts, the court may sever the illegal portion and enforce the remainder.

**5. Subsequent Illegality:** If the statute creating the illegality was enacted after the offer, but before acceptance, the offer terminates. If passed after acceptance, the contract is discharged because of impossibility of legal performance. (See below for the topic of excusable nonperformance.)

## **B. Violations of Public Policy**

Agreements which violate public policy may also be held enforceable. Such contracts include the four topics discussed below. The court has discretion to strike only the offensive portion of the agreement and leave the remainder of the contract in effect. Also possible is a court decision to hold the entire contract unenforceable as against public policy if the offensive portion goes to the heart of the agreement.

**1. Consumer Protection Act Violations:** RCW 19.86 et seq. is the Washington State Unfair Business Practices – Consumer Protection Act. This statute specifies an array of possible acts that may constitute a violation – unfair or deceptive acts or practices in trade or commerce which potentially impacts many members of the public. Court cases have extended jurisdiction to professional services including the business and billing practices of law firms. Injunctive relief is possible and attorney fees and treble damages (up to \$10,000) may be awarded. See the extended coverage in the tort chapter for details.

**2. Restraint of Trade:** Contracts restraining trade and contracts requiring antitrust activities are specifically included in the Washington Consumer Protection Act discussed above. An agreement to fix prices, allocate markets, and other anti-competitive actions including some corporate mergers and acquisitions would qualify. Extremely unfair business practices may also be included.

**3. Non-Competition Employment Agreement:** Non-competition agreements in employment contracts that are unreasonably broad may also be against public policy.

**a. Consideration Required:** There must be valid independent consideration to support the employee’s promise because such prohibitions may restrict a person’s ability to earn a living.

**b. SAT – Reasonable Subject, Area, and Time:** Courts enforce employee restraints on going to competitive employment only to the extent that the restraint is necessary to protect the employer. Such contracts must be reasonable as to the subject matter covered, the geographic area, and the time period.

**4. Business Sale:** If associated with a business sale or trade secret disclosure, the normal presumption is that the non-compete restraint is reasonable. This is usually imposed to protect the business buyer and any purchased goodwill.

**5. Tortious Interference:** If the agreement promotes or encourages tortious interference with a third party, the court may decline to enforce the restraint.

**6. Exculpatory Clauses:** Exculpatory clauses purport to relieve a contracting party from liability resulting from their own negligence or breach of contract. If the public interest is involved, exculpatory clauses are usually against public policy. An example is an attorney’s representation agreement which includes a clause relieving the law firm of liability for failing to exercise due care.

**7. Defense Waiver Clause:** RCW 63.14.150 declares invalid any retail installment agreement provision in which a buyer agrees not to assert a defense against a seller's action on the contract. This also includes a provision requiring submitting to suit in a county other than their residence.

## **VII. STATUTE OF FRAUDS (SOF) – MOULS**

**Rigos Tip:** Unless the bar exam facts expressly state that the agreement was written and signed, discuss the SOF as a defense to contract formation. Look for a telephone call, in-person negotiations, or the words “stated,” “offered,” “agreed,” etc., where it is not clear whether a writing was involved.

The Washington SOF requires a writing signed by the party to be charged (the D or her authorized agent) for certain types of important contracts. This SOF requirement of a writing may not be waived. Oral contracts are not enforceable under the rule unless an exception applies. Only the signature of the party against whom enforcement is sought (the D) is required. Thus the contract may not be enforceable against a party who did not sign it. [RCW 19.36.010]

The five instances in which a writing is usually required are abbreviated by the acronym MOULS.

### **A. Marriage Including Property Transfer Promise**

If marriage was the consideration for a promise regarding a property transfer, the marriage contract must be written. This would include prenuptial and community property agreements. An exception is mutual promises to marry without any reference to a property transfer, which may be oral.

### **B. Over One Year**

The statute applies – so a writing is necessary – if the contract performance duty is expressly required by the agreement term to extend more than one year from the date of execution. This concept is frequently tested on the exam, usually in an employment agreement (but may also apply to a UCC contract over one year).

**1. Immediate Beginning:** Watch for a contract with exactly a one year term beginning immediately. This would not require a writing. The period usually begins on the date the offer was made.

**2. Later Beginning:** A contract for one year beginning tomorrow must be written.

**3. Indefinite Term:** An oral contract without a specified term is usually excluded from the statute. Thus an employment contract for life (“as long as you live”) or without a time limit (an “at will contract”) can be oral because the employee could quit, die, or be fired for cause within a year. The fact that performance of the oral and/or unsigned contract later extends over a year does not affect its enforceability under the SOF.

**4. Executed Portion Enforceable:** One party's performance takes the performed portion out of the SOF application. Therefore, a normal employment contract will be enforceable for the executed time period which the employee worked; the future executory portion would remain unenforceable.

**Rigos Tip:** Often the facts in the question apply to an employment contract where the performance of the project for which an employee was hired is expected to take over a year. This is a distracter because only if the employment term of the employee is expressly over a year does there have to be a writing.

### **C. UCC If \$500 US or More – PAWS Exceptions**

UCC sales contracts for goods \$500 or more in US dollars or modifications raising the new contract amount to \$500 or more must be written. This threshold is raised to \$1,000 for a goods lease contract. The \$500 or more sale writing requirement does not apply to a construction contract since the predominant purpose is the labor. Exceptions apply allowing oral agreements for goods in the PAWS situations as follows. [UCC 2.201]

**1. Part Performance:** Oral contracts are enforceable for the executed portion of a contract already performed (buyer received a partial shipment of goods and accepted them after inspection).

2. **Admission:** An oral agreement is also enforceable if the D admits the contract was made.

3. **Written Merchant-to-Merchant Confirmations:** Written confirmations between merchants that are not objected to in writing within 10 days also satisfies the writing requirement. Both parties are bound.

4. **Specially Manufactured Goods:** Oral contracts for goods specially manufactured for that particular buyer may be enforced without a writing. The goods must not be suitable for sale to others in the ordinary course of business. This exception applies even if the specially manufactured goods amount is \$500 or more.

5. **Quantity Required:** A UCC contract is not generally enforceable beyond the quantity of goods specified in the agreement. Output and requirement contracts for \$500 or more must thus be written (see below).

6. **“Some Writing” Sufficient:** The UCC section’s official comments relax the common law writing requirements of being signed by the party to be charged. Any written authentication which identifies the party against whom performance is sought will suffice. The actual signature of the D is not necessary if there was an intent to authenticate the writing. An unsigned letterhead or e-mail from the D may thus be a sufficient writing under the UCC. As under the common law, the contract may be enforceable against only one party.

7. **Party to be Charged:** Only the “party to be charged” must have signed a writing under the SOF. If A did not sign a writing, but B did, A may sue B. B may not sue A. If A sues B for collection and B asserts a counterclaim for breach, then A’s “admission” in her pleading will make the contract enforceable against her, but only up to the quantity of goods she has placed at issue.

**Rigos Tip:** While a signature is not required for a UCC contract (if sufficient authentication identification is present), it is required for a “firm offer” by a merchant. This creates an irrevocable offer without consideration.

#### **D. Land Sale or Lease**

All land transactions contracts must be written, state the price, and be signed by at least the seller. Lease agreements of real property for over one year must also be in writing and signed by the lessor.

1. **Included Agreements:** The SOF includes conveyancing deeds and liability encumbrances relating to real property; the full legal description is required. Also included are contracts for land based resources such as timber, minerals, oil, and related resources. Contracts for crops are not included (unless over \$500). Any agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation must be written (“equal dignity rule”). All modifications to such agreements must also be written.

2. **Land Possessor Exception:** An oral real property conveyance contract may be enforced if a land possessor makes a down payment, takes possession, and performs substantial improvements to the property. Paying property taxes is strong evidence of ownership. The possessor must be clearly more than a mere tenant.

#### **E. Suretyship Promises**

A writing signed by the party to be charged is required for suretyship undertakings. Included in this category are a promise to guarantee the debts or default of another and a promise by a personal representative to answer personally for a decedent’s or an estate’s debts. Examples of suretyship include a loan guarantee, a bonding company in a construction project, or a fidelity insurance bond securing the honest performance by an employee. [RCW 19.36.010(2) and (4)]

**Rigos Tip:** Be sure the promisor is undertaking in a secondary capacity a liability obligation of another and not a primary obligation of the promisor’s own responsibility. “Ship the goods to my child and I will pay for it” is a primary promise and the SOF does not apply. An oral agreement to guarantee a primary liability is enforceable. A secondary liability would be, “I will pay if my child does not;” such a promise must usually be written.

1. **Contract Issues:** The suretyship contract is formed when a surety makes a promise to either the creditor or debtor. Consideration issues may be present on the bar exam questions.

**a. Consideration – Promise to Creditor:** If the surety promise is made to the creditor as a part of the transaction process, the required consideration is the goods delivered or the loan extended to the debtor (a detriment to the promisee). Consideration in the form of a detriment to the promisee is also present if the creditor extends the due date on the loan or expressly forbears to bring suit on a delinquent loan in exchange for the surety’s promise.

**b. Consideration – Promise to Debtor:** If the surety promise is made to the debtor after the obligation was created, there must be consideration in the form of a benefit to the promisor-surety. This follows because there is no detriment to the promisee-debtor; the debtor receives a benefit from the surety’s participation.

**2. SOF Exception:** The general rule is that a writing signed by the surety is required.

**a. Main Purpose Rule:** If the main purpose of the surety’s undertaking is intended to substantially benefit their own economic interest, an oral promise of guarantee may be enforceable. Consideration to support the guarantee promise is the benefit to the surety.

**b. Examples:** Examples include a promisor who was a pre-existing creditor of the debtor who would receive the proceeds of the bank loan. A parent corporation’s guarantee of the debts of a subsidiary would qualify. A parent orally guaranteeing the obligation of their son or daughter for necessities has also been asked. In contrast, an oral promise to pay the debt of a friend is not usually enforceable.

## **F. Private SOF**

Many states allow a contract provision prohibiting oral modifications of written contracts. The common law rule in Washington is that a “no oral modification“ or “written modifications only” provision is not enforceable. The rationale is that such a provision would improperly restrict the parties’ future right to modify the contract. The provision itself is subject to modifications and thus the parties could orally agree to waive the provision. The UCC disagrees and would require a signed agreement. Still ineffective attempts at modifications can be considered under the UCC as evidence of waiver of the “no oral modification” provision. [UCC 2.209].

## **G. Other SOF Exceptions**

**1. Divisibility:** If the SOF applies and there is no writing, look to see if the contract could be interpreted as divisible. Part performance by a seller may take the executed portion of the contract out of the application of the SOF. This would require the buyer to pay an equivalent percentage payment amount.

**2. Estoppel:** In Washington, promissory estoppel may, in extreme cases, negate the need for a writing. This estoppel may apply if the D represented that no writing was necessary or that she would sign a written agreement later. (“My word is my bond and I will sign when we put it in writing.”) If a party suffered great damages in reliance on an oral agreement in which the D was unjustifiably enriched, estoppel may be asserted. Klinke v. Famous Fried Chicken

**Rigos Tip:** SOF is on almost every bar exam question. If your analysis concludes there is a SOF violation, look for promissory estoppel or part performance which may validate the performed portion of the contract by a divisibility interpretation.

## **H. Alternative Remedies**

Even if the SOF is violated, the P might still recover compensation through a tort recovery theory or a quasi-contract suit to avoid unjust enrichment. (See discussion of remedies section below.)

## **VIII. FORMATION ELEMENTS CONCLUSION**

The OACLLS elements determine if a contract was properly formed. It is important that you understand and memorize these concepts as this portion of the contracts’ rules are heavily tested both under the common law and under the UCC. The memory ladder acronym for contract formation is:

- Offer by offeror which is not yet revoked or rejected (creating the power of acceptance)
- Acceptance by offeree prior to revocation or rejection through a return promise or

- performance of the act requested
- **C**onsideration – benefit to promisor or detriment to promisee
- **L**egal capacity of contracting parties – not 3 Is of infancy, insanity, and intoxication
- **L**egal subject matter and not against public policy
- **SOF** compliance if a **MOULS** contract

## PART II: CONTRACT PERFORMANCE

### I. INTRODUCTION

The OACCLS elements discussed in Part I determine if a contract was properly formed. The second half of the acronym – VIPR TAD – examines imperfections in the contract bargaining process and methods of performance. Remedies and the effect a contract may have on third parties are also examined.

### II. VOID OR VOIDABLE CONTRACTS – MUFFED

Illegal contracts and contracts violating the SOF are “void” as a matter of law and have no force and effect. A motion to dismiss on the pleadings may be brought on the basis P cannot present a prima facie OACCLS case. A contract can be merely “voidable” if the parties did not reach a true “meeting of the minds” or one of the parties lacked capacity. There still is a contract, but the aggrieved party could avoid performance by petitioning a court to declare the agreement void. This is equivalent to rescission or a complete undoing which restores the parties to their previous position without an award for damages.

#### A. Mistakes

Mistakes occur when a party’s basic assumption about some significant aspect of the exchange is not in accordance with the truth. Mistakes are frequently characterized as unilateral or mutual. The usual remedy for mistakes which are excused is rescission.

**1. Unilateral:** Only one party was mistaken. This includes a party who misunderstands the legal consequences of an agreement or the facts upon which the contract was based. Often the bar questions raise this issue when a workman makes a mechanical calculation mistake in preparing the price of a construction bid. Another example is one party who thinks the contract subject is worth much more than the true market value.

**a. General Rule is Enforceable:** A unilateral mistake by one party is not grounds for avoidance so the general rule is that the contractor bears the risk. This requires performance according to the contract terms even if the contractor suffers a loss.

**b. Exception Excusing Performance:** The mistaken party may be granted relief by asserting an affirmative defense if the other party had:

(1) **Knowledge:** Actual or constructive knowledge of the mistake, or

(2) **Aided in Mistake:** Substantially contributed to a significant mistake such as a failure to disclose a significant hidden defect that would substantially drive up the performance cost.

**Rigos Tip:** Frequently the question contains facts indicating the property owner had some idea that the contractor’s bid price was unrealistically low. Also frequent is where the workman who had contracted to do the repair was unaware that there was a hidden defect in the property. If the owner knew of the defect creating the mistake and did not make disclosure, there may be a viable defense for the workman.

**2. Mutual:** Both parties were mistaken. Mutual mistakes of minor consequence are legally irrelevant and executory contracts are more likely to be considered than if the contract was fully executed.

**a. Mutual Mistake of Value:** A mutual mistake of value is not usually grounds for rescission. (Both parties believed the item had no value and it was actually very valuable.)

**b. Mutual Mistake of Fact:** A mutual mistake of fact is grounds for avoidance if the factual dispute is so material that it is clear there was no true meeting of the minds. (The parties disagree on which item was purchased or whether the painting sold to the buyer was to be the original or merely an inexpensive copy.)

c. **Mixed Value and Fact.** If the mutual mistake is of both value and fact, the courts interpret it as a factual mistake allowing avoidance. (Contract to purchase land which both parties thought contained oil but the land was dry. Whether there was oil or not in the land is a question of fact but it still affects the land's value).

## **B. Unconscionability**

Unconscionable contracts under both the common law and UCC are too unfair, oppressive, or one-sided, to be enforceable. The court may strike only the unconscionable portion or refuse to enforce the entire contract.

1. **Characteristics:** The facts must shock the conscience of the court and be beyond all reasonable standards of fair dealings. Either unfair high-pressure bargaining process – an absence of meaningful choice – (procedural unconscionability) or extreme harshness in the outcome (substantive unconscionability such as a grossly excessive price) are actionable in Washington; most states require both PS factors. Such a fact pattern may arise in a standard form contract which was presented by a superior party on a take-it or leave-it non-negotiable basis (an “adhesion” contract). An example might be a warranty blanket disclaimer and/or liability exclusion in small print on the back of a boilerplate sales contract. [UCC 2.302]

2. **UCC Treatment:** The UCC requires good faith by all contracting parties. Confession of judgment clauses in a sales contract may be declared unconscionable. A limitation on consequential damages resulting from personal injury in consumer goods contracts is “prima facie” unconscionable. This shifts the burden to the seller to show the limitation is fair and equitable. The UCC will normally allow a limitation of damages between merchants where the loss is commercial. [UCC 2.719(3)]

**Rigos Tip:** The unconscionability defense on the exam is usually obvious; look for an extreme situation involving a merchant taking advantage of a consumer by using an adhesion contract which contains patently unfair terms. Either procedural or substantive unconscionability qualify in Washington; most state require both.

## **C. Fraud**

Fraud or misrepresentation may be an affirmative defense and grounds to rescind a contract. Fraud may be in the execution or inducement. This is a heavy bar topic.

1. **Fraud In the Execution:** Fraud in the execution or (fraud in the factum under UCC Article 3 Commercial Paper) goes to the instrument itself and creates a void transaction. This type of fraud is possible if a party was tricked into signing a document which was later changed into a contract (the buyer's signed a delivery receipt which was later added to and thereby changed into a promissory note.

2. **Fraud In the Inducement:** Fraud in the inducement or misrepresentation in the contract formation stage may make the contract voidable. The required FIRD elements are:

a. **False Statement of a Material Fact:** A fact must rise above opinion or puffing and is usually quite specific. Compare “this car gets 30 miles per gallon” to “this car is a great buy.”

b. **Intention to Deceive the P:** “Scienter” or the intention to deceive must be present.

c. **Reliance on the D's False Statement:** The P must reasonably rely on the D's misrepresentation in entering into the contract.

d. **Damages:** The benefit of the bargain is the usual measure of damages.

3. **Fraudulent Concealment:** An omission or nondisclosure of a material fact or hidden defect may be grounds for rescission of the contract if significant damages results therefrom. Active concealment by one party may override an unilateral mistake by the other party. (See torts chapter for more detail covering fraud.)

**Rigos Tip:** Fraud – execution, inducement, or concealment – is present as a defense in many contract questions.

## **D. Fiduciary's Undue Influence**

A “fiduciary” is a person who occupies a position of special confidence and trust towards another. There is usually a disparity in business experience, education or age between the fiduciary and the beneficiary. The abused party is often particularly susceptible to overreaching because of their trusting reliance on the fiduciary. Included in this category are an attorney, CPA, corporate director, guardian, trustee, and personal representative of an estate.

**1. Undivided Loyalty Required:** Such a relationship imposes a high degree of undivided loyalty, obedience, good faith and due care. Conflicts of interest and business transactions with clients are suspect and closely scrutinized. All relevant facts must be disclosed or a fiduciary is liable.

**2. Unfair Persuasion:** Undue influence involves unfair persuasion. This is a question for the trier of fact. Such a contract defense may be used where a fiduciary abuses a position of trust. If an attorney exerts influence over an elderly client by entering into an unfair transaction with the client, the contract may be voidable by the elderly client. The fiduciary has the burden of proving the transaction was fair and at arm’s length.

**2. Constructive Trust:** This may arise if a fiduciary acquires legal title to property owned by a beneficiary through undue influence, fraud, theft, or extreme duress.

**Rigos Tip:** Almost any question which involves a business transaction between a professional and a layperson, especially if the professional is a lawyer, merits discussion of fiduciary duties and the defense of undue influence.

### **E. Estoppel**

**1. Equitable Estoppel:** This concept may be asserted as a defense to a contract enforcement action. It differs from promissory estoppel in that the false statement is one of fact rather than a promise. Here, the P deliberately did or said something that created a justifiable belief by the other party that the right would not be enforced. This fact is inconsistent with the lawsuit the P is now asserting against the D. An example would be if P wrote D stating that she would not enforce a contract and D justifiably relied upon the statement. Later the P brings suit on the same contract.

**2. Judicial Estoppel:** This defense applies if the P previously gave sworn testimony in a court proceeding that is inconsistent with the position they are taking in a subsequent legal proceeding.

### **F. Duress**

The defense of duress is where a contracting party is coerced to induce contract consent (or modify a previous contract) because of an improper threat overcoming free will. Examples include impending physical threat or the unjustified threat of pursuing a criminal prosecution. But a threat of civil litigation is not usually sufficient. The victim must show that the improper threat or pressure would have induced a reasonably prudent person to assent to the contract against their will. Such a contract is voidable by the victim. A few extreme cases have recognized the doctrine of economic duress where the necessities were immediately needed and could not be obtained from another source. Doubling the price of insulin by a sole source of supply is an example.

## **III. INTERPRETATION OF CONTRACT – II PACC**

### **A. Intentions of Parties Control**

The objective intentions of the parties control the interpretation of the contract terms according to the Washington “context rule.” Normally the language of the contract is the guiding principle the court will follow.

### **B. Incorporation by Reference**

Incorporation by reference may be present if the agreement refers to another document or contract. The document referred to must be identified with reasonable certainty. If the treatment of a given term in the two documents is different, the terms of the most recent agreement generally controls.

### **C. Parol Evidence Rule – DUCAS Exceptions**

The parol evidence rule (PER) finalizes what the parties intended in a written contract. This is a question of law for the judge. The rule excludes from evidence at trial the terms of any prior or contemporaneous

discussions or agreements which contradict the terms of the final written “integrated” contract. An “integrated” contract is intended by the parties as a final expression of their entire agreement concerning the included terms.

Unstated consistent terms and recitals of fact may always be introduced from extrinsic evidence. A “merger clause” such as “this is the ‘final’ or ‘total’ agreement” may be effective to raise the PER. The general

rule of exclusion is subject to the following **DUCAS** exceptions, which are heavily tested.

**1. Defect in Formation – Context Rule:** Defects in formation rendering the contract void or voidable may be introduced by extrinsic evidence. Examples include fraud in the inducement, mutual mistake, failure of consideration, duress, illegality, or lack of capacity by one of the contracting parties. Also rendering a contract voidable may be preliminary false representations made by a sales agent which contradict the terms of the final written agreement. The Washington case of Berg v. Hudesman held all evidence may be introduced to show the intentions of the parties and circumstances under which a written contract was executed (Context Rule).

**2. UCC Performance, Dealings, and Trade Terms:** If the subject of the contract is goods, three categories of evidence helpful in clarifying intent or supplementing terms may be introduced. [UCC 2.202] The **CPU** order of priority is:

**a. Course of Performance:** The parties' earlier course of performance in the present contract may be the best evidence to clarify uncertainty. If the sales contract provides for a schedule of repeat performances, consistency may be inferred and imposed in the current dispute. [UCC 2.208]

**b. Past Course of Dealings:** The past course of dealings between the parties illustrates how the undecided term was handled in previous contracts. Previous conduct may also establish a particular meaning to, supplement and/or qualify terms of the final agreement. [UCC 1.205]

**c. Usage of Trade:** Evidence indicating a regularly accepted practice or method used in the industry or trade may be introduced. The trade practice must be such as to justify an expectation that it will be observed in this contract. [UCC 1.205]

**d. Expression of Intent Priority Ladder:** Where a contract is ambiguous the courts will look to the following in descending CPU order in trying to establish the intent of the parties: "Express terms," "course of performance," "past course of dealing," and "usage of trade."

**3. Condition Precedent:** If the parties agree elsewhere that the contract was not to become effective until a certain condition occurs, evidence of the non-occurrence of the condition may be introduced.

**4. Ambiguity Clarification:** Evidence of extrinsic negotiations may be admitted to define, interpret, or clarify an ambiguous term contained within the written integrated agreement. The term must be susceptible of more than one interpretation to qualify as "ambiguous."

**5. Subsequent Modifications:** Subsequent contract modifications and acts of the parties which arise after the written integrated agreement and change one or more of its terms may always be introduced into evidence. Under the common law, consideration is required to support a valid modification.

**Rigos Tip:** The parol evidence rule is a favorite exam issue. Three questions exist: (1) Is the final agreement "integrated"? (2) Is the contested term covered in the contract? (3) If so, is there a DUCAS exception?

#### **D. Ambiguity**

Ambiguous words or terms are usually susceptible of more than one meaning. This is a question of law for the court. A latent ambiguity is where the contract appears clear at formation, but subsequent facts show a term could be interpreted in more than one way. The most basic rule is that a term has the ordinary, usual, and popular meaning unless a contrary intent is clearly demonstrated.

**1. Construction:** Ambiguous terms are usually to be construed against the party who drafted the agreement since the creator of the confusion had the power to use more exacting language in the document. A latent ambiguity is enforced in favor of the unaware party if the other party was aware of the ambiguity.

**2. Contradictory Terms:** A contract may contain more than one statement of the same term in conflicting expressions.

**a. Narrative-Time Conflict:** Handwritten terms prevail over typed terms; typed terms prevail over the terms of a standard form printed agreement. The most recent expression of the term controls.

**b. Amount Designation Conflict:** If a number depicted in numerals conflicts with one written by words, the words designation controls. (8 v. eighty)

#### **E. Controlling Statute**

If the agreement does not address a particular item or matter, and there is a controlling statute (such as the Washington variety of the UCC, Uniform Partnership Act, Business Corporation Act, etc.), the statutory provision fills in the blanks. An example would be a contract that does not specify risk of loss in shipment. The applicable UCC rule covering risk of loss would apply.

#### **F. Conflict of Laws**

The controlling procedural or substantive rules of law may vary from state to state, or between counties, or between cities. Where parties reside in different jurisdictions with conflicting laws, a reasonably related contract designation controls. [UCC 1.105(1)]

**1. Substantial Relationship Required:** There must be a substantial relationship to the jurisdiction specified to qualify the designation.

**2. Most Significant Relationship:** Absent a valid contract designation, the courts look to the forum with the most significant relationship with the contract parties, subject, and performance. This is a balancing test.

**3. Examples:** In a sale of property, usually look to the location of the property; in a sale of goods, the place of delivery is often applied; for a personal service contract, the place of performance usually controls.

**4. Forum Selection Designation:** If the contract specifies the forum in which suit must be brought, it is usually enforceable. The parties by agreement may consent to personal jurisdiction in a court which lacks a significant relationship to the parties. A party seeking to invalidate a forum designation has the burden to establish that the designated forum is unfair or unreasonable.

### **IV. PERFORMANCE AND BREACH**

**Rigos Tip:** Performance and Breach are extensively tested on the Washington Bar. Pay particular attention to issues of Excusable Nonperformance, Nonperformance with an “accord and satisfaction,” and Breach.

There are five varieties of performance.

#### **A. Full Satisfactory Performance**

Full satisfactory performance with all conditions satisfied discharges the contracting parties. There are three types of conditions under which some defined event will trigger, limit or extinguish an absolute duty to perform. The important distinction is the condition’s timing.

**1. Condition Precedent:** A condition precedent must occur (or be excused by the court or other party) before the promisor’s duty to perform matures. The condition may be performance of one side in a unilateral contract (if you prepare my will, I will pay you \$1,000). The condition precedent is the preparation of the will. Only when the will is complete is the condition satisfied. The condition may also require approval by the other contracting party or a third party. The courts will review the denial of such approval using one of two standards.

**a. Objective Standard:** An objective (reasonable person) test is adopted if the approval involves a mechanical utility or operational fitness. An example is an architect who must certify project completion before the owner’s duty to pay the contractor matures. The question is whether a reasonable architect would have rejected the contractor’s performance considering the plans and construction circumstances.

**b. Subjective Standard:** A subjective standard is applied if performance approval involves personal taste or fancy. An example is a customer who reserves the right to be personally satisfied with the performance of an artist hired to paint a portrait. The fact that other reasonable people might be satisfied with the portrait is not binding upon the buyer-obligee, assuming no bad faith.

**c. Time of the Essence:** A slight delay in completion of performance does not usually constitute a material breach unless late performance would critically defeat the contract purpose. In comparison, an express “time is of the essence” condition agreed to in the contract will usually be enforced if damages are created because of the late performance. This becomes a major breach suspending the non-breaching party’s duty to perform.

**Rigos Tip:** Time of the essence is frequently tested on the exam. Look for an express condition in the contract.

**2. Condition Concurrent:** Conditions concurrent are promises in the contract which must be performed simultaneously by both parties or at about the same time. An example is a property seller tendering the deed under the condition that the buyer provides payment at the same time. Another example is delivery of goods in lots under the condition the buyer will pay for each lot within ten days. If the buyer does not pay on time, she has breached the concurrent condition. This allows the seller to stop ongoing contractual performance without being in breach, such as halting the next shipment. A court may also construct an equitable “constructive condition concurrent” such as the duty to cooperate in assisting the other party’s performance.

**3. Condition Subsequent:** A condition subsequent is a pre-defined uncertain future event that operates to discharge the performance duty of one or both of the parties. An example is a long-term premise lease contract containing a termination provision if the premises are used for the sale of liquor.

**Rigos Tips:** Conditions are tested on many exams. Often a condition precedent is associated with the offer or acceptance and thus affects whether the contract was formed. Less frequently, the condition is concurrent (involving both parties) or subsequent thus terminating performance. Look also for a condition waiver.

## **B. Substantial Performance**

The common law rejects the UCC’s “perfect tender” rule. Substantial performance avoids a total forfeiture. It applies where there was not technically full performance, but the defect was minor, bad faith was not present, and the substantial benefit was received.

**1. Basic Test:** The basic test is whether the breach was material or minor. The doctrine is designed to prevent a total forfeiture from minor breach. The failure to adhere to the letter of the contract must be insignificant to the overall performance.

**2. Damage Reduction:** The damages flowing from the defect are deducted from the contract price. An example is a building contractor using a different brand of pipe than that specified on the drawings or in the written specifications. The owner must show that the deficiency has less value because it is more than cosmetic.

**3. In Quasi-Contract:** Even if the breach is material, there may be an in quasi-contract recovery.

**Rigos Tip:** Substantial performance is heavily tested. On the exam, performance of services and home building contracts often fail to adhere to all the technical conditions specified in the contract.

## **C. Excusable Nonperformance – CISSU**

Excusable nonperformance discharges the contractual duty where performance has become objectively impossible or unduly burdensome, not merely more difficult or expensive. The impossibility and resulting discharge may be total or partial. This may apply in six situations, abbreviated by the acronym **CISSU**.

**1. Cooperation or Hindrance:** Cooperation which is necessary is not provided by one of the parties. Hindrance may also discharge the other party’s performance duty and create the right to sue for damages.

**2. Illegality After Formation:** Illegality will result from legislation subsequent to the formation which makes the performance of the agreement legally impossible. Supervening illegality discharges the contract.

**3. Incapacity:** The incapacity or death of a personal service contractor will excuse performance of the related personal service contract. An example is if an artist dies prior to the completion of a personal portrait, the contract is excused. This results because the artist's bargained-for unique talents are no longer available.

**4. Source of Supply Destroyed:** A designated source of supply may be destroyed through no fault of the promisor. The contract must specify the particular source of the item for this provision to excuse breach. If the source is not specified, the seller must purchase goods at market to meet her contract performance duty.

**5. Subject Matter Destroyed:** This is also called frustration of purpose or *force majeure*. The unique subject matter of the performance is destroyed through no fault of the contracting parties. If a used car is stolen after a contract to sell it is executed, the future performance is now impossible.

**6. UCC Failure of a Presupposed Condition:** Commercial impracticability may excuse the performance duty under the UCC. The UCC states that a failure of a presupposed condition is not a breach. The non-occurrence of the supervening condition must have been a reasonable basic assumption upon which the contract was made. Compliance with a government regulation or order also triggers this provision. [UCC 2.615]

**a. Examples:** Unforeseeable conditions qualifying include war, terrorist attack, fire, local crop failure, power outage, or an earthquake. A mere cost increase or increased difficulty is not usually sufficient.

**b. Part Performance:** If part performance is still possible after the occurrence, the UCC requires the seller to fairly allocate among customers who must be notified of the delay, non-delivery, or partial allocation. This allows the buyer to take the available quota or terminate the contract and purchase her requirements elsewhere. [UCC 2.615 and 616] (See chapter 1-7 on UCC Article 2 for more details of the UCC's treatment of nonperformance.)

**Rigos Tip:** CISSU excusable nonperformance is heavily tested on the Washington bar both under the common law and the UCC. Make sure neither party agreed to assume the particular risk or caused the impossibility; if so, that may override the above reasons to excuse performance. Parties discharged by impossibility may usually recover in quasi-contract for the value of the benefit conferred.

#### **D. Nonperformance – But**

Nonperformance, but parties agree to modify or end the contractual liability through one of the following:

**1. Accord and Satisfaction:** Accord and satisfaction is where the parties compromise by agreeing to modify performance from that which was specified in the original contract. The executory accord is the new substitute agreement, and the satisfaction is performance of the new agreement. The satisfaction discharges both the obligation of the accord and the original contract. If the satisfaction is not performed, the obligee may sue on either the original obligation (if the statute of limitations has not expired) or on the accord agreement.

**2. Novation:** A novation is a new contract wherein a new party is substituted in place of one of the original parties. A novation is distinguished from an assignment because a novation must include the express release of the original obligor. To be bound, the new party must affirmatively promise to assume the contract obligation.

**3. Cancellation:** Cancellation is the rescission of the entire contract by mutual agreement of the parties. This terminates all executory rights and duties and discharges the parties.

**Rigos Tip:** The parties may agree to a compromise resolution specified in the new accord. If one party later fails to pay (satisfy the executory accord), suit may be brought on the underlying contract unless it was cancelled or the statute of limitations has run. In some situations, promissory estoppel may then be asserted as a defense.

**4. Waiver:** One party voluntarily excuses or relinquishes the right to sue for breach. A waiver may result from an express promise or may be inferred from the circumstances. Non-material conditions precedent to a contract term are often waived by one party on the exam. A waiver may be retracted prior to the due date for the condition's fulfillment if the other party has not acted in detrimental reliance on the waiver.

**5. Release or Promise Not to Sue:** A mutual release terminates the contract relationship.

**a. Joint Obligor:** A release of one joint obligor releases the others from breach unless an express reservation of rights is made in the release.

**b. Mere Negative Covenant:** However, a release must be distinguished from a mere promise not to sue one joint obligor. Such a promise does not affect the liability of the other obligors. (“I release you” as opposed to “I promise not to sue you.”)

**Rigos Tip:** Know the subtleties of the above performance section especially the CISSU excusable nonperformance situations and accord and satisfaction following a breach of the original agreement. Issues involving them are on almost every other exam. A discussion can be a source of easy points for you.

### **E. Breach**

Performance which is not substantial, is not excused, and in which the parties did not agree to an accord and satisfaction, novation, cancellation, or release is breach of contract. Under the UCC, a seller’s good faith shipment of nonconforming goods as an accommodation is nonetheless breach.

**1. Performance Presently Due:** Breach can be failure to perform a duty presently due.

**2. Anticipatory Repudiation:** This expressly occurs when the D positively states that she will not render prospective performance required in the future that substantially impairs the whole of the contract. The expression of intention to breach in the future must be objectively unequivocal, unambiguous, and go beyond performance uncertainty. Similarly doing an act that demonstrates prospective inability to perform may qualify as an implied anticipatory repudiation. The non-repudiating party is entitled to not only suspend her performance, but also to cancel the contract and immediately sue for damages. The aggrieved party may also wait until the performance date to determine if the D will revoke the repudiation. [UCC 2.610]

**a. Retraction Before Position Change:** If the D retracts the repudiation before the P has materially changed position, there is no breach and the contract is fully reinstated. [UCC 2.611]

**b. UCC Assurance of Performance:** Insecurity will create the right to submit a written demand for an adequate assurance of performance and suspend performance. The repudiating party must respond in writing within 30 days. A non-response is treated as anticipatory repudiation. [UCC 2.609]

**Rigos Tip:** Anticipatory repudiation is heavily tested. Often the wording used to express repudiation is equivocal and only expresses doubt about the ability or willingness to perform in the future.

### **3. Divisibility of Contract:**

**a. Common Law:** To avoid an entire forfeiture, a court may interpret a contract as having multiple divisible portions rather than one entirety. Examples include the partial painting or siding of a house that was destroyed by fire through no fault of the worker or an employee who works for only some portion of a fixed term contract. An equivalent allocated payment is required for the performed portion.

**b. UCC Contracts:** Unless intended to the contrary, a single delivery is assumed under the UCC. If delivery is made in separate installments or lots, the price may be apportioned. The UCC will usually enforce whatever quantity was delivered, accepted, and paid for. A court may also interpret a UCC contract as divisible to avoid forfeiture of the whole. [UCC 2.307] This is similar to substantial performance for contractors.

**4. Minor (Nonmaterial) Breach:** Breach is usually material or total. This allows the non-breaching party to cancel their own future executory performance under the contract. If the breach is minor (does not affect a material benefit), the non-breaching party must continue performance and has a claim for damages.

## **V. REMEDIES – MRS DAISI**

The P must specify in her legal complaint the remedy (or remedies) she wants the court to award or order. Most of these remedies are not mutually exclusive and can be pled in the alternative. The memory ladder acronym is **MRS DAISI**.

**Rigos Tip:** Be prepared to discuss all available MRS DAISI remedies which appear feasible in your answer and then focus upon the details of most appropriate remedy in the situation.

### A. Money Damages

Money damages are the preferred remedy under the common law. They may include the following categories:

**1. Liquidated Damages:** A common law or UCC contract may contain stipulated provisions liquidating the damages from a future breach. An example is \$200 per day for late performance of a building contract where it is difficult to calculate the damages accurately.

**a. Sole Remedy:** These will generally be allowed and imposed as the sole and exclusive remedy for breach if the amount is a reasonable estimate of either the anticipated or actual harm.

**b. Penalty Interpretation:** If the court concludes that, based upon the actual damages, the liquidated damages are so large as to constitute a penalty, the liquidated provision will be disregarded. P is then limited to recovering actual damages. [UCC 2.718]

**Rigos Tip:** The key point here is that liquidated damages must bear a reasonable relationship to the anticipated damages either at the time the contract was made or in light of the actual losses incurred from the breach.

**2. Compensatory Damages:** If so large as to constitute a penalty, a liquidation damage clause may be disregarded. P is then entitled only to compensatory or expectation damages.

**a. Benefit of Bargain:** For breach of contract, the innocent party should realize the expectation of the benefit of the bargain. This measure is designed to compensate the P in an amount that would have resulted if the D had not breached the contract.

**b. Construction Contracts:** For defective performance of construction contracts the damages would be the “cost of completion” by another contractor.

**c. Interest Award:** Interest is usually recoverable on contracts involving liquidated damages since the amount is capable of being computed with exactness. An example is a collection suit on a promissory note. The theory is that the P would have had the use of the money had D not breached.

**3. Reliance Interest:** This measure of monetary damages applies where compensatory damages fail to provide the non-breaching party the benefit of the bargain or an in quasi-contract recovery will not avoid injustice. Reliance interest is a consolation to expectation damages. P is entitled to recover any out-of-pocket costs incurred in reliance on the expectation that the D would perform the contract.

**4. Punitive Damages:** Punitive or exemplary damages are intended to punish the D for reprehensible conduct and deter such behavior in the future. Punitive damages are not usually awarded in Washington for simple breach of contract. An exception exists for a fiduciary breaching a contract or where they are provided for by statute. An example of such a statute would be the Consumer Protection Act. See RCW 19.86 *et. seq.* and tort chapter.

**5. Recovery Limitations:** There are two limits of the recoverability of “general” monetary damages.

**a. Foreseeability:** At the contract formation date, D must have been able to reasonably foresee that the resulting damages would occur as a probable consequence of the breach. (Hadley v. Baxendale)

**b. Certainty:** The P must establish with certainty both the amount of the actual loss and the fact that the loss would have been avoided but for the breach. An example is a claim for lost profits made by a new business with no prior history of profitability; such damages may be too uncertain and speculative. If P can not prove actual damages with sufficient certainty, only nominal damages (\$1.00) would be awarded.

**6. UCC Remedies:** The UCC analyzes remedies in terms of which party breached the contract. Briefly, seller receives her contract price and incidental damages. The buyer may “cover” (i.e., buy replacement goods elsewhere) and recover incidental and consequential damages. In certain circumstances specific performance may be requested. (See chapter 1-7 covering UCC Article 2 for more details.)

**7. Damage Mitigation:** Under both the common law and the UCC, the non-breaching party has a duty to mitigate or minimize the losses caused by the breach. Damages, losses and related costs which could have been reasonably avoided are not recoverable. Examples include a wrongfully terminated employee or contractor who must accept comparable employment. A buyer must take reasonable steps to prevent spoilage loss of perishable goods tendered but not conforming to the contract. A landlord must attempt to rent space if the tenant surrenders the lease before the end of the term.

**8. Litigation Expenses:** Litigation expenses include court costs, attorney fees, expenses incurred in the discovery process, transcript costs, and expert witnesses’ fees. A prevailing party may recover litigation expenses from the loser only if authorized by contract, a controlling statute, or court rule.

**Rigos Tip:** While money damages are only one of the possible MRS DAISI remedies, they are the most likely on the exam and usually require a discussion in your answer.

## **B. Rescission/Reformation/Replevin/Restitution**

Equity has developed a number of possible remedies that do not involve money damages. Equitable remedies may be necessary since liquidating the damages to a monetary figure may be too speculative, may not resolve the dispute or adequately measure the detriment suffered by the P. He who seeks an equitable remedy must do equity and have clean hands.

**1. Rescission or a Complete Undoing:** Rescission is a complete undoing that places both parties in their pre-contract positions and discharges all duties. This is a frequent remedy for formation defects, mutual mistake, fraud in the inducement, and excusable nonperformance of an executory contract.

**2. Reformation or Changing the Contract:** A court may order reformation of a contract to conform to the parties’ original true intent. Reformation changes only the mistaken or offensive portion of the agreement while leaving the remainder of the contract in place. An example is the parties had orally agreed to a price of \$150, but the written price was \$510 because of a typographical error in the final contract.

**3. Replevin of Stolen Goods:** Replevin is an action brought to recover possession of goods unlawfully taken from the true owner. A replevin bond may be required to indemnify the officer who recovered the goods. The bond may also cover damages that may be suffered by the person from whose custody the goods were wrongfully taken.

**4. Restitution:** This remedy applies where D wrongfully repudiated the contract before P was allowed to complete performance; the value bestowed on the D is imposed. Restitution may also be used to compensate a victim of an economic crime. An embezzler may be ordered to make restitution to the business from which the funds were wrongfully taken.

## **C. Specific Performance**

Specific performance is a frequent buyer’s common law remedy.

**1. Performance Order:** The court can order the breaching party to complete her performance as promised in the contract. Failure to obey the order may lead to contempt of court.

**2. Remedy Availability:** Specific performance is usually only available if liquidated or compensatory (1) money damages are inadequate, or (2) the subject of the contract is a unique item, such as a

valuable painting, an antique automobile, or a specific parcel of land such as a home. The seller could be ordered to tender a marketable deed to the escrow agent at closing.

**3. Non-Availability:** Specific performance is not generally available to enforce a personal service contract such as an employment contract or legal engagement by an attorney. Courts may have difficulty in enforcing an order requiring involuntary servitude by an employee or forcing an employer to accept an unwelcome employee. There are also constitutional considerations. (See the Constitutional Law chapter.) Specific performance may not be used to enforce a promise to make payment or satisfy a judgment, or convey an asset no longer in the possession of the breaching party.

#### **D. Declaratory Judgment**

One or both parties may seek a judicial determination covering all or some provision of a contract before or after a breach has occurred. This may be a determination of the meaning of an ambiguous term or that there was a mutual mistake. Another example is a declaration that the contract lacks a required formation element such as a failure of consideration or illegality. There must be a justiciable controversy and the declaration may not prejudice the rights of persons not parties to the proceeding. [RCW 7.24 *et seq.*]

#### **E. Accounting**

The remedy of accounting applies where the court determines not only the basic liability issues, but also determines the proper judgment amount. An example is a trial resulting in an order of contribution in a partnership dissolution case or the royalties due on a patent infringement case.

#### **F. Injunctions**

Injunctions and restraining orders are court orders to stop an action, such as infringing upon a patent, trespassing, or logging land. Injunctions will not be issued to prevent breach of contract, but may be used in a personal service contract to prohibit the D from performing for anyone other than the P. If the D continues the prohibited action after an injunction has been issued, he or she can be held in contempt of court, fined, or even jailed.

**1. Temporary Restraining Order:** A temporary restraining order (TRO) is issued after the lawsuit has been filed. The purpose of the order is to provide immediate protection for person or property. In some circumstances, prior notice of the motion to the opposing party is not required.

**2. Preliminary Injunction:** A preliminary injunction is issued prior to a trial on the merits of the underlying dispute. There must be a showing of probability of eventual success and/or irreparable injury. This is usually designed to maintain the status quo until there is a proper judicial resolution of the ultimate controversy.

**3. Permanent Injunction:** A permanent injunction is issued after the court conducts a full trial on the merits. The permanent injunctive provision may become part of the final resolution ordered to conclude the underlying dispute.

#### **G. Statute of Limitations**

The statute of limitations bars actions at law unless the lawsuit is commenced within the time period specified in the contract or dictated by the controlling Washington statute. The law favors a prompt resolution of disputes.

**1. Common Law:** Under the common law, the parties may usually stipulate in the contract the length of time the cause of action remains alive. Absent an agreement the Washington state statute controls.

**2. Contract Rule:** Washington specifies the non-breaching party has six years to file a complaint on express or implied liability arising out of a written agreement and three years for an oral agreement. The time period is triggered and begins to run against the P on the date the contract is breached. [RCW 4.16.040 and 080]

#### **3. Tort Rule:**

- a. **3 Years:** Washington allows three years for most tort actions.
  - b. **2 Years:** If the tort is short-lived such as assault, battery, false imprisonment, libel or slander, Washington allows only two years to bring an action.
  - c. **Trigger Date:** This period is triggered on the date the tort was committed.
  - d. **Discovery Rule:** This tort rule may be extended to the date the P actually discovered or, in the exercise of reasonable diligence, should have discovered the tort. [RCW 4.16.080 and 100]
4. **UCC Treatment:** An action arising from the sale of goods must be commenced within four

years from the date the cause of action accrued; this is usually upon delivery. In a defective product tort action, the statute begins to run against the P on the later of the breach date or the date of discovery. [UCC 2.725]

**5. Tolerated (Suspended) Time Period:** The statute may be tolled (suspended) by D's absence from Washington state. Also tolling the outer limit of the time period is the disability of the P, such as infancy, temporary insanity, or coma. [RCW 4.16.170-230]

**6. Laches:** Traditionally, the statute of limitations does not apply to equitable actions. The time period in which to bring the claim is governed by the doctrine of laches. A party asserting laches must prove that the P unreasonably delayed commencement of the lawsuit after acquiring knowledge of all the material facts constituting a cause of action. Usually the delay unfairly prejudiced the D.

**Rigos Tip:** Dates raise this issue. The statute of limitations for a common law contract is triggered upon breach; not the discovery rule of torts. Under the UCC, the statute is triggered upon accrual even if the aggrieved party lacked knowledge of the breach at that time. Look for a delayed discovery of breach of a common law contract.

## H. In Quasi-Contract

The remedy of in quasi-contract or "in quantum meruit" seeks the fair market value of goods or services performed where there was no contract or the contract has failed at law. This is also called an implied in law contract and is distinguished from restitution where there is a valid contract that was not completed. The objective of this remedy is to do equity and promote fairness.

**1. Purpose:** The purpose is to avoid unjust enrichment where there is no enforceable contract at law. D knowingly received a benefit from P who had a reasonable expectation of compensation.

**2. Recovery Amount:** The amount of the recovery is the value of the benefit which has unjustly enriched D. As in restitution, this may be less (or even more) than the contract price.

**3. Examples:** Exam fact patterns include an agreement violating the SOF, an infant without capacity purchasing luxury goods, a doctor rendering emergency medical treatment to an unconscious patient, or an innocent P mistakenly providing a valuable service to the wrong party.

**4. Laches:** The SOL does not apply to in quasi-contract equitable actions. The time period in which to bring the equitable claim is governed by the doctrine of laches. See above discussion.

**Rigos Tip:** If for any reason your analysis concludes there is not a contract, always discuss an in quasi-contract recovery. There must be an unjustified benefit to D and D usually had knowledge that the material or service was being provided by P with an expectation of receiving payment.

## VI. **THIRD PARTY BENEFICIARIES**

The general rule is that privity of contract is necessary to provide P with standing to sue and thus enforce contractual rights. Third parties may not usually enforce such rights.

### A. General Concepts

**1. Intention to Bestow Rights:** If the contracting parties clearly intend and specify in the contract that a designated third person will receive unqualified rights or benefits from the future contract performance, such a person can directly enforce these rights against the promisor. An intended beneficiary is created at the same time as the primary contract. The promisor must have had the specific third party "in contemplation" when she made the promise. If the promissory interest is shifted to a third party after the contract formation date, it is more likely to be characterized as an assignment.

**2. Legal Rights:** An example is a debtor who agrees in the contract to pay to a third party an executory obligation due a creditor. Such intended beneficiaries have the right to sue the promisor directly. Such a suit is subject to any defense the promisor could assert had she been sued directly by the promisee. The promisor's

counterclaim against the beneficiary may offset the claim, but not result in a positive judgment. The promisor also cannot raise defenses or setoffs which the beneficiary and the promisee may have against each other.

**3. Rights “Vest”:** The original parties to the contract can modify or even rescind the benefiting promise prior to the beneficiaries’ rights “vesting.” “Vesting” of rights requires the beneficiary to know the rights have been bestowed and make some movement to indicate affirmative reliance thereupon. Once the rights have vested in the beneficiary, any modification requires the beneficiary’s consent.

#### **B. Creditor Beneficiary**

The contract specifies that the promisor satisfy a pre-existing obligation which the promisee owes to a named third party. An example is an attorney’s client who agrees to pay the promised legal fee to a specific bank to which the attorney had previously owed money. The third party (bank) may sue both/either the promisor (client) and/or the promisee (attorney).

#### **C. Donee Beneficiary**

A third party donee beneficiary receives the contract right assignment gratuitously from the promisee. An example is a favorite niece receiving a gift from her donor uncle of an amount due him from a third party. A donee beneficiary can only sue the promisor (third party who owes the money). There is a lack of consideration to support the donee suing the donor-promisee (favorite uncle who made the gift). Since the right was gratuitously bestowed, the donor has the right to revoke prior to performance.

#### **D. Incidental Beneficiary**

An incidental beneficiary is not intended by the contracting parties to receive benefits. An example is a wholesaler who will be paid by the retailer debtor after the bank makes the loan to the retailer. An incidental beneficiary has no legally enforceable rights.

**Rigos Tip:** Was there a third-party beneficiary in existence and intended to receive benefits? Modification of the beneficiary’s rights by the original parties is frequent on the bar. Did the beneficiary’s rights vest? Vesting requires that the beneficiary know the rights were bestowed and make some movement in reliance thereupon.

### **VII. ASSIGNMENT OF RIGHTS**

Assignment and delegation involve the introduction of third parties after the original contract has been created between the promisor and the promisee. The new party may receive (through assignment from the promisee) a pre-existing contractual right or agree to perform (through delegation from the obligor) a pre-existing contractual duty. Unless indicated to the contrary, an “assignment of the contract” includes both an assignment of rights and a delegation of duties. [UCC 2.210(5)]

#### **A. General Concept**

Assignment of contractual rights differs from third party beneficiaries in that there was not a pre-existing debt or gift, or if there was, the promisor was not aware of it. An example is a creditor who is owed money and assigns that payment right to her bank for collection.

**1. Time Created:** After the contract formation, the promisee assigns her rights to the assignee. The promisor must be notified of the assignment before she is legally bound to pay the assignee rather than the original promisee-assignor. The assignment extinguishes the assignor’s ability to enforce the same contractual right.

#### **2. Limitations on Assignability:**

**a. Common Law:** Assignability is the general rule. Non-assignable rights include a mere offer, the right to receive the personal services of another, or payment expected to arise under a future contract not yet in existence. Insurance coverage is not usually assignable. Rights under requirements or output contracts where the assignee will substantially vary the quantity are also not usually assignable.

**b. UCC:** Unless otherwise agreed, all rights of either the seller or buyer are assignable unless the burden or risk would materially increase. Any such assignment which delegates performance creates reasonable grounds for demanding assurances. [UCC 2.210(5)] If the assignee does not adequately respond within 30 days, the demanding party may treat the contract as repudiated. [UCC 2.609(4)]

**3. Oral Assignments:** Oral assignments are enforceable unless it affected an interest in land, goods over \$500, or wage assignments.

**4. Revocability:** An assignment with consideration is irrevocable. Consideration may be given by the assignee to the assignor or the assignee may foreseeably rely on the assignment agreement to her detriment.

**5. Effect of Notice:** If notice of assignment is not given to the promisor, she can continue to render performance to the promisee. After notice, the rights of the assignee vest. The promisor must then pay the assignee and any modification of the promise in question requires approval by the assignee.

**6. Promisor's Defenses:** The assignee of the right(s) can sue the promisor directly, but again the suit is subject to all defenses and counterclaims which the promisor could have asserted against the promisee. This promisor may also set off against the assignee any amount due her from the promisee.

**Rigos Tip:** A question may involve the promisor paying the promisee rather than the assignee. Was there notice of the assignment given to the promisor?

## **B. Holder-In-Due-Course**

Article 3 of the UCC provides an exception to an assignee qualifying as a holder in due course (HDC) of a negotiable instrument. [UCC 3.302] An HDC's rights to sue the promisor are not subject to defenses which are personal to the promisee, such as fraud in the inducement or a failure of consideration. [UCC 3.305] (See chapter 2-4 covering UCC – Commercial Paper.)

## **C. Prohibition on Assignment**

**1. Common Law:** A specific provision in the contract that prohibits the promisee from assigning her rights has traditionally been enforceable under the common law.

**a. Modern View:** Many Washington courts are reluctant to enforce a prohibition on assignment of the right to receive payment if the assignor has fully performed their obligations. Similarly, the right to sue for damages arising from breach of contract may always be assigned despite agreement otherwise.

**b. Assignee's Rights:** An innocent assignee for value without knowledge of the assignment prohibition could enforce the contractual rights assigned. This follows even though the assignment might give the obligor an action for breach against the assignor.

**2. Legal Prohibition and Future Rights:** Washington statutory restrictions prohibiting assignment include alimony and child support payments. Wage assignments are limited in amount. Rights not yet in existence such as payment from an expected contract not yet signed are likewise not assignable.

**3. UCC Treatment:** The UCC clarifies this uncertainty. The contracting parties do not have the right to prohibit an assignment of rights which are no longer executory. Examples include a right to payment of an account or transfer of a security interest in collateral. Thus a prohibition on "assignment of the contract" under the UCC is to be construed to bar only the delegation of the performance duties. [UCC 2.210(2) and 9.401]

## **D. Multiple Assignee Priority**

The priority between multiple assignees becomes important if the assignor-creditor makes more than one assignment of the same contract right.

**1. Common Law Rule:** If the assignment is irrevocable, the assignee first in time is the first in right. This prevails over any subsequent takers under the common law.

**2. UCC Treatment:** The first assignee to “perfect” prevails. Usually this means the first assignee to file the UCC financing statement. [UCC 9.322] (See chapter 2-11 covering UCC Article 9 for details.)

**3. Waiver of Defense Clause:** The buyer may agree not to assert defenses against an assignee which could have been raised against the assignor. This contract waiver is not effective in a Washington consumer contract. [RCW 63.14.150] In addition, the waiver clause may not be asserted against real defenses such as incapacity, illegality, fraud in the inducement, or duress. [UCC 9.304 ]

**Rigos Tip:** Many exam questions bring in subsequent participants operating under an assignment of rights (and/or delegation of duties). Issues may arise if the contract prohibits assignment, the promisor refuses to pay the assignee, or there were multiple assignees trying to enforce the same original contract right.

## VIII. DELEGATION OF DUTIES

### A. General Concept

The original obligor delegates the performance duty due the obligee to a third party delegatee who affirmatively promises to so perform. An example is a delegation by an obligor-manufacturer of the responsibility to make goods to another manufacturer who agrees to perform the contract. Delegated performance must be accepted by the obligee-buyer except in the three fact situations specified below.

### B. Prohibition on Delegation

Where delegation is prohibited by the contract, the duty is non-delegable under the common law. Unlike the treatment of the assignment of a contractual right, the UCC allows the contracting parties to agree to prohibit delegation of a performance duty. [UCC 2.210(1)] Acceptance of delegated performance without complaint by the obligee may constitute waiver of a delegation prohibition.

### C. Personal Skill of Obligor

If the performance duty involves the personal service or skill of the obligor, it is non-delegable unless the obligee consents. An example would be a personal service contract such as hiring an artist or attorney, many output or requirement contracts, or hiring a specialty builder to complete a custom-designed home. However, if a contractor was building standardized widgets or multiple similar tract homes, satisfactory performance might be sufficiently objectively determinable. The obligee would have to accept delegated performance.

### D. Material Risk or Burden Imposed

The third situation where delegation is prohibited is where the obligee is forced to accept a material increase in burden or risk. If the risk of non-performance can be shown to be much higher or the obligee is burdened by new conditions, the duty may be non-delegable. An example is an insurance contract.

### E. Right to Assurances

Any delegation of the performance duty may be anticipatory repudiation. [UCC 2.609] This may create reasonable grounds for insecurity and provide the obligee the right to demand assurances. [UCC 2.210(5)]

### F. Delegatee Liability to Obligee

The delegatee who accepts the delegation through an express assumption may become liable to the original obligee if performance is inadequate. The obligee (customer) is an intended third party beneficiary of the delegator-delegatee contract containing the delegatee’s assumption and new promise to perform. Thus the original obligee can pursue the new party.

### G. Delegator Liability to Obligee

The delegator also remains liable to the obligee unless a novation or release is executed by the obligee. Recall that a novation completely substitutes the delegatee for the delegator. A mere acknowledgement or consent by the obligee to accept a delegated performance does not rise to the level of an express release of the delegator.

**Rigos Tip:** Did the obligee have a substantial interest in having the original obligor-delegator perform? Many questions involve an obligee accepting a duty delegation. Often the subsequent delegatee does not perform on a satisfactory level. The delegatee becomes liable to the obligee and (absent a novation or release) the delegator remains liable.

## PRIMER SERIES REVIEW

### CHAPTER 1

#### CONTRACTS AND UCC SALES ARTICLE 2

##### LEARNING QUESTIONS

1. The most likely contract to be classified under the Uniform Commercial Code (UCC) is a contract for
  - (A) An attorney's advice on an estate plan.
  - (B) Crops and timber to be severed from the property later.
  - (C) The purchase of a commercial property building.
  - (D) The sale of an intangible asset.
2. Connie Computer decided to purchase a \$1,000 laptop computer to use during law school. When she went into Computer Retailer Inc., the salesperson also sold her a 5-year service agreement for \$1,200 for a total price of \$2,200. Nine months later, the laptop stopped working and Computer Retailer refused to perform on their service agreement. If Connie sues Computer Retailer, the trial court will likely find for
  - (A) Connie, under the common law because the predominate purpose for which the parties contracted was the sale of goods.
  - (B) Connie, under the UCC only if the predominate reason for entering into the contract was for the goods portion of the contract.
  - (C) Connie, under the UCC unless the predominate purpose of the agreement was for the service agreement portion of the contract.
  - (D) Computer Retailer, if the court determines that the predominate purpose of the agreement is determined by intent and not the relative dollars assigned to the computer and the service agreement.
3. Wendy Wholesaler sold merchandise to Roberta Retailer. A dispute has arisen between the parties and Roberta is trying to prove that Wendy is a "merchant" as opposed to a "casual party." The least important factor indicating the status of a "merchant" is that Wendy
  - (A) Is a wholesaler rather than a retailer.
  - (B) Deals in the goods sold to Roberta.
  - (C) Holds herself out as an expert in the goods sold to Roberta.
  - (D) Sells under 10 units a year to Roberta.
4. Where a client accepts the services of an attorney without an agreement concerning the amount of the fee, there is
  - (A) An implied-in-fact contract.
  - (B) An implied-in-law contract.
  - (C) An express contract.
  - (D) No contract.
5. Sarah Student was a third-year law student who had just purchased the Primer Series MBE Review program. She was studying in the law library and decided to take a short refreshment break. When she returned to her study desk ten minutes later, her Primer Series was gone. She ran into the student lounge and announced, "I will pay \$20 to anyone who identifies the dirty bum who took my Primer Series MBE Review books." Donna Doubtful saw Terry Thief pick up Sarah's Primer Series books, but did not believe Sarah would actually pay her the \$20, if she made the identification. Thus, Donna went up to Sarah and said, "I know the identity of the thief and promise to tell you, but I want the \$20 in advance." The effect of Donna's statement is to
  - (A) Create a unilateral contract.
  - (B) Create a bilateral contract.
  - (C) Create no contract.
  - (D) Create a contract which is defeasible unless Donna makes the required disclosure within a reasonable period of time.
6. There may be a substantial time period between contract formation and final completion of performance. Concerning these executory contracts, which of the following is the least correct?
  - (A) A wholly executory contract is where only promises have been exchanged and there has been no performance by either party.
  - (B) A partially executed contract means that one party has completed performance while the other party has only promised.
  - (C) An executed contract exists when both parties have fully performed and no obligations remain.
  - (D) A partially executed contract means that at least one party has begun performance.
7. Charlie Contractor entered into a contract with Nancy Non-cooperative to remodel a bathroom and kitchen in Nancy's home. The contract assigned \$10,000 to the bathroom and \$15,000 to the kitchen with the \$25,000 total due when all the remodeling was complete. Charlie completed the bathroom, but refused to begin the kitchen because Nancy did not cooperate. If Charlie sues Nancy, the likely outcome is for

- (A) Charlie in an amount of \$25,000 since he alleges that Nancy breached the contract.
- (B) Charlie in an amount of \$12,500 since he completed the bathroom construction.
- (C) Charlie in an amount of \$10,000 if the court finds the contract divisible and the \$10,000 is an equivalent amount for the completed portion of the agreement.
- (D) Nancy since Charlie will not complete the contract, he is not entitled to any compensation.

8. Jack and Jill began to negotiate for the transfer of a business. Their negotiations continued for some time. Jack is asserting that Jill made an offer and promise which he accepted with a return promise. Jill asserts that the agreement was not what she intended. In determining whether a contract has been created, the courts look primarily at

- (A) The fairness to the parties.
- (B) The objective intent of the parties.
- (C) The subjective intent of the parties.
- (D) The subjective intent of the offeror.

9. Which of the following offers for the sale of widgets is not enforceable if the seller changes his mind prior to acceptance?

- (A) A merchant tells buyer in writing she will sell the widget for \$35,000 and that the offer will be irrevocable for ten days.
- (B) A merchant writes buyer offering to sell the widget for \$35,000.
- (C) A merchant telegraphs buyer offering to sell the widget for \$35,000 and promises to hold the offer open for ten days.
- (D) A merchant writes buyer offering to sell the widget for \$35,000 and stating that the offer will be irrevocable for ten days if buyer will pay \$1.00. Buyer pays.

10. In order to have an irrevocable offer under the Uniform Commercial Code, the offer must

- (A) Be made by a merchant to a merchant.
- (B) Be contained in a signed writing which gives assurance that the offer will be held open.
- (C) State the period of time for which it is irrevocable.
- (D) Not be contained in a form supplied by the offeror.

11. James makes a written offer to Fred for the sale of land for \$100,000. In this offer, James states, "This offer will not be revocable for a ten-day period of time." The offer was signed on April 1, mailed to Fred on April 3 and received by Fred on April 5<sup>th</sup>. Which of the following is true?

- (A) Fred's unqualified acceptance on April 10 will not create a contract.
- (B) Fred's acceptance on April 5 will not create a contract if James dies on April 4.
- (C) Fred stating on April 5, "I accept your offer, but will pay only \$90,000" creates a contract.
- (D) Fred's unqualified acceptance on April 15 will not create a contract.

12. A merchant's irrevocable written offer (firm offer) to sell goods

- (A) Must be separately signed if the offeree supplies a form contract containing the offer.
- (B) Is valid for three months.
- (C) Is nonassignable.
- (D) Can not exceed a three-month duration even if consideration is given.

13. Water Works had a long-standing policy of offering employees \$100 for suggestions actually used. Due to inflation and a decline in the quantity and quality of suggestions received, Water Works decided to increase the award to \$500. Several suggestions were under consideration at that time. Two days prior to the public announcement of the increase to \$500, a suggestion by Farber was accepted and put into use. Farber is seeking to collect \$500. Farber is entitled to

- (A) \$500 because Water Works had decided to pay that amount.
- (B) \$500 because the suggestion submitted will be used during the period that Water Works indicated it would pay \$500.
- (C) \$100 in accordance with the original offer.
- (D) Nothing if Water Works chooses not to pay since the offer was gratuitous.

14. Betty Buyer wanted to buy an antique Volvo automobile owned by Sarah Seller who had previously expressed some interest in selling. Betty wrote Sarah a signed letter on April 1 stating "I will buy your Volvo for \$10,000 cash upon you bringing the vehicle to my home before April 5. This offer is not subject to countermand." On April 2 Sarah received the letter and wrote back a signed letter to Betty stating "I accept your offer and promise to deliver the Volvo to you as you request." Unfortunately, the Postal Authority delayed delivery of Sarah's letter for 10 days. In the mean time, Betty grew tired of not hearing from Sarah and purchased another car. When she learned that Betty would not complete the transfer, Sarah sued for breach of contract. The court will likely hold that

- (A) The mailing of the April 2<sup>nd</sup> letter did not prevent a subsequent effective revocation by Betty.

- (B) The April 2<sup>nd</sup> letter bound both parties to a bilateral contract when received.
- (C) The April 2<sup>nd</sup> letter bound both parties to a unilateral contract.
- (D) The April 2<sup>nd</sup> letter was effective to form a contract on April 12<sup>th</sup>, when the offeror received it.

15. Fernandez is planning to attend an auction of the assets of Cross & Black, one of his major competitors who is liquidating. In the conduct of the auction, which of the following rules applies?

- (A) Such a sale is without reserve unless the goods are explicitly put up with reserve.
- (B) A bidder may retract his bid at any time until the falling of the hammer.
- (C) The retraction of a bid by a bidder revives the previous bid.
- (D) If the auction is without reserve, the auctioneer can withdraw the article at any time prior to the fall of the hammer.

16. Base Electric Co. has entered an agreement to buy its actual requirements of copper wiring for six months from the Seymour Metal Wire Company and Seymour Metal has agreed to sell all the copper wiring Base will require for six months. The agreement between the two companies is

- (A) Unenforceable because it is too indefinite as to quantity.
- (B) Unenforceable because it lacks mutuality of obligation.
- (C) Unenforceable because of lack of consideration.
- (D) Valid and enforceable.

17. A contractor and home owner were bargaining on the price for the construction of a new home. The contractor made a number of offers for construction to the home owner including one for \$100,000. Which of the following communications would not terminate the offer so that a subsequent acceptance could be effective

- (A) The home owner asks the contractor if they would be willing to build the house for \$95,000.
- (B) The contractor contacts the home owner and states that the offer is withdrawn.
- (C) The contractor dies before the home owner accepts but the contractor's son intends to continue the business.
- (D) The home owner states "I accept your offer but the price is to be \$97,000."

18. Calvin Poultry Co. offered to sell Chickenshop 20,000 pounds of chicken at 40 cents per pound under specified delivery terms. Chickenshop accepted the offer as follows:

"We accept your offer for 20,000 pounds of chicken at 40 cents per pound per city scale weight certificate."

Which of the following is correct?

- (A) A contract was formed on Calvin's terms.
- (B) Chickenshop's reply constitutes a conditional acceptance, but not a counteroffer.
- (C) Chickenshop's reply constitutes a counteroffer and no contract was formed.
- (D) A contract was formed on Chickenshop's terms.

19. Rainmaking Lawfirm regularly purchased its office supplies from catalogs. Marty Manager saw an advertising catalog from Costco offering 10,000 envelopes for \$1,000 CIF. He immediately sent a purchase order which stated "our law firm accepts your \$1,000 offer for 10,000 envelopes for \$1,000 CIF". Costco then sent Rainmaking an order confirmation which stated "Envelope order acceptance conditional upon a loading charge of \$50 per thousand envelopes. If the parties disagree on the proper contract relationship, a court would likely rule:

- (A) A contract at \$1,000 because the offer terms CIF means cost, insurance and freight including all loading charges.
- (B) A contract at \$1,500 because the loading charges are to be included.
- (C) No contract because the order confirmation was a counteroffer which was not accepted.
- (D) No contract because the purchase order was the offer and, under the mirror image rule, can not be deviated from.

20. On October 1, Arthur mailed to Madison an offer to sell a tract of land located in Summerville for \$13,000. Acceptance was to be not later than October 10. Madison posted his acceptance on the 3rd of October. The acceptance arrived on October 7. On October 4, Arthur sold the tract in question to Larson and mailed to Madison notice of the sale. That letter arrived on the 6th of October, but after Madison had dispatched his letter of acceptance. Which of the following is correct?

- (A) There was a valid acceptance of the Arthur offer on the day Madison posted his acceptance.
- (B) Arthur's offer was effectively revoked by the sale of the tract of land to Larson on the 4th of October.
- (C) Arthur could not revoke the offer to sell the land until after October 10.
- (D) Madison's acceptance was not valid since he was deemed to have notice of revocation prior to the acceptance.

21. Berg offered to sell a parcel of land to Jones for \$75,000 cash. The offer was in writing on March 1 and made by sending an e-mail to Jones' web site. Jones responded by mailing a letter on March 10 which stated "I accept but would like to request that I can pay \$25,000 in three equal installments over the next three years." Berg received the letter on March 15. A contract was
- (A) Formed on March 10.
  - (B) Formed on March 15.
  - (C) Not formed because Jones' addition of the three year payment request was a condition that Berg had to agree should be included.
  - (D) Not formed because the addition of the three year request was, in effect, a rejection.
22. Lee Motors sold an oral option to Hall, Inc., for \$50. The option was to purchase at cost any late model used automobiles received by Lee as trade-ins on new cars for the next 100 days. Hall paid the \$50 in cash and promptly sent Lee a signed memorandum which correctly described the agreement and its terms. Lee did not respond until after 30 days had elapsed and it had discovered it had made a very bad bargain. Therefore, it notified Hall that it would no longer perform under the terms of the option, which it alleged was invalid, and it enclosed a check for \$50 to Hall's order. Which of the following is correct?
- (A) The oral option is invalid for lack of consideration.
  - (B) The Statute of Frauds can be validly asserted by Lee to avoid liability.
  - (C) Lee has entered into a valid contract with Hall.
  - (D) Options for a duration of more than three months are unenforceable.
23. Bunker's son, Michael, was seeking an account executive position with Harrison, Inc., the largest brokerage firm in the United States. Michael was very independent and wished no interference by his father. The firm, after several weeks deliberation, decided to hire Michael. They made him an offer on April 12, and Michael readily accepted. Bunker feared that his son would not be hired. Unaware of the fact that his son had been hired, Bunker mailed a letter to Harrison on April 13 in which he promised to give the brokerage firm \$50,000 in commission business if the firm would hire his son. The letter was duly received by Harrison and they wish to enforce it against Bunker. Which of the following is correct?
- (A) Harrison will prevail since the promise is contained in a signed writing.
  - (B) Harrison will not be able to enforce the contract against Bunker.
  - (C) Harrison will prevail based upon promissory estoppel.
  - (D) The preexisting legal duty rule applies and makes the employment promise unenforceable.
24. Which of the following will be legally binding despite lack of consideration?
- (A) An employer's promise to make a cash payment to a deceased employee's family in recognition of the employee's many years of service.
  - (B) A promise to donate money to a charity on which the charity relied in incurring large expenditures.
  - (C) A modification of a signed contract to purchase a parcel of land.
  - (D) A merchant's oral promise to keep an offer open for 60 days.
25. In which of the following situations would an oral agreement without any consideration be binding under the Uniform Commercial Code?
- (A) A renunciation of a claim or right arising out of an alleged breach.
  - (B) An oral firm offer by a merchant to sell or buy goods which gives assurance that it will be held open.
  - (C) An agreement which is a large requirements contract.
  - (D) An agreement which modifies an existing sales contract.
26. Egan, a minor, contracted with Baker to purchase Baker's used computer for \$400. The computer was purchased for Egan's personal use. The agreement provided that Egan would pay \$200 down on delivery and \$200 thirty days later. Egan took delivery and paid the \$200 down payment. Twenty days later, the computer was damaged seriously as a result of Egan's negligence. Five days after the damage occurred and one day after Egan reached the age of majority, Egan attempted to disaffirm the contract with Baker. Egan will
- (A) Be able to disaffirm despite the fact that Egan was **not** a minor at the time of disaffirmation.
  - (B) Be able to disaffirm only if Egan does so in writing.
  - (C) Not be able to disaffirm because Egan had failed to pay the balance of the purchase price.
  - (D) Not be able to disaffirm because the computer was damaged as a result of Egan's negligence.
27. Michelle Minor, 17-year-old mature appearing female, entered into a \$10,000 contract with Mary Motorcycle, an adult, to purchase a Hardly Demon motorcycle. Mary delivered the motorcycle to

Michelle who paid the \$10,000 and used the motorcycle for three months. The thrill wore off and Michelle returned the motorcycle to Mary and demanded the \$10,000 back in rescission. Assuming the reasonable rental value of the motorcycle was \$200 a month, Michelle will recover

- (A) \$10,000 because the contract is voidable by the infant.
- (B) \$10,000 because Mary may disaffirm the contract.
- (C) \$9,400 because the minor's recovery should be offset by the reasonable value of the benefit received.
- (D) \$9,400 because the absence of a contract means the court must apply the detriment to the party with capacity in determining damages.

**28.** Paul Principal decided to buy a sailboat. He felt that it was necessary to investigate comparable boats with different nautical options. Paul himself was leaving on a trip. Therefore he authorized Alice Agent to do the necessary research and purchase the appropriate boat. Alice conducted research and finally decided to purchase a \$5,000 Choy Lee 26 foot sloop from Splendid Sailboats Unlimited. She signed the sales contract with Splendid as "Paul Principal by his agent, Alice Agent." When Paul returned from his trip he refused to accept the sailboat or pay the \$5,000 to Splendid. Splendid sued Paul and Alice. The likely outcome of the suit is that

- (A) Splendid will prevail against Alice only if Paul refuses to accept the sailboat.
- (B) Splendid will prevail against Paul because the purchase was in writing.
- (C) Splendid will not prevail against Alice even if she guaranteed the payment of the sailboat purchase contract.
- (D) Splendid will not prevail against Alice if she misrepresented the scope of her authority to purchase the sailboat.

**29.** West, a California lawyer, misrepresented to Zimmer that West was admitted to practice law in Kansas. There is a Kansas statute that regulates attorneys and requires all attorneys to be admitted in the state and properly licensed. Zimmer signed a contract agreeing to pay West a fee for handling a personal injury matter in Kansas. West did not sign the contract. West secured a large settlement but Zimmer refused to pay West the agreed upon fee. If West sued Zimmer for nonpayment of the fee, Zimmer would be

- (A) Liable to West only for the value of services rendered.
- (B) Liable to West for the full fee.
- (C) Not liable to West for any amount because West did not sign the contract.

- (D) Not liable to West for any amount because West violated the Kansas bar admission and licensing requirements.

**30.** The Uniform Commercial Code Section 2-201 Statute of Frauds

- (A) Codified common law rules of fraud.
- (B) Requires that all formal contracts be in writing and signed by the parties to the contract.
- (C) Does not apply if the parties waive its application in the contract.
- (D) Sometimes results in a contract being enforceable by only one party.

**31.** Duval Manufacturing Industries, Inc., orally engaged Harris as one of its district sales managers for an 18-month period commencing April 1. Harris commenced work on that date and performed his duties in a highly competent manner for several months. On October 1, the company gave Harris a notice of termination as of November 1, citing a downturn in the market for its products. Harris sues seeking either specific performance or damages for breach of contract. Duval pleads the Statute of Frauds and/or a justified dismissal due to the economic situation. What is the probable outcome of the lawsuit?

- (A) Harris will prevail because he has partially performed under the terms of the contract.
- (B) Harris will lose because his termination was caused by unforeseeable economic factors beyond Duval's control.
- (C) Harris will lose because such a contract must be in writing and signed by a proper agent of Duval.
- (D) Harris will prevail because the Statute of Frauds does not apply to contracts such as his.

**32.** Doral, Inc., wished to obtain an adequate supply of lumber for its factory extension which was to be constructed in the spring. It contacted Ace Lumber Company and obtained a 75-day written option (firm offer) to buy its estimated needs for the building. Doral supplied a form contract which included the option. The price of lumber has risen drastically and Ace wishes to avoid its obligation. Which of the following is Ace's (seller's) best defense against Doral's assertion that Ace is legally bound by the option?

- (A) Such an option is invalid if its duration is for more than two months.
- (B) The option is not supported by any consideration on Doral's part.
- (C) Doral is not a merchant.

- (D) The promise of irrevocability was contained in a form supplied by Doral and was not separately signed by Ace.

33. Ace and Baker both signed a memorandum which stated that Ace agreed to sell and Baker agreed to purchase a tract of land. The contract specified that the transaction should be closed and conveyance made and accepted “by tender of general warranty deed conveying a good and marketable title” on a date specified. The memorandum signed by the parties contains all of the elements deemed essential and necessary to satisfy the Statute of Frauds applicable to the transaction, except there was omission of a recitation of the purchase price agreed upon. Ace has refused to perform the contract, and in an action by Baker for specific performance, Ace relies upon the Statute of Frauds as a defense. If Baker offers evidence, in addition to the written memorandum, that the parties discussed and agreed upon a purchase price of \$35,000 just prior to signing, Baker should

- (A) Succeed, because the law implies that the parties contracted for the reasonable market value of the land, although the price to be paid may not necessarily be that orally agreed upon.
- (B) Fail, because the evidence does not show that the price agreed upon is in fact the reasonable market value of the land.
- (C) Succeed, because Ace is estopped from denying that such agreed price is a fair and equitable one, which will be implied by law as a term of the written memorandum.
- (D) Fail, because the price agreed upon is an essential element of the contract and must be in writing.

34. Deborah Debtor took out a loan at Friendly Finance to start a small retail specialty shop. She had no credit history so her friend Samuel Surety offered to guarantee the repayment in the event Deborah defaulted. Unfortunately, Deborah’s new shop was unable to generate the volume of revenue she had hoped it would. The shop’s working capital position grew progressively worse and Deborah was pressed by the more aggressive creditors. She finally found it necessary to seek relief from her creditors by filing a bankruptcy petition. If Friendly Finance brings suit against Samuel on his guarantee, Samuel’s worst defense is that:

- (A) He did not receive any consideration for his promise that he made to Deborah.
- (B) An agreement he entered into with Deborah contained a right of indemnification/reimbursement so the responsibility remains with Deborah.
- (C) The loan was never made to Deborah.
- (D) His undertaking was only oral.

35. Smith, an executive of Apex Corporation, became emotionally involved with Jones. At the urging of Jones, and fearing that Jones would sever their relationship, Smith reluctantly signed a contract which was grossly unfair to Apex. Apex’s best basis to rescind the contract would be

- (A) Lack of express authority.
- (B) Duress.
- (C) Undue influence.
- (D) Lack of consideration.

36. Sarah Sailor owned two sailboats, a 32 foot and a 37 foot. Bill Buyer has seen the 37 foot sailboat but not the smaller sailboat. Sarah offered in writing to sell “my sailboat” to Bill for \$15,000 cash. Bill accepted and paid Sarah the \$15,000 cash. The next day, Sarah delivered the sailboat to Bill who rejected the tender since it was not the sailboat he thought he was buying. Sarah refused to return Bill’s \$15,000 payment and insisted Bill take the smaller sailboat. Bill’s best argument to seek relief is that

- (A) Express fraud by Sarah.
- (B) A latent ambiguity was known by Sarah but not by Bill.
- (C) There was a mutual mistake.
- (D) Bill’s subjective intent should control requiring reformation of the contract subject.

37. A unsophisticated elderly patient in a hospital needed insulin immediately to treat her diabetes. The hospital forced her to sign a contract relinquishing any right to sue for physical injuries that might develop from the medicine and the price was three times as high as the price available in public drug stores. The insulin was defective causing her death. If her personal representative sues the hospital and it defends on the basis of the insulin contract relinquishment, the likely result is

- (A) The court (judge) would likely hold the contract relinquishment unconscionable.
- (B) The jury would likely hold the contract relinquishment unconscionable.
- (C) Dismissal because the estate can only prove procedural unconscionability not substantive unconscionability.
- (D) Dismissal because the estate can only prove substantive unconscionability not procedural unconscionability.

**Questions 38 and 39 are based on the following:**

Forward Fred was an associate in a prominent law firm who had just been promoted to partner. Along with a large salary increase, the senior partner told Fred that it was time he began to do some “rainmaking” for the firm. Fred considered moving to

a bigger home in a better area in order to meet business owners.

Fred wrote a firm's client named Charlie Client a letter stating he had sold his house and offering to sell him "all his household stuff for \$50,000 that had cost over \$100,000 and was now worth over \$200,000. This is the parties final agreement". Client believed this included the two antique automobiles stored in the basement, which Fred had previously referred to as "part of our household stuff". Client also believed the cost and current market valuations Fred stated, because Client had been a firm customer for many years and respected all the attorneys he had met from the firm.

Client mailed a letter to Fred that stated "I accept, can I pay \$5,000 a month for 10 months?" Later Client learned that the household furnishings cost Fred only \$40,000 and they were worth much less than that figure on the date Fred made the offer. Fred is also refusing to include the two antique automobiles in the sale. Fred is insistent that Client comply with his agreement and has threatened to file a lawsuit.

38. Client's worst defense to Fred's suit would be:
- (A) Fred was a fiduciary and should be held to a very high standard of disclosures when dealing with a firm's client.
  - (B) There was no contract because "household stuff" is a latent ambiguity precluding a true meeting of the minds.
  - (C) Fred committed a fraud in the inducement.
  - (D) Fred never agreed or disagreed with the terms of paying over 10 months at \$5,000 per month so there is no contract.
39. Assume for this question only that a contract exists between Fred and Client. Will Client be able to introduce evidence (assuming it is relevant) that Fred previously referred to the two antique automobiles as "part of our household stuff"?
- (A) Yes, because fraud in the inducement is an exception to the parol evidence rule.
  - (B) Yes, because there is an ambiguity in the contract term.
  - (C) Yes, because the offered evidence only contradicts a recital of facts and not an essential contract term.
  - (D) No, because the contract stated it was "the parties final agreement" which imposes the parol evidence rule of exclusion on prior inconsistent statements.

40. Elrod is attempting to introduce oral evidence in court to explain or modify the written contract he made with Weaver. Weaver has pleaded the parol evidence rule. In which of the following

circumstances will Elrod not be able to introduce the oral evidence?

- (A) The modification asserted was made several days after the written contract had been executed.
- (B) The contract indicates that it was intended as the "entire contract" between the parties, and the point is covered in detail.
- (C) There was a mutual mistake of fact by the parties regarding the subject matter of the contract.
- (D) The contract contains an ambiguity on the point at issue.

41. West sent a letter to Baker on October 18 offering to sell a tract of land for \$70,000. The offer stated that it would expire on November 1. Baker sent a letter on October 25, indicating the price was too high but that he would be willing to pay \$62,500. On the morning of October 26, upon learning that a comparable property had sold for \$72,500, Baker telegraphed West and made an unconditional acceptance of the offer at \$70,000. West indicated that the price was now \$73,000. Baker's letter offering \$62,500 arrived the afternoon of the October 26. Under the circumstances,

- (A) West's letter was a firm offer as defined under the Uniform Commercial Code.
- (B) Baker validly accepted on the morning of October 26.
- (C) There is no contract since Baker's acceptance was not in a signed writing.
- (D) The parol evidence rule will preclude Baker from contradicting his written statements with oral testimony containing terms contrary to his letter of October 25.

42. Rowe Corp. purchased goods from Stair Co. that were shipped C.O.D. Under the Sales Article of the UCC, which of the following rights does Rowe have?

- (A) The right to inspect the goods before paying.
- (B) The right to possession of the goods before paying.
- (C) The right to reject nonconforming goods.
- (D) The right to delay payment for a reasonable period of time.

**Questions 43 and 44 are based on the following:**

Mighty Manufacturing orders two large production line machines for use in their assembly line from Mega Equipment. The machines were received in a large crate at Might's receiving dock with no visible defect apparent on the outside of the crate. The receiving clerk signed an "Acceptance of Delivery" form. Mighty paid Mega the full price 30 days after delivery.

**43.** One machine was moved to the assembly line area. It took five weeks for Mighty to reconfigure the assembly line so the new equipment would perform. As soon as the new equipment was installed, it was clear there were serious defects in the new equipment. Mighty notified Mega of the defect and requested Mega pick up the equipment. The night before Mega was to pick up the equipment, a fire destroyed the Mighty Manufacturing assembly line area. If Mighty's insurance is insufficient to cover the machine loss, the balance of the loss should be borne by

- (A) Mighty, because the machine was on their premises.
- (B) Mega, because the machine was defective.
- (C) Mega, if it was reasonable for Mighty to have waited five weeks before notifying Mega of the defect.
- (D) Mighty, because payment for the goods usually constitutes acceptance.

**44.** The second piece of equipment was likewise left in its crate in Mighty's receiving area when the fire destroyed the adjoining building containing the manufacturing line. Mighty decided it did not want the second machine. It thus shipped it back to Mega and prepaid all freight and demanded its cash back. Upon receipt, Mega had the machine inspected by a neutral industrial engineer, who determined the machine perfectly conformed to the contract specifications. Mega notified Mighty the machine was perfect and that they were holding them to their contract. One week later an unexpected earthquake occurred destroying the warehouse where Mega was storing the machine. If Mega's insurance is insufficient to cover the machine loss, the balance of the loss should be borne by

- (A) Mega because the machine was on their premises.
- (B) Mighty because they repudiated or revoked their acceptance.
- (C) Mighty because they paid for the machines and this constitutes acceptance.
- (D) Mega because they produced the machine in question.

**45.** Which of the following factors result(s) in an express warranty with respect to a sale of goods?

- I. The seller's description of the goods as part of the basis of the bargain.
  - II. The seller selects goods knowing the buyer's intended use.
- (A) I only.
  - (B) II only.
  - (C) Both I and II.
  - (D) Neither I nor II.

**46.** The Uniform Commercial Code implies a warranty of merchantability to protect buyers of goods. To be subject to this warranty the goods need not be

- (A) Fit for all of the purposes for which the buyer intends to use the goods.
- (B) Adequately packaged and labeled.
- (C) Sold by a merchant.
- (D) In conformity with any promises or affirmations of fact made on the container or label.

**47.** Which of the following conditions must be met for an implied warranty of fitness for a particular purpose to arise in connection with a sale of goods?

- I. The warranty must be in writing.
- II. the seller must know that the buyer was relying on the seller in selecting the goods.

- (A) I only.
- (B) II only.
- (C) Both I and II.
- (D) Neither I nor II.

**48.** The Uniform Commercial Code provides for a warranty against infringement. Its primary purpose is to protect the buyer of goods from infringement of the rights of third parties. This warranty

- (A) Only applies if the sale is between merchants.
- (B) Must be expressly stated in the contract or the Statute of Frauds will prevent its enforceability.
- (C) Does not apply to the seller if the buyer furnishes specifications which result in an infringement.
- (D) Can not be disclaimed.

**49.** In general, disclaimers of implied warranty protection are

- (A) Permitted if they are explicit and understandable and the buyer is aware of their existence.
- (B) Not binding on remote purchasers with notice thereof.
- (C) Void because they are against public policy.
- (D) Invalid unless in writing and signed by the buyer.

**50.** Under the UCC Sales Article, an action for breach of the implied warranty of merchantability by a party who sustains personal injuries may be successful against the seller of the product only when

- (A) The seller is a merchant of the product involved.
- (B) An action based on negligence can also be successfully maintained.

- (C) The injured party is in privity of contract with the seller.
- (D) An action based on strict liability in tort can also be successfully maintained.

**51.** Murphy contracted with a builder to construct a new home and specified in the contract that an architect must approve the house before payment was due the builder. Murphy's wife engaged a well-known local artist to render an oil painting of the family. The builder substantially completed the house but could not agree with the architect as to certain remaining items. Murphy's wife rejected the painting because she felt it was not done well and did not depict the family in the proper manner. The builder and the painter filed individual lawsuits against Murphy and his wife. The lawsuits alleged both the architect and Murphy's wife improperly refused to accept performance. Under the circumstances

- (A) Murphy will lose both lawsuits if the plaintiffs can prove that a reasonable architect would have accepted the home, and the painting was a reasonable likeness of the family that would be accepted by most people.
- (B) The builder will prevail if it can show a reasonable architect would have accepted the builder's performance.
- (C) The artist will prevail if he can demonstrate in court that ten out of ten witnesses who are also associates of the family would have accepted the painting as reasonably similar to their mental image of the family.
- (D) The court will adopt an objective standard to determine whether the architect's and Murphy's wife's refusal was reasonable.

**52.** Wilcox mailed Norris an unsigned contract for the purchase of a tract of real property. The contract represented the oral understanding of the parties as to the purchase price, closing date, type of deed, and other details. It called for payment in full in cash or certified check at the closing. Norris signed the contract, but added above his signature the following:

This contract is subject to my (Norris) being able to obtain conventional mortgage financing of \$100,000 at 9% or less interest for a period of not less than 25 years.

Which of the following is correct?

- (A) The parties had already made an enforceable contract prior to Wilcox's mailing of the formalized contract.
- (B) Norris would not be liable on the contract under the circumstances even if he had not

added the "conventional mortgage" language since Wilcox had not signed it.

- (C) By adding the "conventional mortgage" language above his signature, Norris created a condition precedent to his contractual obligation and made a counteroffer.
- (D) The addition of the "conventional mortgage" language has no legal effect upon the contractual relationship of the parties since it was an implied condition in any event.

**53.** Kent Construction Company contracted to construct four small dwellings for Magnum, Inc., according to specifications provided by Magnum. To save money, Kent deliberately substituted 2 x 4s for the more expensive 2 x 6s called for as structural supports in the plans in all places where the 2 x 4s would not be readily detected. Magnum's inspection revealed the contract variance and Magnum is now withholding the final payment on the contract. The contract was for \$100,000, and the final payment would be \$25,000. Damages were estimated to be \$15,000. In a lawsuit for the balance due, Kent will

- (A) Prevail on the contract, less damages of \$15,000, because it has substantially performed.
- (B) Prevail because the damages in question were not substantial in relation to the contract amount.
- (C) Lose because the law unqualifiedly requires literal performance of such contracts.
- (D) Lose all rights under the contract because it has intentionally breached it.

**54.** Acme Manufacturing Co.'s warehouse experienced a severe earthquake. This destroyed some of the goods in production which had been contracted for Baker, Inc. Baker, Inc.

- (A) Can sue for damages because Acme breached the contract.
- (B) Is entitled to notice from Acme if part performance is still possible.
- (C) Does not have the option to accept a partial shipment of the goods.
- (D) Must accept a partial shipment of the goods.

**55.** Stand Glue Corp. offered to sell Macal, Inc., all of the glue it would need in the manufacture of its furniture for one year at the rate of \$25 per barrel, F.O.B. seller's city. Macal accepted Stand's offer. Four months later, due to inflation, Stand wrote to Macal advising Macal that Stand could no longer supply the glue at \$25 per barrel, but offering to fulfill the contract at \$28 per barrel instead. Macal, in need of the glue, sent Stand a letter agreeing to pay the price increase. Macal is

- (A) Legally obligated to pay only \$25 per barrel under the contract with Stand.
- (B) Legally obligated to pay \$28 per barrel under the contract with Stand.
- (C) Not legally obligated to purchase any glue. Stand has breached the contract.
- (D) Legally obligated to pay \$28 per barrel due to the fact inflation represents an unforeseen hardship.

**56.** Charlie Crawford owns Crawford's Vineyards. He entered into firm sales agreements to sell 200 tons of Sirhan wine grapes to Hogue Winery on January 15 and 100 tons to St. Michelle Winery on February 15. The contract specified that all the grapes were to come from Crawford's vineyard. A very unusual mid-summer rain and thunderstorm occurred. There was lightning generated in the storm and it started a summer field fire in the vineyard where Crawford grew the Sirhan wine grapes. The fire destroyed all but 30 tons of Crawford's Sirhan wine grapes.

Crawford then contacted Hogue and St. Michelle and offered to replace the Sirhan grapes with Merlot grapes at a reduced price. He also offered to deliver to Hogue 20 tons and to St. Michelle 10 tons of the Sirhan grapes. Hogue demanded all the 30 tons because he purchased first. Crawford gave him the 20-ton allocation and Hogue purchased his other 180 tons from another grower at a price that was \$24,000 higher than the price he had negotiated with Crawford. If Hogue brings suit against Crawford, Crawford's worst defense is:

- (A) The cause of the shortage was beyond his control.
- (B) His pro-rata allocation between Hogue and St. Michelle was reasonable.
- (C) He should not be held liable because he offered a substitute grape at no extra price.
- (D) Neither he nor Hogue foresaw that a summer fire would occur in the grape fields.

**57.** Dick Debtor owed Carol Creditor \$15,000 which was the disputed amount of a construction job balance. After negotiations between the parties' attorneys, the parties agreed to settle the dispute for \$10,000. Debtor was to pay Creditor the \$10,000 amount within one year. Six months later Dick changed attorneys and the new attorney felt that Debtor had no fault in the underlying dispute so should pay nothing. Dick made it very clear to Carol that he was not going to pay the \$10,000 in six months when it was due. Carol has come to you seeking advice. Your opinion should include that Carol

- (A) Must write the receivable off in total.
- (B) May not litigate for the underlying \$15,000 dispute since she is limited to the \$10,000 compromise.

- (C) May sue for the \$10,000 compromise or the original \$15,000 if the statute of limitation is still open on the underlying claim.
- (D) Must wait for six months to see if Dick changes his mind and pays the \$10,000.

**58.** Alpha and Beta entered into a written agreement to sell and purchase real property. After they had signed the agreement but before closing, they got into an argument. Alpha decided the price was too low, Beta decided the price was too high, and they both decided to cancel the contract. Later Beta changed his mind and decided he would pay what Alpha wanted for the property. He contacted Alpha who refused to sell to him at any price. If Beta brings suit against Alpha for specific performance, Alpha's best defense is that

- (A) Beta did not give consideration for the original agreement.
- (B) Beta did not retract his waiver before any detrimental reliance by Alpha.
- (C) The contract was not subject to a novation agreement.
- (D) The contract had been discharged through rescission.

**59.** Under the Sales Article 2 of the UCC, which of the following rights is (are) available to the buyer when a seller commits an anticipatory breach of contract?

	Demand assurance of <u>performance</u>	Cancel the <u>contract</u>	Collect punitive <u>damages</u>
(A)	Yes	Yes	Yes
(B)	Yes	Yes	No
(C)	Yes	No	Yes
(D)	No	Yes	Yes

**60.** Under the Sales Article of the UCC, which of the following events will release the buyer from all its obligations under a sales contract?

- (A) Destruction of the goods after risk of loss passed to the buyer.
- (B) Impracticability of delivery under the terms of the contract.
- (C) Anticipatory repudiation by the buyer that is retracted before the seller cancels the contract.
- (D) Refusal of the seller to give written assurance of performance when reasonably demanded by the buyer.

**61.** The Balboa Custom Furniture Company sells fine custom furniture. It has been encountering difficulties lately with some customers who have breached their contracts after the furniture they have selected has been customized to their order or the fabric they have selected has been cut or actually

installed on the piece of furniture purchased. The company therefore wishes to resort to a liquidated damages clause in its sales contract to encourage performance or provide an acceptable amount of damages. Regarding Balboa's contemplated resort to a liquidated damages clause, which of the following is correct?

- (A) Balboa may not use a liquidated damages clause since it is a merchant and is the preparer of the contract.
- (B) Balboa can simply take a very large deposit which will be forfeited if performance by a customer is not made for any reason.
- (C) The amount of the liquidated damages stipulated in the contract must be reasonable in light of the anticipated or actual harm caused by the breach.
- (D) Even if Balboa uses a liquidated damages clause in its sales contract, it will nevertheless have to establish that the liquidated damages claimed did not exceed actual damages by more than 10%.

**62.** Harry Homeowner decided to purchase an underground watering system for his lawn and garden. In December he signed a \$5,000 contract with Wendy Waterhouse to put in the underground watering system and the price included all labor and materials. The project was to begin three months hence on March 1 and Wendy scheduled the work. On February 1, Harry decided to do the work himself and called Wendy telling her that the contract was off. Wendy told Harry that she intended to hold him to the agreement. She then began to buy the plastic piping, nozzle heads and faucets necessary to complete the job. On March 1, Wendy showed up at Harry's house to begin the work, but Harry refused to allow her access to the property. Wendy spent \$1,000 on the plastic piping and \$500 on the nozzle heads and faucets. She expected to realize a profit of \$2,500 on the job. If Wendy brings suit against Harry for breach of contract, she will likely recover:

- (A) \$5,000 because this is the agreed upon price of the contract that Harry intentionally breached.
- (B) \$2,500 in expectation damages.
- (C) \$1,500 in restitution damages.
- (D) \$3,500 consisting of \$2,500 in expectation damages and \$1,500 in restitution damages.

**63.** Brown ordered 100 cases of Delicious Brand peas at list price from Smith Wholesaler. Immediately upon receipt of Brown's order, Smith sent Brown an acceptance which was received by Brown. The acceptance indicated that shipment would be made within ten days. On the tenth day Smith discovered that all of its supply of Delicious Brand peas had been sold. Instead it shipped 100 cases of Lovely Brand

peas, stating clearly on the invoice that the shipment was sent only as an accommodation. Which of the following is correct?

- (A) Smith's shipment of Lovely Brand peas is a counteroffer, thus no contract exists between Brown and Smith.
- (B) Smith's note of accommodation cancels the contract between Smith and Brown.
- (C) Brown's order is a unilateral offer, and can only be accepted by Smith's shipment of the goods ordered.
- (D) Smith's shipment of Lovely Brand peas constitutes a breach of contract.

**64.** Brown & Company entered into a written agreement to sell 2,500 widgets to a large distributor in Seattle. When the date for performance arrived, Brown called the buyer and stated it could not deliver as per the agreement. The buyer could not find substitute goods and therefore lost a large contract with an airplane manufacturing company. The buyer could recover

- (A) The reasonable value of the time spent working on the Brown purchase and all attorney fees.
- (B) All incidental damages which developed because of the seller's breach.
- (C) Consequential damages only if the agreement specified that in the event of breach both parties are allowed to collect lost profits.
- (D) All incidental and consequential damages which flow from Brown's breach.

**65.** Pretty Production Co. entered into a contract to sell an antique oriental carpet to Bountiful Buyer for \$20,000. One month before the designated delivery date, Pretty contacted Bountiful and told them they needed to charge an extra \$5,000 or Bountiful "should look elsewhere for a carpet." Bountiful has found two similarly colored oriental carpets that were approximately the same size; one cost \$15,000 but was of lower quality, and the other \$40,000 although it was of a much higher quality than the one they expected to purchase from Pretty. Which of the following statements is true about Bountiful's remedies?

- (A) They must wait for the one month to see if Pretty changes their mind and will deliver the original carpet.
- (B) They may cover their requirements by buying the \$40,000 carpet.
- (C) They must cover their requirement by buying the \$15,000 carpet.
- (D) They may be allowed an order of specific performance.

**66.** Darrow ordered 100 sets of custom-made bookends from Benson Manufacturing Inc. Darrow made substantial prepayments of the purchase price. Benson is insolvent and the goods have not been delivered as promised. Darrow wants the bookends. Under the circumstances, which of the following will prevent Darrow from obtaining the bookends through specific performance?

- (A) The fact that he did not pay the full price at the time of the purchase even though he has made a tender of the balance and holds it available to Benson upon delivery.
- (B) The fact that he can obtain a judgment for damages.
- (C) The fact that he was not aware of Benson's insolvency at the time he purchased the bookends.
- (D) The fact that the goods have not been identified to his contract.

**67.** Ace & Co. entered into a written contract to purchase 35 computer manuals from Lamb & Co. Ace was located in Seattle and Lamb in Boston, but the manuals were to be shipped from New York. Lamb hid the defective books in the bottom of the boxes. Upon receipt of the manuals, Ace only inspected the top manual and signed an acknowledgment of delivery. Nine days later it discovered that all the other books had been misprinted. Ace bought 35 manuals from another source to fulfill their contract with their buyer. Under the circumstances, Ace is not entitled to the following remedy

- (A) To revoke the acceptance because of the discovery of material defects subsequent to acceptance.
- (B) Specific performance because Ace has effectively covered.
- (C) The difference between the contract price and the cover price together with incidental and consequential damages flowing from the breach.
- (D) Profit on the sale it would have made to its customer had its purchase from Lamb been as per the contract.

**68.** Marvin contracted to purchase goods from Ling. Subsequently, Marvin breached the contract and Ling is seeking to recover the contract price. Ling can recover the price if

- (A) Ling does not seek to recover any damages in addition to the price.
- (B) The goods have been destroyed and Ling's insurance coverage is inadequate, regardless of risk of loss.
- (C) Ling has identified the goods to the contract and the circumstances indicate that a reasonable effort to resell the goods at a reasonable price would be to no avail.

(D) Marvin anticipatorily repudiated the contract and specific performance is not available.

**69.** Generous George was the owner of a glass sculpture shop. He was in an automobile accident and Helpful Harry assisted him by pulling him out of the flaming automobile. Helpful accompanied George to the hospital and a discussion developed there about one of his glass sculptures named Emeritus. Harry had always admired the Emeritus which he knew to be worth over \$5,000. He told George "I love the Emeritus but can not afford it because I only have \$500". George said he would sell to Harry at that price; Harry gave him his check for \$500. Unbeknown to either George or Harry, the Emeritus had been sold by one of Generous' salesmen earlier that afternoon to Betty, a bona fide purchaser for value. If Harry requests specific performance of the Emeritus from George, the likely outcome is:

- (A) Denied because George's promise was 90% a gift which can be revoked at will.
- (B) Denied because specific performance against George is no longer possible.
- (C) Ordered because the accident assistance is additional consideration.
- (D) Ordered because there was a bargained-for-exchange of promises even if the consideration was unequal.

**70.** Wally Waterworks contracted with Harriet Homeowner to install an underground watering system at her new home. Subsequently Wally found that he had booked too many orders after Harriet's. Wally was therefore unable to complete some of the jobs he had contracted for including Harriet's. Harriet was furious because some of the new trees and plants she had planted died without the water. She investigated and learned that while Wally was refusing to do her watering system, he was doing one for Nancy Next. If Harriet files suit against Wally

- I. She will be able to collect punitive damages.
  - II. She will not be able to collect punitive damages.
  - III. She will be able to obtain an injunction prohibiting Wally from working on Nancy's watering system.
  - IV. She will not be able to obtain an injunction prohibiting Wally from working on Nancy's watering system.
- (A) I and III are correct.
  - (B) I and IV are correct.
  - (C) II and III are correct
  - (D) II and IV are correct.

**71.** Carol Consumer hired Albert Attorney to prepare a will for her. Under state law only admitted attorneys are allowed to prepare wills. Albert did not tell Carol that he had failed the bar examination and

had not been admitted to the local State Bar Association. The completed will was accepted and paid for by Carol. Carol passed away eight years later and her personal representative discovered that the will did not contain a disclaimer provision which would have allowed her heirs to avoid a large part of the federal estate tax. If Carol's personal representative brings a civil professional malpractice suit against Albert, the best defense he can assert is:

- (A) Carol never paid him for preparing the will.
- (B) Carol knew and appreciated that a disclaimer clause was not included.
- (C) The contract was illegal since it violated the state law requiring the drafter to be admitted to the local bar association to practice law.
- (D) The suit is not timely because the malpractice statute of limitations in the state was three years and it has run.

**72.** Wilson sold his factory to Glenn. As part of the contract, Glenn assumed the existing mortgage on the property which was held by Security Bank. Regarding the rights and duties of the parties, which of the following is correct?

- (A) The promise by Glenn need not be in writing to be enforceable by Security.
- (B) Security is a creditor beneficiary of Glenn's promise and can recover against him personally in the event of default.
- (C) Security is a mere incidental beneficiary since it was not a party to the assignment.
- (D) Wilson has no further liability to Security.

**Questions 73 – 75 are based on the following:**

Gloria Gardener completed a spring gardening contract with Harriet Homeowner which included pruning all the fruit trees in her backyard. The contract was for \$500, payable ten days after completion, and stated "no rights herein can be assigned." Gloria had an expectation that Harriet would hire her to do the summer lawn mowing, edging, and gardening functions for \$1,000. Gloria also sold some lawn furniture to Harriet for \$2,000 which was to be paid in one month. This lawn equipment contract also specified "no right herein can be assigned."

**73.** Gloria became short on cash and approached Friendly Finance for a loan. Friendly insisted that Gloria assign the three contractual rights to Friendly in return for advancing her a loan of \$3,000. Friendly was to collect the full \$3,500 from Harriet with the \$500 to cover interest, collections costs, and an assignment fee. Gloria did not tell Friendly that the contracts prohibited the assignment of rights. If Harriet refuses to pay Friendly and Friendly brings suit, Harriet will likely have to pay Friendly

- (A) -0- because all the contracts stated no rights could be assigned.
- (B) \$500 representing the amount due on the spring gardening contract.
- (C) \$2,500 for the spring gardening contract and the contract for the lawn equipment.
- (D) \$3,500 representing the full face amount on all three contracts.

**74.** The legal effect of the contract promise not to assign the \$2,000 from the sale of the lawn equipment is

- (A) Enforceable because the agreement so states.
- (B) Not enforceable because it appears to be against public interest.
- (C) Not enforceable because the lawn equipment was transferred from Gloria to Harriet.
- (D) Enforceable because Friendly was a third party beneficiary of the Gloria and Harriet contract.

**75.** The legal effect of the prohibition against assignment of the expected \$1,000 summer lawn mowing, edging, and gardening contract payment was

- (A) Not enforceable because it is a future contract.
- (B) Enforceable by Friendly
- (C) Enforceable by Friendly but Harriet has a breach of contract claim against Gloria.
- (D) Not enforceable only if Friendly knew of the assignment prohibition.

**76.** A common law duty is delegable even though the

- (A) Contract provides that the duty is nondelegable.
- (B) Duty delegated is the payment of money and the delegatee is not of as equal credit worthiness as the delegator.
- (C) Delegation will result in a material variance in performance by the delegatee.
- (D) Duty to be performed involves the personal skill of the obligor.

## CHAPTER 1

### CONTRACTS

#### Washington Bar Essay Questions

WSB 7/02-5

In May 2002, Wendy, age 20, and Harry, age 17, legally married and purchased a summer cottage in Spangle, Washington.

On June 1, 2002, Wendy's boss told her he would recommend a raise in July 2002 based on her excellent performance. To celebrate, Wendy purchased unfinished kitchen cabinets and asked Chuck to install them. Chuck quoted a price of \$1,000. Wendy agreed.

Wendy had also purchased some vinyl flooring. Chuck said, "I can install the floor for \$900." Wendy replied, "If I get the raise I'm expecting, you can install the floor." On June 3, Wendy and Chuck signed a contract "to install new cabinets, \$1,000; install floor, \$900." Wendy then said, "I can't wait for everyone to see my new kitchen at my annual Fourth of July party.

As Chuck was leaving, Harry asked him if he would also paint the cabinets at no extra charge. Chuck agreed, later signing with Harry a contract stating, "For good consideration received, I will paint the cabinets."

Wendy's neighbor Dave, said, "You'll want your kitchen walls painted before the cabinets are installed. I'll do it for \$200." Wendy said, "Sounds good."

Dave painted the kitchen on June 15, but Chuck still had not done any work by July 3, so Wendy cancelled the Fourth of July party.

On July 10, Chuck completed the installation of the cabinets and floor. On July 15, Wendy's boss informed her she would not be receiving a raise due to a downturn in business.

When Dave asked for payment of \$200 for labor and \$100 for supplies, Wendy refused, claiming there was no written agreement. Wendy declined to pay Chuck for the cabinets, because "he took too long." She also refused to pay for the floor, because she did not receive the raise. Harry insisted Chuck should not be paid because (1) Harry had not signed the first contract and (2) Chuck had not painted the cabinets.

Disregarding contractor lien and licensing issues, analyze the transactions between the parties and discuss their responsibilities, rights and liabilities.

---

WSB 8/00-10

Alison, a receptionist at a computer consulting company in Seattle, Washington, was tired of the 9-to-5 drudgery. She decided to jump into the wired world with her own Internet business, selling holiday gift baskets. She saw this ad: "Do you want prompt, professional, and experienced web page creation and design? For just \$5,000 you can sell to the world! Consulting also available at \$100/hr. Contact Brenda@wonderwebsite.com."

On November 1, 1999, Alison emailed Brenda: "I need a web page by November 15, 1999. See attached information about my business. Can you do it?" The same day, Brenda emailed Alison back: "☺"

On November 10, 1999, Brenda emailed Alison a preliminary web page design. Alison emailed Brenda, "Looks good. Please include the attached additional Christmas product photos. I'm expecting immediate orders for Christmas baskets."

On November 15, 1999, Brenda emailed Alison the revised and completed web page, but Alison's Internet service provider was down, so she did not receive it until the following day. Brenda put the completed page on the web for public access on November 16, 1999. On that day, when Happy Co., a large local employer, tried to place an order for \$50,000 worth of Christmas baskets for its upcoming Christmas party, the website failed. Happy Co. placed its order with Alison's online competitor. Alison immediately complained to Brenda, who replied, "It's a simple fix – won't take more than 10 hours consulting time." Alison screamed, "Fix it! I'm losing customers!" Brenda did so the next day.

Alison then discovered that Brenda is a 17-year-old computer "geek," that she was Brenda's first web page client, and that Brenda used unlicensed software to design Alison's web page.

Alison refused to make any payment to Brenda. Brenda sued Alison for \$5,000 for web page design and \$1,000 for 10 hours consulting time. Alison counter-claimed for lost profits of \$25,000 on the lost sale to Happy Co.

Discuss the claims and defenses of the parties.

On November 29, 1999, Vancouver, Washington, residents and his wife Belinda responded to an Internet ad by Chopper Charlie's Charters: "Fully Equipped/Four Days of Family Backcountry Skiing/\$1,000 per day/Family of Four."

Adam emailed sole proprietor Charlie, "We want to ski the dangerous Diablo Divide in the North Cascades; what do we need to bring?"

Charlie responded from his Stalnekum, Washington, home office, "Forest Service has closed Diablo, but we can sneak in from the backside. Just bring your personal gear."

After arriving late at the Wenatchee, Washington, Airport and driving three hours over treacherous roads, Adam, Belinda and their teen twins Donnie and Demi arrived at Charlie's helipad to fly out for skiing on December 1.

"Where are your skis?" Charlie asked as they arrived at the chopper pad.

"Well!" Adam huffed, "You said the trips were fully equipped and to just bring our personal gear."

"Out here," Charlie drawled, "everybody knows their skis are their personal gear. Lucky for you, I have spares in my cabin, but that'll be another \$1,000 a day."

"I could buy skis for a quarter of that!" exclaimed Adam.

"You gonna drive back to town to buy your own skis or are we going to fly out today?" asked Charlie.

"You got me there," Adam conceded. "Let's go."

The family skied a full day on Diablo Divide, but early the next day, the Forest Service discovered them skiing in a closed area and ordered them off the mountain. After explaining their plight to Charlie, he said "Well, we can do the Bunny Hills, but the change will cost \$500 more per day."

Not wanting to further disappoint his already frustrated family, Adam responded, "Let's do it but we can settle costs later."

Charlie then flew them to the Bunny Hills for the next two days. They then returned home to find his bill: "2,000 for December 1 and 2; \$3,000 for December 3 and 4; \$4,000 for ski rental. Thank you, Charlie."

Adam refused to pay more than \$3,000 total.

Analyze the parties' transaction, discussing all theories supporting their respective claims.

Al owned sportstuff.com, a Washington corporation located in Bellevue, that sold sportswear over the Internet. For the 2000 super bowl game, sportstuff.com purchased TV time advertising overnight delivery of tee shirts with the game's final score. Al anticipated 50,000 email orders within two hours. If sportstuff.com reached that sales figure, some stock analysts believed the stock price at the company's March 2000 initial offering would rise from \$10 to \$30 per share.

Al contacted Bob, a software programmer, about upgrading sportstuff.com's software to handle the anticipated volume of orders. Bob told Al he could do the job and agreed to take 100 shares of sportstuff.com stock at its existing \$100 price value for his work rather than be paid his usual \$150 per hour rate. They also agreed Bob would be present at the company on game day for two hours to monitor the system.

Bob successfully modified the system in four hours. On game day, however, Bob did not leave his Duvall home because a snowstorm made driving difficult. Instead, he had Cal, a programmer in Bellevue, go to sportstuff.com headquarters. Bob paid Cal \$200 for the two hours of work. The system initially handled the orders, but a power surge caused by the unprecedented storm disabled Bob's modifications. Cal quickly restored the system to its former capacity, but could not reactivate Bob's modifications for over an hour even with Bob instructing telephonically. If Bob had been physically present, the delay would have been minimal.

The software problems cost sportstuff.com an estimated 20,000 sales and \$10,000 in lost profits. Sportstuff.com fell short of its 50,000 sales target. With these setbacks and a flat week in the stock market, sportstuff.com's shares sold for only \$20 each during the initial offering, resulting in a \$1,000,000 loss in anticipated net proceeds.

After the offering, Bob asked Al for his 100 shares. Al refused because sportstuff.com was suing Bob for lost profits and the \$1,000,000. Bob replied he would sue sportstuff.com and see him in court.

Discuss the rights and liabilities of sportstuff.com and Bob.

WSB 7/99-13

Valerie, a veterinarian in Forks, Washington, was expecting to receive a herd of llamas for treatment on November 1, 1998. Valerie's clinic had a good-sized yard but no fence to contain the llamas.

On October 15, over coffee at the Forks Café, Valerie talked to Chuck, an unemployed carpenter, about building a fence for her. Valerie told Chuck that she had purchased all the necessary materials and dug the postholes but that she wanted to have someone more experienced actually build the fence.

Valerie and Chuck discussed their concern about the fall rains that would soon be arriving. Valerie told Chuck, "The fence must be finished by the end of October before the llamas arrive for treatment on November 1." Chuck replied, "No problem."

Chuck was familiar with Valerie's property and said it would take him five days to do the job - one day to measure and cut the materials and four days to erect the fence. The parties agreed on a price of \$500 for the job, payable upon completion. Chuck said, "I'll start tomorrow if you give me \$100 now." Valerie gave Chuck \$100. Chuck did not show up the next day. On October 20, Chuck went to the site and sized and cut the materials. He did not return to the job again until October 28. That day, the expected heavy fall rains arrived, filling the postholes with water and mud. Chuck's work was doubled because he had to repeatedly bail out the holes. On October 31, Chuck told Valerie that he could not finish the job for three more days. Valerie fired him.

The next day, Valerie hired Pat to complete the job for \$800. Pat finished the job six days later. In the interim, Valerie spent \$200 to house the llamas in a neighbor's barn, declining an offer to pasture them for \$100.

Discuss Valerie's claims against Chuck and any defenses he might raise. Do not discuss any contractor licensing, bonding, or lien issues.

---

WSB 7/99-8

Hal inherited two cabins in Central Washington's Methow Valley in 1998. He and his wife Wendy planned to live in one year-around and rent the other. Unfortunately, squirrels had invaded both.

"I can trap them squirrels," their neighbor Pete observed in late March 1999, "but they'll just come back again. It's better to spray with Gonner." Gonner, a chemical, repels rodents, including squirrels. Pete advised that setting traps and releasing the squirrels elsewhere would cost \$500, but spraying with Gonner would cost \$250.

"I insist on Gonner. It's more humane," Wendy said. Hal said, "I don't care what you use, just get rid of those squirrels by May 1." "Great!" replied Pete.

Pete sprayed the family cabin on April 15; those squirrels disappeared. Before he could spray the rental cabin, however, the Department of Ecology outlawed Gonner on April 20.

Pete explained to Wendy that the spray was outlawed. Eyeing his rusty traps, she exclaimed, "Well, you certainly can't use those! I'd be happy to pay you \$500 more if you used new, humane traps." Pete shrugged, drove into town and purchased new gear, returning to set the traps.

Hal, however, demanded that Pete spray the rental cabin with Gonner instead, exclaiming, "Department of Ecology be damned!"

Pete refused to spray or set the traps and submitted a bill for \$250 for spraying the family cabin and \$500 more for buying new traps. Hal responded: "I only owe \$125 because you only sprayed one cabin; I never authorized \$500 for the use of new traps. You have to spray the guest cabin because we can't rent it with squirrels."

Disregarding lien issues, discuss the rights and liabilities of Hal, Wendy, and Pete.

---

WSB 7/98-1

Digwell Excavation, an excavation and site preparation contractor, contracted with King Construction, a commercial builder, to excavate a building site for a large shopping mall project in Seattle, Washington. The contract called for performance to begin September 1, 1997, and to be completed within 90 days. The contract price of \$300,000 was due in three equal installments after completion of each third of the work.

Record wind and rainfall during September prevented Digwell from starting work for 30 days, throwing the entire project behind schedule. On October 1, Digwell began digging out but encountered unstable soil conditions that rendered excavation extremely difficult, further delaying the project. Digwell was forced to rent special compacting equipment, at a cost of \$20,000 which had not been included in his bid.

On Friday, December 1, after completing one-third of the job, Digwell submitted to King his request for the first installment payment of \$100,000. King refused to pay, saying, "I'm going to withhold this payment until I'm sure you can finish this job. So far, you're not doing very well." Angered by King's response, Digwell told  
62 Course 5309 Copyright 2011. The Rigos programs have educated over 100,000 professionals since 1980.

King he had already spent much more than he had planned and, on top of the installment due, he needed compensation for his unanticipated expenses. Following a heated argument in which Digwell failed to convince King to pay the installment due or increase the contract price, Digwell stormed off the job site, saying, "I'm heading for a drier climate!"

When King drove to Digwell's office on Monday morning to find out why he had not returned to work, he found the door locked and a sign in the window saying, "Gone in Search of Sunshine."

That afternoon, King hired Acme Excavation to complete the job at an additional cost of \$60,000 over Digwell's price. When Digwell returned to the work site the next morning, after a three-day weekend in Arizona, he was surprised to find Acme's crew at work.

Disregarding any lien and bond issues, discuss the rights and liabilities of the parties.

---

WSB 7/98-13

Betty owns the Fantasy Book Store and Cafe in Wilbur, Washington. On April 20, 1996, Betty asked Craig to refinish some bookshelves and some tables and chairs for the cafe.

Craig calculated the time necessary to complete the project and left a note for Betty: "Minimum 14 months to complete. Total cost: \$15,000."

Later that week Betty left some stain and varnish for Craig with a note: "\$15,000 is good! Start Monday, okay? /s/ Betty Booker."

Craig started work on Monday, May 1, 1996.

Three months later Craig had completed some tables. Betty was happy with his work and paid him \$8,000.

Betty married Hal on November 30, 1996. They received an antique jukebox as a wedding present. Betty and Hal were very excited. Hal asked Craig to build a display case for the jukebox, and mentioned he had some old Beatles albums which would look great in a matching case. After discussing details, Craig wrote a note which said, "Craig will build a jukebox display case for Hal for \$850. If completed by Dec. 20, 1996, Hal will pay \$100 bonus." Both Hal and Craig signed the note.

Craig finished the jukebox display case on January 10, and the tables, chairs, and some of the bookshelves by July 10, 1997. Betty paid him the rest of the \$15,000. Craig took a costly vacation in July.

Craig then refused to finish the bookshelves for Betty unless she paid him \$1,000 more. She wanted the bookshelves completed, so Betty sent a letter to Craig: "I will pay you \$1,000 to finish the job. /s/ Betty Booker."

Craig finished the bookshelves on October 15, 1997. Betty refused to pay the \$1,000. Betty also refused to pay for the jukebox display case, saying she never asked Craig to build it. Hal paid Craig \$450 grumbling: "You said you would build another case for my Beatles albums. The agreement was \$850 for both items"

Discuss the rights and liabilities of the parties.

---

WSB 2/98-9

Bobbie operates a butcher shop in Dayton, Washington. In January 1997, she purchased an old walk-in freezer at a low price when the local creamery went out of business. The freezer was in serious need of repair. She also bought sufficient coolant to charge the freezer in order to lower the temperature to zero degrees, which she needed for proper meat storage.

In February 1997, Bobbie contracted with Dot to repair the freezer and install the coolant. Dot agreed to perform the work for \$4,000, payable upon completion of all work under the contract.

In June 1997, Dot had almost completed the work but realized that she had seriously underestimated the extent of the freezer's disrepair and that the contract would result in huge financial loss to her. Dot energized the freezer with the coolant supplied by Bobbie, but a broken valve allowed all the coolant to leak out. Dot promptly informed Bobbie about the mishap and offered to purchase new coolant at her own expense. Dot did not know that in March 1997 the federal government had forbidden the sale or installation of the ozone-depleting coolant which Bobbie had previously supplied and required that only environmentally friendly coolant be used. Bobbie was aware of the new regulation at the time but also knew that new coolant was very expensive. She decided not to tell Dot.

Dot discovered that the new coolant was not only more expensive but would only reduce the freezer's temperature to 30 degrees without a complete re-tooling of the freezer. Dot informed Bobbie of the problem and demanded payment of \$10,000 to complete the work. Bobbie responded, "I won't pay you one thin dime unless you complete the work as promised."

Bobbie sued Dot for breach of contract. Dot counter-claimed for \$10,000. How would the court resolve the claims and why?

WSB 2/98-2

Harold and his wife Winnifred operated the Oasis Gardens Bed and Breakfast in Central Washington.

On June 1, 1996, Harold offered 17-year-old Michelle some summer cash for maintaining the flower beds and garden shop. "Weed and fertilize those plants and clean out the shop every summer until you finish college, and I'll pay you \$100 a month. Bury the dead plants and old fertilizer in the vacant lot out back."

Michelle maintained the flower beds as directed and buried the waste at night because Harold correctly told her it was illegal and he did not want any witnesses.

Winnifred paid Michelle for her June 1996 work from the separate checking account into which she had deposited her inheritance from her parents' estate. Michelle left for school on August 31, 1996, without being paid for her July and August work. She returned on June 1, 1997, and began working again. Harold and Winnifred had divorced in February 1997, and Harold now owned and operated the place himself.

On August 1, 1997, Michelle asked for her salary for July and August 1996 and June and July of 1997. Harold declined, however, saying, "Sorry, kiddo, you're too young and there's nothing in writing. You can call this part of your education."

Harold then executed a handwritten agreement with Petunia, sole proprietor of Pretty Gardens, the local florist, at \$200 a month "for maintaining flower beds and properly disposing of waste every summer." When Petunia arrived the next day, Harold asked, "What do you say we give each other a 30-day out? If we don't like the contract anymore, we give each other 30 days' notice to back out?"

"OK by me," Petunia replied as she began weeding the flower beds. Harold paid her \$200 for August, but on September 1, he said, "Can't pay that much no more. This contract's over October 1." Petunia was not paid for her September work, and although she needed the job, she did not return in October.

Discuss the arguments that would be made in actions by Michelle and Petunia against Harold and Winnifred.

---

WSB 7/97-17

Jim, a struggling architect, designed a fabulous new house, hoping it would boost his lackluster career. Jim borrowed money, purchased a new lot in Seattle, and hired a contractor. Construction was completed in July 1996, except for exterior painting.

On August 15, 1996, Jim met with Dan, a painter. Dan offered to paint the house for \$2,000, with Jim to supply the paint. The price was agreeable, but Jim insisted the job start September 1 and be completed September 30. Jim said *Showhouse* magazine was coming the first week in October to take photos for an article on "Best Northwest Architects" and he needed the "break." Dan said he was just finishing another job and could meet Jim's schedule. Jim offered to pay Dan half at the start and half at completion. They shook hands on the deal.

Unfortunately, Dan's other job went longer than expected, and he wasn't able to start until September 7. Jim was angry, but gave Dan the \$1,000 down payment anyway. Dan began work and made steady progress, but on September 18-20, Jim's landscaper blocked the front of the house while planting the lawn. Dan resumed work on September 21, finishing all but one side, but on September 25 it began raining. Dan stopped work, telling Jim he lacked equipment to work in the rain and could not finish until the rain stopped. Furious, Jim fired Dan. Dan demanded the final \$1,000, but Jim refused.

Jim hired Colossal Painting to finish the job for \$2,500. Colossal put up scaffolds and tents and worked in the rain. They completed the job October 5, too late for Jim to be included in the *Showhouse* article.

Jim listed the house for sale, but received no offers until April 1997. All of the houses featured in the article sold in 1996. In May 1997, Jim finally sold his house for \$250,000. Jim felt he would have received \$25,000 more had the article included him, and that he lost jobs the article would have generated.

Discuss the claims and defenses of Jim and Dan.

---

WSB 7/97-1

Tom inherited a two-acre parcel of vacation property near Spokane, Washington, from his grandfather in 1994. After it was damaged by an ice storm in November 1996, Tom and his wife Mary wrote to five tree services saying, "We desire to have fallen trees and debris removed from our property at 1140 Hilltop Lane. Please advise if you can do the work."

Brad, owner of Bradley Landscape, telecopied his response, "I will do your work. My rate is \$50 per hour." Tom wrote to Brad saying, "Your price is too high, but we would like you to do our work for \$40 per hour." Tom heard nothing further from Brad.

Preparing to leave for a Christmas visit to his parents in Seattle following his separation from Mary, Tom asked her to follow up with Brad. She refused, feeling that Tom should do this himself because he was to receive the land under their property division. Tom did nothing.

The day before leaving, Tom received a letter from Carl's Tree Service that said, "I have viewed your property and offer to perform the job, including removal of 11 damaged trees and all debris for a total of \$1600. I can do the job the week of December 30, 1996, [Signed] Carl." Feeling this was a much better price, Tom immediately telecopied his reply, "I accept your offer." Carl began to deliver equipment to the site the next day.

Meanwhile, Brad showed up to do the work the following Monday, December 23<sup>rd</sup>. Upon arrival, he noticed a commercial chain saw and some ropes on the property but thought little of it. Brad finished the job while Tom was gone.

When Tom arrived home on December 29<sup>th</sup>, he was pleasantly surprised to find the work completed. He was unpleasantly surprised the next day, however, when he received Brad's bill for \$2400. Tom called Brad and explained that he never intended to hire Brad and he had another tree service lined up.

Brad and Carl each sue Tom and Mary. Discuss the likely outcome in each suit.

---

#### WSB 2/97-3

Pinky owns a hardware store in Davenport, Washington, known as "Pinky's Precision Tools." Pinky holds an anniversary parking lot sale every July 1. Each June, Pinky has his parking lot painted shocking pink as a promotional gimmick.

In June 1988, Amy agreed to paint the parking lot prior to Pinky's anniversary sale for \$750. When Amy arrived on June 28 to commence work, she told Pinky, "This job is bigger than I expected; I can't complete it until the end of next week." Unable to find another painter on short notice, Pinky canceled the sale. Pinky demanded compensation from Amy for his lost profits. On June 30, 1988, they agreed in writing to settle their differences for \$1,000 payable to Pinky by the end of the Year. Amy never paid.

In June 1995, Pinky received a letter from Amy, congratulating him on the store's impending 30th anniversary. The letter also read, "I know I owe you that \$1,000, and I intend to pay it. /s/ Amy."

Later that June, Boris agreed to do the painting in time for the 30th anniversary sale, for \$500, and Pinky agreed to supply the paint and materials. On June 26, Boris arrived at the store ready to begin. Pinky told Boris, "There's been a run on asphalt paint; I don't have enough for the job, and I won't get another shipment until mid-July. I'm sorry." Boris left. Pinky immediately telephoned Chad and asked him if he could handle the job. Chad agreed to complete the work before July 1 for \$1,500. Chad assured Pinky he could procure a sufficient quantity of pink asphalt paint.

On June 27, vandals ransacked the store. Feeling unable to proceed with the sale, Pinky advised Chad his services were no longer needed. Chad had already expended \$150 on paint and mixed it. He earned \$200 from odd jobs he obtained on June 29 and 30.

On July 1, 1996, Boris demanded \$500 from Pinky, and Chad demanded \$1,650 from Pinky. Pinky demanded \$1,000 from Amy. All demands were refused.

Discuss the rights and liabilities of all parties.

---

#### WSB 2/97-12

Alicia was a Seattle, Washington, interior designer whose quality service and products were legendary. Her friend Byte ran a computer consulting business and was planning his marriage to Colleen. Alicia wanted to modernize her business office with the latest computer technology. Byte wanted to renovate the interior of his home during his honeymoon to surprise Colleen.

Byte told Alicia, "For a \$5,000 consulting fee, I'll design your computer system, negotiate the best prices for you, install the equipment and train your staff. You pay vendors direct. My repair and technical support costs will be \$2,500 additional each year." He neglected to mention that telephone costs associated with the project were extra. Alicia responded, "Well, I can design and renovate the interior of your place for \$10,000. Because we're friends, I won't charge my normal 20% markup on the materials, provided you pay my suppliers direct, in advance. If you'll provide two years of repair and technical support for me, we'll be even." Byte nodded and said, "Deal."

On June 5, 1996, after numerous meetings, Byte settled on a complete design. On June 10, Alicia paid the computer vendors, and on June 15 Byte installed Alicia's computers and trained her staff.

The next day Byte mailed Alicia an invoice, "Long distance - \$175." He included a note, "Wedding tomorrow. Need cash for honeymoon. Can't pay your suppliers yet. Still want to surprise Colleen." Alicia paid her suppliers so the work would get done before Byte and Colleen returned. Work on Byte's house was completed during the honeymoon.

On June 19, Alicia's computers malfunctioned because Byte installed them incorrectly.

When the newlyweds returned, Colleen was certainly surprised, but she hated the house. Byte became angry. He refused to fix Alicia's computers and would not pay her for the materials used in his house. Alicia refused to pay Byte's bill for long distance charges.

Alicia sued Byte and Colleen for her \$10,000 fee and the cost of materials plus 20%. Byte counterclaimed for \$5,000 and payment of his long distance charges.

Ignoring lien issues, discuss the claims and defenses of the parties.

---

WSB 7/96-7

In November 1993, Allen wrote a letter to Bruce, a ditch-digger, asking Bruce to construct an extended ditch across a portion of Allen's Ephrata, Washington, farm. Allen's letter to Bruce read:

"I am getting married and moving to Pasco, Washington. I am trying to find someone to buy the farm. If I cannot find a buyer before spring, I will need a ditch across the west end of my property to channel the spring run-off from the pasture. When the snow clears, dig the ditch.

In December 1993, Bruce replied to Allen's letter, writing to Allen: "I cannot do the work you requested until April of next year. My price would be \$2,500."

Allen promptly wrote back, "\$2,500 is too much. If you will do the work for \$2,000, the job is yours."

In February 1994, Allen sold the farm to Chuck.

In March 1994, Allen told Bruce he had just married Diedre. They did not discuss the ditch.

By April 1994, the winter snows had melted, and Bruce moved his ditch-digging equipment onto the farm. When Chuck asked what he was doing, Bruce replied, "I'm here to dig the ditch that Allen ordered for when the snow cleared." Pleased that Allen had taken care of the run-off problem prior to his purchase of the property, Chuck said, "Oh, great! Go ahead."

When Bruce finished the run-off ditch, Chuck asked him to dig a drainage ditch by the barn for \$500. Bruce agreed and dug the additional ditch before the end of May. When Bruce completed the ditch, he demanded \$2,500 from Allen for his work. Allen refused to pay, saying, "Why would I pay for a ditch on property I no longer own? Do you take me for a fool?"

Bruce sued Allen, Diedre, and Chuck for his work.

Disregarding lien issues, discuss and decide the rights and liabilities of the parties.

## PRIMER SERIES MBE REVIEW

### CHAPTER 1

#### CONTRACTS AND UCC SALES ARTICLE 2 ANSWERS

1. /B/ The best answer because it is the only contract of the four presented that is not from the SIR topics which fall under the common law. Goods include crops and timber that can be severed from the real property without harm. A is incorrect because an attorney's advice is a type of service, which is our S in SIR. C is incorrect because a contract for property falls under the real estate category, which is our R in SIR. D is incorrect because a contract for an intangible asset falls under the intangible category, which is our I in SIR.
2. /B/ B is correct because the "only if" limiting modifier is possible under these facts and it creates a more compelling factual argument to support the legal conclusion than the other alternatives. A is incorrect because the conditional requirement "because" or "since" make the following legal reasoning a requirement which must be met for the alternative to be correct; here the reasoning is not required and is incorrect since the predominate dollar purpose is for the personal service contract (\$1,200 v \$1,000). C is not the best answer because the rationale supporting the conditional modifier "unless" means the rationale must be necessary; here the judge could apply the UCC to a common law contract by analogy. D is not the best answer; the "if" modifier makes the most compelling argument, but the conclusion – Computer Retailer prevailing – does not follow from the argument.
3. /A/ The least important factor in determining if a seller is a merchant would be if they sold at wholesale or at retail. Either a wholesaler or a retailer could be classified as a casual seller. B is incorrect because a seller who "deals in the goods" is one of the merchant characteristics listed in UCC 2.104. C is incorrect because a seller who "holds herself out as an expert having special knowledge and skill in the goods" is one of the merchant characteristics listed in UCC 2.104. D is not the best answer because the number of units sold in a given year is not controlling as to whether the seller is a merchant or casual seller. It could be that 10 units a year would not be a sufficient quantity to qualify as dealing in those goods.
4. /A/ The contract would be implied in the fact that the client accepts the services of the attorney. B is incorrect because the law would not necessarily imply a contract. C is incorrect because there is no express contract under these facts. D is incorrect because there is an implied-in-fact contract.
5. /C/ The offeror, Sarah, was bargaining for a unilateral contract in which acceptance is only rendered by performance of the act requested. A is incorrect because the offeree did not perform the requested act. B is incorrect because the offeror was not bargaining for acceptance by a return promise. D is incorrect; while the offer may become irrevocable if Donna's statement is deemed to be a beginning of performance, it does not create a legal contract until acceptance.
6. /B/ This is the least correct alternative since a partially executed contract is possible where both parties have partially performed. This is a negative question; often the best approach in such questions is to use a true-false approach. This is a negative question; often the best approach in such questions is to use a true-false approach. A is true and therefore incorrect. C is true and therefore incorrect. D is true and therefore incorrect.
7. /C/ The best answer since it is correct and states a rationale that is consistent with the law and the facts given in the question. The contract appears divisible since performance of one portion does not affect the other and payment equivalent to performance is possible. A is not the best answer since the P's allegation of D's breach is not controlling. B is incorrect because the contractor did complete a divisible portion of the contract. D is incorrect because if the contract is deemed divisible, the P will collect an equivalent amount of the whole contract.

8. /B/ When interpreting a bilateral contract, the court attempts to ascertain the objective intent of the parties. A is incorrect because fairness is not usually an issue unless the contract is unconscionable or patently unequal. C is incorrect because the subjective intent is of less importance than the objective test. D is not the best answer because the offeror's communications are to be evaluated objectively; how would a reasonable person interpret the offeror's expressions is the test.
9. /B/ A mere offer to sell without any promise that the offer is to be held open is revocable at the will of the seller. A is incorrect because under the UCC this written statements by a merchant would constitute a "firm offer" which would be irrevocable for the time stated up to 90 days. C is incorrect because under the UCC this written statements by a merchant would constitute a "firm offer" which would be irrevocable for the time stated up to 90 days. D is incorrect because, upon the receipt of consideration, the offer is transformed into an option contract which would be irrevocable for the stated time even if in excess of 90 days.
10. /B/ A concise statement of the UCC's "firm offer" rule. A is incorrect because only the offeror must be a merchant. C is incorrect because the UCC will impose a "reasonable" period of irrevocability on the offeror. D is incorrect because who supplies the form is not relevant to the application of the rule.
11. /B/ The death of the offeror terminates an open offer. A is incorrect because such an acceptance would be effective to create a contract. C is incorrect because this purported "acceptance" is treated as a rejection and a counter offer. D is incorrect; a time period stated in the offer begins to run on the date the offer is received by the offeree so an acceptance on April 15 would be timely.
12. /A/ If the other party provides the contract, the merchant must separately sign the agreement to constitute a firm offer under UCC 2.205. B is not the best answer because a firm offer is valid for the offeror's stated time which may be less than three months. C is incorrect because contracted rights may always be assigned under the UCC. D is incorrect because consideration would convert the firm offer into an option contract.
13. /C/ Acceptance must be with knowledge of the offer. A is incorrect because the award is limited to \$100, the amount known to the offeree as of the date of acceptance. B is incorrect because the award is limited to \$100, the amount known to the offeree as of the date of acceptance. D is incorrect because the award is limited to \$100, the amount known to the offeree as of the date of acceptance.
14. /A/ The offer clearly was seeking performance for acceptance and not a mere promise to perform; as a result, there was no acceptance regardless of when it may be effective. Therefore, the revocation by action of the seller was effective since a prior valid acceptance had not been made. B is incorrect because the April 2 letter did not constitute a valid acceptance. C is incorrect because the April 2 letter did not create a contract. D is incorrect because the April 2 letter did not constitute an acceptance, no matter what the effective date might have been.
15. /B/ Acceptance is at the fall of the hammer and thus a bidder may retract his offer prior to that time. A is incorrect because the presumption is that auctioned goods are put up with reserve. C is incorrect because the previous bid is no longer effective once a new higher bid is accepted. D is incorrect because only if the auction is with reserve does the auctioneer have the right to withdraw the goods prior to acceptance.
16. /D/ This is a contract falling under UCC 2.306. Requirement contracts are valid and enforceable without specifying quantity as long as there is a reasonable basis for giving an appropriate remedy. A reasonable quantity would be imposed. A is incorrect because such a requirements contract is enforceable. B is incorrect because such a requirements contract is enforceable. C is incorrect because such a requirements contract is enforceable.
17. /A/ A is correct because this appears to be a mere inquiry by the offeree which has no effect on the offer; therefore a subsequent acceptance could be still be effective. B is incorrect because the offeror can revoke an open offer thus terminating the offeree's power of acceptance. C is incorrect because the death of the offeror terminates an open offer. D is incorrect because an offeree's purported

acceptance with different terms is a rejection which terminates an open offer.

18. /D/ The UCC would allow acceptance with minor additional consistent terms. Because the “per city scale weight certificate” is minor and not inconsistent with Calvin’s offer, the inclusion of same does not defeat the effectiveness of the acceptance and is not to be treated as a counteroffer. A is incorrect because under the UCC such additional terms become a part of the contract unless the offeror notifies the offeree of an objection to the inclusion of the additional terms in the agreement. B is incorrect because the reply is not a conditional acceptance. C is incorrect because the reply is not a counter offer.
19. /C/ The advertising catalog is not an offer but only an invitation to deal. The offer was the “purchase order” and Costco’s “order confirmation” was an attempted acceptance with an express condition that contradicted the offer terms. Thus it should be interpreted as a counteroffer and since the counteroffer was not accepted by the original offeror, Rainmaking Lawfirm, no contract was formed. A is incorrect because there was no contract. B is incorrect because there was no contract. D is not the best answer because this probably would be interpreted as different terms to which both parties are assumed to object. The change also adds \$500 or 50% to the price which is a material change so inclusion through a seller’s non-objection does not seem likely.
20. /A/ There was a valid Arthur-Madison contract because the effective date of the acceptance was upon dispatch while the effective date of revocation was on receipt which was later. B is incorrect because revocations are only effective upon receipt. C is incorrect because there is generally no restriction on the offeror’s ability to revoke. D is incorrect because acceptance occurred prior to revocation.
21. /B/ Under the traditional common law, mailbox treatment for acceptance requires that “as fast or faster” means be used to communicate the acceptance. Here the mailed response was slower than the e-mailed offer so the acceptance can only be effective on receipt. C is incorrect because the request for the payment terms was not a condition of the acceptance – only a mere request which the offeror could reject. D is incorrect because
- an acceptance may contain a request for additional terms.
22. /C/ The option period was for 100 days and cannot be revoked for that period. A is incorrect because the \$50 paid was the consideration. B is incorrect because a writing would only be required if the option length was one year or longer. D is incorrect because there are no restrictions on the option length.
23. /B/ Because Harrison had already incurred the legal detriment, there was no consideration for Bunker’s promise. Past consideration is no consideration. A is incorrect because there is no contract under these circumstances. C is incorrect because there is no contract under these circumstances. D is not the best answer because the pre-existing duty would only apply between Harrison and Michael.
24. /B/ The doctrine of promissory estoppel applies to eliminate the necessity that the donor of a charitable pledge receive consideration to support the promise. The law implies the necessary consideration. A is incorrect because this promise would be unenforceable unless supported by consideration. C is incorrect because a modification under the common law always requires consideration. D is incorrect because the UCC’s firm offer rule (which would enforce such a promise for up to 90 days without consideration) only applies if the promise is written.
25. /D/ UCC 2.209 states that contract modifications made in good faith require no consideration. Unless over \$500, no writing would be required. A is incorrect because a renunciation of a claim or right arising out of an alleged breach constitutes valid consideration; there would be a detriment to the promisee. B is incorrect because a firm offer requires a writing. C is not the best answer because a “large” requirement contract would probably exceed \$500 and thus would require a writing under the statute of frauds.
26. /A/ Disaffirmance can only be effective within a reasonable time period after reaching the age of majority. B is incorrect because there is not a requirement that the disaffirmation be written. C is incorrect because disaffirmance does not require payment. D is not the best answer because while Baker may be able to sue Egan for negligence, this does not limit

Egan's ability to disaffirm contracts entered into before the age of majority.

27. /C/ The best answer because while an infant's contracts are voidable at the infant's option, equitable liability in an amount of the benefit to the infant may be imposed. This would seem to be the reasonable value of the benefit received. A is not the best answer; while the rationale is correct – the contract is voidable by the infant – the conclusion of \$10,000 is incorrect. B is incorrect; only the infant can disaffirm the contract. D is not the best answer because the standard is the benefit to the infant not the detriment to the other contracting party.
28. /B/ The best answer since it provides a logical rationale to support the conclusion and is a correct statement of the UCC statute of frauds rule. A is incorrect because the agency capacity was disclosed and an agent does not impliedly guarantee that a principal will perform. C is an incorrect statement since an agent has potential personal liability if they guarantee the performance of the principal. D is incorrect because an agent has potential personal liability if they misrepresent the scope of their authority.
29. /D/ The contract was illegal and thus unenforceable because West was not properly admitted to the bar and licensed under state law. A is incorrect because no portion of an illegal contract may usually be enforced unless the contract is divisible. B is incorrect because no portion of an illegal contract may usually be enforced unless the contract is divisible. C is incorrect because the statute of frauds only requires the signature of the party to be charged, Zimmer.
30. /D/ The signatory is the only party against whom the contract may be enforced. The nonsignatory party may still assert the statute as a defense. A is incorrect because a tortious common law fraud action is not related to the statute of frauds. B is incorrect because only MOULSS contracts fall within the statute. C is incorrect because the statute of frauds is a legal procedural principle that in most states cannot be overridden by agreement.
31. /C/ Contracts with over one year of performance on both sides fall within the statute of frauds requiring a writing. A is incorrect because partial performance takes only the performed portion out of the statute's application. B is not the best answer because this is not one of our CISSU situations where the law would excuse performance. D is incorrect because Harris will lose.
32. /D/ An authentication of the party to be charged is required by the statute of frauds. Lacking even Ace's authentication, the UCC would dictate the contract is not enforceable against Ace. A is incorrect because the firm offer rule extends the revocability period to three months. B is incorrect because Doral's commitment to buy is sufficient to constitute consideration. C is incorrect because the issue of whether Doral is a merchant is not relevant.
33. /D/ A contract for the sale and purchase of land falls under the common law and must state the price. A is incorrect because the common law land contract requires the price term be stated. Absent an admission by Ace, a price would not be imposed. B is not the best answer because a reasonable price would not be imposed under the common law even though it might under the UCC's "gap-filler" provisions. C is incorrect because neither estoppel nor implied in law will excuse the missing term of price in a common law land contract.
34. /B/ An agreement between the surety and the debtor is not binding on and does not limit the creditor. While this may allow Samuel to collect from Deborah any sums he may have to pay Friendly, it does not stop the creditor from pursuing the surety directly. A could be a good defense because consideration for the surety's promise may be either a benefit to the promisor or a detriment to the promisee. Here the facts do not specify Samuel received any benefit and if the promise was made to the debtor there would be no consideration. C could be a good defense if Samuel can prove the loan was never made to the debtor. D could be a good defense in that if Samuel's guarantee of the loan was only oral, it would violate the statute of frauds.
35. /C/ Undue influence is where a person abuses a position of authority or close relationship. A is not the best answer because Smith as an executive had express, implied, or apparent authority to bind the principal Apex. B is not the best answer because there was not an improper threat. D is not the best answer because consideration is present.

36. /B/ If one party is aware of a latent ambiguity and does not inform the other party, the contract will generally be enforced against the aware party. A is not the best answer because there was no express false statement by Sarah; at best it was nondisclosure. C is incorrect since only one party was mistaken according to these facts. D is not the best answer since the parties' objective intent controls, not the subjective intent of one party. In addition, the more likely remedy in the event of different intentions would be rescission, not reformation.
37. /A/ The determination of whether a contract is unconscionable is a question of law for the court to decide. Here there appears to be both procedural (unequal bargaining power) and substantive (extreme high price and waiver of a basic right to claim damages for wrongful death) unconscionability. B is incorrect because unconscionability would be decided by the court not the jury. C is incorrect because procedural unconscionability appears present. D is incorrect because substantive unconscionability appears present. Note that if the hospital sued for the insulin price the defense of economic duress would be available.
38. /D/ This is a mere request in the acceptance for payment terms which were not specified in the offer. The acceptance was therefore effective to create a contract. A is a good defense because Fred probably was a fiduciary since the buyer was a client of the law firm. As such, a fiduciary is held to a very high standard. All disclosures should have been made and the false statements about the true price and market value of the "household stuff" violated the fiduciary duty. B is a good defense because a latent ambiguity is where the contract appears clear at formation but subsequent facts show a term could be interpreted in more than one way. Here there would be a contract and the ambiguity would probably be interpreted against Fred because he was both an attorney and the drafting party. C is a good defense because Fred did commit fraud in the inducement by misstating the true cost and market value and Client probably relied thereupon.
39. /B/ Ambiguity of an essential term of a contract is an exception to the parol evidence rule so extrinsic evidence going to the meaning of the ambiguous term may be introduced. A is not the best answer because the facts ask the reason to allow in the evidence of the antique automobiles – not the false statements of fact about the cost and market value. C is not the best answer because the extrinsic evidence offered goes beyond a mere recital of insignificant fact. D is incorrect because this merely is a partial statement of the general rule and is subject to the DUCAS exceptions.
40. /B/ The parol evidence rule requires the final agreement must be "integrated." A is incorrect because subsequent modifications are exceptions to the rule. C is incorrect because ambiguities are exceptions to the rule. D is incorrect because mutual mistake is an exception to the parol evidence rule.
41. /B/ If there is a counteroffer or rejection, a subsequent acceptance is only effective upon receipt; because the \$70,000 acceptance arrived at the offeror before the \$62,500 counteroffer, there was a valid contract formed. A is incorrect because this was not a UCC offer, but rather a common law contract for land. C is incorrect because only the offer has to be written. D is incorrect because a subsequent modification is an exception to the parol evidence rule.
42. /C/ The best answer because the buyer always has the right to reject nonconforming goods. A is not the best answer because the buyer may have to pay before inspection under a C.O.D. contract. However, this is not acceptance and if the goods were nonconforming, the price may be recovered by the buyer. B is incorrect because under a C.O.D. contract, possession only occurs after payment. D is incorrect because C.O.D. requires payment on delivery.
43. /C/ The general rule is that risk of loss passes upon acceptance. Acceptance may be revoked if the defect was hidden and it was reasonable not to discover the defect and reject the goods prior to the date. If the revocation was proper, risk of loss would shift back to the seller at that time. Therefore, to the extent Mighty's insurance did not cover the damage, the seller would be responsible for the difference if the goods were defective. A is incorrect because possession does not always control risk of loss. B is not the best answer because it is too simplistic; the question turns on risk of loss for goods that the buyer has revoked acceptance due to non-conformity because of the hidden defects. D is incorrect

because payment and acceptance are not synonymous. [UCC 2.608]

that there is no requirement that the fitness for a particular purpose representation be written.

44. /B/ The buyer would bear the risk of loss because the repudiation (assuming Mighty did not accept) or revocation (assuming Mighty did accept) was wrongful since a neutral third party determined the good conformed to the contract. Therefore, the risk of loss would shift back to the buyer. A is incorrect because possession does not always control risk of loss. C is incorrect because payment neither controls risk of loss nor does it constitute acceptance, especially where the defect may be hidden. D is incorrect because the fact that Mega produced the machine does not control risk of loss where there was a transfer to the buyer.
45. /A/ All affirmations of fact that become a part of the basis of the bargain are express warranties; this would include a seller's description of the goods. B is incorrect because the seller's selection of goods may constitute an implied warranty of fitness for a particular purpose but not usually an express warranty. C is incorrect because the seller's selection of goods may constitute an implied warranty of fitness for a particular purpose but not usually an express warranty. D is incorrect because the seller's selection of goods may constitute an implied warranty of fitness for a particular purpose but not usually an express warranty.
46. /A/ The UCC only requires the goods to be fit for the ordinary purposes for which such goods are used. "All" is too broad and the focus is only normal usage not the particular buyer's use. B is incorrect because the merchantability implied warranty requires this provision. C is incorrect because the merchantability implied warranty requires this provision. D is incorrect because the merchantability implied warranty requires this provision.
47. /B/ To create an implied warranty of fitness for a particular purpose, the seller must know that the buyer is relying upon the advice in selecting the item. A is incorrect in that there is no requirement that the fitness for a particular purpose representation be written. C is incorrect in that there is no requirement that the fitness for a particular purpose representation be written. D is incorrect in
48. /C/ If the buyer's provided specifications were such that the resulting good infringes on the rights of third parties the seller is not liable to the buyer. A is incorrect because the implied warranty of title and against infringement applies even to casual sellers. B is incorrect because the warranty is implied. Unless the seller specifically states the goods are not free of infringement claims, the implied warranty of the UCC would apply. D is incorrect because if the defect is specified, the buyer may assume the risk of infringement.
49. /A/ Exclusions must be clear, conspicuous, conscionable and consistent. B is incorrect because effective disclaimers are binding if the purchaser has notice. C is incorrect because disclaimers are not automatically void. D is incorrect because only an exclusion of the implied warranty of fitness for a particular purpose must be in writing to be enforceable.
50. /A/ Only merchant sellers are subject to the implied merchantability warranty. B is incorrect because an implied warranty action replaces the common law tort of negligence. C is incorrect because the UCC and Magnuson-Moss Act expand the number of potential Ps beyond the common law privity category. D is incorrect because an implied warranty action replaces the common law tort of strict liability.
51. /B/ The best answer because an objective standard would be applied in determining if the architect's decision was reasonable. A is incorrect because the fact that most people might accept the painting is not binding where the criteria is personal taste or fancy. C is not the best answer because the fact that ten out of ten of P's witnesses believe the painting to be reasonably similar to the family does not necessarily mean it is binding on the client. D is incorrect because a subjective standard is appropriate if performance approval is in the nature of a personal taste or fancy.
52. /C/ This became a condition precedent to his contractual obligation and because of its materiality would probably be deemed a rejection and thus a counteroffer. A is incorrect because the statute of frauds would apply. B is incorrect because Wilcox's lack of signature would only effect his own

liability and not that of Norris. D is incorrect because such language is too substantial a condition to be implied.

53. /D/ The common law does not require The UCC's "perfect tender" under the doctrine of substantial performance. Recovery is possible for less than 100% perfect performance. The doctrine requires that the deviation not be intentional or material. A is incorrect because Kent will not prevail. B is incorrect because the issue is whether the deviation was major or minor; structural support would seem to be major. C is not the best answer because the doctrine does not require exact performance. Note that there would be a question whether an in-quasi contract recovery would be available
54. /B/ If part performance is still possible after failure of a presupposed condition, the seller must notify the buyer and explain the details of possible part performance. A is incorrect because the failure of a presupposed condition is not breach of contract. C is incorrect because the buyer has the option to accept part performance. D is incorrect because the buyer is not required to accept part performance.
55. /B/ UCC contract modifications are enforceable if made "in good faith." It appears from the facts that the UCC requirements of "honestly in fact" and the "observance of reasonable commercial standards of fair dealing in the trade" are met. Thus this modification would be enforceable under the UCC even though the common law's pre-existing duty rule would bar a recovery for the extra \$3 per barrel. A is incorrect because the buyer is obligated to pay \$28 per barrel. C is incorrect because Stand has not breached the contract. D is not the best answer because the facts do not make clear whether the \$25 price was a reasonable basic assumption of the contract.
56. /C/ This alternative would appear to be Crawford's worst defense. UCC 2-615 applies to contract non-performance caused by a condition "the non-occurrence of which was a basic assumption on which the contract was made". C also assumes that there is some liability and that offering a substitute grape might assist in mitigation; a failure of a UCC presupposed condition is not a breach at all. A is a viable defense because UCC 2-615 applies to contract non-performance caused by a condition "the non-occurrence of which was a basic assumption on which the contract was made". D is a viable defense because UCC 2-615 applies to contract non-performance caused by a condition "the non-occurrence of which was a basic assumption on which the contract was made". B is a viable defense because the UCC requires that if part performance is still possible, the seller must allocate among his customers in any manner that is fair and reasonable; this pro-rata allocation appears to be reasonable.
57. /C/ The \$10,000 is an accord arrived at in compromise to resolve the underlying dispute. If the debtor later repudiates the accord by failing to honor the satisfaction, the creditor may sue on the accord (\$10,000 potential) or sue on the underlying dispute (\$15,000 potential) if the statute of limitation on the original breach has not yet run. A is incorrect because Carol has two possible claims which may be asserted. B is incorrect because the failure of the debtor to satisfy the accord reactivates the underlying dispute. D is incorrect because Dick's repudiation seems unequivocal allowing the non-breaching party all the rights had there been a present breach.
58. /D/ This is a cancellation which rescinds the entire contract by mutual agreement thus discharging both parties. A is incorrect because the consideration for the original contract was in the form of mutual promises. B is incorrect because Beta did not waive a condition; Beta agreed to rescind the entire contract. C is incorrect because a novation involves a new contract where a new party is added in lieu of an old party.
59. /B/ The unequivocal repudiation of a future performance duty is an anticipatory breach of contract. Cancellation and demand of assurance of performance by the non-breaching party are permitted, but not punitive damages. Punitive damages are not usually recoverable for mere breach of contract, so A is incorrect. The non-breaching party may cancel the contract, so C is wrong. The non-breaching party may demand an assurance of performance, so D is incorrect.
60. /D/ UCC 2.609 specifies that on receipt of a written demand by the buyer (based upon reasonable grounds), the seller must provide written assurance within 30 days or the buyer may suspend performance. A is incorrect because if risk of loss has passed to the buyer

it will not be released from the contract. B is incorrect because impracticability of delivery is a vague concept without more facts and may not release the buyer from “all” obligations. C is incorrect because a retraction of anticipatory repudiation before the aggrieved party has materially changed its position is not a breach.

61. /C/ The UCC specifies the amount of the liquidated damages stipulated in the contract must be reasonable in the light of either the anticipated or actual harm flowing from the breach. A is incorrect because either party can avail themselves of a liquidated damage provision. B is incorrect because if liquidated damages are so large as to constitute a penalty they will be struck. D is incorrect because there is no absolute percentage limitation as to the relationship between the liquidated provisions and the actual damage. The test is one of “reasonableness.”
62. /B/ Wendy is entitled to be compensated in an sufficient amount to provide her the expectation damages she would have earned had she been allowed to perform the contract; expectation damages are also referred to as compensatory damages or the benefit of the bargain. Here the facts state Wendy would have made a profit of \$2,500 on completing the contract with Harry. A is incorrect because the full contract price would include some costs that Wendy did not incur. C is incorrect because restitution focuses on the beneficial effect to the non-breaching party. D is incorrect because it includes costs that Wendy incurred after she had actual knowledge that Harry had terminated the contract; such an award would allow the piling up of damages and are therefore not generally recoverable. All parties must usually mitigate damages.
63. /D/ The acceptance was valid because the offer did not unambiguously specify immediate shipment. There being a valid contract in effect, the shipment of nonconforming goods is breach. A is incorrect because a non-conforming shipment is not a counter offer. B is incorrect because the contract was breached, not canceled. C is incorrect because the order does not unambiguously specify acceptance can not be by a return promise.
64. /D/ The best and broadest answer. The UCC provides that an aggrieved buyer’s remedies

include “cover” (substitute equivalent goods) and incidental and consequential damages. Because “cover” was not possible, the remaining damages available are incidental and consequential. A is not the best answer because the value of the time spent and attorney fees are only one of the incidental damages available to the buyer. B is not the best answer because consequential damages – such as lost profit on the resale of the goods – are also available. C is not the best answer because this buyer’s remedy does not have to be available to the seller.

65. /D/ Specific performance is allowed if the goods are unique and (1) the buyer is unable to cover, (2) the goods have been identified to the contract, and (3) the goods have not been transferred to a bona fide purchaser BFP). All three specific performance requirements seem met, and the cover requirement of “substitute equivalent” goods is not met because the quality of the two carpets is substantially lower or higher than the contracted goods. A is incorrect because there is no requirement that a non-breaching party must wait to see if the anticipatory repudiation will be revoked prior to the original performance date. B is not the best answer; it seems that the additional quality and doubling of the price would imply this was a substantially superior product than the original carpet which might exceed the “substitute equivalent” rule. C is incorrect. The buyer is not required to cover by accepting inferior goods; these goods are not a reasonable equivalent to the contract goods. If the buyer decided not to pursue specific performance, the likely monetary damages would be for the difference between the contract price and the lower market price or \$5,000 (\$20,000 - \$15,000).
66. /D/ The UCC provides that a non-breaching buyer can request specific performance if the buyer is unable to cover and the goods have been identified to the contract. A is incorrect because none of these facts will prevent specific performance. B is incorrect because none of these facts will prevent specific performance. C is incorrect because the seller’s insolvency does not affect the buyer’s right to seek specific performance.
67. /B/ Specific performance requires that the goods have been identified to the contract. This remedy is not available if the buyer has been able to effectively cover. A is a correct

statement (and thus the incorrect answer) because revocation of acceptance is allowed if the defect was hidden. C is a correct statement of an aggrieved buyer's remedies. D is not the best answer because the expected profit is not the only element of damages available to an aggrieved buyer. Incidental damages are also recoverable.

68. /C/ The measure of damages is the difference between the contract price and the market price. If there is no market price, the contract price would be the measure of recovery. A is incorrect because Ling may recover incidental damages in addition to the contract price. B is not the best answer because the risk of loss rules would determine who bears the loss. D is not the best answer because specific performance is not normally a seller's remedy.
69. /B/ Regardless of any claim that Harry may have against George, the Emeritus sculpture is now in the hands of a bona fide purchaser; therefore specific performance against the seller is not possible. A is not the best answer because the question of adequacy of consideration in the contract does not go to the central question here of specific performance. In addition, revocation of any gift would not effect the possession rights of a third party bona fide purchaser. C is incorrect because Harry's assistance at the accident scene predated the exchange; past consideration is no consideration. D is incorrect because Harry's assistance at the accident scene predated the exchange; past consideration is no consideration.
70. /C/ C is correct. Punitive damages are not usually available for mere breach of contract absent egregious circumstances or willful breach of contract by a fiduciary. Injunctions and restraining orders may be sought in a personal service contract to prohibit the Defendant from working for anyone other than the Plaintiff if the Defendant refuses to complete the contract. A is incorrect because punitive damages are not usually available for mere breach of contract absent egregious circumstances or willful breach of contract by a fiduciary. B is incorrect because punitive damages are not usually available for mere breach of contract, absent egregious circumstances or willful breach of contract by a fiduciary. Injunctions and restraining orders may be sought in a personal service contract to prohibit the Defendant from working for anyone other than the Plaintiff if the Defendant refuses to complete the contract. D is incorrect because injunctions and restraining orders may be sought in a personal service contract to prohibit the Defendant from working for anyone other than the Plaintiff if the Defendant refuses to complete the contract.
71. /B/ If Carol actually knew and appreciated that the disclaimer provision had been omitted, there would seem to be a waiver that would at least allow a partial defense to the claim. A is not the best answer because this was a bilateral contract so breach of either promise is actionable; performance with due care is an implied condition of a professional service contract. C is incorrect because the statute that was violated is regulatory in nature and intended to protect the public from bar exam candidates who can not demonstrate their competency by passing the entry exam. D is incorrect because the discovery rule tolls the statute of limitations until actual or constructive discovery when the trigger date is deemed to occur; this appears to be when Carol's personal representative discovered the omission in the will.
72. /B/ Because Security was specifically contemplated by Glenn as receiving rights, they have third party creditor beneficiary status. They also have the right to go against him personally. A is incorrect because the subject of the contract was land. C is incorrect because Security is a third-party creditor beneficiary. D is incorrect because Wilson remains liable.
73. /C/ The first spring gardening contract right to \$500 payment is assignable because the assignor has fully performed her duties. The third \$2,000 lawn furniture contract is likewise assignable because the assignor has fully performed. In addition, it is a UCC contract because it involves the sale of goods; the UCC will not enforce a prohibition on the assignment of a contractual right. The assignment prohibition in the second expected \$1,000 contract for the summer's work will be enforced because it is a future contract. Therefore C is the correct answer. While Harriet will have to pay Friendly, she may have a claim for breach of contract against Gloria.
74. /C/ UCC 2-210(3) will treat a prohibition of contracts rights assignment as barring only

the delegation of the assignor's performance. A is incorrect because the contract for the lawn equipment had been completely performed by the assignor. B is incorrect because such a prohibition is not against public policy. D is incorrect because Friendly is not a third party beneficiary since they were not specified in the original Gloria to Harriet contract

75. /A/ The assignment of a right on a contract which may come into effect in the future may not be assigned. B is incorrect because Friendly does not want to enforce the condition prohibiting assignment. C is incorrect because Friendly does not want to enforce the condition prohibiting assignment. D is not the best answer because of the word "only" which limits the non-enforceability of the assignment prohibition conclusion to knowledge by the assignee of the condition; a future contract is another reason for non-enforceability.
76. /B/ Because the delegator remains liable, the obligee cannot show prejudice or increased risk. A is incorrect because the parties are allowed to prohibit the delegation of a duty (unlike a prohibition on an assignment which the UCC would void). C is incorrect because delegation is not allowed where a material variance in performance would result. D is incorrect because generally personal service contracts involving personal skills are not delegable.

## CHAPTER 1

### CONTRACTS

#### Washington Bar Essay Answers

These sample answers are actual answers written by successful bar exam applicants. They are not intended to be “model” or “perfect” answers and may contain errors of grammar or law.

WSB 7/02-5

**GOVERNING LAW:** The common law of CONTRACTS governs contracts for service for construction contracts and applies here.

**BACKGROUND:** To have a valid contract there must be MUTUAL ASSENT: an offer, acceptance of the mirror image of the offer, and consideration. The offer must contain material terms and the acceptance must be unequivocal. The Statute of Frauds requires contracts that cannot be performed in one year to be in writing. Because all contracts can be performed within 1 year, Statute of Frauds is NOT implicated.

**WENDY – CHUCK:** Wendy solicited bid from Chuck to install cabinets and floor. Chuck made offer and Wendy accepted. Consideration was service – the obligation to install the flooring was based on a condition precedent – thus, the condition must be met before contract is enforceable. Time is not of the essence unless contract specifically states. **INTERPRETATION:** In interpreting contract, court will look at entire document and facts and circumstances to determine parties’ intent. The court will not allow extrinsic evidence to change or add to the terms of the contracts if the parties intended contract to be integrated (complete embodiment of agreement). Here, the contract does not appear to be integrated even though signed by parties, thus parol evidence would likely be considered to determine whether time is of the essence. Extrinsic evidence will be used to determine **CONTEXT:** (Berg Rule clarify ambiguities, determine validity, enforceability, and whether modifications.) **PERFORMANCE:** A breach is material if the injured party fails to receive benefits of the bargain. If material breach, injured party is relieved from duties – if breach is minor, injured party must perform duties but may recover damages. Here, Chuck substantially performed his duties (installing cabinets and floor). Thus, Wendy had a duty to pay. **EXCUSED.** Wendy could argue that Chuck substantially breached by not meeting deadline but as discussed above time was not of the essence in the written contract so Chuck did not breach. – Flooring – Wendy will be correct in stating that condition precedent was not met, thus there was no contract to enforce. However, Chuck could argue under theory of **QUANTUM MERUIT (QUASI-CONTRACT)** that to prevent unjust enrichment he should be paid for the reasonable value of his services which would probably be \$900. Also, the court may sever the condition from the contract as against public policy or unconscionable because condition is something in the hands of Wendy.

**WENDY – DAVE:** An offer must be definite in price and subject matter of contract. Here, Dave offered to paint the kitchen, but terms were not definite as to who would pay for the supplies. Thus, court might find it hard to enforce contract (Wendy is not correct in stating no writing/no contract). But under quantum meruit, Dave should be paid reasonable value of services including paint because Wendy should not be unjustly enriched. Also, Ct might find implied contract because Dave would have had to go to Wendy’s house to paint and someone would have to pick color so if Wendy acted like there was an agreement and Dave justifiably relied, Ct might enforce contract under **PROMISSORY ESTOPPEL THEORY.**

**HARRY’S ARGUMENT:** Modifications to contracts must be supported by additional consideration to be enforceable. Here Chuck agreed to complete additional work, but Harry did not give additional consideration, thus agreement to paint cabinets is not enforceable. – **CAPACITY** – Harry is 17 and thus technically does not have capacity to enter into a contract. However, if he is married to adult (here Wendy is 20 and is adult), he will be deemed an adult for capacity purposes. Because modification is not enforceable, Chuck is not in breach.

**COMMUNITY PROPERTY ISSUES:** To have a valued marriage in WA, both persons must be 18 or have parents’ or court approval. Because marriage is valid (from facts) these requirements were probably met. Joinder is required for spouses to encumber, sell, and acquire real property. Spouses are presumed to have equal management rights in community property. Property acquired during marriage is community property – One spouse can enter into a contract for the benefit of the community and community will be liable unless it was very clear community was NOT going to benefit or 3<sup>rd</sup> party agreed to only look to separate property. Here, contract was for benefit of community property (CABIN is community property) so community will be liable and Wendy’s separate property will be liable as well, but Harry’s separate property would not be liable and Harry’s argument that contract is not enforceable because he didn’t sign is not proper.

Contracts for services are governed by the common law of contracts. Alison (A) and Brenda's (B) contract is for services and is thus governed by the common law of contracts.

Consumer Protection Act (CPA): The CPA applies to unfair or deceptive acts or practices in trade or commerce which potentially may affect a large number of people (members of the public) and cause damages to a plaintiff's property or business. A may be able to bring a claim under the CPA for B's advertisement, arguing that the ad is deceptive ("professional and experienced" when B had no other customers and used unlicensed software), may affect many members of the public (web advertisement, like other ads, will reach a large audience), causing the loss of a client (Happy Co.) and the loss of potential profits (harm to A's property or business). B could claim that her ad was not unreasonable, that she has experience with designing web pages, and that she promptly finished A's project. The attorney general may bring this action, but a plaintiff bringing the action can recover attorney fees, damages, or triple damages not to exceed \$10,000.

Contracts: Contracts require mutual assent (offer, acceptance, and consideration). B's advertisement was probably an offer for negotiation or bids. A made a specific offer for a project, including a "time is of the essence" deadline. B accepted with a symbol (smiley face), which may be ambiguous. B also began performance by completing a preliminary design, which A approved. B could argue that A modified or altered the initial agreement by adding additional Christmas photos. Modification to contracts requires additional consideration (bargained for exchange). A duty or condition may be waived if one doesn't object; B complied with the revised web design, waiving a modification claim. The contract does not appear to offend the statute of frauds (one not to be performed within a year, for example), so a writing is not required (although email may constitute a writing). The contract also does not appear to be illegal, which would void the contract. However, one must have the capacity to enter into a contract; thus, one must be at least 18, unless married or if a contract for necessities is involved. B is 17, and appears to be unmarried; a contract for necessities isn't involved. Thus, the contract is voidable. B completely performed by the express deadline in the contract, although delivery was delayed because A's server was down. However, the service was defective, requiring B to spend an additional 10 hours to repair. B may argue that this was a contract modification or amendment, supported by new consideration (10 hours work) in exchange for \$100/hour. A may argue that the service was unacceptable, so performance under the terms of the original contract (a correctly running web page for \$5,000) was not yet complete, so B's demand was unfair and A was under duress trying to keep customers. Contract interpretation, assuming the contract was not void, is based on express terms. If the contract is fully integrated (intended by the parties to be complete), then extrinsic evidence is not permissible under the parol evidence rule. However, under the context rule, extrinsic evidence may be permissible to determine the intent of the parties (Berg case), clarify ambiguities, or show incapacity, fraud, mistake, or duress. A can argue that B's ad promised to help her sell to the world, creating a warranty or guarantee, and that she must then get the web page running with the \$5,000 charge, not any additional charge. A may also argue that B committed fraud or misrepresentation, false statement of material fact (professional, experienced), causing A to reasonably rely, and causing damages. The contract does not appear to be integrated, so extrinsic evidence can come in to evidence to show B's age, experience, and the software used. Even if the contract is void due to B's age, she can argue that under the doctrine of unjust enrichment (quantum meruit), she is entitled to be paid because she fully performed, and is at least entitled to the \$5,000 benefit she conferred upon A. A may argue that service was not worth \$5,000 due to flaws in the program. A has a good argument that she does not owe the 10 hours additional work, as discussed above. A can also argue that she lost customers and profits because of the web site failure, and that B was aware of the upcoming orders (mentioned in A's email), and that A is thus entitled to consequential damages. A did receive some benefit (a website which may work). A voidable contract may be declared void by a declaratory judgment, the parties may rescind the contract, or ask for restitution (be placed in the same position prior to the contract), or reform the contract (which A is unlikely to want).

The contract for services is governed by common law rather than UCC Art. 2. (which may apply by analogy).

Formation: A contract requires offer, acceptance, consideration, and mutual assent. Preliminary negotiations are not part of a contract and advertisements are generally considered invitations to bid. C's ad is not an offer, but A's email response may qualify as definite offer. C's response that Diablo Mountain is closed is a counteroffer and revokes A's email offer under mirror-image rule. But, a contract is formed by C's counteroffer and A's acceptance by performance if a court construed as a unilateral offer. A bilateral offer requires a promise for a promise to pay for services rendered. Although C's email response does not contain price, common law will impose an in quantum meruit recovery at a reasonable price if A accepted by performance. No writing is required for statute of frauds because the contract may be performed in less than a year (e-mail ok also).

Illegal contract: An illegal contract is void and will not be enforced at law. A regulatory violation where parties are not in equal fault may be enforced to extent of performance. A may claim illegality because Diablo Mt. was closed by Forest Service. The parties were not in pari delicto because A could argue that he did not know skiing was prohibited on the back side. A may be able to escape the obligations of contract due to illegality of the subject matter.

Terms of contract: A contract which is the final integrated expression of the parties' intent may not be contradicted by extrinsic evidence which contradicts the written document. Parol evidence may be allowed where ambiguous terms are included. In this case, prior oral statements are admissible to determine intent of parties under context (Berg v Hudesman). A may bring in evidence of prior email negotiations to determine incurring of ambiguous terms such as "personal gear" and to establish reasonable price through course of dealings and custom in industry. C will argue email was integrated and prior contradictory evidence should not be admitted. A court will likely admit under Berg the advertisement and email correspondence to establish fully equipped was not a term, meaning of personal gear, and price.

Modification for skis: A services contract may be modified if supported by additional consideration. C' offer to provide skis at \$1,000/each is likely binding if not a term included in original contract. A will pay additional consideration (\$1,000 x 4) for skis if included in original contract, C has provided no additional consideration and the additional cost of skis is an invalid contract modification.

Mutual mistake: A may argue parties were mistaken as to basic assumption of contract affecting heart of bargain. A latent ambiguity as to provision of skis may excuse performance, but it is unlikely because only one party was mistaken (A).

Unconscionability: A can argue the unfair and surprise of ski price renders contract unconscionable. If C took advantage of his special knowledge and bargaining power to charge excessive rate for skis, the contract may be unenforceable. Evidence in purchasing skis ¼ of price supports A.

Frustration of purpose/commercial impracticability/impossibility: The Forest Service's intervention to stop A & C skiing on Diablo Mt. may mean contract is unenforceable. A supervening occurrence rendering basic assumption of contract invalid after formation excuses A's performance of remainder of contract (12/3-12/4). Commercial impossibility or impracticability is an unforeseen expense not foreseeable. A may be able to avoid liability for Dec. 3-4 for these reasons after Forest Service acted.

Bunny Hill agreement: C's offer for Bunny Hill at \$1,500 may be unenforced because there was no acceptance. A's conditional acceptance to "settle costs later" is not definite acceptance. A modification may have occurred for new area and additional consideration (extra payment). A may argue an accord and satisfaction for a bona fide dispute to settle by skiing on Bunny Hill or novation (new agreement in substitute). In any case, A must pay \$1,500 x 2 (3,000) if a satisfaction in total or a modification took place.

Quantum Meruit: If no contract was formed, C may seek damages on restitution for fair market value rather than expectation interest of contract price. The value of services is not limited by the contract price under quasi-contract. A accepted services with expectation of payment.

---

WSB 3/00-14

This contract for services is governed by WA common law of contracts, although Art. 2 relating to sales may apply by analogy. Contract formation requires mutual assent (offer, acceptance), consideration and no defenses. Here, the parties mutually assented and agreed on facts given, exchanged consideration (promises of performance by Bob and Al's payment). Although oral, it is still an enforceable contract because performable within 1 year and part performance (upgrade by Bob) would anyways take it out of statute of frauds. The essential terms were agreed upon (subject matter and price) and parties identified.

Snowstorm: A breach of contract is any nonperformance of a contractual obligation. Here, the contract called for Bob to be present at sportstuff.com for game day and he was not. A material breach undermines the essence of the parties' bargain and allows the nonbreacher to withhold his/her performance and sue for damages. A minor breach is not material failure to perform any contractual obligation. Bob breached by not presenting at company on game day and it's likely material given nature of contract (for Bob's services) and specifically needed him to troubleshoot any problems. Bob may argue his nonperformance was excused by impossibility (unforeseen event makes performance objectively impossible) or impracticability (unforeseen event makes performance unduly burdensome or unreasonable). The facts, however, indicate only that driving was difficult, not impossible or impracticable and Bob is liable for breach.

Use of Cal: Contractual duties may be delegated with intent of delegator (Bob) and assent of delegatee (Cal) so long as the delegation is not prohibited by contract terms or delegation wouldn't undermine the substance of the contract (i.e., contract for performance of duties by particular person) or the parties' expectations under contract. It appears Cal assented to the delegation, but given he is a "programmer" and Bob is a "software programmer," it

Course 5309 Copyright 2011. The Rigos programs have educated over 100,000 professionals since 1980. 79

was Bob's program and the contract called for Bob's presence on game day, the delegate may have been improper (and per above, not excused by Bob's impossibility/impracticability defenses).

Power surge: The power surge may be used by Bob as a defense to obligations under contract or defense to damages as an unforeseen "act of God" which made performance impossible/impracticable or frustrated the purpose of the contract. However, while the power surge may be due to an unprecedented storm (which would likely be unforeseeable act of God), power surges are likely foreseeable events programmers should be aware of and take precautions against. The fact Bob would have been able to get the system up and working as contracted for in "minimal" time also further indicates the necessity or essence of Bob's presence to the contract.

Damages: Bob is liable for any nonperformance of contractual duty not otherwise excused. The normal measure of damages is the parties' expectations under the contract (what they would have received if contract had been performed) plus any incidental and consequential damages. Consequential damages must be foreseeable, either because the breaching party was on special notice or the damages are a natural consequence of the breach itself and all damages must be ascertainable with reasonable certainty and non-breaching party has duty to reasonably take steps to mitigate damages. If damages are not ascertainable with reasonable certainty, reliance damages may be used (put parties back to position before contract). Here, Bob is likely liable for the lost sales (if can be accurately and reliably estimated) because he was on notice of the expected volume of calls and was to design the software to handle that volume. His absence on game day resulted in an over 1 hour downtime (would have been minimal if Bob present) and while Cal/Al tried to mitigate, it was not possible to further mitigate apparently. (Also, Bob may be liable for delegatee Cal's negligent/poor performance of contractual duties). Bob's nonperformance of duty to be present for reasons noted above was not excused. The lost profits of \$10,000 is chargeable to Bob's breach if what Al/Sportstuff would have received if contract performed). The lost estimated stock value however may be a bit too speculative to be awarded on basis of expectation damages because it appears on facts to be due in part to lost sales and flat stock market. The 1 million in anticipated net proceeds likely too speculative to be awarded as damages, unless Sportstuff/Al can prove with more certainty. Bob may counterclaim against Al for breach (nonpayment of 100 shares) on the basis of part performance (the 4 hours spent in reprogramming Sportstuff's computer network) under a theory of unjust enrichment. Bob performed the work expecting to be compensated, and at Al's request and unfair to let Al keep Bob's work without payment (although Bob still liable if a breach). Bob's work may be valued at the agreed upon price (100 shares at \$10 each) or 4 hours x normal rate. Bob likely would not get 100 shares at new increased price of \$20 a share because contract provided otherwise (100 shares at \$10 each) so Bob may only get 50 shares (same net value) in contract and that Al owes Bob the \$200 Bob paid to Cal for performance under the contract. However, it does not appear there was an effective novation, and a modification of a common law contract requires consideration and here, no consideration for exchange of Bob's performance for Cal's from Sportstuff. Bob may also seek recovery of the \$200 paid to Cal under unjust enrichment theory as with the 4 hours spent programming.

---

WSB 7/99-13

Was a contract formed between Chuck and Valerie?: A contract must have an offer, acceptance, and consideration. Valerie gave an offer to Chuck which he could accept, to pay \$500 upon completion of a fence around her property using her materials - by the end of October. Chuck accepted that offer. It was a bilateral contract; Valerie promised to pay \$500 when the fence was completed and Chuck promised to build the fence by the end of October. The promise to pay money and the promise to work are valid consideration given. In addition, they agreed on a contract that Chuck would start tomorrow if Valerie gave him \$100 now. One party may argue that there was no consideration, that it was a preexisting duty, that the extra \$100 was value given by Valerie and Chuck gave value by agreeing to work tomorrow instead of do something else. He had no preexisting duty to start the next day.

Did Chuck breach the contract by not showing up the next day?: Chuck did breach the contract; it was not a material breach of the entire contract to build the fence because it was not a substantial breach affecting the heart of the bargain. It was minor breach of the large contract but it was a material breach of the second contract because the subject of that contract was that Chuck would show up the next day. Because Chuck was in material breach of that agreement, Valerie could sue Chuck to get that \$100 back.

Did Chuck materially breach the contract to build the fence?: Chuck did materially breach the contract to build the fence because the parties had agreed that time was of the essence. Not having completed by the end of October affected the heart of the bargain - that the fence "must be finished by the end of October."

Did Valerie wrongfully fire Chuck?: On October 31, Chuck anticipatorily repudiated the contract - he told Valerie that he would not be able to finish performance in time. She was in her right to treat the repudiation as final and fire Chuck.

Does Chuck have any defenses?: Chuck may argue that under the Common Law, substantial completion of a contract prevents the other party from repudiating the contract. If there is substantial performance, the party must accept performance and then sue to recover for the loss of expectancy and any consequential damages - those that the other party knew would result if he breached. Chuck could claim that Valerie had the duty to mitigate damages by renting another field for the llamas until Chuck was finished and that Chuck should only have to pay for the three days it would have taken him to complete the fence, whether the fence was substantially completed is unclear - Chuck estimated 5 days total and needed 3 more. And Chuck's estimates had been suspect in the past so it's not clear that he was even halfway finished. Whether there had been substantial performance would be for a court to decide.

Was Chuck's breach excused by impossibility or impracticability?: Impossibility excuses nonperformance and terminates the contract; it requires that performance be objectively not possible. Performance became impossible at some point but only because Chuck waited too long to start - these were not unforeseeable, external conditions that made performance impossible. Impracticability also terminates the contract; it requires unforeseen circumstances rendering one party's performance unduly burdensome or prohibitively expensive. The rains in October were expected and it is doubtful that they alone made performance on time not practical. Likewise, Chuck could not argue that a unilateral mistake about the contract excuses his nonperformance - he was aware of the rains and of the time frame required.

Did Valerie properly mitigate her damages?: A party whose contract has been breached may not recover for damages that resulted because they failed to mitigate and avoid excessive loss. Valerie's termination of Chuck may not have been proper if he really only had 3 days left, but she couldn't trust him and his breach appears to be material. She may go out and get someone else to do the job and recover the difference between the contract price (what she paid Chuck) and the market price (what she paid Pat). Since Valerie had not paid Chuck yet, she could recover the \$300 extra the job cost that what it would have cost if Chuck had performed. Since Chuck knew Valerie needed the fence for the llamas on November 1, Valerie may get consequential damages - the extra cost to house the llamas elsewhere. But she cannot recover if he fails to mitigate - she must take an equivalent place to house the llamas-the field if not substantially different from her own and cannot make Chuck pay if she puts them in the Taj Mahal.

May Chuck sue in equity for the value of his performance?: Chuck may sue in quantum meruit - unjust enrichment - for the benefit he gave Valerie. Chuck's building the fence was not done as a gift, he expected payment, and he expected payment because of what Valerie had said. Valerie may argue the fence had no value because she had to pay Pat more than she would have had to pay Chuck - she saved nothing through Chuck's work. Chuck may assert justifiable reliance on Valerie's promise of payment, that she knew would cause his reliance, and he relied to his detriment. But he breached the contract and would have difficulty proving what his detriment was since he was unemployed at the time anyway.

---

WSB 7/99-8

This question is governed by the common law of contracts because it involves a contract for services. UCC 2 governs the sale of goods, and although goods are involved here (spray, traps), the primary purpose is for services, and the primary purpose governs.

Did Pete (P) form a contract with Hal (H) and Wendy (W)?: Contract formation requires mutual assent (offer and acceptance), consideration, and the absence of defenses. An oral contract is acceptable as long as it can be completed within one year so the Statute of Frauds does not apply. Here, P made an offer to spray (\$250) or trap (\$500). H accepted unilaterally, leaving the method up to P. This created an enforceable unilateral contract - H promised to pay up to \$500 for P's performance - removing the squirrels.

Characterization of the property: Community property is anything acquired during marriage, except through gift or inheritance, which is separate property. Anything brought into the marriage is also community property. The cabins here were H's separate property because they were inherited, and so H has sole authority over the cabins. However, W has apparent authority to contract as to the cabins, so both W and H's separate and community property will be liable on contracts entered into by either H or W. However, H may be able to be compensated by W's separate property (or community) for her actions.

Terms of the contract: Since W insisted on Gonner spray, and H acquiesced, the terms of the contract are for spray, at \$250. This may be seen as a latent ambiguity because neither method was specified. (See parol evidence rule, other side).

Was P's performance excused?: If a supervening law makes performance of a contract illegal, performance is excused. If part performance has already occurred, then the performing party will be able to get restitution, an equitable remedy to avoid unjust enrichment. Here, P will be entitled to restitution in the form of the value of the services rendered (probably \$125).

Was there accord and satisfaction?: An agreement to set aside old debts in exchange for new rights and responsibilities is an accord and satisfaction. W's agreement with P to pay \$500 more for removal by trap may be accord and satisfaction.

P's remedy/damages under the new contract: P is entitled to expectation damages, which would place him in the position he would have been if the contract had not been breached. These are limited by foreseeability, certainty, and mitigation. If P can return the traps for a refund, he may be required to do so to mitigate his damages. Otherwise, H and W will owe him \$500. If he is unjustly enriched by being able to keep the traps, they may be entitled to restitution.

Parol evidence: With regard to the terms of the first contract, since there was no written agreement, the court can look to the entire agreement to determine the terms of the contract. W's insistence on Gonner, combined with H's acquiescence to any method and P's acceptance means that the terms of the first contract are for spray/\$250.

H's defense as to the second contract: (See community property rules above.) Since W had apparent authority to contract, the community and separate property are liable for the \$500 and \$125 (restitution). However, if W exceeded her actual authority over the property by entering into a contract with P on her own, H may be entitled to restitution from community or W's separate property.

---

WSB 7/98-1

Governing law: The issues involve a construction contract for services, governed by the common law of contracts. A court may use the UCC by analogy.

Effect of wind and rain: Assuming a valid contract, non-performance may be excused when performance becomes impossible, the other party has frustrated its performance, the subject matter has been destroyed or become illegal, or the parties are incapacitated. Extreme weather conditions not within the contemplation of the parties may be grounds for excusing non-performance. Record wind and rain, if sufficiently extreme may have rendered DE unable to use its equipment reasonably safely.

Time is of the essence: When the contract expressly calls for performance by a time certain and the time is a material condition of the contract, the time provision will be enforced. Here, DE was delayed by record weather that would excuse its delay to the extent of the weather.

Unstable soil conditions: Conditions that make performance more difficult, in this case unstable soil at the site, are not grounds for excusing performance if the parties had bargained for the risk. As an excavator, DE was in the best position to assess the risk of the soil and took the risk of dealing with such a possibility upon his inspection of the site or his failure to inspect it. The extra cost of the equipment and delays are at DE's expense.

King's refusal to pay first installment: A party may suspend performance unless the other party is in breach. King's refusal to pay is itself a breach, if DE is not in breach, because installment payments were an express condition of the contract. Because the installment payments were not conditioned on time - rather upon completing 1/3 of the work. DE's possible untimeliness is not cause for King to withhold payment.

Material breach?: A breach is material if it goes to the whole of the contract. A breach of a single installment is a material breach if the nonperformance of the installment impairs the entire contract. A partial breach merely impairs that installment. Here, subcontractor DE bargained for installment payments probably to sustain its overhead to continue and complete the project. The performance date for completion has come and DE is technically in breach, however, DE will argue it was delayed a full 30 days by impossibility (above) giving it 30 more days to finish the job.

Anticipatory breach: A party who gives objective intent to discontinue performance may be determined to have repudiated and breached the contract. The other party is entitled to cancel the contract and pursue other remedies and a replacement performance. DE's statement and window sign (Drier/Sunshine) is an effective anticipatory repudiation of a reasonable person would have interpreted it as such. King was reasonable under these facts to interpret such and King was entitled to hire Acme, and also had a duty to avoid any damages King could have reasonably avoided.

Remedies: King incurred damages of \$60,000 by substituting performance. King had a duty to make a commercially reasonable substitution but given time restraints on the job, i.e., deadlines. This may well be reasonable.

---

WSB 7/98-13

Did Betty and Craig have a valid contract?: A valid contract is an enforceable promise supported by an offer, acceptance, and consideration. The Statute of Frauds requires that contracts for services be in writing if completion is not within 1 year. Betty invited an offer by asking Craig to refinish the bookshelves. Craig's note  
82 Course 5309 Copyright 2011. The Rigos programs have educated over 100,000 professionals since 1980.

was an offer, and Betty's note was an acceptance. An offer must be clear and communicated, and acceptance must be the "mirror image" of the offer. Consideration is the bargained for exchange of legal value. All three elements were met here, and the notes are probably sufficient to remove the contract from the Statute of Frauds. [Note: UCC 2 does not apply because it's a contract for services, not goods]. Betty's payment for part performance by Craig is allowed, and effectively separates that portion of C's performance from the remaining portion. Betty's claims therefore must relate only to the remaining \$7,000 and unfinished tables.

Did Hal and Craig have a valid contract?: Negotiations do not constitute a contract because they lack the requisite intent to bind. Here, C's note constituted an offer to build a display case for \$850, with a bonus clause. Hal accepted by signing the note. The contract need not be in writing because it is performable within 1 year, but is nonetheless. A bonus clause does not destroy the valid consideration of \$850, and becomes a condition to the contract (C's \$100 is conditioned expressly on the date).

Is C entitled to the \$100 bonus?: Failure to comply strictly with an express condition means that C cannot collect the bonus.

Was a display case part of the contract?: Negotiations lack the requisite intent to bind the parties, and the display case was part of the negotiations, not contract. The Parol Evidence Rule will prohibit Hal from offering evidence of prior oral agreements/negotiations of they are offered to modify, contradict, or vary the contract that is "final and complete." The Berg Rule (context rule) allows courts to consider such prior statements in determining whether the contract was "final and complete." Here, it appears that the writing is final and complete, and C is not liable for the display case.

Did C breach by not completing all bookshelves?: A material breach is one that deprives the parties of the substantial benefit of the bargain. C may claim that by completing nearly all of the work, he substantially performed and is entitled to compensation. Further, C may claim that by paying him, B ratified C's work and accepted substantial performance of the contract. B may claim that she paid C the money because she believed he was nearly done. Assuming B and C had a valid written contract, B may recover from C the cost of finishing the bookshelves, as that was their deal. Specific performance is not preferred in WA because it requires court supervision.

Was there an "accord and satisfaction?": An accord and satisfaction exists if the parties have a bona fide dispute as to compensation. Agreement to settle that dispute is an accord, payment is satisfaction. However, there was no bona fide dispute here - C simply refused to perform his end of the bargain, and offered no justification why an additional \$1,000 was required. B may recover the \$1,000, therefore.

Was the \$1,000 a valid modification?: Modification of contracts require additional consideration to be valid. C offered no additional consideration - he was getting additional money to do what he was already obligated to do. Thus, C may not claim that they validly modified the contract.

What is the measure of damages?: Expectation damages are the norm, placing each party where they would have been had performance been proper. B will not have to pay the \$1,000 which she would not have had to pay anyway had C performed as required. C may recover the remaining portion of the \$850 he is owed (\$400 left) for the jukebox, because the case for the Beatles albums was not part of the bargain.

C may recover from H's separate property, or the community property since the jukebox was community property, and the contract was entered into for the benefit of the community.

Did C breach by completing the shelves by October?: No. The contract provided that performance would take a "minimum of 14 months," and did not set a deadline (though good faith is implied). Neither H nor B indicated that time was a significant factor to them. Unlike the UCC, terms left out are not necessarily filled in by gap-fillers (except for a duty of good faith). H and B may claim that the vacation by C was not good faith, but that would probably fail (he had been at work for quite awhile).

Did C breach by starting on Monday, May 1 and not earlier?: The portion of B's note saying "Start Monday, okay?" is probably not sufficiently definite to constitute a strict condition to the contract (since he started later than that "immediate" Monday). Regardless, any breach is not material, and is waived by B's payment to C 3 months later.

---

WSB 2/98-9

Governing law: This is essentially a contract for services and thus is not covered by UCC Article 2 although Article 2 may be applied by analogy. Common law controls.

Is there a contract: A contract requires mutual assent (offer and acceptance), consideration, and lack of defenses. Here, Bobbie and Dot have a valid contract (offer, acceptance, consideration of work in exchange for \$4,000).

Does Statute of Frauds apply?: The Statute of Frauds requires contracts of marriage, for more than 1 year, goods over \$500, executors, sureties, or land be in writing, signed by the person to be bound and containing all essential terms. This contract does not fit into any of these categories and as such does not need to be in writing.

What is the effect of the change in regulation?: A contract can be voided by supervening illegality which makes the contract impossible to complete legally. After March 1997, Dot was performing an illegal operation by installing the coolant supplied under the contract. Illegal contracts are void. If the contract (or at least the part regarding the coolant) is void, can Dot recover in quasi-contract?: If a contract has been part performed and is terminated due to illegality of further operation, the person performing services may receive in restitution the value of her services to date to prevent unjust enrichment of the other party. Here since Dot had completed most of the work (except for the part now illegal) she should be able to recover the fair value of her work.

Is duty for Dot to perform discharged by impossibility/impracticability/frustration?: (As of June - later activities discussed below) In June when Dot realized that it would be a huge financial loss she might have anticipatorily repudiated based on one of the above defenses. However, these excuses are probably not valid and she would be required to continue performance or pay damages for breach.

Impossibility: - objective - no one could do it. Dot might have an excuse of impossibility if there was absolutely no way to complete the job. If she is to follow the requirements of the contract it may be impossible to perform since it is illegal for anyone to install the coolant specified in the contract.

Impracticability: - unforeseen extreme and unreasonable expense - Dot could claim that there was no way she could have foreseen the extent of the disrepair and the change in regulations. This is not a valid excuse because when you undertake to repair you take the risk of a greater extent of repairs than thought and regulations are published in the Federal Register giving notice at least 30 days before they must be followed so Dot should have known.

Frustration: - unforeseen event going to the heart of the bargain - See above. These events were foreseeable.

Did Dot breach by letting coolant leak out? Negligent performance is a breach of contract. While Dot may claim frustration or impossibility, as a refrigerator repair person she should have known to check valves before charging and is thus liable for her negligence and the breach.

What is the effect of Dot's offer to replace the coolant?: Modification: a change in a contract can be a modification if supported by additional consideration. Here, Dot agreed to supply the coolant (consideration). Bonnie has not offered any additional consideration (unless she agreed to forego a claim for breach) if no consideration there is no modification and the damages for breach are limited to the original contract.

Accord and satisfaction: Accord and satisfaction occurs where there is a dispute, an agreement to settle and performance. If the dispute here involved the breach of contract, the agreement would be replacement of coolant in exchange for not claiming breach. There was no performance and thus no satisfaction.

New contract for old: It is possible the 2 parties cancelled their old contract and replaced it with a new contract with Dot providing the coolant. There are potential problems in mutual assent and enforceability if a new or modified contract is being formed.

Mistake: Mutual mistake of material fact makes the contract voidable if neither party took risk of loss and the mistake goes to the heart of the bargain. A unilateral mistake generally has no effect unless the non-mistaken party knows that the other party is mistaken and uses it to their benefit. Here, Bonnie knows that Dot is mistaken as to the regulations and that coolant will be much more expensive. Because of this withholding of information Dot may be able to avoid the contract.

Bonnie's refusal to pay: Dot contracted to repair the freezer which she has completed and buy new coolant, however, did not contract to retool the entire freezer to work with the new coolant. Because of the additional tasks Dot has a right to renegotiate the cost.

Resolution of breach of contract action: Since the original contract is now illegal, Dot is excused from performance and should receive the fair value of her services. The modifications and/or new contracts fail or can be avoided due to Bonnie's lack of good faith and Dot's mistake. No damages should be awarded.

---

WSB 2/98-2

Michelle (M) contract: Since this is a contract for services, UCC 2 does not apply and Michelle must look to the common law, under which a contract requires offer, acceptance, and consideration (bargained for exchange of legal value). A contract may be bilateral requiring a promise for a promise or unilateral requiring acceptance and consideration in the form of performance. Here, Harold (H) clearly made an offer which was accepted by M by performing the tasks requested in the offer.

Does the offer violate the Statute of Frauds?: The Statute of Frauds requires that all contracts that can't be completed in one year be in a signed writing containing all material terms. (Also required for contracts for marriage, executors, goods over \$500, land, sureties) Since this contract is presumably for over 1 year (every summer during college), it must be in writing to be valid.

Is the contract illegal?: An illegal contract or contract to do something illegal is void (unless separable then only the illegal portion is void) Since disposing of the waste was illegal this portion of the contract was illegal and M cannot claim compensation for the services. The rest of the contract is likely valid (at least based on illegality).

84 Course 5309 Copyright 2011. The Rigos programs have educated over 100,000 professionals since 1980.

Does Michelle have capacity to contract?: Contracts entered into by minors (under 18) are voidable by the minor but can be ratified after the minor comes of age. Contracts entered into by minors for necessities, by minors married to adults and to minors that misrepresent their age are not voidable. H cannot void the contract based on M's age. M must void before turning 18. Since she showed up to do work after turning 18 she ratified the contract.

Can the violation of the Statute of Frauds be excused?: A violation of the Statute of Frauds is excused if the contract is for specially manufactured goods, by a merchant's confirming memo or by part performance. Here, M has performed thus making the contract enforceable.

Has H repudiated the contract?: Repudiation occurs where one party refuses to perform his portion of the contract. Here, H has told M he will not pay her for her work. He is repudiating and Michelle can suspend her performance and sue for breach.

What are M's remedies?: Breach of a contract can be remedied by money damages - expectation (benefit of the bargain), reliance (amount spent on reliance), restitution, consequential (if foreseeable - **Hadly v Baxendale** test), incidentals; specific performance (if act is clear from contract, doesn't require court supervision and damages inadequate) Here M can claim damages for the money owed for her past work and may be able to claim damages for the money she would have received each summer through college. However, since it is not known how long she would be in college - the contract was vague - she may be limited to the amount she expended in reliance on the contract.

If contract not enforceable is there promissory estoppel?: Promissory estoppel occurs where one party makes a promise which he expects the other party to rely on. The promise induces reliance and it would be inequitable not to enforce the promise. Here, H made a promise to M which she relied on to her detriment. H owes M restitution in quasi-contract for the work performed.

Community property issue: Contracts made in furtherance of the community during marriage are community contracts and can be enforced against the community. Winnifred and H ran the B&B as a community, thus the wages paid to M should have come out of community funds. Winnifred is responsible for the contract even after divorce so Michelle could possibly go after her for the wages as well as H. Additionally, since the wages paid in 1996 to M were out of Winnifred's separate property, Winnifred may have a claim against Harold and the community property for contribution. This would have had to have been settled during the dissolution since property settlements can not be modified.

Illegal K damages: can only receive damages for the non-illegal work.

Petunia (P) contract: Valid contract requires offer, acceptance, consideration. Here, the contract complies with the Statute of Frauds (see above) because it is written and for over 1 year. Offer is valid acceptance by performance and consideration of \$200/month.

Effect of H's 30 day offer: Once a contract has been formed any changes are modifications which require additional consideration. Here, H proposed the addition of a condition to the contract which was accepted by P. Since the 30 day out provision allowed each party to cancel the contract on 30 days notice there is mutual consideration and the modification becomes part of the contract. Alternatively, it could be a novation or a completely new contract where the old contract of continual duration was cancelled and a new contract formed with different terms.

Effect of notice Sept. 1: H's cancellation of the contract with 30 days notice complies under the condition of the contract and he is not liable for services after October 1. However, this does not cancel his performance until Oct. 1, he must pay Petunia for her work in September. P must continue performance until the cancellation date as well. P can sue H for breach of contract (not paying Sept. wages) but can not receive damages for future work as the contract has been cancelled. There are no rights against W since the contract was entered into after dissolution.

---

WSB 7/97-17

Was there a contract formed between J and D?: A contract is formed if there is offer, acceptance and consideration. An offer is a manifestation of a present intent to contract, containing definite terms, and which is communicated to an offeree. An acceptance is an assent to the terms of the offer. Consideration is the existence of an exchange of value or services or products by both parties. Here, it appears that the August 15, 1996 meeting resulted in a valid contract. Dan's original offer to paint the house for 2K with J to supply paint was not accepted by J - rather J made a counteroffer (an acceptance that contained additional terms). The additional terms were that D start and finish the job by specific dates. D accepted this job by affirmatively stating that he could meet J's schedule, with the parties mutually agreeing to terms relating to payment. J and D could shake hands on this deal because it is a service contract to be performed within a month - the statute of frauds does not apply in this case.

Was D's failure to start on September 1 a material breach?: D agreed to start on September 1 but didn't. This is a breach of the terms of the contract. If it is a minor breach, it would give rise to damages, but it would not permit J

to refuse D to continue to perform. If a material breach, it would discharge J's duty to perform. Whether a breach is material is determined by looking at the parties' reasonable expectations, the extent of the deprivation to one party as a result of the breach, and the good faith of the person committing the breach, e.g., whether it was intentional. Here, the failure to show up on time was likely a minor breach since it was feasible for D to finish performance by Sept. 30, and he did not act in bad faith.

Did J waive his right to claim that D breached by not starting on Sept. 1?: J must not have considered the breach that material because he continued to perform his end of the bargain by paying D the first half of his fee. A waiver is a voluntary act by a party that excuses a condition or element of performance. Payment by J may constitute a waiver of right to insist that D start on Sept. 1.

Did J frustrate D's ability to complete job by hiring landscaper?: One party to the contract has the obligation not to engage in conduct that makes it difficult for the other party to perform, or frustrates the ability of the other party to perform. D may claim that had J not frustrated his ability to perform he could have completed the project in a timely manner, and thus it was J who breached not D. It is not clear whether the three days D could not work caused his inability to complete or not (whether he could have finished before it started raining).

Was the rain an excuse for D not to finish on time?: A party may be excused from meeting obligations under a contract if the failure to perform is caused by some unforeseeable event that is not the fault of either party, and the risk was not allocated in the contract. The excuse arises from the doctrines of impossibility, frustration of purpose, and impracticability. Impossibility does not work for Dan because it was not objectively impossible to complete the work - witness Colossal's ability to paint. Frustration of purpose and impracticability may not work because general weather conditions are likely to be viewed as foreseeable. It is foreseeable in the Northwest that it could rain at the end of September.

Was D's work stoppage justified by J's breach or was it a repudiation of the contract?: Assuming D is unsuccessful in arguing that he should not be liable because of J's conduct frustrating his ability to perform (the landscaper), J could argue that D's conduct in refusing to continue performance on the onset of rain was a material breach. Dan said he doesn't have equipment - but a court may say that he should have gone out and obtained the proper rain gear. It may be a custom in the industry to be prepared for rain. J could argue that there was an implied term in the contract based on industry custom to be able to complete the work despite the rain. If this conduct by D is a material breach, then J has a right to refuse continued performance and exercise his remedies.

What damages may be available to J?: A breach of contract generally gives the nonbreaching party the right to expectation damages - his benefit of the bargain. Here, that would be a house painted by September 30 for \$2,000. J may also be entitled to incidental and consequential damages. The damages must, however, have been likely given the facts in contemplation of the parties at the time of contracting; they must be reasonable; and they must be proved with reasonable certainty. Dan wants compensation for jobs he lost for not being in the magazine. While the magazine article was within the contemplation of the parties at contracting, J's ability to prove loss of jobs may be difficult - just as it would be difficult for a new business to prove lost profit. This is especially true here where Jim is struggling. J must also be able to prove with certainty that he could have sold the house for 25K more and that it would have been sold sooner. But in his favor is that the house was "fabulous" and other houses in the magazine sold earlier. J may also claim in damages the extra funds he had to pay to get Colossal to complete the job he paid \$1,500 more than he would have under the contract. D may claim that J had a duty to reasonably mitigate damages, and that he paid Colossal too much money to paint the one remaining side of the house. If J is found to be breaching party, then D could argue that he should receive the benefit of his bargain - the other \$1,000 he was to receive under the contract. In either case, D could argue that he should get credit for the work he actually performed on the house. He completed 3/4 of the work, and only received 1/2 payment. (Quantum Meruit/Unjust enrichment).

---

WSB 7/97-1

Since the subject matter of the suits are contracts for service, the common law of contracts will apply. The statute of frauds dictates certain contracts must be in writing in order for them to be enforceable. Contracts for services must be in writing if they cannot be completed within one year of the contract. Since this contract can be completely performed within one year, it does not need to be in writing, although sufficient writings combined with performance are avoidable to satisfy the statute of frauds if necessary.

B v. T & M: Contract formation: T & M's first letter to B was an invitation to make a bid and not an offer. B's letter to T & M quoting \$50/hr was an offer which communicated his intent to enter into a contract with T & M. The offer was rejected by T & M's counteroffer at \$40/hr. The offer by T & M needed to be accepted by B. An offer can be accepted by expressed requirements (there were none) or acceptance can be communicated the same way the offer was made (a letter - this would have been the preferred method) or, if a unilateral contract, by performance. Acceptance must be within a reasonable time. The contract must also be supported by

86 Course 5309 Copyright 2011. The Rigos programs have educated over 100,000 professionals since 1980.

consideration. Not an issue here because there was a detriment on both sides. B will argue that T & M made a unilateral offer that he accepted by beginning performance. As such, he would argue that he had an enforceable contract with T & M and should be paid the \$2,400 he invoiced. He would argue that “we would like you to do our work for \$40/hr” was an offer seeking performance, not a promise of performance, as acceptance and that he accepted within a reasonable time due to the other work he was involved in as a result of the storm damage to the area. T & M will argue that they made an offer for a bilateral contract and were seeking a promise as acceptance. Because they did not receive acceptance (a return promise) within a reasonable time (almost 2 months) their offer had lapsed and they entered into a contract with another party. T & M will also argue that B was on notice when he arrived at the work site and saw a commercial chainsaw and ropes that someone else had the job and that B should have inquired before starting on the job. The court will probably find that there was no valid contract between the parties because the offer lapsed since it was not accepted within a reasonable time. However, the court will award B damage in quasi-contract to prevent unjust enrichment. The court will award damages in the amount of the reasonable value of B’s service which may or may not be \$2,400. T & M will want to introduce C’s bid as evidence of the fair value of B’s services, but the court will decide.

Liability for damages: The property was the separate property of T because he inherited it. However, T & M intended to use community funds for payment of the work as evidence by the solicitation letter from both T & M. This could have made the community liable because it was for a community purpose with community funds. But T & M were separated prior to the completion of the contract and the property was confirmed in the separation agreement to T. Therefore, since T was the only one who would benefit from the work and it was his property he would only be liable for the debt incurred. Debt was incurred after separation since the obligation to pay did not mature until after the work was performed (performance was an implied condition precedent).

C v. T & M: Formation: C’s offer was accepted by T and a valid contract was formed. C began performance but it did not go beyond the preparation stage. C will argue that T & M breached the contract by giving the work to someone else and that he is entitled to expectation damages (the benefit of the bargain). T & M will argue that their duties under the contract were discharged by frustration of purpose since the land was cleared before C could begin work and so there was purpose left in C’s contract. Court will probably award C restitution damages (cost for getting the equipment on and off the work site) and maybe award expectation damages, the profit C had bargained for. For the same reasons as above, only T will be responsible to C. T may want to sue M because she did not follow through in his instructions (on own agency theory) but she was not his expressed or implied agent so his suit against M will probably fail.

---

WSB 2/97-3

Pinky v. Amy: In the dispute between Pinky and Amy, there is a binding contract because each made a mutual promise to the other so consideration. There was mutual understanding and Amy accepted Pinky’s offer. There is no Statute of Frauds issue because performance can be completed within one year. In 1988, Pinky may have sought specific performance, but it is too late now. In 1988, Amy’s statement constituted a repudiation because it clearly stated that she would not be able to discharge her duty to paint. Amy, therefore, breached the contract and Pinky was under no obligation to pay Amy. The 6/30/88 agreement constituted an accord because the amount due to Pinky for lost profits (damages) was disputed. However, there was no satisfaction, so Pinky may sue for the \$1000 accord or for other damages. Amy will counter that the statute of limitations has run, so Pinky can not win. Pinky will argue that Amy’s note of 6/95 either constitutes a new binding promise or satisfies the preexisting duty to pay under the accord as a modification. Pinky will win, so he can recover, but only the \$1000.

Boris v. Pinky: There is an enforceable contract. Boris accepted Pinky’s offer to paint. Mutual promises constituted consideration for a bilateral contract. There is no Statute of Frauds issue because this is a services contract that can be completed within one year. Pinky had two obligations: 1) to supply materials and paint, and 2) to pay Boris for his work. The first obligation is a condition precedent to Boris’ obligation to perform (i.e., paint). Because supplying the materials was somewhat within Pinky’s ability, Pinky had a good faith obligation to ensure that the condition precedent of supplying paint was discharged. However, Boris’ duty to paint was not due for two possible reasons. First, because the condition precedent was not satisfied, his obligation was not yet due. Second, Pinky’s statement was an anticipatory repudiation. He clearly stated that he could not (or would not) render the supplies to Boris. Boris is entitled to damages of \$500 less anything he saved by not having to perform. Pinky, though, will argue that his obligation was discharged by an unforeseeable event occurring after formation of the contract – namely, no paint. Pinky loses because 1) the risk of loss was on Pinky and 2) obviously it was possible to get paint because Chad could get paint. Pinky’s impossibility and impracticability defenses fail.

Chad v. Pinky: There was a binding contract because Chad accepted Pinky’s offer to paint and both made mutual promises to perform as consideration (i.e., Pinky’s promise to pay and Chad’s promise to get supplies and paint). Pinky breached the contract by telling Chad that his services were no longer needed. Chad may recover but not the

\$1650 he seeks. The maximum amount he may recover is \$1500 (the contract term) less any mitigation (i.e., the \$200 from other jobs) because he is under a duty to mitigate after Pinky's breach. So, he may be able to recover \$1300. His expenditure of \$150 for supplies cannot be separately recovered because acquiring supplies was contemplated within the original contract. Pinky will argue that the vandalism constituted a frustration of purpose. However, this defense fails because 1) Pinky assumed the risk of loss and 2) it doesn't appear that the vandalism really went to the heart of the sale (i.e., he could still hold the sale). On the off chance that the court accepts Pinky's defense, Chad may recover on restitution or quasi-contract for some of his losses. However, such losses will most likely be limited to the \$150 less any salvage use he got out of the supplies.

---

WSB 2/97-12

This question is governed by the common law of contracts because the services were the primary purpose of the contract even though it includes the sale of goods (computers). The court may always apply the UCC Article 2 by analogy however. Byte (B) made an offer where the material terms included \$5K fee, \$2.5K costs in exchange for design, negotiation, installation, and training. The computers are goods – movable things. The telephone costs were never made part of the deal and are not terms. The offer was communicated to Alicia (A) in such a way that A thought her acceptance would form a contract. A's acceptance did not "mirror" the offer – instead of paying B a fee, she would perform design and renovation work on his house. In common law contracts, counteroffers resulted from changed terms. However, B accepted this counteroffer by saying "Deal" – a reasonable person would assume this meant they had a contract. Consideration was present – a bargained-for legal detriment. A and B are both doing things they had no previous legally-enforceable duty to do. Is this contract subject to the Statute of Frauds? Yes, service contracts over a year in term and UCC contracts over \$500 must be in writing with either all material terms (common law) or the quantity (UCC) expressly written, and signature of party asserting defense. Was the Statute of Frauds satisfied? Not in writing, as no written contract or writing evidencing one appeared. But possibly through performance – part performance by a party will satisfy the UCC statute, and full performance will satisfy the common law. A paid vendors, B installed computers and then A completely designed/renovated B's house. There was both full performance by A and part performance by B; this contract should be legally enforceable. If not promissory estoppel might prevent parties from escaping responsibilities – reliance induced by activity and benefit received. Was the design ever agreed upon? Although the terms of the contract never mentioned the design, A and B had numerous meetings where they were discussed. The content of these meetings can be introduced into evidence through the context rule extrinsic evidence admitted to show intent of parties and circumstances surrounding the contract (Berg). Parol evidence rule, which bars certain evidence, isn't applicable here – only applies to written, fully integrated contracts. Payment of suppliers by A was not a duty she had – it was B's duty. B might claim the contract was altered, however, no new consideration was present to support an enforceable modification. In UCC contracts, good faith is looked at to determine duty. In both instances, A did not assume B's duty by simply paying the suppliers. Malfunction of computers – Was B a merchant? If so (a seller of goods, selling his normal goods), he would be liable under the implied warranty of merchantability. Goods must perform like they are supposed to. If not, an implied condition in the contract is that the computers would be operational, and B violated that implied condition. Colleen's reaction – This does not excuse B's non-performance. Buyers of special services are allowed to demand full compliance with their wishes and must be satisfied, but B and A spent many meetings deciding upon the design. B cannot claim he is unhappy with the results after he induced A to deliver. She performed and now he must perform. Colleen's liability – B indebted himself prior to his marriage to Colleen (C). Any contracts entered into during marriage are community debts, but not ones entered into prior to marriage. C is not liable on the contract. Damages – Parties should be made whole when another party breaches; placed in a position where they would have been had there been no breach + incidentals – mitigation. A can recover \$10,000 from B, but he didn't agree to the 20%. B cannot recover the \$175 (not part of contract), nor on the \$5K as he materially breached. An alternative method of recovery for both A and B is through a quasi-contract: a legally-enforceable obligation based on the unjust enrichment received by the other party, where the measure of damages is quantum meruit.

---

WSB 7/96-7

These are contracts for services, which do not fall under Article 2 of the UCC, but a court may use provisions of Article 2 by analogy.

Was there a contract for the first ditch? A contract requires an agreement as to essential terms, which may be evidenced by an offer and acceptance. Allen's letter of 1993 is an offer. An acceptance must be a "mirror

88 Course 5309 Copyright 2011. The Rigos programs have educated over 100,000 professionals since 1980.

image” containing the same terms as the offer. Bruce’s letter of December 1993 was a counter-offer. A counter-offer is a rejection, after which the original offer can no longer be accepted. Allen’s reply, at \$2,000, was again a counter-offer, and a rejection. It was also an offer, at \$2,000. An offer may be accepted by any reasonable means, unless the acceptance is limited within the offer.

A unilateral contract, with an offer of payment in return for work, may be accepted by beginning performance. Bruce’s moving his digging equipment onto the farm may be sufficient commencement of performance (particularly if it’s heavy equipment, difficult to move), to be an acceptance of the offer to do the job at \$2,000.

The Statute of Frauds requires that all contracts that are incapable of completion in 1 year be written. It does not apply here.

Is the offer conditional? Under the Berg case, all circumstantial evidence, including prior rejected offers will be allowed in to prove the circumstances surrounding the making of an offer. The written contract is not “integrated”, as all of the contract terms are not contained in any final writing. Thus, parol evidence will be allowed to prove any conditions that may have been part of the offer. Allen’s failing to find a buyer before spring for his farm may have been a condition precedent to any performance due under the contract.

Express conditions must be strictly complied with. If the condition failed, the contract was voidable, but Allen should have sent notice to Bruce that the condition failed. Bruce may have had constructive notice when the sale was recorded, but that’s stretching the notice requirements.

Is Diedre, or their community property, liable? Allen was married before the ditch was dug. Presumptively, all debts incurred during a marriage are community debts, but Bruce should try to have a judgment entered within three years of the marriage, just to make sure.

Since Allen no longer owned the property, is there “frustration of purpose”? This requires unforeseen circumstances, and no fault or assumed risk by either party. Here the parties anticipated that Allen may sell the property.

Is there a contract with Chuck? Chuck may have assumed Allen’s contract for improving the property when he bought the property – it appears Chuck knew the ditch needed to be done. Chuck agreed to have the ditch dug – arguably an acceptance of an oral offer by Bruce to dig the ditch – but a contract requires a manifestation of agreement as to the parties, subject matter, price, and time of performance, and the price was not agreed upon with Chuck. There was no contract with Chuck for the \$2,000 ditch.

Was there a contract for the \$500 ditch? Yes. Chuck’s oral offer and Bruce’s proper acceptance by performance created a contract.

Is Chuck liable for the \$2,000 ditch under quasi-contract? Chuck received the benefit of the ditch; it would be unjust enrichment to allow him to have it for free. Bruce would be paid, in quantum meruit, for the value of his labor, or the fair market value of the improvement to Chuck’s property. This value is not limited to the price of the contract.

Can Bruce sue Allen or Diedre for the \$500 ditch? No. The only agreement, and the only enrichment, is with Chuck.

What is the statute of limitations? Where parol evidence is needed to establish an essential term of a contract, the limitations period is three years. Oral contracts are 3 years, written contracts are 6 years. The statute begins to run from the time the contract was breached.